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Judicial Deference Allows European Consensus to Emerge

Shai Dothan*

Abstract

The European Court of Human Rights (ECHR) searches for human rights policies that are adopted by the majority of the countries in Europe. Using a doctrine known as “emerging consensus,” the court then imposes these policies as an international legal obligation on all the countries under its jurisdiction. But the ECHR sometimes defers to countries, even if their policies fall short of the standard accepted by most of the countries in Europe. This deference is accomplished by using the so-called “margin of appreciation” doctrine. Naturally, emerging consensus and margin of appreciation are often conceived as competing doctrines: the more there is of one, the less there is of another. This article suggests a novel rationale for the emerging consensus doctrine: the doctrine can allow the ECHR to make good policies by drawing on the independent decision-making of many similar countries. In light of that, the article demonstrates that a correct application of the margin of appreciation doctrine actually helps emerging consensus reach optimal results by giving countries an incentive to make their policies independently.

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Table of Contents

I. Introduction.....	395
II. The Doctrines of Emerging Consensus and Margin of Appreciation	399
III. Why Emerging Consensus Can Lead to Good Policies	400
A. Applying the Jury Theorem.....	400
B. Potential Criticism.....	402
IV. Fulfilling the Similarity Condition	404
V. Ensuring a Genuine Consensus	405
A. The ECHR Manipulates Its Decisions to Avoid Backlash.....	406
B. The ECHR Delays Its Decisions to Avoid Backlash	407
C. Emerging Consensus May Induce Countries to Follow a Perceived Majority	410
VI. When Emerging Consensus Cannot be Discovered	413
A. The Law is Still in Flux	413
B. Choice Between Several Options	414
VII. Conclusion	418

I. INTRODUCTION

The European Court of Human Rights (ECHR) is a regional human rights court located in Strasbourg, France. It monitors compliance with the European Convention on Human Rights (Convention).¹ The Convention guarantees individuals basic human rights such as the right to life, the right to liberty, and the right to a fair trial, among many others. Furthermore, the Convention allows individuals to file applications directly to the court against the countries that violated their rights.²

The court's jurisdiction covers forty-seven European countries with a total of 800 million citizens.³ Since its establishment in 1959, the court has issued approximately 20,000 judgments,⁴ making it the most prolific international court in history.⁵ Moreover, the court has examined more than 700,000 applications,⁶ most of them by individuals claiming their rights were abused.⁷ The impact of the court on the life of Europeans is difficult to exaggerate. The court also served as a model for creating the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, extending its influence far beyond Europe.⁸

Scholars have noted that the ECHR is starting to behave as a constitutional court that not only helps specific applicants, but also tries to improve the protection of human rights across Europe.⁹ They have studied the ECHR as a

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

² See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, art. 34, Nov. 11, 1994, E.T.S. No. 155.

³ See EUROPEAN COURT OF HUMAN RIGHTS, THE CONSCIENCE OF EUROPE: 50 YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS 16 (2010), <https://perma.cc/2GFN-7W35>.

⁴ See EUROPEAN COURT OF HUMAN RIGHTS, ECHR OVERVIEW 1959-2016 3 (2017), <https://perma.cc/5PS7-L3MV>.

⁵ See OCTAVIAN ICHIM, JUST SATISFACTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS i (2015).

⁶ See ECHR OVERVIEW 1959-2016, *supra* note 4, at 4.

⁷ A person, non-governmental organization, or group of individuals who were victims of a violation by a member country may file an application according to article 34 of the Convention. While, under article 33 of the Convention, the court can also receive applications from countries who are members of the Convention regarding violations by other member countries, such applications account for only a fraction of the ones filed. See Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 361, 372 (2009).

⁸ See THE CONSCIENCE OF EUROPE, *supra* note 3, at 16.

⁹ See Joshua L. Jackson, Note, *Bronionski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, 39 CONN. L. REV. 759, 777-81 (2006).

prototype for effective international courts¹⁰ and described the judicial tactics used by the court to attain its enormous power.¹¹

But despite all the praise from academics, the ECHR is under constant fire from the press and from European politicians.¹² Many people think the court is overreaching and intruding on the sovereignty of countries. They have criticized the court for making it difficult to extradite criminals and suspected terrorists out of Europe,¹³ and for trying to force European countries to allow prisoners to vote.¹⁴

Some countries are trying to push the ECHR to defer more to domestic authorities and curb its judicial activism. The ECHR has traditionally used a doctrine called the “margin of appreciation” to justify deference to country policies. This doctrine is not mentioned in the Convention, and some countries were concerned that the court doesn’t use it often enough. To address this problem, representatives from all member countries agreed in April 2012 on the Brighton Declaration, which calls on the court to apply the margin of appreciation consistently and, moreover, calls for including the margin of appreciation doctrine

¹⁰ See generally Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (explaining how lessons from the success of the European Court of Justice and the ECHR could be used to enhance other international courts).

¹¹ See Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT’L L. 115 (2011); SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 212–61 (2015).

¹² See Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQ. L. 411, 418 (2013) (showing how, following severe criticism of the ECHR in the U.K. press, there was a sharp decline in the support for the court by the British public).

¹³ See *Othman (Abu Qatada) v. United Kingdom*, 2012-I Eur. Ct. H.R. 159. In this case, the ECHR prevented the deportation of an extremist Muslim cleric to Jordan because he was supposed to stand trial for terrorism there and the court feared that the trial would rely on evidence extracted from others using torture. The cleric was eventually extradited after a lengthy legal struggle. See also *A. A. v. United Kingdom*, 2011 Eur. Ct. H.R. In this case, the court prevented the deportation of a Nigerian who was convicted of rape at the age of 15. The social ties the applicant developed in Britain were the reason for preventing the deportation. The British Media fulminated against this judgment. See James Slack, *Social Ties Keep Rapists in Britain*, DAILY MAIL (Sept. 21, 2011), <https://perma.cc/EV58-5HAW>.

¹⁴ See *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187. In this case, the ECHR decided that a blanket ban on prisoner voting violates the Convention. See *Greens & M.T. v. United Kingdom*, 2010-VI Eur. Ct. H.R. 57. In this case, the ECHR required the U.K. to change its laws on the disenfranchisement of prisoners within six months. British politicians were incredibly critical of these judgments and the former British Prime Minister David Cameron was even quoted as saying that giving the right to vote to prisoners makes him “physically ill.” See Andrew Hough, *Prisoner Vote: What MPs said in Heated Debate*, TELEGRAPH (Feb. 11, 2011), <https://perma.cc/C8FT-A7MX>.

in the preamble of the Convention.¹⁵ Following the Brighton Declaration, a new Protocol, Protocol 15, was drafted to amend the Convention. This Protocol specifically mentions that states enjoy a margin of appreciation. Also, in accordance with the Brighton Declaration, it refers to the principle of subsidiarity, according to which states have the primary responsibility to protect the rights enshrined in the Convention.¹⁶ The principle of subsidiarity provides the standard justification for the margin of appreciation granted to European countries, in recognition of their special ability to make fitting and legitimate policies for their own citizens using their own democratic procedures.¹⁷ So far, Protocol 15 has been ratified by thirty-six European Countries, and signed by nine others.¹⁸ Although the protocol will not enter into force until ratified by all forty-seven Convention members, scholars have argued that the ECHR has already started to restrain itself in response to this powerful backlash.¹⁹

Will deference lead to a decline in the vast judicial impact of the ECHR? Not necessarily. This article highlights a counter-intuitive benefit of the margin of appreciation doctrine. Surprisingly, margin of appreciation may aid in the correct use of what many see as its greatest rival: the doctrine of “emerging consensus.”

The emerging consensus doctrine is used by the ECHR to discover the minimal human rights standards that are respected by at least a *majority* of the countries in Europe. This minimal standard is then required from *all* European countries. States that do not grant these minimal standards will be found in violation of the Convention by the ECHR.

Emerging consensus can be justified in light of a simple mathematical model called the Condorcet Jury Theorem. This model stipulates that a majority vote in a group of similar decision-makers, who decide independently, is more likely to be correct than the choice of each individual decision-maker. The problem with using the Jury Theorem to justify emerging consensus is that not all countries in Europe are similar in every respect, and some countries may be motivated not to decide independently.

¹⁵ See European Court of Human Rights, Brighton Declaration: High Level Conference on the Future of the European Court of Human Rights 3–4, ¶ 12 (Apr. 20, 2012), <https://perma.cc/QW3G-2W9Y>.

¹⁶ Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art. 1, June 24, 2013, ETS No. 213.

¹⁷ Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 912, 918–22 (2005).

¹⁸ See the list of ratifications and signatories updated up to July 12, 2017, *Chart of Signatures and Ratifications of Treaty 213*, COUNCIL OF EUROPE (Oct. 14, 2017), <https://perma.cc/E3FQ-KXNJ>.

¹⁹ See Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, J. INT'L. DISPUTE SETTLEMENT (forthcoming 2018), <https://perma.cc/4UCA-TD4Y>.

This is where the margin of appreciation doctrine can assist the correct application of emerging consensus. Clearly, if a country is fundamentally different from the rest of Europe, it should be granted a margin of appreciation and the ECHR should not obligate it to conform to the policies of dissimilar countries. The ability of the margin of appreciation to assist in satisfying the condition of independent decision-making is slightly less obvious. Margin of appreciation allows the ECHR to provide speedy guidance to European countries without actually finding a violation and risking political backlash. This decreases the incentive of countries to imitate the policies of their neighbors. Furthermore, margin of appreciation allows the ECHR to provide a proper warning about the content of emerging consensus before finding any country in violation. This decreases the incentive of countries to try to guess where the European consensus is going by themselves and to follow it in order to preempt future violation findings against them.

There are also cases in which emerging consensus cannot help the ECHR to discover good policies. First, when countries are still deliberating about what the law should be, the ECHR cannot learn much from their current legal positions. Second, when countries can choose from several legal options based on a balance of several conflicting considerations, the Jury Theorem logic breaks down. These cases give rise to the so-called Condorcet Paradox—a situation in which the choices of group members cannot be aggregated to form a true majority decision. In these situations, the ECHR should avoid emerging consensus. It may decide to do that by deferring to the state using margin of appreciation. But it may also decide to intervene and find a violation based on other doctrines at its disposal.

Section II describes the doctrines of emerging consensus and margin of appreciation as they are applied by the ECHR. Section III points out that the application of emerging consensus could be justified as leading to the informational benefits of the Jury Theorem and discusses potential criticisms of this argument. Section IV highlights that the ECHR's use of margin of appreciation to defer to countries that differ from the rest of Europe can maintain good policies upheld by these countries. Section V highlights situations in which although the ECHR's use of the margin of appreciation could sustain country policies that are inferior to the European consensus, the use of margin of appreciation is essential to allow for the correct identification of the European consensus by the ECHR and to incentivize countries to decide independently. Section VI addresses situations in which emerging consensus cannot be adequately discovered. Section VII concludes.

II. THE DOCTRINES OF EMERGING CONSENSUS AND MARGIN OF APPRECIATION

The emerging consensus doctrine directs the ECHR to take current views on human rights policies into account as it interprets the Convention. It therefore serves as a tool to adapt the meaning of the Convention over time to changing conditions.²⁰ There are three common understandings of the doctrine. The first suggests that the doctrine directs the court to consider the laws of European countries. The second suggests that the doctrine directs the court to consider the views of experts. And the third suggests that the doctrine directs the court to consider the views of the European public.²¹ Recent empirical evidence reveals that the ECHR in fact follows a version of the first understanding; if the majority of European countries protect a certain human right, the ECHR interprets the Convention as protecting this right and finds countries that infringe this right in violation of the Convention.²²

An interview with a former judge of the ECHR confirms that the research division of the court often prepares a comparative analysis of the laws in all, or at least most of, the countries in Europe to assist ECHR judges in Grand Chamber cases—legally important cases that are referred to a panel of seventeen judges.²³ The comparative report will sometimes include a short description of the law in every European country, but it will sometimes be limited to answering a simple identical question about the provisions of the law in every country. If a substantial majority of the countries in Europe adopted a legal solution or if a little more than half of the countries adopted a solution that seems to be supported by a growing trend across Europe, this is an argument judges can use in favor of adopting that legal solution as the correct interpretation of the Convention. Sometimes the comparative analysis prepared for the judges is only a minor supportive tool, but sometimes it affects the result and then judges will usually mention the emerging consensus argument in their judgment. Judges do not always follow the emerging consensus in Europe, but they are sometimes criticized for digressing from it by

²⁰ See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at ¶ 31 (1978) (indicating that the ECHR should interpret the convention in light of present day conditions, including the developments in the laws of European countries).

²¹ See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133, 139 (1993).

²² See Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 106 (2014); see also KANSTANTZIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 12, 37 (2015) (explaining that the ECHR will usually identify an emerging consensus even if countries in Europe are not unanimous but show a convergence towards protecting a certain right, which is protected by a significant majority of countries).

²³ Interview with David Thór Björgvinsson, former judge of the ECHR (Sept. 13, 2016).

dissenting judges. Judges may be persuaded not to follow emerging consensus because of arguments based on the margin of appreciation or on respect for profound moral values of the countries.²⁴

The margin of appreciation doctrine directs the ECHR to grant European countries some leeway to make their own policies without finding them in violation of the Convention. The width of the margin of appreciation determines the amount of leeway granted to the countries. The narrower the margin of appreciation, the more likely the ECHR will find a country in violation of the Convention; and the wider the margin of appreciation, the more likely the ECHR will defer to the country and not find it in violation. The ECHR judgments list a series of factors that determine the width of the margin of appreciation. These include the type of rights infringed by the country, the interests at stake, and the aims pursued by the country when it infringed the rights.²⁵ A key factor that determines the width of the margin of appreciation is the existence of a European consensus on the issue.

The ECHR decided that if there is no European consensus regarding the protection of a certain human right, the margin of appreciation granted to the countries would be wider than if such a European consensus existed.²⁶ The margin of appreciation and emerging consensus are therefore competing doctrines. The more the court is able to identify a European consensus on an issue, the narrower the margin of appreciation it grants to the countries. The less the court is able to identify a European consensus, the wider the margin of appreciation it grants to the countries.²⁷

III. WHY EMERGING CONSENSUS CAN LEAD TO GOOD POLICIES

A. Applying the Jury Theorem

A common intuition is that if many decision-makers consider a problem and prefer a certain policy over others, this policy is probably a good one and hence a policy worth following by other actors. The eighteenth century French philosopher Nicolas de Condorcet developed a model that supports this intuition,

²⁴ *Id.*

²⁵ See Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99, 127–28, ¶¶ 77–78; Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, in 14 CAMBRIDGE Y.B. INT'L LEGAL STUD. 318, 390–403 (Kenneth Armstrong et al. eds., 2012).

²⁶ See Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, 382, ¶ 77 .

²⁷ See Helfer & Slaughter, *supra* note 10, at 316–17; Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 851 (1999).

known as the Jury Theorem. According to the Jury Theorem, if a group of decision-makers have to choose between two options, and each individual decision-maker has an equal probability of more than fifty percent of reaching the correct result, then the majority's decision in this group is more likely to be correct than that of any individual decision-maker. The theorem holds that the larger the group of decision-makers, the higher the probability that the majority's decision will be correct.²⁸

For the Jury Theorem to work, the decision-makers within the group must satisfy two conditions: they must be similar to each other—otherwise the option chosen by one may not necessarily suit others; and they must decide independently and refrain from following each other's decisions—otherwise, additional decision-makers do not minimize the risk of error.

Some scholars argue that the Jury Theorem implies that countries should use comparative law to learn from the experiences of other countries.²⁹ Because countries make informed and sophisticated assessments on what policies they should adopt, they resemble decision-makers who are more likely to decide correctly than to err. Therefore, countries comply with the basic condition for the applicability of the Jury Theorem. This means that the majority of countries in the world or in a specific region are likely to adopt better policies than each country can adopt on its own. Accordingly, the emerging consensus doctrine, which directs the ECHR to follow the policies used by the majority of European countries, leads the ECHR to adopt good human rights policies.

Yet emerging consensus will only lead to good policies when the countries comply with the conditions for the applicability of the Jury Theorem. In other words, emerging consensus is worth following only as long as the countries considered are similar and make their policies independently. This article argues that the ECHR can use the margin of appreciation to limit the application of emerging consensus to situations in which countries are similar to each other. It further argues that a proper use of the margin of appreciation would incentivize countries to decide independently.

²⁸ To illustrate the power of the Jury Theorem, consider this simple numerical example. Imagine a group of decision-makers deciding by majority vote in which each decision-maker has a 60% probability to be right. If the group has five members, the probability that the decision of the group will be correct is 68.3%. For eleven members, the probability is 75.3%. For twenty-one members, it is 82.6%. For fifty-one members, it is 92.6%. If every decision-maker has a 70% probability to be right, the results are even more extreme. Five members would have an 83.7% probability to be right, eleven members would have a 92.2% probability. Twenty-one members would have a 97.4% probability. With fifty-one members, the right result is practically guaranteed—the probability of making the right choice is 99.9%.

²⁹ See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

B. Potential Criticism

It is worth mentioning at this point that the statement that the majority of countries are likely to decide correctly is not free from criticism. After all, a European consensus that restricts human rights instead of protecting them may also develop.³⁰ One can argue, for example, that countries are ruled by political majorities that serve the interests of some parts of society at the expense of the rights of minorities. As a result, national policies across Europe—not just in the country whose case is before the court—are going to discriminate against minorities.³¹

Nevertheless, scholars who analyzed the actual application of emerging consensus by the ECHR suggest that this doctrine is in fact often used to protect minorities. The court sometimes used emerging consensus to justify intervention and enforcement of higher standards of minority protection. When the European consensus violates the rights of minorities, the court will often use its discretion and decide not to follow emerging consensus. Besides, the standards of human rights protection in Europe specifically are already quite high, which justifies the use of emerging consensus to learn from the practices of most European countries.³²

Theoretically speaking, even if every country has minorities and discriminates against them in certain ways, there is no reason to think that all countries will discriminate against the same minorities in the same way and push the European consensus in the same direction. If most countries do not discriminate in the same manner, they would not form a harmful European consensus. For example, if a third of the countries violate the right of minorities to a fair trial, another third harms their freedom of speech, and another third violates their privacy, the emerging consensus doctrine would obligate all countries to protect all three rights. After all, the Jury Theorem is based on the idea that individual decision-makers may be biased, but because they are not biased in the same direction, their biases will balance themselves out and the majority's opinion will be optimal.³³

In case of a prevalent and persistent bias against minorities, deferring to the country is not a better option than following the European consensus. On the

³⁰ See Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 146–47 (2005); Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1231 (1998).

³¹ See Benvenisti, *supra* note 27, at 851.

³² See DZEHTSIAROU, *supra* note 22, at 122–29.

³³ See Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQ. L. 125, 130–31 (2002).

contrary, scholars have argued that the ECHR should intervene more in cases that concern minorities' rights because national policies are naturally suspect in this area.³⁴ There is even some evidence that the ECHR actually gives a narrower margin of appreciation to countries in cases that concern minorities.³⁵ Even if the European majority cannot be trusted on such issues, any individual country would be even less trustworthy.

If the court cannot rely on emerging consensus in cases that involve a persistent bias against a certain minority, it may theoretically rely on abstract moral principles to justify intervention. Sometimes, this is the only reasonable option. The problem is that moral principles are contested, and therefore their application may be arbitrary and may damage the legitimacy of the court's decision.³⁶ All this leaves relying on emerging consensus an imperfect tool, but probably the least of all evils.

One may think about yet another theoretical challenge to the use of emerging consensus for promoting human rights protection across Europe. The emerging consensus doctrine is used by the ECHR to set a minimum, a "floor," of human rights standards that are required from all countries. Countries are allowed, of course, to grant *more* protection than this floor; they are only required not to grant *less* protection. The problem is that human rights are often relational: protecting one right inevitably implies restricting another, forming a "ceiling" for its protection.³⁷ If the court protects the freedom of speech of journalists, for example, it will limit the privacy rights of celebrities.

This challenge doesn't pose any problem to the application of the emerging consensus doctrine, even if it requires a degree of rhetorical skill from the judges. The Jury Theorem is useful exactly because it can help solve real dilemmas in which every choice has both advantages and disadvantages. When a right is violated—even if this violation itself implies the protection of other rights—the ECHR can look to the practice of all countries in Europe and examine whether they allow this violation. If most countries do not allow the violation, either because they do not view the attendant protection of other rights as sufficiently

³⁴ See Benvenisti, *supra* note 27; Shai Dothan, *In Defence of Expansive Interpretation in the European Court of Human Rights*, 3 CAMBRIDGE J. INT'L & COMP. L. 508, 520–23 (2014).

³⁵ See ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 27–31 (2012); Andreas von Staden, *The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review* 10 INT'L J. CONST. L. 1023, 1042 (2012); Oddný Mjöll Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 HUM. RTS. L. REV. 647, 664–65 (2014).

³⁶ See DZEHTSIAROU, *supra* note 22, at 117–18.

³⁷ See FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE: CHALLENGES AND TRANSFORMATIONS IN COMPARATIVE PERSPECTIVE 38–39 (2014).

important or for any other reason, the emerging consensus doctrine would counsel the court to find the practice of the country in question in violation of the Convention. This judicial tool reflects the decisional advantage of the Jury Theorem.

IV. FULFILLING THE SIMILARITY CONDITION

Countries usually shape their human rights regimes to suit the interests of their citizens.³⁸ When countries are similar to one another, the legal regime chosen by each country is likely to prove beneficial for the citizens of other countries as well. All countries differ from each other across many dimensions, but some of the differences between the countries are irrelevant to certain legal choices. In contrast, a country's unique attributes should affect other legal choices. If the difference between the countries is relevant to the nature of the preferred legal regime, the experience of other countries is a less useful tool to discover the proper law.

The differences between European countries are probably less significant than the differences between countries all over the world. All countries in the Council of Europe are democracies³⁹ and share the same region. Many of the countries also share a common heritage and similar political ideals. This suggests that the use of emerging consensus within Europe can lead to better results than the use of comparative law to learn from countries around the world.

That said, some European countries differ from others in legally relevant respects. If a country is different from the rest of Europe, the laws adopted by other countries may not be beneficial for the citizens of that country. In these cases, the ECHR should grant a wider margin of appreciation to the country and defer to its policies in many respects.

In *Şahin v. Turkey*,⁴⁰ for example, a practicing Muslim female student who viewed it as her religious duty to wear a headscarf brought an application against Turkey. She argued that regulations in a Turkish university that forbade her from wearing a headscarf infringed her freedom of religion protected by the Convention. Because no other European country has forbade the wearing of the Islamic headscarf at a university, the overwhelming European consensus, in her view, should limit Turkey's margin of appreciation and condemn its regulations as

³⁸ See Shany, *supra* note 17, at 920 (arguing that human rights regimes chosen by each country do not create significant externalities on the other countries, thus implying that countries do not have to counter foreign influence and instead can shape their legal regimes to suit their citizens' interests).

³⁹ The fact that European countries are democracies also implies that many of their laws are determined in majoritarian institutions that are likely, according to the Jury Theorem logic, to lead to good policies, and hence to policies that should be followed by other countries.

⁴⁰ *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

a violation of the Convention.⁴¹ The ECHR considered the fact that Turkey was significantly different from the other European countries—it is a country inhabited predominantly by Muslims, while its unique history and its fear of extremist groups strongly commit it to secularism.⁴² In light of that, the court granted Turkey a margin of appreciation and decided that its practices did not violate the Convention.

In some issue areas, all European countries are different from each other, and therefore the European consensus is less instructive. For example, while Turkey may indeed be unique in terms of its religious dilemmas, the court in the *Şahin* case also stressed the fact that attitudes towards religious symbols are diverse across Europe generally. Such diversity supports greater deference to the countries' policies.⁴³

When the ECHR applies a wider margin of appreciation to a country because it is different, it can therefore sustain a regime that is more suitable to the citizens of that country than the regime adopted by the majority of European countries.⁴⁴ Under these conditions, granting the country a wide margin of appreciation would therefore keep good policies in place.

V. ENSURING A GENUINE CONSENSUS

The optimal human rights policies are adopted if all European countries make their policies independently and the ECHR applies the policies used by the majority to all the countries that are not fundamentally different from the rest of Europe. But sometimes the ECHR strategically digresses from the correct application of emerging consensus. This behavior may suit the court's interest, but it jeopardizes the collective European interest in adopting the best policies. Countries may also serve their own interests and fail to decide independently. In these cases, the ECHR cannot discover the best policies by following emerging consensus. This suggests that a proper use of the margin of appreciation doctrine can give both the ECHR and the countries incentives to act in ways that would allow emerging consensus to discover the best human rights policies.

⁴¹ See *id.* at 201, ¶ 100.

⁴² See *id.* at 205–08, ¶ 114. For criticism of this decisions, see *id.* at 221–22, ¶ 3 (Tulkens, J., dissenting).

⁴³ See *id.* at 204, ¶ 109.

⁴⁴ Even if a country is not different from the other countries, it may have vastly superior skills at making good policies and should therefore stick to its own policies instead of learning from other countries. The Jury Theorem implies, however, that errors are minimized extremely effectively as the size of the deciding group increases. As can be seen from the numerical example in note 28, *supra*, even a small number of decision-makers can do much better than a single highly sophisticated actor. The possibility that one country would have better decision-making abilities than a group of forty-seven countries, provided these countries all face similar conditions, is very unlikely.

A. The ECHR Manipulates Its Decisions to Avoid Backlash

When the ECHR issues judgments interpreting the Convention, it applies doctrines such as emerging consensus that are well grounded in its case law. These doctrines shape the court's decision, but they are not its sole determinant. The ECHR, like other international courts, also shapes its judgments in light of the possibility that certain decisions may provoke countries to harm the court's interest.⁴⁵ For example, countries may fail to comply with judgments they view as excessively demanding.⁴⁶ Countries may also criticize the court in ways that can prove disastrous to its public support across Europe. In extreme circumstances, countries may even try to damage the court's budget, to change the Convention, or to leave the court's jurisdiction.⁴⁷ If the ECHR does not consider this possibility of backlash, it may risk losing its ability to function as an effective institution and ultimately its ability to set policies that are followed across Europe.

The ECHR may therefore change its decision and digress from the accurate application of emerging consensus in order not to provoke countries to harm its interests. To the extent that emerging consensus leads the ECHR to the best possible result, the ECHR's strategic behavior may lead it to issue judgments that adopt inferior policies. If countries conform to the policies required by the ECHR's judgments, they may adopt bad laws.

The margin of appreciation doctrine allows the ECHR not to find a country in violation of the Convention without at the same time characterizing it as conforming to the European consensus. A judgment that relies on the margin of appreciation to prevent a finding of violation does not present the country's actions as conforming to the European consensus. As a result, other countries that seek to follow emerging consensus as a tool for making good policies would not try to imitate the policy adopted by that country. European countries would realize that the country's conduct was saved from a finding of violation not because it conformed to the European consensus, but because the country was granted a margin of appreciation.

If the ECHR grants the country a margin of appreciation, no violation is found and no acts of compliance are required. Consequently, the country cannot express its protest by noncompliance. Because the ECHR ultimately approves the country's practices, the country is also much less likely to criticize the court or to harm it in any other way than if the court found it in violation. The margin of

⁴⁵ See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 942–44 (2005) (arguing that only a subset of the decisions that are legally possible are also politically possible for international judges); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 632 (2005) (arguing that international courts are constrained by the preferences of countries).

⁴⁶ See Dothan, *supra* note 11, at 122.

⁴⁷ See Ginsburg, *supra* note 45 at 656–68; DOTHAN, *supra* note 11, at 61–113.

appreciation therefore allows the ECHR to establish an emerging consensus accurately and present it in its judgment, while minimizing the fear of backlash by not finding the country in violation. An accurate presentation of the emerging consensus is crucial as a tool to guide other countries to adopt good policies.

But the margin of appreciation is more than just a tool to facilitate the honest application of emerging consensus. More generally, it allows the ECHR to avoid making false doctrinal rulings by giving it a way out of finding countries in violation, while at the same time not presenting their conduct as conforming to a correct reading of the Convention. For example, in the case of *Ireland v. United Kingdom*,⁴⁸ the ECHR reviewed the special emergency measures that the U.K. took against terrorists in Ireland during the 1970s. When scrutinizing the measure of extra-judicial detentions, the ECHR stressed that the national government is better placed to decide what measures are required to combat the threat to the peace and should therefore be allowed a margin of appreciation. Ultimately, the court concluded that due to the emergency conditions prevailing at the time, the derogations from the protection of the right of liberty by the detentions were permitted and did not constitute a violation of the Convention.⁴⁹ The ECHR may not have been able to condemn the detentions undertaken by the U.K. as violating the Convention for fear of backlash. The court did find some investigative techniques of the U.K. to be violations of the Convention, and may have feared that an even more intrusive intervention in its security considerations would lead to a hostile response against the court. The margin of appreciation allowed the court to minimize its risk of incurring the ire of the U.K., without at the same time granting a stamp of approval to all of its security policies.

B. The ECHR Delays Its Decisions to Avoid Backlash

As the last Subsection pointed out, the ECHR may consider the political implications of its judgments and change its decisions to avoid a hostile response by the country. Another option available for the ECHR to prevent backlash is to delay its judgments on sensitive issues until the views of the countries and their citizens become more hospitable to the judgment viewed by the ECHR as correct.

The ECHR can refuse to hear cases under its jurisdiction only under clearly defined conditions. These conditions usually ensure that no significant violation occurred.⁵⁰ But the ECHR can strategically avoid deciding certain cases by

⁴⁸ *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

⁴⁹ *Id.* at ¶¶ 207, 214.

⁵⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 art. 35(3), Nov. 14, 1950, E.T.S. No. 5. reads:

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

declaring that it doesn't have jurisdiction. In this manner, the court can postpone its decision on delicate issues for many years, until it believes that it can issue a judgment on the issue without excessively jeopardizing its interests.

For example, in *Bankovic v. Belgium*,⁵¹ citizens of the Federal Republic of Yugoslavia lodged a complaint against seventeen European countries that were members of NATO.⁵² The applicants claimed that these countries violated the Convention by their involvement in a NATO air strike that killed civilians. The ECHR decided that it did not have jurisdiction to decide the case, because the attack occurred outside of the territories of all countries subject to the Convention. This decision was criticized as digressing from the ECHR's previous judgments,⁵³ yet it allowed the ECHR to avoid finding violations in the actions of the most powerful and influential countries in Europe and, thereby, to prevent a serious backlash.⁵⁴

Only ten years later, in the *Al-Skeini v. United Kingdom*⁵⁵ and *Al-Jedda v. United Kingdom*⁵⁶ cases, which reviewed the U.K.'s military actions in Iraq, the ECHR amended its doctrine regarding jurisdiction and decided that when countries exercise extraterritorial control—even in territories that were never subject to the Convention—the ECHR can still take the case. The ECHR may have calculated that European countries would be much more tolerant to scrutiny of military actions in Iraq in 2011 than to scrutiny of military actions in Yugoslavia in 2001. Therefore, it was only in 2011 that the ECHR thought political conditions allowed

a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

⁵¹ *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

⁵² Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the U.K.

⁵³ See Alexandra R  th & Mirja Trilsch, *Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L. 168, 172 (2003); Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 545 (2003). Previous ECHR decisions on extraterritorial jurisdiction include: *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. B) at 23–24, ¶ 62 (1995); *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2234, 2234–35, ¶ 52; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 25.

⁵⁴ See Dothan, *supra* note 11, at 139.

⁵⁵ *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99.

⁵⁶ *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305.

it to scrutinize the extraterritorial military actions of countries.⁵⁷ But the outcome of this strategy, in addition to adding harmful ambiguity to the ECHR's doctrines on jurisdiction, was that a clarification of the laws applicable to the exercise of military power outside a country's territory was delayed for an entire decade.

The postponement of cases due to political considerations adds on to other factors in delaying the endorsement of emerging consensus by the ECHR. Other reasons for delay include the rapidly increasing number of cases and the court's limited resources that lead to a huge backlog of undecided cases,⁵⁸ as well as the fact that countries can take years to form established policies on new legal problems.⁵⁹

If the ECHR takes too long to find an emerging consensus, countries are deprived of the privilege of rapidly identifying the European consensus by following the ECHR's judgments. In this case, countries may have a strong incentive to learn from other countries in an effort to immediately improve their policies. According to the Jury Theorem's logic, a country can improve its policies by following the majority of countries in Europe. But countries that learn from each other do not make decisions independently. Because all countries do not make their policy decisions at the same time, the countries that establish policies first are likely to influence the policy decisions of other countries, preventing those countries from exercising fully independent judgment. Later on, countries may not be able to distinguish between the countries that made their policy independently and those that simply imitated other countries. Countries may therefore follow policies that do not reflect a real majority decision of all the countries. Instead, they may end up following later imitations of the countries that just happened to make their policy first on the issue—a phenomenon known as an “information cascade.”

When more and more countries imitate each other instead of making an independent decision, the policy adopted by the majority does not enjoy the informational benefit of the Jury Theorem.⁶⁰ Consequently, when countries fail to

⁵⁷ See Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQ. L. 455, 475–76 (2013).

⁵⁸ In 2015, 40,650 applications were allocated to the judges, and 45,576 applications were disposed of judicially, reducing the backlog of cases to 64,850. See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2015 4 (2016), <https://perma.cc/8LA7-GEHM>.

⁵⁹ This problem is addressed in Section VI.A, *infra*.

⁶⁰ The use of comparative law by countries is therefore self-defeating—the more prevalent the use of comparative law, the lower its informational benefits become for the countries that use it. This is a problem with the argument of Posner and Sunstein in favor of the use of comparative law by national courts, which they acknowledge in their paper. See Posner & Sunstein, *supra* note 29, at 163. Elsewhere I argue that international, regional, and federal courts can use comparative law while minimizing this problem. Therefore, when the ECHR uses the emerging consensus doctrine, it can reach superior results compared to national courts that use comparative law. See Shai Dothan, *The Optimal Use of Comparative Law*, 43 DENV. J. INT'L L. & POL'Y. 21, 23–24 (2014).

decide independently, the ECHR would not be able to use emerging consensus to make good policy choices.

In order to give countries an incentive not to follow other countries, the ECHR must therefore try not to delay its policymaking. If countries know that they can learn the optimal policy from the ECHR's decision within a short time, they will be more willing to make an independent decision. This way countries know that the inferior policy they adopt on their own can soon be replaced by the policies required by the ECHR. If countries are deciding independently, the ECHR would be able to identify a genuine European consensus and lead to the best possible policy.

Some countries may be reluctant to adhere to the inferior policies they can adopt on their own, even if they know they would be quickly replaced by the policy set by the ECHR. Yet if all countries realize that an independent decision is essential to allow the ECHR to identify a European consensus, countries that fail to decide independently would be branded as harming the collective interest. To avoid this stigma, countries may be willing to maintain the laws they can reach on their own for a short while, provided they know that the ECHR would discover the emerging consensus as rapidly as possible.

The margin of appreciation doctrine allows the ECHR to identify the European consensus without at the same time finding a country in violation. If the ECHR knows that it can find the consensus without subjecting itself to backlash, it will have no incentive to delay its decision by avoiding sensitive cases, as it did in the *Bankovic* case. This will allow the ECHR to establish a European consensus quickly, thereby reducing countries' incentive to learn from each other. Consequently, the European consensus would be a genuine one and reflect the independent decisions of the countries.⁶¹

C. Emerging Consensus May Induce Countries to Follow a Perceived Majority

In addition to the incentive to make good policies, another factor affecting the countries' decisions is the fear that they might be found in violation of the

⁶¹ If countries have scarce resources to invest in policy research and they know that the ECHR is likely to decide quickly, however, they may rationally decide to invest fewer resources in determining what policy to adopt, knowing that it would soon be replaced by the ECHR's decision. In this manner, the quality of every individual policy made by the countries would decline, and so would the quality of the majority's decision identified by emerging consensus. Fortunately, the Jury Theorem shows that, in a large group of decision-makers who make decisions that are only slightly better than random, the majority's decision is still very likely to be correct (see the numerical example in note 28, *supra*). Therefore, if the forty-seven countries of the Council of Europe make independent decisions based on a cheap and easy assessment of the facts known to them, the policies adopted by the majority will probably be good.

Convention by the ECHR. If a country is found in violation, the finding damages its reputation for compliance with its international commitments. The finding signals that the country is not willing to sustain the costs necessary to maintain its reputation for compliance with international law. Countries that are unwilling to sustain such costs are perceived as bad actors—if they will not honor their treaty commitments, they might break their promises to other countries in pursuit of quick gains.⁶²

Countries may change their policies to avoid a finding of violation against them by the ECHR. To avoid a finding of violation, countries may try to conform in advance to the standards of human rights they expect the ECHR would require in the future. If countries know that the ECHR applies emerging consensus and follows the majority of countries in Europe, they may try to find out what the majority of countries are doing and adopt that policy before the ECHR finds them in violation.

There is a danger in an attempt by all countries to conform to what they perceive to be the policy adopted by the majority. Every country may realize that all the other countries have the same incentive: to detect the majority and conform to it so as not to be found in violation by the ECHR. If some countries start to protect a certain human right, other countries may decide to follow suit, not because they believe that protecting this right is good policy, but because they do not want to be left out in a minority that does not protect this right. Since all countries realize that all the other countries have the same fear of sticking to minority policies and being found in violation, they would all grant protection to the right. In this manner, European countries that try to guess what the European majority prefers might end up adopting policies that would be rejected by the majority of the countries in Europe had they decided independently of each other.⁶³

The fear that may dissuade countries from deciding independently is the fear of falling behind the majority of countries and consequently being found in violation. The ECHR can mitigate this fear through the margin of appreciation doctrine. By using this doctrine, the ECHR can indicate the European consensus

⁶² See Dothan, *supra* note 11, at 119–22.; ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 33–36 (2008).

⁶³ This guessing game is known in Game Theory terms as a “Beauty Contest,” after a thought experiment used by Keynes in which a group of newspaper readers can choose the six prettiest photographs from a hundred photographs of models and win a prize if they choose the same photographs chosen by the majority. In such a situation, the readers choose not what they think are the prettiest pictures, but what they think the majority thinks that the majority thinks (etc.) are the prettiest photographs. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 156 (1936). Similarly, countries that fear a finding of violation if they remain in the minority may try to guess what the majority of countries think that the majority prefers, leading to results that cut against the views of the real majority.

to the countries without at the same time finding them in violation. This ruling gives the countries a proper warning before they are found in violation. It allows countries to make their policies independently, knowing that they will not be found in violation unless the ECHR warns them first, and indicates the consensus that they should follow in the future.

For example, the ECHR indicated dissatisfaction with the U.K.'s laws regarding transsexuals for years before finding the U.K. in violation of the Convention. In *Rees v. United Kingdom*,⁶⁴ issued in 1986, the ECHR decided that keeping a transsexual's former sex on his birth certificate, which he has to display at certain occasions, and preventing him from marrying a person of his opposite current sex, do not violate the Convention. The court and the Commission (the first tier of review at the time) called attention to the fact that several European countries granted greater protection to transsexuals, although no clear consensus was then detected.⁶⁵ The court eventually granted the U.K. a margin of appreciation that prevented a finding of violation, but at the same time it voiced a concern for the suffering of transsexuals and indicated that the issue should be kept under review in light of future scientific and social developments.

The ECHR continued to warn the U.K. that its policies were out of step with proper protection of transsexuals in later cases. In *Cossey v. United Kingdom*,⁶⁶ the ECHR highlighted again the severity of the problem and the need to keep the issue under review. In *Sheffield v. United Kingdom*,⁶⁷ the ECHR showed increasing displeasure with the U.K.'s practices. In this case, the court stressed that only four out of thirty-seven European countries studied prevented a reassignment of the sex in the birth certificate. Finally, after warning the U.K. for fifteen years that its practices digressed from the European consensus, the ECHR eventually found the U.K. in violation in *Goodwin v. United Kingdom*,⁶⁸ issued in 2002.

It appears that despite the great variability of the laws on transsexuals, the ECHR was able to discern an emerging consensus against the U.K.'s practices long before the *Goodwin* case. But up until then the ECHR had granted the U.K. a margin of appreciation, thereby warning it that in the future it may be found in violation without actually condemning it as breaking its treaty commitments.⁶⁹

⁶⁴ *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986).

⁶⁵ *See id.* at ¶¶ 37, 44.

⁶⁶ *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 17 (1990).

⁶⁷ *Sheffield v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011, 2029.

⁶⁸ *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1.

⁶⁹ Some may argue that the ECHR was not convinced that a European consensus forbidding the U.K.'s practices existed much prior to the *Goodwin* case. On this account, the ECHR used the margin of appreciation as a way to delay the declaration of consensus until trends in Europe became clearer while at the same time signaling to the U.K. that its actions were under close scrutiny. *See*

This exercise allowed the ECHR to signal to European countries that they can make their laws independently without fearing a finding of violation prior to being warned. To the extent that this maneuver was successful, it may have incentivized countries to make their policies independently without guessing what policy the majority of the countries would opt for and thereby facilitated the finding of a genuine European consensus by the ECHR.

VI. WHEN EMERGING CONSENSUS CANNOT BE DISCOVERED

The preceding Sections showed that by using the margin of appreciation the ECHR can either protect country policies that should be deferred to or create the preconditions under which a genuine European consensus can emerge. This Section addresses two slightly different situations. These are situations in which emerging consensus cannot be adequately inferred from the practices of countries. This does not mean that country policies should be deferred to, however. The ECHR may use the margin of appreciation simply because it sees no justification to intervene in country policies when there is no contrary European consensus. But the ECHR may also decide to intervene in country policies by using other legal doctrines.

A. The Law is Still in Flux

The Condorcet Jury Theorem recommends following the majority view in a group of decision-makers because it relies on the assumption that each decision-maker is making a rational decision and is more likely to be right than to be wrong. When these conditions are fulfilled, the theorem mathematically guarantees that the majority's decision is more likely to be correct than the decision of each individual decision-maker.⁷⁰

Countries that make their laws in parliament after a public debate, or whose national courts make policy based on reasoned decisions, resemble rational decision-makers. This justifies the use of emerging consensus to aggregate the views of countries and follow the majority's view. But what if the relevant conditions in the countries are currently changing? What if countries are amending

Helfer & Slaughter, *supra* note 10, at 317. This explanation may account for the *Rees* case. But in contrast, when the *Sheffield* case was issued, the emerging consensus was already established in Europe, at least regarding the reassignment of birth certificates. The court points to global trends outside of Europe in favor of granting transsexual rights, trends that may have strengthened until the *Goodwin* case was issued. Yet the influence of these trends was probably not the reason for the different result. This article argues that the ECHR did not delay its finding of violation to wait until it was certain that a consensus existed, but rather to allow the U.K. a clear prior warning before it issued a judgment against it.

⁷⁰ See Posner & Sunstein, *supra* note 29, at 141.

their laws rapidly to address a new situation? Even if the law is in a state of flux, all countries technically have a policy on the issue: after all, if a behavior is not forbidden, then it is allowed. But this is policy by default. It does not stem from a rational decision that responds to current circumstances and therefore there is no reason to assume that it is correct. In these cases, there is no justification for using emerging consensus.

*S.A.S. v. France*⁷¹ demonstrates the problems generated by new phenomena that are addressed legally by some countries but not by others. The case concerned the right of Muslim women in France to wear a full-face veil in public. When the case was decided, France and Belgium were the only European countries that legislated provisions forbidding concealment of the face in public.⁷² But, at the time, the possibility of a similar ban was being *discussed* in some European countries, and in others wearing full-face veils was so rare that it did not yet constitute a real issue. Because most European countries did not consciously address this problem and decide against a ban—rather, they simply did not make any decision and left the permission to wear veils as the natural default position—the court decided that there was no European consensus on the issue.⁷³ The court ultimately decided to defer to the French policy and not to find a violation of the Convention.⁷⁴

Judges Nussberger and Jäderblom criticized this position. They argued that the contemporary laws in Europe clearly indicated a consensus of countries that did not think it was necessary to legislate in this area.⁷⁵ The complex comparative law details in this case could be debated. Indeed, it is sometimes difficult to judge whether a country *chose* to maintain its laws on the issue or did not yet decide. Nevertheless, it is clear that when countries did not make a rational choice to opt for a certain legal regime or even to sustain the regime they have in place in light of changing conditions, their current laws do not possess any decisional advantages that can justify the use of the emerging consensus doctrine.

B. Choice Between Several Options

Condorcet indicated an exception to his Jury Theorem that is known as the Condorcet Paradox. The Condorcet Paradox shows that when a group of several decision-makers have to choose between more than two potential options, the choice of the group's majority does not always follow the condition of transitivity. This means that the way in which the votes of the group are counted determines

⁷¹ *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341.

⁷² *See id.* at ¶ 40.

⁷³ *See id.* at 380–81, ¶ 156.

⁷⁴ *See id.* at 381, ¶ 157–59.

⁷⁵ *See id.* at 387–88, ¶ 19 (Nußberger, J., & Jäderblom, J., dissenting).

what constitutes the policy preferred by the majority. Under these conditions, no meaningful majority can be identified.

The Condorcet Paradox could prevent the use of emerging consensus when countries make their legal choice out of several possible options because of several conflicting considerations. As the Condorcet Paradox shows, if countries can consider conflicting considerations, the way they rate their preferences may lack transitivity.

In judgments that could show an awareness of this problem, the ECHR has been reluctant to identify an emerging consensus when countries make similar policies for different reasons. The *A, B, & C v. Ireland*⁷⁶ case is a potential example. The court decided that since countries in Europe had not reached a consensus on whether a fetus should be considered a person, the apparent consensus in their legislation regarding greater access to abortion cannot solely determine whether Ireland's prohibition of abortion struck a fair balance between the rights of the fetus and the rights of the mother.⁷⁷

This characterization of the boundaries of the issue, where emerging consensus should be discovered, was criticized by some judges as requiring too much for the discovery of emerging consensus and by others as requiring too little. On the one hand, Judge Rozakis and five others wrote a dissenting opinion arguing that the decision when life begins is irrelevant since this was not the question before the court. The question was not whether the fetus was a person; it was whether the right of the fetus—person or not—weighs less than the right of the mother in most European countries. The majority of countries answer this question in the affirmative, forming a consensus.⁷⁸ On the other hand, Judge Geoghegan wrote a concurring opinion arguing that the existence of abortion legislation does not form any consensus regarding the striking of a balance between all the relevant interests. Many reasons could lead to the adoption of legislation, and some countries may not have a public interest in the protection of the unborn as exists in Ireland. The consensus, argued Geoghegan, should be on striking the right balance, but if other countries have other public interests, they may be striking a different balance and therefore not forming any consensus.⁷⁹

While *A, B, & C* seems to suggest that the reasons behind country choice of legal policies matter, it does not demonstrate how the Condorcet Paradox actually unfolds. To understand how the Condorcet Paradox materializes, consider another issue that the ECHR dealt with: prisoners' voting rights. This issue is addressed in *Hirst v. United Kingdom*.⁸⁰ Under certain assumptions about the

⁷⁶ *A. v. Ireland*, 2010-VI Eur. Ct. H.R. 185.

⁷⁷ *Id.* at 261, ¶ 237.

⁷⁸ *Id.* at 280–82, ¶ 2 (Rozakis, J., et al., dissenting).

⁷⁹ *Id.* at 279 (Geoghegan, J., concurring).

⁸⁰ *Hirst*, *supra* note 14, at 216, ¶ 82.

underlying views of countries on the rights of prisoners to vote, the Condorcet Paradox appears. These assumptions are just possible legal views on the right to vote. The paper makes no attempt to suggest that they actually reflect the views of specific European countries, but they can help highlight the theoretical possibility of the Condorcet Paradox.

In *Hirst*, the ECHR was tasked with deciding whether a blanket ban on the right of prisoners to vote violates the Convention. The judgment related that eighteen countries in Europe allowed all their prisoners to vote, thirteen countries prevented all their prisoners from voting (including the U.K., whose policies were being examined), and twelve countries had taken away the right to vote from some prisoners under certain conditions.⁸¹ Countries that condition the prevention of prisoners from voting on certain facts usually consider the number of prison years in the verdict, the severity of the crime, and the connection between the crime and the democratic process. Alternatively, they leave the decision on taking the right to vote to the convicting judges.⁸²

The countries of Europe thus choose from at least three options: (A) allow all prisoners to vote; (B) take away the right to vote from some prisoners under certain conditions; (C) deny all prisoners the right to vote. An analysis of judgments from countries around the world on the issue of prisoners' voting rights reveals that there are at least three distinct views on the nature of the right to vote: (1) voting is an inalienable right that cannot be taken away; (2) voting is a revocable right: although it belongs to the voter, it can be taken away under certain conditions; (3) voting is a privilege: it does not belong to citizens and they may only use this privilege under certain conditions. Even in the simplest case imaginable—three countries with different views on the nature of the right to vote choosing from a menu of three policy options—the Condorcet Paradox may theoretically appear.⁸³

Countries that view voting as an inalienable right prefer policy A over all others. When they have to choose their second-best option, their choice is impossible to predict with certainty. Perhaps they would prefer policy B over policy C to let as many prisoners as possible vote.

Countries that view voting as a revocable right would certainly prefer policy B over all others. Their second-best policy is a mystery. Some countries view disenfranchisement as problematic and would try to reserve it only to rare and

⁸¹ *Hirst*, *supra* note 14, at 200–01, ¶ 33.

⁸² See Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement*, in *COMPARATIVE INTERNATIONAL LAW* 379 (Anthea Roberts et al. eds., 2018) (describing the state of the law on prisoners' voting rights across Europe and arguing that some countries have fundamentally different views on the right of prisoners to vote, making the aggregation of their views by emerging consensus problematic).

⁸³ *See id.*

special circumstances. They may prefer letting everybody vote to denying the vote to all prisoners. In other countries, however, giving all prisoners the right to vote is completely unacceptable. This policy preserves the voting rights of prisoners that these countries think definitely should not vote, for example prisoners who committed severe crimes. For the sake of the argument, let us follow the latter type of countries and choose policy C as better than policy A (denying the right to vote to all prisoners over giving the right to vote to everyone).

Countries that view voting as a privilege often subject prisoners to what is known as “civic death”: because prisoners violated the social contract, they all deserve to be disenfranchised.⁸⁴ These countries will clearly favor policy C. Their second-best policy depends on what these countries view as more important: to treat all prisoners equally and signal a clear social stigma, or to disenfranchise as many prisoners as possible. In most countries, the disenfranchisement of prisoners does not have any effect on election results.⁸⁵ The policy can therefore be viewed as a question of principle and not of strategy. Countries that view the principle of treating all prisoners the same as more important than the number of disenfranchised prisoners could prefer policy A over policy B. They would prefer to let everyone vote instead of giving the right to vote only to some prisoners.

Table 1 presents the hypothetical preferences explained above:

Table 1: Possible Preferences of Countries with Different Views on Voting Rights

	First best	Second best	Third best
(1) Voting as an inalienable right	A	B	C
(2) Voting as a revocable right	B	C	A
(3) Voting as a privilege	C	A	B

⁸⁴ See Susan Easton, *The Prisoner's Right to Vote and Civic Responsibility: Reaffirming the Social Contract?*, 56 PROBATION J. 224, 227–28 (2009).

⁸⁵ The U.S. may prove to be an exception to that rule since prisoners' disenfranchisement in this country may actually change election results. What accounts for the U.S.' unique position are the high number of prisoners, the strict disenfranchisement policies that often include convicts that were already released from prison, the large number of black prisoners that traditionally vote for the Democratic party, and the concentration of some of these prisoners in swing states such as Florida and Virginia, which shift between the two major parties and can therefore determine election results. See Harry J. Enten, *Felon Voting Rights Have a Bigger Impact on Elections than Voter ID Laws*, GUARDIAN (July 31, 2013), <https://perma.cc/2PSX-4DJ7>.

Under these assumptions, most countries (two out of three) prefer A over B. Most countries also prefer B over C. At the same time, however, most countries prefer C over A. If the preferences of the countries are indeed $A > B > C > A$, their preferences are intransitive. The majority's choice depends on the order in which the countries are asked to rate one policy option over another. The Condorcet Paradox appears.

In the example above, the Condorcet Paradox emerges because countries are taking into account several different considerations when they determine their preferences. Countries care both about the number of prisoners allowed to vote and about treating prisoners equally. Legal systems face such difficult cases all the time, but they usually use the legal process to break complex decisions into a series of simpler choices that avoid the problem of intransitivity.⁸⁶

The *Hirst* case does not provide an easy way to break up the choices of the countries and find a majority that is not subject to the Condorcet Paradox. If emerging consensus fails as a result of the Condorcet Paradox, it may be beneficial to limit its use by widening the margin of appreciation granted to the country. But, in contrast to the other cases mentioned in Sections IV and V, the use of the margin of appreciation neither increases the chance of a better decision in the case at hand nor improves the conditions for the applicability of the Jury Theorem. In fact, the court can use other doctrines to intervene in domestic policies, and then there is no necessary justification to grant countries an especially wide margin of appreciation. The court's decision in *Hirst* to strike down the U.K.'s policies on prisoners' voting rights based on other normative arguments besides emerging consensus—such as preventing indiscriminate measures that infringe important convention rights⁸⁷—could be justified along these lines.

VII. CONCLUSION

At first sight, the margin of appreciation may seem like a way to limit the consequences of the emerging consensus doctrine to suitable circumstances. For example, margin of appreciation permits countries to maintain laws that differ from the laws of the rest of Europe when they face conditions that are different from those of other European countries. This narrow use of margin of appreciation allows the ECHR to sustain good policies that suit the interests of the country under scrutiny.

But a closer look at the margin of appreciation doctrine reveals that it can do much more than protect policies that suit countries with unique characteristics. If the ECHR and the countries under its jurisdiction behave strategically—as they often must in order to protect vital interests—the ECHR may err in identifying

⁸⁶ See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107–10 (1986).

⁸⁷ *Hirst*, *supra* note 14, at 216, ¶ 82.

the true consensus of Europe. The margin of appreciation doctrine can help shape the incentives of the ECHR as an institution and the incentives of countries in ways that allow the ECHR to discover a genuine European consensus.

This implies that sometimes the ECHR must grant countries a margin of appreciation even though it is convinced that this would maintain sub-optimal policies adopted by a particular country. This broader delimitation of the margin of appreciation doctrine is essential for a real European consensus to emerge—a prerequisite for the ability of emerging consensus to lead to good policy decisions.