

Building democracy at the bar: The European Court of Human Rights as an agent of transitional cosmopolitanism

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Approximately as appears in *Transnational Legal Theory* (2016)

<http://dx.doi.org/10.1080/20414005.2016.1171561>

Abstract

How, if at all, does the European Court of Human Rights (ECtHR) promote more just states which vary greatly in their democratic credentials? The article considers the ECtHR and its practices from the perspective of ‘non-ideal theory,’ namely how it helps states become more stable and just, and more compliant with the human rights norms of the European Convention on Human Rights. The article first sketches what is meant by ‘non-ideal theory,’ then considers aspects of the Council of Europe and the ECtHR which promote transitions toward more just member states. The ECtHR’s practices suffer from at least two weaknesses in this regard: it assumes with insufficient argument that standards appropriate for ‘ideal theory’ conditions of full compliance also should apply to states that suffer from wide ranging noncompliance, or from unjust institutions. Secondly, the Court relies on an ‘emerging European consensus’ with insufficient empirical and normative justification.

Keywords: cosmopolitanism, human rights, global constitutionalism, transitional justice, the European Court of Human Rights

How should international and regional institutions be designed and operate in order to assist in the “regular course of improvement of state constitutions”?¹ This article considers one case among one kind of institutions that has grown in importance, namely international courts and tribunals (ICs). How, if at all, does the European Court of Human Rights (ECtHR, the Court) promote more just political and legal orders in states which vary greatly in their democratic credentials – including several of the world’s best functioning democracies? One reason to consider the ECtHR is that this ‘cosmopolitan’ objective toward vertical subsystem integration² is quite explicit in its mandate.

The ECtHR was established by the Council of Europe consisting of - by now - 47 states, under the European Convention for Human Rights (ECHR, the Convention) – originally effective in 1953.

This European human rights regime was put in place as an early warning system to help prevent lapses into totalitarianism by means of a court that hold states to account for human

*Email: andreas.follesdal@jus.uio.no This article was written under the auspices of ERC Advanced Grant 269841 MultiRights —on the Legitimacy of Multi-Level Human Rights Judiciary; and partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts The Legitimacy of the International Judiciary. It was first presented at a workshop on transitional justice on 3-4 March 2014 organized by Claudio Corradetti, and has benefited greatly from comments then and later from him, the participants, and an anonymous reviewer.

¹ Immanuel Kant, "Idea for a Universal History with a Cosmopolitan Purpose," in *Kant's Political Writings*, ed. Hans Reiss (Cambridge University Press, 1970).

² Corradetti this issue.

rights violations.³ The objective of the ECHR stated in its Preamble clearly laid out this mission:

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration⁴

The ECtHR's intended role in vertical subsystem integration is explained in Article 19: its task is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto."

Over time, the main contribution of the Convention and the Court slowly changed to fine-tune "well-functioning democracies." The new crop of member states of the Council of Europe post 1989 caused the ECtHR to return to its earlier focus on less stable democracies, whilst at the same time supporting more well-functioning states. Several measure of indicators of democracy show a great variation among European states in this regard. The "European Commission for Democracy through Law" – the "Venice Commission" of the Council of Europe - regularly reports the need for constitutional and legislative reforms to improve the "Functioning of democratic institutions and the protection of fundamental rights." Likewise, the "Democracy Audit," the "Democracy Index," the Polity scale and other analyses score the signatory states from 'top ten' to 'low' on various indicators of democratic quality.⁵ This broadened scope of signatory states makes it even more pertinent to study the ECtHR's contribution to vertical integration, transitional justice and infra-democratic transitions.

The present article looks at how elements of the ECtHR and its practices actually contribute to these tasks, regarded as parts of 'non-ideal theory.' What are some of the ways the ECtHR helps move states at various levels of democratic quality and human rights compliance toward more stable and just legal and political orders –becoming ever more compliant with the human rights norms of the European Convention on Human Rights?

One of the important challenges for the institutional design and the discretion of the judges for these 'non-ideal', transitional and integrative objectives is that the ECtHR must both support states emerging from authoritarian regimes yet avoid criticism from the more well behaving states of the Council of Europe. The 'democratic spirit' of some of the latter states can hardly be doubted; their citizens enjoy comparatively high scores on most standards of good governance, democracy and political trust in government, and the

³ Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, [Http://Www.Echr.Coe.Int/Documents/2005_Lord_Woolf_Working_Methods_Eng.Pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_Working_Methods_Eng.Pdf) (The European Court of Human Rights, 2005).

⁴ Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14. Entry into Force 3 September 1953," in *ETS 5; 213 UNTS 221(1950)*), Preamble.

⁵ <http://www.worldaudit.org/democracy.htm>; www.eiu.com; <http://www.systemicpeace.org/polityproject.html>.

citizenry has low levels of relative poverty.⁶ On the one hand, the scepticism from these more stable democracies fits with Moravcsik's claim that resistance to the ECHR was higher in precisely such states, rather than where governments are afraid that the opposition will backslide on human rights commitments if they got to power.⁷ On the other hand we might suspect that such states have little to complain about, since they can be expected to seldom violate the human rights conventions they have signed. Statistics bear this out: in 2011 the Nordic states and the UK were responsible for 1,5% of the violations found by the ECtHR. This is much less than the per capita would suggest, since these states include 10.7 % of the population of the Council of Europe member states.⁸ For such states, intervention by the ECtHR raises worries about the legitimacy of such interference in democratically legitimated governance – challenges which do not arise with the same weight when the ECtHR intervenes in less well functioning democracies.

The present article first sketches what is here meant by 'non-ideal theory.' The next sections consider several aspects of the Council of Europe and the ECtHR which appears particularly apt to promote transitions toward more just member states: does the Court help promote domestic human rights protection? If so, what are the mechanisms, and what are some of the risks? I shall argue that the Court's practices suffer from at least two weaknesses when assessed as contributing to infra-democratic transitions and transitional justice generally. Firstly, the Court seems to assume that standards appropriate for 'ideal theory' conditions of full compliance also should apply under non-ideal circumstances – e.g. to states that suffer from large scale noncompliance, or from unjust institutions. I illustrate this with reference to the Court's insistence on democratic modes of governance. Secondly, the Court seems to rely on an 'emerging European consensus' when engaging in interpretation of the Convention, in ways that require far more empirical and normative justification.

1 Non-ideal theory

An important strand of normative theory is often labeled "ideal theory." Elaborating on distinctions introduced by John Rawls, the subject matter of such contributions are the appropriate standards of legitimacy for a complex of institutions when there is a general match between the institutions and these standards, and where most actors follow those rules. "Non-ideal" normative theory, on the other hand, concerns the appropriate standards for improving on institutions which fail to satisfy the appropriate normative principles, and standards for action under various circumstances of 'partial compliance' when some actors do not comply.⁹ The first of these may be labelled 'Transitional justice theory', the latter 'partial

⁶ Democracy Index 2008, United Nations Development Programme, "Human Development Report 2009" (2009) .

⁷ Andrew Moravcsik, "Explaining International Human Rights Regimes" (1995) 1 *European journal of international relations* 157-89.

⁸ In 2011 the ECtHR made a total of 1157 judgments finding violations in 987 of them. Of these, the ECtHR made 37 judgments about Denmark, Finland, Iceland, Norway, Sweden, and the United Kingdom, and found violations in only 15 of these cases. [Denmark 6/1, Finland 7/5, Iceland 0/0, Norway 1/1, Sweden 4/0; and the UK 19/8] (European Court of Human Rights, "Statistics 1/1-31/3 2012" (2012) , pp 12-13). In 2011 these states had [5561+5375+318+4920+9416+62436 =] 88 million persons, of almost 819 million living in the Council of Europe states. European Court of Human Rights, "Analysis of Statistics 2011" (2012) .

⁹ John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 244-6; John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

compliance theory.’ Among the normative requirements of ‘transitional justice’ in this sense are parts of what Rawls called the *duty of justice*:

to support and comply with just institutions that exist and apply to us. It also constrains us *to further just arrangements not yet established*, at least when this can be done without too much cost to ourselves.¹⁰

Some of the challenges for a legitimate human rights judiciary today concern several issues of non-ideal theory – both transitional justice and ‘partial compliance’. How can such human rights courts and tribunals help correct such human rights violations as occur – be they more severe and systematic or less -, help prevent future human rights violations, and help societies address past human rights violations and those who committed them. An added challenge is that the states subject to such courts and tribunal often vary greatly in their ability and willingness to comply with the relevant human rights norms. The legal human rights norms and the treaty bodies must be constructed and interpreted with these challenges in mind. The mandate and practices of the ECtHR must thus be appropriate both for generally well-functioning, human rights respecting rule of law states, and at the same time also serve its purpose with somewhat similar standards toward states that are unwilling or unable to respect these human rights. Alternatively, we will need a defense of why *other* human rights standards apply, which these are, and with what authority the ECtHR should decide which member state should be held to which set of standards.

2 Does the ECtHR help?

The impact of the ECtHR is mixed. In assessing its effectiveness, we must keep in mind the fairly modest ambitions of its founding states, and its role as one body within a complex multi-level system of political and legal governance.

Even though the states have subjected themselves to the ECtHR, the ECtHR is *not* authorized to promote and protect human rights by *all* means. As all courts, it is a weak branch of ‘government.’ Neither the function, the composition nor the mode of operation of the ECtHR is set up to provide a ‘collective supranational voice of reason and morality’ as Benvenisti claims.¹¹ Rather, the express task of the ECtHR is limited to “ensure the observance of the engagements undertaken by the High Contracting Parties.”¹² The role of ECtHR with regard to furtherance of respect and promotion of human rights is thus really ‘subsidiary’ or supportive and supplementary to states. We must also recall that the ECtHR interact with several other bodies in a multi-level legal order. Other Council of Europe bodies serve important roles in conjunction with the ECtHR: In particular, the Committee of Ministers which consists of the Foreign Affairs Ministers of all the member states, or their diplomatic representatives, supervises the execution of the judgments of the ECtHR.¹³ Furthermore, the interaction between ECtHR and the European Union is also crucial to understand and assess the impact of the ECtHR.

Yet, central actors remain states. To assess the impact of the ECtHR we therefore need suitable baselines, for instance by envisioning and specifying how well states *de facto* would comply with the ECHR requirements if the states were *not* signatories and subject to the ECtHR. For those states with many complaints against them, the issue is then whether the ECtHR has any positive impact – given such a domestic lack of ability and/or will.

¹⁰ Rawls 1971: 115, my emphasis.

¹¹ Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 *International law and politics* 843-54, 852.

¹² Art 19 ECHR.

¹³ Article 46(2) ECHR.

There is indeed evidence that the ECtHR does promote the objectives of the Convention.¹⁴ Scholars also note that international human rights courts may be detrimental to human rights compliance in some states under some conditions - especially in well-functioning democracies.¹⁵ Some of the mechanisms are well known: the ECtHR may contribute to domestic courts' invalidating domestic laws; they may mobilize domestic groups, or serve as a gate keeper to the European Union.

In the following I consider various such aspects of the ECtHR to illustrate a somewhat different point: how it may be taken to serve 'transitional justice' and infra-democratic transitions. More precisely: What are ways by which the ECtHR can contribute to establish, promote and maintain minimal constitutional thresholds at the state level? It may thus contribute to "transitional constitutionalism" – including 'minor' adjustments' - toward a more legitimate legal cosmopolitan project. I first comment on the institutional role it has as a gatekeeper to the Council of Europe and to the EU, thus serving to promote human rights compliance in states that aspire to join. I then consider how the ECtHR functions as a judiciary: its objectives and its rulings aimed to improve justice specified as compliance with the ECHR; before finally looking at three aspects of the Court's interpretative practice which illuminate the delicate challenges of transitional justice and infra-democratic transitions compared to justice under conditions of general compliance.¹⁶

3 The ECHR as gatekeeper to the EU

The ECHR and the Court assists in bolstering domestic respect for human rights as a requirement for states that seek membership in the Council of Europe (CoE) and the European Union. Thus some states, including Belarus and Kazakhstan, are not members of the CoE due in part to their lack of sufficient compliance with human rights norms. Belarus had a special guest status rescinded due to undemocratic referendums and constraints on freedom of expression.¹⁷ The Parliamentary Assembly has urged Kazakhstan to improve its democratic and human rights records if it is to enjoy observer status – arguably indicating requirements for eventual full membership in the CoE.¹⁸ Arguably, the prospects of membership in the CoE and in the EU sometimes create sufficient pull that a state decides to improve its human rights standards in line with the ECHR standards and the ECtHR.

4 The ECtHR promoting compliance with the ECHR

The most obvious contribution of the ECtHR for transitional justice and infra-democratic

¹⁴ Laurence R. Helfer and Erik Voeten, "Do European Court of Human Rights Judgments Promote Legal and Policy Change?" (2011) *Working Paper* http://scholarship.law.duke.edu/faculty_scholarship/2402 .

¹⁵ Andrew T. Guzman and Katerina Linos, "Human Rights Backsliding" (2014) 102 *California Law Review* .

¹⁶ Several authors have addressed these or related issues in depth, including features of the case law, including Eva Brems, "Transitional Justice in the Case Law of the European Court of Human Rights" (2011) 5 *The International Journal of Transitional Justice* 282-303, concerning compensation and restitution after World War II, post Communism and the war in former Yugoslavia; and Tom Allen, "Restitution and Transitional Justice in the European Court of Human Rights" (2007) 13 *Columbia Journal of European Law* 1-46 concerning restitution of property.

¹⁷ Parliamentary Assembly of the Council of Europe PACE, "Situation in Kazakhstan and Its Relations with the Council of Europe" (2006).

¹⁸ *Ibid.*

transitions is presumably that it helps ensure compliance with the ECHR. Several aspects of its objectives and general practice are worth mention.

Firstly, the objective of the ECtHR is not uniformity but high minimum levels of human rights protection. In some ways this is a less demanding aim for the Court and the states; in other ways this demands much of the state – and of the Court. The Preamble of the ECHR makes clear that the aim is not to harmonize European states to one social model. Rather, the aim is to establish high minimum levels of human rights protection. “Surely the Convention did not mean to efface all national differences in the name of uniformity, but instead to set a minimum level of compatibility.”¹⁹ Thus the states are not required to revise all institutions in accordance with a particular institutional blueprint, so differences among member state policies is not a symptom that the ECtHR has a low impact. This underscores the need to differentiate among international courts: this objective is different, less Procrustean – and perhaps less controversial - than that of the Court of Justice of the European Union which must explicitly harmonize several policy areas among the member states when necessary to liberalize free movement etc.²⁰

On the other hand, the ECtHR challenges state sovereignty in several ways. Individuals may petition the Court.²¹ The individual complaints procedure is open to more than 800 million people in the Council of Europe states. This is of course part of the reason for the severe backlog of cases. Note, however, that of the many cases brought, only five to ten per cent will eventually be deemed admissible. Of particular interest for the challenges of transitional justice, note that more than 65 per cent of the cases are brought against only six states: Russia, Turkey, Italy, Romania, Ukraine and Serbia.

The kinds of responses required of the states also underscore the impact of the Court. When a state is found in violation of the ECHR, the Court will require that it compensates the victims. But the Court also has further objectives. The human rights standards may require changes close to the core of sovereignty, such as voting rights of minorities, curriculum in public schools, established practices of gender discrimination, etc. – thus often fostering legal or constitutional changes of many kinds. Thus even well-functioning democracies may be required to undertake infra-democratic transitions. Such institutional changes are especially apparent for cases of repeat noncompliance. The ECtHR seeks to ‘nudge’ national courts, parliaments and executives in the member states to implement the ECHR requirements. States are often required to take ‘general measures’ to prevent similar violations from occurring in the future, by making changes to legislation or policies. The Court usually leaves it to the state to decide what to do as long as the outcome is consistent with the ECHR. However, when states fail to make such changes and continue to generate cases brought before the Court, it has established a ‘pilot case procedure,’ first in the case *Broniowski v. Poland*.²² The Court seeks to identify the structural problems which leads to such repetitive cases, and requires the State to address these problems – sometimes in quite specific ways.

A final aspect of the Court’s practice relevant for our purposes is that the Court seems committed to an empirical claim that securing well-functioning domestic democratic rule helps promote human rights. The Preamble of the ECHR states as an empirical premise that

¹⁹ Paulo G. Carozza, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights" (1998) 73 *Notre Dame Law Review*, 1228.

²⁰ European Council, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007" (2007) 50 *Official Journal of the European Union*, Art 46.

²¹ Article 34 ECHR.

²² *Broniowski v Poland*, ECtHR Grand Chamber (2004)

democracy is the best way to promote and maintain fundamental freedoms for all:

... Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

This would at first hand appear to be a statement in ideal theory: that democratic mechanisms are instrumentally important to *maintain* a just domestic legal order. Evidence for such an instrumental role of democracy is contested, though there is broad support for some specific mechanisms.²³ This may be one good reason why the Court is particularly attentive to protect the human rights required for democratic decision making, including freedom of expression and assembly. However, note that this is part of non-ideal theory: the Court insists on protecting these rights pertaining to democracy also for clearly less than ideal settings. In particular, the Court is very reluctant in granting states exemption from respect for these rights even in emergencies. The Court thus seems to assume that democratic modes of governance are helpful also for improving on present injustice.

5 Dynamic interpretation

We now turn to consider aspects of how the Court interprets and applies the ECHR in modes conducive to transitional justice and infra-democratic transitions. The ECtHR must often interpret the Convention ‘dynamically’ (sometimes this practice is called ‘evolutive’ or ‘evolving’ interpretation). The aim is to make the ECHR relevant for contemporary issues, and in accordance with present values in Europe.²⁴ For instance, in *Tyrer v. United Kingdom* the Court found that corporal punishment by birching over time had become degrading and thus unacceptable:

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 developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field²⁵

Other examples of dynamic interpretation that goes beyond what the state parties presumably intended in the 1950s include rejection of the death penalty,²⁶ rejection of certain differences in establishing maternity for ‘legitimate’ and ‘illegitimate’ children,²⁷ and decriminalization of homosexuality.²⁸

Why has this practice emerged, and what are we to make of its role for transitional justice and for infra-democratic transitions?

Many treaties are interpreted dynamically. The treaty makers wanted them to apply to new situations, and used ‘generic terms’ to express the treaties’ object and purpose. The treaty bodies are mandated to thus interpret the treaties in light of their object and purpose, according to the Vienna Convention on the law of treaties Art 31:

²³ Thomas Christiano, "An Instrumental Argument for a Human Right to Democracy" (2011) 39 *Philosophy and Public Affairs* 142-76.

²⁴ *Cossey v United Kingdom*, ECtHR, Plenary A, 184 (1990)

²⁵ *Tyrer v United Kingdom*, ECtHR Series A No. 26 (1978)

²⁶ *Soering v the United Kingdom*, (1989)

²⁷ *Marckx v Belgium*, ECtHR 31(1979)

²⁸ *Dudgeon vs. United Kingdom*, ECtHR

General rule of interpretation

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.²⁹

This fits well with the ECtHR's declaration that "the Convention is a living instrument which must be interpreted in the light of present-day conditions."³⁰ "in a manner which renders its rights practical and effective, not theoretical and illusory."³¹ The Court typically justifies such new interpretations by claims that there is *broad consensus* across most states in Europe. I return to this below.

The ECtHR applies a *Principle of Effectiveness*: The choice of interpretation should not be one which limits the obligations of the parties to the greatest degree, but must rather be appropriate to the aim and object of the treaty: to secure the aims of the Universal Declaration of Human Rights.³²

How should we assess such 'dynamic interpretation'? Does it reliably promote transitional justice and infra-democratic transitions? Some such dynamic elements are impossible to avoid. As treaties often go, the ECHR has some vague terms where the states appear to have agreed to delegate further specification to the treaty bodies – for instance, the freedom of expression and the right to privacy. Judgments that specify such terms may serve as precedents for future judgments, thus dynamic interpretations develop the law in significant respects. Moreover, treaty changes are hard to obtain since they require unanimity among all states. All treaties must thus be interpreted by the members of the treaty bodies when circumstances change, at the risk of overstepping their authority.

This dynamic interpretation is one way that the ECtHR can be seen as assisting in moving states toward more just institutions. Nevertheless, some central objections to this practice merit mention.

State governments or administration often hold that judges of the ECtHR interpret a treaty unduly creatively, too far beyond the intentions of the signatories and hence unlawful. Some hold that this is the case when the ECtHR openly undertakes 'dynamic' interpretation of the convention. However, complaining citizens and NGOs may either downplay such 'illegality', or hold that such interpretations are necessary for many treaties to further their objectives under new societal circumstances. Indeed, leaving aside the normative significance of states' intentions when signing a treaty, it seems clear that since the Vienna Convention allows dynamic interpretation guided by such factors, it is reasonable that states' intentions when signing treaties have included such dynamic interpretation since "it is now firmly rooted in the international law on interpretation."³³

However, it does seem to remain an open question how to assess whether 'evolutionary tendencies' are for the normatively better or for the worse, in order to determine whether the judges of the ECtHR are warranted in their dynamic interpretation. What standards do they use - and which should *we* use - to determine that such a development merits broader support and compliance? In particular, the Court's reliance on an 'emerging European consensus' when it grants states a 'margin of appreciation' merits more careful

²⁹ Vienna Convention on the Law of Treaties.

³⁰ *Tyrer v UK*.

³¹ *Goodwin v UK*.

³² *Airey v Ireland*, Eur Ct HR Ser A, 2 E.H.R.R. 305(1979) *Artico v Italy*, 37 EurCtHR. (ser. A)(1980)

³³ Birgit Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies," in *UN Treaty Bodies - Law and Legitimacy*, ed. Geir Ulfstein and Helen Keller (Cambridge University Press, 2012).

attention.

6 The Margin of Appreciation Doctrine – Prompts Deliberation and Rule of Law

One doctrine of the Court which arguably contributes to its promotion of more just institutions is the ‘margin of appreciation’ (MA). The Court sometimes leaves states some but not unlimited discretion for transitional justice policies.³⁴ The room for states’ discretion is especially important when several values conflict, ranging from conflicts among human rights to conflicts between human rights and other important objectives. Note that what is at stake here is not how to interpret which rights individuals have, but rather that the state is granted the authority, within some limits, to determine whether these rights are violated in a particular case. The ECtHR thus applies a MA when it decides to not review and hence not challenge a state’s decision.³⁵

Some details of this practice are important to assess its contribution to transitional constitutionalism and infra-democratic transitions. The Court grants states some but not full discretion to decide whether they are in compliance with their treaty obligations - within several limits. The circumstances may be emergency situations, or when states can credibly claim that the violations of some individuals’ rights is justified because the violations are proportionate to acceptable social objectives or other rights. Such exemptions are explicitly introduced for some rights: Article 8 on private life, Article 9 on religion, Article 10 on free expression, and Article 11 on peaceful assembly. Thus the ECtHR has granted a wide MA to states under certain non-ideal circumstances when the objective is to fight terrorism³⁶ – though the Court does not permit such rights violations to prevent crime in general.³⁷ It thereby may enhance the democratic quality of some member states.³⁸

One particularly interesting limitation to the scope of the MA arguably serves to promote democratic deliberation. The Court refuses states a MA with regards to non-derogable rights: to life, against torture, slavery and forced labour.³⁹ The Court is also very reluctant to grant an MA for rights that are necessary for well-functioning democratic rule, such as freedom of expression for political debates; and freedom of association and free elections.⁴⁰ Such restrictions may occur, but must satisfy high standards of justification.

Of particular importance for transitional justice and infra-democratic transitions is another feature of the MA doctrine: the Court is also in effect more skeptical when the decisions do not reflect deliberation and will formation. The issue is then often whether there

³⁴ Brems, "Transitional Justice in the Case Law of the European Court of Human Rights," 303.

³⁵ George Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26 *Oxford Journal of Legal Studies* 705-32, 706; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 80-81.

³⁶ *Klass and Others v. Germany*, ECtHR (1978)

³⁷ Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1996) 56 *Heidelberg Journal of International Law* 240, 263.

³⁸ arguably illustrating the general point argued by Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, "Democracy-Enhancing Multilateralism" (2009) 63 *International Organization* 1-31.

³⁹ Art 2, 3 and 4, respectively.

⁴⁰ Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," 266, 268.

is ‘proportionality’ or ‘fair balance’ between the means and the aim sought.⁴¹ Discretion might be granted with regard to at least five different elements of the ‘proportionality test’ as developed in later cases and by various authors (). As part of this decision the Court assesses

1. The legitimacy of the social objective pursued
2. How important the restricted/derogated right is, e.g., as a foundation of a democratic society (para 49)
3. How invasive the proposed interference will be
4. Whether the restriction of the right is necessary (para 4)
5. Whether the reasons offered by the national authorities are relevant and sufficient (para 50).

For each of these, the Court may grant the state a narrow or broad MA. Note that some of these factors may well change over time in light of experiences about what rights are necessary for a ‘democratic society’ (Arts. 8-19) (, 613), or concerning realistic alternative policies.

For our purposes, the fifth condition merits attention: In several cases the ECtHR requires that the state must actually have stated reasons for its position, to show that it has performed the requisite ‘balancing’ or reasoning. One reason is that "it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied ... that they are better placed than it is to deal effectively with the matter."⁴²

The ECtHR does not leave it completely to the state to set the standard for sufficient quality of the deliberation, or to determine and specify its main interests. The Court has sometimes found such a review unsatisfactory, because it did not find a “reasonable relationship of proportionality notwithstanding the wide margin of appreciation available to the national authorities.”⁴³ It can also find weaknesses in the arguments or in the balancing. Thus in the ECtHR held that the state had overlooked alternative means to secure its objectives, alternatives that would have avoided the restrictions of rights.⁴⁴

One important effect of the proportionality test is that states adjust their own practice accordingly, so as to avoid decisions against them. Thus the Court nudges states toward more careful deliberation about their choices of legislation and policies, and promotes the rule of law in the sense that legislatures and executives become more attentive to the mandates and procedures required by the ECHR.

Why should the ECtHR grant a MA in the first place? Note that among the reasons, one is particularly relevant for our discussion: the MA doctrine is often said to be an expression of deference to the domestic democratic processes of well-functioning states:

In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State’s margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments

⁴¹ *James and Others v. The United Kingdom*, European Court of Human Rights A 098 B 8793/79(1986) 50.

⁴² *Schalk and Kopf v. Austria*, European Court of Human Rights(2010) dissenting opinion. Cf Jan Kratochvil, "The Inflation of the Margin of Appreciation by the European Court of Human Rights" (2011) 29 *Netherlands Quarterly of Human Rights* 324-57, 333.

⁴³ *A v. Norway*, ECtHR (2009) 74.

⁴⁴ *Rasmussen v Denmark*, ECtHR 71 Ser B(1988), Laurence Helfer, "Consensus, Coherence and the European Convention on Human Rights" (1993) 133 *Cornell International Law Journal* , 161.

commands a degree of judicial self-restraint⁴⁵

However, recall that not all Council of Europe states are well functioning in this sense, and none of them function well all the time. This variation in ‘democratic quality’ should have implications for the Court’s procedures. Those states that are more democratic – however defined – might have a stronger claim to a broader margin of appreciation than do less democratic states. This is one way the ECtHR can avoid criticism of trespassing on the democratically legitimated rules of accountable parliaments. However, such a distinction between states of differing democratic quality may be difficult to draw and politically impossible to state for the ECtHR. By instead applying a proportionality test to individual cases brought for it, the Court avoids such contentious categorizations. At the same time the Court may help foster the instrumental benefits of deliberation – regardless of how democratic such a deliberative process is. The MA doctrine should therefore arguably not explicitly grant a broader MA to a more democratic state tout court. Note that the list of 5 check points may be particularly suitable for this purpose: these points would tend to be necessary topics for democracies and less democratic states alike, for them to be sufficiently responsive to individuals’ interests as protected by human rights. Thus we see that the Court also judges against states that score high on democracy standards. They may not enjoy a broad MA in a particular case insofar as they do not give evidence of due deliberation on the proportionality issues.⁴⁶

6 ‘An Emerging European Consensus’ – whence and whither?

A particular aspect of the practice of dynamic interpretation and MA doctrine poses particular challenges, central to our concern with the Court’s promotion of justice under non-ideal circumstances. The issue is how the Court identifies and uses an ‘emerging European consensus.’ The Court sometimes refers to “the existence or non-existence of common ground between the laws of the Contracting States”⁴⁷ When the Court believes that a consensus emerges among European states, the ECtHR may restrict the scope of the MA, or increase the level of scrutiny of the argument presented by the state.

What counts in favour of this role of an emerging consensus? The Court’s decision to pay attention to such a consensus may be one plausible form of self-binding, to regulate its dynamic interpretation of the ECHR, to restrain judicial discretion. For instance, in *Tyrer v. United Kingdom* the Court found that corporal punishment by birching over time had become degrading and thus unacceptable.⁴⁸ Other examples also mentioned above include the death penalty⁴⁹ and distinctions between ‘legitimate’ and ‘illegitimate’ children.⁵⁰

As regard the role of such an emerging consensus in the MA doctrine, note that violations of rights “of fundamental importance” are not permitted even where there is lack of consensus. Thus in the *Hirst* case concerning convicted prisoners’ voting rights, the Court maintained that “even if no common European approach to the problem can be discerned, this

⁴⁵ *Karatas v. Turkey*, European Court of Human Rights(1999) Joint partly dissenting opinion of judges Wildhaber, Pastor Ridruejo, Costa and Baka.

⁴⁶ *Lindholm and Others v Norway*, ECtHR Series B 13221/08(2012); *X v. United Kingdom*, European Court of Human Rights Eur Ct HR (1997).

⁴⁷ *Rasmussen v Denmark*, ECtHR 87(1984), para 40; *X v. United Kingdom*, 13; cf. Brems, “The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights,” 248, 276.

⁴⁸ *Tyrer v United Kingdom*.

⁴⁹ *Soering v the United Kingdom*.

⁵⁰ *Marckx v Belgium*.

cannot in itself be determinative of the issue."⁵¹

How does the Court identify such a consensus? George Letsas argues that the consensus practice has evolved beyond determining an actual 'shared approach' among the states, but simply relies on "some abstract sense of common standards" – possibly garnered from non-binding international documents.⁵² This development grants even more discretion to the Court. Thus the ECtHR at times claims to observe an emerging international consensus beyond Europe. In the *Goodwin* case on the rights of transsexuals:

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.⁵³

In the *Demir and Baykara* case on trade union rights the ECtHR even referred to international legal instruments which the respondent state had not ratified:

In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.⁵⁴

A criticism of this practice is that the procedure to determine an "emerging common practice" – or "some abstract sense of common standards" is exceedingly opaque – sometimes also contested by the participating judges:⁵⁵

the Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an interpretation of the Convention that it finds ideologically pleasing⁵⁶

Indeed, the ECtHR does not seem to have an established procedure to determine whether there is a requisite consensus.⁵⁷ One main response could thus be to make the rules of the MA

⁵¹ *Hirst v. The United Kingdom (I)*, European Court of Human Rights, Grand Chamber Reports of Judgments and Decisions (2005).

⁵² George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy," in *The European Court of Human Rights*, ed. Andreas Follesdal, Birgit Peters, and Geir Ulfstein (Cambridge University Press, 2013).

⁵³ *Christine Goodwin v. The United Kingdom*, European Court of Human Rights (2002), 85.

⁵⁴ *Demir and Baykara v. Turkey*, ECtHR, Grand Chamber (2008), Para 86.

⁵⁵ *Rasmussen v Denmark*, , Para 40; *X v. United Kingdom*, , 13; cf Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights,"; Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy."

⁵⁶ Helfer, "Consensus, Coherence and the European Convention on Human Rights," , 154; cf Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," 282.

⁵⁷ Benvenuti, "Margin of Appreciation, Consensus, and Universal Standards," Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human*

doctrine including the application of this consensus test more precise. Sometimes claims about an emerging consensus seem overdrawn. Indeed, one may suspect that judges are not constrained much in their discretion by this requirement that they observe an emerging consensus. One example concerns the diminishing differences states have made between 'legitimate' and 'illegitimate' children, mentioned above. The Court claimed in that there was an emerging European consensus to this effect, citing conventions with such wording.⁵⁸ However, the majority of European states had *not* signed these conventions at the time.⁵⁹ Sometimes the Court refers – arguably haphazardly - to non-European states such as New Zealand and Australia.⁶⁰ In some cases the judges disagree amongst themselves whether there *is* a development among the states toward shared grounds.⁶¹

A more general criticism of this practice is that one important aim of the ECHR is to protect those who find themselves in the minority against majorities' abuse of power, intentional or not. Indeed, a standard weakness of majoritarian democratic decision making is to ignore a minority's interests. Thus there would seem to be little reason to limit human rights protections of a minority based on a *consensus of majorities*. In this vein, George Letsas notes that "if human rights are distinctively counter-majoritarian then it makes no sense conditioning their scope and meaning on what the majority itself believes."⁶² A central concern is that there is no reason to believe that an 'emerging consensus' among *majorities* in Europe ensures that certain minority rights will be protected. To rephrase this worry into our concerns about transitional justice: there is no obvious mechanism to ensure that all transitions will be toward more just arrangements, rather than toward more injustice. It may in principle be a minority of European states that continue to ensure better human rights protection, while a majority of states converge on a less optimal set of policies – be it concerning counter terrorist measures, or concerning the Roma-Sinti minority. An emerging consensus does not guarantee that the consensus provides better human rights protection. Thus, the domain of application of such a consensus principles must be carefully delineated.

I submit that the upshot of this discussion about the consensus policy is that its scope of application and methodology are now too vague. Currently the Court is vulnerable to understandable suspicion that it abuses its discretion under the guise of the present consensus doctrine. As it stands, the practice carries a high risk of "manipulative relativity"⁶³ This is not to deny that it may become defensible as a way to regulate Court discretion concerning its dynamic interpretation, and hence reduce the understandable fears of domination by judges.

A more developed procedure to determine consensus, drawing on comparative legal analysis and sociology may help the Court's task to combine sufficient respect for state

Rights Jurisprudence (Brill, 1996), 158; cf Helfer, "Consensus, Coherence and the European Convention on Human Rights."

⁵⁸ *Marckx v Belgium*.

⁵⁹ Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy,"; John G. Merrills, "The Development of International Law by the European Court of Human Rights." (1988), 74.

⁶⁰ *Christine Goodwin v. The United Kingdom*, cf Ignacio de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine" (2006) 7 *German Law Journal* 611.

⁶¹ *Cossey v. United Kingdom*, , 21; Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights."

⁶² Letsas, *A Theory of Interpretation of the European Convention on Human Rights* , Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy."

⁶³ del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine."

sovereignty whilst performing its obligations of international human rights judicial review. Such reforms must also seek to reduce the general vagueness of the MA doctrine to enhance legal certainty and bolster domestic democratic deliberation.

However, George Letsas concludes on the basis of the case law, that the Court currently does not aim for better empirically grounded claims about consensus. He argues that

for the evolution to constitute a standard of correctness for the ECHR it is not necessary to establish any concrete consensus among the majority of contracting states. The idea is more that of a hypothetical consensus: given the principles we now believe underlie the Convention, how would reasonable people agree to apply these principles to concrete human rights cases? But there need not be actual consensus on the application of these principles⁶⁴

I submit that this seems normatively appropriate. To change the Court's policies to reduce vagueness about 'consensus' is neither necessary nor sufficient. The emerging precision may be toward a normatively problematic consensus. In the European setting, the millennium long flourishing 'shared value' of anti-Semitism and its horrific results should warn us that general consensus among states is insufficient.⁶⁵ In the famous phrase ascribed to Maynard Keynes, it may be "better to be roughly right, than to be precisely wrong." The normative challenge in these situations is when there is disagreement – i.e. *not* a complete consensus – which there by definition is not when a state is not complying. I submit that close to universal consensus on a development in state legislation or policies is not sufficient for the Court to require other states to change. To identify which emerging consensuses should be promoted requires the Court to engage in normative reasoning about which emerging trends will indeed further the objectives of the ECHR in the shorter and longer term. It is not obvious that an 'emerging' consensus among states should be regarded as more than a way to *nominate* such evolving standards that promote transitional justice and infra-democratic transitions.

8 Conclusion

I have sought to lay out different ways that the European Court of Human Rights can be seen as promoting 'transitional justice' and infra-democratic transitions, in states whose basic social structure is not fully just, or that fail to comply fully with those just institutions that are established. The ECtHR assists states establish normatively better laws and policies, and promoting better compliance rates with them in several ways. It acts as a gatekeeper to the EU and the Council of Europe, it addresses individual cases, and it interprets the European Convention on Human Rights in ways that arguably moves the member states in a normatively desirable direction. The member states of the Council of Europe are not fully just by plausible standards of justice, and thus other principles and policies may be called for than those justified in 'ideal theory'.

The Court may strengthen domestic judiciaries, and nudge them to secure human rights domestically. There are several ways the Court promotes such compliance; and several ways that the perspectives of transitional justice inform the interpretation of the ECHR. This is of course not to say that these features cannot be criticized. To conclude, note at least two controversial aspects of the Court's practice.

Firstly, the Court seems to assume that standards appropriate for 'ideal theory' also

⁶⁴ George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" (2010) 21 *European Journal of International Law* 509-41, 531.

⁶⁵ Yutaka Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry," in *The European Court of Human Rights*, ed. Andreas Follesdal, Birgit Peters, and Geir Ulfstein (Cambridge University Press, 2013).

should apply to states that suffer from large scale noncompliance, or from unjust institutions. To illustrate: the Court appears to hold that democratic modes of governance are helpful both *within* well-functioning human rights compliant states as a corrective device, *and* for improving on present injustice in member states. These assumptions may be correct, but the latter seems difficult to support in the absence of more empirical evidence.

Secondly, when the Court interprets the ECHR ‘dynamically’, its interpretations should clearly be subjected to careful scrutiny as regards which requirements should apply to states – recalling that the same convention must apply to quite well functioning democracies, and to states which quite weak democratic traditions and cultures. One issue where considerations of normative theory seem especially pertinent is as a check on ‘emerging consensus’ as the ECtHR observes. Agreement, even reasoned agreement, seems neither necessary nor sufficient to identify what should count as normative improvements. A check to see whether such an agreement moves toward a better order – because the norms seem more justifiable to all, or less objectionable to those who have the strongest reasons to object - seems to reduce this risk. I submit that the arguments and principles of normative theory may serve as helpful guidance for such deliberations. Reflections about what justice requires, and a cosmopolitan commitment to the political equality of all, may offer *some* help as the ECtHR seeks to assist states toward such honourable objectives. Some such guiding perspectives are not sufficient, but at least not redundant.