
Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control

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Abstract

This article explores the contestability of European consensus and its significance for the legitimacy of the European Court of Human Rights (ECtHR). The ECtHR's combined legitimization strategy, comprising European consensus and the new procedural approach to the margin of appreciation, which has been seen in several judgments, opens up space for democratic contestation and deliberation. Progressive, rights-friendly judgments that consider a mere trend in 'vanguard' state parties as European consensus will probably provoke domestic contestation in 'laggard' states. This potential backlash can be productive because it can subsequently impart additional legitimization on the ECtHR's judgments. Procedural rationality control ensures that this avenue of democratic legitimization is kept open and that there are institutional structures and processes to balance human rights adequately in domestic debates. Combining consensus-based arguments with a procedural approach to the margin of appreciation reconciles the impact of a European consensus and the need for democratic deliberation. High standards in domestic procedures can possibly rebut the presumption in favour of the solution adopted by the majority of Convention states. Potentially, this approach also allows democratic domestic law-making institutions to react to judgments of the ECtHR based on European consensus.

1 Introduction

For some time now, the European Court of Human Rights (ECtHR) has been in the process of recalibrating its approach to the margin of appreciation that it grants to respondent

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states. The Court obviously is about to reformulate the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to member states. The overarching objective of these efforts is to implement a more robust and coherent concept of subsidiarity in conformity with the Brighton Declaration on the future of the Strasbourg Court, which was released in April 2012, and Protocol 15.¹ A new ‘procedural approach’ to the margin of appreciation that is arguably in the making involves granting a margin of appreciation depending on whether there are sufficient and effective remedies available at the domestic level. Furthermore, the ECtHR grants a broad margin if the domestic authorities have respected procedural guarantees and balanced competing interests and fundamental rights diligently.² The quality of the parliamentary and judicial review of the necessity of a measure is of particular importance. This approach has captured the attention of, and has gained support from, a number of scholars.³

One remarkable fact, however, has not caught the attention it deserves, even if it has not gone entirely unnoticed. In a significant number of relevant cases in which the ECtHR has linked the range of the margin of appreciation to the quality of the parliamentary process, European consensus has also played a decisive role in the Court’s reasoning. If there is no necessary link between consensus-based arguments and a procedural approach to the margin of appreciation, this encounter between European consensus and procedural rationality control is not a mere coincidence. For this reason, this study examines the relation between European consensus and the procedural approach to

¹ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, available at www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf; Protocol 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS no. 213. See Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’, 14 *Human Rights Law Review (HRLR)* (2014) 487, at 498; Saul, ‘The ECtHR’s Margin of Appreciation and the Processes of National Parliaments’, 15 *HRLR* (2015) 745, at 747.

² This procedural approach is part of the ‘systemic’ element of the margin of appreciation related to deference to other decision-making bodies for non-merits reasons. It is to be distinguished from the ‘normative’ element related to the European Court of Human Rights’ (ECtHR) own assessment of merits reasons. Cf. Arnardóttir, ‘Rethinking the Two Margins of Appreciation’, 12 *European Constitutional Law Review (ECLR)* (2016) 27.

³ Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, 17 *European Law Journal* (2011) 80; Van de Heyning, ‘No place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights’, in P. Popelier, C.J. Van de Heyning and P. Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (2011) 65, at 94–96; van de Heyning, ‘The Natural “Home” of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights’, 31 *Yearbook of European Law* (2012) 128, at 153ff; Brems and Lavrysen, ‘Procedural Justice in Human Rights Adjudication: The European Court of Human Rights’, 35 *Human Rights Quarterly (HRQ)* (2013) 176, at 195–198; Spano, *supra* note 1, at 497–499; Saul, *supra* note 1; M. Hunt, H.J. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015); A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (2016), at 135–140; Arnardóttir, ‘Organised Retreat? The Move from “Substantive” to “Procedural” Review in the ECtHR’s Case Law on the Margin of Appreciation’, 5 *European Society of International Law Conference Paper Series* (2015), at 11ff; Saul, ‘Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights’, 20 *International Journal of Human Rights (IJHR)* (2016) 1077; Popelier and van de Heyning, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’, 30 *Leiden Journal of International Law* (2017) 5; Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’, 15 *International Journal of Constitutional Law* (2017) 9; J.H. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017).

the margin of appreciation in the Court's case law. In a second step, the article argues that the combination of consensus-based arguments and a procedural approach to the margin of appreciation is normatively persuasive in terms of the democratic legitimation of the ECtHR. It expresses a vision of democratic constitutionalism and a culture of justification.

The Court has utilized the procedural approach to the margin of appreciation to influence its domestic partners in a constitutional dialogue. To substantiate this claim, the article first focuses on the necessary level of democratic legitimation for the ECtHR and argues that the combination of European consensus and margin of appreciation contributes to an adequate level of legitimation. The article relies on models of legitimation developed specifically by legal scholars for the democratic legitimation of international and domestic courts. Additionally, the argument is embedded in ideas and considerations about the significance of a backlash for democratic constitutionalism and a culture of justification. The combined legitimation strategy of the ECtHR, comprising European consensus and a procedural approach to the margin of appreciation, opens up space for democratic contestation and deliberation. Progressive, rights-friendly judgments that consider a mere trend in 'vanguard' state parties as a European consensus will probably provoke domestic contestation in 'laggard' states.⁴ This potential backlash can be productive because it can – subsequently – impart additional legitimation on the ECtHR's assessment. A procedural approach to the margin of appreciation, in turn, ensures that this avenue of democratic legitimation is kept open and that there are institutional structures, mechanisms and processes to consider and balance human rights adequately in domestic debates.⁵ The institutional setting and procedural guarantees that the procedural rationality approach presupposes can help to increase the 'ownership' of European human rights by domestic institutions and the general public and rationalize the debate. However, forming its partners in a constitutional dialogue, in order to increase its own legitimacy, is certainly a bold move on the part of the Court and is not without practical and normative problems, which the final section will discuss.

2 Analysis of the Case Law

A *The Encounter of European Consensus and a Procedural Approach to the Margin of Appreciation*

The ECtHR has already applied a procedural approach to the margin of appreciation in a number of cases.⁶ In general terms, the procedural approach implies

⁴ For the vanguard/laggard distinction in the US context, see Althouse, 'Vanguard States, Laggard States: Federalism and Constitutional Rights', 152 *University of Pennsylvania Law Review* (2004) 1745 (discussing also the problematic picture of progress it implies by depicting one right answer with the only task being to discover it).

⁵ For the latter aspect, see Hunt, 'Introduction', in Hunt, Hooper and Yowell, *supra* note 3, 1, at 12.

⁶ See, e.g., ECtHR, *Hatton and Others v. United Kingdom*, Appl. no. 36022/97, Judgment of 8 July 2003, para. 128; ECtHR, *Z. and Others v. United Kingdom*, Appl. no. 29392/95, Judgment of 10 May 2001. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>. For further references to the case law, see the articles cited in note 3 above.

that, if the ECtHR is confronted with conflicting fundamental rights and legitimate interests, the Court scrutinizes whether the procedural elements of the decision-making process and the fundamental rights of individuals have been adequately considered by domestic institutions. Granting a margin of appreciation depends primarily on the existence of sufficient and effective remedies open to the applicant at the domestic level to allow a court to reconsider the potential violation of fundamental rights. Furthermore, the decision taken by the national authorities must be the outcome of a reasoned decision that has diligently considered and balanced the fundamental rights of the applicant. In this regard, the ECtHR takes account of the degree to which the domestic authorities have based their opinion on studies, impact assessments or substantial debate. Where the national parliament or domestic courts have provided for a thorough scrutiny of the rights and interests in play and respected the procedural rights of affected individuals (in particular, access to court or accessibility of information), the ECtHR can defer more leniently to the decision of the domestic legislator or court.⁷ Although the new procedural approach has been crucial in a number of cases, it is controversial among the judges of the ECtHR.⁸

In a set of cases in which the ECtHR has established a clear, or at least implicit, connection between the quality of parliamentary process and the breadth of the margin of appreciation, the Court also refers to European consensus.⁹ If not establishing an intrinsic link between consensus-based and procedural arguments, this encounter of both categories of arguments in the reasoning of the Court is not a mere coincidence. On the basis of the case law, we can identify some parallels between the arguments based on a European consensus and on the procedural approach to the margin of appreciation. Both approaches contribute to a rationalization of the intensity of human rights control and mitigate between the ECtHR's dynamic interpretation of the European Convention on Human Rights (ECHR) and the state parties' remaining margin of appreciation.¹⁰ The case law also demonstrates that the analysis of European consensus and of the respondent state's domestic procedures can point in the same direction or in different directions.

⁷ For a summary of the approach, see van de Heyning, *supra* note 3, at 153ff.

⁸ Spano, *supra* note 1, at 497.

⁹ For the role of consensus in determining the margin of appreciation, see McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee', 65 *International and Comparative Law Quarterly (ICLQ)* (2016) 21, at 28–32. Counter-examples are ECtHR, *Sukhovetskiy v. Ukraine*, Appl. no. 13716/02, Judgment of 28 March 2006; ECtHR, *Friend, the Countryside Alliance and Others v. United Kingdom*, Appl. nos 16072/06 and 27809/08, Judgment of 24 November 2009, para. 50; ECtHR, *Lindheim v. Norway*, Applications nos 13221/08 and 2139/10, Judgment of 12 June 2012, para. 128.

¹⁰ For European consensus as a mediator between dynamic interpretation and the margin of appreciation, see Morawa, 'The "Common European Approach", "International Trends", and the Evolution of Human Rights Law: A Comment on Goodwin and I v. the United Kingdom', 3 *German Law Journal (GLJ)* (2002); Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', 12 *GLJ* (2011) 1730, at 1733. In the absence of a consensus, the Court can resort to autonomous interpretation. See Gerards, 'Judicial Deliberations in the European

In most of the relevant cases, both the analysis of European consensus and the procedural approach to the margin of appreciation pointed in the same direction and led the Court to widen the overall margin of appreciation.¹¹ In *Animal Defenders v. United Kingdom*, the Grand Chamber established a clear connection specifically between the parliamentary process and the margin of appreciation.¹² The majority opinion recalled that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. It added that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation'.¹³ Assessing the proportionality of an interference with freedom of expression, the Court in *Animal Defenders* attached considerable weight to the 'exacting and pertinent reviews' by both parliamentary and judicial bodies.¹⁴ Considering the rationale underlying the legislative choice made with respect to the scope of the prohibition, the majority opinion finally underlined that, on the basis of an analysis of 34 contracting parties, there was no European consensus between the contracting states on how to regulate paid political advertising in broadcasting.¹⁵ The Court went on to recall that a lack of relevant consensus among contracting states could speak in favour of allowing a somewhat wider margin of appreciation than that normally afforded to restrictions of expression on matters of public interest.¹⁶ Thus, in the majority opinion, considerations based on a European consensus and the procedural approach to the margin of appreciation

Court of Human Rights', in N.J.H. Huls, M. Adams and J. Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (2009) 407; Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights', 56 *Public Law* (2011) 534, at 544.

¹¹ For the cumulative effect of the non-existence of a consensus on the substantive question and the simultaneous compliance with procedural obligations, see Müller, 'Domestic Authorities' Obligations to Co-Develop the Rights of the European Convention on Human Rights', 20 *IJHR* (2016) 1058, at 1069. For the preponderance of 'positive inference' cases, see Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory', 34 *Oxford Journal of Legal Studies (OJLS)* (2014) 443, at 456ff, 473ff; Donald and Leach, *supra* note 3, at 138.

¹² ECtHR, *Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013. Cf. Saul, *supra* note 1, at 754. Endorsed by Lazarus and Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference', in Hunt, Hooper and Yowell, *supra* note 3, 385, at 388.

¹³ *Animal Defenders International*, *supra* note 12, para. 108. Recently confirmed in ECtHR, *Garib v. The Netherlands*, Appl. no. 43494/09, Judgment of 23 February 2016, para. 113; ECtHR, *Novikova and Others v. Russia*, Appl. nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, Judgment of 26 April 2016, para. 194. Further, see ECtHR, *Parrillo v. Italy*, Appl. no. 46470/11, Judgment of 27 August 2015, para. 10. Dissenting Opinion of Judge Sajó.

¹⁴ *Animal Defenders International*, *supra* note 12, para. 16.

¹⁵ *Ibid.*, paras 65–72, 123.

¹⁶ In this regard, the Court cited ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005, para. 81; ECtHR, *TV Vest AS & Rogaland Pensjonisparti v. Norway*, Appl. no. 21132/05, Judgment of 11 December 2008, para. 67; ECtHR, *Société de conception de presse et d'édition and Ponson*, Appl. no. 26935/05, Judgment of 5 March 2009, paras 57, 63.

pointed in the same direction. They both had the effect of broadening the United Kingdom's (UK) margin of appreciation.

This is also the case in further judgments that establish at least an implicit link between the quality of parliamentary procedure and the breadth of the margin of appreciation,¹⁷ such as *Murphy v. Ireland*,¹⁸ *Evans v. United Kingdom*¹⁹ and *Shindler v. United Kingdom*.²⁰ In the *S.A.S.* case, which considered the French ban on the use of clothing designed to conceal one's face in public places in the light of Articles 8 and 9, the Grand Chamber stated that it had a duty to exercise a degree of restraint in its review of ECHR compliance since such a review would lead it to assess a balance that has been struck by means of a democratic process within the society in question.²¹ The opinion further based its argument on the fact that there was little common ground among the member states of the Council of Europe as to the question of the wearing of the full-face veil in public. It was decisive for the Court that there was no European consensus against a ban.²² Again, both procedural analysis and consensus analysis led the majority to widen the margin of appreciation granted to France, which prompted critics to highlight the notion that granting a margin of appreciation must not add up to complete deference to national institutions.²³

Hirst v. United Kingdom (No. 2) is the second Grand Chamber case to establish a clear connection specifically between the parliamentary process and the margin of appreciation.²⁴ In the reasoning of the majority opinion, however, consensus-based arguments and procedural arguments pointed in different directions. The ECtHR held that the UK's absolute ban on prisoner voting was in violation of Article 3 of Protocol 1.²⁵ The majority judgment emphasized the blanket nature of the ban as a main source of concern.²⁶ However, the judgment also stressed that 'there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.²⁷ Therefore, the majority opinion narrowed the UK's margin of appreciation on the basis of a

¹⁷ For the implicit connections, see Saul, *supra* note 1, at 755ff.

¹⁸ ECtHR, *Murphy v. Ireland*, Appl. no. 44179/98, Judgment of 10 July 2003, paras 67, 73, 81.

¹⁹ ECtHR, *Evans v. United Kingdom*, Appl. no. 6339/05, Merits, Judgment of 10 April 2007, paras 79, 85–86.

²⁰ ECtHR [4th section], *Shindler v. United Kingdom*, Appl. no. 19840/09, Judgment of 7 May 2013, paras 112, 115, 117.

²¹ ECtHR, *S.A.S. v. France*, Appl. no. 43835/11, Judgment of 1 July 2014, para. 154; cf. Saul, *supra* note 1, at 756. See also ECtHR, *Belcacemi and Oussar v. Belgium*, Appl. no. 37798/13, Judgment of 11 July 2017, paras 50ff.

²² *S.A.S.*, *supra* note 21, para. 156.

²³ For critical assessments, see, e.g., Yusuf, 'S.A.S v France: Supporting "Living Together" or Forced Assimilation?', 3 *International Human Rights Law Review* (2014) 277, at 290; Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights', 4 *Cambridge Journal of International and Comparative Law* (2015) 29, at 47ff.

²⁴ *Hirst*, *supra* note 16; *Animal Defenders International*, *supra* note 12.

²⁵ Protocol 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4 November 1993, ETS no. 151.

²⁶ *Hirst*, *supra* note 16, paras 76ff; see Kavanagh, *supra* note 11, at 473ff.

²⁷ *Hirst*, *supra* note 16, para. 79.

scrutiny of the parliamentary debate. The majority opinion added a consensus-based argument. For the majority, it was decisive that it was only a minority of contracting states in which a blanket restriction on the right of convicted prisoners to vote was imposed or in which there was no provision allowing prisoners to vote. Accordingly, the majority held that the margin was wide but 'not all-embracing'²⁸ and that the UK had violated Article 3 of Protocol 1. Hence, the absence of adequate parliamentary scrutiny narrowed the margin of appreciation; the lack of an overwhelming consensus, by contrast, had the effect of broadening the margin of appreciation.

Remarkably, in most of the relevant cases, there was a strong dissenting opinion that refused to concur with the majority's approach to European consensus and procedural rationality. In *Animal Defenders*, the jointly dissenting judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano insisted that the fact that a particular topic was debated (possibly repeatedly) by the legislature did not necessarily mean that the conclusion reached by that legislature was ECHR compliant. Nor did they concur in the view that such (repeated) debate altered the margin of appreciation accorded to the state.²⁹ The dissenters also questioned the majority's argument that a perceived lack of European consensus on how to regulate paid political advertising was an additional ground for widening the margin of appreciation of the respondent state. For the dissenters, there was a considerable problem as to what state practice should be taken into consideration, if at all, for the assessment of the existence of a European trend or even of binding practice.³⁰

The two partly dissenting judges in *S.A.S. v. France* were unable to conclude that the respondent state should be accorded a broad margin of appreciation because the prohibition targeted an intimate right related to one's personality.³¹ They found it difficult to understand why the majority were not prepared to accept the existence of a European consensus on the question of banning the full-face veil. Recalling that 45 out of 47 member states of the Council of Europe had not deemed it necessary to legislate in this area, the dissenters credited this as a very strong indicator for a European consensus against any form of blanket ban on full-face veils.³²

²⁸ *Ibid.*, para. 81. Cf. K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015), at 63.

²⁹ *Animal Defenders International*, *supra* note 12, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 9.

³⁰ *Animal Defenders International*, *supra* note 12, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 15. See also ECtHR, *Evans v. United Kingdom*, Appl. no. 6339/05, Judgment of 10 April 2007, Joint Dissenting Opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para. 12.

³¹ *S.A.S.*, *supra* note 21, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, paras 16ff.

³² *Ibid.*, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, paras 19ff. See also ECtHR, *Dubská and Krejzová v. Czech Republic*, Appl. nos 28859/11 and 28473/12, Judgment of 15 November 2016. Here, the majority found that there was no consensus capable of narrowing the respondent state's margin of appreciation in favour of allowing home births (para. 183). Disagreeing with the majority's approach to this question, the dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller highlighted that there was a consensus in favour of not prohibiting home births among the member states (para. 28).

In the *Hirst* case, the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens took a critical stance towards the majority's procedural approach to the margin of appreciation. They claimed that it was 'not for the Court to prescribe the way in which national legislatures carry out their legislative functions'.³³ Furthermore, they doubted that there was a sufficient basis in the societies of the contracting states, including an emerging consensus as to the standards to be achieved, that would allow an evolutive or dynamic interpretation. According to the dissenting judges, the legislation in Europe showed that there was little consensus about whether or not prisoners should have the right to vote. Thus, the dissenting judges took the view that legislation in the UK could not be claimed to be in disharmony with a common European standard.³⁴

B The Relationship between Consensus-Based Arguments and the Procedural Approach to the Margin of Appreciation

The fact that the breadth of the margin of appreciation was contested among the judges probably provided an additional incentive for the respective majority to develop a detailed reasoning that referred both to the state of a European consensus and procedural criteria. If the analysis of European consensus and of the respondent state's domestic procedures point in the same direction, the Court might feel tempted to compensate, in a sense, for the weaknesses and methodological difficulties of each argument by relying on their joint persuasiveness. It is obvious that assessing both European consensus and domestic procedures is a very complex endeavour methodologically that leaves a considerable degree of discretion to the Court.³⁵ However, it must be clear that this move as such is not more than a rhetorical strategy. Two arguments that are convincing to some extent certainly do not add up to complete persuasiveness.

If the analysis of European consensus and the respondent state's domestic procedures point in different directions, the question arises whether, and under what circumstances, a European consensus can be outweighed on the basis of careful domestic procedures. So far, this problem is unsolved. The ECtHR faces a similar challenge with regard to the relationship of European consensus and internal consensus within the respondent state. It is well known that the Court utilizes various sources to establish a consensus. In the case law, different types of consensus can be distinguished. Apart from a consensus based on the comparative analysis of the law and practice of the contracting parties, the Court also relies on international treaties,³⁶

³³ *Hirst*, *supra* note 16, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para. 7.

³⁴ *Ibid.*, para. 6. It certainly was a problem of the majority opinion that the European consensus it purported was inconsistent with the previous case law. See Dzehtsiarou, *supra* note 28, at 45.

³⁵ For an analysis of the technical purpose that reference to the parliamentary process is serving in the ECtHR's reasoning and the potential for improvements, respectively, see Saul, *supra* note 3.

³⁶ In the exceptional case of ECtHR, *Christine Goodwin v. United Kingdom*, Appl. no. 28957/95, Judgment of 11 July 2002, paras 84ff, the Court placed more emphasis on the 'continuing international trend' towards legal recognition of transsexuals. In the Court's reasoning, this continuing international trend actually substitutes for European consensus. For a discussion, see Dzehtsiarou, *supra* note 28, at 65–71.

on an internal consensus in the respective respondent state and, in some cases, on a consensus among experts.³⁷ So far, the relation between a European consensus and an internal consensus within the respondent state is an issue that is still in need of clarification. In the Irish abortion case, *A., B. and C. v. Ireland*, the ECtHR considered the results of referendums in Ireland and agreed that there was internal consensus in relation to abortion in Ireland. However, the Court also perceived there to be consensus among the member states in favour of allowing abortion on broader grounds than those accorded under Irish law. Remarkably, the Court avoided choosing explicitly between internal consensus and European consensus and discussed the two types of consensus in different parts of the judgment.³⁸

This unclear relationship between European and internal consensus is an open flank in the Court's reasoning that invites critics with strong views based on internal consensus. For example, in the *Hirst* case, internal consensus arguments had been used in the UK to question the legitimacy of the judgment.³⁹ The procedural approach might offer a starting point for calibrating the relationship between European and internal developments. It should be noted that, from the point of view of the procedural approach, it would at least be questionable whether simple referenda sufficiently ensure a procedurally adequate and careful reflection of the rights involved. If sensitive issues are at stake, referenda might not be an adequate procedure to balance competing values and minority interests. Rather, an internal consensus could only trump a European consensus if it is based on a more sophisticated procedure that is capable of processing the delicate balancing process.

Both techniques – consensus-based arguments and the procedural approach to the margin of appreciation – serve to gauge the correct degree of flexibility in the ECtHR's approach. They reflect that, on the one hand, the ECHR should not act as an undue brake on social and economic experimentation, while, on the other, the Court cannot simply follow public opinion because human rights are typically seen as guarantees against a tyranny of the majority.⁴⁰ Consensus-based arguments and the procedural approach to the margin of appreciation can explain why the Convention is the expression of a European public order and, at the same time, the ECtHR has limited review powers using methodologies and concepts that must be different from domestic law.⁴¹

³⁷ For a typology, see Dzehtsiarou, *supra* note 28, at 38–56.

³⁸ ECtHR, *A., B. and C. v. Ireland*, Appl. no. 25579/05, Judgment of 16 December 2010, paras 226, 235–237; cf. Dzehtsiarou, *supra* note 28, at 61.

³⁹ *Ibid.*, at 64, with references.

⁴⁰ Dzehtsiarou, *supra* note 10, at 552.

⁴¹ For a critique of the 'almost schismatic identity of the court' as a constitutional court of Europe or just another international court, see Ajevski, 'Forced to Argue in Two World Views: The Margin of Appreciation and the Schismatic Identity of the ECtHR', available at www.jus.uio.no/pluricourts/english/blog/marjan-ajevski/forced-to-argue-in-two-world-views-the-margin-of-appreciation-and-the-schismatic-identity.html.

In other words, they both mediate between so-called ‘political constitutionalism’⁴² and ‘legal constitutionalism’.⁴³ Strategically, arguments based on a European consensus and the procedural approach to the margin of appreciation react to critics of the Court’s perceived activism and lack of democratic legitimacy. Given fierce criticism from countries formerly known as reliable supporters of the Court,⁴⁴ the ECtHR’s message seems to be that interpretation of the ECHR is a shared enterprise of the Court and the state parties’ domestic institutions. This interaction of the Court with the political process resembles in the widest sense the much-vaunted judicial dialogue, which is beneficial indeed. Actually, the Canadian experience of constitutional dialogue as a variant of the ‘Commonwealth’ model of judicial review can help to explain the ECtHR’s new approach.⁴⁵ Both approaches to judicial review do not reserve the ‘last word’ unqualifiedly to courts but, rather, empower the legislature and aim at triggering political and legislative reasoning about rights. The Canadian model of constitutional dialogue⁴⁶ is based largely on the ‘notwithstanding clause’. Under section 33 of the Canadian Charter of Rights and Freedoms, either the Parliament of Canada or a provincial legislature may ‘expressly declare’ that a statute will operate notwithstanding certain rights-granting provisions.⁴⁷ Since section 33 has fallen into disuse,⁴⁸ some authors now consider it a meaningless tool. Yet, there has been a range of legislative responses along the spectrum from clear acceptance to minor, but not necessarily incompatible, disagreements, to a clear challenging of judicial decisions. Nonetheless, the comparison of the Canadian model of constitutional dialogue with the ECtHR’s approach highlights one key difference. While section 33 is unqualified, the ECtHR bases its interaction with national institutions on procedural criteria as specified by the procedural approach to the margin of appreciation. At best, this qualification does not curtail, but even encourages, constitutional dialogue.

This meaningful interaction between European consensus and the procedural approach to the margin of appreciation notwithstanding, significant differences exist between both doctrines. European consensus is an established doctrine, solidly

⁴² See, e.g., Waldron, ‘The Core of the Case against Judicial Review’, 115 *Yale Law Journal* (YLJ) (2006) 1346; Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case’, in A. Føllesdal, J.K. Schäffer and G. Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2014) 243.

⁴³ See, e.g., R. Dworkin, *Taking Rights Seriously* (1977); Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ *Public Law* (2000) 671; Hickman, ‘In Defence of the Legal Constitution’, 55 *University of Toronto Law Journal* (2005) 981.

⁴⁴ For a recapitulation of this backlash against the ECtHR, see Donald and Leach, *supra* note 3, at 5–10.

⁴⁵ S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013).

⁴⁶ See, in particular, Hogg and Bushell, ‘The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’, 35 *Osgoode Hall Law Journal* (OHLJ) (1997) 75; Hogg, Bushell Thornton and Wright, ‘Charter Dialogue Revisited – or “Much Ado about Metaphors”’, 45 *OHLJ* (2007) 1.

⁴⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁴⁸ Vermeule, ‘The Atrophy of Constitutional Powers’, 32 *OJLS* (2012) 421, at 425.

anchored in a considerable number of cases,⁴⁹ and, over the years, the Court has significantly improved its comparative method that lies at the heart of consensus-based arguments.⁵⁰ Notwithstanding these improvements, European consensus still raises fundamental questions with regard to the precise scope of the consensus and the framing of the consensus question that are beyond the scope of this article. By contrast, the procedural approach is a relatively recent innovation, utilized in only a small number of cases, still in need of further development and controversial among judges not only in the details of its application but also in principle. As already highlighted, both approaches face methodological problems because the comparative research of the domestic law of 47 state parties as a basis for consensus-based arguments and the assessment of parliamentary processes are very demanding exercises when it comes to details.

3 The Democratic Legitimation of the ECtHR and the Significance of Contestability

Arguably, these parallels between consensus-based arguments and a procedural approach to the margin of appreciation are not simply coincidental. Rather, their interaction can be based on a normative theory or a vision of the role of the Court. This normative theory rests on the assumption that the democratic legitimation of the ECtHR can be enhanced by reliance on consensus and the specification of the conditions for contesting a purported consensus. The aim of this section is to argue that the contestability of European consensus is crucial for the democratic legitimation of the ECtHR. A combination of consensus-based arguments and a procedural approach to the margin of appreciation can improve the Court's level of democratic legitimation. Therefore, it is important that there is room for a democratic contestation of judgments that build on a progressive consensus or, rather, on trends in the *avant-garde* of state parties.

The argument relies on two theories about the democratic legitimation of courts. It can be taken from these models that the overall level of legitimation of the ECtHR and its judgments and interpretations based on evolutive interpretation in the absence of established case law is unsatisfactory but can be enhanced by granting a margin of appreciation based on procedural conditions. I will refer to theories that have been developed for the legitimation of courts. One of them, stylized as the 'formal model', refers specifically to the legitimation of international judicial institutions and adapts a model developed for German domestic courts to the international realm. The 'control model', by contrast, was developed for the assessment of the legitimation of domestic courts but can, in principle, also be transferred to the international level. Referring to

⁴⁹ For a data collection, see Stone Sweet and Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization', 1 *Journal of Law and Courts* (2013) 61, at 79ff.

⁵⁰ Dzehtsiarou, *supra* note 28, at 72ff.

these theories, I approach the question of the ECtHR's legitimacy from a slightly different angle than the usual debates about the legitimacy of judicial review. The aim is to infuse additional juridical precision into the debate and to provide a comprehensive model that structures the various factors contributing to the legitimation of the ECtHR. For present purposes, these two models do not exclude each other but, rather, highlight different relevant considerations. In different ways, both models can contribute to an explanation of the combined effect of consensus-based arguments and a procedural approach to the margin of appreciation on the ECtHR's legitimation.

A Formal Model of Democratic Legitimation

German legal doctrine has developed a model for the democratic legitimation of domestic courts that also has had a considerable impact on the case law of the constitutional court.⁵¹ Armin von Bogdandy and Ingo Venzke have applied a variant of this model to international judicial institutions.⁵² They are concerned with the authority of international judicial institutions and, in particular, their law-making capacities, an exercise of authority reaching far beyond the settlement of individual disputes. In a nutshell, the formal model of democratic legitimation distinguishes different strands of democratic legitimation: institutional, substantive and personal legitimation. These criteria can be applied to the ECtHR. The institutional legitimation of the ECtHR rests on the fact that the ECHR – its founding statute – was ratified by the Convention states, involving parliaments. Articles 19ff of the ECHR therefore account for the institutional legitimacy of the ECtHR. Article 19 specifies that 'there shall be set up a European Court of Human Rights' in order to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'. The institutional legitimacy of the Court also rests on Protocol 11, ratified in 1998, which changed the Court from a part-time to a permanent institution and included a number of key provisions referring to, *inter alia*, the election of judges and the institutional composition of the Strasbourg system.⁵³ Protocol 14 of 2004, which entered into force in 2010, deploys further institutional legitimacy by introducing procedural reforms.⁵⁴

⁵¹ Voßkuhle and Sydow, 'Die demokratische Legitimation des Richters', 57 *JuristenZeitung* (2002) 673; seminally Böckenförde, 'Die Demokratie als Verfassungsprinzip', in J. Isensee and F. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 1, *Grundlagen von Staat und Verfassung* (1987) 887; see also Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts', in *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (2011) 281.

⁵² A. Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), at 156ff.

⁵³ Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms on Restructuring the Control Machinery Established Thereby, 11 May 1994, CETS no. 155; cf. E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010), at 460–465.

⁵⁴ Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, 1 June 2010, CETS no. 194.

Substantive legitimation of the ECtHR means that the Court's judgments are based on a treaty ratified in parliament. Binding the judges to the law thus imparts legitimacy on their judgments. In the case of the ECtHR, the substantive aspect of legitimation is comparatively weak. Remarkably, the UK government's decision to ratify the Convention in 1950 was taken without a debate in Parliament.⁵⁵ Even if ratification is based on substantial parliamentary debate, it must be taken into account that, due to the nature of their subject, the guarantees of the ECHR are formulated in open-ended and broad terms. Accordingly, it is difficult to qualify the Court's rulings as a mere application of the letter of the law. Rather, the substantive legitimacy imparted by the Convention as a treaty ratified in the parliaments of state parties is limited and needs to be complemented with democratically informed standards that guide the exercise of the Court's competences in practice.⁵⁶

In any case, Europe has changed considerably since the late 1940s and early 1950s, when the Convention was drafted. If the Convention is to serve as a meaningful instrument of rights protection today, the Court must reflect these changes by means of evolutive interpretation. Therefore, the original consent of the state parties is of limited relevance for the Court's legitimacy.⁵⁷ However, all state parties have renewed their general support for the Convention and the Court's evolutive interpretation by ratifying Protocol 11 in 1998. Furthermore, European consensus is an argumentative technique to prove the reality of the change and to establish the state parties' general consent to it. Kanstantsin Dzehtsiarou convincingly argues that the incorporation of such consent positively impacts the legitimacy of the ECtHR since it prevents the Court from going beyond those developments that the contracting parties are able to accept.⁵⁸ In a case, European consensus contributes to ensuring that the legitimacy imparted by original consent does not fade away over the years; it functions as a renewal of consent. According to Dzehtsiarou, the contracting parties implicitly consent to a particular meaning of the right in question through consensus.⁵⁹

Personal legitimation refers to the appointment of judges. The fact that judges are appointed by institutions that are politically accountable imparts their legitimation. Selection procedures are a subject of their own.⁶⁰ Essentially, the mere existence of institutional, substantive and personal strands of legitimation does not settle the question of the ECtHR's democratic legitimacy. It is not sufficient that the strands of legitimation do exist at all, as they clearly do in the case of the ECtHR. Rather, the different

⁵⁵ Bates, *supra* note 53, at 101, n. 144.

⁵⁶ Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10 *International Journal of Constitutional Law* (2012) 1023, at 1033; similarly Ulfstein, 'The International Judiciary', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 126.

⁵⁷ From a different perspective, Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law (EJIL)* (2004) 279, at 304.

⁵⁸ Dzehtsiarou, *supra* note 28, at 150.

⁵⁹ *Ibid.*, at 153.

⁶⁰ M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015).

strands of legitimation in their interaction and combined effect must generate an adequate measure of democratic legitimation. The ‘chains of legitimation’ linking the ECtHR as an international judicial institution to its constituencies are, by necessity, long. Therefore, it is crucial to consider additional mechanisms that could democratically justify international adjudication – that is, the role of deliberative bodies in selection procedures, the transparency of judicial procedures and the framing and reasoning of judicial decisions.⁶¹ European consensus and the procedural approach to the margin of appreciation can be elements of the latter aspect. Relying on European consensus, the Court can either refer to democratic law-making of other institutions in the Convention states or at least of institutions who seem to be better placed in terms of democratic legitimation.⁶²

A specific legitimation problem of the ECtHR and other international judicial institutions is an institutional asymmetry. While a centralized judiciary exists at the international level, legislative power is decentralized and essentially exists mostly at the level of the various member states. Unlike domestic courts, the ECtHR is not embedded within an overall context of democratic politics at the level of the Council of Europe.⁶³ Domestic (parliamentary) control is therefore curtailed. Granted, the problem of legitimizing the ECtHR’s judgments is scaled down because state parties have control over their enforcement.⁶⁴ However, it should be taken into account that law-making by international courts largely evades the reach of national parliamentary bodies.⁶⁵ Procedures for amending treaties, or alternative mechanisms for ‘overriding’ a specific judicial interpretation, often require unanimity or a qualified majority of state parties, which is difficult to attain. The processes of negotiating international treaties are slow and protracted.⁶⁶ The democratic premise that judicial law-making can be politically corrected with democratic majorities is hardly respected with international adjudication. Therefore, the lack of a fully-fledged political system at the international level creates a major problem for democratic legitimation.⁶⁷ In order to signal opposition to certain decisions and interpretations of the ECtHR, state parties can stop executing the Court’s judgments. Indeed, selective non-compliance was the UK’s reaction to the *Hirst* judgment.⁶⁸ Furthermore, state parties can refuse to sign and ratify new

⁶¹ Bogdandy and Venzke, *supra* note 52, at 156ff. See Langvatn, ‘Should International Courts Use Public Reason?’, 30 *Ethics and International Affairs* (2016) 355, for suggestions how a properly construed ideal of public reason can offer a way in which international courts can address legitimacy concerns raised against them.

⁶² For this argument, see, e.g., S.A.S., *supra* note 21, para. 129.

⁶³ Bogdandy and Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’, 23 *EJIL* (2012) 7, at 19, identify this as the central problem in the justification of international courts. In contrast to many domestic contexts, their public authority is not embedded in a responsive political system.

⁶⁴ See, e.g., Donald and Leach, *supra* note 3, at 125.

⁶⁵ Seminally, Bogdandy and Venzke, *supra* note 52.

⁶⁶ *Ibid.*, at 124.

⁶⁷ *Ibid.*, at 119ff.

⁶⁸ Bates, ‘The Continued Failure to Implement *Hirst v UK*’, *EJIL Talk* (15 December 2015), available at www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/.

protocols to the Convention or even withdraw from the Convention. These signals have considerable costs and consequences far beyond the correction of a specific interpretation.⁶⁹

From this point of view, the procedural approach can be seen as compensation for the lack of a meaningful separation of powers on the level of the 47 contracting states. If adequately framed, a procedural approach to the margin of appreciation not only polices certain aspects of domestic separation of powers in the states parties on the basis of Article 6(1) of the ECHR⁷⁰ but also spells out the separation (as well as coordination and interaction) of powers between the ECtHR and domestic law-making. The procedural approach to the margin of appreciation is a means to calibrate the ECtHR's standard of review in light of the principle of democracy.⁷¹ It is an accommodation strategy, but it can also have the effect of strengthening domestic political processes, which is a familiar effect from theories of constitutional adjudication.⁷² Accordingly, in light of the formal model of democratic legitimation, European consensus and the procedural approach to the margin of appreciation can be understood as specifically addressing substantial and structural legitimacy issues of the ECtHR.

B Control Model of Democratic Legitimation

As an alternative to the formal model, Axel Tschentscher developed what he calls the 'control model' of democratic legitimation for domestic courts in Germany.⁷³ His model draws upon the concept of deliberative democracy and is inspired by the works of Jürgen Habermas, Joshua Cohen and others.⁷⁴ Cohen's ideal of deliberative democracy refers to a society that is deliberatively steered as a whole. Deliberative democracy is an issue not only involving political institutions but also subject to public argumentation and procedures of decision making. Instead of mere representation, which is the main focus of the formal model, procedures must provide for rational argumentation among equals. Habermas also extends the concept of democratic legitimation

⁶⁹ ECtHR, *Greens and MT v. UK*, Appl. nos 60041/08 and 60054/08, Judgment of 23 November 2010, paras 44–47.

⁷⁰ Kosař, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?', 8 *ECLR* (2012) 33.

⁷¹ Staden, *supra* note 56, at 1026: 'normative subsidiarity'. See, generally, Bogdandy and Venzke, *supra* note 52, at 200, referring to Delmas-Marty and Izorche, 'Marge nationale d'appréciation et internationalisation du droit: réflexions sur la validité formelle d'un droit commun pluraliste', 46 *Revue de droit de McGill* (2001) 923; Marks, 'The European Convention on Human Rights and Its "Democratic Society"', 66 *British Year Book of International Law* (1995) 209.

⁷² Bogdandy and Venzke, *supra* note 52, at 206, referring to J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), at 100; J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), at 263ff.

⁷³ A. Tschentscher, *Demokratische Legitimation der dritten Gewalt* (2006), at 113ff.

⁷⁴ Cohen, 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity. Normative Analysis of the State* (1989) 17; Cohen, 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 95; Habermas, *supra* note 72. For an application to domestic courts, see Tschentscher, *supra* note 73. For the democratic legitimation of international judicial institutions, see Bogdandy and Venzke, *supra* note 52.

for the interplay between democratically institutionalized will formation and informal opinion formation. Democratic legitimacy cannot rely solely on the channels of procedurally regulated deliberation and decision making. Rather, it also lives off opinion formation outside of formal procedures and the institutions of the state.⁷⁵ According to Tschentscher's model, therefore, the discursive level of political communication is crucial.

For present purposes, Tschentscher's model has three distinct features. First, it focuses primarily on the legitimation of acts, not of actors. Therefore, it refers to the substantive outcome of a procedure – that is, the decision of a court or the interpretation it chose instead of the court as an institution.⁷⁶ Second, the primary criterion for democratic legitimacy is potential (discursive) control over the product of judicial dispute settlement and law-making. It is not the chain of legitimation linking the actor to the constituencies (representation) that is crucial but, rather, the potential control of the act. Personal legitimation is therefore less important than substantive legitimation. This potential control of the outcome can take place either *ex ante*, *ex post* or simultaneously. Third, the model is open for – and makes operational – the notion of a sufficient overall level of legitimation.⁷⁷ Tschentscher claims that his model, by focusing on the cumulative effect of various avenues of potential control, is better suited to accommodate the idea of an overall level of legitimation than the formal model.⁷⁸

Control can be exercised by actually influencing the ECtHR's decision-making process. This avenue of legitimation is fairly restricted mainly due to judicial independence. In Tschentscher's view, however, judicial independence and democratic control is only a seeming paradox. Rather, judicial independence is, like the selection of judges on the basis of their qualification, a means to ensure that judges follow the rule of law.⁷⁹ However, as we have seen above, the significance of this avenue of legitimation is limited due to the open-ended character of the guarantees of the Convention.

Tschentscher's model, which stresses the notion of an overall level of legitimation, is particularly capable of integrating the combined effect of consensus-based arguments and a procedural approach to the margin of appreciation. This needs some further elaboration. So far, we have taken consensus-based arguments as a legitimation strategy to which the Court has recourse in order to justify and rationalize evolutive interpretations. However, in many cases, consensus does not mean that all state parties or even a majority of state parties would consent to a specific evolutive interpretation of the ECtHR. In this situation, consensus-based reasoning is in need of additional legitimation in order to attain a sufficient level of overall legitimation.⁸⁰

⁷⁵ Habermas, *supra* note 72, at 308.

⁷⁶ Tschentscher, *supra* note 73, at 2ff.

⁷⁷ *Ibid.*, at 265.

⁷⁸ *Ibid.*, at 186.

⁷⁹ *Ibid.*, at 231.

⁸⁰ Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"', 5 *Global Constitutionalism* (2016) 16, at 18; for a critical assessment of European consensus based on the domestic principle of democracy, see Ungern-Sternberg, 'Die Konsensmethode des EGMR: Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip', 51 *Archiv des Völkerrechts* (2013) 312.

This additional legitimation can be brought about by granting a margin of appreciation that is dependent on procedural criteria.

4 The Benefits of Backlash and the Potential of Constitutional Dialogue

Contrary to what the notion of ‘consensus’ might connote, a European consensus identified by the ECtHR is rarely based on uniform laws in all state parties; consensus does not mean unanimity.⁸¹ The notion of consensus does not require the Court to wait for all contracting states to adopt a certain legislative provision or practice. Rather, in the majority of cases, European consensus is used in the sense of a trend, a general direction in which a certain area of the law is developing or changing in a certain number of member states. The Court is not looking for identical legal rules but, rather, strives to trace a convergence between states.⁸² As demonstrated, *inter alia*, by Bilyana Petkova, the Court utilizes European consensus as an instrument to develop the guarantees of the ECHR progressively.⁸³ Indeed, the case law reveals a flexible use of the consensus argument. This approach allows the Court to defer less to member states and to adopt a more progressive, rights-friendly approach.⁸⁴ In *Hirst v. United Kingdom*, the threshold constituted just over 50 per cent of the then members of the Council of Europe.⁸⁵ The ECtHR relies on consensus-based reasoning especially when dealing with newly litigated issues and in the absence of established case law or in order to change its own precedents.⁸⁶ If a core right is at stake, the Court should not base its decisions on consensus.⁸⁷ Consensus can also move beyond the actual consent of state parties if the ECtHR refers to a consensus that exists only at the level of principles, not of specific rules, and derives specific consequences for the case at hand from this abstract principle.⁸⁸

⁸¹ Dzehtsiarou, *supra* note 28, at 12ff.

⁸² Dzehtsiarou, *supra* note 10, at 542.

⁸³ Petkova, ‘The Notion of Consensus as a Route to Democratic Adjudication?’, 14 *Cambridge Yearbook of European Legal Studies* (2013) 663. See, e.g., ECtHR, *E.B. v. France*, Appl. no. 43546/02, Judgment of 22 January 2008 (pronouncing as discriminatory national policies preventing homosexuals to adopt children).

⁸⁴ For instance, in *Goodwin v. United Kingdom*, the Court stated: ‘In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments.’ *Christine Goodwin*, *supra* note 36, para. 92.

⁸⁵ *Hirst*, *supra* note 16, para. 81. In *E.B. v. France*, the applicant referred to the practices of barely ten of the 47 present Council of Europe states. *E.B.*, *supra* note 83. In *A., B. and C. v. Ireland*, the ECtHR went against a clear majority of state parties. *A., B. and C.*, *supra* note 38. See Londras and Dzehtsiarou, ‘Grand Chamber of the European Court of Human Rights, *A., B. and C. v. Ireland*, Decision of 17 December 2010’, 62 *ICLQ* (2013) 250, at 256. Despite the fact that the vast majority of European states allow abortion for health-related reasons or simply for reasons of well-being, the Court did not find a violation of Article 8 on these grounds. This decision is worrying as the ECtHR risks the consistency of its case law by hiding behind what could only be described as an incomprehensible referral to the margin of appreciation. See Petkova, *supra* note 83, at 682–684.

⁸⁶ Dzehtsiarou, *supra* note 10, at 533, 545.

⁸⁷ *Parrillo*, *supra* note 13, paras 174, 176.

⁸⁸ Dzehtsiarou, *supra* note 28, at 14ff.

These judgments, in turn, do not represent ‘the last word’ but can provide a trigger for democratic contestation and deliberation.⁸⁹ It is plausible to assume that they even have a special potential of sparking debate, both within the nation states and at the level of the Council of Europe.⁹⁰ If progressive judgments that rely on an ‘emerging consensus’ trigger a debate that ultimately also has an impact on the Court and allows the Court to establish a dialogue with the various constituencies in the state parties, backlash can indeed be beneficial.⁹¹ In this regard, Petkova, in a comparative study, relies on a theory of backlash developed by Robert Post and Reva Siegel.⁹² The two Yale scholars have developed a theory about how to protect constitutional ideals under conditions of constitutional conflict.⁹³ In their view, which is embedded in a broader theory of ‘democratic constitutionalism’, backlash provoked by progressive judgments – a phenomenon feared by many liberal scholars – is a welcome means of maintaining the democratic responsiveness of constitutional meaning⁹⁴ and of instituting an ongoing and continuous communication between the court and the public. It holds the potential for constitutional dialogue.

However, the backlash that consensus-based judgments of the ECtHR have provoked in some member states, seems to be structurally different from the kind of backlash provoked by the opinions of the US Supreme Court that Post and Siegel have in mind. Their version of backlash is a means of expressing an alternative vision of constitutional values. According to Post and Siegel, Americans find it important that courts articulate a vision of the Constitution that reflects their own ideals.⁹⁵ They contest the substance of the US Supreme Court’s interpretation of the US Constitution. It is an exercise of norm contestation, but it does not principally challenge the authority of either the Constitution or the US Supreme Court. Rather, this kind of backlash even expresses a strong normative identification with the Constitution. UK critics of the *Hirst* judgment, by contrast, did not contest primarily the meaning that the ECtHR gave to Article 3 of Protocol 1. Criticism did not centre on the ‘correct’ meaning of Article 3 but, rather, on the Court’s purported activism and undue interference with affairs of domestic democracy. In general, challenges of the ECtHR’s judgments in the UK were based on various grounds, concerning both the quality of the Court’s procedure, ‘expansionist’ law-making and the purported wish to interfere unduly with national decision making.⁹⁶ Critics also stress the democratic credentials of the UK.

⁸⁹ Petkova, *supra* note 83, at 665.

⁹⁰ *Ibid.*, at 665.

⁹¹ Cf. Cover, ‘The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation’, 22 *William and Mary Law Review* (1981) 639; Kahn, ‘Interpretation and Authority in State Constitutionalism’, 106 *Harvard Law Review (HLR)* (1993) 1147.

⁹² Post and Siegel, ‘*Roe* Rage. Democratic Constitutionalism and Backlash’, 42 *Harvard Civil Rights–Civil Liberties Law Review* (2007) 373, at 377.

⁹³ *Ibid.*, at 377.

⁹⁴ *Ibid.*, at 379.

⁹⁵ *Ibid.*, at 380.

⁹⁶ A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights* (2012); more broadly on the critique uttered in the United Kingdom, see Bratza, ‘The Relationship between UK Courts and Strasbourg’, 16 *European Human Rights Law Review* (2011) 505; O’Boyle, ‘The Future of the European Court of Human Rights’, 12 *GLJ* (2011) 1862.

Similarly, in the Netherlands, critique focused on the undue tightness of the margin of appreciation and the purported activism of the Strasbourg Court.⁹⁷ Assuredly, however, fierce attacks of this quality are the exception rather than the norm.⁹⁸ Still, it can generally be said that, in the case of the ECtHR, backlash is mainly targeted at the Court's institutional legitimacy and is not a means of norm contestation. Critics do not identify themselves with the Convention by presenting an alternative view in the same way that the backlash theorized by Post and Siegel does.⁹⁹

For this reason, in the case of the ECtHR, consensus-based reasoning that relies on progressive trends in some state parties needs to be complemented by a procedural approach to the margin of appreciation. Procedural rationality control ensures that the avenue of democratic norm contestation is open. Furthermore, it incentivizes state parties to create structures with embedded parliamentary consideration of ECHR standards and the ECtHR's judgments. These structures may help to pre-empt opportunistic attacks on the European system of human rights protection by obliging parliamentarians to engage with reasoned, justificatory arguments and the often finely balanced arguments that reflect the scope of rights and the necessity and proportionality of the restrictions upon them. Supposedly, by creating opportunities to engage politicians in debates on fundamental values, it will promote identification with the Convention and support 'ownership' of the Convention.¹⁰⁰ The ECtHR's procedural rationality approach faintly resembles John Hart Ely's participation-oriented, representation-reinforcing approach to judicial review, which checks the political process ('process writ large') and procedural fairness in the resolution of individual disputes ('process writ small').¹⁰¹ However, the ECtHR's procedural rationality control does not aim to justify the existence of judicial review as such. Rather, it contributes to defining the adequate intensity of judicial scrutiny and the remaining margin of appreciation.

Academic supporters of the procedural approach to the margin of appreciation envision a culture of justification.¹⁰² The procedural rationality approach would require member states and domestic courts to justify their decisions better and to not rely simply on their statutory authority.¹⁰³ According to a notion initially coined by

⁹⁷ Kuijer, 'Guaranteeing International Human Rights Standards in the Netherlands: The Parliamentary Dimension', in Hunt, Hooper and Yowell, *supra* note 3, 295.

⁹⁸ See B. Çalı, A. Koch and N. Burch, *The Legitimacy of the European Court of Human Rights: The View from the Ground* (2011); Çalı, Koch and Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights', 35 *HRQ* (2013) 955.

⁹⁹ The UK prime minister reportedly stated that it made him 'physically ill even to contemplate having to give the vote to anyone who is in prison'. See *House of Commons Debate*, vol. 517, col. 921 (3 November 2010).

¹⁰⁰ Donald and Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights', in Hunt, Hooper and Yowell, *supra* note 3, 59, at 92.

¹⁰¹ Ely, *supra* note 72, at 87.

¹⁰² Seminaly, Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights', 10 *South African Journal on Human Rights* (1994) 31; for the European setting, see Dyzenhaus, 'Proportionality and Deference in a Culture of Justification', in G. Huscroft, B.W. Miller and G.C.N. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 234; Dyzenhaus, 'What Is a "Democratic Culture of Justification"?', in Hunt, Hooper and Yowell, *supra* note 3, 425.

¹⁰³ Cohen-Eliya and Porat, 'Proportionality and the Culture of Justification', 59 *American Journal of Comparative Law* (2011) 463.

Etienne Mureinik, a ‘culture of justification’ requires the government to offer to both the electorate and parliament justification for their laws and policies in terms of their consistency with the values protected by the constitution as well as requiring both the government and parliament to offer such justification to the courts. In this way, parliament is empowered against the executive, the courts are empowered against both the executive and parliament and the electorate is empowered against all three branches of the state, which can more easily be held accountable for their transparent decisions on justification.¹⁰⁴ Crucially, a culture of justification builds on the power of persuasion, not of coercion.

Combining European consensus with a procedural approach to the margin of appreciation reconciles the impact of European consensus and the need for democratic deliberation. At best, this approach accommodates resistance instead of limiting avenues of contestation to brusque actions like simple non-compliance or withdrawal. At the same time, it even has a democracy-enhancing effect.¹⁰⁵ Contrary to the account of some of the ECtHR’s critics, taking into account the extent and nature of democratic deliberation when assessing the human rights compatibility of legislation can enhance, and need not undermine, democracy.¹⁰⁶ Furthermore, progressive interpretations based on European consensus can be external stimuli that are essential for democratic debate.

5 Problems

The *Hirst* case demonstrates the combined potential of European consensus and procedural rationality control, while it provides at the same time an example of the ECtHR’s failure to build up support in a dialogic exchange. Therefore, it is of particular interest.¹⁰⁷ The 2005 Grand Chamber judgment left space for the UK Parliament to deliberate democratically on what limitations it considers justifiable on the right of prisoners to vote. The only option expressly precluded by the Grand Chamber was a blanket ban on all convicted prisoners. Potentially, this approach allows democratic domestic law-making institutions to react to the judgments of the ECtHR that are based on a European consensus and to develop alternative solutions that will withstand later judicial examination by the Court (in which the margin of appreciation will be wider on the basis of the procedural approach to determine it). This takes into account the need for potential control that plays a special role in Tschemtscher’s model, as described above.

However, the UK’s domestic institutions refused the invitation set out in the procedural rationality approach. The Commons debate on a backbench motion, which led to a resolution in favour of keeping the current ban by an overwhelming majority

¹⁰⁴ Hunt, *supra* note 5, at 16.

¹⁰⁵ Spano, *supra* note 1.

¹⁰⁶ Kavanagh, *supra* note 11.

¹⁰⁷ For an analysis of the *Hirst* saga, see Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’, 14 *HRLR* (2014) 504.

of 224 votes to 22, was not capable of satisfying the ECtHR's requirement that there must be democratic deliberation about the justification for a limitation in the light of modern standards on the treatment of prisoners.¹⁰⁸ Therefore, in the *Greens and MT* case, the Court subsequently declined the UK's motion to overturn the *Hirst* judgment in light of this debate.¹⁰⁹ The Court made it clear that the mere fact of such a debate is not enough; it is the quality of the deliberation that matters.¹¹⁰ The UK saga on prisoner voting, however, demonstrates that the ECtHR's consensus-based arguments are rebuttable.¹¹¹ Since an assessment of the parliamentary process also formed part of the ECtHR's reasoning in *Hirst*, the consensus-based argument can be contested in adequate, high-standard democratic domestic procedures that adequately weigh the competing interests and assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. Under such circumstances, if a state party is capable of demonstrating that high standard domestic procedures have been followed,¹¹² consensus is contestable, and this contestability is crucial for the legitimation of the ECtHR and its interpretations of the ECHR.

In *Hirst* and its progeny, it is clear that the ECtHR was unable to nudge the UK's domestic institutions into more ambitious democratic deliberations or to increase its own perception as a legitimate actor and enhance the acceptance of its rulings in the UK. This defect, however, does not mean that the combination of European consensus and procedural rationality control is doomed to failure. Rather, it is the very ambiguity of the *Hirst* ruling that is an essential part of the problem. In fact, the judgment allows for a wide and a narrow reading.¹¹³ The narrow reading, which reflects that only a blanket ban on all convicted prisoners was precluded, was adopted in the *Greens and MT* case, as stated above.¹¹⁴ The dissenters in *Hirst*, however, read the majority opinion differently. According to their reading, only two reform options were available: restore the vote to prisoners in the past-tariff phase of detention or amend domestic law such that only judges could disenfranchise prisoners as part of sentencing.¹¹⁵ Together with certain inconsistencies with the previous case law,¹¹⁶ these mixed messages that the ECtHR sent out to a state party with which it already had a difficult relationship contributed to the public outcry in the UK.¹¹⁷

Still, even putting the aforementioned and well-known methodological problems aside, combining European consensus and procedural rationality control is a bold

¹⁰⁸ *House of Commons Debates*, vol. 523, cols 493–584 (10 February 2011). See Nicol, 'Legitimacy of the Commons Debate on Prisoner Voting', *Public Law* (2011) 681.

¹⁰⁹ *Greens and MT*, *supra* note 69.

¹¹⁰ Hunt, *supra* note 5, at 18.

¹¹¹ European consensus establishes a rebuttable presumption in favour of the regulation adopted by the majority of the contracting parties. See Dzehtsiarou, *supra* note 28, at 3.

¹¹² For detailed suggestions on how to structure this scrutiny, see Saul, *supra* note 3.

¹¹³ Cf. Bates, *supra* note 107, at 509–511.

¹¹⁴ *Greens and MT*, *supra* note 69, paras 113ff, referring merely to *Hirst*, *supra* note 16, para. 82.

¹¹⁵ *Hirst*, *supra* note 16, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para. 9.

¹¹⁶ See note 34 above.

¹¹⁷ Bates, *supra* note 107, at 520ff.

endeavour that is not without its problems. The ECtHR has thereby tried to influence the institutional prerequisites and the form of reactions to its interpretations of the ECHR. In order to increase its own overall level of legitimation, the Court has attempted to shape its partners in a judicial dialogue about the Convention. This move is daring because structural arrangements such as the separation of powers or democracy are more difficult to change than substantive commitments – a proposition that can be based on a comparative outlook.¹¹⁸ Therefore, it is unlikely that state parties who resist the ECtHR will ease into structural changes of their law-making procedures. Apart from that, the actual practice of legislative rights review has so far given rise to some scepticism regarding its prospects.¹¹⁹

Furthermore, the danger exists of unravelling the unity of the case law. If a finding that the ECHR has been violated also depends on procedural conditions that vary among the state parties, it will become more difficult potentially to deduce general statements from specific judgments. In reaction to the *Animal Defenders* judgment, a commentator claimed that it is an obvious irony if debates provoked by a certain precedent of the ECtHR can contribute to the ‘quasi-overruling’ of this very precedent.¹²⁰ In fact, the impact of domestic debates is more complex. On the one hand, intensive debate can indeed induce the ECtHR to overrule a precedent. This prospect is an important incentive to engage in a dialogue with the Court in the first place and is crucial for the idea of democratic constitutionalism. On the other hand, the fact that an intensive debate has taken place can alter the margin of appreciation granted to the respective respondent state. Therefore, the Court can reach different findings concerning a violation of the Convention, even without changing the respective interpretation of substantial provisions of the Convention chosen in a parallel case.

6 Conclusion

All in all, the chances seem to outweigh the risks. In a sense, it simply appears necessary to spell out certain procedural prerequisites for the breadth of the margin of appreciation, given the significant differences that exist among the state parties. The alternative to formulating abstract criteria would mean ignoring the problem.¹²¹ Therefore, it should be welcomed that the Court uses consensus-based arguments as a legitimation strategy in order to justify and rationalize evolutive interpretations. However, in many cases, consensus does not mean that all state parties, or even a majority of state parties, would consent to a specific evolutive interpretation of the

¹¹⁸ Levinson, ‘Parchment and Politics: The Positive Puzzle of Constitutional Commitment’, 124 *HLR* (2011) 657.

¹¹⁹ Hiebert, ‘Constitutional Experimentation: Rethinking How a Bill of Rights Functions’, in T. Ginsburg and R. Dixon (eds), *Comparative Constitutional Law* (2011) 298.

¹²⁰ Lewis, ‘*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?’, 77 *Modern Law Review* (2014) 460, at 469.

¹²¹ For an analysis of how the ECtHR promotes more just states that vary greatly in their democratic credentials, see Follesdal, ‘Building Democracy at the Bar: The European Court of Human Rights as an Agent of Transitional Cosmopolitanism’, 7 *Transnational Legal Theory* (2016) 1.

ECtHR. In this situation, consensus-based reasoning is in need of additional legitimation in order to attain a sufficient level of overall legitimation. This additional legitimation can be brought about by granting a margin of appreciation that is dependent on procedural criteria. Combining European consensus with a procedural approach to the margin of appreciation reconciles the impact of European consensus and the need for democratic deliberation. Consensus thus becomes contestable. This approach harnesses the productive potential of contestation instead of limiting the avenues of resistance to non-compliance or withdrawal from the ECHR. The charm of this combination is that, to a certain extent, it evades the standard critique of Ely's above-mentioned participation-oriented, representation-reinforcing approach to judicial review, namely that procedure is essentially meaningless without substantial commitments.¹²² By combining European consensus and the procedural rationality approach, the ECtHR interlinks and mutually reinforces substance and procedure.

¹²² Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories', 89 *YLJ* (1980) 1063, at 1070ff.