UNIVERSITY OF DERBY

THE MARGIN OF APPRECIATION DOCTRINE AND THE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS A LIVING INSTRUMENT

Rachael Eguono Ita

Doctor of Philosophy 2018

Contents

Tables and Charts

Chapter Five

Chapter Six

List of Abbreviations

CJEU	Court of Justice of the European Union
DRC	Dynamic Restricted Correlativity
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EU	European Union
FRG	Federal Republic of Germany
GDR	German Democratic Republic
HUDOC	Human Rights Documentation database
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic Social and Cultural Rights 1966
ICJ	International Court of Justice
ILO	International Labour Organisation
LI	Living Instrument
MOA	Margin of Appreciation
NGO	Non-governmental Organisation
RDMA	Rationalized version of the margin
RQs	Research Questions
UDHR	Universal Declaration of Human Rights 1948
UK	United Kingdom
VCLT	Vienna Convention on the Law of Treaties 1969
VDMA	Voluntarist version of the margin

Declaration and Statements

DECLARATION

This work has not previously been accepted in substance for any degree and is not concurrently submitted in candidature for any degree.

STATEMENT 1

This thesis is being submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in Law.

STATEMENT 2

This thesis is the result of my own independent work/investigation, except where otherwise stated. Other sources are acknowledged by explicit references.

STATEMENT 3

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

Signed: Rachael Ita. (candidate) Date: 07/01/2019

Abstract

The significance of the margin of appreciation doctrine has been underscored recently with the adoption of Protocol No 15 which calls for the inclusion of the terms 'margin of appreciation' and 'subsidiarity' in the Preamble of the European Convention on Human Rights. This development reflects the disquiet amongst member States to the Convention that the doctrine is not being given enough weight by the European Court of Human Rights in the determination of cases before it. One of the interpretive tools that is perceived to be having a negative effect on the margin of appreciation is the living instrument doctrine which has been blamed for narrowing the margin of appreciation afforded to States. This thesis brings an original contribution to the literature in this area by considering the interaction between the margin of appreciation and living instrument doctrines in the case law of the Court. The contribution is achieved in two ways: (a) methodologically: through the methodology adopted which is a combination of the quantitative method of descriptive statistics and the qualitative method of doctrinal textual analysis; (b) substantively: through the systematic examination of the case law of the Court from January 1979 to December 2016 in which both the margin of appreciation and living instrument doctrines are present. The lens of the relationship between rights and duties is applied to the case analysis. The case analysis is used to draw conclusions on the nature of the relationship and whether living instrument arguments are superseding the margin of appreciation doctrine where there is conflict. The results of the case analysis also shows distinctions in the interpretive approaches of the Court at the admissibility and compliance stages. The overall results of the study show that there are a variety of ways in which interaction takes place between both doctrines and the nature of both doctrines will continue to require a close interaction between the Court and the State parties in their compliance with obligations under the Convention.

Acknowledgements

A colleague of mine once said to me that the secret to completing a PhD is to 'keep writing and not quit'. That seemed like a simple thing to do, but the reality of this PhD journey was that there were high times when I felt like writing and low times when I could easily have thrown in the towel. I found the secret to keeping the flow of writing was having lots of 'cheerleaders' who kept saying 'keep going'! 'it is worth it'! or variants of such cheers. I have had the privilege of having so many people who have cheered me on to completion and this is an opportunity to acknowledge them. First of all, my thanks goes to God for His grace and strength to complete this project. Without His help I know I would not have had the strength to keep facing the different difficulties along the way of completing this project.

I would like to say thank you to my supervisory team that have helped me throughout this work. My first supervisors Dr Antonios Platsas and Professor Kevin Bampton, began this journey with me but had to move on to other pastures. Their initial contributions helped me take the first steps in this project. My current supervisors Dr David Hicks and Professor Ilias Bantekas have been invaluable to me in coming to this point of completion and I would like to say thank you to them for their comments and support throughout this work. Thanks to you both for being patient with me through the writing process and painstakingly reading through the work to provide valuable insights and direction towards completion.

I would also like to thank the Derby Law School for sponsoring me through this project. Particular thanks go to the Head of the Derby Law School, Ms Sue Jennings for her understanding especially at the end point of this project. To my colleagues at the Derby Law School who kept cheering me on, I say thank you.

My thanks goes to my dad, who sadly, didn't live to see the end of this project. His prayers and encouragement at the start and middle of the project to keep writing was invaluable. To my lovely siblings, thank you for encouraging me every step of the way. My in-laws were a great support to me throughout this project and I appreciate all the support provided. I am also grateful to my friends and New Life family who have been very supportive throughout this journey. Thank you Sue Brannan for all your help. To my beloved husband Henry and gorgeous daughters Annabelle and Hannah, I say a big thank you for your understanding through all the long nights and the time devoted to completing this project. Without your support, I know I would not have made it to the end.

Chapter One
Introduction

1. Introduction

This study examines the relationship between the margin of appreciation doctrine and living instrument doctrine used by the European Court of Human Rights (ECtHR, the Court) in its interpretation of the European Convention on Human Rights (ECHR, the Convention).[1] Although both doctrines are embedded in the jurisprudence of the Court, their use by the Court has not been without criticism.[2] One of the areas of criticisms is directed at the interaction between both doctrines in the Court's jurisprudence. In particular, the living instrument has been criticised for narrowing the width of the margin of appreciation afforded to States and thereby resulting in the State being found to be in breach of their obligations under the Convention.[3] A case in point which shows the strength of the concern about the interaction between the margin of appreciation and living instrument doctrines is the 2005 case of *Hirst v United Kingdom*.[4] In *Hirst*, the ECtHR ruled that the blanket (legislative) ban on prisoners voting in the United Kingdom was a breach of the United Kingdom's obligations under Article 3 of Protocol No 1 to the ECHR. The discontent with this decision is evidenced by the fact that 13 years after the judgment, there has still been no implementation of the decision by the United Kingdom. A combined reading of the decision in *Hirst* and an analysis of the different criticisms of the decision from the perspective of interpretive tools, reveals discontent with the margin of appreciation afforded to the State in that case and how it was impacted by the Court interpreting the Convention in the light of present-day conditions through the use of consensus.[5]

More recently, following the Brighton Declaration, Protocol No 15 has been adopted which calls for the inclusion of the terms 'margin of appreciation' and 'subsidiarity' in the Preamble of the Convention. These developments further reinforce the importance of the

[1] Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5.
[2] Criticisms of both doctrines will be discussed in greater detail in Chapter 2.
[3] Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534, 542; 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) 19.
[4] *Hirst v United Kingdom* (no 2) App no 74025/01 (ECtHR, 6 October 2005).
[5] For a discussion of the case and the UK's position, see Ed Bates, 'The Continued Failure to Implement Hirst v United Kingdom' EJIL Talk! (15 December, 2015) available at < https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/> accessed 20 August 2018; Thomas Kleinlein, 'Consensus and Contestability: the ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) EJIL 871.

margin of appreciation doctrine and the concern that the doctrine is being negatively impacted in the jurisprudence of the Court. This research is carried out against this backdrop of discontent and focuses on the interaction between the margin of appreciation doctrine and the interpretation of the Convention as a living instrument. The purpose of this chapter is to introduce the subject matter to the reader. It sets the context and outlines the importance of interpretation to the realisation of human rights. It brings under the spot light the two key interpretive tools, which form the focus of this study: the margin of appreciation and living instrument doctrine of the Court. It also sets out the hypothesis, the objectives, methods, and the overall structure of the research project.

1.1. Context

The ECHR was created in the aftermath of the Second World War and represented an attempt to ensure that the atrocities of that period were never repeated.[6] It creates an obligation on member States[7] to secure the rights contained within it to everyone within their jurisdiction.[8] The enjoyment of the protection provided by the Convention is therefore not dependent upon an individual being a citizen of a member State. Since its creation in 1950, the Convention has become a catalyst for the advancement of human rights protection in Europe. The ECHR has been so successful that it has been described as 'the most effective human rights regime in the world',[9] the "jewel in the crown"[10] of the Council of Europe human rights regime. It is acknowledged that the success of the Convention has been made possible through the work of the European Court of Human Rights (ECtHR, the Court) the

[6] For a more detailed account of the history of the establishment of the Council of Europe and the Drafting of the European Convention on Human Rights and Fundamental Freedom, see A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd edn MUP 1993) 1-21; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 4-23.

[7] Within this work 'State Parties', 'Contracting Parties' will be used interchangeably with 'member States' to denote the parties to the European Convention on Human Rights.

[8] Article 1 ECHR.

[9] Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2012) 3.

[10] C Lalumière, 'Human Rights in Europe: Challenges for the Next Millennium' in R St. J Macdonald and F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff 1993).

body charged with the interpretation of the provisions of the Convention.[11] The Court itself has also been recognised as a 'jewel',[12] and more recently as the 'conscience of Europe'.[13]

From its 'humble beginnings' in 1950, the protection system created by the Convention has 'evolved' in several ways.[14] These may be categorised into: geographical evolution, structural evolution and content evolution. Geographical evolution can be seen in the increase in the number of member States. From a document ratified by 10 predominantly Western European States in 1950 to the current 47 member States which extends not only to Western European States but also to Central and Eastern European States.[15] Structural evolution has occurred through changes in the mechanism for enforcement of the rights provided for by the Convention. It was initially a two-tier system with enforcement shared by the European Commission of Human Rights and the European Court of Human Rights. It has now evolved from an optional right of individual petition to the European Commission on Human Rights ('the Commission') and an optional compulsory jurisdiction of the Court, to the current system where the Commission has been abolished and a full time Court has been established with compulsory jurisdiction.[16] Content evolution is displayed in two ways: an addition of more substantive rights through the additional Protocols to the Convention[17] and the use of evolutive interpretation as a technique of interpretation for the cases brought before the Court.[18] This research hones in on the impact of the interpretative techniques employed by the Court, in particular, its margin

[11] Article 19 ECHR establishes the Court and assigns it the role of ensuring the member State parties comply with their obligations under the Convention. This supervisory role is only engaged through contentious proceedings and once all domestic remedies have been exhausted - Article 26 ECHR. See Pieter Van Dijk, Godefridus JH Van Hoof, AW Heringa, *Theory & Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 82.

[12] Kevin Boyle, 'The European Experience: The European Convention on Human Rights' (2009 – 2010) 40(1) Victoria U Wellington L Rev 167.

[13] Julia Laffranque, ' A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom' (2017) 26 Juridica International 34,46.

[14] Evolution is considered here from the perspective of adaptation to change.

[15] This evolution in the number of member States has not been without attendant challenges. For more on this see Robert Harmsen, 'The Transformation of the ECHR Legal Order and the Post Enlargement Challenges Facing the European Court of Human Rights' in Giuseppe Martinico & Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*' (Europa Law Publishing 2010) 32.

[16] This is as a result of Protocol No 11 of 1998. The effect of the creation of the permanent Court on the volume of cases received is shown by the fact that between 1959 and 1998 the Court delivered 837 judgments. However, between 1999 and 2012, the Court delivered 15,110. This represents more than 94% of the close to 16,000 decisions delivered by the Court between 1959 and 2012 - Statistics taken from the Court's website 'ECHR Overview: 1959-2012' pg. 4 available at <http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf > accessed 7 April 2016.

[17] There are currently 16 protocols to the Convention. Not all the Protocols however add more rights to the Convention. Some of them deal with procedural issues. For a full list and text of the Protocols to the Convention, see < http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer>.

[18] Further discussion on the meaning of evolutive interpretation will be provided later on in the work.

of appreciation doctrine and evolutive interpretation which is displayed in its living instrument doctrine.

Interpretation plays a key part in the protection of international human rights. This is because international human rights treaties are usually drafted in 'vague' terms.[19] Vagueness in international treaties may create a challenge for the attainment of certainty in interpretation. On the other hand, it serves a useful purpose because vague legal provisions give a better allowance for interpretative manoeuvres by the relevant adjudicatory body. In a similar fashion to other international treaties, the provisions of the Convention have been described as being 'relatively vague'.[20] This therefore leaves room for interpretation by the Court. In carrying out its role, 'the Court' has resorted to a variety of interpretation methods. It has endorsed the rules of interpretation of international treaties found in Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 ('VCLT')[21] and applied them in its adjudication of provisions of the Convention.[22] The Court has also gone beyond the provisions of the VCLT to create other interpretive tools.[23] These tools reflect its position as an international adjudicatory mechanism with the final say on the effective protection of the rights enshrined within the Convention.[24]Whilst the need for interpretation of the provisions of the ECHR by the Court is not disputed, the tools of interpretation used by the Court have been the subject of debate amongst academics and judges. This thesis contributes to this ongoing debate by focusing on a systematic analysis of the interaction between two of the interpretative tools used by the Court: the margin of appreciation doctrine and the living instrument doctrine.

---

[19] The issue of vagueness is one that resonates with other international treaties as well whether or not they are for the protection of human rights. For more on the definitions of 'vague' legal terms, see TAO Endicott, *Vagueness in Law* (OUP 2000) 31,37.

[20] See e.g. 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.

[21] 1155 UNTS 33.

[22] In *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), the Court confirmed that in interpreting Article 6(1) of the Convention it would be guided by Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 which, although not in force at the time, 'enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion'.

[23] Some of these tools created by the Court include: the living instrument doctrine, the principle of proportionality (Where the Court determines that the right of an individual has been infringed, proportionality is a test applied by the Court to determine whether such interference by the member State is justified), the margin of appreciation doctrine, the principle of autonomous concepts (the principle of autonomous concepts implies that the terms used in the Convention are given a separate meaning and do not necessarily have the same meaning as that used within the domestic jurisdiction). For more on the interpretative approaches adopted by the Court, see D J Harris et all, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 7-21.

[24] The Court is set up as a subsidiary system of enforcement as the Convention expressly assigns the primary role of application and enforcement of its provisions to the member States. See Articles 1 & 16 ECHR.

The margin of appreciation may be defined as a tool that grants some degree of flexibility to member States in their interpretation and application of the rights enshrined in the Convention.[25] It affords the member State 'room for manoeuvre' in applying the Convention within their jurisdiction. The result of the application of the margin of appreciation doctrine to the interpretation of the Convention is that the diversity of the member States of the Convention is recognised and the application of the protection from the Convention is interpreted in line with the practice of the particular State. This means that it is possible for different levels of protection of Convention rights to exist within the member States to the Convention. For example, Article 9 of the Convention provides for freedom of religion. On the issue of wearing the full-face veil (*burqa)* as part of a religious belief, the application of the margin of appreciation doctrine has led to the upholding of the blanket ban of the wearing of the *burqa* in public places in France.[26] In some other European countries such as the United Kingdom for example, the veil can be worn in public. This potential for different levels of protection as a result of the application of the margin of appreciation doctrine has caused the application of the doctrine by the Court to be criticised.[27]

In contrast to the margin of appreciation doctrine, the living instrument doctrine focuses on an evolutive approach to interpretation rather than an interpretation that considers the diversity of member States. In adopting this approach to interpretation, the Court describes the Convention as a 'a living instrument which must be interpreted in the light of present-day conditions'[28] This means that the Court would be mindful of developments in society whilst interpreting the Convention. Therefore, the concepts used within the Convention will not be given the meaning they had in 1950 when the Convention was drafted, but rather interpreted in the light of their present usage in society. The use of both the margin of appreciation (diversity of member States in applying the Convention) and living instrument (consideration of contemporary developments in society when applying the Convention) doctrines by the Court has not been without criticism.[29] One of the areas of criticism is that the living instrument doctrine leads to a narrowing of the margin of

[25] There are different definitions that have been proffered in relation to the margin of appreciation doctrine, but the commonality is the acknowledgement that it provides space to national authorities to interpret the Convention.
[26] See the case of *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).
[27] Criticisms of the margin of appreciation doctrine will be dealt with later on in Chapter 2.
[28] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).
[29] Some of the criticisms of both doctrines will be examined in Chapter 2.

appreciation afforded to States.[30] This suggests a relationship between both doctrines and this is the area that this research focuses on. The aim of this thesis is therefore to carry out a systematic examination of the case law of the Court to determine how the margin of appreciation and living instrument doctrines interact with each other and the effect this has on the outcome of the cases presented before the Court.

1.2 Research Hypothesis

The effective protection of the rights contained in the European Convention on Human Rights depends on a partnership between the national courts and the European Court of Human Rights. This partnership is achieved through the margin of appreciation doctrine as a justified response to the position of the Court as a subsidiary means of enforcement. The recognition of member States as the primary enforcers of the Convention does not mean that the 'living character' of the Convention should be frustrated; its 'livingness' makes it an effective and relevant instrument for the protection of human rights. There should therefore be a framework for determining how the margin of appreciation interacts with the interpretation of the Convention as a living instrument.

The Court is in some instances faced with 'hard cases'[31] in which an interpretation of the Convention in line with the individual view of the member State would conflict with an interpretation that takes into consideration present day circumstances prevailing across other member States of the Council of Europe and the wider developments in international law. In such situations the member State may be seeking to rely on its margin of appreciation as justification for its actions, effectively using the margin of appreciation as a 'corporate veil' and entreating the Court not to 'pierce its veil'[32] in situations where changes in society would suggest that the Court adopts an alternative, evolutive approach. This then creates a tension between both doctrines and poses a challenge for the Court as it would be impossible to give a judgement that would yield a positive result for both the applicant who is requesting protection of human rights under 'the Convention' and the respondent member State at the same time. A compromise has to be made between the protection of the position of the individual member State and the pursuit of the overall goal of protection of individual human

[30] Baroness Hale (n 3); Tulkens (n 3).
[31] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 85.
[32] 'Piercing the veil' or 'lifting the veil' is a term from company law which refers to the action of a court to hold corporate shareholders personally liable for the debts and liabilities of the company. In this work, it is used in the sense of the Court choosing to assess the human rights implications of the actions of a member State regardless of a defence of margin of appreciation.

rights across in Europe. The central issue then is the determination of which of the interests will ultimately prevail in the decision of the Court. It is this tension between diversity of member States, expressed through the margin of appreciation, and effective protection of individual rights, expressed through the living instrument doctrine in the interpretation of the Convention that this thesis seeks to explore.

1.3 Research Objectives

The research objectives are expressed in the following research questions:

1. What is the nature of the interaction between margin of appreciation and living instrument arguments in cases brought before the European Court of Human Rights? (RQ 1 relationship)
2. To what extent are living instrument arguments superseding margin of appreciation arguments? (RQ 2 conflict)
3. Which interpretive and theoretical approaches are applied by the Court to decide the outcome of cases where the margin of appreciation and living instrument arguments conflict?(RQ 3 interpretive and theoretical approaches)
4. What recommendations can be made for future research and policy developments? (RQ 4 recommendations)

1.4 Research Methodology

The overall research design is structured around the exploratory and explanatory model.[33] The first stage is exploration of the case law of the European Court of Human Rights (ECtHR, the Court) and relevant literature on the margin of appreciation and living instrument doctrines. Through an examination of these cases, themes of inquiry will be revealed which will be followed through in the explanatory stage. The explanatory stage is focused on using the interpretive methods which will be highlighted later on in the work, to examine the case law to determine key themes and patterns in the way the ECtHR applied the interpretive methods to cases where it had to balance out competing margin of appreciation and living instrument claims. This research design of exploratory and explanatory stages has influenced the research methods adopted within this work.

A combination of quantitative and qualitative tools will be adopted. The qualitative method of doctrinal research and the quantitative method of descriptive statistical analysis

[33] A detailed explanation of the research framework for this research is provided in Appendix A to this thesis.

were adopted for the exploratory stage whilst the qualitative method of doctrinal research was adopted for the explanatory stage. The combination of both methods was intended to offer value-added at each stage towards answering the central research questions. The first legal research method used in the analysis chapters (five and six) is the quantitative method of descriptive statistics**.** Descriptive statistics are tools used to organise and summarise data.[34] In this work, the tools are applied to organise and summarise the data generated from the population of interest, which is the case law of the ECtHR in which both the margin of appreciation and living instrument doctrines are present from January 1979 to December 2016.[35] Percentages, bar charts and pie charts will be used as descriptive statistical tools within this work.[36]

The use of descriptive statistics is limited as it does not provide a qualitative analysis of the issues that may be raised from the results. Whilst it may provide answers to RQ 2 (conflict) which examines the extent to which living instrument arguments are superseding margin of appreciation arguments from a quantitative point of view, it will not provide any qualitative answers to the reason why this is the case. A further method is therefore necessary to strengthen the study.

In the light of the limitations of the descriptive statistical analysis, the second research method applied in this thesis is doctrinal research. Doctrinal research may be described as 'the process used to identify, analyse and synthesise the content of the law'.[37] Doctrinal research relies on sources such as legal rules contained in statutes and case law.[38] The arguments generated as a result of doctrinal research are not only derived from primary legal sources[39] such as case law and statute but may also arise from secondary legal sources such as scholarly publications in the area.[40] In this thesis, the primary source of the data is the case law of the ECtHR from January 1979 to December 2016 in which both the margin of appreciation and living instrument doctrines are present. This case law will be accessed via the Human Rights Documentation (HUDOC) database which is found in the official site

[34] Zealure C Holcomb, *Fundamentals of Descriptive Statistics* (Routledge 2017) 2.
[35] A separate section will explain the data source in more detail.
[36] Holcomb (n 34) 9.
[37] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7, 9.
[38] Paul Chynoweth, 'Legal Research' in Andrew Knight, Les Ruddock (eds) *Advanced Research Methods in the Build Environment* (Wiley Blackwell, 2008) 28, 29.
[39] The sources of law are usually divided into 'primary' and 'secondary' sources. Primary sources include statute/legislation, case law and judicial precedents. Secondary cover a wider remit and include articles by scholars in the area, text books and case comment (to mention a few).
[40] Rob van Gestel and Hans-W. Micklitz (2011) Revitalizing Doctrinal Legal Research in Europe: What about Methodology? (European University Institute Working Papers Law 2011/05) 26.

of the European Court of Human Rights.[41] Scholarly writing in this area will also be used for the doctrinal analysis. In the context of this thesis, doctrinal research will be applied throughout the work as it will aid in providing answers to the four research questions in this thesis. Doctrinal research also has its limitations as it takes an 'insider's view of the law'.[42] This is because the arguments are generated from a synthesis of the law itself rather than from a study of external factors. It 'takes as its starting point and its main focus of attention rules of law, without systematic or regular reference to the context of problems they are supposed to resolve, the purposes they were intended to serve or the effects they in fact have'.[43] Due to the number of examples of case law to be considered, doctrinal research itself would be limited in the categorisation of the case law prior to analysis. This deficiency is nonetheless ameliorated through the use of the descriptive statistical analysis to first of all categorise and identify patterns which will inform the choice on how to proceed with the doctrinal analysis.

1.5 Conclusion

In order to deal effectively with the questions posed, this thesis is structured into seven chapters. This chapter has introduced the subject matter of this research and the methodology to be applied to deal with the research questions posed. It has also set out the context of this research and the research challenges for the work that follows. Chapter two provides the first step in dealing with RQ 1 (relationship). It offers an introduction to the use of the margin of appreciation doctrine and the living instrument doctrine in the jurisprudence of the Court. It identifies the contexts and rationale for their use within the jurisprudence of the Court. It also identifies some of the criticisms that have been levelled against both doctrines and the impact on these on the use of the doctrines by the Court. In doing so, the chapter addresses RQ 1 by establishing that there is a relationship between both doctrines and it provides an initial inquiry into what the existing literature reveals about the relationship between both doctrines and their impact on the protection of human rights through the Convention. It highlights the role of consensus as a linking factor and the attribute of change which both doctrines exhibit. Change is particularly seen in time and space, width and function. Chapter two therefore proffers initial answers to RQ 1

[41] A detailed consideration of the selection criteria for the case law is provided in Appendix A to this thesis.
[42] Hutchinson (n 37) 7,15.
[43] W Twinning (1976) Taylor Lectures 1975 Academic Law and Legal Development, Lagos: University of Lagos Faculty of Law, 20, quoted in Hutchinson (n 37).

(relationship) and to RQ 2 (conflict). It also draws attention to areas where there are gaps in the literature that will be addressed by this thesis as a contribution to the codification of the law in this area.

Chapter three paves the way for the case analysis which will provide answers to RQ 1 (relationship), RQ 2 (conflict), and RQ 3 (interpretive and theoretical approaches). It examines the underpinning for the margin of appreciation and living instrument doctrines through the lens of international rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties 1969 (VCLT). Chapter three aims to achieve two main tasks: (a) Examine the legitimacy in international law of the creation of the margin of appreciation and living instrument doctrines as tools of interpretation by the Court; and (b) Examine the links between the margin of appreciation and living instrument doctrines with the theories of interpretation reflected in the international rules on treaty interpretation. It argues that although neither doctrine is expressly mentioned within the VCLT, they are still legitimate rules of interpretation created by the Court which fit into the framework for international adjudication. This thesis provides a contribution to the literature by showing the interaction between the margin of appreciation and living instrument doctrines with the recognised rules of interpretation in the VCLT. It concludes by showing that both doctrines are relevant to the Court's preferred approach of teleological interpretation.

A further contribution to the literature in this area will be provided in Chapter four which considers an underpinning for the margin of appreciation and living instrument doctrines through the lens of the relationship between rights and duties. It begins with Hohfeld's theory that for every right, there is a correlative duty, when one speaks of the existence of a right, it means a duty has been invaded.[44] It however argues that the Hohfeldian conception of the correlativity of rights and duties is inadequate to explain the use of the margin of appreciation and living instrument doctrines as tools of interpretation in the determination of rights and duties. The alternative theory put forward by Joseph Raz of rights as grounds of duties is examined and based on the key challenges in that theory, a dynamic restricted correlativity thesis is proposed in this work as a framework for underpinning the use of the margin of appreciation and living instrument doctrines by the Court. This thesis seeks to provide an original contribution to the literature by examining the use of the margin of appreciation and living instrument doctrines by the Court through the

[44] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale LJ 16, 32.

lens of dynamic restricted correlativity. Chapter four therefore provides some indications for RQ 3 (interpretive and theoretical approaches) and concludes with a tool to be applied when analysing the case law in the subsequent chapters.

Flowing from the foundations that have been set in the previous chapters, chapter five is the first of the case analysis chapters. The methodology adopted in the selection of the case law and the research design are detailed in Appendix A to this thesis. It also sets out the analytical parameters and limitations of this research. This study seeks to provide an original contribution to the literature in this area through the methodology applied which is a combination of the quantitative method of descriptive statistics and the qualitative method of doctrinal textual research. Appendix B to this thesis reveals the coding criteria that was applied to the case law, whilst Appendix C contains a list of the cases that were analysed. The case law to be analysed is restricted to cases from January 1979 to December 2016 in which both the margin of appreciation and living instrument doctrines are present.

Chapter five will seek to provide initial answers to RQ 1 (relationship), RQ 2 (conflict), RQ 3 (interpretive and theoretical approaches) and RQ 4 (recommendations). It focuses on the use of living instrument and margin of appreciation arguments in determining the scope *ratione materiae* of the Convention at the admissibility stage. It will highlight that an examination of the use of the living instrument and margin of appreciation doctrines distinctly at the admissibility phase is usually overlooked in the literature, but one of the areas of criticism levelled against the living instrument doctrine has been that it has expanded the coverage of the Convention and in tandem restricted the margin of appreciation afforded to States. This study therefore seeks to provide an original contribution to the existing literature by examining the use of the living instrument and margin of appreciation arguments in relation to arguments on the scope *ratione materiae* of the Convention. The case analysis will begin with a descriptive textual analysis seeking to establish RQ 1 - the relationship between the living instrument and margin of appreciation doctrines at this admissibility phase. It highlights four models of interaction between the margin of appreciation and living instrument doctrines in the case law examined. It will also provide initial answers to RQ 2 on whether living instrument arguments are superseding margin of appreciation arguments. Based on the outcome of the descriptive statistics, doctrinal textual analysis will be applied to examine two aspects of the impact of the living instrument doctrine on the margin of appreciation doctrine (a) expansion *ratione materiae* and (b) restriction *ratione materiae* of the scope of the Convention. Both will be examined, and relevant case law will be considered in order to provide some initial answers to RQ 3

(interpretive and theoretical approaches). The case analysis in chapter five will argue that although on the face of it, living instrument arguments achieve a higher success rate with decisions of compatibility, when they are faced side by side with margin of appreciation arguments, the overall effect on the outcome of the case is different. There is therefore scope to consider the way in which margin of appreciation arguments are used at the applicability stage.

Chapter six is the second case analysis chapter and seeks to provide an original contribution through a consideration of the use of the living instrument and margin of appreciation doctrines in determining the nature and scope of duties of States at the merits stage. This analysis will be done through a combination of the descriptive statistics and doctrinal analysis. Chapter six provides a further layer to answering RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). It also forms the basis for consideration of RQ 4 (recommendations). The first part of the analysis focuses on the issue of width of the margin of appreciation as the living instrument doctrine is criticised for narrowing the margin of appreciation afforded to States. Through the use of the descriptive statistics it will be argued that the living instrument doctrine has not had an explicit impact of narrowing the width of the margin of appreciation which suggests the issue is more nuanced than the text of the case law. Consequently, it will be argued that the doctrinal analysis of the case law should be adopted from the perspective of policing the boundaries of the margin of appreciation which is linked to the justification the State has to put forward for an interference or for omitting to act, rather than focusing on the designated width of the margin of appreciation in the case. It will be argued that a consideration of boundaries would yield a better understanding of the relationship between both doctrines. The doctrinal textual analysis will consider the impact of the living instrument on the boundaries of the margin of appreciation from two perspectives: (a) The boundaries on the nature and scope of duty; and (b) The boundaries on the scope of duty. The rights and duties paradigm will be retained based on what will be considered in chapter 4. Two case studies will be used to illustrate the use of the living instrument to police the boundaries of the margin of appreciation: (a) Recognition of post-operative gender identify of transsexuals; and (b) Equality of inheritance rights for illegitimate children. From the doctrinal analysis it will be argued that the living instrument doctrine does not just lead to a change in time, but also a change in space. It will also be argued that whilst the living instrument doctrine may result in the State having a high threshold of justification, opportunity for dialogue with the Court can be seen in the case studies which would have eliminated the need for the ECtHR to interfere.

The final chapter is chapter seven which will provide a conclusion to this work and also makes some recommendations for future research.

While this thesis was being completed, one thesis was published on the issue of the living instrument doctrine.[45] This is not surprising due to the importance of this doctrine in the decision making of the Court. This thesis focuses on the nature of the interaction between the margin of appreciation and living instrument doctrines, as opposed to a general consideration of the presence of the living instrument doctrine in the jurisprudence of the Court.

[45] 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 Two
Overview of the Margin of Appreciation Doctrine And the Living Instrument Doctrine

2. Introduction

In the previous chapter, the general subject matter and context of this research was introduced as well as the key objectives of the project. It highlighted that the main focus of this research is on the interaction between the margin of appreciation and living instrument doctrines in the case law of the European Court of Human Rights (ECtHR, the Court). This chapter therefore proceeds with an examination of some key issues surrounding the application of the margin of appreciation doctrine and the living instrument doctrine by the ECtHR, in its role in supervising the implementation of the European Convention on Human Rights (ECHR, the Convention).[1] It highlights the origins and evolution in the definition of the margin of appreciation doctrine, the contexts in which it has been used, as well as the function it plays as a tool of interpretation used by the ECtHR. In the light of the criticisms that have been raised against the use of the margin of appreciation doctrine, this chapter examines the justifications that have been given for the presence of the doctrine within the jurisprudence of the Court and its continued relevance as an interpretive tool. In a similar fashion, the origins, definition and function of the living instrument doctrine are considered. Due to the criticisms levelled against the use of the living instrument doctrine, the justifications for its use and continued presence within the jurisprudence of the Court is also examined. This chapter then provides the first steps towards dealing with RQ 1 (relationship) by exploring whether a relationship exists between the margin of appreciation and living instrument doctrines in their application by the Court. From an examination of existing literature in this area, it highlights the basis for this relationship and draws attention to the gaps in the literature which this thesis seeks to fill. The chapter concludes by showing that there is a need for a systematic analysis of the case law in which both the margin of appreciation and living instrument doctrines are applied by the Court in order to determine the nature of the relationship between them and the interpretive approaches adopted by the Court.

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

2.1 Origins of the Margin of Appreciation Doctrine

In order to address RQ 1 (relationship), it is necessary to begin by first of all examining whether there is a relationship between the two doctrines. It is important to provide an understanding of both doctrines in the jurisprudence of the Court. It is also necessary to lay a foundation on the role of the member States and the role of the Court in protecting the rights in the ECHR. Article 1 of the ECHR expressly assigns the primary role of application and enforcement of its provisions to the member States, requiring them to 'secure to everyone within their jurisdiction' the rights and freedoms contained within the Convention.[2] This 'primarity' means that it is the role of the member State, in the first place, to apply the Convention in order to secure the rights and liberties enshrined in it.[3] This protective role of the member State is, however, accompanied by the supervisory function of the ECtHR in monitoring implementation by the State.[4] The Court's supervisory role remains subsidiary to the national mechanisms for protecting human rights.[5] This subsidiary role is further underscored by the provision of Article 35(1) ECHR which states that the Court's supervisory role will only be activated after all domestic remedies have been exhausted.

The margin of appreciation doctrine reflects the subsidiary nature of the Court's supervisory role. It is the allowance given by the ECtHR to national authorities to interpret and apply the provisions of the Convention. It gives room for differences in national contexts to be taken into consideration by the member States. The term 'margin of appreciation' is however neither found within the text of the Convention nor in the preparatory documents (*Travaux Préparatoires).*[6] It is however noteworthy that the absence of the margin of appreciation in the text of the Convention will soon be changed as a result of the proposals

[2] Article 1 ECHR.
[3] Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014) 18.
[4] Article 19 ECHR provides for the establishment of the European Court of Human Rights 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'.
[5] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 48.
[6] This has been noted by a plethora of academic commentators. E.g. Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Kluwer Academic Publishers 1996) 14; Michael R Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) ICLQ 638,639; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 2-3. Cf Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' (2010) 3 UCL Human Rights Review 1 who states that the term 'margin of appreciation first appeared in 1949 in the proposals made by the European Movement when considering the creation of transnational human rights system to be created in post-war Europe.

from the Brighton Declaration of 2012[7] and the resulting new Protocol No. 15.[8] When Article 1 of Protocol No 15 comes into force, it will add the terms 'margin of appreciation' and 'subsidiarity' to the Preamble of the Convention. It requires that the margin of appreciation and subsidiarity are to be taken into consideration by the Court in carrying out their supervisory role over the implementation of the Convention by the member States. With 44 ratifications out of the 47 member States to the ECHR, the possibility of Protocol No 15 coming into force appears to be imminent, thereby reinforcing the significance of the margin of appreciation doctrine.[9]

Whilst 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, there have been differences in current literature on the point as to when the doctrine was first used by the Commission. [10] Hutchinson traces the origins of the margin of appreciation doctrine to the Commission's report in the 1960 *Lawless v Ireland* case that involved derogation under Article 15 as a result of a state of emergency in the Republic of Ireland.[11] By contrast, other commentators draw attention to the fact that the margin of appreciation doctrine was first introduced and adopted by the Commission *Suo motu*[12] in its report on the earlier 1958 case of *Greece v United Kingdom.*[13]

---

[7] High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration, 19-20 April 2012) available at <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf accessed 29 July 2018.

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

[9] Current status of ratifications as at 29 July 2018. Available at < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=xwvJ7TQ3> accessed 29 July 2018.

[10] The Commission and the Court were created by former Article 19 of the Convention and were both charged with the obligation of 'ensuring the observance of the engagement undertaken by the High Contracting Parties' to the Convention. Protocol No 11 of 1998 (Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Entered into Force 1 November 1998) ETS 155) made significant changes to this structure: the Commission was abolished and a permanent Court with compulsory jurisdiction replaced the Court. For a more in depth examination of the role of the European Commission prior to 1998, see Erik Friberg and Mark E Villiger, 'The European Commission of Human Rights', in R St J Macdonald, F Matcher and H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff, 1993) 605-620; Pieter Van Dijk, Godefridus JH Van Hoof and AW Heringa, *Theory & Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 26-31; For an 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.

[11] *Lawless v Ireland* (No 3) App no 332/57 (ECtHR, 1 July 1961), para 90; Hutchinson (n 6).

[12] 'On its own motion'.

[13] *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 (n 6) 15; van Dijk and van Hoof (n 10) 84; Oren Gross and Fionnuala Ní Aolán, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 HRQ 625, 631; Arai-Takahashi (n 6) 5; Greer (n 6) 2.

In the *Greece* case, the United Kingdom had exercised its right under Article 15 to derogate from some of its obligations under the Convention as a result of a state of emergency in the Island of Cyprus. [14] Whilst deciding on the issue as to whether the measures adopted by the UK were justified, the Commission stated that in such a case a certain margin of appreciation must be conceded to the government.[15] The Commission found that the derogation by the UK fell within the margin of appreciation afforded to the government and there was no violation of their obligations under the Convention. The *Greece* case therefore formed the birth of the margin of appreciation doctrine.

In relation to the Court itself, the 'certain measure of discretion' alluded to by the Commission in the *Greece* case was relevant to the ECtHR decision in *Lawless v Ireland*, another case that dealt with derogations under Article 15, although as Yourow points out, there was no express mention of the margin of appreciation.[16] Brems acknowledges this implicit recognition of the margin of appreciation by the Court was also seen in several other cases,[17] but the first express use of the term 'margin of appreciation' by the Court was in the 1971 case of *De Wilde, Ooms and Versyp* v *Netherland*s, a case dealing with supervision of correspondence during detention for vagrancy.[18] The Court in that case recognised that the Contracting States had a 'power of appreciation' under Article 8(2) of the Convention. In the examination of the case, the Court decided that in this case the Belgian authorities had not gone beyond the limits of that power of appreciation. Judge Spielmann writing extra judicially, however points out that this formulation of the doctrine in the *De Wilde Ooms and Versyp* case was 'a slightly different formulation' and that the first use of the term 'margin of appreciation' by the Court itself was in the 1976 case of *Engel and Others v*

[14] Derogation is a temporary suspension of compliance with certain human rights obligations. Article 15(1) of the ECHR gives member States the right to derogate from certain provisions of the Convention 'in time of war or other public emergency threatening the life of the nation'. The measures undertaken must however be only such as are 'strictly required by the exigencies of the situation'. The measures must also not be inconsistent with any other international law obligation of the particular member State. At the time, the United Kingdom was responsible for the international relations of the territory of Cyprus.

[15] *Greece* (n 13).

[16] *Lawless* (n 11); Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987-1988) 3 Connecticut Journal of International Law 111, 120.

[17] *Belgium Linguistics Case – 'In the case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium'* App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 23 July 1998); *Wemhoff v Germany* (Merits) App no 2122/64 (ECtHR, 27 June 1968); *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970).

[18] *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> accessed 17 July 2014.

Netherlands.[19] Moving on from its early beginnings in the case law of the Commission, the margin of appreciation doctrine has now become embedded within the enforcement system of the Court.[20] The inclusion of the margin of appreciation doctrine in the text of the Preamble of the Convention when Protocol No 15 comes into force will further enhance the significance of the doctrine in the jurisprudence of the Court.[21]

2.2 Evolution in the Definition of the Margin of Appreciation Doctrine

Although it is now entrenched within the case law of the Court, defining the term 'margin of appreciation' is no simple task considering its recognised case-dependent, uneven, and largely unpredictable nature.[22] However aspects of the margin of appreciation can be gleaned from the different definitions proffered by the literature. The definitions also show a progression in the understanding of the function of the margin of appreciation doctrine. The initial allusion to the margin of appreciation has already been traced to the *Greece* case. In that case, the Commission described the margin of appreciation as a '*certain measure of discretion*' to be given to the member State.[23] The Commission in the case provided no further definition or justification of the margin of appreciation doctrine. This has left room for further examination of the doctrine through the jurisprudence of the Court.

In the first comprehensive work on the margin of appreciation doctrine in 1996, Howard Charles Yourow defined it as:

> The latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or

[19] *Engel and Others v Netherlands* App nos 5100/71; 5101/71; 5102/71; 5354/72; and 5370/72. 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> accessed 29 July 2018.

[20] By the end of the 1990s over 700 of the Court's judgments had endorsed the margin of appreciation doctrine, see Editor's Note, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: It's Legitimacy in Theory and Application in Practice' (1998) 19 Human Rights Law Journal 1. Outside of the enforcement system established by the Court, the legal basis of the margin of appreciation doctrine may be traced to the *French Conseil d'Etat* in which the term *margé d'appréciation* is used as well as the administrative law in all civil law jurisdictions. For a more detailed discussion on the origins of the margin of appreciation and its presence in other civil/continental jurisdictions, see Arai-Takahashi (n 6) 14.

[21] This is particularly so due to the role that the Preamble plays in interpretation of treaties. For more on this point see D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013) 8. Available at https://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf > accessed 29 July 2018.

[22] Greer (n 6) 5.

[23] *Greece* (n 13).

> limitation upon a right guaranteed by the Convention to constitute a violation of one of the Convention's substantive guarantees.[24]

From Yourow's definition the margin of appreciation is a flexible tool because it gives some allowance to member States. In relation to the scope of obligations on the State that the margin of appreciation may be applied to, Yourow's definition appears to limit this flexibility to the negative obligations on the member State to refrain from interfering with individual rights. It does not shed any light on whether the State enjoys a margin of appreciation in cases where there is a positive obligation on the member State to fulfil a human rights obligation.[25] This association by Yourow of the margin of appreciation doctrine with negative obligations on the member States may be linked to the fact that the margin of appreciation doctrine was first used in the *Greece* case, which was about derogations by the UK under Article 15 of the Convention.[26]

The question that arises from Yourow's definition is whether the margin of appreciation doctrine is only relevant when the Court is considering negative obligations of member States under the Convention? The definition of the margin of appreciation by Steven Greer in 2000 is relevant in answering this question. Greer defined the margin of appreciation as 'The room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights'.[27] Greer's definition is similar to Yourow's, to the extent that it acknowledges the flexible nature of the margin of appreciation in relation to the space it gives to national authorities but it differs in the area of the scope of obligations the margin of appreciation can be applied to. Greer expands the understanding of the margin of appreciation beyond a reference to negative obligations by using the phrase 'fulfilling their obligations'. This could be interpreted to mean that the margin of appreciation provides flexibility to the member State in carrying out both positive and negative obligations under the Convention as both come under the term 'fulfilling'.

Further support for the view that the margin of appreciation is applicable to both positive and negative obligations of States can be gleaned from Tümay's definition of the margin of appreciation in 2008 as 'The discretion given to a government when it evaluates

[24] Yourow (n 6) 14.
[25] For more on the distinction between negative and positive human rights obligations, see Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* (OUP 2016) 215-275.
[26] *Greece* (n 13).
[27] Greer (n 6) 5.

factual situations and applies the provisions enumerated in the Convention'.[28] The margin of appreciation doctrine is therefore the lens through which the Court supervises the extent to which the member State has fulfilled its positive and negative obligations under the Convention. This shows an evolution in the understanding of the scope of the margin of appreciation doctrine from the first comprehensive work in 1996 to the present day.

An important part of the nature of the margin of appreciation doctrine is that it affords flexibility not only to the member States parties in carrying out their role as the primary enforcers of the Convention, but also to the Court itself in carrying out its role as an international tribunal that is dealing with sovereign member States.[29] This functional aspect of the margin of appreciation has been referred to from early publications on the doctrine. Macdonald defined the margin of appreciation doctrine in 1993 as 'the general approach of the European Court of Human Rights to the delicate task of balancing sovereignty of Contracting Parties with their obligations under the Convention'.[30] It is 'the interpretative tool used by the Court which partly "resolves" the definitional quandaries…while at the same time attempting to reconcile the sovereignty versus human rights debate'[31]. Fenwick highlights that it gives the Court the flexibility to avoid damaging confrontations between it and the member States and to balance the sovereignty of the member States with their obligations under the Convention.[32] The Court therefore remains mindful that it is an international adjudicatory mechanism and owes its existence to the will of the States. The sovereignty of the member States empowers them, if they wish, to pull out of the Convention.[33] The margin of appreciation therefore serves as a useful functional tool for the Court.

From the above definitions it can be seen that the 'margin of appreciation' doctrine is used by the Court to achieve more than one function. It is a 'two pronged' instrument used by the Court to deal with the dual areas of interpretation of individual rights on the one hand and sovereignty of member States on the other. The Court has not always clearly shown the

[28] Murat Tümay, 'The Margin of Appreciation Doctrine Developed by the Case Law of the European Court of Human Rights' (2008) 5(2) Ankara Law Review 201 at 202.
[29] See van Djik, van Hoof and Heringa (n 10) 92.
[30] R St Macdonald (n 13) 83.
[31] K A Kavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' (2006) EHRLR 422.
[32] Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish Publishing Limited 2005) 34-37.
[33] For example, the United Kingdom has been debating on the issue of whether to pull out the Convention and create its own British Bill of Rights. The plan has however been shelved until after Brexit. Jon Stone, 'British Bill of Rights Plan Shelved for Several More Years, Justice Secretary Confirms' *The Independent* (London, 23 February 2017) < https://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brexit-liz-truss-theresa-may-a7595336.html> accessed 29 July 2018.

particular sense in which the doctrine is used in the case law and this has prompted criticism of inconsistency and arbitrariness in its application.[34] Letsas attempts to bring some coherence to this apparent lack of coherence and transparency in case law by distinguishing between a 'substantive' and a 'structural' use of the margin of appreciation.[35] The substantive use of the margin of appreciation refers to 'all the cases where despite the fact that there was 'interference' with a freedom protected by the ECHR, the interference did not amount to a violation of a right'.[36] It addresses the relationship between individual rights and collective goals.

In instances where the State's measures to advance collective goals lead to an interference with the freedoms of the individual, the Court would then have to determine whether the interference with the individual's right was 'proportionate' to the legitimate aim pursued by the member State.[37] In cases where a reasonable balance is found, the national authorities are considered to be within the margin afforded to them and therefore not in breach of their obligation under the Convention. [38] The substantive use of the margin of appreciation may be seen in the accommodation clauses in Articles 8-11 of the Convention. The Court also adopts tests such as are 'necessary' in a democratic society or 'pressing social need' found in the accommodation clauses in order to assess whether the interference with the individual's freedom amounts to a violation of their rights. The substantive use of the margin of appreciation is similar to what Vila and Ungureanu refer to as the 'rationalized' version of the margin (RDMA) which is where the 'ECtHR focuses on examining if the impugned measure has achieved a fair balance between individual rights and democratic values'.[39] In this substantive use, the margin of appreciation functions as a tool to define the norms within the Convention.

The structural concept on the other hand, addresses the limits, or intensity of the review of the Court as a result of its status as an international tribunal, which has to take into consideration the sovereignty of the member States.[40] In this context the Court refrains from

[34] E.g. R Macdonald (n 13); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) Oxford Journal of Legal Studies 705, 706
[35] Letsas, 'Two Concepts of the Margin of Appreciation' (n 34) 705.
[36] Ibid 710.
[37] Ibid 706; This is why Arai-Takahashi refers to the margin of appreciation as 'the other side of proportionality' Arai-Takahashi (n 6) 14.
[38] Arai-Takahashi (n 6) 14.
[39] Marisa Iglesias Vila and Camil Ungureanu, 'The Conundrum of Pluralism and the Doctrine of the Margin of Appreciation: The Crucifix "affair" and the Ambivalence of the ECtHR' in F Requejo and C Ungureanu (eds), *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014) 179, 184.
[40] Letsas, 'Two Concepts of the Margin of Appreciation' (n 34) 721.

making a substantive determination on whether the particular action of the member State is a breach of the rights of the individual. Essentially, the Court devolves a level of responsibility for ensuring protection of human rights to the domestic authorities. [41] The relationship here is between the member State and the Court.[42] Consequently, the structural use of the margin of appreciation is a tool that balances the sovereignty of member States with their obligations under the Convention.[43] In this way, the margin of appreciation functions as a tool of judicial deference because it set limits on judicial review by the Court. The structural use of the margin of appreciation is similar to what Shany refers to as 'norm application' which is where the international Court respects the discretion of the national Courts in interpreting their obligations under the Convention in different ways.[44] It is also what Vila and Ungureanu refer to as the 'voluntarist' version of the margin (VDMA) which is where 'European supervision is carried out with a prior strong presumption in favour of the state'[45] with the result that 'the ECtHR should be reluctant to engage in an independent and detailed proportionality assessment of the impugned measure'.[46]

Letsas however raises questions about the utility of the margin of appreciation in either the substantive or structural sense in the case law of the Court.[47] He has argued that a proper analysis of the margin of appreciation shows that the doctrine is 'at best redundant and at worst a danger to the liberal-egalitarian values which underlie human rights'.[48] Vila and Ungureanu on the other hand argue that the RDMA may be helpful in 'clarifying both what is wrong with an abstract assessment of conventionality, and when a stringent proportionality test in the application of the Convention should be rejected'.[49] This view is linked to the supervisory role of the Court in determining the breadth of the margin of appreciation.

The deference afforded by the margin of appreciation is not unlimited. The Court itself has stated that 'the domestic margin of appreciation goes hand in hand with a European supervision'.[50] The question that arises is what exactly is covered by this supervision?

---

[41] Spielmann, 'Whither the Margin of Appreciation?' (n 19) 13.
[42] Letsas, 'Two Concepts of the Margin of Appreciation' (34) 721.
[43] R St J Macdonald (n 13) 83.
[44] Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law? (2006) 16(5) EJIL 907, 910.
[45] Vila and Ungureanu (n 39)183.
[46] Ibid 184.
[47] Letsas, 'Two Concepts of the Margin of Appreciation' (n 34) 711-5, 731-2.
[48] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer (2010) 21(3) EJIL 509,531.
[49] Vila and Ungureanu (n 39)186.
[50] *Handyside* (n 5).

According to the Court, this supervision covers (a) the aim of the measure challenged (b) its necessity; (c) the decision of the Court applying the legislation in question.[51] The supervision therefore appears to cover substantive as well as procedural issues. Harris *et al* aptly recognised this supervision aspect of the margin of appreciation when they explain that the margin of appreciation means that 'the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right.'[52] It is not only a tool that gives space to the national authorities but also one that triggers supervision by the Court. The rigour and reach of this supervisory role of the Court are, however, not without dispute.[53]

The margin of appreciation has evolved from a tool created by the Commission in the 1958 *Greece* case to one expressly adopted by the Court in the *Engel* case and now embedded within the jurisprudence of the Court. It is evident that the margin of appreciation doctrine cannot be conscribed and fitted into any particular box. It is a flexible tool applied by the Court. The understanding of the margin of appreciation is very much linked to an examination of the case law of the Court. This in turn means that as the case law to which the margin of appreciation is applied evolves, our understanding of the margin of appreciation also changes. Evolution can be seen in the change from the initial restrictive definition of the margin of appreciation, which appeared to restrict the usefulness of the margin of appreciation to the assessment of the fulfilment of negative obligations on the State in regard to their securing of the Convention's guarantees in their territory. Due to the invocation of the margin of appreciation at the time in relation to derogations in Article 15, the understanding of its use was limited. The expansion of the use of the margin of appreciation in other articles has led to a different understanding of the doctrine as encompassing both positive and negative obligations of member States. This case-dependent nature of the margin of appreciation forms the basis for focusing this thesis on a case analysis as the understanding of the margin of appreciation can only be critically assessed through a comprehensive analysis of the case law of the Court.

An established fact is that the margin of appreciation does not give member States an unlimited room in their implementation of the Convention guarantees but is accompanied by supervision of the Court. It may however be queried as to why there is a need for the

[51] Ibid, para 49.
[52] D J Harris, M O'Boyle, E P Bates & C M Buckley, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (3rd 3dn, OUP 2014) 14.
[53] The criticisms on this issue will be addressed later on within this chapter in section 2.3.

margin of appreciation within ECtHR jurisprudence. A follow-on issue is whether the margin of appreciation is applicable to every aspect, or restricted to only certain aspects, of the Convention. These questions form the basis for the next section in examining the contexts and rationale for the use of the margin of appreciation doctrine.

2.3 Contexts and Rationale for the Invocation of the Margin of Appreciation Doctrine

The key question in relation to the context for the use of the doctrine is whether the margin of appreciation is applicable to the entire Convention or only to specific provisions. In considering this issue, there is a clear illustration of evolution in the case law of the Court. Initially, the margin of appreciation doctrine was applied to situations involving Article 15 of the Convention addressing derogations in times of public emergency.[54] It has since been extended to cover other articles such as Articles 14 and paragraph 2 of Articles 8-11 which contain the limitation clauses.[55] Whilst some academics and judges writing extra judicially have adopted a restrictive view that the margin of appreciation doctrine should only be applicable to certain Articles in the Convention,[56] Macdonald, a former judge of the Court, maintains that the Court has not imposed a limit so in theory, there should be none as the margin of appreciation doctrine 'is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not.'[57] Brems agrees with this view, stating that the margin of appreciation has now been extended to all the rights contained within the Convention and its additional protocols and that even in cases where the margin of appreciation is not expressly mentioned, it is actually applied by the Court in the interpretation of those provisions of the Convention.[58]

Article 1 of the new Protocol No 15, which calls for the Court to take into consideration the margin of appreciation doctrine in adjudicating matters does not specify

[54] Examples of such cases include – *Greece* (n 13); *Ireland v United Kingdom* App no 5310/71 (ECtHR 18 January 1978); *Brannigan and McBride v United Kingdom* App nos 14553/89 and 14554/89 (ECtHR, 20 May 1993).
[55] Arai-Takahashi (n 6) 8; Greer (n 6) 8.
[56] For example Greer, who argues that the margin of appreciation should only be applied to Article 15, Articles 8-11, Article 14 and Article 1 of Protocol No 1; Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights (Council of Europe Publishing, Human Rights Files No 17, Strasbourg 2000) 8. More recently, Judge Spielmann has expressed the view that the margin of appreciation is not applicable to some articles of the Convention. See Spielmann, 'Whither the Margin of Appreciation?' (n 19).
[57] R St J Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in *International Law at the Time of its Codification, Essays in Honour of Judge Roberto Ago*, (Milan: Giuffrè 1987) 187, 208;
[58] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (n 18) 242.

any restrictions on the Articles of the Convention that the margin of appreciation should be applied to. This therefore leaves open the argument that the margin of appreciation could be applied to the entire Convention.[59] Indeed, one may argue that it is evolving from a pragmatic tool, one created as a result of the circumstances of the *Greece* case, to a tool that is to become a convention, a requirement to be followed by the Court.

Although the margin of appreciation doctrine has become a significant part of the Court's jurisprudence, its incorporation into the jurisprudence of the Court has remained a subject of debate. It has received mixed reactions from both academics and judges writing both judicially and extra-judicially. Advocates of the doctrine welcome it as an important part of the Convention's machinery,[60] a tool used to strike a balance between national views of human rights and the uniform (pan-European) application of Convention values.[61] It is further welcomed as a relevant tool for the member States, and is seen as giving them 'the opportunity to strike a balance between the common good of society and the interests of the individual when they restrict rights'.[62] It has therefore been described as a pragmatic device for the benefit of the Court and member State parties, utilised to reconcile the political, social, cultural and economic diversity of member States.[63] It is seen in this sense as a practical tool to be used by the Court but one could argue it is moving from a pragmatic tool to one that is required of the Court.[64]

Critics on the other hand disapprove of the margin of appreciation on the basis that it introduces an element of relativity into the uniform interpretation of the Convention, resulting in differences in scope and emphasis depending on the circumstances of the case.[65] The mixed response to the margin of appreciation therefore generates a need to consider the justification for the continued presence of the doctrine in the jurisprudence of the Court. Justification for the use of the margin of appreciation doctrine can be gleaned from pronouncements of the Court as well as from academic commentary on this issue.

The Court in the landmark case of *Handyside v United Kingdom* elucidated the need for

[59] Protocol No 15 (n 8).
[60] 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.
[61] Arai-Takahashi (n 6) 3.
[62] Tümay (n 28) 201.
[63] K A Kavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' (2006) EHRLR 422. In this context, a pragmatic device is practical tool.
[64] This will be more evident when Protocol No 15 comes into force.
[65] P Van Dijk and GJH van Hoof, *Theory and Practice of the European Court of Human Rights* (2nd edn, 1990) 583-606.

the doctrine and the underlying rationale for it. [66] In *Handyside* the Court was faced with deciding to what extent the State could curtail freedom of expression on the basis of protection of morals. Whilst acknowledging that the actions of the United Kingdom infringed on the applicant's right to freedom of expression under Article 10, the Court invoked the margin of appreciation and upheld the restriction by the United Kingdom to be in line with the provisions under Article 10(2). The Court stated that:

> The Convention leaves to each Contracting state, in the first place, the task of securing the rights and liberties it enshrines…In particular, it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place…By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. Consequently, Article 10 para.2 leaves to the Contracting states a margin of appreciation.[67]

From the above statement of the Court, three key factors may be deduced as the rationale for the margin of appreciation doctrine: subsidiarity, diversity of contracting States and the 'better position' rationale. These three factors form the bedrock of the justification of the use of the margin of appreciation doctrine by the Court. Each of these rationales will be examined within this section and the concerns raised about their legitimacy will be also be analysed in tandem.

2.3.1 Subsidiarity

This justification for the margin of appreciation doctrine is a systemic one that goes to the very constitutionality of the Court. The Court has been constituted to be a place of last resort when remedies at the national level have been exhausted. The member States are the primary enforcers of the Convention with the Court performing a subsidiary function of

[66] *Handyside* (n 5).
[67] Ibid, para 48.

review of the member States' actions.[68] Subsidiarity connotes an understanding that an association should empower its members to act and to choose the means of achieving the particular commitments they have chosen through their own initiatives.[69] Where a smaller group can perform a function efficiently, a larger group does not need to assume such functions.[70] Essentially subsidiarity is poised to enhance the freedom of smaller groupings of people to act.[71] Applying this line of reasoning to the Convention's system of enforcement then necessitates the requirement for member States, as the smaller groupings, to be the primary enforcers of the Convention guarantees. Subsidiarity also gives support to the idea of 'shared responsibility' between the Court and national courts.[72] There should therefore be a sharing of judicial functions between the national courts and the ECtHR.[73] The issue still remains as to where to 'draw the line' in this sharing of judicial functions.

Subsidiarity as the underlying grounding of the margin of appreciation doctrine may be seen not just from the express statement in *Handyside*, but also within the text of the Convention itself by virtue of a combined reading of Articles 1, 13, 35 and 53.[74] The subsidiarity within the Convention has two elements: a substantive element and a procedural element.[75] The substantive element is based on the assumption that the national authority is in a better position to deal with the substance of the Convention complaint and provide appropriate relief at the national level[76] whilst the procedural aspect of subsidiarity is based on Article 35 by virtue of which the supervisory role of 'the Court' can only be engaged

[68] Subsidiarity in this context is therefore different to that under European Union law.
[69] J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 146.
[70] Ibid 146-7.
[71] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 61.
[72] Gerards and Fleuren (n 3) 21.
[73] For more about this idea of sharing of judicial functions between the Court and the national courts, see Antoine Garapon, 'The Limits to the Evolutive Interpretation of the Convention' (European Court of Human Rights, Dialogue Between Judges 2011) 31.
[74] Tümay (n 28) 203-204. Tümay observes that a combined reading of Articles 1, 13, 35 and 53 of the ECHR displays the implied subsidiary character of the Convention mechanisms. Article 1 provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention'. Article 13 provides that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 53 provides that 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'.
[75] See Committee on Legal Affairs and Human Rights Draft Protocol No. 15 to the European Convention on Human Rights1 Report Rapporteur: Mr Christopher Chope, United Kingdom, European Democratic Group 3, 4. Available at < http://www.assembly.coe.int/Communication/ajdoc11_2013.pdf> Accessed 19 December 2013.
[76] This may be seen from a combined reading of Articles 1, 13 and 53. Tümay (n 28) 203. For a different view on the position of national authorities in the context of derogation cases under Article 15, see Gross and Ní Aolán (n 13) 639.

once all domestic remedies have been exhausted.[77] The case for subsidiarity as the justification for the employment of the margin of appreciation doctrine by the Court is further supported by the new Protocol No 15, which inserts the term subsidiarity into the Preamble to the Convention.[78]

Moving on from the contents of the Convention itself, academic commentators also draw attention to the role of the Convention system as subsidiary to domestic legal systems.[79] Carozza refers to the margin of appreciation as 'rooted' in subsidiarity.[80] It is a 'natural product' of the distribution of powers between the Convention's enforcement mechanisms and the domestic authorities.[81] Whilst the primary responsibility for enforcement is with the member States, the last word is with the Court as it functions as a supervisory mechanism.[82] Judge Spano writing extra judicially has referred to the margin of appreciation as a 'functional manifestation of the principle of subsidiarity…the former being the operational tool for the realisation of the latter'.[83] It can therefore be seen that subsidiarity is advocated both by the Court, the Convention, Judges writing extra judicially and academic commentators as being a justification for the presence of the margin of appreciation doctrine within the jurisprudence of the Court.

2.3.2 The Better Position Rationale

In addition to subsidiarity, the Court in *Handyside* referred to State authorities being in a 'better position'. The better position rationale embodies the use of the margin of appreciation as a tool for judicial restraint.[84] It is used by the Court to refrain from

[77] Article 26 ECHR.
[78] See Protocol No 15 (n 8).
[79] Herbert Petzold, 'The Convention and the Principle of Subsidiarity' in The European System for the Protection of Human Rights 41 (Ronan St J Macdonald *et al* eds, 1993) Paul Mahoney, 'Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin, (1990) 11 HRLJ 57
[80] Carozza, Paolo G 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97(1) American Journal of International Law 38, 40.
[81] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (n 18) 242.
[82] P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 HRLJ 57, 81; Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (n 18) 242; See also Committee on Legal Affairs and Human Rights Draft Protocol No. 15 to the European Convention on Human Rights1 Report Rapporteur: Mr Christopher Chope, United Kingdom, European Democratic Group 4. Available at < http://www.assembly.coe.int/Communication/ajdoc11_2013.pdf> Accessed 17 July 2014.
[83] Robert Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Respect?' (2015) 33(1) Nordic Journal of Human Rights 1, 4.
[84] Eva Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe' in David P Forsythe, Patrice C McMahon (eds), Human Rights and Diversity: Area Studies Revisited (Board of Regents of the University of Nebraska 2003) 81, 82.

questioning certain actions by the State. This restraint is rooted in the acknowledgement of the sovereignty of the member States to the Convention. Brems describes it as being used to demarcate the room left for national sovereignty *vis-a-vis* supranational control.[85] Sweeney refers to it as the institutionalised dimension of subsidiarity, with the Court exercising judicial self-restraint. [86] Mahoney however argues that this connotation of judicial self-restraint is an abdication by the Court of its supervisory duty and calls for greater scrutiny by the Court of decisions of the national courts rather than relying on the margin of appreciation doctrine.[87] There does not however appear to be a move in that direction as the issue of subsidiarity is being strengthened with its inclusion in Protocol No 15.[88]

The Court in a variety of cases in which the margin of appreciation has been invoked has since used this 'better position' rationale. It has featured heavily in derogation cases under Article 15. In *Ireland v United Kingdom,* the Court had to decide on whether the derogation by the United Kingdom under Article had infringed the provisions of the Convention. The Court in that case confirmed the wide margin of appreciation given to member States to decide on the presence of a state of emergency and the scope of the derogations necessary to avert it on the basis that they were in a better position than the international judge.[89] However Gross and Ní Aolán argue that in such cases of emergency it is the international Court, rather than the national Court that would be in a better position to analyse the issues and come to a rights decision.[90] The 'better position' rationale is therefore not unanimously accepted in all quarters.

2.3.3 Diversity of Contracting States

The third justification for the margin of appreciation doctrine to be deduced from the statement of the Court in *Handyside* is the diversity of contracting parties. The diverse nature of the contracting parties to the Convention is self-evident. Although the initial parties to the Convention were predominantly Western European States,[91] it was recognised that there was

[85] Ibid.
[86] J. A Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54(2) ICLQ 459, 474.
[87] Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (n 82) 57.
[88] Protocol No 15 (n 8).
[89] *Ireland* (n 54); The Court has continued to apply this line of reasoning. See for e.g. *Brannigan* (n 54); *Zehentner v Austria* App no 20082/02 (ECtHR, 16 July 2009), para 57.
[90] Gross and Ní Aolán (n 13) 639.
[91] Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

diversity in their cultural, economic and legal traditions.[92] This is reflected within the Statute of the Council of Europe as on the one hand it refers to the 'common heritage' of its members, but on the other, it also expresses the need to achieve 'greater unity' between them.[93] Hence diversity was clearly acknowledged even within the initial 10 member States of the Council of Europe and the Convention. Diversity is even more evident in the present day as the membership of the Convention has evolved from 10 contracting States in 1950, to currently 47 member States. This expansion in the number of member States has also meant an expansion in the ideological divide of the State parties. It has moved from a document signed by mainly Western European States, to a document now signed by States embracing Western, Central and Eastern Europe with the differences in culture, economic and legal traditions that go with these areas. [94]

This increased diversity of member States means that there will be an absence of consensus amongst member States in certain areas. The Court has recognised this lack of uniform European conception on issues such as morals,[95] when life begins,[96] and the requirements of the protection of the rights of others in relation to attacks on their religious convictions[97] and several other areas. The Court in dealing with these issues has resorted to giving a wide margin of appreciation to the member States. The margin of appreciation has therefore been embraced as a unique tool to accommodate this diversity of the different State parties to the Convention.[98] Advocates of the doctrine consider it a justified response to sociological, religious, cultural, moral, political and ideological diversity between the contracting States.[99]

Lester criticises the use of the margin of appreciation on the basis that it promotes

---

[92] Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) German Law Journal 711, 717.
[93] Article 1 Statute of the Council of Europe.
[94] The statistics from the Court show that the greatest amount of human rights breaches is recorded against member States from Eastern Europe. The Court's latest official statistics show that since it was established in 1959, almost half of the judgments delivered by the Court concerned 5 member States: Turkey (2,994), Italy (2,268), Russian Federation (1,475), Poland (1,042) and Romania (1,026). (European Court of Human Rights 2014 Council of Europe: The ECHR in Facts and Figures 2013 available at <http://www.echr.coe.int/Documents/Facts_Figures_2013_ENG.pdf> accessed 31 January 2014.
[95] *Handyside* (n 5); Müller and Others v. Switzerland App no 10737/84 (ECtHR, 24 May 1988), Otto-Preminger-Institut, and Wingrove v. the United Kingdom App no 17419/90 (ECtHR, 25 November 1996).
[96] *A, B and C v. Ireland* App no 25579/05 (ECtHR, 16 December 2010); *Evans v The United Kingdom* App no 6339/05 (ECtHR, 10 April 2007).
[97] *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 September 2005); Wingrove (n 95); *Giniewski V. France* App no 64016/00 (ECtHR, 31 January 2006).
[98] Arai-Takahashi (n 6) 3; see also Kavanaugh (n 63) 422; Eva Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe' (n 84) 81, 102.
[99] Arai-Takahashi (n 6) 3; Kavanaugh (n 63) 422.

cultural relativism in the interpretation of the Convention.[100] Eyal Benvenisti echoes this fear stating that 'The margin of appreciation, with its principled recognition of moral relativism is at odds with the concept of the universality of human rights'.[101] Sweeney counters this fear of relativism and argues that universality does not mean uniformity. Therefore local variations in the standards of the Convention do not equate to outright relativism.[102] It is conceded that the result of the application of the margin of appreciation is that whilst common values are being upheld, the same set of facts can give rise to different decisions depending on the member State involved.[103] Uniformity is therefore not achieved through the margin of appreciation, but that can be distinguished from universality that can be maintained in relation to the core values to be achieved by the provisions of the Convention.

In addition to the reasons of subsidiarity, diversity and better position Judge Spielmann writing extra judicially highlights other reasons in the literature of the use of the margin of appreciation doctrine:

> [I]it signals recognition by the Court of the inevitable limits to its institutional capacity, i.e. acceptance that it cannot consider every case in every detail; that a court, and *a fortiori* an international court, is not the ideal forum for arbitrating difficult choices of socio-economic policy; that the European Court is too distant to rule on cases of great sensitivity.[104]

These reasons are very much related to the idea of the domestic authorities being in a better position than the international Court due to the constraints on the Court as a result of its very structure as a supra national Court. This necessitates a need for interaction between the ECtHR and the national Courts. In recent literature, the use of the margin of appreciation as a tool for interaction between national Courts and the ECtHR has been emphasised. The Brighton Declaration of April 2012 drew attention to the shared role between the States and the Court in the implementation of the Convention's guarantees, urging the Court to give prominence to the principles of the margin of the margin of

---

[100] A Lester 'Universality Versus Subsidiarity: a Reply' 1 European Human Rights Law Review (1998) 73, 76
[101] E Benvenisti 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 New York University Journal of International Law 843, 844
[102] Sweeney (n 86) 469; See also Legg (n 71) 43 - 47
[103] For example, the issue highlighted in Chapter 1 - in *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) it was decided that a ban on the covering of the face in public spaces which resulted in the prohibition of the wearing of the burqa/headscarf in public places was within the state's margin of appreciation and therefore not a breach of the Convention. This was in spite of the fact that the veil is worn in several other European countries.
[104] Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (n 21) 2.

appreciation and subsidiarity as a means of achieving this interaction.[105] This view of interaction via the margin of appreciation doctrine has also been expressed in the Court's case law. In their joint dissenting opinion, Judges Sajó, Lazarova Trajkova and Vučinić in *Mouvement Raëlien Suisse v Switzerland* referred to the margin of appreciation doctrine as a 'valuable tool for the interaction between national authorities and the Convention enforcement mechanism'.[106] Judge Spielmann, writing extra judicially has also expressed similar views, referring to 'a European review going hand in hand with the domestic review'.[107] The rationale for the existence of the margin of appreciation is therefore moving towards an increased recognition of the role of the member States of the Convention as the primary enforcers which necessitates a partnership between the ECtHR and national authorities.

2.3.4 Certainty and the Margin of Appreciation Doctrine

Whilst several reasons have been given for the presence of the margin of appreciation doctrine within the jurisprudence of the Court, there remains a concern with the issue of predictability in the use of the doctrine by the Court. Greer observes that in spite of the mountain of jurisprudence on the subject its most striking characteristic remains its 'casuistic, uneven, and largely unpredictable nature'.[108] Macdonald identifies two issues that create unpredictability: the absence of a uniform application process of the doctrine by the Court and the absence of a detailed rationale for the use of the margin of appreciation in specific cases.[109] This criticism is echoed by Letsas.[110] It results in the inconsistency in the application of the margin as a result of the absence of a detailed rationale for its use by the Court.[111] The disquiet in relation to the use of the doctrine by the Court is also echoed by some of the judges of the Court itself with European Court Judge De Meyer calling for the margin of appreciation to be abandoned altogether:

> I believe that it is high time for the Court to banish that concept from its reasoning…and recanting the relativism it implies … where human rights are

[105] Brighton Declaration (n 12).
[106] *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) Joint Dissenting Opinion of Judges Sajó, Lazarova Trajkova and Vučinić para 5.
[107] Spielmann, 'Whither the Margin of Appreciation?' (n 19).
[108] Greer (n 6) 5.
[109] R St J Macdonald (n 13) 85.
[110] George Letsas, 'Two Concepts of the Margin of Appreciation' (n 34) 706-707.
[111] P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HRLJ 1.

> concerned, there is no room for a margin of appreciation which would enable the state to decide what is acceptable and what is not … the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each state individually, to decide that issue...[112]

Whilst some of the literature has been devoted to bringing some clarity in the way the Court uses the margin of appreciation,[113] others argue that to try to get a general guiding principle of how the margin of appreciation works is to misunderstand the doctrine itself as it varies depending on the circumstances.[114] The Court itself has supported this idea of the flexible nature of the margin of appreciation by stating in *Rasmussen v. Denmark* that 'The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background…'[115] The consensus then that can be seen from academic opinion as well as from the case law of the Court itself is that the margin of appreciation is flexible in nature. It would appear that the search for a precise formula on how the margin of appreciation works is a futile mission with little if any chance of success. What may however be possible is recognising certain patterns from the case law of the Court as to how the margin of appreciation is applied.

The contexts for invocation of the doctrine evolved from the early association with the derogation clauses in Article 15 to a general principle relied on by the Court in some cases explicitly, whilst in others covertly. The embedding of the margin of appreciation within the jurisprudence of the ECtHR has not, however, prevented the question of the rationale of its use by the Court. The primary rationale for the use of the margin of appreciation by the Court is subsidiarity. This rationale is supported by a combined examination of the jurisprudence of the Court, and certain provisions of the Convention[116] as well as academic opinion. In conjunction with the rationale of subsidiarity is the acknowledgement by the Court that the State parties are sovereign and that due to their proximity to the issues within the States, they are in a better position to deal with the application of the guarantees in the Convention. The use of the margin of appreciation in this

---

[112] *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997), Partly dissenting opinion of De Meyer J.
[113] For example, Letsas 'Two Concepts of the Margin of Appreciation' (n 34) 705; Shany (n 44), Martin Kopa, 'The Algorithm of the Margin of Appreciation Doctrine in the Light of Protocol No 15 Amending the European Convention on Human Rights' (2014) 14(1) ICLR 35; Jan Kratochvil, 'The Inflation of the Margin of Appreciation Doctrine by the European Court of Human Rights' (2011) 29(3) Netherlands Quarterly of Human Rights 32;
[114] R St Macdonald (n 13) 85.
[115] *Rasmussen v Denmark* App no 8777/79 (ECtHR, 28 November 1984), para 40.
[116] Articles 1, 35 and 53 ECHR.

way is the subject of mixed reactions. Whilst some welcome its use as a form of judicial self-restraint, others are of the view that its reach is not deep enough and, in some cases, argue it is the Court that is in the better position to decide on particular issues as an independent observer that is far removed from the particular situation in question.

A key limitation to the depth of scrutiny that the Court can carry out is linked to another justification for the presence of the margin of appreciation in the jurisprudence of the Court – the diversity of the contracting States. The State parties to the Convention have evolved from predominantly Western European States in the 1950s to a combination of Western, Central and Eastern European States. This evolution has brought with it an attendant challenge to the notion of a 'common heritage', which is reflected, in the Preamble to the Convention. It is recognised that there is a diversity of cultural, social and economic practices within the current 47 member States to the Convention. This presents a unique challenge in the interpretation of the guarantees in the Convention. The margin of appreciation therefore functions not only as recognition of subsidiarity and the better position of the State parties but also the cultural, economic and social diversity of State parties. The absence of consensus on a variety of social issues necessitates a tool to accommodate the diversity of the State parties whilst at the same time ensuring that cultural relativism does not overtake a universal application of the Convention. Universality does not mean uniformity and can still be achieved even with the application of the margin of appreciation doctrine and the attendant differences in decisions depending on the member State involved. The result of the use of the margin of appreciation in this way is the risk of uncertainty.

It is acknowledged that the application of the margin of appreciation doctrine by the Court varies on a case-by-case basis. The Court has also not established a detailed rationale for its use in individual cases nor consistently applied it overall. The result is that the margin of appreciation is seen as a tool of uncertainty which cannot be predicted. Nonetheless, this uncertainty, which reflects the flexibility in the margin of appreciation doctrine, is the exact quality that makes it a useful tool in the hands of the Court. It can be adjusted to fit a variety of circumstances. In spite of the criticisms that have been levelled against it, the margin of appreciation therefore remains a tool used by the court repeatedly in its interpretative role, thereby retaining its place as a significant doctrine in the jurisprudence of the Court. It is a unique way of dealing with a myriad of issues that plague the Court. Both its critics and advocates acknowledge the element of change within the margin of appreciation. It is this 'dynamic' nature of the margin of appreciation that creates a bridge to the next interpretive

tool that is considered within this thesis: the interpretation of the Convention as a living instrument.

2.4 Origins and Definition of the Living Instrument Doctrine

In addition to its subsidiary role, the Court is charged with the task of interpreting a human rights treaty. The tension exists between the interpretation of the text based on the intention of the parties at the time of the drafting of the Convention (subjective approach) and interpreting the text to take into consideration changes in society since the drafting of the treaty (objective approach). The tension develops not only in relation to how the intent of the original drafters may be inferred from the words of the treaty, but also how to balance developments in society in order for the rules to remain relevant in current society. The Court has addressed this problem by adopting an evolutive approach and interpreting the Convention as a 'living instrument'. This therefore suggests an objective approach rather than a subjective approach to the interpretation of the Convention.

In a similar vein to the margin of appreciation doctrine, the 'living instrument'[117] doctrine neither appears in the text of the Convention nor in the *Travaux Préparatoires.*[118] It is rather an interpretative tool created by the Court. The genesis of the 'living instrument' doctrine is usually traced to the seminal case of *Tyrer v United Kingdom.* [119] In *Tyrer* the Court was faced with the determination of whether judicial corporal punishment of juveniles in the form of the judicial birching of a schoolboy amounted to degrading punishment in breach of Article 3 of the Convention.[120] The Court in finding the punishment to be degrading and therefore in breach of Article 3 of the Convention stated that:

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

[117] Within this work, the term 'living instrument' will be considered synonymous with 'evolutive interpretation' George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2006) 65. 'Living instrument' and 'evolutive interpretation' will be used interchangeably within this thesis.
[118] The *travaux préparatoires* are the preparatory documents of a treaty. The supplementary role of the *travaux préparatoires* will be considered in further detail in chapter 3.
[119] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978). See e.g. Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) HRL Rev 57,60; Tümay (n 28) 210; 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.
[120] Article 3 of the Convention provides 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this Field.[121]

The Court determined that in a 'great majority' of States of the Council of Europe, judicial corporal punishment was no longer used as a form of punishment. The Court did not adopt a comparative method to show which States fell within the category of a 'great majority'. It did however note that judicial corporal punishment had been abolished in England, Wales and Scotland at the time and that within the Isle of Man, the legislation had been under review for many years.[122] Beyond considerations of the penal policy of other European States, the Court went on to some substantive considerations on the nature of judicial corporal punishment noting that '…The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being.*'* It noted the safeguards put in place by the State when the actual birching was being carried out but still considered the punishment as a whole to be degrading. It concluded that the birching inflicted on the applicant amounted to degrading punishment in breach of Article 3. The reference of by the Court to the Convention being a living instrument has become a well-known dictum repeated by the Court in many other cases.[123]

If the living instrument doctrine originated in *Tyrer*, then it would appear that the Convention was not considered as a living instrument until January 1978, twenty eight years after it was created and twenty years after the margin of appreciation doctrine was initially introduced into the Strasbourg jurisprudence in the *Greece* case.[124] This view is rejected and it is reasoned that the ECHR was already considered a living instrument and *Tyrer* was just the first case in which the Court stated this expressly.[125] Attention is drawn to the verb 'recall' used prior to describing the Convention as a living instrument in *Tyrer*. One view would be that this was just a word used without any additional meaning attached to it. The alternative view proposed here is that meaning is to be given to the word 'recall'. To 'recall'

[121] *Tyrer* (n 119) 31.
[122] Ibid.
[123] For e.g. *Dudgeon v United Kingdom* App no 7525/76 (ECtHR, 22 October 1981); *Loizidou v Turkey* (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995); *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005; *Saadi v the United Kingdom* App no13229/03 62 (ECtHR, 29 January 2008); *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July, 2011); *Konstantin Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012); *X and Others v Austria* App no 19010/07 (ECtHR, 19 February, 2013).
[124] *Greece* (n 13).
[125] This is not the first time that reference is made to the existence of certain measure of evolution already existing in the Convention framework. See 'Françoise Tulkens (n 119) 7.

is to 'bring (a fact, event, or situation) back into one's mind; remember'.[126] This presupposes that the event or state of affairs already exists before one can be said to 'recall' it. The question that arises then is, since this was the first time the Court was using the expression 'living instrument' in its description of the Convention, how could it then be 'recalling' it at the same time? It must be then that there are other seeds of 'livingness' in the interpretation of the Convention which can be gleaned from earlier case law.

It is proposed that the conception of the Convention as a living instrument predates the *Tyrer* case and stands as an overarching principle that governs the interpretation of the Convention. This is not the first time such a suggestion has been made. Letsas acknowledges that 'the idea that the ECHR is a living instrument has figured in Strasbourg's case law since its very early days'.[127] Tulkens refers to some early cases that show evolution within the Strasbourg system.[128] Some of these early cases that display 'evolution' or 'livingness' in the Convention relied on the purposive/teleological method of interpretation established by Article 31(1) of the Vienna Convention on the Law of Treaties in which priority is given to the object and purpose of treaties.[129]

The Court in the 1968 case of *Wemhoff v Germany*[130] expressly declared the Convention as a law-making treaty. It therefore rejected a restrictive interpretation of the ECHR but rather favoured one that would best lead to the realisation of the aim and object of the treaty. A similar consideration of the Convention as a law-making treaty was applied by the Court in *Golder v United Kingdom*[131] in finding that a right of access to a court could be read into Article 6 of the Convention. In *Young, James and Webster v the United Kingdom*[132] the aim and purpose of Article 11 was relied on in accepting that the negative aspect of a person's freedom of association could fall within the ambit of Article 11. It can be seen that the Court from its early days has displayed a desire to interpret the Convention in an evolutive way in order to give effect to its guarantees. *Tyrer* added an express identification of this evolutive approach to interpretation by reference to the living

[126] Oxford English Dictionary < https://en.oxforddictionaries.com/definition/recall> accessed 2 August 2018.
[127] 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.
[128] 'Françoise Tulkens (n 119) 6-10, 7.
[129] RCA White and C Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 4.
[130] *Wemhoff (*n 17).
[131] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975).
[132] *Young, James and Webster v the United Kingdom* App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981).

instrument doctrine which allows the Court to consider changes in society in interpreting the provisions of the ECHR.[133]

Interpreting the Convention as a living instrument denotes that the standards of the Convention are not to be considered as static but should be reflective of social changes.[134] It means that the Convention evolves by virtue of the interpretation of the Court.[135] The living instrument doctrine means that the Court takes into consideration developments in European social and legal concepts as a basis to define terms within the Convention.[136] Letsas however emphasizes that this evolutive method of interpretation does not mean that the ECtHR interprets the Convention to keep in line with current consensus within States regardless of their content. Rather the use of the living instrument doctrine is 'with a view to understand better the principles that underpin the rights of the Convention, regardless of how States themselves apply these principles'.[137] Sociological, technological and scientific changes, evolving standards in the field of human rights and altering views on morals and ethics have to be considered by the Court when applying the Convention. Letsas advocates that these evolving standards must not only be different, but also better, 'towards the truth of the substantive protected right'.[138]

The implication of the use of the living instrument doctrine by the Court is twofold. In the first instance it implies that the ECtHR does not have to interpret the ECHR 'on the basis of the original conditions which were known to the drafters of the Convention, and which in the meantime may have drastically changed'.[139] Interpreting the convention in this way reduces the relevance of the *travaux préparatoires* of the Convention as a supplementary source of interpretation.[140] In the second instance, it implies that the ECtHR is 'not obliged to maintain its own case-law in situations where the social, cultural, economic substructure which supported a certain finding by the Court no longer exists'.[141] Although

[133] For a more discussion of the 'pre *Tyrer*' origins of the living instrument doctrine in the case law of the Court, see 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
[134] van Dijk, van Hoof and Heringa (n 10) 77.
[135] E.g. Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83,84.
[136] Dragoljub Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2008-2009) 42 Creighton L Rev 361,79.
[137] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 117) 75.
[138] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 117) 79.
[139] 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, 61.
[140] van Dijk, van Hoof and Heringa (n 10) 77-8.
[141] Rozakis (n 139) 61.

the Court is not bound by its earlier decisions, it has stated that it would not depart from them without good reason in the interest of certainty. The application of the living instrument doctrine is one of the occasions where the Court may depart from its earlier decision.[142] The question that arises is in what contexts can the Court apply the living instrument doctrine and what justification can be advanced for the use of the living instrument doctrine by the Court. These are the issues addressed below.

2.5 Contexts and Rationale for the Interpretation of the Convention as a Living Instrument

In practice, the Court has applied the living instrument doctrine to a variety of issues that have come before it. The initial application of the living instrument approach to interpretation involved the Court deciding on an issue that had not been contested before it previously. In *Tyrer*, judicial corporal punishment of juveniles was challenged for the first time before the Court. The Court relied on the developments in contracting States in concluding that judicial corporal punishment was a violation of the prohibition of inhumane treatment under Article 3 of the ECHR. Following on from the *Tyrer* case, the living instrument doctrine has been invoked by the Court to deal with several other substantive provisions of the Convention. In *Marckx v Belgium* it was relied on by the Court in finding a violation of Articles 8 and 14 where the Belgian Code did not automatically recognise maternal affiliation with a child born out of wedlock to unmarried mothers at the point of birth.[143] It has also been relied on in finding that that criminalisation of sexual relations between consenting homosexual adults amounted to a breach of the right to family life,[144] that the difference in treatment under Russian law between servicemen and servicewomen as regards entitlement to parental leave was a breach of the right to family life under Article 8 and discrimination under Article 14.[145]

The living instrument doctrine has also been applied to cover substantive issues that it may be argued, were not within the contemplation of the original drafters of the Convention. For example, in *Sigurdur A Sigurjónsson v Iceland* it was decided that the Convention was a living instrument and Article 11, which provides for freedom of association must also be interpreted to cover a negative right of association. [146] In that case,

[142] For e.g. *Chapman v United Kingdom* App no 27238/95 (ECtHR, 18 January 2001), para 70.
[143] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).
[144] *Dudgeon* (n 123).
[145] *Konstantin Markin* (n 123).
[146] *Sigurdur A Sigurjónsson v Iceland* App no 16130/90 (ECtHR, Judgment of 30 June 1993).

the Court held that the applicant could not be compelled to be a member of a taxicab organisation. Such compulsion was a breach of the applicant's negative right of association under Article 11 of the Convention. The Court made this decision despite the reference by the Icelandic authorities to the fact that within the *travaux préparatoires* there was evidence that a general rule that no one may be compelled to belong to an association was omitted from the Convention.[147] The living instrument doctrine could therefore be seen in this case as going beyond the intention of the original drafters by including a right that was expressly excluded.

In *Matthews v United Kingdom* this point is made even clearer where the Court relying on the living instrument doctrine held that Article 3 of Protocol 1 which provides for the right to free elections, was applicable to elections to the European Parliament.[148] At the time of drafting the Convention the European Parliament did not exist therefore it could not have been within the contemplation of the original drafters. This once again shows a very objective approach to the interpretation of the Convention. It also shows the flexibility of the living instrument doctrine as it has been applied by the Court in the above two cases to make the Convention relevant in addressing current issues.

The Court has extended the use of the living instrument doctrine beyond substantive provisions of the Convention to procedural provisions. In *Loizidou v Turkey* (preliminary objections) the ECtHR, relying on the living instrument principle, held that the declarations Turkey made under Articles 25 and 46 which restricted the competence of the former commission and original court to actions taking place within the territorial boundaries of Turkey was invalid.[149] This application of the living instrument doctrine to procedural elements of the Convention has been received with a mixed response. Mowbray supports this move of the ECtHR to apply evolutive interpretation to the procedural and institutional elements of the ECHR on the basis that they are of great importance to victims seeking redress in the ECtHR.[150] On the other hand, Golsong, a former Registrar of the Court has strongly objected to this extension of the living instrument doctrine to the procedural

[147] This rule had been modelled on Article 20 (2) of the Universal Declaration of Human Rights 1948. The disregard by the Court of the intentions of the drafters are revealed from the *travaux* is in line with the Court's overall view of ascertaining the meaning of the terms of the Convention in line with their object and purpose rather than a rigid adherence to the intention of the drafters at the time of the drafting of the treaty. The relevance of this to theories of interpretation as contained within the Vienna Convention on the Law of Treaties will be considered in Chapter 3.
[148] *Matthews v United Kingdom* App no 24838/94 (ECtHR, 18 February 1999). Article 3 of Protocol No 1 provides the right to free election.
[149] *Loizidou v Turkey* (n 123).
[150] Mowbray (n 119) 63.

elements of the Convention.[151] It is his view that the clear meaning of the words as they were understood at the time of drafting should be adhered to and any modification to them should be made through the process of amendment of the Convention by a Protocol.[152] The jurisprudence appears to show that the Court has not adopted the path advocated by Golsong but has continued to apply evolutive interpretation to both the substantive and procedural aspects of the Convention. The practical difficulties and the length of time it would take to get such an amendment done by way of a Protocol may account for the rejection of this limitation on the scope of the living instrument doctrine.

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. They are to reflect changing social practices within the different member States. The scope of the living instrument doctrine has evolved from the substantive provision in Article 3 to procedural elements of the Convention. In relation to the substantive elements, its scope covers not only absolute rights such as the prohibition of torture in Article 3, but also qualified rights such as Article 8, which protects family life. Whilst its application to the procedural elements of the ECHR has not been without criticism, the Court has retained this approach to the interpretation of the procedural elements of the Convention. This researcher endorses this approach of the Court as effective protection of individual rights requires the application of the living instrument doctrine to both the substantive and procedural aspects of the Convention.

In the light of the criticism of the scope of the living instrument doctrine it is necessary to address the issue of the rationale behind the adoption of evolutive interpretation in the form of the living instrument doctrine within the jurisprudence of the Court. The Court in *Tyrer* did not proffer any justification for its invocation of the living instrument doctrine. As Mowbray highlights, considering the significance of the doctrine in the jurisprudence of the Court now, in hindsight it would have been helpful for the Court to offer some justification for this decision.[153] Although no justification was provided by the Court in *Tyrer*, several sources may be referred to in finding justification for the use of the living

[151] 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.
[152] Ibid.
[153] Mowbray (n 119) 57.

instrument doctrine. These range from inferences from the text of the ECHR itself, to considerations of the special character of the Convention.

2.5.1 The Text of the Convention

One of the criticisms of the use of the living instrument doctrine is that it leads to interpretation that goes beyond the intention of the drafters of the Convention. In response to this academics and judges writing extra judicially have drawn attention to the intention of the drafters as expressed in the text of the Convention itself.[154] In its Preamble, the Convention acknowledges that its parent body – the Council of Europe, is set up to achieve greater unity of its members through 'the maintenance' and 'further realisation of human rights and fundamental freedoms'.[155] Judge Rozakis writing extra judicially on the textual interpretation of these words in the Preamble was of the view that:

> The drafters invited those applying and interpreting the Convention – State parties, judicial organs of the Convention – to broaden the purview of the rights provided for by the text, presumably by streamlining its provisions to account for the ever-changing realities of life and the demands of progress which are typical of every modern society.[156]

Judge Tulkens writing extra judicially, shares a similar view, opining that whilst maintenance requires the Court to ensure that the rights and freedoms enshrined in the Convention continue to be effective in changing circumstances, further realisation enables the Court to adopt a level of innovation and creativity to extend the reach of the Convention guarantees in order to protect the substance of the rights and freedoms.[157] Maintenance and further realisation encapsulated within the preamble itself therefore provide a basis for evolutive interpretation of the convention.[158] The text of the Convention provides a counter

---

[154] Tulkens, (n 119) 7.
[155] Preamble to the European Convention on Human Rights.
[156] Rozakis (n 139) 57.
[157] 'Françoise Tulkens (n 119) 7; See also Sir Nicolas Bratza, 'Living Instrument or Dead Letter – the Future of the European Convention on Human Rights (2014) EHRLR 116,110.
[158] 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. Similar views are shared by Tulkens (n 25) 7; Antoine Garapon, 'The Limits to Evolutive Interpretation' in Dialogue between Judges 2011 European Court of Human Rights 29-38, 36; Jean-Paul Costa President of the European Court of Human Rights (Speech at Solemn Hearing of the European Court of Human Rights on the occasion of the Opening of the Judicial year).

argument to the critic that the living instrument doctrine does not reflect the intention of the drafters of the Convention.

2.5.2 The Special Nature of the Convention

Another reason that has been given for the use of the living instrument doctrine is that the Convention has a special nature which has to be taken into consideration when interpreting it. The ECHR is special because it is an organisational treaty that establishes an institutional community with organs having specific powers. It is not just a coexistence or cooperation treaty but is rather in the category of 'treaty-law' rather than 'treaty-contract' because it establishes a permanent regulatory basis, rather than mutual and sometimes transient obligations.[159] Merrills points out that the approach of the Court to the interpretation of the Convention is a product of two forces: a reflection of the beliefs 'about the proper judicial approach to treaty interpretation' and secondly, 'a specific conception of the nature of the European Convention and, as a corollary, a particular conception of the judicial role in relation to it'.[160] Human rights treaties such as the ECHR are special because their object and purpose is the protection of the rights of individuals against their own State and against other contracting States to the treaty. The special nature of such treaties therefore justifies the use of the living instrument doctrine to ensure attainment of the object and purpose of the treaty.[161]

Whilst not expressly stating its justifications for the use of the living instrument doctrine in particular cases,[162] the ECtHR itself has referred to the special nature of the ECHR as a system for protection of human rights and relied on the principle of effectiveness in adopting an evolutive approach to its interpretation.[163] Mahoney agrees with this stating that 'while the original meaning may be decisive for some other kinds of treaties, it cannot determine human rights treaties, less they would risk becoming progressively ineffective with time'.[164] Wildhaber shares a similar view noting that 'A failure by the Court to maintain a dynamic

---

[159] 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 (Translation directed and edited by Christine Chodkiewicz)

[160] 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, (n 159) 309.

[161] Bratza, (n 157) 110.

[162] This is a point that has resulted in criticism of the doctrine. See Mowbray (n 119) 61.

[163] See *Scoppola v Italy* (no 2) App no 10249/03 (ECtHR, Judgment of 17 September 2009).

[164] Mahoney (n 82).

and evolutive approach would risk rendering it a bar to reform or improvement'.[165] Therefore, there is an acknowledgement that the nature of human rights requires an attendant flexibility and updating of interpretation as any law that does not adapt to human and societal changes will face the risk of being ineffective and outdated. The rights contained within the Convention, therefore, have to be interpreted in the light of present day circumstances in order to make them practical, effective, and connected to the dynamism of modern society.

2.5.3 Certainty and the Limits of the Living Instrument Doctrine

Drawing on the principle of effective protection of individual human rights, the need for the interpretation of the Convention as a living instrument is largely uncontested. The main concern centres on the limits of its use. This may be seen in the form of different strands of argument. The first concern is the limits of judicial interpretation. This refers to the constitutional role of the Court. The key question is whether it is the role of the ECtHR to increase the scope of protection offered under the Convention. It has been argued that the living instrument approach is a form of judicial activism with a potential to bind parties to obligations they did not intend.[166] An example of this happening may be seen in the *Matthews* case where the right to elections in Article 3 of Protocol No 1 was held to be applicable to elections to the European Parliament, an organisation that could not have been foreseen by the initial drafters of the Convention because it did not exist at the time. This form of activism is rejected as an erosion of the principle of the rule of law and is seen as overreaching by the Court. However, others contend that in its use of the living instrument doctrine the Court has been able to maintain a balance and has therefore not gone beyond or acted *ultra vires* its powers as interpreters of the Convention.[167]

The other aspect of the debate on the limits of evolutive interpretation centres on what the Court should use as a yardstick to determine the extent to which it will carry out the review. In a case before the court, what principles should curtail its use of evolutive interpretation or how can its evolutive interpretation be performed in accordance with established principles?[168] Dzehtsiarou advocates for the use of a European consensus approach to be adopted by the Court as a way of legitimating its decisions when applying

[165] Wildhaber (n 135) 86.
[166] See for example Lord Bingham in *Brown v Scott* [2003] 1 AC 686, 703.
[167] Mowbray (n 119) 57.
[168] For more discussion on this point see Baroness Hale (n 119); Kanstantsin Dzehtsiarou, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights (2011) 12 German Law Journal 1730-1745.

evolutive approach of interpretation.[169] The reliance on European consensus as a limit to the interpretation of the Convention as a living instrument is seen in the early case law of the Court on the living instrument.[170] Benvenisti however argues that consensus cannot be the only basis as human rights do not exist for the protection of the majority only, it is actually counter-majoritarian.[171] Dzehtsiarou and de Londras offer a three-pronged response to this argument: (a) that the Court has actually used European consensus to protect rights of marginalities;[172](b) that consensus ensures minimum standards and States are free to set higher standards; and (c) that consensus is not an automatic or strictly binding concept adopted by the Court.[173]

Reliance on consensus could also have the negative effect of leading of regression in the protection of rights, what Webber refers to as D(evolution) of rights.[174] Letsas argues that the Court has moved away from limiting the interpretation of the Convention as a living instrument on the absence of European consensus. He argues that based on its case law, it now looks for 'common values' and 'emerging consensus' in international law thereby raising the human rights standards beyond what is currently available within the member States.[175] Letsas advocates for a 'moral' reading of the Convention which focuses on a discovery of what the human rights were meant always meant to protect rather than a reliance on consensus as a determining factor for evolutive interpretation.[176] The reliance on consensus is therefore not one that is welcomed in all quarters.

A further concern on the limit of evolutive interpretation is the potential for uncertainty as a result of the flexibility in interpretation adopted by the Court. The critical issue is whether the member States will be able to predict the decision of the Court or the position of the Court in relation to a particular issue if the Court could change its position due to changes in society. Baroness Hale highlights that certainty enables member States to know the extent of their obligations.[177] Where certainty is missing in the case law of the Court the

[169] Dzehtsiarou (n 168).
[170] Some of the early cases include: *Marckx* (n 143; *Handyside* (n 5); *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986); *Cossey v United Kingdom* App no 10843/84 (ECtHR, 27 September 1990); *Sheffield and Horsham v United Kingdom* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998). See Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (n 127) 112-113.
[171] Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 Journal of International Law and Politics 843.
[172] Marginalities such as religious minorities, life-long prisoners, illegitimate children and homosexual men.
[173] Fiona de Londras and Kanstantsin Dzehtsiarou, Great Debates on the European Convention on Human Rights (Palgrave 2018) 79-80.
[174] Webber (n 133).
[175] Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (n 127) 117.
[176] Ibid 106.
[177] See for example comments by Baroness Hale (n 119).

result would therefore be confusion on the part of the member States on what their obligations are. The Court itself has confirmed that it is not bound by precedent so on the one hand, even if it did not adopt evolutive interpretation, it is still free to depart from its earlier case law on a particular issue. It has however held that it would not change its decisions without compelling reasons, in order to maintain legal certainty and foreseeability of rulings.[178] There is therefore an acknowledgement by the Court for a degree of coherence and predictability in its application of the living instrument doctrine. It is yet to be seen if this will be reflected in the case law on the margin of appreciation and living instrument doctrines.

In a similar vein to the margin of appreciation doctrine, the presence of the living instrument doctrine within the jurisprudence of the Court has been questioned. The rationale for the use of the living instrument doctrine by the Court may be gleaned from the text of the Convention which in its Preamble, refers to maintenance and further realisation of the rights contained within it. In particular, the requirement for further realisation highlights a need for an evolving framework that is sufficiently robust to deal with current issues. A further rationale for the living instrument doctrine is seen in the Court's acknowledgement of the special nature of the Convention as system for protection of human rights. This special system requires the application of the living instrument doctrine in order to ensure effective protection of the rights. The result of the application of the living instrument doctrine is a degree of flexibility in the interpretation of the Convention guarantees. Whilst this may be seen as a positive from the point of view that it makes the Convention relevant to issues that may not have been within the contemplation of the original drafters, it may also be seen as a negative. The Court is criticised for judicial activism by such an expansive interpretation of the Convention based on the living instrument doctrine.

The concern about judicial activism has precipitated the call for limits to the use of the doctrine through mechanisms such as European consensus. The call for consensus reflects an acknowledgment that there is diversity within the member States to the Convention. The living instrument doctrine has the potential then to infringe on this diversity and consensus could be a way of keeping it in control. A related doctrine that is orientated at managing the diversity of the State parties is the margin of appreciation. In the following section it is necessary to consider if a relationship exists between both doctrines and the nature of such a relationship in extant literature (RQ 1 relationship).

[178] *Chapman* (n 142) para 70.

2.6 Forging a Link between the Margin of Appreciation Doctrine and the Interpretation of the Convention as a Living Instrument

At face value, the margin of appreciation and living instrument doctrines appear to be unrelated. On the one hand, the rationale for the margin of margin of appreciation is rooted in the recognition of the autonomy and diversity of member States as well as the subsidiarity of the Court to the national enforcement systems. On the other hand, the living instrument doctrine is rooted in the maintenance and further realisation of the rights contained in the ECHR to ensure their effectiveness and the harmonisation of the practice within the member States. Whilst the substantive use of the margin of appreciation doctrine means that the Court allows the member State discretion to decide whether a particular law or action of the State infringes on the right of the individual, the living instrument doctrine appears to subject the discretion afforded to member States to a higher level of scrutiny thereby giving the Court a more active role in the case. It could be seen as a battle between 'weak' (margin of appreciation) as opposed to 'strong' (living instrument) scrutiny.

However, on closer analysis, the question arises as to whether these two doctrines that appear to be headed in different directions have some relationship. The crux of the issue arises when the court is faced with a 'hard case'[179] or scenario where it could reach two different decisions depending on the weight it gives to either the margin of appreciation or the living instrument doctrines. Essentially if deference to the member State via the margin of appreciation doctrine will lead to a decision in which the Court finds no violation even where there have been developments in society to suggest otherwise, there has to be some level of evaluation of both doctrines by the Court before coming to its decision. In the existing literature, whilst the interaction between the margin of appreciation and living instrument doctrines is mentioned in some of the literature, there is room for a detailed systematic analysis of the cases in which both the margin of appreciation and living instrument doctrines were present. Such an analysis will provide a better understanding of the relationship between both doctrines and the interpretive methods applied by the Court when dealing with a conflict between both doctrines. This is a gap that this thesis seeks to fill in the literature.

In *Tyrer* where the Court for the first time expressly referred to the living instrument doctrine, in deciding on whether judicial corporal punishment was a requirement for

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

maintaining law and order in a European country, the Court referred to the practice in member States. The Court noted that:

> [T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this Field…it is noteworthy that, in the great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; in the Isle of Man itself, as already mentioned, the relevant legislation has been under review for many years. If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country[180]

The Court was therefore influenced by the social developments in the member States and interpreted the Convention 'as a living instrument that goes hand in hand with legal and social developments in European countries'.[181]

In *Handyside* where the Court espoused more fully the rationale for the margin of appreciation doctrine, in determining whether the UK's interference with the applicant's rights on the basis of the protection of morals was in line with the provisions of Article 10(2), it also referred to the practice in member States. The Court stated that:

> In particular, it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place which is characterised by a rapid and far-reaching evolution of opinions on the subject.[182]

From the statements of the Court in *Tyrer* and *Handyside*, it can be seen that there is a link in the factors that affect the application of the margin of appreciation and living instrument doctrines. This link lies in the reference to the practice in member States in coming to a decision as to whether a particular action by a State is in line with the

[180] *Tyrer* (n 119).
[181] Popovic (n 136) 379.
[182] *Handyside* (n 5) para 48.

Convention's guarantees. The resort to finding consensus amongst the contracting States on a particular issue is a feature of both the living instrument doctrine and the margin of appreciation doctrines of the Court.[183] The effect of the link between the margin of appreciation and living instrument doctrine in existing literature will be further explored below.

2.6.1 Change in Time and Space

Brems acknowledges a relationship in the nature of the margin of appreciation and living instrument doctrines. According to Brems, the margin of appreciation interacts mainly with the rule of autonomous interpretation and evolutive interpretation.[184] Autonomous interpretation is 'antithetic' to the margin of appreciation because there is no room for a domestic margin of appreciation, whereas evolutive interpretation is 'analogous' to the margin of appreciation.[185] By considering them to be analogous Brems recognises the margin of appreciation and living instrument doctrines as having both similarities and differences. Where does the similarity lie between them? Brems goes further to state that 'where the margin of appreciation allows for variations of interpretation in space, evolutive interpretation allows for variations in time'.[186] One could therefore deduce from this that the similarity in both doctrines is the issue of 'variations' in essence: 'change', 'not being fixed', 'fluidity'. The margin of appreciation and living instrument doctrines are similar because they both lead to changes and cannot be couched in fixed terms. However, they are different in relation to the kind of variation or change they bring. Whilst the margin of appreciation will lead to variations as a result of the particular country involved (space), the living instrument doctrine will lead to variations based on the time in which the decision is made. A third dimension of variation, which Brems does not identify, is the variation that occurs as a result of the type of issue involved.

Even though Brems alludes to the relationship between the margin of appreciation doctrine and the interpretation of the Convention as a living instrument, she does not provide a detailed analysis of the case law to show how this relationship between the margin of

[183] For a comprehensive analysis of the use of consensus by the Court, see K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015).
[184] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (n 18) 242.
[185] This work is not concerned with autonomous interpretation but rather looks at evolutive interpretation therefore a detailed discussion of autonomous interpretation will not be undertaken here.
[186] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (n 18) 242.

appreciation and the living instrument is seen in the case law of the Court. It is also questioned whether there is a variation in time that is happening in the margin of appreciation doctrine itself. This is an area that will be tested in this thesis whilst considering the nature of the relationship (RQ 1) between the margin of appreciation and living instrument doctrines.

Essentially, Brems sees both the margin of appreciation and evolutive interpretation as related in the sense that they both lead to change and flexibility in the decisions of the Court, differing only in the nature of the change they bring. Whilst the use of the margin of appreciation doctrine can lead to change as a result of the differing conditions within a particular member State, the use of the living instrument/evolutive interpretation can lead to a difference of interpretation as a result of the time in which that case has come before the Court. What Brems does not deal with is the conflict between interpretation in space and time within the same case. How would the court determine which of these would triumph? Also, has the margin of appreciation evolved so that it is also leading to variation in time as well? These are aspects of the gap in the literature that this piece of research will attempt to fill through further analysis carried out in chapters five and six of this thesis.

2.6.2 Change in Width

Another link between the margin of appreciation and living instrument doctrines identified in the literature is seen in the impact the living instrument has on the width of the margin of appreciation afforded to States. Tümay highlights that the living instrument is linked to the margin of appreciation because it serves as a tool to determine the width of appreciation left to the contracting States.[187] The width of the margin of appreciation is important as it could be vital to the Court's determination on whether the particular measure that is challenged struck a fair balance.[188] The question that may be asked is in what way does the living instrument doctrine determine the width of the margin of appreciation? One of the key factors amongst others that determines the width of the margin of appreciation is consensus. de Londras and Dzehtsiarou highlight four types of consensus that may be deduced from the practice of the Court: (a) international consensus, which is mainly based on consideration of international treaties; (b) European consensus which is mainly based on consideration of practice within Contracting States; (c) internal consensus which is based on

[187] Tümay (n 28) 231.
[188] Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee' 65(1) (2016) ICLQ 21, 24.

the prevailing position within the respondent State; and (d) expert consensus, which is the consideration of the view of experts when scientific evidence is required by the Court.[189] The Court usually gives a narrow margin to the member State where it finds a European consensus on the issue and also where the matter is related to rights fundamental to democracy, namely freedom of expression and freedom of association and assembly.[190] What this means in effect is that where there is a lack of European consensus, for example where morals are at issue, the ECtHR gives the member State a wide margin of appreciation.[191] The link between the width of the margin of appreciation and the living instrument doctrine therefore arises due to the use of consensus by the ECtHR when applying both doctrines.

The living instrument doctrine is considered to have a negative impact on the width of the margin of appreciation. In discussing the limits of evolutive interpretation, Baroness Hale noted that one of the ways in which the jurisprudence of the Convention had developed beyond the expectation of the drafters was inter alia 'the narrowing of the margin of appreciation permitted to member States'.[192] She identified evolutive interpretation as one that 'tends to lead' to a narrowing of the margin of appreciation.[193] The case of *Hirst v United Kingdom* is an example of a situation when there has been an apparent narrowing of the margin of appreciation which caused concern.[194] Although this point was highlighted, Baroness Hale did not proceed to provide a systematic analysis of the case law of the Court in which both the margin of appreciation and living instrument doctrines were present in order to determine the extent to which the margin of appreciation of the State had been narrowed as a result of evolutive interpretation. This may have been due to the constraints of the presentation. It however leaves a gap which this thesis seeks to fill in order to provide an original contribution to the literature on this subject.

Letsas also acknowledges a relationship between the margin of appreciation and evolutive interpretation as a result of consensus when he identifies a 'positive aspect' and 'negative aspect' of evolutive interpretation.[195] Whereas the negative aspect is that what the national authorities and the people of the respondent member State believe about the applicant's human rights claim is not decisive for whether the applicant has that right under

[189] de Londras and Dzehtsiarou (n 173) 79.
[190] Tümay (n 28) 231.
[191] E.g. *Handyside* (n 5); (1979-80) 1 EHRR 737
[192] Baroness Hale (n 119) 538.
[193] Ibid 18.
[194] *Hirst v United Kingdom* App (No 2) App no 74025/01 (ECtHR, 6 October 2005); Baroness Hale (n 119)542.
[195] Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (n 127) 112-113.

the Convention, the positive side of it is that commonly held standards in the Council of Europe are very weighty considerations for whether the applicant has the right they claim.[196] He therefore identifies the core of evolutive interpretation as 'the use of present-day developments and standards in the Council of Europe as a counterweight to the moral climate prevailing on the respondent member State'.[197] As a result of this 'core' of the living instrument doctrine, Letsas, like Brems, links evolutive interpretation to the margin of appreciation doctrine.[198] In linking the margin of appreciation and living instrument doctrines Letsas differs from Brems as the former does not directly address the issue of variations in space as a result of the margin of appreciation doctrine.

In *Marckx*, where the Court held that the Belgian legislation which did not confer maternal affiliation by birth in relation to illegitimate children violated Articles 8 and 14 of the Convention.[199] The Belgian Government, whilst conceding that the legislation in question favoured the traditional family, argued that retaining such legislation was for the purpose of ensuring the full development of the family as a matter of 'objective and reasonable grounds relating to morals and public order'.[200] The Court rejected the view of the Belgian Government on the grounds that whilst it may have been regarded as permissible to distinguish between 'legitimate' and 'illegitimate' families at the time the Convention was drafted, there was a clear evolution in the law of many of the contracting States and relevant international instruments to the full recognition of the maxim '*mater semper certa est*'. The Court was therefore using the living instrument doctrine in this case as a counter weight to the moral climate in Belgium which resulted in a narrowing of the margin of appreciation afforded to the State. In this way, the use of the living instrument doctrine could be seen as a tool that limits the margin of appreciation afforded to the State.

2.6.3 Change in Function

Change in time and space as well as change in width are two areas in which a relationship exists between the margin of appreciation and living instrument doctrines (RQ 1 relationship). A third aspect of the link between them is in the area of change in the nature of their relationship and the function of the margin of appreciation doctrine. The issue

[196] Ibid.
[197] Ibid.
[198] He also links the margin of appreciation to the principle of autonomous concepts developed by the Court. See Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (n 127) 112-113.
[199] *Marckx* (n 143).
[200] Ibid paras 36-39.

addressed is the nature of the relationship between the living instrument and margin of appreciation doctrines and whether this has changed over time. In relying on the living instrument doctrine, it has already been highlighted that the Court frequently resorts to an analysis of whether consensus exists on a particular issue amongst the contracting States. Following an analysis of selected case law of the Court on the living instrument doctrine through two time periods (1980s - 1990s, and the 1990s onwards),[201] Letsas argues that wide margins were granted by the Court in the 1980s-1990s in cases where there was no consensus amongst the contracting States with the result that States were held to be within their margin of appreciation and were therefore not found in violation of the Convention.[202] However, from the 1990s, the case law of the Court shows greater scrutiny on the member States with more violations against the Convention being found by the Court even in cases where consensus was not found to exist.[203]

This analysis by Letsas suggests evolution in how the Court has dealt with the relationship between the margin of appreciation and living instrument doctrines. It can be seen that the margin of appreciation appears to have a reduced impact on the outcome in cases where the living instrument doctrine is raised hence affecting its function as a 'room for manoeuvre' for the State. There is still room for concrete analysis on this point to either corroborate or refute the view that the margin of appreciation is having a reduced impact in such cases. There is also room to examine to what extent a margin of appreciation still exists for the States in such cases where the Court finds no consensus on an issue. The room for further analysis arises because Letsas' analysis is on case law on the living instrument doctrine, not necessarily an examination of how the Court deals with cases where there is a conflict between the margin of appreciation and living instrument doctrines. The analysis is also based on a selected number of cases, but he does not explicitly identify the criteria by which the cases analysed had been selected. A systematic examination of the Court's approach in cases where both the margin of appreciation and living instrument doctrines are raised therefore remains a gap which this thesis seeks to fill (RQ 2 conflict). This thesis adopts the method of doctrinal analysis combined with the quantitative method of descriptive statistical analysis to a systematic analysis of 75 cases of the Court from January 1979 to

[201] The latest case cited by Letsas in 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (n 127) was in 2011. *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011).
[202] A wide margin of appreciation was given in cases such as *Handyside* (n 5); *Otto-Preminger-Institute* (n 95; *Rees* (n 170); *Cossey* (n 170); *Sheffield and Horsham* (n 170).
[203] This is reflected in cases such *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) in which the Court reversed its previous case law on the positive duty under Article 8 of the Convention to officially recognise the new gender identity of post-operation transsexuals.

December 2016 inclusive, in which both the margin of appreciation and living instrument doctrines were referred to in order to discover how the Court handles the 'hard cases' in which the application of the margin of appreciation doctrine intersects with the living instrument doctrine. It will seek to provide a comprehensive analysis of any changes and draw from current events in addressing reasons for change.

The literature examined illustrates that the margin of appreciation and living instrument doctrines share a common feature of both being absent in the text of the Convention but rather being developed by the Court itself. An apparent link between both doctrines is not one that has yet been explored in great detail. The literature shows that they may not be as unrelated as might be assumed; one commonality is that they both have an impact on the justification of the use of discretion by the member State. On the one hand, the margin of appreciation can be seen as giving room for a wide discretion for State parties whilst the living instrument doctrine subjects the State to a higher level of scrutiny. There are hard cases in which there is a conflict between the margin of appreciation and living instrument doctrines. From the literature it can be seen that the connecting point between the margin of appreciation and living instrument doctrines is in the use of consensus by the Court when applying both doctrines. This link manifests in three main areas: change in time and space, change in width and change in function. European consensus plays a key role in this regard with the presence of consensus leading to a narrow margin whilst the absence of consensus generally leads to a wide margin. Consensus is, however, not a determinative factor in itself.

A core aspect of both doctrines is the issue of change. The margin of appreciation is not stagnant. The interpretation of the Convention as a living instrument is also not stagnant but requires consideration of changes in society. On the question as to whether there has been a change in the relationship between the margin of appreciation and living instrument doctrines, Letsas suggests that the Court has moved from a lower scrutiny to heightened scrutiny therefore interpreting the Convention in a more evolutive manner and requiring member States to justify their actions. However, as previously stated, the parameters for selection is not explicitly provided and the latest case cited was in 2011. There therefore remains a gap for analysis of the relationship (RQ 1) between the margin of appreciation and living instrument doctrines of the Court through its case law. This forms the focus of this research. This thesis adds to the literature by focusing on the case law in which both the margin of appreciation and living instrument doctrines are present, with a systematic analysis of case law from January 1979 to December 2016 which provides a basis for drawing

conclusions on whether there has been any change in the nature of interaction between the margin of appreciation and living instrument doctrines.

2.7 Conclusion

The margin of appreciation doctrine is engrained within the jurisprudence of the Court. It has evolved from a doctrine that was initially considered to apply derogation cases under Article 15 of the ECHR, to a doctrine that pervades the interpretation of the entire Convention and is soon to be included in the text of the Convention itself. There is no set limit on the provisions of the Convention to which it can be applied. It achieves both a substantive role in determining whether States have achieved the right balance when there is a conflict between individual rights and collective goals, and a structural function of deference to the national authorities. The Court has however not been very clear on which role it is performing in particular cases, nor has there been fixed parameters for its application. There are mixed reactions to the use of the margin of appreciation doctrine by the Court. Some have welcomed the presence of the margin of appreciation within the case law of the ECtHR on the basis that it is a pragmatic tool to deal with a variety of issues that the Court is faced with such as: (a) the diversity of member States; (b) the sovereignty of member States and the recognition of the Court as a subsidiary means of enforcement. Others have others have criticised the lack of precision in its application and lack of a detailed rationale for its presence within the jurisprudence of the Court. It has also been criticised for promoting relativism in the protection of rights, with some calling for its total abandonment by the Court.

Notwithstanding the mixed reactions, the significance of the margin of appreciation in the jurisprudence of the ECtHR has steadily grown and it has remained a tool used by the Court in determining whether a member State has violated its obligations under the ECHR. Its presence in the future jurisprudence of the Court will potentially be even more visible when Protocol No 15 has been ratified by all State parties to the Convention. The margin of appreciation is recognised for the flexibility that it offers both the Court and the member States. This is partly linked to the role consensus plays in determining the width of the margin of appreciation. This is the very aspect of the margin of appreciation doctrine that makes it vulnerable to critics but also the key attribute of the doctrine that forges a link with the living instrument doctrine, another interpretative tool used by the Court.

The interpretation of the Convention as a living instrument would appear quite unrelated to the margin of appreciation at face value, but within the case law of the court an intersection between the margin of appreciation and living instrument doctrines has been identified within extant literature, albeit without any comprehensive analysis devoted to just this area. The description of the relationship is not one that is simplistic. The use of consensus as a relevant factor when applying the living instrument doctrine connects it with the margin of appreciation doctrine. The impact of this connection may be seen in the fact that both of these doctrines have the potential to lead to change in the interpretation of the Convention.

The change may be seen in time and space, with the living instrument doctrine leading to a change in time whilst the margin of appreciation doctrine leads to a change in space. There is however scope to consider whether there could be a change in both time and space within the same case. Another aspect of the relationship between the living instrument and margin of appreciation doctrines is the determination of the width of the margin of appreciation. The living instrument doctrine has been criticised for 'narrowing' the width of the margin of appreciation, with the result that the State is found to be in violation of their obligations under the Convention. A systematic analysis of the case law in which both doctrines are present will be useful in shedding more light on the impact of the living instrument on the width of the margin of appreciation and the factors considered by the Court in such cases. A third aspect of the relationship between the margin of appreciation and living instrument doctrines can be seen in the potential for change in function. Some of the literature suggests that changes that have occurred over the years in jurisprudence with the Court moving away from wide margins in which it allows the member States more discretion in their interpretation of the Convention, to a narrow margin where the member States are subject to more scrutiny. The depth of research in this area is one that still gives room for more research. Whilst existing literature acknowledges a change from wide margins to narrow margins over the past decades, the selected case law analysed in the available literature leaves room for a more systematic analysis to explain the varied situations in which the margin of appreciation doctrine and living instrument doctrine have been dealt with by the Court within the same case. This is the gap that this thesis seeks to fill.

The presence of the margin of appreciation and living instrument doctrines in the jurisprudence of the Court would, however, appear disproportionately powerful in isolation without an understanding of their place as tools of interpretation of international

treaties. The next chapter addresses this issue by engaging in an analysis of the relevance of the Vienna Convention on the Law of Treaties (1969) to the interpretation of the ECHR and how the margin of appreciation and living instrument doctrines fit within the theories of treaty interpretation. The examination in the next Chapter will seek to provide some grounding for the presence of both doctrines in the jurisprudence of the Court.

Chapter Three:
The Margin of Appreciation and Living Instrument Doctrines
Through the Lens of the Rules of Interpretation of International Treaties

3. Introduction

Chapter two examined the origins and utility of the margin of appreciation and the living instrument doctrines in the jurisprudence of the European Court of Human Rights (ECtHR, the Court). Extant literature suggests an affirmative answer to the question of whether there is a relationship between the margin of appreciation and living instrument doctrines. This was a prelude to dealing with the nature of the relationship (RQ 1) between the margin of appreciation and living instrument doctrines. One of the similarities between both of these doctrines has been their absence within the treaty document itself: the European Convention on Human Rights (ECHR, the Convention).[1] They are both creations of the ECtHR. The previous chapter provided some important indications on the nature of the relationship between both doctrines. It was shown that consensus is a significant factor in the application of both doctrines. Although both doctrines are instruments of change, the margin of appreciation results in differences based on the 'space' that the decision relates to, which means the relevant country, whilst the living instrument doctrine on the other hand brings a variation in time, which means the societal conditions on the date the decision is being made. The literature also showed that the application of the living instrument was linked to the narrowing of the width of the margin of appreciation granted to States. In cases where more weight was given to the living instrument doctrine and it influenced the decision of the Court, less weight would be given to the margin of appreciation doctrine and vice versa. Chapter two also exposed the gaps in the literature that this thesis seeks to fill through the comprehensive analysis of the case law (RQ 2) of the Court, explored further below, in which both the margin of appreciation and living instrument doctrines are mentioned.

This chapter moves this thesis forward towards an examination of important interpretive and theoretical approaches (RQ 3). To provide a sound framework that should be applied to the determination of cases in which there is conflict between the margin of appreciation and the living instrument doctrines, these need to be situated within the theories of interpretation of treaties. It is necessary to align them with the theories on interpretation

[1] Although this position will change once Protocol No 15 Amending the European Convention on Human Rights and Fundamental Freedoms, CETS No. 213 comes into force as it provides for the inclusion of the margin of appreciation doctrine in the Preamble of the Convention.

of treaties as without that analysis, the margin of appreciation and living instrument doctrines may appear as 'giants on stilts'. Doctrines that have had a significant influence on the case law of the Court but having very shaky foundations until placed within a context of their roles as tools of interpretation of international treaties. The main purpose of this chapter is therefore to provide some underpinning for the margin of appreciation and living instrument doctrines from the framework and theories for interpretation of treaties in international law. The outworking of this main purpose leads to two tasks. First, to examine the legitimacy in international law of the creation of the margin of appreciation and living instrument doctrines as tools of interpretation by the Court. Second, to examine the links between the margin of appreciation and living instrument doctrines with the theories of interpretation reflected in the international rules on treaty interpretation.

The Vienna Convention of the Law of Treaties 1969 (VCLT, Vienna Convention)[2] offers a framework to assess the legitimacy of the creation of the margin of appreciation and living instrument doctrines by the Court as tools of interpretation. It also offers a theoretical framework for assessing their impact on the interpretive approach of the Court. The ECHR itself is a treaty, a written international agreement between 47 States[3], which is governed by international law.[4] The VCLT is therefore relevant when considering the interpretation of the ECHR. An examination of the rules of interpretation of treaties codified in Articles 31-33 of the Vienna Convention immediately reveals that they do not contain any reference to the terms 'margin of appreciation' or 'living instrument'. The absence of the doctrines in the VCLT creates the debate as to whether the margin of appreciation and living instrument doctrines are valid within this wider framework of treaty interpretation as provided within the Vienna Convention and in turn, whether they accord with the recognised rules of interpretation of treaties. This chapter engages with that debate and argues that the inclusion of the margin of appreciation and living instrument doctrine as tools of interpretation by the Court is valid even though there is no express mention of both doctrines in the VCLT. It also examines how the margin of appreciation and living instrument doctrines interact with the theories of adjudication in the Vienna Convention. The result of this analysis provides the

[2] Vienna Convention on the Law of Treaties 1155 UNTS 331 – opened for signature on 23 April 1969 and entered into force on 27 January 1980.

[3] There are currently 47 member States to the ECHR (as at 2 August 2018) see http://www.coe.int/en/web/portal/47-members-states accessed 2 August 2018.

[4] This definition of the ECHR as a treaty is in line with Article 2(1) of the Vienna Convention on the Law of Treaties 1969.

basis for the theoretical framework for examination of the case law of the ECtHR which will be detailed in Chapter five.

3.1 Rules of Interpretation in the VCLT

The VCLT offers a theoretical framework to assess which interpretive tools should be adopted when interpreting an international treaty. This provides some foundation to assess the issue of the legitimacy of the creation of the margin of appreciation and living instrument doctrines by the Court. The Vienna Convention also provides the foundation for addressing central research question number three (RQ 3 interpretive and theoretical approaches).[5] The VCLT is product of the International Law Commission ("the ILC"), a body created by the United Nations General Assembly in 1947,[6] and given the task to progressively develop and codify international law.[7] The significance of the task and the attendant difficulties are seen in the fact that it was not until 19 years later, in 1966, that the first final draft article was adopted by the ILC and then considered in the UN Conference of 1966.[8] On 22 May 1969 the VCLT was finally adopted and it entered into force on 27 January 1980. The reach of the VCLT is wide as it currently encompasses 114 member States,[9] thereby making it applicable to more than half of the existing member States of the UN.[10] The significance of the wide reach of the VCLT is further evidenced because it functions as a 'residual rule'[11]; it is applicable to all treaties between States unless a particular treaty provides otherwise; or the parties agree otherwise; or a different intention is otherwise established. It also covers a wide

[5] The research questions for this thesis are fully stated in Chapter 1 at section 1.3.

[6] United Nations General Assembly Resolution 174 of 21 November 1947 Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/174(II) accessed 11 November 2016.

[7] Article 1 Statute of the International Law Commission 1947. Codification is the process through which rules of law are committed to written form. The process of codification of international law is however not just a process of systematising in written form existing rules of international law as distilled from state practice, but is necessarily legislative as well as it involves some level of progressive development of the law in the form of bringing uniformity where there are conflicting state practices and also bringing changes to areas where there is established consensus in state practice but such practice is unsatisfactory and requires changes. For more on the special nature of codification of international law which was not reflected in Article 15 of the Statute of the ILC and the justification for this, see H Lauterpacht, 'Codification and Development of International Law' (1965) 59 American Journal of International Law 16, 23-30.

[8] Resolution 2166 (XXI) of 5 December 1966.

[9] 116 states had ratified the VCLT as at 24 July 2018 < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 24 July 2018.

[10] There are currently 193 member States of the UN (data correct as at 24 July 2018).

[11] Malgosia Fitzmaurice, 'The Practical Working of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 169.

scope of issues relating to treaties from the formation to the termination and other relevant matters in between.[12]

Articles 31-33 of the VCLT enshrine the rules on interpretation of treaties.[13] The Convention adopts a two-stage approach: in the first stage interpretation is based on the tools contained in Article 31 to ascertain the ordinary meaning of the word. The second stage process in Article 32 involves resort to supplementary materials for interpretation in order to confirm the meaning arrived at or where there is ambiguity or absurdity following interpretation based on Article 31.[14] One could therefore deduce that the under the VCLT, the elements of interpretation in Article 31 are part of the 'general rules of interpretation' to be applied in all cases whilst those in Article 32 are 'supplementary means' to be restricted to specific instances.[15] The ultimate aim of interpretation is ensuring the performance of the treaty. Article 31 provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (*a*) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (*b*) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context; (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[12] The VCLT does not however cover all aspects of treaty law. For example, it does not deal with the issue of succession of treaties, responsibility for the breach of treaties or the effect of the outbreak of hostilities on treaties. See Article 73 VCLT.
[13] For an in-depth exposition of Articles 31-33 see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 205 – 226.
[14] J G Merrills, 'Two Approaches to Treaty Interpretation' (1968-1969) Australian Yearbook of International Law 55,56.
[15] Merrills, 'Two Approaches to Treaty Interpretation' (n 14).

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The general rule of interpretation in Article 31(1) contains an overarching principle as well as three other elements to be applied in interpretation of treaties. The overarching principle is that a treaty should be interpreted in good faith.[16] The difficulty of identifying what good faith means is highlighted by Gardiner who points out that 'good faith' 'is an excellent example of a term whose 'ordinary meaning' is elusive'.[17] In practice however, the rule of interpreting a treaty in good faith reflects the principle of *pacta sunt servanda*, contained in Article 26 of the VCLT. This principle is usually referred to in relation to the performance of treaties and as Aust points out, interpretation of treaties is part of the performance of treaties.[18] It could therefore be concluded that good faith is applied to the interpretation of treaties in order to ensure the performance of the treaties. It serves as an overarching principle which underpins the different rules of interpretation applied.

In addition to the principle of good faith it can be deduced that the three key tools of interpretation in Article 31(1) are: 'the text', 'the context' and the 'object and purpose'.[19] '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.[20] It should be immediately apparent to the reader that Article 31 does not contain any reference to the terms margin of appreciation or living instrument. It is therefore necessary to consider how the margin of appreciation and living instrument doctrines can be considered to be valid tools of interpretation even though they are not expressly mentioned within the text of Article 31. An analysis of this point will be relevant for answering RQ 3 (interpretive and theoretical approaches).

---

[16] Aust (n 13) 208; A similar view is expressed by Fitzmaurice, 'The Practical Working of Treaties' (n 11) 179.
[17] Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 170; The ambiguity surrounding the use of the term 'good faith' was also highlighted earlier in Merrills, 'Two Approaches to Treaty Interpretation' (n 14).
[18] Aust (n 13) 208.
[19] Fitzmaurice, 'The Practical Working of Treaties' (n 11) 179.
[20] These schools of interpretation were recognised and distilled from the practice of the International Courts prior to the existence of the VCLT. See Oliver Morse, 'Schools of Approach to the Interpretation of Treaties' (1960) 9 Catholic University Law Review 36,39; For a list of more of the interpretive principles applied by the International Court of Justice prior to the VCLT, see 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.

3.2 Underpinning the Creation of the Margin of Appreciation and Living Instrument Doctrines within the VCLT

In order to address the issue of the legitimacy of the creation of the margin of appreciation and living instrument doctrines it is necessary to situate them within the interpretive rules for international treaties as captured within the VCLT. The first theoretical issue to navigate is the relevance of the Vienna Convention to the interpretation of the ECHR. The ECtHR was given the role to 'interpret' and 'apply' the provisions of the Convention and its Protocols.[21] The ECHR did not however state what rules should guide the Court in carrying out its role of interpreting and applying the Convention. The ECHR was signed in 1950 and came into force in 1953 whilst the VCLT was signed in 1969 and came into force in 1980. At face value therefore, the rules of interpretation in Articles 31-33 of the VCLT should not be applicable to the ECHR because it clearly states in Article 4 VCLT that its provisions are not retroactive and only apply to treaties that were concluded after its entry into force.[22] What then is the basis for the relevance of the provisions of the VCLT to the interpretation of the ECHR? The relevance of the Vienna Convention to the interpretation of the ECHR lies not in the sequence of their existence but in the link between the VCLT and customary international law.[23] Customary international law itself is derived from a combination of State practice and '*opinio juris*': the belief in the binding nature of that practice.[24] The International Court of Justice (ICJ) identified the rules of interpretation contained in Articles 31 and 32 of the VCLT as reflective of customary international law.[25]

There are two significant points that arise from the status of Articles 31 and 32 of the VCLT as reflective of customary international law. The first implication is that those provisions are applicable even in cases where the States before the Court are not parties to the VCLT. In a case before the ICJ - *Kasikili/Sedudu Island (Botswana/Namibia),* neither Botswana nor Namibia were parties to the Vienna Convention but they accepted that the VCLT was applicable to the interpretation of the treaty in dispute as it reflects customary

[21] Article 32 ECHR.
[22] Article 4 VCLT.
[23] Customary international law is one of the sources of international law identified in Article 38(1) of the Statute of the International Court of Justice 1945. Article 38(1) is considered as a starting point in identifying the sources of international law. It identifies treaties, custom, general principles of law, judicial decisions and writing of publicists as sources of international law.
[24] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands*) [1969] ICJ Rep 3; *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, paras 183 and 207.
[25] *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) [1994] ICJ Rep 21, para 41; See also *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [1996] (II) ICJ Rep 812, para 23; *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, para 18.

international law.[26] This is as a result of the widely recognised principle that customary international law binds all States whether or not they have been party to its creation.[27] This principle of the binding nature of customary international law is only subject to two exceptions: rules of special or local customary law, which are only applicable to a specific group of States[28] and the 'persistent objector' principle.[29] The second implication is that the provisions of Articles 31 and 32 are applicable to treaties that were concluded prior to the entry into force of the VCLT.[30] For the purposes of this thesis, the second implication is significant because it means that even though the ECHR was in force 23 years before the VCLT, the provisions of Articles 31-33 are nevertheless applicable to the interpretation of the ECHR.

The ECtHR itself has confirmed in the case of *Golder v United Kingdom* that the VCLT is applicable to the interpretation of the ECHR and that Articles 31-33 reflect customary international law and are applicable to the interpretation of the Convention.[31] The Court stated:

> The Court is prepared to consider…that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted….[32]

---

[26] *Kasikili/Sedudu Island* (n 25).
[27] Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) 97
[28] For example, in the *Asylum Case (Columbia v Peru)* [1950] ICJ Reports 266, the practice of diplomatic asylum in which certain Latin American States took cognisance of the right of embassies of other states in the region to give asylum to political fugitives was held not to be applicable to Peru.
[29] The persistent objector principle applies to a state, which consistently objected to a rule whilst it was not yet customary international law. In such a case, the state is seen as a persistent objector and can continue to opt out of that application of that rule. For example, the 10-mile rule in relation to base lines was held to be inapplicable against Norway as they had consistently objected to its application to the Norwegian coast – *Anglo Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116.
[30] *Kasikili/Sedudu Island* (n 25).
[31] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 29.
[32] Ibid.

The status of Articles 31-33 as rules of customary international law therefore make the rules of interpretation embodied within them, relevant to the interpretation of the ECHR.

Whilst Golder answers the question as to whether the VCLT is relevant to the interpretation of the ECHR, it still leaves open the issue as to how the margin of appreciation and living instrument doctrines can be considered as valid tools of interpretation of an international treaty when they were not expressly mentioned in Articles 31-33 of the Vienna Convention. Put differently, is there room for international courts to create their own rules of interpretation? The answer to this question requires an examination of the question as to whether the VCLT purport Articles 31-33 to be an exhaustive codification or a selective codification of the interpretive principles for international treaties. An examination of the ILC's Commentary on the VCLT shows that it recognised that there are other principles of interpretation that could be applied to the interpretation of treaties and that it was not a good idea to attempt to codify all of them in the Vienna Convention. The ILC, had restricted itself to 'trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.33 It was therefore a selective process rather than an exhaustive one. The effect of this as Merrills notes, is that the ILC does not intend to rule out other helpful principles or maxims that would be useful in interpreting treaties.[34] This leaves room for an international court to apply rules of interpretation that go beyond what is provided for in the VCLT. Indeed, as Letsas points out, it is the purpose of the treaty that would determine the particular interpretive rules and methods that should be applied by the Court.[35]

The understanding that the rule of interpretation in Article 31 of the VCLT is not a comprehensive list of the principles that can be applied by an international court is significant here. Chapter two had already provided the rationale for the creation of the margin of appreciation and living instrument doctrines from the perspective of the Court.[36] In recognition of the status of the ECHR as an international treaty, seeking validation for the creation of both doctrines within the Vienna Convention which embodies the law of treaties was also essential. The VCLT is relevant to the ECHR because it embodies customary

[33] International Law Commission's Commentary to Articles 27 and 28 of the ILC Draft (ultimately Articles 31 and 32 of the VCLT) from the 'Draft Articles on the Law of Treaties with Commentaries 1966' in Yearbook of the International Law Commission (1966) Vol II on Para 5 page 218-9 available at < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf> accessed 17 October 2016.
[34] Merrills, 'Two Approaches to Treaty Interpretation' (n 14) 57.
[35] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) EJIL 509, 533.
[36] See Chapter two sections 2.3 and 2.5.

international law in Articles 31-33. From the analysis in this section it follows that although it can be clearly seen that the text of Articles 31-33 VCLT do not include the words margin of appreciation or living instrument, in the light of the acknowledgement that Article 31 is not an exhaustive list of all the rules of interpretation that can be applied by an international Court, the creation of additional rules of interpretation by the ECtHR is in keeping with the rules of international treaty interpretation. There is therefore a firm basis in line with recognised international law principles for the Court to adopt its own rules of interpretation in addition to what is provided for within the VCLT. Underpinning the doctrines in the VCLT provides a platform for dealing with RQ 3 (interpretive and theoretical approaches) which seeks to analyse the framework for cases in which there is conflict between the margin of appreciation and living instrument doctrines. Before considering the actual relationship if any between the margin of appreciation and the rules in the VCLT it is necessary to give a brief overview of the different rules and how they reflect the theories of interpretation of international treaties.

3.3 Rules of Interpretation in the VCLT and Theories of Interpretation

In *Golder* the ECtHR referred to taking into consideration the principles enshrined in Articles 31-32 VCLT.[37] The text, context and object and purpose have been identified as the three tools of interpretation contained within Article 31 of the Vienna Convention. The different elements are, however, not exhaustive as the tools of interpretation that can be applied by an international Court. They are three elements of one singular rule of interpretation rather than a set of multiple rules of interpretation.[38] In this way the VCLT incorporates the three main schools of interpretation: the textual/objective, internationalist/subjective and purposive/teleological within Article 31(1). The VCLT brings a dynamic approach to the use of the schools/theories of interpretation as each of those elements: text, context and object and purpose are to be applied together in order to

[37] In this chapter Article 33 will not be discussed as it is mainly concerned with interpretation when there a treaty is drafted in more than one language. It does not necessarily focus on the tools of interpretation and schools of thought of interpretation which are the relevant areas covered within this chapter.

[38] The ILC's Commentary on the Draft Article 27 (which turned out to be Article 31) indicates that it embodies a singular rule: '[A]rticle 27 is entitled "General *rule* of interpretation" in the singular, not "General *rules"* in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule…' (Draft Articles on the Law of Treaties (n 33) 220; Fitzmaurice also highlights that there are three different elements of this singular 'rule' of interpretation: the text, the context, and the object and purpose. Fitzmaurice, 'The Practical Working of Treaties' (n 11) 179.

arrive at the interpretation of the relevant treaty provision at issue. They are not standalone techniques but should rather be considered as a whole.

A related question is: does this singular rule of interpretation create a hierarchy amongst the different elements that it embodies? The ILC has stated that Article 31 when read as a whole does not lay down a hierarchy of norms for the interpretation of treaties. It was considerations of logic and not legal hierarchy that influenced the Commission in arriving at the order of the words in the article.[39] There is therefore no hierarchy of legal norms within Article 31(1), it is rather a logical progression with interpretation beginning with the text, and then the context followed by other considerations such as the object and purpose or supplementary materials.[40] The VCLT does not also give precedence to any of the schools of interpretation as the object and purpose of the treaty would determine the approach of the relevant international court.[41] In this section these three elements are examined to give a context to their application before proceeding in the next section to examine their relevance to the ECHR.

3.3.1 Ordinary Meaning/Textual School

The textual approach places emphasis on literal translations.[42] For the textual school, if the word, clause or phrase of the treaty in dispute is clear, then there is no need to resort to any further materials in order to determine its meaning.[43] If however the text is unclear or ambiguous, the textual school would allow for recourse to supplementary means of interpretation such as the *travaux préparatoires* in order to resolve this.[44] The VCLT codifies this textual school of interpretation approach in Article 31 where it provides that the terms of the treaty are to be interpreted in line with their ordinary meaning. This could be interpreted as their 'natural' or 'plain meaning'.[45] An example of the textual school in operation can be seen in *Kasikili/Sedudu Island (Botswana/Namibia)*[46] where the ICJ in dealing with a boundary dispute, referred to the ordinary meaning of the terms 'main channel' in the pertinent provision of the 1890 Treaty. Based on this textual approach, it concluded that the northern channel of the River Chobe around the disputed Kasikili/Sedudu

[39] Draft Articles on the Law of Treaties (n 33), para 9, pg. 220.
[40] Aust (n 13) 208.
[41] Letsas (n 35) 514, 533.
[42] Morse (n 20) 41.
[43] Ibid.
[44] The *travaux préparatoires* are the preparatory documents. See Morse (n 20) 41.
[45] Martin Dixon, *Textbook on International Law* (7th edn, OUP 2013) 73.
[46] *Kasikili/Sedudu Island* (n 25).

Island must be regarded as its main Channel, which informed the conclusion that Kasikili/Sedudu was a part of Botswana.[47]

How important is the textual approach in the Vienna Convention? It is noted that the VCLT gives precedence to the textual approach.[48] This precedence reflects the view of the ILC that the text 'must be presumed to be the authentic expression of the intention of the parties' and that as a result, 'the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties'.[49] The ordinary meaning of a term can therefore be assumed to most likely reflect what the parties intended unless the contrary can be proved.[50]

Although words would normally be given their ordinary meanings, parties can assign special meanings to terms. Article 31(4) provides that a special meaning will be given to a term if it is established that the parties so intended. In such a case, the special meaning will be applied notwithstanding the apparent meaning of a term in its context. There is therefore a freedom of parties to decide on what meanings they would give to particular terms but barring that happening, the ordinary meanings of words would be adopted.

A related issue is where treaties are drafted in more than one language. In many cases, international treaties are drafted in more than one 'official' language.[51] A situation may arise in which an interpretation of the text as written in the two languages, may lead to different conclusions. The issue then is which of the languages should supersede the other? Which 'ordinary meaning' should be adopted? Article 33(1) provides that 'unless the treaty provides, or the parties otherwise agree, that in the case of divergence between the texts a particular text shall prevail, the text is equally 'authoritative' in each language in which it has been authenticated. Where there are two different conclusions that could be arrived at because of the different interpretations based on the different languages, the interpretation that is in line with the object and purpose of the treaty is the one that should be adopted.[52]

It can be seen that the reference to the 'ordinary meaning' reflects the textual school of interpretation and is the primary rule to be adopted in interpreting treaty provisions in line with the VCLT. The textual school places emphasis on the text itself as the objective

[47] *Kasikili/Sedudu Island* (n 25), paras 40-42.
[48] Merrills, 'Two Approaches to Treaty Interpretation' (n 14).
[49] Draft Articles on the Law of Treaties (n 33) 354.
[50] Aust (n 13) 209.
[51] For example, the European Convention on Human Rights and Fundamental Freedoms 1950 is drafted in English and French.
[52] Article 33(4) this brings a relationship between the textual school and the 'object and purpose' school which will be discussed later in the work.

expression of the intention of the parties which is then relevant to the interpretation of the relevant provision. Interpretation is to be restricted to what is expressed in the text by the parties. Anything not included in the text should not be adopted. By including the text in the general rule, and giving precedence to it, the VCLT leaves room for international adjudicatory bodies to adopt the textual school of interpretation which gives primacy to the text. It however does not end here but goes to incorporate another recognised school/theory of interpretation which is discussed below.

3.3.2 Context/Intentionalist School

Whilst the textual school places emphasis on relying on the text itself to ascertain the intention of the parties to the treaty, the intention of the parties' school advocates reliance not only on the text but on all related conduct with respect to the treaty and its creation in order to ascertain the intention of the parties.[53] The unifying factor between both approaches then is that they both seek to give effect to the intentions of the parties to the treaties. They however diverge on the issue of where that intention is to be found. Whilst the textual approach looks for the intention within the text itself except where there is ambiguity or uncertainty, the intentionalists look for that intention in a variety of documents which would include preparatory works and subsequent agreement. Intentionalists doubt that any text can be 'clear' 'natural' or 'plain' but rather that words can have any meaning the parties want it to have. Therefore, in order to ascertain what the words mean, then all the relevant conduct of the parties should be considered. Dixon shares a similar view stating that 'in the normal case, the 'normal and plain meaning' of words in a treaty can be understood only in the context in which they are used, and it is a mistake to believe that any treaty phrase has one 'true' meaning'.[54]

Essentially, the intention of the parties' school requires that the terms of the treaty should be read in context and this is very much in line with what is provided for in Article 31 of the VCLT which provides that the terms of a treaty be interpreted in their context. This context may also include special meanings given to terms as covered in Article 31(4) of the VCLT. As McNair opined, the task of interpretation is: 'The duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances'.[55] Here, 'circumstances' can be

[53] Morse (n 20) 39.
[54] Dixon (n 45) 74.
[55] A McNair, *The Law of Treaties* (2nd edn, OUP 1961) 365.

interpreted to mean 'context'. Aust shares a similar view on the importance of context stating that 'any term can be fully understood only be considering the context in which it is employed'.[56] For the intention of parties' school, the ordinary meaning is therefore not something that should be taken separately but is intimately linked with context and should be taken in conjunction with all the other relevant elements of the rules of interpretation in the VCLT.[57]

The question that arises is what factors can be considered in forming the context in order to fully give the term its ordinary meaning? The first factor is the text of the treaty including its preamble and annexes.[58] The second factor that provides context is any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty.[59] Third, any instrument, which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[60] By including these different materials as a way to inform context, the reference to interpretation in context can be seen to be a qualifier of the ordinary meaning of terms used in the treaty. In so doing it aids the selection of the ordinary meaning of a term and modifies any over-literal approach to interpretation.[61] The ordinary meaning of the words is therefore a starting point rather than an end in itself. It may in some instances have a determinative role where the context confirms the interpretation arrived at from adopting the ordinary meaning and if there were no other factors leading away from that conclusion.[62]

In addition to the context there are other materials that the VCLT provides that can be considered as well when interpreting the treaty. These are subsequent agreements,[63] subsequent practice,[64] and any rules of international law applicable between the parties.[65] The reference to rules of international law confirms that a treaty must be interpreted in the wider context of international law.[66] The rules of international law that may be relied upon

[56] Aust (n 13) 210.
[57] Gardiner (n 17) 181.
[58] Article 31(2) VCLT.
[59] Article 31(2)(a) In this instance the agreement does not have to be part of the treaty itself, but it must express the clear intention of the parties – Aust (n 13) 211.
[60] Article 31 (2) (b).
[61] Gardiner (n 17) 197.
[62] Gardiner (n 17) 185.
[63] Article 31(3)(a).
[64] Article 31 (3) (b).
[65] Article 31 (3) (c).
[66] See Aust (n 13) 216; the separate opinion of President Higgins in the *Oil Platforms* (n 25), paras 41-5 points to the view that the use of this provision as a 'peg on which to hang the whole corpus of international law on the use of force' was controversial. President Higgins pointed out that in applying the provision, the Court

in order to arrive at an interpretation that is consistent with the perceived intention of the parties may involve both international law in existence at the time of the treaty's formation and present international law.[67] In taking international law rules into account, it opens the door for consideration of more up to date views on particular issues that are referred to in the relevant treaty. This can open the door to an evolutive interpretation of treaties.

3.3.3 Object and Purpose/Teleological Interpretation

The third main school of thought with regards to interpretation of treaties is the teleological school. Article 31(1) of the VCLT requires that the object and purpose of the treaty be considered in the interpretation of the treaty. This means that the ordinary meaning of a word is not to be ascertained in the abstract but has to be done in the context of the object and purpose of the treaty.[68] This reference to the object and purpose brings the teleological element into the general rule of interpretation.[69] For the teleological school it is the purpose of the treaty itself that is the main point and to some extent this purpose is considered to be independent of the intentions of the original drafters of the treaty.[70] Teleological interpretation involves ascertaining the general purpose of the treaty and then interpreting the relevant provision in the light of it. This would in turn involve taking into consideration the general tenor of the treaty, the circumstances in which it was made and its position in international law.[71]

One of the main criticisms against teleological interpretation is that it involves some level of law making.[72] It involves using the objects, principles and purposes of the treaty which are expressly declared or presumed to supplement interpretation. In the outworking of the teleological interpretation gaps could be filled in the interpretation of the treaties. Teleological interpretation could therefore involve a legislative function for the court rather than a purely judicial or interpretive function.[73] This room for law making when the teleological approach is applied has been one of the main reasons why it has not been

---

should also have had regard to the 'context' of the treaty that gave jurisdiction to the Court and that was limited to economic and commercial matters' R Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) ICLQ 791, 800-3.

[67] Aust (n 13) 216.

[68] Aust (n 13) 209.

[69] Gardiner (n 17) 211.

[70] G G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 British Year Book of International Law 1, 2.

[71] Ibid.

[72] Ibid 8.

[73] Ibid 8.

resorted to in great measure in some quarters.[74] It has played a lesser role in interpretation of treaties than the search for the ordinary meaning of the words in their context.[75]

In considering the object and purpose a related question is whether these are fixed in time or may change over time. This brings into play the 'emergent purpose'[76] or 'evolutive' school of thought which requires interpretation not necessarily based on the objects and purposes of the treaty at the time it was drafted but in line with what the objects and purposes of the treaty appear to be in the present time.[77] The treaty is interpreted in the light of the role it plays in the current international setting. Fitzmaurice highlights the link between teleological interpretation and the principle of 'effectiveness', another interpretative principle applied by international courts.[78]

What is the function of the resort to the object and purpose? Aust argues that the regard to the object and purpose is 'more for the purpose of confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong'.[79] Gardiner points out there is a link between the context and the object and the purpose of the treaty. This link is that they are both elements necessary for finding out the ordinary meaning of terms used in the treaty.[80] The resort to the context and the object and purpose is therefore all in order to identify the ordinary meaning of the terms used in the text.

The teleological school is similar to the textual approach because it requires reference to the text of the treaty itself rather than what may be presumed to have taken place in the mind of the drafters.[81] It is also similar to the intentionalist approach because although its focus is the objects and purpose, ascertaining the objects and purpose could involve determining what the drafters intended to be the object and purpose of the treaty even though the teleological interpretation may go beyond the drafter's intention. The intentionalist schools is therefore reflected to some extent in teleological interpretation.[82] It could therefore

[74] For example, the International Court of Justice has not widely adopted teleological interpretation but rather favours the literal approach. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (n 70) 8.
[75] Aust (n 13) 209; When we consider the interpretation of the ECHR it will be seen that this is not the case as teleological interpretation is resorted to a lot more by the ECtHR than by the ICJ.
[76] Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (n 70) 8.
[77] Ibid.
[78] Ibid.
[79] Aust (n 13) 209; For an example of the application of this line of thought in practice see the ICJ's judgment in *Kasikili/Sedudu Island* (n 25), paras 43- 47.
[80] Gardiner (n 17) 210.
[81] Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretations and other Treaty Point' (n 20) 209.
[82] Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretations and other Treaty Point' (n 20) 209.

be said that teleological interpretation is the intentionalist approach at a different level.[83] The textual approach brings some form of control to the teleological interpretation by insisting that the objects and purpose should not be stretched beyond what is reflected in the text. If the object and purpose cannot be achieved by interpreting what has been clearly stated in the treaty, then the textualists would advocate for an amending of the treaty rather than an interpretation that 'stretches' the text.[84] This is in keeping with the ILC's position, which indicates that although the object and purpose are referred to in Article 31(1) VCLT, primacy is given to the text as the basis for interpretation of a treaty.[85] This is however where the teleological school differs from the textual and intentionalist schools of interpretation as it incorporates an interpretation that 'fills gaps' or 'amends' the text in order to achieve the purpose of the treaty. The three schools of thought therefore interact to some extent with each other. The VCLT itself gives room for either school of interpretation to be used.

3.3.4 Supplementary Means of Interpretation

It has already been seen that the Vienna Convention embodies the three main schools of interpretation. The use of the VCLT by the ICJ and the ILC's commentaries however show that primacy is given to the text of the treaty. The related question is whether the ordinary meaning of a term be relied on at all times or if there are instances in which it is necessary to depart from the ordinary meaning of a term? By virtue of Article 32(b) where the ordinary meaning of a term would lead to a result that is manifestly absurd or unreasonable, then the parties have to adopt another interpretation. Once again, the VCLT is codifying what already existed as an 'exception' to the textual rule in which it was recognised that where there was ambiguity or uncertainty by virtue of reliance on the text, recourse could be had to the preparatory documents.[86] The implication is that except in such instances where there would be absurdity, the ordinary meaning of the words is to be adopted in order to give effect to the intention of the parties. This implies that Article 32 gives a subordinate role to supplementary documents such as the *travaux*.[87] The text of the treaty is

[83] Ibid.
[84] Ibid.
[85] Draft Articles on the Law of Treaties (n 33) para 2 pg 218.
[86] Morse (n 20) 41.
[87] Different arguments have been advocated for the relegation of the travaux to a supplementary role. One of the key arguments revolves around the issue of consent, and the impact of relying on the travaux where a state was not an original party to the drafting of the VCLT. For an analysis of this issue and the fluidity that is revealed from the practice of international courts, see Panos Merkouris, 'Third Party' Considerations and 'Corrective Interpretation' in the Interpretative Use of Travaux Pr*éparatoires:* - Is it Fahrenheit 451 for Preparatory Work?' in M Fitzmaurice, Olufemi Elias, Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010 Martinus Nijhoff Publishers) 75, 77-83; For a

the main document to be relied on in the interpretation of the treaty and the *travaux* are only to be relied on as a supplementary means.[88]

Article 32 VCLT identifies two functions of the *travaux*. The first function is confirmation of the meaning arrived at following interpretation using the tools in Article 31. The adjudicatory body would have to, first, interpret the provision according to its ordinary meaning in context and in the light of its object and purpose as provided in Article 31 VCLT. Only after doing this would the *travaux* be resorted to in order to confirm the meaning that has been elucidated from the process.[89] The second function of the *travaux* is to 'determine' the meaning of a particular provision. This is only relevant where interpretation according to the general rules in in Article 31 produces an interpretation that is either 'ambiguous or obscure'[90] or leads to a manifestly absurd or unreasonable result.[91] In such cases, the *travaux* can be relied on, not to confirm a meaning but rather to 'determine' the meaning.[92] A reading of Article 32 therefore suggests only two functions of the *travaux*: 'confirmation' and 'determination' of meaning, there is no express mention of any other functions.[93]

Is the role of the travaux however only restricted to what is clearly spelt out in Article 32: 'confirmation' and 'determination' or can it also perform a 'corrective' function? For example, if, though the text of a treaty was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a different meaning came to light, what would happen in such a circumstance?[94] Essentially, if there is a conflict between the clear meaning of a term and the meaning arrived at from the *travaux*, which will prevail? Can the *travaux* 'correct' the meaning arrived at through the Article 31 process? It has been advocated that in such a situation, the *travaux* should prevail.[95] In essence, this would

different argument that supports relegation of travaux to a supplementary position due to the possible issues of lack of authenticity of the documents, see Aust (n 13) 217.

[88] *Territorial Dispute* (n 25).

[89] In *Kasikili/Sedudu Island* (n 25) paras 45-46, the ICJ relied on Article 31 first in interpreting the treaty before resorting to the *travaux* to confirm the conclusion they had reached about the purpose of the 1890 Treaty and the intention of the parties at that time.

[90] Article 32(a).

[91] Article 32(b).

[92] The use of the *travaux* to determine the meaning of a provision in these circumstances was already in existence prior to the VCLT. In the *Polish Postal Service in Danzig Case* PCIJ Rep Series B No 11, 39, it was the view of the Permanent Court of Justice that the recourse to the preparatory work is permissible when a literal interpretation would lead to a 'manifestly absurd or unreasonable' result.

[93] Merkouris (n 87) 75.

[94] This issue was raised in passing by Mr Crucho de Almedia the Portuguese delegate in the diplomatic conference on the adoption of the VCLT. See Crucho de Almedia, Vienna convention on the Law of Treaties, Meetings of the Committee of the Whole, 33rd Meeting para 56 available at < http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf> accessed 15 November 2016.

[95] Ibid.

allocate a 'corrective' function to the *travaux*, giving it a third function not recognised in the VCLT. The difficulty this brings is that if the *travaux* were to supersede the text, then this would upset the hierarchy between the Articles 31 and 32.[96] The question as to whether the whether the *travaux* could perform a corrective function was therefore not subjected to a full debate and no clear agreement on this point was made in the preparatory stage of the drafting of the Vienna Convention.

In more recent times, Judge Schwebel has argued in favour of the *travaux* having a corrective function.[97] His argument, which was based on the principle of good faith and Vattel's dictum that an interpretation which renders an act null should be rejected, is that if the *travaux* is not accorded a corrective role, then its purpose will be constrained to just a confirmatory role thereby marginalising the article.[98] He therefore argued that it was logical that a 'corrective' role be accorded to Article 32.[99] Merkouris has however criticised this argument for a corrective function of Article 32 as having 'an inherent logical error'.[100] He argues that even if a corrective role is not assigned to Article 32 it will not make the Article redundant because it would still retain the role of 'determining' the meaning of terms where there is lack of clarity, unreasonableness or absurdity as a result of the application of the principles in Article 31.[101] Through an examination of case law in which this 'corrective' function was allegedly used or hinted at, Merkouris concludes that in all those cases it had been a 'determinative' function played by the *travaux*. Correcting the meaning is therefore just 'one extreme manifestation of determination, not a separate function'.[102] The merits of this argument are evident because if the *travaux* is to retain its place as a 'supplementary' rule of interpretation, it cannot supersede a 'clear' meaning from the text itself.

The lack of a corrective function for the *travaux* in Article 32 does not completely rule out any function for the *travaux*. Whilst they may not have a major role on their own, in the right situation of ambiguity or absurdity they are relevant in helping the judge arrive at a conclusion that is in line with the intention of the parties and the purpose of the treaty. Aust however calls for caution in the use of the *travaux* because they are 'by their nature

[96] These were Articles 27 and 28 at the time.
[97] S Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?' in Jerzy Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Brill/Nijhoff 1996) 541.
[98] Ibid.
[99] Schwebel (n 97) 545.
[100] Merkouris (n 87) 84.
[101] Merkouris (n 87) 84-5.
[102] For a rigorous critique of the suggestion of a corrective function for the *travaux*, see Merkouris (n 87) 94.

less authentic' and 'often incomplete and misleading'.[103] Their usefulness is also 'often marginal and very seldom decisive'.[104] In practice, interpretation is usually based on the text of the treaty with the *travaux* resorted to as a supplementary means of interpretation to confirm the meaning already arrived at or determine the meaning where this is lack of clarity, absurdity or unreasonableness.[105]

The VCLT provides a framework for addressing the issue of what rules of interpretation should be applied to international treaties. It embodies a singular rule of interpretation in which a treaty should be interpreted according to its ordinary meaning read in context and in the light of its object and purpose. This singular rule however expresses itself in three elements: text, context, and object and purpose which reflect the three schools of interpretation namely: textualism, intentionalism and teleologicalism. They form the main rule of interpretation but there is room for resort to the *travaux* where there is a need to confirm the meaning arrived at or to determine the meaning. There remains a debate as to whether the *travaux* can perform a corrective function. In the next section, the application of these rules of interpretation to the ECHR are examined as well as how the margin of appreciation and living instrument doctrines feature within this framework.

3.4 Application of the Rules of Interpretation in the VCLT to the ECHR

The approach of the ECtHR to the interpretation of the ECHR may be gleaned from its case law. Two forces have driven the Court's approach to interpretation of the Convention. First, its beliefs on the appropriate 'judicial approach to treaty interpretation'[106] and Second, its 'conception of the nature of the European Convention' and the 'judicial role in relation to it'.[107] Taking the first force identified by Merrills – 'the reflection on the proper judicial approach to treaty interpretation'[108], one needs to consider the relevance of the text, context and object and purpose – tools identified in Article 31 and then the *travaux* in Article 32 to the interpretation of the ECHR. In *Golder*, the ECtHR set out a general doctrine of

[103] Aust (n 13) 217.
[104] Aust (n 13) 219.
[105] *Territorial Dispute* (n 25).
[106] J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 69.
[107] Merrills, *The Development of International Law by the European Court of Human Rights* (n 106); 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) 309 (Translation directed and edited by Christine Chodkiewicz).
[108] Merrills, *The Development of International Law by the European Court of Human Rights* (n 106).

interpretation of the Convention which was to be in line with Articles 31-33 of the VCLT.[109] It also confirmed that the different elements of the rule in Article 31 should be applied as a 'unity', a 'single combined operation'.[110] The application of Articles 31-33 of the VCLT to the ECHR is therefore similar to the ILC's approach that the different elements in Article 31 form one single rule and that there is no hierarchy between the elements of the single rule of interpretation in Article 31.

In *Golder*, the ECtHR had to determine by virtue of interpretation whether access to a court was a part of the right to a fair trial guaranteed under Article 6(1) of the Convention. Could the 'right of access to court' be implied in the requirement to a fair trial laid down in Article 6, since that was not expressly stated within the article? Essentially *Golder* was a case of whether the unenumerated right of access to Court could be read into the Convention.[111] After confirming that it will be guided by Articles 31-33 of the VCLT in interpreting the Convention and in particular Article 6(1), the Court then went on to apply the rules of interpretation in the Vienna Convention. The Court began by a literal reading of the text of Article 6(1) in line with its context.[112] It therefore reflected the textual approach to interpretation, which is highlighted in Article 31 VCLT. The Court was of the view that the terms of Article 6(1) when taken in their context suggest that the right of access to court is included in the guarantees it sets forth. In coming to this conclusion, it referred to the ordinary meaning of the terms in Article 6 taking into consideration the French and the English versions.[113]

The Court then went on to consider the context of Article 6(1). To determine the context, they resorted to the Preamble, which in line with the VCLT forms an integral part of the Context.[114] The Preamble is also useful in order to determine 'object and purpose' of the Convention.[115] In considering the preamble, the Court placed great emphasis on the reference to the rule of law in the Preamble and considered that in line with the principle of

[109] Ost notes that the Court had already set out a method of interpreting the Convention from its judgment in *Lawless v Ireland* App no 332/57 (ECtHR, 1 July 1961) and has carried that on with each case. It was however the first express setting out of the general rule of interpretation adopted by the Court. Ost (n 107) 285.
[110] *Golder* (n 31), para 29.
[111] An unenumerated right is a right not expressly provided for in a text but may be inferred or read into it. See Letsas (n 35) 515. For a distinction between enumerated and unenumerated rights in the context of the American Constitution, see R M Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (Vintage Books 1993) 12.9
[112] *Golder* (n 31), para 31.
[113] Ibid paras 32-33. Article 33(1) of the VCLT provides that where a treaty is drafted in more than one language, each of the texts is equally authoritative unless the parties provide otherwise.
[114] VCLT Article 31(2).
[115] *Golder* (n 31), paras 33 – 34.

good faith recognised in Article 22 of the VCLT, the principle of the rule of law referred to in the Preamble should be considered when interpreting Article 6(1) according to its context and in line with the object and purpose of the Convention.[116] It concluded that '[I]n civil matters one can scarcely conceive of the rule of law without there being a possibility of access to courts'.[117] The Court was therefore adopting a logical progression in taking into consideration the different elements in Article 31.

Next, the Court considered Article 31(3) (c) which provides that together with the context, consideration can be taken of 'any relevant rules of international law applicable in the relations between the parties'[118] of which general principles of law recognized in civilised nations was a part.[119] It was of the view that the principle that provides that a claim should be capable of being submitted to a judge 'ranks as one of the "universally" recognised fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice'.[120] It took the position that Article 6(1) should be read in the light of these principles and came to the conclusion that when this was taken into account 'the fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings'. The court finally concluded that:

> Taking all the preceding considerations together, it follows that the right of access constitutes an element, which is inherent in the right stated by Article 6 Para. 1 (art.6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 Para. 1 (art.6-1) read in its context and having regard to the object and purpose of the Convention, a law making treaty…and to general principles of law.[121]

After considering the main principles of interpretation in Article 31 of the VCLT an applying them to the issue in *Golder*, the Court went on to recognise Article 32 VCLT of the Vienna Convention which provides for supplementary means of interpretation. The Court

[116] Ibid para 34.
[117] Ibid para 34.
[118] Article 31(3) (c) VCLT.
[119] In Article 38(1) of the Statute of the International Court of Justice which identifies the sources of international law to be recognised by the International Court of Justice when adjudicating disputes submitted to it, reference is made in (1) (c) to general principles of law recognised in civilised countries as one of the sources of international law.
[120] *Golder* (n 31) para 35.
[121] Ibid para 36.

recognised the *travaux* as being supplementary means of interpretation even though, in this particular instance, it did not see a need to resort to it.[122] Following *Golde*r, the ECtHR has applied this systematic approach in only a handful of cases.[123]

Golder reveals that the ECtHR recognises the rules of interpretation in Articles 31-33 VCLT as being applicable to the interpretation of the ECHR.[124] It shows that the Court sees Article 31 VCLT as embodying the primary rule of interpretation with Article 32 only relevant as a supplementary means of interpretation when the meaning arrived at by applying Article 31 is ambiguous or obscure or leads to a result that is manifestly absurd.[125] If the meaning arrived at after applying Article 31 is clear, the Court may not need to refer to the *travaux* even to confirm that meaning as envisaged under Article 32 VCLT. In *Golder*, the ECtHR was satisfied with the meaning arrived at using the general rule of interpretation and did not need to resort to the *travaux*. This reflects the subsidiary position of the ECtHR has given to the *travaux, which* has continued to be reflected in other cases.

Whilst *Golder* is significant in setting out that Articles 31-33 VCLT are relevant to the interpretation of the ECHR, there are two key issues that *Golder* on its own does not provide answers for which are relevant for this thesis. The two pertinent questions are:

- Is there any interaction between the margin of appreciation and living instrument doctrines to the textual, contextual or object and purpose schools of interpretation?
- What interpretive schools/theories of interpretation should take precedence when the Court carries out its interpretive task?

Providing answers to these questions will aid the completion of the second task of this chapter which is to examine the links between the margin of appreciation and living instrument doctrines with the theories of interpretation reflected in the international rules of treaty interpretation. This in turn contributes to answering RQ 3 (interpretive and theoretical approaches).

---

[122] Ibid.
[123] E.g. *Johnston and others v Ireland* App no 9697/82 (ECtHR, 18 December 1986).
[124] Indeed, the Court has adopted the systematic approach it utilised in *Golder* to several other cases: e.g. *Johnston* (n 123)
[125] The Court has reinforced this distinction in the weight accorded to Articles 31 and 32 in other cases. See *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001).

3.5 Interaction between the Margin of Appreciation and Living Instrument Doctrines and the Rules of Interpretation in the VCLT

The three elements: the text,[126] the context[127] and the object and purpose[128] have been applied by the Court whilst interpreting the provisions of the Convention.[129] The Court therefore adopts the overall approach from the VCLT that a treaty should be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[130] Letsas points out that beyond *Golder*, Articles 31-33 of the VCLT have only been referred to by the Court in very few cases and that the VCLT has therefore played a 'minor role in the interpretation of the Convention.[131] Whilst it is agreed that the Court has not expressly mentioned the VCLT in every case, it is argued here that it has actually had a more significant impact from the perspective that it has provided the foundational framework from which the Court has carried out its interpretive task. The Court has repeatedly reiterated that interpretation of the Convention must be based on the rules set out in Articles 31 and 32 of the VCLT.[132] This confirms that even where it may not expressly refer to those rules, they underpin the interpretation of the Convention as a whole.

In line with the understanding that Article 31 VCLT is not an exhaustive codification of the rules of interpretation of international treaties,[133] the Court has gone beyond the provisions of Article 31 and created other rules of interpretation.[134] Some of these tools created by the Court include: the living instrument doctrine,[135] the principle of proportionality[136], the fourth instance doctrine,[137] the principle of effective interpretation[138]

---

[126] *Lithgow and others v United Kingdom* App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81 and 9405/81 (ECtHR, 8 July 1986).
[127] See *Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium* (*Belgian Linguistic Cases*) App nos 1474/62; 1677/62; 1691/62 and 1769/63 (ECtHR, 23 July 1968); *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980).
[128] *Golder* (n 31).
[129] These have been applied by the Court systematically within the same case.
[130] Article 31 (1) VCLT.
[131] Letsas (n 35) 513.
[132] *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008), para 4.
Mamatkulov and Askarov v Turkey App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005), para 111; *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR, 21 November 2001), para 55.
[133] See 3.2 for an analysis on the scope of the rules of interpretation contained in the VCLT.
[134] The legitimacy of this has already been addressed in 3.2 which shows that Articles 31-33 are not an exhaustive list of all the interpretive principles that could be applied by an international court.
[135] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).
[136] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) where the Court determines that the right of an individual has been infringed, proportionality is a test applied by the Court to determine whether such interference by the member State is justified.
[137] *Garcia Ruiz v Spain* App no 30544/96 (ECtHR, 21 January 1999).
[138] *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

the margin of appreciation doctrine,[139] and the principle of autonomous concepts.[140] The particular focus of this thesis is on the margin of appreciation and living instrument doctrines and the relevant question here is that, in the light of the understanding that the rules of interpretation in Article 31 of the VCLT are relevant to the interpretation of the ECHR as a whole, is there a link between them the margin of appreciation and living instrument doctrines and those rules of interpretation in Articles 31 and 32 (RQ 1 relationship; RQ 3 interpretive and theoretical approaches)? In direct terms, how do the margin of appreciation and living instrument doctrines relate to the text, the context and the object and purpose?

3.5.1 Interaction with The Textual School

The textual school of interpretation requires that weight be given to the ordinary meaning of words. Its focus is on ascertaining the intention of the parties as revealed in the text of the treaty. As already seen in *Golder*, the ECtHR has endorsed the textual approach by identifying the ordinary meaning of the terms used in provisions of the ECHR.[141] This same approach has been applied in other cases.[142] In *Johnston v Ireland*,[143] one of the questions at issue 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 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'.[144] The Court went on to find that Article 12 was inapplicable in this particular case because it did not grant a right to divorce.

---

[139] *Greece v United Kingdom* App no 176/56 (Commission Decision, 26 September 1958).
[140] *Engel and others v The Netherlands* App nos 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72 (ECtHR, 8 June 1976. The principle of autonomous concepts implies that the terms used in the Convention are given a separate meaning and do not necessarily have the same meaning as that used within the domestic jurisdiction. For more on the interpretative approaches adopted by the Court, see D J Harris *et al*, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 5-17.
[141] In *Golder* (n 31) para 36, it referred to the ordinary meaning of the terms in Article 6 ECHR.
[142] In *Case of Lithgow and others* (n 126), para 114 the Court did not accept a wide reading of the phrase 'the general principles of international law' in Article 1 of Protocol No 1. It was of the view that 'the words of a treaty should be understood to have their ordinary meaning…and to interpret the phrase in question as extending the general principles of international law beyond their normal sphere of applicability is less consistent with the ordinary meaning of the terms used'.
[143] *Johnston* (n 123) para 51.
[144] Ibid paras 51-2.

The ECtHR has not given primacy to the textual approach. It has rejected the approach that 'legal interpretation is an inquiry into the linguistic meaning of words'.[145] It has used the textual approach as a starting point for its reasoning rather than as a decisive point. The textuality argument is 'either presented as decisive or secondary depending on whether it can be supported by other considerations based on the "spirit" of the Convention and not its "letter"'.[146] The Court does not hesitate to jettison the textuality argument if it is contradicted by an overriding principle based on the general proposition that fundamental individual rights should be protected.[147] The textual school is therefore made subject to the object and purpose school. This was clearly displayed in *Golder* where the Court resorted to an examination of the object and purpose of the Convention to come to decision that Article 6 included the right of access to Court.[148]

The Court's rejection of the textual approach in which weight is given to the ordinary meaning of words is also seen in its use of autonomous concepts. This arises in instances where the Court has gone beyond the ordinary meaning of terms and given them a special meaning. The allocation of special meanings can be underpinned by reference to Article 31(4) of the VCLT, which allows for parties to give special meaning to terms. These terms given special meanings by the Court are referred to as autonomous concepts and the process of giving special meanings to terms is referred to as autonomous interpretation.[149] The Court set out its rationale for autonomous interpretation in *Engel and others v The Netherlands* in which it decided that the concept of criminal charge was autonomous.[150] It is difficult to detach the meanings of terms completely from the national context. Indeed, national laws become a reference point for understanding what a concept means. Herein lies the potential for interaction with the margin of appreciation doctrine which gives room to national authorities to interpret and apply the provisions of the Convention. Where the Court allocates an autonomous meaning it takes away the allowance the national authorities have and places the responsibility on the Court. The limits of autonomous interpretation therefore remain an interesting issue to consider in ascertaining the scope of the margin of appreciation afforded to States. The exploration of the relationship between autonomous interpretation and the margin of appreciation doctrine is however is however outside of the scope of this thesis so

[145] Letsas (n 35).
[146] Ost (n 107) 288.
[147] Ibid 288-9.
[148] *Golder* (n 31).
[149] Merrills, *The Development of International Law by the European Convention of Human Rights* (n 106) 71.
[150] *Engel and others* (n 140) para 8.1.

will not be considered further here since this research is focused on the interaction between the margin of appreciation and living instrument doctrine.

Autonomous interpretation also interacts with the living instrument doctrine. One of the criticisms against autonomous interpretation is that it ventures into legislation. This criticism is directed at the use of autonomous concepts to 'widen' the protection offered under the Convention. In his dissenting judgement in *König v Germany*, Judge Matscher disagreed with the Court's wide autonomous interpretation of 'civil rights and obligations' he suggested that the Court's wide interpretation of the phrase might be regarded as going beyond autonomous interpretation and 'venturing into the field of legislative policy'[151] Merrills agrees that autonomous interpretation is a kind of judicial legislation and has gone further to call for a decision as to how far the Court will go.[152] The ability of autonomous interpretation to 'expand' the Convention's guarantees is very similar to the living instrument doctrine. The two doctrines have been criticised for offering increased protection of rights beyond what may have been expressly provided for in the Convention.[153] It is also worth pointing out that, in some cases, relying on an autonomous interpretation can lead to a restriction of the protection afforded by the Convention.[154] Further consideration of the interaction between autonomous interpretation and the living instrument doctrine will however not be explored further here since the focus of this thesis is on the interaction between the margin of appreciation and living instrument doctrines.

The Court's approach to the use of the textual approach gives room for the living instrument doctrine as it is possible for the court to be persuaded by arguments that show an evolution in the understanding of a concept as a result of its desire to ensure the protection of human rights. The use of the living instrument doctrine by the Court usually involves a rejection of the textual approach which focuses on the ordinary meaning of the words used in the relevant treaty. The living instrument approach involves consideration of changes that may have occurred that may challenge the ordinary meaning in the text. The textual school is still relevant to the interpretation of the ECHR as a starting point for further analysis rather than as a determining factor.

---

[151] *König v Germany* App no 6232/73 (ECtHR, 28 June 1978) Separate Opinion of Judge Matscher.
[152] Merrills, *The Development of International Law by the European Court of Human Rights* (n 106) 72.
[153] Letsas points out that the use of autonomous meaning 'is directly linked to the idea that the Convention concepts should not be interpreted in a Conventionalist way' Letsas (n 35) 527.
[154] E.g. In *James and others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986) the Court, rejected the argument that it should interpret strictly Article 1 of Protocol No1 which permits deprivation of possessions 'in the public interest' on the ground that the corresponding phrase in the French text had a narrow meaning in some domestic systems. Instead it decided that the terms should be interpreted autonomously and in the wider sense in the light of the English text and other factors.

3.5.2 Interaction with The Contextual/Intentionalist

Article 31(1) of the VCLT requires that a provision be read in its context. The reading of a treaty in context reflects the intentionalist school which focuses on the intention of the parties as revealed from a variety of sources including the preparatory documents. This means a 'systematic interpretation' should be adopted in the interpretation of treaties.[155] In interpreting the ECHR, the Court reads the text in context, with the understanding that the Convention should be read as a whole.[156] The ECtHR uses the textual approach as a starting point for its reasoning.[157] The context becomes a supporting or negating factor to the ordinary meaning of the term. The focus of the Court's interpretation is on "spirit" of the Convention and not its "letter"'.[158] The 'spirit' of the Convention may be found in understanding its context.

The issue that arises is what determines the context? By virtue of Article 31(2) of the VCLT, the context of a treaty for the purpose of interpretation comprises the text including its Preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty[159] and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[160] The implication of this provision is that there are a wide range of documents that can be resorted to in order to understand the context and by implication the 'spirit' of a treaty. The unifying factor between the different items identified by the VCLT is that they all relate to the intention of the parties as they are agreements made in the past by the parties in relation to the treaties. The documents highlighted therefore reflect the intentionalist school which gives primacy to the intention of the parties as revealed in a variety of documents including preparatory works

The ECtHR has also resorted to the Preamble of the ECHR in order to inform context, but it has done this in a way that favours a teleological rather than an intentionalist approach. The statement in the Preamble of the ECHR that the Convention is taking the 'first steps' in the bid to ensure the collective guarantee of certain rights guaranteed in the Universal Declaration on Human Rights is relied upon by the Court in informing context. The question that arises in this regard is whether this expression in the Preamble of the Convention should

[155] Ost (n 107) 290.
[156] See *Belgian Linguistic Cases* (127).
[157] This was seen in *Golder* (n 31) case analysed in section 3.4.
[158] Ost (n 107) 288.
[159] Article 31(2)(a).
[160] Article 31(2)(b).

be given a restrictive interpretation on the basis that the treaty has been worded in that way because it reflects a 'historical "maximum" beyond which any doubt should be interpreted in favour of States'.[161] Or should it be seen as a first step, which will ultimately lead to other steps so the general rule in interpreting the Convention should be one, which gives full effect to the protection of rights? Support for the latter approach may be seen in the Preamble itself, which also refers to 'development' of human rights as well as their protection. Also, the Preamble of the Statute of the Council of Europe, the parent body for the Convention refers to the wish to establish progressively the ideal of freedom and the rule of law.[162] Whilst Fitzmaurice favours the former approach of restrictive interpretation, the Court more frequently chooses the latter approach, which favours a more progressive interpretation of the Convention. The Court has therefore adopted an approach to viewing the Preamble that is also ties in with the idea of evolutive interpretation.

The Court's approach to what can be used to inform context is also wider that of the VCLT. The overarching view of the Court in relation to what informs context when interpreting the Convention may be summed up in its statement in *Saadi* v *United Kingdom* where it stated that:

> Under the Vienna Convention on the Law of Treaties, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn… The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions…The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties… Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable…[163]

[161] Ost (n 107) 293.
[162] Preamble to the Statute of the Council of Europe. Available at < http://assembly.coe.int/nw/xml/RoP/Statut_CE_2015-EN.pdf> accessed 3 August 2018.
[163] *Saadi* (n 132) para 62.

The above statement clearly shows that in reading a provision in context, the Court does not give primacy to the intentionalist school as reflected in Article 31(2) VCLT. The Court rather gives primacy to the following as informing the context of the ECHR:

- The nature of the ECHR as a treaty for the effective protection of individual human rights
- The reading of the Convention as a whole in a way that promotes internal consistency and harmony between the various provisions of the Convention

The ECtHR also takes into consideration relevant rules and principles of international law as provided under Article 31(3)(c) VCLT. It relegates preparatory works such as the *travaux* to supplementary rules to be used only in cases of a need to confirm meanings or where there is ambiguity or absurdity, rather than being used as documents to inform the context. They do not have a decisive role. The Court's view of 'context' is therefore different to what intentionalists would consider as 'context' because the focus is not on the intention of the parties but rather on the nature of the treaty being interpreted.

The special nature of the Convention as a treaty for the effective protection of human rights has been repeatedly referred to by the Court in determining the meaning of words when read in their context.[164] This approach to context links in with the use of the living instrument doctrine as the Court refers back to effective protection of the rights contained in the Convention as a reason for adopting an evolutive interpretation.[165] In *Bayatyan v Armenia* the Court stated:

> The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today …Since it is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved…[166]

The reading of the Convention as a whole has also influenced the determination of the context for various cases. In *Belgian Linguistic*, the Court stated that 'the provisions of

[164] *Golder* (n 31).
[165] *Vallianatos and others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013); *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011), para 102.
[166] *Bayatyan* (n 165).

the Convention and its Protocols must be examined as a whole'.[167] One way of doing this is that it interprets a provision by also reading and considering other provisions of the Convention and its Protocol.[168] In other instances, the Court has determined the context of a particular provision by relying on a reading of the full provision of the article in question. This approach was adopted in *Johnston* where the Court found that a full reading of Article 12 showed that the right to marry was subject to national laws.[169] Reading the Convention as a whole in *Johnston*, led to a rejection of the argument for the application of the living instrument doctrine in determining the meaning of the provision of a right to marry. Where the provision itself has several paragraphs, the Court in some cases has examined the different paragraphs of the same article in order to determine the context of the provision.[170]

Difficulty arises in the reading of the Convention 'as a whole' in cases where the Court takes into consideration the Protocols of the Convention that have not been ratified by the respondent State. In such a case whilst the applicant would be seeking to find an article within the Convention itself and argue that that article in conjunction with the Protocol covers the issue, the respondent on the other hand would be arguing that the matter is solely covered by the Protocol and they are therefore not bound by it. For example, in *Guzzardi v Italy* the question was the relationship between Article 5(1), which guarantees the right to liberty, and Article 2(1) of Protocol No 4 that guarantees freedom of movement. Italy, the respondent State, had not ratified Protocol No 4 the case therefore hinged on whether there had been a violation of Article 5(1).[171] In that case, the Court came to the conclusion that although to constitute an infringement of Article 5(1) there must be something over and above a mere restriction on liberty of movement, in this particular case, taken cumulatively and in combination with the circumstances of the applicant's confinement were indeed such as to deprive him of his right to liberty. The Court concluded that the deprivation of liberty could not be justified and was therefore a breach of Article 5(1). Sir Fitzmaurice disagreed with this position stating that:

[167] *Belgian Linguistic Cases* (n 127) para 30.
[168] This was the approach it adopted in the *Belgian Linguistic Cases* (n 127).
[169] *Johnston* (n 123) para 52; In *X v United Kingdom* App no 442/72 (ECtHR, 5 November 1981), the Court advocated for Article 5 should be read as a whole it was of the view that there is no reason to believe that for one and the same deprecation of freedom the word lawfulness changes meaning from s1(c) to s4.
[170] Example in *Van Der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 19 in relation to Article 4.
[171] *Guzzardi* (n 127).

> If Article 5 (art. 5) of the Convention were to be interpreted so widely as to include instances of what was basically restriction on freedom of movement or choice of residence, then not only would Article 2 of the Protocol (P4-2) be rendered otiose, but an indirect means would be afforded of making Governments subject to the obligations of the latter, despite the fact that they had not ratified the Protocol. This could not have been intended, but it is a possibility that can only be avoided by a strict interpretation of Article 5 (art. 5) that confines it to its proper sphere.[172]

Fitzmaurice's dissent highlights the issue with considering Protocols of the Convention that have not been ratified by the State party since it is a fundamental principle of treaty law that a treaty only binds the parties to it and would only create obligations for third parties in specific situations.[173] The Court however in *Guzzardi* restricted its decision to consideration of the State's obligation under Article 5(1) rather than strictly under Article 2(1) of Protocol No 4.

In addition to the context, the Court has endorsed the reliance on relevant rules and principles of law. To this end, the Court has referred to other international and regional human rights treaties and international law instruments.[174] This is in line with Article 31(3)(c) VCLT which allows the courts to take into consideration 'any relevant rules of international law applicable in the relations between the parties'. From his analysis of the case law of the Court, Letsas argues that the Vienna Convention is mainly invoked by the Court when it takes into consideration other international treaties or general principles of international law.[175] The idea is that the ECHR is only a part of international law therefore in interpreting it, consideration should be given to other parts of international law so that it is not interpreted in a vacuum. In *Demir and Baykara v Turkey*, the Court noted that:

> [I]n defining the meaning of terms and notions in the text of the Convention, it can and must take into account elements of international law other than the

[172] *Guzzardi* (n 127) Dissenting Opinion of Sir Gerald Fitzmaurice para 6(c).
[173] Articles 26, 34-36 VCLT.
[174] In *Sorensen and Ramussen v Denmark* App nos 52562/99 and 52620/99 (ECtHR, 11 January 2006) it referred to the European Social Charter; in *Al Adsani* (n 132) it referred to an international treaty, The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984.
[175] Letsas (n 35) 521.

> Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.[176]

The living instrument and margin of appreciation doctrines interact with the issue of context where the Court refers to other international Conventions and instruments or general principles of law as evidence of subsequent agreement or practice. The Court has referred to the Convention being a 'living instrument' in several cases where it has referred to other international treaties in order to give content to an ECHR right.[177] This in turn has affected the margin of appreciation given to States in such cases as the Court has decided the cases taking into consideration developments in international law in order to determine the meaning of the right in question. Reliance on these rules of international law are, however, geared towards the overall purpose of the interpretation of the Convention in the context of it being a treaty for the protection of human rights.

The nature of the Convention as a system to protect individual rights underpins the interaction between the issue of context and the use of the living instrument doctrine. Context for the Court is not an inquiry into the intention of the drafters at the time of the creation of the treaty in 1950, but rather an understanding of the nature of the Convention itself and the mechanism created for enforcing it. As Professor Soerensen, a previous President of the European Commission and then judge of the Court has stated,

> [I]he 'original meaning of the terms as evidenced by the preparatory works and the circumstances of the conclusion of the Convention, according to the logic of Article 31 of the Vienna Convention, should not overrule the meaning which results years later from the change in mentalities and practices'.[178]

He was in essence endorsing a subjugation of the intentionalist argument to a different consideration such as the nature of the treaty in question. The living instrument

---

[176] *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 146. More recently, the Court has expressed a similar view on the importance of subsequent agreement, subsequent practice and any other relevant rules of international law in interpreting the ECHR in *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014), paras 100-102.

[177] E.g. *Demir and Baykara* (n 176) para 146; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 277.

[178] M Sorensen, 'Do the Rights Set Forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975?' Report Presented by Max Sorensen to the 4th International Colloquy about the European Convention on Human Rights, 5-8 November 1975 as quoted in Ost (n 107) 302.

doctrine 'flies in the face' of the intentionalist school where the intention of the drafters at the time of drafting is given greater weight.

In distinction to the use of textual interpretation alone, when the Court examines the text in its context – systematically, this is usually a decisive element. However, this is usually the case when this systematic interpretation is combined with a consideration of the object and purpose of the ECHR.[179] The use of the object and purpose/teleological interpretation is therefore given a higher weight than a reliance on the intentions of the parties either as revealed by the text or by the context of the drafting. The next section discusses the object and purpose approach.

3.5.3 Interaction with The Object and Purpose/Teleological School

Interpreting the text of the Convention in context often goes in tandem with teleological interpretation, which seeks to promote the object and purpose of the Convention. The focus of teleological interpretation is on the aims that the treaty seeks to achieve rather than on the intention on the drafters of the treaty.[180] The main object and purpose of the ECHR in the words of the Court is to be 'an instrument for the protection of individual human beings.'[181] The Court sees itself as the mechanism to ensure the effective realisation of that goal. In *Belgian Linguistic* it stated that:

> The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter. [182]

[179] Ost (n 107) 291.
[180] As seen in 3.5.2, the nature of the Convention has also been relied by the Court when dealing with the context.
[181] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 87.
[182] *Belgian Linguistic Case*s (n 127) Section B para 5.

The Court has favoured the teleological school more than the textual or intention of the parties' school. The case law of the Court shows that it has relied on the object and purpose rule to either confirm the meaning already arrived at through a literal interpretation[183] or in some cases it can override the literal interpretation and lead to another meaning.[184] It has directly relied on the object and purpose of the Convention in order to give content to an ECHR right.[185] In such cases this has usually led to an interpretation that expands the content of the rights, hence an 'evolutive' interpretation. The reliance on the object and purpose is therefore one area where the living instrument doctrine is upheld in the case law of the Court and where the margin of appreciation doctrine is curtailed.

Whilst the overall object and purpose of the Convention is the protection of individual rights, in particular cases, how should this object and purpose be determined? Should it be the object and purpose of the particular article in question or the object and purpose of the entire Convention including its Preamble and Protocols? The VCLT does not make any express recommendations on this point. The case law of the ECtHR shows that the Court has adopted both approaches to ascertaining the object and purpose. In *Golder*, the Court referred to the object and purpose of the Convention as a whole as revealed in its Preamble when coming to the conclusion that in accordance with the rule of law and democracy, the right to fair trial in Article 6 included a right of access to Court.[186] In *Johnston*, the Court adopted the second approach and focused on the object and purpose of Article 12 itself when it came to the conclusion that the right to divorce could not be derived from Article 12 which provides for the right to marry.[187] In *Johnston* the Court referred to the *travaux*, which expressly stated that the contracting States did not intend to guarantee the right to dissolution of marriage within Article 12 but rather only a right to marry.[188] The Court therefore adopts both the approach of considering the purpose of the Convention as a

[183] E.g. *Lawless* (n 109); *Johnston* (n 123) (here the objective and purpose of Article 12 were taken from the preparatory texts and were used to confirm the conclusion that Article 12 guaranteed a right to marry but not a right to dissolution of marriage.
[184]In *Pretto and others v Italy* App no 7984/77(ECtHR, 8 December 1983) and *Sutter v Switzerland* App no 8209/78 (ECtHR, 22 February 1984) it was decided that the object and purpose of Article 6 did not require judgment to be delivered in public in spite of the text itself as long as the public nature is guaranteed by some other means (this majority view in this case may be contrasted with the dissenting opinion of Judge Ganschof van der Meersch in the Sutter case, in which he suggests that a restrictive interpretation of a right protected by the Convention is not in accordance with its objective and purpose)
[185] For example, *Golder* (n 31).
[186] Ibid.
[187] *Johnston* (n 123).
[188] *Johnston* (n 123) para 52.

whole and the more narrow purpose of a particular article of the Convention when applying the consideration of the object and purpose in a particular case.

The object and purpose school interact with the interpretation of the Convention as a living instrument. The link exists in the debate on the issue of time. Is the object and purpose of the Convention rooted in the past and therefore static or are they abstract aims that could change and progress? In other words, should its aims be considered in the light of the past or the future? If it is considered in the light of the past, then the focus will be on the intention of the parties at the time the Convention was drafted which could be gleaned from materials such as the *travaux*. If it is considered in the light of the future, then the objective is being looked at as more of an abstract idea, which has been presented at the time of the drafting of the Convention, but one that is capable of changing in the future. The two views here can be distilled into historical and future. Once again, the VCLT does not expressly suggest any approach to be taken on this issue and both approaches could sit within the Vienna Convention framework.

The ECtHR has adopted the future approach rather than the historical approach even in the midst of strong dissenting views by some of the judges. The dissenting view of Sir Gerald Fitzmaurice in *Syndicat National De la Police Belge*, reflects the historical approach. He stated in that case that:

> The objectives of a treaty do not exist in the abstract: they derive from the intention of the parties as expressed in the terms of the treaty or as evidenced by them and are closely related to them as they are their only source (…) They (the intentions of the parties) cannot be introduced afterwards in the guise of objectives which were not contemplated at the time.[189]

The ECtHR did not adopt Fitzmaurice's historical approach in this case and has continued to favour an evolutive interpretation which is in line with the futuristic approach. It sees the purpose and aims as objectives to be attained which means that they can be perfected and extended.[190] The Court usually sees the terms of the treaty as the starting point rather than the final expression of the aims to be achieved by the Contracting States. The textual approach is therefore subjugated to the consideration of the object and purpose of the

[189] *Affaire Syndicat National de La Police Belge* (ECtHR, 27 October 1975), Dissenting Opinion of Sir Gerald Fitzmaurice, para 33.
[190] Ost (n 107) 292.

treaty itself. This approach to the object and purpose aligns with the living instrument doctrine in which the Convention is interpreted in the light of present-day circumstances. In doing this, the Court takes into consideration the change in ideas within the democratic members of the Council of Europe.[191] The Court does not however require explicit consensus in the member States before it adopts an evolutive interpretation.[192] Letsas argues that the Court rather adopts a moral reading of the Convention by seeking to ascertain the moral value the particular ECHR right serves and the arguments that best support it rather than the arguments that are favoured by the majority.[193] This lack of focus on explicit consensus has not been without criticism as critics see the Court as sometimes preceding the change of ideas within the democratic members of the Council of Europe.[194] Whilst that may be debatable, the key issue is that the historic approach is not favoured by the Court, rather the object and purpose is relied upon to ensure an interpretation in line with present day circumstances, which reflects the living instrument doctrine.

The result of the way in which the Court sees the aim and purpose of the Convention leads it to a wide interpretation of the rights that are to be protected or at least a rejection of a narrow construction of those rights.[195] As a result of this wide interpretation of the rights, the Courts adopt a narrow interpretation of reservations made by States to provisions of the Convention. In *Airey v Ireland*, the Irish Government sought to justify its omission to provide free assistance of a lawyer in a civil proceeding for a petition for judicial separation on the grounds, a fortiori that it had made a reservation to Article 6(3), which provides for free assistance in criminal cases.[196] The Court in that case gave a narrow interpretation to the reservation and held that a reservation to Article 6(3) did not have any influence on the interpretation of Article 6(1). It held that the applicant had been denied an effective right of access to the Court under Article 6(1).

[191] Ibid 302.
[192] Letsas (n 35) 528-9.
[193] Ibid.
[194] See Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534; It has been argued that this is what happened in *Hirst v United Kingdom* App no 74025/01 (ECtHR, 6 October 2005).
[195] Ost (n 107) 293. This may be seen in cases such as *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970). In that case the Court had to decide whether the "cassation" procedure fell outside the scope of Article 6, as submitted by the Belgian Government. The Court rejected such a formal view on the grounds that good administration of justice had such an important place in democratic societies that a narrow construction of Article 6 § 1 was out of tune with the aim and purpose of that provision.
[196] *Airey* (n 138).

A related implication of a wide interpretation of the rights protected is that the Court adopts a narrow interpretation of the limitations placed on the rights by contracting States.[197] This brings into view the margin of appreciation doctrine of the Court in which the Court affords room for manoeuvre to States before determining that a restriction on Convention rights breaches the obligation of the State. The margin of appreciation doctrine recognises that the rights in the Convention can be limited but the policing of the margin allowed to the State is affected by the wide interpretation of the rights. The use of the margin of appreciation is an expression of another object of the Convention, which is that it functions as a subsidiary system with the States having the primary role of interpreting and applying its provisions. The problem arises where there is a conflict of results that could be achieved if either of the objects and purposes were pursued. In other words, what would happen when the object and purpose of protecting individual rights which necessitates evolutive interpretation, would lead to a result that is at variance with the other purpose of the Convention, which is that it is a subsidiary system which should allow States the primary role of interpreting? There is still a gap in the analysis of the case law (RQ 2) of the Court on this point and this is the gap this thesis seeks to fill.

The teleological school is preferred by the Court and this is reflected in its case law. The Court would override a literal interpretation if it conflicts with an interpretation that is in line with the object and purpose of the Convention. The next section considers the place of supplementary rules of interpretation such as the *travaux* in the Court's interpretive rules.

3.5.4 Interaction with the Supplementary Means of Interpretation

Article 32 of the VCLT makes provision for the use of supplementary means of interpretation. The recourse to preparatory documents is one of such means of interpretation. The use of supplementary means of interpretation is linked to the three theories of interpretation and is not a standalone rule of interpretation. It is linked to the textual, context and object and purpose schools as it may be used to confirm the meaning arrived at after according a provision its ordinary meaning and reading it in context and in the light of its object and purpose.[198] The *travaux* could have a determinative effect where the result of interpretation arrived at after using the text, context, and object and purpose is manifestly

[197] E.g. *Engel and others* (n 140) (Article 5 § 1); *Klass and others v Germany* App no 5029/71 (ECtHR, 6 September 1978).
[198] This is as provided for in Article 31(1) VCLT.

absurd or unreasonable.[199] The overall approach of the Court is that preparatory documents play a very marginal role in the interpretation of the ECHR. The documents reveal the intention of the parties but as previously discussed, the Court does not favour the intentionalist school in most of its decisions but rather places emphasis on an interpretation that would promote the protection of individual rights.

From its early case law in which it referred to the rules of interpretation in the VCLT, the Court showed its approach to the use of the *travaux* and their secondary place in the interpretation of the rights in the ECHR. In *Golder* it came to the conclusion that the meaning arrived at as a result of the application of Article 31 was clear and it therefore did not need to resort to the preparatory documents at all.[200] It did not therefore seek to use the preparatory documents for their functions of either 'confirmation' or 'determination' as provided for in Article 32.[201] This showed a clear statement of the path the Court was to adopt in relation to the *travaux.* The Court's distinct approach to the *travaux* is also seen in cases where the meaning arrived at by the ECtHR after applying Article 31 is clear in the Court's view but is contradicted by the preparatory documents. In such cases the Court has disregarded the preparatory documents even though they clearly indicate the intention of the Contracting States.

In *Young, James and Webster v United Kingdom,* the applicants were former employees of the British Railways Board ("British Rail"). In 1975, a "closed shop" agreement was concluded between British Rail and three trade unions, providing that thenceforth membership of one of those unions was a condition of employment. The applicants did not satisfy this condition and were dismissed in 1976. They alleged that the treatment to which they had been subjected gave rise to violations of their rights under the Convention. [202] In that case, the Court refused to rely on the *travaux,* which had indicated that the right not to be compelled to join a trade union had been excluded from the text of the Convention. The Court was of the view that the ordinary meaning of the right contained in Article 11 of freedom of join a trade union must necessarily include some freedom on how to exercise the right which would include a freedom not to join a trade union. Here the applicant had alleged that the closed shop legislation in the UK, which provided that only union labour could be employed violated their rights. The Court found that there had been a violation of their rights

[199] Article 32 VCLT.
[200] *Golder* (n 31).
[201] The functions of the *travaux* have previously been examined in section 3.4.4.
[202] *Young, James and Webster v United Kingdom* App nos 7601/76; 7806/77 (ECtHR, 13 August 1981). In particular, they relied on Articles 9,10,11 and 13 of the ECHR.

under Article 11. This shows that the Court is not aligning itself with the intention of the parties' school but rather seeks to ensure effective protection of the rights guaranteed within the Convention. It will therefore ignore the *travaux* if resorting to them would give a narrow interpretation to the right.

Although the above analysis shows the Court using the *travaux* in ways not necessarily expressed in Article 32 VCLT, the Court has also in some cases used the *travaux f*or its functions of 'confirmation' and 'determination'. In *Johnston*, the Court referred to supplementary rules of interpretation to confirm the interpretation it had arrived at that the right to divorce could not be derived from Article 12 which provides for the right to marry.[203] Situations in which the *travaux* have been used in a decisive manner to determine the content of a provision because the meaning elucidated from the text is still controversial are extremely rare in the Court's case law.[204] In his comprehensive analysis of the case law of the Court, Ost found only one case that 'resembled that hypothesis'.[205] The *travaux* are therefore secondary in the Court's methodology and this goes beyond what is expected in Article 32 of the VCLT.

The supplementary role of the preparatory documents is aligned to the living instrument doctrine. This is because the living instrument doctrine, which involves evolutive interpretation, requires that the manifestations of the intention of the Contracting States at the time of drafting are not of decisive importance'[206] Judge Kutscher in his analysis of the case law of the Court of Justice of the European Communities came to the conclusion that: 'An interpretation based on the situation at the time of inception is totally ill-adapted to community law which looks to the future'.[207] Decision-making that moves beyond the intention of the drafters would give room for interpretation that is not just aligned to changes in society but rather to giving full effect to the Convention's rights. It can be seen that dissenting opinions in cases that have put forward more restrictive definitions often do so by recourse to the preparatory documents'.[208]

---

[203] *Johnston* (n 123).
[204] Ost (n 107) 290.
[205] *James and others* (n 154) para 38.
[206] Ost (n 107) 290.
[207] H Kutscher, in Reports of the Judicial Academic Conference 27-28 September 1976, Publications of the Court of Justice of the European Communities, Luxemburg, 1976, 1-22.
[208] Ost (n 107) 290. For example in *Campbell and Cosans v United Kingdom* App nos 7511/76 and 7743/76 (ECtHR, 25 February 1982), para 21, Sir Vincent's dissenting opinion which contradicted the majority opinion, cited not only but also a reserve made by the UK Government on the automatic application of the provision concerned (Art 2 Protocol No 1 and corporal punishment in schools).

The Court's approach to the use of preparatory documents is therefore aligned to the overarching purpose of the protection of individual human rights which requires an interpretation that gives effect to this principle. In doing so, the Court does not focus on the intention of the drafters but rather seeks to adopt an interpretation that will give full protection to the right. The use of supplementary means of interpretation is therefore subsidiary to the object and purpose principle as applied by the Court. As Professor Sorensen a Previous President and then judge of the Court put it: 'original meaning of the terms as evidenced by the preparatory works and the circumstances of the conclusion of the Convention, according to the logic of Article 31 of the Vienna Convention, should not overrule the meaning which results years later from the change in mentalities and practices'.[209] The living instrument doctrine 'flies in the face' of the subjective approach to interpretation where the intention of the drafters is considered. It is therefore more aligned to the teleological school where the words are given their ordinary meaning in their context and the in the light of their object and purpose.

3.6 Conclusion

The purpose of this chapter was to provide some underpinning for the margin of appreciation and living instrument doctrines from the theories for interpretation of treaties to avoid them appearing as 'giants on stilts' within this thesis. To achieve this purpose involved two key tasks. First, an examination of the legitimacy in international law of the creation of the margin of appreciation and living instrument doctrines as tools of interpretation by the Court. Second, an examination of the links between the margin of appreciation and living instrument doctrines with the theories of interpretation reflected in the international rules on treaty interpretation. The results from the above tasks feed in directly to providing a structure to address RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches).

The VCLT provides the framework in international law for underpinning the margin of appreciation and living instrument doctrines in the jurisprudence of the Court. Articles 31-33 of the Vienna Convention provide for rules of interpretation of treaties. These rules reflect a two-stage process that involves, applying a general rule, and then applying a supplementary rule of interpretation in specific circumstances. The general rule of interpretation in Article 31 is that a treaty should be interpreted in good faith and the terms

[209] Sorensen (n 178) 88-89.

of the treaty should be given their ordinary meaning in their context and in the light of their object and purpose. The preparatory documents are confined to a supplementary means of interpretation in Article 32 and are only useful to either confirm an interpretation arrived at using the general rule of interpretation or to determine a meaning in instances where applying the general rule would lead to a result that is absurd or manifestly unreasonable. The general rule in Article 31(1) reflects the three main schools of treaty interpretation: the textual, intention of parties and teleological school. The VCLT does not necessarily give weight to either of those schools although the practice of the ICJ shows a preference for the textual school.

It is immediately apparent that there is no mention of either the margin of appreciation or the living instrument doctrines the VCLT, therefore, their validity as tools of interpretation of an international treaty could be debated. This chapter has, however, shown that although neither the margin of appreciation nor living instrument doctrines are expressly mentioned within Articles 31-33, an examination of the ILC's commentary on the VCLT and existing literature show that Articles 31-33 are a selective rather than an exhaustive codification of the rules of interpretation. As a result, international Courts have the liberty to apply other principles of interpretation that are relevant to the interpretation of the particular treaty they deal with. The rules of interpretation in Articles 31-32 do not also follow any hierarchy and can be applied in any order. Another significant point is that Articles 31-32 are recognised as customary international law. This makes them relevant even to treaties that were created prior to the VCLT, such as the ECHR. A combination of the understanding that Articles 31-32 are a selective codification and that the rules reflected in those articles are part of customary international law provides the underpinning for the legitimacy of the ECtHR to create new rules of interpretation such as the living instrument and margin of appreciation doctrines which are not expressly mentioned in the VCLT.

The ECtHR in *Golder* confirmed the status of Articles 31-33 of the VCLT as rules of customary international law, which are applicable to the interpretation of the ECHR. In applying these rules, the Court has in some cases adopted a systematic process in which it begins with an identification of the ordinary meaning of the terms of the treaty and then proceeds to consider the context and then the object and purpose. In other cases, it has focused on the object and purpose without resorting to a literal definition of the particular terms. The Court has therefore adapted the application of the rules in the VCLT to suit the interpretation of the ECHR. What is more, the case law also shows that following *Golder*, the Court has not referred much to Article 31 VCLT in interpreting the Convention. *Golder*,

however, clearly shows that the Court recognises the applicability of the VCT rules and as a result, the recognised schools of interpretation of treaties. Nonetheless, *Golder* does not explain if there is any relationship between the margin of appreciation and living instrument doctrines with the rules of interpretation already contained in the VCLT. It also does not provide a definitive answer on which school of interpretation is preferred in the case law of the Court. For this, there has been a need to examine further case law of the Court and existing literature.

The overall approach of the Court reveals a preference for the teleological school of interpretation as the Court has given weight to interpretations that are in accord with the object and purpose of the Convention. The Court would rarely rely on the textual approach alone to decide a case. Rather, the decision arrived at through the textual approach will be either weak or strong depending on whether it is corroborated by other elements such as the context or the object and purpose. The Court's approach to the elements that determine context is beyond those provided for within the VCLT. It interprets context as taking into consideration the special nature of the Convention as a treaty for the protection of the rights of individuals rather than a contractual treaty. This in turn has favoured teleological interpretation.

The tools of interpretation of the Convention by the ECtHR goes beyond the VCLT with the creation of tools such as the margin of appreciation and living instrument doctrines. Links may be seen between these two doctrines and the textual, intention of the parties and the teleological interpretation. The main trend within the Court is a rejection of a textual or intentionalist interpretation based on the *travaux* or perceived intention of the drafters in 1950 It has rather focused on the aim of the Convention to protect individual rights and this necessitates the interpretation of the Convention as a living instrument. Taking into consideration the special nature of the role the Court plays as a subsidiary system for this enforcement of standards there remains a need for the margin of appreciation doctrine to exist side by side with the interpretation of the Convention as a living instrument. The focus of the Court on the teleological school may suggest that, where there is a conflict between an interpretation that is evolutive and one that is more conservative and hinged on the margin of appreciation doctrine, the Court may be more inclined to follow the evolutive interpretation.

The understanding that the nature of the Convention drives the interpretive choices of the Court will be relevant to addressing RQ 3 (interpretive and theoretical approaches) as any framework identified from the case law of the Court and theories of interpretation would

have to be measured against the overarching goal of the Convention to protect individual rights and at the same time remain a subsidiary system of enforcement. This chapter has therefore served as a launch pad for the consideration of the analysis of the case law (RQ 2) which will be done in chapter five. Prior to that analysis, chapter four adds a further layer to the legitimacy of the use of the margin of appreciation and living instrument doctrines through the lens of the theory of the correlativity of rights and duties.

Chapter 4

The Margin of Appreciation and Living Instrument Doctrines Through the Lens of the Correlativity of Rights and Duties Theory

4. Introduction

Chapter three examined the underpinning for the use of the margin of appreciation and living instrument doctrines through the lens of the theories for interpretation of international treaties. It established that the European Convention on Human Rights (ECHR, the Convention), being a treaty itself, is subject to the rules of interpretation contained within Articles 31-33 of the Vienna Convention of the Law of Treaties 1969 (VCLT, Vienna Convention). The customary international law status of Articles 31-33 of the VCLT makes them relevant to the interpretation of the ECHR. These rules of interpretation in the VCLT are not exclusive and there is room for international tribunals to create their own rules of interpretation to supplement the interpretation of the relevant treaty they are charged with interpreting. Chapter three has established that the margin of appreciation and living instrument doctrines are aligned with the three main interpretive schools which are reflected in Article 31 of the VCLT - the textual, context and object and purpose approach. There is therefore legitimacy for the use of these doctrines as tools of interpretation of an international treaty. This gives a foundation for addressing RQ 3 (interpretive and theoretical approaches) which looks at the interpretive approach applied by the European Court of Human Rights (ECtHR, the Court) in dealing with cases where there is a margin of appreciation and living instrument argument.

This chapter adds a further layer to this thesis by examining another theoretical question that may be directed at the use of the margin of appreciation and living instrument doctrines. It looks at the issue of whether these doctrines are relevant to interpretation of human rights treaties as opposed to a generic international law treaty. In other words, the purpose of this chapter is to examine whether there is justification for the use of the living instrument and margin of appreciation doctrines in dealing with cases where there is an allegation of the breach of human rights. Whilst the previous chapter has underpinned their use generically for international treaties, as the VCLT is relevant to all treaties, this chapter seeks to examine whether their use sits in with an understanding of what rights are and when it can be said that a right has been breached. This provides a further layer of analysis before delving into the analysis of the relevant case law of the Court in chapter five.

To deal with the issue, this chapter examines the basic issue of what a right is and the question of the correlativity of rights and duties. It begins with the Hohfeldian analysis of 'claim rights' which shows that at the core of a right is the assigning of a duty. It then goes on to examine the arguments against the correlativity theory, in particular, the arguments that have been made by Joseph Raz in his somewhat 'restricted correlativity' theory which adds a further dimension to the argument on the relationship between rights and duties. The combination of the Hohfeldian analysis of the correlativity of rights and duties and Raz's criticism forms the basis of what this researcher terms 'dynamic restricted correlativity'. Through the lens of dynamic restricted correlativity, this chapter seeks to locate the position of the margin of appreciation and living instrument doctrines as tools for determining the existence of a right and the assigning of the corresponding duty. It takes the position that, when we refer to the use of the margin of appreciation and living instrument doctrines by the Court, we are essentially referring to the determination of whether a right exists and if it does, whether there has been a breach of a duty in that instance. Viewed from the framework of rights and duties, the living instrument doctrine can be seen as a mechanism to attach more duties to States whilst the margin of appreciation could be considered as a tool to restrict the extent of the duties imposed on the State.[1] The outworking of this position may not, however, be a simplistic one of clear divisions between rights and duties and the use of the doctrines. Further examination of the interactions will be conducted in the case law analysis in chapters five and six.

4.1 The Nature of Rights: A Hohfeldian Perspective

To examine a theoretical underpinning for the use of the margin of appreciation doctrine through the lens of a theory of rights, it is necessary to 'peel back the layers' and go to the core of the issue in relation to rights. This entails a brief overview of the nature of rights in general and human rights in particular. The most in-depth analysis of the conceptual nature of rights may be traced back to Wesley Newcomb Hohfeld.[2] Indeed the Hohfeldian analysis is frequently referred to as a starting point for an analysis of rights.[3] A similar path is adopted here, with a focus on the exposition of the correlativity of rights and duties as propounded by Hohfeld.

[1] The Court has been criticised for the use of both doctrines. See chapter 2.
[2] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale LJ 16.
[3] See for example, John Finnis, *Natural Law & Natural Rights* 2nd edn (OUP 2011) 199-205.

Hohfeld provided a conceptual analysis of rights as a whole, not particularly human rights. He was concerned that the imprecise use of legal concepts makes it difficult to bring effective solutions to legal problems.[4] Hohfeld was particularly concerned about the lack of precision in the use of the terms 'rights' and 'duties' in the process of legal analysis. He argued that:

> [O]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from: the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analysing even the most complex legal interests such as trusts, options, escrows, "future" interests, corporate interests, and others.[5]

This lack of precision in the use of the terms described above led to a situation of lack of clarity, what he described as 'chameleon-hued words' which ultimately made it difficult to deal effectively with legal problems.[6] For Hohfeld, this was not an acceptable situation as there was more to law than just rights and duties, and legal rules could only be understood accurately if we identify the most basic legal conceptions and the relations between them. Through the use of examples from the dictum of judges in case law, Hohfeld expounded how the word 'right' is used to also denote among other things, power, immunity, privilege. To further explain this point, he analysed eight jural relations: rights, privilege, power, immunity, no-rights, duty, disability and liability. [7] Flowing from this analysis, Hohfeld identified four different groups of rights: 'claim right', 'power right', 'immunity right' and 'privilege right'.[8] He argued that it is only in one of those contexts that the word relates to a claim, and in a strict sense, a right.[9] Identifying the context in which the word related to a right in the strict sense was important for clarifying the use of the term 'right'.

Ratnapali, whilst discussing Hohfeld's analysis used five practical examples of statements which exemplify the different ways in which Hohfeld identified the word 'right' was used.

---

[4] Hohfeld (n 2) 28-9.
[5] Ibid 28.
[6] Ibid.
[7] Ibid 30.
[8] Ibid.
[9] For an elucidation of some deficiencies with Hohfeld's 'claim right', see Finnis (n 3) 202.

- I have a *right* to be paid my wages under the contract of service.
- I have the *right* to walk in my yard.
- I have a *right* to leave my property to another by will.
- I have a *right* not to be arrested without a warrant.
- I have a *right* to be respected by my colleagues.[10]

Although the word 'right' is used in each of these sentences, the word has a different meaning in each sentence. The first sentence which involves a 'right' to be paid wages in accordance with a contract is an example of what Hohfeld describes as a claim, a right in the strict sense of the word. The second sentence which refers to a right to walk in a person's yard is a privilege or liberty associated with owning or renting a property. The third reference to a right to leave property to a beneficiary by will is a power to bestow rights on others. The right not to be arrested without a warrant is an immunity, whilst the right to respected by one's colleagues amounts to a moral claim, not a legal claim or right.

Hohfeld acknowledged that these distinctions have been present in the law but that they are neglected in some instances by judges and commentators with the result that there is error and confusion of the law. His task was therefore to make the distinction between these different uses of the term 'right' in order to remove the confusion and ensure that only what is actually a right, is treated in that way. Whilst Hohfeld was not the first to realise that these distinctions exist, his analysis has been described by Ratnapali as 'the most accurate and compelling analysis of the fundamental legal conceptions that most clearly expose juristic errors.'[11] Finnis however points out that whilst Hohfeld's analysis covers a wide range of the use of the term 'right' by lawyers, it does not cover all of the uses of the term.[12] This criticism by Finnis notwithstanding, the Hohfeldian analysis provides a good starting point in identifying what may be referred to as rights in the strict sense. What Hohfeld's analysis establishes, is that fundamentally, rights are claims. The difference between 'claim rights' and all other forms of the use of the term rights is that they entail a duty on another. This relationship between claim rights and duties is expressed in the principle of correlativity of rights and duties which will be explored further in the next section.

[10] Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2009) 296.
[11] Ibid.
[12] Finnis (n 3)199-205.

4.1.2 The Correlativity of Rights and Duties

From the initial analysis of what rights in the 'strict sense' of the word means as propounded by Hohfeld, the relevant right in this thesis are the claim rights. The obvious question that arises is: what exactly are claim rights? In answer to this question, rather than adopting a formal definition of rights, Hohfeld presented a scheme of opposites and correlatives. [13] A tabular representation of his analysis is presented below[14]:

Jural Relation	**Jural Correlative**	**Jural Opposite**
Right	Duty	No-right
Privilege (Liberty)	No-right	Duty
Power	Liability	Disability
Immunity	Disability	Liability

For the purposes of this thesis, the jural correlatives are important. In particular since this thesis is focused on rights, this section focuses on right and its correlative which is duty. The other jural relations in the table above are disregarded for the purposes of this thesis. A duty may be described as an obligation to act in a certain way; it is 'that which one ought or ought not to do'.[15] A right is a claim which necessitates a duty. Therefore, when one speaks of a right being invaded, a duty has been violated.[16] In effect, the correlativity of rights and duties means that if A has a right, someone else has a duty to allow A to enjoy that right. From Hohfeld's analysis, duty is the correlative of a right which means that when a right is invaded, a duty is violated.[17] For example, based on the correlativity thesis, 'If X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.[18] Hohfeld was of the view that the word 'claim' was a synonym for the term 'right' in this limited and proper meaning of what a right is.[19] These have become known as 'claim rights'. As Allan points out, 'claim-rights are defined by reference to their correlative duty on the part of another, rather than the actions of the right-holder'.[20] The correlativity of rights and duties in this sense means that a right cannot exist without identification of the specific duty attached to it.

---

[13] Hohfeld was of the view that a formal definition of rights would be 'unsatisfactory, if not altogether useless' – Hohfeld (n 2) 30.
[14] Tabular representation of Hohfeld's analysis adapted from: Hohfeld (n 2) 30.
[15] *Lake Shore & M.S.R.Co v Kurtz* (1894) 10 Ind. App., 60; 37 N.E., 303,304.
[16] Hohfeld (n 2) 32.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] This is in keeping with the interest theory of rights. Paul Allam, 'A Conception of Rights' (2011) 17 UCL Jurisprudence Rev 19,26. Cf with 'Liberties' which Allan describes as being characterised by focus on the actions of the rights holder as opposed to claim rights that are grounded in the correlative duty.

A right in its true sense then, is normative in the sense that someone else has a duty to allow me to enjoy the right to which I have a claim. Allan emphasises the normative nature of a right by describing it as an 'others must' claim.[21] If I have a right to freedom of religion, then others should allow me to practice my religion. If I have a right to freedom of speech, then others should allow me to speak freely. Essentially, a right is linked to a duty. There is a correlation between rights and duties. As Fellemeth put it, 'Rights always implicate duties, because rights justify claims by the right holder to a correlative duty'.[22] A duty is described as an 'I must' claim.[23] A right which creates an 'others must' claim, has an 'I must' correlated duty.[24] The implication of this definition of a claim right as one to which a duty attaches is that it determines when a right exists, thereby making it definitional rather than justificatory.[25] In the context of duties, the duty that arises from the existence of a right could be based on the interest in the right holder or the will of the right holder. The focus within this chapter is on the use of the margin of appreciation and living instrument doctrines as tools to determine the existence of rights and duties rather than justification for whether rights should exist in the abstract sense, hence the discussion here is restricted to the analysis of the correlativity of rights and duties rather than justification for the existence of rights.

Hohfeld's proposition of the correlativity of rights and duties has been welcomed by many and has formed the basis of the understanding of rights. As expressed by Salmond, 'there can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child.'[26] Viewed from the perspective of obligations, 'There can therefore be no duty unless there is someone to whom it is due; there can be no right unless there is someone from whom it is claimed'.[27] Allan's support of the correlativity of rights and duties is seen when he states that 'Wherever there are rights there are correlated duties. You cannot have rights without duties'.[28] Although Allan acknowledges that there might be limited instances where there may be a

[21] James F P Allan, 'The Idea of Human Rights' (2013) 25(1) Bond Law Review 1, 8.
[22] Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* (OUP 2016) 12.
[23] Allan (n 21).
[24] Ibid.
[25] Allam (n 20) 26. Justification for the existence of rights is a different issue which has been subject to two main theoretical positions – the 'interest theory' which focuses on the interest of the right holder on the one hand, and the 'will theory' which focuses on the power of choice of the right holder on the other. See Matthew H Kramer, 'On the Nature of Legal Rights' (2000) 59 Cambridge Law Journal 473. The focus of this section is on the effect of a right, namely the imposition of a duty, hence the debate on the two theoretical justifications for the existence of a right are outside the scope of this thesis.
[26] Glanville Williams, *Salmond on Jurisprudence* (11th edn, Sweet and Maxwell 1957) 264.
[27] Williams (n 26).
[28] Allan (n 21).

duty without a right, such as when one considers a duty not to cut down a 2,000-year-old tree. Although one could claim that they had a duty not to cut down the tree, there could be no corresponding claim from the tree that it had a right not to be cut down.[29]

The essential claim of the correlativity thesis is that where a right exists, there is a duty that necessarily follows the existence of that right. To say that A has a right to X is the same as saying that someone has a duty to secure A in X. This idea of a connection between rights and duties has however not been without criticisms. In the following section some of the criticisms of the correlativity theory are highlighted.

4.1.3 Criticism of the Correlativity of Rights and Duties Thesis

Whilst one view is that rights and duties are correlative, the other view is that rights and duties are not necessarily correlative. Under this school of thought, duties are divided into absolute and relative duties. Relative duties have corresponding rights whilst absolute duties have no rights that correspond to them. [30] For this school of thought, it is important that a right is vested in a determinate person and that it is enforceable by some form of legal process instituted by him. According to this view, duties that are owed towards the public at large or to indeterminate parts of the public do not have any correlative rights. An example would be the duty to refrain from committing a public nuisance as this is not owed to any particular person.[31] When one considers the two schools of thought, it would appear the connecting point is still that there is agreement that in some cases, rights and duties are correlative.

The position that rights and duties are two sides of the same coin, that one could not talk of rights without specifying the duties that they entail, has however been challenged. Whilst conceding that there is a context in which rights may be deemed as correlative to duties, Lyons has argued that 'it is at best misleading to say that all rights "correlate" with duties.[32] Not all rights and duties are correlative as rights relate to obligations in several ways.[33] Saul highlights three key theoretical challenges to the correlativity doctrine.[34] First, that there are duties that may not be owed to any particular claimant.[35] This criticism may

[29] Ibid.
[30] Williams (n 26).
[31] Ibid.
[32] David Lyons, 'The Correlativity of Rights and Duties' (1970) 4(1) Noûs 45.
[33] Lyons (n 32) 50.
[34] Ben Saul, 'In the Shadows of Human Rights: Human Duties, Obligations and Responsibilities' (2001) 32 Columbia Human Rights Law Review 565, 587.
[35] Carl Wellman, *Real Rights* (OUP 1995) 183.

be seen in Hart's assertion that 'the duties imposed by the criminal law are not relative duties, not duties to any determinate second party'.[36] A similar position is taken by Feinberg when he points out that 'duties of status, duties of obedience, and duties of compelling appropriateness are not necessarily correlated with other people's rights'.[37] For example, duties of charity are not owed to any particular object. In this situation, there are duties without any corresponding rights. Second that the duty bearer may not be specified. 'Not all rights are claims against some duty-bearer'.[38] If there is no identifiable duty bearer, then this makes correlativity incomplete.[39] The situation may be that there are multiple duty-bearers or that there are different degrees of responsibility or conditions that need to be satisfied before the obligation can be discharged. Duties may also be owed in general and would therefore not be specifically enforceable.[40] Third, that the 'burden of a particular obligation may be unclear'.[41] This means that it may not be clear what scope of obligations are required. In respect of human rights, is it a negative duty to refrain from interfering with a right or does it entail a positive duty to actively ensure and facilitate the fulfilment of that right? Correlativity therefore requires 'specificity and determinacy'.[42] A further issue with the correlativity thesis which is that there is a great deal of ambiguity that surrounds the implication of specific duties from specified rights. This can be seen in international human rights treaties where duties are usually not expressly stated. In such instances 'implying the content of duties from express rights is subject to arbitrariness of interpretation according to a variety of contextual variables, including culture, social structure, local law and so on'.[43] Saul argues that this is a better state of affairs because 'While there may be uncertainty attached to 'dynamism', it is arguably superior to codification of correlative duties, which may in-flexibly and a-contextually mummify duties'.[44]

Although the correlativity thesis is not without some criticism, there is an agreement that rights entail duties even if there is disagreement on the nature of those duties and the extent to which a duty may exist. There are however questions that are raised by the correlativity

[36] H.L.A. Hart, *Essays on Bentham*: *Jurisprudence and Political Theory* (OUP 1982) 182-186, quoted in Saul (n 34).
[37] Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) 139 quoted in Saul (n 34).
[38] Wellman (n 35)184.
[39] Saul (n 34).
[40] Ibid.
[41] Ibid.
[42] Lyons (n 32) 46.
[43] Saul (n 34).
[44] Saul (n 34) 588.

thesis which have not been answered through the examination of the criticisms above. From a Hohfeldian perspective, a right would only exist when there is a duty that attaches to it. Several questions arise from this position. Is there always a correlative duty to every right? Is there always a corresponding right to every duty? Is there only one duty that attaches to a right or could there be multiple duties? Could the duties that attach to a right evolve over time? Does the right exist first before the duty or should the duty be articulated in order for the right to exist? Whilst it is tempting to critic Hohfeld as formulating a general statement on rights, it is worth noting that he considers that '[I]n its *narrowest sense* the word right is used as the correlative of duty'.[45] Hohfeld therefore acknowledges that this is a limited sense of the use of the word 'right'. The questions highlighted above are, however, pertinent and need further examination. A relevant theory that builds on Hohfeld's formulation and provides an alternative conception of the relationship between rights and duties, is the somewhat 'restricted' correlativity theory of Joseph Raz. This will be examined in the next section.

4.2 Rights as Grounds of Duty

Joseph Raz has formulated one of the most insightful alternatives to the correlativity thesis. In his exposition on the nature of rights, Raz states that 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[46] Within this definition of rights there is emphasis on the interest of the right holder, placing his definition within the well-known 'interest theory' of human rights.[47] From Raz's explanation of the nature of rights, it can be seen that in a similar vein to Hohfeld, Raz does not provide a formal definition of what a right is but rather espouses the circumstances in which a right can be said to exist in relation to a particular person. His definition is, however, more comprehensive as it covers issues of capacity to have rights, the interest to be protected and the basis for the duty. This approach is therefore normative rather than conceptual. For the purposes of this thesis this normative aspect of the definition of rights is relevant as the thesis explores the use of the margin of appreciation and living instrument doctrines in determining the outcomes of cases in which the applicant claims that they have a right that has been

[45] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale LJ 717 (emphasis added).
[46] Joseph Raz, *The Morality of Freedom* (OUP 1986) 166.
[47] The focus of this chapter is however not on the justification of when a right exists therefore no further analysis is made of the 'interest theory' or 'will theory' of rights.

violated by the respondent State (RQ 1 relationship; RQ 2 conflict; RQ 3 interpretive and theoretical approaches).

On the issue of correlativity of rights and duties, Raz distinguishes between two types of correlativity thesis:

- 'that to every duty there is a corresponding right' and
- 'that to every right there is a correlative duty'.[48]

In relation to the former, Raz argues that there is no conceptual basis for upholding the view that 'to every duty there is a corresponding right'.[49] He acknowledges that some moral theories may lead to such a correlativity theory based on their moral principles, but he rejects such a position.[50] In relation to the latter form of the correlativity thesis that to every right there is a correlative duty, Raz acknowledges merit in this type of correlativity thesis but argues that there have been deficiencies in the way the theory of the correlativity of rights and duties has been formulated.[51] Raz begins his criticism of the formulation of the correlativity thesis using Brandt's definition as an example: 'X has an absolute right to enjoy, have or be secured in Y means the same as 'It is someone's objective overall obligation to secure X in, or in the possession of, or in the enjoyment of Y, if X wishes it'.[52] Raz sees this formulation of correlativity of rights and duties as misleading on three main grounds.

First, Raz challenges the idea that to every right there corresponds one duty, which is to secure the object of the right to the right holder, subject to the right-holder's desire for this.[53] Raz argues that this position which places emphasis on the choice of the right holder is a mistaken one as there are rights that exist even where an individual has not chosen to have that right. He gives an example of the right to education, stating that the right to education is a ground to provide educational opportunities to individuals whether they wish for that to happen or not.[54] His argument is that in such a situation, the choice of the right-holder is not engaged as the State still has to fulfil its duty even where the right holder has not expressed any desire for this to happen. He also argues that there are rights which ground

[48] Raz, *The Morality of Freedom* (n 46)170.
[49] Ibid.
[50] Ibid 170, 210-213.
[51] Ibid 170.
[52] Richard Brandt, *Ethical Theory* (Englewood Cliffs 1959) 453 quoted in Raz (n 46) 170.
[53] Raz, *The Morality of Freedom* (n 46) 170.
[54] Raz, *The Morality of Freedom* (n 46) 170.

duties that fall short of securing their object and that a right may ground many duties not one.[55] To support this position, Raz provides the following example:

> A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape or imprison the right-holder.[56]

This position of Raz that there are some rights that are not dependent on the choice of the right holder has been the subject of criticism. Allam criticizes Raz on this point stating that Raz is confusing rights with goals, thereby greatly expanding the concept of what a right is.[57] This researcher is however aligned to Raz's position that a right's existence should not be dependent on the choice of the right holder.

Second, Raz argues that the right is the ground of the duty. He proffers a somewhat restricted correlativity thesis by stating that:

> It is wrong to translate statements of rights into statements of 'corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, which if not counteracted by conflicting considerations, justifies holding the other person to have the duty.[58]

In a more recent article, whilst discussing the truism that the right of one person limits the freedom of another, Raz elaborated on his view of rights as a ground of duty as a qualification for that truism in this way:

> [R]ights are grounds of duties on others. The bare fact that something is of value to me does not endow me with a right to it, because it does not in itself establish that other people have a duty to secure me with, or not to interfere with my, possession of it. It would appear that we have a right only if the right entails that the value of having it, or our need for it, is of a kind sufficient to impose duties on some others-more precisely, on at least one other. The value of the right to its possessor is its ground. It is that value which justifies holding others to be duty-

[55] Ibid 171.
[56] Ibid.
[57] Allam (n 20) 28.
[58] Raz, *The Morality of Freedom* (n 46)171.

> bound to secure or at least not to interfere with the right- holder's enjoyment of the right, and it is only when such duties exist that the right exists. It exists because it gives rise to such duties.[59]

From the above formulations, it can be argued that Raz agrees with the view that there is an interaction between rights and duties. He however offers a different view of that interaction, by seeing rights as grounds of duties rather than as correlative of duties. The imposition of the duty would have to be justified, taking any conflicting considerations into account. A statement that A has a right to X is not equivalent to the statement that B has a duty to secure A in X. It is rather a ground of a duty on B to secure A in X if there are no other contradictory reasons against this. This is in distinction to the Hohfeldian position which would be that if A has a right against B to X, then B has a duty to secure A in X. Raz's correlativity is therefore 'restricted' or 'limited' by the possibility of counteracting factors that could limit the imposition of the duty. Raz does not, however, specify what these contradictory reasons might be. He however gives an indication of what may influence these contradictory reasons: 'The existence of a right often leads to holding another person to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live.'[60]

Perry has criticised Raz's formulation of rights as grounds of duties. He argues that by conceiving of rights as grounds of duties, Raz fails to draw a distinction between two types of rights: rights-claims that are mainly a way of talking about discretionary choices and those that are primarily a way of talking about obligations.[61] Perry agrees to a certain extent with Raz when he argues that 'Those rights-claims that are primarily a way of talking about discretionary choices are a ground of duty in the sense that *B* ought not to interfere with *A's* choice of X because A's choice of X is discretionary. In that sense, the rights in question are prior to the duties they ground'.[62] On the other hand when it comes to those rights-claims that are primarily a way of talking about obligations (from the view point of the beneficiary), Perry adopts a different position from Raz. He argues that those are not a ground of duty. 'If we may interpret Raz as arguing, at least in part, that those rights-claims that are primarily a way of talking about obligations are a ground of duty, then we must

[59] Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31, 36
[60] Raz, *The Morality of Freedom* (n 46) 171.
[61] Michael J Perry, 'Taking Neither Rights-Talk nor the Critique of Rights Too Seriously (1984) 62 Texas Law Review 1405, 1407.
[62] Perry (n 61) 1406.

conclude that Raz is wrong.'[63] Furthermore, 'It would be circular to attempt to justify the claim that A ought not to choose X on the basis of B's right that A not choose X, if B's right is itself explained in terms of A's duty not to choose X.[64] Perry rather agrees with Brandt that in such a situation, 'If one person's having a right *logically entails* some other person's(s') having an obligation, then it is just confusion to cite the right as a reason for the obligation; the fact of the right just is, or includes, the fact of the obligation'.[65] Perry therefore aligns himself with Brandt's position of the correlativity of rights and duties. Even taking Perry's point into account, he does not altogether jettison Raz's argument on rights as grounds of duties but rather seeks to delimit the situation in which rights may be seen as grounds of duties as opposed to situations where he considers there is an obligation and therefore rights are not grounds of duties in such duties but necessary entail duties. Perry does not however provide any concrete examples to illustrate this position being made.

In the view of this researcher, Raz's formulation of rights as grounds as duties does not exclude the possibility of the correlativity of rights and duties in certain situations. It provides an alternative formulation of the correlativity theory proposed by Hohfeld as it still recognises that a duty ensues from a right although it conceives of situations where a duty may not necessarily be imposed. To this extent, it can be seen as a 'restricted correlativity theory'. It brings into the picture a possibility of a balancing of conflicting claims to the existence of a correlative duty. It gives room for interpretation in order to determine whether a duty exists in the particular case after taking into consideration possible conflicting factors. The relationship between rights and duties in this sense is therefore not automatic or correlative but rather a form of restricted correlativity.

Third, Raz argues that rights are dynamic as there is no closed list of duties that correspond to a right.[66] In this area, Raz expands the correlativity theory by asserting that more than one duty may attach to a right and that this list is not exhaustive. He asserts that:

> The existence of a right often leads to holding another person to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right. The right to political participation is not

[63] Perry (n 61)1407.
[64] Ibid.
[65] Ibid. Quoting Brandt, 'The Concept of a Moral Right and Its Function' (1983) 80 Journal of Philosophy 29 (emphasis in original).
[66] Raz, *The Morality of Freedom* (n 46) 171.

> new, but only in modern states with their enormously complex bureaucracies does this right justify, as I think it does, a duty on the government to make public its plans and proposals before a decision on them is reached, as well as a duty to publish its reasons for a decision once reached (except in special categories of cases such as those involving defence secrets). This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical thought. Unfortunately, most, if not all formulations of the correlativity thesis disregard the dynamic aspect of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established This objection to the reduction of rights to duties does not rule out the possibility that 'A has a right to X' is reducible to 'There is a duty to secure A in X' But since this duty can be based on grounds other than A's interest, the two statements are not equivalent.[67]

Raz is essentially emphasising the dynamic nature of rights, showing that the determination of what rights exist is very dependent on the society/context in which the right is being interpreted. The duties that go with a right are therefore not fixed but may change as time goes on. Fellmeth suggests that the reverse may also be the case where he states that 'Not only can a right correlate to multiple duties: a duty can also correlate to multiple rights. This is the normal case of IHRL, where a State owes the same duty to all persons under its jurisdiction.'[68]

Waldron shares a similar view to Raz on the dynamic nature of rights and that the view that a right can ground more than one duty. According to Waldron a right can generate 'waves of duties':

> We talk about rights when we think that some interest of an individual has sufficient moral importance to justify holding others to be under a duty to serve it. But if a given interest has that degree of importance, it is unlikely that it will justify the imposition of just one duty. Interests are complicated things. There are many ways in which a given interest can be served or disserved, and we should not expect to find that only one of those ways is singled out and made the subject matter of a duty…Even a particular duty, thought of as associated with a

[67] Raz, *The Morality of Freedom* (n 46) 171
[68] Fellmeth (n 22) 82.

> right, itself generates *waves of duties* that back it up and root it firmly in the complex, messy reality of political life.[69]

Waldron used the example of the right not to be tortured which generates a duty not to torture. He however highlights that that duty can be backed by other duties such as 'a duty to instruct people about the wrongfulness of torture; a duty to ameliorate situations in which torture might be likely to occur and so on'.[70] These are duties that arise in order to prevent torture from happening. In situations where torture has taken place, this should generate remedial duties like 'the duty to rescue people from torture, the duty on government officials to find out who is doing and authorising the torture, remove them from office and bring them to justice, the duty to set up safeguards to prevent reoccurrence of the abuse and so on'.[71] A further set of duties arise if these remedial duties are not carried out. In such a case, the right would generate duties of enforcement and enquiry.[72] As to the weight to be given to these waves of duty that may arise from one right, Waldron adopts the view that each set of duties is equally important, 'each stage presents itself as a categorical duty that makes immediate demands on the relevant actor…'[73] Waldron's example sheds more light on how rights can become the ground of more than one set of duties in a human rights context.

Raz further elucidates on the dynamic nature of rights by stating that 'A change of circumstances may lead to the creation of new duties based on the old right'.[74] In an earlier article, Raz defined legal rights as legally-protected interests, which are documented and binding.[75] This may be distinguished from moral rights which may not be protected in a document and do not carry binding force. A consequence of legal rights is that they justify the existence of other rights and duties and can be legal reasons for legal change.[76] They are grounds for developing the law in certain directions. He argues that because of this dynamic nature of legal rights they cannot be restricted, as some would suggest, to the legal duties which they currently justify. To do so would be to overlook the role of legal rights in changing and developing the law.[77] Raz does not, however, explain why the dynamic aspect

---

[69] Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503,510.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Jeremy Waldron, 'Duty Bearers for Positive Rights' (2014) New York University Public Law and Legal Theory Working Papers 497
[74] Raz, *The Morality of Freedom* (n 46) 171.
[75] Joseph Raz, 'Legal Rights' (1984) 4(1) Oxford Journal of Legal Studies 12.
[76] Raz, 'Legal Rights' (n 75).
[77] Ibid 15.

of rights is fundamental to any understanding of their nature and function in practical thought**.**

Raz takes this idea of new duties further, whilst discussing the dynamic nature of legal rights, stating that the dynamic nature of rights means that there is an existing duty on the Court to impose 'certain new duties on other people in certain circumstances'.[78] Fellemeth however does not see this flexibility identified by Raz as an advantage in international law. He argues that 'Raz's interpretive dynamism does not apply in an international legal context…The state is understood to be the only first-order duty holder by all relevant actors in almost all cases, and the duty cannot easily be shifted elsewhere for convenience.'[79] This is still an area that is open for examination to see whether there is room for allocation of duties to other duty holders apart from the State in international law. Although Raz does not include an explanation of why rights should be dynamic, he proffers some reasons that could form grounds for the Court's decision such as general welfare, public safety or public order or the rights of the individual in question. He recognises that a part of this assessment would be the weight the Court is allowed to attribute to the reason for its decision when it conflicts with others.[80]

However, Raz introduces a caveat to the idea of dynamic rights by stating that rights justify the view that people have duties where there are no conflicting considerations of greater weight. He explains that 'Within certain institutional settings there are weighty reasons not so much against allowing rights to generate new duties as against allowing official action on the basis of new duties unless they are recognized by the appropriate institutions'.[81] This could therefore be interpreted as meaning that it is possible to recognise that a duty has a potential to arise but either ignore it or delay recognition of that duty until there is some validation for going ahead with it, received from other quarters.

From the criticisms levelled by Raz on the correlativity thesis, three key points stand out: (a) A right is a ground of a duty in others, and that duty is only imposed if there are no counteracting factors; (b) A right may be the ground of more than one duty; (c) The list of duties that may arise from a right are not fixed and could change based on time and circumstances. Raz, just like Hohfeld, concedes that his definition of rights does not encompass all aspects of the use of the term, but that 'it aims to encapsulate the common

[78] Ibid 19.
[79] Fellmeth (n 22) 64-5.
[80] Raz, 'Legal Rights' (n 75) 20.
[81] Raz, *The Morality of Freedom* (n 46) 172.

core of all rights, and thus to help to explain their special role in practical thought.[82] By seeing rights as grounds of duties, Allam asserts that Raz is presenting a justificatory definition rather than merely a conceptual definition. This would be putting his definition in a different light to that of Hohfeld, which was mainly to define rather than justify. [83] The similarity between Raz's rights as grounds of duties and Hohfeld's rights as correlative of duties, is the retention of a relationship between rights and duties even though the extent to which that relationship exists is somewhat different. Rights as grounds of duties includes does not exclude a situation of correlativity between rights and duties but also conceives of a situation where no duty may be imposed due to counteracting factors. The next section provides a thesis that is based on a synthesis of both Hohfeld and Raz's formulation.

4.3 Dynamic Restricted Correlativity

From the examination of the interaction between rights and duties displayed in Hohfeld's correlativity thesis and the Raz's formulation of rights being a ground of a duty, the researcher is of the view that several elements can be merged in order to form a theory about the relationship between rights and duties. A common factor in both formulations is that where rights are involved there are duties to be found. Where they differ is in relation to the flexibility of the duty. The combination of elements from Hohfeld's correlativity thesis and Raz's formulation of a right being a ground of more than one duty, is what this researcher refers to as Dynamic Restricted Correlativity (DRC). This encapsulates two key principles. First, that a right is a ground of duties which would only be imposed if there are no substantial competing arguments which prevent the imposition of the duty. Second, that duties imposed by a right are not fixed and can change over the course of a period of time or as a result of change of circumstances. DRC will be used as a basis for examining the interaction between the margin of appreciation and living instrument doctrines as tools for determination of human rights and human rights obligations on States.

4.3.1 Interaction between the Margin of Appreciation and Living Instrument Doctrines and Dynamic Restricted Correlativity

Whilst Hohfeld and Raz's formulations on the nature of rights and duties are directed at rights in general, inferences can be drawn from them when dealing with human rights and

[82] Raz, *The Morality of Freedom* (n 46) 166.
[83] Allam (n 20) 27.

in particular when dealing with the adjudication of cases by the ECtHR. There is agreement that there is interaction between rights and duties although the nature of the interaction is proposed in different forms. In adjudicating claims under the ECHR, the ECtHR is effectively determining when rights exist and the existence of a duty to fulfil those rights. Some of the key questions that could be asked then would be who is the right holder and who is the duty bearer? International human rights law is structured with the individuals as the rights holders and the States as the duty bearers. Whilst there are some arguments for duties to be imposed on a wider range of actors, the general position in international law is that States are the duty bearers when it comes to the enforcement of human rights obligations.[84]

Gleaning from the definition of 'claim rights', in the strict sense, rights are linked to duties. When the Court adjudicates and finds that a State has interfered with the rights of an individual under the Convention, the correlativity thesis espoused by Hohfeld, suggests that the Court has also effectively made a finding that the State had a duty to protect that right and it has breached its duty and therefore violated the provisions of the Convention. That finding in tandem means that the individual had a right that should have been protected. However, in practice, when dealing with the qualified rights under Articles 8-11, the finding that a State has interfered with a right does not automatically mean that the State has violated the Convention. This suggests that there are some issues with the application of the correlativity thesis.

The relevant question here is: in what way does the above analysis of the correlativity of rights and duties relate to the doctrines of the margin of appreciation and living instrument which are being considered in this thesis (RQ 3 interpretive and theoretical approaches)? The margin of appreciation doctrine provides room for manoeuvre to States in their application of the ECHR guarantees. The margin of appreciation may be used in a substantive way to determine whether an interference by the State is justified or it may be used in a structural way as a tool for deference by the Court.[85] Essentially, the substantive use of the margin of appreciation it determines at what point States will be seen to have breached their duties under the Convention in relation to those articles of the ECHR for which the margin of appreciation can be invoked. The rights are conferred on individuals

[84] For the argument about a rights and duties paradigm for the international human rights law, see Fellmeth (n 22) 61-101.
[85] For more discussion on the substantial and structural use of the margin of appreciation, see Chapter 2, section 2.2

whilst the duties are put on the State to give effect to the rights provided for within the ECHR. Dynamic Restricted Correlativity draws inspiration from the criticisms of the correlativity thesis fielded by Raz, provides a framework for linking the margin of appreciation doctrine to the living instrument doctrine.

The first point from DRC principle which is based on Raz's objection to the correlativity thesis is that rights are grounds of duties, rather than stating that for every right there is a corresponding duty. The core of his argument here is hinged on the issue that a duty may not always arise. A right is a ground of duties which would only be imposed if there are no substantial competing arguments which prevent the imposition of the duty. The imposition of a duty therefore becomes contingent on other factors, rather than automatically flowing from the assertion of a right. The imposition of the duty has to be justified. This sits very well with the role of the court in the substantive use of the margin of appreciation doctrine where the Court determines whether or not the State although it has interfered with a certain right, is also in breach of their duty under the Convention (RQ 1 relationship). Interference does not automatically mean a breach. A good example of such situations are the qualified rights under Articles 8 -11 of the Convention. The reference by Raz to the possibility of conflicting considerations can be seen as an acknowledgment of the reality in adjudication of rights. There are situations where there is conflict between determining whether a duty exists or not or whether there are counteracting factors that should be considered. It is then up to the adjudicator to weigh and determine which side of the scale the balance should rest on. This may be considered to be a realistic assessment of one of the duties of the Court in adjudication of human rights cases

The second point that flows from DRC is that a right is not a ground of just one duty. Raz states that rights are (part of) the justification of many duties.[86] More than one type of obligation could therefore arise from the same right. Through the use of the living instrument doctrine, the ECtHR has referred to both positive and negative obligations in relation to articles such as Articles 2,[87] 3,[88] and 8.[89] The assertion that more than one type of duty can arise from a right is also relevant to the consideration of the use of the living instrument doctrine as it gives scope for new obligations.

[86] Raz, *The Morality of Freedom* (n 46) 172.
[87] The right to life.
[88] Prohibition of torture, inhuman or degrading treatment.
[89] The right to private and family life.

The third point is that the list of duties can change over time. Raz asserts that 'A change of circumstances may lead to the creation of new duties based on the old right'.[90] This link between rights and the creation of new duties can be clearly tied in with the living instrument doctrine. At its core, the living instrument doctrine ensures that the Convention remains relevant as an instrument for the protection of the rights of individuals by taking into consideration changes in society when interpreting its guarantees. This had led to the criticism that the doctrine is creating rights that the States had not signed up to. This could be justified then based on Dynamic Restricted Correlativity which acknowledges that there could be new duties created from old rights. This begs the question as to whether the issue is that new rights are being created or that new duties are being imposed, and whether the case law of the Court demonstrates such patterns (RQ 1 relationship; RQ 2 conflict; RQ 3 interpretive and theoretical approaches).

4.4 Conclusion

The purpose of this chapter was to examine the margin of appreciation and living instrument doctrines through the lens of the correlativity of rights and duties. Hohfeld's analysis of claim-rights provided the backdrop for the analysis of the relationship between rights and duties. The correlativity thesis as espoused by Hohfeld indicates that for every right there is a correlative duty. Rights and duties are seen as two sides of the same coin, in Hohfeldian terms, 'jural correlates'. To say that a right exists in A is the same as saying that there is a duty to secure A. Without the identification of the duty and the duty holder, a right would not be considered to exist. Whilst Hohfeld's analysis provides a starting point for an understanding of the relationship between rights and duties, the correlativity thesis has criticised from a theoretical and practical level. It has been argued that not all rights correlate to duties. That there are some duties that are not directed at any specific object. For example, duties of charity are not directed at any specified object. It has also been argued that in some instances the duty bearer may not be specified. The duties may be owed in general and therefore specifying the duty bearer may not be possible. It has also been contended that the burden that attaches to a particular duty may be unclear, leaving it then to open to interpretation. Another point which is not covered in Hohfeld's correlativity thesis is that there is a dynamic nature to rights which gives room for possible development of more duties. Several questions therefore arise which require an alternative conception of the

[90] Raz, *The Morality of Freedom* (n 46) 171.

relationship between rights and duties: Is there always a correlative duty to every right? Is there always a corresponding right to every duty? Is there only one duty that attaches to a right or could there be multiple duties? Could the duties that attach to a right evolve over time? Does the right exist first before the duty or should the duty be articulated in order for the right to exist? Does the duty bearer have to be identified before a right can be said to exist? These questions which are not covered by the Hohfeldian conception of the correlativity of rights and duties require consideration through other theories that deal with the interaction between rights and duties.

Raz has provided an alternative conception of the correlativity of rights and duties with his formulation of a right as a ground of a duty. 'It is a ground of a duty which if not counteracted by conflicting considerations justifies holding the other person to have the duty.'[91] In his criticism of the correlativity thesis Raz proposes three key points: (a) the idea that rights are grounds of duties, the imposition of which is justified only where there are no counteracting factors; (b) the idea that a right can have more than one duty attached to it; and (c) the idea that rights are dynamic and changes in circumstances could mean that new duties can be imposed. The outworking of Raz's conception of rights as grounds of duties still retains a relationship between rights and duties but it does not conceive of them as corresponding to one another. It can therefore be seen as a 'restricted correlativity' position. Under this position, it is possible for a duty not to be imposed if there are insufficient interests to ground that duty or counteracting factors. There is also not one fixed duty for every right. There could be more than one duty that arises from a right. Waldron's example of a 'wave of duties' that may arise when the right not to be tortured is considered, is a good explanation of how a right may ground more than one duty. This means that it is possible for a duty not to be imposed if there are insufficient reasons for the imposition of the duty. The restricted correlativity also gives room for the dynamic conception of rights which means that the duties imposed may change over time and depending on the circumstances. Although Raz's position and critic of the correlativity thesis have not been without attendant criticisms, the three key points which he highlights, form the basis of the Dynamic Restricted Correlativity principle developed in this chapter. They are aligned to the interaction between the margin of appreciation and living instrument doctrines.

Where a State opposes the argument for a certain right before the Court, it is essentially arguing against an imposition of a duty upon it. The use of the margin of

[91] Raz, *The Morality of Freedom* (n 46) 171.

appreciation doctrine to determine whether an interference by a State would be considered a violation of the Convention also fits with Raz's definition of rights as grounds of duties which will be justified if there is no other counteracting reason. The State is allowed under the margin of appreciation doctrine to provide justification for interference with the rights of individuals based on the particular circumstances prevailing in the State. This could be a counteracting factor and it would therefore come as no surprise that in some cases the balance is tilted in favour of the State and the Court does not find a violation of the Convention in that case. When it is said that the ECHR is a living instrument, it means the rights contained within the document should be interpreted in a dynamic way. The position that a right may ground more than one duty means that there is room for both positive and negative obligations on States. Through the use of the living instrument doctrine, the Court has imposed both positive and negative obligations in relation to certain provisions of the Convention. The living instrument doctrine therefore fits in with the dynamic restricted correlativity principle which acknowledges that there could be more than one duty attached to a right.

The dynamic restricted correlativity principle also gives room for a further manifestation of dynamic interpretation, which is that that new duties may be imposed upon States in order for them to fulfil their obligations under the Convention. This researcher is aligned to the view that more than one duty can arise from a right and that there should be scope for new duties to be imposed as circumstances change. In the view of the researcher, correlativity does not mean that to every right there is one fixed corresponding duty, rather, to every right there is a potential for corresponding duties. To the researcher the more accurate presentation of the correlativity of rights and duties is that: 'to every right, there are potential corresponding duties'. Dynamic restricted correlativity encapsulates this even better by acknowledging that a right is a ground of dynamic duties which if not counteracted by conflicting arguments, is a justification for imposing those duties. There is scope for new duties to arise from the same right.

A key question which arises is whether the criticism that the Convention rights have been expanded is an accurate reflection of what is happening? Conceptually, has the Court been creating new rights or has it been extending the duties on States in order to fulfil the existing rights? This ties in to the question of whether it is possible at the time of drafting a human rights treaty to agree on all the corresponding duties that arise from a particular right. What is clear at this stage though is that there is a conceptual relationship between rights and duties which sits at the core of the interaction between the margin of appreciation and living

instrument doctrines. The lens of the correlativity of rights and duties in addition to the rules of interpretation in Articles 31-33 of the VCLT are therefore both relevant and will form the framework for the analysis of case law in chapters five and six (RQ 1 relationship; RQ 2 conflict; RQ 3 interpretive and theoretical approaches). Chapter five begins the first stage of the case analysis.

Chapter Five
Case Analysis Part I
Margin of Appreciation and Living Instrument Arguments In Determining the Scope of Applicability of the Convention

5. Introduction

In chapter four, the margin of appreciation and living instrument doctrines were explored through the lens of the theories on the relationship between rights and duties. It established that there were some deficiencies in the correlativity thesis as espoused by Hohfeld which needed to be addressed. One of the most insightful alternatives to the correlativity thesis is the position taken by Joseph Raz where he proposes that rights are grounds of duties. From the critic of the correlativity thesis by Raz, a 'dynamic restricted correlativity' thesis was proposed. This incorporates three key points highlighted by Raz: (a) That a right is a ground of a duty, the imposition of which will only be justified if there are no counteracting factors; (b) That a right can be the ground of more than one duty[1]; and (c) That the duties that arise from a right are not fixed and could change over time. Dynamic restricted correlativity therefore sees rights as potential grounds of duties, duties that need to be justified in order to be imposed and duties that could evolve over time. At the heart of a margin of appreciation argument is the determination of whether a duty exists on the part of the State. The margin of appreciation and living instrument doctrines fit in with dynamic restricted correlativity. Where the substantive concept of the margin of appreciation is used in relation to the qualified rights such as those under Articles 8-11, it provides a tool to justify the imposition of duties. On the other hand, when the living instrument doctrine is applied, it has the potential to lead to the imposition of new duties, therefore tying in to the dynamic nature of rights and the recognition that new duties can be imposed on old rights. Dynamic correlativity of rights and duties is therefore a useful lens with which to examine the relationship between the margin of appreciation and living instrument doctrines.

This chapter is the first of two which present the results of the case analysis. The methodology that has been adopted in the selection of the case law is detailed in Appendix A to this thesis. The two case analysis chapters explore the case law of the ECtHR from January 1979 to December 2016 in which both the margin of appreciation and living

[1] In a human rights context, this gives room for the imposition of both negative and positive obligations in order to ensure a particular right.

instrument arguments have been used within the Court judgment and the resultant impact on the allocation of rights and duties. The process of selection of the case law is detailed in Appendix A to this thesis whist the full list of cases selected is detailed in Appendix C. This examination of the relevant case law feeds directly into the central research questions RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). It also provides a springboard to address RQ 4 (recommendations).

This chapter is the first case analysis and it focuses on cases in which the margin of appreciation and living instrument doctrines have been relevant in determining the scope *ratione materiae* of the Convention at the admissibility stage. The following chapter will address the use of the margin of appreciation and living instrument doctrine at the merits stage in relation to compliance with the requirements of the Convention. These two aspects have been chosen because the literature explored in chapter two showed that it is argued that the living instrument doctrine impinges on the margin of appreciation of States by expanding the coverage of the scope of this Convention. One way this could happen is by extending the scope *ratione materiae* of the Convention. It is therefore important to examine the use of both doctrines in dealing with arguments about the scope *ratione materiae* of the Convention. It has also been argued that the living instrument limits the margin of appreciation, making States liable for violations in circumstances where they should not be liable.[2] An examination of the use of both doctrines from the context of the merits and the allocation of rights and duties at that stage is therefore also imperative.

In the existing research on the margin of appreciation and living instrument doctrines, this focus on the distinction between the use of the two doctrines in the admissibility stage and the merits stage is one that is usually overlooked. In this thesis, it is considered an important distinction to raise due to the impact of admissibility determination on the overall direction of the case. The division of the analysis of the case law into the admissibility and merits stage therefore not only engages the existing research but adds to it through a systematic analysis of the case law to determine the approach of the European Court of Human Rights (ECtHR, the Court) to the use of these arguments in the cases brought before it. This analytical division should generate useful insights toward answering RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). Following the examination of the interaction between the margin of appreciation and living instrument

[2] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) (Dissenting Opinion of Judge Sir Gerald Fitzmaurice), para 39.

doctrines at the admissibility stage, this chapter will conclude on the impact of these doctrines on the scope of the European Convention on Human Rights (ECHR, the Convention).

5.1 The Compatibility Question

The compatibility question, which comes under the broad head of admissibility of a case is one that must be addressed by the ECtHR. In practice, the admissibility stage is where the majority of the applications before the Court are dismissed.[3] 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.[4] The issue of compatibility is one of the arguments that could be raised against the hearing of a case by the ECtHR.[5] Compatibility as a ground of admissibility relates to the competence of the court to hear the claim brought before it.[6] These questions of competence concern the limits of the ECtHR jurisdiction and are therefore considered by the Court on its own motion even if they are not raised by the respondent government. The issue of competence falls into four categories:

(i) Who is competent to bring a case and against whom (*ratione personae*)

(ii) The subject matter of the application (*ratione materiae*)

(iii) The time of the alleged violation (*ratione temporis*)

(iv) The place of the alleged violation (*ratione loci*)

Incompatibility *ratione materiae* is the focus within this chapter. This ground of compatibility has been chosen for two key reasons. First, reading through the data collected, the area where living instrument and margin of appreciation arguments were applied at the admissibility stage was to the issue of compatibility *ratione materiae*. Second, this area has been chosen because the issue of the jurisdiction of the Court has

[3] In 2013, 92% of the cases brought before the Court were rejected on the basis of inadmissibility. See 'A Practical Guide on Admissibility Criteria' Council of Europe/European Court of Human Rights 2014 7. Available at < http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 6 November 2017.

[4] Article 35(3).

[5] The other conditions for admissibility contained in Article 35 ECHR are: domestic remedies must have been exhausted; the claim must be brought within six months of the final decision at the domestic level (The six month is going to be reduced to four months when Protocol No 15 is ratified and comes into force. – Article 8(3) of Protocol No 15 provides for a reduction of the period from 6 months to 4 months); there should be the existence of a significant disadvantage suffered by the applicant; the application should not be anonymous; it should not be substantially the same as another claim before the Court; it should not be manifestly ill-founded; and the claim should not be an abuse of the right of petition

[6] D J Harris et all, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 81.

been raised in the literature as one of the areas where there is tension between the margin of appreciation and living instrument doctrines. The ECtHR is a court with limited *ratione materiae* jurisdiction. The limitation is twofold: (a) limitations in the type of subject matter; and (b) limitation in scope of the subject matter covered. In relation to type of subject matter, its jurisdiction is limited to the protection of human rights. The jurisdiction of the Court is also limited to the scope of human rights issues that it can deal with. It is limited to dealing with human rights that are guaranteed under the provisions of the ECHR, which in turn are based on the agreement of the State parties to the Convention.

Where an argument is made that a particular issue is incompatible *ratione materiae* with the Convention, the implication of this argument is that the Court should not deal with the issue in question as its content is not within the scope of issues that the Court can address. A successful argument that a particular issue is incompatible *ratione materiae* with the Convention therefore has the effect of excluding that matter from the purview of the Court. Where that happens, there is no further decision the Court can make on this case as its hands will be effectively 'tied'. The result will be that there would be no determination of whether a right exists in that case or whether a duty has been breached.

The general approach of the Court to the interpretation of the rules of admissibility is that they should be applied 'with some degree of flexibility and without excessive formality'.[7] The Court has also adopted the object and purpose rule (teleological interpretation) intimating that the rules of admissibility be interpreted taking into consideration their object and purpose.[8] The Court has taken note of the general purpose of the Convention and its special character as a human rights treaty which must be interpreted in a way that makes its provisions practical and effective.[9] These two factors of teleological interpretation and the reference to the special nature of the Convention are in line with the overall approach of the Court to the interpretation of the Convention as discussed in Chapter three of this thesis. One could therefore deduce that in interpreting the admissibility provisions of the Convention there is not a strict approach to adherence or compliance with the text, rather the key factor is the overall purpose of the Convention and how that admissibility requirement can be interpreted in a way that fits in with the overall purpose of

[7] *Ilhan v Turkey* App no 22277/93 (ECtHR, 27 June 2000), para 51; *Cardot v France* App no 11069/84 (ECtHR, 19 March 1991).
[8] *Worm v Austria* App no 22714/93 (ECtHR, 29 August 1997), para 33.
[9] *Yasa v Turkey* (ECtHR, 2 September 1998), para 64.

the Convention. The admissibility requirements are, therefore, there to facilitate the effective protection of the guarantees contained in the Convention rather than to impede them.

The importance of the outcome of an incompatibility argument before the Court is one that cannot be ignored in this thesis. It is the view here that the impact of the interaction of the margin of appreciation and living instrument arguments lies not only in the final outcome of the decision in the particular case on whether there has been a violation of the Convention or not, but it is also important to examine whether the scope of the Convention *ratione materiae* has been impacted either by way of expansion or contraction even if a violation was not found in the case under consideration. The finding of compatibility precedes a finding of violation or non-violation. Therefore, if we can examine how the issue of compatibility is dealt with using the margin of appreciation and living instrument doctrines it will be the first step in the analysis of whether rights are extended or not. The following sections contain the analysis of the case law.

5.2 Descriptive Statistical Analysis of Case Law

This section covers the analysis of the case law using the quantitative method of descriptive statistical analysis.[10] Following detailed selection criteria detailed in Appendix A, the final sample of cases being subjected to systematic analysis for this thesis is 75 cases.[11] The 75 cases have been read manually and then coded based on the relevance of the margin of appreciation and living instrument arguments to a contention on the issue of compatibility of the convention. For the descriptive statistical analysis, four key questions were posed:

1. Is compatibility *ratione materiae* contested in the case?
2. Are the margin of appreciation or living instrument doctrine arguments referred to in addressing compatibility?
3. Which of the two arguments is used the most at the compatibility stage?
4. What is the outcome of compatibility arguments in cases in which there is a margin of appreciation or living instrument argument?

The results from the analysis of each of these questions is presented in the sections that follow

[10] A summary of the methodology adopted has been presented in the methodology section in chapter 1 of this thesis.
[11] The process of selection is fully discussed in Appendix A whilst the full list of cases that were selected is in Appendix C.

5.2.1 Is Compatibility *Ratione Materiae* Contested?

To address this initial question of whether compatibility was contested, the 75 cases were examined, and the results of the analysis is presented in the Table 5.1.

Table 5.1 Contest of Compatibility *Ratione Materiae*	
Compatibility *ratione materiae* not contested	**Compatibility *ratione materiae* contested**
40	35

The results in Table 5.1 show that in the majority of the cases: 40 cases, compatibility was not contested. However, in a high percentage of the cases: 35 cases, or 47% of the case law examined, compatibility was contested. There is, therefore, a high occurrence of compatibility arguments in the case law which involves both margin of appreciation and living instrument arguments. This is significant as, the determination that a particular issue is compatible *ratione materiae,* is essential for a case to be heard by the Court. If an issue is not compatible *ratione materiae*, the Court will be unable to make any further determination of the key issues in the case.

5.2.2 Are the Margin of Appreciation or Living Instrument Doctrine Arguments Referred to in Addressing Compatibility?

To answer this second question, the 35 cases were examined to find out if either the margin of appreciation or living instrument doctrines (or both) were referred to either by the applicant, respondent or the Court itself in deciding on the issue of applicability. The outcome of this analysis was a division of the case law into two groups. Group A were cases in which compatibility *ratione materiae* was contested without a margin of appreciation or living instrument argument, whilst Group B consisted of cases where compatibility *ratione materiae* was contested with either the margin of appreciation or living instrument arguments or both. The results of the analysis are presented in Table 5.2.

Table 5.2 Use of Margin of Appreciation and Living Instrument Arguments to Contest Compatibility *Ratione Materiae*	
Group A: Compatibility *ratione materiae* contested without a margin of appreciation or living instrument argument.	**Group B: Compatibility *ratione materiae* contested with either the margin of appreciation or living instrument argument or both.**
21	14

From Table 5.2 it can be seen that in 21 (60%) of the cases, addressing the compatibility question did not involve the use of the margin of appreciation or living instrument doctrines while in 14 (40%) of the cases the margin of appreciation and/or the living instrument doctrine was relevant. This shows that although the compatibility question features highly in the overall sample, the use of the two doctrines in this phase is not very high. There is, however, still a reasonable level of the use of these doctrines at this stage which provides further support for the importance of addressing how these two doctrines interact with the compatibility question before going into their use at the merits stage. The presence of these two doctrines at the applicability stage also ties in with the literature which highlights the scope of the Convention as an area that has been affected by the interaction of the margin of appreciation and living instrument doctrines in the jurisprudence of the Court.

5.2.3 Which of the Arguments is Used the Most at the Compatibility Stage?

Although the analysis in Table 5.2 shows the presence of the doctrines in 14 cases at the applicability stage, it does not provide answers to which doctrine is used the most. To determine which of the arguments was used the most the 14 cases from Group B in Table 5.2 [12] were further analysed and coded in order to determine which of these doctrines was used in each case. The result of this analysis is presented in Table 5.3 which shows the different ways in which the doctrines were used at the applicability stage and which was used the most.

[12] Cases where compatibility *ratione materiae* was contested with the use of either the margin of appreciation or living instrument argument or both.

Table 5.3 Argument Used the Most at Compatibility Stage		
Group 1: Margin of appreciation and living instrument doctrines	**Group 2: Living instrument doctrine only**	**Group 3: Margin of Appreciation Doctrine only**
2	11	1

From Table 5.3 it can be seen immediately that living instrument arguments are the most frequently used in compatibility arguments. They are present in 11, or 79% of the cases in the sample. Margin of appreciation arguments on the other hand are present either on their own or in conjunction with the living instrument doctrine, in 3 cases, or 21% of the sample size. This initial finding confirms the view in the literature that living instrument arguments have an impact on the scope *ratione materiae* of the Convention. What it does not answer is in what way it impacts on the scope. Is it widening the scope or is it restricting the scope *ratione materiae*? To determine this, it is necessary to examine whether living instrument arguments been successful. The outcome of the argument would determine what impact they have had.

Another point that is highlighted from this descriptive statistic of the case law is that cases where both margin of appreciation and living instrument arguments are present in the determination of compatibility are relatively low in the sample at 2 cases, or 14% of the cases. These cases are the 'hard cases' where there is room for conflict between the two doctrines, an issue that is the focus of this thesis. On the face of it, this could suggest that the situation of conflict between the two doctrines when the issue of compatibility is being addressed is at a low level. The approach of the Court in those cases and the outcome, are crucial in determining the impact and weight of the living instrument argument in those cases where there is also a margin of appreciation argument on the issue of compatibility.

5.2.4 What is the Outcome of the Compatibility Arguments in Cases in Which There is a Margin of Appreciation or Living Instrument Argument?

This question feeds into the research question on the relationship (RQ 1) between the margin of appreciation and living instrument arguments in cases before the Court. It would also show how successful living instrument arguments have been in the cases considered. First of all, the outcomes of the compatibility *ratione materiae* arguments of

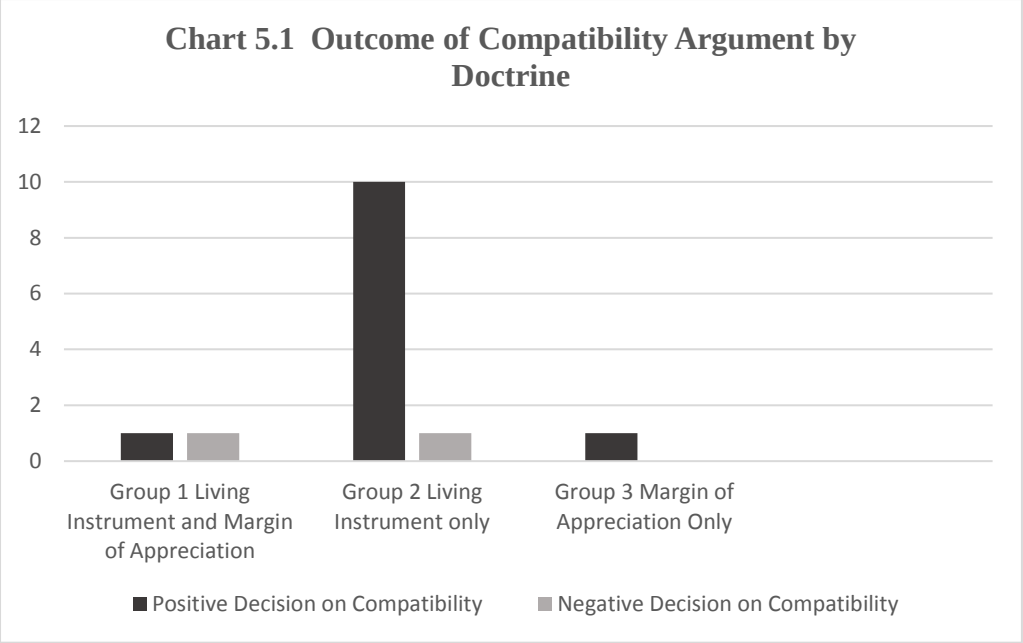
the 14 cases as a whole were analysed. The result of the compatibility arguments is presented in the table below:

Table 5.4 Outcome of Compatibility Arguments	
Positive Decision on Compatibility *ratione materiae*	**Negative Decision on Compatibility *ratione materiae***
11	3

Table 5.4 shows that in 11 cases, which accounts for 79% of the case law in which the living instrument and (or) margin of appreciation arguments were raised on the issue of compatibility *ratione materiae*, the Court came to a decision in favour of compatibility *ratione materiae*. A decision in favour of compatibility *ratione materiae* could be argued to be a decision expanding the scope of the Convention as the question of compatibility would not arise if a particular right was clearly included in the text of the Convention or had been the subject of an earlier positive decision of the Court. There is however room for more discussion on this point which will be explored later in this chapter.

A further analysis of the particular doctrine that has been responsible for the positive decision of compatibility *ratione materiae* was carried out as a second part of phase 4 analysis. Groups 1,[13] 2[14] and 3[15] from Table 5.3, were analysed in order to narrow down the impact of the different arguments on the outcome of the compatibility arguments. Whilst it was clear that compatibility arguments were successful, to fulfil the aim of this research, it was necessary to break this down even further and consider the impact of the different arguments in question. The results of this analysis are presented in Chart 5.1.

[13] Cases with both a margin of appreciation and living instrument argument at the compatibility stage.
[14] Cases with only a living instrument argument at the compatibility stage.
[15] Cases with only a margin of appreciation argument at the compatibility stage.

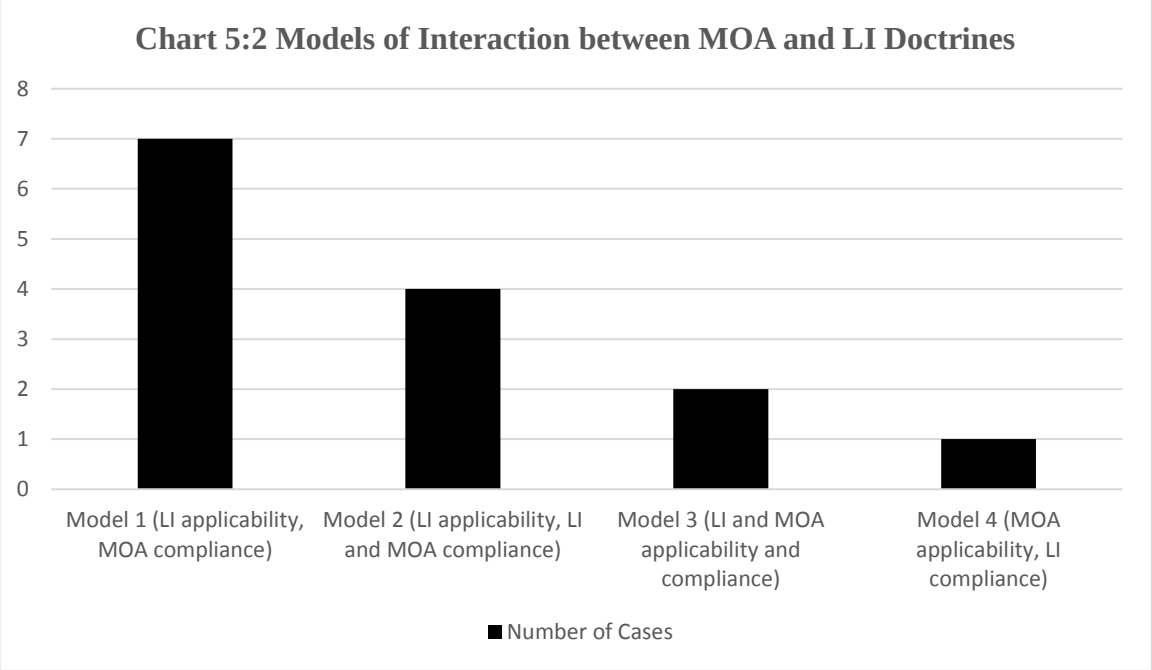


The outcome of this phase of analysis shows that in the majority of the cases where the issue was found to be compatible *ratione materiae* with the Convention, there was a living instrument argument raised which was accepted by the Court. This accounts for 11 out of the 14 decisions, making up 79% of the case law examined. In relation to Group 1 where there are both margin of appreciation and living instrument arguments, it can be seen that it is a 50% split between cases in which the living instrument argument was preferred to the margin of appreciation argument and a positive decision on compatibility *ratione materiae* was reached by the Court, and cases in which there was a living instrument and margin of appreciation argument and the margin of appreciation argument was preferred to the living instrument argument. These results from Group 1 do not therefore on the face of it, reveal any particular doctrine being given preference to the other.

The analysis so far has shown that in most compatibility arguments the outcome was positive. The key issue though, is how this impacted on the overall outcome of the case as to find that an issue is compatible with the Convention does not automatically mean that the State has violated their obligations. It is relevant to find out how the margin of appreciation and living instrument doctrines have impacted on the final outcome of the case. To get some answers to this question, a further study was carried out. The cases were analysed on the basis of the interaction between margin of appreciation and living instruments from the applicability to the merits stage. There were five possible interactions that were tested:

1. Living instrument doctrine applied to applicability argument, only margin of appreciation doctrine applied to compliance. (Model 1 LI applicability, MOA compliance).
2. Living instrument doctrine applied to applicability argument, both living instrument and margin of appreciation doctrines applied to compliance. (Model 2 LI applicability, LI & MOA compliance).
3. Living instrument and margin of appreciation doctrines applied to both the applicability argument and the compliance arguments. (Model 3 LI and MOA applicability and compliance).
4. Margin of appreciation doctrine applied to applicability argument, only living instrument doctrine applied to compliance. (Model 4 MOA applicability, LI compliance).
5. Margin of appreciation doctrine applied to applicability argument, both margin of appreciation and living instrument doctrines applied to compliance. (Model 5 MOA applicability, MOA & LI compliance).

After reviewing the case law, only Models 1, 2 3 and 4 were found. The results are displayed in Chart 5.2 below where 'MOA' stands for margin of appreciation and 'LI' stands for living instrument.



It can be seen from Chart 5.2 that Model 1 (LI applicability, MOA compliance) accounts for the greatest number of cases in the case analysis. The 7 cases in that category

make up 50% of the sample. On the other end of the spectrum are cases in Model 4 (MOA applicability, LI compliance). 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 for compatibility issues – 13 cases involve the use of living instrument arguments in the compatibility stage (Models 1, 2 and 3), as opposed to 7 cases where the living instrument was used in the compliance stage (Models 2, 3 and 4). For the margin of appreciation doctrine, it is mainly used in the compliance stage - 13 cases (Models 1, 2 and 3), as opposed to 3 cases in which it was used in the compatibility argument (Models 2 and 3). 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. This interpretation is reinforced when it is considered that the results showed no case under Model 5 (MOA applicability, LI & MOA compliance). The margin of appreciation may however be raised as a counteracting factor where the living instrument doctrine is applied to applicability as can be seen in Model 3, (LI and MOA applicability and compliance). Model 3 however accounts for just two cases, 14% of the sample. As Model 3 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 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 5.3 contains the results of this analysis of the link between the finding of compatibility and the determination of a breach of duty based on the four models of interaction between the margin of appreciation and living instrument arguments from the applicability to the compliance stage.

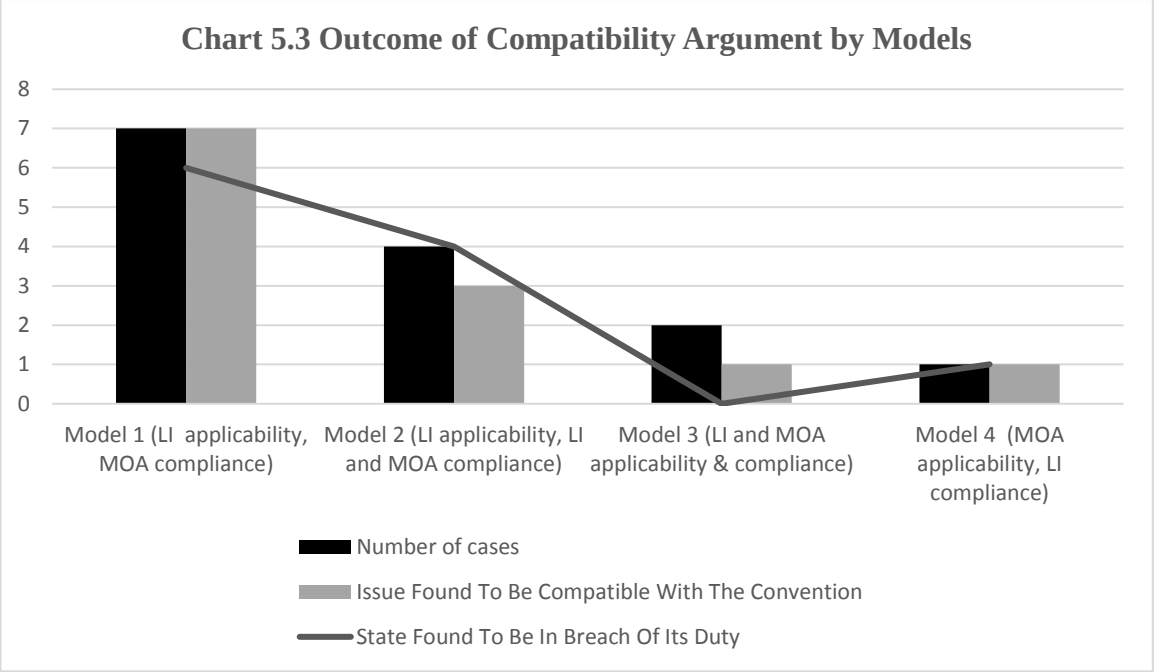


Chart 5.3 shows that highest number of violations in percentage terms by Models, was seen in Model 4 (MOA applicability, LI compliance) where there was a 100% result of the State being found to be in breach of its duty. There was only one case in the category of Model 4 though, so overall, based on case numbers, it account for the least number of cases. The highest number of violations based on number of cases was found in cases under Model 1 (LI applicability, MOA compliance). In six out of the seven cases in Model 1, the overall finding of the Court was that the State had breached its duties under the Convention.[16] This is 85% of the cases in that category. In relation to the four cases in Model 2 (LI applicability, LI and MOA compliance), 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.[17]

With regards to the two cases in Model 3 (LI and MOA applicability and compliance), 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 Model 3 (LI and MOA applicability and compliance) were the only ones where the Court did not find a violation. The overall outcome is that in

[16] 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.
[17] 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.

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.

5.2.5 Limitations of the Descriptive Analysis

The outcome of the descriptive analysis at this stage has shown that living instrument and margin of appreciation arguments have both been relevant in addressing the issue of compatibility *ratione materiae*. It has shown that living instrument arguments have trumped margin of appreciation arguments in decisions where the compatibility *ratione materiae* of the Convention has been contested. It has 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.

The use of a quantitative tool of descriptive statistical analysis however suffers some limitations. First, the 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. This is something that needs to be examined in order to fully answer RQ 3 (interpretive and theoretical approaches). Second, the descriptive statistics do not show whether there is an alignment in the interpretive technique employed by the Court in coming to its decision, with the principles of interpretation discussed in chapter three. This cannot be ascertained using quantitative methods alone. Third, the quantitative analysis does not highlight what types of issues were before the Court and whether there is any correlation between the decision on compatibility and the type of issue before the Court. Fourth, the researcher is conscious that the sample being examined is a small fraction of the overall case law of the Court. Whilst these represent all the cases that had an express reference to the margin of appreciation and living instrument doctrines or their variants, they are still a small percentage of the Court's case law. 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 analysis. As a result, a qualitative examination of the case law would enhance the case analysis and overall results achieved.

5.3 Doctrinal Textual Analysis of the Case Law

The limitations of the descriptive statistical analysis highlighted above necessitated the use of a textual approach as a second key phase of the analysis.[18] The descriptive analysis had already revealed that there had been a high incidence of positive decisions on compatibility *ratione materiae* in the data examined. The qualitative analysis builds on this initial finding by applying textual analysis to the case law to determine what factors contributed to the decision of the Court on compatibility and the overall finding of violation. Two themes that are derived from the case law on the interaction between the margin of appreciation and living instrument doctrines are 'expansion' and 'restriction'. For the purposes of this textual analysis, the case law will be categorised based on their impact on either expanding or restricting the scope of the Convention. A negative decision on compatibility will be categorised here as restriction of the scope *ratione materiae* of the Convention whilst a positive decision on compatibility will be categorised here are as an expansion of the scope *ratione materiae* of the Convention. The sections that follow provide the results of the textual analysis of the case law under these two headings identified.

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

One of the areas of interaction between the living instrument and margin of appreciation doctrines that has been identified in the literature is the scope of the coverage 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.[19] 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. Restriction

[18] The need for both the quantitative method of descriptive statistical analysis and the qualitative method of textual doctrinal analysis in this thesis has been fully discussed in Appendix A which deals with the framework for the case analysis.

[19] This has been discussed in Chapter 2, section 2.5 'Contexts and Rationale for the Interpretation of the Convention as a Living Instrument'.

ratione materiae considers 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.

This restriction is not necessarily a positive or negative thing. It depends upon the view adopted. On the one hand it may be argued that the Court is ensuring its legitimacy by 'policing' the borders of its jurisdiction and ensuring that it only decides on issues that are clearly covered by the Convention. This in turn, may enhance the Court's legitimacy and the compliance with its decisions as they may be perceived by the State parties as being within the confines of the Court's mandate. On the other hand, it may be argued that the Court is abdicating its responsibility to ensure the maintenance and further realisation of the Convention's guarantees. There could, therefore, be a mixed interpretation of the situations in which the Court restricts the scope of the Convention as a result of the different roles the Court has to fulfil. From descriptive statistical analysis, above, there are two cases in which the Court restricted the scope of the Convention and rejected a living instrument argument to extend the scope of the Convention. In *Johnston*, the Court adopted Model 1 (LI applicability, MOA compliance) whilst in *VO v France*, the Court adopted Model 3 (LI & MOA applicability and compliance).[20] Since the focus of this thesis is on the way in which the Court deals with cases where there is a conflict between the living instrument and margin of appreciation doctrines, the case of *VO v France* has been chosen for further discussion below.[21]

5.4.1 Margin of Appreciation Supersedes Living Instrument Argument

The case of *VO v France* is an example of a 'hard case' scenario in which there was a conflict between the margin of appreciation and living instrument doctrines.[22] In *VO*, 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 compatibility argument of whether Article 2 which guarantees the right to life applies to an unborn child. The question was therefore related to the scope of applicability of Article 2 as opposed to a question about the definition of the term 'right to life'. This is an important

[20] *Johnston* (n 17); *VO v France* App no 53924/00 (ECtHR, 8 July 2004).
[21] The case of *Johnston* (n 17) has also been discussed to a certain extent in Chapter three when the rules of interpretation in the VCLT was considered.
[22] *VO* (n 20).

distinction as the coverage of the Convention can be extended either through an extension of its scope of applicability or via extension of the interpretation of the concepts it covers.

In this case, the ECtHR adopted Model 3 (LI & MOA applicability and compliance). The Court was of the view that the compatibility issue was so intrinsically linked to the merits of the case and joined them both.[23] 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.[24] This could be considered as a living instrument argument with a focus on expert consensus.[25] 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.[26] They pointed to the fact that there were different statutory periods for abortion in the contracting States and that this was an area where the States had a margin of appreciation.[27] There was one third party intervention from the Family Planning Association which supported the government's position that the right to life in Article 2 should not be interpreted as extending to the unborn child.[28] This case is interesting as it pitches two types of developments against each other: 'expert consensus' as a basis for invoking the living instrument doctrine, versus 'European dissensus'[29] as a basis for invoking the margin of appreciation doctrine. This is an example of a 'hard case' where there is a conflict between the living instrument doctrine and the margin of appreciation doctrine in determining compatibility *ratione materiae*.

In addressing the compatibility argument, the Court began by adopting a textual interpretation. It acknowledged that unlike Article 4 of the American Convention on Human Rights which expressly refers to the protection of the right to life "in general, from the moment of conception", Article 2 of the ECHR is silent on when the protection of the right to life begins.[30] The Court did not however make a finding that there was a decision to expressly exclude the protection of the unborn child from the text of the ECHR. The

[23] *VO* (n 20), para 44.
[24] *VO* (n 20), para 47.
[25] The Court itself later refers to the term 'living instrument' when giving its judgment. This will be considered later on in this chapter.
[26] *VO* (n 20), paras 52-54.
[27] *VO* (n 20), para 55.
[28] *VO* (n 20), paras 67-73.
[29] In this case the dis-census was the lack of uniformity in the laws of the contracting States on access to abortion and the conditions on which such access may be granted.
[30] *VO* (n 20), para 75.

Court recalled some of its earlier case law where reference to Article 2 had been made in the context of abortion, it showed that the Commission and the Court had not concluded that the foetus had a right to life under Article 2 but rather had avoided determining that issue by finding the existence of the foetus to be intrinsically linked with that of the mother.[31] The Court considered this case to be different to previous cases[32] and couched the key issue as whether '*apart from cases where the mother has 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*'.[33] This necessitated a determination of when the right to life begins.

The Court was persuaded by the lack of consensus that existed amongst the States on when the right to life begins and chose not to decide on this issue but rather leave it to the margin of appreciation of States. It concluded 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"…The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate… and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life....[34]

---

[31] *VO* (n 20) paras 75-78; The Court referred to earlier cases such as *X v United Kingdom* App no 8416/79 (Commission decision, 13 May 1980); *X v Austria* App no 7045/75 (Commission decision, 10 December 1976); *Brüggemann and Scheuten v Germany* App no 6959/75 (Commission's report, 12 July 1977) and *H v Norway* App no 17004/90 (Commission decision, 19 May 1992) . The Court also referred to two other instances where it had to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman v Ireland* App nos *14234/88; 14235/88* (ECtHR, 29 October 1992) where it had based its decision on Article 10(2) looking at whether the state's restriction on access to information on abortion abroad was necessary in a democratic society. It had not felt there was a need to directly address the question of whether the right to life was applicable to the foetus. It also referred to its decision in *Boso v Italy* App no 50490/99 (ECtHR, 5 September 2002). [31] where it had to deal with a case where the woman had terminated the pregnancy without the consent of her husband, the Court did not make a decision on whether Article 2 provided protection for the foetus, it rather based its decision on the issue of whether a fair balance had been struck between the needs of the woman on the one hand and the protection of the foetus on the other.

[32] The previous case law examined had dealt with different contexts of abortion rather than an involuntary termination of pregnancy through negligence.

[33] *VO* (n 20), para 81.

[34] Ibid para 82.

To show a lack of international consensus as well, the Court referred to three international treaties neither of which defined when the right to life begins.[35] In the view of the Court, there was therefore a lack of internal, European, international and expert consensus. The Court relied on the absence of consensus as a determinant to apply the margin of appreciation in a structural way here to refrain from actually deciding on the issue. The margin of appreciation argument served as a limiting factor and superseded the living instrument argument here. The Court concluded that it was 'neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention'.[36] It went further to state that: '*even assuming that Article 2 was applicable in the instant case…there has been no violation of Article 2 of the Convention'*.[37]

By joining the compatibility issue with the merits, the Court avoided a clear decision on whether Article 2 is relevant to the protection of the 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.[38] In his dissenting opinion, Judge Rees argued that based on Article 31 of the VCLT, the ordinary meaning of the term 'everyone' taken in context and in the light of the object and purpose of the Convention leads to the conclusion that 'the protection of life also extends in principle to the foetus'.[39] He gave more weight 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.[40] It is interesting that the Court did not refer to this Charter when discussing international consensus. He argued that:

> The Convention, which was conceived as *a living instrument to be interpreted in the light of present-day conditions in society, must take such a development*

[35] Article 2 of the 1997 Oviedo Convention on Human Rights and Biomedicine that Convention does not define the term 'everyone', rather the explanatory report to the Convention rather provides that member States should decide on this issue. The 1998 Additional Protocol on the Prohibition of Cloning Human Beings and 2004 Additional Protocol on Biomedical Research, which do not define the concept 'human being' but left it to the discretion of States.
[36] *VO* (n 20), para 85.
[37] Ibid para 95.
[38] *VO* (n 20) (Separate Opinion of Judge Rozakis joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen).
[39] Ibid (Dissenting Opinion of Judge Rees), para 4.
[40] Article 3(2) Charter of Fundamental Rights of the European Union; *VO* (n 20) (Dissenting Opinion of Judge Rees), para 5.

> *into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention*. Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. 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.[41]

On the issue of the margin of appreciation Judge Rees made an interesting argument. He 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.[42] He was of the view that 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 rather than to restrict the applicability of Article 2.[43] For Judge Rees, Article 2 applied to human beings even before they were born and he found that there had been a violation of this provision by France.[44] Judge Rees was therefore arguing for the margin of appreciation to be restricted to norm application as discussed in chapter two, rather than norm definition.[45]

Similarly, in the dissenting opinion of Judge Mularoni, joined by Judge Strážnická, he gave greater weight to the living instrument doctrine, arguing that Article 2 was applicable and had been violated.[46] He acknowledged that the *travaux préparatoires* of the Convention were silent on the scope of the words 'everyone' and 'life' on the issue of whether Article 2 is applicable before birth.[47] However, in a similar fashion to Judge Rees, he highlighted the significant developments in science, biology and medicine since the 1950s and that these developments included advances in the prenatal stage. There were also moves politically at the national and international level to find suitable means of

[41] *VO* (n 20) (Dissenting Opinion of Judge Rees), para 5 (emphasis added).
[42] Ibid para 8.
[43] Ibid.
[44] Ibid para 9.
[45] For a discussion on the use of the margin of appreciation in this way, see Chapter 2, section 2.2 'Evolution in the use of the margin of appreciation doctrine'.
[46] *VO* (n 20) (Dissenting Opinion of Judge Rees), para 4.
[47] *VO* (n 20) (Dissenting Opinion of Judge Mularoni, joined by Judge Strážnická).

protecting 'even prenatally, human rights and the dignity of the human being against certain biological and medical applications.'[48] He argued that:

> Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted...The Court has…stated that the Convention is a living instrument, to be interpreted in the light of present-day conditions…I therefore find that Article 2 of the Convention is applicable in the present case and has been violated, as the right to life has not been protected by the law of the respondent State.[49]

The majority was of a different view and the respondent State was not considered to be in violation of its obligations.

The analysis of the restriction *ratione materiae* of the Convention in this section has highlighted several factors. First, although the Court did not expressly refer to the VCLT, its influence can be seen in the interpretive approach adopted by the Court. The text of the Convention was a starting point in accordance with Article 31(1) VCLT. The Court also referred to subsequent agreement and State practice by considering the practice in the member States and current international treaties which dealt with similar issues on the beginning of life. *VO* raised the issue of whether scientific developments should be used as a counter weight to dissensus in the practice amongst States. 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. In using the margin of appreciation in a structural way in this case, the Court allowed room for State parties to define the scope of the right to life, causing the margin of appreciation doctrine to trump

[48] Ibid.
[49] Ibid.

the living instrument doctrine. From the perspective of the relationship between rights and duties, the successful use of the margin of appreciation here meant that no rights were created for the applicant in this case and therefore no duty ensued for the State. The next section looks at case law in which the scope *ratione materiae* of the Convention was extended.

5.5 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 thesis.[50] In reading through the case law and applying the lens of dynamic restricted correlativity of rights and duties, the researcher has recognised that two outcomes could be identified:

- Expansion *ratione materiae* of the scope of the Convention but no expansion of the duty of the State
- Expansion *ratione materiae* of the scope of the Convention and expansion of the duty on the State.

These will now be discussed below.

5.5.1 Expansion of the Scope of the Convention, No Expansion of Duty on 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, therefore no expansion of the duty on the State. It is important that these cases are looked at in order to discover the limiting factors on the State's duty 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. This point will be discussed within the sections below. In this section, two cases are drawn from the patterns identified in the descriptive

[50] See Chapter 2 for criticisms of the living instrument doctrine.

statistics analysis above, which depict instances where the Court made a positive decision on compatibility but did not find a breach of the obligations on the State. Key themes on the interpretive approach of the Court in both cases is discussed below.

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. The first case is the 2005 case of *Leyla Sahin v Turkey*.[51] In that case, the applicability issue before the Court was whether Article 2 of Protocol No 1 (Art 2 PN1) which provides for the right to education, applies to institutions of higher education. In dealing with the issue, the Court adopted Model 1 (LI applicability MOA 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 part of the right in Art2 PN1.[52] The Court however found that based on the margin of appreciation afforded to the State, it had not breached its obligations in this particular case. The second case is the 2010 case of *Schalk and Kopf v Austria*.[53] In this case, the Court adopted Model 3 (LI & MOA applicability and compliance). Since Model 3 is the one in which the conflict between the margin of appreciation and living instrument doctrines is more apparent, this case will be discussed in more detail below.

5.5.1.2 Living Instrument Trumps Margin of Appreciation Argument

In *Schalk and Kopf v Austria*, 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.[54] They also alleged that they had been subject to discriminatory treatment in breach of Article 14 taken in conjunction with Article 8. The first applicability question was whether Article 12 included the right to marry for persons of the same sex.[55] 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. The Court was of the view that the complaint raised serious issues that could not be discussed at the admissibility stage, it

[51] *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).
[52] Ibid para 141.
[53] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).
[54] Ibid.
[55] Ibid para 40; The government raised the question of whether the complaint of the applicant fell within the scope of Article 12 since they were two men claiming the right to marry.

therefore decided to proceed to deal with the merits of the case and discuss the compatibility issue whilst dealing with the merits.[56]

In dealing with the applicability issue under Article 12, the Court adopted Model 1 (LI applicability, MOA compliance). 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*, Court noted that based on the text, the right to marry under Article 12 was subject to the contracting laws of the member States.[57] It however went a step forward by stating that any restrictions imposed should not be such as to impair the very essence of the right.[58] The Court was of the view that if its recent case law on transsexuals was viewed in isolation, it could be that one could interpret that Article 12 does not exclude marriage between two men or between two women. However, when the text of Article 12 is considered in the light of the way other Articles were drafted, the conclusion could be drawn that the drafters had deliberately worded the text with the words 'men' and 'women' rather than terms such as 'everyone' or 'no one' which could be found in other articles of the Convention.[59] The Court effectively used an intentionalist argument to limit the scope of Article 12. It did not however refer to any definitive statement in *travaux préparatoires* that supports this interpretation of the intention of the drafters, unlike in *Johnston* where it was shown that the drafters had omitted the reference to dissolution of marriage.[60]

The Court went on to consider the context at the time of drafting the Convention. It was of the view that when one takes into consideration the time in which the Convention was drafted, 1950, marriage at that time was widely considered to be a union between a man and

[56] This was the same approach adopted by the Court in *VO*.
[57] *Schalk and Kopf v Austria* (n 53), para 49; This was the same position it had taken in *Johnston*.
[58] Ibid.
[59] The Court referred to its jurisprudence in *Sheffield and Horsham v United Kingdom* App nos 22985/93, 23390/94 (ECtHR, 30 July 1998); *Cossey v. the United Kingdom* App no (ECtHR, 27 September 1990); and *Rees v. the United Kingdom* App no (ECtHR, 17 October 1986) where it had held that that denial of a post-operative transsexual the opportunity to marry someone of the opposite sex was a matter to be decided by national authorities and was not a violation under Article 12, to its more recent decision in *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) where it decided that denial of a transsexual the right to marry in their post-operative sex, was a violation of Article 12 of the Convention. The Court also referred to its decision in the more recent cases of *Parry v. the United Kingdom* App no 42971/05 (ECtHR, 28 November 2006) and *R. and F. v. United Kingdom* App no 35748/05 (ECtHR, 28 November 2006) where in a situation where the applicants, a married couple made up of a woman and a male to female post-operative transsexual had complained that under current marriage laws, they would have to end their marriage if the second applicant went ahead to get legal recognition of their change of gender as the marriage laws provided only for marriage between different sex couples. The Court in that case had decided that it was up to the different states to decide on marriage laws and it did not find a violation of the Convention.
[60] See discussion of the *Johnston* case in 6.4.1

a woman therefore that lent additional credence to interpreting Article 12 as only being applicable to a marriage between a man and a woman.[61] Another consideration for the Court was the link between the right to marry and the founding of a family. This had been an issue that had been raised even in previous case law on transsexuals as an argument against granting the right to marry same sex couples.[62] The argument had been that the object and purpose of Article 12 which guaranteed the right to marry was linked to the creation of a family, therefore it could only be interpreted as the right of marriage between a man and a woman. Following its previous jurisprudence, the Court was of the view that the inability to procreate cannot be interpreted to mean that it removes the right to marry. However, the Court was of the view that this does not lead to any conclusions in relation to same-sex marriage.[63]

The Court's approach to the admissibility question so far, reflects the rules of interpretation in Article 31 of the VCLT First, it looked at the text, then the context at the time of the drafting of the ECHR and finally, the object and purpose of Article 12. There was also a reference here to the 'intention' approach, as the Court was drawing conclusions based on what it presumed to be the 'deliberate' selection of the words 'men' and 'women'. Whilst, it has already been established in chapter three that the Court does not rely solely only on the intention approach, it could be referred to by the Court in conjunction with other considerations before coming to its decision as can be seen in this case. 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 went on to state that in actual fact the applicant had not relied on the textual interpretation of Article 12 as the basis of their claim but had rather relied on the living instrument approach of the Court. They had contended 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.'[64] The Court acknowledged that there had been major social changes to the institution of marriage since 1950 but it also noted a lack of European consensus regarding same-sex marriage. This lack of consensus was based on the finding that only six of the forty-seven member States allowed same-sex marriage.[65] This could be distinguished from the *Christine*

[61] *Schalk and Kopf* (n 53), para 55.
[62] See for examples, *Christine Goodwin* (n 59) para 98.
[63] *Schalk and Kopf v Austria* (n 53), para 56.
[64] Ibid para 57.
[65] Ibid para 58.

Goodwin case because the Court had seen a convergence of standards in relation to marriage of transsexuals in their assigned gender. The issue in that case also involved marriage between partners of a different gender.[66] At this stage, one can see the Court resorting once again to the consensus argument in order to determine whether or not the living instrument approach should be applied in this case. The Court could not find European consensus.

The Court then proceeded to consider international consensus. A comparison had been made between the Convention and Article 9 of the Charter of Fundamental Rights of the European Union ('the Charter') which did not refer to 'men' and 'women' and the accompanying Commentary of the Charter which confirmed that Article 9 was meant to be broader in scope than similar Articles in other human rights instruments.[67] The Charter however, also refers to the fact that there is diversity in the national laws on this issue and leaves the decision on whether to allow same-sex marriage to the States.[68] Based on Article 9 of the Charter, the Court decided that:

> Regard being had to Article 9 of the Charter, therefore, the Court 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. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint.[69]

This decision that Article 12 was applicable to same sex couples, 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. In other cases where it has considered recent international agreements between the States, it has concluded that the particular article was not applicable as a result of the lack of specification in the recent international agreement considered.[70] The method of coming to this decision is therefore subject to criticism.

Following its finding that Article 12 was applicable, the Court did not, however, find a violation but rather deferred to the national authorities on the issue of how to regulate same-same marriage. In the words of the Court, 'However, as matters stand, the question whether

[66] Ibid, para 59.
[67] 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'.
[68] *Schalk and Kopf v Austria* (n 53), para 59.
[69] Ibid para 61.
[70] See discussion in *VO v France* in 5.4.1.

or not to allow same-sex marriage is left to regulation by the national law of the Contracting State'.[71] The Court based its decision on the basis that that 'marriage has deep-rooted social and cultural connotations which may differ largely from society to society' and the Court should therefore 'not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of the society'.[72] It concluded that Article 12 does not 'impose an obligation on the respondent Government to grant a same-sex couple such as the applicant's access to marriage'.[73] There had, therefore, been no violation of Article 12 of the Convention. This application of the margin of appreciation is what Spielmann refers to as a 'the margin within the margin'.[74] 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 couples and the status to accord to them.

This finding of compatibility as criticised in the Concurring opinion of Judge Malinverni joined by Judge Kolver is quite instructive. Whilst he agreed and voted with the majority that there had been no violation of Article 12, he disagreed with the view the Court had taken in relation to the applicability of Article 12.[75] Referring to Article 31 of the VCLT, he argued that the ordinary meaning to be given to Article 12 could not be anything other than recognising that a man and woman, that is persons of opposite sex, have the right to marry.[76] He also took the position that when Article 12 was read in the light of the object and purpose of the ECHR, the same conclusion could be reached. As Article 12 associates the right to marry with the right to found a family, he was of the view that this this showed that Article 12 referred to marriage between a man and a woman. He argued that Article 31 (3) (b) VCLT which allows for subsequent practice to be taken into consideration could not be relied on to come to the finding that Article 12 should now be read in such a way as not to exclude marriage between same-sex couples. To support this, he argued that the fact that six States provide the possibility for homosexual couples to marry, cannot be regarded as 'subsequent practice in the application of the treaty'. He concluded that the literal interpretation prevents the

[71] *Schalk and Kopf v Austria* (n 53) para 61.
[72] Ibid para 62.
[73] Ibid para 63.
[74] 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.
[75] See *Schalk and Kopf v Austria* (n 53) (Concurring opinion of Judge Malinverni joined by Judge Kolver). This had been expressed in the majority judgment in para 55.
[76] Ibid.

interpretation of Article 12 as conferring the right to marry on persons of the same sex.[77] Furthermore, even if the supplementary rules of interpretation under Article 32 VCLT were considered, he would come to the same conclusion.

On the issue of the application of the living instrument doctrine, Judge Malinverni acknowledged that the Convention is a living instrument that should be interpreted in a manner that takes into consideration present-conditions. He also acknowledged that there have been substantial changes to the institution of marriage since the adoption of the Convention. He, however, argued that based on the Court's existing case law a limitation to the evolutive interpretation was that the Court cannot be means of an evolutive interpretation derive from it a right that was not included therein at the outset.[78] He rejected the argument that the Court could rely on Article 9 of the Charter of Fundamental Rights of the European Union to find that Article 12 should now be read to include the right to marry for same-sex couples. Whilst there was a difference in the way Article 9 of the Charter was framed, he was of the view that no inferences could be drawn from this in relation to the interpretation of Article 12 of the Convention. Judge Malinverni's reliance on Article 31-33 of the VCLT and the consensus argument to come to a different conclusion to that of the Court on the issue of applicability is quite instructive even though the majority did not agree with the outcome he proposed.

The second applicability argument arose from the allegation of the applicants 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 Registered Partnership Act. They alleged that this amounted to a breach of Article 14 taken in conjunction with Article 8.[79] In relation to this strand of argument, the Court adopted Model 3 (LI and MOA applicability & compatibility). This is therefore one of the 'hard case' scenarios where there was potential for direct conflict between both doctrines. The government agreed with the applicants that Article 8 was applicable in this case as the relationship between a same-sex couple came within the notion of 'private life' provided for within the Article. The applicability issue was whether the relationship of a same-sex couple also constitute 'family life' for the purposes of Article 8 of the Convention.[80]

---

[77] Ibid.
[78] This was the decision of the Court in *Johnston* (n 17).
[79] *Schalk and Kopf v Austria* (n 53), para 65.
[80] In an interesting twist, both the applicants and the respondents argued 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 in addressing the issue of whether there had been a violation of Article 14 in conjunction with Article 8, reiterated its position that Article 14 had no independent existence and could only be applied where another Article of the Convention was engaged as well.[81] The Court reiterated some of its earlier case law which had shown that the notion of family was not confined to marriage-based relationships.[82] The Court drew attention to more recent cases where it recognised a growing tendency in some of the European States to recognise stable relationships between homosexual couples but in those cases it had come to the conclusion that there was a lack of consensus on that issue and as such States could still enjoy a wide margin of appreciation.[83] The Court then 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. It noted that in 'a considerable number of member States have afforded legal recognition to same-sex couples'.[84] This could be seen as the Court recognising European consensus. In addition, it noted that 'Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family"'[85] This could be seen as the Court seeking international consensus on the issue as well. The Court concluded that:

> In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.[86]

This decision that the facts of the case came within the notion of 'private life' as well as 'family life' within the meaning of Article 8 showed that the living instrument doctrine trumped the wide margin of appreciation of the States in this area.

The UK government which intervened as a third party also agreed that the same-sex relationships should be considered to be within the ambit of 'family life' - *Schalk and Kopf v Austria* (n 53), paras 76, 79, 82.

[81] Ibid para 89.

[82] The Court reiterated some of its case law such as *Elsholz v. Germany* App no 25735/94 (ECtHR, 13 July 2000); *Keegan v. Ireland* App no 16969/90 (ECtHR, 26 May 1994) and *Johnston* (n 17).

[83] 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.

[84] *Schalk and Kopf v Austria* (n 53), para 93.

[85] Ibid.

[86] Ibid para 94.

In regard to the compliance issue 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. It first of all drew attention to the key principles of Article 14 and the margin of appreciation enjoyed by the States in this area:

> [I]n order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.[87]

The Court reiterated its principle that differences based on sex or sexual orientation should be justified by very weighty reasons. It 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'.[88] It also referred to the fact that one of the factors that may be relevant could be the existence or non-existence of common ground between the laws of the contracting states'.[89] The Court then addressed the two key 'limbs' of the applicants' arguments in relation to being discriminated against: first, that as a same-sex couple, they did not have access to marriage and second, no alternative means of legal recognition was available to them until the entry into force of the Registered Partnership Act.[90] With regards to the first limb of the argument, 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.[91] It referred back to its principle that the Convention should be read as a whole.[92]

---

[87] Ibid para 96.
[88] Ibid para 98.
[89] Ibid.
[90] Ibid para 100.
[91] Ibid para 101.
[92] This was the same approach adopted by the Court in *Johnston* (discussed in 6.3.1.1) 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.

On the second point of whether the respondent State should have provided an alternative method of recognition for the applicants, the Court noted that the Registered Partnership Act had now come into force. The question to be considered was therefore whether the respondent States had a responsibility to provide that recognition earlier than it did.[93] 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'.[94] 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'.[95] Once again we see the Court adopting a margin within a margin. The Austrian Registered Partnership Act which came into force on 1 January 2010 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 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'.[96] 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'.[97] There had therefore been no violation of Article 14 taken in conjunction with Article 8.[98]

In the dissenting opinion of Judge Rozakis, Judge Spielmann and Judge Jebens, they disagreed with the finding that there had been no violation of Article 14 taken in conjunction with Article 8. They were of the view that once the Court found that same-sex relationships fell within the ambit of 'family life' under Article 8, they should then have required the government to advance its reasons for the difference in treatment between same-sex couples and heterosexual couples. They were of the view that the margin of appreciation argument should only be relevant where the government had adduced its reasons for the difference in treatment. Since the government had not done so in this case, they concluded that the Court

[93] *Schalk and Kopf* (n 53), para 104.
[94] Ibid para 105.
[95] Ibid.
[96] Ibid para 108.
[97] Ibid para 109.
[98] 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* (n 53), para 115.

should have found a violation of the Convention.[99] Although these judges dissented on the issue of a finding of violation, they agreed with the decision about compatibility and the applicability of Article 14 taken in conjunction with Article 8, so there was unanimity on this point.

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 has 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 can no longer be interpreted to exclude same sex marriage. It also formed the basis for the decision that the relationship between same sex couples was 'family life' within the ambit of Article 8 ECHR. In *Schalk* which was discussed in a greater depth, the rules of interpretation in Article 31-32 of the VCLT were relevant to the Court's interpretation although it moved beyond those tools to consider the living instrument doctrine. The basis for the Court decision that Article 12 could be applied to same sex couples is however out of sync with its practice in finding consensus. It relied on only one international instrument, one that did not even expressly provide for marriage between same sex couples, in order to come to its decision. There was a clear lack of European consensus in the practice of States on the recognition of same sex marriage, but the Court still made a decision that Article 12 was applicable, although it stopped short of a finding that there had been a violation under Article 12.

In relation to the finding that the relationship between same-sex couples comes within the ambit of family life under Article 14, there was a clear contention between the living instrument doctrine and the margin of appreciation doctrine. The Court chose the evolving consensus in views concerning legal recognition of same-sex couples and its case law to decide that the relationship was part of family life, although it once again stopped short of finding a violation. The right was therefore seen as a ground of a duty, but the duty was not imposed due to counteracting factors. It is interesting to note that in a recent advisory opinion delivered by the Inter-American Court, it found that States had a duty to extend some form of legal protection to homosexual couples. In relation to Costa Rica which already had civil marriage in place, the Court was of the view that to comply with the American Convention on Human Rights, Costa Rica did not need to create any new institutions but should rather

[99] *Schalk and Kopf v Austria* (n 53), (Dissenting opinion of Judge Rozakis, Spelmann and Jebens).

extend the existing institutions for marriage to same sex couples.[100] This suggests a different position to that of the ECtHR in *Schalk* where a duty to provide access to marriage for same sex couples was not recognised. Although, there have been some criticisms of the impact of this decision of the Inter-American Court, it would therefore be interesting to see what the ECtHR's position will be on the margin of appreciation enjoyed by a State in this area, if a similar case is brought before it in the future.[101]

5.5.2 Expansion of the Scope of the Convention, And Expansion of Duty on the State

This section considers cases where the Court found that the particular issue was compatible with the Convention after there had been a living instrument debate on the issue and the Court also found that the respondent State had been in breach of its obligations under the Convention. The highest number of cases from the sample come under this category with a total of 9 out of the 14 cases falling within this section. A selection of these cases will be discussed below, drawing from the different categories of the use of the living instrument and margin of appreciation doctrines within the cases.

In six out of the nine cases that fall under this section of extension of both scope of the Convention and the duty of the States, Model 1 was adopted by the Court (LI applicability, MOA compliance).[102] In two of the cases, Model 2 was adopted by the Court (LI applicability, LI and MOA compliance),[103] whilst in one case, Model 4 was adopted by the Court (MOA applicability, LI compliance).[104] A variety of issues were covered in these cases. In *Matthews v United Kingdom*, the applicability issue was whether Article 3 of Protocol No 1 which guaranteed the right to free elections was applicable to elections to the

[100] State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf accessed 12 August 2018.

[101] For an example of a commentary of this case, see Elena Abrusci 'The IACtHR Advisory Opinion: one step forward or two steps back for LGBTI rights in Costa Rica?' February 27 2018 EJIL talk! Available at < https://www.ejiltalk.org/the-iacthr-advisory-opinion-on-gender-identity-equality-and-non-discrimination-for-same-sex-couples-one-step-forward-or-two-steps-back-for-lgbti-rights-in-costa-rica/> accessed 12 August 2018.

[102] The six cases in this category in chronological order are: *Matthews v The United Kingdom* App no 24833/94 (ECtHR, 18 February 1999); *S A Dangeville v France* App no 36677/97 (ECtHR, 14 April 2002); *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 July 2002); *Beganovic v Croatia* App no 46423/06 (ECtHR, 25 June 2009); *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011); *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016).

[103] *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) and *Glor v Switzerland* App no 13444/04 (ECtHR, 30 April 2009).

[104] *Siliadin v France* App no 733316/01 (ECtHR, 26 July 2005).

European Parliament.[105] In *S A Dangeville v France* the issue was whether an application for refund of VAT paid in error constituted an 'asset' and therefore a 'possession' within the meaning of Article 1 of Protocol No 1.[106] In *Société Colas Est and Others v France* the applicability question was whether the provisions of Article 8 applied to juristic persons such as the applicants and whether it afforded protection for their business premises.[107]

In *Berganovic v Croatia*, the applicability question was whether the severity of the attack against the applicant which was inflicted by other individuals, came within the ambit of Article 3.[108] In *Bayatyan v Armenia*, the applicability question was whether the right to conscientious objection was protected under Article 9 ECHR. [109] In *Magyar Helsinki Bizottsag v Hungary,* the applicability question was whether Article 10 which provides for the right to freedom of information, also includes a right of access to State held information.[110] In *Demir and Baykara v Turkey* the applicability 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. It can be seen that the cases in this section were not restricted to issues under Articles 8-11, the usual Articles where it is assumed the margin of appreciation would be relevant. Instead they have a wider coverage.

5.5.2.1 Living Instrument Doctrine Without a Consensus Factor

In each of these cases, the Court relying on the living instrument doctrine came to a positive decision on applicability of the Convention to the issues raised. Although the living instrument doctrine was applied in all of these cases, there were differences in how the Court approached the cases. In coming to the decision in *Matthews* 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 is firmly rooted in the Court's case law…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. To the extent that

[105] *Matthews* (n 102).
[106] *S A Dangeville* (n 102).
[107] *Société Colas Est And Others* (n 102).
[108] *Beganovic* (n 102).
[109] *Bayatyan* (n 102).
[110] *Magyar Helsinki Bizottság* (n 102).

> Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols.[111]

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.[112] 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. [113] 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.[114] 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,*[115] where the living instrument doctrine was relied on in coming to the decision that an application for refund of VAT paid in error constituted an 'asset' and therefore a 'possession' within the meaning of Article 1 of Protocol No 1.[116] 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.[117] A similar approach was also adopted in *Berganovic v Croatia,* where the Court found that the acts of violence that had been alleged by the applicant were severe enough to come within the ambit of Article 3 ECHR.[118] 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 assessing breaches of fundamental values of democratic societies'.[119] *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.

---

[111] *Matthews* (n 102), para 39.
[112] Ibid para 40.
[113] Ibid para 64.
[114] Ibid para 65.
[115] *S A Dangeville* (n 102).
[116] Ibid.
[117] *Société Colas Est And Others* (n 102), para 115.
[118] *Beganovic* (n 102) para 58, 66.
[119] Ibid para 66.

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. This shows that the living instrument doctrine is not just about consensus. It is about ensuring adequate protection of rights whether or not there is consensus in the practice of States.

5.5.2.2 Living Instrument Doctrine with a Consensus Factor

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.[120] 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.[121] 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. It stated that:

> Whilst it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement…It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory…[122]

[120] *Bayatyan v Armenia* (n 102).
[121] Ibid paras 93-96.
[122] Ibid para 98.

The Court was not convinced that the approach of the Commission in the past to this issue is approach was in in line with the real purpose and meaning of Article 4(3). It relied on the *travaux préparatoires* in coming to this decision.[123] The Court however linked the interpretation that the Commission had adopted in earlier cases, to the prevailing attitudes of the time.[124] This formed the basis for the Court's reference to the living instrument doctrine and the resultant consideration of the changes that had happened in society. The Court found that there had been changes which showed consensus at the international,[125] European[126] and national level,[127] to recognise conscientious objection. As a result, it could no longer confirm the Commission case law. This finding of applicability 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.[128] 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. 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

[123] Ibid para 100.
[124] Ibid para 101.
[125] 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. *Bayatyan* (n 102), para 105-7.
[126] At the time of the alleged interference in 2002-2003, there was already a consensus in all Council of Europe member States due to the fact that the overwhelming majority had already recognised the right to conscientious objection in their laws. *Bayatyan* (n 102), para 103.
[127] 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.
[128] *Bayatyan* (n 102), para 123.
[129] *Magyar Helsinki Bizottság* (n 102),para 133.
[130] Ibid paras 134-137.

approach recognised European[131] and international consensus[132] on the right of access to information. 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.

The case of *Demir and Baykara v Turkey* was also another one 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.[136] In that case 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,[138] and 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.[139] Relying on this combination of international and European consensus, the Court concluded that 'members of the administration of the State' cannot be excluded

[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.
[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* (n 103).
[137] Ibid.
[138] It relied on provisions such as Article 8(2) of the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR); Article 22 of the International Covenant on Civil and Political Rights (ICCPR); provisions from the ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise; Article 12 (1) European Union's Charter of Fundamental Rights
[139] *Demir and Baykara* (n 103), paras 48, 106.

from the scope of Article 11 of the Convention.[140] 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.[141] 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.[142]

On the question whether Article 11 included the right to collective bargaining. Taking all these developments at the international, regional and national levels into consideration, the Court concluded that:

> In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11… should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement ...[143]

As a result of the developments that had been highlighted, 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.[144] In this case, the State had a 'limited' margin of appreciation.[145] 'The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation judgment of 6 December 1995 based on that absence, with the resulting *de facto* annulment *ex tunc* of the collective agreement in question, constituted interference with the applicants' trade-union freedom as

[140] 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.
[141] *Demir and Baykara* (n 103), para 125-6.
[142] Ibid para 127.
[143] Ibid para 153.
[144] Ibid para 154.
[145] Ibid para 119.

protected by Article 11 of the Convention'.[146] 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'.[147] 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.[148] To evidence the consensus, the Court referred to a combination of European and international treaties.[149] This case is significant because it was the first time the ECtHR was applying Article 14 in relation to disability. Similarly, in *Siliadin v France* consensus was also relevant. 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 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

[146] Ibid para 157.
[147] *Glor* (n 103), para 53.
[148] *Glor* (n 103).
[149] In this case, the Court referred in particular to Recommendation 1592 (2003) towards full social inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008.
[150] *Siliadin* (n 104).
[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* (n 104), para 88.
[153] Ibid.
[154] Ibid para 141.

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.

5.6 Conclusion

The aim of this chapter was to present the first case analysis, with a focus on the use of the margin of appreciation and living instrument doctrines to determine the scope of applicability *ratione materiae* of the ECHR. 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 applicability and merits stage is largely ignored in the literature, this researcher considers it an important element for this thesis and seeks to contribute to the existing knowledge in this area by including an analysis of the case law under this heading. An understanding of the interaction between the margin of appreciation and living instrument doctrines at the applicability stage is relevant to answering RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches).

The first analysis conducted in this chapter was with the quantitative method of descriptive statistical analysis. Four key questions were explored in that section: (a) Is compatibility *ratione materiae* contested in the case? (b) Are the margin of appreciation or living instrument doctrine arguments referred to in addressing compatibility? (c) Which of the two arguments is used the most at the compatibility stage? (d) What is the outcome of compatibility arguments in cases in which there is a margin of appreciation or living instrument argument? 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. In 40% of those cases, either the margin of appreciation or living instrument arguments were raised. It also revealed that living instrument arguments were raised in 79% of the relevant cases. In terms of the overall outcome of the compatibility *ratione materiae* arguments, the Court found the issue to be compatible with the convention in 79% of the cases examined where there was either a margin of appreciation or living instrument argument. Furthermore, in almost all the cases where the living instrument doctrine was

[155] Ibid para 148.

raised, the Court found the issue to be compatible *ratione materiae* with the Convention.[156] This prompted an initial finding on RQ 2 (conflict) which suggested that living instrument arguments were superseding margin of appreciation arguments at the applicability stage on the issue of compatibility *ratione materiae*. 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 some answers to RQ 1 (relationship) by revealing four different models and ways in which the living instrument and margin of appreciate doctrines interacted in the cases examined. The four models were:

1. Living instrument doctrine applied to applicability argument, only margin of appreciation doctrine applied to compliance (Model 1 LI applicability, MOA compliance)
2. Living instrument doctrine applied to applicability argument, both living instrument and margin of appreciation doctrines applied to compliance. (Model 2 LI applicability, LI and MOA compliance)
3. Living instrument and margin of appreciation doctrines applied to both the applicability argument and the compliance arguments. (Model 3 LI and MOA applicability & compliance)
4. Margin of appreciation doctrine applied to applicability argument, only living instrument doctrine applied to compliance. (Model 4 MOA applicability, LI compliance)

The most occurring model in the case law was Model 1 (LI applicability, MOA compliance). Interestingly, there were only two cases in Model 3 (LI and MOA applicability and compliance) which is the Model where there was potential for a clear interaction between the margin of appreciation and living instrument doctrines both at the applicability 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 Model 3, the Court found that there had been no violation of

[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.

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*. 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*, a point that would be relevant for answering RQ 3 (interpretive and theoretical approaches). It was also restricted due to the limited number of cases that fell within this category for examination. It was therefore deemed necessary by the researcher 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 Model 3 (LI and MOA applicability & compliance) case and could therefore provide further insights to RQ 2 (conflict). 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 a negative answer to RQ 2 (conflict) as it suggested that living instrument arguments were not trumping 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 materie* of the scope of the Convention revealed two outcomes. First, expansion of the scope *ratione materiae* of the Convention without an expansion on the duty on the State. Second, expansion *ratione materiae* of the scope of the Convention plus an expansion of the duty on the State. In relation to the former, expansion of the scope *ratione materiae* without expansion of duty, *Schalk and Kopf* a Model 3 (LI and MOA, applicability & compliance) 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. This suggested a positive answer to RQ 2 (conflict) as it showed that living instrument argument was trumping the margin of appreciation argument on compatibility when placed side by side in this case. Nonetheless, there was no finding of a breach of duty.

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 (RQ 2). 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 which is important. 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 trumped 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 expansion of scope of duty, the analysis showed that a higher number of cases were found in this category. Cases in Model 1 (LI applicability, MOA compliance) 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 suggest 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. This finding was relevant in answering RQ 3 (interpretive and theoretical approaches).

Other themes revealed by the case analysis in this chapter is 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 provided further answers to RQ 3 (interpretive and theoretical approaches) as it 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.

Reflecting on dynamic restricted correlativity which is based on Raz's critique of the correlativity thesis examined in chapter four, it can be seen that in many of the cases examined, the finding of compatibility *ratione materiae* and the existence of a right did not automatically mean that a duty ensued on the part of the State. It was a finding of a ground of a duty but in some of the cases, using the margin of appreciation doctrine, the State was not considered to have a duty, and, in some others, it was not considered to have breached its duty in relation to that right. Raz's idea that a right can be the ground of more than one duty is also seen, as in quite a few of the cases examined, the Court was creating 'new duties' on the States, flowing from the finding of applicability of the Convention to the issue raised. The dynamic nature of duties is also clearly seen through the cases where the Court moved away from earlier jurisprudence such as the *Demir and Baykara* and the *Bayatyan* cases. From a theoretical perspective, this shows that in the case law, rights are not always seen as correlative of duties, but rather grounds of duties. This sheds further light on RQ 3 (interpretive and theoretical approaches).

Overall, this chapter has provided some answers to RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). It has shown 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 chapter. In the next chapter, the second phase of analysis of the case law focuses on those cases where their applicability was not contested or the margin of appreciation and living instrument doctrines were not raised at the applicability stage. It focuses on the use of both doctrines in the merit stage of the proceeding and draws

conclusion on the interpretive approach applied by the Court and whether living instrument arguments are superseding margin of appreciation arguments in that context.

Chapter Six

Case Analysis Part II

Margin of Appreciation and Living Instrument Arguments in Determining the Nature and Scope of Duties on States

6. Introduction

In the previous chapter, the focus was on the use of living instrument and margin of appreciation arguments in deciding the issue of compatibility *ratione materiae*. Since the question of compatibility *ratione materiae* goes to the question of the jurisdiction of the Court to deal with a particular issue, it was necessary to consider that separately. The case analysis showed that living instrument arguments were used more than margin of appreciation arguments at the applicability stage. In almost all the cases where the living instrument doctrine was relied on, the Court found the issue to be compatible *ratione materiae* with the European Convention on Human Rights (ECHR, the Convention).[1] There were however some cases where the margin of appreciation trumped the living instrument argument on compatibility. In assessing the impact of the compatibility argument on the outcome of the case, the descriptive statistical analysis of the case law revealed four models of interaction between the margin of appreciation and living instrument doctrines in cases where the compatibility *ratione materiae* was contested.[2]

Through the use of doctrinal textual analysis of the case law based on the four models of interaction, the previous chapter showed that the Court relied in many cases on the interpretive rules in Articles 31-32 VCLT even when it did not directly mention those Articles in the case. It also showed that it was not in all cases that the use of the living instrument argument led to an expansion *ratione materiae* of the scope of the Convention. Furthermore, even in cases where there had been an expansion *ratione materiae* of the scope of the Convention, it was not in all of those cases that the Court ultimately found that the State was in breach of its duty under the Convention, essentially still retaining a margin of appreciation argument in favour of the State. In such cases, applying the dynamic restricted the correlativity thesis, the finding that a particular issue comes within the scope of the Convention, provides a ground of the duty but does not automatically mean a duty follows. A distinction therefore exists between the finding that a particular issue is within the scope

[1] The four models are presented in Chapter 6, section 6.2.4
[2] The four models are presented in Chapter 6, section 6.2.4

of the Convention, and a finding that a State is in breach of its obligations under the Convention. Furthermore, there are instances in which the Court has refrained from an expansion of the scope of the Convention and therefore made no expansion in the scope of the duties on the State. The analysis from chapter five was therefore relevant to answering RQ1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches).

The current chapter is the second part of the case analysis. The focus here is on the impact of the living instrument in determining the nature and scope of duties of States where a margin of appreciation is afforded to the State. This analysis looks at the merits of the case itself since the issue of applicability has been considered in the previous chapter. It examines the impact the living instrument argument has on the margin of appreciation and the overall outcome of the case and the rules of interpretation applied by the Court in coming to its conclusion. In order to address this, a combination of qualitative and quantitative approaches is applied in this chapter. First of all, drawing from the literature in Chapter 2, this chapter begins with a discussion on the issue of 'widths' of margin of appreciation, the importance of this and the extent to which the width of the margin of appreciation is impacted by the living instrument doctrine. It then examines the correlation if any, of the width of the margin of appreciation afforded and the final decision on whether a State has violated its obligations. Following that analysis, the chapter moves on to consider some of the areas where the living instrument and margin of appreciation arguments have impacted on the overall outcome of the case and how the Court had dealt with those cases. In particular, two case studies are examined to show the impact of the living instrument doctrine on the margin of appreciation afforded to States in those areas of the Convention. The chapter ends with conclusions that are drawn from the different stages of the case analysis conducted.

6.1 Widths of Margin of Appreciation and the Scope of Duty on the State

One of the areas identified in chapter two in which there is a relationship between the margin of appreciation and living instrument doctrines, is in relation to the determination of the width of the margin of appreciation.[3] In a speech at the European Conference of Presidents of Parliament, the previous president of the ECtHR, Sir Nicolas Bratza explained the process the Court adopts in relation to the application of the margin of appreciation this way:

[3] Chapter 2, particularly 2.6.2

> In many types of cases, the Court's approach is first to determine the appropriate margin of appreciation. There is no general formula for this – whether the margin is broad or narrow depends on a number of variables. The second stage is to establish whether or not the national authorities remained within that margin.[4]

The width of the margin of appreciation afforded to States is therefore a significant factor, a preliminary issue to be addressed in cases where a margin of appreciation is relevant. From the existing literature, the width of the margin of appreciation afforded to States is usually described as either 'wide' or 'narrow'. Where a wide margin of appreciation is afforded a State, the Court gives greater deference to the State and would adopt a lower level of scrutiny, with the likely outcome that the State is not found to be in violation of its obligations.[5] On the other hand, where a narrow margin of appreciation is given, the Court sets a higher threshold and adopts a higher level of scrutiny, with the likely result that the State is found to be in violation of its obligations.[6]

Baroness Hale suggests that the application of the living instrument doctrine has the unwelcome effect of narrowing the margin of appreciation of the State.[7] Grounds for this idea can be seen in the case law of the Court itself. In *A, B and C v Ireland*, the Court whilst noting that States have a wide margin of appreciation in the context of abortion rights, went on to say 'however, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus'.[8] In this case the ECtHR did not find that the margin of appreciation was narrowed by consensus,[9] nonetheless it lends support to the argument that a wide margin of appreciation can be narrowed where the living instrument doctrine is applied and changes in society are relied on based on the consensus approach. This chapter tests the use of the living instrument doctrine to alter the width of the margin of

[4] Antoine Buyse, 'Speech of Bratza and Candidates for New Judges' ECHR Blog, 21 September 2012. Available at < http://echrblog.blogspot.com/2012/09/speech-of-bratza-and-candidates-for-new.html> accessed 13 August 2018.

[5] An example of this wide margin of appreciation can be seen in the context of protection of 'morals' in *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 48; A wide margin of appreciation was also afforded by the Grand Chamber to the State in the context of the protection from excessive noise in *Hatton v United Kingdom* App no 36022/97 (ECtHR, 8 July 2003), paras 123 and 130.

[6] A narrow margin of appreciation is given in relation to difference in treatment based on sexual orientation – e.g. *Kozak v Poland* App no 13101/02 (ECtHR, 2 March 2010), para 92; *X and others v Austria* App no 19010/07 (ECtHR, 19 February 2013), para 99.

[7] Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534, 542.

[8] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010), para 234.

[9] In this case, although there was clear evidence of consensus, the Court did not restrict the margin of appreciation afforded to the State. *A, B and C* (n 8), paras 235-236.

appreciation and what this means from the paradigm of the correlation between rights and duties. In this way, this thesis adds to the literature in this area.

6.2 Descriptive Analytical Statistics on Width of Margin of Appreciation

The first phase of the analysis is a descriptive statistical analysis of the data which contains cases in which both the margin of appreciation and living instrument doctrines are present.[10] It examines several key issues: (a) The types of widths of margin of appreciation given to States; (b) Whether there is a correlation between the width of the margin of appreciation and the overall finding of violation or no violation. (c) Whether the living instrument led to a narrowing of the width of the margin of appreciation.

6.2.1 Question 1: What are the Types of Widths of Margin of Appreciation in the Case law?

The data was scrutinised in order to determine the types of widths of margin of appreciation the States were deemed to have within the case. This is restricted to the categorisation of width explicitly given by the Court to the margin of appreciation.[11] The results are presented in Chart 6.1 – margin of appreciation is referred to as MOA.

Chart 6.1 Widths of Margin of Appreciation

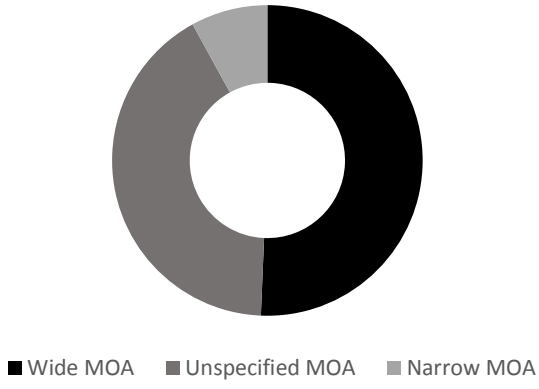


Chart 6.1 show that rather than the clear ‘narrow’ and ‘wide’ widths, there are three ‘widths’ of the MOA that can be detected in the case law: ‘wide’; ‘narrow’; and ‘unspecified’. The unspecified width is seen in cases in which the Court refers to terms such as ‘a margin

[10] A detailed description of the selection criteria is contained in Appendix A to this thesis.
[11] The designated width by the Court was coded as opposed to the width the applicant argued the margin of appreciation should have or the view expressed by the respondent State or in the dissenting judgment.

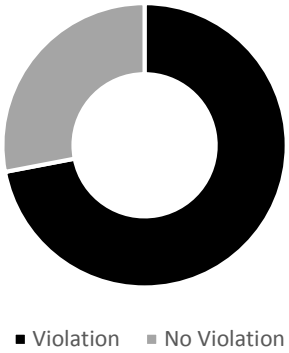
of appreciation' or 'a certain margin of appreciation' without specifying the exact width. In the majority, 51% of the cases examined, the Court designated the MOA as being 'wide'. [12] Interestingly, in 41% of cases the width of the MOA was unspecified, [13] whilst in just 8% of the cases, the Court expressly categorised the MOA as being 'narrow'.[14] There are therefore a variety of widths of MOA that the Court can deem a State to have.

6.2.2 Question 2: Is There any Relationship Between the Width of the Margin of Appreciation and the Finding of Violation in the Case?

The purpose of this question was to explore the issue around the correlation between the width of the margin of appreciation afforded and the overall outcome of the case. From the existing literature, it would appear a wide margin of appreciation should lead to a finding of no violation whilst a narrow margin of appreciation would most likely lead to a finding of violation. The outcome of cases in which there is an unspecified width of the margin of appreciation has not been fully explored in the literature.[15] In order to provide an answer to this question, some further sub questions were asked:

First, in how many of the cases from the sample, did the Court make a finding of at least one violation of the Convention?

Chart 6.2 Outcome of Cases



[12] In 38 out of the 75 cases examined, the Court referred to the margin of appreciation afforded to the State to be 'wide' or 'broad'.

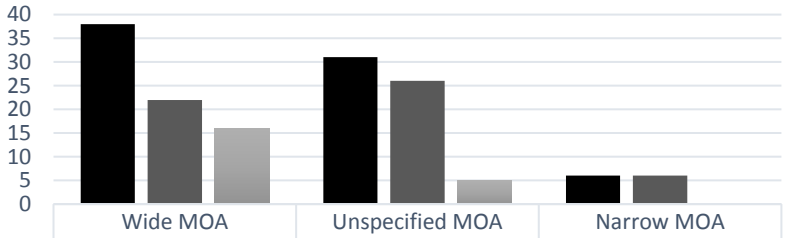
[13] In 31 out of the 75 cases examined, the Court did not necessarily designate the width of the margin of appreciation but referred to 'certain' margin of appreciation or just referred to 'a margin' of appreciation afforded to the State.

[14] 6 out of the 75 cases, the Court referred to the margin of appreciation as 'narrow' or 'limited'.

[15] The use of the term 'certain margin of appreciation' is discussed by Jan Kratchovil in the context of an inflation of the use of the margin of appreciation. In that context reference to it is seen as unhelpful in the actual determination of the case, it is seen as a synonym for deference in that context. See Jan Kratchovil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29(3) Netherland Quarterly of Human Rights 324, 340-342.

In the majority, 54, out of the 75 cases examined, the Court found at least one violation of the Convention. This accounts for 72% of the cases. This is quite a high figure considering that the 'narrow' margin of appreciation was only seen to have been designated by the Court in 8% of the cases. There was a need to further investigate the outcomes of the cases based on the type of width of margin of appreciation. The results are presented below:

Chart 6.3 Outcome of Cases Based on Width of Margin of Appreciation

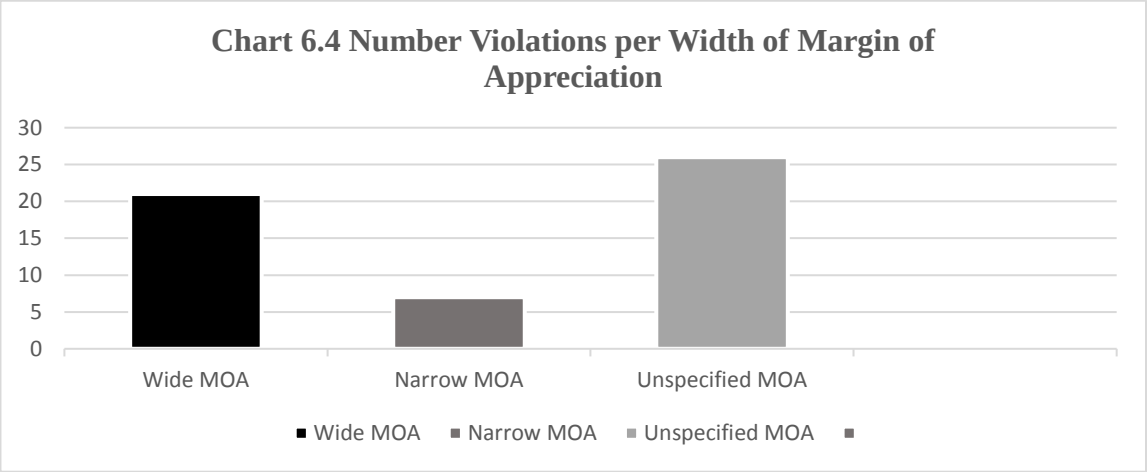


	Wide MOA	Unspecified MOA	Narrow MOA
Total Number of cases	38	31	6
Violation	22	26	6
No Violation	16	5	0

From the results, in 100% of the cases where the margin of appreciation was designated to be 'narrow', the Court found a violation of the Convention.[16] However, as pointed out above, the 'narrow' margin of appreciation accounts for only 8% of the case sample.[17] There were, however, violations found in 54 out of the 75 cases, so the finding of violations must extend to the other cases where the margin of appreciation was designated either as 'wide' or 'unspecified'. In 60% of the cases where the margin of appreciation was designated to be 'wide', the Court found a violation of the Convention.[18] Interestingly, where the Court deemed the margin of appreciation afforded to the unspecified, using terms such as 'certain' or 'a' margin of appreciation, the Court found in 84% of those cases that there had been a violation of the Convention.[19] This figure is even higher than when the margin of appreciation is deemed to be wide.

[16] 6 out of 6 cases where the margin of appreciation was designated as 'narrow'.
[17] 6 out of 75 cases that were subjected to the comprehensive analysis.
[18] 22 out of the 37 cases where the margin of appreciation was designated as 'wide'
[19] 26 out of 31 cases where the margin of appreciation was unspecified.

The chart below puts these findings in the context of the proportion occupied by the different widths of margin of appreciation in the overall outcome of findings of violations.



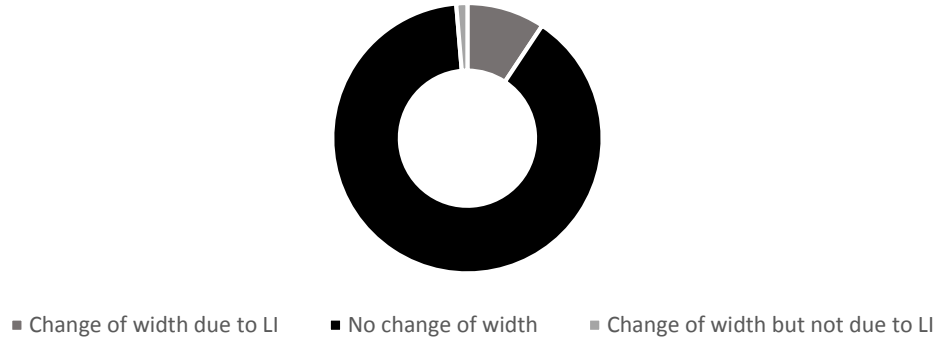
Overall, the narrow margin of appreciation accounts for 13% of the violations.[20] The wide margin of appreciation accounts for 39% of the violations[21] whilst the unspecified width of margin of appreciation accounts for 49% findings of violations. With the unspecified width accounting for almost half of the cases where the Court found a violation, this suggests that the width of the margin of appreciation, whilst relevant, is not the only factor to be considered in determining the outcome. There are other factors that affect the overall outcome irrespective of the width of the margin of appreciation.

6.2.3 Question 3: Has the Living Instrument Doctrine Resulted in a Narrowing of the Width of the Margin of Appreciation?

In answering this question, a first sub question was asked: In how many cases was there a change to the width of the margin of appreciation due to the living instrument doctrine? The result is presented in Chart 6.5 – living instrument also referred to as 'LI':

[20] 7 out of the 54 cases where the Court found a violation.
[21] 21 out of the 54 cases in which the Court found a violation.

Chart 6.5 Relation of Living Instrument to Change of width of Margin of Appreciation

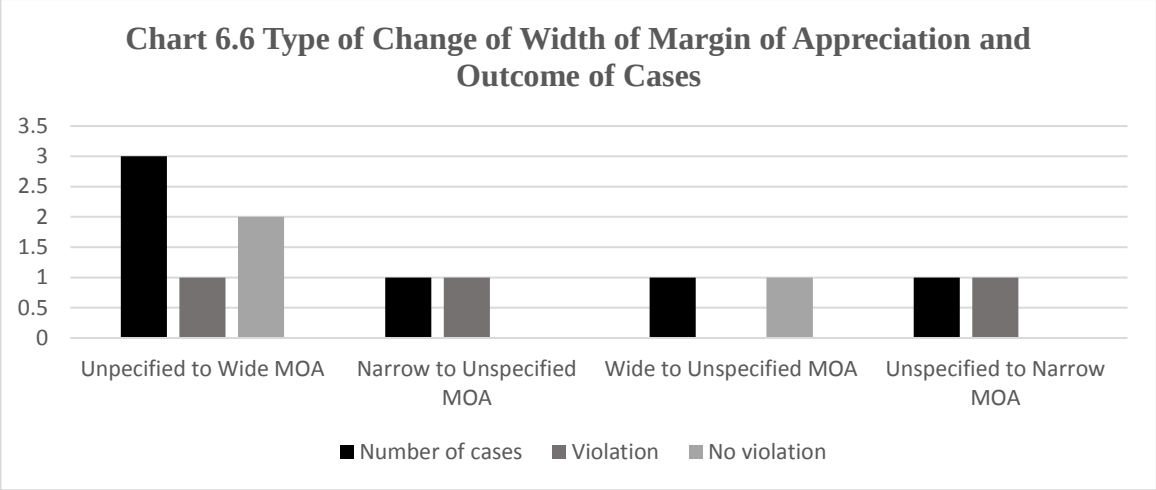


The width of the MOA was changed explicitly as a result of the application of the LI doctrine in 6 cases which accounts for 8% of the overall sample. Although the Court expressly referred to the LI in consideration of the width in 10 cases, it only changed the width in 6 out of the 10 cases.[22] In 68 cases, which accounts for 91% there was no direct change of the width of the MOA. In 1 case, which accounts for 1% there was a change of the width of the MOA, but it was not as a result of the direct application of the LI doctrine.[23] A direct reference to a change of the width of the margin of appreciation as a result of the LI is therefore seen in a very minimal number of cases.

The second question asked, was how did the LI affect the width of the MOA in those cases where there had been a change of width? The results are presented in Chart 6.6 which depicts the different changes to widths that was made as a result of the application of the living instrument doctrine. It also highlights the overall finding of the Court on whether the State was in violation of its obligations under the Convention.

[22] The Court expressly considered the effect of the LI on the wide width of the MOA in the following cases: In the following cases, although the LI was considered in terms of narrowing the width of the MOA, the Court decided that the width remained wide: *A, B and C* (n 8); *S.H. and Others v. Austria* App no 57813/00 (ECtHR, 3 November 2011); *Dubská and Krejzová v The Czech Republic* App nos 28859/11 and 28473/12 (ECtHR, 15 November 2016). The Court expressly considered the effect of the LI on the 'limited' MOA in *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016) bit it determined that the margin of appreciation would be narrow in that case, hence effectively no change was made to the width of the MOA.

[23] In one case, there was a change of the width, but it was not related to the LI doctrine – *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).



The literature suggests that the living instrument doctrine results in a narrowing of the margin of appreciation. The results in Chart 6.6 above however show that the living instrument doctrine can also lead to either an expansion of the width of the margin of appreciation as was seen in three of the cases, or it can lead to the width becoming unspecified. It was in only one case that there was an explicit reference by the Court to the width of the margin of appreciation being narrowed by the application of the living instrument doctrine. The results also show that a finding of violation does not necessarily follow a change of width as in some cases no violation was found even when the width was changed. Does this mean that the living instrument has not had an impact on the width of the margin of appreciation and in particular narrowing of the width? It appears answering that question involves more than a quantitative method of descriptive statistical analysis.

6.2.4 Limitations of the Descriptive Statistical Analysis

The descriptive statistics has been helpful as a first step in providing further answers to RQ 2 (conflict). It has shown that in addition to the narrow and wide widths, in some cases, the width of the margin of appreciation is not specified by the Court. This would suggest with all due respect, that the allocation of the width of the margin of appreciation may be a more nuanced point than may be seen in the statement by Sir Nicolas Bratza. The direct words used in the case law does not suggest a clear specification of the width in all cases. This raises the issue of how the State party would know what it is to do in the particular case since it may be unaware of the width of the margin of appreciation it requires.[24]. The descriptive

[24] Kratchovil has expressed similar criticisms about the lack of articulation of the width of the margin of appreciation in some cases and the effect that may have on the State in determining what it requires to fulfil its obligations. See Kratchovil (n 15), 324, 340-342.

analysis also showed that a narrow margin of appreciation was directly allocated in only a small portion of the cases. The outcome was a finding of violation in all those cases but overall the unspecified width of margin of appreciation accounted for the most findings of violations, leading to conclusion that a finding of violation goes beyond the size of the width of the margin of appreciation. The descriptive statistical analysis is however limited in detailing how the living instrument doctrine impacts on the margin of appreciation outside of a look at the width of the margin of appreciation.

The descriptive statistical analysis also added a further step to answering RQ 2 (conflict) when it revealed that it was only in a small number of cases, 6 that the use of the living instrument doctrine directly led to a change in the width of the margin of appreciation. The change was also varied, and it was only in one case that it led to a change from an unspecified width to a narrow width. This result suggested a different outcome to what had been seen in the literature in Chapter two where the link between the margin of appreciation and living instrument doctrines was that the living instrument doctrine narrowed the margin of appreciation afforded to the State.[25] The results strengthened the conclusion of the researcher that an examination of the interaction between the living instrument doctrine and the margin of appreciation doctrine should go beyond a consideration of changes to the width. The descriptive statistical analysis is however limited in terms of the extent to which it can reveal the other considerations within the case. In order to discover the impact of living instrument arguments on the margin of appreciation and the overall outcome of the case law, and to determine the interpretive approaches adopted by the Court, a qualitative analysis of the case law is needed.

6.3 Doctrinal Textual Analysis

The case analysis so far has revealed that the impact of the living instrument doctrine on the margin of appreciation goes beyond narrowing the width of the margin of appreciation explicitly when examining the text of the cases. The textual analysis therefore focuses on the 'boundaries' (which includes the width) as opposed to a partial focus on just the term 'width' of the margin of appreciation. First of all, this section examines the origins of the use of the living instrument doctrine to police the boundaries of the margin of appreciation doctrine and then proceeds by virtue of two case studies to examine the impact that the living instrument doctrine has had on the margin of appreciation of States in those specific areas.

[25] See Chapter 2, in particular the discussion on 'change in width' in section 2.6.2

6.3.1 Origins of the Application of the Margin of Living Instrument to Police the Boundaries of the Margin of Appreciation Afforded to States

The early seeds of the use of the living instrument doctrine to 'police' the boundaries of the margin of appreciation afforded to States may be traced back to the 1979 case of *Marckx v Belgium.*[26] Interestingly, *Marckx* was decided just over a year after the 1978 case of *Tyrer v United Kingdom* in which the Court articulated the living instrument doctrine for the first time.[27] There was therefore a relationship between the living instrument doctrine and the margin of appreciation afforded to States right from the early days of the introduction of the living instrument doctrine to the jurisprudence of the Court. In *Marckx,* the Court was faced with a situation where the Belgian Code did not automatically recognise maternal affiliation with a child born out of wedlock to unmarried mothers at the point of birth. The applicants, an unmarried mother and her daughter, complained about certain aspects of the Belgian Civil Code in this matter. The main articles relied on by the applicants were Articles 8 and 14 although they raised some other points based on other Articles.[28]

The ECtHR determined that Article 8 did not provide any distinction between 'legitimate' and illegitimate' children.[29] Furthermore, the requirements of 'respect' for family life imposed both negative and positive obligations on the State to provide effective respect for family life.[30] The Court noted that States had a 'choice of means' in creating safeguards that ensured connection between a child and his family from the moment of birth.[31] A law that failed this requirement would, however, be a breach of Article 8(1). The Court's referral to a 'choice of means' available to the State when deciding on how it would establish family ties between an unmarried mother and their children, was effectively a recognition that a margin of appreciation was available to the State. However, that margin of appreciation was subject to the supervision of the Court on the basis that whatever means adopted by the State had to ensure that the relevant parties were able to lead a normal life. Whilst the Court does not expressly state what the width of the margin of appreciation is here, it is stating that there are some boundaries to that discretion afforded to the State.

The living instrument doctrine became relevant in this case when determining whether there had been a breach of Article 8 taken in conjunction with Article 14 on the issue

[26] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).
[27] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).
[28] The applicants also relied on Articles 3 and 8 of the Convention and Article 1 of Protocol No 1 to the Convention.
[29] *Marckx* (n 26), para 31.
[30] Ibid.
[31] Ibid. (emphasis added).

of the establishment of maternal affiliation between the first and second applicants.[32] The applicants had alleged that they had been victims of discriminatory treatment because of the lack of an automatic recognition of maternal affiliation between an unmarried mother and an 'illegitimate' child when compared with the position of a married mother and her child in which case recognition was automatic by mere registration of the birth.[33]

The government justified its current law which favoured traditional family structures on the basis that 'the law aims at ensuring that family's full development and is thereby founded on objective and reasonable grounds relating to morals and public order.'[34] The Court however disagreed with this view, noting that whilst support for the traditional family was a legitimate aim, the measures that were employed to achieve this should not lead to discriminatory treatment between the 'illegitimate' family and members of the 'legitimate' family as both should be able to fully enjoy their rights under Article 8.[35] In response to the government's argument that the question of reforming the current law only arose many years after the entry into force of the ECHR in Belgium, the Court referred to the need to interpret the Convention as a living instrument.[36]

> It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions ... In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".[37]

The Court therefore applied the living instrument doctrine in policing the boundaries of the 'choice of means' available to the State in this case. In doing so, the ECtHR took into

[32] The Court had already found that there had been a breach of Article 8 taken on its own in relation to the manner of establishing maternal affiliation.
[33] *Marckx* (n 26), paras 32-35.
[34] *Marckx* (n 26), para 40.
[35] Ibid.
[36] The ECHR entered into force in Belgium on 14 June 1955. The need for change was attributed to the adoption of the Brussels Convention of 12 September 1962 on the Establishment of Affiliation of Natural Children. Belgium had signed, but not yet ratified the 1962 Convention
[37] *Marckx* (n 26), para 41.

consideration the Brussels Convention of 1962[38] and the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock[39]. The Court therefore relied on international consensus here.[40] The existence of the two treaties showed 'a clear measure of common ground in this area amongst modern societies'.[41]

The ECtHR also noted the developments that were taking place in Belgium to reform the laws in relation to maternal affiliation and removing the existing distinction between legitimate and illegitimate children.[42] The internal consensus in Belgium was moving in line with international consensus. The Court concluded that the distinction that was created in the establishment of maternal affiliation between legitimate and illegitimate children lacked an 'objective and reasonable justification'.[43] In the particular case, the manner of establishing maternal affiliation of the second applicant had violated in respect of both applicants Article 14 taken in conjunction with Article 8.[44]

In his strong dissenting opinion, Judge Sir Gerald Fitzmaurice however criticised the way the Court had used the consideration of the evolution in society, effectively the living instrument approach, to determine the boundaries of the margin of appreciation of the State in this case.[45] He argued that:

> [T]he Belgian Government ought not to be condemned for the operation of a law which, while some may consider it defective or inequitable, has in fact…much that can be urged in favour of it, and in any event lies well within the margin of appreciation or discretion that any Government, acting bona fide, ought to be accorded. I fail to see how States can possibly be required to have uniform laws in matters of this kind. It is I think an exaggeration to say, as was maintained on behalf of the applicants, that the old forms of family relationships, and in particular the old distinction between legitimate and illegitimate children, are in

[38] This had been signed by only eight states and ratified by four.
[39] This had been signed by ten states and ratified only by four members of the Council of Europe.
[40] International consensus refers to situations where the Court relies on international instruments in order to show evolving trends on a particular issue. This has been highlighted previously in Chapter 2, in particular the discussion on 'Change in Width' in section 2.6.2.
[41] *Marckx* (n 26), para 41.
[42] Ibid.
[43] Ibid para 43.
[44] Ibid.
[45] As had already been mentioned earlier in this chapter, the Court referred to a 'choice of means' without an express use of the words 'margin of appreciation' but in doing so, the Court was effectively referring to the margin of appreciation available to the State. Judge Sir Gerald Fitzmaurice's reference to the margin of appreciation doctrine in his dissenting opinion further confirms this view.

> the process of obliteration. But, in any event, States must be allowed to change their attitudes in their own good time, in their own way and by reasonable means, - States must be allowed a certain latitude.[46]

Judge Sir Gerald Fitzmaurice was therefore arguing that the State had not been given enough discretion in this case. His core argument on the use of the living instrument doctrine here being that it was for the State to decide when it would make its own changes even in situations where there has been a shift in the attitudes in society over time. He argued that 'breaches of the Convention should be held to exist only when they are clear and not when they can only be established by complex and recondite arguments, at best highly controversial, as much liable to be wrong as right.[47] Fitzmaurice's dissent highlights the issue that persists with the use of the living instrument doctrine to police the boundaries of the margin of appreciation – there continues to be a lack of clear determination of how the principle works. This may be argued to be the nature of this doctrine. Just like the margin of appreciation, there is lack of precision in the living instrument doctrine.

The Court's decision showed that whilst it was up to the State to determine the means, there was a minimum requirement that the means should ensure a normal family relationship and the State had to comply with that now, rather than take its time to catch up with developments. This was in spite of the fact that the State was already carrying out some internal changes to the relevant law. Notwithstanding the criticism above advanced by Judge Sir Gerald Fitzmaurice and several other judges in their dissenting opinions, *Marckx* case laid the foundations for the use of the living instrument doctrine in policing the boundaries of the margin of appreciation.

Several principles can be extracted from *Marckx* as to how the Court used the living instrument doctrine to police the boundaries of the margin of appreciation afforded to the State.

- International and regional treaties were examined to determine what the trend was in relation to the issue of maternal affiliation. This included treaties to which Belgium itself was not a party. International consensus continues to be relevant to the determination of the boundaries of the margin of appreciation.

[46] *Marckx* (n 26), Dissenting opinion of Judge Sir Gerald Fitzmaurice para 29.
[47] *Marckx* (n 26), Dissenting opinion of Judge Sir Gerald Fitzmaurice para 31.

- The Court referred to the practice within European States – this was a reference to European consensus which continues to be relevant.
- The Court was also influenced by the changes that were taking place in the domestic arena of Belgium – this was a reference to internal consensus, in this case it was in sync with the international and European consensus, but this is not always the case.[48]

A combination of these considerations influenced the Court in reaching its decision on the importance of the issue at stake and on the means that would be sufficient to achieve protection of the issue.

Since *Marckx*, the use of the living instrument as a tool to police the boundaries of the margin of appreciation afforded to States has continued to develop in the Court's case law and has been applied in different cases.[49] In the 2008 case of *K.U v Finland*, the Court, whilst referring to the State's positive obligations to secure respect for private life in the horizontal sphere of relations between individuals, stated that:

> While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation…The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved…[50]

Whilst *Marckx* and *K.U* refer to the use of the living instrument doctrines to police the boundaries of the margin of appreciation in cases where there is a positive obligation on the State, the living instrument doctrine is also relevant to determine the boundaries of the margin of appreciation where the State has the negative obligation to not interfere with a particular right. In such cases, the living instrument doctrine is relevant to the issue of

[48] For example, in *A, B and C* (n 8), the restrictive abortion laws in Ireland were out of sync with the abortion laws in other contracting States but the Court did not deem this an automatic violation of the Convention.
[49] For example, in *Johnston v Ireland* the Court referred to the same principles in finding that there had been a violation of Article 8 in respect of the rights of the third applicant, the daughter born to an unmarried couple. It held that the State had a positive duty to take steps to regulate the legal situation in relation to the establishment of family ties between the third applicant and the first and second applicant who were her parents. *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986).
[50] *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) paras 43-4.

whether the interference is justified. In *A B C v Ireland*, where the Court had to determine whether the interference with private life as a result of the restrictions placed on access to abortion was justified, the living instrument doctrine was expressly referred to as a determinant of the breadth of the margin of appreciation afforded to the State.[51] Essentially the living instrument doctrine is relevant in determining the threshold of the justification a State would need to give in order for an interference in the rights of an individual or a failure to perform a particular positive obligation, would be seen as justified before the Court.

In assessing the use of the living instrument to determine the boundaries of the margin of appreciation, one is effectively dealing with the use of the living instrument to raise or lower the threshold of justification required of States in order to escape liability for their actions. The discussion on the use of the living instrument doctrine to police the boundaries of the margin of appreciation therefore also ties in the consideration of the allocation of duties to States.

6.4 Boundaries of Margin of Appreciation and the Duty on the State

The examination of the boundaries of the margin of appreciation is assessed within this work in the context of the impact on the outcome of the case. A finding of violation is essentially a finding that there is a duty on the State which has been breached whilst a finding of no violation could either be a finding that there is no duty on the State, hence none could be breached, or that there was a duty on the State, but that duty has not been breached in that instance. The analysis of the duty on a State necessitates two key questions. First, what is the nature of the duty required (positive or negative obligation)? Second, what is the scope of the duty? There may be some cross-over in some cases and blurred lines between the two aspects but those form the core points to take into consideration when discussing the duty on the State.

The case law analysis shows the use of the living instrument doctrine to police the boundaries of the margin of appreciation in a variety of areas such as the protection of the

[51] In this case, although there was clear evidence of consensus, the Court did not restrict the margin of appreciation afforded to the State. *A, B and C* (n 8), paras 235-236.

rights of illegitimate children,[52] transsexuals,[53] homosexuals[54] and prisoners.[55] It has covered other areas such as trade unions,[56] the right to vote,[57] and freedom of expression amongst others.[58] Two of these areas have been chosen, for reasons given below, for further analysis in the sections that follow. The textual analysis will be divided into two categories:

- The use of the living instrument doctrine to determine the nature and scope of duty
- The use of the living instrument doctrine to determine the scope of the duty

In the course of the analysis, the themes of change in time and space, change in width and change in function which were highlighted in chapter two when discussing the link between the living instrument and margin of appreciation doctrines will be highlighted where relevant.[59]

6.5 Interaction between the Living Instrument and Margin of Appreciation Doctrines in Determining the Nature and Scope of State Duty

The issue of recognition of the post-operative identity of transsexuals is used as a case study to illustrate the impact of the living instrument doctrine on the margin of appreciation in determining the nature and scope of the duty on the State. This area has been chosen for a number of reasons. First, from the case law examined, 12% dealt with issues surrounding transgender rights.[60] Second, the issue of gender identity is one that is such a private area of life, therefore any regulation of that area or interference in that area by the State is worthy of consideration. Third, it is a good example of change in time and space.[61] The width of the

[52] E.g. *Inze v Austria* App no 8695/79 (ECtHR, 28 October 1987); *X v Latvia* App no 27853/09 (ECtHR, 26 November 2013).
[53] E.g. *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986); *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002); *Y.Y v Turkey* App no 14793/08 (ECtHR, 10 March 2015).
[54] E.g. *Frette v France* App no 36515/97 (ECtHR, 26 February 2002); *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010); *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013).
[55] E.g. *Hirst v United Kingdom (No. 2)* App no 74025/01 (ECtHR, 6 October 2005), *Scoppola v Italy* (No 3) App no 126/05 (ECtHR, 22 May 2012) and *Anchugov and Gladkov v Austria* App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013).
[56] E.g. *Sigurður A. Sigurjónsson V. Iceland* App no 16130/90 (ECtHR, 30 June 1996) and *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008)
[57] E.g. *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999) and *Sitaropoulos and Others v Greece* App no 42202/07 (ECtHR, 8 July 2010)
[58] E.g. *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) and *Magyar Helsinki Bizottsag v Hungary* App no 18030/11 (ECtHR, 8 November 2016).
[59] See discussion in Chapter 2, particularly, 2.6, 2.6.1, 2.6.2 and 2.6.3.
[60] 9 out of 75 cases.
[61] In Chapter two whilst discussing the relationship between the margin of appreciation and living instrument doctrines, it was highlighted that this thesis will test whether a change in time and space and occur in the same case as the literature suggested that the living instrument leads to a change in time whilst the margin of appreciation leads to a change in space. See chapter two, in particular, 2.6.1.

margin of appreciation in these cases was either 'wide'[62] or 'unspecified'.[63] Interestingly, the Court found a violation in 5 out of the 9 cases, some of which included 'wide' margins. This reinforces the point that a designation of a wide margin does not necessarily lead to an outcome that the State has not violated its obligations.

6.5.1 Change in Nature and Scope of Duty: Recognition of Post-operative Identity of Transsexuals

In *Christine Goodwin v United Kingdom*, the Court departed from its earlier decisions concerning the boundaries of the margin of margin of appreciation afforded to States in relation to the recognition of post-operative gender identity for transsexuals.[64] Before considering *Goodwin*, it is necessary to provide some context from the earlier case law of the Court on this subject in order to identify the Court's earlier position and how this was changed in *Goodwin*. It is striking that the earlier cases were all from the same jurisdiction – the United Kingdom. This is therefore a good example of the interaction between the living instrument and margin of appreciation doctrines leading to a change in time within the same space.[65] After *Goodwin*, there are examples of extension to other jurisdictions, showing a change in both time and space.

The first case in which the Court dealt on the merits with the issue of recognition of the post-operative identity of a transsexual was in the 1986 case of *Rees v United Kingdom*.[66] In that case, the applicant, a female to male post-operative transsexual, brought the application before the Court alleging that the failure of the United Kingdom to effect a change in the birth register to recognise his post-operative sexual identity was a breach of his rights under Article 8 which provides for a right to private and family life, and Article 12 which provides for the right to marry.[67] The Court reiterated that Article 8 imposed both positive and negative obligations on the State and that the positive obligations that may be inherent in the effective respect of private life was subject to the margin of appreciation of the State.[68] In coming to a decision concerning whether a positive obligation existed in this case, the

[62] 7 out of 9 cases
[63] 2 out of 9 cases
[64] *Goodwin* (n 53).
[65] Time meaning chronological time and space meaning the country in question – member State.
[66] *Rees* (n 53). Six years earlier, in the 1980 case of *Van Oosterwijck v Belgium* App no 7654/76 (ECtHR, 6 November 1980), the issue of recognition of the post-operative status of a transsexual had come before the Court but the Court rejected the application on the grounds that the applicant had failed to exhaust local remedies. The Court did not therefore address the merits of the case.
[67] *Rees* (n 53), para 32.
[68] Ibid para 35.

Court looked to see if there was consensus in the practice of member States in this area. It noted that there were divergent practices within the member States with some allowing for recognition of the new gender identity, and others not providing any options for that. The Court therefore concluded that there was a lack of common ground, which gave the State a wide margin of appreciation in this area.[69]

In assessing whether there had been a fair balance struck between the needs of the individual and that of others in society, the Court referred to the margin of appreciation of the State. It was of the view that 'The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt'.[70] The Court concluded that having regard to the wide margin of appreciation to be afforded the State in this area of dealing with transsexuals and the consideration of striking a balance between the interests of the individual and that other others in society, the positive obligations that arise from Article 8 could not be extended to require the State to make alterations in the birth register which would recognise the new gender of the applicant. In essence, the Court came to a finding that the nature of obligation on the State in this case was not a positive obligation to make changes to the birth register. Following this finding, there was no need then to consider the issue of scope of the obligation since an obligation did not exist in the view of the Court.

The Court, however, referred to the living instrument doctrine as a form of directive to the State to keep the situation under review. In the words of the Court,

> [I]t must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances... The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.[71]

[69] Ibid para 37.
[70] Ibid para 42a.
[71] Ibid para 47.

The above statement showed that the Court recognised that the boundaries of the margin of appreciation afforded to the State in the area of the nature and scope of obligations could be affected by adopting the living instrument doctrine and taking into consideration the evolution in practices in the Contracting States. It was, however, not convinced in this case that there was a consensus which required a decision that there was in existence a positive obligation on the State to recognise the new gender identity of post-operative transsexuals. Therefore, although the living instrument doctrine was considered by the Court, it did not have a direct effect of lifting the threshold of justification required on the State by virtue of their margin of appreciation. It was restricted to an invitation to the State to keep in mind developments and make relevant changes. Essentially, an invitation for dialogue between the Court and the domestic authorities.

Four years later, in *Cossey v United Kingdom* which was also a case on the recognition of the post-operative identity of a transsexual, the applicant argued that the failure to register her new identity amounted to an interference with her rights under Article 8, thereby framing it as an issue of a negative obligation.[72] The Court did not subscribe to this view, reiterating that as it had held in the *Rees* case, the relevant issue was whether a positive obligation existed on the State to make the alterations to the birth register in order to ensure in effective respect for the rights of the applicant under Article 8.[73] It was of the view that there had not been significant developments since *Rees* to warrant a change in its position.[74] In a similar vein to the *Rees* case, the Court referred to the need to interpret the Convention in the light of current circumstances and urged the State to keep the need for relevant measures in this area under review.[75] This invitation did not however yield any favourable results.

Nine years later, in the case of *Sheffield and Horsham v United Kingdom*, the Court was once again faced with a situation of the respect for private life of post-operative transsexuals.[76] The applicants were both post-operative male to female transsexuals. In a similar vein to *Rees* case and *Cossey*, they alleged that the refusal of the government to grant legal recognition of their post-operative gender amounted to a breach of their rights under Article 8 taken alone and in conjunction with Article 14.[77] Their argument was therefore framed slightly wider than that in the *Rees* and *Cossey* cases which required recognition by

[72] *Cossey v United Kingdom* App no 10843/84 (ECtHR, 27 September 1990) para 36.
[73] Ibid.
[74] Ibid paras 40, 48.
[75] Ibid para 42.
[76] *Sheffield and Horsham v United Kingdom* App nos 22985/93 23390/94 (ECtHR, 30 July 1998).
[77] Ibid para 39.

virtue of an alteration in the birth register.[78] The Court was still not convinced there were significant developments sufficient enough to lead to a change in its position on the issue.[79] The Court did however call on the State to keep its legislation under review.[80]

Four years later, in *Goodwin*, the opportunity came for the Court to reconsider its position.[81] In that case, the application was brought by a male to female post-operative transsexual. The applicant alleged that the failure of the respondent State to recognise her post-operative gender identity was a breach of her rights under Article 8 and had exposed her to discriminatory treatment contrary to Article 14 of the Convention. The Court noted that although it is not bound to follow its previous judgments it normally would not depart from them in the interest of legal certainty.[82] However, the changing situation in the member States required it to consider the issue afresh in the light of the developments that had occurred. In the words of the Court:

> However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved…A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement… The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention…[83]

The Court once again examined medical and scientific considerations, concluding it was not persuaded that they provided any determining arguments about the legal recognition of transsexuals.[84] The Court then went on to consider the state of any European consensus on the issue. It noted the States had a wide margin of appreciation in the area of legal recognition of post-operative transsexuals and therefore there would be different approaches. As a result of this, it was of the view that:

---

[78] Ibid para 53.
[79] Ibid para 45.
[80] Ibid para 61.
[81] *Goodwin* (n 53).
[82] Ibid paras 74-5
[83] Ibid paras 74-5.
[84] Ibid para 83.

> The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals. [85]

European consensus was therefore not required, rather a 'continuing international trend' was sufficient.

On the core question of whether the appropriate balance had been struck in this case between the individual and the general needs of society, it noted that nothing had been effectively done by the government to review proposals to deal with the issues facing transsexuals. The Court concluded that:

> [T]he Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention…it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.[86]

The Court also found the State to be in violation of Article 12 which provides for the right to marry. Rejecting the argument of the government that this should be left to the margin of appreciation of the State, the Court concluded that the margin of appreciation could not extend that far. Whilst it was up to the State to determine the choice of means, there was no reason to bar transsexuals from enjoying the right to marry.[87] The living instrument doctrine in this case altered the nature of the margin of appreciation afforded to the State, thereby leading to a departure from previous decisions of the Court on this subject in two respects. First, the Court found that there existed a positive obligation on the State to recognise the post-operative identity of transsexuals as part of the right to private life under Article 8 and a right to marry was recognised under Article 12. The State no longer had a margin of

[85] Ibid para 85.
[86] Ibid para 93.
[87] Ibid para 103.

appreciation to decide whether or not it had a duty to recognise the post-operative status of transsexuals. That margin of appreciation in deciding whether or not there was a duty was therefore eroded completely. Second, the Court found that the State had breached its positive obligations by not striking a fair balance. The scope of the duty on the State was therefore also affected as the State was unable to demonstrate that it had met the threshold required to show a fair balance. The effect of the judgment was, therefore, to restrict the margin of appreciation to the way in which the duty was to be executed rather than the decision as to whether a duty existed. This is similar to a restriction of the margin of appreciation to norm application as opposed to norm definition.[88]

Following this landmark decision in *Goodwin*, the Court has found a breach where States fail to make provision for recognising the post-operative identity of transsexuals. In the case of *I v United Kingdom* which had similar facts to those in the *Goodwin* case, the Court also found a violation of Articles 8 and 12 of the Convention respectively.[89] The finding of a positive obligation on the State to ensure legal recognition of post-operative transsexuals was applied in the context of pension rights of a post-operative male to female transsexual in the case of *Grant v United Kingdom*.[90] Although at the time the United Kingdom government had effected legislation in response to the Court's judgment in the *Goodwin* case, the Court still found a violation of Article 8 for failure by the State to accord the applicant pension rights applicable to women of biological origin.[91] The Court was of the view that the applicant's status as a victim of such a breach began from the date of the *Goodwin* decision in 2002 and only came to an end when the Gender Recognition Act came into force in 2004.[92]

6.5.2 Extension of Scope of Duty: Access to Gender Reassignment Surgery

Goodwin brought about a change in the case law of the ECtHR and established that there was a positive obligation to recognise the post-operative gender of a transsexual. The scope of that positive obligation has now been extended to police the boundaries of the margin of appreciation in relation to regulating the conditions for gender reassignment

[88] A discussion of the difference between norm definition and norm application in the use of the margin of appreciation was made in chapter 2, particularly 2.2 'Evolution in the Definition of the Margin of Appreciation Doctrine'. For more on this distinction, see Yuval Shany, 'Toward a general Margin of Appreciation Doctrine in International Law?' (2006) 16(5) EJIL 907; Kratchovil (n 15).
[89] *I v United Kingdom* App no 25680/94 (ECtHR, 11 July 2002).
[90] *Grant v United Kingdom* App no 32570/03 (ECtHR, 23 May 2006).
[91] Ibid paras 42-4.
[92] This case raises an interesting issue of the role of the Court in monitoring compliance with its decision and the temporal nature of the Court's decision. These will be considered later in the chapter.

surgery. In *L v Lithuania*[93] the positive obligation to recognise the post-operative status of a transsexual was extended to cover a situation in which the domestic law did not provide any regulation of gender reassignment surgery. The Court reiterated the principles of the margin of appreciation doctrine and its boundaries being determined by virtue of the interpretation of the Convention as a living instrument.[94] The Court decided in this case that this was a gap in the law that had to be remedied. The Court found a violation of Article 8 of the Convention.

In the more recent case of *Y.Y v Turkey*, the obligation was examined in the context of access to gender reassignment surgery and the compatibility of the conditions that could be imposed prior to the surgery with the duty of the State under the Convention. [95] In that case, the applicant alleged that the failure of the Turkish authorities to approve his request for gender reassignment surgery on the basis that he had not shown he was 'permanently unable to procreate', was a violation of his right to respect for private and family life under Article 8 of the Convention.[96] In making a decision on whether an obligation existed and the nature of the obligation, the Court was of the view that although Article 8 could not be interpreted as guaranteeing an unconditional right to gender reassignment surgery, it had held in the earlier case of *Goodwin*, that transgenderism was recognised internationally as a medical condition that required treatment to assist those concerned. It noted that the health services of most of the Contracting States recognised the condition and provide or permit treatment, including irreversible gender reassignment.[97] The Court was of the view that the refusal by the State authorities to grant permission to the applicant to have gender reassignment surgery had 'repercussions on his right to gender identity and to personal development, a fundamental aspect of the right to respect for private life.'[98] The failure of the State to allow access to the applicant for gender reassignment surgery was therefore an interference with his rights under Article 8. The interpretation of the Convention in the light of present-day conditions was therefore relevant in determining the issue of the existence and nature of obligation on the State. The Court chose to address the case based on a negative obligation as opposed to a positive obligation, which was the approach in the previous cases.

The next question was whether the interference was justified. The legal basis of the interference was not contested, and the Court found that it had been prescribed by law.[99] The

[93] *L v Lithuania* App no 27527/03 (ECtHR, 11 September 2007).
[94] Ibid para 56.
[95] *Y Y* (n 53).
[96] Ibid paras 17 & 44.
[97] Ibid paras 61-62, 65.
[98] Ibid para 66.
[99] Ibid para 71.

Court also found that the interference pursued the legitimate aim of health-protection in the public interest.[100] The next issue to examine was whether the interference was necessary. In order for an interference to be considered as 'necessary in a democratic society', it had to meet a 'pressing social need', be proportionate to the legal aim pursued and the reasons given by the national authorities to justify it must be 'relevant and sufficient'.[101] Once again, the margin of appreciation and living instrument doctrines were relevant on this point of the determination of whether the interference was necessary in a democratic society.

The Court pointed out that the State has a margin of appreciation in the determination of whether a particular interference was necessary, but that determination was subject to review by the Court. The issue in this case was also important as it was in relation to the applicant's freedom to define his gender identity, which was 'one of the most basic essentials of self-determination'.[102] The Court underscored the importance of a dynamic interpretation of the Convention stating that:

> A failure by the Convention institutions to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement…In the context of the present case, the Court therefore considers it appropriate to take account of the development of international and European law, and of law and practice in the various Council of Europe member States, in order to assess the circumstances of the present case "in the light of present-day conditions"[103]

In this instance, although the Court had alluded to a margin of appreciation available to the State, the living instrument doctrine was directly relevant to the determination of the boundaries of the margin of appreciation and the final decision of whether the State had breached its duties under the Convention. It was relevant to the determination of the scope of the obligation on the State.

The Court took into consideration the practice in many European countries which allowed for gender reassignment treatment and recognition of the new gender identity. It also noted that the different regulations in a number of countries where gender reassignment is recognised, make that recognition of the new gender contingent 'either implicitly or

[100] Ibid para 79.
[101] Ibid para 100.
[102] Ibid para 102.
[103] Ibid paras 103-4.

explicitly, on gender reassignment surgery and/or on the inability to procreate'.[104] The Court reiterated that the contracting States were given a wide margin of appreciation on the issue of the legal recognition of post-operative gender status and that such a margin would exist in relation to the 'legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment'.[105]

On the pre-operative requirements for gender reassignment, the Court applied the living instrument doctrine to the determination of the boundaries of the margin of appreciation of the State by taking into consideration legislative developments in the Council of Europe and developments within member States which showed a move towards removing barriers to access to gender reassignment surgery.[106] The domestic courts justified their initial refusal to grant permission to the applicant to under gender reassignment treatment on the basis of the applicant's ability to procreate. The Court disagreed with this position, concluding that the requirement of 'inability to procreate' was wholly unnecessary to justify the regulation of gender reassignment surgery. Therefore, the interference with the applicant's private life as a result of the rejection of his request for the gender reassignment surgery could not be considered 'necessary' in a democratic society'.[107]

The Court drew further support for its position from the fact that the domestic Court had changed its initial decision and had authorised the applicant after the present proceedings had been initiated in the Court, to undergo gender reassignment surgery even though he was not permanently unable to procreate.[108] The Court held unanimously, that in denying the applicant the possibility of undergoing gender reassignment surgery, the State had breached his right to respect for private life and there was therefore a breach of Article 8 of the

[104] Ibid para 105.
[105] Ibid paras 106-7.
[106] The Court referred to the Appendix to Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, in which the Committee of Ministers of the Council of Europe had stated that 'prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements'. The Court also referred to Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, in which the Parliamentary Assembly of the Council of Europe 'called on the member States to address the specific discrimination and human rights violations faced by transgender persons and, in particular, to ensure in legislation and in practice their right to official documents that reflected the individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery or hormone therapy'. Furthermore, the Court referred in particular to the fact that some of the member States had recently amended their legislation on access to gender reassignment treatment and the issue of the legal recognition of gender reassignment by removing the infertility/sterility requirement *Y Y* (n 53), para 110 -111.
[107] *Y Y* (n 53), para 121.
[108] Ibid paras 24, 25, 121.

Convention. The combination of international consensus, European consensus and the change in internal consensus as evidenced by the subsequent authorisation of the gender reassignment surgery, underpinned the use of the living instrument doctrine to restrict the boundary of the margin of appreciation.

The interaction between the living instrument doctrine and the margin of appreciation doctrine has been shown through these cases concerning the rights of transsexuals examined under this section in relation to the determination of the nature and scope of duty on States. The application of the living instrument doctrine resulted in a move from a position where no positive obligation to recognise the post-operative identity was held to exist in *Rees*, to a position where a positive obligation was held to exist in *Goodwin* and even further, an obligation to ensure the right conditions for access to gender reassignment surgery are available in *L* and *Y .Y*. The boundaries of the margin of appreciation moved from determining whether an obligation existed, to being restricted to determining the way in which the obligation would be achieved. The progress was shown in relation to negative obligations as well, thereby encompassing the full nature of duties on States.

The progression of events in relation to the recognition of the post-operative status of transsexuals is a clear example of a change being achieved in both time and space. It also shows the Court inviting dialogue with the national Court in making its decision. There was scope from 1986, for the United Kingdom, to adjust its national laws without there being interference by the Court. Failure to make any adjustments even in the light of developments at the international and regional levels, resulted in the issue being brought back to the Court in different cases and the margin of appreciation of the State shifting to just the practical issues of the recognition rather than to the issue of deciding whether or not to recognise the new gender identity. One could argue that had the State chosen to make its own adjustments earlier on, they may have been no need for the Court to make the decisions on those issues.

6.5.3 Restriction of Scope of Duty: No Recognition of a Right to Same-Sex Marriage

This trend in the recognition of the post-operative identity of transsexuals could give the impression that the application of the living instrument doctrine in this area post *Goodwin*, always leads to a decision of violation. This is however not the case as the Court has restricted this approach where the outcome would be to recognise a right to same-sex marriage. In *Hämäläinen v Finland*, the applicant who was born male, had married a woman and had a

child.[109] Subsequently, the applicant was diagnosed as transgender and underwent gender reassignment surgery to become female. The applicant sought to have full recognition of her change of gender by virtue of a change in her identity number from a male to a female one. However, one of the requirements of the domestic law for registration of post-operative identity was that if the applicant was married, the consent of the spouse was to be given in order for the change to be made and the marriage would be converted automatically into a registered civil partnership. The applicant objected to this requirement stating that she wanted to retain her marriage and at the same time gain full legal recognition of her new identity. At the domestic level, the Supreme Administrative Court had dismissed the applicant's case, stating that the ECHR did not require the State to create laws permitting same sex marriage. The State was therefore within its margin of appreciation.

In dealing with this issue, the Court chose to address this under the umbrella of positive obligations as opposed to considering it as an interference with the applicant's rights. This could be considered in keeping with its earlier jurisprudence on the recognition of the post-operative gender identity of transsexuals.[110] The Court framed the question as follows 'whether the respect for family life entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married'.[111]

As to the margin of appreciation doctrine, the Court reiterated that States enjoy 'a certain' margin of appreciation when implementing their positive obligations under Article 8. Factors to be taken into consideration when determining the breadth of the margin of appreciation include the importance of the issue at stake – with a restricted margin of appreciation in areas to do with identity, the place of consensus on either the importance of the issue at stake or the means of protecting it with a wider margin of appreciation where sensitive moral and ethical issues are involved.[112] In applying the principles to the case, the Court was of the view that based on its case law, Article 8 cannot be interpreted as imposing a positive obligation on member States to grant same-sex couples access to marriage. A civil partnership was an adequate option.[113]

---

[109] *Hämäläinen v Finland* App no 27359/09 (ECtHR, 16 July 2014).
[110] The Court was however criticised for this approach in the Dissenting Opinion of Judges Sajó, Keller and Lemmens who argued that the Court should have taken the approach that it was an interference which would have then resulted in a narrower margin of appreciation being given to the State. See *Hämäläinen* (n 109) Dissenting Opinion of Judges Sajó, Keller and Lemmens, paras 1-3.
[111] *Hämäläinen* (n 109), para 64.
[112] Ibid para 67.
[113] Ibid para 71.

As a result of recognising that this was an area which was subject to constant developments, the Court proceeded to examine the practice in other Council of Europe States in respect of the issues in this case to see if there had been any changes. The Court's comparative study showed revealed that there was diversity in the practice of member States.[114] The Court concluded that there was, therefore, an absence of any European consensus on allowing same-sex marriage and also lack of consensus on how to deal with gender recognition in the case of a pre-existing marriages.[115] The Court did not therefore find that any significant changes in practice to warrant a change in its position on the issue.[116] In line with previous practice, as a result of the lack of consensus and the sensitive moral and ethical issues raised, the Court determined that the margin of appreciation to be afforded to the State was a wide one.[117]

> This margin must in principle extend both to the State's decision whether or not to enact legislation concerning the legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.[118]

This is the sort of situation that Spielmann refers to as 'the margin within the margin'.[119] The first part of the Court's finding as to the scope of the margin of appreciation appears to contradict its earlier jurisprudence in the *Goodwin* case where it held that 'the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention'.[120] One would have expected that enacting legislation would be a crucial step in protecting the right. The margin of appreciation should, therefore, have been restricted to the rules that could be laid down by the State in order for the new identity to be recognised, but here the Court seems to suggest that the State can

[114] Only ten of the member States allowed for same-sex marriage. Furthermore, there was no commonality of practice in those States where same sex marriage was not allowed on the status of married persons that had undergone gender reassignment. There were only three states in which exceptions which allowed a married person to gain legal recognition of his post-operative gender without having to end a pre-existing marriage.
[115] *Hämäläinen* (n 109), para 73-4.
[116] Ibid (n 109), para 71.
[117] Ibid para 75.
[118] Ibid para 75.
[119] 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.
[120] *Goodwin* (n 53), para 93.

decide whether or not to have legislation that recognises the post-operative identity in the first place and then how it balances the interests. After considering the operation of the Finnish legislation in this case, the Court concluded that the requirement that the applicant's marriage be converted to a civil partnership was not disproportionate. It did not also find any significant differences between the civil partnership and marriage.[121] Proportionality, as opposed to necessity was therefore the deciding factor in this case.[122]

In the more recent case of *Aldeguer Tomás v Spain*, the Court has once again confirmed its position established in *Schalk and Kopf v. Austria* and followed in *Hämäläinen*, that *there* is no obligation on the States to provide for same-sex marriage.[123] The *Tomás* case was slightly different though as the Court did not find that there was any discrimination, therefore there could be no violation of the Convention.[124] In the recent Advisory Opinion of the Inter American Court of Human rights, it was decided that a State had a duty under the American Convention on Human Rights to provide legal protection for same sex couples such as extending the existing institutions of marriage to same sex couples.[125] The Court of Justice of the European Union recently held that under the European Union freedom of movement laws, married gay couples have the same residency rights as heterosexual couples even if same sex marriage is not recognised in the country they move to.[126] Considering the impact that international consensus has on the application of the living instrument doctrine to the scope of the margin of appreciation, it would appear that is a matter of time therefore before the ECtHR also finds that States should provide access to same sex marriage.

6.6 Interaction Between the Living Instrument and Margin of Appreciation Doctrines in Determining the Scope of State Duty

This section examines the application of the living instrument doctrine to the boundaries of the margin of appreciation in order to determine the scope of the duty on the

---

[121] *Hämäläinen* (n 109), para 87.
[122] In *Y.Y* the Court had referred to a lack of necessity of the measure. It was not a proportionality issue there. See *Y Y* (n 53), para 121.
[123] *Aldeguer Tomás v Spain* App no 35214/09 (ECtHR, 14 June 2016), para 90.
[124] Ibid para 91.
[125] State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf accessed 12 August 2018. Referred to in Chapter 5, particularly section 6.5.
[126] Case C-673/16 *Coman and others v Romania* (CJEU, 5 June 2018) available at < http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0673&lang1=en&type=TXT&ancre=> accessed 16 August 2018.

State. One area in which the Court has applied the living instrument to determine the scope of the duty of the State is in relation to the protection of the rights of illegitimate children.[127] This has ranged from the issue of equality of inheritance rights of 'legitimate' and 'illegitimate' children,[128] inheritance rights of adopted children,[129] citizenship and residence rights of illegitimate children,[130] and parental access to children born out of wedlock.[131] This area of protection of the rights of illegitimate children has been chosen as a case study here for a number of reasons. Firstly, 11 out of the 75 cases in the data were about illegitimate children. This was a large number, accounting for about 15% of the cases. This shows that this is an issue of importance as it keeps reoccurring in the case law of the Court. Secondly, the ECHR is not expressly a child rights Convention unlike the Convention on the Rights of the Child which is expressly created to protect children's rights.[132] The ECHR itself only mentions children twice. It was therefore interesting to examine the interaction between the living instrument and margin of appreciation doctrine in providing protection for a group of people that the Convention was not expressly created to address.[133] Thirdly, this provides a good example of change in time within different spaces as the case law is drawn from different contracting States. This is an area that was identified earlier in chapter two as an area to be explored.

In relation to the width of the margin of appreciation, of the 11 cases examined, only two of the widths of margin of appreciation were present: 'wide'[134] and 'unspecified'.[135] The unspecified width accounting for the majority of the cases.[136] Notably, in all 11 cases, the Court found that there had been a violation of at least one provision of the Convention. This further strengthens the argument made earlier that the width of the margin of appreciation afforded to the State is not as important since the lack of a designated 'narrow' margin of

[127] The terms 'illegitimate' and 'children born out of wedlock' will be used interchangeably in this section to refer to the same group of people.
[128] E.g. *Marckx* (n 26).
[129] *Pla and Puncernau v Andorra* App no 69498/01 (ECtHR, 13 July 2004).
[130] E.g. *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011), *X v Latvia* (n 52).
[131] *Sommerfeld v Germany* App no 31871/96 (ECtHR, 8 July 2003), *Zaunegger v Germany* App no 22028/04 (ECtHR, 3 December 2009).
[132] United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989
[133] For more on the protection of children's rights through the ECHR, see Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate/Dartmouth, 1999); Ursula Kilkelly, 'Children's Rights; a European Perspective' (2004) 4 Judicial Studies Institute Journal 68; Ursula Kilkelly, 'Protecting the Children's Rights Under the ECHR: The Role of Positive Obligations' (2010) 61(3) NILQ 245.
[134] E.g. *Johnston* (n 49); *Pla* (n 129); *Sommerfeld* (n 131), *Zaunegger* (n 131).
[135] *E.g. Marckx* (n 26); *Inze* (n 52); *Mazurek v France* App no 34406/97 (ECtHR, 1 May 2000); *Brauer v Germany* App no 3545/04 (ECtHR, 28 May 2009); *Fabris v France* App no 16574/08 (ECtHR, 7 February 2013); *Genovese* (n 130); *X v Latvia* (n 52).
[136] 7 out of 11 cases.

appreciation in these cases did not eliminate the finding of a violation in all cases. What is more important is the threshold the Court sets which must be overcome by the State party when providing justification for its interference with the rights of individuals. The use of the living instrument doctrine particularly in the area of inheritance rights for children born in and outside of wedlock is further used to illustrate this point.

6.6.1 Equality of Inheritance Rights of Children Born out of Wedlock

The articulation of positive obligations under Article 8 in relation to respect for private and family life in the *Marckx and Belgium* case created the foundations for the application of the living instrument doctrine to determine the boundaries of the margin of appreciation in cases dealing with children born out of wedlock.[137] Whilst the issue of the establishment of maternal affiliation was part of the issue dealt with in the *Marckx* case, a related issue was the inheritance rights of children born out of wedlock and that is the aspect of the case considered in this section. In that case, the applicants had complained that the restrictions that were put by the Belgian Civil Code on the inheritance rights of a child born out of wedlock on intestacy over her mother's estate or dispositions *inter vivos*, or by will, were a breach of their rights when compared to the lack of restrictions put on a married woman to dispose of her property. They particularly argued a breach of their rights under Article 8 on its own and taken in conjunction with Article 14, and Article 1 of Protocol No 1 taken alone and in conjunction with Article 14.[138]

On the question whether there had been a breach of the rights of the daughter, under Article 1 of Protocol No 1, the Court found that Article as not applicable to her situation. It reiterated that Article 1 of Protocol No 1 enshrined the right to peaceful enjoyment of possessions, therefore presupposing the existence of those possessions already. It did not guarantee the right to acquire possessions either on intestacy or through *inter vivos* dispositions.[139] The Court was therefore of the view that Article 1 of Protocol No 1 did not apply to the daughter, since in this case there had not been any dispositions made to her.

---

[137] *Marckx* (n 26). The first reference to the existence of positive obligations in the Convention's guarantees may be traced back to the early 1968 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium*" (Merits) App nos *Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63;2126/64* (ECtHR, 23 July 1968), in which the Court found that there were positive obligations on the State in relation to its obligations under Article 2 of Protocol No 1 concerning the right to education.
[138] *Marckx* (n 26), para 49. The Commission had found a breach of Article 14 taken in conjunction with Article 1 of Protocol No 1, only with respect to the mother, Paula Marckx.
[139] *Marckx* (n 26), para 50.

However, in relation to the consideration of the issue under Article 14 taken in conjunction with Article 8, the Court took the position that the right to inheritance was an integral part of the respect for family life. States were, however, allowed 'the choice of the means calculated to allow everyone to lead a normal family life.'[140] The restrictions which the Belgian Civil Code placed on the applicant's inheritance rights on intestacy and via voluntary dispositions were therefore not in themselves in conflict with the Convention as the State had a margin of appreciation in this area. The Court had to examine the reasons underlying the restrictions put in by the State in order to establish if there had been a violation. In this particular case, however, the Court was of the view that the distinction that had been made between "illegitimate" and "legitimate" children raised an issue under Articles 14 and 8 when taken in conjunction.[141] To support this position, the Court referred to the living instrument doctrine, drawing attention to the change in societal views in relation to children born out of wedlock over time.

> The European Court of Human Rights interprets the Convention in the light of present-day conditions but it is not unaware that differences of treatment between "illegitimate" and "legitimate" children, for example in the matter of patrimonial rights, were for many years regarded as permissible and normal in a large number of Contracting States... Evolution towards equality has been slow and reliance on the Convention to accelerate this evolution was apparently contemplated at a rather late stage…'[142]

The Court concluded that in relation to Alexandra Marckx, there had been a breach of Article 14 taken in conjunction with Article 8 in relation to 'her capacity to receive property from her mother and of her total lack of inheritance rights on intestacy over the estates of her near relatives on her mother's side.'[143] The *Marckx* case therefore set a standard of policing the boundaries of the margin of appreciation in relation to the inheritance rights of children born out of wedlock, using the living instrument doctrine to determine the scope of the duty involved and whether there had been a violation of the Convention by the State as a result of the restrictions imposed. It established that inheritance rights were a part of family life and

[140] Ibid para 53.
[141] Ibid para 54.
[142] Ibid para 58.
[143] Ibid paras 58 - 59.

that although the States had a margin of appreciation in determining what restrictions could be imposed in relation to inheritance matters, as a result of the interpretation of the Convention as a living instrument, a restriction which has the effect of creating a distinction between legitimate and illegitimate children in the area of inheritance rights was a violation of the Convention, a breach of the State's duty. The *Marckx* decision was relied on by the Court in the case of *Johnston v Ireland* where it held that the absence of an appropriate legal regime to reflect the natural family ties between a child born out of wedlock and her parents, who were unmarried due to the restrictive divorce laws in Ireland, was a failure to respect her family life under Article 8.[144]

Although the Court did not find a breach of Article 1 of Protocol No 1 in *Marckx*, an opportunity for the Court to consider the rights of illegitimate children in this area arose eight years later in the case of *Inze v Austria*.[145] In that case, the applicant complained that he had been discriminated against in the enjoyment of his property rights relating to inheritance of his mother's farm on account of his illegitimate birth. The ECtHR first of all had to determine whether issues relating to hereditary farms came within the ambit of Article 1 of Protocol No 1. The government had argued that this matter fell outside of the scope of that Article, relying on the Court's earlier decision in *Marckx*.[146] The Court distinguished the particular facts here from those in *Marckx*.[147] In this case, the applicant was considered to be an heir and following the rules of intestacy was entitled to a portion of his deceased mother's estate.[148] The Court concluded that the applicant was not challenging the system of hereditary farms but rather challenging the criteria applicable to determining the choice of the principal heir.[149] Consequently, the facts came within the scope of Article 1 of Protocol No 1 and Article 14 taken in conjunction with Article 1 of Protocol No 1 was applicable. This was significant as that created the basis for the further consideration of whether the State had violated its obligations.

In relation to the issue of compliance, the Court stated the principles in relation to when a difference in treatment is discriminatory for the purposes of Article 14 of the Convention: 'A difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable

[144] *Johnston* (n 49), para 75.
[145] *Inze* (n 52).
[146] *Marckx* (n 26).
[147] *Inze* (n 52), paras 37, 38.
[148] Unlike the situation in *Marckx* where no property had passed to the daughter.
[149] In particular, the provision of section 7(2) of the domestic Provincial Act which gives precedence to legitimate over illegitimate children.

relationship of proportionality between the means employed and the aim sought to be realised"…'[150] This statement means that although on the face of it, it could be that there has been an interference with the right of an individual or a failure to protect the right of an individual, that does not automatically mean that the State in question has breached its obligations under the Convention. This is an example of dynamic restricted correlativity which is built on Raz's concept of a right being a ground of a duty. The State can be exonerated from this duty if it is able to provide justification for its non-compliance with the duty.

This justification comes through the use of the margin of appreciation doctrine. The Court alludes to this by stating that:

> [T]he contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background'…In this respect, the Court recalls that the Convention is a living instrument, to be interpreted in the light of present-day conditions…[151]

The Court clearly states that the States have a margin of appreciation when determining issues concerning difference of treatment, if their justification is acceptable, then they would not be seen to have been in breach of their duties. However, the Court directly attaches the living instrument doctrine to the scrutiny of the margin of appreciation that the State has in these matters. Whatever justification the State gives, has to be in line with present-day conditions. It cannot be a justification that is archaic and out of sync with present society. The living instrument was therefore applied to determine the scope of the obligation on the State.

The particular issue here was a justification for a difference in treatment between legitimate and illegitimate children in the area of inheritance. How far would the State need to go in justifying its position? The Court went on to state that 'The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in member States of the Council of Europe'.[152] In support of this statement, the Court referred to the 1975 European Convention on the Legal Status of

[150] *Inze* (n 52), para 41.
[151] *Inze* (n 52), para 41.
[152] Ibid.

Children born out of Wedlock. The Convention was in force at time in nine of the member States of the Council of Europe, including Austria who had ratified the Convention on 28 May 1980 with a reservation which the Court deemed not relevant to the case. The result of using the living instrument doctrine as a yardstick for determining the level of justification that the State would have to give in order to be within its margin of appreciation was that the Court came to the conclusion that due to this importance today of equality between children born in and out of wedlock, 'Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention'.[153] The threshold for the justification that the State had to give was therefore very high.

The government gave several reasons for the difference in treatment.[154] The Court was not convinced by the reasons put forward by the government and did not find them weighty enough to justify the difference in treatment. In particular, the Court challenged the general nature of the reasons such as the 'deceased's intentions, the place where legitimate children are brought up and the surviving spouse's relations with his or her legitimate children'[155] which in some cases, such as the one in question, may not represent the actual situation. In relation to the argument that the convictions of the rural population merely reflected the traditional outlook, the Court drew attention to the developments in society and the fact that the government themselves had recognised these developments because they had prepared a Bill which provides that the attribution of a hereditary farm would be based on objective circumstances such as training for running farms and being brought up on the particular property.[156] It was of the view that those amendments show that the legitimate aim that was being pursued by the legislation could be achieved by 'applying other criteria other than that based on birth in or out of wedlock'.[157] The Court came to the unanimous decision that there had been a breach of Article 14 of the Convention, taken together with Article 1 of Protocol No 1.

Although the Court did not expressly refer to any 'width' of the margin of appreciation, the application of the living instrument doctrine resulted in a high threshold of justification to be provided by the State in order for its to be within its margin of appreciation.

---

[153] *Inze* (n 52), para 41.
[154] A full list of the reasons given by the government can be seen in *Inze* (n 52), para 42.
[155] Ibid para 43.
[156] Ibid para 44. This approach to not giving particular weight to domestic persuasions where there are not aligned to current developments is in line with the Court's approach in *Tyrer* (n 27) where the domestic views on corporal punishment were not given great weight by the Court.
[157] *Inze* (n 52), para 44.

This, it could be argued, made the margin of appreciation 'narrow'. The reliance on traditional beliefs which were not consistent with present-day developments as evidenced, in this instance by 'international consensus' and was not sufficient to satisfy this requirement.[158] Although significantly, the Court did not evidence a comparative study either of international instruments or State practice, hence no reference to European consensus per se, it built on its jurisprudence on the removal of distinctions between legitimate and illegitimate children which had already begun to be developed in *Marckx*.[159]

The Court applied its jurisprudence from *Inze* in the 2009 case of *Brauer v Germany* which involved a difference of treatment between children born out of wedlock based on the time of their birth.[160] Once again, the Court referred to developments in society and in particular the 1975 European Convention on the Legal Status of Children born out of Wedlock which at the time was in force in twenty-one of the member States. Notably, Germany had not ratified the Convention.[161] In relation to the legitimacy of the aim pursued, the Court was of the view that as a result of the evolution in the European context and the dynamic interpretation of the Convention, the aim of protecting the legitimate expectation of the deceased and their families should be subordinate to the requirement of equal treatment between children born outside and within marriage.[162] The living instrument doctrine was therefore relevant to the determination of the justification of the aim pursued. The Court was of the view that there was no ground on which discrimination based on birth outside of wedlock could be justified today. The Court did not also find the measures taken to be proportionate. It held unanimously, that there had been a violation of Article 14 taken in conjunction with Article 8. The lack of a legitimate aim coupled with absence of proportionality were therefore key factors in the decision in *Brauer*.

In the 2000 case of *Mazurek v France*, the Court extended the principles it had elucidated in the *Inze* case on the scope of the State obligations in relation to inheritance rights of children born out of wedlock, to the determination of inheritance rights of a child

[158] International consensus was shown through reference to the European Convention on the Legal Status of Children born out of Wedlock 1975.
[159] *Marckx* (n 26).
[160] *Brauer* (n 135).
[161] This is different from the *Inze* case where Austria had ratified the Convention. A general principle of international law is that States are not bound by treaties that they have not ratified. However, the case law of the Court has shown a pattern of referring to international treaties even when they have not been ratified by the State, as a way of either showing consensus or an evolving trend on a particular issue in international law.
[162] The Court also referred to its earlier decision in *Marckx* where it had held that distinctions made for succession purposes between 'illegitimate' and 'legitimate' children raised issues under Articles 14 and 8. *Brauer* (n 135), para 43.

born out of an adulterous relationship.[163] The Court in this case, relied on the principles it had elucidated in *Inze* on the need for equality between children born in and out of wedlock and the requirement that differences in treatment should be justified by weighty reasons.[164] It also referred to the 1975 European Convention on the Legal Status of Children born out of Wedlock which had been ratified by France. The threshold here was therefore set high for the State as a result of the reliance on the living instrument doctrine.

The Court agreed that the government's aim of protection of the traditional family could arguably be considered to be a legitimate one, this was different to *Brauer* where the Court found that the aim should have been subordinate to the protection of equality.[165] The living instrument doctrine was relevant to the determination of proportionality.[166] The ECtHR noted that the concept of family had evolved over time. It referred to several legal developments at the international,[167] European[168] and national levels[169] that that showed a trend towards abolishing discrimination against adulterine children in inheritance matters. It noted that it had to take this tendency into account in its dynamic interpretation of the relevant provisions of the Convention.[170] The Court concluded that in the instant case, it did not find any ground to justify discrimination based on birth out of wedlock. There was no reasonable proportionality between the means employed and the aim pursued.[171] The Court held unanimously, that there was therefore a violation of Article 1 of Protocol No 1 taken in conjunction with Article 14 of the Convention.

[163] *Mazurek* (n 135).
[164] Ibid paras 48-9.
[165] Ibid para 50.
[166] This was different in *Brauer* where the living instrument doctrine was more related to the issue of the legitimacy of the aim pursued.
[167] The Court referred to the United Nations Convention on the Rights of the Child 1989 which contained a prohibition against discrimination based on birth.
[168] The Court also referred to the practice in other member States of the Council of Europe where there was a tendency in favour of eradicating discrimination against adulterine children.
[169] It also referred to national developments in France in which recommendations had been made for abolishing discrimination against adulterine children in inheritance matters and the subsequent legislative steps that had been taken in that direction. The Court noted that in May 1990 the French Conseil d'Etat had published a report recommending the abolition of discrimination against adulterine children in inheritance matters. Also, in December 1991 a bill had been proposed which proposed bringing the inheritance rights of adulterine children in line with those of other children. In 1998 the Minister of justice had also set up two projects that were to consider the shifts in family models from a sociological angle and the possible changes to the law that should be made in the light of the factual developments. The first report had criticised the lack of equality and in 1999 a recommendation abolishing restriction on adulterine children's rights had been submitted in the second report.
[170] *Mazurek* (n 135), para 52.
[171] Ibid paras 54-5.

6.6.2 Extension of Scope of Duty to the Private Domain

The use of the living instrument doctrine to determine the scope of the duty on the State in the equal treatment of children born in and out of wedlock has been extended to even the private domain. In the 2004 case of *Pla and Puncernau v Andorra* the issue was a difference of treatment between biological children and adoptive children. In this case, unlike that of *Inze v Austria* where intestate succession was involved and the interference had been created by the domestic legislation itself, this case involved a situation where the testatrix had made a will, so it was in the private sphere.[172] The issue to be determined by the Court was whether interpretation of that will, which was drafted in 1939 and executed in 1995, by the Andorran High Court of Justice which had the effect of excluding the applicant from inheritance under the will, was a breach of Article 14 taken in conjunction with Article 8. The Court adopted a similar approach of requiring weighty reasons for a difference of treatment in the context of the interpretation of a testamentary disposition.[173]

Whilst noting that it was not the Court's role to deal with disputes that were of a private nature, the Court took the position that it could not remain passive where the interpretation of a legal provision by a national Court is unreasonable, arbitrary or inconsistent with the principles of the Convention. This would be the case even where it was a private matter.[174] The Court then went on to reiterate the key principles concerning when a difference in treatment will be seen to be discriminatory which is when 'it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[175] It was of the view that it could not 'discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based'.[176] In the Court's view, an adopted child is in the same legal situation as a biological child of his or parents in all respects which include the family life and resulting property rights.[177]

The Court also reiterated that 'the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-

[172] It was also noted that Andorran legislation itself prohibited discrimination on grounds of birth expressly in its Constitution and in its special law on adoption, therefore this was not an interference created directly by government legislation.
[173] *Pla* (n 129).
[174] Ibid para 59
[175] Ibid para 61.
[176] Ibid para 61.
[177] Ibid para 61.

day conditions and that great importance is attached today in the member States of the Council of Europe to the question of equality between children born in and out of wedlock as regards their civil rights'.[178] The Court went further to state that even if the will in question required interpretation by the national courts it should not have been done exclusively in the light of the social conditions that existed in 1939 and 1949 especially because of the changes that had occurred in society since then. [179] This appears to suggest that the Court requires the national Courts to be dynamic in their interpretation as well. The Court concluded that there had been a violation of Article 14 taken in conjunction with Article 8. Once again, the living instrument doctrine had been applied to determine the boundaries of the margin of appreciation and in turn, the scope of the duty that could be imposed on the State in this instance.

This move of the Court to areas that may be deemed as 'private' was strongly criticised by Judge Sir Nicolas Bratza in his partly dissenting opinion. He stressed that there was a distinction between this case and earlier cases where there had been difference in treatment because this case was in the private sphere as opposed to some of the earlier cases such as *Marckx* and *Inze* where the interference had come from government legislation.[180] He disagreed *inter alia* with the Court's position that the interpretation of the will should have taken into account the social, economic and legal changes that had taken place since the document was created. He was of the view that it was open to the domestic court to interpret the clause in the light of the legal conditions that prevailed when the will was drafted rather than when it was examined[181].

It is clear that despite these strong disagreements, the majority were of the view that there had been an interference with the rights of the applicant under the Convention. The State therefore was seen as having a positive duty to avert this effect of discrimination. One could argue that the existence of discrimination only arose because of the interpretation given by the State, therefore it had interfered with the rights as the testatrix had not made a clear statement excluding adopted children. Once again, the State's margin of appreciation was very narrow here and the Court did not see the reason given by the State even when it was that it was giving effect to the intention of a private individual, to be sufficient to justify difference of treatment between children.

[178] Ibid para 62.
[179] Ibid para 62.
[180] Ibid partly dissenting opinion of Judge Sir Nicolas Bratza para 2.
[181] Ibid partly dissenting opinion of Judge Sir Nicolas Bratza para 2, 13-14.

The Court has applied its principles on equality of treatment for inheritance purposes of legitimate and illegitimate children to monitor States' compliance with its judgment. Following the Court's earlier decision in *Mazurek*, the French authorities reformed the rules of inheritance by repealing all the discriminatory provisions relating to children 'born of adultery' and creating new legislation in 2001 thereby bringing the Country's legislation in line with the Court's principle of non-discrimination. This could be commended as an example of good dialogue between the Court and the State party. However, thirteen years later, in the case of *Fabris v France*, the Court once again veered into the private area when it found a violation of Article 14 taken in conjunction with Article 1 of Protocol No 1 of the Convention in spite of the changes made.[182] The Court found a violation in a case where the applicant had been excluded from sharing in the division of his mother's estate due to his adulterine birth. Unlike the situation in *Mazurek*, the applicant in *Fabris*, had been excluded from the inheritance as a result of the *inter vivos* disposition of the property by his mother. Although the *Mazurek* decision was made before the applicant's case was decided and the domestic legislation had been changed the transition provisions that had been included in the new law restricted the retroactive effect of the 2001 Law to successions that were already open on the date of the publication of the Law and that had not given rise to division by that date.[183] In this case, the domestic Court determined that the estate had already been transferred to the beneficiaries, hence the applicant's claim fell outside the scope of the new legislation.

The living instrument doctrine was directly relevant in deciding the boundaries of the margin of appreciation in this case, as it had been in the previous cases to do with the inheritance rights of illegitimate children. In line with the living instrument approach, the Court referred to the developments in Europe that showed common ground between the member States of the Council of Europe on equality and eliminating of distinctions between legitimate and illegitimate children.[184] The Court once again affirmed as it did in *Pla v and Puncernau v Andorra* that although this case dealt with a disposition in the private sphere there were conditions under which the Court's supervisory role could still be engaged.[185]

Following on from this elucidation of the general principles, the Court proceeded to determine whether there had been an interference with the rights of the applicant and whether

[182] *Fabris* (n 135).
[183] *Fabris* (n 135), para 65.
[184] Ibid para 58.
[185] *Pla* (n 129); *Fabris* (n 135), para 60.

this interference was justified. It was agreed that there was an interference with the applicant's right and that the aim of legal certainty pursued was legitimate.[186] Such an interference however had to be proportionate to the aim pursued. In assessing the proportionality of the measure, the Court had to deal with the balance to be made between the protection of the legitimate expectation of the deceased and the beneficiaries since the property had already passed to the beneficiaries. The Court was of the view that the challenge of the disposition by the applicant should have been foreseeable by the beneficiaries.[187] The combination of the European case law and the legislative reforms within the State showed a clear trend towards eliminating all discrimination in relation to the inheritance rights of children born outside marriage. The protection of the legitimate expectation of the deceased and the beneficiaries should therefore be subordinate to the principle of equal treatment between children born within and outside of marriage.[188]

It was shown in the case that a legitimate child who had been wilfully excluded or born at a later date, could also have filed for abatement and that would not be held inadmissible. The Court did not approve of this distinction which was seen in the domestic court's decision in 2007, which was years after the *Marckx* and *Mazurek* judgments, 'to apply the principle of protection of legal certainty differently according to whether it was asserted against a legitimate child or a child 'born of adultery'. Essentially, there was still discrimination even with the new legislation that was in place from 2001. The Court held unanimously that there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No 1.

Although not clearly articulated in the judgment itself, the decision of the Court that found the transition measures that had been imposed by the domestic authorities to be in breach of the Convention's guarantees raised the question of the temporal effect of the Court's case law and the extent to which the Court can monitor compliance with its own decisions. These points were identified in the Concurring opinion of Judge Pinto De

[186] *Fabris* (n 135), para 65.
[187] In support of this position, the Court drew attention to particular aspects of domestic legislation and practice which should have made the beneficiaries aware that their right to the property could be challenged by the applicant. The Court also considered the fact that the applicant's challenge of the disposition had been filed at the time of the Court's judgment in *Mazurek* where the Court had decided that difference in treatment in inheritance matters based on grounds of birth was incompatible with the Convention. Other factors that the Court took into consideration was the domestic change in the law in 2001 as well as the fact that the existence of the applicant was known to the beneficiaries. These points taken together, should have raised doubts as to whether title to the estate had passed to the beneficiaries at the time of the death of their mother. *Fabris* (n 135), para 68.
[188] *Fabris* (n 135), para 68.

Albuquerque who pointed out that 'In addition to the question of the principle of equality before the law, the case deals with two other questions of cardinal importance for the system of protection of human rights in Europe, namely, the retroactive effect of the Court's judgments and the Court's competence to control the execution of its own judgments by the national authorities.'[189] *Fabris* was creating a legacy which 'reaffirms the constitutional force of the Court's judgments and the Court's jurisdiction to verify whether a State Party has complied with the obligations imposed on it by one of the Court's judgments.'[190] The State should have complied with earlier judgments such as *Marckx* which had already established that distinctions made between legitimate and illegitimate children was incompatible with the Convention's guarantees.[191]

The case law on the protection of the rights of illegitimate children illustrates the strength of the use of the living instrument doctrine to police the boundaries of the State and to require weighty reasons for the difference in treatment. In all the cases that were examined, the State was unable to justify its difference in treatment between legitimate and illegitimate children and this led to the findings of violation. This is different to the situation with regards to the rights of transsexuals where there have been some cases in which the Court has not found a violation of the Convention even after the *Goodwin* case.

6.7 Conclusion

The focus of this chapter has been on the interaction between the living instrument and margin of appreciation doctrines in determining the nature and scope of duties on States in cases where the applicability of the Convention was not in issue or where neither of those doctrines was relevant to the determination of applicability. This examination was important in shedding further light on RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). It was also relevant for RQ 4 (conclusion and recommendations). The descriptive statistical analysis of the case law focused on the widths of the margin of appreciation and whether there was a correlation between the width given and the finding of violation. It showed that there were three rather than two types of widths of margin of appreciation in the case law: wide, narrow and unspecified with the wide width accounting for the majority of cases and the unspecified width following closely. The descriptive statistics also showed that apart from the very few cases where the margin of appreciation

[189] Ibid Concurring Opinion of Judge Pinto De Albuquerque.
[190] Ibid.
[191] Ibid.

had been clearly stated to be narrow by the Court, the width of the margin of appreciation did not have a direct bearing on the finding of violation. Even in cases where the Court had stated that the State had a wide margin of appreciation, through the use of the living instrument doctrine, the State could be held to a high threshold of justification for its actions with the result that the Court finds a violation of the Convention in the particular case. The living instrument had also had very minimal effect on an express re-categorisation of the width of the margin of appreciation. This result suggested that to provide further insight on RQ 1 (relationship) and RQ 2 (conflict), the focus of the qualitative analysis should not be on 'widths' per se but more on the use of the living instrument doctrine to police the borders of the margin of appreciation irrespective of the width ascribed to the margin of appreciation.

It was shown that the use of the living instrument doctrine to police the borders of the margin of appreciation can be traced as far back as the 1979 case of *Marckx*. The Court has used the living instrument doctrine as a yardstick for setting the threshold of justification the State has to advance for interference with the rights of individuals. It has also been used as a threshold for determining whether a particular obligation exists. The relationship (RQ 1) between the living instrument and margin of appreciation doctrine is therefore varied and relevant to both determination of rights and allocation of duties. The doctrinal textual analysis of the case law focused on the use of the living instrument to determine the boundaries of the margin of appreciation in relation to the nature and scope of duty. From the case study on the recognition of the post-operative status of transsexuals, the use of the living instrument doctrine was applied to both the existence and nature of the duty as well as the scope of the duty on the State. Evolution was shown from the earlier case of *Rees* where the Court used the living instrument as an admonition to the State to keep its practice up to date, to the case of *Goodwin* where the living instrument doctrine was used to determine that no margin of appreciation existed on the question of whether or not to recognise the post-operative status of transsexuals, but rather the margin of appreciation was restricted to the means of achieving this recognition. The conflict (RQ 2) that had existed between both doctrines from *Ree*s was therefore resolved in favour of the living instrument doctrine in *Goodwin*. There was, however, room for dialogue between the State and the Court and if this had happened, changes could have happened earlier on at the domestic level without the Court needing to make the decision at the international level.

The case of *Hämäläinen* seemed a step back in this area with the Court now assigning the margin of appreciation to both the decision on whether to enact legislation to recognise post-operative identity as well as to the issue of what conditions may be imposed prior to

registration. This suggests a lack of consistency in this area of the case law on transsexuals but when one brings in the Court's jurisprudence on same-sex marriage which was particularly relevant to that case, it would appear that the decision in *Hämäläinen* was consistent with the jurisprudence of the Court on the issue of same-sex marriage. Other decisions like *Aldeguer Tomás* show that the area of same-sex marriage is one where the Court still accords the State a wide margin of appreciation to determine whether or not to provide legal recognition of same-sex marriage. The living instrument doctrine has not resulted in a high threshold for justification of the margin of appreciation. The Court's statement in *Schalk and Kopf* that Article 12 need not be read in a way that excludes the possibility of people of the same sex getting married could be seen as seeds for future change of direction of the Court. Time will still tell what impact if any *Hämäläinen* may have on States that do not recognise the post-operative gender status of transsexuals. The issue of same-sex marriage is an example of where conflict (RQ 2) between both doctrines has been resolved in favour of the margin of appreciation. It shows that the relationship (RQ 1) between both doctrines is diverse and there is not always one doctrine that takes precedence in the Court's judgments. The interpretive approach of the Court (RQ 3) in this case relies to a great extent on the existence or no existence of European consensus as a means of legitimising a reliance of Article 31(3) VCLT which allows for consideration of subsequent agreements and practice of States in the interpretation of treaty obligations.

The second case study focused on the scope of duties on States. It examined the protection of the rights of children born out of wedlock over a 35-year period.[192] Although the Court had found in the *Marckx* case that a distinction between legitimate and illegitimate children was a violation of the Convention and in *Inze*, clearly found that difference in treatment with regards to inheritance rights was a violation of the Convention, further cases that involved distinctions between children on the basis of their birth still came to the Court. The Court extended its decision in this area to cover children born out of adulterous relationships as well as adopted children. The Court also monitored the efficacy of measures that had been taken by the State to give effect to its judgments, in the *Fabris* case. The Court's decision in the area of protection of rights of illegitimate children was consistent with a finding of at least one violation in all the cases irrespective of the width of margin of appreciation afforded. The living instrument appears to have had a very strong impact on the threshold for justification of interference in order for a State to take advantage of their margin

[192] 1979 - *Marckx* (n 26) to 2013 - *Fabris* (n 135).

of appreciation in this area. In this area of protection of rights of children born out of wedlock, conflict (RQ 2) appears to have been resolved in favour of the living instrument doctrine. In relation to these cases, the Court's interpretive approach (RQ 3) seems to have been consistent based on the cases examined with a focus not so much on European consensus as evidence of subsequent practice, but rather on international trends that show a need for protection of rights of children born out of wedlock.

The combination of the quantitative and qualitative approach in this chapter has shown that overall, living instrument and margin of appreciation arguments are vital in the determination of the rights and duties of the States under the Convention. It addresses RQ 2 (conflict) as the analysis shows that where living instrument arguments are applied to determine the borders of the margin of appreciation, they appear to be superseding margin of appreciation arguments with the Court finding at least one violation of the Convention in such cases. However, there are limitations as there are instances where the margin of appreciation trumps the living instrument doctrine and the Court refrains from extending allocation of duties to States in certain areas such as the provision of same-sex marriage. This shows that there is no simplistic answer to RQ 2 (conflict) as sometimes the living instrument supersedes and sometimes it does not. The results show that the relationship (RQ 1) between the margin of appreciation and living instrument doctrines is varied. The case analysis however shows that the application of the living instrument doctrine provides an opportunity for dialogue between the Court and the State through incremental increase in the nature and scope of obligations on the State. The reliance on developments within international and regional law as well as the practice in European States is an avenue for States to engage with the Court by carrying out such comparative work at the domestic level in order to keep its practices in line with the jurisprudence of the Court. There is, however, room for more clarity in the interpretive approach of the Court (RQ 3) to the policing of the borders of the margin of appreciation.

The next chapter provides the conclusion to this thesis. Within that chapter key points that have been established in different parts of this thesis will be highlighted and discussed. Conclusions will be drawn from the analysis that has been conducted on the case law within this work. The concluding chapter will end with recommendations on further areas of research that could enhance the work of the Court in this area.

Chapter Seven
Conclusion and Recommendations

7.1 Conclusion

This study examined the nature of the relationship between the margin of appreciation and living instrument doctrines used by the European Court of Human Rights (ECtHR, the Court) in the interpretation of the European Convention on Human Rights (ECHR, Convention). Both doctrines, interpretive tools created by the Court, have also been the basis for criticism of the Court. The Court has been criticised for not affording enough margin of appreciation to States in certain cases, and the living instrument doctrine has been pinpointed as one of the reasons for this.[1] It is alleged that the living instrument doctrine has led to the narrowing of the margin of appreciation afforded to States with the result that States are found to be in violation of obligations they did not subscribe to under the Convention or new obligations based on the rights they had subscribed to under the Convention in what may be perceived to more instances than they should be.[2] These criticisms suggest a conflict between both doctrines and this study was aimed at examining that conflict and how it is dealt with in the case law of the Court. At a time when the entry into force of Protocol No 15 which calls for the inclusion of the term 'margin of appreciation' and 'subsidiarity' in the Preamble of the European Convention on Human Rights (ECHR, the Convention) is appearing to be more of a reality, the examination of any tension between the living instrument doctrine and the margin of appreciation doctrine is necessary.[3]

To address the relationship between the margin of appreciation and living instrument doctrines in the case law of the ECtHR, the following central research questions (RQs) were posed in this thesis:

1. What is the nature of the interaction between margin of appreciation and living instrument arguments in cases brought before the European Court of Human Rights? (RQ 1 relationship)

[1] A case in point is *Hirst v United Kingdom* (no 2) App no 74025/01 (ECtHR, 6 October 2005).
[2] Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534, 542.; 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) 19.
[3] There are currently 44 out of the 47 member States of the Council of Europe that have ratified Protocol No 15. Current status of ratifications as at 29 July 2018. Available at < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=xwvJ7TQ3> accessed 29 July 2018.

2. To what extent are living instrument arguments superseding margin of appreciation arguments? (RQ 2 conflict)
3. Which interpretive and theoretical approaches are applied by the Court to decide the outcome of cases where the margin of appreciation and living instrument arguments conflict? (RQ 3 interpretive and theoretical approaches)
4. What recommendations can be made for future research and policy developments? (RQ 4 recommendations)

In order to deal with RQ 1 (relationship), the first stage was to provide an overview of the margin of appreciation doctrines and their use by the ECtHR. In Chapter two, the origins of both doctrines in the jurisprudence of the Court was examined. It revealed that both doctrines were interpretive tools created by the Court in its adjudicatory role. The margin of appreciation doctrine although initially referred to by the European Commission on Human Rights in *Greece v United Kingdom*, was first applied fully by the Court in *Engel and Others v Netherlands*.[4] The margin of appreciation is a 'two pronged' instrument, applied by the Court to both the substantive issue of determining whether there had been a proper balance struck between competing interests, and to the structural issue of whether it should be the Court or the State which is in a better position to deal with an issue.[5] The lack of clarity in the way it has been used has prompted criticism of the doctrine.[6] The Court in *Handyside v United Kingdom* underpinned the need for the doctrine in its jurisprudence on three key themes: subsidiarity, better position rationale and diversity of State parties.[7] This research has examined how these elements reflect the key justifications but still leave room for criticism.

The flexibility afforded by the margin of appreciation doctrine, although a source of criticism, provides a link to the living instrument doctrine. This study showed that although the living instrument doctrine was expressly referred to by the Court for the first time in *Tyrer v United Kingdom*,[8] the evolutive interpretation of the Convention was already

[4] *Greece v United Kingdom* App no 176/56 (Commission Decision, 26 September 1958); *Engel and Others v Netherlands* App nos 5100/71; 5101/71; 5102/71; 5354/72; and 5370/72.
[5] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) Oxford Journal of Legal Studies 705, 706.
[6] For example, *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997), Partly dissenting opinion of De Meyer J; Letsas, (n 5) 705.
[7] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 48.
[8] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).

embedded in the Court's jurisprudence.[9] The living instrument doctrine, like the margin of appreciation doctrine has been subject to criticisms for lack of justification in its use by the Court.[10] Several reasons such as the text of the Convention which refers to 'maintenance and further realisation', and the special nature of the Convention itself as a human rights treaty, have been advanced to justify the continued use of the living instrument doctrine by the Court.[11]

Following on from a consideration of the origins and the justification for the use of both doctrines in the jurisprudence of the Court, Chapter two established that a relationship exists between the margin of appreciation and living instrument doctrines. Whilst the margin of appreciation is rooted in subsidiarity, the living instrument doctrine is rooted in the need to ensure effective protection of the rights guaranteed under the ECHR. Consequently, on face value, there does not appear to be a relationship between both doctrines. However, the effect of the application of the margin of appreciation doctrine could promote diversity of the State parties, whilst the living instrument has the potential to lead to harmony/uniformity between the parties. This therefore reveals a potential for tension between both doctrines. It was established that right from the early cases of both doctrines, reliance on consensus in the practice of States was a linking factor for both the margin of appreciation and living instrument doctrines.[12] Four types of consensus could be relied on by the Court either on their own or in conjunction with each other: international consensus[13], European consensus[14], internal consensus[15] and expert consensus.[16] Another linking factor between both of them is the issue of change. Brems identified that 'where the margin of appreciation allows for variations of interpretation in space, evolutive interpretation allows for variations in time'.[17] Through an examination of change in time and space, width and function, chapter

[9] Early cases such as *Wemhoff v Germany* App no 2122/64 27 (ECtHR, 27 June 1968); *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975); *Young, James and Webster v United Kingdom* App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981).

[10] L Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416, 428; Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) HRL Rev 57,60.

[11] The justification for the living instrument doctrine was discussed in chapter two, particularly section 2.5 'Contexts and rationale for the interpretation of the Convention as a living instrument'.

[12] In *Tyrer* (n 8) where the Court espoused the living instrument doctrine and *Handyside* (n 7) where the Court espoused more fully the rationale for the margin of appreciation doctrine, there was reference to reliance on the practice of States.

[13] Consideration of international treaties.

[14] Consideration of the practice of member States.

[15] Consideration of the climate within the respondent State.

[16] Consideration of medical and scientific evidence. Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 79-80.

[17] 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 accessed 16 August 2018.

two showed that there was an indication of a link between both doctrines but there was also scope for a systematic analysis of the case law in which both doctrines were used by the Court in order to make some conclusions about the interactions between both doctrines. Chapter two therefore set the scene for the examination of the different research questions and the ways in which originality would be achieved in this work.

To pave the way for the case analysis which would provide answers to RQ 1 (relationship), RQ 2 (conflict), and RQ 3 (interpretive and theoretical approaches), one of the issues that was apparent was a need to provide grounding for the use of the margin of appreciation and living instrument doctrines. Hence, Chapter three examined the use of the margin of appreciation and living instrument doctrines through the lens of the rules of interpretation of treaties contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).[18] It achieved two key tasks: (a) It examined the legitimacy in international law of the creation of the margin of appreciation and living instrument doctrines as tools of interpretation by the Court; and (b) It examined the links between the margin of appreciation and living instrument doctrines with the theories of interpretation reflected in the international rules on treaty interpretation.

On the question of legitimacy, it showed that although the ECHR came into force before the VCLT, Articles 31-32 of the VCLT are considered to be part of customary international law, therefore these are relevant to the interpretation of the ECHR.[19] It also established that the International Law Commission, in drafting the tools of interpretation in the VCLT had restricted themselves to 'trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.[20] Consequently, international Courts are free to create other rules of interpretation that enable them to interpret the treaty they are tasked with interpreting. The ECtHR is therefore within its remit under international law to create rules of interpretation such as the margin of appreciation and living instrument doctrines in interpreting the ECHR.

---

[18] Vienna Convention on the Law of Treaties 1155 UNTS 331 – opened for signature on 23 April 1969 and entered into force on 27 January 1980.

[19] *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) [1994] ICJ Rep 21, para 41; See also *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [1996] (II) ICJ Rep 812, para 23; *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, para 18; *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975).

[20] International Law Commission's Commentary to Articles 27 and 28 of the ILC Draft (ultimately Articles 31 and 32 of the VCLT) from the 'Draft Articles on the Law of Treaties with Commentaries 1966' in Yearbook of the International Law Commission (1966) Vol II on Para 5 page 218-9 available at < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf> accessed 17 October 2016.

To answer the question on the links between the margin of appreciation doctrine and living instrument doctrine with the theories of interpretation reflected in the international rules on treaty interpretation, chapter three examined the interaction between the margin of appreciation and living instrument doctrines and the textual, intentionalist and object and purpose schools. This thesis has contributed to the literature in this area by showing that both doctrines interact at different levels with these schools of interpretation. Whilst the Court would normally use the textual approach as a starting point, it is not limited by the text and considers interpretation that fits in with present day society, hence adopting a living instrument approach to textual interpretation. The Court has also not been limited by the intention of the parties as revealed by the *travaux préparatoires*, rather, it has emphasised the nature of the ECHR as a treaty for the effective protection of human rights.[21] It is open to considering the overall intention of the Convention to maintain and further realise human rights and is guided by this progressive rule of interpretation in looking at context. The use of the living instrument and margin of appreciation doctrines are even more related to the Court's reliance on Article 31(3) of the VCLT which requires consideration of subsequent agreement and subsequent practice of States in interpretation of the text of treaties. In this area of interpretation, both doctrines are linked as subsequent practice could lead to either a wide or narrow margin of appreciation afforded to States in a particular area. Subsequent practice could also be the basis for invocation of the living instrument doctrine. The interpretation of the Convention taking into consideration its context and nature as a human rights treaty underpins the connection with the use of the living instrument doctrine in the interpretation of the Convention.

Chapter three also showed that the object and purpose/teleological approach to interpretation is the one most aligned with the use of the living instrument doctrine and is the area where there is most opportunity for conflict between relying on the living instrument doctrine and relying on the margin of appreciation doctrine. The teleological interpretation requires consideration of the object and purpose of the treaty and the Court has frequently relied on this in its interpretation of the Convention.[22] The reliance on the object and purpose links in to the living instrument doctrine when the question is asked as to how the object and purpose of the Convention is to be determined. Is the object and purpose of the Convention

[21] *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008), para 62.
[22] *Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium* (*Belgian Linguistic Cases*) App nos 1474/62; 1677/62; 1691/62 and 1769/63 (ECtHR, 23 July 1968); *Saadi* (n 21).

rooted in the past and therefore static or are they abstract aims that could change and progress? In other words, should its aims be considered in the light of the past or the future? By adopting the living instrument doctrine, the Court has endorsed the position that there could be change and progress in the object and purpose of the Convention. Adopting a living instrument approach leads to a wide interpretation of the rights contained in the Convention. The result of this is a narrow consideration of restrictions that are put on those rights. This is where a connection arises with the margin of appreciation doctrine of the Court in which the Court affords room for manoeuvre to States before determining that a restriction on Convention rights breaches the obligation of the State.

Whilst Chapter three had provided the first stage of grounding for dealing with RQ 1 (relationship), RQ 2 (conflict) and (RQ 3 interpretive and theoretical approaches), Chapter four provided a further framework to consider the use of both doctrines by peeling back the layers, to the core issue of the relationship between rights and duties. It examined the relationship between the margin of appreciation and living instrument doctrine through the lens of the correlativity thesis. Hohfeld's analysis of claim-rights provided the backdrop for the analysis of the relationship between rights and duties. Based on Hohfeld's theory, for every right, there is a correlative duty, when one speaks of the existence of a right, it means a duty has been invaded.[23] The Hohfeldian correlativity thesis did not however account for situations where a duty exists without a clear right attached to it. For example, duties of charity. There are also instances in which a duty is owed to the public in general rather than to a particular person therefore the identification of the specific duty bearer may not be possible in some cases. This posed problems for the correlativity thesis as under that theory, a right cannot be said to exist without identification of the duty and the duty bearer.

Joseph Raz's critic of the correlativity thesis is one of the best alternatives to that theory in the view of the researcher. According to Raz, a right is 'A ground of a duty which if not counteracted by conflicting considerations justifies holding the other person to have the duty.'[24] Four key elements were put forward by Raz which could be summarised as follows: (a) A right is a ground of a duty which is not dependent on the choice of the right holder, rather it is based on the interest to be protected. The duty would only be imposed if there was sufficient justification given and there were no counteracting factors. (b) There is no fixed list of the number of duties that are attached to a particular right. (d) Rights have a

[23] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale LJ 16, 32.
[24] Raz, *The Morality of Freedom* (OUP 1986)171.

dynamic nature and the duties that arise as a result of a particular right could change over time.[25] Based on a combination of Hohfeld's analysis and Raz's critic, this research proposed a 'dynamic restricted correlativity' thesis. It takes the position that a right is a ground of duties which would only be imposed if there are no substantial competing arguments which prevent the imposition of the duty. It also recognises that a right can be the ground for more than more duty and the duties can change over time.

This thesis has provided an original contribution to the literature by examining the way in which the margin of appreciation and living instrument doctrines can be explained using dynamic restricted correlativity. Essentially when the Court adjudicates a claim and finds a violation, it is assigning duties to the State. The inadequacy of Hohfeld's formulation of the correlativity thesis is apparent when one considers the qualified rights such as those in Articles 8-11 ECHR. In those cases, a finding of an interference is not an automatic finding of violation. Reasons have to be given to justify the interference and if those reasons are sufficient, the State will not be deemed to have violated its obligations. In essence, the existence of the right would be affirmed, but no duty placed on the State even when it has interfered. This sits very well with the role of the court in the substantive use of the margin of appreciation doctrine where the Court determines whether or not the State, although it has interfered with a certain right, is also in breach of their duty under the Convention (RQ 1 relationship). Interference does not automatically mean a breach as the State can present reasons and if they are within their margin of appreciation, there will not be found to be in breach of the Convention's guarantees.

The living instrument doctrine accords with the conception of a right as a ground of more than one duty. Through the use of the living instrument doctrine, the ECtHR has referred to both positive and negative obligations in relation to articles such as Articles 2,[26] 3,[27] and 8.[28] The scope of those duties are also susceptible to change and have evolved over time through the reliance on the living instrument doctrine. The analysis of the margin of appreciation and living instrument doctrines through the lens of relationship between rights and duties raised the question of whether the ECtHR is expanding rights or increasing the duties on the States. If rights and duties are correlative, then whichever way it is considered they are one and the same thing. However, if rights are considered as grounds of duties, then

[25] Raz, (n 24) 170-171.
[26] The right to life.
[27] Prohibition of torture, inhuman or degrading treatment.
[28] The right to private and family life.

expanding a right does not necessarily correlate with allocating more duties. The case law analysis provided an underpinning for how this works in the Court in practice.

This thesis has also provided an original contribution the body of knowledge in this area in the methodology applied to the systematic analysis of the case law in which both the margin of appreciation and living instrument doctrines are present. The rigour of the study is evidenced in the sustained focus on legal scholarship throughout the thesis and in the detailed appendices to this work. Appendix A contains a detailed presentation of the methodology adopted in this thesis in terms of research design and structure and the method of selection of relevant case law. Appendix B reveals the coding criteria applied to the case law, whilst Appendix C contains a list of the cases that were analysed. The outcome of the case law analysis which was presented in chapters five and six of this study was based on case law from the Court from January 1979 – December 1976 in which both the margin of appreciation and living instrument doctrines (or any of its variants) were expressly referred to and relied on by the Court in its judgment.[29] Through a systematic process of selection detailed in Appendix A to weed out duplicated cases and cases not relevant to the specified theme, the researcher arrived at a final selection of 75 cases for the case analysis in chapters five and six. The results presented in this study are however limited to the contents of the data studied. This study was unable to consider all cases that dealt with the margin of appreciation separately, and all cases that dealt with the living instrument separately. It was limited to just those cases where both doctrines were present. This was considered sufficient to deal with the research questions that were posed and justification for this is explained in Appendix A. This thesis has provided an original contribution to the literature by adopting a combination of the quantitative method of descriptive statistical analysis and the qualitative method of doctrinal analysis to the case law examined.

Chapter five was the first phase of the case analysis which provided initial answers to RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches). It examined the use of the margin of appreciation and living instrument arguments in determining the scope *ratione materiae* of the Convention at the admissibility stage. An analysis of this stage was important for two reasons: (a) One of the areas of criticism levelled against the living instrument doctrine has been that it has expanded the coverage of the Convention and in tandem restricted the margin of appreciation afforded to States; (b) A

[29] The Court sometimes uses other words of phrases to convey the living instrument doctrine such as 'present-day conditions', 'evolutive', 'evolving'.

distinction between the use of the doctrines at the applicability and merits stage is usually overlooked in the literature; and (c) The issue of compatibility *ratione materiae* goes to the jurisdiction of the Court to hear a matter. The combination of these three elements grounded the decision to conduct the analysis of the use of both doctrines at the admissibility phase.

Two methods were adopted for the case analysis: quantitative method of descriptive statistical analysis and doctrinal analysis. The first phase was the descriptive statistical analysis. Four questions were posed in order to examine the nature of interaction between the margin of appreciation and living instrument doctrines (RQ 1 relationship) and also explore whether living instrument arguments were superseding margin of appreciation arguments at the applicability stage (RQ 2 conflict). The four questions were:

- Is compatibility *ratione materiae* contested in the case?
- Are the margin of appreciation or living instrument doctrine arguments referred to in addressing compatibility?
- Which of the two arguments is used the most at the compatibility stage?
- What is the outcome of compatibility arguments in cases in which there is a margin of appreciation or living instrument argument?

The results showed that in 40% of the cases where compatibility *ratione materiae* was contested, either the living instrument doctrine or margin of appreciation doctrine, or both, were relied upon.[30] The living instrument doctrine was used as the basis for arguments that a particular issue is covered by the Convention or that an issue covered by the Convention extends to the particular facts of the case presented. The margin of appreciation doctrine, on the other hand, was usually relied on to contest applicability of the Convention to the issue raised or to extension of duties of the State in particular area, to the facts of a case presented. In relation to question on which of the doctrines is used the most, the use of the living instrument doctrine was at a higher level than the use of margin of appreciation arguments.[31]

The case law was further examined to provide an answer to question four about the outcome of the compatibility arguments. The answer to this question directly feeds into RQ 2 (conflict), which queries whether living instrument arguments are superseding margin of appreciation arguments. The results showed that in an overwhelming majority of the cases,

[30] 14 out of the 35 cases.
[31] In 2 cases, both living instrument and margin of appreciation arguments were used. In 11 cases the living instrument was raised on its own and in 1 case, only the margin of appreciation was raised.

79%, where the living instrument doctrine had been relied on to argue for compatibility *ratione materiae*, there had been a positive decision. On the other hand, a margin of appreciation argument as a counter to the living instrument doctrine had a poor success rate. It was successful in only 1 case where the Court found the issue to be incompatible *ratione materiae* with the Convention. However, there were only two cases in which both the margin of appreciation and living instrument doctrines were applied at the applicability stage and in those cases, it was a 50/50 outcome. This would therefore suggest that at the applicability stage, living instrument arguments were not necessarily superseding margin of appreciation arguments when both arguments were placed side by side. The success rate of living instrument arguments was higher (79%) when there was no conflicting margin of appreciation argument, than it was, when there was a conflicting margin of appreciation argument placed side by side (50%). This was an interesting discovery to add to the literature in this area as it suggests that the margin of appreciation is still playing a strong role in the determination of the scope *ratione materiae* of the Convention.

It was noteworthy that by raising the living instrument argument in relation to compatibility *ratione materiae*, this created more areas in which there is also a need for a margin of appreciation argument. For this reason, it was necessary to examine the relationship between both doctrines and the final outcome of the case. To achieve this, the cases were analysed on the basis of the interaction between margin of appreciation and living instruments from the applicability to the merits stage. The results revealed four models:

1. Living instrument doctrine applied to applicability argument, only margin of appreciation doctrine applied to compliance. (Model 1 LI applicability, MOA compliance).
2. Living instrument doctrine applied to applicability argument, both living instrument and margin of appreciation doctrines applied to compliance. (Model 2 LI applicability, LI & MOA compliance).
3. Living instrument and margin of appreciation doctrines applied to both the applicability argument and the compliance arguments. (Model 3 LI and MOA applicability and compliance).
4. Margin of appreciation doctrine applied to applicability argument, only living instrument doctrine applied to compliance. (Model 4 MOA applicability, LI compliance).

Model 1 (LI applicability, MOA compliance) was the highest occurring relationship, accounting for 50% of the cases examined.[32] This showed the strength of the use of the living instrument doctrine for applicability arguments. On the other end of the spectrum, Model 4 MOA (applicability, LI compliance) accounted for just 7% of the cases, showing the low use of the margin of appreciation doctrine at the applicability stage. Overall, the living instrument doctrine was used the most for the compatibility issues, in 92% of the cases.[33] This may be contrasted with the margin of appreciation doctrine that was only raised in 22% of the cases. At the compliance stage, the living instrument doctrine was used at a lower rate – 50% of the cases as opposed to the margin of appreciation which was used in 92% of the cases at the compliance stage. The differences in the way in which these two doctrines were used at the applicability and compliance stages indicated that the living instrument doctrine was mainly used to determine whether a right exists that was covered by the ECHR, whilst the margin of appreciation was used to determine whether the State has breached its duty under the Convention.

A further level of descriptive analysis was carried out to determine the outcome of the cases based on the four models discovered in the case law. The results showed that for Model 1 (LI applicability, MOA compliance), in 85% of the cases, there was a finding of at least one violation of the Convention. In Model 2 (LI applicability), the Court found a violation in 100% of the cases. In Model 3 (LI and MOA applicability and compliance) the Court did not find any violation in 100% of the cases whilst in Model 4 (MOA applicability, LI compliance) it found a violation in 100% of the cases. Overall, in 86% of the cases examined, the Court found at least one violation of the Convention.[34] It was significant that the results showed that in all the cases where Model 3 (LI and MOA applicability and compliance) was applied, the State was not found to be in violation of its obligations. This was even more significant when the outcome of the compatibility question in the cases under Model 3 (LI and MOA applicability and compliance), was 50/50. Although the Court found in one case that the issue was compatible *ratione materiae* and the in the other that it was not, the outcome was still the same – the State was not in violation of its obligations. This indicates that the margin of appreciation still has a strong place in the Court's jurisprudence even when the living instrument doctrine is applied.

[32] 7 out of 14 cases.
[33] 13 out of 14 cases. In some cases, alongside the margin of appreciation doctrine and in others, on its own.
[34] In 12 out of the 14 cases under the category of cases where the either the margin of appreciation or living instrument doctrine or both were present in the case and used in the applicability argument.

Although the descriptive statistical analysis provided some insights based on the numbers of cases within each category, it was limited as reliance on the results could not give an understanding of the reasons for the decision of the Court nor the interpretive approaches applied by the Court. The size of the sample also made it important to engage in doctrinal analysis of the text of the cases alongside the results that had been arrived at through the descriptive statistical analysis. The descriptive statistical analysis was however helpful in coming to a decision on which cases to examine further in the textual analysis as not all the cases could be analysed in depth due to the constraints of this research project.

The doctrinal textual analysis was structured around two themes that had emerged from the case law: 'expansion' and 'restriction', both themes relate to the issue of change, which had already been identified in chapter two as a linking factor between both the margin of appreciation and living instrument doctrines. It examined the interaction between the margin of appreciation and living instrument doctrines from the perspective of expansion *ratione materiae* and restriction *ratione materiae* of the scope of the Convention. The issue of restriction *ratione materiae* is not usually captured in the literature, hence a focus on that area as a way of contributing to the codification of knowledge in this area. Restriction *ratione materiae* referred to those cases where there had been a living instrument argument urging the Court to find a particular issue to be compatible with the Convention, but 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 Court restricts the scope of the ECHR. The analysis revealed two cases in which the Court had restricted *ratione materiae* the scope of the Convention by rejecting a living instrument argument.[35] Whilst in *Johnston and Others v Ireland*, the Court adopted Model 2 (LI applicability, LI & MOA compliance), in *VO v France*, the Court adopted Model 3 (LI & MOA applicability and compliance). The model adopted did not therefore seem to have a significant impact on the outcome of compatibility. The case of *VO* was chosen for a more descriptive textual analysis as that was a case where both the margin of appreciation and living instrument doctrines were applied to the applicability and compliance stages therefore one in which the tension between both doctrines could be examined in order to answer RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches).

[35] *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986); *VO v France* App no 53924/00 (ECtHR, 8 July 2004).

In *VO* the Court had to determine whether Article 2 was applicable in a case where the applicant had suffered from an unsolicited termination of her pregnancy due to a case of mistaken identity. The analysis showed that rough an examination of the case, it was seen that the interpretive approach of the Court was in line with the rules of interpretation in the VCLT, using the textual interpretation as a starting point. The Court also considered subsequent practice amongst States, in line with Article 31(3) VCLT. *VO* was interesting because it pitched two types of consensus before the Court and only one choice could be made. Whilst the applicant raised the developments in science, hence expert consensus, the government drew attention to the lack of agreement amongst States as the basis for advocating for a wide margin of appreciation on the issue of when the right to life begins. The Court chose the margin of appreciation doctrine over the living instrument doctrine in this case based on the fact that it did not find there to be consensus within the member States on this issue nor in the international treaties. The margin of appreciation therefore trumped the living instrument doctrine in this case. The Court by putting together the compatibility question as well as the merits together, side stepped the opportunity to make a clear statement on when the right to life begins. This is considered as a missed opportunity here. The outcome of the case was that no right was found to exist here and therefore no duty ensued.

Moving on from considering where the scope of the Convention had been restricted *ratione materiae*, the second issue examined was the use of living instrument and margin of appreciation arguments to expand *ratione materiae* the scope of the Convention. Under this heading, the case analysis revealed that there were two possible outcomes: (a) Expansion *ratione materiae* of the scope of the Convention, no expansion of scope of duty (b) Expansion *ratione materiae* of the scope of the Convention, expansion of scope of duty. Expansion *ratione materiae* of the scope of the Convention with no expansion of the scope of duty refers to those cases where the Court finds the particular issue to be compatible with Convention but does not find that the State has breached its obligation in the particular case. Essentially, the State is not found to have breached its duty. In this area, there were only two cases identified where the Court expanded *ratione materiae* the scope of the Convention without an attendant finding of a breach of obligations of the State.[36] The Court adopted two different models in those cases. Whilst in *Leyla Sahin v Turkey*, the Court adopted Model 1 (LI applicability MOA compliance), in *Schalk and Kopf v Austria*, the Court adopted Model

[36] *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) and *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).

3 (LI & MOA applicability and compliance). Notwithstanding the difference in models, the outcome of both cases was similar, the Court did not find a violation of the Convention, and hence no new duties were imposed on the State. *Schalk and Kopf* was discussed in further detail, since as in *VO,* it engaged both the margin of appreciation doctrine at the applicability stage and was therefore one of the 'hard cases' where the tension between both doctrines could be better displayed.

In *Schalk and Kopf* the Court was faced with the question of whether the refusal by the Austrian authorities to allow a same-sex couple to get married was a violation of Article 12 and Article 14 taken in conjunction with Article 8. The Court had two applicability questions to deal with: first, whether Article 12 which provides for the right to marry was applicable to same sex couples and second, whether the lack of same sex marriage was discriminatory within the terms of Article 14 taken in conjunction with Article 8. The Court in a similar vein to *VO,* also adopted the interpretive approaches in the VCLT, beginning with the text of the Convention. However, it proceeded to consider the living instrument doctrine on the basis that this was the ground on which the applicant was relying on for their claim. In relation to Article 12, although the Court noted a lack of European consensus, the Court relied solely on Article 9 of the Charter of the Fundamental Rights of the European Union (the Charter) to conclude that Article 12 should no longer be read as limited to marriage between two persons of the opposite sex. It concluded that Article 12 was applicable to the applicant's case. The Court did not however find a violation of the Convention on the basis that the regulation of same sex marriage should be a matter for national authorities to decide. The reliance on Article 9 of the Charter alone was seen as a departure from the normal practice of the Court in this area and was subject to criticisms.[37] On the applicability question for Article 14 taken in conjunction with Article 8, the living instrument doctrine trumped the margin of appreciation doctrine as the Court found that the facts of the case came within the notion of 'private life' as well as 'family life' within the ambit of Article 8. It did not however find a violation of the Convention. In dealing with that issue the Court relied on the rules of interpretation of the VCLT and the issue of consensus and evolving practice amongst the States.

The outcome of the cases in this area when viewed from the perspective of dynamic correlativity of rights and duties, shows the conception of rights as grounds of duties. In both *Sahin* and *Schalk and Kopf,* although a right was seen to exist, no new duties were imposed.

[37] Critique was expressed in the dissenting opinions and has been expressed in other literature.

If a right is considered a correlative of a duty, there should have been a finding of violation in both cases. However, when a right is considered a ground of a duty, it is possible to find that a right exists without identifying the duty that goes with that right at the material time. It could also lead to new duties being imposed over time. The finding in *Schalk and Kopf* that a duty did not exist on the State to provide access to marriage for same sex couples, could change over time. The developments that have been seen in the Court of Justice of the European Union (CJEU) and the Inter-American Court of Human Rights (IACHR), suggest there could be room for a different view of the Court in the future.[38]

A further point that was considered was the expansion *ratione materiae* of the scope of the Convention and expansion of duty on the State. The results showed that this was the area where the most cases were found.[39] However, none of the cases were based on Model 3 (LI & MOA applicability and compliance). Model 1 (LI applicability, MOA compliance) had the highest number of cases,[40] followed by Model 2 (LI applicability, LI and MOA compliance),[41] then Model 4 (MOA applicability, LI compliance).[42] The issues covered also ranged from areas of absolute rights such as the prohibition of torture,[43] to qualified rights such as the right to freedom of religion.[44]

The cases under this section were further analysed using the theme of consensus since it had already been shown from Chapter two that consensus was a linking factor between the margin of appreciation and living instrument doctrines.[45] The first section examined cases in which the living instrument doctrine was applied without a consensus factor. This referred to those cases where the Court made a reference to interpreting the Convention as a living instrument which takes into consideration present day conditions but did not go ahead to refer or consider either international consensus, European consensus, internal consensus or

[38] State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf accessed 12 August 2018. Referred to in Chapter 5, particularly section 6.5; Case C-673/16 *Coman and others v Romania* (CJEU, 5 June 2018) available at < http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0673&lang1=en&type=TXT&ancre=> accessed 16 August 2018.

[39] 9 out of 14 cases.

[40] 6 out of 9 cases.

[41] 2 out of 9 cases.

[42] 1 out of 9 cases.

[43] *Beganovic v Croatia* App no 46423/06 (ECtHR, 25 June 2009).

[44] *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

[45] This was detailed in chapter two and the case of *Tyrer* (n 8) which espouses the living instrument doctrine and *Handyside* (n 7) which espouse the rationale for the margin of appreciation both contain reference to the practice of States, a reference that is seen as a reference to consensus.

expert consensus as a determining factor in the case. An example of this approach can be seen in the case of *Matthews v United Kingdom* where the Court decided that Article 3 of Protocol No 1 applied to elections to the European Parliament. The Court referred to the living instrument doctrine without any reference to a comparative study to determine any form of consensus. Similarly, in *Berganovic v Croatia* where the Court extended the obligation to protect against torture to horizontal relationships, (actions between individuals), there was no reference to a comparative approach to identify consensus or lack thereof.[46] These cases suggest that contrary to the idea that the living instrument doctrine leads to an adoption of a majoritarian approach, there are cases to show that the living instrument doctrine is counter majoritarian in some cases with a focus on the nature of the right and the need for protection of the rights. This is an approach welcomed by this researcher. The cases under this section also resulted in the imposition of new duties on States, an outcome that was in line with the dynamic nature of rights under the dynamic restricted correlativity thesis which gives room for new duties to be imposed over time and space.

The second section examined cases in which consensus was a determining factor. An example of this could be seen in *Bayatyan v Armenia* where the Court for the first time had to make a determination of whether the right to conscientious objection came within the scope of Article 9 which provides for the right to freedom of thought, conscience and religion.[47] In deciding whether or not to move away from this existing jurisprudence of the European Commission on Human Rights on this issue, the Court noted the potential for conflict between legal certainty and the relevance of the Convention to present day society. It referred to the need to interpret the Convention as a living instrument and referred to changes which showed consensus at the international,[48] European[49] and national level,[50] to

[46] *Beganovic* (n 43).
[47] *Bayatyan* (n 44).
[48] 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. *Bayatyan* (n 44), paras 105-7.
[49] At the time of the alleged interference in 2002-2003, there was already a consensus in all Council of Europe member States due to the fact that the overwhelming majority had already recognised the right to conscientious objection in their laws. *Bayatyan* (n 44), para 103.
[50] 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.

recognise conscientious objection as coming within the ambit of protection of freedom of religion. A similar reliance on consensus was also seen in *Magyar Helsinki Bizottsag v Hungary* where the Court decided that Article 10 included a right to freedom of access to State held information.[51] These cases are more aligned to the view of the importance of consensus to the living instrument doctrine and the effect this has on the margin of appreciation of the State as in all the cases examined under this section, the State was found to be in violation of its obligations.

Whilst Chapter five had provided some answers to RQ 1 (relationship), RQ 2 (conflict) and RQ 3 (interpretive and theoretical approaches), it had done so in the context of applicability arguments on compatibility *ratione materiae*. There was therefore a need to conduct a second analysis which focused on the merits of the cases. This was the contribution provided by chapter six, the second case analysis chapter which focused on the use of the margin of appreciation and living instrument doctrines to determine the scope and nature of duties on States. The first area examined was the issue of width of the margin of appreciation. This is an area that has occurred frequently in the discussion of the margin of appreciation and has been identified as the first thing the Court decides in a case where the margin of appreciation is applicable.[52] The living instrument doctrine had also been pinpointed for narrowing the width of the margin of appreciation.[53] As was highlighted in Chapter two, change in width was an area that this thesis was going to assess, hence chapter six began with an examination of the use of the living instrument doctrine to alter the width of the margin of appreciation.[54]

The first stage of this analysis was the descriptive statistical analysis which focused on three questions:

- What are the types of widths of margin of appreciation in the case law?
- Is there any relationship between the width of the margin of appreciation and the finding of violation in the case?
- Has the living instrument doctrine resulted in a narrowing of the width of the margin of appreciation?

[51] *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016)
[52] Antoine Buyse, 'Speech of Bratza and Candidates for New Judges' ECHR Blog, 21 September 2012. Available at < http://echrblog.blogspot.com/2012/09/speech-of-bratza-and-candidates-for-new.html> accessed 13 August 2018.
[53] Baroness Hale (n 2) 542.
[54] Chapter 2, particularly 2.6.2.

The results showed that there were three possible widths of the margin of appreciation: wide, narrow and unspecified. The unspecified widths referred to cases where the Court used terms like 'a margin of appreciation' or 'a certain margin of appreciation' but did not identify the width. The unspecified width was seen in 41% of the cases[55] whilst the narrow width was seen in just 8% of the cases.[56] The wide width accounted for the most cases – 51% of the cases.[57] These outcomes were limited to the width specified by the Court explicitly in the case as opposed to the arguments made by either the applicant or the Respondent State on what the width should be.

The second question on the relationship between the width of the margin of appreciation and the outcome of the case involved two sub questions. Firstly, the analysis examined what the outcomes had been in the cases. It showed that in 72% of the cases examined, the Court had found at least one violation of the Convention.[58] The cases were analysed again based on the width of the margin of appreciation and the overall outcome of the case. The results revealed that the Court found a violation in 100% of the cases where the width of the margin of appreciation was narrow. Nonetheless, with the narrow width accounting for just 8% of the cases, it gave an initial indication that there was more to the finding of violation than a narrow width. In 60% of the cases where the margin of appreciation was designated to be 'wide', the Court found a violation of the Convention.[59] Interestingly, where the Court deemed the margin of appreciation afforded to the unspecified, using terms such as 'certain' or 'a' margin of appreciation, the Court found in 84% of those cases that there had been a violation of the Convention.[60] This figure is even higher than when the margin of appreciation is deemed to be wide.

To provide a more direct answer to RQ 2 (conflict), the question was asked whether the living instrument doctrine has resulted in a narrowing of the width of the margin of appreciation. The results revealed that there was only one case where the application of the living instrument doctrine led to a narrowing of the margin of appreciation. It was also a case where the width of the margin of appreciation was unspecified rather than wide. The results were restricted to the express words used by the Court in the case as opposed to any subjective interpretation of the text. This outcome seemed to contradict the view in the literature that

[55] 31 out of the 75 cases.
[56] 6 out of 75 cases.
[57] 38 out of 75 cases.
[58] 54 out of 75 cases.
[59] 22 out of the 37 cases where the margin of appreciation was designated as 'wide'
[60] 26 out of 31 cases where the margin of appreciation was unspecified.

the living instrument doctrine had led to the narrowing of the width of the margin of appreciation, at least in relation to the cases examined, which were cases from January 1979 to December 2016 in which both the margin of appreciation and the living instrument doctrines were present in the case.[61] This highlighted the limitation of the descriptive statistical analysis as it appeared the 'narrowing' of the width of the margin of appreciation was a more nuanced issue than express statements made in the case law. It was therefore necessary to adopt a doctrinal approach with a textual analysis to discover the way in which both doctrines had interacted at the merits stage of the cases to determine the nature and scope of the rights and duties.

Taking into consideration the finding that the width of the margin of appreciation did not always have a direct link on the outcome and the fact that in 41% of the cases examined the width of the margin of appreciation was not specified, the doctrinal textual analysis was focused on the use of the living instrument doctrine to police the boundaries of the margin of appreciation. The analysis showed that the use of the living instrument doctrine to police the boundaries of the margin of appreciation can be traced back to the 1979 case of *Marckx v Belgium*.[62] *Marckx* was decided just over a year after the 1978 case of *Tyrer v United Kingdom* in which the Court articulated the living instrument doctrine for the first time.[63] This showed that right from the early days of the explicit use of the living instrument doctrine, it had served a function to regulate the boundaries of the margin of appreciation afforded to States. Several principles were extracted from *Marckx* on how the living instrument doctrine was applied to police the boundaries of the margin of appreciation afforded to the State.

- International and regional treaties were examined to determine what the trend was in relation to the issue of maternal affiliation. This included treaties to which Belgium itself was not a party. (international consensus)
- The Court referred to the practice within European States. (European consensus)
- The Court was also influenced by the changes that were taking place in the domestic arena of Belgium (internal consensus) – in this case it was in sync with the international and European consensus, but this is not always the case.[64]

[61] The criteria for selection of the cases has been detailed
[62] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).
[63] *Tyrer* (n 8).
[64] For example, in *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010), the restrictive abortion laws in Ireland were out of sync with the abortion laws in other contracting States but the Court did not deem this an automatic violation of the Convention.

A combination of these considerations influenced the Court in reaching its decision on the importance of the issue at stake and on the means that would be sufficient to achieve protection of the issue. This study showed that since *Marckx*, the use of the living instrument as a tool to police the boundaries of the margin of appreciation afforded to States has continued to develop in the Court's case law and is applied not just to positive obligations, but also negative obligations.[65]

Through the lens of the relationship between rights and duties, the use of the living instrument doctrine to police the boundaries of the margin of appreciation of States is effectively the use of the living instrument doctrine to determine when a State has breached its duty even when it had a margin of appreciation. The doctrinal analysis therefore focused on the boundaries of the margin of appreciation in the light of the duty on the State. Due to the constraints of the breadth of this research, two case studies were selected from the case law to demonstrate the use of the living instrument doctrine to determine the nature and scope of duty, and the use of the living instrument doctrine to determine the scope of the duty.

The recognition of the post-operative identity of transsexuals was used as a case study to demonstrate the use of the living instrument to police the boundaries of the margin of appreciation doctrines in determining the nature and scope of duty. This area was chosen for a number of reasons: (a) Volume of cases in this area in the data analysed: 12% of the cases dealt with issues surrounding transgender rights;[66] (b) Importance of the issue: gender identity is concerned with a very private area of life, therefore any regulation of that area or interference in that area by the State is worthy of consideration; and (c) Relevance: It provided a good example of a change in time within the same space, an issue that was identified in chapter 2 as one of the areas not reflected in the discussion by Brems on the relationship between the margin of appreciation and living instrument doctrines.[67]

The width of the margin of appreciation in these cases on the protection of rights of post-operative transexuals was either 'wide'[68] or 'unspecified'.[69] Overall, in the cases in this case study, the Court found a violation in 5 out of the 9 cases, some of which included 'wide' margins. This therefore reinforced the point made earlier that a designation of a wide margin

[65] Ibid para 234.
[66] 9 out of 75 cases.
[67] In Chapter two whilst discussing the relationship between the margin of appreciation and living instrument doctrines, it was highlighted that this thesis will test whether a change in time and space can occur in the same case as the literature suggested that the living instrument leads to a change in time whilst the margin of appreciation leads to a change in space See Chapter 2 especially section 2.6.1 'Change in time and space'.
[68] 7 out of 9 cases
[69] 2 out of 9 cases

does not necessarily lead to an outcome that the State has not violated its obligations. The case study showed that from the 1986 case of *Rees v United Kingdom*[70] where the Court did not find any positive obligation to recognise the post-operative gender of the applicants, to the 2002 case of *Christine Goodwin v United Kingdom*, the nature and scope of the duty on the State had changed.[71] In *Goodwin*, the Court decided that the choice of whether or not to recognise the post-operative identity of transsexuals was no longer within the margin of appreciation of the State. The State's margin of appreciation was now limited as a result of the application of the living instrument doctrine, to the methods to be applied to recognise the post-operative sexual identity. Even though there were differences in the practice of States, the Court did not accord great weight to this, rather focusing on the evidence of an 'international trend' towards recognition of the post-operative status of transsexuals.[72] The cases involved the same member State so were an example of not just change in time, but also change in space. From the duty to recognise the post-operative status of transsexuals, the living instrument doctrine has also been applied to police the boundaries of the margin of appreciation in relation to regulating the conditions for gender reassignment surgery. In *L v Lithuania* the positive obligation to recognise the post-operative status of a transsexual was extended to cover a situation in which the domestic law did not provide any regulation of gender reassignment surgery.[73] On the other hand, in *Y.Y v Turkey*, the obligation was examined in the context of negative obligations. [74] It focused on access to gender reassignment surgery and the compatibility of the conditions that could be imposed prior to the surgery with the duty of the State under the Convention. The expansion of the scope of the duties on states in relation to recognition of the post-operative gender identity of transsexuals has however not been without limits, showing that the living instrument doctrine is not without control. In *Hämäläinen* the Court held that Article 8 cannot be interpreted as imposing a positive obligation on member States to grant same-sex couples access to marriage.[75] The reliance on the living instrument doctrine was not sufficient to trump the margin of appreciation afforded to the State and no duty was imposed in this instance.

The second case study focused on the use of the interaction between the living instrument and margin of appreciation doctrines in determining the scope of duty on the State.

[70] *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986).
[71] *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).
[72] Ibid para 85.
[73] *L v Lithuania* App no 27527/03 (ECtHR, 11 September 2007).
[74] *Y Y v Turkey* App no 14793/08 (ECtHR, 10 March 2015).
[75] *Hämäläinen v Finland* App no 27359/09 (ECtHR, 16 July 2014), para 71.

The case study was on the protection of the rights of illegitimate children.[76] This area was chosen for a number of reasons: (a) Volume of case law in data: 11 out of the 75 cases in the data were about illegitimate children[77] and this shows that this is an issue of importance as it keeps reoccurring in the case law of the Court; (b) Importance of the issue: The ECHR is not expressly a child rights Convention unlike the Convention on the Rights of the Child which is expressly created to protect children's rights.[78] Consequently, it was interesting to examine the interaction between the living instrument and margin of appreciation doctrine in providing protection for a group of people that the Convention was not expressly created to address; and (c) Relevance: It was a good example of change in time within different spaces, as the case law was derived from different member States.

The particular focus was on equality of inheritance rights of children born out of wedlock and it examined the case law of the Court which spanned a 35-year period. Significantly, in all the cases examined where the rights of illegitimate children to inherit was considered, the Court found a violation of the Convention. From the doctrinal textual analysis, this study showed that the early principles showing a positive obligation on States to ensure equality of inheritance rights to children born in and out of wedlock were established in *Marckx*.[79] *Inze v Austria* became the first case in which the Court dealt with Article 1 of Protocol No 1 again in the context of a child born out of wedlock, with the living instrument doctrine applied to the borders of the margin of appreciation. In that case the Court, relying on the living instrument doctrine, expressly found a violation of Article 14 taken in conjunction with Article 1 of Protocol No 1 where the applicant had been excluded from inheriting based on a domestic law that favoured the legitimate child over the illegitimate child. Although the Court did not specify the width of the margin of appreciation in that case, the application of the living instrument doctrine led to the requirement of a high threshold of justification for the grounds of interference. Following *Inze*, the Court has applied similar principles to find a breach of the Convention where there has been difference of treatment of illegitimate children even when negative obligations are engaged.[80] Through the application of the living instrument doctrine to police the borders of the margin of

[76] The terms 'illegitimate' and 'children born out of wedlock' was used interchangeably in this section to refer to the same group of people.
[77] This was a large number, accounting for about 15% of the cases.
[78] United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989.
[79] The Court did not however find a violation of Article 1 of Protocol No 1 as it was not deemed relevant in that case.
[80] For example, *Brauer v Germany* App no 3545/04 (ECtHR, 28 May 2009); *Mazurek v France* App no 34406/97 (ECtHR, 1 February 2000).

appreciation, the scope of the duty on the State has been further extended to cover the area of dispositions made in the private domain.[81] The consistency of the outcome of the Court's decision in the area of protection of inheritance rights of illegitimate children can be contrasted with the Court's case law on the rights of post-operative transsexuals considered in the first case study.

7.2 Recommendations for Future Research

This examination of the case law of the Court on the living instrument and margin of appreciation doctrines has highlighted some areas where more study can be done. The importance of the applicability stage and arguments concerning compatibility *ratione materiae* was highlighted in chapter five. From the results of the descriptive statistical analysis in that chapter on the use of the margin of appreciation and living instrument doctrines at the applicability stage, it showed that in the two cases where both doctrines were applied to both the applicability issue and compliance issue, the Court found that there had been no breach of the Convention. This suggests that the margin of appreciation has not been completely taken over by the living instrument doctrine. There is room for more analysis on the use of both doctrines as arguments made before the Court by the parties before the Court and the impact if any, it has on the direction of the Court takes in the case. There is room for more research on the applicability phase and the role of margin of appreciation arguments at that phase. This is because the case analysis showed very minimal use of the doctrine at that phase but where it was used, it had an impact on the Court's decision.

Another area where further research can be conducted is the understanding of the *erga omnes* character of the Convention and the Court's decisions. The reoccurrence of similar cases in relation to the inheritance rights of children born out of wedlock in spite of the consistency of the Court's jurisprudence in this area suggest that States are not considering the *erga omnes* effect of those judgments. Whilst a reading of Article 46 of the Convention would suggest that the Court's judgments are only binding on the parties to the particular case, it is clear from the doctrinal analysis in both chapters five and six, that the Court requires other States to keep to the principles developed in its case law. This would mean that if the Contracting States take note of the Court's judgment in cases before it whether or not they are parties to the case, they will be able to within reason, foresee the direction of the Court

[81] *Pla and Puncernau v Andorra* App no 69498/01 (ECtHR, 13 July 2004); *Fabris v France* App no 16574/08 (ECtHR, 7 February 2013).

and avoid violations within their States. They would also be able to ensure legal certainty by taking heed to judgments of the Court. The aspect of the *erga omnes* effect of the Convention and the perception of States in this area could therefore be an area for further research.

Overall, this thesis has provided an original contribution to the literature on the margin of appreciation and living instrument doctrine in two ways. First, through the methodology adopted which involved a combination of the quantitative method of descriptive statistical analysis of the case law of the Court in which both the margin of appreciation and living instrument doctrines were applied. Second, through the systematic analysis of the case law on the margin of appreciation and living instrument doctrines from January 1979 – December 2016 through the lens of the relationship between rights and duties. It identified a distinction between the use of both doctrines at the admissibility stage and at the merits stage. This thesis has shown that there is no 'one size fits all' method that is applied by the Court in dealing with these cases where both doctrines are relevant. Whilst conceding that the common factor between both doctrines is flexibility, there is still room for the Court to clearly articulate its methodology in its case law in order for there to be better understanding by the domestic Courts and in turn better reception and application of its decisions. Better articulating the methodology of the Court could also assist States in their efforts to generate ECHR-compliant legislation and policy.

Bibliography

International Treaties

- Additional Protocol on the Prohibition of Cloning Human Beings and 2004
- Additional Protocol on Biomedical Research 1998
- Charter of Fundamental Rights of the European Union 2000
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950)
- Convention on Access to Official Documents 2009
- Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008
- European Convention on the Legal Status of Children born out of Wedlock 1975
- United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989
- ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise
- ILO Forced Labour Convention 1930
- International Covenant on Civil and Political Rights (ICCPR) 1966
- International Covenant on Economic Social and Cultural Rights 1966 (ICESCR);
- Oviedo Convention on Human Rights and Biomedicine 1997
- Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1998 ETS No. 155
- Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (Opened for signature 24th June 2013, not yet in force) ETS No. 213
- Statute of the International Court of Justice 1945 15 UNCIO 355
- Statute of the Council of Europe (Entered into force on 3 August 1949) ETS No. 1
- Statute of the International Law Commission 1947
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956
- United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 UNTS

- Universal Declaration on Human Rights 1948
- Vienna Convention on the Law of treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331
- Brussels Convention of 12 September 1962 on the Establishment of Affiliation of Natural Children.

UK Cases

- Brown v Scott [2003] 1 AC 686

Cases from other Jurisdictions

- Lake Shore & M.S.R.Co v Kurtz (1894) 10 Ind. App., 60; 37 N.E., 303

European Court of Human Rights Cases

- A, B and C v. Ireland App no 25579/05 (ECtHR, 16 December 2010)
- Affaire Syndicat National de La Police Belge (ECtHR, 27 October 1975)
- Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979)
- Al-Adsani v United Kingdom App no 35763/97 (ECtHR, 21 November 2001)
- Aldeguer Tomás v Spain App no 35214/09 (ECtHR, 14 June 2016)
- Anchugov and Gladkov v Austria App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013)
- Banković and Others v Belgium and Others App no 52207/99 (ECtHR, 12 December 2001)
- Bayatyan v Armenia App no 23459/03 (ECtHR, 7 July 2011)
- Beganovic v Croatia App no 46423/06 (ECtHR, 25 June 2009)
- Biao v Denmark App no 38590/10 (ECtHR, 24 May 2016)
- Boso v Italy App no 50490/99 (ECtHR, 5 September 2002)
- Brannigan and McBride v United Kingdom App nos14553/89 and 14554/89 (ECtHR, 25 May 1993)
- Brauer v Germany App no 3545/04 (ECtHR, 28 May 2009)

- Brüggemann and Scheuten v Germany App no 6959/75 (Commission's report, 12 July 1977)
- Campbell and Cosans v United Kingdom App nos 7511/76 and 7743/76 (ECtHR, 25 February 1982)
- Cardot v France App no 11069/84 (ECtHR, 19 March 1991)
- Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium (Belgian Linguistic Cases) App nos 1474/62; 1677/62; 1691/62 and 1769/63 (ECtHR, 23 July 1968)
- Christine Goodwin v United Kingdom App no 28957/95 (ECtHR, 11 July 2002)
- Cossey v United Kingdom App no 10843/84 (ECtHR, 27 September 1990)
- Delcourt v Belgium App no 2689/65 (ECtHR, 17 January 1970)
- De Wilde, Ooms and Versyp v Belgium App nos 2832/66, 2835/66 and 2899/66 (ECtHR, 18 June 1971)
- Demir and Baykara v Turkey App no 34503/97 (ECtHR, 12 November 2008)
- Dubská and Krejzová v The Czech Republic App nos 28859/11 and 28473/12 (ECtHR, 15 November 2016)
- Dudgeon v United Kingdom App no 7525/76 (ECtHR, 22 October 1981)
- Elsholz v. Germany App no 25735/94 (ECtHR, 13 July 2000)
- Engel and others v The Netherlands App nos 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72 (ECtHR, 8 June 1976
- Evans v The United Kingdom App no 6339/05 (ECtHR, 10 April 2007)
- Fabris v France App no 16574/08 (ECtHR, 7 February 2013)
- Frette v France App no 36515/97 (ECtHR, 26 February 2002)
- Garcia Ruiz v Spain App no 30544/96 (ECtHR, 21 January 1999)
- Genovese v Malta App no 53124/09 (ECtHR, 11 October 2011)
- Giniewski v France App no 64016/00 (ECtHR, 31 January 2006)
- Glor v Switzerland App no 13444/04 (ECtHR, 30 April 2009)
- Golder v United Kingdom App no 4451/70 (ECtHR, 21 February 1975)
- Goodwin v United Kingdom App no 17488/90 (ECtHR, 27 March 1996)
- Grant v United Kingdom App no 32570/03 (ECtHR, 23 May 2006)
- Greece v United Kingdom App no 176/56 (ECtHR, 26 September 1958)
- Guzzardi v Italy App no 7367/76 (ECtHR, 6 November 1980)

- H v Norway App no 17004/90 (Commission decision, 19 May 1992)
- Hämäläinen v Finland App no 27359/09 (ECtHR, 16 July 2014)
- Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976)
- Hassan v United Kingdom App no 29750/09 (ECtHR, 16 September 2014)
- Hatton v United Kingdom App no 36022/97 (ECtHR, 8 July 2003)
- Hirst v United Kingdom (No 2) App no 74025/01 (ECtHR, 6 October 2005)
- I v United Kingdom App no 25680/94 (ECtHR, 11 July 2002)
- İ.A. v Turkey App no 42571/98 (ECtHR, 13 September 2005)
- Ilhan v Turkey App no 22277/93 (ECtHR, 27 June 2000)
- Inze v Austria App no 8695/79 (ECtHR, 28 October 1987)
- Ireland v United Kingdom App no 5310/71 (ECtHR 18 January 1978)
- James and others v United Kingdom App no 8793/79 (ECtHR, 21 February 1986)
- Johnston and others v Ireland App no 9697/82 (ECtHR, 18 December 1986)
- K.U. v Finland App no 2872/02 (ECtHR, 2 December 2008)
- Karner v Austria App no 40016/98 (ECtHR,24 July 2003)
- Keegan v. Ireland App no 16969/90 (ECtHR, 26 May 1994)
- Klass and others v Germany App no 5029/71 (ECtHR, 6 September 1978)
- König v Germany App no 6232/73 (ECtHR, 28 June 1978)
- Konstantin Markin v Russia App no 30078/06 (ECtHR, 22 March 2012)
- Kozak v Poland App no 13101/02 (ECtHR, 2 March 2010)
- L v Lithuania App no 27527/03 (ECtHR, 11 September 2007)
- Lawless v Ireland (No 3) App no 332/57 (ECtHR, 1 July 1961)
- Leyla Sahin v Turkey App no 44774/98 (ECtHR, 10 November 2005)
- Lithgow and others v United Kingdom App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81 and 9405/81 (ECtHR, 8 July 1986)
- Loizidou v Turkey (preliminary objections) App no 15318/89 (ECtHR, 23 March 1995)
- Magyar Helsinki Bizottság v Hungary App no 18030/11 (ECtHR, 8 November 2016)
- Mamatkulov and Askarov v Turkey App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005)
- Marckx v Belgium App no 6833/74 (ECtHR, 13 June 1979)
- Mata Estevez v. Spain App no 56501/00 (ECtHR, May 2001)

- Matthews v United Kingdom App no 24838/94 (ECtHR, 18 February 1999)
- Mazurek v France App no 34406/97 (ECtHR, 1 May 2000)
- Mouvement Raëlien Suisse v Switzerland App no 16354/06 (ECtHR, 13 July 2012)
- Müller and Others v. Switzerland App no 10737/84 (ECtHR, 24 May 1988)
- Murphy V. Ireland App no 44179/98 (ECtHR, 10 July 2003)
- Öcalan v Turkey App no 46221/99 (ECtHR, 12 May 2005)
- Oliari and Others v Italy App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015)
- Open Door and Dublin Well Woman V. Ireland App no 14234/88 14235/88 (ECtHR, 29 October 1992)
- Otto-Preminger-Institut and Wingrove v. the United Kingdom App no 17419/90 (ECtHR, 25 November 1996)
- Parry v. the United Kingdom App no 42971/05 (ECtHR, 28 November 2006)
- Pla and Puncernau v Andorra App no 69498/01 (ECtHR, 13 July 2004)
- Pretto and others v Italy App no *7984/77*(ECtHR, 8 December 1983)
- R and F v. United Kingdom App no 35748/05 (ECtHR, 28 November 2006)
- Rantsev v Cyprus and Russia App no 25965/04 (ECtHR, 7 January 2010)
- Rasmussen v Denmark App no 8777/79 (ECtHR, 28 November 1984)
- Rees v United Kingdom App no 9532/81 (ECtHR, 17 October 1986)
- S A Dangeville v France App no 36677/97 (ECtHR, 14 April 2002)
- S H and Others v. Austria App no 57813/00 (ECtHR, 3 November 2011)
- Saadi v United Kingdom App no 13229/03 (ECtHR, 29 January 2008)
- SAS v France App no 43835/11 (ECtHR, 1 July 2014)
- Schalk and Kopf v Austria App no 30141/04 (ECtHR, 24 June 2010)
- Scoppola v Italy (no 2) App no 10249/03 (ECtHR, Judgment of 17 September 2009)
- Sheffield and Horsham v United Kingdom App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998)
- Sigurdur A Sigurjónsson v Iceland App no 16130/90 (ECtHR, 30 June 1993)
- Siliadin v France App no 733316/01 (ECtHR, 26 July 2005)
- Sitaropoulos and Others v Greece App no 42202/07 (ECtHR, 8 July 2010)
- Société Colas Est and Others v France App no 37971/97 (ECtHR, 16 July 2002)
- Soering v United Kingdom App no 14038/88 (ECtHR, 7 July 1989)
- Sommerfeld v Germany App no 31871/96 (ECtHR, 8 July 2003)

- Sorensen and Ramussen v Denmark App nos 52562/99 and 52620/99 (ECtHR, 11 January 2006)
- Stoll v Switzerland App no 69698/01 (ECtHR, 10 December 2007)
- Sutter v Switzerland App no 8209/78 (ECtHR, 22 February 1984)
- Tyrer v United Kingdom App no 5856/72 (ECtHR, 25 April 1978)
- Vallianatos and others v Greece App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013)
- Van Der Mussele v Belgium App no 8919/80 (ECtHR, 23 November 1983)
- Van Oosterwijck v Belgium App no 7654/76 (ECtHR, 6 November 1980)
- VO v France App no 53924/00 (ECtHR, 8 July 2004)
- Wemhoff v Germany App no 2122/64, (ECtHR, 27 June 1968)
- Wingrove v. the United Kingdom App no 17419/90 (ECtHR, 25 November 1996)
- Worm v Austria App no 22714/93 (ECtHR, 29 August 1997)
- X v Austria App no 7045/75 (Commission decision, 10 December 1976)
- X v Latvia App no 27853/09 (ECtHR, 26 November 2013)
- X and others v Austria App no 19010/07 (ECtHR, 19 February 2013)
- X v United Kingdom App no 442/72 (ECtHR, 5 November 1981)
- Y.Y v Turkey App no 14793/08 (ECtHR, 10 March 2015)
- Yasa v Turkey (ECtHR, 2 September 1998)
- Young, James and Webster v United Kingdom App nos 7601/76; 7806/77 (ECtHR, 13 August 1981)
- Z v Finland App no 22009/93 (ECtHR, 25 February 1997)
- Zaunegger v Germany App no 22028/04 (ECtHR, 3 December 2009)
- Zehentner v Austria App no 20082/02 (ECtHR, 16 July 2009)

Court of Justice of the European Union Cases

Case **C-673/16** *Coman and others v Romania* (CJEU, 5 June 2018) available at < http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0673&lang1=en&type=TXT&ancre=> accessed 16 August 2018

International Court of Justice Cases

- Anglo Norwegian Fisheries Case (UK v Norway) [1951] ICJ Rep 116
- Asylum Case (Columbia v Peru) [1950] ICJ Reports 266
- Kasikili/Sedudu Island (Botswana/Namibia) [1999] ICJ Rep 1045
- Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14
- North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] ICJ Rep 3
- Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objections) [1996] (II) ICJ Rep 812
- Polish Postal Service in Danzig Case PCIJ Rep Series B No 11
- Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] ICJ Rep 21

Cases from Other Jurisdictions

- State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf accessed 12 August 2018.

Books

- Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002)
- Aust A, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press, 2013)
- Bates E, *The Evolution of the European Convention on Human Rights: From its Conception to the Creation of a Permanent Court of Human Rights* (OUP 2010)
- Brandt R, *Ethical Theory* (Englewood Cliffs, 1959)

- de Londras F and Dzehtsiarou K, *Great Debates on the European Convention on Human Rights* (Palgrave, 2018)
- Dixon M, *Textbook on International Law* (7th edn, OUP 2013)
- Dworkin R, *Taking Rights Seriously* (Harvard University Press, 1977)
- Dworkin RM, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (Vintage Books, 1993)
- Dzehtsiarou K, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015)
- Endicott T, *Vagueness in Law* (OUP 2000)
- Feinberg J, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980)
- Fellmeth AX, *Paradigms of International Human Rights Law* (OUP, 2016)
- Fenwick H, *Civil Liberties and Human Rights* (Cavendish Publishing Limited, 2005)
- Finnis J, *Natural Law and Natural Rights* (2nd edn, OUP 2011)
- Gardiner RK, *Treaty Interpretation* (2nd edn, OUP 2015)
- Gerards J and Fleuren J (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014)
- Greer S, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights (Council of Europe Publishing, Human Rights Files No 17, Strasbourg 2000) available at http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf accessed 7 February 2013
- Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (3rd edn, OUP 2014)
- Hart HLA, *Essays on Bentham*: *Jurisprudence and Political Theory* (OUP 1982)
- Helen Keller H and Sweet AS (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2012)
- Kilkelly U, *The Child and the European Convention on Human Rights* (Ashgate/Dartmouth, 1999)
- Holcomb ZC, *Fundamentals of Descriptive Statistics* (Routledge 2017)
- Legg A, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012)

- Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2006)
- Ratnapala S, *Jurisprudence* (Cambridge University Press 2009)
- Robertson AH and Merrills JG, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd edn, MUP 1993)
- McNair A, *The Law of Treaties* (2nd edn, OUP 1961)
- Merrills JG, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993)
- Raz J, *The Morality of Freedom* (OUP 1986)
- van Dijk P and van Hoof GJH, *Theory and Practice of the European Court of Human Rights* (2nd edn, Kluwer Law and Taxation Publishers 1990)
- van Dijk P, and van Hoof GJH *et al*, *Theory & Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998)
- Wellman C, *Real Rights* (OUP 1995)
- Williams G, *Salmond on Jurisprudence* (11th edn, Sweet and Maxwell 1957)
- Yourow H C, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Kluwer Academic Publishers 1996)

Chapters in Authored Books

- Brems E, 'The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe' in David P Forsythe, Patrice C McMahon (eds), Human Rights and Diversity: Area Studies Revisited (Board of Regents of the University of Nebraska, 2003)
- Chynoweth P, 'Legal Research' in Andrew Knight, Les Ruddock (eds) *Advanced Research Methods in the Build Environment* (Wiley Blackwell, 2008)
- Delmas-Marty M, 'The Richness of Underlying Legal Reasoning' in Delmas-Marty M (ed), *The European Convention for the Protection of Human Rights, International Protection Versus National Restrictions* (Kluwer Academic Publishers 1992) (Translation directed and edited by Christine Chodkiewicz)
- Fitzmaurice M, 'The Practical Working of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014)

- Friberg E and Villiger ME, 'The European Commission of Human Rights', in Macdonald R S J, Matcher F and Petzold H (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff, 1993)
- Golsong, 'Interpreting the European Convention on Human Rights beyond the Confines of the Vienna Convention on the Law of Treaties', in RSJ Macdonald, Matcher F and Petzold H (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff, 1993)
- Harmsen R, 'The Transformation of the ECHR Legal Order and the Post Enlargement Challenges Facing the European Court of Human Rights' in Giuseppe Martinico & Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*' (Europa Law Publishing 2010)
- Hutchinson T, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013)
- Lalumière C, 'Human Rights in Europe: Challenges for the Next Millennium' in R St. J Macdonald and F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff 1993)
- Letsas G, '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)
- Macdonald RSJ, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in *International Law at the Time of its Codification, Essays in Honour of Judge Roberto Ago* (Milan: Giuffrè 1987)
- Macdonald RSJ, 'The Margin of Appreciation', in Macdonald R S J, Matcher F and Petzold H(eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff 1993)
- Merkouris P, 'Third Party' Considerations and 'Corrective Interpretation' in the Interpretative Use of Travaux Pr*éparatoires:* - Is it Fahrenheit 451 for Preparatory Work?' in Fitzmaurice M, Elias O, Merkouris P (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010 Martinus Nijhoff Publishers)

- Ost F, 'The Original Canons of Interpretation of the European Court of Human Rights' in Delmas-Marty M (ed) *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Kluwer Academic Publishers, 1992)
- Petzold H, 'The Convention and the Principle of Subsidiarity' in Macdonald R S J, Matcher F and Petzold H (eds)*The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff 1993)
- Schwebel S, 'May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?' in Jerzy Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Brill/Nijhoff, 1996)
- Thirlway H, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014)
- Vila MI and Ungureanu C, 'The Conundrum of Pluralism and the Doctrine of the Margin of Appreciation: The Crucifix "affair" and the Ambivalence of the ECtHR' in Requejo F and Ungureanu C (eds), *Democracy, Law and Religious Pluralism in Europe* (Routledge 2014)

Journal Articles

- Allam P, 'A Conception of Rights' (2011) 17 UCL Jurisprudence Rev 19
- Allan JFP, 'The Idea of Human Rights' (2013) 25(1) Bond Law Review 1
- Bakircioglu O, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) German Law Journal 711
- Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534
- Baruch JA, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113
- Benvenisti E, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 New York University Journal of International Law 843

- Boyle K, 'The European Experience: The European Convention on Human Rights' (2009 – 2010) 40(1) Victoria U Wellington L Rev 167
- Brandt, 'The Concept of a Moral Right and Its Function' (1983) 80 Journal of Philosophy 29
- Bratza N, 'Living Instrument or Dead Letter – the Future of the European Convention on Human Rights (2014) EHRLR 116
- Brems E, 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 available at < http://www.zaoerv.de/56_1996/56_1996_1_2_a_240_314.pdf> accessed 17 July 2014
- Carozza, Paolo G 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97(1) American Journal of International Law 38
- Dzehtsiarou K, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights (2011) 12 German Law Journal 1730
- Editor's Note, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: It's Legitimacy in Theory and Application in Practice' (1998) 19 Human Rights Law Journal 1
- Fitzmaurice GG, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 British Year Book of International Law 1
- Fitzmaurice G, '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.
- Garapon A, 'The Limits to the Evolutive Interpretation of the Convention' Dialogue Between Judges 2011 European Court of Human Rights 31
- Greer S,' The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation? (2010) 3 UCL Human Rights Review 1
- Gross O and Ní Aolán F, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 HRQ 625

- Higgins R, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) ICLQ 791
- Hohfeld WN, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913-1914) 23 Yale LJ 16
- Hohfeld WN, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 Yale LJ 717
- Hutchinson MR, “The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) ICLQ 638
- Kavanaugh KA, ‘Policing the Margins: Rights Protection and the European Court of Human Rights’ (2006) EHRLR 422
- Kleinlein T, ‘Consensus and Contestability: the ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control’ (2017) EJIL 871
- Kilkelly U, ‘Children’s Rights; a European Perspective’ (2004) 4 Judicial Studies Institute Journal 68
- Kilkelly U, ‘Protecting the Children’s Rights Under the ECHR: The Role of Positive Obligations’ (2010) 61(3) NILQ 245
- Kopa M, ‘The Algorithm of the Margin of Appreciation Doctrine in the Light of Protocol No 15 Amending the European Convention on Human Rights’ (2014) 14(1) ICLR 35
- Kramer MH, ‘On the Nature of Legal Rights’ (2000) 59 Cambridge Law Journal 473
- Kratochvil J, ‘The Inflation of the Margin of Appreciation Doctrine by the European Court of Human Rights’ (2011) 29(3) Netherlands Quarterly of Human Rights 32
- Laffranque J, ‘ A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom’ (2017) 26 Juridica International 34
- Lauterpacht H, ‘Codification and Development of International Law’ (1965) 59 American Journal of International Law 16
- Lester A, ‘Universality Versus Subsidiarity: a Reply’ (1998) 1 EHRLR 73
- Letsas G, ‘Two Concepts of the Margin of Appreciation’ (2006) Oxford Journal of Legal Studies 705
- Letsas G, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer (2010) 21(3) EJIL 509
- Lyons D, ‘The Correlativity of Rights and Duties’ (1970) 4(1) Noûs 45

- Mahoney P, ‘Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin, (1990) 11 HRLJ 57
- McGoldrick D, ‘A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee’ 65(1) (2016) ICLQ 21
- Merrills JG, ‘Two Approaches to Treaty Interpretation’ (1968-1969) Australian Yearbook of International Law
- Morse O, ‘Schools of Approach to the Interpretation of Treaties’ (1960) 9 Catholic University Law Review 36
- Mowbray A, ‘The Creativity of the European Court of Human Rights’ (2005) HRL Rev 57
- Perry MJ, ‘Taking Neither Rights-Talk nor the Critique of Rights Too Seriously (1984) 62 Texas Law Review 1405
- Raz J, ‘Legal Rights’ (1984) 4(1) Oxford Journal of Legal Studies 12
- Raz J, ‘Human Rights in the Emerging World Order’ (2010) 1 Transnational Legal Theory 31
- Rozakis C, ‘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
- Sadurski W, ‘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
- Saul B, ‘In the Shadows of Human Rights: Human Duties, Obligations and Responsibilities’ (2001) 32 Columbia Human Rights Law Review 565
- Schokkenbroek J, ‘The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights (1998) HRLJ 30
- Shany Y, ‘Toward a General Margin of Appreciation Doctrine in International Law? (2006) 16(5) EJIL 907
- Spano R, ‘The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Respect?’ (2015) 33(1) Nordic Journal of Human Rights 1
- Sweeney JA, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54(2) ICLQ 459

- Tümay M, 'The Margin of Appreciation Doctrine Developed by the Case Law of the European Court of Human Rights' (2008) 5(2) Ankara Law Review 201
- Waldron J, 'Rights in Conflict' (1989) 99 Ethics 503
- Wildhaber L, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83
- Yourow HC, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987-1988) 3 Connecticut Journal of International Law 111

Working Papers

- van Gestel R and Micklitz H, (2011) Revitalizing Doctrinal Legal Research in Europe: What about Methodology? (European University Institute Working Papers Law 2011/05) 26
- Waldron J, 'Duty Bearers for Positive Rights' (2014) New York University Public Law and Legal Theory Working Papers 497

Parliamentary Reports

- Committee on Legal Affairs and Human Rights Draft Protocol No. 15 to the European Convention on Human Rights1 Report Rapporteur: Mr Christopher Chope, United Kingdom, European Democratic Group 3, 4. Available at < http://www.assembly.coe.int/Communication/ajdoc11_2013.pdf> Accessed 19 December 2013
- Draft Articles on the Law of Treaties with Commentaries 1966' in Yearbook of the International Law Commission (1966) Vol II on Para 5 page 218-9 available at < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf> accessed 17 October 2016.
- Crucho de Almedia, Vienna convention on the Law of Treaties, Meetings of the Committee of the Whole, 33rd Meeting para 56 available at < http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf> accessed 15 November 2016.

Conference Papers

- Antoine Buyse, 'Speech of Bratza and Candidates for New Judges' ECHR Blog, 21 September 2012. Available at < http://echrblog.blogspot.com/2012/09/speech-of-bratza-and-candidates-for-new.html> accessed 13 August 2018.
- Kutscher H, in Reports of the Judicial Academic Conference 27-28 September 1976, Publications of the Court of Justice of the European Communities, Luxemburg, 1976, 1
- Tulkens F, 'What are the Limits to the evolutive interpretation of the Convention?' (Dialogue between Judges, Strasbourg 2011) 6 available at < https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf> accessed 18 July 2018
- Sorensen M, 'Do the Rights Set Forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975?' Report Presented by Max Sorensen to the 4th International Colloquy about the European Convention on Human Rights, 5-8 November 1975
- Spielmann D, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013) available at https://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf > accessed 29 July 2018
- Spielmann D, 'Whither the Margin of Appreciation?' (UCL – Current Legal Problems (CLP) Lecture, University College London, 20 March 2014) available at < https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf> accessed 29 July 2018
- W Twinning W(1976) Taylor Lectures 1975 Academic Law and Legal Development, Lagos: University of Lagos Faculty of Law, 20

Web Articles

- European Court of Human Rights 2014 Council of Europe: The ECHR in Facts and Figures 2013 available at

<http://www.echr.coe.int/Documents/Facts_Figures_2013_ENG.pdf> accessed 31 January 2014

- 'A Practical Guide on Admissibility Criteria' Council of Europe/European Court of Human Rights 2014 7. Available at < http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 6 November 2017

Newspapers

- Stone J, 'British Bill of Rights Plan Shelved for Several More Years, Justice Secretary Confirms' *The Independent* (London, 23 February 2017) < https://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brexit-liz-truss-theresa-may-a7595336.html> accessed 29 July 2018

Online Blog Posts

- Abrusci E, 'The IACtHR Advisory Opinion: one step forward or two steps back for LGBTI rights in Costa Rica?' February 27, 2018 EJIL talk! Available at < https://www.ejiltalk.org/the-iacthr-advisory-opinion-on-gender-identity-equality-and-non-discrimination-for-same-sex-couples-one-step-forward-or-two-steps-back-for-lgbti-rights-in-costa-rica/> accessed 10 April 2018
- Bates E, 'The Continued Failure to Implement Hirst v United Kingdom' EJIL Talk! (15 December, 2015) available at < https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/> accessed 20 August 2018

PhD Thesis

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)

Appendix A:
Framework for Analysis of the Relationship between the Living Instrument and Margin of Appreciation Doctrine Doctrines

Introduction

This appendix sets out the methodology that was applied in order to fulfil the research objectives of this thesis. The aim is to enable the reader to understand the process that was adopted in the research and the direction of the research analysis undertaken. It strives to ensure that the research process is transparent and can be replicated by other researchers. The research questions which have formed the basis of this research framework are:

1. What is the nature of the interaction between margin of appreciation and living instrument arguments in cases brought before the European Court of Human Rights? (RQ1 relationship)
2. To what extent are living instrument arguments superseding margin of appreciation arguments? (RQ2 conflict)
3. Which interpretive and theoretical approaches are applied by the Court to decide the outcome of cases where the margin of appreciation and living instrument arguments conflict? (RQ 3 interpretive and theoretical approaches)
4. What recommendations can be made for future research and policy developments? (RQ4 recommendations)

In dealing with the four research questions, a combination of research methods was applied in this thesis. This is because no one method on its own was considered robust enough to properly answer the questions posed. Each of the research methods that were applied in this study will be considered below and their relevance to answering the research questions posed will also be considered.

Research Design

The overall research design has been structured around the exploratory and explanatory model. The first stage was exploration of the case law of the European Court of Human Rights (ECtHR, the Court) and relevant literature on the margin of appreciation and living instrument doctrines. Through an examination of these cases, themes of inquiry were revealed which were then followed through in the explanatory stage. The explanatory stage

was focused on using the interpretive methods highlighted in Chapter 3 to examine the case law to determine key themes and patterns and whether there was consistency in the way the ECtHR applied the interpretive methods to cases where it had to balance out competing margin of appreciation and living instrument claims. This research design of exploratory and explanatory stages has influenced the research methods adopted within this work.

Research Methods

A combination of quantitative and qualitative tools was adopted. The qualitative method of doctrinal research and the quantitative method of descriptive statistical analysis were adopted for the exploratory stage whilst the qualitative method of doctrinal research was adopted for the explanatory stage. This mixed-methods approach – moving from qualitative, to quantitative, and back to qualitative – is intended to offer value-added at each stage towards answering the central research questions.

Descriptive Statistics

The first legal research method used in the analysis chapters is the quantitative method of descriptive statistics**.** Descriptive statistics are tools used to organise and summarise data.[1] In this work, the tools were applied to organise and summarise the data generated from the population of interest, which is the case law of the ECtHR in which both the margin of appreciation and living instrument doctrines are present from January 1979 to December 2016.[2] In order to ensure the reliability and validity of the research, the data has to be collected in a systematic manner. [3] Consequently, the process that was adopted in generating the data to be analysed on this thesis will be considered later on in this chapter. Excel has been used initially to systematically categorise and classify the data. Descriptive statistics was applied to further classify the cases, identify patterns and key issues. This approach was used to enhance the rigour of the study, but also to help inform the subsequent doctrinal analysis so that this research would offer a more comprehensive analysis than other works in this field.

The nominal scale is the scale of measurement that was applied to the data analysed through the use of descriptive statistics. The nominal level involves classification of data

[1] Zealure C Holcomb, *Fundamentals of Descriptive Statistics* (Routledge 2017) 2.
[2] A separate section will explain the data source in more detail.
[3] Lee Epstein & Andrew D Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 46-58.

with words rather than numbers.[4] Percentages, bar charts and pie charts were used as descriptive statistical tools within this work. Percentages were used as they provide a way to compare groups of unequal size.[5] Bar charts and pie charts were used to depict pictorially the results of the analysis of the case law as well. The use of bar charts and pie charts drew attention to the findings through the visual element. They were also useful tools because this research engages in univariate analysis, focusing on one variable at a time,[6] therefore these tools of descriptive statistics were instructive tools to present the results.

The use of descriptive statistical analysis was useful for providing answers to RQ 1 (relationship) and RQ 2 (conflict). The data collected – the case law of the court, was useful for examining the descriptive statistics and inferences between the margin of appreciation and living instrument doctrines.

Analytical Parameters

The use of descriptive statistics was limited as it does not provide a qualitative analysis of the issues that may be raised from the results. Whilst it provided answers to RQ 2 (conflict) which examines the extent to which living instrument arguments are superseding margin of appreciation arguments from a quantitative point of view, it did not provide any qualitative answers to the reason why this is the case. Descriptive statistical analysis was also not be sufficient in determining RQ 3 (interpretive and theoretical approaches). RQ 3 required a qualitative analysis of the data to identify the approach of the Court and how it is underpinned.

The design of the project limited the source of the data to judgments of the ECtHR in which there is a reference to the margin of appreciation and the living instrument doctrine. This means that the source of the data has not been created by the researcher but rather by a 'third party' in this case, the Court. The limitation is relevant because there could be cases in which the Court gives deference to a State – essentially applying the margin of appreciation – without expressly referring to it. There could also be cases in which the ECtHR considers developments in society – thereby applying the essence of the living instrument doctrine but does not expressly mention the doctrine in the case. The results that were derived from this thesis are therefore limited in their generalisability beyond the case law being considered.

[4] Holcomb (n 1) 4.
[5] Holcomb (n 1) 9.
[6] Alan Bryman, *Social Research Methods* (5th edn, OUP 2016) 336.

Doctrinal Research

In the light of the limitations of the descriptive statistical analysis, the second research method applied in this thesis was doctrinal research. Doctrinal research may be described as 'the process used to identify, analyse and synthesise the content of the law'.[7] It is 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'[8] Hutchinson describes doctrinal research as a 'two-part' process as it involves first locating the source of the law and then secondly, interpreting and analysing the content of the law.[9] It not only critically examines the relevant statute, case law and doctrine, but goes further to provide a synthesis of these different elements in order to 'establish an arguably correct and complete statement of the law on the matter in hand'.[10] In adopting doctrinal research there should therefore be great attention given to process of locating the law as well as the way the law is analysed.

In terms of locating the source of the law, doctrinal research relies on sources such as legal rules contained in statutes and case law.[11] The legal doctrines that arise from the application of the legal rules in particular case contexts are also relevant materials for doctrinal research.[12] The arguments generated as a result of doctrinal research are not only derived from primary legal sources[13] such as case law and statute but may also arise from secondary legal sources such as scholarly publications in the area.[14] This reliance on statute and case law in order to determine what the law is in a particular area, is why doctrinal research is also referred to as 'black-letter law'.[15] In this research, reliance was placed on

---

[7] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7, 9.

[8] Dennis Pearce, Enid Campbell and Don Harding ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) cited in Terry Hutchinson, *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010) 7.

[9] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Research' (2012) 17 Deakin Law Review 83, 110.

[10] Hutchinson, 'Doctrinal Research: Researching the Jury' (n 7) 9-10.

[11] Paul Chynoweth, 'Legal Research' in Andrew Knight, Les Ruddock (eds) *Advanced Research Methods in the Build Environment* (Wiley Blackwell, 2008) 28, 29.

[12] Legal doctrines are systematic formulations of the law in particular scenarios. See Chynoweth (n 11) 28, 29.

[13] The sources of law are usually divided into 'primary' and 'secondary' sources. Primary sources include statute/legislation, case law and judicial precedents. Secondary cover a wider remit and include articles by scholars in the area, text books and case comment (to mention a few).

[14] Rob van Gestel and Hans-W. Micklitz (2011) Revitalizing Doctrinal Legal Research in Europe: What about Methodology? (European University Institute Working Papers Law 2011/05) 26.

[15] Black-letter law refers to' the law that is printed in books set in Gothic type, which is very bold and black' – B Gardner, Black's Law Dictionary, St Paul, MN: Westlaw International, 2009.

primary sources such as the case law of the ECtHR and other international Courts. Secondary sources such as scholarly publications in the area were also utilised for the analysis.

Interpreting and analysing the source of the law involves 'rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'.[16] It is therefore not just a repeating of the content of the law but rather an attempt to draw some coherent conclusions from the volume of materials analysed. An additional aspect of the synthesis and analysis is to identify areas of difficulty in the application of the relevant legal rules and propose areas of reform in order to make the law work more effectively.[17] Doctrinal research may also be utilised to predict future directions for the law in a particular area following the synthesis of existing rules.[18] The analysis and synthesis aspect of doctrinal research is significant and important for legal research.

In the context of this thesis, doctrinal research was applied throughout the work as it aided in providing answers to the four research questions in this thesis. In order to answer RQ1 (relationship) on the nature of the interaction between margin of appreciation and living instrument arguments in cases brought before the European Court of Human Rights, doctrinal research will be necessary. The aspect of doctrinal research that involves locating the source of the law was relevant in providing answers to the related questions: what is the margin of appreciation doctrine and what is the living instrument doctrine and how have they been applied by the Court? Through a systematic examination of the case law of the ECtHR which is the source of the law in this instance, doctrinal research enabled an understanding of whether a relationship exists between both doctrines and the ways in which these interactions are seen in the case law. The essential question to be answered was what is the law on the relationship between the margin of appreciation and living instrument doctrine? Doctrinal analysis was also relevant to RQ2 (conflict) in considering whether living instrument arguments are superseding margin of appreciation arguments in the case law of the Court. Through an analysis and synthesis of the relevant case law, doctrinal research was applied to show whether the legal reasoning adopted by the Court in these cases shows any trends in the relationship between both doctrines. The use of analysis and

[16] Council of Australian Law Deans, *CALD Statement on the Nature of Research* (May and October 2005), 3 http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf.

[17] Hutchinson (n 7) 7 at 23.

[18] D Pearce, E Campbell and D Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, Canberra: Australian Government Publishing Service, 1987.

synthesis which are part of doctrinal research was applied in determining the way in which the Court has shown a link between both doctrines within its jurisprudence.

Doctrinal research was also applied to answer RQ3 (interpretive and theoretical approaches) on the interpretive framework that is applied in cases where there is a conflict between the margin of appreciation and living instrument doctrines. Here through analysis and synthesis of the relevant case law, consideration was given to how the Court has dealt with cases where there is a conflict to ascertain the framework used by the ECtHR. Secondary materials such as extra judicial writing of past and current judges of the Court in this area will also be relevant in understanding the framework to be applied by the ECtHR. This framework was then be measured against the yardstick of interpretation of treaties through the VCLT as well as adjudicating on the existence of duties where there are competing claims in relation to a particular right.

The doctrinal research formed the foundation to deal with RQ4 (recommendations) which focuses on conclusions and recommendations, because an understanding of what the law is, is essential before one can make recommendations for change or future research. It has already been identified that an aspect of analysis and synthesis in doctrinal research is identifying any issues with the law as applied and also making recommendations for the future. To provide a framework, any issues with the current state of the law on the relationship between the margin of appreciation and living instrument doctrines would need to be identified. Doctrinal research, therefore, was relevant to all aspects of this research and formed a main research method for the analysis of the case law in this thesis.

Analytical Parameters

Doctrinal research also has its limitations as it takes an 'insider's view of the law'.[19] This is because the arguments are generated from a synthesis of the law itself rather than from a study of external factors. It 'takes as its starting point and its main focus of attention rules of law, without systematic or regular reference to the context of problems they are supposed to resolve, the purposes they were intended to serve or the effects they in fact have'.[20] Due to the number of examples of case law to be considered in this research, doctrinal research itself was limited in the categorisation of the case law prior to analysis. This deficiency was nonetheless ameliorated through the use of the descriptive statistical

[19] Hutchinson, (n 7) 7,15.
[20] W Twinning (1976) Taylor Lectures 1975 Academic Law and Legal Development, Lagos: University of Lagos Faculty of Law, 20.

analysis to first of all categorise and identify patterns which informed the choice on how to proceed with the doctrinal analysis.

Another analytic parameter is that doctrinal research involves expert use of logical analysis and a 'unique blend of deduction and induction'.[21] This research relied primarily on the inductive approach in coming to conclusions from the case law on the margin of appreciation. The inductive approach is a recognised means of analysis of international law.[22] It is however acknowledged that there are limits to induction. Within this particular work, not all case law of the Court was analysed, but rather only a selection of cases. The arguments and conclusions reached may therefore be assessed from the viewpoint of strong or weak arguments rather than valid or invalid arguments. The researcher acknowledges that any of the conclusions reached are strong/weak only to the extent that they are supported by the data analysed. Doctrinal research was therefore used in this work as a foundation to determine what the law is. [23] Following on from a determination of what the law is, and in tandem with the descriptive statistical analysis, doctrinal textual analysis as a method provided a more comprehensive answer to the research questions posed.

Sources of Data

It has already been identified that this research involved a combination of doctrinal research and descriptive statistical analysis. The central aim of this research was to examine the nature of the relationship (RQ1) between the margin of appreciation doctrine and the interpretation of the European Convention on Human Rights (ECHR, the Convention), as a living instrument as revealed in the case law of the ECtHR. This central question was been broken down into the four research questions set out in the introduction to this appendix. In order to carry out this study which examined the nature of the relationship of the margin of appreciation and living instrument doctrine and the resultant effect on the decision of the Court, relevant data had to be generated. The case law of the ECtHR was the source of this data which was analysed. The preliminary activity was locating the relevant case law and then coding or categorising them in order to create the data that is to be analysed. The main goal was to make inferences from the result of the study. In particular the focus was on textual analysis.

[21] Oliver Wendell Holmes, Jr 'The path of the Law' (1897) 10 Harvard Law Review 457.
[22] One of the prominent advocates for the inductive approach to international law was George Schwarzenberger, *The Inductive Approach to International Law* (Stevens & Sons Ltd, 1965), George Schwarzenberger, The Inductive Approach to International Law (1947) 60 Harvard Law Review 539.
[23] Hutchinson (n 7) 28.

The primary source of data was the case law of the European Court of Human Rights. The case law of the Court was accessed through the Human Rights Documentation (HUDOC) database found in the official European Court of Human Rights website.[24] The HUDOC data base was chosen as it provides full access to the case law of the Court.[25] It is a part of the official ECtHR's Portal, 'a powerful, user-friendly information system'.[26] It is therefore a reliable source of the Court's case law. It provides access to the Court's case law via a sophisticated, yet user-friendly screen which was launched in 2012.[27] There is also a good organisation of the case law with helpful search criteria that can be used to identify the cases. The case law is also digitised and easily downloaded for analysis. HUDOC was therefore chosen as the best source for the case law of the Court.

Prior to obtaining the data from this source, there were three questions that needed to be addressed:

- Which Court's judgments were relevant?
- What search criteria should be used?
- How would accuracy be ensured?

These questions reflect key questions in research design: Identifying the target population, locating or generating data, deciding how much data to collect and avoiding selection bias.[28] These issues will be discussed below. The ways in which they were dealt with and the results that were obtained as a result of this approach will also be presented.

Identifying the Relevant Court

To ascertain which Court judgments were considered relevant to this study, it is necessary to begin with an understanding of the structure of the adjudicatory mechanism under the Convention. Prior to 1998, there was a two-tier system in place in which both the Commission[29] and the Court[30] supervised the implementation of the Convention.[31] The Commission was the first tier. Under this system, complaints about violations of the

[24] http://hudoc.echr.coe.int/eng.
[25] HUDOC User Manual, 26 September 2016 1 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017.
[26] HUDOC User Manual, 26 September 2016 1 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017.
[27] HUDOC User Manual, 26 September 2016 1 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017.
[28] Epstein & Martin (n 3) 63.
[29] The European Commission of Human Rights was established in 1954.
[30] The European Court of Human Rights became functional in 1959.
[31] This could be brought by contracting States, individuals, non-governmental organisations, or individuals who claimed to be victims of violations under the Convention. Articles 19, 24-26 ECHR.

Convention could be initially brought before the Commission.[32] The jurisdiction of the Commission to hear individual petitions was optional as it was only applicable to States that had accepted its jurisdiction.[33] Where a case had been referred to the Commission, it would attempt to resolve the issues by conciliation but where this failed, either the Commission or a member State could refer the issue to the Court. [34] The Commission had the authority to create a report and set out its views on whether there had been a violation in the particular instance.[35] This report could be transmitted to the Court where the case is referred to the Court but in instances where the case is not referred to the Court, the report was to be transmitted to the Committee of Ministers to make a final decision on violation.[36] In essence, the Commission's report would form the basis of the decision as to whether there was a violation of the Convention. Reports of the Commission in cases that were not referred to the Court are therefore classified in this thesis as relevant data to be considered.

The Court was the second tier and its role was to determine if there had been a violation in such cases as had been referred to it by a contracting State or the Commission.[37] It would then transmit its decision to the Committee of Ministers which had the role of enforcement of the judgments. The jurisdiction of the Court was optional just like the Commission. The Court could, therefore, only exercise jurisdiction in respect of those States that had expressly accepted its jurisdiction in individual petitions.[38] Decisions of the Court prior to 1998 are considered relevant case law for the purpose of this thesis.

Post 1998, Protocol No 11 made significant changes to the adjudicatory structure.[39] The Commission was abolished and a permanent full time Court with compulsory jurisdiction was established with jurisdiction to deal with all matters concerning the interpretation and application of the Convention and the related Protocols.[40] The decision-

[32] Articles 25 and 26 of the 1950 ECHR.
[33] Article 25 of the 1950 ECHR.
[34] Articles 44 and 48 of the 1950 ECHR. Individuals did not have a right of direct access to the Court at the time.
[35] For a more in-depth examination of the role of the European Commission prior to 1998, see Erik Friberg and Mark E Villiger, 'The European Commission of Human Rights', in R St J Macdonald, F Matcher, H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff, 1993) 605-620; Pieter Van Dijk, Godefridus JH Van Hoof, AW Heringa, *Theory & Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 26-31.
[36] Articles 31 and 32 of the 1950 ECHR.
[37] Article 45 of the 1950 ECHR.
[38] Article 46 of the 1950 ECHR.
[39] ETS No 155, Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Opened for signature and ratification on 11/05/1994, entered into force on 01/11/1998.
[40] Article 32 ECHR. For an 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.

making powers of the Committee of Ministers was also abolished. The right of individual petition was made an automatic part of the adjudicatory system.[41] The permanent Court consists of one judge from each of the contracting States to the Convention.[42] The new Court has both administrative and judicial roles to play. In relation to administrative work, the significant decisions are taken by the Plenary Court which is composed of all the Court judges.[43] Judgments of the Plenary Court are not considered as relevant data for this thesis as they are judgments on administrative points which are not part of the core issues to be dealt with in this research. Those judgments are therefore excluded.

When it comes to judicial work, the current system allows for four possible formations of the Court in deciding cases.[44] The Court may sit in a single-judge formation, in committees of three judges, as a Chamber of seven judges or as a Grand Chamber of seventeen judges.[45] Where the Court sits as a single-judge formation, the competence of the single judge is restricted to decisions on admissibility. They can declare an application inadmissible or strike it off the Court's list of cases where no further examination is required for such a decision.[46] Where the judge does not declare the case inadmissible, then they can forward it on to a committee or to a Chamber for further examination.[47] The competence of the Committee is twofold. In a similar manner to the single judge, it can make final decisions on admissibility of a particular application.[48] Where it declares an application to be admissible, the Committee can make a judgment on the merits in instances where the Court's case law on a particular issue is well established.[49] This is usually referred to as WECL cases.[50] In all other matters where it deems the application to be admissible, the Committee has the role of referring the cases to the Chambers or the Grand Chambers.

The Chambers usually sit in formation of seven judges and would make decisions on the merits in such cases that are referred to it by the Committee or single judge. The Chambers also have some jurisdiction to determine on admissibility where a decision has not been made by either the single judge or the Committee. They also make decisions on

[41] Article 34 ECHR.
[42] Article 20 ECHR.
[43] Article 25 ECHR; For more on the Plenary Court, see DJ Harris et al, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP, 2014) 111.
[44] For more on the different sections of the Court, see Harris et al (n 43) 111.
[45] Article 26 ECHR.
[46] Article 27(1) (2) ECHR.
[47] Article 27(3) ECHR.
[48] Article 28(1) ECHR.
[49] Article 28(2) ECHR.
[50] Harris et al (n 43) 112.

admissibility and merits of inter-State applications.[51] Within three months from the date of its judgment, a decision of the Chamber can be referred to the Grand Chamber.[52] Decisions of the Chamber on the merits of a case become final in three instances:

- The parties state that they will not refer the case to the Grand Chamber; or
- Three months after the date of the final decision where there has been no declaration to refer the case to the Grand Chamber; or
- Where the case is referred to the Grand Chamber, but the Grand Chamber rejects the request.[53]

The Chamber has the ability to relinquish jurisdiction in favour of the Grand Chamber at any time before it has given its judgment. This is restricted to instances where a case before the Chamber 'raises a serious question affecting the interpretation of the Convention or the Protocols thereto' or in instances where deciding a question that has been brought before the Chamber 'might have a result inconsistent with a judgment previously delivered by the Court'.[54] For the purposes of this thesis, the judgments of the Chamber are relevant. The particular judgments that are relevant are those that have become final under any of the above circumstances. Judgments of the Chamber that have become final have been included in the data sample because they are binding once they become final. The fact that the matter was not referred to the Grand Chamber for further consideration does not remove the weight of those decisions. The Chamber decisions have also been selected in order to provide comprehensiveness to the sample. Such judgments are therefore included when searching the HUDOC database.

The Grand Chamber is the final decision-making stage. It is not an appeal body in the strict sense of the word but has the role of developing and ensuring consistency in the Court's jurisprudence in interpreting the Convention and its protocols.[55] It can decide on cases that have been relinquished by the Chamber in accordance with Article 30 or where a party refers a case to it following a final judgment of the Chamber.[56] Cases that have been decided by the Grand Chamber cannot be taken any further. The decisions of the Grand Chamber are therefore important not only because they are final decisions following a referral, which would suggest the importance of the matter being contested, but also because

[51] Article 29 ECHR.
[52] Article 43.
[53] Article 44 ECHR.
[54] Article 30 ECHR. There is also a condition that none of the parties to the case objects to this.
[55] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 241.
[56] Article 31 ECHR; The Grand Chamber also has advisory jurisdiction. Articles 31 and 47 ECHR.

they could be cases in which the Chamber has relinquished its jurisdiction because it is of the view that the particular case is so important that it has to be dealt with by the Grand Chamber directly. The decisions of the Grand Chamber were therefore considered as very relevant data for this thesis.

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 work were: (1) 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.[57] These selections were made to ensure comprehensiveness of the study and also validity due to the status of the cases being considered. The time period was January 1979 to December 2016. This cut-off date was chosen as this provided a natural end of year cut off taking into consideration that the case law was being analysed by the researcher in the first half of 2017.

Identifying the Search Criteria

Following an identification of the relevant Court, the next stage for this thesis was identifying the search criteria that would be appropriate to collating the case law. This thesis was an inquiry into the relationship between the margin of appreciation and living instrument doctrines in the case law of the Court. It was therefore logical to search for cases in which the margin of appreciation and living instrument doctrines were referred to. Choosing cases in which both doctrines were mentioned gave the opportunity to identify the relationship between them, understand how the Court has dealt with conflict between them and also identify relevant frameworks that could be applied to dealing with such cases of conflict.

Second, as already revealed in chapter two, the Court does not always use the terms 'living instrument' expressly but may sometimes use the phrase 'present-day conditions' when dealing with cases in a similar way to the living instrument doctrine.[58] This understanding prompted an examination to determine other words/phrases used by the Court which have a similar connotation to the living instrument. The following words/phrases were identified: "current circumstances", "evolving standards" and "evolving". Consequently, the researcher deemed it appropriate to expand the search criteria to include cases in which the margin of appreciation any of these other terms were present: 'margin of appreciation and

[57] In instances where a case had been referred to the Grand Chamber following a decision from the Chamber, the Chamber's decision may be referred to in the analysis.
[58] See Chapter 2, in particular, 2.3.

present-day conditions', 'margin of appreciation and current circumstances', 'margin of appreciation and evolving standards' and 'margin of appreciation and evolving'. This has been undertaken to ensure the accuracy and robustness of the research data.

The next issue to determine was the type of information retrieval model to be applied in searching the Court's case law. An information retrieval system may be defined as 'a software programme that stores and manages information on documents, often textual documents but possibly multimedia'.[59] The system 'informs on the existence and location of documents that might contain the desired information'.[60] Documents returned which satisfy the need of the searcher, are termed 'relevant documents'.[61] A perfect information retrieval system would return only relevant documents but such a system does not exist and the understanding of what is 'relevant' would usually vary depending on the particular individual looking through the results.[62] Whilst there does not exist a perfect information retrieval system, a good one could be classed as one that retrieves relevant documents before irrelevant ones and a system that returns very few irrelevant documents.

For the purpose of this thesis, information retrieval systems that managed information on textual documents were relevant. HUDOC has already been identified as the digitised database from which the case law of the Court would be retrieved. Accordingly, the search options available on HUDOC were the relevant information retrieval systems to consider. HUDOC offers two options for a text search: the 'simple search field' and 'Boolean search screen'.[63] The Boolean model is the first model of information retrieval and is arguably the most criticised model.[64] It is one of the exact match models of information retrieval.[65] 'The model can be explained by thinking of a query term as an unambiguous definition of a set of documents'.[66] A search with the query term 'family' for example would return results of all the documents in which the word 'family' appears.

For this thesis the query terms were not just individual words, but rather phrases: for example, "margin of appreciation" AND "living instrument". A simple search for margin of appreciation would therefore not suffice as it would return results of 'margin', 'of',

---

[59] Djoerd Hiemstra, 'Information Retrieval Models' in Ayşer Göker and John Davies (eds), *Information Retrieval: Searching in the 21st Century* (John Wiley & Sons Ltd, 2009) 1.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] HUDOC User Manual, 26 September 2016 6 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017.
[64] For more on the Boolean model, see Hiemstra (n 59) 3-4.
[65] Other exact match information retrieval models are discussed in Hiemstra (n 59) 3-5.
[66] Hiemstra (n 59) 3.

'appreciation' and probably 'margin of appreciation' as well. This would lead to too many results that would need to be sifted through. The purpose of the thesis was also not just to deal with the margin of appreciation on its own but the relationship between the margin of appreciation and living instrument doctrines. A search mechanism that would involve retrieving results of cases that had both phrases in them was therefore necessary. A Boolean search allowed for searching using phrases. A further advantage of the Boolean search was the ability to combine operators with query terms in order to produce new sets of documents. The Boolean search was therefore considered the relevant information retrieval model for this thesis.

It was necessary to consider how the search could be done with the phrases and return the relevant results. George Boole had propounded three basic operators which could be combined with query terms and their returned documents in order to form new data sets: 'the logical product called AND, the logical sum called OR and the logical difference called NOT'.[67] The relevant operator for this thesis is 'AND' because combining the two query terms with AND reveals results that will be less than or equal to the 'document sets of any of the single sets'.[68] It would yield results that included both terms. The HUDOC User Manual also specifies a list of 'HUDOC Portal Boolean Search Syntax' in which it details that 'AND' means 'finds documents containing both terms in any order – word AND word or phrase AND word, or phrase AND phrase, etc'.[69]

A Boolean search using the query terms "margin of appreciation" AND "living instrument" would therefore yield a result that includes sets of documents that are indexed with both the terms 'margin of appreciation' and 'living instrument', essentially an intersection of both sets.[70] A second Boolean search of "margin of appreciation" AND "present-day conditions" would yield a result that includes sets of documents that are indexed with both the terms 'margin of appreciation' and 'present-day conditions'. The same would be the case with all the other combinations identified earlier.[71] The basic operator 'OR' was not seen as relevant as both terms were needed in the search result in order to compare their application in a particular case. The basic operator NOT was not considered

[67] Ibid 3.
[68] Ibid.
[69] HUDOC User Manual, 26 September 2016 17-18 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017
[70] Hiemstra (n 59) 3.
[71] "margin of appreciation" AND "current circumstances", "margin of appreciation AND evolving standards", margin of appreciation AND evolving".

as relevant either as the aim of the search was to have documents that included not excluded the terms margin of appreciation and living instrument.

The advantage of using an exact match model in the form of a Boolean search for this piece of research is that it would retrieve all the cases in which an exact match to the query terms were found. This was considered an important point for this research since the focus is on those specific interpretive tools of the Court, an exact match to those terms was important in gathering the data. The Boolean search was also advantageous for this research as the results retrieved can be controlled by inserting the exact phrase to be searched for and it would be clear why the particular results were retrieved. In this instance, those particular results would be retrieved because they contained the relevant query terms.

Although the Boolean search has the advantages mentioned above, it also has some limitations. One of the key limitations of a Boolean search is that it does not provide a ranking of the materials that have been retrieved.[72] In returning the data from the search of the case law, it would not automatically suggest which case was most important. Whilst ranking may be considered of the utmost importance in retrieval models,[73] for this thesis this was not an insurmountable issue. Ranking in this instance was relative to the focus of this thesis which is the relationship (RQ1) between the margin of appreciation and living instrument doctrines in the case law of the Court. The most relevant cases then would be those in which the margin of appreciation and living instrument doctrines AND, OR, the margin of appreciation doctrine and 'present-day' conditions were referred to by the Court in dealing with the case itself.[74] HUDOC provides an 'Advanced Search' tool which is able to return results on specific search terms and pinpoint where this is found in the case law. This tool was used to further select the case law.

Ranking is also linked to the Court that made the decision. Therefore, decisions from the Grand Chamber would be ranked higher than those from the Chamber. In this particular instance, in cases that had been referred from the Chamber to the Grand Chamber, the issue of ranking was addressed by excluding the Chamber decision as the Grand Chamber decision was now the final decision. Ranking does not, however, affect the substance of the information retrieved from final decisions of the Chamber as the Court does not operate a precedent system as may be found in common law jurisdictions, all final decisions are

[72] Hiemstra (n 59) 3.
[73] Ibid 5.
[74] A similar pattern would be expected when any of the other combinations was used: 'margin of appreciation AND current circumstances', 'margin of appreciation AND evolving standards' or 'margin of appreciation AND evolving'.

therefore relevant in themselves. The issue of whether a case is important is also a debatable issue as the nature of the particular right being addressed could also influence the consideration of the ranking of the case even where it is a Chamber rather than a Grand Chamber decision.

5.5 Generating the Data

Four common approaches to generating data in empirical research exist and they are: experiments, surveys, observation and textual analysis.[75] In this study, the method for generating the data is textual analysis. This was chosen as the most appropriate method because the focus of the study is on the Court's decision and how it shows the relationship between the margin of appreciation and living instrument doctrines. Experimental and non-experimental social science methodologies were not necessarily relevant to this thesis. Whilst surveys might reflect people's perception of the relationship between the margin of appreciation and living instrument doctrines, they were not ideal to use in this case as what was required was the Court's actual use of these terms in practice rather than a perceived use.[76] Observation would involve immersing oneself in the Court's activities for a period of time. Observation can vary depending on the level of contact with the subject of study. This method was not been considered suitable to this piece of research due to the limitation of resources to achieve this.

Textual analysis involves 'extracting information from textual content that the researcher can use to draw inferences.[77] Textual analysis is also referred to as content analysis.[78] In this research the text came from the case law of the ECtHR as earlier highlighted. The case law was therefore the source of data rather than the data itself as the data had to be extracted from the case law in order for it to be susceptible to systematic analysis.

The first stage was to carry out some searches. Searching for the data was done at different stages of the thesis to test various approaches, with the final search done in the first quarter of 2017. The case law included in the sample was from January 1979 to December 2016 and the final number included in the analysis was 75 cases. The first search for just

[75] For more on these methods, see Epstein & Andrew (n 3) 71.
[76] Surveys are generally used where there is a need to generate data on people's attitudes, opinions, or beliefs on a specific issue. Epstein & Andrew (n 3) 75 People are usually asked the same question. This method is therefore unsuited for the type of research being undertaken here.
[77] Epstein & Andrew (n 3) 81.
[78] Bryman (n 6) 284.

'living instrument' in the Court's case law returned a total of 109 cases. This was then further weeded out to take out the cases that had been repeated as a result of them being referred to the Grand Chamber.[79] After removing duplicated cases which included cases that were reported in both English and another foreign language, the final count on this list was 105 cases. The first Boolean search for two phrases was for "margin of appreciation" AND "living instrument" and on the 'document collections' in the left-hand pane of the HUDOC data base, the relevant judgments selected were Grand Chamber, Chamber and Reports of the European Commission on Human Rights. This search returned a result of 68 cases which were made up of 40 Grand Chamber judgments, 22 Chamber judgments, and 6 reports of the Commission. The search was flipped to "living instrument" AND "margin of appreciation" to ensure accuracy. This search revealed exactly the same results with the same 68 cases. This initial search shows that the margin of appreciation doctrine appears in more than half of the cases in which we find the express use of the living instrument doctrine in its clear format. This shows that these two doctrines enjoy some kind of relationship (RQ 1) which needs to be explored.

Flowing from the understanding in chapter two that the Court has other phrases which capture the living instrument principle in the case law, the second search was for "margin of appreciation" AND "present-day conditions". It was also flipped to "present-day conditions" AND "margin of appreciation". Both searches revealed 77 cases: 24 Grand Chamber judgments, 49 Chamber judgments and 4 reports from the Commission. Combining the first combined phrase search and this second combined phrase search gave a total of 145 cases.

The next stage was a manual read through the list of cases to weed out any case names that had been duplicated as a result of the two searches, or cases that were not final decisions. A manual search was also undertaken to ensure that no case had been retrieved

[79] *Hatton and Others v United Kingdom* App no 36022/97 (ECtHR, 2 October 2001); *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 March 2003); *Bayatyan v Armenia* App no 23459/03 (ECtHR, 27 October 2009); *Hutchinson v United Kingdom* App no 57592/08 (ECtHR, 3 October 2015).

from the search which did not contain the search terms. This was to ensure accuracy of the results retrieved. Several cases had been duplicated. Some others were duplicated as they had both 'living instrument' and 'present day conditions' within the text, so they appeared on both lists. Such cases were then listed just once. Some of these were cases that had been referred from the Chamber to the Grand Chamber, the search had returned the results including both the Chamber and Grand Chamber decisions, and hence the cases were listed twice. The relevant cases were: *Hatton and Others v United Kingdom*[80], *Bayatyan v Armenia*[81] *Fabris v France.*[82] *Mouvement Raëlien Suisse v Switzerland*[83] was also listed twice with the Chamber decision referring to the margin of appreciation and living instrument doctrines whilst the Grand Chamber decision referred to the margin of appreciation and present-day conditions. In keeping with the ranking based on the Court, the Grand Chamber decision is included in the list.[84] A similar decision was made in reference to Reports of the Commissions in instances where the cases were referred to the Court. Where the case had been referred to the Court and a decision had been made, the decision of the Commission was taken off the list and only the decision of the Court was retained.[85]

Some other cases were removed from the list because although the Commission's Reports referred to both the margin of appreciation and living instrument doctrines; or margin of appreciation and present-day conditions, these cases had subsequently been referred to the ECtHR and the Court's decision only referred to the margin of appreciation. Hence those cases fell outside the criteria, of being final, and were excluded from the list for final analysis.[86]There was a final check through this to ensure that all the decisions that were

[80] App no 36022/97(ECtHR, 2 October 2001) – Chamber decision; *Hatton and Others v United Kingdom* App no 36022/97 (ECtHR, 8 July 2003) – Grand Chamber.
[81] App no 23459/03 (ECtHR, 27 October 2009) – Chamber; *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) – Grand Chamber.
[82] *Fabris v France* App no 16574/08 (ECtHR, 21 July 2011) – Chamber decision; *Fabris v France* App no 16574/08 (ECtHR, 7 February 2013).
[83] *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 January 2011) – Chamber decision; *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) Grand Chamber decision.
[84] The Chamber decision will be referred to for analysis where relevant to contrast the reasoning of both Courts but is not listed here are part of the final list of cases to be analysed.
[85] E.g. *Matthews v The United Kingdom* App no 24833/94 (Commission (Plenary), 29 October 1997) this was later decided by the Court in *Matthews v The United Kingdom* App no 24833/94 (ECtHR, 18 February 1999). The later decision was retained on the list. *Johnston and others v Ireland* App no 9697/82 (Commission, Plenary 5 March 1985) this was later decided by the Court in *Johnston and others v Ireland* App no (9697/82) (ECtHR, 18 December 1986).
[86] *Sutherland v The United Kingdom* App no 25186/94 (Commission, (Plenary) 1 July 1997) it was later decided by the Court in *Sutherland v The United Kingdom* App no 25186/94 (ECtHR, 27 March 2001)*Botta v Italie* App no 21439/93 Commission (Plenary) 15 October 1996, this was decided by the Court in *Botta v Italy* App no 153/1996/772/973 (ECtHR, 24 February 1998); *A.G.V.R v The Netherlands* App no 20060/92 Commission (Plenary) 17 October 1995, this was later decided by the Court in *Van Raalte v The Netherlands* App no 20060/92 (ECtHR, 21 February 1997); *Schuler-Zgraggen v Switzerland* App no 14518/89 Commission

retained were final decisions. The final number after excluding cases that were not final decisions was 86.

Three more Boolean searches were made to ensure comprehensiveness. A Boolean search was executed for the terms "margin of appreciation" AND "current circumstances". This revealed a total of 15 cases. Following a manual reading of the list and weeding out of the cases that were duplicated[87] or not found to be relevant, because the use of the phrase 'current circumstances' was not related to the interpretation of the Convention as a living instrument,[88] there were an additional three cases that were added to the list of cases.[89] Another Boolean search was conducted for "margin of appreciation" AND "evolving standards". This brought a total of 2 cases. One of the cases had already been picked up in the search for "margin of appreciation" AND "living instrument".[90] There was therefore just one additional case added to the list of cases.[91] The last Boolean search was made of "margin of appreciation" AND "evolving". This revealed a total of 104 cases.[92] Taking into consideration the cut off period of 31 December 2016, the result was 102 cases. These were then manually read through to exclude any irrelevant cases and any cases that were duplicated from the previous lists. After a manual look through, 8 more cases were added to the case list which brought the number to 98 cases. A further search was completed for "margin of appreciation" AND "current human rights standards" this revealed a result of

(Plenary) 7 April 1992, this was later decided by the Court in *Schuler-Zgraggen v Switzerland* App no 14518/89 (ECtHR, 24 June 1993) *Silver and others v The United Kingdom* App no 5947/72;6205/73;7052/75;7061/75; 7107/75; 7113/75; 7136/75 (Commission, Plenary 11 October 1980); The Court's decision in *Silver and others v The United Kingdom* App no 5947/72;6205/73;7052/75;7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983) does not make mention of either the living instrument doctrine or the phrase 'present-day conditions' hence the *Silver* case did not make the final list of cases.

[87] *X and Others v Austria* App no 19010/07 (ECtHR, 19 February 2013); *Sheffield and Horsham v The United Kingdom* App nos 22985/93; 23390/94 (ECtHR, 30 July 1998); *Cossey v. The United Kingdom* App no 10843/84 (ECtHR, 27 September 1990); (Commission decisions that were excluded because there were subsequent court decisions: *A.G.V.R. v. The Netherlands* App no 20060/92 (Commission (Plenary), 17 October 1995); *Horsham v The United Kingdom* App no 23390/94 (Commission (Plenary),21 January 1997); *Sheffield v The United Kingdom* App no 22985/93 (Commission (Plenary),21 January 1997).

[88] *Bowman v The United Kingdom* App no 24839/94 (ECtHR, 19 February 1998); *Pini and others v Romania* App nos 78028/01;78030/01 (ECtHR, 22 June 2004); *S.J. v. Belgium* App no 70055/10 (ECtHR, 27 February 2014); *Paposhvili v Belgium* App no 41738/10 (ECtHR, 17 April 2014); *Radkov and Sabec v. Bulgaria* App no 18938/07;36069/09 (ECtHR, 27 May 2014); *Yabloko Russian United Democratic Party and others v. Russia* App no 18860/07 (ECtHR, 8 November 2016).

[89] *S.H. and others v Austria* App no 57813/00 (ECtHR, 3 November 2011); *Chapman v. United Kingdom* App no 27238/95 (ECtHR, 18 January 2001); *Rees v United Kingdom* App no 9532/81 (ECtHR, (Plenary) 17 October 1986.

[90] *Magyar Helsinki Bizottság v. Hungary* App no 18030/11 (ECtHR, 18 November 2016).

[91] *Öcalan v. Turkey* (No. 2) App nos 24069/03;197/04;6201/06;10464/07 (ECtHR, 18 March 2014).

[92]http://hudoc.echr.coe.int/eng#{"fulltext":["\"margin of appreciation\" AND \"evolving\""],"sort":["kpdate Descending"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","REPORTS"]} .

three cases. Following a weeding out of any duplicated cases, one more case was added to the list making a total of 99 cases.[93]

To ensure a systematic analysis of the case law under consideration, the pool of cases was divided into two sets. The first set comprised of all the cases in which the terms 'margin of appreciation' AND 'living instrument' or any of its variants appear within the section of the case report called 'The Court's Assessment'. This is the most important section as the Court's decision is based on its assessment of the principles of law that are applicable and its view on how they are applicable in the particular case. These cases were categorised as 'Set 1'. 'Set 2' comprised those cases in which either of the query terms 'margin of appreciation' AND 'living instrument' and any of its variants appears within the text but not necessarily in the section of the Court's assessment but is rather found either in the parties' submissions or in the dissenting opinions. The cases in Set 1 came to a total of 75 cases which form the core of the case law to be analysed within this work. Cases in which the margin of appreciation and living instrument doctrines appear only in the dissenting judgment were retained as points of reference if there were relevant points to be drawn from them but did not form the main core of analysis in the work.

Coding the Data

Coding can be defined as 'translating properties or attributes of the world (variables) into a form that is susceptible to systematic analysis.[94] The process of coding involves 'first developing a precise scheme to account for the values of each variable and second, methodically and physically assigning all units a value for each variable'.[95] The coding scheme for this work was developed using a combination of deductive and inductive approaches. The deductive approach was first employed, and a scheme of variables was created first and applied to a sample. As the sample was studied, the coding scheme was further developed with new aspects added to be considered. A sample of 23 cases from the list of cases in which the margin of appreciation and living instrument doctrines were reflected within the main court's assessment. From an examination of this sample, the coding scheme was developed.

[93] *Firth and Others v United Kingdom* App no 47784/09 (ECtHR, 12 August 2014). 47784/09;47806/09;47812/09;47818/09;47829/09;49001/09;49007/09;49018/09;49033/09;49036/09 (ECtHR, 17 August 2014); and *Hirst v United Kingdom* App no 74025/01 (ECtHR, 6 October 2005) had already been identified.
[94] Epstein & Andrew (n 3) 95.
[95] Ibid.

Some of the factors which were considered in the coding were questions such as: what article is in issue? Who raised the margin of appreciation doctrine first in the case? Who raised the living instrument doctrine first in the case? Was there any third-party intervention and what doctrine was supported? What was the outcome of the case? A detailed presentation of the coding scheme is contained in Appendix B to this thesis.

Analysing the Data in Relation to the Research Questions - Data Analysis Process

This section provides an indication of how the data was analysed. Phase I of the case law analysis which was done in chapter five, consisted of a quantitative and doctrinal textual analysis of the case law from the perspective of the use of margin of appreciation and living instrument arguments in the applicability stage to determine the compatibility *ratione materiae* of the Convention. It also examined the impact of the outcome of the compatibility decision on the outcome of the case. The data collected was first of all summarised using descriptive statistical analysis. The second stage was making inferences based upon descriptive statistics. Textual analysis was applied at this stage. Textual analysis involves 'extracting information from textual content that the researcher can use to draw inferences'.[96] In this instance it involved extracting content from the case law of the ECtHR on the margin of appreciation and living instrument doctrine which was then be subjected to analysis. The doctrinal method was applied to analyse the law and synthesis the findings in order to draw conclusions.

Phase II of the analysis was done in the chapter six. It involved both a quantitative and doctrinal textual analysis of the cases from the perspective of the impact of margin of appreciation and living instrument arguments in determining the scope of duties on States. The focus was on the merits stage of the case rather than the admissibility stage. In a similar fashion to chapter five, it began with a summary of the data through the use of descriptive statistical analysis and then inferences were drawn which formed the basis for the doctrinal textual analysis that follows.

Conclusion

This appendix has provided an explanation of the framework that was be applied in the analysis of the decisions of the Court. The limitations of the study have been highlighted and the measures to foster validity of the results has also been highlighted. In adopting a

[96] Ibid 81.

mixture of doctrinal research and quantitative methods of descriptive statistical analysis, this research has filled a gap in the existing literature on the margin of appreciation doctrine and provided an original contribution to the literature in this area. It has provided for a systematic examination of the case law in a way that leads to results that can be replicated. It has shown how the decisions of the Court when they apply the margin of appreciation doctrine and living instrument doctrines fare when subjected to such systematic analysis.

Appendix B:

Coding Scheme for Systematic Case Analysis

List of Abbreviations:

LI – Living Instrument doctrine

MOA – Margin of appreciation doctrine

NA – Not applicable

NLS – No living instrument submission

NMS – No margin of appreciation submission

VARIABLE	VALUE	VALUE LABEL
Name of Case	Varies depending on the case title	
Date of decision	Possible Range (1 January 1955 – 31 December 2016)	This captures the date on which the decision of the Court was made in the particular case. The year 1955 was chosen as the start date as that was the year in which the first decision of the Commission was given as contained in the HUDOC database.
Respondent State	United Kingdom Ireland Austria Iceland Turkey France Bulgaria Spain Andorra Turkey Malta Luxembourg Lithuania	

	Switzerland Finland Germany Croatia Poland Greece Armenia Italy Russia Ukraine Latvia Denmark Hungary	
Article 2 invoked	YES NA	Article 2 was relied on by the applicant and the Court decided on this article in the case. Article 2 was not invoked, or it was raised by the applicant, but the Court decided that there was no need to consider the case under that article.
Article 3 – Article 3 Protocol No 1 (Column E to column S) recurring as 'Article 2 invoked'		
Doctrine supported by the 3rd party submission	LI	The third-party submission argues that the Court should consider changes in society and interpret the Convention in the light of those changes. The submission will be coded as supporting the LI doctrine whether or not the term

		LI is expressly mentioned within the submission.
	MOA	The third-party submission argues that the Court should consider the differences in individual States and give the State a discretion on the particular issues. The submission will be coded as supporting the MOA doctrine whether or not the term MOA is expressly mentioned within the submission.
	NA	There is no third-party submission, or the third party submission does not make reference to the margin of appreciation or living instrument doctrines or argue for reliance on consensus or State discretion.
First party to raise and rely on the LI doctrine	Applicant	The term is referred to expressly by the applicant in their argument or they refer to the need for the government to take into consideration changes in society when making their decision or developments within member States which is essentially the living instrument argument even if they have not expressly referred to the term.
	Court	The term is raised for the first time by the Court itself in its adjudication of the case.
First party to invoke and rely on the	Respondent	The term is referred to by the respondent as a basis for its argument or

margin of appreciation doctrine	Court	they argue that the State should be given discretion in dealing with the particular issue, which is essentially the margin of appreciation argument. The term is raised for the first time by the Court in its analysis of the case.
LI argument relied on successfully to make issue compatible *ratione materiae* with the Convention.	YES	The living instrument doctrine or any of its variants is relied on by the Court to bring the case within the ambit of the court's jurisdiction or to bring the case within the ambit of a particular article of the Convention.
	NO	Living instrument relied on to argue for compatibility *ratione materiae* but the argument was not accepted by the Court.
	NLS	There was a compatibility argument, but the living instrument doctrine was not used as a basis for the argument here.
	NA	The compatibility *ratione materiae* of the Convention to the case was not contested. (Or there is no applicability issue within the case.)
MOA successfully relied on to challenge compatibility *ratione materiae*	YES	The margin of appreciation doctrine or any of its variants is relied on by the Court or Respondent to challenge the compatibility *ratione materiae* of the

		Convention to the particular issue being raised.
	NO	The margin of appreciation doctrine is used to challenge compatibility, but the argument is not accepted by the Court.
	NMS	There was a compatibility argument, but the margin of appreciation doctrine was not used as a basis for the argument here.
	NA	The compatibility *ratione materiae* of the Convention to the case was not contested or there is no applicability issue within the case.
Does dissenting judgement favour the application of the living instrument doctrine?	YES	There is a dissenting judgment that favourably discusses the living instrument doctrine or its variants and argues that the court should have adopted that approach in reaching its decision in the case.
	NO	The dissenting judgment refers to the living instrument doctrine or any of its variants but argues that the Court should not adopt an outcome in line with this doctrine or that the doctrine is not relevant to that case.
	NA	There is no dissenting judgment, or the dissent does not specifically relate to the

		living instrument doctrine or its application to the case.
Does dissenting judgment favour the application of the margin of appreciation doctrine?	YES	There is a dissenting judgment that favourably discusses the margin of appreciation doctrine and argues that the court should have adopted that approach in reaching its decision in the case.
	NO	The dissenting judgment refers to the margin of appreciation doctrine but argues that the Court should not adopt an outcome in line with this doctrine or that the doctrine is not relevant to that case.
	NA	There is no dissenting judgment, or the dissent does not specifically relate to the margin of appreciation doctrine or its application to the case.
Is there a finding of breach of a positive obligation?	YES	The Court finds that the State had a positive obligation and also finds that (in relation to at least one of the articles raised in the case), the State had breached its positive obligation.
	NO	The Court finds that the State had a positive obligation in the case but holds that the State was not in breach of that positive obligation.
	NA	The issue of positive obligation does not arise, or the court rejects the argument that the case raises an issue of positive

		obligation on the State. The court rather considers the case on the basis of the breach of a negative obligation of non-interference.
Finding of violation of Article 2	YES NO NA	The Court finds that article 2 has been violated by the State. The Court finds that there has been no violation of article 2. Either article 2 was not raised at all in the case or the Court did not deem it fit to consider the case under that article therefore for the purposes of the coding, it is the same as the article not being raised at all within the case.
Finding of violation of Article 3 – Article 3 Protocol No 1 (Column AK to AZ) recurring as finding of violation of Article 2		

Appendix C:

List of Cases for Data Analysis

(Margin of Appreciation and Living Instrument Doctrines Present in the Case)

January 1979 to December 2016

(Arranged in Chronological Order beginning from Earliest Decision by the Court)

- Marckx v Belgium App No 6833/74 (ECtHR, 13 June 1979)
- Rees v United Kingdom App no 9532/81 (ECtHR, 17 October 1986)
- Johnston and others v Ireland App no 9697/82 (ECtHR, 18 December 1986)
- Inze v Austria App no 8695/79 (ECtHR, 28 October 1987)
- Cossey v United Kingdom App no 10843/84 (ECtHR, 27 September 1990)
- Sigurður A. Sigurjónsson v Iceland App no 16130/90 (ECtHR, 30 June 1993)
- Sheffield And Horsham v United Kingdom App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998)
- Matthews v United Kingdom App no 24833/94 (ECtHR, 18 February 1999)
- Mazurek v France App no 34406/97 (ECtHR, 1 February 2000)
- Dikme v Turkey App no 20869/92 (ECtHR, 11 July 2000)
- Annoni Di Gussola and others v France App nos 31819/96 and 33293/96 (ECtHR, 14 November 2000)
- Chapman v United Kingdom App no 27238/95 (ECtHR, 18 January 2001)
- Frette v France App no 36515/97 (ECtHR, 26 February 2002)
- S.A. Dangeville v France App no 36677/97 (ECtHR, 16 April 2002)
- Stes Colas Est and others v France App no 37971/97 (ECtHR, 16 April 2002)
- Pretty v United Kingdom App no 2346/02 (ECtHR, 29 April 2002)
- Christine Goodwin v United Kingdom App no 28957/95 (ECtHR, 11 July 2002)
- I v United Kingdom App no 25680/94 (ECtHR, 11 July 2002)
- S.L v Austria App no 45330/99 (ECtHR, 9 January 2003)
- L. and V. v Austria App nos 39392/98 and 39829/98 (ECtHR, 9 January 2003)
- Sommerfeld v Germany App no 31871/96 (ECtHR, 8 July 2003)
- M.C. v Bulgaria App no 39272/98 (ECtHR, 4 December 2003)
- Gorraiz Lizarraga and others v Spain App no 62543/00 (ECtHR, 27 April 2004)
- VO v France App no 53924/00 (ECtHR, 8 July 2004)
- Pla And Puncernau v Andorra App no 69498/01 (ECtHR, 13 July 2004)

- Siliadin v France App no 73316/01 (ECtHR, 26 July 2005)
- Hirst v United Kingdom (No. 2) App no 74025/01 (ECtHR, 16 October 2005)
- Leyla Sahin v Turkey App no 44774/98 (ECtHR, 10 November 2005)
- Mizzi v Malta App no 26111/02 (ECtHR, 12 January 2006)
- Grant v The United Kingdom App no 32570/03 (ECtHR, 23 May 2006)
- Zarb Adami v Malta App no 17209/02 (ECtHR, 20 September 2006)
- Wagner and J.M.W.L v Luxembourg App no 76240/01 (ECtHR, 28 June 2007)
- L. v Lithuania App no 27527/03 (ECtHR, 11 September 2007)
- Stoll v Switzerland App no 69698/01 (ECtHR, 10 December 2007)
- Emonet and others v Switzerland App no 39051/03 (ECtHR, 13 December 2007)
- E.B. v France App no 43546/02 (ECtHR, 22 January 2008)
- Demir and Baykara v Turkey App no 34503/97 (12 November 2008)
- K.U. v Finland App no 2872/02 (ECtHR, 2 December 2008)
- Muñoz Díaz v Spain App no 49151/07 (ECtHR, 8 December 2009)
- Glor v Switzerland App no 13444/04 (ECtHR, 30 April 2009)
- Brauer v Germany App no 3545/04 (ECtHR, 28 May 2009)
- Berganovic v Croatia App no 46423/06 (ECtHR, 25 June 2009)
- Zaunegger v Germany App no 22028/04 (ECtHR, 3 December 2009)
- Kozak v Poland App no 13102/02 (ECtHR, 2 March 2010)
- Schwizgebel v Switzerland App no 25762/07 (ECtHR, 10 June 2010)
- Schalk And Kopf v Austria App no 30141/04 (ECtHR, 24 June 2010)
- A, B and C v Ireland App no 25579/05 (ECtHR, 16 December 2010)
- Haas v Switzerland App no 31322/07 (ECtHR, 20 January 2011)
- R.R. v Poland App no 27617/04 (ECtHR, 26 May 2011)
- Stummer v Austria App no 37452/02 (ECtHR, 7 July 2011)
- Bayatyan v Armenia App no 23459/03 (ECtHR, 7 July 2011)
- Genovese v Malta App no 53124/09 (ECtHR, 11 October 2011)
- S.H. and others v Austria App no 57813/00 (ECtHR, 3 November 2011)
- Sitaropoulos And Others v Greece App no 42202/07 (ECtHR, 15 March 2012)
- Konstantin Markin v Russia App no 30078/06 (ECtHR, 22 March 2012)
- Scoppola v Italy (No. 3) App no 126/05 (ECtHR, 22 March 2012)
- Herrmann v Germany App no 9300/07 (ECtHR, 26 June 2012)

- Mouvement Raëlien Suisse v Switzerland App no 16354/06 (ECtHR, 13 July 2012)
- Harroudj v France App no 43631/09 (ECtHR, 4 October 2012)
- P. and S. v Poland App no 57375/08 (ECtHR, 30 October 2012)
- Fabris v France App no 16574/08 (ECtHR, 7 February 2013)
- X and others v Austria App no 19010/07 (ECtHR, 19 February 2013)
- Anchugov and Gladkov v Russia App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013
- Vallianatos and others v Greece App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013)
- Pichkur v Ukraine App no 10441/06 (ECtHR, 7 November 2013)
- X v Latvia App no 27853/09 (ECtHR, 26 November 2013)
- Dhahbi v Italy App no 17120/09 (ECtHR, 8 April 2014)
- Hämäläinen v Finland App no 37359/09 (ECtHR, 16 July 2014)
- Y.Y. v Turkey App no 14793/08 (ECtHR, 10 March 2015)
- Oliari and others v Italy App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015)
- Parrillo v Italy App no 46470/11 (ECtHR, 27 August 2015)
- Biao v Denmark App no 38590/10 (ECtHR, 24 October 2016)
- Aldeguer Tomás v Spain App no 35214/09 (ECtHR, 14 June 2016)
- Magyar Helsinki Bizottsag v Hungary App no 18030/11 (ECtHR, 8 November 2016)
- Dubská And Krejzová v Czech Republic App nos 28859/11 and 28473/12 (15 November 2016)