
A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine

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Introduction

One of the more contested interpretative practices of the European Court of Human Rights (ECtHR) is its sighting of an ‘emerging European consensus’ (EuC) and the implications that the Court draws. The Court sometimes claims ‘the existence . . . of common ground between the laws of the Contracting States’.¹ Such claims of a consensus, or sometimes just of an *emerging* consensus, may concern the policies, regulations or values in Europe on a particular issue. The claim plays two interrelated roles for the Court. It is said to guide the Court’s ‘dynamic’ interpretation of the European Convention on Human Rights (‘Convention’; ECHR). The findings of a consensus also lead the Court to restrict the *margin of appreciation* it grants a state in letting the domestic judiciary’s decision of a violation stand. One way this occurs is that the Court submits the arguments from the accused state to stricter scrutiny, if there is a consensus contrary to the position of the state.² The Court thus appears to be guided by viewing such a consensus as a signpost for a path the majority of Member States have chosen in the past. The consensus indicates the better, best or even correct way for other states.

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¹ *Rasmussen v. Denmark* (Appl. no. 8777/79), judgment, 28 November 1984, para. 15.

² For restricting the margin, for example, *Glor v. Switzerland* (Appl. no. 13444/04), judgment, 30 April 2009; for degree of scrutiny, cf. *Rasmussen v. Denmark*, para. 15.

However, appeals to an emerging consensus are often very vague, and the Court is often accused of a fluid mode of detecting and applying sightings of a consensus, finding it when it wishes and ignoring it where it sees fit. The Court also undertakes a dynamic interpretation independent of such a consensus, and the lack of such a consensus does not always lead the Court to grant a wider margin of appreciation. Consensus sightings therefore often function more as walking sticks that support what the majority of judges wanted to conclude anyway. A further risk is that the doctrine will lead the Court to fail to protect human rights as much as it should: if the lack of a consensus leads the Court to not find against the state, partly to avoid a public backlash, the human rights standards may be lowered.³

A specification of the EuC practice should provide a normative account of why and where the Court should draw on such sightings. The burden of argument rests with the inclusion of the EuC practice: unless it has good reasons in its favour, it should be abandoned. So, can either or both of these roles of EuC be justified? Second, if an EuC practice is to be kept, suggestions for its improvement should be guided by the normatively justifiable roles such a practice should play, be it as part of the Court's 'dynamic interpretation' of the Convention, or as a means to specify the margin of appreciation doctrine, or both. This requires closer reflection about which are sound reasons for the Court to appeal to EuC. Section 9.1 sketches the current practice of the Court. Section 9.2 explains why several critics claim that the EuC practice is too vague and otherwise problematic. Section 9.3 considers some of the most prominent arguments in favour of EuC, noting that several of these arguments fail to consider the peculiar subsidiary role of the human rights review by the ECtHR within the multi-level European legal order. In particular, its role is limited to interpret and adjudicate the Convention on Human Rights, and thereby secure and promote democracy and the rule of law – as stated in the preamble. Unlike the Court of Justice of the European Union, the ECtHR does not have an explicit mandate to promote convergence among domestic jurisdictions, nor should the ECtHR protect all rights agreed upon by a majority of states. Furthermore, arguments that the practice infuses some valuable democratic flavour to the dynamic interpretation seem misleading.

³ See, however, Section 11.3 by O. Bassok, who appears to disagree.

9.1 The EuC Practice

In order to assess the ECtHR's reliance on perceptions of an (emerging) EuC within the margin of appreciation doctrine, we need an account that is at the same time true to the practice and sufficiently charitable when that practice has been vague or inconsistent over time. The Court refers to such an EuC by a variety of different terms: 'international consensus among contracting states of the Council of Europe',⁴ 'any European consensus',⁵ 'common standard amongst Member States of the Council of Europe',⁶ 'common European standard'⁷ and 'general trend'.⁸ For our purposes, 'consensus' covers the gamut of terminological variety.

It is useful to distinguish the two roles that 'consensus' serves. The Court relies on it: (a) as a source for dynamic interpretation and (b) as part of a mechanism of self-restraint by the Court.

One main role of claims about a consensus concerns the Court's practice of a dynamic interpretation of the Convention. The Court itself explains that a perceived consensus sometimes justifies such interpretations:

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v. the United Kingdom*, (25 April 1978, § 31, Series A no. 26), the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked *to justify a dynamic interpretation of the Convention*.⁹

A scholar of the Court explains the process thus:

... the tribunals interpret the Convention as a modern document that responds to and progressively incorporates changing European social and legal developments. Toward this end, they search for the existence of right-enhancing practices and policies among the Contracting States that affect human rights. When these practices achieve a certain measure of uniformity, a 'European consensus' so to speak, the Court and

⁴ *Lee v. the United Kingdom* (Appl. no. 25289/94), judgment, 18 January 2001, para. 95.

⁵ *Evans v. the United Kingdom* (Appl. no. 6339/05), judgment, 10 April 2007, para. 45.

⁶ *T v. the United Kingdom* (Appl. no. 24724/94), judgment, 16 December 1999, para. 72.

⁷ *X., Y. and Z. v. the United Kingdom* (Appl. no. 21830/93), judgment, 22 April 1997, para. 44.

⁸ *Ünal Tekeli v. Turkey* (48616/99) [2005] 1 FCR 663; (2006) 42 EHRR 53 at 61, respectively. Cf. K. Dzehtsiarou, *European Consensus and the Legitimacy of the Strasbourg Court* (Cambridge: Cambridge University Press, 2015), section 2.2.1 for this overview.

⁹ *A, B & C v. Ireland* (Appl. no. 25579/05), judgment, 16 December 2010, para. 234, my emphasis.

Commission raise the standard of rights-protection to which all states must adhere. In this way the tribunals have expanded the Convention's reach to groups of individuals whom the drafters did not view as falling within the Convention's protective ambit.¹⁰

A second, related role for consensus arguments is within the Court's doctrine of the margin of appreciation. This doctrine applies to certain Convention rights and within certain limits.¹¹ The Court then defers to the national judiciary's assessment of whether the state is in violation of the Convention. When the Court detects a consensus or sees signs of a 'trend' or emerging consensus in principles, policies or regulation in the states under its jurisdiction, it may restrict the margin, or it may submit the arguments from the accused state to stricter scrutiny. Thus, the Court may look more closely at whether the domestic authorities have conducted proportionality tests to minimise restrictions on Convention rights while pursuing their objectives. In effect, it is determining whether the legislative process has been sufficiently deliberative, attending to alternative policies and their human rights impact.¹² Thus, Kleinlein notes that

in a set of cases in which the Court refers to European consensus in order to determine the range of the margin of appreciation, the Court also establishes a clear or at least implicit connection between procedural standards, in particular, the quality of parliamentary process, and the breadth of the margin of appreciation.¹³

So, when the Court observes a consensus, it explicitly goes beyond what de Londras holds is its desirable and proper function:

Key to this legitimacy-enhancing nature of European consensus is the Court's failure to discriminate between different kinds of law . . . It is not the job of the European Court of Human Rights to determine the quality of the politico-legal process that led to a piece of domestic law when

¹⁰ L. Helfer, 'Consensus, coherence and the European Convention on Human Rights' (1993) 133 *Cornell International Law Journal* 134.

¹¹ The Court has hardly ever applied the margin to the non-derogable rights to life (Article 2), against torture (Article 3) or to slavery or forced labour (Article 4), cf. A. Follesdal, 'Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty Over, or Has It Just Begun?', in O. M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (London: Routledge, 2016) 194.

¹² A. Follesdal, 'Appreciating the Margin of Appreciation', in A. D. Etinson (ed.), *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2017).

¹³ See Section 10.3 by T. Kleinlein.

sketching a picture of the European status quo for the purposes of identifying a consensus. In that context, all that matters is that the law is valid as a matter of domestic legal analysis; the ins and outs of its making are a matter for the domestic system to address.¹⁴

As a consequence, the Court sometimes – but not always – finds a violation when state practice runs counter to such a consensus.¹⁵ The Court may consider the existence of a consensus concerning interpretations of legal norms, but also concerning central concepts such as the beginning of life.¹⁶ Many of the early cases in which the Court has granted a margin of appreciation where it found no consensus concerned rights' restrictions based on a concern for public morals.¹⁷

These two roles of the consensus doctrine sometimes converge: when the Court perceives a consensus, it appeals to this in laying out its new interpretation *and* limits the range for not overriding the domestic authorities' assessment of whether there is a breach of the Convention.¹⁸ The consensus test the Court uses does obviously not require full unanimity – it is after all used to assess a state that diverges from the consensus. Rather, the Court identifies some extent of a perceived convergence among some states. The proportion of states that converge varies quite drastically. Early references to a consensus were often not based on much in the way of rigorous comparisons.¹⁹ To help the Court determine whether there is such a consensus, a research unit at the registry has increasingly provided comparative analysis, drawing on the expertise of lawyers trained in the different jurisdictions. The research unit explores the case law of several states, although seldom covering all

¹⁴ See Section 14.1 by F. de Londras.

¹⁵ *Tyrer v. the United Kingdom* (Appl. no. 5856/72), judgment, 25 April 1978; *Marckx v. Belgium* (Appl. no. 6833/74), judgment, 13 June 1979; *Evans v. the United Kingdom*; cf. L. Helfer and A.-M. Slaughter, 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Review* 273–392.

¹⁶ Cf. Section 14.2 by F. de Londras.

¹⁷ Restraining the freedom of the press (*Handyside v. the United Kingdom*, Appl. no. 5493/72, judgment, 7 December 1976); blasphemous films (*Wingrove v. the United Kingdom*, Appl. no. 17419/90, judgment, 25 November 1996); reassignment of transsexuals' sex after operation (*Cossey v. the United Kingdom*, Appl. no. 10843/84, judgment, 27 September 1990); or refusal of same-sex marriage (*Schalk and Kopf v. Austria*, Appl. no. 30131/04, judgment, 24 June 2010).

¹⁸ Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2001), p. 200.

¹⁹ P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in M. A. Guy Canivet and D. Fairgrieve (eds), *Comparative Law before the Courts* (London: BIICL, 2004), pp. 146–9.

forty-seven jurisdictions, although not in all cases in which the Court claims an emerging consensus.²⁰

9.2 Challenges to the Current Practice Concerning Consensus

Many authors, including those in this Part, explore but also criticise the Court's consensus doctrine. They consider how the Court determines such an emerging consensus, how it is used and the normative justifications of this practice.²¹ Frequent laments, also from the present authors, include that the doctrine is vague, indeterminate, inconsistent and arbitrary.²² To understand and assess these criticisms, we consider, in this section, what sorts of indeterminacy and inconsistency are said to occur. Section 9.3 considers the functions that are thought to justify the consensus doctrine and how such indeterminacy threatens these functions.

9.2.1 Which Rights?

It is difficult to discern which rights the Court interprets dynamically by means of the emerging EuC. Prominent examples include the freedom of expression (Article 10),²³ the respect for family life (Article 8 (1) regarding the decriminalisation of homosexual behaviour)²⁴ and the prohibition against discrimination (Article 14, e.g., regarding 'illegitimate' children).²⁵ On the other hand, a central issue concerning the right to life (Article 2), namely when life begins for purposes of regulating

²⁰ Dzehtsiarou, *European Consensus*.

²¹ Early contributions include H. C. Yourow, 'The margin of appreciation doctrine in the dynamics of European human rights jurisprudence' (1987) 3 *Connecticut Journal of International Law*; Helfer, 'Consensus, coherence'; H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Boston, London: Kluwer, 1996); E. Benvenisti, 'Margin of appreciation, consensus, and universal standards' (1999) 31 *International Law and Politics* 843–54. The present list benefits from T. Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court on Human Rights Is in Need of Repair and How It Can Be Done', in S. Flogaitis et al. (eds), *The European Court of Human Rights and its Discontents* (Cheltenham; Northampton, MA: Elgar, 2013), pp. 71–95.

²² See Sections 13.1 and 13.2 by D. Kagiarios and Section 12.4 by M. Amos; J. L. Murray, 'The influence of the European Convention on Fundamental Rights on community law' (2011) 33 *Fordham International Law Journal* 1416.

²³ *Murphy v. Ireland* (Appl. no. 44179/98), judgment, 10 July 2003.

²⁴ *Dudgeon v. the United Kingdom* (Appl. no. 35765/97), judgment, 24 February 1983, para, 60.

²⁵ *Marckx v. Belgium*.

abortion, is not interpreted dynamically on the basis of a consensus.²⁶ The Court seldom, if ever, grants a margin of appreciation for apparent violations of the non-derogable rights to life (Article 2) and against torture (Article 3), slavery or forced labour (Article 4).²⁷ Helfer notes that the consensus inquiry is only used regarding rights explicitly or implicitly protected by the Convention, but not entirely new rights.²⁸ One important kind of expansion seems to be new grounds for *unacceptable discrimination*, sometimes, but not always, with reference to Art 14. Thus, the consensus may support homosexuals (*Dudgeon*), 'illegitimate' families (*Marckx*), prisoners (*Hirst*), in favour of children (*Tyrer*), among others. I shall argue later in this chapter that this may be one part of the practice that may be sustained and that finds some support from the arguments considered 'later.'

9.2.2 *Emerging*'

The Court sometimes claims to observe an *emerging* consensus:

The Court cannot but note that there is an emerging European consensus towards legal recognition of same sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.²⁹

The Court often notes a 'clear tendency' or trend without specifying the evidence or considering possible counter examples. Thus, several scholars have argued that such sightings of an emergence are highly subjective and left to the judges' discretion.³⁰

²⁶ Cf. Chapter 14 by F. de Londras.

²⁷ Although the Court has referred to the margin of appreciation regarding positive obligations; with regard to some aspects of Art. 2 (*Budayeva and Others v. Russia*, Appl. nos. 15339/02; 11673/02; 15343/02; 20058/02; 21166/02, judgment, 20 March 2008, para. 156) and Art. 3 (*M.C. v. Bulgaria*, Appl. no. 39272/98, judgment, 4 December 2003; *Berganovic v. Croatia*, Appl. no. 46423/06, judgment, 25 June 2009, para. 80). I am grateful to Oddný Mjöll Arnardóttir for these references.

²⁸ Helfer, 'Consensus, coherence', 138, my emphasis.

²⁹ *Schalk and Kopf v. Austria*; see also *Christine Goodwin v. the United Kingdom*.

³⁰ L. R. Helfer and E. Voeten, 'International courts as agents of legal change: Evidence from LGBT rights in Europe' (2014) 68 *International Organization*, 77, 93.

9.2.3 *The Object of Consensus*

The object about which the Court observes a consensus, or the lack thereof, varies drastically. The Court is sometimes concerned with legislation and sometimes with principles. It also discusses consensus as regards more philosophical premises, for example, about when life begins.³¹ A further complicating concern is how this object is described. The Court has considerable discretion to decide about which issue on which there is a (lack of) consensus. This creates opportunities for strategic definitions. Thus, Amos noted that the Court in *Animal Defenders* looked at the consensus regarding the regulation of political advertising, rather than the consensus on a blanket ban, leading to a broad margin of appreciation.³² In other cases, the Court looked for whether there was a consensus on a blanket rule. An important case concerns prisoners' right to vote: is the issue to be compared whether *some* prisoners are prevented from voting or whether there is a *blanket ban* on prisoners' right to vote, or where there is *some* restriction on such a right? Such nuances were one crucial point of difference between the majority view and the dissenting opinion in *Hirst (II) v. the United Kingdom*.³³

9.2.4 *Percentage*

The Court appears to equivocate concerning the number of states required to determine a consensus. In *Sheffield and Horshman v. the United Kingdom*, the 'consensus' was shared by twenty-three of thirty-seven Member States, yet was not found to be decisive. In *Hirst (II) v. the United Kingdom*, the Court agreed that thirteen states have similar prohibitions, yet held that a lack of consensus should not determine the case. As de Londras discusses in this volume, the Court did not regard a consensus on abortion as decisive in *A, B & C v. Ireland* – although abortion is permitted in forty-three of forty-seven states.³⁴ The ambivalence leaves the Court open to suspicion of bias.³⁵

³¹ *Vo v. France* (Appl. no. 53924/00), judgment, 8 July 2004.

³² See Section 12.4.1 by M. Amos.

³³ *Hirst v. the United Kingdom (No. 2)* (Appl. no. 74025/01), judgment, 6 October 2005, para. 81.

³⁴ See Section 14.2 by F. de Londras.

³⁵ Dzehtsiarou, *European Consensus*, chapter 3.

9.2.5 Sources

The Court appears to look more or less broadly for indications of a consensus. No clear rationale is evident for why and when it considers questionnaires, legislation, recommendations by the Council of Europe (CoE) or international reports and conventions – some of which may not have been ratified by a majority of the relevant states.³⁶ It is not clear how the Court determines the scope of relevant sources. Thus, reiterating a point de Londras makes in this volume, it is reasonable to consider whether domestic referendums might also count as expressions of consensus.³⁷

A related concern is the jurisdiction of the sources that the Court uses. In the *Goodwin* case, the Court went beyond referencing (a few) European states to also claim an international consensus including Australia and New Zealand. Kagiros similarly notes that the Court refers to international sources in cases concerning the Roma but not in cases regarding same sex marriage.³⁸ The Court sometimes refers to international law, calling it *relevant*,³⁹ and sometimes, but not always, seems to put greater weight on such sources than on a consensus among European states.⁴⁰ In partial defence, it may be argued that some such references are not part of the consensus practice, but are rather attempts at a systematic integration in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which judges should take account of the relevant rules of international law.⁴¹ Another hypothesis might be that the Court looks more broadly for a consensus among international *or* European sources when it wants to enhance the application of the right to non-discrimination. Kagiros in this volume suggests that the Court may go beyond Europe to the developing norms

³⁶ G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in A. Follesdal et al. (eds), *The European Court of Human Rights* (Cambridge: Cambridge University Press, 2013), pp. 106–41; Dzehtsiarou, *European Consensus*, chapter 3.

³⁷ See Section 14.3 by F. de Londras.

³⁸ See Sections 13.3.1 and 13.4.1 by D. Kagiros.

³⁹ *Scoppola v. Italy (No. 3)* (Appl. no. 126/05), judgment, 22 May 2012, paras 40–4 and 95.

⁴⁰ In favour of international sources in the face of lack of consensus, *D. H. and others v. the Czech Republic*, (Appl. no. 57325/00), judgment, 13 November 2007; in favour of EuC, *Kafkaris v. Cyprus* (Appl. no. 21906/04), judgment, 12 February 2008.

⁴¹ V. Tzevelekos and P. Kapotas, 'Book review; K. Dzehtsiarou, "European consensus and the legitimacy of the European Court of Human Rights"' (2016) 53(4) *Common Market Law Review* 1145, 1147.

internationally when the applicant would be better served by the latter.⁴² Such attempts at finding patterns are interesting but do not do much to enhance the consistency of the case law.

9.2.6 *Contested Decision Tree*

Finally, there are two concerns of a more procedural kind regarding the role of consensus in the Court's argument. First, the Court does not (yet) seem to have a settled understanding of when and how an emerging consensus should enter the reasoning leading to a judgment. Thus, one reconstruction that appears to capture much of the practice of the Court goes along the following lines:⁴³

- 1) Is the claimed violation of a right covered by the Convention as dynamically interpreted in light of the consensus? If 'No', decide with the state. If the answer is 'Yes', go on to ask
- 2) Is the restriction of the right possibly a permitted derogation under Articles 8–11? If 'No', make a judgment against the state, and if 'Yes', go on to ask
- 3) Has there been a domestic good faith proportionality test? If 'No', continue to make a judgment on the merits of the case, and if 'Yes', go on to ask
- 4) Is there a consensus on this issue? If 'Yes', submit the proportionality test to strict scrutiny and grant a narrow margin of appreciation if at all. If 'No', go on to
- 5) submit the proportionality test to less strict scrutiny, possibly granting a wider margin of appreciation.

Note, in particular, the sequence of 3 before 4, that is, that a state must have carried out a proportionality test in order to be granted a margin of appreciation at all. Note that, on this account, whether a piece of legislation is based on a referendum and thus arguably is even more an expression of the democratic will does not automatically count in its favour.⁴⁴ What matters to the Court is whether alternative policies have been assessed, including the impact on the rights of all affected. This is not necessarily the case in a referendum. Thus, what appeared to matter

⁴² See Chapter 13 by D. Kagiarios.

⁴³ For simplicity of presentation, I omit other cases in which consensus plays a role in granting a margin of appreciation, for example, for certain 'balancing' between rights.

⁴⁴ Cf. Section 14.3 by F. de Londras.

more for the Court in the Irish case on abortion was that there had been a 'lengthy, complex and sensitive debate in Ireland [...] as regards the content of its abortion laws'.⁴⁵

This necessary condition is made fairly explicit in some judgments, for example, in *Animal Defenders*.⁴⁶ However, the Court has also diverged from this practice, more so earlier in its history. In *Schalk and Kopf v. Austria*, the majority found in favour of the state because there was no consensus on the topic – even though there was no evidence of a proportionality test.⁴⁷ Judges Spielmann, Jebens and Rozakis dissented, because they assumed the necessity of step 3 before step 4:

[I]n the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the 'existence or non-existence of common ground between the laws of the Contracting States' is irrelevant as such considerations are only a subordinate basis for the application of the concept of the margin of appreciation.⁴⁸

9.2.7 *Consensus – But Still a Margin of Appreciation*

A final area in which the consensus practice is unclear concerns how the Court will assess the arguments a state presents when its position is at odds with the consensus. The judges are guided by a perceived consensus or the lack thereof, but their decision is not determined by it: consensus is a *rebuttable* presumption in favour of a particular interpretation of the Convention, and the Court may maintain an interpretation even in the face of a lack of consensus.⁴⁹ Some propose a (non-exhaustive) list of when the Court may deem a trend insufficient:

[If] the tribunals can demonstrate that they lack the institutional competence to adjudicate a particular category of disputes; and second, where the less progressive nations can be separated from their more progressive counterparts by a distinction that divides the Contracting States along common law/civil law lines . . . or according to geo-political sub-regions.⁵⁰

⁴⁵ *A, B & C v. Ireland*, 239; cf. Chapter 14 by F. de Londras.

⁴⁶ *Animal Defenders International v. the United Kingdom* (Appl. no. 48876/08), judgment, 22 April 2003.

⁴⁷ For example, as noted by D. Kagiros (Chapter 13).

⁴⁸ *Schalk and Kopf v. Austria*; cf. Letsas, 'The ECHR as a Living Instrument'; J. Kratochvil, 'The inflation of the margin of appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324–57.

⁴⁹ Dzehtsiarou, *European Consensus*; cf. Tzevelekos and Kapotas 'Book Review'.

⁵⁰ Helfer, 'Consensus, coherence'.

The conclusion is that several important aspects of the consensus practice remain woefully underspecified. Further clarity must be guided by a normative account of which role a consensus *should* play – if it indeed should be kept. We now turn to consider critically which arguments can be sustained in favour of these roles of a consensus.

9.3 Proposed Arguments in Favour of Consensus

Several arguments have been offered in favour of the roles of a perceived consensus by the Court. Unfortunately, some of them have been found wanting.

9.3.1 *Adds Social Legitimacy*

There are a few ways that the consensus doctrine may be thought to add *social* legitimacy. That is, public support of the Court's judgments may thereby increase, based on 'compliance constituencies'⁵¹ beliefs that the Court exercises normatively legitimate authority. The doctrine may thus help generate its own support for the Court.⁵²

Bassok notes that the consensus doctrine – if specified appropriately – will reduce the risk that the Court will lose public confidence, because it seeks to align itself with public opinion.⁵³ This is, of course, not to say that the judgments are thereby more sound, but only that, in this way, the Court maintains its social legitimacy. Note that if this is a successful argument, the sources of consensus may have to go beyond the expressions of governments' views and perhaps include referendums⁵⁴ and public opinion polls.

Against this argument, however, note that the most important target constituency in the short-term is the violating government and the population in that state. A crucial point in this argument is thus whether those constituencies will come to be convinced about the legitimacy of the Court by becoming aware of other European countries' convergent practices and by the impact of such a (lack of) consensus. This may occur, but is not obvious. Consider, for instance, the risks that Amos

⁵¹ X. Dai, *International institutions and National Policies* (Cambridge: Cambridge University Press, 2007).

⁵² I owe this observation to Andrew Williams.

⁵³ See Sections 11.2.1 and 11.2.2 by O. Bassok.

⁵⁴ See Section 14.3 by F. de Londras.

identifies, that is, a population may react against the Court's finding of a violation not only because the Court is riddled with foreign judges but also because of its reasoning: the consensus of a range of foreign citizens in different countries, with no understanding or respect for the unique features of the state in question.⁵⁵ And inversely, reliance on the lack of consensus may reduce the perceived legitimacy of the Court in the eyes of applicants and non-governmental organisations – unless there are convincing reasons for the Court to consider such a lack of consensus.

9.3.2 *Curbs Judicial Discretion*

One frequently offered argument in favour of the 'emerging consensus' practice is that it provides a constraint on the Court's discretion in its dynamic or 'evolutive' interpretation of the ECHR. This may also enhance perceptions of legitimacy in the eyes of the states and other constituencies by assuring them that the Court will not run wild. This constraint even appears to carry some democratic credentials. Consider first the constraint argument.⁵⁶

The interest in checking the Court judges' discretion is clearly appropriate. Some control is needed to avoid subjecting states and individuals to the arbitrary discretion of the Court – that is, to avoid *domination* in the republican sense in political philosophy.⁵⁷ The risk is especially appropriate because of two aspects of the Court's practice. It engages in 'dynamic interpretation', often beyond what the states explicitly consented to and sometimes even contrary to their express will.⁵⁸ Second, when the Court sometimes grants states a margin of appreciation, there is a risk that the Court violates rule-of-law standards and is more lenient toward 'strong' states whose displeasure or even disobedience would lead to unfortunate confrontations and the loss of the Court's perceived

⁵⁵ See Section 12.3.2 by M. Amos.

⁵⁶ Presented, for example, in Section 14.1 by F. de Londras and in Section 11.3 by O. Bassok; K. Dzehtsiarou and P. Repyeuski, 'European Consensus and the EU Accession to the ECHR', in V. Kosta et al. (eds), *The EU Accession to the ECHR* (Hart, 2014), pp. 309–24; Zwart, 'More Human Rights'.

⁵⁷ P. Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 139–60; P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

⁵⁸ *Young, James and Webster v. the United Kingdom* (Appl. no. 7601/76); 7806/77 (ECtHR 13 August 1981), cf. Letsas, 'The ECHR as a Living Instrument'.

standing. In both these cases, appeals to a consensus might serve as a check on the discretion of the Court, because its interpretation and application of the Convention are shared by many European states.

Against this argument, I submit that the current consensus practice of the Court does not provide such checks. The consensus is too much in the eyes of the majority of the Court and is faced with contrary claims even by dissenting judges. It is for the majority of judges of the Court to determine the topic, value or standard, using European or international sources, as well as the number of states required for a finding of consensus. One implication is that *if* consensus is to serve as a check, it must be made much more precise. In addition to the points previously mentioned, one important issue would be to clarify which state regulations are not suitably monitored and reviewed by a regional human rights body – the regulations' importance to individuals' lives notwithstanding. To illustrate, such considerations may count against a review by the ECtHR of the states' regulation of rights concerning abortion.⁵⁹ A second clarification concerns which rights, or which core rights, are so central that their violations are not to be determined by domestic authorities, *regardless* of the existence of a consensus or the lack thereof.

9.3.3 *Some Sort of Tacit Consent*

The consensus test is not only said to constrain the judges' discretion but is also alleged to introduce a 'democratic' element. The Court engages in 'majoritarian activism' by being constrained by the 'tacit consent' of a majority of states.⁶⁰ Dzehtsiarou holds that 'consensus integrates democratic decisions into the decision-making of courts of constitutional review, thus improving their legitimacy'.⁶¹ In particular, the European consensus amounts to state consent to dynamic interpretations: '[T]hrough consensus, the Contracting Parties implicitly consent to a particular meaning of the right in question'.⁶²

⁵⁹ Discussed in depth by F. de Londras, Section 14.2.

⁶⁰ See Section 10.2.1 by T. Kleinlein and Chapter 11 by O. Bassok. Cf. A. Stone Sweet and T. L. Brunell, 'Trustee courts and the judicialization of international regimes: The politics of majoritarian activism in the European Convention on Human Rights, the European Union, and the World Trade Organization' (2013) 1 *Journal of Law and Courts* 61–88; Dzehtsiarou, *European Consensus*.

⁶¹ Dzehtsiarou, *European Consensus*.

⁶² *Ibid.*

Indeed, one might imagine ways to strengthen this ‘shared enterprise’ of dynamic interpretation among the Court and the states.⁶³ There might be procedures put in place whereby the Court would explicitly ask domestic parliaments or the Parliamentary Assembly of the CoE to discuss the issue, issuing a preliminary consensus statement – and possibly even add a Protocol on the interpretation of a particular issue.

Against this argument, and even against such innovative proposals, I submit that the consensus practice as it stands is not a suitable mechanism, either in principle or in practice. Consider first one objection whose impact may be overstated. Several authors have noted that there is something counterintuitive about relying on a majority rule in adjudicating human rights.⁶⁴ Kagiarios in this volume notes:

Particularly for groups that have been subjected to unfavourable treatment and have historically withstood injustice and discrimination, EuC seems to be a counterproductive tool for determining their rights.⁶⁵

In response, the consensus practice only superficially conflicts with the counter-majoritarian role of human rights. The role of consensus is to update and expand the interpretation of the Convention rights. Thus, the consensus is among states whose majority-backed politicians agree on similar *self-constraints* in their treatment of individuals. It is when such *self-binding* is broadly shared that it enters into the dynamic interpretation. Two caveats are nevertheless important. First, the majoritarianism entails a risk that some discriminated groups will not be discovered through this mechanism and thus risks underreporting. Second, this risk is avoided only in so far as the dynamic interpretation always moves in the direction of *expanding* the set of groups to be protected by the Convention. When the dynamic interpretation concerns how to ‘balance’ Convention rights against each other, the risk is still there, as is the risk of a majority of states increasing discrimination against certain groups. But such reversal appears not to have occurred:

Although the court regularly overturns precedent to raise standards of rights protection under the convention, the court has never reversed a

⁶³ See Chapter 10 by T. Kleinlein.

⁶⁴ Cf. Chapter 11 by O. Bassok; see also Letsas, ‘The ECHR as a Living Instrument’, p. 124; cf. G. Letsas, ‘Strasbourg’s interpretive ethic: Lessons for the international lawyer’ (2010) 921 *European Journal of International Law*, 509, 540.

⁶⁵ See Section 13.2 by D. Kagiarios.

precedent in order to reduce the level of protection. Once national regulatory autonomy has been lost in a given field, states have never regained it.⁶⁶

However, the role of consensus may easily turn in the direction of less protection of minorities' rights – unless the consensus practice can be ensured against such developments.

Consider now other more worrisome objections against the 'democratic' argument for consensus.

First, the fact that *other* democracies have decided their legislation democratically does not deflect the criticism that the domestic democratic decision in one state is overturned by a body not directly authorised by *that* population subject to the rules. Indeed, such a role may provoke a backlash in a domestic population. This may occur even if there was a more specific discussion on the precise topic in all the domestic parliaments.⁶⁷

Second, it is appropriate to question the sense in which the states can be taken to have expressed tacit consent at all, by issuing legislation or policies the Court draws on when claiming to see a trend. As noted above, the phrasing of the object matters crucially – for example, whether there are any constraints on prisoners' voting rights or whether there is a blanket ban. To interpret states as expressing tacit consent to such formulations seems to overstretch consent.

Third, there is no reason to assume that state legislatures have intended both that their decision should regulate their treatment of their own citizens and that it should *also* serve as a preferred model for all other CoE Member States. To the contrary, legislatures may hold that their main task is to regulate as best they can, given the peculiarities of their own territory, their culture and their citizens' preferences. This objection would not hold against specific discussions initiated in all parliaments asking whether the Court should interpret the Convention in one particular way.

The upshot is that this argument in favour of consensus based on democratic majoritarianism seems ill founded. It may create an impression of constraint through a democratic majoritarian procedure, but its role as a check may be plausible only if the consensus practice is made more precise. The argument that it infuses some degree of democratic check on the Court's dynamic interpretation thus seems misleading.

⁶⁶ Stone Sweet and Brunell, 'Trustee courts', 81.

⁶⁷ See Chapter 12 by M. Amos and Chapter 14 by F. de Londras.

Such an *impression* of democratically imposed constraints is specious. If the Court gains social legitimacy by such misleading references to a consensus, this is unfortunate.

9.3.4 *Predictability and Conflict Avoidance*

The consensus practice arguably helps stabilise norms and expectations, while avoiding confrontations with states.⁶⁸ These benefits accrue from this particular form of reciprocal ‘dialogue’ between the ECtHR and the national authorities.⁶⁹ On the one hand, the Court’s identification of an emerging European consensus serves to warn states of future restrictions on their room for legislation and regulation. This helps reduce or remove future actual conflict.⁷⁰ Indeed, the Court may in effect warn even in cases in which the Court does not find a violation. Finding a non-violation in the face of an emerging consensus, such as in *Schalk and Kopf v. Austria*, ‘indicates that laggard states will not be able to maintain the status quo’.⁷¹

On the other hand, if the ECtHR claims to observe an emerging trend, states’ reactions may indicate to the Court whether the dynamic interpretation is likely to meet with widespread objections – thus challenging its longer-term social legitimacy.⁷² A dialogue of this kind may be visible in the *Scoppola v. Italy* case, in which the United Kingdom intervened on behalf of Italy, arguing against the Court’s refusal to grant a margin of appreciation regarding prisoners’ voting rights in that case – challenging the majority opinion in the similar case against itself, *Hirst (II) v. the United Kingdom*.⁷³

This defence of the consensus practice seems plausible but weak. In its favour, the possibilities of such dialogue and mutual warnings are welcome – although such consensus will not always reduce tensions, especially not if domestic actors are deeply resistant to change.⁷⁴ And there is a risk that the Court will use such signals to treat powerful states more leniently. This may in turn reduce the social legitimacy of the Court in

⁶⁸ See Section 11.3 by O. Bassok; Dzehtsiarou, *European Consensus*, p. 132.

⁶⁹ See Sections 10.2.1 and 10.2.2 by T. Kleinlein.

⁷⁰ See Section 11.3 by O. Bassok.

⁷¹ Stone Sweet and Brunell, ‘Trustee courts’, 79–81.

⁷² Dzehtsiarou, *European Consensus*.

⁷³ *Scoppola v. Italy* (No. 3), 75–80; *Hirst v. the United Kingdom* (No. 2).

⁷⁴ See Chapter 12 by M. Amos.

the eyes of non-government compliance constituencies.⁷⁵ The Court must be prudent in at least understanding when it will meet strong and principled resistance by some governments and other constituencies, without sacrificing its role in upholding the Convention in the eyes of other constituencies.⁷⁶

9.3.5 *Epistemic*

One proposed argument for the Court's use of observed trends toward a EuC is epistemic: convergence is evidence of a correct way to interpret and secure the Convention rights. The doctrine allows the ECtHR to better track the truth. One argument sometimes offered in favour of this claim is Condorcet's 'jury theorem'.⁷⁷ Condorcet's theorem holds that when several independent experts vote on which of two competing claims are correct, assuming that each is more likely to be correct than not, the larger a majority for one claim, the more likely it is to be correct.

Against this application of Condorcet's jury theorem to alleged violations of the Convention, note two important disanalogies. First, for Condorcet's original theorem to apply to the consensus among states, one must assume independence among the domestic decisions. This assumption fails to hold, in part, because European states do look to each other's jurisprudence in law making. Indeed, the argument for consensus in promoting predictability assumes that the Court actually fosters such causal effects among the states.

A further difference concerns the understanding of 'correct' answers. Helfer holds:

Where states have adopted a variety of responses, the Court and Commission should respect their experimentation and encourage diversity by not imposing a single solution, *at least until concordant state practice proves such a measure to be clearly preferable to others.*⁷⁸

⁷⁵ Cf. *ibid* Section 9.1.

⁷⁶ K. Henard, 'How the European Court of Human Rights' concern regarding European consensus tempers the effective protection of freedom of religion' (2015) 4 *Oxford Journal of Law and Religion* 398–420.

⁷⁷ Marquis de Condorcet, 'Essay on the application of analysis to the probability of majority decisions' (1785); E. A. Posner and C. R. Sunstein, 'The law of other states' (2006) 59 *Stanford Law Review*; cf. the Section 11.3 by O. Bassok.

⁷⁸ Helfer, 'Consensus, coherence', 160.

Condorcet's theorem holds in the first instance for choices among two alternatives, only one of which is correct. The argument has been shown to also hold for the choice of the unique correct answer among several alternatives.⁷⁹ I submit that the theorem nevertheless does not apply to how the ECtHR should assess states' alternative legislation.

It is not obvious that the ECtHR should interpret *all* rights dynamically in the direction in which there happens to be consensus among several states. This would seem to ignore the complex, subsidiary role of the ECtHR within the multilevel legal order. The argument for regional human rights review does not support such a general claim. One reason is that the objective of the ECtHR is not, and arguably should not, be to *harmonise* the legislation of the various domestic jurisdictions in order to make them similar. Instead, it should help secure certain human rights, thus constraining the varieties of domestic legislation. From this perspective, it remains unclear why an actual emerging trend in legislation among some states should reduce the margin another state is granted.

Such claims seem particularly inappropriate for issues for which one state faces its own peculiar dilemmas in balancing two Convention-protected rights against each other, and for which it has established its own routines to handle them – routines that hitherto have appeared unobjectionable, until other states converge. Thus, Judge Geoghegan, in a concurring opinion in *A, B & C v. Ireland*, argues that states have different public interests and may therefore strike different 'balances' among rights – and therefore fail to express any consensus.⁸⁰ A less controversial example may be the varieties of models in Europe that structure the relationship between the majority's religion and the state, ranging from strong secularism in Turkey to an established church, for example, in Great Britain.⁸¹ It remains unclear why the Convention rights of religious minorities in states with an established church should be dynamically interpreted so as not to have been violated, yet if the

⁷⁹ C. List and R. Goodin, 'Epistemic democracy: Generalizing the Condorcet jury theorem' (2001) 9 *Journal of Political Philosophy* 277–306.

⁸⁰ *A, B & C v. Ireland*.

⁸¹ F. Tulkens, 'The European Convention on Human Rights and church-state relations: Pluralism vs pluralism' 30 *Cardozo Law Review*, 2575, 2577; *Darby v. Sweden* (European Commission on Human Rights), para. 45; discussed in C. Evans and C. A. Thomas, 'Church–state relations in the European Court of Human Rights' (2006) *Brigham Young University Law Review* 699, 707.

Court detects a convergence among European states away from such a model, those rights should be interpreted as being violated.⁸²

Note that some uses of consensus may survive this anti-harmonisation argument. In particular, it may be relevant against proportionality arguments by a state that its own rights-violating policies are the *only* way to 'balance' the rights against important social objectives or other rights. For the Court to point out that there is a trend toward other institutional solutions seems to be a sound way to discount such arguments. However, this is not the ordinary way that consensus arguments are used. The role of convergence toward correct answers may be sustained against these objections if the consensus concerns standards for review, rather than particular pieces of legislation – for example, what counts as religious freedom or interference in family life.

Another important role of consensus not affected by this objection concerns its role in discovering hitherto overlooked historic discrimination against groups of individuals – be they children born out of wedlock, gays, lesbians, transsexuals, Roma or prisoners. When several states make such discoveries, the trend may seem to be evidence in favour of the Court protecting them against discrimination – while allowing the states discretion regarding how to remove the discriminatory practices out of respect for the variety of institutions and history.

9.4 Conclusion

The roles of the ECtHR in the identification of an emerging EuC are vague and contested. The discussion of arguments offered in favour of relying on such a consensus in the dynamic interpretation of the Convention and in granting the states a narrower margin of discretion when there is such a consensus yields some preliminary conclusions. They should inform the requisite further specification of that practice.

From a 'constitutional' perspective, we should welcome formal and informal modes of checks and constraints on the discretion of the ECtHR, both in its dynamic interpretation of the Convention and in its doctrine of the margin of appreciation. Furthermore, the Court's identification of an *emerging* consensus serves to enhance predictability and may help avoid some unnecessary confrontations with the states. Thus, such a perceived consensus may be one helpful constraint that also

⁸² Evans and Thomas, 'Church–state relations', 706.

stabilises expectations, but only if that practice is made drastically more specific as regards the rights to which it applies, the object of comparison, the extent of consensus, the range of sources and how to identify the 'trends' of such a consensus. Absent such specification, claims that consensus serves as a constraint would appear to be a sham. The consensus doctrine may then instead reduce the credible role of the Court in monitoring and interpreting the Convention. Its normative and social legitimacy are both at risk.

As regards the reasons in favour of this sort of check on discretion rather than others, some arguments have been found wanting. Some of the weaknesses of the arguments are due to the failure to consider the peculiar subsidiary role of the human rights review by the ECtHR within the multi-level European legal order. Convergence among domestic jurisdictions is not the proper objective, nor should the Court protect all rights agreed upon by a majority of states. Moreover, claims that the consensus practice infuses some valuable democratic input or check on the process seem misleading. Similarly, some epistemic arguments seem overdrawn. Such limitations notwithstanding, two upshots may be that the consensus practice may be more appropriate as regards identifying standards and norms rather than concrete legislation and discoveries by several states concerning protection against discrimination for groups hitherto overlooked. These conclusions should inform the further specification of the Court's practice of relying on the identification of an emerging EuC. Such normatively informed and reasoned clarification is sorely needed as the Court continues to pursue its important objective of promoting human rights compliance by the Member States of the CoE.