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The 'Consensus Approach' of the European Court of Human Rights as a Rational Response to Complexity

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1. Introduction

The present chapter uses complexity theory to argue that the so-called 'consensus approach' of the European Court of Human Rights (henceforth 'the Court' or 'ECtHR') can be a rational response to the cognitively demanding task of interpreting and applying the European Convention of Human Rights (henceforth 'the Convention' or 'ECHR') to member states of the Council of Europe. The chapter begins by setting the stage in two ways. First, drawing on recent literature on the subject, I provide a succinct sketch of a number of complexity theory concepts and argue that they can be relevant to the study of the ECHR. Second, I briefly present the consensus approach and some of the criticisms that have been addressed against it, with specific reference to the moral reading of the Convention. The moral reading of the ECHR, associated with Ronald Dworkin's legal interpretivism and defended by leading commentators such as George Letsas (Letsas 2007), is one of the most forceful sources of criticism of the consensus approach. It is also an independently plausible and sophisticated theory of interpretation of the ECHR. Thus, using complexity theory to show that, despite initial appearances, the moral reading of the Convention could be compatible with the consensus approach is an interesting result in itself.

I aim to do this in the main body of the chapter by first sketching the decision problem that the Court faces in a number of hard cases. These involve human rights review of state measures emerging through complex patterns of institutional interaction at the domestic level. I then provide an outline of a number of constraints that limit the epistemic capacity of the ECtHR and can spawn uncertainty about the correct outcome.

The difficulty specifically stems from the combination of complexity with limited epistemic resources. Next, supposing for the purposes of my argument that the moral reading of the Convention is the correct theory of interpretation of the ECHR, I claim that, under circumstances of uncertainty, consensus can best be understood as a reasoning strategy, and not as a criterion of truth about ECHR rights. It is thus not necessarily incompatible with a moral reading of the Convention. Last, I suggest that, *qua* reasoning strategy, the consensus approach could perhaps be best understood and assessed as a collective intelligence device. Throughout, the chapter is exploratory rather than conclusive. Sketching a possibility is a long way from defending it against all, or even the most important, objections. My main goal, rather, is to make conceptual space for further and more detailed future work along the lines suggested here.

2. Setting the stage (a): complexity theory, domestic legal systems and the ECHR

The theory of 'complex adaptive systems' or simply 'complexity theory' roughly designates a family of approaches that initially emerged in natural sciences such as ecology and neuroscience to explain ways in which patterned order could emerge from the unplanned interactions of a number of heterogeneous agents or elements, be they individual neurons vis-à-vis the brain or colonies of insects (Wheatley 2016: 581 and 587-588; Page 2010; Ruhl 2008). One of the most important guiding ideas behind complexity approaches is the recognition that the state of such systems is not reducible to that of their constitutive elements or agents, the system being 'larger than the sum of its parts' (Wheatley 2016: 587). Due to the success of complexity approaches in accounting for the function of such natural systems, the approaches were subsequently used to shed light on social systems presenting similar attributes, such as economies, domestic political systems or systems of states (Page 2010; Wheatley 2016). Importantly, there is also now an emerging literature that applies complexity theory to domestic legal systems and to international law (Wheatley 2016: 580).

Whilst there is no canonical definition of complexity (Wheatley 2016: 589), there is broad agreement that a given system, be it natural or social, can be considered *complex* as opposed to merely complicated (Page 2010: 7) when (at least some of) the following features are present (Page 2010; Wheatley 2016). First, the system involves the interaction of a multiplicity of heterogeneous elements or agents. Second, the system is open to an environment that exists outside of it. Third, agents can adapt their behaviour on the basis of feedback they receive from other agents or from the environment of the system. Fourth, because of heterogeneity and adaptation, the system *qua* system can have properties which are 'emergent' in the specific sense that they supervene upon but are not reducible to any of the properties of the individual agents composing the system. Fifth, systems may achieve various states of 'stable disequilibrium' and are to this extent 'self-organising'. Importantly, this means that the structure of complex systems can sometimes achieve a level of spontaneous stability, i.e. stability that is not the result of a 'central controller' but, rather, the patterned result of the numerous interactions between its constitutive agents. Equally importantly, such stable states are temporary, insofar as they are continuously challenged from agents under pressures by the system's environment. Sixth, emergent properties as well as temporary states of stable disequilibrium of a system may change in 'non-linear ways', i.e. in ways which are not the direct consequence of the behaviour, intended or otherwise, of any individual agent. As a result, individual behaviours appearing insignificant or innocuous may have wide systemic impact in ways difficult to predict in advance. Seventh, some changes of the emergent properties of the system become practically irreversible because of path-dependence mechanisms that steer and 'lock in' the system towards one particular direction.

Even this brief glance at some generic concepts from complexity theory suffices to indicate their potential fruitfulness when it comes to understanding the relationship of the ECHR with domestic legal systems. For the purposes of the present chapter, in particular, two aspects are essential. The first is to do with the fact that domestic legal systems are complex in the sense roughly specified above. To begin with, they are the product of the interaction of a multiplicity of heterogeneous agents who can adapt their behaviour to

that of other agents within the system. This is especially the case insofar as distributions of power allow some agents to block or alter the decision made by other agents. As Adrian Vermeule puts it, under these conditions law is the product of the concerted action of aggregates of individuals (which comprise institutions), as well as of nested aggregates of aggregates (relationships between institutions themselves) (Vermeule 2012: chapter 1). The solution provided to some issue under domestic law can thus be an emergent property of the system in the sense that it is not necessarily reducible to the action or intention of any one agent within the system. Moreover, legal solutions to issues are frequently merely the outcome of temporary stable disequilibria, apt to change under a different configuration of interactions on the part of the agents composing the system. Last, changes to such solutions are prone to phenomena of path-dependence in the sense that it may be much more costly or practically impossible to revert the system back to its prior state once changes have taken place.

The second aspect is to do with the fact that the ECHR *itself* can be understood as a system prone to complexity effects. Thus, and in a non-exhaustive manner, domestic agents may adapt their behaviour to accommodate decisions of the ECtHR in potentially disruptive ways through, for example, strategic interaction, which may result in the system having emergent properties not intended by any one agent. Likewise, the stability of the system may be the result of a temporary, stable but dynamic disequilibrium resulting from the interactions between the Court and nested aggregates of domestic agents or even between individual judges composing the Court.

An important premise of this chapter is that both aspects, i.e. those pertaining to the complexity of domestic legal systems and those to do with the ECHR itself as a complex system, can affect the review of state practices with regard to their compatibility with the Convention in a number of important ways. As already indicated, it is not my ambition to analyse or even outline all of these ways. Instead, I shall draw out some of the

consequences of complexity with regard to the more specific issue of the so-called 'consensus approach' used by the ECtHR, perceived as a reasoning strategy.

3. Setting the stage (b): the moral reading of the ECHR, the consensus approach and its criticisms

With these preliminary points concerning complexity theory in place, I now move on to outline the approach of interpretation of the ECHR that I shall assume throughout the chapter. Following Letsas (Letsas 2013:122-141) and Dworkin (Dworkin 1996), I shall call it 'moral reading' of the Convention. The approach draws on Dworkin's legal interpretivism to claim that objective moral considerations about the point of abstractly formulated ECHR rights necessarily figure among the truth conditions of propositions about the content of those rights. In his book-length defence of the moral reading of the Convention (Letsas 2007), Letsas suggested that the abstract moral language of the ECHR lends itself quite naturally to such a rendering. The main idea is that applying the Convention's abstractly formulated rights to particular cases necessitates specification of their content through an interpretation of the moral values underpinning and justifying these rights. Furthermore, and as a matter of substantive political morality, Letsas favours a liberal egalitarian theory of Convention rights, which is robustly anti-perfectionist and anti-majoritarian (Letsas 2007, chapter 5). Under such a theory, the purpose of ECHR rights is to shield individuals from the hostile preferences of majorities in a wide variety of situations. Within this picture, the Court successfully discharges its role by acting as an international guardian of equal individual liberty whenever the judicial institutions of Contracting States have failed themselves to accomplish this essential task.

Letsas plausibly maintains that the Court's interpretive practice provides sufficient evidence of endorsement of the moral reading (Letsas 2007, chapter 3). Indeed, through its 'autonomous concepts' and 'living instrument' approaches, the Court has opted for a purposive interpretation of the Convention, relatively detached from Contracting States'

understandings of ECHR rights. Especially in recent years, Letsas convincingly contends (Letsas 2013: 115-122), the Court's practice seems to aim at discovering the objective moral truth about the content of ECHR rights. Importantly, Letsas argues, such an approach depends on substantive moral considerations and not on Member States' shared understandings. Thus, on the moral reading, the sheer fact that a majority of States happens to share a moral view does *not* make that view true. Accordingly, the goal is to establish the *objective* content of Convention rights, which is not reducible to the content that Contracting States merely believe these rights have (Letsas 2004).

One central point of contention addressed by the present chapter is whether the moral reading of the ECHR is consistent with the so-called 'consensus approach' adopted by the Court. In order to tackle it, we must have some idea of what the approach entails (for an exhaustive treatment see Dzehtsiarou 2015). At a first take, the consensus approach consists in interpreting and applying Convention rights according to a rough requirement of identification of shared understandings and practices across Contracting States. These shared understandings and practices serve as a standard whereby to evaluate the performance of individual States on the human rights issue adjudicated by the Court. The consensus inquiry typically consists in a comparative examination of national (Dzehtsiarou 2015:49-55), European (Dzehtsiarou 2015:40-45) or international (Dzehtsiarou 2015:45-49) law and practice. Whilst there are different ways to understand the approach's function in the Court's reasoning, at a minimum it grounds a 'rebuttable presumption' (Dzehtsiarou 2015: 24-30), if not always a conclusive reason, in favour of a given outcome. Moreover, the Court typically links consensus to the 'dynamic interpretation' of the ECHR, whereby new interpretations of Convention rights are provided in order to treat novel kinds of human rights issues. When it comes to deciding on these new interpretations, the Court considers shared States' understandings and practices as a particularly important factor.

A non-exhaustive review of the case law reveals a number of features of the Court's consensus inquiry that are of particular interest for the purposes of the present chapter. First, the Court formulates the issue on which it bases its comparative law inquiry in a way specifically tailored to the outcome of the case and to the level of abstraction appropriate to the case's particular facts.[1] Second, by doing this, the Court typically does not delve into the reasoning process that led to the particular political decisions made by the Contracting States, but merely compares the end results of these decision-making processes, to wit, the decisions themselves.[2] Third, and in view of the above, the Court does not provide any deep analysis of the moral point or purpose of the human right involved, nor does it engage in direct moral reasoning. Instead, it focuses on the facts of the case and to the results of the comparative law inquiry, deferring to common understandings of Contracting States in deciding the issue at hand. Fourth, the Court's approach consists in loosely aggregating Contracting States' solutions with respect to the identified issue.[3] Fifth, the choice made by the majority of Contracting States is seen as providing a particularly weighty but not necessarily conclusive reason in favour of deciding the issue at hand in the same way (Dzehtsiarou 2015: 24-30). Sixth, the Court's comparative law inquiry is seldom systematic or comprehensive (Dzehtsiarou 2015). Seventh, the Court may consider that the existence of State consensus with respect to some issue is a factor that narrows the margin of appreciation of the respondent State[4], but it may also hold that the absence of consensus widens the respondent State's margin of appreciation and lowers scrutiny[5], or, alternatively, that the existence of consensus in favour of a particular State measure furnishes a rebuttable presumption that the measure is not in violation of the Convention.[6]

Commentators' reactions to uses of the consensus approach have been mixed. While the approach has generally been considered as a legitimacy-enhancing mechanism

[1] For a particularly clear example in this and other respects, see *Sørensen and Rasmussen v. Denmark*, Application Nos. 52562/99 and 52620/99, Judgment of 11 January 2006.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] See, for example, *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004.
[6] See, for example, *Pretto and Others v. Italy*, Application No. 7984/77, Judgment of 8 December 1983.

(Dzehtsiarou 2015: 143-176), it has also been criticised on a number of different grounds. We can usefully group such criticisms into two general categories. The first revolves around the perceived indeterminacy and lack of precision of the appropriate doctrinal test (Helfer, 1993; Ambrus, 2009), which, critics argue, often fails to provide clear guidance to States and is sometimes even characterised as 'random' (Ambrus 2009: 354) or else applied in an imprecise and inconsistent fashion. Critics have also complained that the Court frequently fails to define in a clear and consistent way whose consensus should be taken into account and how, as well as the correct level of abstraction at which it should be formulated (Dzehtsiarou 2015: 14-23). As a result, the manner in which the Court uses the consensus approach is often in tension with the rule of law values of legal certainty, predictability and equality before the law. Importantly, critics also propose specific ways of reconstructing the approach so as to better promote these values (Ambrus 2009: 362-370). We can thus label this first kind of criticism 'ameliorative'. Scholars engaging in it generally agree that the consensus approach is intrinsically valuable, suggesting ways in which its application by the Court could be normatively enhanced, once rid of inconsistencies and ambiguities.

In this chapter, I shall not take issue with such ameliorative criticism. Instead, I shall focus on a second, more radical, kind of reproach. Authors that subscribe to this kind of argument maintain that the approach is fundamentally at odds with moral requirements stemming from the very idea of human rights protection. Accordingly, they urge that it be abandoned in favour of direct moral reasoning by the Court. Two mutually reinforcing claims are advanced. The first, weaker, claim is to the effect that frequently the consensus approach appears to be superfluous. The indeterminacy of the consensus test, critics argue, shows that fleeting mention of common understandings in ECtHR judgments merely bolsters conclusions already arrived at by recourse to substantive moral reasoning at a prior stage (Letsas 2013: 108-115). As Eyal Benvenisti puts it: '[consensus] is but a convenient subterfuge for implementing the court's hidden principled decisions' (Benvenisti 1999: 852). On its face, this claim is compatible with the ameliorative view, at least if it turned out that it is possible to formulate the consensus test with a degree of

precision sufficient to provide a well-structured decision procedure. However, the superfluity criticism serves as prelude to a second, much stronger, claim, to the effect that, even if it were possible to arrive at a precise formulation of the consensus test, the consensus approach would still flout the normative requirements stemming from the point and purpose of the ECHR. This stronger claim, associated with the moral reading of the Convention, is at the heart of debunking criticisms of the consensus approach. It has been most forcefully and clearly articulated by Letsas (Letsas 2004; Letsas 2007: chapter 2).

In order to better grasp why Letsas argues that the consensus approach is not merely superfluous, but in fact incompatible with the moral reading of the Convention, recall the Court's reasoning in such cases, outlined above. By resorting to consensus, the Court apparently abstains from providing any substantive normative reasons about the point, purpose and moral value of ECHR rights. Instead, it seems to merely defer to what it thinks the common European standard is with respect to the human rights issue at hand, identified by a vague reference to the practices of the majority of Contracting States (or even practices of non-Contracting States and other international institutions). This is, for example, exactly the way in which the Court appears to have recently proceeded in the particularly controversial *Lautsi v. Italy* and *S.A.S. v. France* cases.[7] From the vantage point of the moral reading of the ECHR, the Court's choices raise two broad kinds of concern. First, by resorting to common understandings of Contracting States through the comparative law study of the solutions adopted by these States on a given Convention right issue, the Court would aggregate solutions determined by the beliefs of political majorities about the content of Convention rights. It would thus appear to presuppose that these beliefs, and not independently identifiable moral values, determine the content of ECHR rights (Letsas 2004). Letsas contends that this attitude is in tension with Strasbourg's 'interpretive ethic' (Letsas 2010), which gives pride of place to the idea that the moral values underpinning ECHR rights are objective and, as such, irreducible to the

[7] See *Lautsi and others v. Italy*, Application No. 30814/06, Judgment of 18 March 2011; *S.A.S. v. France*, Application No. 43835/11, Judgment of 1 July 2014.

beliefs that Contracting States hold about them (see also Benvenisti 1999). Second, adding insult to injury, the consensus approach would also appear to flout the very normative *raison d'être* of Convention rights: the fact that they are rights purporting to protect individuals and minorities from the hostile preferences of majorities. In particular, as already indicated, it would seem to follow from the anti-majoritarian nature of ECHR rights that the Court has the mission to provide an independent moral check on Member States with respect to Convention rights issues. The Court arguably fails to do this when it merely mirrors or upholds Member States' majoritarian current practices and beliefs.

Letsas' forceful critique seems to present proponents of the consensus approach that also subscribe to the moral reading of the Convention with a harsh dilemma. If they want to stick to some version of the consensus requirement, they should either abandon their commitment to objective moral truth by espousing a conventionalist view to the effect that the Contracting States' concurring beliefs figure among the determinants of the content of Convention rights, or else they should adopt a theory of ECHR rights that makes majoritarian preferences the determining moral factor. Both of those alternatives are unattractive. On the one hand, moral conventionalism seats uneasily with the universalist ambition of human rights, as well as with the Court's own method of 'autonomous concepts' (Letsas 2004). On the other hand, consequentialist moral conceptions such as utilitarianism, which roughly make maximisation of aggregate preference-satisfaction an objective criterion of moral rightness, are widely believed to be traditional enemies of human rights and could hardly be considered as natural candidates for an attractive conception of Convention rights (Letsas 2007, chapter 5).

4. Decisions for complex normative systems: the problem of uncertainty

Do the above considerations exhaust what sense there is to be made of the consensus approach under a moral reading of the ECHR? I beg to differ. In other work (Tsarapatsanis 2015), I have developed an institutional account of the Court's interpretive

practice, defending the margin of appreciation doctrine by appealing to normative considerations pertaining to shared responsibility and subsidiarity in the implementation of the Convention. It is a significant virtue of institutional accounts that they purport to explain and justify doctrines of judicial deference and self-restraint, such as the consensus approach or the margin of appreciation, without abandoning the ambition of reading the ECHR morally. Institutional accounts supplant the moral reading of the Convention: they hold that institutional reasons about the proper division of labour between the Court and national institutions, and not merely substantive ones about the moral point or value of human rights, are relevant to the determination of judicial outcomes. Unlike substantive reasons, which abstract from the identity of the Court *qua* court and refer only to the merits of the individual case, institutional reasons apply specifically to the Court as an enforcing institutional agent, by determining the Court's powers and responsibilities within a wider scheme of institutional cooperation. Such reasons may justify the Court's responsibility to defer to Contracting States' shared understandings of Convention rights irrespective of the fact that these understandings are potentially at odds with the content of Convention rights seen from the perspective of an ideal moral theory of human rights. Moreover, these considerations are not *ad hoc*, applying only within the narrow context of the ECHR legal order, but pervasive in public law more generally (Kyritsis 2015). Institutional approaches to judicial decision-making usually highlight issues of judicial competence and legitimacy as factors justifying both judicial restraint and deference to the choices made by the political branches of government. Judicial duties of deference to democratically legitimated institutions, underscored by institutional accounts, thus seems to cohere particularly well with the general structure of the consensus approach used by the ECtHR.

Nevertheless, in this chapter I contend that there is one additional question that should be asked with regard to the nature and role of the consensus approach and that insights from complexity theory are absolutely crucial to answering it. To begin with, recall that, by adopting a moral reading of the ECHR, I assume that pertinent moral reasons, both substantive and institutional, together with whatever empirical facts are made relevant by

these reasons, jointly determine the truth-values of propositions of Convention rights. The question, then, is whether the above reasons and facts are epistemically accessible to judges given the judges' actual (as opposed to ideal) cognitive and, more generally, epistemic capacities. And, if so, what are the conditions and costs of such accessibility? This further question is particularly important, not least because efficient and reliable decision-making by the Court is not a theoretical, but an eminently practical enterprise. That real, flesh-and-blood judges be able to reliably discover normative and empirical facts determining the truth-values of particular propositions of Convention rights at an acceptable cost is what really matters in the collective enterprise of interpretation and enforcement of the Convention. Thus, even if there were, abstractly speaking, determinate objective right answers to all possible questions posed by the application of the Convention under a moral reading, their sheer existence would be utterly useless for the purposes of the administration of an effective regional system of human rights protection, should it turn out that these answers are epistemically inaccessible to real, as opposed to ideal, judges, or accessible only at very high costs by comparison to the benefits delivered. I shall call this the *epistemic challenge* to the moral reading of the ECHR. I shall also claim that complexity theory is particularly important to framing and understanding the depth of the challenge, before moving on to suggest that consensus may provide an acceptable solution to it.

The epistemic challenge helps bring into sharper focus the decision problem that judges of the Court face in hard cases. Succinctly put, the nature of the problem results from the combination of two sets of factors. First, under a moral reading of the Convention the considerations that provide reasons for individual judges to decide cases are frequently not just complicated but *complex* in the specific sense outlined earlier. Second, individual judges are boundedly rational. As a result, judges deciding in good faith are often unsure about the best course of action. In what follows, I shall begin by substantiating the first part of the claim. Grasping the role of complexity as a systematic generator of uncertainty in the functioning of the ECHR normative system is crucial. Then, in the next subsection I shall focus on a number of features that constrain the epistemic capacities of judges.

A. Complexity and the decision problem faced by ECtHR judges

We can sharpen our initial grasp of the decision problem by tentatively distinguishing between three kinds of factors that the ECtHR must take into account when deciding cases: those relating to individual justice, those relating to the effect that the Court's case-law has on the wider system of protection of rights under the ECHR and those relating to strategic considerations, widely conceived. The first are to do with granting appropriate relief to the particular individual complaining of a violation of a Convention right by a State Party. The second revolve around the impact the case law of the Court has on the ECHR system of protection of human rights as a whole. The third concern different and complex contexts of interaction between, on the one hand, individual members of a collegial Court among themselves and, on the other hand, interaction of the Court as a whole with States Parties taken individually or *in tandem*. When consulting the proposed tripartite list, it is helpful to keep in mind two things. First, the distinction between different kinds of factors introduced here is not intended to reflect any deep properties of the factors themselves. It merely serves the tentative aim of helping us organise our thinking about the specification of the decision problem in hard cases. Thus, and to take an example, the reader should feel free to subsume the category of strategic considerations under either of the first two categories, if she perhaps thinks that these are not independent enough. Second, no controversial claim is made regarding the relative force of the reasons that the factors generate. This depends entirely on a fuller and more detailed specification of the point and purpose of the ECHR, which falls squarely outside the scope of this chapter. As a result, the list proposed here will have served its function if it can be plausibly accepted by people that otherwise reasonably disagree on the point and purpose of the ECHR and, accordingly, on the different weights to be assigned to the normative reasons stemming from the indicated factors.

We may begin by individual justice. It is uncontroversial that one of the ECHR's most dazzling achievements to date has been the initial recognition and gradual reinforcement of a right to individual petition, especially after the adoption of Additional Protocol 11 (Greer 2006: 1-59). The function of providing redress for alleged Convention rights violations by States Parties for the benefit of specific individuals is one of the Court's most important tasks. Uncertainty with regard to the proper resolution of hard cases can occur at this level, without any need to take into account the wider effects of the case law of the Court on the ECHR system as a whole or of strategic considerations. In particular, judges can, for example, be uncertain or in reasonable disagreement about the best moral theory of human rights or about specific conceptions of such rights even from within an agreed upon general theory, or about how to balance the protection of individual rights with institutional considerations such as the democratic legitimacy of the decisions taken by Member States. In all these cases, nuanced judgment would be appropriate and reasonable judges could disagree about how best to exercise it. However, it is important to note that, if hard cases and uncertainty under a moral reading of the ECHR were only to do with the administration of individual justice in the above sense, then the decision problem that the Court faces would perhaps be difficult, but not necessarily complex in the sense specified above. In particular, there would not be any need to take into account adaptive interactions between the ECHR and domestic legal systems, since these factors would just be irrelevant with regard to the Court's mission.

I thus submit that what really makes the decision problem that the ECtHR faces not just difficult but complex, in the sense specified earlier on in the chapter, is the importance of taking into account, first, the impact that its decisions have on the wider system of protection of Convention rights, and, second, strategic considerations about the interaction of the Court with various institutional actors whose help and cooperation is vital in effectively enforcing the ECHR. Beginning with the first issue, it is important to note that, in many cases, the Court's judgments do not just resolve an issue relating to an individual claim of alleged ECHR violation following a petition, but, rather, set the minimum threshold of Convention rights protection across all Contracting States. Thus, a

judgment by the Court finding a violation of the Convention in a specific case often entails not only that the respondent State ought to modify its legislation, but also that all other Member States that have similar legislation ought to change it. Using examples from the case law of the Court may helpfully bring out the point. Thus, when the Court takes a position on issues such as same-sex marriage[8], abortion[9], closed-shop agreements[10] or prisoners' voting rights[11], it is *de facto* if not *de jure*, defining the minimal level of protection that will have to be accorded by all States Parties with regard to the issue that is decided. However, as already noted, it is one of the major insights of complexity theory that the solutions provided by complex domestic systems to various issues are emergent properties of deeper interactions between adaptive agents reflecting dynamic temporary disequilibria. At the very least, then, and given phenomena of path-dependence, the Court has to be particularly careful when governing complex domestic systems, since the costs of imposing an erroneous unique solution to a given issue may make it subsequently infeasible to return the system to a previous state. Besides, this problem can be particularly acute when the correctness of the solution to some Convention issue depends heavily on empirical parameters as appears, for example, to be the case in *Sørensen*, mentioned in section 3 above, where the question was whether the legitimate aims pursued through closed-shop legislation could have been achieved in the absence of such legislation.

Complexity phenomena are also at play with regard to a variety of strategic interactions that are pertinent to deciding ECHR issues. In fact, the Court has to pay heed to the way other institutional actors are likely to apply its case law and, insofar as it does, it must have some view about the outcomes of such future interactions. The Court is part of a wider system of protection of ECHR rights, governed by the principle of subsidiarity and marked by an institutional partnership with domestic actors, which are under a duty to make their distinctive contributions within the system. This is the whole point, for

[8] See *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgment of 24 June 2010.
[9] See *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.
[10] See *Sørensen* judgment, n.1 above.
[11] See *Hirst v. the United Kingdom (No.2)*, Application No 74025/01, Judgment of 6 October 2005.

example, of the rule of the exhaustion of domestic remedies before an application to the Court is deemed admissible (Tsarapatsanis 2015: 686). Moreover, similar concerns also arise from the practical problems that the Court faces in the effective implementation of the Convention. Insofar as the Court has limited capacity, a large part of the role of handling implementation issues will inescapably be played by domestic authorities, which comprise but are not limited to courts. Issues of strategic interaction can also stem from the fact that the Court is an international Court, with the result that political reactions to the implementation of its judgments by domestic authorities are harder to overcome than those faced by domestic courts. Thus, securing effective state compliance, either with regard to the behaviour of a single state when it comes to the implementation of a particular judgment[12] or, more generally, with regard to the patterned behaviour of states that appear to systematically challenge the legitimacy of the Court on any number of issues, can be an important source of normative considerations. Here again, complexity theory delivers crucial insights, since it holds that states of (dis)equilibria of complex systems are always temporary and subject to disruption by adaptive behaviours of agents. This suggests that compliance and cooperation by Contracting States should not be taken for granted, but, rather, should be seen as the emergent and potentially fragile property of past interactions between the Court and domestic legal actors. Perceived legitimacy of the Court by domestic agents can go some way towards addressing those issues, since it may stabilise and streamline expected behaviours. Still, there might be a real sense in which the complexity of the ECHR system and the multiplicity of agents' interactions make the impact of certain outcomes genuinely uncertain.

Besides, considerations stemming from patterns of strategic interaction are also at play at the level of decision-making by the Court itself. In fact, as Vermeule has forcefully pointed out (Vermeule 2012: chapter 5), in multi-member courts, such as the ECtHR, individual judges favouring a particular optimal solution to a decision problem have to

[12] See, as a salient example, the non-compliance (yet) by the United Kingdom with regard to the *Hirst* case (above n.8).

take into account the fact that they are sitting on a panel with other judges who may disagree with their views. Accordingly, and to take a hypothetical example, a judge who adheres to the moral reading of the Convention will have to make do with the fact that she is sitting on a panel with other judges who may not share her first-best interpretive approach. Other judges might thus be positivists or adopt some other approach. Interactions among judges are thus complex in the specific sense that the outcome of those interactions (the final judgment) is an emergent property of the Court, which does not necessarily reduce to the actions or intentions of individual judges. Moreover, states of doctrinal or interpretive stability on the part of the Court are also temporary and potentially fragile, since they reflect the underlying complex emergent patterns of interactions among individual judges.

Now, complex situations such as these present judges with an important decision problem. The rational judge that finds herself in the minority will have to opt for a suboptimal solution by her own lights. As Vermeule puts it (Vermeule 2012: 156-160), at this point she has a number of different strategic choices at her disposal. For example, she might adopt an 'evangelist' approach, disregarding the consequences of her behaviour in particular cases with the hope that, in the long run, she may convert other judges by the sheer force of her example. But she might also settle for a second-best view by strategically using her resources in some other way, for example by influencing the formulation of the reasons provided if she agrees with the outcome. Whilst this approach might initially seem opportunistic, it is far from evident that it is inconsistent with the very idea of the moral reading, since at a minimum it leads to acceptable outcomes by the judge's own lights. Be that as it may, the more general claim is to the effect that all cases of strategic interaction sketched above involve versions of the same core problem: how to cope with the fact that, once a moral reading is adopted as the best interpretive approach towards the ECHR, the judge adopting the approach has to cooperate with actors that do not necessarily share that view and which have the power to influence the real world effects of the implementation of the Convention.

B. Epistemic constraints and reasoning strategies

As already observed, complexity with regard to systemic effects or strategic interactions is only one of the sources of judicial uncertainty. Uncertainty with regard to interpretation and application of the ECHR can be also exacerbated because of a number of familiar cognitive and epistemic constraints akin to what Christopher Cherniak (Cherniak 1986: 8) has called the '*finitary predicament'* of human epistemic agents, to wit, the fact that their cognitive resources are limited. As a result of the finitary predicament, human agents' rationality has been called resource-dependent or bounded (Bishop and Trout 2005). Bounded rationality approaches focus on how agents with limited information, time and cognitive capacities ought to make judgments and decisions (Tsarapatsanis 2015: 689-691). The approaches became particularly prominent since the 1970s, when an impressive array of experimental results in social psychology consistently showed that, under certain circumstances, human agents reason and decide in ways that systematically violate the formal canons of rationality (Bishop and Trout 2005). At least part of the explanation for these shortcomings is attributed to the lack of cognitive resources available to human agents. Charting the actual limits of these resources is an important part of cognitive science and empirical psychology. Both conceptualise the mind as a finite information-processing device, strictly limited with regards to its memory, attention and computation capacities. These general considerations, which apply to judges insofar as the latter are human epistemic agents like any other, are complemented in a straightforward way by specific constraints on how the Court functions. Thus, pressures involving the capacity to efficiently process applications and deliver judgments in a timely fashion can turn out to be significant, insofar as the Court has a backlog of tens of thousands of pending cases[13] and is also committed to issuing decisions promptly as a matter of human rights (for more on these constraints see Tsarapatsanis 2015: 690).

[13] There were 64,850 pending cases as of 31/12/2015. See the ECtHR's 2015 report at p.187 available here: http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf (last accessed 1/4/2017).

Now, as already indicated, under the moral reading of the ECHR, certain kinds of normative and empirical facts determine the truth-values of propositions of Convention rights. In order to achieve the epistemic goal of apprehending these facts, judges need to deploy the appropriate epistemic means. I shall refer to these means as 'reasoning strategies'. Two kinds of normative constraints may be reasonably imposed on the selection of these strategies. First, they ought to be reliable, i.e. such as to allow agents to systematically track the relevant facts. This follows directly from the fact that, under the moral reading of the ECHR, the epistemic goal of judges is objective truth and not some other aim, such as justifiability or reasonableness. Second, they ought to be tractable, i.e. suitable for judges as epistemic agents endowed with finite cognitive resources.

Tractability brings immediately into play the epistemic constraints sketched above, especially bounded rationality. Thus, bounded rationality accounts ask which reasoning strategies agents with constrained cognitive resources ought to follow in order to reliably attain sets of specified epistemic goals for different kinds of environments. Accordingly, the reasoning strategies identified for boundedly rational agents are resource-relative: they are tailored to the actual cognitive abilities and resources of agents. Resource-relativity as a constraint on the selection of reasoning strategies can be justified in various ways. To begin with, one can appeal to the 'ought-implies-can' norm: no judge should use a reasoning strategy that is clearly intractable. Moreover, and more controversially, reasoning strategies are also constrained by cost/benefit considerations. Suppose, for example that, if judges of the Court had infinite time, they could score better on the reliability dimension. However, ECtHR judges do not have infinite time and, in fact, they are under relentless time pressure, amplified by the ever-increasing volume of their caseload. It follows that, depending on the circumstances in which they are placed, judges could sometimes reasonably trade off marginal increases in reliability for speed, by following appropriately economical reasoning strategies, such as a more deferential and less fine-grained standard of review, through the margin of appreciation doctrine, if they have reason to trust the judgment of national authorities (Tsarapatsanis 2015: 685). Generalising the point, we might say that it is not enough that reasoning strategies score

high on the reliability dimension: it is important that they also come at an acceptable cost with regard to the finite epistemic resources of judges.

The upshot for the purposes of the present discussion is that reasoning strategies that take the formulation of objectively true propositions about the ECHR under a moral reading as their epistemic goal ought to take account of the judges' epistemic resources limitations. Even if the relevant moral and empirical facts could in principle be accessible to resource-independent agents, such as agents with normal perceptual capacities that perform no reasoning mistakes, have sets of completely consistent beliefs and infinite memory and time, we still ought to ask, first, whether they are they also in principle accessible to resource-dependent judges sitting at the ECtHR and, second, at what cost. Moreover, the epistemic constraints briefly alluded to in this section exacerbate the problem of responding appropriately to the uncertainty that the complexity of the ECHR system of rights protection generates in hard cases. This is so even without supposing that disagreement about the identification of the relevant moral facts poses any special epistemic problem *per se*. Whilst disagreement among epistemic peers can sometimes cause considerable uncertainty, my primary focus here is on the resource-restrained epistemic abilities of judges, which would be important even if disagreement were completely absent.

6. The consensus approach as a reasoning strategy

To summarise the argument thus far, I have stressed that in hard cases judges of the Court can be uncertain about the best solution, owing to the non-exhaustively specified combination of sheer difficulty, complexity of systemic impact and strategic interaction and epistemic constraints. This is the case even if we assume, as I did throughout the chapter by adopting the moral reading of the ECHR, that there are objective right answers to hard cases. Given the pervasive epistemic issues I mentioned, it is possible and in fact desirable to distinguish between objective solutions to hard cases and reliable and tractable reasoning strategies for actual (as opposed to ideal) boundedly rational ECtHR

judges. Whereas the former, under the moral reading of the ECHR, make objective morality a constitutive part of what makes propositions about the ECHR true, the latter aim at articulating ways for non-ideal agents to gain access to this truth by maximising the chances of correct outcomes or minimising the risks of incorrect ones. It could thus be the case that judges might be more likely to arrive at the objectively correct outcome under a moral reading in an *oblique* way, rather than via direct moral reasoning. From the point of view of criteria of assessment of reasoning strategies, unconstrained moral reasoning shall have to be compared with a number of contenders and evaluated across a number of dimensions, chief among which figure reliability and tractability.

I thus submit that the consensus approach should be understood as just one of those contenders, i.e. as an oblique reasoning strategy which bypasses unconstrained moral reasoning and is apt to aid ECtHR judges in arriving at correct decisions whilst attempting to effectively govern a complex system. There are two points that should be noted here. First, classifying the consensus approach as a reasoning strategy and not as a criterion of truth of propositions about the ECHR straightforwardly avoids Letsas' criticism of the consensus approach outlined above. In particular, on this understanding consensus does not determine the truth about ECHR rights, and therefore does not amount to majoritarianism about human rights. It is merely a heuristic device that may provide epistemic help to judges under conditions of uncertainty generated by complexity. Second, the argument of this chapter is that heuristics such as consensus can provide such an epistemic help under conditions of uncertainty and as a means to address it. No claim is thus made that consensus would be relevant to the moral reading even in the absence of uncertainty. However, it is indeed argued that, once the insights from complexity theory are fully taken into account, uncertainty proves to be a particularly pervasive phenomenon with regard to ECHR adjudication.

At this point, an important caveat should be underscored. It is one thing to indicate the possibility of understanding the consensus approach as a reasoning strategy, which was my main aim in this chapter, and it is quite another to argue in favour of the overall

plausibility of such an approach *qua* reasoning strategy. Moreover, a fuller account should compare the relative merits of the consensus approach with those of other approaches, such as unconstrained moral reasoning, potentially specifying contexts in which the use one or the other could be more warranted. Since I do not have the space for a detailed treatment, I shall only provide a number of tentative considerations in favour of such plausibility, which open venues for future research, along with a number of critical comments.

I have already said that reasoning strategies for non-ideal epistemic agents should be assessed along the twin dimensions of reliability and tractability. Complexity theory provides an important source of considerations in favour of using consensus as a reasoning strategy along these dimensions. As already observed, consensus takes account of solutions to ECHR issues that have emerged spontaneously from the interactions of agents composing domestic legal systems, and which it could be perilous to upset absent very strong reasons. Moreover, imposing a completely novel solution in the absence of consensus could carry significant costs in case the wrong decision is made, due to path-dependence. These considerations at the very least suggest that concerns deriving from aspects of complexity theory can inform a prudential attitude on the part of judges, especially when it comes to assessing solutions to ECHR issues that could have wider systemic impact. Likewise, and with respect to tractability, identification of common solutions adopted by Contracting States may be much more economical than calculation of complex normative and empirical factors.

Moreover, *qua* reasoning strategy, consensus may also be useful as a collective intelligence device. Collective intelligence arguments can take many different forms, but they revolve around the core notion that, under certain conditions, collectives may epistemically outperform individuals. Among the arguments advanced is the Condorcet Jury Theorem (henceforth 'CJT'), which roughly states that aggregating the beliefs of sincerely voting independent individuals on some subject, at least when the individuals

are more likely to be right than wrong, increases the likelihood of choosing the right answer.[14] Interestingly, Eric Posner and Cass Sunstein have explicitly used CJT to argue that, under certain conditions, aggregating the solutions that relevantly similar states have provided to some issue can provide a good reason to believe that the majority solution is correct (Posner and Sunstein 2006). While the proposal is far from uncontroversial and faces a number of technical challenges that cannot be addressed in detail here, it provides, if plausible, a clear justification for some (disciplined) form of the consensus inquiry *qua* reasoning strategy. In the same vein, it could be possible to explore the plausibility of models of cognitive diversity (Page 2007). Roughly, the core idea of such models is that aggregating views based on different interpretations of how the world works maximises the chances that the median answer will be right as opposed to the one provided by a randomly chose individual from the group (Page 2007: 197). As in the application of CJT to solutions provided by domestic legal systems to various issues, it bears further exploring whether cognitive diversity models could also provide a justification for the consensus approach.

Here again, the notion of collective intelligence connects to insights from complexity theory. The solutions to various human rights issues provided by Contracting States could be understood as emergent properties of complex national legal systems, resulting from the interactions of the agents composing those systems and not reducible to their individual actions or intentions. Common patterns of such emergent properties could thus be harnessed to enhance the cognitive capacities of ECtHR judges under conditions of uncertainty. Moreover, disciplining and streamlining the use of consensus through more formal models such as CJT or cognitive diversity could help augment the legitimacy of the Court as well as the predictability of its reasoning, with beneficial effects with respect to both compliance and cooperation. Last, insofar as the consensus inquiry provides clear results due to common patterns of solutions, it can help stabilise the behaviour of diverse judges in a way that unconstrained moral reasoning, which frequently leads to disagreement, perhaps cannot. In this way, it could help address the issue of strategic

[14] For an informal presentation of CJT see the work of Hélène Landemore (Landemore 2013: 70-75).

interaction of judges in multimember courts. The flipside of this, with regard to tractability, is that access to reliable information about the solutions adopted by different Contracting States and aggregation of those solutions to provide a (rebuttable) guide for decision under uncertainty carries its own important costs. Whether such a reasoning strategy is ultimately more frugal, relative to gains in reliability, than deciding by unconstrained moral reasoning will thus depend on specifics that cannot be touched upon here.

7. Conclusion

In this chapter, I argued that, understood as a reasoning strategy, the consensus approach is compatible with a moral reading of the ECHR. My main argument consists in distinguishing between criteria of truth of propositions about Convention rights and reasoning strategies. The function of the latter is merely epistemic. Using insights from complexity theory, I claimed that some reasoning strategies could be rational responses to the decision problem judges of the Court face in hard cases. In these cases, uncertainty is not accidental but the combined product of the bounded rationality of judges with often-complex factors, such as strategic interactions and systemic effects of the Court's judgments. I then contended that a number of heuristic devices used by the Court, such as the consensus approach, should be best understood as reasoning strategies and not as criteria of truth of propositions about the ECHR. Last, I briefly sketched the possibility that insights from complexity theory could also be used to justify using the consensus approach as a collective intelligence device. However, a lot more would need to be said in order to fully assess the relative merits of the consensus approach compared to other approaches, such as unconstrained moral reasoning. I therefore conclude by submitting that more systematic exploration of specific reasoning strategies for Courts facing hard cases in complex normative environments could yield high theoretical and possibly practical payoffs.

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