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## The relationship between European consensus, the margin of appreciation and the legitimacy of the Strasbourg Court

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*When determining whether a state should be granted the margin of appreciation, often the European Court of Human Rights (ECtHR, the Strasbourg Court or the Court) resorts to the method of European consensus. However, important issues remain unclarified concerning the relationship between the two notions, and how such relationship is linked to the legitimacy of the Strasbourg Court. This article firstly shows that the two notions are often, but not always, inter-dependent: there have been cases where the decision on the margin of appreciation points in a different direction than the outcome of the comparative exercise; and in further cases, consensus was not the crucial factor to be taken into consideration by the Strasbourg Court. Thus, consensus is one of the methods used by the Court in its application of the proportionality test, in order to decide on the scope of the margin of appreciation that the contracting parties enjoy. Next, the article explains why clarifying the relationship between consensus and the margin of appreciation will have implications for the Court's interpretative practice once Protocols 15 and 16 ECHR enter into force. The multi-dimensional legitimacy of the Strasbourg Court is considered afterwards. The article then submits that the way European consensus is generally being used (i.e. as a factor which is obviously not irrelevant but also not always decisive for the outcome on the margin of appreciation) supports the multi-dimensional legitimacy of the Court. Nonetheless, it concludes by identifying inconsistency in the formulation of the relationship between the two notions in the ECtHR's jurisprudence, and encourages the Court to codify in a more coherent way that relationship.*

Keywords: European Court of Human Rights; margin of appreciation; European consensus; legitimacy; proportionality; Protocol 15 ECHR; Protocol 16 ECHR.

### Introduction

The European Court of Human Rights (ECtHR, the Strasbourg Court or the Court) has been facing over the last years significant criticism for its allegedly activist approach to the scope of the rights guaranteed by the European Convention on Human Rights (ECHR, the Convention). Often, such criticism centers on the tenet that the Strasbourg Court should grant states a broader margin of appreciation.<sup>1</sup> The adoption of Protocol 15 ECHR partly reflects these views: a

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<sup>1</sup> See, for example, Lord Hoffmann, 'The universality of human rights' (2009) 125 *Law Quarterly Review* 416. Russia has enacted legislation enabling the Russian Constitutional Court 'to declare rulings of international bodies "impossible to implement"'; see Philip Leach and Alice Donald, 'Russia defies Strasbourg: Is contagion spreading?' (2015) *EJIL Talk!*, available at: [www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading](http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading). Such criticism is increasingly being voiced by other contracting parties as well, which have traditionally been

product of laborious high-level conferences and especially the Brighton Declaration,<sup>2</sup> when Protocol 15 enters into force it will amend the Convention's preamble with a view to including a reference to the margin of appreciation doctrine and the principle of subsidiarity.<sup>3</sup> More recent developments include the adoption of the 'Copenhagen Declaration' in April 2018, which makes several references to the subsidiarity principle, the margin of appreciation and dialogue.<sup>4</sup>

The margin of appreciation doctrine generally entails that since the ECHR guarantees minimum standards of protection, the Strasbourg Court – depending of course on the circumstances of the case and the right in question - may leave the standard of protection of that human right to the respondent state. When the Court examines the breadth of the margin of appreciation, often it seeks to establish the existence of 'European consensus'. European consensus is effectively a comparative exercise across the members of the Council of Europe to identify broad, but not necessarily unanimous, agreement/ convergence (or disagreement) on a legal issue, with a view to potentially increasing the scope of the human right in question.

The (seemingly interrelated) concepts of consensus and the margin of appreciation have emerged as central to the work of the ECtHR. Simultaneously, they are politically contested; the adoption of Protocol 15 and the debate surrounding the Copenhagen Declaration clearly confirm this. But, crucially, the precise nature of their relationship has been inadequately set out by the Court. Indeed, much of the confusion surrounding the two terms stems from the Court's own case-law, and its general reluctance not only to provide sufficiently precise definitions when interpreting the Convention, but also (as this article will show) to articulate in clear terms the relationship between key concepts, such as the one between consensus and the margin of appreciation. And yet whether and to what extent reliance on consensus will inform the Court's outcome on the margin of appreciation is a matter directly related to the overall legitimacy of the Strasbourg Court.

Moreover, the development of consensus analysis by the ECtHR has had significant implications for the argumentation of the parties before the Strasbourg Court. The respondent states are inclined to argue that the lack of consensus entails that states should be granted the margin of appreciation; conversely, individuals advance the claim that there *is* European

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more accommodating to the Court's evolutive interpretation. See, for example, Judgment no 49/2015 of the Italian Constitutional Court, holding that the ordinary courts in Italy are bound to comply with the case-law of the Strasbourg Court *only when it is well-settled*. For a related online symposium by the I-CONnect blog see: [www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015/](http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015/).

<sup>2</sup> See, for example, Mark Elliott, 'After Brighton: Between a rock and a hard place' [2012] *Public Law* 619.

<sup>3</sup> See Art 1 of Protocol 15 ECHR. Protocol 15 ECHR was adopted in June 2013.

<sup>4</sup> See 'Copenhagen Declaration' (2018) available at: [rm.coe.int/copenhagen-declaration/16807b915c](http://rm.coe.int/copenhagen-declaration/16807b915c).

consensus on a matter falling under the scope of the Convention, and therefore that the Strasbourg Court should not grant the respondent the margin of appreciation.

In this context, this article rejects the presumption that the decision on the margin of appreciation will always depend on the identification (or not) of European consensus: this refers not only to cases where the outcome of the comparative exercise did not correspond to the Court's decision on the margin of appreciation, but also to cases where consensus was not necessarily the most important factor in determining the margin of appreciation. Moreover, this contribution argues that the way European consensus is *generally* being used by the ECtHR in order to decide on the margin of appreciation supports the multi-dimensional<sup>5</sup> legitimacy of the Strasbourg Court, which has to strike a (no doubt difficult) balance between the development of human rights in Europe and its role as jurisdiction of last resort, in accordance with the subsidiarity principle. Taking this further, it is submitted that the ECtHR should disentangle the *majoritarian dimension* of consensus from the application of the margin of appreciation, and elaborate more on the *nature and scope of convergence* across Europe in its jurisprudence. Lastly, the article claims that the Strasbourg Court should formulate in clearer terms and codify in its case-law the interplay between the two notions.

Thus, the article makes a significant contribution to the debates on the legitimacy of the Court, given that, since the Court's legitimacy is multi-dimensional, it cannot solely depend on consensus; and the occasional tensions between the two notions (e.g. when there is lack of consensus and yet the Court decides that it should not grant the respondent the margin of appreciation) do not, *for this reason alone*, suggest that the ECtHR's legitimacy is undermined. By examining the implications post-Protocols 15 and 16 ECHR, the paper also contributes to the ongoing (as the Copenhagen Declaration aptly verifies) process of reform of the Convention machinery. Lastly, by clarifying the precise interplay between the two concepts, the article informs the debate on how the ECtHR's reasoning can be improved.

The argument is advanced as follows. First, some preliminary remarks are offered on the two concepts and their relationship. Next, the article rejects the presumption that the decision on the margin of appreciation will always depend on the identification (or not) of European consensus. Undeniably, the Strasbourg Court often follows the guidance of its Europe-wide comparative exercise – often, *but not always*. Specific categories of cases where this absence of dependency (in other words, cases where the doctrine of European consensus is not always

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<sup>5</sup> On the 'multi-dimensional' legitimacy of the ECtHR see text below at nn 146-159, and references cited therein.

used by the Court as the *altera pars* of the margin of appreciation) can be identified are explored. Taking this path of enquiry further, it is shown that European consensus is *one of the methods* used by the Court in the context of its application of the *proportionality test*, in order to decide on the scope of the margin of appreciation that the contracting parties enjoy.

The next section explains how defining the interplay between the margin of appreciation and European consensus has implications which also pertain to the Court's interpretative practice once Protocols 15 and 16 ECHR enter into force. The penultimate part of the article demonstrates how the broader approach of the Court (namely that European consensus is not an irrelevant factor for the outcome on the margin of appreciation, but simultaneously it is not always the decisive factor) supports its multi-dimensional legitimacy. Nonetheless, the Court has used varying formulations in its case-law to delineate the relationship between the two notions. On this point, the article concludes by explaining that the Strasbourg Court should be more coherent when articulating this relationship.

It is appropriate at this juncture to clarify the scope of this paper. To begin with, the article deals with 'the *how* question', namely how consensus generally relates to the margin of appreciation in the jurisprudence of the Court. It is beyond its aims to elaborate on exactly *when* European consensus *should* be used by the Strasbourg Court (e.g. in which Convention rights or issues under examination). Thus, the judgments under consideration in this article *have actually involved* the use of consensus by the Court. Moreover, by emphasising that what is compatible with the legitimacy of the Court is the way European consensus is *generally* (and therefore *not specifically*, i.e. in a specific case discussed here) being used by the ECtHR in order to decide on the margin of appreciation, the present article does not adopt a position either on the overall outcome or the legitimacy of the judgments under examination.

### **On the margin of appreciation, European consensus and their relationship: Conceptual and definitional issues**

In the well-known *Handyside* case, the ECtHR sought to clarify a few issues regarding the margin of appreciation. Firstly, the margin was linked with subsidiarity; second, the Court stated that the margin is granted both to the legislature and the domestic judiciary or other organs interpreting the law; but – third - this margin is not unlimited as it is ultimately shaped by European supervision.<sup>6</sup>

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<sup>6</sup> *Handyside v the United Kingdom*, Application 5493/72, 7 December 1976, paras 47-49.

As Legg observed, one of the reasons behind the use of the margin of appreciation in international human rights law is ‘democracy’, in that tribunals are likely to take into account the legislature’s weighting of competing interests or the extent of public participation.<sup>7</sup> The difficulty here – and this is acknowledged by Legg – is that judicial deference in *international* adjudication can be grounded in different reasons than those emerging within a domestic constitutional framework. Thus, when the Strasbourg Court assesses the *quality* of debate within the domestic legislature,<sup>8</sup> for example, it should proceed with caution, even if this may result in a decision to grant the respondent the margin of appreciation.<sup>9</sup> Such level of scrutiny by the Strasbourg Court may be viewed as an instance of a Court exceeding its powers: one might wonder whether the Court was established to be involved *to that degree* in developments within the domestic democratic process. Other (perhaps pragmatic) justifications for deference include the extreme possibility of withdrawal from the ECHR or significant delays in the implementation of the ECtHR’s judgments.<sup>10</sup> Letsas distinguished between the substantive use of the margin of appreciation, namely whether applicants can enjoy a certain right as a matter of human rights law, and the structural one, based on the idea that the Strasbourg Court is an international tribunal and therefore it has to defer to the contracting parties as they are *better placed* to decide on the issue that is being put before it.<sup>11</sup> It is under this latter dimension that the lack of consensus among contracting states becomes primarily relevant, according to

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<sup>7</sup> Andrew Legg, *The margin of appreciation in International Human Rights Law: Deference and proportionality* (Oxford University Press 2012) ch 4.

<sup>8</sup> On this point see Matthew Saul, ‘The European Court of Human Rights’ margin of appreciation and the processes of national parliaments’ (2015) 15 *Human Rights Law Review* 745.

<sup>9</sup> This is not, of course, always the case. See, for example, the well-known judgment of *Hirst v the United Kingdom (No 2)*, Application 74025/01, 6 October 2005, para 79: ‘As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.’

<sup>10</sup> Laurence Helfer, ‘Consensus, coherence and the European Convention on Human Rights’ (1993) 26 *Cornell International Law Journal* 133, at 137. Although once perceived as highly unlikely, the possibility of withdrawal from the ECHR is recently considered as an option within certain circles in the UK. For an insightful perspective on the relationship between the UK and Strasbourg see Ed Bates, ‘The UK and Strasbourg: A strained relationship – The long view’ in Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A strained relationship?* (Hart Publishing 2015) 39.

<sup>11</sup> George Letsas, ‘Two concepts of the margin of appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705. That states are ‘better placed’ to decide is an argument also advanced by Legg’s account of grating the margin ‘on the basis of superior knowledge or expertise of local authorities’; Legg (n 7) ch 6. Further accounts in the (extensive) literature include: Eva Brems, ‘The margin of appreciation doctrine in the case-law of the European Court of Human Rights’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240; Paul Mahoney, ‘Marvellous richness of diversity or invidious cultural relativism?’ (1998) 19 *Human Rights Law Journal* 1; Yutaka Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia 2002); Dean Spielmann, ‘Whither the margin of appreciation?’ 67 *Current Legal Problems* (2014) 49.

Letsas.<sup>12</sup> More generally, it is no secret that the ECtHR's methodology regarding the margin of appreciation has attracted varied criticism.<sup>13</sup>

At this point the use of European consensus by the Court can be considered. While it is indeed possible to understand the term 'consensus' as encompassing 'consensus based on international treaties, internal consensus in the respondent Contracting Party, [and] expert consensus', only the identification of 'consensus based on comparative analysis of the laws and practices of the Contracting Parties' can truly be viewed as European consensus.<sup>14</sup> On this basis, the present contribution refers *only* to the latter use of consensus by the ECtHR. Indeed, European consensus analysis can occupy its distinct place in the ECtHR's reasoning only if it is dissociated from other interpretative practices used by the Court. To that end, European consensus is inevitably linked to this seemingly straightforward question: what is the position (or perhaps 'the trend'<sup>15</sup>) in the broad *majority* of domestic legal orders? It is this 'supermajoritarian' tendency (for lack of a better term) within Europe that consists the essence of consensus analysis and, by consequence, its distinctive contribution to the Court's methodology. The Research Division of the Court undertakes the task of conducting this comparative exercise.<sup>16</sup> The use of such comparative method can be explained by the fact that the ECHR stems from the domestic systems, and this is confirmed by the Convention's Preamble, which refers to the 'common heritage of political traditions, ideals, freedom and the rule of law'.<sup>17</sup>

The consensus method can appear appealing (to some) or unattractive (to others); or perhaps it has the potential to be both, as this contribution will argue, thereby distinguishing itself from accounts severely criticizing or wholeheartedly endorsing this form of reasoning. Indeed, this type of comparative 'majoritarian' exercise may be viewed by some as acknowledgment of the

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<sup>12</sup> Letsas (n 11) 722.

<sup>13</sup> See Steven Greer, *The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000) 32, arguing that the margin of appreciation 'could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires'. Authors have also emphasised the need to duly consider minority rights; see, for example, Eyal Benvenisti, 'Margin of appreciation, consensus, and universal standards' (1999) 31 *NYU Journal of International Law and Politics* 843, in particular 848-850. Compare also Carla Zoethout, 'Margin of Appreciation, Violation and (in)Compatibility: Why the ECtHR Might Consider Using an Alternative Mode of Adjudication' (2014) 20 *European Public Law* 309; Jan Kratochvíl, 'The inflation of the margin of appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324.

<sup>14</sup> Kanstantsin Dzehtsiarou, *European consensus and the legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 39.

<sup>15</sup> *Ibid.*, 12 (and case-law cited therein).

<sup>16</sup> *Ibid.*, 86-87. That Division is part of the Court's Registry.

<sup>17</sup> See Eva Brems, *Human rights: Universality and diversity* (Martinus Nijhoff 2001) 420.

Court's position to guarantee minimum standards of protection, while by others as reluctance to adjudicate. Moreover, the Court's level of consistency when relying on consensus analysis has been far from satisfactory.<sup>18</sup>

But how is the use of consensus related to the margin of appreciation? Commentators accept that European consensus is not the only method used by the Court,<sup>19</sup> and as '*a factor determining whether a wider or narrower margin of appreciation ought to apply*' it is not binding.<sup>20</sup> A properly applied consensus 'is a criterion that determines the breadth of the margin of appreciation in a more objective, transparent and predictable manner than achieved through the application of other criteria'.<sup>21</sup> The comparative advantage of consensus, according to that author, is that it enhances the legitimacy of the Court's decisions. Because of this link with legitimacy, Dzehtsiarou grants consensus some type of primacy over other methods used by the Court in such cases. Thus, in the same contribution he argues:

'European consensus can be conceptualized as a *way of mediating* between the margin of appreciation and evolutive interpretation. If there is no European consensus, the issue will fall in the area of the margin of appreciation, and as soon as consensus is established, the ECtHR can apply evolutive interpretation and wrest this issue from state discretion.'<sup>22</sup>

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<sup>18</sup> See, for example, *S.H. and Others v Austria*, Application 57813/00, 3 November 2011. Therein, the Court firstly observed that 'there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus', before adding that '[t]hat emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State' (para 96). However, the Court on several occasions has been satisfied with the emergence of a clear trend across Europe. See also the dissenting opinion of seven Judges in *Odièvre v France*, Application 42326/98, 13 February 2003, para 12: 'the suggestion that the States had to be afforded a margin of appreciation owing to the absence of a *common denominator* between their domestic laws simply does not tally with the extracts of comparative law on which the Court itself relies'.

<sup>19</sup> Petkova argues that 'the ECtHR analyses consensus to establish a dialogue with representatives of its larger constituency and has thus never interpreted it as a stand-alone judicial test on which to exclusively base its decisions'; see Bilyana Petkova, 'The notion of consensus as a route to democratic adjudication?' (2012) 14 *Cambridge Yearbook of European Legal Studies* 663, at 681-682.

<sup>20</sup> Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No consensus on consensus? The practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248, at 249, 262 (emphasis added).

<sup>21</sup> Dzehtsiarou (n 14) 132-133.

<sup>22</sup> *Ibid.*, 138. See also Arai-Takahashi (n 11) 203-204, who views European consensus as a 'bridge' between evolutive interpretation and the margin of appreciation. On the link between consensus and evolutive interpretation see also the seminal judgment *Tyrer v the United Kingdom*, Application 5856/72, 25 April 1978, para 31; and, conversely, *Vo v France*, Application 53924/00, 8 July 2004, para 82, granting France the margin of appreciation in the absence of European consensus 'notwithstanding an evolutive interpretation of the Convention'. Further on the notion of evolutive interpretation see, among others, Dialogue between judges 2011: 'What are the limits to the evolutive interpretation of the Convention?' (Council of Europe 2011). The evolutive interpretation is based on the tenet that the Convention is a living instrument; see, for example, Sir Nicolas Bratza, 'Living instrument or dead letter: the future of the European Convention on Human Rights' [2014] *European Human Rights Law Review* 116. For Bjorge, the evolutionary interpretation of the treaties 'represent[s] an intended evolution'; Eirik Bjorge, *The evolutionary interpretation of the treaties* (Oxford University Press 2014).

To be sure, Dzehtsiarou accepts that consensus is a ‘rebuttable presumption’; or that its nature/application is ‘non-absolute and non-automatic’.<sup>23</sup>

In a concurring opinion Judge Rozakis argued:

‘[I]t is my opinion that the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept.’<sup>24</sup>

Writing extra-judicially, he claimed elsewhere that ‘the time has come where this Court should disentangle the “consensus” factor from the application of the margin of appreciation’.<sup>25</sup> Explaining this position, he observed that ‘even in situations where there is no consensus, the Court is free to undertake its own assessment of the facts and produce its own reasoning – not necessarily leading to a violation – which, after all, may be of assistance to European states’ whenever they may have to adjudicate on a similar situation.<sup>26</sup> For Wildhaber and colleagues, ‘consensus informs the content of the treaty obligations contained in the ECHR’.<sup>27</sup> Thus, consensus ‘is a factor or element in defining the margin of appreciation, in proportionality balancing and generally in interpreting the ECHR, of indicative, persuasive, in some cases probably decisive value’.<sup>28</sup>

How the Court itself has attempted to delineate in its case-law the relationship between consensus analysis and the margin of appreciation will be critically examined in the last section of the paper. In order to take this path of enquiry further, though, it is possible to think of a number of scenarios with regard to the link between the two doctrines. First, the Court identifies

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Compare also Christian Djeflal, *Static and evolutive treaty interpretation: A functional reconstruction* (Cambridge University Press 2015), in particular chapter 10.

<sup>23</sup> Dzehtsiarou (n 14) 37, 206.

<sup>24</sup> Concurring Opinion of Judge Rozakis in *Egeland and Hanseid v Norway*, Application 34438/04, 16 April 2009 (emphasis original).

<sup>25</sup> Christos Rozakis, ‘Through the looking glass: An “insider’s” view on the margin of appreciation’, in *La conscience des droits: Mélanges en l’honneur de Jean-Paul Costa* (Daloz 2011) 527, at 536.

<sup>26</sup> *Ibid.*

<sup>27</sup> Wildhaber et al (n 20) 256.

<sup>28</sup> *Ibid.*



European consensus (existing or growing/emerging) in a direction different from that of the domestic legislation or practice in question, and then narrows the margin of appreciation of the state; this is a fairly common application of European consensus.<sup>29</sup> Second, conversely, the Court finds lack of European consensus and grants the respondent the margin of appreciation.<sup>30</sup> Both scenarios effectively align with the widely shared practice of respondent states or applicants to argue that the identification or not of European consensus should determine the Court's decision on the margin of appreciation. Third, there have been instances where the Court, despite identifying the existence of (almost) pan-European agreement on a particular issue, *contrary to the practice and/or legislation of the respondent*, it decided, nonetheless, to grant the respondent the margin of appreciation. This leads to the fourth (and inverse) scenario, namely cases where, despite the lack of European consensus, the ECtHR did not grant the respondent the margin of appreciation. The focus of the article will now shift to the third and fourth categories, for they can provide us with further insights into the interplay between the two terms. In all of the cases discussed in the following two sections, European consensus *was not* the catalyst in determining the Court's position on the margin of appreciation.

### **Cases where the Strasbourg Court *was* deferential despite the *presence* of European consensus**

In the Chamber *Sitaropoulos* judgment, the Court dealt with the question as to whether Greece did not meet its obligations under Article 3 of Protocol 1 when failing to implement legislation with a view to securing expatriates' right to vote.<sup>31</sup> The Court relied considerably on the fact that Greece 'clearly [fell] short of the common denominator among Contracting States as regards the effective exercise of voting rights by expatriates'; moreover, the Convention should guarantee rights that are practical and effective.<sup>32</sup> Thus, Greece could not rely on the otherwise wide margin of appreciation that the Strasbourg Court generally tends to grant states under Article 3 of Protocol 1. Despite the above, the Grand Chamber, while acknowledging that the 'great majority' of states had implemented legislation enabling citizens to vote from abroad, it nonetheless found that their arrangements and criteria for this right differed.<sup>33</sup> The Grand Chamber also took into account the fact that several international human rights treaties (and

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<sup>29</sup> For example, the Court has decided that the lack of legal recognition of same-sex couples goes against the state's positive obligations under Article 8 ECHR; *Oliari and Others v Italy*, Applications 18766/11 and 36030/11, 21 October 2015.

<sup>30</sup> See, for example, *Lautsi and Others v Italy*, Application 30814/06, 18 March 2011.

<sup>31</sup> *Sitaropoulos and Others v Greece*, Application 42202/07, 8 July 2010.

<sup>32</sup> *Ibid*, paras 44-47.

<sup>33</sup> *Sitaropoulos and Giakoumopoulos v Greece*, Application 42207/07, 15 March 2012 (Grand Chamber), para 74.

their interpretation by international tribunals) did not provide for such right, and furthermore observed that instruments adopted by the Parliamentary Assembly and the Venice Commission simply invited, without obliging, states to consider extending the right to vote for expatriates.<sup>34</sup> Thus, the Grand Chamber held that ‘none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote’.<sup>35</sup> The Grand Chamber appeared to conflate the question as to whether, in principle, nationals living abroad have the right to vote (on which it did underline the emergence of European consensus) with the question as to *how* such right should be guaranteed, on which it identified ‘a wide variety of approaches’<sup>36</sup> (and therefore absence of consensus).

Turning to Article 8 ECHR, in *A, B and C v Ireland* the Court dealt with the prohibition of abortion in Ireland.<sup>37</sup> The three applicants had travelled to England for abortion for reasons related to their health and well-being (the two first applicants) or fear that pregnancy was a risk to their lives (the third applicant). They submitted that the restrictions on lawful abortion in Ireland constituted a violation of their right to private life. To substantiate their claim, they relied, among others, on the clear ‘European consensus’ pointing to the extension of the right to abortion in Ireland.<sup>38</sup> The Court found that ‘contrary to the Government’s submission, ... there [was] indeed a consensus amongst a substantial majority of the Contracting States ... towards allowing abortion on broader grounds than accorded under Irish law’.<sup>39</sup> Nonetheless, that was not sufficient for the Strasbourg Court in order for Ireland’s margin of appreciation to be restricted.<sup>40</sup> In that case, the Court relied on the fair balance between the protection of public interest (framed as ‘the acute sensitivity of the moral and ethical issues raised by the question of abortion’) and the need to respect the applicants’ right to private life under Article 8 ECHR.<sup>41</sup> Methodologically questionable was the Court’s reference to the lack of consensus as to when life begins, for the purposes of Article 2 ECHR<sup>42</sup> – although there is an obvious connection, the ECtHR in *A, B, and C v Ireland* examined the prohibition of abortion in light of Article 8,

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<sup>34</sup> *Ibid*, paras 72-73.

<sup>35</sup> *Ibid*, paras 74-75.

<sup>36</sup> *Ibid*, para 75.

<sup>37</sup> *A, B and C v Ireland*, Application 25579/05, 16 December 2010.

<sup>38</sup> *Ibid*, paras 174-175.

<sup>39</sup> *Ibid*, para 235.

<sup>40</sup> *Ibid*, para 236.

<sup>41</sup> *Ibid*, paras 232-233 and

<sup>42</sup> With reference to the aforementioned case *Vo v France* (n 22) paras 75-80.

not 2, ECHR.<sup>43</sup> In any event, crucial in the Court's conclusion on the margin of appreciation was perhaps the aforementioned fair balance test, re-formulated later in the judgment by the Court as the need to examine 'whether the interference constitute[d] a proportionate balancing of the competing interests involved'.<sup>44</sup> In that case, despite the presence of European consensus pointing in a different direction, the Strasbourg Court gave weight to 'the profound moral views of the Irish people as to the nature of life'.<sup>45</sup> The Court refused to acknowledge (as requested by the applicants) that the views of the Irish people had changed significantly since the 1983 referendum<sup>46</sup> – the result of the recent referendum of May 2018<sup>47</sup> evidently demonstrates that the Court's analysis of the legitimate aim in that case was rather shallow.

Elsewhere, the Court had to decide whether a ban on 'secondary action', namely strike action in support of the initial – lawful – strike, is compatible with Article 11 ECHR.<sup>48</sup> In order to determine whether the interference was necessary in a democratic society, the ECtHR took into account – among others - comparative studies by the European Committee on Social Rights, demonstrating that 'with its outright ban on secondary action the [UK stood] at one end of the comparative spectrum, being one of a small group of European States to adopt such a categorical stance on the matter'.<sup>49</sup> Looking at the international level, the ECtHR furthermore added that the UK was 'out of line with a discernible international trend calling for a less restrictive approach'.<sup>50</sup> Interestingly, the Strasbourg Court underlined that the UK government 'played down the significance of the comparative perspective, emphasising the deep structural and cultural differences among European States in the field of industrial relations'.<sup>51</sup> Eventually, the Court decided to grant the UK the margin of appreciation, prioritising a number of other considerations: the need to strike a fair balance between 'the competing interests of the individual and of the community as a whole';<sup>52</sup> that the interference in the exercise of the applicant's trade-union freedom was not as 'invasive' as the applicant had argued, given that

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<sup>43</sup> The explanation offered by the Court was that since 'the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected ... the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother'; *A, B and C v Ireland* (n 37) para 237.

<sup>44</sup> *Ibid*, para 238.

<sup>45</sup> *Ibid*, para 241.

<sup>46</sup> *Ibid*, paras 223-228.

<sup>47</sup> See: [www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion](http://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion).

<sup>48</sup> *National Union of Rail, Maritime and Transport Workers (RMT) v the United Kingdom*, Application 31045/10, 8 April 2014.

<sup>49</sup> *Ibid*, para 91.

<sup>50</sup> *Ibid*, para 98.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*, para 86.

‘the effect of the ban on secondary action [did not strike] at the very substance of the applicant union’s freedom of association’ under Article 11 ECHR, which meant that a wider margin of appreciation had to be granted to the respondent state;<sup>53</sup> that in the sphere of social and economic policy ‘the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”’;<sup>54</sup> and also that there was a *domestic* consensus on the scope of permissible industrial action.<sup>55</sup> On this basis, the Court ultimately found that the UK had not violated Article 11 ECHR.

### **Cases where the Strasbourg Court was *not* deferential despite the *lack* of European consensus**

In *Goodwin*, the Court found a violation of Article 8 ECHR, due to the lack of legal recognition in the United Kingdom of gender reassignment.<sup>56</sup> The Court took into account the ‘continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals’,<sup>57</sup> and attached less importance to the missing common European approach to the matter. The ECtHR underlined that ‘the notion of personal autonomy is an important principle underlying the interpretation of [the] guarantees’ under Article 8 ECHR,<sup>58</sup> and also that ‘serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity’.<sup>59</sup> On the basis of the fair balance test, the Strasbourg Court concluded that ‘there [were] no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment’, and therefore the respondent state could ‘no longer claim that the matter [fell] within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right [to private life] protected under the Convention.’<sup>60</sup> Moreover, the Court found a violation of the right to marry under Article 12 ECHR. The Court inferred from comparative material submitted to it that ‘fewer countries permit[ted] the marriage of transsexuals in their assigned gender than recognise[d] the change of gender itself’.<sup>61</sup> Still, the ECtHR pointed out that the margin of appreciation could not ‘extend so far’ as to find that ‘the range of options open to a Contracting

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<sup>53</sup> *Ibid*, para 88.

<sup>54</sup> *Ibid*, para 99.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Goodwin v the United Kingdom*, Application 28957/95, 11 July 2002.

<sup>57</sup> *Ibid*, para 85.

<sup>58</sup> *Ibid*, para 90.

<sup>59</sup> *Ibid*, para 77.

<sup>60</sup> *Ibid*, paras 91-93.

<sup>61</sup> *Ibid*, para 103.

State included an effective bar on any exercise of the right to marry'; the 'very essence' of the applicant's right to marry had been infringed.<sup>62</sup>

In the case of *Hirst (No 2)*, the Strasbourg Court had to adjudicate on the compatibility of the ban on prisoners' right to vote with the requirements of Article 3 of Protocol 1 ECHR.<sup>63</sup> The UK essentially argued that the lack of European consensus on the matter (a point accepted by the Court<sup>64</sup>) entailed that it should be granted the margin of appreciation. Nonetheless, the outcome of the comparative exercise was not sufficient for the Court to conclude that the restriction in question was proportionate. Among others, the ECtHR underlined the lack of sufficient debate within the UK parliament (discussed above); the point that 'even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue' as the wide margin of appreciation under the abovementioned Convention article is not 'all embracing';<sup>65</sup> and that this was a 'blanket restriction on all convicted prisoners in prison', which did not take into account the individual circumstances of the prisoners, the nature of the offence, the length of service, etc.<sup>66</sup> The Court also added that this was a 'vitaly important Convention right', having previously observed that the right to vote in the twenty first century should not be considered as a 'privilege'.<sup>67</sup> Importantly, the Court left it to the UK 'legislature to decide on the choice of means for securing the rights guaranteed' by Article 3 of Protocol 1.<sup>68</sup>

In *Dickson*, the Court found a violation of Article 8 in the absence of European consensus, given that the UK policy at stake (the refusal of artificial insemination facilities to prisoners, except for exceptional circumstances) 'effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case'.<sup>69</sup> That was so because the policy at stake 'placed an inordinately high "exceptionality" burden on the applicants when requesting artificial insemination facilities'.<sup>70</sup> Thus, relying on the fair balance test, the Court concluded that as the

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<sup>62</sup> Ibid, paras 101, 103.

<sup>63</sup> *Hirst v the United Kingdom (No 2)* (n 9).

<sup>64</sup> Ibid, para 81: 'As regards the existence or not of any consensus among Contracting States, the Court notes that, although there is some disagreement about the legal position in certain States, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States.'

<sup>65</sup> Ibid, paras 81-82.

<sup>66</sup> Ibid, para 82.

<sup>67</sup> Ibid, paras 59, 82.

<sup>68</sup> Ibid, para 84.

<sup>69</sup> *Dickson v the United Kingdom*, Application 44362/04, 4 December 2007, para 82.

<sup>70</sup> Ibid.

threshold was already too high for applicants, it precluded an individual assessment and balancing of the competing public and individual interests on the basis of proportionality.<sup>71</sup> The Court accordingly noted that ‘the matter was of vital importance to the applicants’ as artificial insemination was their only realistic hope of having a child together.<sup>72</sup> Overall, the policy in question violated Article 8 ECHR and fell outside the scope of the UK’s margin of appreciation.

In *Phinikaridou*, the statutory three-year limitation period prevented subsequent requests for judicial recognition of paternity, even when applicants became aware of circumstances that would enable them to seek judicial recognition *after the expiration of that period*.<sup>73</sup> The Court firstly observed that ‘the existence of a limitation period per se is not incompatible with the Convention’.<sup>74</sup> The pertinent question was, however, whether the absoluteness of such period satisfied the fair balance test. Although the Court did not use the term ‘consensus’, it was probably of the view that such consensus was absent. In particular, the ECtHR observed that a ‘comparative examination of the Contracting States’ legislation on the institution of actions for judicial recognition of paternity reveal[ed] that there [was] no uniform approach in this field’; yet ‘a tendency [could] be ascertained towards a greater protection of the right of the child to have its paternal affiliation established’.<sup>75</sup> Still, the length of existing time limits (if established) varied considerably (between one and thirty years) and, crucially, ‘[o]nly a small number of legal systems seem[ed] to have produced solutions to the problem which arises when the relevant circumstances become known only after the expiry of the time-limit’.<sup>76</sup> The Strasbourg Court nonetheless paid particular attention to the essence of the right in question when performing the balancing exercise. It reiterated that the Convention guarantees rights that are not theoretical or illusory but practical and effective, and that by disproportionately protecting the general interest (‘legal certainty in family relations’) and that of the presumed father, the respondent proceeded to a ‘radical restriction’ of the applicant’s ‘right to find out her origins’.<sup>77</sup> Thus, despite the considerable margin of appreciation that is generally left to states on this

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<sup>71</sup> Ibid, paras 82-83.

<sup>72</sup> Ibid, paras 72, 87.

<sup>73</sup> *Phinikaridou v Cyprus*, Application 23890/02, 20 December 2007.

<sup>74</sup> Ibid, para 52.

<sup>75</sup> Ibid, para 58.

<sup>76</sup> Ibid, para 59.

<sup>77</sup> Ibid, para 64.

matter, under these circumstances ‘the very essence of the right to respect for one’s private life under Article 8’ had been impaired.<sup>78</sup>

In *X and Others v Austria*, the Court examined whether the prohibition of the adoption of the child of one partner in a same-sex couple by the other partner was compatible with Article 14, in conjunction with Article 8 ECHR.<sup>79</sup> The Court underlined the difference in treatment of the applicants when compared to unmarried heterosexual couples in respect of second-parent adoption. Turning to its proportionality analysis, it pointed out that where there is a difference in treatment based on sex or sexual orientation the margin of appreciation is narrow, and therefore proportionality ‘does not merely require the measure chosen to be suitable in principle for achievement of the aim sought’ but it must also be demonstrated that it was ‘necessary ... to exclude certain categories of people, in this instance persons living together in a homosexual relationship, from the scope of application of the provisions in issue’.<sup>80</sup> No such argument or evidence was provided by the Government. The respondent did, however, advance the lack of European consensus on the issue of second-parent adoption by same-sex couples. The Court firstly reiterated the narrow margin of appreciation when it comes to issues of discrimination on the grounds of sex or sexual orientation.<sup>81</sup> It then explained that the key issue in the present case was the *difference in treatment* and not generally the question of same-sex couples’ access to second-parent adoption.<sup>82</sup> Thus, only the ten Council of Europe states that allowed ‘second-parent adoption in unmarried couples may be regarded as a basis for comparison’, and ‘the narrowness of this sample [was] such that no conclusions can be drawn as to the existence of a possible consensus’.<sup>83</sup> The Court concluded that the difference in treatment could not be justified and there was a violation of Article 14, in conjunction with Article 8 ECHR.

### **The margin of appreciation does not always depend on European consensus**

These two categories of cases aptly illustrate that the assessment on the margin of appreciation does not always depend on European consensus. Whether one agrees or disagrees with how the ECtHR conducted its balancing exercise and/or with its conclusion in some (or all) of the

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<sup>78</sup> *Ibid*, para 65. In a more recent case, with a factual and legal framework different from that in *Phinikaridou*, the Court clarified that if applicants show ‘an unjustifiable lack of diligence in instituting paternity proceedings’, while being aware of their respective father’s identity, the margin of appreciation granted to states regarding such proceedings would mean that the legislation in question would be compatible with Article 8. See *Silva and Mondim Correia v Portugal*, Applications 72105/14 and 20415/15, 3 October 2017, in particular paras 67-70.

<sup>79</sup> *X and Others v Austria*, Application 19010/07, 19 February 2013.

<sup>80</sup> *Ibid*, para 140.

<sup>81</sup> *Ibid*, para 148.

<sup>82</sup> *Ibid*, para 149.

<sup>83</sup> *Ibid*.

above cases are separate matters: this contribution is concerned with providing insights into the Court's general (and therefore not specific) approach with regard to the link between consensus and the margin of appreciation. And the latter is explainable, it will be argued, if that general approach is linked with the question of its legitimacy. Such discussion can only take place once the function of consensus within the Court's reasoning has been fully crystallised – which is the purpose of the following paragraphs.

It must be said that cases like those presented in the earlier two sections are not the norm in the jurisprudence of the Strasbourg Court: often, the comparative exercise corresponds to the decision on the margin of appreciation. But even when the consensus analysis is more aligned with (or was perhaps more influential in) the outcome on the margin of appreciation, this does not mean that consensus was the only, or even the determinative, factor in all of these judgments. In several cases that will be cited below (when consensus is viewed as part of the ECtHR's proportionality exercise), a plethora of considerations, in addition to consensus, were taken into account by the Court before deciding on whether states should be granted the margin of appreciation.<sup>84</sup> This is not to suggest, either, that there haven't been instances where the Court indeed appears to place considerable emphasis on the comparative law material.<sup>85</sup>

To further demonstrate the point made in this section, cases where the consensus argument is raised by one (or both) of the parties, but the ECtHR appears to omit addressing it in its reasoning, can also be considered.<sup>86</sup> To be sure, other reasons behind the Court's unwillingness to engage with consensus analysis may exist, including the limited available resources for such

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<sup>84</sup> For example, in *Perinçek v Switzerland* (Application 27510/08, 15 October 2015), the ECtHR explicitly acknowledged that 'the comparative law position [could not] play a weighty part in the Court's conclusion', since 'there [were] other factors which [had] a significant bearing on the breadth of the applicable margin of appreciation' (paras 256-257). The case concerned the compatibility with Article 10 ECHR of the applicant's criminal conviction and punishment for having publicly denied the Armenian genocide; it concluded that there had been a violation of the above Article.

<sup>85</sup> On the presence of consensus see, for example, *S. and Marper v the United Kingdom*, Applications 30562/04 and 30566/04, 4 December 2008, in particular para 112 (against the permanent retention of DNA profiles of suspected but unconvicted persons); *Berkovich and Others v Russia*, Applications 5871/07 and 9 others, 27 March 2018, in particular para 98 (against the prohibition of persons aware of State secrets from travelling abroad). On the lack of consensus see, for example: *X, Y and Z v the United Kingdom*, Application 21830/93, 22 April 1997, in particular paras 44, 52 (legal recognition of a female to male transgender person as the father of his child); *Petrovic v Austria*, Application 20458/92, 27 March 1998, in particular paras 38-43 (granting fathers parental leave allowance); *Evans v the United Kingdom*, Application 6339/05, 10 April 2007, in particular paras 79, 90 and 92 (withdrawal of consent to the use of genetic material in the context of IVF treatment); *Khamtokhu and Aksenchik v Russia*, Applications 60367/08 and 961/11, 24 January 2017, in particular paras 83-88 (difference in treatment on account of age and sex with regard to life imprisonment).

<sup>86</sup> See, for example, *Pretty v the United Kingdom*, Application 2346/02, 29 April 2002 (ban on assisted suicide); *Delfi AS v Estonia*, Application 64569/09, 16 June 2015 (liability of an online news portal for offensive comments); *Sekmadienis Ltd. v Lithuania*, Application 69317/14, 30 January 2018 (religious symbols in commercial advertising).



comparative assessment,<sup>87</sup> or perhaps the lack of sufficient delineation of the issue on which consensus is being claimed for. Indeed, the consensus argument is occasionally raised almost mechanically by the parties concerned, without provision of any evidence (this might also apply to instances where the Court does, indeed, choose to take into account the comparative material). Since the question as to when the Court should rely on consensus is not addressed in this contribution, the earlier remarks should not be viewed as suggesting that the Court should either disregard or always be responsive to such claims. Rather, they should be viewed as providing further support for the claim that the margin of appreciation does not always depend on European consensus. Moreover, they evidence the extent to which consensus, for better or worse, is being viewed by parties as the catalyst for the margin of appreciation.

### **European consensus as part of proportionality**

Taking this path of enquiry further, it will be shown that European consensus is one of the factors considered by the Court in its application of the proportionality test. Brems captured this in her seminal article when observing that in ‘most cases ... comparative analysis is a – supportive or decisive – argument in the key part of the Court’s reasoning, namely where it measures the proportionality or the reasonableness of an interference with a protected right’.<sup>88</sup> The proportionality principle and the margin of appreciation doctrine are, of course, generally associated:<sup>89</sup> as observed by Arai-Takahashi, ‘[t]he more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities’, and therefore ‘[i]t is possible to consider the application of the proportionality principle as the other side of the margin of appreciation’.<sup>90</sup> In this section it will be argued that precisely locating consensus within the proportionality part of the Court’s reasoning is a challenging exercise.

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<sup>87</sup> Wildhaber et al (n 20) 256-257. As the authors point out, the Court may sometimes conveniently rely on research that has been undertaken by the Council of Europe, UN bodies, NGOs – among others.

<sup>88</sup> Brems (n 11) 277.

<sup>89</sup> This is not to suggest that methodological difficulties have not been identified. Thus, it has been suggested that the ‘interaction between proportionality and the margin of appreciation’ remains unclear; see Jonas Christoffersen, *Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 31.

<sup>90</sup> Arai-Takahashi (n 11) 14.

Indeed, it has rightly been observed that the Strasbourg Court has not adopted a particular structure<sup>91</sup> when applying the proportionality test.<sup>92</sup> To be fair to the Court, this is anything but an easy task, and the design of proportionality may indeed depend on the right in question or the facts of the case and the available evidence. For example, although the Court is frequently stressing that the balancing exercise will not differ on the basis of whether there is an interference with the right in question or a positive obligation,<sup>93</sup> in practice the structure of the Court's reasoning in the aforementioned situations can be different. Further, when Article 14 is engaged, the ECtHR often reformulates the test, stating that 'a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.<sup>94</sup>

In this context, it is probably unwise to provide generalised conclusions as to where precisely the ECtHR's consensus analysis within the application of the proportionality principle can be located. Despite these challenges, it can nonetheless be observed that in many cases such analysis is taken into account by the Court when examining whether the restriction was 'necessary in a democratic society' (or a similar formulation),<sup>95</sup> the 'central step' of the test to

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<sup>91</sup> Proportionality is often perceived to consist of a three-step test: whether the measure is suitable to the pursued objective; necessary, in the sense that less restrictive alternatives are not available; and proportionate *stricto sensu*, namely that a proper balance between the individual and public interest has been achieved. See Arai-Takahashi (n 11) 192-193; Christoffersen (n 89) 69-70; Alec Stone Sweet and Jud Mathews, 'Proportionality balancing and global constitutionalism' (2008-2009) 47 *Columbia Journal of Transnational Law* 72, at 75-76. For a broader discussion on whether proportionality is suitable for human rights adjudication see, among others, Alison Young, 'Proportionality is dead: Long live proportionality!' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds) *Proportionality and the rule of law: Rights, justification, reasoning* (Cambridge University Press 2014) 43.

<sup>92</sup> Arai-Takahashi (n 11) 193-195; Christoferssen (n 89) 31; Eva Brems and Laurens Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 139.

<sup>93</sup> See, for example, *Odièvre v France* (n 18) para 40: 'The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation'. Similarly, *Phinikaridou v Cyprus* (n 73) para 47; *Dickson v the United Kingdom* (n 69) paras 70-71.

<sup>94</sup> *Vallianatos and Others v Greece*, Applications 29381/09 and 32684/09, 7 November 2013, para 76. The Court reiterated that 'just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification' (para 77). See also *Ünal Tekeli v Turkey*, Application 29865/96, 16 November 2004, paras 50-53 – among others. Moreover, the Court has clarified that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society'; see the seminal judgment *D.H. and Others v Czech Republic*, Application 57325/00, 13 November 2007, para 176.

<sup>95</sup> See, for example: *A, B and C v Ireland* (n 37) paras 235-236; *Bayev and Others v Russia*, Applications 67667/09 and 2 others, 20 June 2017, para 66; *Berkovich and Others v Russia*, Applications 5871/07 and 9 others, 27 March 2018, para 98; *Chapman v the United Kingdom*, Application 27238/95, 18 January 2001, paras 90-94; *Demir and Baykara v Turkey*, Application 34503/97, 12 November 2008, para 122; *Dudgeon v the United Kingdom*, Application 7525/76, 22 October 1981, para 60; *Egeland and Hanseid v Norway* (n 24) para 54; *Hamidović v Bosnia and Herzegovina*, Application no. 57792/15, 5 December 2017, paras 36-38; *Lee v the United Kingdom*, Application 25289/94, 18 January 2001, paras 95-96; *Paradiso and Campanelli v Italy*, Application 25358/12, 24

find (or not) a violation of the Convention, and that on which the ECtHR generally devotes a substantial part of its reasoning.<sup>96</sup> In cases engaging states' positive obligations (or in certain instances where the Court did not deem it necessary to decide whether there was an interference or positive obligation) consensus has been considered (but not necessarily followed) either before<sup>97</sup> or in the context of<sup>98</sup> the 'fair balance' test.<sup>99</sup> When Article 14 ECHR is engaged, consensus is frequently taken into account when the Court examines whether there is an objective and reasonable justification in the difference of treatment.<sup>100</sup>

There is a crucial exception to the use of consensus in the context of proportionality. The Court may (infrequently) deploy consensus to examine whether the matter falls in the first instance under the scope of a Convention right. Many such cases have concerned Article 3 ECHR,<sup>101</sup> which is an absolute right; however, consensus has been used to delineate the scope of further Convention rights, such as Articles 4(3)(a),<sup>102</sup> 6,<sup>103</sup> 9,<sup>104</sup> and 10<sup>105</sup> ECHR. Such cases effectively illustrate that in the complex and often dynamic jurisprudence of the ECHR, it is

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January 2017, para 203; *Parrillo v Italy*, Application 46470/11, 27 August 2015, para 176; *Perinçek v Switzerland* (n 84) paras 255-257; (*RMT*) *v the United Kingdom* (n 48) para 98; *S. and Marper v the United Kingdom* (n 85), para 112; *S.A.S. v France*, Application 43835/11, 1 July 2014, para 156; *S.H. and Others v Austria* (n 18) paras 95-96; *Tănase v Moldova*, Application 7/08, 27 April 2010, para 172.

<sup>96</sup> Alain Zysset, 'Searching for the legitimacy of the European Court of Human Rights: The neglected role of "democratic society"' (2016) 5 *Global Constitutionalism* 16, at 23. The Court has time and again stated that 'necessary in a democratic society' means that 'the interference complained of corresponded to a "pressing social need", that the reasons given by the national authorities to justify it were relevant and sufficient and that it was proportionate to the legitimate aim pursued'; see (*RMT*) *v the United Kingdom* (n 48) para 83; *Egeland and Hanseid v Norway* (n 24) para 48 – among others.

<sup>97</sup> *Goodwin v the United Kingdom* (n 56) paras 84-85; *Hämäläinen v Finland*, Application 37359/09, 16 July 2014, paras 72-75.

<sup>98</sup> *Dickson v the United Kingdom* (n 69) paras 77-82; *Evans v the United Kingdom* (n 85) paras 90-92; *Odièvre v France* (n 18) para 47; *Oliari and Others v Italy* (n 29) para 178; *Phinikaridou v Cyprus* (n 73) paras 58-59; *X, Y and Z v the United Kingdom* (n 85) para 52.

<sup>99</sup> As Mowbray observed, the test has been employed 'as a basis for assessing the proportionality of respondent States' interferences with the Convention rights of applicants and for determining when States are subject to implied positive obligations under the Convention'; see Alastair Mowbray, 'A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 289, at 315.

<sup>100</sup> See, for example: *Ünal Tekeli v Turkey* (n 94) para 61; *Rasmussen v Denmark*, Application 8777/79, 28 November 1984, para 41; *Fretté v France*, Application 36515/97, 26 February 2002, para 41; *Khamtokhu and Aksenchik v Russia* (n 85) paras 83-88; *Marckx v Belgium*, Application 6833/74, 13 June 1979, para 41; *Petrovic v Austria* (n 85) para 42; *Vallianatos and Others v Greece* (n 94) paras 91-92; *X and Others v Austria* (n 79) para 149. The Court frequently adds that the difference of treatment is discriminatory 'if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"'. See further Rory O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR' (2009) 29 *Legal Studies* 211, in particular p. 224 *et seq.*

<sup>101</sup> See *Tyrer v the United Kingdom*, Application 5856/72, 25 April 1978, para 31; *Kafkaris v Cyprus*, 21906/04, 12 February 2008, para 104; *Vinter and Others v the United Kingdom*, Applications 66069/09, 130/10 and 3896/10, 9 July 2013, para 117.

<sup>102</sup> *Meier v Switzerland*, Application 10109/14, 9 February 2016, para 79.

<sup>103</sup> *Micallef v Malta*, Application 17056/06, 15 October 2009, para 78.

<sup>104</sup> *Bayatyan v Armenia*, Application 23459/03, 7 July 2011, paras 103-104.

<sup>105</sup> *Magyar Helsinki Bizottság v Hungary*, Application 18030/11, 8 November 2016, in particular para 148.

not always straightforward to draw a clear line between interpretation (presumably focusing on the scope of the right) and balancing,<sup>106</sup> including when consensus is being deployed by the Strasbourg Court.

It is also noteworthy that generally the Court's consensus analysis is not particularly extensive, even when it is more decisive for the margin of appreciation. The Court admittedly does not want to give the impression that the comparative exercise is the sole or main criterion upon which its judgment is based. Thus, the evolution in the respective human rights standards will be *supported* but not *based exclusively* on consensus. Conversely, such disentanglement of consensus from the margin of appreciation may enable the Court to show sensitivity and eventually accommodate 'cultural relativist claims'.<sup>107</sup> As Brems rightly cautions, however, while one of the functions of the doctrine of the margin of appreciation is indeed to take into account such differences, the comparative method in Europe 'can be useful to avoid one of the main risks of a cultural relativist approach: its conservative tendency'.<sup>108</sup>

### **The relationship between European consensus and the margin of appreciation post-Protocols 15 and 16 ECHR**

Protocols 15 and 16 ECHR will bring to the fore the interplay between consensus and the margin of appreciation, pushing the Court to delineate and articulate in a clearer way in its reasoning the relationship between the two terms (this point is returned to toward the end of the article). It is remembered that much of the discussion surrounding the adoption of these two Protocols centred on the Court's legitimacy, and the need (at least in the view of some contracting states) for the Court to further accommodate domestic sensitivities.

When Protocol 15 enters into force,<sup>109</sup> the Preamble of the Convention will be amended, with a view to including a reference to the margin of appreciation and the subsidiarity principle.<sup>110</sup> With regard to the former term, it can be anticipated that post-Protocol 15 some contracting parties will argue, first, that their margin of appreciation should be expanded – an argument not supported by the final text of Article 1 of Protocol 15<sup>111</sup> – and, second, that the Protocol

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<sup>106</sup> See Djeflal (n 22) chapter 10.

<sup>107</sup> On which see Brems (n 11) 285-286.

<sup>108</sup> *Ibid.*, 311.

<sup>109</sup> As of May 2018, all the contracting parties have signed, while 4 of them have not ratified, that Protocol; see: [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p\\_auth=SeaQ9ErP](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=SeaQ9ErP)

<sup>110</sup> Art 1 of Protocol 15 ECHR.

<sup>111</sup> On how the new Preamble might be interpreted see Nikos Vogiatzis, 'When "reform" meets "judicial restraint": Protocol 15 amending the European Convention on Human Rights' (2015) 66 *Northern Ireland Legal Quarterly* 127, in particular 141-146. Importantly, according to that author, Protocol 15 ECHR subjects the margin of

provides further support in favour of granting the margin of appreciation in the absence of European consensus. Another feature of Protocol 15 ECHR is the reference to the principle of subsidiarity.<sup>112</sup> Subsidiarity could play a role concerning *when* European consensus will be relied upon by the Strasbourg Court. Thus, it has been argued that if one distinguishes between *consensus* (as being something ‘more than a simple majority’ of states but rather ‘express[ing] the general agreement’ of states) and a *trend*, in the latter case ‘the Court should respect the subsidiarity of the Strasbourg system, should wait for further consolidation and corroboration and, when this has taken place, only then proceed to find a “consensus”’.<sup>113</sup> It remains to be seen whether and to what extent the subsidiarity principle may be used by the ECtHR in conjunction with European consensus or, indeed, the margin of appreciation, after Protocol 15 enters into force.

With the ratification by France in April 2018, Protocol 16 ECHR will enter into force on 1 August 2018, solely in respect of the ten states which have ratified it.<sup>114</sup> It will empower the highest domestic courts and tribunals to submit a question to the ECtHR concerning the interpretation or application of the ECHR.<sup>115</sup> The request should stem from a pending case before that court,<sup>116</sup> and the opinion of the Strasbourg Court will not be binding.<sup>117</sup> The provisions of Protocol 16 have attracted considerable scholarly attention<sup>118</sup> (also in light of the EU’s potential accession to the ECHR, a point briefly considered below). Domestic courts do interpret, of course, the Convention,<sup>119</sup> and therefore it is anticipated that the activation of

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appreciation to the ‘supervisory jurisdiction’ of the Court, bringing the latter in an overall stronger position than the one anticipated by the Court’s critics during the Brighton Conference.

<sup>112</sup> On the subsidiarity principle see, generally, Christoffersen (n 89) chapter 3; Alastair Mowbray, ‘Subsidiarity and the European Convention on Human Rights’ 15 *Human Rights Law Review* (2015) 313; Andreas von Staden, ‘The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review’ (2012) 10 *International Journal of Constitutional Law* 1023.

<sup>113</sup> Wildhaber et al (n 20) 257.

<sup>114</sup> See the table of signatures and ratifications as of May 2018 at: [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p\\_auth=SjCbMEEd](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=SjCbMEEd).

<sup>115</sup> Art 1(1) of Protocol 16 ECHR.

<sup>116</sup> Art 1(2) of Protocol 16 ECHR.

<sup>117</sup> Art 5 of Protocol 16 ECHR.

<sup>118</sup> See Paul Gragl, ‘(Judicial) love is not a one-way street: The EU preliminary reference procedure as a model for ECtHR advisory opinions under Draft Protocol No. 16’ (2013) 38 *European Law Review* 229; Kanstantsin Dzehtsiarou and Noreen O’Meara, ‘Advisory jurisdiction and the European Court of Human Rights: A magic bullet for dialogue and docket-control?’ (2014) 34 *Legal Studies* 444.

<sup>119</sup> See, for example, *R (Chester) v Secretary of State for Justice*; *McGeoch v The Lord President of the Council* [2013] UKSC 63, where the UK Supreme Court provided its views on the permissible margin of appreciation under Article 3 of Protocol 1 ECHR, including an assessment of the ECtHR’s case-law. Compare also *R (On The Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, concerning the scope of the ban of political advertising in the UK, where the – then - House of Lords in the UK examined the question of European consensus regarding the manner in which religious broadcasting should be regulated; the case reached the Strasbourg Court afterwards.

Protocol 16 will incite at least some domestic courts to submit questions to the ECtHR concerning primarily the margin of appreciation, but complementarily the notion of European consensus as well.

Beyond this, Protocol 16 ECHR will have implications for the EU's accession to the ECHR, if and when it takes place. One of the reasons put forward by the Court of Justice of the European Union (CJEU) in its controversial Opinion 2/2013<sup>120</sup> that the Draft Agreement on the EU accession to the ECHR<sup>121</sup> was incompatible with the autonomy of EU law was that the advisory opinion process via Protocol 16 could circumvent the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU).<sup>122</sup> Regardless of the merits of this finding by the CJEU, for present purposes the following hypothetical scenario may be reflected upon: the domestic court requests an advisory opinion from Strasbourg on a matter which falls under the scope of EU law, and involves the interpretation of Convention rights or indeed Charter rights which correspond to those guaranteed by the Convention.<sup>123</sup> The CJEU judgment in *Delvigne*<sup>124</sup> already provides a suitable example for reflection. To what extent the CJEU's indications may correspond to the ECtHR's permissible margin of appreciation under *Hirst (No 2)* is something that the Strasbourg Court could be called upon to decide.<sup>125</sup> And indeed, the ECtHR is frequently exploring the case-law of the CJEU also in cases where it resorts to European consensus. While the existing interactions between the two European courts no doubt constitute a fascinating topic to explore,<sup>126</sup> it cannot be excluded that

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<sup>120</sup> Opinion 2/2013 of the Court on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

<sup>121</sup> On which see, among others, Tobias Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (2011) 48 *Common Market Law Review* 1025; Paul Gragl, 'A giant leap for European human rights? The final agreement on the European Union's accession to the European Convention on Human Rights' (2014) 51 *Common Market Law Review* 13; Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds) *The EU Accession to the ECHR* (Hart Publishing 2014).

<sup>122</sup> Opinion 2/2013 (n 120) paras 196-199. See further Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: Is it still possible and is it still desirable?' (2015) 11 *European Constitutional Law Review* 239, at 263.

<sup>123</sup> See Art 52(3) of the EU Charter, effectively providing that Union law may provide a higher standard of protection – or conversely that the ECHR serves as the minimum standard.

<sup>124</sup> Case C-650/13, *Delvigne v Commune de Lesparre-Médoc*, EU:C:2015:648. The CJEU held that any restrictions to the right to vote for the European elections should comply with the proportionality principle.

<sup>125</sup> In *Matthews*, the ECtHR found that the right to vote for the European elections is covered by Article 3 of Protocol 1; *Matthews v the United Kingdom*, Application 24833/94, 18 February 1999, in particular paras 34-35 and 42-44.

<sup>126</sup> See, for example, Sionaidh Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European Human Rights *acquis*' (2006) 43 *Common Market Law Review* 629; Vassilis Tzevelekos, 'When elephants fight it is the grass that suffers: "Hegemonic struggle" in Europe and its side-effects for international law' in Kanstantsin Dzehtsiarou et al (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 9; Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights'

post-accession Protocol 16 ECHR effectively will bring to the fore possible discrepancies between the EU and the ECHR standards of protection. All this is to suggest that clarifying the relationship between the margin of appreciation and consensus post-Protocol 16 will improve the coherence of the ECtHR's reasoning in its interactions with the CJEU - whichever form such interaction may take after a hypothetical accession agreement.

Lastly, the discussion on the Convention and the Court's reform is ongoing as the recent Copenhagen Declaration (which welcomed the entry into force of Protocol 16 and urged the few remaining states to ratify Protocol 15<sup>127</sup>) demonstrated. Although some of the controversial and, indeed, unfortunate formulations<sup>128</sup> of an earlier draft Declaration were omitted or redrafted in the final text, the fact remains that several states have been insisting that the Court should rely more extensively on the notions of subsidiarity (perhaps advancing a 'state centric subsidiarity'<sup>129</sup>) and the margin of appreciation.

Once the Court's general approach with regard to consensus and the margin of appreciation has been presented, it is now appropriate to examine the legitimacy question.

### **The relationship between European consensus and the margin of appreciation in light of the multi-dimensional legitimacy of the Strasbourg Court**

*Why this relationship is linked with the legitimacy question*

At least three reasons can be provided as to why the Court's approach with regard to the interplay between the two notions is linked to the ongoing discussion on the ECtHR's legitimacy. First, the methodology of international courts and tribunals contributes to the legitimisation of their judgments; this may also be termed as 'procedural fairness'.<sup>130</sup> The clearer the methodology, the more likely applicants will trust the Court's reasoning, and the more likely respondent states will implement the Court's judgments. Second, on the use of

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(2016) 35 *Yearbook of European Law* 145; and, of course, *Bosphorus v Ireland*, Application 45036/98, 30 June 2005, paras 155-165, in particular para 165.

<sup>127</sup> See paragraphs 37(a) and 11 of the Copenhagen Declaration, respectively.

<sup>128</sup> Alice Donald and Philip Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' (2018) EJIL: Talk!, available at: [www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten](http://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten).

<sup>129</sup> See Andreas Follesdal and Geir Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (2018) EJIL: Talk!, available at: [www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue](http://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue).

<sup>130</sup> Janneke Gerards, 'Inadmissibility decisions of the European Court of Human Rights: A critique of the lack of reasoning' (2014) 14 *Human Rights Law Review* 148; Tom Barkhuysen and Michiel Van Emmerik, 'Legitimacy of European Court of Human Rights judgments: Procedural aspects' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds) *The legitimacy of Highest Courts' rulings: Judicial deliberations and beyond* (T.M.C. Asser Press 2009) 437.

consensus as such, a question arises as to whether it is appropriate for a counter-majoritarian institution to resort to consensus (which involves a ‘majoritarian dimension’) in order to adjudicate on the permissible margin of appreciation. Third, the scope of the use of the margin of appreciation by the ECtHR (which as we have seen is frequently, but not always, influenced by consensus) is relevant as that doctrine sometimes acts as a safeguard against judicial activism.<sup>131</sup>

*Preliminary remarks about the legitimacy of international courts and tribunals*

Judges sitting at international courts or tribunals are generally not elected; their legitimacy,<sup>132</sup> therefore, cannot stem from the regular domestic electoral process. As a parenthetical observation, it is noted that the same generally holds for national judges (with some exceptions, such as judges in several US states), and therefore there is nothing particularly extraordinary about this situation. Regardless, state consent cannot but constitute the starting point when searching for legitimacy.<sup>133</sup> However, it is generally accepted that because of their influence (international courts do not simply affect the litigants in a specific case, but ‘shape the obligations of states prospectively’, while impacting non-state actors as well), the ‘normative legitimacy’ of such courts should be further substantiated.<sup>134</sup> Accordingly, given that international courts perform functions which go beyond dispute settlement (namely they ‘stabilize normative expectations’, ‘develop normative expectations and thus make law’ and ‘control and legitimate the authority exercised by others’), state consent has to be complemented with ‘other legitimacy resources’.<sup>135</sup> The emergence of human rights norms at the regional or international level evidence the transformation of traditional understandings of sovereignty, if not the challenges that domestic orders face in order to provide solutions to persistent, yet interdependent, problems. In this sense, Alter rightly points out that international

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<sup>131</sup> Andreas Follesdal, ‘Why the European Court of Human Rights may be democratically legitimate: A modest defense’ (2009) 27 *Nordic Journal of Human Rights* 289, at 297. ‘Judicial activism’ is a contested notion in itself; for further discussion see, among others, Brice Dickson (ed) *Judicial activism in common law Supreme Courts* (Oxford University Press 2007).

<sup>132</sup> This is not the place to discuss the concept of legitimacy in international law, but for a helpful account explaining the different strands of legitimacy discourse (and in particular, the distinction between ‘legal’ and ‘social’ legitimacy) see Christopher Thomas, ‘The uses and abuses of legitimacy in international law’ (2014) 34 *Oxford Journal of Legal Studies* 729; see also Thomas Franck, ‘Legitimacy in the international system’ (1988) 82 *American Journal of International Law* 705.

<sup>133</sup> For Franck, compliance entails an ‘obligation’ above states’ ‘sovereign will’, and the ‘obligation derives not from consent to the treaty, or its text, but from membership in a community that endows the parties to the agreement with status, including the capacity to enter into treaties’; see Franck (n 132) 756.

<sup>134</sup> Nienke Grossman, ‘The normative legitimacy of international courts’ (2013) 86 *Temple Law Review* 61, at 68.

<sup>135</sup> Armin von Bogdandy and Ingo Venzke, ‘On the functions of international courts: An appraisal in light of their burgeoning public authority’ (2013) 26 *Leiden Journal of International Law* 49, at 50.



courts ‘can contribute to accountability in domestic and international politics, which is part of the project of making international law democratically legitimate’.<sup>136</sup> Adding to this perhaps, Donald and Leach observe that a ‘widely acknowledged justification for international human rights bodies is the need to provide an external safety mechanism given the inevitability that even well-functioning democracies make mistakes’; thus, ‘judicial review provides an external corrective to, rather than a substitute for, domestic deliberation’.<sup>137</sup> That being said, if international courts are viewed as ‘policy instruments’, then it is easier to explain the fact that courts do depend on social legitimacy for implementation: ‘non-compliance with the law is certainly not the goal, but it can be a way to allow for democratic choice to trump international law compliance’.<sup>138</sup> Thus, on the one hand, the legitimacy of international human rights courts vis-à-vis *the people* also resides in their power to generate a ‘generalizable interest’ on the basis of a specific case; potentially, their judgments could ‘protect individuals everywhere and in any part of the world’.<sup>139</sup> On the other, ‘the absence of directly representative institutions on the transnational level and the difficulty of establishing a meaningful electoral process on the global level is one of the reasons why the principle of subsidiarity has greater weight when assessing institutional decision-making beyond the state’.<sup>140</sup>

For international courts, legitimacy becomes more challenging *inter alia* since their judges ‘are less subject to peer pressure and less steeped in a domestic judicial culture’, ‘and also because [a]buse of judicial power is more likely when legislation is more indeterminate’ – as it can be with an international treaty.<sup>141</sup> Simultaneously, international courts perform two functions closely associated with the rule of law, a ‘central standard of legitimacy’: they ‘enhance *non-domination* by guarantees and protections of individuals against infringements by their state’, and they ‘increase *predictability*’, which enables individuals ‘to make longer term plans in pursuit of [their] various interests’.<sup>142</sup>

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<sup>136</sup> Karen Alter, *The new terrain of international law: Courts, politics, rights* (Princeton University Press) 364.

<sup>137</sup> Alice Donald and Philip Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016) 129.

<sup>138</sup> Alter (n 136).

<sup>139</sup> Seyla Benhabib, ‘Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times’ (2007) 11 *Citizenship Studies* 19, at 33.

<sup>140</sup> Mattias Kumm, ‘The legitimacy of international law: A constitutionalist framework of analysis’ (2004) 15 *European Journal of International Law* 907, at 926.

<sup>141</sup> Follesdal (n 131) 291.

<sup>142</sup> Andreas Follesdal, ‘Curb, channel and coordinate: The constitutionalism of international courts and tribunals’ in Geert De Baere and Jan Wouters (eds) *The contribution of international and supranational courts to the rule of law* (Edward Elgar 2015) (emphasis added).

*How the broader use of consensus by the Strasbourg Court supports its multi-dimensional legitimacy*

Much of what was said about the legitimacy of the international courts and tribunals also applies to the Strasbourg Court. However, owing to the Convention's particular features, including the right of individual application, the procedure of appointment of the ECtHR's judges, the Court's method of adjudication, and subsidiarity as manifested in the Convention, it is necessary to examine the legitimacy of the ECtHR separately. From earlier sections it follows that even if the presence or lack of consensus may overlap with the Court's decision on the margin of appreciation, this by no means entails that consensus was in all of these cases the decisive factor upon which the Court based its decision. This can be explained if European consensus is examined in light of the legitimacy of the Strasbourg Court.

Is European consensus the safest method to adjudicate on borderline cases? Or should it be rejected altogether when the ECtHR decides when the respondent should be granted the margin of appreciation? The author does not believe that consensus is the only legitimising factor that should determine the outcome of new, unsettled human rights questions. As such, consensus is *neither irrelevant nor the only factor* to be considered by the Strasbourg Court. It is submitted that the answer as to *why* European consensus is generally being used in the aforementioned way is because the legitimacy of the ECtHR is multi-dimensional (a point explained in a moment), and therefore the Court cannot but deviate occasionally from the guidance provided by the comparative exercise, whilst simultaneously taking it into due consideration.

Although answering the enquiry as to *when* European consensus *should be used or followed* by the ECtHR falls outside the scope of this paper, it is nonetheless important to note that the ECtHR is by definition a counter-majoritarian institution; thus, seeking guidance via the identification of a strong majority across the contracting parties does not always constitute a helpful exercise.<sup>143</sup> Accordingly, the ECtHR's legitimacy cannot be solely dependent on a comparative exercise across 47 states. Simultaneously, however, it is generally accepted that the Strasbourg Court ensures a minimum level of protection (this being an expression of the subsidiarity principle) and thus 'institutional reasons' suggest that the ECtHR will inevitably

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<sup>143</sup> George Letsas, 'The truth is in autonomous concepts: How to interpret the ECHR' (2004) 15 *European Journal of International Law* 279. Letsas is generally critical of consensus, observing on p. 304: 'If it makes no sense to let the majorities decide what rights individuals have, then it makes no sense either to resolve legal disagreement in human rights cases by appealing to what the majorities now believe or have legislated'.

be, in some cases, deferential.<sup>144</sup> Thus, when deciding on the margin of appreciation, consensus offers gains in objectivity, predictability and perhaps occasionally transparency,<sup>145</sup> which cannot be neglected. The simultaneous counter-majoritarian and subsidiary function of the ECtHR is returned to below.

Let us now explore the multi-dimensional legitimacy of the ECtHR. The Court's powers stem from an international treaty signed by the democratic will of states (*pacta sunt servanda*).<sup>146</sup> That treaty grants the Court under Article 19 ECHR the mandate to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'. Moreover, the first paragraph of Article 32 ECHR states that '[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto', while the second that 'in the event of dispute as to whether the Court has jurisdiction, the Court shall decide'. Next, the Strasbourg Court (and, indeed, any court) fulfills its functions when it is completely independent. Thus, Protocol 14 ECHR, which introduced a nine year non-renewable term for judges, certainly enhances the legitimacy of the ECtHR.<sup>147</sup> Particularly important is the right of individual application to the Court, which goes hand-in-hand with the Court's legitimacy.<sup>148</sup> Further, the quality of the Court's reasoning augments the legitimacy of its judgments: in principle, a thoroughly explained decision adds to the coherence and predictability of the Convention machinery, thereby contributing to legal certainty.<sup>149</sup> Differently put, 'procedural fairness' legitimises the outcome of the Court's judgments.<sup>150</sup> It has rightly been observed, though, that 'the style of reasoning adopted by the Court places the flexibility needed to deal with cases on their facts above the achievement of doctrinal clarity or engagement with the philosophical issues at stake'.<sup>151</sup>

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<sup>144</sup> Dimitrios Tsarapatsanis, 'The margin of appreciation doctrine: a low-level institutional view' (2015) 35 *Legal Studies* 675. Thus, the author proposes a theory of underenforcement 'in the interpretation and application of legal norms', in light of the 'shared responsibility' between the ECtHR and the domestic authorities in embedding human rights.

<sup>145</sup> Dzehtsiarou (n 14) 132-133.

<sup>146</sup> See further Jean-Paul Costa, 'On the legitimacy of the European Court of Human Rights' (2011) 7 *European Constitutional Law Review* 173, at 174. Article 26 of the Vienna Convention on the Law of the Treaties states that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.

<sup>147</sup> *Ibid*, 175. See also Art 2 of Protocol 14 and Art 23(1) ECHR.

<sup>148</sup> See, for example, Nikos Vogiatzis, 'The admissibility criterion under Article 35(3)(b) ECHR: A "significant disadvantage" to human rights protection?' (2016) 65(1) *International and Comparative Law Quarterly* 185.

<sup>149</sup> See Dzehtsiarou (n 14) chapter 6.

<sup>150</sup> Gerards (n 130); Barkhuysen and Van Emmerik (n 130).

<sup>151</sup> Aileen McHarg, 'Reconciling human rights and the public interest: Conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, at 673.

A study completed in 2011 found that various domestic actors perceive the Court as legitimate, primarily due to its function to guarantee the respect for human rights even at the expense of unpopularity or opposition from domestic governments.<sup>152</sup> The Court's popularity with civil society – despite the limited number of admissible cases submitted by NGOs – may be explained with reference to the persistent 'exemplary' relationship between the Strasbourg Court and NGOs; the latter view access to the Court as an 'opportunity to participate in the development of international human rights law'.<sup>153</sup> Further, the fact that judges are elected by the Parliamentary Assembly of the Council of Europe, on the basis of three nominees,<sup>154</sup> adds to the Court's legitimacy. Importantly, the legitimacy of the ECtHR was enhanced by the decision of the Parliamentary Assembly not to accept lists of candidates if they do not include at least one candidate of each sex, with a view to ensuring a fairer gender balance on the bench.<sup>155</sup>

When considering the Strasbourg Court's legitimacy, comparisons with directly elected legislatures at the domestic level beg the question as to whether it is the role of courts (be they domestic or inter/supranational) to function as majoritarian institutions. According to a particular strand of political constitutionalism, however, precisely on these grounds international human rights courts should be confined to 'weak review'.<sup>156</sup>

The other side of the coin with regard to the ECtHR's legitimacy is subsidiarity, which means here that the Court cannot be deemed to enjoy limitless legitimacy, however firm its social acceptance may be found to be. The Court has never been truly hostile to subsidiarity,<sup>157</sup> precisely because it is completely impractical for the Court (or the Committee of Ministers) to ensure compliance without the cooperation of the domestic authorities, either at the preventive

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<sup>152</sup> Başak Çalı, Anne Koch and Nicola Bruch, 'The legitimacy of the European Court of Human Rights: The view from the ground' (UCL Report 2011).

<sup>153</sup> Rachel Cichowski, 'Civil society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds) *The European Court of Human Rights between law and politics* (Oxford University Press 2011) 77, at 95-96.

<sup>154</sup> Nicolas Bratza, 'The relationship between the UK courts and Strasbourg' [2011] *European Human Rights Law Review* 505, at 506. See also Art 22 ECHR.

<sup>155</sup> Resolution 1366 (2004) of the Parliamentary Assembly of the Council of Europe, 'Candidates for the European Court of Human Rights'. See further Bilyana Petkova, 'Spillovers in selecting Europe's judges: Will the Criterion of Gender Equality Make it to Luxembourg?' in Michal Bobek (ed) *Selecting Europe's judges: A critical review of the appointment procedures to the European Courts* (Oxford University Press 2015) 222.

<sup>156</sup> Richard Bellamy, 'The democratic legitimacy of International Human Rights Conventions: Political constitutionalism and the European Convention on Human Rights' (2014) 25 *European Journal of International Law* 1019. For Bellamy, 'the ECtHR could be described as applying a "soft" version of strong review', and thus an appropriate adaptation to weak review could be 'to allow the Committee [of Ministers] to become the final court of appeal' (ibid, 1037). The UK's Human Rights Act 1998 under sections 2 – 4, and in so far as the obligations upon domestic courts are concerned, may be viewed as falling under the 'weak review' approach.

<sup>157</sup> For the Court's views on the reference to subsidiarity in Protocol 15 ECHR see Vogiatzis (n 111) 139.

stage or during enforcement. Subsidiarity also entails that the Court will frequently point out that the domestic authorities are in a better position to assess the relevant human right question – and therefore the appropriate standard of protection. After all, the Convention safeguards minimum standards; a dynamic interpretation of the ECHR, especially when far-reaching, almost always entails a risk of allegations of judicial activism.

In this context, the ECtHR has to strike a delicate balance between its constitutionalist mission (enshrined by Articles 19 and 32 ECHR) and its subsidiary role in guaranteeing the appropriate standards of protection. The challenging position of a Court which acts as the jurisdiction of last resort is this: it has to develop the standards of human rights according to the evolutive interpretation of the treaties, but not to the point of – for example – creating new rights which do not feature or cannot be inferred from the Convention's text or purpose. After all, transnational institutions (including courts) cannot rely on the 'presumption of legitimacy' that national institutions enjoy.<sup>158</sup> This is why the importance of the right to individual application to the Strasbourg Court should be reiterated, a right which cannot, of course, in itself, legitimise *any* Court judgment. Moreover, the traditions (or vigour) of judicial review across Europe vary,<sup>159</sup> and this perhaps could explain why some of the voices accusing the Court of activism stem from domestic judicial branches.

Such a balance (between the constitutionalist function and subsidiarity) is no doubt anything but a straightforward exercise, and this is where European consensus may come into play. European consensus adds *as well* to the legitimacy of the Court's conclusions. However, if European consensus always had to be accepted as the crucial factor to be taken into consideration by the Strasbourg Court, it is not an exaggeration to suggest that there would be no need to establish a Court in the first place (or at least to grant it the present jurisdiction under Articles 19 and 32 ECHR). It would probably suffice to establish an independent monitoring mechanism attached to the Council of Europe, which would merely identify and then confirm the convergence of the various legal orders in Europe on sensitive matters, and then would adjust (possibly through a process of ratification) the level of human rights protection accordingly. This is to suggest that the Court *has* to interpret and apply the Convention. In so doing, it cannot merely be satisfied with the outcome of a comparative research across the contracting parties – and this can work both ways, that is, either in favour or to the detriment

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<sup>158</sup> James Gibson and Gregory Caldeira, 'The legitimacy of transnational legal institutions: Compliance, support, and the European Court of Justice' (1995) 39 *American Journal of Political Science* 459, at 464. Indeed, 'unless citizens extend their allegiance to a transnational polity, the most direct source of legitimacy is unavailable'.

<sup>159</sup> *Ibid.*

of the development of human rights standards. In this sense, when consensus is not the catalyst for the decision on the margin of appreciation, it cannot be taken for granted that the Court's judgments lack legitimacy *simply because* the Court did not follow or give prominence to the guidance provided by European consensus.

To be sure, the work of the Court may be criticised from a broader standpoint, which obviously exceeds the Convention's 'territory'. Reservations have been and will continue to be raised about the Court's judgments due to a plethora of reasons, including varying degrees of skepticism vis-à-vis judicial review,<sup>160</sup> especially when it enforces rights which are not 'narrowly defined or absolute'.<sup>161</sup> It has been observed that 'rights adjudication is intrinsically political';<sup>162</sup> authors have critiqued, from various standpoints, the theory of 'common law constitutionalism'.<sup>163</sup> Criticism has been levelled against the judiciary for failure to protect civil liberties and restrict the power of the executive, even after the adoption of landmark pieces of legislation such as the UK's Human Rights Act 1998.<sup>164</sup> Other approaches understand developments such as the Human Rights Act<sup>165</sup> as a successful compromise of a seemingly 'impossible demand': the need to reconcile 'the demands of self-rule with the need to respect the human rights of those within its remit'.<sup>166</sup> The Act may therefore facilitate the dialogue between the legislature and the judiciary.<sup>167</sup> These points should be duly noted in an account discussing the legitimacy of courts and tribunals, but it is, of course, beyond the aims of this contribution to address the perennial debate on the merit (or lack thereof) of judicial review, or – more generally - the relationship between the judiciary and the elected legislature.

In some cases, criticism against the Strasbourg Court and the Convention (particularly from non-academic circles) may possibly stem from an 'antipathy' towards European control over

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<sup>160</sup> Jeremy Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Review* 1346; Mark Tushnet, 'Abolishing judicial review' (2011) 27 *Constitutional Commentary* 581; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015).

<sup>161</sup> Adam Tomkins, 'The role of the courts in the political constitution' (2010) 60 *University of Toronto Law Journal* 1, at 4.

<sup>162</sup> Martin Loughlin, *The idea of public law* (Oxford University Press 2004) 129.

<sup>163</sup> See, for example, J. A. G. Griffith, 'The political constitution' (1979) 42 *Modern Law Review* 1; Thomas Poole, 'Legitimacy, rights and judicial review' (2005) 25 *Oxford Journal of Legal Studies* 697.

<sup>164</sup> K.D. Ewing, 'The futility of the Human Rights Act' [2004] *Public Law* 829; K.D. Ewing, *The bonfire of the liberties: New Labour, human rights, and the rule of law* (Oxford University Press 2010).

<sup>165</sup> For a broader discussion of the impact of the Act in the UK see, among others, Patrick Birkinshaw, *European Public Law: The Achievement and the Challenge* (Kluwer 2014) 436-482, who concludes (on pp. 480-481) that the Act 'is a constitutional change which has had the most dramatic impact on the way judges and lawyers think ... and a pervasive influence in virtually all areas of governance and administration'.

<sup>166</sup> Conor Gearty, *Principles of human rights adjudication* (Oxford University Press 2005). See also more recently an elaborate account on why the Human Rights Act should not be repealed in Conor Gearty, *On fantasy island: Britain, Europe and human rights* (Oxford University Press 2016).

<sup>167</sup> Alison Young, *Parliamentary sovereignty and the Human Rights Act* (Hart Publishing 2008).

domestic affairs,<sup>168</sup> and such criticism directed at the ECtHR may occasionally be voiced via the ‘convenience’ of the legitimacy discourse. It may also be assumed that the simultaneous presence of two European courts conflates these voices of concern.<sup>169</sup> Yet it could equally be claimed that a ‘virtuous competition’ between the two courts may result in ‘beneficial effects for the protection of fundamental rights in Europe’.<sup>170</sup>

In any event, while the author does not stand among those believing that the ECtHR has been, on balance, particularly activist in its approach, the author acknowledges, nonetheless, that the discussion on legitimacy cannot be overlooked by the Strasbourg judges, not least because of the imminent risk of non-implementation. Because of the structure of the Convention machinery as a subsidiary level of protection, effective implementation – although formally entrusted to the Committee of Ministers<sup>171</sup> – quite inevitably presupposes dialogue<sup>172</sup> and ‘communication between the different actors’.<sup>173</sup>

Thus, to return to the question of the use of European consensus by the Strasbourg Court, it is submitted that using consensus as *one* of the available forms of reasoning within proportionality is preferable to either disregarding consensus altogether or relying primarily (or perhaps exclusively) on it, because this supports the multi-dimensional legitimacy of a Court that has to strike a delicate balance between the development of human rights in Europe (the constitutionalist thesis) and its role as the jurisdiction of last resort. Consensus injects a majoritarian dimension to the Court’s analysis which can seem at first glance attractive from a legitimacy point of view. It is not clear, however, why priority should be given to this legitimising factor. Thus, the lack of consensus cannot amount to a ‘carte blanche’ for violations of rights as such matters are ultimately determined by a Strasbourg Court duly considering present-day conditions and evolution. The presence of consensus should also not exclude the possibility for the respondent to justify divergence (in light of subsidiarity). The

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<sup>168</sup> A point made by Elliott (n 2) 626-627, who is also critical of such accounts/ approaches.

<sup>169</sup> Such concerns can vary, and beyond critical observations they may also include voices advocating higher standards of human rights protection in Europe (e.g. that the ECtHR’s standing is undermined as it guarantees minimum standards; or that the CJEU should bring additional matters within the scope of EU law, thereby extending the reach of the Charter, etc).

<sup>170</sup> See Fabbrini and Larik (n 126).

<sup>171</sup> See Art 46 ECHR.

<sup>172</sup> Rt Hon Lady Justice Arden DBE, ‘Peaceful or problematic? The relationship between national supreme courts and supranational courts in Europe’ (2010) 29 *Yearbook of European Law* 3; Merris Amos, ‘The dialogue between United Kingdom courts and the European Court of Human Rights’ (2012) 61 *International and Comparative Law Quarterly* 557.

<sup>173</sup> Dean Spielmann, ‘Judgments of the European Court of Human Rights: Effects and implementation’ (2013) Conference at the Paulinerkirche Göttingen Georg-August-University, Göttingen, available at: [www.echr.coe.int/Documents/Speech\\_20130920\\_Spielmann\\_Gottingen\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20130920_Spielmann_Gottingen_ENG.pdf), p. 4.

Court was not created to decide on a consensual basis; it was created to safeguard and, *where appropriate*, develop the human rights standards in Europe, being mindful, nonetheless, of its subsidiary role and the need to defer in order to accommodate domestic sensitivities or expertise - again, *where appropriate*.

In this sense, the application of consensus within the proportionality exercise enables the Court to take into account a plethora of factors before concluding on the margin of appreciation, such as the balancing of competing public and private interests, the examination of less restrictive alternatives, considerations of whether the essence of the right has been impaired, the tenet that rights should be practical and effective and not theoretical and illusory, occasionally statistical evidence or expert opinions,<sup>174</sup> among others.

Taking this further, unless we accept that courts are majoritarian institutions (they are not) or at least that they reflect majoritarian tendencies (even prominent sceptics of judicial review would not advance the claim that such review, when it occurs or should occur and however confined, should be ultimately based on a calculus of the majority view), then the majoritarian aspect of consensus is not the best argument to legitimise its use by the Court. Rather, it is the actual *convergence* of the legal orders that enables the Court to resort to evolutive interpretation; and it is that convergence that should be viewed as legitimising consensus. Evolutive interpretation, it is remembered, is based on the tenet that the Convention is a living instrument which should reflect present-day conditions. If consensus is the bridge between the margin of appreciation and evolutive interpretation,<sup>175</sup> then the convergence across Europe can be deemed to reflect the necessary present-day conditions, thereby justifying the use of consensus. Thus, it is crucial for the Court, or so this article submits, to disentangle consensus perhaps not primarily from the margin of appreciation, as Rozakis argued,<sup>176</sup> but from its majoritarian component. Often, one finds in the Court's reasoning meticulous calculations of the position across the Council of Europe, rather than elaboration on the nature and scope of convergence. The argument can be put in a different way: the Court should disentangle the majoritarian dimension of consensus from the application of the margin of appreciation. There is an additional reason for this: if the precise function of consensus is not made clear, then

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<sup>174</sup> See, for example, *D.H. and Others v Czech Republic* (n 94) (on systemic problems of discrimination affecting minorities).

<sup>175</sup> *Arai-Takahashi* (n 11) 203-204; *Dzehtsiarou* (n 14) 132-133.

<sup>176</sup> See *Rozakis* (n 25).



ultimately the faculty for the Court to rely on evolutive interpretation on the basis of *other criteria* as well may be lost.

Overall, consensus as a form of analysis, however useful, has its limitations. In this context, the Court should clearly articulate in its jurisprudence its general approach concerning the impact of consensus on the margin of appreciation. The concluding section will show, nonetheless, that this is not the case. Thus, while the article has generally justified the ECtHR's general approach from the point of view of its compatibility with the multi-dimensional legitimacy of the Court, it will take a slightly more critical approach when it comes to the coherence in the ECtHR's reasoning.

### **Conclusion and outlook: A call for a clearer articulation of the relationship between the two terms**

This article sought to clarify the relationship between the margin of appreciation doctrine and European consensus. It was shown that consensus does not always determine the outcome on the margin of appreciation. Consensus is a form of reasoning used by the Court in its application of the proportionality test. Moreover, it was demonstrated that the clarification of the interplay between the two notions will have implications for the interpretation of the Convention after the entry into force of Protocols 15 and 16 ECHR.

In this context, this contribution argued that the use of consensus by the ECtHR as an important, yet flexible, exercise supports its multi-dimensional legitimacy. Indeed, the general use of consensus by the ECtHR in the determination of the margin of appreciation fits into the function of the Court as a non-majoritarian European institution, benefitting from different sources of legitimacy, which does, nonetheless, operate under the principle of subsidiarity and the related need to accommodate diversity across Europe. It is true that the deployment of European consensus often enhances the legitimacy of the ECtHR's judgments. But total reliance on it by the Strasbourg Court would undermine the latter's constitutionalist position or the legitimacy it enjoys owing to a number of other factors, including individuals' direct access to that Court.

The paper examined a number of cases where a mismatch between consensus and the margin of appreciation was identified, and referred to several further judgments where the outcome on the margin of appreciation did not deviate from the guidance provided by the comparative exercise - even though in the latter case consensus was not always the crucial element that guided the Court. To be sure, the aim was to unravel the *general approach* of the Court insofar

as the interplay between these two terms is concerned; it should not be concluded that the outcome or legitimacy of the Court's balancing exercise in some or all of the above cases was assessed here: this was not a contribution on the application of proportionality by the ECtHR, nor was it assessed when exactly consensus *should* inform the margin of appreciation.

Of course, the question of when European consensus should be used by the Court and, if so, when it should determine the outcome on the margin of appreciation, is critical to understanding whether use (or non-use) of consensus analysis contributes to the legitimacy of the Court. This is certainly a valid point, in response to which the following remarks can be of relevance. In order to answer the question of how much weight consensus *should* play in the Court's reasoning, it is essential to critically reflect on all forms of reasoning adopted by the Court, with a view to evaluating their significance. That exercise goes beyond the aims of this contribution – albeit it is noted that there would be considerable challenges in such exercise, not least because often much depends on the factual and legal framework of each case. In any event, the *how* precedes the *when*: to answer the latter question, one should first dispel any doubts as to the current method employed by the Strasbourg Court. Thus, the present article can serve as a basis for further research on the ways of reasoning employed by the Court, including consensus.

Beyond the contribution to the legitimacy debate, the findings of this article have a number of implications for respondent states, applicants, or even critics of the ECtHR. States and individuals should be aware that invoking the consensus argument does not automatically lead to more or less deferential judgments. Of course, pondering on whether they have gone far enough or too far is an exercise that international courts cannot escape – but this cannot solely depend on the consensus question, however helpful a method it may be found to be. In any event, the judges in Strasbourg are mindful of, if not concerned about, the present legitimacy debate – but it is useful to remember that opposition to/ criticism of the Court is not necessarily *evidence* of illegitimate judgments:

‘If there were neat harmony of interests between national legislatures and international human rights courts, or between minority protection and majoritarian popular sovereignty, or between individual citizens and the authorities governing over them, we would hardly need international human rights treaties in the first place’.<sup>177</sup>

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<sup>177</sup> Johan Karlsson Schaffer, Andreas Follesdal and Geir Ulfstein, ‘International human rights and the challenge of legitimacy’ in Andreas Follesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds) *The legitimacy of*

As already noted, though, the article will conclude with some critical observations. The following question can be posed: what is the way forward for the ECtHR, in light of the broader discussion on the Court's legitimacy (which includes clarity of reasoning, as already explained), and most notably the adoption of Protocols 15 and 16 ECHR, which will inevitably bring to the fore issues addressed here? This contribution will encourage the Court to articulate its approach on the relationship between consensus and the margin of appreciation in a more accessible and coherent way; in other words, it is now time for consolidation and codification.

Indeed, a number of cases illustrate that the Court has used different formulations in its jurisprudence. In several judgments concerning Article 8 ECHR, the Court has delineated this relationship as follows:

‘A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. ... Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider’.<sup>178</sup>

This definition is incomplete: first, the question as to whether and to what extent the *presence* of consensus is relevant for the margin of appreciation is not addressed; second, there has been jurisprudence where the Court granted the margin in cases where a particularly important facet of the individual's existence or identity was at stake.

In cases involving Article 14 (in conjunction with other Convention articles, and notably Article 8), the Strasbourg Court has employed the following explanation:

‘[t]he scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the

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*International Human Rights regimes: Legal, political and philosophical perspectives* (Cambridge University Press 2013) 1, at 13.

<sup>178</sup> See *Evans v the United Kingdom* (n 85) para 77; *A, B and C v Ireland* (n 37) para 232; *X and Others v Austria* (n 79) para 148; *Hämäläinen v Finland* (n 97) para 67. In *S. and Marper v the United Kingdom* (n 85) para 102, the phrase ‘particularly where the case raises sensitive moral or ethical issues’ was omitted.

existence or non-existence of common ground between the laws of the Contracting States'.<sup>179</sup>

The same formulation has also been used in the context of Article 3 of Protocol 1 ECHR.<sup>180</sup> Using slightly different wording, the Court observed in a case concerning the alleged violation of Article 14, in conjunction with Article 5 ECHR that '[a]n additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the existence or non-existence of a European consensus'.<sup>181</sup> These definitions are better, in that they address the existence of consensus as well. However, they may be taken to mean that the Court in most cases resorts to the comparative material, which is not the case. Also, they do not encompass cases where consensus and the margin of appreciation do not overlap.

On a few occasions where Article 9 was at stake, the ECtHR held that it 'may, if appropriate, have regard to any consensus and common values emerging from the practices of the States Parties to the Convention'.<sup>182</sup> The key difference is the term 'if appropriate', which is more reflective of the Court's existing practice. However, there is no reference to the absence of consensus.

In this context, the article concludes by arguing that the Court should clarify and consolidate its messages with regard to the interplay between the two notions. This contribution has offered insights into the Court's general practice.<sup>183</sup> A more coherent approach will also assist the parties (or interveners) when preparing their submissions, and will alleviate some of the inconsistency in the Court's reasoning.

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<sup>179</sup> *Rasmussen v Denmark* (n 100) para 40. See also *Glor v Switzerland*, Application 13444/04, 30 April 2009, para 75; and *Petrovic v Austria* (n 85) para 38, concerning Article 14 in conjunction with Article 8 ECHR.

<sup>180</sup> *Sitaropoulos and Giakoumopoulos v Greece (Grand Chamber)* (n 33) para 66.

<sup>181</sup> *Khamtokhu and Aksenchik v Russia* (n 85) para 79.

<sup>182</sup> *Hamidović v Bosnia and Herzegovina* (n 95) para 38; *S.A.S. v France* (n 95) para 129.

<sup>183</sup> For example, a definition along the following lines can be proposed: *in order to decide whether states should be granted the margin of appreciation, one of the factors that the Court may take into consideration, where appropriate, is the presence or lack of consensus. The presence or absence of consensus is often, but not always, influential in the decision on the margin of appreciation.*