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***Consensus-Based Interpretation of Regional Human Rights Treaties*, by F. Pascual-Vives (Brill/Nijhoff, 2019, 290 pp., Hardback)**

This work aims to examine the ways in which the ECtHR and the IACtHR use a consensus-based approach to interpret regional human rights treaties. This is an excellent work that is, at the same time, a study of international law theory, treaty interpretation and human rights. The central thesis that is defended in the work is that the notion of consensus, understood from the substantive point of view, "as the general agreement of a significant group of States that consider the scope of an international norm, constitutes the backbone of the interpretation of human rights treaties". If said consensus exists, the courts resort to the evolutionary interpretation of the rights recognized in the treaties. Instead, in the absence of such consensus, the courts resort to the notion of national margin of appreciation as a concrete application of the principle of subsidiarity in order to be more deferential to the sovereignty of States (p. 227).

The structure of the work has three parts divided into eight chapters. In the first part, the theoretical framework of the work is reconstructed around the notions of consensus, the sectorialization of international law and subsidiarity as a general principle of international human rights law. The second part analyzes the method for the evolutionary interpretation of the treaties and their application to regional human rights treaties, taking into account the existing consensus among the States parties regarding the provisions interpreted. And, in the third part, the technique of the national margin of appreciation and the intrinsic and extrinsic circumstances that condition its application by international tribunals, in particular those for the protection of human rights, are examined.

This work is an excellent work that is framed in what could be called the updated current of voluntarist positivism in Spanish doctrine that has its point of reference in the consensual conception of international law by C. Jiménez Piernas.[1] The consensus (*consensus generalis*) is conceived as "a general agreement of the actors involved in the international system that is indicative of their convictions and interests. This notion can help to explain the formation of customary and conventional rules, as well as to provide a plausible theoretical justification for the mandatory nature of public international law" (p. 226). Consensus has a formal and a substantive dimension. From the formal perspective, the consensus consists of a procedure for negotiating and adopting normative texts in the

[1] Vid., the works of C. Jiménez Piernas, "El papel de la noción de *consensus* en la fundamentación y el concepto de derecho internacional público", in Luiz Olavo Baptista and J.R. Franco da Fonseca (eds.), *O Direito internacional no Terceiro Milenio* (Sao Paulo: Editora Sal Paolo, 1998), pp. 103-119; and C. Jiménez Piernas (dir.), *Introducción al Derecho internacional público. Práctica española y de la Unión Europea* (Madrid: Tecnos, 2011) pp. 51-53.

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sphere of the institutional structure, both in the bodies of international organizations and in those of codification conferences.[2] In a substantive sense, consensus implies "a general agreement of the subjects operating in the international system. It represents their basic and common interest and convictions and allows them both to identify the content of the international rules applicable in their relations and to claim binding nature" (p. 14). This approach explains, from a dogmatic point of view, "the validity of public international law and to justify the binding character of customary rules and international treaties. In short, these norms are nothing but the result and expression of a general agreement reached by subjects of public international law. This social agreement (*consensus gentium*) is precisely what makes the effectiveness and efficacy of public international law likely among States and international organizations that apply and recognize customary rules and international treaties as a mandatory" (pp. 15-16). The book uses this conception of public international law to examine the interpretation of international treaties by regional courts for the protection of human rights, in particular the ECtHR and the IACtHR. However, the author himself warns of the need to differentiate this consensual approach from "most extreme voluntarist doctrines, inasmuch as it does not require specific evidence of the consent of all States to the acceptance of customary rules of a general scope. Further, this approach maintains the autonomy between the two elements that makes up customary international law. It is also compatible with the doctrine of persistent objector, while allowing the express opposition of a State to a customary rule at the time of this formation" (pp. 19-20).

F. Pascual-Vives examines the possibilities that the consensual approach has for the interpretation of international human rights protection treaties by means of two techniques: evolutionary interpretation and the doctrine of national margin of appreciation. Both, one and the other, as a general observation induced from the practice of regional courts for the protection of human rights, are used in different situations. In cases where there is thick consensus of the States in a certain sense, the courts resort to the evolutionary interpretation of human rights treaties in accordance with the social circumstances present at the time of their interpretation. This method of interpretation favors the adaptation of those treaties to contemporary social reality and allows the extension of the recognized rights to individuals (p. 72). However, the application of this method of interpretation generates significant tensions in the judicial practice of regional courts. On the one hand, evolutionary interpretation is at the center of the dialectic between the principle of sovereignty of States and the obligation to cooperate. On the other hand, a tension is also generated between the universal and the regional dimension of the consensus that explains the evolutionary interpretation. And, finally, there are tensions between international and constitutional jurisdiction in matters of human rights.

[2] J. Ferrer Lloret, *El consenso en el proceso de formación institucional de normas en el derecho internacional*, (Barcelona: Atelier, 2006).

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The author defends that regional human rights courts, before constitutional courts with a tendency to judicial activism, are international courts (chapter 5).

In the event that the thin consensus of the States regarding the interpretation of a provision, the courts resort to the technique of the national margin of appreciation. This technique is the object of study in the third part of the work and has a special interest. It examines the praetorian origin of this technique by the ECtHR in 1958 in the case *Greek v. United Kingdom* as an indeterminate legal concept. It is a concept that has a multifaceted character that, in the words of H. Waldock, allows the balance "between the exercise by individual of the rights guaranteed to him and the protection of the public interest" (p. 145). Professor Pascual-Vives offers a lucid and useful synthesis of the characteristics and operational possibilities of the national margin of appreciation as a multifaceted legal concept: the importance of the legal nature of the interpreted rule since it is not the same as that derived from positive or negative obligations or whose purpose is to protect the public interest or not; the parameters for evaluating the national restrictive measure are its necessity, legality and proportionality; the national margin of appreciation constitutes a legal expression of the principle of subsidiarity; this technique cannot be identified with the interpretation methods included in the VCLT; and the use in international practice is not homogeneous in the different international regimes depending on the degree of integration of the same, being the law of the European Union and the jurisprudence of the regional human rights courts the areas in which it has more yield (pp. 179-180). In sum, this author concludes that the national margin of appreciation cannot be conceived as a true legal doctrine but rather is a technique used by courts and dispute settlement bodies in light of the principle of subsidiarity to assess reasonableness of the conduct of a state through recourse to the principles of legality, proportionality and necessity (pp. 180-181). The application of the national margin of appreciation is conditioned, according to this author, by intrinsic and extrinsic circumstances to the interpreted norm. The intrinsic circumstances can be the legal nature of the rule (if peremptory or dispositive) or of the obligations (positive or negative) and by the kind of interest (public or private) that is at stake. One of the extrinsic circumstances that condition the application of the national margin of appreciation technique is the density (thick or thin) of the existing consensus regarding the norm. As a general rule, the possibility of application of the national margin and its performance in the jurisprudence of regional courts on human rights is inversely proportional to the existing consensus. The smaller this is, the more space the States have for their margin of appreciation and the greater the consensus, the less are the possibilities of resorting to the national margin (pp. 207 and 226-227).

In conclusion, in this work, the theoretical approach used, *consensualism* (which can be shared or not), can be the object of discussion, but is absolutely remarkable the coherence of the legal reasoning, the argumentative rigor, the variety and the quality of the legal practice and recourse to the inductive or empirical method as a scientific method. It is an excellent work where a solid theoretical framework is presented and applied to a legal

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problem such as the interpretation of human rights protection treaties. We are, in short, before an exemplary work that shows that it is only possible to carry out a relevant analysis of legal technique and international practice if there is a solid conceptual framework to give them shape and meaning.

Ángel J. Rodrigo
Universitat Pompeu Fabra (Barcelona)


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