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The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?

The Conservative plans to replace the Human Rights Act 1998 with a British Bill of Rights have refocused the attention on the roots of the scepticism surrounding the incorporation of the European Convention on Human Rights (ECHR). One major source of discontent is the relative power of domestic and Strasbourg authorities, in particular the claim that the European Court of Human Rights (ECtHR) frequently oversteps the boundaries of its interpretative competence. Lord Sumption's extra-judicial critique forcefully illustrates this perceived illegitimacy: 'the [ECtHR]... has become the international flag-bearer for judge-made fundamental law extending well beyond the text... [It] develops the Convention… so as to reflect its own view of what rights are required in a modern democracy'.[1] Whereas States' acceptance of judicial innovation depends on multiple factors, the main objection is that the ECtHR 'exceed[s] the jurisdiction conferred upon it by their original consent'.[2] This article argues that the convergence of practice amongst a substantial majority of Council of Europe (CoE) States ('European consensus') legitimises evolutive interpretation *qua* implied revision of the original mandate. It also welcomes the reliance on public support for human rights reform within the respondent State ('local consensus') in the absence of sufficient commonalities in Europe. My (somewhat counter-intuitive) contention is that both doctrines reflect the Convention's attachment to the democratic society and the allocation of powers between national authorities and European supervision.

Section A explains the value of European consensus by reference to the legitimising function of the comparative method in international adjudication. I thus dispute the Court's authority to adopt purely aspirational interpretations. Section B rejects the view that methodological transparency in the consensus analysis would be counter-productive and proposes a 'checklist' of criteria, based on concerns raised by the case-law: sample selection, proportion of States deemed to constitute a sufficient majority, inattention to the coverage of all geopolitical blocs, over-emphasis on extra-European trends, hasty generalisations, different treatment of comparable ratios. I argue that, when the checklist is not satisfied, shifting the focus to public opinion in the respondent State is preferable to both deference and overstretching European consensus. I distinguish between two sub-categories of local consensus. A 'rights-minimising' local consensus (rejected in the past, successful in *A, B and C v Ireland*)[3] allows national standards falling below European standards to prevail based on strong societal support; section C draws a parallel with the limited reach of the 'persistent objector' under customary law,[4] suggesting that it should have even less bearing when applied to a quasi-constitutional instrument (a position arguably supported now by *A.L. (X.W.) v Russia*).[5] The second version, a 'rights-maximising' local consensus (illustrated by *Oliari v Italy*),[6] invokes public opinion to expand the respondent's Convention obligations without generalising *erga omnes partes*. Section D maintains that the apparent inconsistency of this method with Strasbourg subsidiarity and respect for democratic processes (understood as parliamentary deliberation) is removed by a wider reading of the 'democratic society'

[1] Lord Sumption, *The Limits of Law*, Kuala Lumpur lecture, 20 November 2013 <https://www.supremecourt.uk/docs/speech-131120.pdf>.

[2] F De Londras - K Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *HRLR* 525, 528.

[3] *A, B and C v Ireland* (25579/05), 16 December 2010.

[4] A State exempting itself from the application of a rule the formation of which it constantly opposed. See J Crawford, *Brownlie's Principles of International Law* (OUP, 2012), 28.

[5] *A.L. (X.W.) v Russia* (44095/14), 29 October 2015.

[6] *Oliari v Italy* (18766/11;36030/11), 21 July 2015.

principle, emphasising the role of public opinion and domestic constitutional courts in a functional democracy.

State-specific assessments of compliance are a positive trade-off between controversial pan-European standards and localised but effective supra-national control. A temporary 'variable geometry' of rights is also preferable to reining in evolutive interpretation altogether whilst waiting for European consensus to crystallise. The Conclusions thus argue that local consensus is a legitimate interpretive tool if it maximises human-rights protection within a State when domestic democratic processes are jammed; conversely, it should not accommodate a version of persistent objection that destabilises the European consensus orthodoxy and is detrimental to the quasi-constitutionalist project of the Convention.

A. THE CONTRIBUTION OF 'EUROPEAN CONSENSUS' TO LEGITIMACY AND COMPLIANCE

The ECtHR's function as a standard-setting body meets important institutional constraints. Its mandate '[t]o ensure the observance of the engagements undertaken by the [parties]'[7] is not unfettered discretion to make, rather than ascertain, the law. As Mahoney cautioned, '[e]ntrusting to judges a task of evolutive interpretation should not mean… *carte blanche* to push forward the frontiers of progress according to their own personal notions of justice'.[8] State consent remains the 'indispensable basis of legitimacy in all realms of international law'.[9] This extends to tribunals, for instance the International Court of Justice cannot adjudicate *ex aequo et bono* save for the parties' express request, and equity-based rulings do not purport to clarify international law.[10] Letsas' proposition that treaty interpretation is determining 'fact-independent moral values'[11] disregards the 'voluntarist and co-operative character' of international law.[12] The ECtHR's role is not to cast subjective ideals as binding obligations, but to identify the 'common heritage' of 'like-minded' States.[13] According to Wildhaber *et al*, ECHR rights 'imitate and reinforce those pre-existing in many domestic legal systems'.[14] By undertaking a comparative review, as van der Meersch explained, the Court is 'having recourse to a "common law" which derives… from the general body of the Contracting States' laws… and by which the Convention itself was inspired'.[15]

European consensus thus provides an objective, measurable interpretive criterion, as opposed to the judges' individual moral preferences. Mahoney colourfully suggested that '[t]he evolving standards in the Convention… should not simply be plucked from the sky by the judge'.[16] In fact, under Article 31(3)(b) Vienna Convention on the Law of Treaties

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[7] Article 19 ECHR.
[8] P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *HRLJ* 57, 68.
[9] J Cabranes, 'Customary International Law: What It Is and What It Is Not' (2011) 22(1) *Duke J.Int'l&Comp.L.* 143, 148.
[10] Art 38(2) ICJ Statute.
[11] G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) *EJIL* 509, 512.
[12] Crawford, *cit*, 16.
[13] Art 1 Statute of the Council of Europe, ECHR Preamble.
[14] L Wildhaber, A Hjartarson, S Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *HRLJ* 248, 251.
[15] WG van der Meersch, 'Reliance, in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States' (1980) 1 *HRLJ* 13, 15.
[16] Mahoney, 'Judicial Activism and Judicial Self-Restraint', *cit*, 72.

(VCLT), accepted by the ECtHR as binding,[17] the interpreter must examine the parties' 'subsequent practice' in the implementation of the treaty as evidence of their understanding of the norms. Interpretation therefore requires an empirical exercise, aimed at finding the signatories' prevalent interpretation. In the presence of mere trends, the Court 'should wait for further consolidation and corroboration and… only then proceed to find a "consensus"'.[18] Indeed the decision of a minority to go beyond the minimum shared standards cannot modify all parties' obligations. For example, as acknowledged in *Parry v UK*, the choice of several States to open marriage to same-sex partners reflects their own vision of marriage, not ECHR obligations.[19]

The relevance of 'State practice' is not undisputed; Benvenisti claims that consent is an outmoded concept and, by emphasising sovereign commitments, the Court 'relinquishes its duty to set universal standards'.[20] Yet sovereignty and the 'enduring force of consent as a fundamental principle'[21] remain constant features of the non-hierarchical global society. Certainly, human-rights bodies enjoy wider discretion than other adjudication fora, as they interpret law-making treaties based on 'open-textured'[22] notions. Additionally, as Neuman argued, human-rights treaties are distinguishable from other agreements by virtue of their prominent 'suprapositive' aspect – the underlying normative principles embodied in positive norms, whether 'natural law, religious traditions, universal morality'.[23] It is, however, insufficient for judges to affirm what they *assume* to be the content thereof. International tribunals entrusted to apply specific treaties (rather than natural law) cannot purport to have the monopoly on truth.

The claim that Strasbourg authorities should adopt a '*moral* reading'[24] further presupposes that morality is univocal and can be abstractly determined, which is belied by historical observation. Currently prohibited by a *jus cogens* norm,[25] slavery was not deemed morally unacceptable by the international society until the 1815 Congress of Vienna (Britain abolished it in 1833, providing compensation to slave-owners for the loss of their 'property'…), and a Supplementary Convention on the Abolition of Slavery was still necessary in 1956.[26] This revolution from legal assent to absolute bar disproves the assumption that moral values underpinning positive obligations are objectively accessible to the interpreter. As the Human Rights Committee recognised in *Hertzberg v Finland*, 'public morals differ widely' and '[t]here is no universally applicable common standard'.[27] Strasbourg jurisprudence has confirmed that the requirements of morals also vary within the more cohesive CoE, and, as expressed in *Handyside v UK*, '[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these

[17] I Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights – The Method' (2013) 12 *The Law & Practice of Int'l Courts and Tribunals* 243.
[18] Wildhaber *et al*, 'No Consensus on Consensus', *cit*, 257.
[19] *Parry v UK* (42971/05), 28 November 2006.
[20] E Benvenisti, *Margin of Appreciation, Consensus and Universal Standards* (1999) 31(4) *N.Y.U.J. Int'l L.&Pol.* 843, 852.
[21] L Helfer, 'Nonconsensual International Lawmaking' (2008) 1 *U.Ill.L.Rev.* 71, 72.
[22] N Lavender, 'The Problem of the Margin of Appreciation' (1997) 4 *EHRLR* 380, 390.
[23] G Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stan.L.Rev.* 1863, 1868-9.
[24] Letsas, *ibid*.
[25] See A Aust, *Modern Treaty Law and Practice* (CUP, 2013), 279.
[26] P Halstead, *Unlocking Human Rights* (Abingdon, Routledge, 2014), 5-7. In the USA the abolition of slavery did not occur until 1865.
[27] *Hertzberg v Finland* (61/1979), 2 April 1982, para.10.3.

requirements'.[28] A comparative glance at regional instruments further reveals different rights prioritisations. The Inter-American Convention on Human Rights protects life 'from the moment of conception',[29] while ECHR guarantees do not include pre-natal life.[30] Significantly, the lists of non-derogable rights do not overlap.[31] The proposition that 'universal morality' is well-equipped to justify an evolutive reading also fails to explain dissension within tribunals, including disagreement at the admissibility stage on what is 'manifestly' ill-founded. Greer and Wildhaber noted that 'judicial agendas and perceptions differ' and 'there are various ways of safeguarding most human rights'.[32] The consensus doctrine thus attenuates the individual interpreter's bias and enhances the legitimacy of ECtHR rulings.

There are also pragmatic objections to interpretation unsupported by State practice. Large-scale non-compliance would reinforce the position, already adopted in some jurisdictions,[33] that selective implementation is the normalcy of the relationship with the Court. Lacking autonomous enforcement tools, the Court depends on the credibility of its judgments and compliance-inducive peer pressure within CoE. As Krisch put it, judges need to be 'impartial and trustworthy interpreters' and cautious 'not to upset national authorities so much as to provoke a backlash'.[34] Helfer observed that 'nonconsensual lawmaking may generate domestic opposition to compliance or, more rarely, pressure to withdraw from the treaty'.[35] Current British debates confirm that this is more than just an academic consideration. The partnership between Strasbourg and domestic authorities, on which the effectiveness of the system relies, may occasionally recommend deference to 'ethical decentralisation'.[36]

This view is further supported by the overall ECHR philosophy. As Spano noted, 'the Convention is not an instrument of human rights unification,… but only lays down minimum standards'.[37] The comparative review of domestic laws assists the Court in identifying them objectively. In *Tyrer v UK*, the Court held that it 'cannot but be influenced by the developments and commonly accepted standards' of CoE States.[38] Similarly, in *Marckx v Belgium*, the ECtHR '[could not] but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe ha[d] evolved'.[39] Albeit judge-made, the 'consensus' doctrine is traceable to Article 31 VCLT; it relies on the ECHR's 'object and purpose' – including, as the 'context' suggests, the 'maintenance and *further realisation*' of human rights[40] – and on 'subsequent practice'. Moreover, it has received *a posteriori* validation from member States through 'acquiescence'.[41] This mitigates Dzehtsiarou's

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[28] *Handyside v UK* (5493/72), 7 December 1976, para.48.
[29] See Art 4(1) Inter-American Convention on Human Rights (IACHR).
[30] See *X v UK* (8416/78), 13 May 1980; *Boso v Italy* (50490/99), 5 September 2002; *Vo v France*, (53924/00), 8 July 2004, para.82.
[31] Compare Art 15(2) ECHR and Art 27(2) IACHR.
[32] S Greer - L Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2012) 12(4) *HRLR* 655, 680.
[33] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP, 2010), 126.
[34] *Ibid*, 139.
[35] Helfer, *cit*, 120.
[36] J Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War era' (2005) 54 *ICLQ* 459.
[37] R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *HRLR* 487, 493.
[38] *Tyrer v UK* (5856/72), 25 April 1978, para.31.
[39] *Marckx v Belgium* (6833/74), 13 June 1979, para.41.
[40] Preamble (emphasis added).
[41] C Draghici, 'The Human Rights Act in the Shadow of the European Convention: Are Copyist's Errors Allowed?' (2014) 2 *EHRLR* 154, 157.

concern that 'original consent… did not necessarily extend to the interpretive methods deployed by the court'.[42]

Admittedly, as Wildhaber *et al* observed, 'the Court has never indicated that it considers consensus as binding'.[43] Rather, the degree of European consensus widens or restricts States' margin of appreciation (*Kearns v France*,[44] *Mosley v UK*,[45] *X. v Austria*[46] suggest an inversely proportional correlation). Nevertheless, consensus-based expansion of obligations resembles the process of creation of customary norms, defined as 'evidence of a general practice accepted as law'.[47] The comparative survey is analogous to the 'objective element' of custom,[48] described by the ICJ as 'constant and uniform usage practised by the States'.[49] For the purposes of customary rules, '[t]he practice of states… embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions,… and ministerial statements'.[50] Given the 'persuasive' and often 'decisive' weight of the consensus factor in the Court's analysis,[51] the effect of both custom and 'consensus' is that a State may find itself bound by a norm to which it had not subscribed, if the norm becomes the practice of the overwhelming majority. The *opinio juris* element is more elusive; the introduction of further rights is not necessarily accompanied by the belief that they are *owed*, and therefore does not constitute practice *in the application of the treaty*, nor evidence of new regional custom. However, if most CoE States guarantee a certain right, an underlying belief may be *presumed* that it is required by current human rights exigencies. Alternatively, States' conduct may be said to spell out the common values underpinning Convention norms; thus, the question of whether that conduct was initially perceived as voluntary loses significance. The 'psychological' element has also been questioned as a component of customary norms, given its dubious applicability to State entities and difficulties in ascertaining it.[52] Therefore, the classification of European consensus as a mere interpretive aid rather than as evidence of supervening obligations has limited practical significance.

European consensus has indeed the capacity to restrict States' discretion in matters engaging highly subjective considerations of public morality or religion, typically deferred to domestic judgment, as recognised in *Handyside v UK* (obscene publication bans),[53] *Wingrove v UK* (blasphemy laws),[54] or *Müller v Switzerland* (seizure of sexually explicit art).[55] Supervening European consensus may trump the 'morality' defence; *Dudgeon v UK* for instance established that criminalisation of homosexual activity was no longer accepted in Europe and therefore inconsistent with the ECHR.[56] Conversely, wide discretion is afforded

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[42] K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) Jul *PL* 534, 537.
[43] Wildhaber *et al*, 'No Consensus on Consensus?', *cit*, 262.
[44] See *Kearns v France* (35991/04), 10 August 2008, para.74.
[45] See *Mosley v UK* (48009/08), 10 May 2011, para.110.
[46] *X. v Austria* (19010/07), 19 February 2013, para.148.
[47] Art 38 ICJ Statute.
[48] D Harris, *Cases and Materials on International Law* (London, Sweet & Maxwell, 2010), 19.
[49] *Asylum Case (Colombia/ Peru)*, ICJ Reports 1950, 276.
[50] Jennings - Watts, *cit*, 26.
[51] Wildhaber *et al*, *ibid.* See also HC Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987-1988) 3 *Conn.J.Int'l L.* 111, 158: 'The law of the Convention sometimes seems neither more nor less than consensus, or lack thereof'.
[52] JL Slama, '*Opinio Juris* in Customary International Law' (1990) 15(2) *Okla.City U.L.Rev.* 603, 652-655.
[53] para.50.
[54] *Wingrove v UK* (17419/90), 25 November 1996, para.58.
[55] *Müller v Switzerland* (10737/84), 24 May 1988, para.36.
[56] *Dudgeon v UK* (7525/76), 22 October 1981, paras.40-41; see also *Norris v Ireland* (10581/83), 26 October 1988, paras.35-38; *Modinos v Cyprus* (15070/89), 22 April 1993, para.24.

in areas characterised by no clear common ground, e.g. legal status of the foetus (*Vo v France*),[57] parenthood of children born through assisted reproduction, specifically the position of the mother's lesbian partner (*Kerkhoven and Hinke v Netherlands*)[58] or transsexual partner (*X, Y and Z v UK*),[59] regulation of IVF treatment (*Evans v UK,*[60] *SH v Austria*),[61] compensation for expropriation (*James v UK*),[62] religious symbols in public institutions (*Şahin v Turkey*).[63] The absence of consensus can expand States' latitude in areas characterised by strict scrutiny; in *Animal Defenders International v UK* (regulation of paid political advertising), the Grand Chamber (GC) recognised that European diversity in political thought and democratic vision broadened the otherwise narrow margin of appreciation *vis-à-vis* limitations on speech regarding matters of public interest.[64]

'Reverse consensus' may also legitimise widely accepted restrictions. Thus, in *Engel v Netherlands* the Court upheld distinctions in disciplinary measures between officers and servicemen insofar as they 'had their equivalent in the internal legal system of practically all the Contracting states'.[65] Similarly, *Rasmussen v Denmark* conceded that 'in most [ECHR States] the position of the mother and that of the husband are regulated in different ways' in paternity proceedings.[66] According to *Kiyutin v Russia*, the common practice of deporting HIV-positive aliens supported differences in treatment based on health status.[67]

The far-reaching impact of 'European consensus' in expanding rights or endorsing restrictions makes the objective assessment of commonalities critical to the Court's authoritativeness. As Dzehtsiarou suggested, 'only European consensus which is consistently applied and based on rigorous and verifiable data can enhance the legitimacy of the ECtHR'.[68] Furthermore, attention to domestic laws avoids disobedience or 'critical loyalty'[69] from municipal courts.

B. CONSENSUS METHODOLOGY: A 'CHECKLIST' OF CRITERIA?

A credible assessment of consensus cannot be limited to an impressionistic statement, especially when the legislative trend is disputed by the parties.[70] This was the case in *Mazurek v France*, where the Court noted, without any comparative analysis, 'a distinct tendency in favour of eradicating discrimination against adulterine children'.[71] Many judgments include, however, a meticulous examination of practice in a dedicated section. The detailed analysis of penal systems in *Vinter v UK*[72] allowed the GC to formulate prescriptive standards for review

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[57] *Vo v France* (53924/00), 8 July 2004, para.82.
[58] *Kerkhoven and Hinke v Netherlands* (15666/89), 19 May 1992.
[59] *X, Y and Z v UK* (21830/93), 22 April 1997, para.44.
[60] *Evans v UK* (6339/05), 10 April 2007, para.81.
[61] *SH v Austria* (57813/00), 3 November 2011, paras.94-116.
[62] *James v UK* (8793/79), 21 February 1986, para.65.
[63] *Şahin v Turkey* (44774/98), 10 November 2005, para.109.
[64] *Animal Defenders International v UK* (48876/08), 22 April 2013, para.123.
[65] *Engel v Netherlands* (5100-2/71;5354/72;5370/72), 8 June 1976, para.72.
[66] *Rasmussen v Denmark* (8777/79), 28 November 1984, para.41.
[67] *Kiyutin v Russia* (2700/10), 10 March 2011, para.65.
[68] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP, 2015), 2.
[69] Greer - Wildhaber, *cit*, 683.
[70] The *erga omnes* value of ECtHR's interpretation requires a comparative analysis even when the parties are in agreement.
[71] *Mazurek v France* (34406/97), 1 February 2000, para.52.
[72] *Vinter v UK* (66069/09;130/10;3896/10), 9 July 2013, paras.68-75.

of detention under life sentences, notwithstanding States' wide discretion in criminal justice matters.[73] In *Stummer v Austria*, a comparative survey of social security legislation[74] supported the refusal to consider work in prison when calculating pension rights.[75] Similarly, the conclusion in *Sindicatul 'Pastorul cel Bun' v Romania* that no consensus existed on trade unions for priests relied on the review of constitutional models governing the relationship between State and religious denominations.[76] In *Godelli v Italy*, although the operative part did not reference the comparative law section on the right to know one's origins,[77] it undoubtedly informed the conclusion that a rigid system of non-disclosure exceeded the margin of appreciation.[78] Occasionally, instead of conducting its own research, the Court relies on independent surveys produced by the respondent or intervening third parties. In *TV Vest AS v Norway*, the Court thus accepted Norway's submission of an electoral rights survey by the European Platform of Regulatory Authorities.[79]

Even where the comparative analysis is present, its scope may be problematic. Ideally, all member States should be included, as was the case in *Schalk and Kopf v Austria*,[80] *Kiyutin v Russia*[81] or *Lautsi v Italy*.[82] Assessments based on a mere sample are doubtful when the population is randomly selected. For instance, the comparative study conducted in *Markin v Russia* was based solely on 33 States, with no discussion of the selection criteria (e.g. geopolitical representativeness) or impact on statistical relevance.[83] Equivocation on what constitutes a sufficient majority is also unhelpful. The Court unsurprisingly characterised 40 States (85% of the ECHR community) as a 'substantial majority' in *A, B and C v Ireland*,[84] however less clear-cut majorities were inconsistently assessed. According to an *obiter* in *Dickson v UK*, although 30 States out of 47 (over 63%) allowed for conjugal visits in prison, they were not mandatory under Article 8.[85] Conversely, in *Markin* the Court found, on the basis of 28 out of 33 States reviewed (60%) that 'in a majority of European countries,… the legislation now provides that parental leave may be taken by civilian men and women'.[86] The parameters within which consensus emerges remain unclear.

A related problem is the correct basis for comparison, as the aspects in contention are not always socially significant/ subject to legislative debate in all States. In *Vallianatos v Greece*, by reducing the comparison to the 19 States having introduced registered partnerships,[87] the Court distorted the real question, i.e. the availability of legal recognition for same-sex couples, in whatever form. Similarly, in *X. v Austria*, regarding second-parent adoption for same-sex partners, the GC limited the analysis to the ten States allowing second-parent adoption in unmarried couples.[88] By overlooking the fact that 35 States contemplated no access to either joint or second-parent adoption for same-sex couples, the Court circumvented the crux of the dispute, namely the existence of consensus on giving a child two

[73] para.120.
[74] *Stummer v Austria* (37452/02), 7 July 2011, para.60.
[75] para.105.
[76] *Sindicatul 'Pastorul cel Bun' v Romania* (2330/09), 9 July 2013, paras.61, 171.
[77] *Godelli v Italy* (33783/09), 25 September 2012, paras.28-32.
[78] paras.57-58.
[79] *TV Vest AS v Norway* (21132/05), 11 December 2008, paras.24, 65.
[80] *Schalk and Kopf v Austria* (30141/04), 24 June 2010, para.58.
[81] paras.37-38, 65.
[82] *Lautsi v Italy* (30814/06), 18 March 2011, paras.26-27.
[83] *Markin v Russia* (30078/06), 22 March 2012, paras.71-75.
[84] para.235.
[85] *Dickson v UK* (44362/04), 4 December 2007, para.81.
[86] para.140.
[87] *Vallianatos v Greece* (29381/09;32684/09), 7 November 2013, paras.25-26, 91.
[88] paras.55, 149.

legal mothers (or fathers). An example of correct restriction of the comparator is *S.A.S. v France*: 'the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member States, where this practice is uncommon'.[89] For the dissenters, '[t]he fact that 45 out of 47 member States… have not deemed it necessary to legislate in this area' was 'a very strong indicator for a European consensus';[90] the fallacy of this analysis lies in the fact that unresponsiveness to non-existent problems has no evidentiary value. In fact, the consensus doctrine measures attitudes and legal solutions adopted in respect of similar socio-political dilemmas.

To provide an accurate reflection of regional practice, consensus must be not only quantitatively relevant, but also geopolitically representative. In *Hachette Filipacchi v France*, the evidence of consensus on strict regulation of tobacco advertising was largely based on EU law (and two non-binding CoE Parliamentary Assembly resolutions).[91] This raises methodological concerns: firstly, EU harmonisation is indicative of sub-regional custom and cannot be equated with ECHR consensus; secondly, the 28 EU States account for less than 60% of ECHR membership, and consensus jurisprudence, customary law and voting systems within international organisations suggest that simple majority is insufficient to create new obligations; thirdly, it would lead to the paradoxical effect of subjecting CoE to the volition of EU institutions (including decisions reached by a EU majority, hence even less representative Europe-wide); finally, if consensus operates by analogy with customary law, there cannot be entire subregional blocks outside the alleged normative trend.

Conversely, inferring consensus from treaties ratified by numerous CoE States is consistent with the reference in Article 31(3)(c) VCLT to 'relevant rules of international law applicable in relations between the parties' as auxiliary tools for interpretation. As *Mosley v UK* indicated, 'any standards set out in applicable international instruments and reports are relevant to the interpretation of the guarantees of the Convention and in particular to the identification of any common European standard in the field'.[92] An example is *National Union of RMT Workers v UK* (concerning the right to strike), where the Court held that 'the practice of European States reflecting their common values' encompassed the International Labour Organisation Convention no. 87 and the European Social Charter.[93] However, the weight of treaties as 'State practice' depends on the number of ratifications.[94] Low levels of ratification cannot dispense with the comparative review of domestic laws. Controversially, in *Marckx v Belgium* the Court found 'a clear measure of common ground' on the position of illegitimate children in two treaties,[95] each ratified by only four States.[96] As Wildhaber *et al* pointed out, the Court 'relied on the mere paper existence of treaties, rather than on the reality of their status as instruments binding in international law'.[97] Another example is *Brauer v Germany*, where the consensus analysis was limited to the European Convention on the Legal Status of Children Born out of Wedlock, ratified by 21 States.[98] Arguably, where the consensus method would not support a progressive conclusion, rather than compromising the doctrine's integrity through far-fetched applications, the Court should focus on alternative

[89] *S.A.S. v France* (43835/11), 1 July 2014, para.156.
[90] Partly dissenting opinion of Judges Nussberger and Jäderblom, para.19.
[91] *Hachette Filipacchi Presse Automobile v France* (13353/05), 5 March 2009, paras.19-22, 47.
[92] para.110.
[93] *National Union of Rail, Maritime and Trasport Workers v UK* (31045/10), 8 April 2014, para.76.
[94] See Cabranes, *cit*, 151.
[95] Convention on the Establishment of Maternal Affiliation of Natural Children (1962), European Convention on the Legal Status of Children Born out of Wedlock (1975).
[96] para.41.
[97] Wildhaber *et al*, 'No Consensus on Consensus?', *cit*, 254.
[98] *Brauer v Germany* (3545/04), 28 May 2009, para.40.

hermeneutic principles.

Another difficulty regards the value attached to non-European practice. International trends may corroborate European consensus as persuasive authority/ supporting evidence, especially when the numbers in Europe are not compelling. For instance, *Vinter v UK* found irreducible life sentences in contrast with both the European and international prevailing practice.[99] Conversely, evolutive interpretation cannot be exclusively/ primarily grounded on extra-European practice. In *Goodwin v UK*, the Court critically 'attache[d] less importance to the lack of evidence of a common European approach…, than to the clear and uncontested evidence of a continuing international trend in favour… of legal recognition of the new sexual identity of post-operative transsexuals'.[100] This failed to recognise that the relevant 'subsequent practice' for treaty interpretation is that of the contracting parties, insofar as it expresses implied consent to new obligations. Instead of destabilising the consensus methodology, the Court could have justified the finding of violation by focusing on the disproportionate impact on transsexuals and the inconsistency of domestic legislation. In fact, medical recognition (and irreversible treatment) of gender dysphoria without legal recognition of the acquired gender placed transsexuals in a legal limbo.[101] Whereas judgments limited to the respondent's situation (such as the earlier *B v France*)[102] afford relief only within particular jurisdictions, the incremental approach preserves legitimacy and fosters acceptance.

Whilst a comparative review is not always necessary, uneven application to similar disputes is problematic, as is the refusal to engage in the consensus analysis when the argument is raised by the litigants. In *E.B. v France*, the Court thus disregarded the government's contention that no consensus existed on the eligibility of single homosexual applicants to adopt, with only nine out of 46 States permitting gay adoption.[103] This is even more critical since in the analogous *Fretté v France* the Court had found it 'indisputable that there is no common ground on the question'.[104] Overruling *Fretté* without addressing the main stumbling block raises legitimacy doubts, especially since, as Tobin and McNair's study suggests, gay adoption 'remain[ed] limited to only a handful of states' and usually to step-parent adoption.[105] The subsequent *Alekseyev v Russia* indicated that no European consensus has been reached on allowing same-sex couples to adopt;[106] yet if single applicants' sexual orientation cannot bar their eligibility to adopt, a couple's sexual orientation should not either. Evidently sweeping the consensus question under the carpet may generate inconsistencies.

The scholarship is not unanimous, however, on the need for transparency and consistency in the consensus analysis. For Mahoney, '[i]n order to reduce to a minimum the inevitable element of the judge's looking at society's values through his or her own spectacles, there should be some methodology'.[107] Conversely, for Legg 'it is not desirable for the Tribunals to calculate the current practice of states with precision', because the provision of limited information on methodology facilitates 'the balancing of apologism and utopianism

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[99] para.114.

[100] *Goodwin v UK* (28957/95), 11 July 2002, paras.55-56, 84-85. The evidence regarded Singapore, Canada, South Africa, Israel, Australia, New Zealand, US States.

[101] See para.78: '[w]here a State has authorised the treatment… it appears illogical to refuse to recognise the legal implications of the result'.

[102] See *B. v France* (13343/87), 25 March 1992, paras.48, 52-55.

[103] *E.B. v France* (43546/02), 22 January 2008, para.65.

[104] *Fretté v France* (36515/97), 12 June 2001, para.41.

[105] J Tobin - R McNair, 'Public international law and the regulation of private spaces: does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?' (2009) 23(1) *Int'l J.Law, Policy & the Family* 110, 128.

[106] *Alekseyev v Russia* (4916/07;25924/08;14599/09), 21 October 2010, para.83.

[107] P Mahoney, 'Judicial Activism and Judicial Self-Restraint', *cit*, 72.

in their reasoning'.[108] Methodological confusion is arguably not conducive to judicial flexibility nor self-assertiveness, but to impaired legitimacy. Blurring the methodological basis of evolutive interpretation diminishes the potential of judicial revision to function as tenable alternative to inter-governmental treaty amendment/ additional protocols. It also appears misguided to assume that clarity would reduce latitude in interpreting the comparative data. The degree of crystallisation of consensus warrants a different intensity of scrutiny, and the interplay between consensus and other criteria (importance of the right, proportionality etc.) affords the comparative review the weight required by the circumstances of the case.

The doctrine could be reorganised around several cumulative criteria: a comparative survey encompassing all States or a sample representative of all major geopolitical blocks, as historically defined (e.g. Western Europe, Eastern Europe); reliance on treaties widely ratified by CoE States in lieu of, or to corroborate, the comparative law analysis; the rule must be observed by a highly qualified majority (with a higher ratio for correction if assessment is based on a sample); no contrary practice from any geopolitical block (conversely, the departure of a minority of States from the rule should not bar its formation); use of extra-European trends as persuasive authority (not as substitutive evidence). Judicial amendment would thereby acquire the same credentials as regional custom, preserving State consent as underpinning source of legitimacy and reconciling supra-national law-making with sovereign democracy. When contemplating in *Schalk and Kopf* the future reading of same-sex marriage into the Convention contingent upon wider European practice,[109] the ECtHR itself alluded to the value of State consent as the foundation of evolutive interpretation.

C. THE 'ISOLATED POSITION': WHAT SCOPE FOR PERSISTENT OBJECTION IN A SUPRA-CONSTITUTIONAL FRAMEWORK?

If the practice of a substantial CoE majority generates binding ECHR standards, the question arises whether one or few jurisdictions having lagged behind are automatically in contravention. According to *F v Switzerland*, 'the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention'.[110] In practice, however, this contrast (in *F*, the absence of time bars on remarriage in other States) tends to result in a finding of violation. This is occasionally rationalised by the Court under the proportionality assessment (a restriction most States deem unnecessary cannot be strictly required). Thus, in *Paksas v Lithuania* (concerning impeached presidents' permanent ineligibility to stand for parliamentary elections), the GC noted that 'Lithuania's position in this area constitutes an exception in Europe',[111] and the immutability of disqualification was judged disproportionate.[112] *Vallianatos v Greece*, while reiterating that isolated positions do not automatically violate the Convention, indicated that the existence of consensus requires the country swimming against the tide to provide 'convincing and weighty' justifications.[113] Faced with an individual exception in *Khoroshenko v Russia* (stricter regime for family visits in prison), the GC merely found that the discrepancy narrowed the margin of appreciation;[114]

[108] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP, 2012), 127-8.
[109] para.61.
[110] *F v Swizerland* (11329/85), 18 December 1987, para.33.
[111] *Paksas v Lithania* (34932/04), 6 January 2011, para.106.
[112] para.112.
[113] paras.91-92.
[114] See *Khoroshenko v Russia* (41418/04), 30 June 2015, paras.135-136.

this affected, however, the demonstration of necessity and proportionality and the defence was unsuccessful. These cases suggest that the *F v Switzerland* principle is a doctrinal concession, whereas compelling justifications for an isolated position are nearly unachievable. Admittedly, from a pragmatic perspective, it seems unnecessary for the Court to antagonise States and diminish the value of consensualism in the formation of international law, if it can less controversially deal with the deviation in the analysis of proportionality. From a constitutionalist perspective, one might nevertheless prefer a firmer stance on the opposability of new quasi-unanimous rules to individual objectors as a matter of ECHR law.

More problematically, the isolated position exceptionally triumphed in *A, B and C v Ireland*.[115] Although the Court acknowledged the 'consensus amongst a substantial majority... towards allowing abortion on broader grounds than accorded under Irish law'[116] (on demand in 40 States and on health/ well-being grounds in 35), it 'd[id] not consider that this consensus decisively narrows the broad margin of appreciation of the State'.[117] Thirty years earlier, the Commission in *Brüggemann v FRG* noted the unsettled state of the law in this area[118] and dismissed the complaint due to lack of consensus.[119] The Court in *A, B and C* fails to engage with the *Brüggemann* analysis; the only argument adduced in support of self-restraint is that where life begins and whether unborn life is covered by Article 2 are matters within States' discretion.[120] The Court thus focuses on the diverse regulation of foetal rights rather than on the actual issue before it: the current consensus on the pre-eminence of the mother's right to self-determination (subsumed under 'private life'). It surprisingly makes no reference to its jurisprudence (*X v UK, Boso v Italy*) establishing that any claims of prospective fathers opposing abortion (including on behalf of the unborn child) are outweighed by the expectant mothers' rights.[121] Nor does the analysis of proportionality convince. It invokes the legality of, and accessibility of information about, travelling abroad for an abortion;[122] this policy, on the contrary, calls into question the *necessity* of the absolute prohibition (including on health grounds) and the *adequacy* of pre-natal life protection, limited to underprivileged women unable to travel overseas.

The CoE approach to death penalty casts further doubt on the suitability of deference to isolated positions. Although Article 2 permits capital punishment, all member States had abolished it as of 1996, and a Parliamentary Assembly resolution made the willingness to ratify Protocol 6 (prohibiting capital punishment in time of peace) and to introduce a moratorium on executions prerequisites for accession.[123] Upon becoming a CoE member, Russia committed to a moratorium and to abolishing death penalty within three years.[124] This suggests that a regional customary norm prohibiting death penalty has emerged, and isolated positions are unacceptable when the quasi-totality of CoE States has moved in a more rights-protective direction. This also impacts on judicial interpretation. According to *Soering v UK*, 'subsequent practice could be taken as establishing the agreement of the Contracting States to abrogate the exception', however Protocol 6 'shows that the intention… was to adopt the normal method of amendment'.[125] *Ocalan v Turkey* also intimated that Article 2 might have

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[115] paras.231-237.
[116] para.235.
[117] para.236. The following paragraph offers a lenghty restatement instead of a justification.
[118] *Brüggemann and Scheuten v FRG* (6959/75), 12 July 1977, para.64.
[119] HC Yourow, 'The Margin of Appreciation', *cit*, 124.
[120] para.237.
[121] *X v UK* (8416/78), 13 May 1980; *Boso v Italy* (50490/99), 5 September 2002.
[122] para.241.
[123] Resolution 1044(1994), para.6.
[124] Parliamentary Assembly Opinion 193(1996), para.10(ii).
[125] *Soering v UK* (14038/88), 7 July 1989, para.103.

been modified by subsequent practice (wide ratification of Protocol 6, CoE policy requiring an undertaking to abolish capital punishment as a condition for admission).[126] In the presence of an *optional* Protocol removing the express exception, the Court understandably preferred self-restraint. As Mowbray explained, '[t]he Court would be clearly trespassing upon the policy-making powers of member States if it sought to circumvent the Convention amendment process by interpreting the existing text to achieve similar developments'.[127] Subsequently in *Al-Saadoon and Mufdhi v UK*, the Court was prepared to find that the wide ratification of Protocol 13 (complete abolition of capital punishment) and consistent State practice 'are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'.[128] Admittedly, the Court did not rely solely on Article 2, but in conjunction with Protocol 13.[129] Similarly, in *Al Nashiri v Poland*, it invoked Article 2 taken together with Protocol 6, as against a ratifying State.[130] The conclusive test for amendment by a supervening customary rule was *A.L. (X.W.) v Russia*, which relied on Article 2 exclusively, against a non-party to Protocols 6 or 13.[131] If isolated positions are untenable in the presence of explicit textual exceptions, this applies *a fortiori* to open-ended provisions such as Article 8.[132]

Against this background, the *A, B and C* judgement is a dangerous concession to obsolete national laws, and a departure from the Court's rejection of consensus within the respondent's society as a counter-argument to European consensus. The UK had unsuccessfully argued in *Tyrer* that judicial corporal punishment in the Isle of Man 'was not in breach of the Convention since it did not outrage public opinion in the Island'.[133] In *Dudgeon* the Court had dismissed arguments for the criminalisation of homosexual relations based on the conservative and religious attitudes of Northern Irish society[134]/ 'the moral climate in Northern Ireland in sexual matters'.[135] European concert arguably establishes a priority of rights. As Greer noted, 'even a strong national abhorrence of such behaviour cannot prevail against the intrinsic importance of the right'.[136] Equally unsuccessful was the submission in *Lautsi v Italy* that the presence of crucifixes in classrooms 'was the expression of a "national particularity",... attributable to... a deeply rooted and long-standing attachment to the values of Catholicism'.[137] As Ryan points out, 'the Court was clear that its deference to Italy was not based on Italy's internal consensus, but rather on the *absence* of European consensus'.[138]

By contrast, in *A, B and C* the Court agreed that overwhelming European consensus

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[126] *Ocalan v Turkey* (46221/99), 12 May 2005, paras.162-165. The Court avoids a definitive stance, focusing on the Art 3 breach (death sentence following an unfair trial).

[127] A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5(1) *HRLR* 57, 67.

[128] *Al-Saadoon and Mufdhi v UK* (61498/08), 2 March 2010, para.120.

[129] para.123. See, analogously, *Rrapo v Albania* (58555/10), 25 September 2012.

[130] *Al Nashiri v Poland* (28761/11), 24 July 2014, para.576.

[131] para.64. Concern for State consent can be read in the reference to Russia' own undertaking to abolish the death penalty upon becoming a CoE member.

[132] See also CoE Parliamentary Assembly Resolution 1857(2012), reaffirming the suspension of Belarus' special guest status until a moratorium on death penalty has been decreed.

[133] para.31.

[134] para.56.

[135] para.57.

[136] S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg, CoE Publishing, 2000), 10.

[137] para.36.

[138] C Ryan, 'The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom' (2014) 3(1) *UCL J.L.&Jurisprudence* 237, 247.

was outweighed by local sentiment.[139] As De Londras and Dzehtsiarou observed, '[t]o allow the alleged values of a particular State to be exempted from the general minimum standard… is clearly out of step with the development of a European public order'.[140] Arguably, the role of supra-national supervision is precisely to call into question deeply rooted traditions and legal inertia. As Costa noted, the Court, 'with its international composition, representing all of the legal cultures and systems of Europe', can act as an 'external auditor', requiring States to 'modif[y] rules or practices that were long deemed unproblematic until they were subject to the external scrutiny'.[141] Moreover, as Warbrick's comment on *Tyrer* suggested, '[o]nce the content of a right is established, good, local arguments cannot justify diminishing it'.[142]

This deference to exceptionalism in *A, B and C* challenges the Strasbourg Court's role as guarantor of regional custom in the area of human rights. Admittedly, new standards cannot be read into the Convention in the presence of a 'collective persistent objector'; if an entire group (e.g. Eastern European States) never followed the alleged rule, it is doubtful whether that rule has acquired ECHR-wide opposability. Conversely, *individual* persistent objectors should not preclude the Court from finding that a new obligation exists under the Convention.[143] In the practice of international law, as Stein noted, 'the principle of the persistent objector has played a very limited role in the legal relations of states'.[144] Jennings and Watts also emphasised that 'a dissenting state cannot free itself by an act of will from the obligations imposed on it by a rule of customary law'.[145]

There is no reason to contest the analogous functioning of modificative human-rights treaty interpretation. If the overwhelming majority of ECHR signatories understand and apply a norm differently from the respondent, this cements the Court's ability to conclude that the Convention law has moved on. One State should therefore not be able to unilaterally opt out of what becomes the shared perception of a Convention right across the CoE community. If individual persistent objection is doubtful under customary law, there is even less scope for it in relation to an obligation which merely expands an extant commitment, consensually undertaken upon ratification/ accession. Furthermore, a veto right is inconsistent with the quasi-constitutional nature of the ECHR system, revolving around a supranational bill of rights inspired from the members' 'common heritage', the interpretation of which was entrusted to a binding collective enforcement machinery.

D. 'LOCAL CONSENSUS' AND THE COURT'S ROLE IN RELATION TO DEMOCRATIC PROCESSES

[139] Commentators have disputed the finding that the evidence indicated public support for restrictive abortion laws. See Wildhaber, 'No Consensus on Consensus', *cit*, 259; A Ciervo, 'The Unbearable Lightness of the Margin of Appreciation: ECHR and "Bio-Law"' in G Repetto, *The Constitutional Relevance of the ECHR in Domestic and European Law: an Italian Perspective* (Cambridge, Intersentia, 2013) 159, 166; F De Londras and K Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B and C v Ireland, Decision of 17 December 2010' (2013) 62(1) *ICLQ* 250, 261.
[140] De Londras - Dzehtsiarou, *cit*, 252.
[141] J-P Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7(2) *Eur.Const.L.Rev.* 173, 180-1.
[142] C Warbrick, '"Federal" Aspects of the European Convention on Human Rights' (1989) 10 *Mich.J.I.L.* 698, 724.
[143] See also Ziemele, *cit*, 250: 'An alternative way of reading [*A, B and C*] would be to say that Ireland has always objected to the development of such wide availability of abortion'.
[144] TL Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harv.Int'l L.J.*, 457.
[145] R Jennings - A Watts, *Oppenheim's International Law* (OUP, 2008), Vol.1, 24-25.

A different recourse to 'local consensus' allows the Court, when unable to rely on European consensus to effect change, to shift the attention to attitudes within the national community and expand rights solely within the respondent State. The *Oliari v Italy* decision was largely based on circumstances peculiar to the respondent State and did not purport to have a reach beyond it: 'the Italian legislature seems not to have attached particular importance to the indications set out by the national community, including the general Italian population and the highest judicial authorities in Italy'.[146] Without engaging in a hasty extrapolation of pan-European rules, the Court signalled that recognition of same-sex unions no longer is a discretionary area and States will be held accountable if the law does not reflect the more progressive views of their populations.

This approach allowed the Court to depart from its ambiguous position in *Schalk and Kopf*, where it noted an '*emerging* European consensus' towards the legalisation of same-sex unions and held that States retained discretion as to the 'timing of the introduction of legislative changes'.[147] Lau interpreted the judgment as establishing the right, but according a 'grace period' to States;[148] it is doubtful, however, whether an obligation *sine die* can purport to constitute a legal obligation at all. In *Oliari* the Court abandoned this practically inconsequential stance; nor did it overstretch the significance of State practice as in *Vallianatos*.[149] Instead, the Court proceeded to deconstruct the State, traditionally viewed as a unitary interlocutor at international level, and identified its 'vital forces'[150] in the popular will. It highlighted 'the sentiments of a majority of the Italian population, as shown through official surveys', the 'popular acceptance of homosexual couples' and the 'popular support for their recognition and protection'.[151] The outcome of domestic constitutional review could be seen as another indicator of the local moral compass: 'the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions'.[152]

Admittedly, the Strasbourg Court is less well-positioned than domestic authorities to measure public opinion and ought not, as a rule, substitute its assessment of what society requires. Whilst an international court does not have autonomous means of gauging domestic public opinion, it may nevertheless accept evidence from reliable sources (e.g. national statistics offices, reputable NGOs); this has already been the Court's practice for the purpose of comparative law reviews.[153] Moreover, since the presumption in democratic societies is that parliamentary acts are the expression of popular will, a survey of public opinion should not systematically feature in every Strasbourg judgment.[154] When, however, a law is deemed unconstitutional by the highest domestic judicature, in the exercise of a recognised prerogative under constitutional law, that authoritative determination of moral/ legal requirements in the respondent State should rebut the presumption and allow the Court to

[146] para.179. Nineteen States afforded recognition (see paras.27-28).
[147] para.105.
[148] H Lau, 'Rewriting Schalk and Kopf: Shifting the Locus of Deference' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, 2013), 257.
[149] It only accorded 'some importance' to the 'thin majority of CoE States' (24 out of 47) having legalised same-sex associations (see para.178).
[150] Term borrowed from *Handyside*.
[151] para.181.
[152] para.180.
[153] See K Dzehtsiarou - V Lukashevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court' (2012) 30(3) *Netherlands QHR* 272, 294-297. The use of a plurality of sources may mitigate the ECtHR's lack of independent means for assessing the methodological integrity of surveys.
[154] The Court's assessment of social and political views within CoE remains primarily concerned with manifestations of the will of *States*, not societies (national legislation, treaty participation, soft law emanating from international organisations to which ECHR States are parties).

proceed to its own re-assessment of public opinion.

To invariably equate acts of representative institutions (ie legislative majoritarianism) with popular will would amount to a reductive, procedural approach to democracy, which does not reflect its ECHR meaning. Greer observed in fact that the ECHR 'democratic principle' has been gradually refined, from mere opposition to totalitarianism to requirements such as the separation of powers and accountability.[155] As emphasised in *Young, James and Webster v UK*, 'democracy does not simply mean that the views of a majority must always prevail'.[156] Arguably, the constitutional control mechanism in the Italian legal system designates the Constitutional Court as the final arbiter in controversies over the just composition of conflicts of rights.[157] The Strasbourg proceedings thus indirectly restored the constitutional division of power between the legislature and the judiciary, and therefore the effectiveness of democratic checks and balances. To that extent, the Court's novel approach in *Oliari*, rather than being anti-democratic, promotes the proper functioning of democracy.

If that reasoning is correct, then it invites a further question: is it the Court's place to concern itself with the correct working of democratic channels involving legislatures and courts in a Convention State? One possible response is to recognise that the margin of appreciation afforded to States is predicated on the assumption that they are democracies based on the rule of law.[158] As Mahoney noted, that doctrine 'presupposes, as a condition for its application, the normal functioning of democratic process at national level'.[159] Neuman interestingly pointed out that the unpopularity of the margin of appreciation with other human-rights bodies is due to the lack of democratic credentials elsewhere.[160] Arguably, the Court owes less deference to domestic deliberation if it becomes apparent that democratic inter-institutional dialogue malfunctions and that there is a disconnect between legislative action, public opinion and judicial appraisal. In exceptional circumstances, in the presence of red flags such as judgments of unconstitutionality, the Strasbourg Court is legitimised to look beyond the State.

Additionally, the passivity of the legislature in *Oliari*[161] stands in contrast with the lengthy deliberation at the origin of the contested measures in *Animal Defenders International*[162] and *S.A.S.*[163] Where a law stems from extensive public debate, the Court's approach is more deferential, as required by the pervasive support for democracy in the Convention.[164] By contrast, restrictions arising from legislative oversight are arguably unlikely to be 'necessary in a democratic society'. It could even be maintained that, when courts and opinion polls suggest that a restriction no longer enjoys societal support, there is at least a 'duty to consult' on potential reform, whether or not the legislative bill is ultimately approved.

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[155] Greer, *cit*, 18.
[156] *Young, James and Webster v UK* (7601/76;7806/77), 13 August 1981, para.25.
[157] It is questionable whether British parliamentary sovereignty would inspire the same approach.
[158] According to L Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *HRLJ* 161, 162, discretion is 'inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law'.
[159] P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism? (1998) 19(1) *HRLJ* 1, 4.
[160] G Neuman, 'Subsidiarity' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), 360, 376.
[161] See para.183: 'despite some attempts over three decades… the Italian legislature has been unable to enact the relevant legislation'.
[162] para.123.
[163] para.156.
[164] See Preamble' 'profound belief' that 'fundamental freedoms… are best maintained… by an effective political democracy', 'democratic society' references (Arts 6, 8-11, Protocol 4 Art 2), electoral rights (Protocol 1 Art 3, Preamble to Protocol 13).

Finally, as established in *Wemhoff v Germany*, when several interpretations of a right are possible, the one more favourable to the individual must be adopted.[165] Having to choose between the conflicting positions of two branches of government (both amounting to expressions of the 'State'), namely a rights-restrictive legislative omission and a judgment of unconstitutionality upholding the right, the ECtHR may legitimately prefer the latter. Especially when the constitutional court's interpretation is ostensibly supported by public opinion, it should be treated as a more accurate reflection of that society's present-day requirements.

CONCLUSIONS: 'RIGHTS-MAXIMISING' AND 'RIGHTS-MINIMISING' VERSIONS OF LOCAL CONSENSUS

The codification of the principles of 'subsidiarity' and 'margin of appreciation' in Protocol 15[166] might be read as a political reaction to judicial activism. It is also a reminder that the ECHR's underlying values are not abstract moral notions, independent from the signatories' shared standards.[167] A distinction must be drawn in particular between gap-filling interpretation and *contra legem* interpretation. The more radical the departure from the meaning emerging from textual, holistic and originalist interpretation, the greater the need for State practice to justify it, as *de facto* modificative agreement. Similarly, the more detailed the rule the Court wishes to read into the Convention, the more significant the evidentiary support of State practice should be, lest the Court become a policy-making forum.

By overlooking the ECHR emphasis on the democratic society and the subsidiary logic of international supervision,[168] methodologically flawed findings of European consensus expose the Court to criticism and mistrust. As Arai-Takahashi argued, it is not desirable 'to enforce standards of the Convention at the expense of regional legitimacy'.[169] An important concern is to 'ensur[e] the citizens of Europe the means to articulate and practice their preferred values'.[170] This entails accepting pluralism in the understanding of certain rights in the absence of European consensus. Case-by-case determinations of societal support for a new right are a commendable compromise. The Court will thus neither obstruct progress altogether by declining to recognise the right, nor proceed to controversially uphold the right as mandatory for all States.

Admittedly, the case-by-case approach does not further the Court's mission to entrench ECHR rights as a common constitutional framework. The consolidation of a

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[165] See *Wemhoff v Germany* (2122/64), 27 June 1968, para.8: 'it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.

[166] Art 1 (adding a new recital to the ECHR Preamble).

[167] HC Yourow (*The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence*, The Hague, Kluwer, 1996, 194) mentions a 'puzzling problem as to whether or not the Court creates a truly autonomous law of the Convention…, or whether national law and practice… actually defines the international or "European" jurisprudence'. How *truly* autonomous 'Convention law' can be is equally puzzling; far from being a self-contained normative body, it is defined by reference to prevailing practice.

[168] See H Petzold, 'The Convention and the Principle of Subsidiarity' in RStJ Macdonald *et al*, *The European System for the Protection of Human Rights* (Dordrecht, M. Nijhoff, 1993) 41, 60: '[subsidiarity] means that… the Convention institutions have to make… due allowance for those legal and factual features which characterize the life of the society in the State concerned'.

[169] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen, Intersentia, 2002), 249.

[170] *Ibid*.

'European public order'[171] indeed requires pronouncements valid *erga omnes partes*. Nevertheless, a transitional variable geometry, by introducing progressive interpretation within specific national contexts, has the potential to accelerate incipient trends through cultural cross-pollination. The local consensus analysis thus merely postpones that 'quest for a pan-European human rights superstructure with constitutional characteristics'.[172] Conversely, endorsing (or condoning) isolated positions when they perpetuate lower human-rights standards goes against the 'further realisation' of rights at the core of the ECHR collective guarantee system.

The thesis that the local consensus analysis is legitimate if it widens, but not if it narrows, human-rights protection might be criticised as methodological double standard. This would be inaccurate. Once the content of a Convention right has been fixed at a certain level by generalised practice, a national majority can no longer defend lesser standards by adducing its attachment to them. If consensus can be conceptualised as a 'rebuttable presumption in favour of the rule or practice adopted by the majority',[173] in cases of quasi-unanimity in Europe rebuttal should not succeed merely through reliance on local preferences, otherwise supra-national supervision becomes perfunctory. Conversely, if European consensus is insufficiently clear, the decentralisation of ECHR interpretation allows reform to occur *first* where there is a substantial social basis for advancement. By looking beyond the State as unitary entity and focusing on public opinion and constitutional arrangements, rather than being anti-democratic, the Court acts as a guarantor of democratic process. There is, thus, an objective distinction between the ideological and pragmatic foundations of the 'rights-maximising' and 'rights-minimising' versions of 'local consensus'. The Court's approach to the proper use of this doctrine regrettably remains ambivalent.

[171] Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', *cit*, 165.
[172] D Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR' in R Rubio-Marín (ed), *Human Rights and Immigration* (OUP, 2014), 106, 123.
[173] Dzehtsiarou, *European Consensus*, *cit*, 208.