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Beyond Sovereignty and Nationhood: An
Analysis of the Principles Governing the
Founding of the European Court of Human
Rights and the Legitimacy of its Autonomy and
Intervention

Rebecca J Kelly

A thesis submitted to the University of Huddersfield
in partial fulfilment of the requirements for the
degree of Doctor of Philosophy

University of Huddersfield, School of Law

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Table of Contents

1	Chapter One: An Introduction to the European Convention on Human Rights and to Criticism of the European Court of Human Rights	9
	The scope of the PhD	9
1.1	Introduction	10
1.2	Background	17
1.2.1	The Origins of the ECHR and the ECtHR.....	17
1.2.2	The Convention System	18
1.2.3	Criticism of the ECtHR.....	20
	<i>Fig. 1.4 Member State Concerns taken from the Brighton Declaration</i>	25
1.3	Research Objectives.....	25
1.4	Thesis	31
1.5	The Research Question and Objectives	32
1.6	Methodology.....	35
1.7	Approach.....	36
	Phase One (Objective One).....	37
	Phase Two (Objective One)	37
	Phase Three (Objective One).....	38
	Phase Four (Objective Two).....	39
	Phase Five (Objective Three)	39
	Phase Six (Objective Three)	40
	Phase Seven (Objective Four)	40
	Phase Eight (Objective Four)	40
1.8	Chapter Outlines	40
	Chapter One.....	41
	Chapter Two	41
	Chapter Three.....	44
	Chapter Four	47
	Chapter Five.....	49
	Chapter Six.....	53
	Chapter Seven.....	55
	Chapter Eight	55
2	Chapter Two: Legitimacy in Law and a Valid Approach to Securing Human Rights	57
2.1	Introduction	58
2.1.1	Legitimacy and Authority	59

2.1.2	Human Rights Objectivity.....	64
2.2	Formalism	66
	<i>Fig. 2.3 Solutions for Resolving Substance and Standards for Application of Rights</i>	<i>68</i>
2.3	Legal Realism.....	74
2.4	A Moral Constructivist Approach: Kant, Rawls and Gewirth	75
2.5	Pure Reason and The Principle of Generic Consistency.....	83
2.6	Dialectically Necessary Norms: A Negative Method for Reviewing Construction.....	93
2.7	Positively Constructing Human Rights	99
2.8	A System for Constructing Human Rights.....	114
2.8.1	Summary of the Findings on the Basis for Constructing Rights	114
2.8.2	The Stages for Constructing International Legal Rules	120
	<i>Fig. 2.14 Interpretation as an In Abstracto Exercise and Application as In Concreto</i>	<i>129</i>
2.8.3	Stage One – Interpretation	129
2.8.4	Stage Two – Application.....	133
2.9	Chapter Conclusions	134
3	Chapter Three: Placing Legitimate Authority	137
3.1	Introduction	138
3.2	The Importance of State Consent	141
3.3	Interpreting the Treaty	150
3.3.1	The Preamble	154
3.3.2	Democratic Legitimacy.....	157
3.3.3	Democracy in the Stages for Human Rights Protection.....	162
3.3.4	The Negotiation	166
3.4	Chapter Conclusions	166
4	Chapter Four: An Analytical Framework for Assessing the Legitimacy of European Court of Human Rights Procedure	168
4.1	Introduction	169
4.2	The Negotiation Process	170
4.3	Republican Liberalism and Authority.....	174
4.3.1	Developments Require Democratic State Support.....	174
4.3.2	Democracy Results in Common Developments.....	180
4.3.3	Subsidiarity Requiring Evidence of Commonality	185
4.4	Broad Consequences for the ECtHR.....	191
4.5	Subsequent Agreements.....	193
4.6	Analytical Framework for Court Authority and Autonomy.....	196

4.7	Chapter Conclusions	201
5	Chapter Five: Tenets for Building a Legitimate Judicial Model for the European Court of Human Rights	203
5.1	Introduction	204
5.2	Stage One – Interpretation	210
5.2.1	Extrapolation.....	214
5.2.2	Originalism	221
5.2.3	Living Originalism	229
5.2.4	Finding Consensus.....	233
5.3	Stage Two – Application.....	243
5.4	Prioritisation of Serious Breaches	249
5.5	Chapter Conclusions	252
6	Chapter Six: Development of a Proposed Corrective Judicial Model and Review of the Present European Court of Human Rights Approach.....	257
6.1	Introduction	258
6.2	Stage One - Interpretation	258
6.2.1	Questions that Fall Under Stage One.....	258
6.2.2	Questions that Cannot Fall Under Stage One	261
6.2.3	Distinguishing Between Stages One and Two.....	263
6.3	Stage Two – Implementation Requirements and Assessing Application.....	265
6.3.1	The Procedural Requirements	267
6.3.2	The Substantive Review	273
6.4	Prioritisation of Serious Breaches.....	285
6.5	The Proposed Corrective Model	289
6.5.1	Similar Issues.....	290
6.5.2	The Assessment of the ECtHR is Final	291
6.6	The Ruling	295
6.7	Illustrating the Issues	296
6.8	Chapter Conclusions	303
7	Chapter Seven: Evaluation of the Proposed Corrective Model.....	310
7.1	Introduction	311
7.2	Terrorism Laws and Deportation	313
7.2.1	Torture and “Inhuman or Degrading Treatment or Punishment”	313
7.2.2	The Right to a Fair Trial	328
7.3	Prisoner Voting.....	333
7.3.1	Stage One (Interpretation).....	333

7.3.2	Stage Two (Application)	339
7.4	Secondary Strike Action	344
7.4.1	Stage One (Interpretation).....	344
7.4.2	Stage Two (Application)	348
7.5	Jurisdiction and Extra-territoriality	350
7.6	Life Imprisonment.....	352
7.7	Same-Sex Marriage	358
7.8	Civil Rights and Obligations.....	360
7.9	Chapter Conclusions	363
8	Chapter Eight: Conclusions and Recommendations.....	365
8.1	Introduction	366
8.2	Satisfaction of Research Objectives	366
8.2.1	Objective 1 – To establish a basis for evaluating human rights systems and the relevance of consent to legitimate institutional oversight	367
8.2.2	Objective 2 – To establish the object and purpose of the ECHR and the consequences for a framework of analysis for assessing the legitimacy of ECtHR procedure.....	370
8.2.3	Objective 3 - To propose a corrective judicial model	375
8.2.4	Objective 4 – Evaluation of the proposed model using case law	381
8.3	Future Areas of Work.....	384
8.3.1	Yellow and Orange Cards	384
8.3.2	Formal Input into Remedies.....	385
8.3.3	Advisory Judgments Only	386
8.3.4	Advisory Opinions	386
8.3.5	Provisional Judgments	388
8.3.6	Redefining the Rights	389
8.4	Contribution of the Work.....	389

Abstract

The rulings of the European Court of Human Rights (ECtHR) under the European Convention on Human Rights (ECHR) are facing increasing criticism from some contracting states. At the heart of these concerns is the perception that the ECtHR is, in some cases, acting outside its legitimate mandate, by expanding its use of authority beyond the object and purpose of the agreement. While significant work has been published concerning the approach taken by the ECtHR in protecting rights, there is little that addresses the legitimacy of the existing judicial model in terms of the authority initially and subsequently conferred upon the Court by ECHR signatories.

This work provides a critical review and analysis of the authority initially conferred upon the ECtHR by the first signatories and by the subsequent operation and evolution of the ECHR legal system. Findings from the review and analysis of the nature of the ECtHR's authority are used as the basis for development of an analytical framework for the purpose of assessing the legitimacy of its procedures. The framework is designed to appraise the validity of the criticisms by states and to support the development of a proposed improved judicial model for decision-making. The analytical framework and the corrective model represent the major challenge and originality in the work and the major contribution to knowledge.

Application of the analytical framework and the corrective model to relevant and controversial decisions of the ECtHR demonstrates their value and indicates that in some cases the criticisms made by states appear valid. This evaluation of the corrective model suggests that it is, at the least, of value in support of practical and academic analysis of ECtHR decisions, but also that it may be a useful element in the development of improvements in the processes and operation of the Court, to enhance legitimacy, consistency and authority in its rulings.

Discussion relating to the potential for wider development of the ECtHR's processes, beyond the proposed corrective model, is provided under the heading of further work.

1 Chapter One

An Introduction to the European Convention on Human Rights and to Criticism of the European Court of Human Rights

The scope of the PhD

1.1 Introduction

Chapter One presents the background to the European Convention on Human Rights (ECHR) and sets out challenges made by different groups in relation to its interpretation and application via the European Court of Human Rights (ECtHR). The purpose of this chapter is not to evaluate the validity of such challenges but rather to identify the specific and underlying concerns associated with them and their potential impact on the future effectiveness of the ECHR. The following discussion will introduce the areas and issues addressed in this work and hence the scope of the overall PhD project.

The difficulties in practice caused by any significant questioning of the ECtHR's use of its authority are evidenced by worrying and measurable trends, explored in this chapter. Trends include significant non-compliance with rulings, duplication of cases and troubling public statements. Such incidents have the potential to undermine confidence in, and respect for, a system dependent upon member state and popular support.¹ While concerns have been

¹ Without judgment compliance, the legality of an adjudicatory system is in question. See A. Huneus, "Compliance with International Court Judgments and Decisions", in K. Alter, C. Romano and Y. Shany (eds), *Oxford Handbook of International Adjudication* (Oxford University Press: 2013) 437.

The ECtHR itself has held that without domestic delivery of its judgments, the right of access to a court under Article 6 become illusory. See *Hornsby v Greece*, Application No. 18357/91, Judgment of 19 March 1997.

It is also recognised by the Council of Europe Steering Committee for Human Rights in its report on the future of the ECHR system:

Of course, our Convention – first established in the aftermath of the Second World War – is only ever as strong as the political will behind it. *Member States are primarily responsible for its implementation and for executing the judgments of the European Court of Human Rights. The system hinges on their willingness and ability to do so.* The decision of Europe's governments to reiterate their commitment to it, through the adoption of the Brussels Declaration on "the implementation of the Convention, our shared responsibility" (March 2015), was therefore extremely welcome [emphasis added].

Council of Europe, 'The Longer-Term Future of the System of the European Convention on Human Rights' (adopted December 2015, published June 2016) report of the Steering Committee for Human Rights, page 7, available at <<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4>> accessed 9 May 2018.

voiced most robustly in the UK by both political representative and prominent judges², this work posits that such concerns are now more widespread and represent a growing perception that the ECtHR can be said to be overstepping its authority under the ECHR mandate. Notably, the membership of the ECHR, as a collective body of 47 states, agreed in the Brighton Declaration that the safeguards recognising a divide between national choices and legitimate centralised protection require reinforcement.³

This work submits that where the text of the ECHR appears open to more than one interpretation in relation to the rights or to different approaches for their application, a detailed analysis of the shared government object and purpose of its member states could distil what this implies for a legitimate approach to the interpretative and enforcement

² In reference to the judiciary, the concerns about some aspects of the operation of the ECtHR as raised by Lord Hoffmann, Lord Sumption and Lady Hale are explored later in this work.

In reference to political bodies, controversy the ECtHR's ruling on the right of convicted prisoners to vote, caused some members of parliament to call for the UK to break its treaty obligations. For example, David Davis MP stated:

However, there are those who argue that there is nothing more we can do, that we have accepted the jurisdiction of the Strasbourg Court and must forever obediently obey its decisions. But this is not the case. Britain cannot be forced to give prisoners the vote or to pay compensation to prisoners who sue the government. The Strasbourg Court has no power to fine Britain for non-compliance with its judgments.

The Council of Europe has failed to expel Bulgaria for police brutality, Moldova for torture and Russia for atrocities committed in Chechnya, so it is hardly likely to expel a country for standing up for its proper constitutional rights. If Parliament rejects the proposal to give prisoners the vote, the matter will simply remain on the long list of unenforced judgments reviewed by the Committee of Ministers.

D. Davis MP, 'Today's Vote on Prisoners' Rights is an Historic Opportunity to Draw a Line in the Sand on European Power', Conservative Home (blog from 10 February 2011) available at <<http://www.conservativehome.com/platform/2011/02/david-davis-todays-vote-on-prisoners-rights-is-an-historic-opportunity-to-draw-a-line-in-the-sand-on.html>> accessed 6 September 2018.

Some MPs have accused the ECtHR of 'judicial activism'. For example, Jack Straw, MP stated:

[T]he problem has arisen because of the judicial activism of the Court in Strasbourg, which is widening its role not only beyond anything anticipated in the founding treaties but beyond anything anticipated by the subsequent active consent of all the state parties, including the UK.

J. Straw MP, Hansard, HC Vol. 523, Col. 502, 10 February 2011 available at <<https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm>> accessed 6 September 2018.

³ As well as in the declarations adopted at the conferences held in Interlaken on 18 and 19 February 2010, Izmir on 26 and 27 April 2011 and Brussels on 26 and 27 March 2015.

authority of the ECtHR. These implications could form the basis for the identification of a framework of principles underpinning and justifying the limits of the ECtHR when exercising its autonomy. This orientation might then guide an analysis of the ECtHR's case law to help evaluate the accuracy or otherwise of claims that the current judicial model operates outside the legitimate boundaries of a reasonably mandated framework.

The agreement between the ECtHR (as the agent) and ECHR contracting states (as the principals⁴) does give the Court a wide discretion in the choice of means adopted to accomplish the Convention aims.⁵ Under Article 32, the ECtHR has jurisdiction to decide all matters concerning the interpretation and application of the ECHR and its Protocols. However, the government object and purpose of the agreement must still guide the ECtHR in its actions, given that its agency authorizes it only as the enabler and guardian of the principals' agreed goals for cooperation in ceding to it power. The authority of the ECtHR is thereby subject to inferred limits if it is not to exceed what is reasonably necessary for the task conferred.⁶

Ultimately, either a lack of reflective awareness by the ECtHR of its own place, or the absence of an established and transparent judicial model guiding its rulings, may lead to complaints and actions representing more than mere discontent by the member states. An erosion of the sense

⁴ This is ultimately the voters but for practical purposes it is the state(s) which gives/represents their agreement.

⁵ As Hawkins et al explain:

'Discretion entails a grant of authority that specifies the principal's goals but not the specific actions the agent must take to accomplish those objectives.'

D. Hawkins, D. Lake, D. Nielson and M. Tierney, *Delegation and Agency in International Organizations* (2006: Cambridge University Press) 8.

⁶ An inferred control over the ECtHR's powers is possible, in spite of the wording under Article 32 ECHR, which gives the Court the wide-reaching jurisdiction of deciding, 'all matters concerning the interpretation and application of the Convention and the Protocols thereto' and expressly authorises the ECtHR to determine for itself the limits of this jurisdiction.

As an agent, the ECtHR's powers are subject implicitly to the limits of the authority vested in it by the principals to the agreement. To explain:

The relations between a principal and an agent are always governed by a *contract*, even if this agreement is implicit (never formally acknowledged) or informal (based on an unwritten agreement).

ibid 7.

of legitimacy brings with it the risk of “demise or reform”.⁷ For a legal system such as the ECHR, extra vigilance is perhaps called for, to ensure that there is not an unrealistic reliance upon textualism by the ECtHR in using its jurisdiction under Article 32. The area of human rights is never far from controversy, and has far-reaching consequences that could not have been predicted fully by the original drafters.

Judge-made tools used in reviewing national choices, such as subsidiarity, the margin of appreciation and consensus, show that the ECtHR is aware of the need to show a degree of judicial restraint. This is not the same as suggesting the ECtHR must do what the member states want, but only that its process of reasoning must take account the conditions of the grant of authority i.e. the purpose desired by the states and the implications for continued state influence limiting the pace of development.⁸ The ECtHR recognises the danger of moving beyond the conditional grant of authority from the member states and accepts that its autonomy is limited in its range by the need for such mechanisms of control. There is then no attempt to deny the central role of the states in the human rights process. It is apparent from the Brighton Declaration, however, that reform is being called for.

Since the Brighton Declaration, the challenge regarding the authority of ECtHR case law has been considered by the Council of Europe.⁹ There is also evidence of a possible shift in attitude within

⁷ P. Popelier and C. Van de Heyning, “Subsidiarity Post-Brighton: Procedural Rationality as Answer?” (2017) *Leiden Journal of International Law* 5,7.

⁸ The following explanation is helpful on this point:

Agents receive conditional grants of authority from a principal, but this defining characteristic does not imply that agents always do what principals want. Agency slack is independent action by an agent that is undesired by the principal. Slack occurs in two primary forms: shirking [...] and *slippage*, when an agent shifts policy away from its principal’s preferred outcome and towards its own preferences. Autonomy is the range of potential independent action available to an agent after the principal has established mechanisms of control [...] [emphasis added]

D. Hawkins (n 5) 8.

⁹ See the Council of Europe report of the Steering Committee for Human Rights on the future of the Convention system:

The authority of the Court is vital for its effectiveness and for the viability of the Convention system as a whole. These are contingent on the quality, cogency and consistency of the Court’s judgments, and the ensuing acceptance thereof by all actors of the Convention system, including governments, parliaments, domestic courts, applicants and the general public as a whole. The interpretation of states’ obligations under the Convention, especially by reference

the ECtHR, which recognises the force and potential danger to the ECHR system of these concerns. Dean Spielmann, while President of the European Court of Human Rights, commented that:

The future imagined at Brighton is one where the centre of gravity of the Convention system should be lower than it is today, closer temporally and spatially to all Europeans, and to all those under the protection of the Convention.¹⁰

Similarly, Judge Spano of the ECtHR has suggested that:

The next phase in the life of the Strasbourg Court might be defined as the age of subsidiarity, a phase that will be manifested by the Court's engagement with empowering member States to truly "bring rights home".¹¹

There is evidence that suggests there been a demonstrable growth in the role of the margin of appreciation in ECtHR rulings post the Brighton Declaration. Figure 1.1 is an extract from a working paper produced by iCourts¹², which analyses datasets from the iCourts database on decisions by international courts. By comparing the number of references to the margin of appreciation in ECtHR case law against the quantitative development of case law, the relative development in references to the margin of appreciation is shown as a percentage of total cases.

to the "European consensus", has at times led to criticisms by some of these actors. This reflects a wider debate about the implementation of the principle of subsidiarity and, in particular, the extent of the margin of appreciation that states should be afforded.

Council of Europe, 'The Longer-Term Future of the System of the European Convention on Human Rights' (adopted December 2015, published June 2016) report of the Steering Committee for Human Rights, page 56, available at <<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4>> accessed 9 May 2018.

¹⁰ D. Spielmann, "Whither the Margin of Appreciation" (2014) 67 *CLP* 49, 65.

¹¹ R. Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14 *Human Right Law Review* 487, 491.

¹² The Danish National Research Foundation's Centre of Excellence for International Courts (iCourts), is a research centre dedicated to the study of international courts, their role in a globalising legal order and their impact on politics and society. More information is available at <<https://jura.ku.dk/icourts/about/>> accessed 6 September 2018.

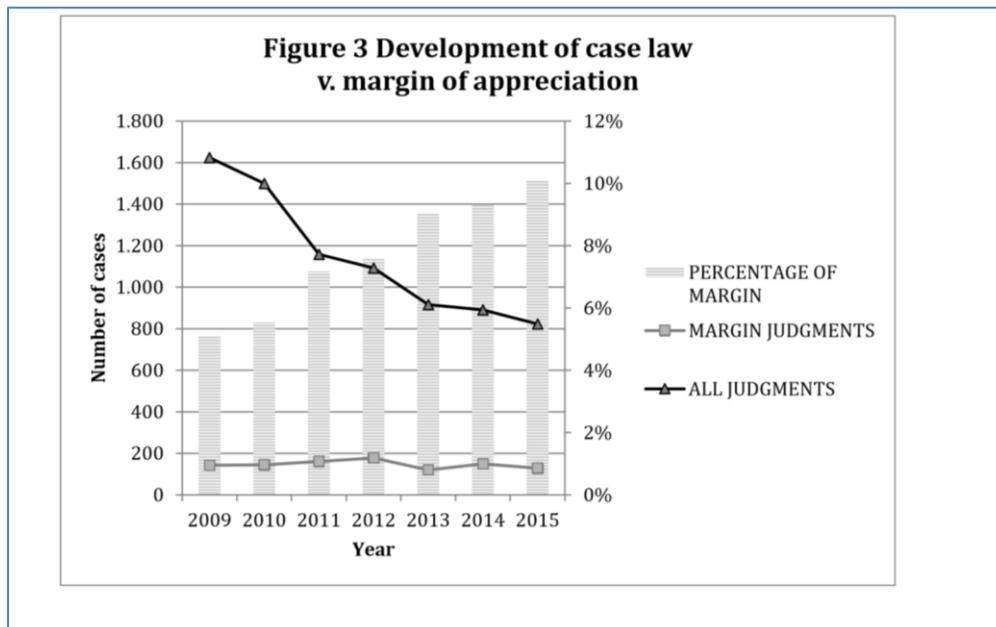


Fig 1.1 Development of Case Law v. Margin of Appreciation¹³

The chart shows a statistically significant growth in the percentage of cases referring to margin of appreciation over the entire period since the Brighton Declaration. However, it is notable that the peak is still only around 10% of cases.

It is clear that any problem in the balance that is reached between the member states and the ECHR institutions is thus a matter of degree and a result of the difficult tightrope the ECtHR must tread between interference and inconsequence. The author most certainly does not seek to undermine the work of the ECtHR to date, or to suggest that the Court has been anything other than a positive overall influence.¹⁴ The work proposes, only, possible ways in which the ECtHR process may be strengthened, to avoid any missteps as it continues to maintain its fine balance moving towards an ever more comprehensive system and responding to newly emergent societal trends and concerns. The author notes also that the ECtHR has been proactive in its responses to

¹³ M. Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (June 27, 2017) iCourts working paper series no. 100, page 17, available at <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2993222_code2133408.pdf?abstractid=2993222&mirid=1&type=2> accessed 26 January 2018

¹⁴ For an analysis of the benefits of the ECtHR at the individual, national and global level see M. Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28(3) *European Journal of International Law* 763.

the concerns since Brighton, both in word and deed. However, should there be any continuing validity in the claims being made by the member states then they must be taken seriously. If there is no validity, demonstrating the point remains important to the future of the ECHR.

In light of the UK decision to withdraw from the European Union (EU), the potential impact of a lack of public understanding and support for an international system is more apparent than ever. These “voluntary” arrangements are vulnerable to damaging perceptions, and can be fatally undermined by them. This is despite their longevity and, with the EU in particular, substantial integration with national systems and evidence of beneficial aspects for individuals which may appear to offset the negative elements. There is real evidence of some shift in attitude towards how the decisions of the ECtHR should take effect in UK law. Government proposals openly question whether the UK should be bound to follow ECtHR rulings.¹⁵ Such an eventuality on the part of an important ECHR participant would surely impact on the effectiveness of the Convention as a system in securing rights.¹⁶

¹⁵ Note the proposals for a British Bill of Rights and to negotiate a status for the UK where the ECtHR’s rulings would be merely advisory or, alternatively, to altogether leave the ECHR.

The proposals for reform set out in the UK Government review of the operation of the Human Rights Act 1998 and of the ECHR will be explored in depth later in this work, when the project considers how the operation of the ECtHR could be brought more in line with the findings of the work, on basis of the Court’s authority.

For now, it is worth noting that despite the Government paper’s support, at p. 2, of purpose of the ECHR as, ‘an entirely sensible statement of the principles which should underpin any democratic nation’ it suggests, at p. 6, that the UK negotiate a deal where the ECtHR’s judgments are advisory as opposed to a legal obligation.

The Conservative Party, ‘Protecting Human Rights in the UK: The Conservative’s Proposals for Changing Human Rights in the UK’, available at <https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf> accessed 5 January 2017.

In its 2015 Manifesto, the Government repeatedly confirms its commitment to scrap the Human Rights Act 1998 and to and curtail the role of the ECtHR across a range of areas.

‘The Conservative Party Manifesto 2015’, available at <<https://www.conservatives.com/manifesto>> accessed 5 January 2017.

¹⁶ As posited by the MP and QC Dominic Grieve:

Precisely because the Convention is dependent on peer group pressure for its observance, we [the UK] will offer an example and an invitation for it to be ignored by others. It is already the case that countries such as Russia and the Ukraine have used the UK position to procrastinate on implementing judgments. Others will do the same and the Convention will be further

1.2 Background

1.2.1 The Origins of the ECHR and the ECtHR

The ECHR was created in the aftermath of the Second World War as a treaty-based system protecting the human rights agreed to as fundamental by all the founding states. These have since been endorsed by later signatories. Under the supervision of the ECtHR, contracting states agree to be subject to challenge by citizens on their legislative, administrative and judicial decisions. Since its adoption by the Council of Europe in 1950 and entry into force in 1953, the system of enforcement has developed into a modern and sophisticated body of autonomous law that has a major impact across European societies. That body of law continues to grow, to integrate: (1) new ECHR community understandings of the normative scope of the generally defined rights (interpreted by the ECtHR); and (2) standards for responding to challenges with the particular application of those norms (overseen by the ECtHR).

The purpose of the ECHR is, as set out in its Preamble, to maintain and further human rights by providing greater unity through common understanding and observance/enforcement. The signatories agree to pursue ‘a common understanding and observance of the Human Rights’ and resolve ‘to take the first steps for the collective enforcement’.

The generally defined rights, which form the categories and limits under which more specific norms may be interpreted, are contained in Section I, which consists of Articles 2 to 18.

A simple reading of the ECHR text makes it clear that the ECtHR is responsible for settling the common understanding or interpretation of the rights and overseeing their

challenged and undermined. Indeed, the impact will go further. Our current statements have already had an effect beyond the member states of the Convention. The UK position was used by Venezuela in justifying ignoring obligations under the American Convention on Human Rights [...] The President of Kenya cited it at the time when the United Kingdom and other were pressing him to cooperate with the ICC, of which Kenya accepts jurisdiction. And this is before one looks at the beneficial impact which will be lost if the ECHR ceases to be viewed as a benchmark for citation in courts in places such as India and South Africa.

D. Grieve, “Is the European Convention Working?” (2015) *European Human Rights Law Review*, 584, 592.

observation/enforcement or application. The literal wording under Article 32 gives the ECtHR the wide-reaching jurisdiction of deciding 'all matters concerning the interpretation and application of the Convention and the Protocols thereto'. It also expressly authorises the ECtHR to determine for itself the limits of this jurisdiction: 'In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.' In accordance with the wording of Article 32, contracting member states that disagree with either ECtHR's involvement or ultimate decision must still follow it or otherwise be in breach of the ECHR.¹⁷

Chapter Two will argue that the wording does not, however, equate to suggesting that the ECtHR has unlimited power and cannot be criticized and questioned about the legitimacy of its actions. It is inferable that in making those determinations the ECtHR should be mindful that it does so in accordance with the government object and purpose of the ECHR and the limits that places on the validity of the exercise of this authority. The judge-made tools that have developed over time in its *acquis* reinforce that the ECtHR is itself concerned not to overstep the mandate given to it, albeit that this work questions whether those tools are satisfactorily deployed and consistent in their usage. Mindfulness of government object and purpose is also part of the wider international law system.

This work considers that it is at least partly the lack of certainty about how the ECtHR is to render its function that is causing accusations against it of judicial activism. The ECHR text alone cannot establish how the ECtHR should proceed when: (1) interpreting new constructions of the norms that form part of the common understanding or the scope of the protected rights; and (2) the standards or requirements that apply to the states to show satisfactory application/observance of those norms.

1.2.2 The Convention System

Any person who considers that their ECHR rights have been violated by a state party can take their case to the ECtHR. Allowing the right for individuals to go before the ECtHR is a unique feature of the ECHR, as traditionally only nation states are considered actors in international

¹⁷ With the caveat of in extremis evidence of bias or grossly unjust results.

law.¹⁸ It remains the only international human rights agreement providing this individualised protection. This unique characteristic has allowed the ECtHR to develop ECHR rights with relative independence and speed, and this is perhaps responsible for criticisms of the Court resulting from what some see as an unrestricted or undisciplined growth in its enforcement.

Judgments finding a breach are binding on the respondent state(s)¹⁹ and they are obliged to execute them if they are to comply with their international law duties and not risk the reputational costs of refusing to meet those obligations.²⁰ Additionally, other member states are likely to respond in their national law, to avoid possible action in the future, criticism and political embarrassment. While this system of enforcement relies upon the states concerned

¹⁸ The European Union is perhaps the closest comparison in creating a system that gives individual citizen's rights upon which they may directly rely (direct effect). However, the EU system relies on the national courts to apply EU law. The role of the EU Court of Justice is limited to: (1) interpreting the meaning and requirements of the law after a request from the national court or tribunal, in order that the national court may determine the outcome on the facts of the individual case; and (2) should the EU Commission bring enforcement proceedings, ruling on whether the national system is in breach of its EU duties e.g. the courts are not correctly interpreting or applying the law.

¹⁹ Article 46 of the ECHR states that:

‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.’

²⁰ As it is for the member state to implement the judgment of the ECtHR there is, in practice, a certain amount of leeway in implementation. On this point, see N. Bratza, “The Relationship between the UK Courts and Strasbourg” [2011] *European Human Rights Law Review* 505.

However, should it become established practice not to implement judgments or to ask the ECtHR to reconsider its ruling then the pressure on states held to be in violation to comply is reduced. This is more apparent if the route for implementation is considered.

Decisions of the ECtHR against a state are implemented through the Committee of Ministers of the Council of Europe. The Committee of Ministers receives reports about progress remedies the violation and may apply pressure as necessary. The Parliamentary Assembly will also pressurise states to bring their laws into conformity. This process is reliant upon the member states working collectively and willingly intervening in the internal affairs of each other, this means that if the ECtHR fails to provide convincing rulings the effectiveness of those decisions will ultimately decline.

complying with the ruling, the political embarrassment of being found in breach and the link with membership of the EU²¹ means that ECtHR judgments are normally honoured.²²

The majority of contracting states (now including the UK, after the Human Rights Act 1998) have incorporated into national law the ECHR rights and ECtHR case law interpreting the norms that they encompass and standards for application. Thereby reducing the need for individuals to resort to going before the ECtHR to have their rights upheld and the ultimate likelihood of the state being found to have failed in its observation.

1.2.3 Criticism of the ECtHR

Most recently, the UK, triggered by high-profile rulings on prisoners' voting rights and on barriers to deportation, has been very vocal in its criticism of an apparent increase in

²¹ Article 6(2) of the Treaty Establishing the European Union (Maastricht Treaty) states:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The EU Court of Justice has held that the ECHR has "special significance" in its case law. *Nold v Commission*, Case 4/73 [1974] ECR 491.

²² In 2017 the number of cases brought to a successful conclusion reached an all-time high:

The number of cases closed reached an all-time high thanks to a new policy of enhanced dialogue with states, resulting in more – and timelier – closure decisions in the face of positive developments. In 2017, the Committee of Ministers closed 3 691 cases compared to 2 066 in 2016, including many repetitive cases in which individual redress had been provided. In particular, there has been an important increase, over 30%, in the closure of cases revealing structural problems which had been pending before the Committee for more than five years. As a result, the total number of cases pending at the end of the year has decreased by around 25%, and is now down to some 7 500 (as compared to some 11 000 in 2014). The number of structural problems under supervision also decreased by around 7 %.

Council of Europe and Committee of Ministers, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: The 11th Annual Report 2017' (March 2018), page 7, available at <<https://rm.coe.int/annual-report-2017/16807af92b>> accessed 9 May 2018.

The Department for the Execution of Judgments provides access to a searchable list of all judgments currently outstanding against all contracting states, available at <http://www.coe.int/t/dghl/monitoring/execution/default_en.asp> accessed 20 November 2016.

intervention by the ECtHR.²³ There is a perception that judicial intervention by the ECtHR is, inappropriately, threatening the separation of powers between the law and politics by too readily questioning the political decisions of government and the reviews of national courts within that democratic system.

If true, the suggestion that the ECtHR is exceeding its authority undermines the very legitimacy of some judgments. Even if not true, it still represents harmful speculation, potentially undermining trust and confidence in the system. With perhaps a little dramatic flair, the point is well made by the UK judge Lord Hoffman who when discussing an expanded recognition of the right to privacy and the role of ECtHR judges commented:

What legislative power the judicial representative of Slovenia can wield from his chambers in Strasbourg. Out with this pernicious American influence. What do their courts or Founding Fathers know of human rights [referring to the notion of representation of the people]? It is we in Strasbourg who decree the European public order. Let the balance be struck differently, I say, and all the courts of Europe must jump to attention.²⁴

Lord Sumption also observed:

[T]he [Court] [...] 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.²⁵

Lady Hale has commented:

“There is indeed a serious debate in Strasbourg itself about the limits to its evolutive approach.”²⁶

²³ Research has pointed to an “unprecedented” legitimacy challenge. See R. Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity” (2014) 3 *Human Rights Law Review* 487, 488.

²⁴ Lord Hoffman, “The Universality of Human Rights” (2009) 125 *Law Quarterly Review* 416, 429.

²⁵ Lord Sumption, “The Limits of Law, 27th Sultan Azlan Shah Lecture, Kuala Lumpur” (20 November 2013) available at <<https://www.supremecourt.uk/docs/speech-131120.pdf>> accessed 15 October 2016.

²⁶ Lady Hale, “Lady Hale at the Warwick Law Lecture 2013: What’s the Point of Human Rights?” (28 November 2013) available at <<https://www.supremecourt.uk/docs/speech-131128.pdf>> accessed 22 October 2017.

Support beyond the UK of views that the ECtHR has gone outside the agency that contracting member states are comfortable with is suggested by the failure of states to respond promptly and effectively to judgments. There are approximately 7,584 pending cases as yet unresolved by the violating respondent state and a frequency of new so called “cloned” cases even after a clear ruling on the same issue.²⁷ Given the political embarrassment of any refusal to comply with human rights rulings, this suggests a growing strength of feeling.

Concerns were also raised by Lord Laws that the role of the Court:

[I]s not to make marginal choices about issues upon which reasonable, humane and informed people may readily disagree [...]

Fundamental values possess at the very least an irreducible minimum. But short of that, the balance to be struck between policy and rights, between the judiciary and government, is surely a matter for national constitutions.

Lord Laws, “The Common Law and Europe” Hamlyn Lecture at Inner Temple Hall (27 November 2013) available at <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf>> accessed 22 October 2017.

And by Lord Judge:

My profound concern about the long-term impact [...] on our constitutional affairs is the democratic deficit [...] in our constitutional arrangements parliament is sovereign [...]

It would make sense for the [Human Rights Act] to be amended, to express that the obligation to take account of the decisions of the Strasbourg court did not mean that our supreme court was required to follow or apply those decisions, and that in this jurisdiction the supreme court is, at the very least, a court of equal standing with the Strasbourg court [...]

Are we [...] prepared to contemplate the gradual emergence of a court with the equivalent jurisdiction throughout Europe of that enjoyed by the supreme court in the United States of America?

Lord Judge, “Constitutional Change: Unfinished Business”, Constitution Unit, University College London (December 2013) available at <<http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/181213>> accessed 22 October 2017.

²⁷Council of Europe and Committee of Ministers, ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: The 11th Annual Report 2017’ (March 2018) puts the number of cases where implementation has not been completed at around 7,584 and the total number of new repetitive cases at 1,154 at the end of 2017 available at <<https://rm.coe.int/annual-report-2017/16807af92b>> accessed 9 May 2018.

Note also, *Burdov (no 2) v Russia* in which the ECtHR said that:

The State has thus been very frequently found to considerably delay the execution of judicial decisions ordering payment of social benefits such as pensions or child allowances, of compensation for damage sustained during military service or of compensation for wrongful prosecution. The Court cannot ignore the fact that approximately seven hundred cases concerning similar facts are currently pending before it against Russia.’

A.2. Leading or repetitive

For cases awaiting classification under enhanced or standard supervision (see A.3.), their qualification as leading or repetitive cases is not yet final.

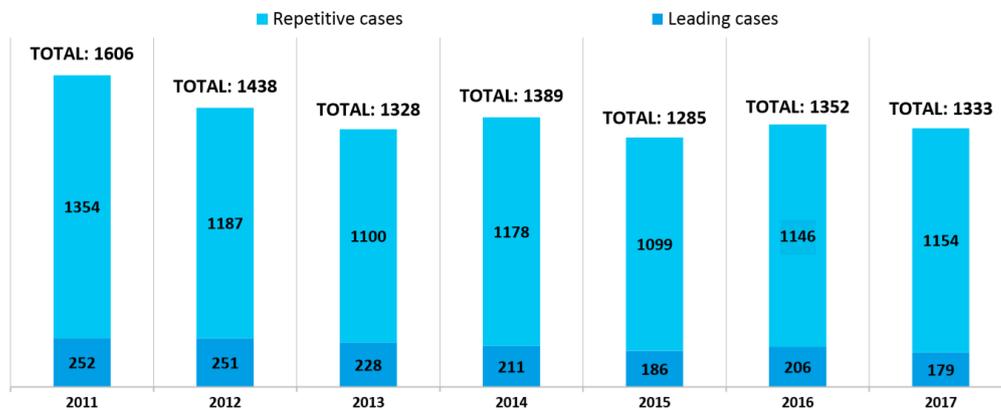


Fig 1.2 New ECtHR Cases²⁸

A.1. Overview

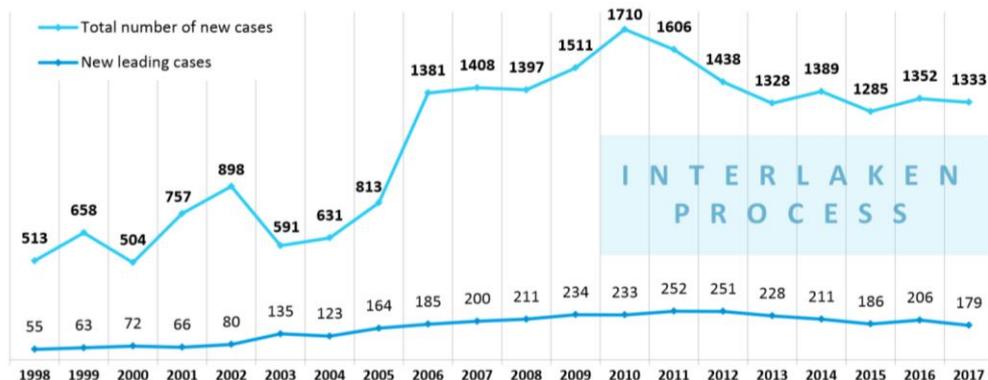


Fig 1.3 ECtHR Cases Pending Resolution²⁹

Burdov (no 2) v Russia, Application No 33509/04, Judgment of 15 January 2009, para 133.

²⁸ Council of Europe and Committee of Ministers, ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: The 11th Annual Report 2017’ (n 27) 57.

²⁹ *ibid* 57.

Recent research has reached similar conclusions based on comparative in-depth reports, covering fifteen contracting states. It revealed: (1) sparse criticism in Austria, Belgium, the Czech Republic, Germany, Italy, Poland and Sweden; (2) moderate criticism in France, Hungary, Norway, the Netherlands, Switzerland and Turkey; (3) strong criticism in the UK; and (4) hostile criticism in Russia.³⁰

The debate around the role of the ECtHR has reached the stage where Council of Europe members in the Brighton Declaration have called for an evaluation of the ‘fundamental role and nature of the Court’, suggesting the current system may not ‘secure the viability of the Court’s key role in the system for protecting and promoting human rights’.³¹ The criticisms made in the Brighton Declaration can helpfully be broken down into three key areas of concern:

³⁰ P. Popelier, S. Lambrecht and K. Lemmens, *Criticism of the European Court of Human Rights* (Intersentia:2016).

³¹Note in particular the points relating to the longer-term future of the ECHR system and the ECtHR, as set out below.

Declaration 30:

This Declaration addresses the immediate issues faced by the Court. It is however also vital to secure the future effectiveness of the Convention system. To achieve this, a process is needed to anticipate the challenges ahead and develop a vision for the future of the Convention, so that future decisions are taken in a timely and coherent manner.

Declaration 31:

As part of this process, it may be necessary to evaluate the fundamental role and nature of the Court. The longer-term vision must secure the viability of the Court’s key role in the system for protecting and promoting human rights in Europe. The right of individual application remains a cornerstone of the Convention system. Future reforms must enhance the ability of the Convention system to address serious violations promptly and effectively.

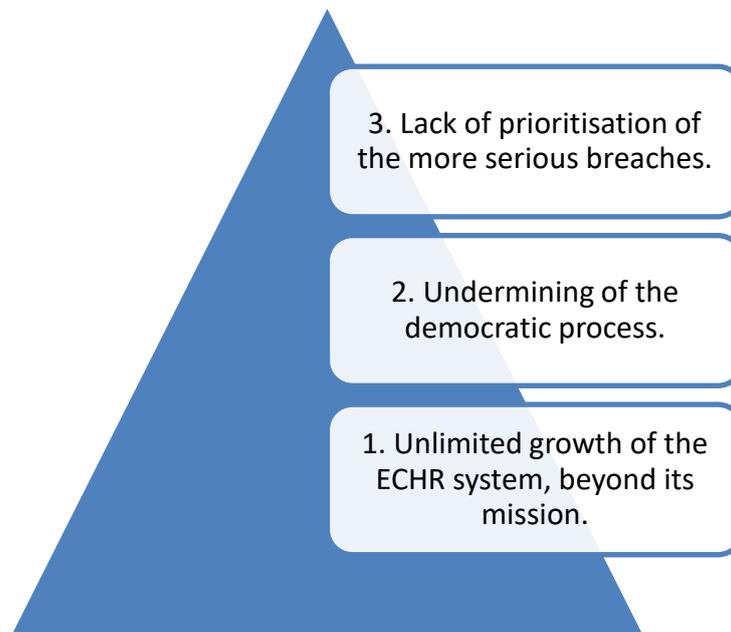


Fig. 1.4 Member State Concerns taken from the Brighton Declaration

1.3 Research Objectives

There is already significant literature concerning the current approach of the ECtHR in making judgments. Such work provides valuable insights, documenting how the ECHR system has operated and evolved, and will be used extensively in this research project. However, it is suggested that existing work alone cannot establish satisfactorily a method for identifying the legitimacy of the approach that has developed. A framework of principles for analysing the legitimacy of the ECtHR's procedures, in accordance with the authority and degree of autonomy recognised in the ECHR, is required to evaluate the approach evident in case law and proffer improvements to the judicial model.

In acknowledging that the interpretation of human rights norms and the standards for application is not conclusively settled, the power of the ECtHR must then flow from its acceptance as an authority to resolve that uncertainty for legal purposes (i.e. as an agent on behalf of its principals). The authority of the ECtHR as a law-making body flows ultimately from the consent of citizens as offered by their democratic representative (the State) in signing the ECHR. The ECtHR must comply with what can be reasonably inferred about the

limits of that consent, drawing from the spirit as well as the letter of the agreement to appreciate the underlying shared government object and purpose of the member states.

The legitimacy of the ECtHR's choices in relation to its enforcement mandate is, therefore, dependent upon whether they are in line with the object and purpose of the agreement. Yet there is limited existing research considering the nature of that given authority and even less about its implications. As the extensive range of resources deployed in this work will illustrate, the reasons for this lacuna include the breadth of different legal disciplines that must be blended to make any meaningful progress on the task. It has even been suggested, by the ECtHR itself, that a consistent judicial strategy is simply not feasible for dealing with cases that come before it.³² While certainly a difficult task, this work would question whether it is appropriate to altogether abandon the attempt.

The subject matter is also both controversial and emotive, given it involves a system that has for a number of years proven itself extremely effective in making changes widely accepted as positively transforming the everyday lives of people and supporting ground-breaking

³² Dean Spielmann, while President of the European Court of Human Rights, commented that:

To provide the best possible response, our Court necessarily treads a narrow path. We face a constant challenge as regards the acceptability of our decisions. This question is all the more sensitive *as our legitimacy is conferred on us by the States* that we find against, and our position is therefore far from easy. *We do not follow a particular judicial strategy*, but it goes without saying that we do think about how our judgments will be received [emphasis added].

'European Court of Human Rights, Annual Report 2015, Speech on the Occasion of the Opening of the Judicial Year on 30 January 2015', (March 2016) 978-92-871-9894-5, page 34 available at <http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf> accessed 19 November 2016.

developments.³³ Asking too many questions could be seen as dangerous and most would agree, as does this work, that withdrawal from the ECHR would be most unfortunate.³⁴

Additionally, some may be unconvinced at the ability to impose any limit upon the work of the ECtHR given the wording of Article 32 of the ECHR. However, to suggest that the drafters of the ECHR, by not expressly limiting the ECtHR to the object and purpose for which it was made, historically granted it unlimited discretion and no means of accountability for delivery, does not accord with the expectations of any legal institution for transparency and legal certainty.³⁵ In any event, the present relevance of whether member states are satisfied that their sovereignty is impacted to no greater an extent than to what they agree is shown by

³³ The achievements of the ECtHR in interpreting the ECHR rights is impressive, are set out in chapter 13 of The Council of Europe, *The Conscience of Europe, 50 years of the European Court of Human Rights*, (Strasbourg, 2010) ISBN 978 1 906507 45 9, available at <http://www.echr.coe.int/Documents/Anni_Book_content_ENG.pdf> accessed 5 January 2017.

The Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, in collaboration with the Human Rights Centre of the University of Essex, has published an information document compiling selected examples of the positive impact of the Convention within the member states. 'Impact of the European Convention on Human Rights in States Parties: Selected Examples' (January 2016) AS/Jur/Inf, available at <<http://website-space.net/documents/19838/2008330/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895>> accessed 19 November 2016.

³⁴ In terms of a loss of valuable insights between the member states and joint monitoring and, from a more self-interested perspective, a loss political stability that increases the potential for conflict and the non-economic movement of people elsewhere.

³⁵ Systems such as the ECHR, despite dealing with a particularly difficult area, must still strive to create rules with as much clarity as possible to comply with the Rule of Law. Fallon explains:

'The Rule of Law is an ideal that can be used to evaluate laws, judicial decisions, or legal systems [emphasis added].'

R. Fallon, "The Rule of Law as a Concept in Constitutional Discourse", *Columbia Law Review*, 97 (1997) 1, 8-9.

As Lady Justice Arden explains:

A principal badge of judicial accountability in national courts is that judges show restraint in their decision-making and do not venture into those areas which should be left to national Parliaments. For Strasbourg, there is a constant tension between its international obligation to interpret the Convention and national sovereignty.

Lady Justice Arden, 'An English Judge in Europe: An article based on the Neill Lecture given in Oxford at the invitation of All Souls College, Oxford, 28 February 2014 in celebration of the past Wardenship of Lord Neill of Bladen', 12, available at <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-arden-an-english-judge-in-europe.pdf>> accessed 19 November 2016.

their recent attempts to now influence how the ECtHR exercises its judicial discretion over them.³⁶

Finally, there is the point that the rights in the ECHR are both partially defined and explained in Section I the text, as are the limitations that can be placed upon those rights in practice. There is also a range of autonomous legal rulings or *acquis* from the existing body of ECtHR case law. This may be thought sufficient to avoid future dispute about: (1) the interpretation of the norms that fall under the scope of the rights; and (2) the standards for the application of those norms. But, as this work will show, that is far from the case.

When rights come into conflict or are raised in a new context, divergent interpretations of the consequences of combining the existing norms mean new ones are constructed. It may be unclear which of these “candidate norms” is required and must be adopted as falling under the scope of rights.³⁷ Even when a new norm is interpreted as falling under the parameters of a right i.e. as a common societally understood basic moral principle of general application that ignores specific legal facts instead being demanded *in abstracto* by all humans, the *in concreto* application of those enduring underlying general norms to particular circumstances may leave a large margin of discretion.

If the reasoned interpretation of human rights were uncontroversial and easily discernible from higher recognised norms, one may question why the member states felt any need to interpret the broad categories of rights that are found in Section I of the ECHR at all. Or, conversely, why it took such an extended period of negotiation for the states to agree to those

³⁶ As already noted, the addition of the Protocol 15 requirement for subsidiarity and margin of appreciation in the ECHR Preamble.

³⁷ Collins notes with regard to intentional law in general (this work suggests the problems are magnified for moral questions):

[N]ormative disputes are often structured in terms of divergent interpretations of existing legal rules; that different, sometimes potentially conflicted, legal rules, entitlements or rights will exist independently of each other without any obvious relation between them; and that, prior to law’s ascertainment in certain adjudicatory contexts, it may be questionable where particular candidate norms actually “exist” in the first place – this being particularly the case at the international level, where adjudicators are left to fill the gaps caused by international law’s uncoordinated and decentralised law-creating processes.

R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 157.

definitions that are included and their refusal or inability to provide even more detailed specification. That there is no mathematically certain route to identifying what human rights require is evident.

While the author appreciates that the work proposed in this examination is extensive and challenging, it is feasible to undertake an exploration of evidence including the text and history of the ECHR to “reasonably” interpret the shared government object and purpose and thereby the mandate and underlying authority of the ECtHR. From that ECtHR function, further “reasonable” conclusions can be reached about the implications of that authority in respect to legitimate rulings. Any framework of analysis for legitimacy will, as is generally the case in international law research, be open to challenge but it will pose important questions and support the carrying out of appropriate comparative analysis. It will support the development of a proposed corrective model and will be at the very least a valuable starting point in taking the important debate forward and raising new avenues for discussion.

There is a substantial body of different theoretical perspectives on the basis for and means of determining moral truths or, to be more precise, a justified societal approach to the construction of moral norms. The influential work of Kant and Gewirth is accepted as the basis to provide a rationale and a process for moral reasoning by agents. These theoretical theses will be explored in generality for their ability to provide clarity on human rights norms and also in relation specifically to the ECHR system. Where gaps are left by the preferred conception of justice, which is reasoned to be the Principle of Generic Consistency (PGC), in the legitimate approach to be taken by the ECtHR, those gaps must be filled in accordance with a reasonable appliance of the ECHR’s object and purpose in light of its original negotiation and by the relevant rules of wider international law. The relevance of state agreement, via consent, is based on a development of the Rawls’ social contract theory, which values the sovereignty of states while accepting there are universal norms of moral agents which transcend national borders.

There is existing research applying international relations theory to the negotiation of the ECHR to identify its object and purpose, setting out the reasonably inferable ambitions of the project and the methods for reaching them as accepted by the consenting founding member

states.³⁸ This work builds upon that research by making original points concerning the implications of that shared basis (republican liberalism). Specifically, republican liberalism means there must be a primacy of a liberal democratic approach via the nation states to first interpreting local societally constructed moral norms, translating those understandings into legal norms, and then applying them. The ECtHR, in sifting through the diverse ways in which the governments of the various member states interpret norms and establish standards for their concrete application, must do so in a manner that respects the outcomes of the operation of liberal democracy. Such an approach is in accordance with republic liberalism, and is also a conception of justice that supports norms under the PGC as being dialectically constructed by the operation of equal and free agents. The ECtHR's interpretation of what form the ECHR community human rights norms must be based on evidence of practices by the governments of the member states that could show common moral justificatory understandings. Similarly, standards for the application of those shared norms must be drawn from the consistent approaches and standards for delivery in those states.

The review of theoretical jurisprudential approaches to human rights, when combined with international law theory interpreting the original object and purpose of the ECHR and its subsequent growth, creates an original picture of the project and the place of the ECtHR. This supports the development of the framework of principles governing the institutional autonomy of the ECtHR, which both enables and limits its role.

By drawing together existing research on how the ECtHR has developed new norms when interpreting the rights and standards for their application and comparing this with a framework for analysis of legitimacy, it will be possible to reach some conclusion about the cogency of allegations made against the current judicial approach to decision-making. Where allegations against the ECtHR are supported, identification and evaluation of a possible improved judicial model designed to provide greater legitimacy in its rulings and more effective enforcement and development of the ECHR may be undertaken.

³⁸ This work uses the extensive research of Moravesik. As set out in A. Moravesik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54(2) *International Organisation* 217.

1.4 Thesis

The thesis this work seeks to defend is that:

The European Court of Human Rights (ECtHR) faces criticism from contracting states, who are of the view that its adjudicative technique and aspirations take it beyond its legitimate mandate. This view must be taken seriously, on the assumption that the criticisms in question share a common and coherent ground.

The basis of coherent critique presupposes the existence of shared criteria that might allow one to ascertain three things: (1) the basis for a legitimate ECtHR mandate on human rights and the scope and limit of that authority; (2) the elements of a conforming approach by the ECtHR regarding interpretation and application (a framework); and (3) the possibility of an improved judicial model for decision-making in accordance with the framework.

The first part of the problem requires a sufficiently determinate understanding of how a legitimate mandate to adjudicate on human rights was first acquired by the ECtHR and what were/are the implicit expectations for the exercise of this judicial authority once established.

The Principle of Generic Consistency (PGC) provides a basis for human rights beyond the limits of the laws or customs of any particular culture or government. Such purposes are reasonably inferable from the text of the ECHR and its negotiation. This forms the foundations for an ECtHR mandate, offering a potential insight into the first part of the problem. But the potential for reasonable debate about rights interpretation and application requires a means of coordination between agents, meaning that states continue to play a vital role. It is possible to develop an internationalised democratic social contract theory, which values the sovereignty of states under the rule of law and which, in turn, sees the existence, protection and promulgation of human rights as intrinsic to this politico-legal model of internationalised civil society.

States may consent to international cooperation and to be subject to oversight in order to secure compliance with the PGC as a proper government purpose. But a clear government

purpose for cooperation must also include some express or inferable agreement on a means for constructing human rights norms that could represent citizens at large.

The second part of the problem concerns the way the ECtHR approaches the task of interpretation and application of human rights law. This exercise of judicial autonomy must inevitably reject the mechanical and static notion of a distinct division between making law (legislation) and its subsequent interpretation and application. Rather, we require a complex synthetic dynamic theory for legitimate interpretation and application that explains the continual construction of an ECHR body of law by following the implications of a common European political, moral, legal and cultural dialectic.

A synthesis of these two perspectives offers the opportunity to build a critical model of the phenomena and to develop important principles for a framework to guide the ECtHR. This supports the third part of the problem, a corrective model for decision-making to support more legitimate and effective future operation and evolution.

1.5 The Research Question and Objectives

In order to provide a clear focus and direction for the research, a research question was established:

Since its inception, the European Court of Human Rights has been charged with demonstrating an increased willingness to find member states in violation of the European Convention on Human Rights. While some evolution in the interpretation of rights is necessary and the requirements for application to secure rights are to be expected to become less fluid as the Court develops its *acquis*, some participants allege that the nature of these ongoing developments cannot be reconciled with the Court's mandate.

- (1) To what extent is the mandate of the Court identifiable and relevant to the scope and limits of its authority?
- (2) Based on that authority, what are the elements of a corresponding exercise of judicial autonomy (a framework) and has an expansive interpretation of rights and a reduced margin made available to member states in applying them, exceeded that authority?
- (3) If discrepancies are identified could a corrective model for decision making by the Court be proposed, to support more legitimate and effective operation and future evolution of the system?

In light of the research question, the project may be defined as having four main objectives:

Objective 1 – To establish a coherent basis for evaluating human rights systems and the relevance of consent to legitimate institutional oversight

- **Defining human rights as an exercise in justified moral reason by agents who must consent to allocate authority to institutions.**
- Application of theories on human rights and recognition of limits upon assuming any indisputable approach, beyond showing some views cannot be supported as reasoned and some systems for resolution cannot be reasoned in accordance with the methodology of the PGC.
- Recognition of the need, within a unified and functional society, for agents to consensually accept (via a social contract) as binding the potentially reasoned outcomes developed via a potentially reasoned procedure.
- Reliance upon institutions to which agents give authority and corresponding autonomy in order to settle what the basic principles are and to resolve conflict.
- **Establishing the role of state consent and the consequent relevance of the original basis of the ECHR, placing institutional authority in the ECtHR.**
- Recognising the role of the state as an accepted authority overseeing and representing the collective purposes of citizens: (1) interpreting societal norms (societal expectations) including those justified moral norms that are enduring and form the basis for justice and fairness between citizens; (2) translating those general principles into legal norms; and (3) applying them.
- Establishment of the consequences of that sovereignty in necessitating evidence of on-going state input and consent to the operation and procedures of the ECtHR if it legitimately expects decisions to be followed.
- Maintaining that the object and purpose of the founding member states is the basis upon which authority was originally consensually ceded to the ECtHR, and continues to limit the legitimate use of its discretionary powers in accordance with its institutional authority.

Objective 2 – To establish the common government object and purpose of the ECHR, and the consequences for a framework of analysis for assessing the legitimacy of ECtHR procedure in line with its authority

- **Establishing a reasonably inferable agreed original basis for the ECHR.**
- Analysis of materials contemporaneous with the negotiation and signing of the ECHR in order to identify the international relations theory that most closely fits the agreement as a shared government object and purpose.
- Exploring the reasonable implications of the identified prominent theory for the mandate of the ECtHR.
- **Identifying the consequences for the legitimate authority of the ECtHR and developing a framework of analysis for assessing Court procedure.**
- Consideration of the reasonably implied consequences of the object and purpose of the ECHR (as a means to fill the gaps left by the express terms relating to the autonomy of the ECtHR).
- Exploring the impact upon the ECtHR's authority to make declarations on the (1) interpretation of the *in abstracto* normative scope of the rights; and (2) standards for the *in concreto* application of those principles by states.
- Development of a framework of analysis comprising elements to assess the legitimacy of the ECtHR procedure, in line with the implications identified.

Objective 3 - To propose a corrective judicial model

- **Development of tenets that would underlie a structure for a legitimate judicial model for the ECtHR.**
- Identifying the pillars for a reasonable model, that is in accordance with the elements of the framework of analysis.
- **Development of a proposed improved judicial model.**
- Creation of a detailed model, utilizing the helpful principles of the ECtHR's current approach.
- **Comparing the ECtHR's current approach against the framework for legitimacy and proposed model.**
- A review of the approach currently used by the ECtHR as against the proposals.
- Identification of any suggestion of possible slippage from its authority within the framework of analysis.

Objective 4 – Evaluation of the proposed model using case law

- **Testing problem ECtHR cases against the proposed judicial model.**
- A review of the facts and arguments made in challenging cases, with hypothetical testing of the potential for the proposed model to respond to criticisms about the judicial approach, notably securing greater appropriate deference to the democratic process and transparency and accountability in the future.
- **A review of proposals for wider reform altering the express terms of the ECHR.**
- An exploration of the potential for future research into reforms of the ECHR regime.
- Based upon proposals put forward in relation to the ECHR and in relation to the operation of the European Union's Court of Justice.

1.6 Methodology

The first phase of the project: establishing the scale and relevance of the challenges made against the legitimacy of the ECtHR, involves empirical research. Quantitative research, drawn from the publications and statistics of the ECHR system, reveals problems such as those relating to non-compliance with judgments and rising caseloads. Qualitative research finds concerning observations from key ECHR stakeholders and academics suggesting perceived problems and a possible deepening of views that could undermine the future effectiveness of the system.

Empirical research is used in the next phase of the project: exploring of the history of the ECHR system. Qualitative investigation supports reasoning concerning the object and purpose of the system and also the resulting conclusions about the reasonably inferable implications

for the approach to be taken by the ECtHR in light of its mandate. This phase also uses cases and analysis to explore the judicial tools currently used by ECtHR.

Empirical research is also deployed in the last stages of the project: the development and evaluation of a corrective judicial model. Qualitative information is drawn from a range of case reports to evaluate the current judicial model of the ECtHR and then to assess the theoretical impact of the proposed corrective one.

However, this project requires more than simply empirical research; without a theoretical reconstruction of the ECtHR in its legal context, there is nothing against which to form a critical view of the ECtHR's autonomy and authority and thereby the judicial model it adopts in its decision-making. It is, therefore, the exploration and application of philosophical theory of law that principally enables an original contribution to be made relating to: (1) the authority of the ECtHR; (2) an analytical framework for legitimacy in its decision-making; and (3) a proposed corrective model. Theory is used as a means to make sense of the real-life empirical phenomenon of the ECHR system.

1.7 Approach

The option of a dedicated literature review chapter was considered, but an integrated approach was determined to be more appropriate for this project. The range of relevant topics includes: basic rights and autonomy; legal authority; international law; global regulating bodies; and judicial doctrines and tools. Separating the survey and analysis of existing materials on these varied points would risk loss of focus on the research question and isolating points that only together develop into a means of engaging with the research problem. Embedding the literature throughout the work effectively situates it within the context of the project and enables both the relevance of and any gaps in current knowledge on each area to be combined and linked together into an organised and systematic consideration.

The examination and analysis to be carried out to respond to the research question and achieve the four research objectives falls into eight phases, which correspond broadly with the chapters of the research:

Phase One (Objective One)

- A.** Exploration of the overall role and importance of the ECHR project.
- B.** Identification of core criticisms about the legitimacy of the operation of the ECtHR, based on those raised consistently by key public figures, including political and judicial commentary.
- C.** Development of objectives and a methodology for responding to the criticisms.

Phase Two (Objective One)

- A.** Application of natural rights theories relating to moral constructivism as the basis for the “substantive” legitimacy for the human rights. Specifically, practical dialectically necessary reasoning by agents in accordance with the Principle of Generic Consistency (PGC). Consideration of the limitations of pure reason as a sole basis for the ECHR project in practice, without an acceptance of: (1) dialectically “contingent” compromised reasoning by agents in societies; (2) further development of procedures to interpret which of the possible justified moral claims developed through the informal practical discourse of agents (social interactions) represent the proper shared public principles of general application; and (3) an authority to translate (propose and produce) those societally understood expectations into legal norms and to then apply them in practice to particular circumstances according to appropriate standards.
- B.** Explanation of the need for a degree of consistency and compromise regarding the process for interpretation and application of rights, required by the PGC between interacting agents. Consideration of the consequent reliance upon consent by agents in a society to certain procedures and institutions with an accepted authority to resolve uncertainty and thereby unite the construction of reasoned interpretations and applications, even when some agents disagree with a particular outcome: “procedural” relative legitimacy.
- C.** Consideration of routes to restrict the autonomy of any such institution, based on the institutional authority to which its agents consented. This grant is conditional upon serving a particular public (as opposed to private) purpose, or when the institution is an international one, a government purpose that could properly be common to all the signatory states. Only

when decisions are made reasonably in accordance with that object purpose, does an institution have a legitimate expectation that its decisions should bind.

D. Evaluation of the potential for questions of legitimacy to impede the effectiveness of decisions by an institution if judgments are consequently not respected and followed in practice.

Phase Three (Objective One)

A. Application of the theory of a social contract as providing the basis for sovereign states having the presumed consent of agents to protect moral norms, translate societal understandings into legal norms and apply those principles.

B. Identification of possible routes for arguing that international institutions may also hold authority, via consent by states to surrender national sovereignty to an international body for a public government purpose such as better securing justified moral norms that can be interpreted as being commonly understood between the signatories.

C. A consideration of what the text of the ECHR reveals about the particular object and purpose of the agreement, concluding that the central uniting theme is reinforcement of the recognition of national democracy as the process consented to by agents to represent their dialectic collective moral construction of generic human norms and to ensure standards for their proper delivery.

D. Explanation of the broad consequences of that trust in democracy in what this work argues are the two different stages for the ECtHR judgment process: (1) the interpretation of the normative scope of the rights i.e. the moral norms constructed *in abstracto* by the operation of a representative democracy as the basis of freedom and justice; and (2) judicial review of standards for the *in concreto* application of those underlying principles of general application to particular circumstances: (a) a procedurally correct democratic review based upon facts and expert opinion; and (b) reasonableness of the ultimate substantive choices made.

Phase Four (Objective Two)

A. A review of what can be reasonably inferred about the government object and purpose shared by ECHR member states, to respond to issues concerning the authority of the ECtHR unresolved by the consideration of its text alone.

Notably, in the *in abstracto* interpretation of the normative scope of the rights, to ascertain and reconcile the differences in the parameters of rights as constructed by the plurality of societies (the member states) and, in the *in concreto* application of those principles of general application to particular circumstances, how to settle the margin of discretion left to the democratic representatives in the context of particular societies. This margin being required to allow for different circumstances, for example social, economic and security concerns, and for particular customs, policies and practices.

B. Exploring evidence from the text and from the ECHR's negotiation, to reasonably infer the theory of government purpose most strongly associated with providing authorisation for the ECtHR by the member states. Specifically, that of republican liberalism which requires deference by an international body to democratic decisions made by a sovereign state.

C. Formulation of relevant criteria or guiding elements for a framework of analysis for assessing the legitimacy of judicial procedure based on the extent of the authority and autonomy of the ECtHR under republican liberalism.

Phase Five (Objective Three)

A. Review and selection of the principles under a judicial model that would best fit with the framework of analysis, producing tenets underlying the structure for a legitimate approach (for detailed development in Phase Six and then for use in Phase Seven to review the ECtHR's current approach). For example, with regard to *in abstracto* norms interpreted as falling under the parameters of a right, the requirement for significant state consensus. With regard to the application *in concreto* of those general norms, the tools of subsidiarity and a procedural and substantive margin of appreciation.

Phase Six (Objective Three)

A. Mapping of the current approach for judgment used by the ECtHR against the elements identified as limiting its authority under the proposed framework of analysis for assessing the legitimacy of the Court procedure.

B. Evaluation of the extent to which divergence of the current ECtHR judicial approach from the proposed framework links to the criticisms of member states (set out in the Brighton Declaration) indicating validity of the concerns.

C. Formulation and explanation, with appropriate illustration using facts and arguments from existing case law, of a proposed improved corrective model for judgments by the ECtHR in line with the framework.

Phase Seven (Objective Four)

A. Testing the proposed corrective model against the facts and arguments made, in challenging cases, with hypothetical testing of the potential for the proposed model to alter outcomes and respond to criticisms about the current ECtHR approach, notably securing greater appropriate deference to the democratic process, transparency and accountability in the future.

Phase Eight (Objective Four)

A. Overall conclusions and identification of the scope and requirements for further work.

B. Consideration of further work to include a review of proposed improvements that may involve altering the express terms of the ECHR (hence beyond the remit of this research). Existing proposals and those drawn from other systems of international law are to be considered.

1.8 Chapter Outlines

The work is structured into eight chapters that cover the eight phases:

Chapter One

This chapter has identified three consistent concerns in relation to the operation of the ECtHR and the implications of a resulting erosion of confidence in the ECHR system. The research objectives determined are designed to respond to the concerns and the research methodology to achieve them has been defined.

Chapter Two

The chapter explores the vital role played by the concepts of individual consent and legitimacy in all legal systems (including the ECHR). The chapter then uses existing literature to explain why decision-making authorities entrusted with a legitimate authority to settle human rights disputes face particular difficulties, given the uncertainty surrounding what human rights norms actually are and require.

The chapter explores a number of possible theories for interpreting the ECHR. It concludes that moral scepticism or a legal realist explanation must be discounted, given that the agreement does recognise there are universal moral norms. A positivist interpretation of the rights is also unsuitable, as the ECHR has openly idealist undertones, providing an underlying basis to assess the merit of law beyond mere construction by legislature and courts. While natural law is rejected as a coherent basis for the idealistic human rights under the ECHR, the parties to it must consider that there are natural rights.³⁹ Moral constructivism provides a basis for objectively correct reasoning on the natural rights, with Alan Gewirth's PGC the route to explain human rights recognition under the ECHR, by providing a process for moral reasoning by agents and the identification of justified norms.

However, the PGC gives only a basis for moral internal reasoning by individuals. The PGC can be used to form a criterion for reason: a decision could not stand that was, for example, arbitrary, appealed to an unvindicated or alien authority, discriminated against the inherent characteristics of some agents or was based on reasoning that is incoherent or irrelevant. It

³⁹ For the purposes of this work, natural law consists of those processes endowed by God or rules of nature independent of human intervention whereas natural rights are a purely human concept based on their inherent properties as moral agents.

does not, however, purport to provide a complete response with definitive answers in practice to every issue, and imperfect agents may in spite of their best endeavours come to incorrect conclusions. As such, dialectically “contingent”, as opposed to dialectically necessary, understandings of norms under the PGC may be relied upon. These contingent constructions are justified and moral norms provided a process for reasoning and systems for societal compromise on that reasoning are in place to comply with the PGC, by safeguarding against subjectivity and promoting equality and freedom.

Given that agents in a society may only reasonably “settle” upon which of the potentially morally reasoned interpretations of the normative scope of human rights are to be protected and how, agents must consent to use a reasonably structured system to reach a binding compromise, any such system has two points to consider: (1) settling which potentially moral understandings of public rights and duties emerging from society form the “compromised” legally recognised *in abstracto* principles that underly everything else⁴⁰; and (2) standards for the practical application *in concreto* of those principles of general application to particular circumstances.

Human rights protection is concluded as relating to: (1) negatively abstaining from decisions relating to interpretation and application that could not be in accordance with the criteria for reason under the PGC (rare); (2) honouring a system of governance in accordance with the PGC to positively select between “candidate” reasonable interpretations of the normative scope of rights; and (3) requiring authorities to comply with standards for that system (e.g. democratic due process) in ensuring the application of those principles of general application to particular circumstances.

The various institutions given the power to deploy the accepted potentially moral system of governance, political as well as judicial, may legitimately expect their decisions to be accepted given moral agents must consent to such power. However, that use of authority is legitimate only if exercised via a process that demonstrably shows the institution remained within the

⁴⁰ These principles are generic, something that all agents commonly reason as a right or duty for all generally rather than being limited to specific circumstances. They can be considered as basic norms that represent the general consensus on basic society understandings. Such norms are viewed as permanent and not subject to a changeable world, they are the very cores of justice and fairness.

confines of the mandate given by the consent of its principals.⁴¹ While it is the PGC that provides the substantive legitimacy or justification for human rights decisions, in practice institutions tasked with their upkeep are more often assessed against procedural legitimacy. That procedural legitimacy comes from being potentially in compliance with the PGC but also being in accordance with the consent to a particular system by the principals (for example the citizens of a state) whom first give it authority. For example, the operation of liberal democracy across Europe flows from the consent of citizens, the principals, to that form of government.

A procedure may provide relative moral legitimacy to its outcomes, thereby constructing justified norms, in being: (1) potentially in accordance with the PGC by promoting objective dialectical reasoning by free and equal agents, and utilizing the outcomes of that societal reasoning⁴²; (2) consented to by agents within a society; and (3) effective in resolving which “candidate” potentially reasoned normative interpretations under the rights are to be adopted, translating those norms into law, and securing application of those principles of general application to particular circumstances.

The chapter notes that ECHR may go further than protecting only those norms that any human agent anywhere would recognise. By forming into states, agents may agree to protect and promote rights and duties that are perhaps not universally true and independent of the laws or customs of any particular culture or government. There may be some principles that are not natural, but are basic to that state. For ECHR states, with Europe’s shared political traditions and ideals, principles of general application that form overlapping and common societal expectations between those governments may be more substantial than those that are truly universal. Provided this ever-higher construction of principles is built upon the solid moral foundations of the PGC then these could form a justified, appropriate and binding interpretations of the rights for all ECHR member states.

⁴¹ States gain authority from the consent of moral agents (citizens), and international bodies from the consent of states.

⁴² For example, informed by empirical evidence from the outcomes of everyday social interactions and political decisions made by those who are representative of and accountable to the citizenship.

Chapter Three

The chapter considers the concept of legitimate authority based on the consent of agents. It uses existing literature to translate this into institutional authority. Institutions provide their principals with a service to better deliver a particular shared public purpose, a government purpose on behalf of the public as a whole. That service is given legitimately when the authority acts to reasonably fulfil only that purpose (the mandate) and subject to an appropriate procedure demonstrating compliance.

The chapter assesses the continued reliance upon states, as a system that may validly claim authority regarding the government purpose of human rights settlement and application. It then explores the relevance of a shift of some of that power to international bodies, such as the ECtHR. It considers the routes established in literature on international law for that shift and concludes that, despite criticisms, state consent remains, in practice, central to interpreting the shared government purposes behind international instruments such as the ECHR and the mandate of international institutions such as the ECtHR.

The government purpose behind the ECHR is reasoned by the chapter to relate to negative protection of human rights norms but also to their positive development between the member states. The negative role of the ECtHR is clear under the ECHR mandate. It must prevent state interpretations and applications of human rights that could never accord with the PGC criteria for reason (rare). But it goes beyond such a limited function, to include a positive role for the ECtHR in: (1) unifying which of the different “candidate” reasonable interpretations of the normative scope of rights constructed by the member states form the common ECHR position; and (2) overseeing the application of those principles according to common standards.

State consent creates this positive role for the ECtHR – modifying the agreement of moral agents to compromise on moral norms at the national level (the national social contract) to include a degree of compromise at the international level (a type of international social contract, emerging from increasing international socialisation constructing international or regional *jus cogens* of principles of norms). This has resulted in international agreements such as the ECHR. State acceptance under such international contracts is, however, only for a

particular government object and purpose that may be far narrower than the role a national government must perform. In reality and, for now at least arguably by necessity given the limits of a cosmopolitan international community, states retain the vast majority of the authority and responsibility for the interpretation and application of the moral principles and norms underlying their national society, and that limits the nature of the authority ceded to international institutions such as the ECtHR.

The appliance of state consent as the basis for the object and purpose of the ECHR, giving the ECtHR its legitimate mandate, is a logical place to gather evidence on the reasonably inferable shared government object and purpose of the membership. The first consideration must be the ECHR text that all of the membership signed but, where there are gaps or ambiguity in that text, the original negotiation by the founding member states is the next obvious point of agreement (subject to any clearly inferable later consent to change). While the chapter concludes that the ECHR text was authorised to be interpreted widely and progressively, developments not clearly indicated must still be made and justified in line with the agreement's overall object and purpose.

The chapter concludes that the clear uniting factor is the acceptance of national liberal democratic government as the best process to compromise on societal understandings of moral principles and the application of those norms of general application to particular circumstances. Subject to the possibility of any candidate norm complying with criterion for reason under the PGC, the purpose of the ECHR is to develop and secure human rights as commonly understood in European countries that have liberal democracy. Democracy is a process with systematic safeguards in line with the PGC, giving a type of "democratic (relative) legitimacy" to the norms that are reasoned by the organs of a democratic state following correct procedure. Democracy is accepted as the route to deliver the public compromised will of moral agents and, while still dialectically "contingent", the more the reasoning of different agents is represented in constructing norms the more likely any consistent understanding will fit with what is dialectically necessary. This is more so when the agents are spread across different states and consistent constructions of *in abstracto* principles still emerge despite cultural and social differences.

Where all agents could reason dialectically on an issue, the principles constructed by that public reasoning, as embodied through their democratic representatives, are supreme (provided the norms could accord with the criteria for reason). It is only where all agents could not reason publicly, that the operation of democracy ceases to reflect the reasoning of which all agents with capacity are equally capable. This is when there is a shift from interpretation of public norms, the general societal expectations or principles of general application, to the particular application to specific circumstances. For example, where the question relates to: (1) individual cases; (2) points outside the knowledge or experience of everyone; or (3) introduces a risk of bias or self-interest. At that point reliance must by necessity shift from the whole public to reasoning by those agents who are, for example, better informed, independent, accountable, and have the skills or expertise to review evidence. This is the point at which the operation of democracy is necessarily subject to judicial review checking whether due process was followed, the identification and proper treatment of factual evidence, comparative law, and the proper consideration of views from experts in the given field.

For stage one, interpretation *in abstracto* of the normative scope of generic rights that apply generally, the work notes that there is no reason to accept that the reasoning of “experts” on the principles is necessarily more valid than that of other agents. As such, the constructions of the democratic process, which represents the proper public will of all the people is supreme, unless clearly unreasoned under the PGC.

Once the matter moves to stage two, the *in concreto* application of those principles that must balance competing interests in individual cases and in particular circumstances, democracy still retains the ultimate authority to settle the matter. Reasoning representative of what all agents “would” agree to continues to be the route for moral compromise and the role of democratic government (be it legislature, executive or judicial) continues to embody the proper will of the people. However, only those agents aware of the particular facts and able to apply expertise would be able to contribute to the construction of a correct response. It is the role of democratic representatives to be informed of the facts and to consider this expert evidence. Once the question moves beyond the generic, there is also a danger of a government body failing to ensure it is correctly informed before deciding, rushing to

decision, or bowing to popularism, bias, greed or prejudice. Without proper procedure and oversight, facts could be ignored or misinterpreted, expert evidence could be missed or not properly considered, or the response might not be in accordance with the information available. This stage therefore requires the government to demonstrate it acted within a “margin of appreciation” in light of that information. This includes a procedural margin requiring a due democratic consideration that is, for example, balanced, open, transparent and informed. It also includes a substantive margin, within which the state must have reached a reasonable and proportionate decision based on the available evidence.

Questions remain, however, about which democratically constructed normative understandings developed by the democratic governments of states can be used by the ECtHR to provide the common ECHR rights and duties. Questions also remain about the margin left to states within which to apply them. A process for legitimate interpretation of the commonly understood normative scope of the ECHR rights and setting common standards for the application of the principles requires a more in-depth evaluation of the object and purpose of the agreement.

Chapter Four

The chapter reviews what can be reasonably inferred from principles of international law about the shared government object and purpose of the ECHR. The findings are applied to respond to aspects regarding the authority of the ECtHR unresolved by the consideration of the express terms in its text and the PGC as the method for justified moral constructions of human rights.

The chapter concludes that the object and purpose of the ECHR, reasonably inferable as revealed by the negotiation and initial drafting, is to secure the aims of republican liberalism. As a particular conception of the characteristics of the system, this should influence how ECtHR judges approach cases.⁴³ Republican liberalism has a focus on promoting and

⁴³ While in relation to a point more remote than a judge’s interpretation of a particular legal agreement, their very concept of law, Capps explains the relevance of underlying conceptions as influencing judges very helpfully:

reinforcing national democracy. The function of the ECtHR is to secure an overarching ECHR justice of a more constitutional nature, and not directly individual justice.

The consequences of republican liberalism are explored by the chapter. It is argued that the ECtHR must rely upon the democratic government in the states for evidence of democratically constructed moral positions on the interpretation of the rights and of evidence of shared standards for the particular application of those general principles. In interpreting the *in abstracto* moral principles that are democratically recognised as falling under the normative scope of the ECHR rights, the practices of different states must show that a norm is commonly understood by government. That understanding is shown by state consensus in practices that could be reasonably interpreted as supporting the norm claimed as being a common construction.

In determining whether a state has complied with those commonly held principles of general application in its *in concreto* application to particular circumstances, again republican liberalism means that it must be for the state democratic governments to provide protection. Furthermore, it is suggested that the ECtHR does not have access under the ECHR system to the infrastructure (or the simple proximity) that is necessary to understand and then to effectively respond to issues at a national level. This means that the role of the ECtHR is limited to one of oversight, and not the provider of individual justice. With regard to oversight of the correct application, the ECtHR must recognise the principle of subsidiarity and thereby a margin of appreciation. When the ECtHR measures state performance against standards other than overarching procedural requirements for due democratic process in any decision making (the procedural margin of appreciation), then degree of state consensus on any specific expectations for delivery or on the relevance of expert opinion must play an

[T]he concept of law is an account of its essential features. So, for example, if a norm has these features, it can be correctly called a law [...] [W]hen a judge decides a case, he will [...] employ a concept of law. The concept allows him to identify what is peculiarly legal about the various norms invoked by litigants. These norms are then employed to determine the outcome of the case [...] Divergence in the concepts of law held by judges leads to a different account of the norms which are to be applied and the outcome of the case. In this context, philosophical debates concerning the correct concept of law may well have a significant practical effect on, or be the source of criticism of, judicial practice [...]

P. Capps, *“Human Dignity and the Foundations of International Law”* (Hart Publishing:2009) 2.

important part in determining the reasonableness of the state's substantive decision (the substantive margin of appreciation).

These points inform the development of the framework of analysis for assessing the legitimacy of ECtHR procedure, which the work applies in relation to a proposed judicial model for the Court's future operation and evolution, illustrated in Fig.5.1.

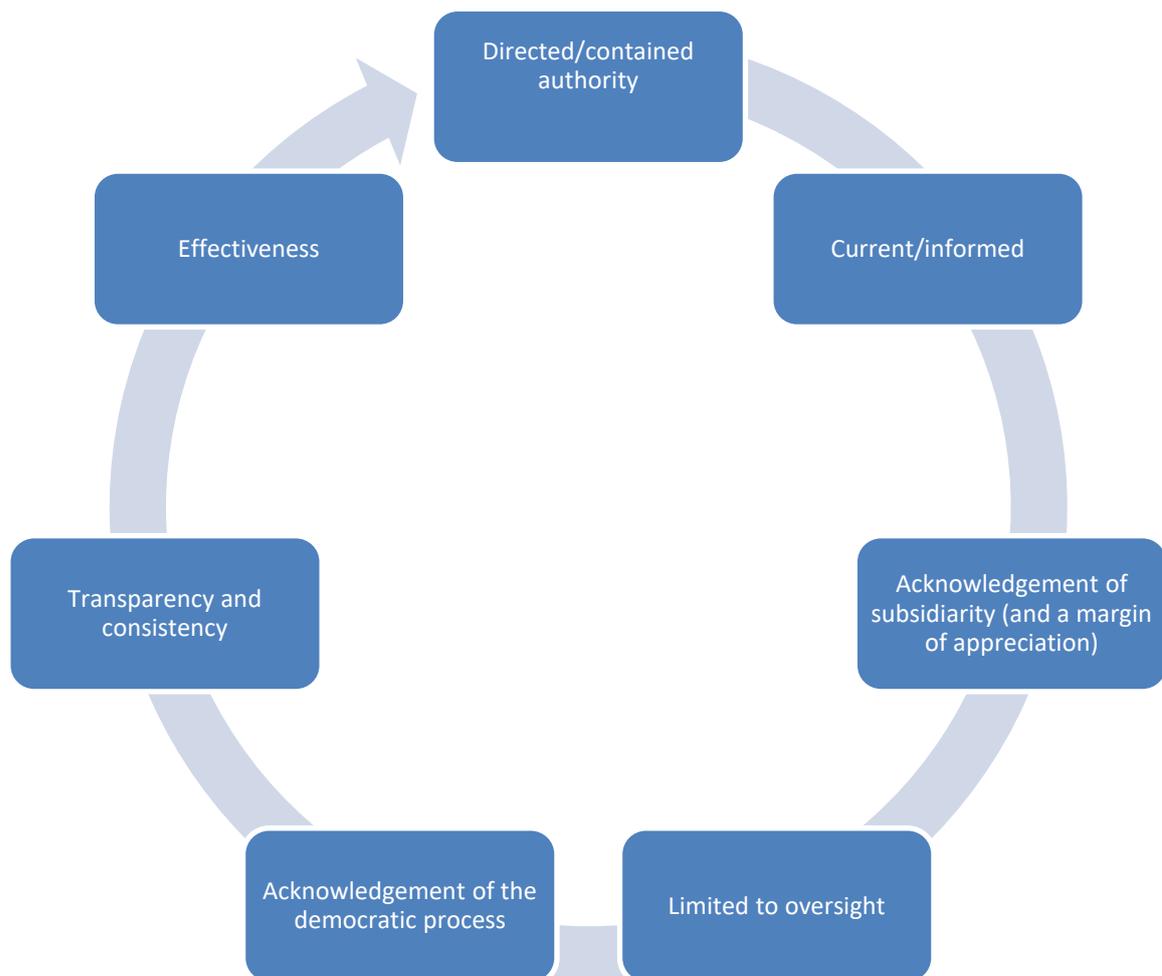


Fig. 5.1 [from Chapter Five] Elements from the Framework of Analysis for Assessing the Legitimacy of ECtHR Procedure

Chapter Five

The chapter explores a range of possible options with respect to the elements in the framework of analysis for assessing the legitimacy of ECtHR procedure, before settling upon

the tenets that must underlie the structure and form the building blocks for the review of the Court's current approach and the development of a proposed corrective judicial model.

The ECtHR, as an agent of its principals, must act within its mandate if it is to claim legitimacy. One response to the problems of expansion of the project beyond the purpose of its agents and securing directed/contained authority, would be to limit protection to the interpretations and applications envisaged by the founding member states back when the ECHR was first signed.

However, the chapter suggests this would be too restrictive given the shared government object and purpose of the ECHR as reasonably inferred: to support the democratic construction of moral norms and standards for application in line with the PGC and remain current and informed in its oversight as the world changes. As such, it is necessary to determine a reasonable approach for development in line with that object and purpose, while still acknowledging the democratic process and subsidiarity in keeping with the continuing sovereignty of the states.

The ECHR is informed by the express aim set out in its Preamble to look for points of unity and commonality in the national democracies or the "common understanding". This arguably introduces expressly the idea of consensus as a tool, although some more limited developmental ability on the part of the ECtHR could have been implied even in the absence of such a reference.

Democracy is the keystone that holds the ECHR project together in accordance with republican liberalism, if faith in its validity is chipped away then the whole structure built up around it becomes weakened. If that keystone is removed as the apex, with democracy no longer the most important element of the structure, it collapses. If national democracy is to be reinforced as the "right" approach for reasoning upon and to secure moral rights, the chapter argues that only when a generic *in abstracto* principle can be interpreted from government practices across the member states will it have ECHR recognition. There must be evidence that the democratic process, which when properly administered is seen as presumptively correct, consistently resulted in construction of a moral norms. To be the consistent outcome of democratic government, norms do not, however, need to be

universally recognised across the member states. Under republican liberalism, democracy to be viewed as successful must be trusted to “normally” reveal the correct response but history (and the need for the ECHR) tells us that is not completely reliable. As such, it is suggested that a significant majority consensus is sufficient (with some safeguarding caveats).

Regarding the *in concreto* application of those commonly understood principles of general application to particular circumstances, the ECtHR is not to simply substitute the findings of the national democratic system with its own, but rather to review whether the government decision falls under the margin open to the respondent state. Under republican liberalism, there is a strong presumption that national democratic states are best placed to make the decisions. Provided the state applied due democratic process and utilised relevant evidence and expertise to make an informed choice, there is a strong *prima facie* presumption that the substantive outcome of that correctly administered democratic procedure is reasonable. Contrary indications may come from the absence of presence of consensus in practices by similar member states facing comparable problems or from a consensus in expert opinion recognised by a majority of member states.

The key tenets of any legitimate judicial model are selected, in Fig. 5.2, as:

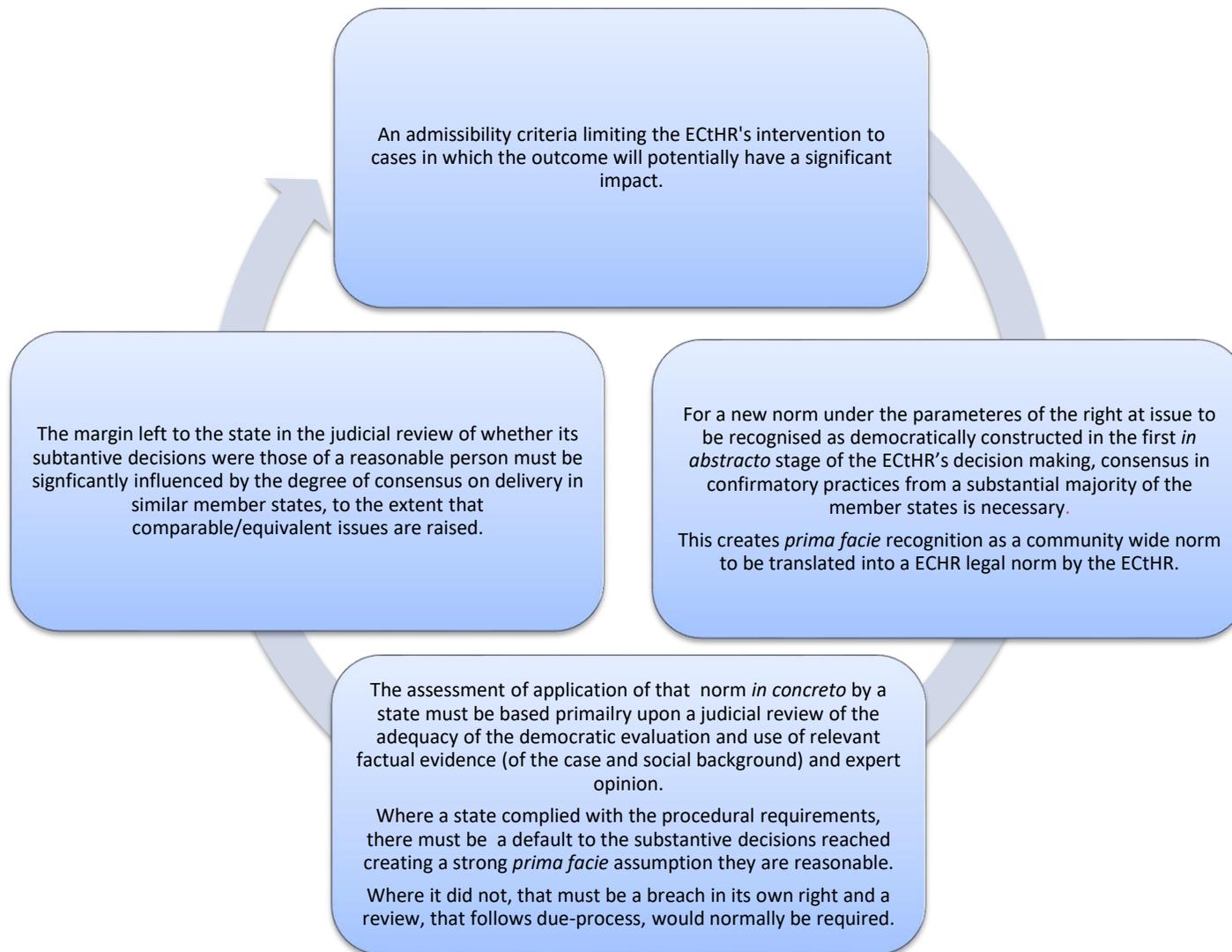


Fig. 5.2 [from Chapter Five] Tenets Underlying the Structure for a Legitimate Judicial Model for the ECtHR

Chapter Six

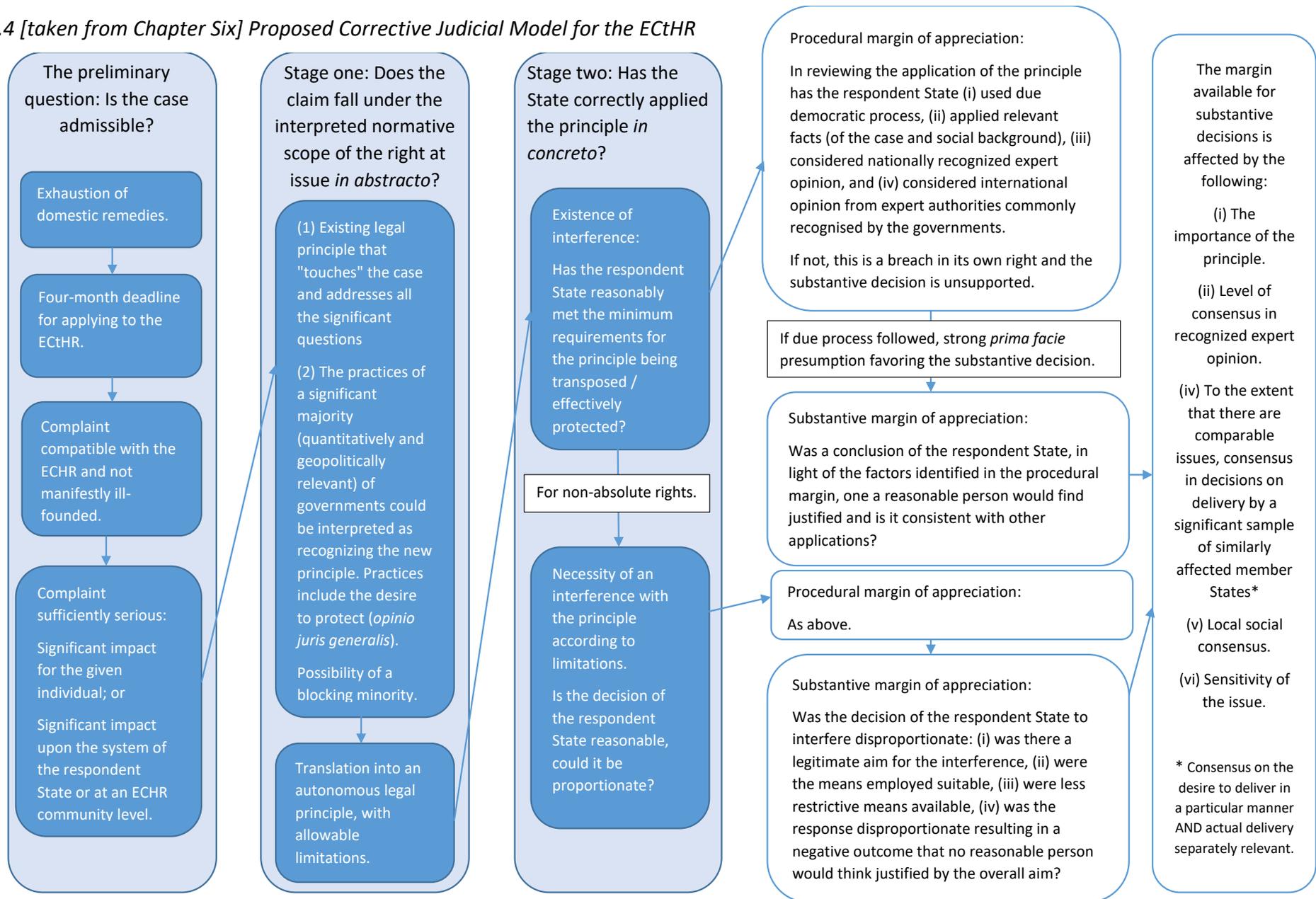
The chapter assesses the current approach of the decision-making of the ECtHR and identifies a number of shortfalls against the framework of analysis and its tenets underlying the structure for a legitimate judicial model.

Notably, the ECtHR does not have a particular judicial strategy. Furthermore, its approach to settling points such as consensus and the margin of appreciation is unpredictable. Consensus among states relating to interpretation of the rights and standards for application is found with varying numerical and geopolitical significance in the evidence presented and, sometimes, very little evidence of confirmatory member state practices at all. In the interpretation stage, a margin of appreciation is allowed to states when this work would suggest there must be none. Once a norm is recognised as falling under an ECHR right, it is a generic and *in abstracto* principle of general application i.e. a right or duty that applies to everyone. There is no need for such a norm to vary and it must surely be uniform if states are to respect it as a universal, permanent and fixed responsibility. The need for variation arises only in the particular *in concreto* application stage, where changeable and varied situations in particular circumstances of the different in states and in specific cases means there may need to be some flexibility. Finally, in the application stage, democratic due process is not always sufficiently factored into the margin left to the state, with no clear separation of the procedural margin of appreciation and the substantive margin.

Arguably this results in: (1) expanding interpretation of the normative scope of the rights, which are not understood by the states as forming part of the agreement; (2) an artificially reduced margin of appreciation that fails to take sufficient account of due democratic process in national political reasoning and of work of national courts, which is further narrowed by reliance upon expert opinion that is not recognized by states; and (3) an overall perceived expansion of the ECHR project beyond its purpose.

The chapter proposes an improved corrective model, as illustrated in Fig. 6.4:

Fig. 6.4 [taken from Chapter Six] Proposed Corrective Judicial Model for the ECtHR



Chapter Seven

The chapter applies the proposed corrective judicial model to prominent and often-cited rulings that resulted in significant controversy. The cases considered include areas such as terrorism and deportation, prisoner voting, same-sex marriage, secondary striking, life imprisonment and gender reassignment.

Consideration is given to the hypothetical ability of the proposed new approach to have responded to the points made by the respondent states in past cases. While the use of the proposed model shows that disagreement in these types of cases is perhaps inevitable, it is concluded that the corrective model could well have resulted in different outcomes in some of the cases and may have lessened criticisms from the member states and also the individual applicants. It would have resulted in more transparent, consistent and clearly justified outcomes at each of the different points of the judgments.

Chapter Eight

In the concluding chapter, the contributions of the work are summarised and areas for future work identified.

A review of the negotiation and wording of the original agreement indicates that republican liberalism is a reasonably inferable categorisation of the shared government object and purpose. In keeping with the express terms found in the ECHR Preamble, this places the promotion and reinforcement of national democracy at the heart of the arrangement.

The review is used to produce a framework of analysis comprising elements to assess the legitimacy of the ECtHR's rulings and a number of tenets that must underlie the structure for a legitimate judicial model. These are applied to the current processes of the ECtHR to assess any validity in the concerns raised by member states. This is original work and analysis and represents one of the major contributions to knowledge from the research project.

It is concluded that the process could be appropriately strengthened and a proposed improved model for ECtHR rulings is developed, the second major original contribution of the work. The most important changes are: (1) the recognition of two stages to the ECtHR process,

interpretation and application, each raising different evidential requirements; (2) evidence of significant majority consensus between the member states is essential in interpreting the scope of a right; (3) a separate procedural and substantive margin of appreciation should always be expressly considered in relation to application; (4) correct application of procedural requirements by the member states means a strong *prima facie* presumption that the substantive determination is acceptable; and (5) evidence of the presence or absence of consistent applications in similarly affected member states on an issue must be factored in, in determining the reasonableness of the substantive decision.

The proposed corrective judicial model is applied hypothetically to a number of cases, and it is concluded that it provides a theoretically viable way forward, that could improve legitimacy by improving the deference of the democratic process and securing greater transparency, consistency and accountancy on the part of the ECtHR.

Having demonstrated the potential of a model to improve the operation of the ECtHR under the current terms of the ECHR, the chapter notes that further work may be undertaken to consider whether some of the positive aspects of the model may be further strengthened through possible future reform to the ECHR. While this further work would require significant and more detailed analysis beyond the scope of the current research project, the chapter does provide some broad discussion for future exploration.

The two most promising potential future reforms are identified by the work as relating to formal input by respondent states and applicants in the choice of remedies by the ECtHR and to the creation of provisional judgments, an idea put forward by Lady Justice Arden. These judgments would happen before a case even reached the ECtHR, wherever the Court views that it may, soon, and significantly expand its jurisprudence through new interpretations or standards for application.

2 Chapter Two

Legitimacy in Law and a Valid Approach to Securing Human Rights

The concept of legitimacy in legal systems and
challenges for objectively correct human rights
reasoning

2.1 Introduction

The previous chapter presented a number of important points that relate to the first phase of this project. It identified three consistently made concerns about the operation of the European Court of Human Rights (the ECtHR) in accordance with the European Convention on Human Rights (the ECHR), as set out in the Brighton Declaration. These are the concerns to which this work will respond.

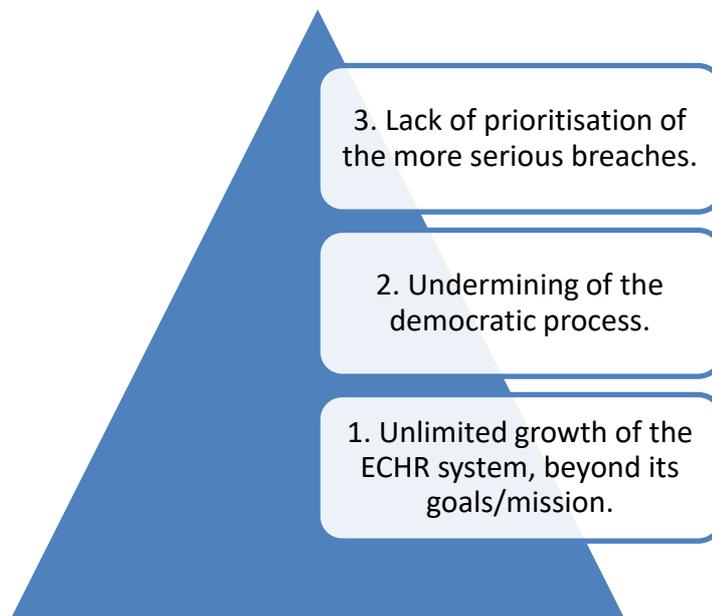


Fig. 1.4 [taken from Chapter 1] Member State Concerns taken from the Brighton Declaration

The last chapter also identified evidence of a trend for complaints and non-compliance by member states with respect to judgments by the ECtHR. However, any apparent link between dissatisfaction and non-compliance is a valid criticism of the ECtHR only if, as the system stands, its judicial approach in some way justifies the complaints levelled against it. As such, this chapter is concerned with phase two of the project in determining a basis that may be used to assess the legitimacy or validity of the concerns.

2.1.1 Legitimacy and Authority

John Finnis reasons that law is authoritative, with a general or presumptive obligation for one to obey it, because it is integral to securing the “common goods” for human flourishing.⁴⁴ Political authority is justified as a means for coordination of a community⁴⁵ and ‘the sheer fact of effectiveness is *presumptively* (not indefeasibly) decisive [emphasis added]’.⁴⁶ Finnis argues for a strong presumption that law from an effective power should be followed rather than questioned. This presumption may be defeated exceptionally where laws are manifestly unjust in attacking the basic common good:

Of course, this derivation of the relevant normative consequences is not indefeasible. That is to say, the conjunction of the principle with the opportunity is only presumptively sufficient to justify the claim to and recognition of authority. Those who use their empirical opportunity, or even their legally recognized authority, to promote schemes *thoroughly opposed to practical reasonableness cannot then reasonably claim to have discharged their own responsibilities* in reason, and may be unable to justify their claim to have created a good and sufficient *exclusionary reason* affecting the responsibilities of those whose compliance they are seeking or demanding [emphasis added].⁴⁷

Implicit in this support for legal authority, there are recognised limitations on how that authority is to be exercised so as to legitimately require individuals to follow the decisions of a law-making institution. Even with the strong presumption of authority favoured by Finnis, the laws legitimacy is open to question, albeit infrequently, based on practical

⁴⁴ J. Finnis, *Natural Law and Natural Rights* (Oxford University Press: 2011).

These basic goods are, for Finnis, those identified by practical reasonableness as necessary to fulfil individuals as moral agents, being [at 155]:

[A] set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.

The seven basic goods are identified by Finnis as: life; knowledge (for its own sake); friendship and sociability; play (for its own sake); aesthetic experience; practical reasonableness, i.e. the ability to reason correctly about what is best for oneself and the freedom to act on those decisions; and religion.

⁴⁵ ‘Authority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community.’ *ibid* 246.

⁴⁶ *ibid* 247.

⁴⁷ *ibid* 246.

reasonableness. This work, however, considers that the legitimacy of any legal authority should actually be reviewed and monitored regularly (a position that is in line with the ECHR and routine international oversight of national legal systems). It is not only manifestly unjust choices that may be challenged.

There are a number of weakness to the position taken by Finnis which may be used to justify a more robust challenge of the exercise of legal authority. Whilst the power of an authority to coordinate is logically important to agents, the possession of that power is in itself insufficient to demand that all decisions be followed. There must be a clear and proper government purpose within the constitutional framework of that society.

Merely because agents *do* follow an authority, it cannot be presumed that they do so in a way that is for the common good. As Boylan notes:

What I find problematic about contractarian or agreement theories as justifications for human rights (or for morality that creates the context for consent) is that they are so invested in asserting that people acting within some constraints [...] will generate a normative conclusion that is sufficient to yield to consent. What is there about agreement that yields positive normativity? *There are many agreements that are made that are strikingly immoral [...] What agreement produces is a voluntary pact between people or between institutions/countries. But agreements can be bad (as judged by the PGC [the principle of generic consistency], for example). The 1939 Nazi-Soviet Non-Aggression Pact was an agreement that was voluntary – but the ends for which it was conceived were evil. There are countless other examples like this. [emphasis added].*⁴⁸

Furthermore, Finnis does not articulate a particular form of political government as a means for just decision-making with regards to the common goods. A form that supports the participation of agents and reflects the social organisation in which they live must be part of legitimacy for individual agents, if they are to accept that their needs are better met by cooperation with other agents under a system of government. As Duke cautions:

The problem with such a position from the perspective of a more robust conception of the relationship between the authority of law and the common good is that it sets out from the epistemic and moral autonomy of the individual in abstraction from the

⁴⁸ M. Boylan, "Justification in Morality and the Law" in P. Capps and S. Pattinson (eds) *Ethical Rationalism and the Law* (Hart Publishing: 2017) 84.

forms of *social organization and participation* that the concrete fulfilment of such autonomy presupposes [emphasis added].⁴⁹

If one is to support legal decision-making authorities as necessary to achieve certain basic public goods between agents within a society – justified moral rights and duties that Finnis recognises exist objectively beyond any theories based on contract or consent – then the processes for the exercise of that authority must too be supportive of those moral norms. In the immunities view of moral rights, they stem from those freedoms that are necessary for the self to develop.⁵⁰ This view is in keeping with the ECHR, the Preamble focuses upon “fundamental freedoms”. Such a process must include agent participation (whether actual or through political representation and accountability) and consideration of empirical evidence of the ways in which “free” agents exercise their autonomy in the everyday life and reach compromises with others doing the same.

Once there is an acceptance of public goods that are objectively justified and morally valid, then any system must show itself to comply with that underlying conception of justice by building upon the PGC with a system that is effective in terms of people complying with it and having the potential to support the dialectic methodology of the PGC. This compliance cannot ever be presumed merely because decisions are habitually followed. Instead, legitimate exercise of authority depends upon: (1) interpretations of the common goods and their application having the potential to accord with objective reasonableness under the PGC (i.e. not manifestly unjust); and (2) a process for the settlement of interpretations and application that respects agent participation and empirical validity. Such a view is apparent in the ECHR, which is rooted in a liberal view of democratic government as the correct system for coordination (versus rival “wrong” systems such as communism and totalitarianism).

⁴⁹ G. Duke, “Finnis on the Authority of Law and the Common Good” (2013) *Legal Theory* 44, 52.

⁵⁰ As Pildes notes:

In the [...] immunities view, rights emanate from some conception of the self; rights demarcate spheres of belief and conduct insulated from majoritarian preferences to enable fundamental attributes of that self to develop [...] I believe it is the dominant view of rights in the contemporary political culture [...] And it is a view for which many, in academic writing as well as public discourse, find inspiration in the work of Dworkin.

R. Pildes, “Dworkin's Two Conceptions of Rights” (2000) 29(1) *The Journal of Legal Studies* 309, 311.

Theories dispute the claim of Finnis that there is any general or presumptive duty to obey the law, even within a “just” state (for the purposes of the ECHR, a liberal democracy). Notably, the work of Raz through the Normal Justification Thesis (NJT), requires the legitimate exercise of legal authority to be judged each and every time it is exercised.⁵¹ The NJT justifies an authority only where a service is given to its principals:

[T]he normal way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him [...] if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.⁵²

For Raz, a legal system must be legitimised in relation to every law that is passed in order for an individual to be reasonably expected to follow it. Any law must be interpreted as being for a clear and proper government purpose under a proper constitutional framework, or be otherwise illegitimate as a law if it cannot be made to fit. This work takes the NJT as providing a more supportable explanation of legitimate legal authority than the less probing review of theories such as that of Finnis. Under the ECHR, an expectation of review of national government decisions on “the law” is apparent and is not limited to only extreme unjust choices. The same expectation of appraisal must be true also of the decisions on “the law” made by the ECtHR itself. As it questions the observance of the member States to the ideals of liberal democracy, so to must it be subject to that same respect for adherence to the outcomes of the operation of such democratic government.

While the ECtHR has the power to make decisions on the interpretation and application of the ECHR and its Protocols, it must use its authority legitimately each time it is exercised and that means providing reasoning for decisions that any subject is likely to accept as being better to comply with over their own. Its principals⁵³ must be convinced not to follow their

⁵¹ This is not to say that agents should routinely “pick and choose” at will which laws to follow. Rather, that they should not follow the law unquestioningly but treat it instead more like a “knowledgeable friend”. See J.Raz, “The Obligation to Obey: Revision and Tradition” (1985) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 139, 148.

⁵² J. Raz, *The Morality of Freedom* (Oxford University Press: 1986) 53.

⁵³ For international law, the principals are the states but those states are representative of human agents (the citizens).

own independent reasoning over the law, or to be bound by another rival power. An important part in considering the purpose of the principals in agreeing that the ECtHR may be placed to make decisions that are better complied with than their own must come from the ECHR text.

Under Article 32 of the ECHR, the ECtHR has the authority to decide upon all matters relating to both the “interpretation and application” of human rights:

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

A literal reading of Article 32 would identify the meaning of this provision as giving the ECtHR complete and apparently unlimited authority on anything it self-proclaims as raising human rights. This does not, however, fit with how a legal system should work if it is not to rely upon threat or habit. Under the NJT, the way that the ECtHR provides its service must engender support in its principals, who are free to question the legitimacy of that process of reasoning. Otherwise the expertise of the ECtHR is open to question and the cost to those agents of agreeing to its coordination will be too great. It must be possible to defend the legal decisions as having objective grounds. The problem, for international law in general, is that:

Conventions often under-specify the content of international law, and it is this under-specification that creates the normative space that is filled by the interpretative practices of the international courts and bureaucracies. These interpretative practices establish what international law is taken to be, but they simultaneously raise questions about how the authority of the law develops beyond the state. Officials cannot straightforwardly appeal to the texts of the treaties to claim authority; they must seek other grounds, such as an appeal to expertise; substantive justice, economic, political and social dynamics; or interpretative techniques drawn from domestic administration and so on.⁵⁴

⁵⁴ P. Capps P and H. Olsen (eds), *Legal Authority Beyond the State* (Cambridge University Press: 2018) 4-5.

The service conception of the NJT requires that an authority demonstrate its expertise and its ability to coordinate. The term expertise in this context relates to the capacity to apply knowledge appropriately, such expertise is likely to be marked for example by its 'steadier will, less likely to be tainted by bias, weakness or impetuosity, less likely to be diverted [...] by temptations or pressures'.⁵⁵ Coordination problems arise when 'without a coordinated effort, some good, which can in principle be secured at an acceptable cost, will be lost'.⁵⁶

Under the NJT the ECtHR has legitimacy via its service as a power for judicial review, there is a recognised need for coordination on human rights issues and the Court has the degree of removal and the expertise and skills necessary to review government decisions. However, legitimacy goes beyond the mere provision of a service by the exercise of power, to include also how that service is provided. For an individual to consider themselves bound, they must be satisfied of some element of objectivity in judgement. It is this objectivity that means the ECtHR may legitimately expect its principals to recognise it as, in the words of Raz, a "knowledgeable friend" and to follow that authority.

2.1.2 Human Rights Objectivity

The ECHR cannot be handled as a body of rules, it is clear that the agreement is idealist rather than a positivist in its understanding of a moral foundation to society. An idealist basis for human rights may come from: (1) natural law or moral realism if one is satisfied of an authority's ability to "discover" truths set by God or the laws of nature; or (2) natural rights based on the human construction of justified moral norms by a correct and rational evaluative process for reasoning.

This is not to deny the relevance of a particular contractual or consensual agreement between agents in a society, provided those agreements do not go against natural rights ideals. As this chapter will argue, moral agents will agree to cooperate and thereby create such agreements with which they may be legitimately expected to comply. While not necessarily universally objective, decisions taken in accordance within the provisions and spirit of such agreements

⁵⁵ J. Raz, *The Morality of Freedom* (Oxford University Press: 1986) 75.

⁵⁶ J. Raz, "Facing Up: A Reply" (1989) 62 *Southern California LR* 1153, 1190.

require an authority to look beyond individual standpoints and self-interest to those of all of the public. They are also effective in the necessary task of coordination and are in accordance with the morally necessary requirement for social coordination. Such decisions have a degree of moral justification that may not be universal, but is relative to that society, and may claim legitimacy relative to that arrangement.

This chapter will argue that a legal system may legitimately hold an expectation that its principals will follow decisions only provided the interpretations and applications are not merely pronounced based on subjective values and beliefs, but based rather on objective reasoning reached via an agreed and appropriate process. As a legal system, the ECHR cannot rely upon: (1) a purely positivist formalist argument based upon a strict reading of the text; or (2) natural-law theories or moral realism as a basis for objective moral truths. It does not, however, find legal realism or moral scepticism as supportable positions for legal systems in general and particularly not for the ECHR. It argues instead for natural rights constructed by humans, a more policy-oriented or social conception of correct morally justified law.

A natural rights approach is based upon: (1) the ability of moral agents within society to reason objectively on justified moral norms; and (2) the need for a system between agents in a society in order to compromise on: (a) which “candidate” moral norms, those that could under the PGC be interpreted as falling under the normative scope of a human right, form the societal principles upon agents have compromised – those principles underly everything else and form the permanent basis of justice and fairness for coexistence in society; and (b) decisions regarding the application of those principles of general application to particular circumstances i.e. specific cases, changeable situations, and varied contexts.

Natural rights reason law is a normative social practice; it is a dialectic evaluative process guiding moral agents in constructing justified societal generic norms. The accepted system for a society identifies the shared understandings that form the societal interpretation of fundamental rights underlying the whole of society, their normative scope, and informs the standards for assessing everyday application.

2.2 Formalism

A legal positivist view of the legitimate exercise of authority by the ECtHR would emphasise the importance of the ECHR as a treaty, along with international custom. This provides a helpful starting point in directing the ECtHR; the Court clearly must be informed by the object and purpose of the ECHR and the agreement itself is the most obvious place to begin. Specifically, reliance on formalism requires the text to establish all that the ECtHR needs to know about: (1) the overall government object purpose of the principals (states); and (2) the efforts or actions reasonably necessary as the means to accomplish that mandate.

As is standard practice, the overarching motivations and expectations under the ECHR are set out in its Preamble and this forms the first key indicator of object and purpose:

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms; Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement [...]

It is apparent from the text of the ECHR Preamble that the member states expressly agree:

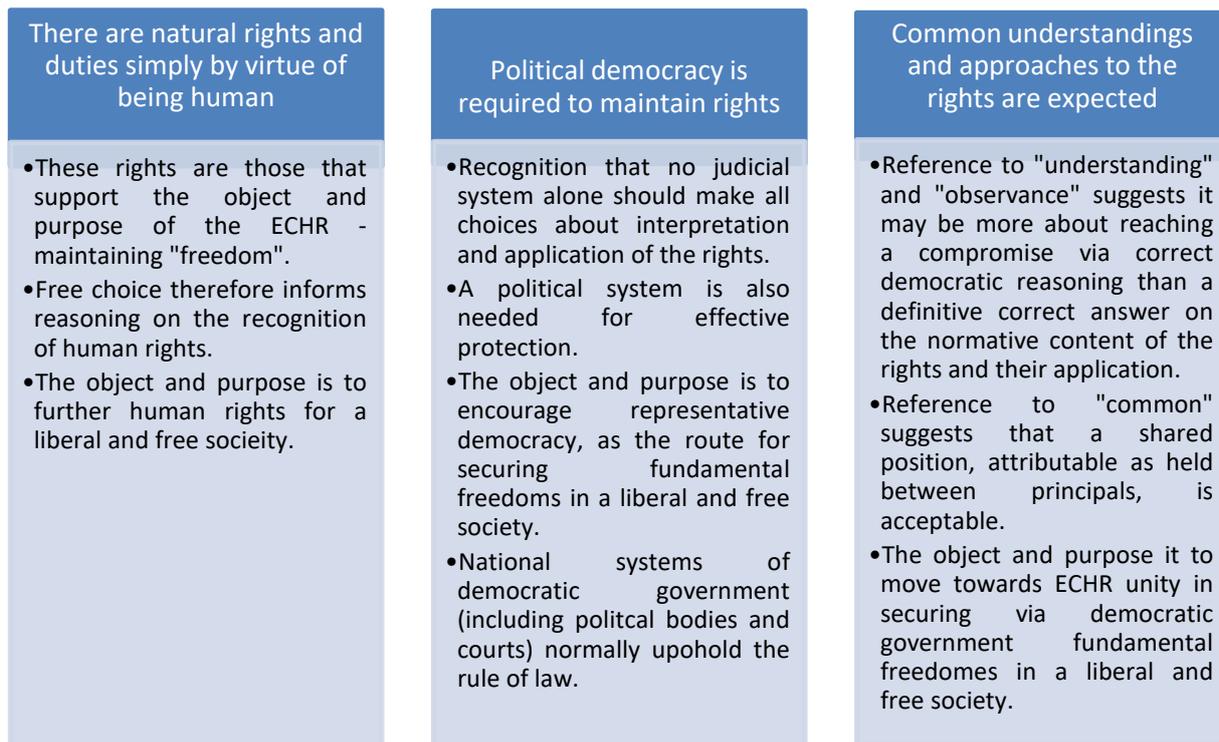


Fig. 2.1 Object and Purpose in the ECHR Preamble

The text has revealed important points about the government object and purpose of the member states, but it leaves a number of ambiguities about the mandate of the ECtHR. To show that the ECtHR is acting within its legitimate authority, any framework for decision-making will need to respond to major remaining questions:

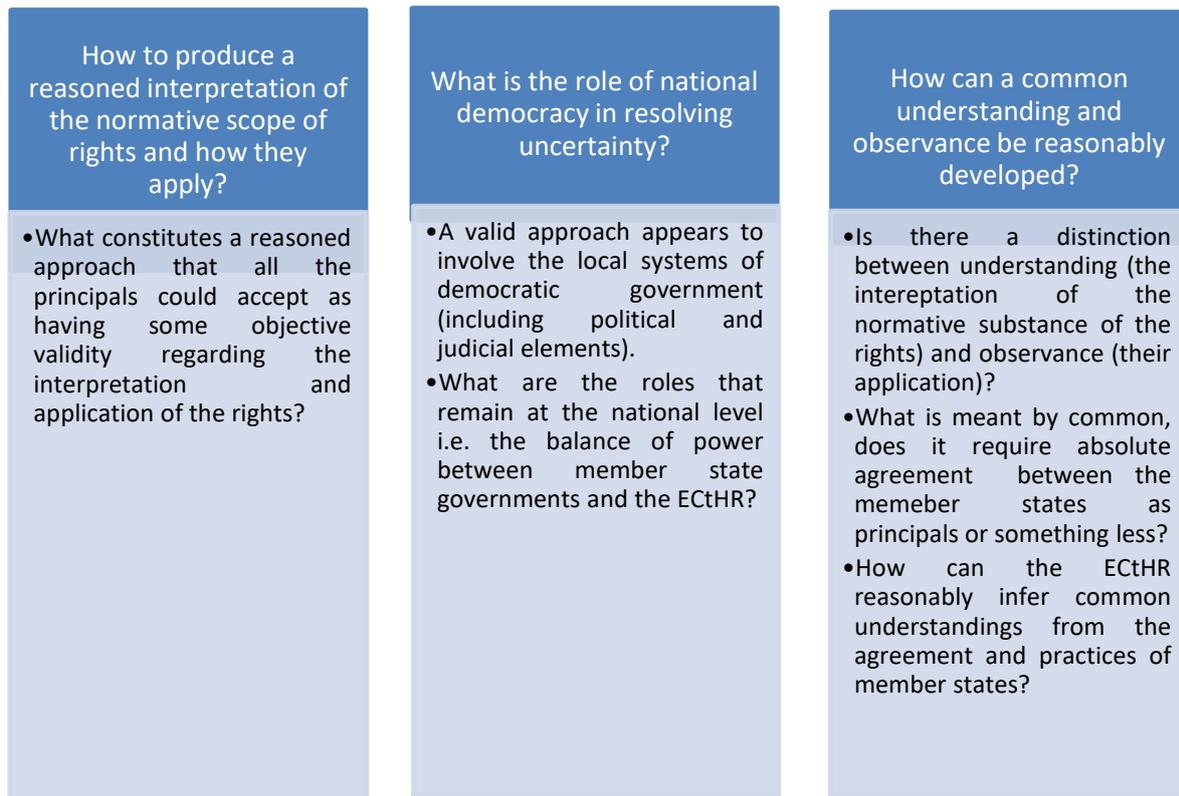


Fig. 2.2 Objectives from the ECHR Preamble Requiring Clarification

A response to these questions would provide the detail necessary to produce a framework for ECtHR judgments, by identifying a reasonable approach to settle disputes on the normative substance of the rights (understanding/interpretation) and appropriate standards by which to assess the particular observance/application of those principles of general application.



Fig. 2.3 Solutions for Resolving Substance and Standards for Application of Rights

The issues we must settle in relation to the ECHR via a reasonable interpretation of evidence from the text and beyond are thus threefold: (1) a shared governmental purpose of the principals; (2) the efforts or actions by the ECtHR that could properly be reasoned as a means to achieve that mandate; and (3) what this means for the ECtHR when resolving ambiguity

about how to settle the normative scope of the rights, standards for application, and monitoring of state compliance.

Moving beyond the ECHR Preamble for guidance, its Articles can be used to resolve some ambiguity about the finer points required by its object and purpose. The text of the ECHR provides an express basic interpretation of each of the rights it protects, reflective of the rights as commonly understood by the member states at the time of its signing. The categories of ECHR human rights are limited to a list contained in Section I, which consists of Articles 2 to 18. Each right is broadly interpreted via a definition of its general extent and the circumstances in which application may be restricted in particular circumstances.

This 'formalist' type understanding of legal reasoning would, however, rely upon the detail that is provided by the ECHR text being sufficient to supply a determinate answer to all questions asked of the ECtHR. Brian Leiter says:

“Formalist” theories claim that (1) the law is “rationally” determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus “autonomous” from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy.⁵⁷

A formalist claim requires that the ECtHR can, by applying the unique logic of legal reasoning, use its superior judicial intellect to “discover” simple ethical truths from within the legal system, thereby giving an integrated answer to all possible questions. Yet, as Leiter explains, such a process of “mechanical deduction” is not possible. In the absence of the ECHR agreement setting out comprehensively and in minute detail all of the possible normative aspects of the rights, such arguments fall short of providing a means for indisputable objective reasoning that the principals of a system must accept. As Hart argues, a legal norm inherently entails an “open texture”.⁵⁸

⁵⁷ B. Leiter, “Legal Formalism and Legal Realism: What Is the Issue?” (2010) 16 *Legal Theory* 111, 111.

⁵⁸ Per Hart, norms:

Take, for example, the protection under ECHR Article 3 against ill-treatment:

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

At first sight, the apparently unambiguous direction under Article 3 that such acts are never permitted seems clear. Yet, it is not clear what amounts to prohibited treatment. There are different possibilities for its normative interpretation; the substance of the right may be limited to extreme suffering, physical harm and permanent damage, or could include mental anguish and humiliation. Also, there is the question of what it meant by subjecting a person to that treatment. It could be limited to not undertaking it oneself or extended to not exposing people to a risk of it from other parties. Even after the briefest consideration of what is set out as an absolute right, questions are then raised requiring the normative parameters under Article 3 to be further interpreted via an objectively justified process for moral reasoning before they can be applied. Given that the text of Article 3 does not in itself provide the definitions required to be certain of the moral norms it incorporates or sufficient detail to read between its lines, the ECtHR will need a different methodology to look beyond its terms to settle its scope or normative substantive parameters.

[H]owever smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*. So far, we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. It is, however, important to appreciate why, apart from this dependence on language [...] we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives [...] It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate [...] The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility.

H. Hart, *The Concept of Law* (Oxford University Press: 1961) at 128.



Fig. 2.4 Illustration of the Limits of ECHR Text as a Route to Derive Aspects of Interpretation and Substantive Application

Another example comes from ECHR Article 8, which recognises that everyone has the right to respect for his private and family life, home and correspondence. This right is, however, qualified (as are most under the ECHR) and may be limited for a range of reasons. ECHR Article 10 guarantees the right to free expression, and forms one reason why Article 8 may be interfered with. This raises the question of when a public figure can generally expect to have their privacy protected, in spite of a free press with the freedom to report on issues of interest to the public. When not been applied to a specific case, this is a principle of general application. The response to this question of the normative scope of Article 8 cannot be formed from a reading of the text of Article 8 and Article 10 alone, requiring instead an externally sourced response constructed by methodology beyond deduction from the ECHR's wording alone.

Furthermore, once a generic *in abstracto* moral justified norm is interpreted under a right, there remains uncertainty about how that principle of general application is to be applied *in concreto* to particular circumstances. For example, whether the details of a specific story about a politician's family life should be published in the public interest, or what type of treatment a specific person may be subjected to if expelled to another country and the risk of maltreatment occurring at a given time.

Similar difficulties occur with relying on established case law relating to interpretation and application of the ECHR rights to settle what should be done in cases raising new points. The potential for cases raising a similar starting point of already accepted principles to raise significant dispute about scope and application is demonstrated by an iCourt illustration generated from its database to show the network formed by references to ECtHR case-law where article 14 (non-discrimination) was mentioned. Each node represents an individual

case, linked in with earlier cases setting norms interpreted as falling under Article 14 and standards for application.

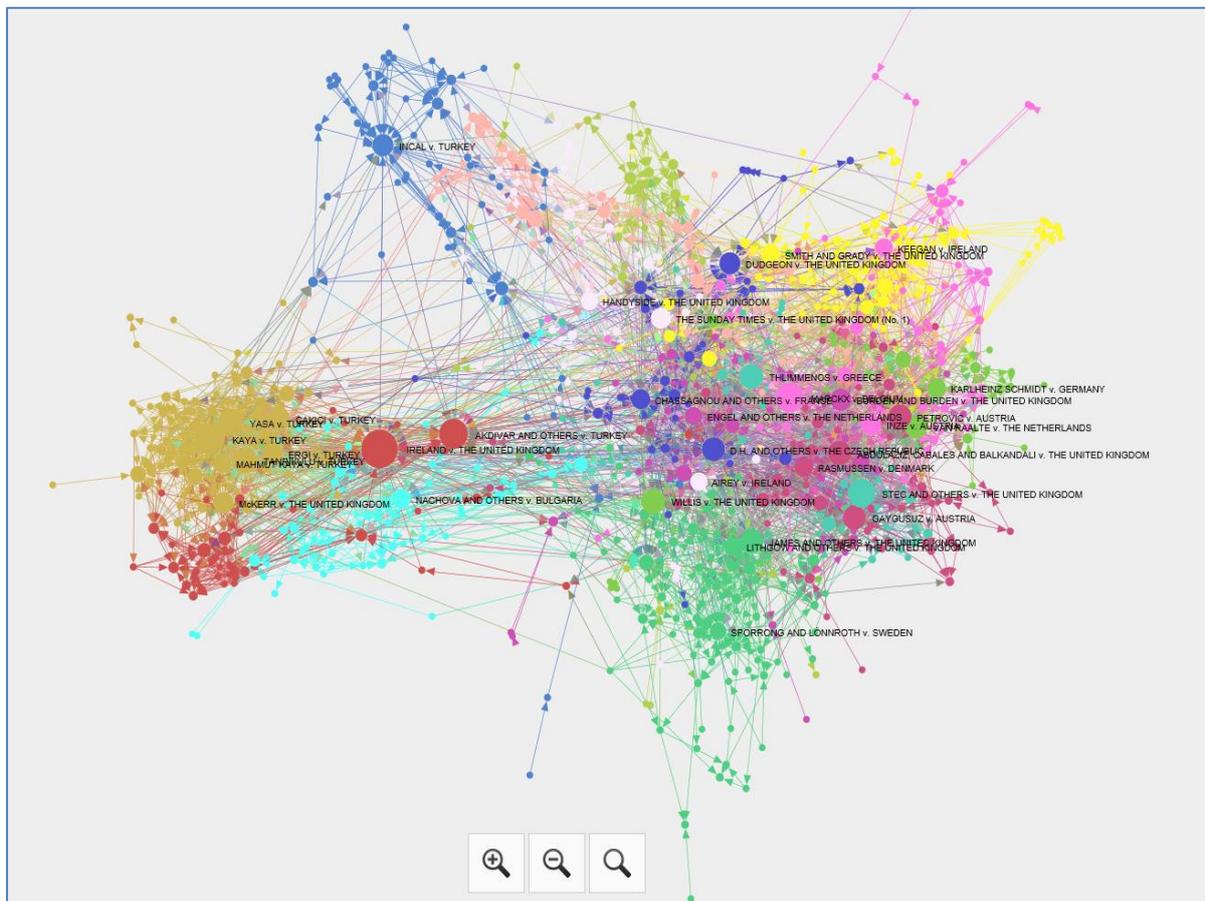


Fig. 2.5 Article 14 Network of Cases⁵⁹

What has been explained so far shows the limits of relying solely upon the text of the ECHR to determine the normative parameters of the rights and to assess the application of those principles of general application in particular circumstances. In at least some cases, confining an analysis to ECHR text alone to discern what government purpose and democratic common understanding demands could actually force the ECtHR to make decisions contrary to the consent of the principals and most certainly would give rise to serious concerns about deviation from its mission and an undermining of democracy.

⁵⁹ iCourts Database of International Courts, ECtHR - Article 14 Network' available at <<http://icourts.dk/networks/sigma/article14/>> accessed 12 May 2018.

However, while denying the ability to rely on inductive reasoning based on the text of the agreement and the *acquis* of the ECtHR as resolving all questions under the ECHR, this work does not suggest there can be no legitimate element of applying established case law to respond to points that are sufficiently similar. It will argue that a criterion for reason and the rule of law require a degree of consistency and predictability in ECtHR outcomes, as does the reliance principally on national governments (via the legislature, executive and judiciary) to uphold its judgments.

What the work suggests is that developments determined primarily by the use of existing case law must be done with the upmost caution. The danger of any court attempting to expand legal rules based upon a claim of formalism or rationalist reason developed from existing law is that the judges become removed from the actual objectives of the agency as determined by its principals and their normative reasoning:

[T]o positions more and more remote from the life which they regulated, with the result that they regulated it with an ever-decreasing feeling for its realities.⁶⁰

The methodology of the PGC lends itself to moral norms being forged in social interactions, which shape and strengthen shared societal understandings of generic rights and duties required for all ends and experiences. The public understandings that develop over time inform the national governments, allowing them to propose and produce the legal norms that have a justified moral status and form part of an effective legal system. Focusing too greatly on the rules without looking behind them risks, as cautioned by Olsen and Toddington, underemphasising:

[T]he social processes through which legal rules become meaningful [...] [W]e argue that valid legal rules are not only members of a formally structured legal system, but are also mediated and mediating products of the relationship between law and society.⁶¹

For human rights issues in particular, the inappropriateness of the ECtHR working in isolation and not both considering and respecting social constructions as reflected by national

⁶⁰ H. Oliphant, "A Return to Stare Decisis" (1928) 14:2 *American Bar Association Journal* 71, 72.

⁶¹ H. Olsen and S. Toddington, "The Scandinavian Roots of a New Approach to Legal Knowledge" (2012) 4/139 *Retfærd* 57.

governments is a clear threat to securing acceptance of the validity of its decisions. There is evidence showing that support for an international court drops following decisions which are unpopular with the public of its member states.⁶² Human rights should be recognisable to humans as the rights and duties underpinning and governing their daily relationships with one another. This is the case for all systems of law, but is particularly so for human rights given they arise from the dialectic reasoning necessitated by daily interaction. This examination will suggest that safeguarding a harmonious society, and the need for and ability of humans to strive for that moral coexistence, is the very basis for any common recognition and commitment to maintaining human rights and an objective approach to their evaluation and identification.

2.3 Legal Realism

A legal realist view would argue that judges begin with the conclusion to a case and work backward. The reasons given by judges are simply rationalizations for decisions that they had already arrived at because of their intuition and non-legal evidence such as empirical information. There is then no *a priori* validity to the law, experience must serve as the guide.⁶³

This approach could provide only at best empirical validity drawn from social practice and social experience. Olsen and Toddington set out the consequence were a realist stance to be adopted:

[J]udges do not reason about the meaning and valid application of law, they simply end up with 'beliefs'. So, where we might refer to the value-laden ideal of deliberative legal reasoning as aiming at 'axiological validity', this traditional notion of the judicial ratiocination required to establish legitimate interpretation of the laws might now conveniently be contrasted with what Ross holds to be the demystified, non-metaphysical, empirically accessible phenomenon of judicial behaviour in belief – and the unvarnished report of what biographical members of the judiciary allegedly perceive as valid, is now to be referred to as 'empirical validity'.⁶⁴

⁶² E. Voeten, "Public Opinion and the Legitimacy of the Courts", (2013) 14 *Theoretical Inquiries in Law* 411, at 435.

⁶³ See A. Ross, *On Law and Justice* (University of California Press; 1959).

⁶⁴ H. Olsen and S. Toddington, "Legal Realism: In Search of a Science of Law" (2016) 4 *Retfærd* 22, 30.

The central critique of realists in relation to formalism is that it fails to reflect the “transactions of life”.⁶⁵ This is a concern that this work accepts, empirical validity is an essential element of legal validity. But it is not, in of itself, sufficient for legitimacy or in line with the idealist ECHR.

As Olsen and Toddington explain:

We can say [...] that Formalism is inadequate as a model of legal reasoning and also as an ontological commitment for legal science. It fails to acknowledge fully the transformative and dynamic activity required by what Oliphant refers to as ‘legal treatment’. Law is transformative in that it is able to categorise and re-code the conflictual ‘interactions of life’ into interactions through law. It is dynamic because in doing so it must continually develop – not just search for, but invent – the normative resources that sustain its own procedural and normative autonomy. It must do this in a way that responds to real normative concerns pragmatically, creatively, inventively, *and in a sustainable and legitimate fashion*. This is what is meant by legal validity. To succeed, therefore, in demonstrating that legal validity does not reside as an inherently essential property of formal doctrine or procedure is not enough; *the Realist critique must go on to affirm that it is to be found in the dialectic of a mutually conditioning interaction between legal doctrine and social life*.⁶⁶

What is required is a route for a decision-making process inline that is both morally informed to produce justified norms and also empirically valid. Olsen and Toddington conclude:

Legal Realism’s critique of Formalism cannot be coherently or relevantly configured methodologically as an amalgamation of Legal Positivism and Logical Empiricism. Rather, we argue that *only when an empirical inquiry into legal phenomena is combined with an ethically informed verstehen sociology can we break the circle of formalism and establish legal theory as a science of legal validity* [emphasis added].

2.4 A Moral Constructivist Approach: Kant, Rawls and Gewirth

The ECHR agreement represents an underlying assumption that in a free society there are certain universal natural rights. The ECHR Preamble identifies the rights it incorporates as:

[T]hose fundamental freedoms which are the foundation of justice and peace *in the world* [emphasis added].

The rights apply at all times and are so above individual sovereign nation states. If the ECHR wording alone is not sufficiently clear to demonstrate that conclusion, this view of universality

⁶⁵ See Oliphant, H. (n 60) 73-74.

⁶⁶ Olsen, H. and Toddington, S. (n 64) 29.

is evidenced in the conviction during its negotiation that it would prevent "evils" such as those committed during the Second World War, for which perpetrators had been held legally to account despite the lack of any formally recognised positive laws against such atrocities at the time⁶⁷, and moreover in the surety that the rights contained in the ECHR would ensure it would act as a "beacon"⁶⁸ to which other states would one-day aspire.

Yet why there is any such assumption and furthermore the actual basis for these universally valued norms is not so readily apparent. As we have already reasoned a justification and an approach are necessary if the ECtHR is to command respect in asserting its authority as legitimately resolving questions on the point. The government object and purpose under the ECHR must, therefore, involve the means of accommodating this uncertainty to the reasonable satisfaction of the parties to it.

The basis for accepting the ECtHR's authority to settle questions on human rights must be one that may reasonably be attributed to all the principals who consent (or at least are taken to have consented) to be subject to the ECHR. While the ultimate principals are the individual agents whom comprise the citizens of the states, for practical purposes we will need to be satisfied by the body acknowledged as representing them when entering into an international agreement on their behalf – i.e. the member state. It is, therefore, a government purpose

⁶⁷ The assumed status of these crimes against humanity beyond any formalist positivist approach was explained by Quincy Wrights shortly after the Nuremberg Trials:

The assumptions underlying the Charter of the United Nations, the Statute of the International Court of Justice, and the Charter of the Nuremberg Tribunal are far removed from the positivistic assumptions which greatly influenced the thought of international jurists in the nineteenth century. Consequently, the activities of those institutions have frequently been vigorously criticized by positivistic jurists [...] [who] have asked: How can principles enunciated by the Nuremberg Tribunal, to take it as an example, be of legal value until most of the States have agreed to a tribunal with jurisdiction to enforce those principles? How could the Nuremberg Tribunal have obtained jurisdiction to find Germany guilty of aggression, when Germany had not consented to the Tribunal? How could the law, first explicitly accepted in the Nuremberg Charter of 1945, have bound the defendants in the trial when they committed the acts for which they were indicted years earlier?

See W. Quincy "Legal Positivism and the Nuremberg Judgment" (1948) 42(2) *American Journal of International Law* 405; 405-407.

⁶⁸ David Maxwell-Fyfe, a key figure in the drafting of the ECHR, described it in a 1950s speech as, "a beacon to the peoples behind the Iron Curtain, and a passport for their return to the midst of the free countries".

that must be found to reasonably form a basis for cooperation under the ECHR. The justification must work both at the time of the ECHR's conception and also as a plausible continuing basis upon which to unite agents in the modern world as the governments choose to continue their membership or to now join. It must be a reasonable interpretation of a clear and proper government purpose that could be shared between the states, government purposes being those acceptable to the public at large (all agents) and are not just the private intentions or values of the particular negotiators.

One possible basis for the ECtHR making objective determinations, rather than subjective pronouncements, about ECHR rights is a belief in universal divine or natural laws. If it were, in addition, possible for the ECtHR to assert superior knowledge or skill to all others in proclaiming the correct interpretation and application of such rights, irrespective of other opinions, then the allegations of illegitimacy made against it would be responded to conclusively.

However, there is simply no basis for faith in a particular religion or in the laws of nature that is acceptable to all agents and, even if the work were to presume one of those grounds is accepted by all the ECHR's subjects e.g. Christianity, there is still no way of providing an uncontested resolution to what it requires in terms of interpretation and application.⁶⁹

This work, while not denying that natural or divine laws could exist, does not therefore consider that it provides a useful route forward for resolving the legitimacy of the ECtHR's decisions to the satisfaction of all its principals. Draghici notes:

[H]uman 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". It is, however, insufficient for judges to affirm what they *assume* to be the content thereof.

⁶⁹ There are a number of clear contradictions between religion and human rights as now recognised, key conflicts identified by Henkin relate to freedom of religion and religious choice, equality and non-discrimination, gender distinctions and capital punishment. L. Henkin, "Religion, Religions, and Human Rights." (1998) 26(2) *The Journal of Religious Ethics*, 229.

International tribunals entrusted to apply specific treaties (rather than natural law) cannot purport to have the monopoly on truth.⁷⁰

This work, therefore, accepts that the ECtHR cannot legitimately fulfil the object and purpose of the ECHR with reasoning based solely upon some unprovable notion of divine or natural laws.

The work does not, however, accept the view of value sceptics that this means that law cannot be both objective and normative. The sceptical challenge from Koskeniemi explains the apparent conflict, that the evaluative element in forming norms means they must always be subjective:

Organizing society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views or preferences are not. To show that international law is objective - that is, independent from international politics - the legal mind fights a battle on two fronts. On the one hand, it aims to ensure the *concreteness* of the law by distancing it from theories of natural justice. On the other hand, it aims to guarantee the *normativity* of the law by creating distance between it and actual state behaviour, will, or interest. Law enjoys independence from politics only if both of these conditions are simultaneously present.

The requirement of concreteness results from the liberal principle of the subjectivity of value. To avoid political subjectivism and illegitimate constraint, we must base law on something concrete - on the actual (verifiable) behaviour, will and interest of the members of society-states. The modern view is a *social conception of law*. For it, law is not a natural but an artificial creation a reflexion of social circumstances [...]

This argumentative structure, however, which forces jurists to prove that their law is valid because concrete and normative in the above sense, both creates and destroys itself. For it is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and more political it seems [...] An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference

⁷⁰ C. Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" (2017) *Public Law* 11,13.

to social context. It seems utopian and - like theories of natural justice - manipulable at will.⁷¹

The difficulty with such scepticism is that that the solution is to abandon normativity in understanding law and resort instead to the formalist type of approach. Such approaches were dismissed above as potentially disengaging from real human culture and thus undermining the laws legitimacy. Voyiakis explains that:

[B]y accepting the main sceptical claim that any attempt to produce an account of international law that is both objective and normative is doomed to fail. It would then make its way out of the sceptical challenge by abandoning or relaxing the claim to normativity. In practical terms, this strategy would favour a formalist approach to international law, according to which propositions of international law may be objectively *valid* or *invalid* depending on whether they can be properly inferred from certain valid premises, but they do not generally create any moral rights and obligations for international agents.⁷²

This is not in accordance with the ECHR, which is clear in its understanding of such moral imperatives. It is also, as Dworkin notes, a problem that such sceptic argumentation holds that there is “no right answer”, which is itself somewhat ironically an objective moral claim based on evaluation (showing that in practice even sceptics make moral judgements).⁷³ Morality is a part of how society functions and it is clearly accepted under both the ECHR and wider international law by recognising human rights. A means of holding objectivity and normativity compatible is therefore required. The implication of value scepticism is cautioned by Voyiakis with the following examples:

[S]cepticism entails that our disagreements about, say, the morality of the invasion of Iraq or the permissibility of abortion have no subject matter, for there is nothing that we actually disagree about. If our evaluative judgements are no more than reports of our subjective feelings or emotions, then our debates about matters of value amount to no more than exchanges of reports of our respective psychological states, with nothing to share or divide between them. Indeed, if the sceptics are right, the very idea of evaluative agreement or disagreement is inherently confused, for both of

⁷¹ M. Koskeniemi, “The Politics of International Law” (1990) 1 *European Journal of International Law* 4,7-8.

⁷² E. Voyiakis, “International Law and the Objectivity of Value” (2009) *Leiden Journal of International Law* 51,54.

⁷³ R. Dworkin, “Objectivity and Truth: You’d Better Believe it” (1996) 25 *Philosophy and Public Affairs* 2.

these attitudes require some issue, a case on which people's views may be said to converge or differ. A further implication of value-scepticism is that evaluative arguments can never be interesting in themselves, for such arguments only tell us things about the speaker, not about the way things are.⁷⁴

It is clear and unavoidable in relation to scepticism and legal realism that, as we noted when dismissing strict formalism, moral evaluative judgement is required under the ECHR and that some decisions may be held morally justified and others not. This means that human thought, if we reject natural law based external features of the universe or moral realism where the content and authority of the law is independent of willing, must play a central role in natural rights constructions that are morally "correct" by virtue of a justified approach to reasoning. Furthermore, if we reject scepticism and legal realism then there must be a systematic means to assess validity of that process of human thought both as individual agents and through the cooperation of agents jointly reasoning and compromising via organs of the systems of governance which agents in society recognise. As Attwooll notes:

The term 'legal idealism' has various meanings. These include: the notion that laws, and the rights and duties they confer, genuinely exist, in which legal idealism is opposed to legal realism; the notion that law is intimately connected with moral or social values, in which legal idealism is opposed to legal positivism; the notion that one can move from certain premises about human reason and will to systematic principles for legal development and decision-making; and the notion that one can derive systematic principles of a similar kind from the requirements of social life. It is also sometimes used to imply too much faith in the capacity of law to solve problems. The enduring issues of legal idealism concern establishing systematic principles for legal development and decision-making.⁷⁵

Dworkin's contribution to the question of a moral system for constructivism is that we can identify the interests of others in our reasoning and look beyond self-interest to formulate coherent moral views. Thought does exist and can be used to reason with respect to one's own norms, the "content of our mind", but also to reason using our knowledge of the world

⁷⁴ E. Voyiakis (n 72) 58.

⁷⁵ E. Attwooll, *Routledge Encyclopaedia of Philosophy* (Taylor and Francis: 1998) available at <<https://www.rep.routledge.com/articles/thematic/legal-idealism/v-1>> accessed 7 September 2018.

and of the minds of others.⁷⁶ Such evaluations are then seen as objective interpersonal, as opposed to subjective, standards. As Davidson explains:

I do not say that there cannot be real differences in norms among those who understand each other. There can be, as long as the differences can be seen to be real because placed within a common framework. The common framework is the area of overlap, of norms one person correctly interprets the other as sharing. Putting these considerations together, the principle that emerges is: the more basic a norm is to our making sense of an agent, the less content we can give to the idea that we disagree with respect to that norm. Good interpretation makes for convergence, then, and on values in particular, and explains failure of convergence by appeal to the gap between apparent values and real values (just as we explain failure to agree on ordinary descriptive facts by appeal to the distinction between appearance and reality). There is thus a basis for the claim that evaluations are correct by interpersonal - that is, impersonal, or objective - standards. For if I am right, disputes over values can be genuine only when there are shared criteria in the light of which there is an answer to the question who is right. Of course, genuine disputes must concern the values of the very same objects, acts, or states of affairs.⁷⁷

Another argument made by sceptics against the ability to evaluate objectively is based on relativity, as set out by Mackie:

The argument from relativity has as its premises the well-known variation of moral codes from one society to another and from one period to another, and also the differences between different groups and classes within a complex community. Such variation is in itself merely a truth of descriptive morality, a fact of anthropology which entails neither first order nor second order ethical views. Yet it may indirectly support [...] subjectivism: radical differences between first order moral judgements make it difficult to treat those judgements as apprehensions of objective truths [...] In short, the argument from relativity has some force simply because the actual variations in the moral codes are more readily explained by the hypothesis that they reflect different ways of life than by the hypothesis that they express perceptions, most of them seriously inadequate and badly distorted, of objective values.⁷⁸

Some disparities may be explained by differences across different communities and cultures. Such variation can occur with objective reasoning when it comes to the application of norms in particular situations, known as "situationism". Where there is no such explanation, the

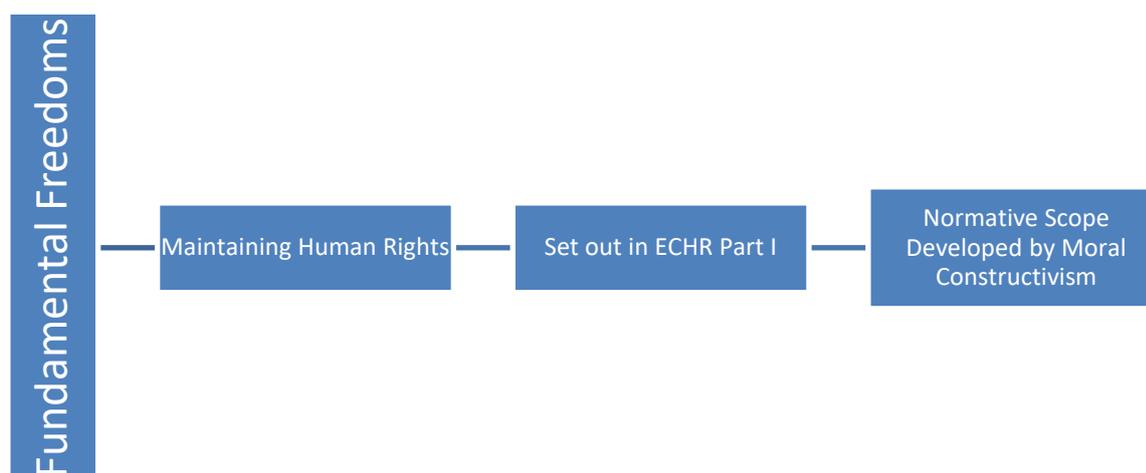
⁷⁶ See D. Davidson, Essay 13 "On the Very Idea of a Conceptual Scheme" in *Inquiries into Truth and Interpretation* (Oxford University Press: 1984).

⁷⁷ D. Davidson, Essay 3 "The Objectivity of Values" in *Problems of Rationality* (Oxford University Press: 2004) 50-51.

⁷⁸ J. Mackie, *Ethics: Inventing Right and Wrong* (Penguin: 1990) 36-37.

point should be made that the existence of agreements such as the ECHR is in recognition that reasoning and actions can be flawed. Sometimes agents uphold personal beliefs, values and standards, rather than trying to reason interpersonally and objectively, or act selfishly. Divergence is therefore to be expected, but that is not proof that there is not a morally justified or correct answer. The point should also be made that there is a significant deal of consistency on human rights norms recognition in different societies.⁷⁹

It is in accordance with the ECHR that agents may together construct human rights through a constructivist procedure of correct practical reason upon interpersonal public or generic norms (i.e. moral constructivism of natural rights as opposed to “discovery” of natural laws). Moral constructivism provides an explanation of why there are justified human rights norms (as against scepticism) without any reliance on natural law or moral realism.



⁷⁹ As Galanos notes:

[T]he extent to which it is said that we disagree on questions of morality is over-exaggerated and stimulated by controversial issues such as abortion. What if we were to choose a more straightforward example such as genocide? Is it conceivable that someone may advocate the rightness of genocide? Moreover, there is empirical evidence showing a considerable amount of moral agreement across cultures. For example, the ‘Golden Rule’ of Christianity, ‘Do unto others as you would have them do unto you’, is also prominent in numerous non-Western cultures. In addition, it is questionable whether we disagree more about moral propositions than we do about scientific ones. The example of disagreement between cosmologists and radio astronomers about the interpretation of certain radio-astronomic observations demonstrates that there are scientific areas where there is widespread disagreement.

C. Galanos, “Universal Human Rights in the Face of Cultural Relativism and Moral Objectivity: Preaching or Teaching?” (2010) *UCL Jurisprudence Review* 29, 36.

Fig. 2.6 Moral Constructivism as the Method for Deriving Aspects of Interpretation

Alan Gewirth⁸⁰ suggests a way of constructing norms by examining the implications of agency – from the point of view of the prospective, purposive agent who recognises the simultaneous vulnerability of and indispensable importance of what we can refer to as the *generic conditions of agency* – that is, the general wherewithal to operate as a viable purposive being employing means in pursuit of voluntarily chosen ends. Gewirth's contention is that all agents must – on pain of contradiction *qua* continuation of the viability of their prospective, purposive agency – regard interference with their *generic conditions of agency* (GCAs) as impermissible. This amounts to claiming *rights* to one's GCAs. On the basis that these rights are claimed on the sufficient basis that one is an *agent*, all agents can and must claim these rights, and all agents must acknowledge the validity of this claim on this sufficient criterion. The acknowledgement of *rights* claims to GCAs thus reciprocally function as the acknowledgement of *duties* to other agents. The Principle of Generic Consistency (PGC) emerging from this analysis thus states that all agents should respect the generic rights of others as well as themselves. The PGC is thus a process by which all agents can morally reason upon justified norms and the demonstrable implications that they necessarily must, dialectically, accept apply to them and all others simply by virtue of being an agent and acting accordingly. This process for construction of norms would thus require that moral reason consistent with the PGC inform the routes adopted by the ECtHR in its processes for decision-making on the expanded normative interpretation of the parameters of right and setting standards for the application.

2.5 Pure Reason and The Principle of Generic Consistency

While it is not possible to be sure of the precise individual motives and thinking behind the individual agents of the states involved in the negotiation process⁸¹ or why new state

⁸⁰ A. Gewirth, *Reason and Morality* (University of Chicago Press: 1978).

⁸¹ The values behind the founding of the Council of Europe are very wide ranging, including a cumulative moral heritage based on Greek philosophy, Roman law, Christianity, and the humanism of the French Revolution. A. Robertson, *The Council of Europe: Its Structure, Functions and Achievements* (Stevens and Sons Ltd: 1961) and A. Robertson, *The Council of Europe: European Institutions. Cooperation, Integration and Unification*. (Stevens and Sons Ltd: 1973).

representatives continue with that membership, it is the public government purpose that is relevant. A proper government purpose, that could be common to members, may be inferred.

The first point that is requisite by any reading of the ECHR is that there are some norms that are accepted as a moral duty governing behaviour towards one another, simply by virtue of being human. This conclusion is inescapable; the term “human” rights itself conveys that belief.⁸² Furthermore, if these rights are susceptible to review under the ECHR, there must then be an acceptance that reasoning may be applied in a way that allows meaning and a measurability of those duties.

For Kant, the reasoning applied to discover justified moral norms was transcendental; they stem from universal aspects of the understanding in the form of *a priori* concepts that structure the apprehension of external phenomena in our sensory experience. These *a priori* concepts are deducible transcendently rather than empirically in that they appeal to the conditions under which knowledge of the empirical world is possible. They are objectively justified⁸³ in that each one is founded on a premise that applies to any possible human experience, one to which all reasonable humans would logically agree. A process of mental synthesis is applied to the premise, to establish the *a priori* concept.⁸⁴ Each begins with a premise about: (1) the self-attributability of pure mental items in all possible representations capable of accompanying them but distinct from them, an awareness of one’s own mind, in

⁸² Green explains these rights are recognised as, ‘they arise out of, and are necessary for the fulfilment of, a moral capacity without which a man would not be a man’ See T. Green Lectures on the Principles of Political Obligations (Longmans Green:1917) 47 cited in D. Boucher, “The Recognition Theory of Rights, Customary International Law and Human Rights” (2011) 58 *Political Studies* 753, 756.

⁸³ As Kant says:

The objective validity of the categories as *a priori* concepts rests, therefore, on the fact that, so far as the form of thought is concerned, through them alone does experience become possible.

I. Kant, 1781-1787, *Critique of Pure Reason*, I. Kant and N. Smith (Palgrave Macmillan: 2003) B126.

The numbers marked "A" and "B" indicate the pages of the first (1781) and second (1787) editions.

⁸⁴ In Kant’s table of categories, there are twelve including: Unity, Plurality, and Totality (the Categories of Quantity); Reality, Negation, and Limitation (the Categories of Quality); Inherence and Subsistence, Causality and Dependence, and Community (the Categories of Relation), and Possibility-Impossibility, Existence-Nonexistence, Necessity-Contingency (the Categories of Modality).

ibid A80/B106.

accordance with the *necessary unity of apperception*; or (2) a premise about a necessary and universal feature of our experience of norms that cannot be explained by association. The *a priori* concepts enable synthesis of manifest representations.⁸⁵

The transcendental argument works by stepping back from the external world of truth and falsity, instead asking, “under what conditions is knowledge possible”? For Kant, knowledge of an external world – empirical knowledge – presupposed a set of concepts which make the idea of a relation between the subject and a norm coherent in terms of explanation. Events occurring in space and time and according to the concept of causality do not so much describe the external world but describe the format in which our understanding is made whole and coherent. It is thus more likely that space and time and causality are attributes of the understanding first and foremost, this is what Kant called phenomenal knowledge, whatever the world is like in itself is perhaps unknown to us. To know such things is beyond our phenomenal capacities which are determined by our time-shaped, space-shaped, causality-shaped accuracy of understanding and perception.

In relation to how this might rationalise with respect to human rights, Kant has written extensively on the point. The transcendental method in moral philosophy, for Kant, starts from the conditions under which moral behaviour and moral critique would be possible. The first thing that is necessarily true, is that moral behaviour and moral critique makes sense only if it is addressed to beings that are free. In other words, beings who, unlike empirical objects, are capable of transcending the sphere of causality and determination in order that they can make a choice. The choice can be based on reason only if it is genuinely free and the reason cannot be explained away by reference to a determining appetite. Thus, there must be reasons that are substantive in themselves to ground an explanation for a free action. These reasons cannot be specific to one’s own appetites and interest, for these motivations are simply causal determinants. The test for freedom, therefore, is to universalise one’s maxims. If one can universalise one’s maxims then one escapes the determination of the will by

⁸⁵ Kant explains:

By synthesis, in its most general sense, I understand the act of putting different representations together, and of grasping what is manifold in them in one [act of] knowledge.

ibid A77/B103.

contingent causal motives. The simple idea of freedom thus leads us to the cusp of a moral imperative.

According to Kant, the categorical imperative or the “supreme principle of practical reason” provides an objective moral route to justified human rights norms. Norms are moral if reasoned to have general authority, requiring that agents follow as they would wish (and expect) them to apply to others.⁸⁶ A moral norm must be disconnected from any particular conditions, including the identity of the person or the particular physical details surrounding the proposition. Kant’s formulation, the “formula of universal law”, is:

Act according to that maxim by which you can at the same time will that it should become universal law.⁸⁷

Kant’s metaphysical view is not a position that is necessarily acceptable to all under the ECHR. Many would argue that human knowledge can originate only from senses experienced in the external world and not from pure reason.⁸⁸ In spite of the challenge to the view that transcendental reason can be applied, Kant makes the vital argument that moral reason is transcendental and does depend upon presupposing a higher norm arrived at *a priori* that acts as a supreme moral principle. Toddington explains:

Kant [...] points out that Reason suggests that any particular moral imperative presupposes a more general one, and that a justificatory regress becomes immediately apparent. In other words, the validity of any particular moral norm implying some corresponding duty to act does not merely presuppose a more general normative ground; it points to the existence of a supreme moral principle.⁸⁹

⁸⁶ Agents must respect other agents because of Kant’s formula of free will as an end in itself, with fits with the ECHR’s focus on liberty and fairness, it requires:

So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.

I. Kant, 1785, *Groundwork on the Metaphysics of Morals* (Cambridge University: 2012).

⁸⁷ *ibid.*

⁸⁸ For example, John Locke, George Berkeley, and David Hume.

⁸⁹ S. Toddington, “Dialectical Necessity and the ‘Is-Ought’ Problem”, in P. Bauhn (ed), *Gewirthian Perspectives on Human Rights* (Routledge: 2016) 63: 67.

The wording of the ECHR makes it clear that the principals have accepted that there is a supreme moral principle to which they are subject. The right to “freedom” is the fundamental starting point in its Preamble. However, this transcendental knowledge must somehow be reasoned in the real world through experiences and the norms developed by that reasoning must be supported by other agents within a society if it is to be upheld. That is why the ECHR Preamble relies upon the operation of “democracy” and “common understanding”. It is in only an experiential worldview, requiring the comparing and contrasting of solutions between agents, that a process is formed that would support experiences being applied in an objectively moral manner, susceptible to evaluation. This results in the construction of values and principles of general application that are reasoned to be universally correct. Here, the work of Gewirth builds on Kant’s formulation of the categorical imperative by adding an implied empirical content. The PGC provides a concerted attempt to explain how such norms could be correctly constructed through moral reasoning in the worldview.

Gewirth’s PGC says that moral agents ought to respect the generic rights of freedom and that, as a result, some undeniable imperatives or norms must bind all. To be so, the norm must be shown to be “dialectically necessary” for all agents. It is “dialectic” reasoning as it is based not on some transcendental approach, but rather on the inferences and discourses between agents. These concepts are socio-anthropological, recognising that social systems incorporate ‘basic assumptions of purposive, practical and linguistically mediated characteristics of human association.’⁹⁰ It is “necessary” for the agent to claim, with integrity, to be acting in accordance with a norm that arises from their general application of the attributes of human agency, and not particular features pertaining to them as an individual. They must then logically apply that generic imperative to other agents, as a necessary normative commitment. Gewirth explains:

I shall then, view the agent as a person who is rational in that he is aware of and can give expression to the generic features that conceptual analysis shows to pertain necessarily to his actions, including the logical implications of these features. It is important to note, however, that it is not the dialectically necessary method that determines the generic features of action and hence the general standpoint of agency itself, since the contents of these features are independent of what any agent may

⁹⁰ H. Olsen and S. Toddington (n 61) 65. The work distinguishes, at p.77, three functions of the law: social-anthropological, technological and representational.

think they are. But once these features have been ascertained, as indicated above, the method operates to trace what judgments and claims every agent logically must make from this standpoint.⁹¹

There are two key components to the PGC. The first is that:

[E]very agent logically must hold or accept that he has rights to freedom and wellbeing as the necessary conditions of his action, as conditions that he must have; for if he denies that he has these rights, then he must accept that other persons may remove or interfere with his freedom and well-being, so that he may not have them; but this would contradict his belief that he must have them.⁹²

A purposive agent must accept he has the rights to freedom and wellbeing necessary to successfully pursue his actions for a purpose that he regards as good, if he is to defend that freedom against other persons.⁹³

The second component is that:

[T]he agent logically must accept that all other prospective purposive agents have the same rights to freedom and well-being as he claims for himself.⁹⁴

An agent must accept that, if they have these rights to freedom and well-being by virtue of their agency, all other agents must have them also.⁹⁵

The logic behind the necessity requirement is summarised by Beyleveld:

⁹¹ Gewirth, A., *Reason and Morality* (University of Chicago Press: 1978) 44.

⁹² A. Gewirth, "The Epistemology of Human Rights," *Social Philosophy & Policy* 1(2) (1984) 18.

⁹³ Gewirth:

Since the agent regards as necessary goods the freedom and well-being that constitute the generic features of his successful action, he logically must also hold that he has rights to these generic features, and he implicitly makes a corresponding right-claim.

A. Gewirth (n 91) 63.

⁹⁴ A. Gewirth (n 92) 18.

⁹⁵ Gewirth:

The agent holds that other persons owe him at least non-interference with his freedom and well-being, not because of any specific transaction or agreement they have made with him, but on the basis of his own prudential criteria, because such non-interference is necessary to his being a purposive agent.

Gewirth, A. (n 91) 66.

The dialectically necessary argument has three stages [...] Stage I contends that any agent (e.g., Albert) contradicts that he is an agent if he does not accept that he generically instrumentally (i.e., in order to pursue or achieve his own purposes, regardless of what these might be) ought to defend his possession of the generic conditions of agency. Stage II argues that it follows purely logically that it is dialectically necessary for Albert to consider that he has rights to the generic conditions of agency (i.e., that, subject to Albert's will, other agents categorically ought to act out of respect for Albert's need for these conditions). Finally, stage III contends that it follows purely logically that it is dialectically necessary for Albert to consider that all agents have these 'generic rights' equally. Since Albert represents any agent, it is dialectically necessary for all agents to accept that all agents have the generic rights.⁹⁶

As the ECHR Preamble confirms expressly that it is concerned with the rights humans require for "freedom", the PGC is singularly appropriate for securing that purpose. It appears embedded within the ECHR system, with its notions of fundamental freedoms echoing its ideals. Olsen and Toddington endorse the notion of the PGC as a means of explaining the ECHR:

In short, a document like the European Convention on Human Rights presupposes the validity of the PGC even if its originators and signatories dispute the methodology of arriving at the PGC, or are entirely unaware of the PGC.⁹⁷

There remains debate about whether human rights truly exist on this basis and resulting charges that the understandings of the basic norms emerging through agreements such as the ECHR are in reality more of the Westernised view, imposed by a small but powerful group of states.⁹⁸ However, the role of this work is not to consider the validity of the underlying assumption behind the ECHR project itself. It accepts that the states that are members of the ECHR (as well as people relying on its provisions and the ECtHR) must be bound by the reasonable consequences of the agreement's recognition that there are human rights. If the

⁹⁶ D. Beyleveld, "The Principle of Generic Consistency as the Supreme Principle of Human Rights" 13(1) *Human Rights Review* (2011) 1, 2-3.

⁹⁷ See H. Olsen and S. Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing: 2007) 7.

⁹⁸ See for example R. Panikkar, "Is the Notion of Human Rights a Western Concept?" (1982) *Diogenes* 30:75 -102 or the review of cultural prisms and human rights (including Asian and Islam takes on human rights) included in S. Sedley, "Human Rights and the Whirligig of Time" (2016) *Edinburgh Law Review* 1, 2-5.

membership accepts that there are human rights, it must also accept that there are categorically binding requirements for a society. As Beyleveld explains:

[A]ccepting that there are human rights, or that there are categorically binding requirements of any kind of action, logically requires accepting the *PGC* [...] as the supreme criterion of practical reasonableness.

Consequently, *all* legal systems that recognise human rights [...], *all* who view law as a matter of obligation, and *all* who consider that there are categorically binding requirements on action, must take the *PGC* to be a necessary criterion of legal validity. Conventions on human rights must, as conventions on human rights, be interpreted to conform with the *PGC*.⁹⁹

In relation to the objective of providing a basis for reasoned normative interpretation of the rights under the ECHR, the work can now provide further clarification of a legitimate means for their construction.

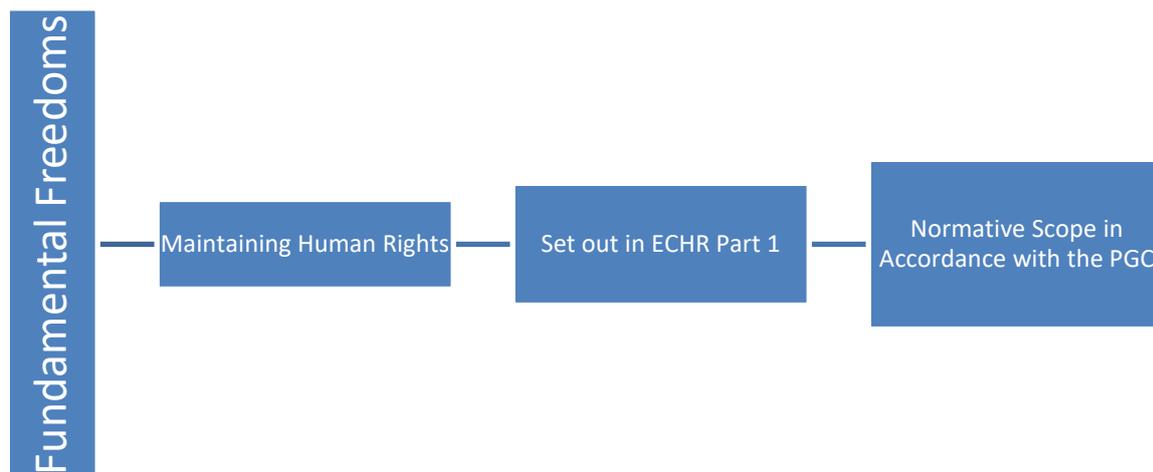


Fig. 2.7 The *PGC* as the Method for Deriving Aspects of Interpretation

The dialectically necessary claims that an agent must make are not “truths” in the sense of assertoric propositions, but they are claims about what an agent must value if one seeks long-term to engage in the business of employing means to ends that one has the freedom to choose. Norms recognised by “everyone” simply by the internal reasoning possible by virtue of being an agent in a society are far from “black letter” and measurable by any scientific

⁹⁹ D. Beyleveld, “Legal Theory and Dialectically Contingent Justifications for the Principle of Generic Consistency” (1996) 9(1) *Ratio Juris* 15, 15.

standard, but they are objective in the agent having gone beyond thinking only subjectively to justify principles of general application.

Gewirth provides guidance on the types of rights that may be constructed in accordance with the PGC and how they may be balanced against one another to form more normative detail, through the Criterion of Degrees of Necessity for Action.¹⁰⁰ There are three distinguishable categories of goods: basic, non-subtractive, and additive. According to the criterion, basic rights override non-subtractive rights, which, in turn, override additive rights.¹⁰¹

Basic goods are capacities without which an individual cannot act and would thereby lose his status as an agent, for example the right to life, basic bodily integrity, health and mental equilibrium.¹⁰² The basic goods are the minimum capacities necessary for effective action within a society and yet there may be disagreement on which candidate norms are included within them. As Boylan explains, the basic goods do not prescribe justice allocation among heterogeneous groups:

[W]hat about the sub-groups within any society that require particular goods for action such as: (1) very pure air to breathe; (2) very pure water to drink; and (3) quantities of vacant, underdeveloped land. Providing these goods may be basic for their ability to act, but they can be in direct conflict with various goods that the business sector sees as basic goods to them. In other words, conflicts between goods are supposed to be adjudicated on their being more proximate to action. But what if there is no “absolute” way to determine this. According to worldview of one group “p” is proximate to action, and to another “not-p” is proximate. Unless we trivialize a basic good as a minimum number of calories and maintaining a minimum core body temperature, we cannot arrive at objective standards.¹⁰³

¹⁰⁰ A. Gewirth, *The Community of Rights* (Chicago University Press: 1996) 45-46. The criteria were previously referred to as the Criterion of Degree of Needfulness for Action.

¹⁰¹ A. Gewirth (n 91) 53-58.

¹⁰² Gewirth explains:

The basic goods, which are the general necessary preconditions of action, comprise certain physical and psychological dispositions ranging from life and physical integrity (including such of their means as food, clothing and shelter) to mental equilibrium and a feeling of confidence as to the general possibility of attaining one’s goals.

ibid 54.

¹⁰³ M. Boylan, “Choosing an Ethical Theory” in M. Boylan (ed), *Gewirth: Critical Essays on Action, Rationality, and Community* (Rowman & Littlefield: 1999) 74, 85.

What amounts to a basic good according to one's reasoning may depend upon one's worldview:

If we understand basic goods as entailing those essential goods necessary for individual effective action within the society, then we are forced to consider whether the following are basic goods: (1) a telephone [today this could include a mobile]; (2) a computer [today this could include access to the internet]; (3) an automobile; and (4) a college education. These various candidates for basic goods have been debated [...] over the years. All of them might be necessary for effective action within the society.¹⁰⁴

If we are not to "trivialise" basic goods, as Boylan cautions, a route is necessary for at least a relative settlement of which out of number of "candidate" norms is the one that a society adopts. For example, via the operation of democracy.

Gewirth's next category of non-subtractive rights maintains an agent's capacity to act, for example use of resources, being able to plan for the future, not being lied to or stolen from. Additive rights increase that capacity, for example the right to education, a career, or to marry. All raise the same challenges when it comes to their recognition, again emphasising the need for a means of compromise within a society.

This consideration of the PGC shows its value as it allows an objective route to justify the selection and the relative weight of those norms that deserve moral protection. Yet, even accepting the PGC as the substantive justification and means of deriving human rights norms, it does not address our problem that it remains impossible to produce definitive proof of their actual substance. Gewirth notes:

Thus while the dialectically necessary method will continue to uphold the normative necessity of the generic rights [...], the more specific rights that will be derived from them may have elements of contingency – only, however, as to their derivation, not as to requiredness of their enforcement or fulfilment [...]¹⁰⁵

As the section below considers, while the PGC provides a basis for the ECHR and the requirement to enforce and fulfil rights formed in pursuance of the PGC, in terms of the actual

¹⁰⁴ *ibid* 84.

¹⁰⁵ A. Gewirth (n 100) 105.

processes of the ECtHR, it provides a means only to identify reasoning that could not comply with a criterion for reason (immoral) and to identify a process for decision-making that could not support moral reasoning. That leaves a very wide range of candidate norms that could be moral and different decision-making routes that could all make moral determinations. Views between individual agents vary significantly on these points and there is no way to prove definitively that any one is the dialectically necessary determination. As Patterson explains, even if the project accepts the premise:

[T]hat political, legal and moral kinds have a hidden essence – there is little hope that such kinds will ever be identified in any manner comparable to natural science. The reason for this is quite simple: there is no agreed procedure for resolving disagreements in matters of value.¹⁰⁶

Thus, the problem of different agents internally reaching conflicting views on those crucial points will somehow need to be externally resolved by the ECtHR if it is to perform its function of effectively guarding the rights in pursuit of the PGC. On this point, the work suggests that dialectically contingent (i.e. one thinks that) as opposed to dialectically necessary (i.e. one logically “must” think that) interpretation will have to be utilised in the construction of many norms evaluated as rights and duties arising under the PGC. While contingent, the operation of a system such as democracy means that the process of reasoning “can” be correct and minimise subjectivity. This means that the norms constructed via democracy will have at least relative legitimacy. In a democracy, nobody is assumed to have a privileged access to moral truth, but all have equal standing in evaluating what to do in constructing norms that form the principles underlying society.

2.6 Dialectically Necessary Norms: A Negative Method for Reviewing Construction

The methodology for delivering Kant’s discipline of reason requires a form of self-examination and a system of precautions:

¹⁰⁶ D. Patterson, “Dworkin on the Semantics of Legal and Political Concepts” (2006) 26 (3) *Oxford Journal of Legal Studies* 545, 552-553.

[W]here, as in the case of pure reason, we come upon a whole system of illusions and fallacies, intimately bound together and united under common principles, its [reason's] own and indeed negative lawgiving [...] seems to be required, which, under the title of a discipline, erects a system of precautions and self-examination out of the nature of reason and the objects of its pure employment.¹⁰⁷

Reason is thus negative, lawgiving, and is a self-discipline. The implications of this are explained by O'Neill:

Any law giving that is to be both self-imposed and negative – that is, without content – can impose no more than the mere form of law. The discipline of reason can require only that no principle incapable of being a law count as a fundamental principle for governing thought and action. Any fundamental principle with determinate content would implicitly subject thought and action to some or other “alien” or unvindicated “authority”. Hence Kant views the fundamental principle of reason as that of governing both thinking and doing by principles that others too can adopt and follow.¹⁰⁸

This is in keeping with, the categorical imperative or supreme principle of practical reason which we already noted as: ‘Act according to that maxim [norm] by which you can at the same time will that it should become universal law’.

What is apparent from this is that reason is, in Kant's words, “no dictator”. O'Neill explains that, ‘there is no algorithm that fully determines the content of reasoned thought and action’.¹⁰⁹ Nor, according to Kant, should we, ‘expect from reason what obviously exceeds its power’.¹¹⁰ The implications of this are set out by O'Neill:

Reason offers only necessary conditions for thought and actions – in Kant's terminology a “Cannon” for adequate thought and action [...] Since the non-speculative theoretical use of reason has only regulative warrant, we can aim at the systematic unity of knowledge, but only in awareness that the ideal of completeness is not attainable [...]¹¹¹

¹⁰⁷ I. Kant, 1781, *Critique of Pure Reason*, trans. and ed. P. Guyer and A. Wood (Cambridge University Press: 1996).

¹⁰⁸ O. O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy* (Cambridge University Press: 2015) 28.

¹⁰⁹ *ibid* 28.

¹¹⁰ I. Kant (n 107).

¹¹¹ O. O'Neill (n 108) 28-29. She later considers, at p.35, that:

Returning to the wording of Kant, the discipline of reason may be used only, 'to mark out the path towards systematic unity'.¹¹² The question remains, what this means for a court such as the ECtHR tasked with ensuring that states remain on that path. That reason is no dictator does not remove the ECtHR from its responsibility to reflect the common understandings.

That innumerable interpretations of moral norms and decisions on how they should be applied may all meet the constraints of reason causes difficulties for their settlement, but there are at least modes of unreason against which the ECtHR can "negatively" guard. O'Neill explains three, as identified by Kant:

- A. To posit 'capacities, insights and transcendent authorities'.
- B. To assume that thinking and acting can be 'wholly arbitrary or non-lawlike'.
- C. To assume that the 'fundamental principles of thought and action can appeal only to some local authority'.¹¹³

Kant further provides three maxims that, together, comprise the *sensus communis*.¹¹⁴ Reasoning that could not accord with this criterion for reason would be immoral. Once more, the work of O'Neill helpfully summarises:

- A. No submission to "alien" authorities.

However, taken alone, refusal of submission might 'lead to anarchy or to isolation'. This is avoided by the second maxim.

[B]ecause this discipline [reason] constrains but does not generate what count as reasoned ways of thought and life, the task of reason cannot be defined in terms of some final product – a completed edifice of reason, comprising a finished system of all truths – but only in terms of a process of subjecting proposed thought and action to the discipline. Reason dictates neither thought nor action; its discipline is construed as a process, not as the once and for all discover of secure foundations.

¹¹² I. Kant (n 107).

¹¹³ O. O'Neill (n 108) 30.

¹¹⁴ I. Kant, 1790, *Critique of the Power of Judgement*, trans. P. Guyer and E. Matthews (Cambridge University Press: 2000).

B. Agents are required to ‘think from the standpoint of others – that is, that their thinking be based on principles that are at least possible for others’.

Despite having a means by which the ECtHR may challenge a view as being necessarily unreasoned and immoral, this still leaves a lot of scope. Any process of thought or action that is guided by both of the first two maxims - ‘rejecting “lawgivers” and maintaining “lawlikeness”’ – will most likely be in ‘constant flux and revision, hence may well generate contradiction and hiatus’. This makes a third maxim ‘indispensable for a sustained process of thought or action that embodies the two’.

C. A sustained process of ‘consistency-restoring review and revision’.¹¹⁵

¹¹⁵ O. O’Neill (n 108) 33.



Fig. 2.8 The Criterion for Reason

The ECtHR, then, is able to claim a negative role in testing the interpretations and applications of the rights developed by the reasoning of agents, ruling that some are immoral given the constraints of reason. For example: (1) where the reasons given are incoherent e.g. reasoning that is irreconcilable with the right such as “to provide housing to those in need, limited to those who earn more than the minimum wage” or is irrelevant to it such as “to provide housing to those who are in need, provided they are of good moral character” or “rape is prohibited, unless the victim was previously paid for sex”; (2) interpretations and applications that could not be the possible will of everyone (e.g. promoting violence, false promising, revenge, coercion or theft, or victimising a group based on personal inherent characteristics); or (3) appeal to an unknowable “alien” authority such as religion or nature.

We can also add to the list of negative grounds for challenge the Criterion of Degrees of Necessity for Action. So, it would not be possible to argue that a basic right be limited because of a non-subtractive or additive right.

In its negative role, the ECtHR has the relevant expertise and degree of removal to provide effective oversight. If, however, the ECtHR is going to move beyond ruling only when a normative interpretation on the parameters of a right or decision on application is absurd and thereby have a greater impact on the positive way forward, a basis beyond the criteria for reason must be found. The negative role is insufficient, for the ECtHR to effectively secure rights it must have a means of identifying positively between a multitude of candidate interpretations and different standards for application.

In terms of its positive developmental role, the ECtHR certainly has the skill to develop interpretations and applications that are lawlike and could be the correctly reasoned will of everyone. However, it is not clear why any agent should necessarily submit and follow the ECtHR's reasoning above their own or that of others, such as the government of their state, when they could have reached different conclusions that also satisfy these basic requirements. In keeping with the NJT, legitimacy relies upon the ECtHR demonstrating why its decisions should be respected over one's own or those from conflicting authorities.

Unless the ECtHR can show it is intrinsically better placed to reason on these points according to the PGC then, without some other means of showing a relationship between the Court and agents giving it legitimate capacity to command obedience, such as one developed through agreement by contract or consent, it is itself an "unvindicated" authority on the positive aspects of interpretation and application of the rights.

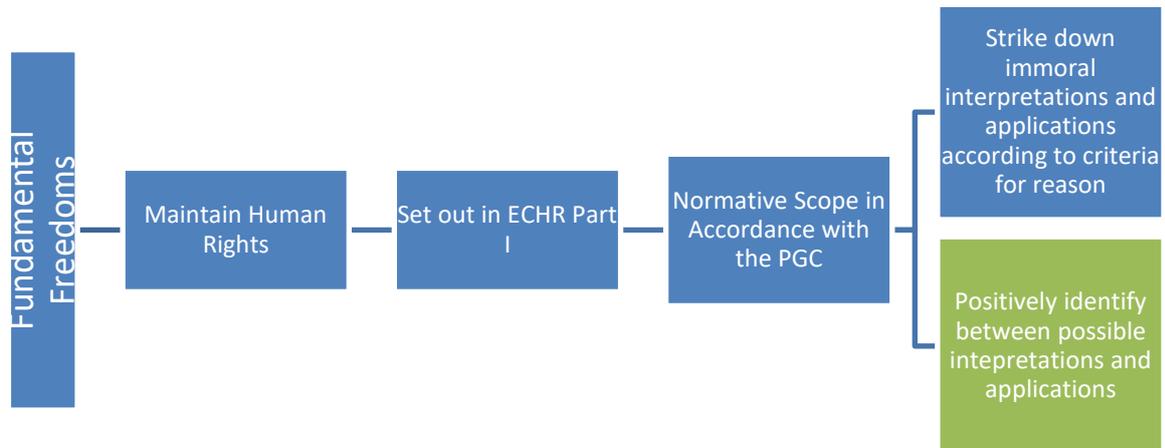


Fig. 2.9 The PGC and the Need for Methodology Relating to Positive Aspects of Interpretation and Application

The work now has sufficient information to identify the negative objective of the ECtHR to guard against reasoning that would be immoral under the PGC. When it comes to the positive objective of the ECtHR, it is necessary to explore further the implications of a shared government purpose in signing the ECHR and what that means for a reasonable approach for the positive construction of rights.

2.7 Positively Constructing Human Rights

Constructing norms using the PGC is particularly difficult, as it is a question that can be settled through only an internal process of self-reason. Kant explains:

To think for oneself means to look within oneself (i.e., in one's own reason) for the supreme touchstone of truth; and the maxim of thinking for oneself at all times is enlightenment. Now this requires less effort than is imagined by those who equate enlightenment with knowledge, for enlightenment consists rather in a negative principle in the use of one's cognitive powers; and those who are exceedingly rich in knowledge are often least enlightened in their use of it. To employ one's own reason means simply to ask oneself, when one is urged to accept something, whether one

finds it possible to transform the reason for accepting it, or the rule that follows from what is accepted, into a universal principle governing the use of one's reason.¹¹⁶

We must, according to the theories of Kant, be neutral as between differing "conceptions of the good". Views vary greatly, meaning individuals may feel very strongly that they have the better understanding of the coverage of a right i.e. the principles of general application that fall under it and also of the factors that allow interference with those principles in particular circumstances. Yet, another individual may genuinely hold an equally strong opposing view with the same self-confidence that their own understanding is correct. Taking modern examples of debates, abortion and euthanasia show extremes of different views or interpretations of the "right" moral justified norms.¹¹⁷

The potential for divergence is perhaps most clearly shown by views and practices once reflecting widely held convictions as acceptable in society, later being labelled as erroneous and unsupportable. Notable, now "unthinkable" examples from still relatively recent European history include slavery, women's rights and corporal and capital punishment.¹¹⁸ The

¹¹⁶ I. Kant, 1786, "What Does it mean to Orient Oneself in Thinking?" trans. A. Wood and G. Giovanni, in *Religion and Rational Theology* (Cambridge University Press: 1996) 7.

¹¹⁷ There remains significant uncertainty about when life begins. The ECtHR has held that the point at which life starts remains a matter that should be left to the discretion of States (*Vo v France*, Application No. 53924/00, Judgment of 8 July 2004).

¹¹⁸The observation of apparent inconsistencies in legal principles has resulted in an entire movement, postmodernism, questioning the very existence of universal truths and instead attributing rights held out as moral norms to be relative and the result of changing social, cultural, economic, technological and political circumstance. As Stacy explains:

Postmodernism as a form of legal analysis has only recently emerged from the earlier broadening influence of the phenomenon of socio-legal studies that took place from the early 1970s to the mid-1980s. This jurisprudence attempted to move beyond the idea of law as an autonomous discipline and incorporate the insights of the social science disciplines. New jurisprudential discourses of law and economics, critical legal studies, women and the law, law and literature, and indigenous people and the law, sprang up in law schools [...] This new body of scholarship employed interdisciplinary approaches to legal analysis to demonstrate that the legal regime is linked to social, economic, political and cultural contexts. They questioned the bedrock assumption of jurisprudence; namely that law is a self-contained, autonomous system.

See H. Stacy, *Postmodernism and Law: Jurisprudence in a Fragmenting World* (Stanford University Press: 2001), 44.

interpretation and the application of human rights is in constant flux as societal attitudes "evolve".¹¹⁹

Even the work of Gewirth himself, in attempting to derive more detailed moral norms from those already recognised by, is subject to challenge. Wellman argues:

He [Gewirth] derives the right to education from the right to productive agency because education "is a prime means for the development of productive agency" (p. 149¹²⁰). One ground of the human right to employment is that it "serves to counter the threat that unemployment poses to basic well-being" (p. 221). He defends the human right to economic democracy by arguing that "it helps to maintain that control over one's behaviour that is the essential feature of freedom" (p. 273). To my mind, none of these causal connections is right enough to establish the strict necessity that is required to derive a right from another more basic right.¹²¹

While the rights set out by Gewirth are a reasonable interpretation of the higher norms from which they are formed, it may be possible to reason otherwise. They are only, as such, candidate principles. Gewirth accepts that there are two key problems in deriving specific rights:

First, all humans have rights to freedom and well-being as the necessary conditions of their action and generally successful action. Second, some good, X, is required for persons to have freedom or well-being or both. Third, therefore persons have a right to X.

However, Gewirth explains: (1) someone may have a prior right to X; and (2) such arguments make very strong assumptions about factual or causal connections.¹²²

A human agent may reach what is, from their perspective, a moral conclusion and believe it to be free of bias. However, given that we have rejected the feasibility of "pure" transcendental reasoning as a means of constructing moral principles in practice, in favour of

¹¹⁹ As explained by Lord Bingham when considering a mandatory death penalty, there is an expectation that expectations and understandings of rights must change, 'in light of evolving standards of decency that mark the progress of a maturing society'. *Reyes v R* [2002] UKPC 11, at para. 26.

¹²⁰ All page references related to A. Gewirth (n 100).

¹²¹ C. Wellman, "The Community of Rights by Alan Gewirth" (1999) 108 (429) *Mind* 162, 164.

¹²² A. Gewirth (n 100) 104.

dialectically contingent societal reasoning in light of experience, such decisions are influenced inevitably by reflecting upon the possible application to that person's own life and so upon their own individual identity, culture and experiences.¹²³

This does produce challenges with the PGC as an approach for the positive interpretation of rights, as Williams considers. The dialectically “necessary” requirement requires an agent to be conceived as a rational agent “and no more” but in reality, agents have particular features and desires. This, argues Williams, makes the task unintelligible¹²⁴ and leaves no room for an individual self.¹²⁵ However, the requirement can be saved using an argument developed by Beyleveld, that an agent can be bound by both the norms he holds because of his “particular contingent properties” and also those arising through properties that “make him an agent like any other agent”.¹²⁶ Because to enjoy his particular properties and achieve his purposes, whatever those ends, certain freedoms are always necessary in order for him to do so

¹²³ For a consideration of the impact of the environment and social interactions on the thinking process, see G. Foxall, “The Contextual Stance” (1999) 12 *Philosophical Psychology* 25.

¹²⁴ Williams argues:

We are concerned with what any given person, however powerful or effective he may be, should reasonably do as a rational agent, and this is not the same thing as what he would reasonably do if he were a rational agent *and no more*. Indeed, that equation is unintelligible, since there is no way of being a rational agent and no more.

B. Williams, *Ethics and the Limits of Philosophy* (Fontana: 1985) 63.

¹²⁵ Williams concludes:

How can an *I* that has taken on the perspective of impartiality be left with enough identity to live a life that respects its own interests? If morality is possible at all, does it leave anyone in particular for me to be?

ibid 70.

¹²⁶ Beyleveld supports the point with the following premise of judgment in a self-reflecting agent:

For me (Albert) to think of myself as *a* particular real (i.e., finite, embodied) agent, I must think of myself as having the particular powers and characteristics that distinguish me from any other real agents that make me *the* particular agent that I am; but, equally, I cannot think of myself as *the* particular agent I am without recognizing that I am *a* particular agent, and I cannot think of myself as *a* particular agent unless I think of myself as *an* agent, as possessing the properties and characteristics that make me and any other agent (e.g., Brenda) *agents*.

D. Beyleveld, “Williams’ False Dilemma: How to Give Categorically Binding Impartial Reasons to Real Agents”, *Journal of Moral Philosophy* (2013) 204, 208.

successfully. Without these general public rights, justified moral norms of general application, there can be no individual self within a society.¹²⁷

This work accepts that, from the standpoint of an individual agent, their consideration that a right must be interpreted in a particular way is intrinsically tied up with their own unique thoughts about how it could apply to their particular existence. Reasoning on interpretation is unavoidably tied with their own ends and experiences, however much they try to apply the logic of dialectical necessity.

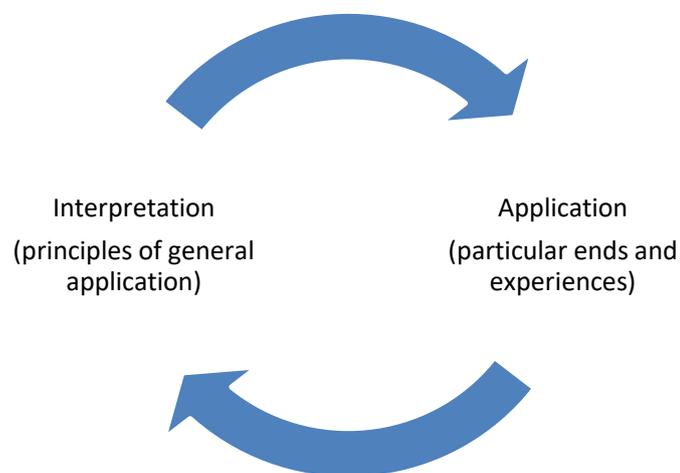


Fig. 2.10 The Link between Application and Interpretation

Agents have admittedly different starting points in reasoning, because of how a norm would apply to them and affect their informal social interactions, but this does not mean that agents cannot come to a point where some views on norms must generally converge for the ends of any agent to be upheld. Where identified, these societal expectations are generic and beyond

¹²⁷ Beyleveld concludes:

Far from it being the case that the idea of being categorically bound to an impartial principle renders unintelligible the idea of the *individual self*, it actually grounds this idea (and the idea of an *individual self*) through the idea of an *individual self*.

ibid 225.

those of smaller groups. Provided that they could accord with the PGC, these are justified moral principles in being recognised as having general application and in proving effective in creating a functioning population. They are the principles which form the underlying and permanent public rights and duties all recognise as the basis for justice and fairness in that society. Such norms are evidenced in the consistent elements of practices between interacting agents. But the difficulty remains in finding an acceptable means to identify that convergence by collecting the evidence of practice, interpreting what shared public values are attributable to the behaviour, and translating that into law for application.

An agent is bound to consider for themselves where that point of merger could be, before thinking as broadly as they can about how their actions will affect others. Thinking of others should be possible, it is not necessary to have the same ends and experiences in mind, as there is a point at which the interests of all agents meet. But, while the process of existentialism is a valuable resource, no one individual can be sure they have reasoned correctly on what the correct public position should be. As explained by Kierkegaard:

Human reason has boundaries [...] But people have a rattle-brained, conceited notion about human reason, especially in our age when one never thinks of a thinker, a reasonable person, but thinks of pure reason and the like, which simply does not exist, since no one, be he a professor or what he will, is pure reason. Pure reason is something fantastical [...]¹²⁸

It is impossible to be sure which individuals have correctly reasoned and identified a generic imperatively required norm.¹²⁹ So, while it is possible to infer agreement of agents to the idea of universal rights via the PGC, it does not automatically follow that the dialectically contingent reasoning of any one agent should be entrusted as being the best place for development of a reasoned understanding of the dialectically necessary norms.

¹²⁸ S. Kierkegaard; H. Hong and E Hong eds. and trans. *Kierkegaard's Writings, XII: Concluding Unscientific Postscript to Philosophical Fragments*, Volume II (Princeton University Press: 1992) 99.

¹²⁹ On this point, the work of Arthur Schopenhauer is of note. He argues that humans are motivated by their own basic desires, that: 'Man can indeed do what he wants, but he cannot will what he wants'. See A. Schopenhauer, *The World as Will and Presentation* (translated by R. Aquila and D. Carus) (Longman: 2008).

Given the potential for lawyers to instinctively defer to judges, having been trained to follow the decisions of judges in the national systems, it may be tempting to respond to the concerns about contingent reasoning by individual agents by simply replacing their reasoning on norms with the reasoning of a court or at least allowing a court to sift the candidate norms from a wider pool of agents to select the understanding that they prefer. But, this is not necessarily a solution that agents must accept.

The crucial point is that judges are susceptible to many of the same dangers as other agents.¹³⁰ In relation to the ECtHR, it is an unavoidable conclusion that despite best endeavours to be impartial, its judges are still subject to external influences irrespective of any attempt to look past them. It is impossible to view ECtHR judges as removed from the real world, as they also live within it and will have a particular (some may argue removed to that of many other agents) worldview.¹³¹

It is arguable that the immersion of judges into a formalised system of law may actually result in their view being less representative of the outcome from dialectic moral discourse between agents when it comes to the interpretation of the normative parameters of an ECHR rights and of the standards for correct application. It may be contended that only in experiencing

¹³⁰ An example of the limitations of reliance on judicial training to produce consistent results comes from the UK, with highly trained judges within the same state reaching different conclusions based on the same facts. In a “Review of Year” by Michael Fordham QC, Blackstone Chambers at the JUSTICE Annual Human Rights Conference (13 October 2017), it was noted that out of 24 human rights cases he identified as coming before the Supreme Court, the Court of Appeal was overturned 14 times.

¹³¹ In relation to US constitutional cases in the Supreme Court which also deal with the interpretation and application of “shared” principles across a diverse range of US states, Marmor concludes following a review that:

The justices’ moral, political, sometimes even religious, convictions tend to influence, not to say determine, the outcome of their decisions on constitutional matters, though, of course, rarely the public reasons for them. The reasons are always cast in legal terms and phrases as legalistically as possible.

None of this is news, of course [...] But this begs an obvious question: Why do we go for it? What moral-political reasons can support a constitutional structure that gives an essentially nondemocratic institution [...] not (professionally or politically) accountable to anyone, the power to prevail over the decisions of the democratically elected [...]?

A. Marmor, “Randomized Judicial Review” in T. Bustamante and G. Bernardo (eds.), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer International Publishing: 2016) 13.

differing needs, desires and obstacles in the real world can the true considerations and consequences of holding to certain values be understood, an impossibility for any small group of individuals who cannot be representative of the whole beyond the desires and familiarities they hold.¹³² An awareness of how the law functions in the world must form part of the development of that law. This work has already accepted that agents may reason based upon their own existence and, arguably, reasoning may not be a practical guide to thought and action without including consideration of the relationship between the possible norm and its effect. Empirical reality is necessary to dialectic reasoning. As explained by Balkin and Siegel:

[L]egal principles are intelligible and normatively authoritative only insofar as they presuppose a set of background understandings about the paradigmatic cases, practices, and areas of social life to which they properly apply. A principle always comes with an imagined regulatory scene that makes the meaning of the principles coherent to us. When that background understanding is disturbed the principle becomes "unstuck" from its hermeneutic moorings; it no longer seems clear how the principle applies *or even whether it should apply* [emphasis added].¹³³

The PGC is useful as means for viewing empirical reality through a moral lens but it does still rely on that empirical experience to make ethical judgements. As Olsen and Toddington explain:

A critical Idealism accepts the impossibility of concept-neutral observation and consequently can be understood from here on in as the view that scientific endeavour is not reporting 'what we find' (for there is no way of knowing 'what we find' without a conceptual apparatus), it is the search for some defensible and non-arbitrary conceptual apparatus that provides us with a critical orientation to empirical experience and a purchase for critical ethical judgement.¹³⁴

¹³² Everyday social processes are environments in which current understandings and rules are tested as they come into conflict, requiring reasoning to form views and to act. This experience may develop new determinations of principles and also of how rules and actions may respond. This means it is possible for the legal protection under a right to move on even if in the past the view was that it was unavailable in similar circumstances. See D. L. Jones, "The Global and the Local: "System" and "Lifeworld" in the Study of World Order" (2001) *Co-operation and Conflict* 36(3): 297, 300.

¹³³ J. Balkin and R. Siegel, "Principles, Practices and Social Movements" (2006) 154(3) *University of Pennsylvania Law Review* 927, 928.

¹³⁴ Olsen, H. and Toddington, S., "Legal Realism: In Search of a Science of Law" (2016) 4 *Retfærd* 22, 25.

Under the principle of hypothetical imperatives there is a, 'practical necessity of a possible action as a means to achieving something else that one wills [...]'.¹³⁵ This follows from the maxim: 'Whosoever wills the end also wills (insofar as reason has a decisive influence on those actions) the indispensable necessary means to it that are within his power.'¹³⁶ This means that norms may relate to what an agent cannot do to another as it will deny them an end, and also to providing the resources necessary for agents to have the opportunity to achieve that end. It is only when the fuller range of ends is being considered, that the understanding of the norms generally required by all agents to be free can be fully developed. A better alternative to relying on judges to be representative of wider society is therefore needed.

If the PGC holds true, then certain principles are of consistent importance to anyone's ends and so should theoretically be consistently informing and influencing agents as they reason and interact going about their activities. They radiate out to increasingly remote levels, and constructions by agents should ultimately overlap into the shared constructed justified moral norms. These constructed principles are morally justified, in that they represent agents in a society striving for fair outcomes of general application. Societal principles may also exceed the demands of the PGC in "any" society, but be a moral public position within a given society forming part of its unique enduring structure of justice and fairness.

¹³⁵ I. Kant, 1785, *Groundwork on the Metaphysics of Morals* (Cambridge University Press: 2012).

¹³⁶ *ibid.*

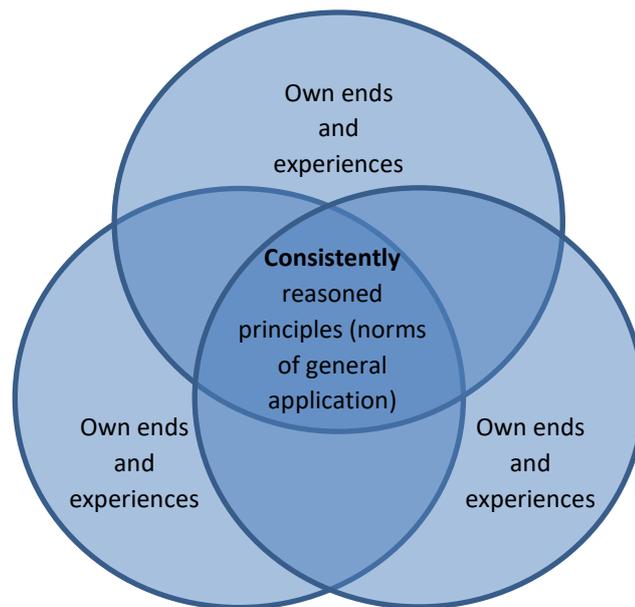


Fig. 2.11 Norms of Consistent Importance to Anyone's Ends

Using social contract theory, it is accepted that individuals may not always do the moral thing but the community within a nation sovereign state at least represents an agreement to strive to take account of the needs of others so as to avoid any break-down in order.

For Hobbes, states and the social contract are the alternative to living in a brutal "state of nature" in which self-interested people would be in constant conflict: "The condition of man [...] is a condition of war of everyone against everyone".¹³⁷ For Locke, the state of nature

¹³⁷ The argument made by Hobbes was, for its time, radical suggesting that legal authority and obligation are based on the individual self-interests of all members of society who are understood to be equal to one another. The position of a sovereign (the monarch) was not because they had an essential authority to rule over the rest but rather because their absolute authority is necessary to the survival of that society.

It is because of self-interest that agents agree to rationally submit to sovereign under a social contract as the alternative is a state of nature where "life is nasty, brutish, and short". No rational person would prefer that position:

Whatsoever therefore is consequent to a time or war where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth, no navigation nor use of the commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth; no account of time, no arts, no letters, no society,

would be a peaceful one of liberty in which persons are free to pursue their own interests and plans, free from interference. It is the pursuit of property and conflict that moves man from the state of nature and requires a social contract.¹³⁸ For Rousseau also, man has fallen from a state of nature under which human are free and has need of a social contract to now safeguard freedom because of private property and the “progress” of civilization creating issues including dependence and economic and social inequalities.¹³⁹

Rawls in his later theory of justice goes further than the notion of the state of nature, using the device of the “original position” to explain why agents would form a social contract to secure stability and to maximise the rights of all.¹⁴⁰ For Rawls, as for Kant, agents have the moral capacity of judging norms from a generic and impartial standpoint. The morally justified principles of general application are discovered via impartiality by imagining persons in a hypothetical situation, the original position, under which agents operate under the “veil of Ignorance”. In the original position one is denied any particular knowledge of one’s circumstances, such as one’s: state, gender, race, particular talents, disabilities, age, social status, and ends. Under these conditions an agent can construct objectively justified moral principles for a just society, as they could not know which would favour their own specific circumstances. Rawls describes his theory as “justice as fairness.” This more rationalist account of the basis for a social contract is more in line with the PGC and the argument of this

and, which is worst of all, continual fear and danger of violent death, and the life of man solitary, poor, nasty, brutish, and short.

T. Hobbes, 1651, *Leviathan* (Wordsworth Editions Limited: 2014).

¹³⁸ J. Locke, 1690, *The Second Treatise on Civil Government* (Prometheus Books: 1986).

¹³⁹ Rousseau:

The social pact, far from destroying natural equality, substitutes, on the contrary, a moral and lawful equality for whatever physical inequality that nature may have imposed on mankind; so that however unequal in strength and intelligence, men become equal by covenant and by right.

J. Rousseau, *The Social Contract and Other Later Political Writings* (ed.) Victor Gourevitch (Cambridge University Press: 1997).

¹⁴⁰ J. Rawls, *A Theory of Justice* (Harvard University Press: 1971).

work. Kant supports the view of Rawls that this cooperation, to avoid the state of nature, is itself a moral imperative.¹⁴¹

If moral norms required by the PGC are consistently reasoned in a society, because of a commitment under a social contract based upon a conception of “justice as fairness” to do the moral thing in relation to other agents, what is needed is a methodology as part of a social contract for extraction where the norms intercept to form the principles of general application. This means that while the PGC provides the substantive justification, it is the procedural justification under a social contract that allows a legal system to move into the positive construction of the normative scope of rights and settlement of contested points about the principles they encompass.

Even with a community fully committed to Gewirthian moral principles, imagined by Beyleveld as Gewirthia, Beyleveld explains that there will be contested “interpretations and applications” that require authoritative public settlement. This is “the external problem of authority”, a community that is morally divided. The need Beyleveld recognises for some form of procedural justification for the imagined Gewirthia, is in keeping with the call in this work for an at least relatively legitimate process under the ECHR system:

Of course, the extent of moral pluralism in any community is a matter of degree, but, even where just one dissenting citizen believes that the legal regime is making a fundamental error (by reference to principles that the dissenter accepts but the regime rejects), it is incumbent on those who support the regime to explain why the dissenter is bound – that is, why even the dissenter should regard the legal regime as having authority.¹⁴²

The argument continues:

¹⁴¹ Taking the Kantian view, agents must as a matter of practical reason reject a state of nature based on unilateral will and submit to an omnilateral will determined by an allotted external power:

[Each agent in a community must] resolve upon [...] the principle that it must leave the state of nature [...] unite itself with others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognised as belonging to it is to be determined by law and is allotted to it be adequate power (not its own but an external power).

I. Kant, 1797, *The Metaphysics of Morals* (Cambridge University Press: 2003) 90.

¹⁴² D. Beyleveld and R. Brownsword, “Consent in the Law” (Hart Publishing: 2007) 310.

[O]ur particular interest is in clarifying how far we can run with a procedural justification to “bind in” those who dispute the authority of law or who claim to be free to follow their consciences rather than the legally authorised rules or determinations. After all, *if* the relationship between representative governing agents and citizens can be assimilated to that between a principal and a representative agent or treated as analogous to private governance within a club, citizens (just like principals and club members) will be bound by acts taken by their representatives or delegates within the scope of the authority. The fact that citizens did not know in advance what particular decision would be the outcome of the process, or that they would now prefer some other rule of determination, will not release them from their procedural bond.¹⁴³

While procedural justification is then necessary, that leaves the question of how to determine what the procedure is. Clearly, for the purposes of human rights agreements, it must be one that could comply with the PGC but that may allow more than once process for determination and decision-making. Beyond that, however, it is concluded that the consent of agents to a particular regime is the best relatively legitimate route to securing the PGC and stability. This is a stance endorsed by Beyleveld:

Proceduralism thus throws up its own questions for determination, and we seem to need a further level of proceduralism to resolve the matter. However, this threatens to become an infinite regress of one layer of proceduralism on another. At this level, we can say that the procedural turn that best serves the PGC is one to which agents’ consent.¹⁴⁴

As Toddington explains, this type of civil society via a social contract is necessary for the PGC:

In [Kant’s] *Metaphysics of Morals* the much maligned “mono-logical” subject finds the moral law within, and with the law comes freedom, duties and rights; but the *unilateral* determination of right on the basis of a principle as general as Kant’s versions of the Categorical Imperative can bring only conflict. The necessary implication of the destabilising potential of unilateral right is the move to an agreement to *institutionalise* the determination of Right and transform a myriad individual wills into an omnilateral authority acceptable to all. This achievement is the mark of Civil Society.¹⁴⁵

¹⁴³ *ibid* 310.

¹⁴⁴ *ibid* 320.

¹⁴⁵ Toddington, S. “The Moral Truth about Discourse Theory” (2006) 19 *Ratio Juris* 217, 227-228.

The reasoning that follows in Chapter Three proposes that the legal recognition for this comes initially via the democratic operation of governments and courts in nation states and, as necessary, international institutions.

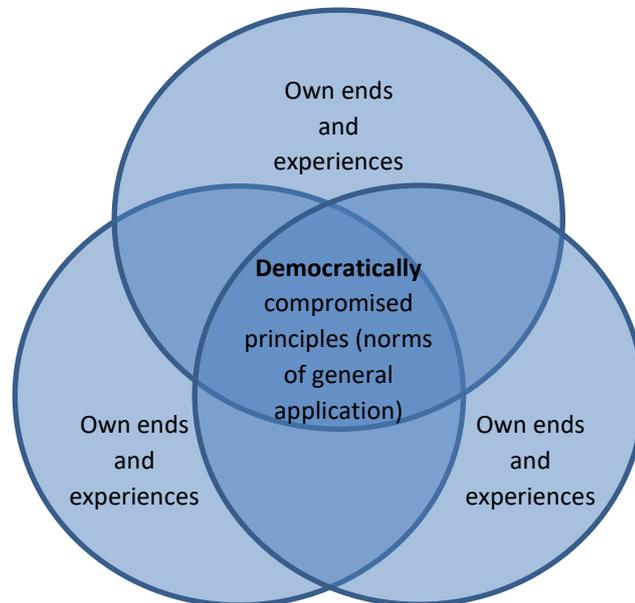


Fig. 2.12 Norms of Consistent Importance to Anyone's Ends Recognised Via Democracy

Any society must reach agreement on: (1) what potentially moral process is accepted for the construction of principles, those rights and duties that inform everything else as the foundations of justice and fairness; and (2) given it is infeasible for all agents to be directly involved in every decision, the appropriate placing of agency in institutions to: (a) represent that process of societal dialectic construction, (b) the translation into legal norms (proposal and production), and then (c) application of the principles of general application to particular circumstances.

For a functional society, there must be an accepted system able to determine authoritatively when a societal norm exists, which may be proposed and then produced as a legal norm. That system must also be able to ensure such general principles are executed correctly. The rational need for such a system, to avoid the alternative of conflict or failure to try and reflect justice as it would be reasoned under the original position, means that if effective in uniting citizens as free equals and avoiding conflict, there is already some degree of legitimacy to whatever system is adopted and its procedures.

The crucial question is the existence of a system to which a society defers, whether via consent or at least attachment.¹⁴⁶ Those subjected to rules enacted in a particular form should freely respect them despite any divergent personal views. They must accept the expression of the omnilateral will as above their unilaterally held one.¹⁴⁷ As Olsen and Toddington explain:

[L]aw must simultaneously be distinguished from voluntary, consensual and subjectively reasoned forbearance; but in a form in which the capacity to threaten and coerce is justified, and where the incentive to comply is justified notwithstanding the threat.¹⁴⁸

It is not feasible or helpful for such a system to rely upon only the interpretations of norms which all its agents have actively reasoned upon and expressed consent to form a collective principle. This would be too slow and cumbersome. Equally, not all agents can be involved in making choices about how to apply principles of general application in particular circumstances. As Hart explains, it is necessary that a legal system include accepted "secondary" or power-conferring rules.¹⁴⁹ These secondary rules empower particular bodies, following specific methodology or procedures, to pass or pronounce upon the law e.g. in the UK parliament passes law according to set processes and the courts interpret and apply that

¹⁴⁶ On the idea of "attachment" to a particular narrative or project that citizens accept see J. Balkin, "The Declaration and the Promise of a Democratic Culture" 4 *Widener L. Symp. J.* 167 (1999). While its argument is directed at to the American Constitution, under the ECtHR the same type of commitment is made in relation to shared European traditions of democracy and the declared human rights.

¹⁴⁷ It is for this reason that criticisms in relation to the operation of the ECHR are of importance even though, as it stands, most of the rulings made under the system are implemented. It is not enough for rules to be followed they should also be respected. The special status of the ECHR means there is a particular stigma associated with any failure to comply meaning particular care is needed in its interpretation. As commented on by Letsas in relation to the ECtHR:

[I]ts judgments have always enjoyed publicity and respect amongst contracting states. There are several reasons behind this success [...] First, that the Convention is widely treated (by states, individuals, and courts) as a source of important duties which courts must get right as a matter of law. Secondly, that the status of the ECHR rights as justiciable rights against the government is treated as morally significant when it comes to interpreting their scope and limits.

G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press: 2007) 39.

¹⁴⁸ H. Olsen and S. Toddington, "Legal Idealism and the Autonomy of Law", *Ratio Juris*, 1999, vo.12, 286, 291-292.

¹⁴⁹ H. Hart, *The Concept of Law* (Oxford University Press: 1961).

law subject to rules established in legislation and by the common law. That power is based upon an acceptance by society of the validity of the secondary rules, making it vital they are as clear as possible.¹⁵⁰

Therefore, the expression of legal autonomy in interpreting and applying law flows from “institutional autonomy” as a route to a legitimate expectation for others to follow decisions on those points. As Venzke explains, semantic authority provides a basis for the evaluation of legal judgments. It relates to, 'an actor's capacity to influence and shape meanings as well as the ability to establish its communications as authoritative reference points in legal discourse.'¹⁵¹

The question then is, what is the power conferred or institutional autonomy between national and international institutions in resolving questions about the democratic interpretation and application of human rights?

2.8 A System for Constructing Human Rights

2.8.1 Summary of the Findings on the Basis for Constructing Rights

The preceding analysis made a number of important points in relation to the construction of human rights under the ECHR. (1) The ECHR has an idealist rather than a positive realist undertone and supports natural rights. (2) The rights it guarantees must be developed in line

¹⁵⁰ This need is explained by Danilenko:

Domestic and international experience demonstrates that a legal system which lacks more or less clear criteria separating its content from politically desirable rules, moral rules or courtesy runs a risk of allowing a high degree of subjectivity in the ascertainment of the applicable rules of conduct. If the formal tests of validity delineating law from non-law are absent or are not sufficiently clear, the subjects of law, law-applying institutions and commentators will tend to invoke in support of their positions the most different rules allegedly constituting "law". The inevitable result of such a trend will be a general decline in the authority and normative power of the law. The law will lose much of its quality as a body of rules having a special binding character, which is lacking in all other social norms.

G. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers: 1993) 16, 17.

¹⁵¹ This is a question of the actors who enjoy the semantic authority to interpret law. On this see I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press: 2012) 63.

with the PGC. (3) As a route for the moral construction of justified rights, the PGC relies upon dialectic discourse between agents as they experience the real world. (4) Agents will, under the PGC, create systems for compromise on the interpretation of moral norms and to safeguard their application. (5) The legitimacy of these systems will be subject to: (a) the criteria for reason under the PGC, (b) coherence with already established principles and norms of the society, (c) compliance with secondary power conferring rules, (d) meeting government standards (e.g. democratic due process), and (e) empirical validity.

The implication of the relevance of dialectic discourse is that, while legal realism alone is dismissed as an appropriate basis for the rulings of the ECtHR to be legitimised, empirical evidence is still a very relevant to identifying the outcomes of the PGC's operation within society.

The role of institutions means that while secondary rules are not, as positive law would suggest, sufficient alone to provide legitimacy they are an important part of an agreement between cooperative agents for which the PGC recognises a need.

For any authority to claim legitimacy in relation to its decisions about the interpretation and application of law, it is as such relevant to consider: (1) compliance with secondary rules; (2) fit with empirical evidence; (3) potential compliance with the criterion for reason in accordance with the PGC; and (4) coherence with existing principles of the system and its form of governance (e.g. democracy).

Applying this to the three types of power within a state, some broad observations can already be made. These powers are: (1) the legislative power; (2) the executive power; and (3) the judicial power.

The legislative power to make and change the law should be made, in accordance with the PGC, by institutions that are representative of all agents within a society. It is the consistent norms that emerge through dialectic discourse in the real world that best represent principles underlying society under a social contract for freedom and equality. The representative institutions are the political bodies or, to be more precise, under the ECHR directly elected representatives such as a national parliament. They interpret the public will, to form laws in

accordance with a proper public (as opposed to private) government purpose which must include the moral norms of that society.¹⁵²

The executive power is to carry the laws into effect, that is to execute or carry out the laws with the assistance of a police force, a military force and the civil service, overseen and funded by the political institutions.

The judicial power is to interpret the law in accordance with the proper government purpose, and to apply the law to disputes and conflicts that arise between the state and the individual and to disputes and conflicts that arise between individuals. This power rests with the courts and tribunals.

In reality, as part of their task construing legislation national courts may be required to fill in any gaps and such gaps may raise issues of a moral nature. But it should do so in light of the object and purpose of the legislature, considering what could be a proper government purpose AND whether that purpose is in accordance with the evidence of the background circumstance of the law.¹⁵³ That evidence could include, for example: the face of the text, explanatory notes, statements made in a parliament, and reports from law reform bodies. In the UK the background evidence may include: Law Commission reviews and proposals,

¹⁵² Rousseau notes:

‘As soon as any man says of the affairs of the State "What does it matter to me?" the State may be given up for lost.’

J. Rousseau (n 139).

¹⁵³ What is looked for are the proper justifications for the law in question. As Evans explains, that the search is for ‘the public interest reasons in favour of the rule [...] that were thought to justify making it part of the law’.

Evans continues:

Whether these concerns actually motivated legislators is irrelevant. We can see this when we think how odd it would be for a lawyer to argue that the purpose of a particular provision was really to gain extra votes in a marginal electorate and that consequently it should be interpreted to best achieve that purpose.

J. Evans, “Controlling the Use of Parliamentary History” (1998) 18 *New Zealand Universities Law Review* 1, 19.

departmental green and white papers, select committee reports, and any government issued guidance.

Any interpretation should not, recognise new types of claim if it goes beyond the reasonably inferable government purpose or if the matter is too political e.g. when there are significant unresolved moral issues.¹⁵⁴ In those cases, while a court's choice may be one of the many candidates for further normative interpretation under the existing law, it really requires that selection between alternatives to be made by the legislature, as the representative of the public will. This is more often the case when the interpretation is in relation to human rights claims.

When interpreting the purpose of the legislature, the national court is well placed given: (1) an ability to reconcile how the law fits together coherently with other domestic rules; (2) appreciation of the process for proposing and producing legal norms; and (3) relative closeness to the relevant empirical evidence that must form part of interpreting the government (public as opposed to private) purpose of the legislature.

As stated above, when applying the law in resolving disputes between individuals and ensuring government decisions observe standards, the national court's closeness to the empirical reality is useful. Relevant standards include compliance with secondary rules, empirical validity, correct democratic process, and the criterion for reason under the PGC. While an international court can identify the more overt government failures, a national court is better placed to appreciate the more locally nuanced issues. For disputes between individuals, the national court is well placed to appreciate the realities those individuals face given the national customs, policies and practice. It is also required to act to resolve the dispute, there is no alternative but for the national court or tribunal to apply the law.

¹⁵⁴ Given that the authority of a court can be justified only in an instrumental way, even a national court would still have basis only for a weak form of judicial review leaving the law open to further interpretative activity by citizens and political institutions. On this, see T. Bustamante, 'On the Difficulty to Ground the Authority of Constitutional Courts: Can Strong Judicial Review be Morally Justified?' in T. Bustamante and G. Bernardo (eds.), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer International Publishing: 2016) 29.

There are, however, notable differences in an international system. First, international systems normally (note the possible exception of the EU Parliament¹⁵⁵) lack any directly elected political institution. This causes problems with making or changing the law on the basis of societal developments relating to new public understandings of principles or to changes in the environment for their application. Legislative power still, by necessity as well as choice, largely rests with national governments. The requirement for state consent (or consensus) permitting any alteration to an agreement thus forms a key element in international law. Second, international courts are far removed from the legislators who propose and produce the law, as the representatives of the proper public will, and distant from the empirical reality of the citizens of the different member states. Third, the international courts are not the only means for applying the international law. National courts and tribunals often remain the first line for resolving any legal disputes under an international agreement, trusted to do so without any right to appeal in the absence of significant evidence of a failure in that duty. These considerations must limit international judicial authority when interpreting and applying vague law under international instruments.

With regard to interpretation, the lack of political status means any international authority must surely be more cautious in any expanding “interpretation” of the commitments to which a state originally consented. For human rights in particular, it has already been noted that interpreting what falls within those widely defined higher principles often raises new possible moral constructions that are more suitable for political resolution. Interpretation that raises new principles is making choices on behalf of a whole society, a role still mostly reserved for states. Making leaps in the normative interpretation of a right without referencing agreement within the states as evidence, is arguably in reality akin to attributing a revised purpose for the membership. Such changes should be subject to clear evidence of some form of consent from the political organs of the member states, whether express or through showing a new common understanding of the normative scope of rights from state practice. National courts already impose limits on interpretations that are too political, for international courts that

¹⁵⁵ The EU Parliament is itself subject to some criticism of its representativeness and accountability, and is not purported to be a replacement for national political bodies.

are further removed from empirical awareness and accountability to the electorate, this must also be an expectation.

With regard to application, international courts face challenges because of their removal from the empirical position within particular states and also a lack of infrastructure to support the detailed investigations possible within a national system. Also, the need for international application to resolve disputes arises only where the national application has fallen short of a minimum standard. They are not the only means of resolution given the complete national systems of government.¹⁵⁶ Where there is any significant doubt about a settled standard under the agreement, the international court need not try to force one. As such, it may be expected that there will be substantial deference to national choices and rulings about implementation.

It is the role of the national democratic representatives to act as the embodiment of its citizens, making reasonable and fully informed decisions (with a fall back on national courts) on what constitute public rights and duties and how to apply them. The ECtHR must rely upon the practices in the states and trust the ability of the national government, including oversight by the national courts, to develop and safeguard rights in accordance with societal understandings and needs. For the ECHR law to be legitimate in terms of reflecting the public interpretations of norms, essential for compliance with the PGC, safeguarding democracy and ensuring effectiveness, it must be built upon the law as it is developed nationally by representative government. The ECtHR is not directly elected¹⁵⁷ and may not attempt to

¹⁵⁶ The national legal system has to be able to resolve all issues that come before it. It has no choice in an incomplete system but to fill-in any gaps left indeterminate by existing legal norms, while being mindful of any societal norms. The national court has the necessary authority to fulfil that function and is also well-placed to do so. It is within the particular society (in keeping with the principle of subsidiarity), and accountable element within the democratic system making decisions that are subject to review and possible reversal.

¹⁵⁷ Here, the author is mindful of media reporting describing ECtHR judges as “unelected”, when in fact they are elected by parliamentarians in the Parliamentary Assembly of the Council of Europe. That is, however, incomparable with direct election of political bodies.

gauge public opinion across the diverse range of member states itself.¹⁵⁸ The judge's personal views always should be minimised in their impact.

2.8.2 The Stages for Constructing International Legal Rules

This work suggests that there are two stages to the protection of norms under an international legal system. First, interpreting the meaning of the text and its normative scope in accordance with a proper shared government object and purpose. That interpretation, if it is to accord with a public purpose as the basis for consensual cooperation under an international social contract, must comply with the common goods as understood by citizens that the government (their representative) is trying to secure. Second, the application of those norms should be interpreted for the benefit of the public in any given situation.

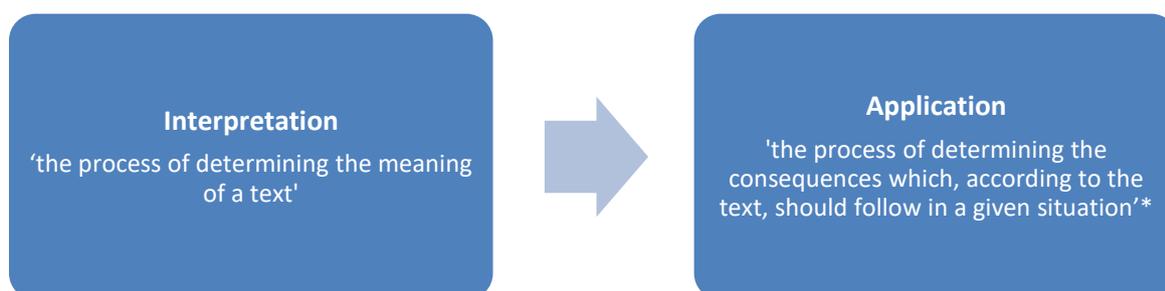
When governments create national legislation or enter into international arrangements, individual citizens are not a party to the agreement and particular circumstances cannot all be known to and considered by a government. The proper motivation is a government, as opposed to private, purpose i.e. a purpose for citizens at large. This work argues that for international agreements any meaning attributed to ambiguous text must be based on a public purpose and interpreted to reflect how citizens understand the public goods the state is securing via membership.

The ECHR government purpose, in relation to human rights, relates to the protection of commonly understood moral justified norms as developed by the operation of democracy across the membership. These principles are of general application, and must be disconnected from any particular conditions, including the identity of the person or the particular physical details surrounding the proposition. In contrast, the application of those principles of general application to particular circumstances is contingent upon variable conditions. Application no longer raises constant and universal issues upon which a "public" position proper may be taken, but rather requires the *in abstracto* principles to be applied *in concreto* to present and variable circumstances.

¹⁵⁸ Except in exceptional circumstances, such as the judgments being ignored of national court finding a clear conflict between interpretation or application by the government and public values.

As an example, an international treaty on environmental standards may have as its government purpose the strategic aims of combating climate change, conserving and enhancing natural capital, and preventing risks to health and wellbeing. These may form part of a public purpose, understandable by and relevant to the ends of all citizens. Such normative aspirations may be interpreted as the shared government purpose of the member states, provided there is evidence that they are accepted by those governments either expressly or by implication as falling under the remit of the treaty. Questions of the particular application, where the text is unclear, would relate to the matters beyond the reasoning of the public at large, such as the levels of reduction necessary, use of technology, balance against commercial interest, or application to a particular case or situation.

The stages suggested, taken from a definition by Harvard Law School, correspond to two points that are referred to in the ECHR itself¹⁵⁹ and also in many other international legal agreements:



*Fig. 2.13 The Harvard Law School Distinction between Interpretation and Application*¹⁶⁰

Distinguishing between the interpretation and the application of norms in international law is not, as Gourgourinis explains, without its critics:

The difference between the interpretation and application of norms in international adjudication has been an obscure issue in international legal doctrine, the two terms

¹⁵⁹ ECHR Article 32 'The jurisdiction of the Court shall extend to all matters concerning the *interpretation and application* of the Convention and the Protocols thereto which are referred to it as provided [...] [emphasis added]'

ECHR Preamble a 'common understanding and observance of the Human Rights [...].'

¹⁶⁰ Harvard Law School, 'Draft Convention on the Law of Treaties: Article 19. Interpretation' reprinted in (1935) 29 *AJIL* (Supplement: Research in International Law) 937, 938–39.

frequently being employed interchangeably. It is hence occasionally said that a distinction between interpreting and applying international norms is difficult, or even impossible, to draw. For instance, Sir Frank Berman¹⁶¹ has remarked that in international law:

“[T]here is a virtually inseparable link between interpretation and application; jurisdictional clauses in treaties invariably cover, as a portmanteau category, “disputes over the interpretation or application of the present treaty”, in such a way that the competent tribunal is not required to distinguish the one from the other.”¹⁶²

This work concludes that, while in practice the line may sometimes be blurred, there is a theoretical distinction between interpretation and application. It is suggested that interpretation relates to identifying the understood public purposes which states continue to act to protect via an international treaty. For human rights, those public purposes would be the principles of general application understood as being for all (as opposed to smaller groups) and essential to freedom. Those norms are accepted by all citizens as universal and enduring, having been constructed by the dialectical reasoning of agents while interacting and finding a point at which all individual ends and experiences necessarily intersect. The norms understood by society to have that basic status have continued to evolve since the ECHR was entered into, and so too must the interpretation that may be attributed to the government purpose in entering and then persisting with a treaty for their promotion. Just as when the ECHR was first entered into there would need to be an interpretation of the public understandings behind the common government purpose then: today, where ambiguous text permits, modern, common understandings may prevail.

In contrast, the application relates to how those common understandings of public norms are to be executed in given situations. In human rights, how the principles of general application are to be applied in particular circumstances.

A helpful metaphor is provided by Rousseau who contrasted his resolving to walk towards an object with his feet actually carrying him there.¹⁶³ One is in an *in abstracto* abstraction to

¹⁶¹ F. Berman, “International Treaties and British Statutes” (2005) 26 *Statute LRev* 1, 10.

¹⁶² A. Gourourinis, “The Distinction between Interpretation and Application of Norms in International Adjudication” (2011) 2 (1) *Journal of International Dispute Settlement* 31.

¹⁶³ Rousseau:

reach an object, the other the *in concreto* delivery. We may all generally agree that we want to secure housing for all¹⁶⁴, but the ways in which we can practically achieve that public purpose is contingent upon variable circumstances between cases and in different states.

The crucial point to consider next is where the institutional authority to make determinations on interpretation and applications lies within international agreements. This work argues that: (1) international judicial interpretation must be based upon common understandings of the government purpose shared by the principals, as evidenced by government agreement or practices that establish the agreement of the parties regarding its interpretation; whereas (2) determination on the adequacy of the particular application of a publicly understood purpose comes from compliance with standards that enable independent oversight by a court tasked with international judicial review of national delivery (e.g. the ECtHR).

The common government purposes of a treaty are first set by the terms entered into by its principals. In signing the agreement, they were motivated by ends and experiences understandable to them as political representatives of the public at large, so non-lawyers.¹⁶⁵ The reaching of an agreement to cooperate was not the result of any rarefied process of legal reasoning for which only lawyers are trained. As such, the role of international judges in the interpretation stage is to settle the meaning of a term based not upon any technical process of legal reasoning but upon a process that seeks to reasonably identify the government purpose as understood by and uniting its body of principals. It is this shared government purpose that must first direct a court as to its mandate in overseeing its execution, hence they are the first stage in any judicial process. If an international treaty is to remain relevant to serving the public good in question, the government purpose may be interpreted beyond how

Every free action is produced by the concurrence of two causes; one moral, i.e. the will which determines the act; the other physical, i.e. the power which executes it. When I walk towards an object, it is necessary first that I should will to go there, and, in the second place, that my feet should carry me.

J. Rousseau (n 139).

¹⁶⁴ It is worth noting that this would require further interpretation of the normative scope of that principle e.g. would the right cover making housing affordable or include paying for that housing and, if so, what would be the general point at which the public reasons there is a duty to pay?

¹⁶⁵ Albeit that they will likely have secured legal advice on the possible implications for application during the drafting.

it would have been originally understood to incorporate any new understandings about that government purpose. Evolution in understanding may be inferable from subsequent agreement or current practices of member states, showing that the common understanding between the principals has developed.

What is a reasonable process for settling upon the government objects as they are now understood as continuing to unite the principals under a treaty may be identified by: (1) established rules of international law such as express state consent or implied consent through consensus; and (2) the original terms and the nature of the particular agreement, whether found expressly in terms of the treaty or implied from its overall object and purpose and negotiation. This will be explored in Chapter Three.

When it comes to the application to secure the interpreted public understandings, it is well within the established normal remit of courts to determine the requirements for execution and to then assess the adequacy of delivery. There would, otherwise, be no effective agreement. However, a reasonable approach to that judicial review of delivery must still be in accordance with the overall object and purpose of the undertaking and may allow a significant margin to states in their choices and expected standards must still be influenced heavily by the norms and practices of principals showing any public agreement relating to delivery of the government purpose. This too will be explored in Chapter Three.

As an example, taken from wider international law supporting the argument that there are two steps raising different types of consideration for an international court, the examination will use the right of free movement of workers within the European Union.¹⁶⁶ In its case law on this as a government purpose driven by a public understanding, the Court of Justice of the EU (CJEU) has interpreted the right to movement as meaning “economic activity”. That was the CJEU identifying the understanding of the principals of the shared government purpose

¹⁶⁶ For a paper on the development of law on the free movement of workers, see V. Hatzopoulos, "The Concept of 'Economic Activity' in the EU Treaty: From Ideological Dead-ends to Workable Judicial Concepts" Department of European Legal Studies, Research Paper in Law 06 / 2011 (2011) available at https://www.google.co.uk/url?url=https://www.coleurope.eu/system/files_force/research-paper/researchpaper_6_2011_hatzopoulos.pdf%3Fdownload%3D1&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwj4lcf227XRAhWBUBoKHQH3BDsQFggWMAA&usg=AFQjCNHXa3RqivvRRMWOHtX6UDmOTNR_uw accessed 9 January 2017.

to create a free market, including movement of workers. That interpretation was developed as it was reasonably understood by its principals (the EU Member States). It was not the CJEU itself deciding this should form an aspiration as a public normative expectation for the public good but rather a response to what it reasoned the EU Member States had initially agreed to as an understood object and how those states could now be taken to understand its extent.¹⁶⁷ The CJEU could have interpreted the text to include workers to include “social activity” but to have done so without considering whether this was a shared understood government objective would have been to expand the agreement beyond what its members consented to on behalf of citizens in general to perform a public good. Only when it came to what was meant by being economically active, a technical question beyond the understanding of all people, requiring evidence and expertise in relation to particular facts and circumstances, did the consideration shift to application and the CJEU judges begin making determinations about the standards for execution.

¹⁶⁷ The ability for original understood government purposes to develop over time as they respond to evolving societal expectations and realities is reflected in the case law around this point:

From a 'market citizen' to 'European social citizenship'

Freedom of movement of workers was established as a core instrument at the service of the single market, helping to redistribute labour from Member States with high rates of unemployment to those with a shortage of labour. However, besides this economic aspect the free movement of workers also has a social aspect, reflected in workers' desire to raise their standard of living. Freedom of movement shifted from being a mere instrument of economic integration to serving a broader objective of EU integration, based on EU citizenship and thus on individuals, to be placed at the heart of the EU [CJEU judgment of 03.07.1986, C-66/77 *Lawrie-Blum*, para 12]. The CJEU stated that "Union citizenship is destined to be the fundamental status of nationals of the Member States" [CJEU judgment of 20.09.2001, C-184/99 *Grzelczyk*, para 31] and started basing the equal treatment principle on EU citizenship status, so that worker status was no longer the sole criterion opening up access to social benefits to EU citizens in their host Member State. The case law of the CJEU, but also EU legislation on free movement, shaped not only in economic but also humanitarian terms [S. O'Leary, "Free Movement of Persons and Services", in *The Evolution of EU Law*, P. Craig and G. De Búrca (ed.), 2011, p. 510], have brought about a genuine paradigm shift, from a concept of economically active citizens as actors in the Single Market to a notion of Union citizenship ensuring a quasi-complete inclusion in the national social community [S. Giubboni, "Free Movement of Persons and European Solidarity" (2007) 13(3) *European Law Journal* 368].

E. Poptcheva, European Parliamentary Research Service, 'Freedom of Movement and Residence of EU citizens: Access to Social Benefits' (6 October 2014) <[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI\(2014\)140808_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI(2014)140808_REV1_EN.pdf)> accessed 23 September 2018, page 4.

The argument developed by this work in relation to the distinction between the two stages is not to deny that it can sometimes be challenging to differentiate between interpretation and application, but that there is no reason for a court not to reasonably attempt to do so.

This work suggests that a question moves beyond interpretation only if it relates to applying a public purpose to particular situations rather than general application. Under an international agreement, interpretation is concerned with those areas in which it is in theory possible to unite all agents behind a norm, and to then determine how far such united position has been reached by the political-wings¹⁶⁸ across the membership. Until interpretation of public norms is settled, new norms require a political interpretation of societal expectations as constructed by government. Only once the consideration shifts beyond the reach of the general public to the application to individual cases or particular circumstances, does the question move away from raising needs upon which the public could be expected to effectively reason. This application stage may require expert knowledge and relevant experience. The matter is no longer purely political when it requires particular skill or expertise to appreciate the different possible perspectives of the correct outcome or not everyone will appreciate the details of an individual case. This occurs when, for example: (1) expert knowledge, skills and experience on a particular circumstance is required beyond that of the of “general” public reasoning; or (2) the consideration is only in relation to certain individuals or groups.

When there is any doubt about whether an issue raises questions of interpretation or application, it is suggested that the question is presumed first to be one of interpretation. It is the states that must first have given the authority to an international court to secure shared government purposes as understood by them. Unless there is a means to argue for a settled position on what those common understandings relevant to a particular case are, it cannot be acceptable for a state to be held accountable for non-application of any that remain disputed. An international court must work from a settled minimum interpretation of the

¹⁶⁸ Responsible for legislating as the representative of and with the executive authority to bind its citizens.

rights and duties to which states are subject under an agreement, as a first stage, before it can move to application as a second.

Another given reason for resisting formal separation of interpretation and application, identified by Gourgourinis, is one that, arguably, instead emphasises the very distinction between the treatment of interpretation and application that this work concludes is necessary:

A [...] stance favouring the non-distinction between interpretation and application has been taken by Serge Sur who viewed interpretation of as ‘omnipresent in the judicial activity’, extending ‘to all that comes under the legal process’ and thus, fully encompassing all possible aspects of application.¹⁶⁹ *Perhaps, then, the problem lies in the fact that reference is often made to the position that ‘interpretation is an art, not a science’ and thus, not being subject to black-letter rules but rather relating to presumptions,*¹⁷⁰ so that distinguishing between two legal concepts (interpretation and application), one of which appears to escape full apprehension by legal science (i.e. interpretation) may appear feasible only in a limited manner [emphasis added].¹⁷¹

This work would note that the difficulty of applying legal science to interpretation cannot be a reason to simply ignore that it raises different considerations. Principals can have bound themselves only to an agreement to which they have consented. They do so because of a public government purpose. It seems appropriate that any interpretation of the extent of that undertaking may only go so far as a possible understanding of that government purpose shared by the member states of an agreement. The fact that “presumptions” may need to be made about why principals enter into and continue with agreements and what the common understandings are does not mean that no attempt at a reasoned approach should be made. Nor should the labelling of the outcome of any reasonable approach by the ECtHR to interpreting the understood common government purposes as still being mere “presumptions”, undermine the relevance of such an approach in showing more legitimacy

¹⁶⁹ S. Sur, *L’interprétation en Droit International Public* (Librairie Générale de Droit et de Jurisprudence, Paris 1974) 31.

¹⁷⁰ Gourgourinis notes as examples: R. Jennings, ‘General Course on Public International Law’ (1967) 121 RCADI 323, 544; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn Routledge: 1997) 365; A. Aust, *Modern Treaty Law and Practice* (CUP, 2000) 184; and C. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn CUP, 2005) 33.

¹⁷¹ A. Gourgourinis, “The Distinction between Interpretation and Application of Norms in International Adjudication” 2 (1) *Journal of International Dispute Settlement* (2011) 31, 32

than would otherwise be present. This work would also argue that, given the acceptance of the need for legal authorities to provide coordination, provided the approach taken is one that is reasonably in accordance with the overall object and purpose of an agreement there is then an expectation that the presumptions produced are binding on the principals as part of the necessary consequences of agreeing to part of the system.

This work will argue that liberal democratic political reasoning, representing as it does the procedure by which agents engage in moral societal constructivist reasoning in accordance with the PGC, could represent part of an objectively justifiable process for normative interpretation of the rights. Democracy is also directly referenced in the ECHR Preamble, and has an impressive pedigree as an effective system for the states that are members of the treaty. What at first sight may seem, as referenced by Gourourinis, to be nothing more than “presumptions” are not so if they are drawn from liberal democratic government understandings, with a process of determination by which the ECtHR could reasonably be seen to utilize the national democratically constructed interpretations.

From the above, the terms *in abstracto* and *in concreto* can be helpfully incorporated into a definition of the two different stages of legal considerations by the ECtHR:

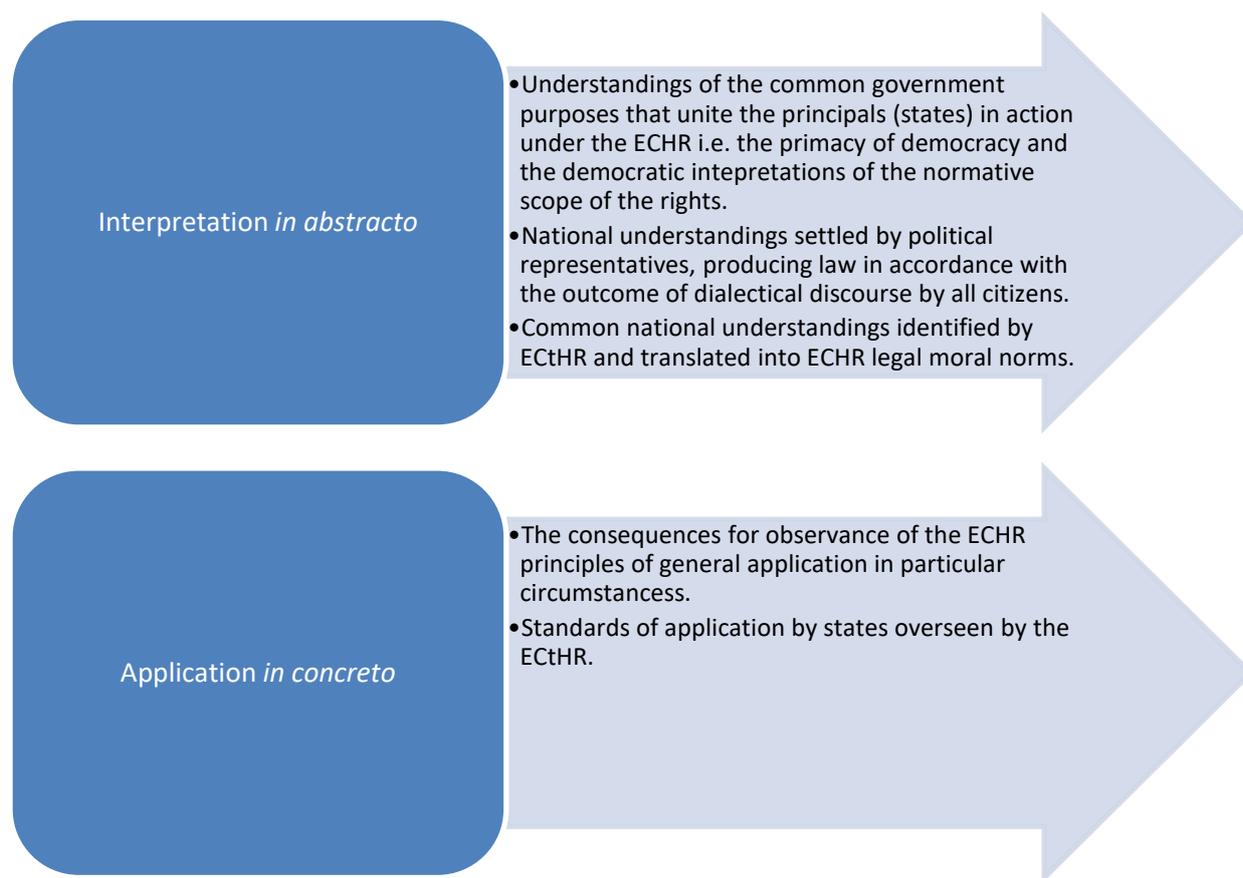


Fig. 2.14 Interpretation as an *In Abstracto* Exercise and Application as *In Concreto*

2.8.3 Stage One – Interpretation

The first consideration for the ECtHR relates to the *in abstracto* interpretation of the normative parameters of the ECHR right at issue. This must be the first layer of consideration, representing the understanding of the shared government purposes of the member states to which they consent to apply. It is these common understandings – the enduring and underlying societally constructed norms – that, provided they could comply with the PGC, constitute:

[T]he basic modes of normativity to which all other concepts must adjust. They are fundamental not only to the law but to all other normative phenomena we might associate with it, such as morality and social or cultural convention. The concepts that fall into this category form the basic notions of right, duty, liability, competence and so on, and what is implied or entailed by the employment of these ideas in the analysis, characterisation or adjudication of disputes. The associated forms within

which these concepts operated are also part of this first tier of concepts which include notions like rule; principle; scaling; weight and status.¹⁷²

If the PGC holds true, then agents in society are, while perhaps not knowingly, able to reason in an objective and thereby justified manner on the norms they hold to be morally true as rights and duties for all. While *in abstracto* these principles of general application are formed by thinking upon every day experiences. As stated earlier, norms that must be recognised by “everyone” simply by the internal reasoning possible by virtue of being a human agent living in a society are far from black letter and measurable by any scientific standard. But they are objective and morally justified, the agent having gone beyond thinking only subjectively. This means that in relation to interpretation of those moral norms anyone’s ends demand everyone’s interpretations (provided they could accord with the criteria for reason) and could be at least as valid as those of any lawyer or court. [Although legal expertise would be essential to ultimately translate societal expectations into workable legal norms ready for application.¹⁷³]

In identifying the scope of the rights, the ECtHR must be respectful of the more local political systems for reaching a compromised dialectically contingent understanding of the normative requirements. These local systems feed-up the principles held by individual agents to an increasingly higher level – ultimately the ECtHR itself. It becomes more of a challenge to find the point at which reasoning intersects as the size of the group of people forming the relevant “public” increases and ends and experiences become more varied. How and where the ECHR system accepts this political compromise at an ECHR level can be achieved is the central

¹⁷² H. Olsen and S. Toddington, “The Scandinavian Roots of a New Approach to Legal Knowledge” (2012) 4/139 *Retfærd* 57, 65.

¹⁷³ Olsen and Toddington explain:

Law regulates interaction and association. It directs, choreographs, and translates linguistically and conceptually the interaction of particular individuals with particular things in particular situations [...] In legal doctrine and practice, everyday objects and contexts are represented precisely and formally in ways which serve the purposes of transforming social interaction into legal interaction.

ibid 67

element of appreciating what aspects the member states and the ECtHR are to perform in relation to interpretation of human rights. As Collins comments:

The pre-emptive capacity of the law seems to depend upon incorporating, centralising and streamlining law-determining processes or institutions; substantive autonomy eventually implies – indeed, necessitates – institutional autonomy. In this respect, *a legal system's "secondary rules" would need to offer guidance that goes beyond identifying legal norms (and, perhaps, clarifying the relationships between them), having to outline procedures and processes, not only for determining the validity and meaning of those norms, but also for clarifying which official or authorised body has the ultimate say in any continuing conflict – that is, whose view is ultimately to be determinative [emphasis added].*¹⁷⁴

Any part of a legal system, including the ECtHR, must therefore work within an effective, wider system by which a society organises itself and reflect an appreciation of the reasoning of its agents in that system, if it is to effectively work as 'transformative, dynamic and organic' with the 'endless variety of [agent's] normative concerns and expectations'.¹⁷⁵ That system will require not only a judiciary, but also a political wing.

¹⁷⁴ R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 158.

¹⁷⁵ H. Olsen and S. Toddington (n 172) 58.



Fig. 2.15 Elements of Government

Given all of the different elements that influence a society, it cannot be presumed that the legal system forms the best route for representing the will of agents in relation to underlying human rights and such an assumption would be particularly problematic for an international court. It is the political system that does so, which forms a coordinated set of principles, laws, ideas, and procedures relating to a particular form of government (for example, liberal democracy).¹⁷⁶

This work argues that a legal system must respect that political representatives are primarily responsible for reflecting the interpretations of agents regarding the generic moral imperatives, the principles, that unite a society. This leaves the question of how conflicting

¹⁷⁶ For a challenge to the view that judges are better moral reasoners than democratically elected legislators see J. Waldron, "Judges as Moral Reasoners" (2009) 7(1) *International Journal of Constitutional Law* 2. The article examines whether the ability of judges to engage in responsible and high-level moral reasoning is adversely affected by their duty to apply the law and legal doctrines. It also considers the extent to which reasoning morally on one's own account differs from doing so on the account of society as a whole, and whether legislatures are better able to conduct the latter task because of the dynamics of large group decision-making.

views reached by political representatives in the different member states are to be reconciled by the ECtHR.

2.8.4 Stage Two – Application

The second stage of the ECtHR decision-making process relates to the *in concreto* application of the *in abstracto* principles constructed by the political representatives of agents, when consideration shifts from generic evaluations of what we should all expect onto particular evaluations relating to individual cases and specific problems. This is at a less fundamental level, moving beyond the general societal reasoning that all/any agents are inherently able to consider by simple virtue of being a moral agent in a society. This reasoning requires agents to have access to specialist evidence, expertise and experience.

Not “everyone” will understand the peculiar issues raised by a case without having relevant facts and expert advice. The type of reasoning is also often completely removed from the everyday reasoning in which all agents engage. There is also a need to take into consideration the existing rules of the wider legal system, in order to ensure consistency-restoring review as required by the rule of reason and a coherent body of law.

These types of issue raise the areas where oversight of the political process is entrusted to judicial review by authorities such as the ECtHR, requiring the particular skills of lawyers or legal technology. A court will have the role of providing legal oversight of political reasoning at this stage, through a judicial review of the appropriateness of the evidence used, ensuring that the established process to reason on point of application was exercised, and checking for consistency of the outcome with the wider law.

This leaves the question of when the ECtHR can challenge state decisions on application. Some decisions would clearly not comply with the criteria for reason under the PGC by applying out of date knowledge, being inconsistent with the principle they claim to uphold, not fitting with the wider existing legal system, making factual errors, or being based on reason that could not be accepted by all, irrespective of personal characteristics (for example, that one gender is more valuable than the other or that one sexual preference is the only right one). Others may not have followed a procedure that considered appropriate evidence or

applied democratic principles and due-process to decision-making. The ECtHR may then act but, outside of that limited number of cases, it is not immediately clear prior to further analysis when the Court may challenge the democratically recognised national political representatives' positive choice between a number of potentially reasoned responses. The state must enjoy a significant margin, particularly where there is a lack of consistency in the standards shown by the norms and practices across the member states.

2.9 Chapter Conclusions

None of the above should be taken as a view that the ECtHR can avoid becoming involved in or even settling debates that raise moral elements. Rather, it suggests that the approach of the ECtHR must endeavour to make a distinction between: (1) the types of moral questions best determined purely by political process representing the societal construction of generic norms as underlying public principles (subject only to the extreme choices that are against the criterion for reason under the PGC or wholly unrepresentative of public morality on the issue); and (2) questions concerning how to respond to specific cases and circumstances beyond the understanding of all agents to generally reason upon when applying the principles. This latter type of question, which this work terms the application, may be subjected to judicial review of the decision-making process used by a state and of the reasonableness of the ultimate decision made. Bogdandy and Venzke argue:

The fact that a judicial decision implies a choice between alternatives has prompted some authors to describe judicial decision-making generally as political. This qualification also emphasises the multitude of interests and motives that can guide the judge in her decision. Still, the realisation of judicial choice and discretion does not prevent the distinction between judicial and political law-making. Rather, that differentiation credits the fact that *fundamentally different institutions are at work, operating in fundamentally different legal settings* [emphasis added].¹⁷⁷

¹⁷⁷ A. Bogdandy and I. Venzke. *In Whose Name: A Public Law Theory of International Adjudication* (Oxford University Press: 2014) 109.

It may not always be possible to neatly separate the stages, but having structured institutional rules provides the best available safeguard and a court must be trusted with applying them as fairly as possible.¹⁷⁸ Collins comments:

The point is not that moral and prudential reasoning fail to enter into elements of the process of legal reasoning, or the law's application and enforcement [...], but only that the law be capable of providing a *point of finality* through the decisions or acts of authorised officials – so long as there is *acceptance of the structural and institutional rules* capable of sustaining the finality of legal reasoning then law can be sustained at the systematic level as a coherent, autonomous system of *public practical reasoning* [emphasis added].¹⁷⁹

To summarise, even with some agreement on what are the highest-level norms for a society and codification through legal agreement (as in the Articles of the ECHR), human rights are invariably stated in general terms. This leaves many aspects of their interpretation and application unclear and open to substantial debate. This not a criticism; it would be impossible to have drafted them to be complete. As treaties are durable pieces of legal text that can only be amended by international agreement, they may even be intentionally drafted at a high level of generality.

To conclude this chapter, progress has been made by the identification of: (1) moral constructivism through practical reasoning (specifically the PGC) as the substantive justification for human rights under (at least) the ECHR's conception of justice; (2) the negative role of the ECtHR in ensuring an unreasoned response does not stand; (3) the need for moral agents to consent to resolve uncertainty about the positive construction of dialectically necessary (or at least contingent) public norms through a process for coordination within a society; (4) procedural justification (specifically liberal democracy) forming the basis for the legitimate authority to select between candidate norms; (5) the legislative political authority as the interpreter of the general societal norms, translator into legal norms, and funder of the executive; (6) national courts been required to fill gaps left by the legislature with interpretation and application but refrain when political questions are

¹⁷⁸ See Article 56(1) ICJ Statute: 'The judgment shall state the reasons on which it is based'.

¹⁷⁹ R. Collins, 'Modernist Positivism and the Problem of Institutional Autonomy' in R. Collins and N. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge:2011) 32.

raised or there remains significant debate; (7) the reasonableness of political interpretations being subject only to the extreme choices that are against the criterion for reason under the PGC or wholly unrepresentative of public morality on the issue; (8) decisions by the legislature and its executive branches on particular application of principles been more readily judicially reviewed (in accordance with the PGC, empirical reality, use of expert evidence, due democratic process and reasonableness); (9) the role of international agreements to perform particular government objects and purpose; and (10) international courts being more cautious when interpreting the meaning of law to refrain from making purely political choices and being more cautious when challenging the national government application if procedural requirements for reasoned decision-making were met.

However, it is only by closer consideration of the nature of national systems and international law that the more detailed elements of the government object and purpose of the ECHR system and its consequences for the ECtHR's role can be appreciated.

3 Chapter Three

Placing Legitimate Authority

Legitimate authority in states and delegated
authority to international bodies

3.1 Introduction

Chapter Two suggested the need to adopt a form of moral constructivism in accordance with the Gewirthian ‘Principle of Generic Consistency’ (PGC), as the basis for grounding the claims to the universality of human rights under the European Convention on Human Rights (ECHR). In a dialectically *contingent* sense, the PGC is the conception of justice that all the members of the ECHR must logically have accepted in acknowledging the existence of rights and, reciprocally, the existence of duties to rights bearers.

The most concise synopsis of this argument is that if an agent accepts that other agents hold certain rights, then they also accept that those agents are entitled to whatever generic conditions are required to exercise those rights. This is equivalent to affirming the PGC itself and this foundational principle provides a starting point for a concept of legitimacy. Interpretations and applications of the ECHR rights must be capable of being framed as justified moral norms in general accordance with the PGC.

There might very well be a plurality of more or less reasonable (PGC-compatible) interpretations of human rights legislation, and a systematic approach to developing the normative scope of the rights in question would be alert to developing a method for choosing between a variety of plausible reasoned views. To avoid begging the moral question in these situations by recourse to metaphysical argument, constructing the optimum normative solution to these problems must be based on a procedure that provides a “procedural legitimacy”.¹⁸⁰ Such a procedure must accord with the PGC, be accepted by the agents in a

¹⁸⁰ For instance, Korsgaard characterizes Kantian constructivism as law being formed through process (procedural realism) as there ‘are answers to moral questions *because* there are correct procedures for arriving at them’ not because there are independent moral truths

What distinguishes substantive from procedural realism is a view about the relationship between the answers to moral questions and our procedures for arriving at those answers. The procedural moral realist thinks that there are answers to moral questions *because* there are correct procedures for arriving at them. But the substantive moral realist thinks that there are correct procedures for answering moral questions *because* there are moral truths or facts that exist independently of those procedures, which those procedures track.

Korsgaard, C., ‘The Sources of Normativity’ (The Tanner Lectures on Human Values, Cambridge University, 16 – 17 November 1992) <https://tannerlectures.utah.edu/_documents/a-to-z/k/korsgaard94.pdf> accessed 16 December 2017, 38.

society on this basis, and thus require decisions to be made in the interests of important agent rights.

According to the ECHR, it is the operation of liberal democracy that provides procedural legitimacy to the interpretation and application of the rights. The role of the European Court of Human Rights (ECtHR) is oversight of the operation of democracy, guarding against clearly unreasoned decisions, and to some extent ensuring the development of a “common” understanding in relation to interpretation and consistency in standards for the approach to application between the member states.

Phase Three of this project requires a more detailed development of the concept of institutional authority under a procedural justification (procedural legitimacy) of legal systems and an assessment of the extent to which, over time, authority has in part shifted from states to international bodies. This chapter thus begins with consideration of state authority, followed by the more difficult task of explaining the basis for recognising international authority.

If authority to settle matters is required to unify the interpretation of and to ensure proper application of norms between interacting agents, then the evolution of states governing that process within particular bounded territories could be predicted as a means to enable agents to live harmoniously. The acknowledgement of the need for societal co-ordination under an a least hypothetical social contract by those who are to be governed by a system and its procedures provides a general rationale of social legitimacy. If it accords with the PGC, which would itself call for such coordination, that system also has morally justified legitimacy.

However, providing reasons for developing shared moral norms and cooperation between agents in an *intra-state* convention is far more challenging than at state level as it must appeal to a much larger collective, and its authorities must be increasingly remote from the everyday lives of agents. Three things might be noted: (1) coercion is not a reasoned system for securing law; (2) the moral norms interpreted as general duties in one society may represent only a “candidate” view on what is the right universal construction under the PGC; and (3) local understanding and application of principles may vary because of normative and cultural

differences between societies. It is difficult¹⁸¹, in the absence of active and deliberate agreement between long established states to give a plausible coordinatory argument for the existence of consent to external intervention.

At international level, this perhaps explains why, outside of a treaty agreement, instances where a call to action by multiple-states against another under a type of international social contract has been successfully galvanised, have been restricted to situations raising: (1) interpretations of normative values with near unanimous acceptance across different states, cultures and types of political system; and (2) actions by a state so clearly in opposition to those principles that they are in breach of what *any* state could possibly reason in response to the issue it is facing.

It follows that the ECHR project, as a more ambitious undertaking than that most basic endeavour, must rely upon some express agreement by agents for international interaction. It is the initial express agreement that gives the ECtHR greater potential scope in making binding decisions. Specifically, the agreement of contracting states (as the representatives of citizens) consenting to a type of enhanced co-operation. A state would do so because it represented something of value to the way of life of its citizens. As the principals to a contract giving the ECtHR power as an agent to secure a public good, states must accept international coordination can better deliver their government purpose. But it is the delivery of that government purpose that motivates them to give the ECtHR its mandate. Therefore, by inferring what overall government object and purpose brought the member states together, the limits of authority given to bodies overseeing the aims of particular international agreements may be determined and acknowledged. That acknowledgement would include routes for that authority when interpreting evolving understandings of the government purpose, and the limits for judicial review in relation to application of norms.

The central theme of liberal democracy as the express shared value of the ECHR has already been noted, but this chapter develops the more detailed points that may be reasonably

¹⁸¹ Although not impossible with *in extremis* human rights violations.

inferred from the text of the Convention and its negotiation to support the delivery of the intended co-operation between its contracting states.

3.2 The Importance of State Consent

Traditionally, there has been an acceptance that nation sovereign states are completely autonomous.¹⁸² In turn, international law was viewed as being built entirely upon state consent. However, given the recognition by this project of certain moral norms or objectively true forms of rationality in Chapter Two, such a position is untenable in relation to the underpinning argument. More modern reasoning instead accepts that states are no longer viewed as the foundation for international law. Their very legitimacy is in fact grounded in their recognition as being in accordance with the conditions set by global law and acting within the areas of competency that fall within the national domain.¹⁸³ There is the moral

¹⁸² The centuries of roughly 1500 to 1789 saw the rise of the sovereign states under, which the citizenry of an independent state is defined as sovereign. Collins suggests it was only sometime between the mid-nineteenth and early twentieth centuries that the older traditions of the law of nations developed into the systematic, institutionalised practice in accordance with the modern understanding of international law. R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 19.

¹⁸³ As Kumm argues:

[N]ational constitutional legitimacy is not self-standing. The legitimacy of national constitutions is not only a matter between “We the People” and the national constitution. National constitutional legitimacy depends, in part, on how the national constitution is integrated into and relates to the wider legal and political world. Domestic constitutional law has to be embedded in the right way in an appropriately structured international legal system for it to be legitimate. One of the core purposes of international law is to create and define the conditions under which a sovereign state’s claim to legitimate authority is justified. States have a standing duty to help create and sustain such conditions and an international legal system that is equipped to fulfil that function. The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide.

M. Kumm "The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law" (2013) 20(2) *Indiana Journal of Global Legal Studies* 605, 612.

need for a hypothetical international social contract, as Rawls would argue under the veil of ignorance and in the original position we could not know which state we would live and must rationally recognise basic rights that are universal.

Yet given the challenges of interpreting and applying those universal truths as set out in Chapter Two, it has been further argued that routes for human compromise resolving differing reasoning must play a major part in the actual interaction of agents.¹⁸⁴ In international law, the construction of law still relies upon a means of resolving which different expressions of universal values form the global standard. Without a form of collective-government to provide a source of authoritative constitutional values, the extent of international law rules would be very limited. The majority of the body of international law must be founded upon the identification of some prior social institutionalisation accepted by a body of citizens. For now, it remains the case that this collective of cooperating agents is primarily located at state level, the level at which most normative construction of at least contingently justified moral rights occurs.

He summarises the argument: '[T]he foundation of constitutionalism is the idea of free and equal persons governing themselves through law as part of an international community of equally sovereign states.'

M. Kumm "Constituent Power, Boundaries and Identity: On the Justificatory Depth of Constitutionalism - A Rejoinder to Neil Walker" (2016) 14(4) *International Journal of Constitutional Law* 914.

¹⁸⁴ Walker notes the role played by the exchange of reasoning on universal laws and different forms of voice and accountability in relation to settling their requirements:

Global law, I argue, embraces the two major templates of law's mode of intervention in the world. It includes both *ratio* – law understood as enjoying a presumptive rationality of its own, and *voluntas* – law understood as an expression and instrument of human will [...] [T]here is a *non-metaphysical universalism* according to which different universal forms of rationality within and across different species and sub-species of global law as *ratio* engage with one another in a vocabulary of universal normativity, understood as involving the open exchange of always provisional claims or accomplishments rather than the closure of a definitive 'covering-law'. What we find here is the development of new legal trends that are presumptively cosmopolitan [...] And [...] global law also involves direct *attention to the logic of will formation and revision*. It does so by focusing on the legal process values according to which different expressions of *voluntas* are (at least partially) constructed and audited *within* law, and through which many forms of global law as *ratio* – for example, as regards human rights protection or the spread of administrative law values, are themselves opened up to different forms of voice and different accountability constituencies.

N. Walker, "The Shaping of Global Law" (2017) 8(3) *Transnational Legal Theory* 360; 363 – 364.

International law continues to be state-centred, because it is assumed that the state system is the legitimate exercise of sovereignty in accordance with the consent of citizens.¹⁸⁵ States continue to have a strong institutional order, demonstrably able to create, interpret and enforce laws followed by the majority of a population. States may not be a perfect social and legal systems, but they are well-established and effective in managing populations. As such, states retain a powerful role and state consent remains a central consideration in understanding any agreement.

However, given the partial disaggregation of the state.¹⁸⁶ We now see a history of international cooperation¹⁸⁷ and an increased practical necessity for supra national authoritative entities. This has resulted in what this work will refer to as “international law” implying law-making bodies and enforcement mechanisms such as those we see operating under the ECHR.

Whilst accepting there are interesting arguments about whether such international bodies truly create "law" in the strict sense, for the purposes of this work the arguments of Hart will be adopted insofar as accepting that international norms *do* form a system that is authoritatively interpreted and enforced in recognition of limits on state sovereignty.¹⁸⁸ The decision to view the ECHR as a genuinely *legal* system is necessary to support this project in analysing the practices of the ECtHR, given the arguments already made suggesting that to be effective its judgments must be routinely and voluntarily followed, with that stability assured through accepted and clearly applied procedures. As Capps explains in relation to international law in general:

[I]f once accepts that such practices are not law, then one must consider how we should characterise them. What are self-styled international lawyers really up to?

¹⁸⁵Letsas, suggests that a commitment-based legitimacy, rather than authority-based, may better explain why states comply with the Court. The initial commitment made by states is more viable than the Court's authority. G. Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy", in A. Follesdal, B. Peters, and G. Ulfstein, (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. (Cambridge University Press, 2013) 126.

¹⁸⁶ See A. Slaughter, *A New World Order* (Princeton University Press: 2004) 34.

¹⁸⁷ See W. Friedman, *The Changing Structure of International Law* (Columbia University Press: 1964).

¹⁸⁸ See H. Hart, *The Concept of Law* (Oxford University Press: 1961), Chapter 10 on International Law.

They might simply be deluded figures, who think they are able to constrain the self-interested actions of states. Alternatively, they might be "noble liars" who use a set of moral principles, coupled to the public commitments of states, to criticise State behaviour. But in such circumstances, we should recognise that state action is unconstrained by law and that international relations are largely the product of power-relations. It seems to me that in such circumstances there is a *prima facie* moral reason to render the normative practices of international lawyers more like a form of law so as to effectively constrain the actions of states.¹⁸⁹

State systems no longer enjoy ultimate legal authority. Rather, it is shared with other systems in cross-cutting activities and obligations extending beyond the control of national borders. However, this acknowledgement of international systems, with non-state entities claiming legal authority, does not require their positioning in relation to states according to some type of vertical relationship, either above or below states. Instead, the current international relationship is more horizontal with appropriate mutual recognition and respect between international entities and states.

Any attempt to place international law as a superior governor of the conduct of states, particularly on constitutional matters such as human rights, would serve only to heighten criticism of its validity, in particular given the reliance upon national democracy by the participants to the ECHR (explored later).¹⁹⁰

¹⁸⁹ P. Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing: 2009) 3-4.

¹⁹⁰ Collins comments:

I maintain [...] that the purpose of any legal order has to be understood within the context of the kinds of political relations which pertain in the society or community in question. To see the purpose of international law as one of regulating or governing international politics is to misconstrue the nature of the political relations which pertain at the international level, which are fundamentally different from the relations of political subordination that exist within the state. The overall "institutional purpose" of law within a plural, "horizontal" society (such as arguably exists at the international level) must instead be understood in a way which is meaningful to the participants in that society.

R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 12-13.

Buchanan reasons:

Whether or not the most comprehensive and defensible ideal [as opposed to non-ideal] moral theory of international law will include a uniquely primary role for states is a complex question – and one that probably cannot be answered until we have much more developed examples of moral theories of international law than we now possess. Nevertheless, it could be argued

Recognition of the international authorities by the states, which remain powerful participators, persists therefore as an important aspect of any international system. In particular, for agreements such as the ECHR, which claim authority with regard to what remain largely internally controlled public order concerns, this recognition by the state is of particular importance. Public order is still upheld in practice through the resources and the infrastructure of national systems and without member state acceptance the rulings of the ECtHR would have no effective legal impact.

that even the best ideal moral theory will include a prominent place for something like states [...]

First, as Kant emphasized, a plurality of territorially based units each having considerably powers of self-government is probably preferable to the risk of inescapable tyranny that a world government would pose. Second, a world government might be intolerably inefficient. Third, persistent pluralism with regard to conceptions of public order and justice speak in favour of a plurality of political units, within which different values can find effective expression; and primary jurisdiction over a territory is the most reliable way to protect pluralism. Fourth, some (including most famously Rousseau) argue that there are limits to the scale of the public units in which democracy can flourish and that a democratic global state is not possible. For all of these reasons [...] the division of the world's area into something resembling states may be morally defensible if not wholly attractive, quite apart from the fact that for the foreseeable future we are likely to be stuck with a system in which States are the most prominent constituents.

A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press: 2004) 55-56.

Kumm comments:

The idea of self-government of free and equals lies at the heart of the tradition of liberal-democratic constitutionalism. The guiding ideal of global order this gives rise to is a world of liberal democratic constitutional states, collectively subjected to the authority of international law. The point of international law is to authoritatively define the conditions under which sovereigns can govern themselves as well as provide the legal space for sovereigns to coordinate their activities and cooperate as they deem fit. The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide.

M. Kumm "The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law" (2013) 20(2) *Indiana Journal of Global Legal Studies* 605, 625.

The question, given the role of nation sovereign states, is why should individuals within a nation be concerned to abide by decisions made in systems beyond their own? The answer is that while there may not have been a decision by individuals to give authority to any particular international body or bodies, the state as their representative has given that authority on their behalf. So, while the true principals of the ECHR contract are the individual voters, it is the state which represented that unified acceptance by granting the authority on their behalf. It is within the power of the sovereign will of the voters within a nation to allow the state to consent by proxy to an international order and subject itself to that agreement.¹⁹¹

Arguments of state recognition outside of any express state agreement to membership are possible through theories such as "consensus".¹⁹² However, norms assumed to apply to all states regardless of their agreement are limited and notoriously difficult to establish.¹⁹³ Given the existence of a treaty positively codifying some shared categories of moral norms and encouraging cooperation on them, thereby supporting a wider protection, the focus of this work is not human rights as they may be understood and apply to all states but rather on the rights as interpreted and applied in ECHR member states. With its common government object and purpose, shared norms are more readily identifiable and the division of responsibility between the Council of Europe, ECtHR and national governments may be

¹⁹¹ On the general point that a state may so bind itself, despite later dissatisfaction, see *SS Wimbledon* [1923] PCIJ, Series A, no. 1 at 25: '[T]he right of entering into international agreements is an attribute of State sovereignty.'

¹⁹² This principle is referred to as a pluralist justification of human rights, based on norms appearing across different world views. On this point, see E-J. Kim, "Justifying Human Rights: Does Consensus Matter?" (2012) 13 *Human Rights Review* 261.

¹⁹³ As Gardbaum reasons:

There is perhaps general agreement that a small, but critical, core of the most important human rights law has achieved *jus cogens* and, thus, higher law, status as binding treaty makers and probably also trumping conflicting custom [...] although there is less consensus about how - the process by which - norms achieve this status, which may prevent the list from being added to.

S. Gardbaum, "Human Rights as International Constitutional Rights" (2008) 19(4) *The European Journal of International Law* 749, 756.

The Universal Declaration of Human Rights purports to serve this role, hence not requiring the status of a treaty. Its application has proved, as predicted, to be limited to challenging acts of only the most serious nature and so the more obvious and indisputable applications of its rights. Despite this, it still faces heavy criticism for having exceeded what may be claimed as universally accepted in custom.

identified. The difficulties with higher principles mean that, in spite of some positive guidance in the ECHR, the shared government purpose of the signatories and what that reasonably means for procedural legitimacy in interpreting the government understood normative scope of the principles must be further explored. A reasonably inferable proper government object and purpose behind the ECHR is the central question.¹⁹⁴

This is not to suggest that the authority of an organisation like the ECtHR is limited only to express powers, explicitly laid out in its constituent instrument, or that the interpretation and application of law becomes set on the date of signing. But it does propose that any implied developments must be reasonably in accord with its object and purpose and respect the current pace of development of the membership. Collins and White explain:

[T]he attribution of certain legal capacities provides evidence of objective legal personality, which then gives rise to specific competences, the context of which is determinable through application of the implied powers doctrine [...] *which defines the scope of such competencies by reference to the organisation's functional purpose and organisational structure* [emphasis added].¹⁹⁵

The pronouncement of legitimate law by the ECtHR depends on its authority to interpret different elements of the ECHR's provisions, with an expectation of adherence to that decision or "compliance pull".¹⁹⁶ There is, as Tomuschat insists, a distinction between the "philosophical ought" and the "legal ought". For the purpose of understanding the role of the

¹⁹⁴ Collins comments:

[A]t a doctrinal level the structures of modern international law can be said to rest ultimately upon a positivist epistemology. To make this claim is not necessarily to endorse a position of unalloyed sovereignty, nor to assert that international law operates on the basis of state voluntarism - that every State must consent to every legal norm but only that the basis of the authority of legal norms lies in their procedural (as opposed to moral or prudential) acceptance by those subject to the law.

R. Collins, "Modernist Positivism and the Problem of Institutional Autonomy" in R. Collins and N. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge: 2011) 25-26.

¹⁹⁵ R. Collins and N. White, "Between Independence and Accountability: Exploring the Legal Autonomy of International Organisations", in B. Reinalda (ed), *Routledge Handbook of International Organisation* (Routledge: 2012) 119: 122-123.

¹⁹⁶ A state is expected to comply with international obligations only where a rule has been created in 'the proper manner' and so creates a 'compliance pull' as the right thing to do. See T. Franck, *The Power of Legitimacy among Nations* (Oxford University Press: 1990).

ECtHR, it is the legal ought which is of concern. The ECtHR must be viewed as a mechanism, designed as one element of an overall project or enterprise to 'translate human rights as legal proposition into a living reality'.¹⁹⁷ This argument builds on the concept of constituent power, where authority is generated, but does not accept that constituent power itself provides the foundations for a legal authority or that such authorities are not still subject to the PGC.¹⁹⁸ However, it does challenge any dismissal of the acute relevance of the formative grounds and conditions for an authority to its legitimate operation.¹⁹⁹ For practical purposes, that makes

¹⁹⁷ C. Tomuschat, *Human Rights: Between Realism and Idealism* (Oxford University Press: 2008) 2-5.

¹⁹⁸ See Kumm:

I have argued [...] that constituent power is not basic in normative terms, because its exercise is itself internally authorized and circumscribed by non-derogable principles that it is the task of constituent power to specify and concretize in the act of constitution-giving. It is the idea of free and equals governing themselves through law that authorizes and circumscribes the exercise of constituent power and that guides the interpretation of positively enacted constitutions. Even on the foundational level the constitutionalist project is normative and justificatory, not empirical/sociological.

M. Kumm "Constituent Power, Boundaries and Identity: On the Justificatory Depth of Constitutionalism - A Rejoinder to Neil Walker" (2016) 14(4) *International Journal of Constitutional Law* 914, 920.

¹⁹⁹ Walker argues that the founding pact is of central importance, given the need for a recognized collective authority and the difficulties of this emerging outside of agreement by the states:

[N]o matter how little reliant the justification of continuing constitutional authority within the state may be or should be in terms of the founding pact, at the very least some attention to those foundations provide a way of identifying the self-imagined extent and boundaries of the community involved in the process of ongoing justification. These foundational traces supply a base point of orientation, the indispensable platform upon which a collective authority comes to recognize itself over time; and, in so doing, as able to engage in the "recursive internalism" by which later iterations of "We the People", typically given through voice through themselves duly "constituted" democratic forms of representation, reflect upon and seek to review the ambitions and correct the shortcomings of their earlier common selves. "The international community", however, cannot serve the same orienting function of emergent collective self-identification at the post-national level. Scattered in various fragments, the post-national institutional configuration lacks the constitutive unity to provide an anchoring identity. What is more [...] its dispersed and democratically underdeveloped institutional forms struggle to provide the organizational coherence or nurture the sense of common attachment necessary to overcome that original impediment and generate a robustly reflexive collective post-national self [...]'

The risk of not recognising the role of constituent power is to undermine compliance with the decisions of authorities, and to question the reason of constructed forms of governance and guiding principles to the extent that there would be a lack of any collective orientation and direction:

The danger here is twofold [...] it is both motivational and epistemic. If there are no broadly endorsed and engaged collective transnational identities eligible to assume the mantle of the

the key issue for this work the exercise of functions reasonably accepted by the member states as belonging to the ECtHR under the joint enterprise; or the Court's role in the regime.

Despite the challenges of this exercise, it is a necessary part of recognising the ECHR as a legal system. Collins explains this is encapsulated in the key aspects of modern international law and the drive to provide rules that guide its ordering. Collins cites a study by the International Law Commission, that explicitly confirmed the need for a systematic reading:

It is often said that law is a “system”. By this, no more need be meant than that the various decisions, rules and principles of which the law consists do not appear [...] randomly related to each other. Although there may be disagreement among lawyers about just how the systematic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.²⁰⁰

Collins notes:

Accordingly, to recognise that international law can be understood as a system – and in that sense demonstrates a certain autonomy – is to acknowledge the simple, though not less important, point that international legal rules are not just “rules of thumb” [...] Rather, they derive their validity from source-based criteria endogenous to, and determined by, the system itself. As self-evident as this understanding might appear, however, the important point is that this systematicity is not something in-built or intrinsic to the very nature of international relations. Like any legal system, international law is a social construct and has come to be understood in this way because this systematic understanding is deemed meaningful and important to

“international community” transnational constitutional law will either not succeed in making effective regulatory claims upon a state-centred world [...] And if [...] one [...] instead treats the constituent claim as largely detached and externally constructed rather than as reflexive and internally generated [...] the very same lack of grounded collective orientation and direction may render [...] general normative criteria insufficient as a guide to the proper distribution of constitutional authority. Even if unobjectionable in principle, these general normative criteria are too vague to provide clear and uncontroversial guidance in the absence of just that continuous reflexive negotiation and precision of meaning that an actual process of collective self-identification might allow.

N. Walker, “The Return of Constituent Power: A Reply to Mattias Kumm” (2017) 14(4) *International Journal of Constitutional Law* 906, 909-910.

²⁰⁰ International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi” (2006) UN Doc A/CN.4/L.682, at 23.

international legal participants – states, lawyers, diplomats and other actors – as a basis of association in their mutual relations.²⁰¹

The appropriate starting point is therefore to explore the ECHR itself, using accepted principles of international law interpretation accepted by the international participants to that agreement.²⁰²

3.3 Interpreting the Treaty

In identifying the meaning of treaties, the Vienna Convention on the Law of Treaties provides the accepted routes. These routes of interpretation extend beyond express terms but remain controlled. In relation to those rules, Venzke explains that:

They are the point of reference for discussing what counts as legal interpretation and what does not. No matter what reasons or motivations drive an interpretation, it

²⁰¹ R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 6.

²⁰² The criteria for recognising a rule as constituting law, referred to here as "formal sources", does not deny that there may be higher criteria in operation based on universal principles or that they may well be imperfect. Danilenko explains (at 24):

[T]he concept of formal sources in no way seeks to explain the ultimate reason for the authority of the international legal system as such. It simply proceeds from the fundamental assumption that international law is a system of rules operating as law of the international community. Nor does the doctrine of sources seek to explain all the ways in which states and other international actors create international legal obligations. The concept of sources of law relates to procedures or processes for establishing common rules of conduct constituting positive law.

But the need for such formality cannot in practice be ignored if international law is to be workable, as Danilenko argues (at 25):

Although the metaphor "source" has a certain static flavour, the real purpose of the concept of formal sources is to define the positive law process or the law-making processes leading to the emergence of rules of positive law. At the same time, the concept of sources deals with those procedures both from a law-making and a law-applying perspective. From the law-making perspective, sources of law determine legitimate processes by which a rule acquires a legally binding force. From the point of view of law-application, procedural rules governing law-making emerge as positive law tests used by subjects of law and law-applying agencies for an objective identification of the resulting legally binding rules. In the international system the legitimacy of the asserted legal rules directly depends on whether the arguments are based on tests derived from the prescriptions governing the accepted process of law making.

G. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers: 1993).

needs to be couched within the argumentative standards contoured by the rules of interpretation.²⁰³

Article 31 of the Vienna Convention on the Law of Treaties demands that the ordinary meaning of provisions of a treaty be given 'in their context and in the light of its object and purpose'.

As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. The preamble is also very useful for the determination of the object and purpose of the instrument to be construed. In relation to the ECHR, its Preamble is an essential source for this work in assessing the legitimate authority of the ECtHR. However, as this work has already noted in Chapter Two, there are important issues which are not addressed by it. Some of these issues may be clarified by considering the other elements of the text of agreement. However, review of the documentation alone will only progress the argument so far, other elements relating to the context in which the agreement was made must be addressed.

An understanding of the will or force behind an agreement must, where documentation alone is insufficient, come from analysis of the circumstances at and around the time of signing.²⁰⁴ This makes not only the text of the ECHR but also the context and drafting process leading to

²⁰³ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press: 2012) 50.

²⁰⁴ The reasoning behind the primacy of what was agreed under a treaty is expressed by the International Law Commission in its work on the appropriate codification of international customary law:

[I]n the years ahead the codification of convention will continue to be considered as the most effective means of carrying on the work of codification. *Its preciseness, its binding character, the fact that it has gone through the negotiation stage of collective diplomacy at an international conference, the publication and wide dissemination of the conventions, all these are assets that will not be lightly abandoned* [emphasis added].

2 YILC 230 (1973).

Also, see Helfer who suggests that there is an assumption of, 'perfect correspondence between domestic preferences and the state's international commitments at the time of ratification' and so 'domestic opposition to compliance or pressure to exit from the treaty should increase if the state adheres to the treaty in its overlegalised form'. L. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes" (2002) 102 *Columbia Law Review* 1832, 1855.

its creation relevant for consideration. This is not a task of discerning the particular intentions or mental state of all the drafters. This would be difficult in the extreme and they are likely in reality to have had very different views in different areas.²⁰⁵ In addition, this is not a case of interpreting a private agreement between parties where a court's only role is to distribute rights and duties according to the parties' intentions. This is a public act, a government purpose on behalf of citizens at large, on the part of the governments who signed the ECHR. The construction by a court here relates to how the ECHR may be interpreted as having a goal that fulfils a clear and proper governmental purpose.

It must be possible for the ECtHR to reasonably interpret from the agreement and its negotiation some shared, generally accepted government object and purpose between the states. As expressed by Barak:

[A]n interpreter should not seek the motivations that propelled the members of the legislative body to vote in favour of the statute but rather should focus on the general objectives they sought to achieve.²⁰⁶

Therefore, while a definitive understanding of the will of the states may be impossible, it is possible and necessary to require a "reasonable" interpretation of the generally accepted objective and purpose, based on the evidence available. Reasonable is not the same as the now largely debunked restrictive interpretation approach.²⁰⁷ Closely associated with the

²⁰⁵ See P. Allott, "The Concept of International Law" (1999) 10 *European Journal of International Law* 31, 43.

²⁰⁶ A. Barak, *Purposive Interpretation in Law* (Princeton University Press: 2005) 134.

²⁰⁷ A "restrictive interpretation" was once favoured by the International Court of Justice, as set out in the *Lotus* judgment to safeguard state sovereignty under which only explicit prohibitions could limit a state:

'Restrictions upon the independence of States cannot therefore be presumed'.

Lotus (France v. Turkey), 1927 PCIJ Series A, No. 10, 4, at 18.

The Court explained the implications of this in the advisory opinion on the Treaty of Lausanne of 1925:

If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.

Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 PCIJ Series B, No. 12, 7, at 25.

object and purpose rule is the effective interpretation argument. This prefers an interpretation that is most effective in enhancing the purpose of the treaty. What is required is a reading that does not go too far or, conversely, fail to go far enough. Without relying on concepts such as a "reasonableness", it would prove impossible to legitimise international orders as being complete and coherent, when in reality the states exhibit many core differences. Reasonable is a somewhat uncertain term, perhaps reflective of the wider issue of the "lack of density" to the rules of international law²⁰⁸, but the term is still necessary as the best available response to this indeterminacy. As Corten argues:

Over and above particular cases, the use of the notion of "reasonable" provides legitimacy to the international legal order as a whole, by presenting an image of a closed, coherent and complete legal system. From that perspective, references to reason suggest an ideal of unity and community of values that is particularly remarkable in an international society which is very loosely integrated, and which is characterised by decentralised centres of power and acute cultural and political differences. In fact, the very presence in international discourse of references to the

A fuller analysis of the "restrictive interpretation" approach, including the cases above as well as a number of others, is provided by in L. Crema, "Disappearance and New Sightings of Restrictive Interpretation(s)" (2010) 21(3) *The European Journal of International Law* 681, 684 - 685

However, as Crema explains, more recent international decisions confirm that the rule of restrictive interpretation in favour of State sovereignty is no longer in force. Crema selects as a good example the *Iron Rhine* arbitration, decided in 2005:

The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation [...] is not in fact mentioned in the provisions of the Vienna Convention.

Iron Rhine, arbitration (Belgium v. The Netherlands) (2005), at [53].

The ICJ again pointed to the non-existence of this rule in *Costa Rica and Nicaragua*:

[T]he Court is not convinced [...] that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua.

Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (2009), at [48].

²⁰⁸ Warbrick comments:

The very lack of density to the rules of international law ... their uncertainty, their incompleteness and [...] sometimes their incoherence one with another, increases the opportunity for imaginative interpretation for whoever takes on the task. The line between the legal and the political is drawn from a different place in the international legal system than it is in a developed, domestic order.

C. Warbrick, "Brownlie's Principles of Public International Law: An Assessment" (2000) 11 *European Journal of International Law* 621, 626-27.

notion of "reasonable" is indicative of the persistent problem of legitimacy of a legal order which is neither based on a common ideology nor controlled by a centralised enforcing body.²⁰⁹

A focus on an overall purpose as reasonably understood does mean looking back to what will be termed in this work as the "original purpose". However, this is not the same as limiting the project to the "original understanding" of its likely effect. The actual interpretation and applications of that project may later vary from what the drafters may or even could have predicted at the time but it may be argued that the continued nature and aspirations of the project or its "function" should be kept in line with the original object and purpose agreed. It is only the understanding of what the original purpose requires that may evolve, in the absence of express renegotiation by member states.

3.3.1 The Preamble

The next issue to consider is whether any clarity about the functions of the ECHR legal system and the functions remaining with sovereign states may be inferred from the text.

The ECHR Preamble reads:

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend [...]

The Preamble makes it clear that, while democracy is limited by fundamental rights, from a pragmatic point of view democracy is seen as the system for protecting and, by extension of that same logic, of capturing liberal thinking upon their meaning. Democracy is the procedure for both interpreting the rights, developing or constructing their normative content to give substance, and for their application according to expected standards.

²⁰⁹ O. Corten, "The Notion of Reasonable in International Law: Legal Discourse, Reason and Contradictions" (1999) 48 *International and Comparative Law Quarterly* 613, 618.

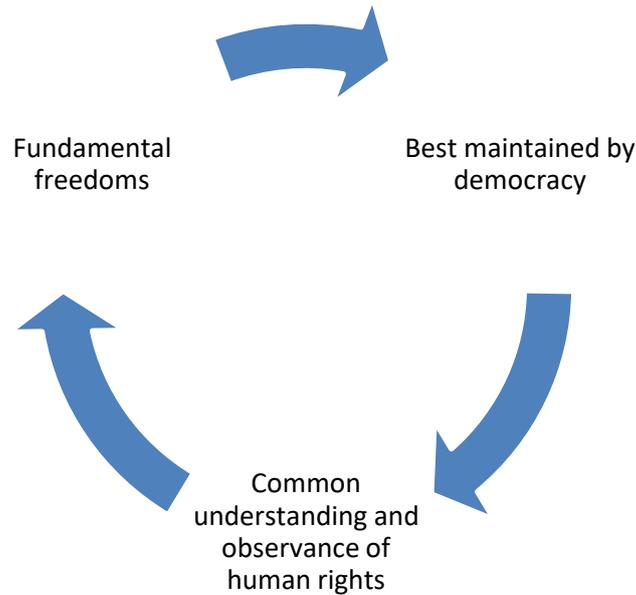


Fig. 3.1 The Cycle of Democracy and Human Rights

If the fundamental freedoms are “best” maintained by a political democracy, then the best “common” understanding of human rights norms must also flow from the effective operation of democracy as it applies and thereby continually evolves the understanding of principles that generally apply. Thus, a cycle is created of justified moral norms being recognised by democracy as falling under the scope a right and then the rights being further interpreted within democracies, with ever more detailed norms emerging via that process to then be observed.

In relation to the ECHR's approach, this addresses one of the conceptual difficulties with the ability to limit democracies, summarised by Gould:

While different theories of justice have grounded individual liberties and rights in various ways, it has remained less than clear whether the introduction of constitutional guarantees by a democratic or consensual procedure is what legitimises these rights, in which case they would be grounded in the value of democracy; or whether these rights have a normative claim that is independent of, or external to, such procedures. That is, are such rights constituted as rights by their democratic or

consensual recognition, or is the imperative to institute them based on their prior and autonomous status as rights?²¹⁰

The ECHR Preamble accepts that there are limits on what a democracy may do, this work has already recognised that there are some norms and executory responses that may “not” be reasoned as they cannot comply with the criteria for reason. In an original position, it may also be possible to identify beyond the negative protection against unreasoned choices, to positively construct rights and duties that have “prior and autonomous status as rights”. But the original position cannot be in actuality created, democracy represents a concerted effort to reason morally while living under the necessary social contract. The use in the ECHR Preamble of the word “understanding” in relation to rights reflects the arguments already made about the difficulties of any purely objective determination of what “is” the necessary meaning. The most to be hoped for is a “common” accepted construction of the interpretation and the standards for assessing application between the member states.

If the ECHR project were limited to testing for clearly immoral understandings, rules and actions, then it would be a far more limited system than the one that has developed. However, the ECHR Preamble refers to the development of “common understanding and observance”. The membership is, therefore, required to seek progress in producing consistency in the positive construction of norms which develop under the rights as interpreted throughout the multitude of different democracies forming the membership and in standards for application. The listing and partial definition of particular norms as rights based on how they were understood at the time infers as much, even in the absence of such a statement of intent.

The ECHR system must assume that democracy is equipped to routinely make choices which represent the common construction interpreting principles of general application as well as ensuring the particular application follows standards for their safeguarding. The institutional legitimacy of the ECtHR is also then tied in with it promoting whatever is required to show democratic legitimacy. An update to fig 2.3, from Chapter Two, can now be made:

²¹⁰ C. Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press: 2004) 14-15.

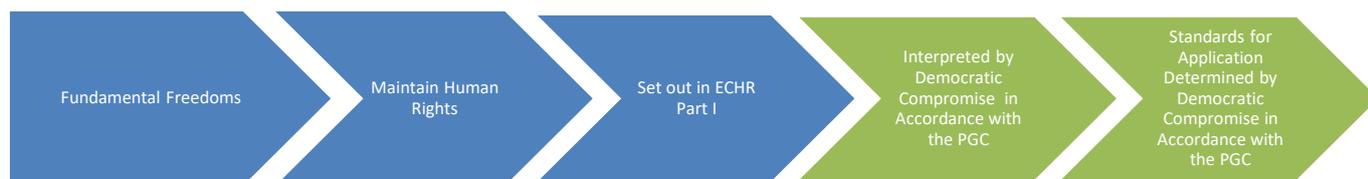


Fig. 3.2 Solutions for Resolving Substance and Standards of Rights

As explained by Bustamante, democracy as a process provides a justification of legal authority more robust than the purely service provider-based concept of legitimacy posited by Raz in the Normal Justification Thesis. It moves beyond providing a service of resolving disputes, to morally justifying “how” that service is given:

This provides a justification of (legal) authority more robust as compared to the Normal Justification Thesis. Let us call it the Democratic Justification Thesis (DJT). This thesis can be asserted thus: an institution has intrinsically legitimate authority over a person [...] when the directives of this institution are the outcomes of a *fair-decision* process in which such person has a right to an *equal participation*. The Democratic Justification provides, thus, the most powerful justification available for the authority of a legal institution [emphasis added].²¹¹

3.3.2 Democratic Legitimacy

In a functional legal system in accordance with the NJT, subjects must normally follow the decisions reached despite some individuals not agreeing that all the outcomes are in accordance with their internal reasoning. However, this does not prevent the search for a procedure that is itself of moral form.²¹² People must believe that the state reflects their views and interests, avoiding individual subjectivity. As Kant explains, an omnilateral judgment is one that expresses, 'all the wills of a community together'.²¹³ While it is not possible to guarantee that decisions may not later be judged as wrong, morally grounded procedures may provide some safeguard against immoral decisions.²¹⁴

²¹¹ T. Bustamante, 'On the Difficulty to Ground the Authority of Constitutional Courts: Can Strong Judicial Review be Justified?' in T. Bustamante and G. Bernardo (eds.), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (Springer International Publishing: 2016) 52.

²¹² See L. Fuller, *The Morality of Law* (Yale University Press: 1969).

²¹³ I. Kant, *The Metaphysics of Morals* (1797) (Cambridge University Press: 1996) 48.

²¹⁴ See Rawls:

A review of the ability of democracy to meet the criteria for reason at this point has two benefits. First, it is necessary to check that democracy could fit with the criteria developed in line with the PGC. Second, in so doing the important elements it possesses that make it a correct procedure can be explored. These elements are those to be respected as well as protected by the ECtHR and so start to inform the framework developed in Chapter Four, building upon the notion of a Democratic Justification Thesis to support procedural legitimacy in Court judgments.

In accordance with the idea of the categorical imperative, a system may claim legitimacy only if it forms part of a process that both could be accepted by all agents as one which is supportive of self-reflection and the deployment of reason.²¹⁵ Clearly, a system that relies on coerced agreement is not sufficient. As O'Neill explains, that 'does not outlive the coercion, and does not reach the uncoerced'.²¹⁶ The better image, as proposed by Kant, is one that supports "reasoned exchange" and "free debate".²¹⁷ In his words:

Reason must in all its undertakings subject itself to criticism; should it limit freedom of criticism by any prohibitions, it must harm itself, drawing upon itself a damaging suspicion. Nothing is so important through its usefulness, nothing so sacred, that it may be exempted from this searching examination, which knows no respect for persons. Reason depends on this freedom for its very existence. For reason has no dictatorial authority; its verdict is always simply the *agreement of free citizens, of*

'Ideally, a just constitution would be a just procedure arranged to insure a just outcome.'

J. Rawls, *A Theory of Justice* (Harvard University Press: 1971) 197. Rawls continues, at 198:

Clearly any feasible political procedure may yield an unjust outcome. In fact, there is no scheme of procedural political rules that guarantees that unjust legislation will not be enacted. In the case of a constitutional regime, or indeed any political form, the idea of perfect procedural justice cannot be realised. The best attainable scheme is one of imperfect procedural justice.

²¹⁵ This mitigates some of the issues with the theory of a social contract and justification of there being any one system which is preferable. All that is necessary is that the adopted system could be consented to by all.

²¹⁶ O. O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy* (Cambridge University Press: 2015) 25.

²¹⁷ *ibid* 25.

*whom each one must be permitted to express, without let or hindrance, his objection or even his veto [emphasis added].*²¹⁸

Any system that requires authorities within a legal system to empower and incorporate the reasoning of agents which, in keeping with the PGC, are supportable by everyone within a society, is to be welcomed.²¹⁹ It must encourage evaluation and discourse by agents in a manner that can be shared with and promote unified thinking with other agents. Democracy, as a system intended to safeguard against dictatorial or totalitarian states with a lack of transparency and accountability in leadership and to promote freethinking and the sharing of ideas, provides one such system that could in theory be supported by all.²²⁰ This view is famously supported by Rawls who, perhaps a little too boldly, takes the position that only views developed by a particular political democracy could deliver the type of public reasoning demanded to construct the principles from the original position:

²¹⁸ I. Kant, *Critique of Pure Reason*, trans. and ed. P. Guyer and A. Wood (Cambridge University Press: 1996).

²¹⁹ The well-known work of Rawls and his constructive procedure based on the hypothetical original position under the veil of ignorance is interesting here. See Chapter Two (n 140).

Rawls conceived of a hypothetical process in which agents constructed principles in the abstract from behind a veil of ignorance that would remove all information about their particular characteristics (e.g. gender, ethnicity, social status, gender and conception of the good). See J. Rawls, *A Theory of Justice* (Harvard University Press: 1971) 12. Via a process of 'reflective equilibrium', agents could go back and forth and then, 'eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles that match our considered judgements duly pruned and adjusted.' See J. Rawls (n 214) 20. But how is that reflection to be achieved?

²²⁰ The rationality behind democratically representative and accountable institutions as moral decision makers is supportable by building upon Kant's idea that people's actions should be influenced by moral truths with the arguments made by Habermas' on the relevance of the "lifeworld". He distinguishes between the "system" and the "lifeworld". While the system is heavily influenced by external factors and may not be representative of a diverse population, individual agents removed from such considerations are able to identify the better arguments and hold the system to account. See J. Habermas, *Theory of Communicative Action Vol. 1: Reason and the Rationalisation of Society* (Beacon Press: 1985).

Arguably, in claiming moral superiority or a "better" view on a dispute than those with life experience is to strip those individuals of their humanity in removing the relevance of their everyday and so extensive self-reasoning.

The lifeworld, or the lived realm in the public sphere, has a greater potential for free thought and communication and the informal, culturally-grounded understandings and mutual accommodations that develop in it are a valuable resource in law-making. See J. Habermas, *The Theory of Communicative Action: Vol.2: The Critique of Functionalist Reason, Volume 2* (Polity: 1987).

Public reason is characteristic of a *democratic people*: it is the reason of its citizens, of those sharing the equal status of citizenship [...] [it] is public in three ways: as the reason of citizens as such, it is the reason of the public; its subject is the good of the public and matters of fundamental justice; and its nature and content is public, being given by the ideals and principles expressed by a *society's conception of political justice, and conducted open to view*.²²¹

There must be caution in suggesting that democracy is justifiably to be taken as the universally correct process for identification of objects in accordance with the PGC; it may be only the Westernised view. However, while there are other systems of government that could be up to that same basic task of normative justification, democracy is the system clearly espoused by the ECHR. For the ECHR legal system to move away from it as the procedurally legitimate means of constructing the human rights, it would require a drastic renegotiation of the most fundamental assumption of the agreement.

Democracy provides the basis for uniting those societies that have “chosen” it, and all member states of the ECHR do so expressly, and allows the norms of a society practical effect.²²² The absence of any credible alternative basis, for example, the historic dependence upon religion or upon social convention, is a key justification for reliance upon democracy to

²²¹ J. Rawls, *Political Liberalism* (Columbia University Press: 1993) 213.

²²² As O'Neill explains:

The thought that public reasoning takes place among fellow citizens in bounded societies is fruitful because those citizens can be taken to share certain fundamental commitments. Their shared civic commitments to liberalism, to democracy and to the continued existence of their bounded society provide a basis for debating or justifying its specific political arrangements. Yet the very fact that citizens are assumed to share these commitments may also hamper the justification of fundamental political arrangements. If the commitments to liberalism, to democracy and to the continued existence of a bounded society are taken as given, the answers to certain fundamental questions about justice, such as the justice of secession or annexation, or the justice of liberalism or democracy, are prejudiced. Even coherentist justifications must do more than reiterate commitments. The thought that public reasoning may take place only among fellow citizens may seem inadequate because it excludes reasoning that crosses boundaries or engages with those who are not fellow citizens.

O. O'Neill (n 216) 91-92.

This view is supported by some of the reasoning behind the ECHR. First, the potential for the ECHR project to enlighten non-democratic states outside of the ideals of the Convention and bring them into the fold suggests at some view that agents living in non-democratic states may reason enough of the same values to have a desire to join. As such, ignoring their understandings is not necessary. Second, the ECHR itself is based on understandings that are beyond any particular state or society.

settle coordination issues.²²³ On all aspects upon which the use of the democratic process could comply with the criteria for reason, there is no basis for the ECtHR to challenge the role it is given under the ECHR as the superior route for moral construction.

The consideration by Rawls in selecting democracy as his preferred system is useful in reasoning how democracy plays its role, but may also be used to suggest its limits. Citizens within a particular civil society or sovereign nation state (given a hypothetical agreement or “social contract” to join together and look after each other’s interests) have: (1) a particular motivation to treat each other’s views as having equal status i.e. that they not only may, but must influence their reasoning; and (2) a practical ability to successfully communicate with those other agents, given they have at least some common points from which to start.

For the PGC to operate through democracy, it would appear to be linked to whether all agents can be relied upon to think of the positions of others and are able to meaningfully communicate with them about their reasoning.²²⁴ It is submitted that this causes a variation

²²³ As explained by Lord Sumption in relation to growth of law as filling a vacuum:

The spread of Parliamentary democracy across most of the world has invariably been followed by rising public expectations of the State [...] The State has become the provider of basic standards of public amenity, the guarantor of minimum levels of security and, increasingly, the regulator of economic activity and the protector against misfortune of every kind. The public expects nothing less. Yet protection at this level calls for a general scheme of rights and a more intrusive role for law [...] This expansion of the empire of law has not been gratuitous. It is a response to a real problem. At its most fundamental level, the problem is that the technical and intellectual capacities of mankind have grown faster than its moral sensibilities or its co-operative instincts. At the same time other restraints on the autonomy and self-interest of men, such as religion and social convention, have lost much of their former force, at any rate in the west. *The role of social and religious sentiment, which was once so critical in the life of our societies, has been largely taken over by law* [emphasis added].

Lord Sumption, ‘The Limits of the Law’, (20 November 2013), 27th Sultan Azlan Shah Lecture, Kuala Lumpur, page 3 available at <<https://www.supremecourt.uk/docs/speech-131120.pdf>> accessed 21 November 2016.

²²⁴ As Toddington explains:

Social contract theorists in general, and Kant and Rousseau in particular, have argued that some process of universalisable reasoning relating to individual and collective human interests is prior to the moment of consensual incorporation into Civil Society. Civil Society, as Rousseau and Kant point out so emphatically, is not merely a stable or event respectful and generous *community* [...] but a *population united under the principles of equality and sovereign law*. The creation of this *public* power is effected by a transformation of individual wills into an omnilateral or General Will, and this General Will is legitimised by its aspiration to a honour a

in the role of democracy in the two stages of: (1) interpretation of the normative parameters of a right; and (2) application of the principles of general application to particular circumstances.

3.3.3 Democracy in the Stages for Human Rights Protection

Where all agents could morally reason on an issue, the outcome of that reasoning, as embodied through their democratic representatives, is then supreme in accordance with the Democratic Justification Thesis (provided it could accord with the criteria for reason under the PGC). It is only where all agents could not do so, where a question raises points outside their knowledge or experience or introduces a risk of bias or self-interest, that the execution of that general understanding is necessarily subject to the views of experts in the given field.

Democracy views a system representing the reasoning of all agents as the best means of reaching a moral and an accepted compromise on societal principles i.e. rights and duties and when they may be restricted in particular circumstances.²²⁵ Ideally, this public reasoning would also be determinative of how those principles of general application should be applied in specific cases and situations. Clearly it is not possible for every agent in a society to actually get together and reach these compromises, and some agents may not have the time, skill or will to explore issues, so instead democratic representatives are used as the embodiment of agent's will. While the reality may be questioned, the assumption of democracy is that the outcomes from the reasoning and compromises of these representatives is equivalent to the outcome that, hypothetically, would be secured if all agents were able to responsibly do the same with public-spiritedness rather than self-interest.

principle identical to that enunciated in Habermas: to tie legitimacy to the pursuit of generalisable interests.

S. Toddington, "The Moral Truth about Discourse Theory" (2006) 19 *Ratio Juris* 217, 227.

²²⁵ The fact that some reasoning may represent a compromised outcome, not certainly the correct one, does not prevent the process of normative reasoning being objective. As Rescher explains:

If we have done all that reasonably can be asked of us, the best that can reasonably be done, then there can be no need for further assurance [...] A wholly justified claim to certainty and knowledge is compatible with a nagging element of theoretical doubt.

N. Rescher, *Scepticism* (Oxford University Press: 1980) 40-41.

Majoritarianism has its place in a liberal democracy, as the recognition of “self-rule” by agents and as a means to hold the decision-makers to account. This is not the same, however, as simple majoritarianism.²²⁶ The use of elected representatives and the operation of PGC to filter the choices of the legislature, guard against the dangers of simple majoritarianism.²²⁷ Here, the work of Brunder explains the balance:

To the unelected court falls the task of specifying within the sphere of rational necessity the abstract principles that have been inscribed into a written constitution and of testing legislation against those principles to determine whether it *could* be assented to by free, worth-claiming citizens. To a majority of the elected legislature belongs the task of deciding by fiat which of the many ways of promulgating the common welfare that *could* be freely assented to is Law’s actual determination. Thus, majority consent is indeed validating of Law’s rules and, unless patently unreasonable in its result, owed respect by a court; but this is only because the idea of moral membership requires it [...] as the rule of decision in the area left free by what the same idea requires as a matter of theoretical necessity. Accordingly, provided that each body keeps to its proper sphere of operation – the supreme court to pure practical reason and the legislature to intersection between practical reason and empirical circumstances – there is no anti-democratic implication of judicial review not any inherent despotism in majority decision-making.²²⁸

This means that, provided all agents could effectively reason on a point, then the democratic decision (provided it could accord with the criteria for reason) must be upheld as the true societal construction of a principle i.e. the norms of general application and when they can be restricted in particular circumstances. Brunder continues:

Democracy is indeed defeated [...] when the court substitutes its own judgment concerning what the common welfare or how best to attain it for that of the people’s

²²⁶ Rousseau notes that the general will ‘is always right and tends always to the public advantage; but it does not follow that the deliberations of the people always have the same rectitude’. Although, he does conclude that the general will is a representation of common interests from the process of voting. J. Rousseau, *The Social Contract and Other Later Political Writings* (ed.) Victor Gourevitch (Cambridge University Press: 1997), Book II, Chapter 3, Whether the General Will Can Err, p. 57.

²²⁷ Dworkin advocates a rights-oriented liberalism:

A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.

R. Dworkin, 1971/1997, *Taking Rights Seriously* (Bloomsbury Academic: 2013) 234.

²²⁸ A. Brunder, *Constitutional Goods* (Oxford University Press: 2004) 213.

representatives; and the demos's defeat is here just as much a defeat for the Law as its passing of a statute no self-respecting person could assent to.²²⁹

This creates a distinction for the weighting to be given by the ECtHR to the decisions of democracy between two stages in human rights issues of interpretation and application.

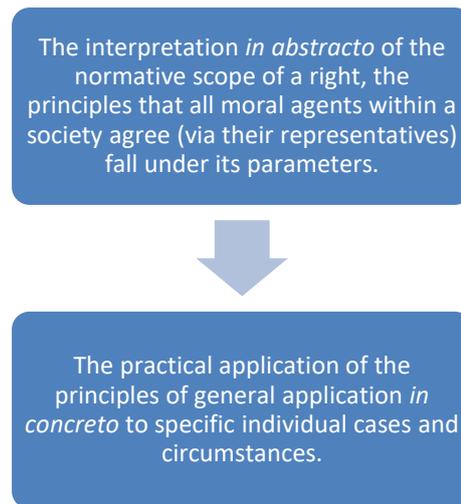


Fig. 3.3 The Two Stages in Resolving Human Rights Questions

For stage 1, the interpretation *in abstracto* of the normative scope of rights and when those norms can be limited in particular circumstances, the work notes that there is no reason to accept that the reasoning of “experts” on norms is any more valid than that of other agents. The operation of the PGC is not comparable to a mathematical exercise. The political representatives, chosen to speak on behalf of all citizens, therefore have the role of positively selecting between candidate norms and proposing and producing national law. The question for the ECtHR is which democratically reasoned understandings from the different member states form the ECHR legal position.

Once the matter moves to stage 2 and *in concreto* application, securing the norms and balancing competing interests in individual cases and particular circumstances, democratic representatives act on behalf of all citizens in setting standards and applying them. The

²²⁹ *ibid* 213.

theoretical reasoning of all moral agents on the point continues to be the route for compromise. However, this stage requires that the democratic process show it is correctly informed and utilised expert skill in applying that knowledge. These procedural requirements are part of the overarching democratic standards for decision-making within any democracy. Other standards more specific to the particular case at hand may also be settled.

In this *in concreto* stage, during our hypothetical meeting of all of agents, they could not possibly comply with the criteria for reason without the support of experts. The criteria require that the reasons for a decision are coherent; all agents could not possibly posit cogent lawlike arguments without reliance on experts. By extension, their democratic representatives must also appeal to and apply expert opinion in reaching decisions on application. The application stage must then include a procedural element, demonstrating a democratic process was used, facts checked, and relevant evidence properly considered.

This application stage also introduces the risk, in moving beyond questions of interpretation with generic norms that apply to all agents – necessarily including the agent themselves, that the reasoning will be affected by factors such as prejudice, self-interest or fear of the majority of agents overriding the rights of the minority. This, combined with the gaps in understanding undermining the effectiveness of the electorate as a safeguard, means there must also be a substantive element to a court review. A conclusion about the existence in a specific case of an interference with a norm must be one that a reasoned person would reach given the facts. Furthermore, when the state argues that the interference with a person's rights was necessary, the decision made must be one that a reasoned person would consider a proportionate response.

The questions for the ECtHR in the application stage are: (1) how strong the presumption is that complying with democratic due-process means there is no breach by a state; (2) how to identify the democratically recognised standards for delivery of the particular norm; and (3) how wide the margin of discretion is for a state in its ultimate substantive decision before it can be found to have acted in a way that a reasoned person would not.

3.3.4 The Negotiation

The review of the ECHR Preamble has allowed a number of vital points to be made about reasonably inferable aspects of a legitimate ECtHR process and will inform development of the analytical framework for assessing the legitimacy of the Court procedure developed in Chapter Four. It does not, however, address two central questions: (1) which democratically reached interpretations of the normative scope of rights can be used by the ECtHR as a “common” understanding; and (2) how the degree of choice left to states within which to operate in applying those principles of general application to particular circumstances is determined. Given a reading of the text was alone insufficient to address these points, the examination will need to explore what else can be found about the context and the object and purpose of the agreement from the negotiation progress.

What the negotiation reveals about the motivations of member states binding themselves to the ECHR will be explored in Chapter Four, before the framework for analysis is set out.

3.4 Chapter Conclusions

The *rationale* that moved member states to become signatories of the ECHR and to continue abiding by the decisions of the ECtHR revolves around promoting democracy as the best and fairest system within individual states. Subsequent rulings of the ECtHR and observations from member states confirm democracy as the continuing common idea or central unifying element.²³⁰ Whilst the specifications of the quality of democracy leave much to be discussed

²³⁰ For example, see *United Communist Party of Turkey v Turkey*, Application No. 19392/92, judgment of 30 January 1998, para. 45, where the ECtHR explained:

Democracy is without doubt a fundamental feature of the European public order [...] That is apparent [...] firstly, from the Preamble to the Convention [...] [The Court] has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society [...]

See also the Committee of Ministers Guidelines for Civil Participation in Political Decision Making (27 September 2017) CM(2017)83-final available at <<https://rm.coe.int/guidelines-for-civil-participation-in-political-decision-making-en/16807626cf>> accessed 8 May 2018:

Considering that the participation of citizens is at the very heart of the idea of democracy; Considering that representative democracy, based on the right of citizens to freely elect their representatives at reasonable intervals, is part of the common heritage of member States;

– especially in a system where individual rights are seen as “trumps” over policy aims – we can accept the general point. Two questions that arise are: (1) which democratically reasoned interpretations of the normative scope of rights can be used by the ECtHR; and (2) how might we determine the scope of choice left to states within which to operate in applying the principles pertaining to rights?

Considering that direct democracy, based on the right to take part in elections and to launch and sign popular initiatives and requests for referendums, is a longstanding tradition in certain member States;

Considering that participatory democracy, based on the right to seek to determine or to influence the exercise of a public authority’s powers and responsibilities, contributes to representative and direct democracy and that the right to civil participation in political decision-making should be secured to individuals, nongovernmental organisations (NGOs) and civil society at large;

Emphasising that responsibility and accountability for taking decisions ultimately rests with the public authority that has the democratic legitimacy to do so [...]

4 Chapter Four

An Analytical Framework for Assessing the Legitimacy of European Court of Human Rights Procedure

Origins of the agreement, consequences for the
Court's legitimate authority, and a framework
guiding cooperation

4.1 Introduction

Phase Four of the work is to construct a more comprehensive picture of the object and purpose of the European Convention on Human Rights (ECHR) in moving towards a framework of analysis for assessing the procedural legitimacy of the European Court of Human Rights (ECtHR).

The earlier analysis leaves two areas of uncertainty regarding the relationship between the individual democratic member states and the overall ECHR system:

1. In the *in abstracto* interpretation of the normative scope of rights, how might we identify and reconcile the different understandings democratically recognised by the plurality of societies under the ECHR as candidates for falling within the parameters of the right at issue and allowable restrictions in particular circumstances?
2. In the *in concreto* application, how might we settle standards expected of states and the scope of permissible variation or “margin” available to the democratic representatives in light of: (a) the general standards for democratic decision-making and evidence on approaches regarding reasonable protection of the given norm; and (b) discretion in proportionately responding to particular circumstances and individual cases?

A response to these points requires an exploration of the shared government object and purpose of the ECHR. By appreciating the common government purpose of the contracting states, it is possible to make a reasonable inference about the role of the ECtHR consented to by the membership. Specifically, in relation to the proactiveness of the ECtHR in finding common interpretations of the rights and how readily it should intervene in the application by the national systems. As noted in Chapter Three, the ECHR Preamble alone will not allow us to draw out the detail of what was originally and consensually agreed by the founding states. Wider evidence of the initial negotiation process and of subsequent reflections on the process is required here.

4.2 The Negotiation Process

Evidence from a detailed review by Moravesik of the negotiation process and the early terms of the ECHR agreement does not support a clearly idealistic recognition by the founding states.²³¹ There is no suggestion of an intention for a strongly inclusive order, empowered to routinely challenge individual national decisions with an ambitious normative objective.²³² The evidence supports a view that democratically determined decisions were not expected to be challenged, which is not in keeping with idealist motivations.²³³ Nor does the evidence indicate the agreement was only through a realist force,²³⁴ by the more powerful states

²³¹ Moravesik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54(2) *International Organisation* 217.

²³² In considering idealism as a motivator for the ECHR, the basis for cooperation, it is important to stress that this differs from accepting that the very idea of human rights is based on an idealist understating of moral values and principles. Instead, it is idealism as the motivator for states cooperating multilaterally in identifying and safeguarding those rights rather than securing them unilaterally within their own borders. Under an idealist approach cooperation occurs when states agree to have a strongly inclusive order.

²³³ Moravesik, in his study on the origins of human rights, argues that such idealism in the negotiation would be evidenced by the states with a long history of democracy taking the lead as proponents of reciprocally binding obligations. *ibid* 222.

The study continues (at 231) with an exploration of the willingness of the various founding governments to support elements of the design of the ECHR necessary to making it a reciprocal agreement. First, compulsory jurisdiction by an independent court. Second, the right of individual petition giving individuals standing. Where both elements were voted for, that is defined as support for a reciprocally binding regime, whereas a vote against is counted as opposition.

The founding member states were (at 232) divided by the study into: "established democracies" (systems consistently under democratic rule since before 1920), "new democracies" (those not in place by 1920 but firmly established during the negotiations and remaining so after), and "semi democracies and dictatorships" (systems that were not fully democratic by the time of the negotiations). In correlating support for a reciprocal regime against the length of democratic rule (at 232), Moravesik observes an inverse-U-shaped relationship. All six new democracies supported binding human rights guarantees, while six of the seven long-established democracies joined the non-democracies in opposing it. The results of the study call into question idealism as the decisive element in defining the objectives of the founding states.

²³⁴ A realist interpretation of the ECHR would identify the original intent as safeguarding each self-interested state's own security (see J. Mearsheimer, *The Tragedy of Great Power Politics* (W.W. Norton and Company: 2001)). The agreement would be the result of force, exerted by the more powerful countries or by a threat to the states. The objective of the agreement would be only to further the national interest by guarding against actions in other countries that may impose a threat externally beyond the state in question (see K. Waltz, *Man, the State and War: A Theoretical Analysis* (Columbia University Press: 1959)).

wishing to impose their own understanding of the rights upon others and forcing the issue.²³⁵ Rather, it appears to have fallen somewhere between those two points, as a means to promote and safeguard the ideal of democratic rule in uncertain times – republican liberalism. This is in accordance with the view formed by work in Chapters Two and Three of trust in democracy as a correct means to construct and apply human rights, and proving relative moral legitimacy to those choices.

Moravesik explains that the real motivation of the founding member states appears to have been partly their domestic self-interest:

Establishing an international human rights regime is an act of political delegation akin to establishing a domestic court or administrative agency [...] creating a quasi-independent judicial body is a tactic used by governments to “lock in” and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis non-democratic threats. In sum, governments turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives.²³⁶

Republican liberalism aimed to secure newly formed democracies across Europe with the support of established democratic nations to keep them on the right track. The newly established democracies would have been the most supportive of a reciprocal system to “lock-in” the core principles. Republican liberalism also explains why the longer “established” democracies were less inclined to be accountable themselves, while being content for other countries to be subject to intervention:

The decision of any individual government whether to support a binding international human rights enforcement regime depends [...] on the relative importance of these two basic factors: Sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favour of it. If we

²³⁵ Given that the ultimate motivation for agreeing to the ECHR would be self-interest, Moravesik reasons that it would be anticipated that the more powerful states would have exerted the greatest pressure and so forced their ideology onto the smaller members, which in turn would have attempted to defend their sovereignty. However, the study reaffirms the finding that the established democratic powers were not the drivers for the reciprocal undertaking and stresses that those states were also the great powers of the time. It is therefore indicated that neither idealism or realism account for the objective behind the treaty. Moravesik proposes the theory of republican liberalism as an alternative better fit. A. Moravesik (n 231) 222.

²³⁶ *ibid* 219.

assume that the inconvenience governments face is constant (or randomly distributed), it follows that a country is most likely to support a human rights regime when its government is firmly committed to democratic governance but faces strong internal challenges that may threaten it in the future. Its willingness to tolerate sovereignty costs increases insofar as the costs are outweighed by the benefits of reducing domestic political uncertainty.²³⁷

States committed to the rule of law at the national level are likely to abide by the rule of law at the international level. Whereas states variable in their commitment at the national level are less likely to comply at the international level. Helfer and Slaughter argue:

[S]tates committed to the rule of law domestically will be more law-abiding in the international realm, through the projection or transferal of their domestic habits. Accustomed to self-imposed constitutional constraints at home, constraints enforced by an independent judiciary, they are more likely to accept the constraints of international law as enforced by an international or supranational tribunal.²³⁸

This means states less consistent in their commitment to democracy require a more robust intervention when something is going wrong and closer cooperation to “lock-in” its ideals. Thus, supporting the conclusions of Moravcsik about the greater support of the new democracies when the ECHR was negotiated for a reciprocal agreement.

In accordance with republican liberalism, the purpose of the ECHR was to stabilise public opinion on the merits of liberal democracy, particularly in new or flawed democracies.²³⁹ This

²³⁷ *ibid* 228.

²³⁸ Helfer, L. and Slaughter, A., "Towards a Theory of Effective Supranational Adjudication" (1997) 107(2) *Yale Law Journal* 273, 332.

²³⁹ The continued focus on stability and the role of shared ground between the democratic States is evident in the report of the Council of Europe Steering Committee for Human Rights on the future of the ECHR system:

In these turbulent and fragmented times, the European Convention on Human Rights is an anchor. As a basis for joint action between 47 member States, it empowers European governments to act together in order to combat shared threats to Europe’s stability, while still safeguarding liberty. Where politics stalls or falters, the Convention can move us forward, keeping the doors of diplomacy open even when relations are fraught. Not only does it provide a common ground between nations, based on agreed laws and shared values: by setting out the fundamental freedoms all in Europe must respect, the Convention is a source of cohesion in our increasingly diverse societies, too.

Council of Europe, ‘The Longer-Term Future of the System of the European Convention on Human Rights’ (adopted December 2015, published June 2016) report of the Steering Committee for Human

would create a supportive and self-affirming group of member states providing mutual reassurance on the effective delivery of human rights through democratic rule.²⁴⁰

The ECHR project was concerned more with internal reinforcement of democracy, with a state commitment to showing themselves as effective democratic bodies by allowing comparison of their delivery against the collectively understood human rights norms. The accepted understanding of republican liberalism is that it creates symbolic (or, in the case of the ECtHR, actual) international constraints which allow undemocratic decisions of future governments to be challenged at the national level.²⁴¹ Moravesik argues that the expectation, with republican liberalism as the motivation for cooperation, would not be to encourage significant international intervention, but rather to reinforce the existing national systems:

Most participants [the founding member states] appear to have felt that domestic politics would remain the primary site of enforcement – all members were to be democracies, at least formally – with international controls serving as an external signalling device to trigger an appropriate domestic response. The ECHR [the Convention] was intended primarily to strengthen existing domestic institutions of judicial review, parliamentary legislations, and public action, not to supplant them.²⁴²

This symbiotic relationship between the ECtHR and national democracy is a view endorsed by the Court itself.²⁴³ For the established democracies, it was expected that their current

Rights, page 7, available at <<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4>> accessed 9 May 2018.

²⁴⁰ As Sikkink comments:

Human rights norms have a special status because they prescribe rules for appropriate behaviour and they help define identities of liberal States. Human rights then become the yardstick used to define who is in and who is outside of the club of liberal States.

K. Sikkink, "Transnational Politics, International Relations Theory, and Human Rights" (1998) (31)3 *Political Science and Politics* 516, 520.

²⁴¹ P. Evans, H. Jacobson and R. Putman, *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (University of California Press: 1993).

²⁴² A. Moravesik (n 231) 238.

²⁴³ The Convention is designed to incorporate a traditional civil liberties approach to securing "effective political democracy", as said by Guido Raimondi, President of European Court of Human Rights in a speech on parliamentary immunity and human rights:

It would not be conceivable on the European system of protection of human rights with his court untied-so to speak-from democracy. In fact, we have a bond that is not only regional geographic: one cannot be a party to the European Convention on human rights if you are not a member of the Council of Europe; You cannot be a member State of the Council of Europe

practices would be found to be largely consistent, and there was even questioning as to why a treaty was needed between states already committed to democratic rule. The response to this is to affirm once more the acceptance that a collective means for measurement and intervention may be required to secure democracy against external and internal risks. The views of the United Kingdom, seen as a bastion of democratic values, are of interest here. Sir David Maxwell-Fyfe of the UK explained:

In answer to the criticism that, as signatories will be limited to democratic States the Convention is unnecessary [...] our plan has the advantage of being immediately practicable; it provides a system of collective security against tyranny and oppression.²⁴⁴

The next point is to consider what this collective object and purpose of promoting and securing national liberal democratic rule means for delivery by the member states and the ECtHR.

4.3 Republican Liberalism and Authority

4.3.1 Developments Require Democratic State Support

The acceptance of the primacy of democracy, which still resides within the member states, negates viewing the agreement as federal. If a federal constitutional function could be shown, this would give the ECtHR considerable authority. As Bogdandy and Venzke argue:

If international courts could be interpreted as having a constitutional function for the domestic legal orders, it would be possible not only to justify their de-coupling from

if you do not respect pluralist democracy, the rule of law and human rights. Hence a non-democratic State could not participate in the ECHR: the protection of democracy goes hand in hand with the protection of fundamental rights and the need to protect the freedom, to protect the proper functioning of Parliament, which is central to democracy (as always said in the Court's case-law), it is certainly a requirement that is deserving of protection and so that's certainly balanced with the protection of human rights.

Address [made in Italian] by G. Raimondi, 'Allocuzione del presidente Raimondi alla presentazione dello Scudo in Ara Coeli' (January, 2016) DPERonline n. 1/2016 Issn 2421 0528, pages 2 and 3 available at

<https://www.academia.edu/22369691/Allocuzione_del_presidente_Raimondi_alla_presentazione_dello_Scudo_in_Ara_Coeli> accessed 19 November 2016.

²⁴⁴ Council of Europe 1975, I/120, extracted from A. Moravesik (n 231) 238.

an effective legislature. Such an understanding would also legitimise a creative and expansive interpretation of the legal foundations.²⁴⁵

Federalism would, however, require a strong central institutional autonomy that is lacking in the ECHR system. As Capps argues, such strong autonomy may be achieved only through 'the establishment of the legislative, executive and adjudicative institutions associated with the sovereign state'.²⁴⁶ Under the ECHR these powers still lie within the democratic states, with no comparable separate Convention site of representation for citizens.²⁴⁷ As Collins explains, international law should not be defended as an, 'autonomous system of rules capable of cohesively regulating international relations and pre-empting the political freedom of states'. This is not, however, necessarily a criticism or a suggestion of an institutional problem on the part of the ECtHR. Collins continues:

[M]y aim in engaging with the structural peculiarities of a decentralised legal order is, ultimately, to argue that that this condition should not be thought of as a "problem" at all [...] In fact, I will argue that the view that international law is somehow "constitutionally" deficient arises only because of the rather incoherent and unrealistic expectations we have of the international legal order.²⁴⁸

²⁴⁵ A. Bogdandy and I. Venzke. *In Whose Name: A Public Law Theory of International Adjudication* (Oxford University Press: 2014) 128.

²⁴⁶ P. Capps, "Autonomy in Kant's Philosophy of International Law" in T. Collins and N. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge: 2011) 50.

²⁴⁷ In contrast to the EU, which has a more federal structure. Notably, even the EU is subject to limits given the criticisms of its democratic deficit. This is despite continuing attempts to resolve those issues with an elaborate political system, providing the EU with a degree of its own democratic legitimacy. See for example, B. Rittberger, "Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament" (2012) 50 *Journal of Common Market Studies* 18, S. Hobolt, "Citizen Satisfaction with Democracy in the European Union" (2012) 50 *Journal of Common Market Studies* 88, and R. Kelemen "Eurolegalism and Democracy" (2012) 50 *Journal of Common Market Studies* 55.

Despite the complex intuitional structure of the EU now including an elected parliament and its authority to create directly effective laws applied in a wide range of everyday situations, even it failed to claim itself as a "constitution" with effective control above its EU Member States given that those states still retain too much power. The issues are considered in M. Rosenfeld, "The European Treaty-Constitution and Constitutional Identify: A View from America" (2005) 3 *International Journal of Constitutional Law* 316. Given the more limited machinery and agreed areas for cooperation under the ECHR are perhaps even greater in relation to the ECtHR.

²⁴⁸ R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 4. Collins also identifies that some of the same problems exist at national system. Therefore, the issues with the legal

In a review of the evolution of the ECHR regime and the relative positions and status of the ECtHR and national courts, Krisch concludes:

While domestic and European human rights law have indeed become increasingly linked and Strasbourg decisions are regularly followed by national courts, this does not indicate the emergence of a unified, hierarchical system along constitutionalist lines. Instead, [...] domestic courts insist on the ultimate supremacy of their own legal order over European human rights law, and they have thus created a zone of discretion in deciding whether or not to respect a judgment of the ECtHR, allowing them to negotiate with Strasbourg on issues they feel particularly strongly about.²⁴⁹

The underlying assumption of the ECHR undoubtedly supports a move towards greater constitutionalism at international level. But we have not yet seen sufficient progress towards constructing a European mechanism independently capable of giving such a project normative coherence. Whilst the ECHR system may be seen as a first step, there is not yet the structure or the support for a centrally driven process for constructing norms under the rights. It remains for state governments to determine public goods, forming the basis for an understanding of what public purpose national legislation or international cooperation is fulfilling.

The Council of Europe incorporates the ECtHR, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe but, as a whole, they are not sufficient to create the unity of a federal Europe or a public sphere capable of delivering the type of public deliberation necessary to provide it with independent democratic legitimacy

The Committee of Ministers comprises the Foreign Ministers from the member states, or their deputies. The Committee meets at ministerial level once a year and at deputies' level (Permanent Representatives to the Council of Europe) weekly. It is a collective forum, where European-wide responses to problems facing society are formulated. The Committee's decisions are embodied in European conventions and agreements, which are legally binding on states that ratify them or reach governments in the form of (non-binding)

system that is the ECHR do not mean that it may not, as with national legal system, still have the qualities necessary to operate.

²⁴⁹ N. Krisch, "Open Architecture of European Human Rights Law" (2008) 71(2) *Modern Law Review* 183, 215.

recommendations on matters for which the Committee has agreed "a common policy". The Committee is essential to coordination and building consensus amongst member states. In this sense it clearly has a political remit. However, we should not confuse political influence with the kind of legislative power that we expect of directly elected national government or even the more powerful international authorities, for example, EU institutions such as the Council of the European Union. The latter has the authority to pass binding secondary law, whereas the decisions of the Committee are binding only so far as they are adopted (or not) by the member states.²⁵⁰

The Parliament comprises 324 representatives from the member state national parliaments and is again political in nature. It meets four times a year but again, unlike national parliaments or the EU European Parliament, it cannot pass binding law.

The ECtHR, like other international bodies, is 'open to criticisms with regards to constitutive normative categories such as "representation" and "legitimacy" but only should it attempt to claim a political role.²⁵¹ The implications of this require acceptance of the limits upon the ECtHR. First, to understand the significance of the behaviour of a particular community

²⁵⁰ The ministers have the authority to commit their governments to the actions agreed on in the meetings.

On this point, see the speech of Lord Hoffmann:

The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 states which now belong. The situation is quite different from that of the European Economic Community, in which the Member States agreed that it was in their economic interest to have uniform laws on particular matters which were specified as being within European competence. On such matters, the European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights [...] The proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by European public order.

Hoffmann, Lord, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 19 March 2009) <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> accessed 16 December 2017.

²⁵¹ Weber, M. (2004), "The Critical Social Theory of the Frankfurt School and the "Social Turn" in IR" (2004) 31(1) *Review of International Studies* 195, 205.

requires an appreciation of the local factors that influence it. These factors are something that a body external to that community may not fully appreciate. Second, ECtHR judges are simply not representative of the way in which law operates in practice in different societies and or of the views emerging from those who participate in and are impacted by decisions. They have a limited worldview. Third, the judges in the ECtHR are not afforded a democratically legitimate voice on through direct election and accountability. They must rely on evidence of understandings of the normative scope of rights from the practices of the better placed national governments, that have more direct knowledge, direct authority to represent, and more local accountability. For the same reasons, they must also normally presume that in applying those principles state government is better placed.

Under the ECHR agreement as it stands, states remain best placed in being answerable to a comparatively small grouping of affiliated individuals and so representative of particular needs. As Presser argues, the rule of law itself requires that:

[A]ny compulsion in the society must not take place arbitrarily, but must be subject to some restraints. That restraint comes from “popular sovereignty” based on reliance that, the best way to prevent the exercise of arbitrary power is to disperse political power as widely as possible and to lodge ultimate sovereignty in the citizenry.²⁵²

By accepting the primacy of the national political democratic process to select between potentially reasoned responses, the ECtHR itself gains democratic legitimacy. The ECtHR does not directly claim the role of a representative body but acts as the conduit through which democratically reached normative interpretations of the rights and applications of those norms are channelled. In this manner, it may find the “common” positions to translate into ECHR law. By being subject to the rules developed by member states in accordance with democracy, the ECtHR is indirectly made subject to the citizenry. It is the citizenry who provide legitimacy to states, recognising a moral imperative to cooperate in free and equal society, and states that provide legitimacy to international institutions furthering the public good as understood by the citizens following dialectic reasoning.

²⁵² S. Presser, “Legal History or the History of Law: A Primer on Bringing the Law’s Past into the Present” (1982) 35 *Vanderbilt Law Review* 849, 853-854.

Bogdandy and Venske explain why this is not only the current position in many international agreements, but is also likely to continue:

Early euro-federalists and champions of a global parliamentarism might entertain the hope that supranational parliaments could carry the essential burden of democratic legitimation, like federal parliaments. By now, however, the insight has prevailed that the democratic process organised in the domestic constitutional orders constitute an achievement whose quality is hardly reproducible beyond the State in the foreseeable future. The legitimisation of international public authority should thus pick up on existing domestic pathways of democratic legitimation and supplement them with proper mechanisms. For international courts this means an intrinsic dependence on State-generated legitimation, which may well guide their work of interpretation [...]²⁵³

The core values of the ECHR support the national state as the level for the democratic process of moral construction. Subject to the criteria for reason under the PGC, the best means of developing new normative interpretations of the rights and securing their application is accepted by the ECHR itself as through national democratic governments.²⁵⁴ The ECHR Preamble confirms this and under Article 1, it is for the member states to secure the rights within their jurisdiction. There is clearly no implication that the ECtHR has taken away that role by assuming any direct control over the protection of rights.

What remains then is a form of weaker institutional autonomy as compared to federalism, based on an interstate system. Capps explains:

[I]n its weak form, institutional autonomy can be disconnected from the institutional form which is the sovereign state. In its weak form states collectively undertake the

²⁵³ A. Bogdandy and I. Venzke (n 245) 146.

²⁵⁴ There are, in fact, dangers of suggesting a legal order in constitutional terms as the basis for the ECHR rather than as a delegation by States. Lindseth comments that the widespread practice of considering the European legal order in constitutional terms entails a 'category mistake' because:

[T]he legitimation of supranational regulatory power (its 'mandate,' so to speak) has never been successfully located supranationally [...] Rather, it has been located, how ever tenuously, in the enabling treaties themselves, akin to enabling legislation on the national level, empowering the supranational exercise of regulatory discretion within the capacious limits defined by those treaties. (p. 19)

The constitutional approach does not fit with the configuration of systems such as the EU, Lindseth claims, because it requires international institutions to claim a self-legitimizing capacity which they never had.

administrative functions of international legal order through an interstate system. It is more like a league or confederation than a federated state of peoples.²⁵⁵

This is not to suggest that the member states should be seen as “organs” of the ECHR system, but rather that they have a powerful “authoritative” role guiding the ECtHR in interpreting and applying it.²⁵⁶

4.3.2 Democracy Results in Common Developments

While not federal, this does not undermine the importance of the move from a mere co-existence of the states with informal and ad hoc consideration and comment on the actions of others, to a real partnership with an increasingly constitutional role.²⁵⁷ The elements for a supranational constitutional court are helpfully set out by Fabbrini and Maduro as including the following: (1) jurisdiction beyond inter-state disputes, with the court able to rule on proceedings directly brought by individuals or upon request by another judicial body (usually a national court); (2) judicial powers analogous to those a national courts for example: to pronounce binding decisions (as opposed to recommendations), to review the lawfulness of legal measures for their conformity with the higher standards set by a treaty, to set aside non-conforming legal measures or determine another court to do so or to adopt other effective remedies; (3) interpretation of the founding treaty as granting rights directly upon individuals; (4) development of a hermeneutic which is autonomous from international law recognising the founding document as an act of a new legal kind, endowed with interpretive rules of its own; and (5) a meaningful degree of effectiveness vis-à-vis the other institutional actors, with its decisions commanding respect.²⁵⁸

²⁵⁵ P. Capps (n 246) 50.

²⁵⁶ T. Nardin, *Law, Morality, and the Relations of States* (1982: Princeton University Press), cited in R. Collins, *The Institutional Problem in Modern International Law* (Hart: 2016) 11.

²⁵⁷ For a discussion on the distinction between coexistence and cooperation amid the move to a more communitarian model, see W. Friedman, *The Changing Structure of International Law* (Columbia University Press: 1964) 19.

²⁵⁸ Fabbrini, F. and Maduro, M., ‘Supranational Constitutional Courts’ (21 June 2017) iCourts working paper series no. 98, pages 5-7 available at <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2990277_code2133408.pdf?abstractid=2990277&mirid=1> accessed 26 January 2018.

The ECHR creates a new transnational community with rights that extend beyond national borders.²⁵⁹ The acceptance of these rights as individually centred and the effectiveness of ECtHR rulings means that this community is (at least) heading towards a constitutional arrangement. The level of consistent interpretation by national judges across member states and the disapplication of national law conflicting with ECHR provisions and the case law from the ECtHR is increasing.²⁶⁰ The member states have by legislation and through their case law voluntarily limited their sovereignty by subjecting themselves to an authority that is, at least in some respects, more akin to a supranational constitutional body than a traditional international one.²⁶¹ Returning once more to the ECHR Preamble, where the idea of a “common” understanding (as opposed to national) and enforcement has already been identified, the wording also confirms both the desirability and the feasibility of this:

Considering that the aim of the Council of Europe is the achievement of *greater unity* between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms [...]

Being resolved, as the Governments of European countries which *are like-minded and have a common heritage* of political traditions, ideals, freedom and the rule of law, to take the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration, possibility for formalised *collective action* is recognised in the signatory States [emphasis added].

²⁵⁹ Even well-established democracies under an agreement motivated by republican liberalism are subject to the collective view. Moravesik provides an explanation based on securing peace:

According to republican liberal theory, established democracies have an incentive to promote such [human rights] arrangements for others – which may involve some small risk of future pressure on established democracies to deepen their commitment – in order to bolster the “democratic peace” by fostering democracy in neighbouring countries.

A. Moravesik (n 231) 229.

²⁶⁰ See G. Martinico, “Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts” 23 (1) *European Journal of International Law* 401.

²⁶¹ See for example L. Helfer and A. Slaughter, “Towards a Theory of Effective Supranational Adjudication” (1997) 107(2) *Yale Law Journal* 273. The work argues that the effectiveness of the ECtHR is linked to its supranational jurisdiction to hear claims brought by private parties directly against governments or against other individuals. Such powers enable the ECtHR to:

[P]enetrates the surface of the State, to forge direct relationships not only with individual citizens but also with distinct government institutions such as national courts. (at 288)

The ECtHR's central role in achieving this is made explicit, being tasked with ensuring the observation of the rights as undertaken by the states (see Article 19)²⁶² and resolving disputes over the interpretation and implementation (see Article 32)²⁶³.

State support and acceptance of these wider ECHR community constitutional type principles is also real. The work of Krisch comments that:

[I]n spite of [the] divergence on fundamentals, the interplay between the different levels of law has been remarkably harmonious and stable. There have hardly been open clashes; instead mutual accommodation and convergence have been the norm [...]²⁶⁴

While falling short of a federation, the ECHR is a community-oriented system and the ECtHR is able to shape and influence the freedom of the individual states based on their place in a wider ECHR community.²⁶⁵ The ECtHR is therefore able to exercise public constitutional authority in relation to that collective community, with the capacity to, 'impact other actors in their exercise of freedom'.²⁶⁶ It may therefore effectively challenge the views of individual states even if some members are not content with the particular outcome²⁶⁷, based on

²⁶²Article 19:

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis [...]

²⁶³ Article 32:

The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention [...]

²⁶⁴ N. Krisch (n 249) 215.

²⁶⁵ It is notable that the delegation of authority to an international court is representative of a strong commitment to enhancing the credibility of the ECHR system. As Majone explains:

[A]n Agent [the member states] bound to follow the directions of the delegating directions of the delegating political could not possibly enhance the commitment.

G. Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance" (2001) 2(1) *European Union Politics* 103, 110.

²⁶⁶ Taken from A. Bogdandy and I. Venzke (n 245) 112.

²⁶⁷ This advantages of looking beyond a merely instrumental justification to the effectiveness and stability of the agreement, are identified by Eriksen in relation to the European Union. If instrumental rationality is used to assess the performance of an organisation:

Action is conceived of as motivated by preferences and anticipation of consequences... However, functional interdependence and interest accommodation are inherently unstable,

collective commonly constructed interpretations of the normative scope of the rights, and acceptable responses in the application of them. Craven explains that human rights treaties may be viewed as creating regimes:

[E]mbodiment of certain collective values [...] which both define and transcend individual states' legal interests. Since the treaty, according to this view, is the product of coordinated action by states acting in concert, the substantive values and protected legal interests embodied also partake of this character. In ratifying the treaty [...] states assume obligations not in relation to each other state *ut singuli*, but to all other participating states as a collective [...] Individual state interests, in other words, are entirely bounded by (and constituted within) the interests of the regime as a whole, and exist only insofar as they correspond with that of the collective.

Given the emphasis [...] upon the nature of the regime as the source of legal interests, it would seem to follow that [...] it is the regime's institutions that must play the dominant role in determining the treaty's application and effect. The effect of reservations or the question of compliance [...] can only be determined by the centralised institutions that are constitutive of the regime, and are not matters on which individual states may (legally speaking) take a different view.²⁶⁸

However, national democracy remains the system trusted to consistently deliver morally reasoned responses under republican liberalism. It is, therefore, expected that individual states with their own constitutions would require clear evidence of a collectively understood norm under a right before it could form part of the ECHR "constitution" of principles.

as actors will opt out of cooperation whenever they are faced with a better option. Interests make parties friends one day and enemies the next (Durkheim, *The Division of Labor in Society* (Free Press: 1964) 204). Therefore, a political order cannot be reduced to the pursuit of self-interest or to the requirements of functional adaptation. Interests generate unstable equilibria (Axelrod, *The Evolution of Cooperation* (Basic Books: 1984)). Hence a common identity and common norms and values are required to motivate collective action.

E. Eriksen and J. Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" (2004) 25(4) *International Political Science Review* 435, 440.

²⁶⁸ M. Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" (2000) 11 *European Journal of International Law* 489, 516.

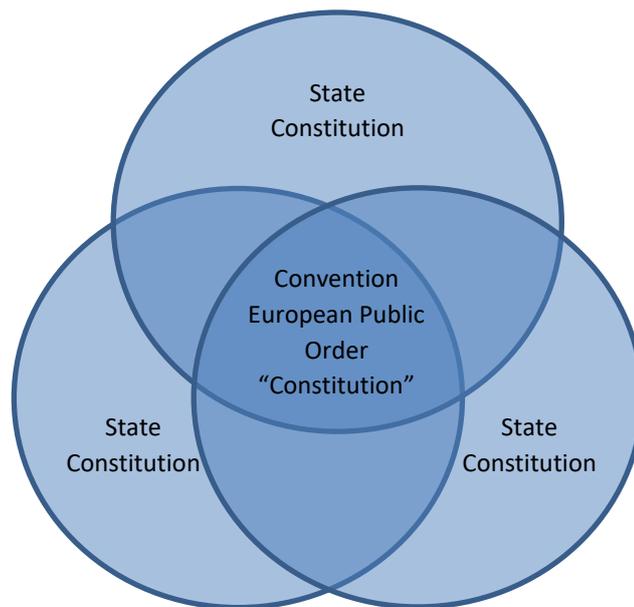


Fig. 4.1 State Constitutions and the ECHR System

As will be explored in more detail in the following section, there is nothing morally wrong with agents paying special attention to their state. The state: (1) represents a point at which progress can be achieved on justified moral norms; and (2) even in a globalised world, differences in the understanding of constructed principles of general application will emerge from the differences in character from one state to another. Keller comments:

Standards of justice arise from within particular communities, we might say, so there is nothing arbitrary or morally obnoxious about the citizen’s paying special attention to the community in which her own sense of justice and her own moral identity are grounded – where that community receives its political expression through a state.²⁶⁹

However, it is no longer the case that the state remains, for a good citizen²⁷⁰, the only source of a deep moral identity. There is now a more outward looking, sharing of concerns across

²⁶⁹ S. Keller, “Civic Motivation and Globalization: What is it Like to be a Good Citizen Today?” in D. Thunder, *The Ethics of Citizenship in the 21st Century* (Springer: 2017) 29, 30.

²⁷⁰ S. Keller explains:

To the extent to which a person’s beliefs are false and her deliberations misguided, she fails to perform well the characteristically human activities of forming beliefs and values and making decisions. Beginning from the question of what it takes for an individual human to flourish in her role as citizen, then, there is an intrinsic reason, not just an instrumental reason, to want her beliefs, values, and motives to be correct, or appropriate, or right-minded.

ibid 33.

the world which must lead to faster sharing of views. In relation to the ECHR, once national norms reach the point of being common in Europe, so not essentially those of citizens of particular states, their application rightly becomes a supranational concern.

4.3.3 Subsidiarity Requiring Evidence of Commonality

The ECHR regime must be seen as a community operating alongside and not as a replacement to the member states.²⁷¹ It is therefore imperative that the ECtHR be legitimised and controlled when it intervenes in democratic choices, claiming the collective regime requires a different outcome. As Chandler notes:

What was lost in the promulgation of human rights theory in the 1990s was the connection between rights and subjects that can exercise those rights, which was at the core of political accountability and democracy. Once the historical and logical link between rights and subjects of these rights is broken, then democracy becomes a meaningless concept. The epistemological premise of democracy is that there are no final truths about what is good for society that can be established through the powers of revelation or special knowledge. *If we accept that people are the best judges of their own interests, then only self-determination can be the basis for collective self-government.* Democracy therefore is only a means to an end, to the realisation of the *public good*, because it allows people to define what that good is as well as to control the process by which it is realised [emphasis added].²⁷²

This idea of self-determination is central to a liberal society which must protect individual free choice. However, the realisation of that free choice requires a type of public reason tied in with forces such as social convention and biology and with the content of social structures such as family and politics. Public reasoning is just as much a crucial part of a liberal democracy as is liberty and is essential to self-authorship by free agents. Brunder explains:

²⁷¹ Capps explains the argument in relation to international institutions:

I claim that international legal order can be, in part, achieved by states adopting a dual role as subjects and organs of the international legal order. Thus, an international legal order can be largely instituted on the basis of an interstate system. This system must, however, be founded on a set of constitutional norms which determine when the state acts as subject, or as organ, of the international legal order.

P. Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing: 2009) 6.

²⁷² D. Chandler, "Universal Ethics and Elite Politics: The Limits of Normative Human Rights Theory" (2001) 5(4) *The International Journal of Human Rights* 72, 86.

One is free [...] when one realizes one's capacity for self-authorship, not by recoiling from one's vulnerability to heteronomy, but by acknowledging the goodness of already existing social structures – for example, the family, cultures, collegial associations, and the political community – that in turn validate the worth of the self-actuating self [...] On the one hand, the self is heteronomous, because it depends for its worth on being a valued actualizer and perpetuator of an objectively existing social unit; yet on the other, heteronomy is reconciled to self-authorship, because the structures acknowledged as valuable reciprocally value the self-authoring self through whose conscientious endorsement their life is vibrantly reproduced and confirmed as good.²⁷³

Self-authoring agents must be free to choose their stance towards the public good life and to influence the direction in which it continues to develop. The result is differing outcomes from those choices and different stances between societies towards the meaning of the public good. As Taylor explains:

[A society] cannot hold together simply by the satisfaction of its members' needs and interests. It also requires a common, or at least widespread set of beliefs which link its structures and practices with what its members see as ultimately significant.²⁷⁴

Or in the words of English:

[T]he civic nation is based on reasoned principles, not blood [...] critical to this vision, is an understanding that adherence to principles of justice is cemented through shared sentiments, educational formation, and a broader political culture.²⁷⁵

Fig 2.11 from Chapter Two can be updated thus:

²⁷³ A. Brunder, *Constitutional Goods* (Oxford University Press: 2004) 30-31.

²⁷⁴ C. Taylor, *Hegel* (Cambridge University Press: 1975) 459.

²⁷⁵ W. English, "Varieties of Citizenship and the Moral Foundations of Politics" in D. Thunder, *The Ethics of Citizenship in the 21st Century*" (Springer: 2017) 13, 17.

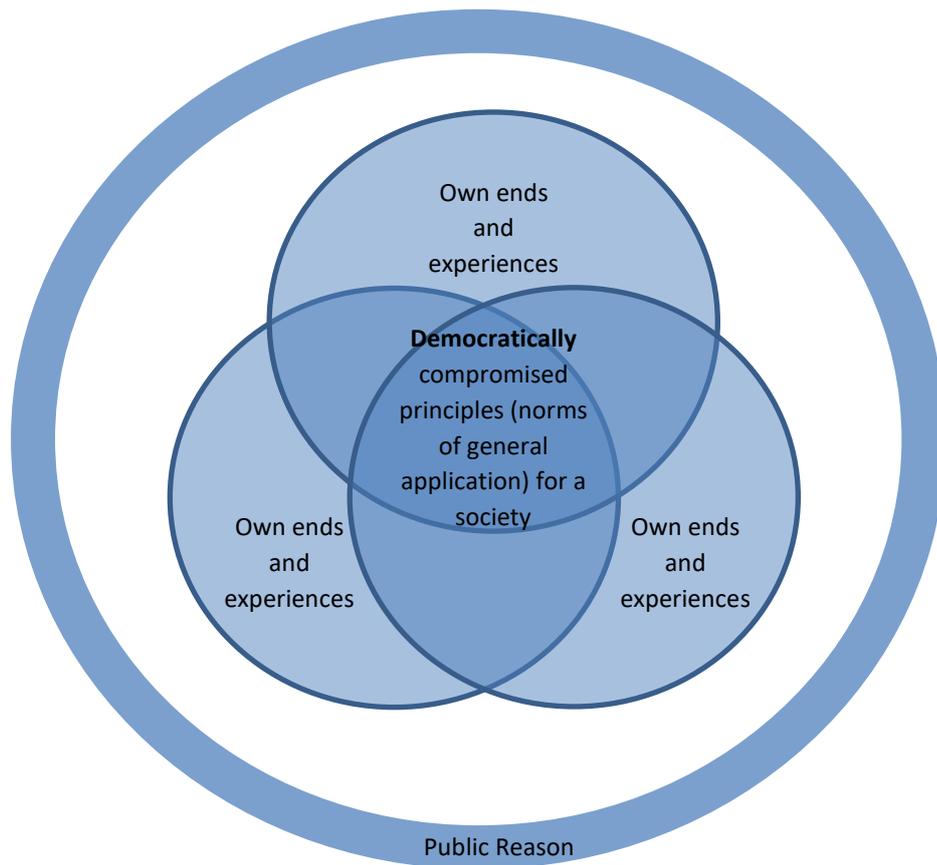


Fig. 4.2 Norms of Consistent Importance to Anyone's Ends in a Democratic Society

Subsidiarity provides a means of reconciling the universalistic claims of the ECHR versus the often-pluralistic norms self-determining agents reasonably construct within a particular society. It is not a sign of weakness in the ECHR system, but rather a positive means of placing responsibility with the democratic national authorities while enabling cooperation, assistance and intervention where necessary:

[S]ubsidiarity can be understood to be a conceptual alternative to that comparatively empty and unhelpful idea of state sovereignty. The principle of subsidiarity provides an analytically descriptive way to make sense of a variety of disparate features of the existing structure of international human rights law, from the interpretive discretion accorded to states, to the relationship of regional and universal systems, while also justifying the necessity of international cooperation, assistance and intervention. In fact, subsidiarity fits international human rights law so well that the basic values of the principle can be regarded as already implicitly present in the structure of international human rights. If that is correct, then it is not surprising to find in the development of human rights law that other doctrines and ideas have arisen that function at least in

part as analogues to subsidiarity in addressing the pervasive dialectic between universal human rights norms and legitimate claims to pluralism.²⁷⁶

In relation to the risks of an overzealous intervention by international bodies such as the ECtHR, the difficulties are apparent in the explanation of Bogdandy and Venzke:

If public law, in accordance with the liberal-democratic tradition, is understood as a system that protects individual freedom and makes collective self-determination possible, every act with repercussions for these normative principles must come under scrutiny to the extent that these repercussions are significant enough to raise justified doubts about the legitimacy of an act.²⁷⁷

The principle of subsidiarity resonates with the individualistic liberal tone and the ECHR's stated aim to protect fundamental freedoms²⁷⁸, by means of encouraging free and equal choice between people to reach a compromise through democracy.²⁷⁹ This is also in keeping

²⁷⁶ P. Carozza, "Subsidiary as a Structural Principle of International Human Rights Law" (2003) 97(1) *American Journal of International Law* 38, 40.

²⁷⁷ A. Bogdandy and I. Venzke (n 245) 17-18.

²⁷⁸ Note that the principle of subsidiarity was re-endorsed by all of the member states in the Brighton Declaration, with a call for it to be expressly incorporated into the Treaty. Protocol 15 has done so, with both it and the margin of appreciation now included. At the end of the ECHR Preamble, a new recital reads:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

²⁷⁹ The starting point is the ECHR's preference for an individualistic view of rights. It is the support of equal liberty (equality of choice and opportunity) and not equality itself which forms the basic core value. This creates a presumption of an underlying freedom to promote one's own self-interests, hold individual views, participate in activities that give personal enjoyment, secure an unequal share of resources, and to enjoy free choice in whether and how to interact with others.

However, part of valuable choice making involves interaction with others whether by design or necessity. According to Ringen:

Reason is a social competence: I'll be reasonable if you are. What enables me to be reasonable is trust that you will be reasonable in return. There is not much use in preaching to individuals about being reasonable in all things unless they live in an environment in which reason reasonably prevails. But reason is not only a social competence. It is also a competence in the individual. For a social environment to be created in which reason prevails, the individuals who make up that environment must be capable of and inclined to reason. That's not enough for a culture of reason to emerge and persist; for that to happen individual inclinations must come together and be institutionalized so that each of us is able to live as we preach. But it is still necessary that individuals enter the social game with a willingness to reason. No

with the Principle of Generic Consistency (PGC), valuing freedom, equality and evaluative judgements on the part of empowered agents.

Subsidiarity recognises that the best means of finding an appropriate balance is to enable decisions at the most local source of the issue. Higher intervention is called for only as and when necessary, for example, when there is local support for being held to the same common human rights standards as practiced in other similar states. Carozza explains how such limits must be justified:

It [subsidiarity] envisages that just as the individual realises his fulfilment in a community with others, so do smaller communities realise their purpose in interactions with other groups [...] And, in turn, the "higher" groupings exist not just for their own sake but to assist the smaller, more limited associations in realising their tasks [...] The various human associations that constitute society (to the extent that they are healthy and functioning properly) are seen to fit together organically. In one direction, each larger grouping is understood to serve the smaller, and all in the end or understood to serve individual dignity; in the other direction, not only the individual, but also each level of human association is understood to be linked, by its very structure and purpose, to a "higher" one.²⁸⁰

The nation state represents a point of collective self-determination before the ECHR system. These localised decisions on norms and their application are within the more contained, identifiable constitutional principles and public goods, culture and economic interests of a particular nation. Exposure to these parts forming a particular democratic infrastructure is essential to representativeness of its citizens. Governments held accountable through election, and national court rulings are more open to genuine and realistic challenge by those elected representatives. As Brunder explains:

The compatibility of political judgment with rule of Law implies that an elector may now be represented by a deputy in whom the elector sees a background and experience similar to his in own and in whose judgment the subject reveals his confidence by voting for him. Indeed, under certain social conditions, he may be adequately represented by a deputy for whom he did not vote [...] and, carrying the same logic further, by a majority of those voting in an assembly even if his own deputy

convention can become institutionalized unless people bring with them those attitudes and beliefs that are the building blocks of conventions.

Ringen, S., *What Democracy is For: On Freedom and Moral Government* (Princeton University Press: 2007) 213.

²⁸⁰ P. Carozza (n 276) 43.

voted with the minority [...] [I]f the community is more or less homogeneous in culture and economic interest, then one can see oneself “virtually” represented in outlook and interests by like-minded deputies even if one has not personally helped to elect them, even if they are not one’s *own* deputies.²⁸¹

Unless the role of the democratic sovereign state is to be abandoned in favour of a more appropriate/effective international approach to liberal self-determination by agents, care must be taken not to unjustifiably undermine it. As this chapter has argued, the stage of such a comprehensive international system has not been reached yet. Bull raises the concern that:

Carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states. For, if the rights of each man can be asserted on the world political stage over and against the claims of his state, and his duties proclaimed irrespective of his position as a servant or a citizen of that state, then the position of the state as a body sovereign over its citizens, and entitled to demand their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy. The way is left open for the subversion of the society of sovereign states on behalf of the alternative organising principle of a cosmopolitan community.²⁸²

The authority of the organs of the nation state should not therefore be unnecessarily undermined and caution should be exercised in the question of any use of judicial authority.²⁸³ This is not an attempt to de-legitimise the Council of Europe or the ECtHR’s

²⁸¹ A. Brunder (n 273) 398-399.

²⁸² H. Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press: 1997) 146.

²⁸³ Recognition of need for citizens to participate in shaping their local environment is recognised under the ECHR system in, for example, agreements relating to local government:

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Considering that one of the methods by which this aim is to be achieved is through agreements in the administrative field;

Considering that the local authorities are one of the main foundations of any democratic regime;

Considering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe;

Considering that it is at local level that this right can be most directly exercised;

power of adjudication, but rather to recognise that its authority and autonomy has limits and that where there are doubts that the Court has been given the power to act, resolution should always be in favour of the state.

4.4 Broad Consequences for the ECtHR

The primacy of democracy under republican liberalism and the principle of subsidiarity, recognises the first place of authority in settling human rights as sovereign nation states. The dangers of an international court being too proactive, without a democratic mandate, are identified by Fonte:

There is nothing particularly “universal” about the agenda of much of what passes for the “international community”. On the contrary, their agenda (on group rights, new definitions of “human rights”, limiting democratic sovereignty, abolishing the death penalty, and so on) is, for the most part, simply the views of “progressive” transnational elites. These are rarely the views of democratic majorities in democratic nations [...] This is not to imply that raw majoritarianism within a nation-state is the ultimate moral position. But [...] democratic procedures within democratic nation-states are more effective, more comprehensive, and above all more just way of deciding what are universal human values.²⁸⁴

States are the sole embodiment of the operation of the democratic process under the ECHR system; the ECtHR representing only a safeguard. What the ECtHR can offer is: (1) an authoritative system for settling the collective community minimum normative interpretation of the scope of rights; and then (2) a process of review for ensuring due democratic

Convinced that the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen;

Aware that the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power;

Asserting that this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment,

Council of Europe, European Charter of Local Self-Government (1985) CETS122 available at <<https://rm.coe.int/168007a088>> accessed 9 May 2018.

²⁸⁴ J. Fonte, “Democracy’s Trojan Horse, The National Interest (2004) 76,117 cited in N. Gvosdev, “Communitarian Realism” (2005) 48 *American Behavioural Scientist* (2005) 1591, 1596.

consideration in the application and a response that is in line with collective expectations for the standard of substantive delivery.

In settling those points and applying them, republican liberalism gives the ECtHR a more “constitutional” oversight role. While under an idealist system there may be a strong suggestion of the delivery of individual justice being a primary objective, republican liberalism does not require the ECtHR to settle the application of every case that comes before it. It relies instead upon the national courts to do so, acting as an overseer only and then only where a sufficiently important collective community public law point is raised. The work has reasoned that in its constitutional type role, the ECtHR falls short of a federal system. So, in addition to not being mandated to be the deliverer of justice in all cases, when it comes to determining what the community constitution requires, it is acceptable for it to have “gaps” in declining to select between candidate interpretations and standards for application.²⁸⁵ Where such gaps exist, there is as yet no community response overriding the more local system and the national constitution and legal system should thus apply to resolve the issues rather than remain beyond the community standardised position.

Several provisions of the ECHR indicate that the ECtHR is subsidiary to the national system, with its role one of review rather than a court of “fourth instance”.²⁸⁶ ECHR Articles 1 and 13 place the primary authority for securing the rights with national authorities, who also have the obligation to make effective remedies available. Applicants are required by Article 35 to exhaust domestic enforcement procedures before petitioning the ECtHR.²⁸⁷

²⁸⁵ In contrast to an international treaty requiring a higher degree of detail and certainty, such as one relating to trade, banking or the environment.

²⁸⁶H. Petzold, “The Convention and the Principle of Subsidiarity” in R. Macdonald, F Matscher. and H. Petzold (eds.) *The European System of the Protection of Human Rights* (M. Nijhoff Publishers: 1993) 41-62.

²⁸⁷ ECHR Article 1:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

ECHR Article 13:

This differs from the role that a national court plays in dealing with day-to-day cases based on national norms. The national court is the only means of settling the dispute at hand and is integrated into a comprehensive legal and political system for that state.²⁸⁸ An international court is concerned with situations only to the extent of some degree of agreement beyond the national level.

4.5 Subsequent Agreements

It is worth noting at this point any evidence of a possible change in the underlying object and purpose of the ECHR since its beginning. Given subsequent events could raise the question of whether there has been an alteration in the understanding of the old and new membership since the original negotiation.

Major changes to how an agreement operates are reserved for contracting states to accept. For example, the ECHR initially made the right of individual petition entirely optional for member states and this was altered by Protocol 11²⁸⁹, which came into effect in 1998.

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

ECHR Article 35 (1):

The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rule of international law, and within a period of six months from the date on which the final decision was taken [four months once Protocol 15 is ratified by all Contracting States].

Note also the European Programme for Human Rights Education for Legal Professionals (HELP). The programme supports the Council of Europe member states in implementing the ECHR at the national level, in accordance with the Committee of Ministers Recommendation (2004) 4, the 2010 Interlaken Declaration, the 2012 Brighton Declaration and the 2015 Brussels declaration. This is done by enhancing the capacity of national judges, lawyers and prosecutors in all to apply the ECHR in their daily work. For more information, see <<https://www.coe.int/en/web/help/home>> accessed 12 May 2018.

²⁸⁸ Any national court decisions on what a constitutional principle requires may also later be subjected to wider challenge and possible reversal by higher courts or the legislature, as opposed to representing the more “definitive” findings of the ECtHR under the ECHR.

²⁸⁹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

Another example relates to restricting that right to significant cases, accepted through signing Protocol 14.²⁹⁰

Given that these system changes required express re-negotiation and agreement, what then of the even more problematic determination that the core object and purpose has altered. Claiming that the original negotiated remit of an organisation has grown without an express re-consultation of states would seem unsupportable without strong evidence.²⁹¹

It could be argued that mandating the right of individual petition represented such an express agreement that could have the potential change the underlying nature of the ECHR. This work has suggested that, initially at least, the ECHR was concerned more with constitutional justice than with individual justice. If Protocol 11 necessarily changed that position, then arguably there would need to be a reevaluation of the direction of the ECHR. But the text of the Protocol does not clearly alter the nature of the ECHR²⁹². This work suggests that it can be read instead as a means to improve its effectiveness, with the signatory states having agreed to it in:

²⁹⁰ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

²⁹¹ For agreements where the common objectives do regularly change, it is notable that new treaties are a common feature. A good example of this is found in the many manifestations of the European Union since its first inception going back to the 1957 Treaty of Rome.) A change to the form of enforcement does not necessarily alter the actual substance of the undertaking. See A. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008) 131.

²⁹² This is a view endorsed as reasonable by Andrew Drzemczewski, the Head of the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe:

The first general observation is that the title of Protocol No.11 referred to the “restructuring of the control machinery” of the Convention. Thus, the structural changes made, although profound, did not tamper with any of the rights already guaranteed in the body of the Convention or its protocols.”

He went on to stress that there was no change in the power balance between the member states and the ECtHR:

The rights and freedoms found in the ECHR and its protocols should first and foremost be firmly anchored in domestic law; Strasbourg should play merely a subsidiary role [...] Any amelioration of the Strasbourg control mechanism – and irrespectively of how efficiently it operates – will not in itself ensure real and effective protection of human rights within States Parties to the ECHR. Therefore, the success of the Strasbourg system is contingent on adequate human rights protection in member States (thereby short-circuiting or even totally eradicating the need to go to Strasbourg) [...]

Considering the urgent need to *restructure* the control machinery established by the Convention in order to maintain and *improve the efficiency* of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe [...] [emphasis added]²⁹³

Protocol 14 also arguably reaffirms the view that the focus is not on individual but rather constitutional justice. It seeks to filter out cases with less chance of succeeding, those that are similar to cases brought previously against the same member state, and those in which the applicant has not suffered a "significant disadvantage". The text confirms that it is not the objective or the nature of the whole ECHR which has changed, but rather a practical recognition that the system for delivery of those purposes is not effective. Signatories agree to it in:

Considering the urgent need to amend certain provisions of the Convention in order to maintain and *improve the efficiency* of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe; Considering, in particular, the need to ensure that the Court can continue to play its pre-eminent role in protecting human rights in Europe [...] [emphasis added]²⁹⁴

Protocol 16 goes further in supporting the view that under the ECHR the ECtHR is not principally tasked with the delivery of individual justice, but rather with securing that delivery by the member states. The Protocol will allow the highest courts and tribunals of a state to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights, supporting the national judiciary as the chief providers of justice:

1 Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

A. Drzemczewski, The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application (Strasbourg: 16 November 1999) p. 356-358, available at <<http://www.corteidh.or.cr/tablas/13600.pdf>> accessed 8 January 2017.

²⁹³ Preamble, Protocol 11, ECHR.

²⁹⁴ Preamble, Protocol 14, ECHR.

2 The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

3 The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.²⁹⁵

4.6 Analytical Framework for Court Authority and Autonomy

Any judicial model for the ECtHR must be based upon a framework of principles that enable it to legitimately interpret the ECHR. The preceding work in this chapter reasons that the ECtHR arguably serves as only a functional regime between democratic nations. Its role is first identifying and then ensuring a proper national process of application of the collectively recognised interpretations of the normative scope of the rights.

When developing an analytical framework for assessing the legitimacy of the ECtHR procedure based upon its institutional authority or autonomy, the following point must thus be kept in mind. The ECtHR depends upon the member states for the operation of democracy. It draws from democratic legitimacy for its own authority. Furthermore, it relies upon a level of uniformity in the recognition by democratic states of new normative duties under the scope of rights to demonstrate their commonality and shared standards for application. Without acceptable evidence of commonality, there is no justification for higher intervention in securing the protection of a collectively recognised ECHR principle. The ECtHR also relies upon commonality in the member states respecting certain international sources as evidence on understood principles of general application and of standards for best practice in their particular application. Some method is required to show consent by member states to these increasingly remote sources for guidance.

At this point, it is important to note the concerns made by the member states, that the work has set out to address:

²⁹⁵ Article 1, Protocol 11, ECHR.

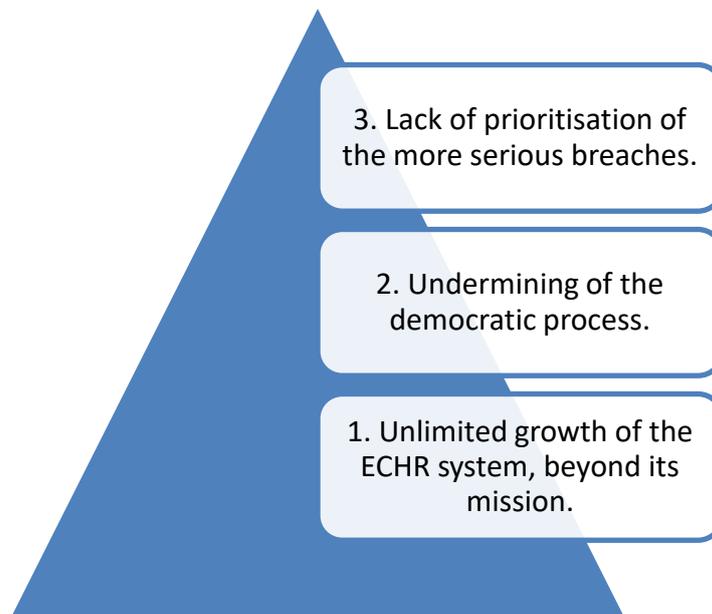


Fig. 1.4 [from Chapter One] Member State Concerns Taken from the Brighton Declaration

If the ECtHR either: (1) interprets a common *in abstracto* norm as falling under a right before it has been recognised via the member states or; (2) intervenes in the *in concreto* application when due process was followed and the substantive decision is neither unreasoned nor outline with other similarly affected states, then the first and second concerns (unlimited growth and undermining democracy) may be valid. In terms of what is recognised as sufficient to show commonality between governments (at least for the purposes of the ECHR), the type and level of consent required must be settled.

Even with evidence of a common new normative interpretation of a right, intervention into the decisions made by states about application of that norm may not always be desirable. The aim of the ECHR is to promote national democracy (underlining as opposed to undermining democracy) and the resolution of issues at the state level. Therefore, the ECtHR may be reserved in determining when it should become involved (seriousness of the breach). It will also need to provide a margin within which the democratic process can operate with a presumption that democratic choices are correct (hence avoiding undermining of democracy and respecting the principle of subsidiarity).

At this point, it is possible to propose an analytical framework for assessing the legitimacy of the ECtHR procedure. The elements of the framework will form the points of reference for

developing the proposed improved judicial model and the deliverables against which its potential for success will be measured:

Element	Explanation	Risk
Transparency and consistency	<p>Clearly explained reasoning for judgments.</p> <p>Decision-making process with clearly defined stages for interpretation and application, always applied.</p>	<p>Difficulty applying a decision outside of the specific facts of the case.</p> <p>Inconsistent development of law.</p> <p>Lack of clarity on what is required for a state to comply with its duty.</p> <p>Undermining of ECtHR accountability.</p> <p>Undermining of trust in the legitimacy of judgments.</p>
Directed/contained authority	Acts as agent to secure the objects of its principals (the member states as representatives of citizens).	Expansion beyond the goals/mission, slippage from securing government object and purpose, as represented by the signatory states.
Current/informed	Judgments need to keep pace with evolving understandings of the government purpose of the principals and to be informed by/harmonious with, wider international law.	The ECHR ceases to be effective for agents and relevant internationally.
Acknowledgement of subsidiarity and a margin of appreciation	Local variation means that national democratic government choices are presumed to be correct.	<p>Unrealistic judgments.</p> <p>Judgments not in accordance with public values.</p> <p>Unimplemented judgments and loss of public investment – meaning the ECHR ceases to be effective.</p>
Limited to oversight	Not tasked with securing individual justice i.e. an appeal court.	<p>Excessive caseload, undermining local systems and overwhelming the ECtHR.</p> <p>Overly intensive review of state democratic decisions.</p>

<p>Acknowledgement of the democratic process</p>	<p>The ECtHR is tasked with upholding and reinforcing democracy.</p> <p>Democratic decisions on interpretation of right are correct if they could accord with the PGC.</p> <p>Provided the democratic process is followed national decision-making on application should, <i>prima facie</i>, be upheld with a wide margin of appreciation.</p>	<p>Undermining of the operation, relevance and faith in democracy as the best route to securing “human rights” and organising society.</p> <p>Undermining the very basis of the ECHR and the rights as listed in its text.</p>
<p>Effectiveness</p>	<p>Judgments upheld and decisions of the ECtHR influential in driving forward wider reform.</p>	<p>Individuals do not secure an appropriate remedy and no systematic change.</p> <p>Decisions do not inform future law-making and public debate.</p>

Fig. 4.3 Analytical Framework for Assessing the Legitimacy of ECtHR Procedure

4.7 Chapter Conclusions

The analytical framework has been developed in line with the object and purpose of the ECHR as a republican liberalist undertaking to better secure moral justified norms under the PGC within national democracies. It provides a means by which to develop and measure a legitimate approach to be adopted by the ECtHR in its judicial decision making. The elements included in the proposed framework address the three main concerns that have been raised by the member states in the Brighton Declaration:

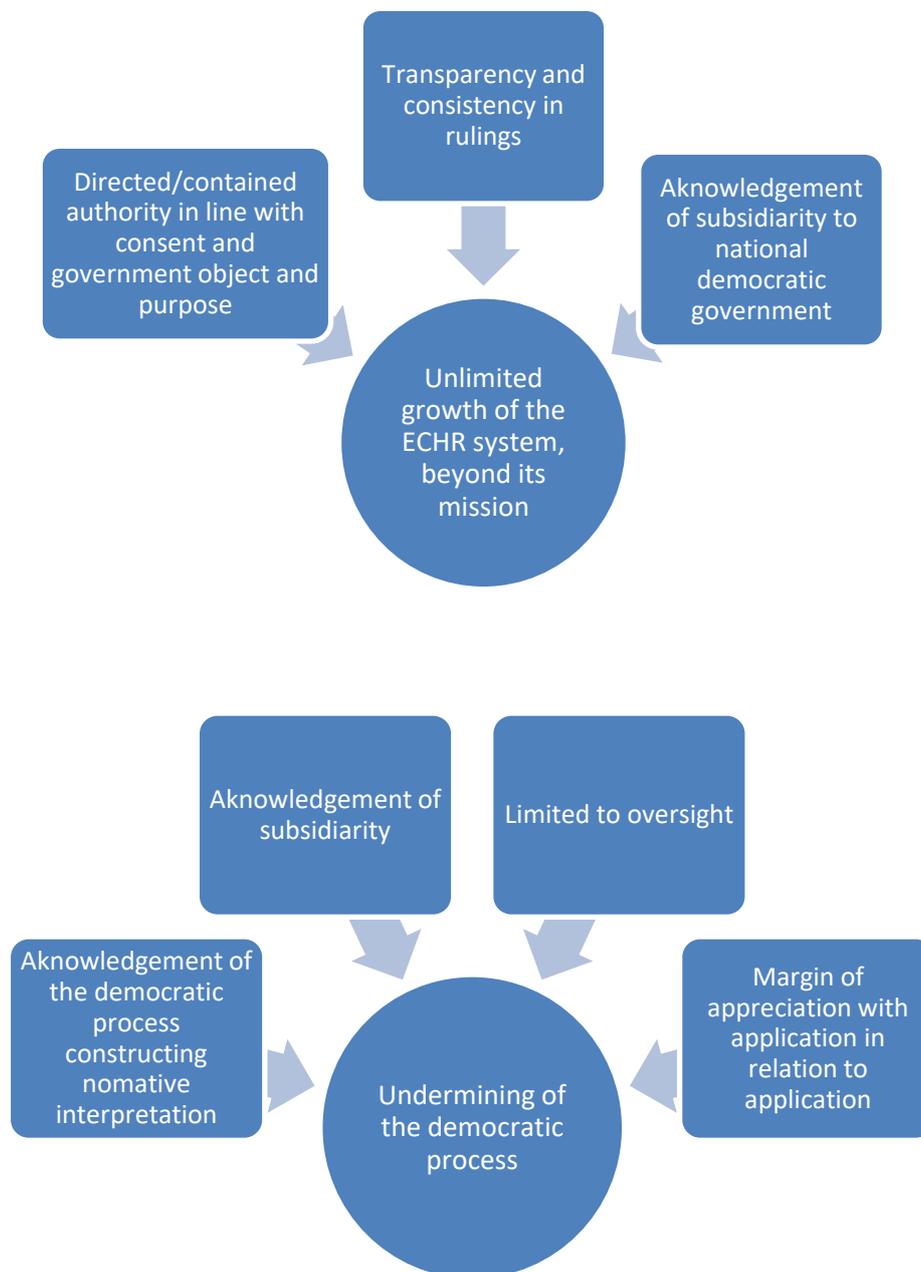




Fig. 4.4 Member State Concerns at the Heart of the Framework

The concerns of the member states are thus at the heart of the elements captured by the analytical framework. The framework will be used to develop tenets that must underlie any structure for a legitimate judicial model by the ECtHR and the creation of a proposed corrective judicial model. These will be used to assess the current approach of the ECtHR to its rulings, to identify shortfalls, and to evaluate the theoretical impact, effectiveness and fairness of the proposed improved judicial model generated in Chapter Six.

5 Chapter Five

Tenets for Building a Legitimate Judicial Model for the European Court of Human Rights

An assessment of options for responding to the
analytical framework for Court legitimacy

5.1 Introduction

The work has identified the need for the judicial process to respond to the concerns of member states:

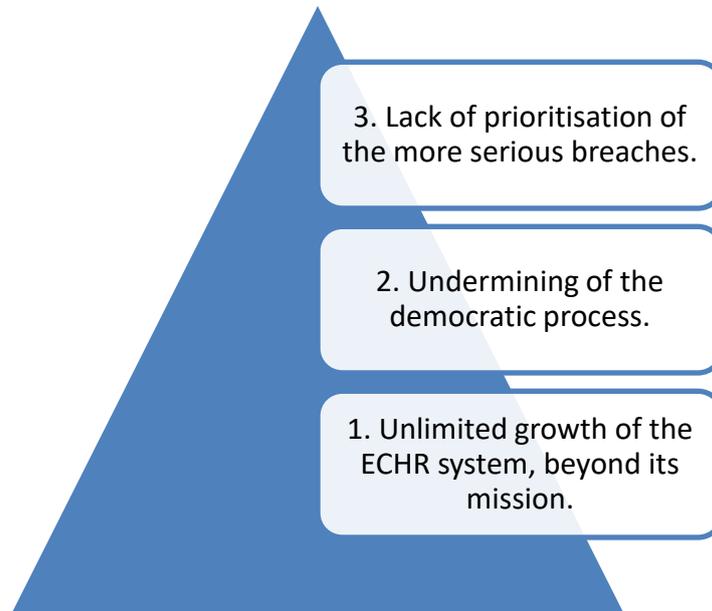


Fig. 1.4 [from Chapter One] Member State Concerns Taken from the Brighton Declaration

In response to critical review and analysis of those concerns and identification of the reasonably inferable object and purpose of the European Convention on Human Rights (ECHR), as based upon republican liberalism, Chapter Four developed an analytical framework for assessing the legitimacy of the European Court of Human Rights (ECtHR) procedure and for developing a proposed new corrective model. This comprised a number of principles:

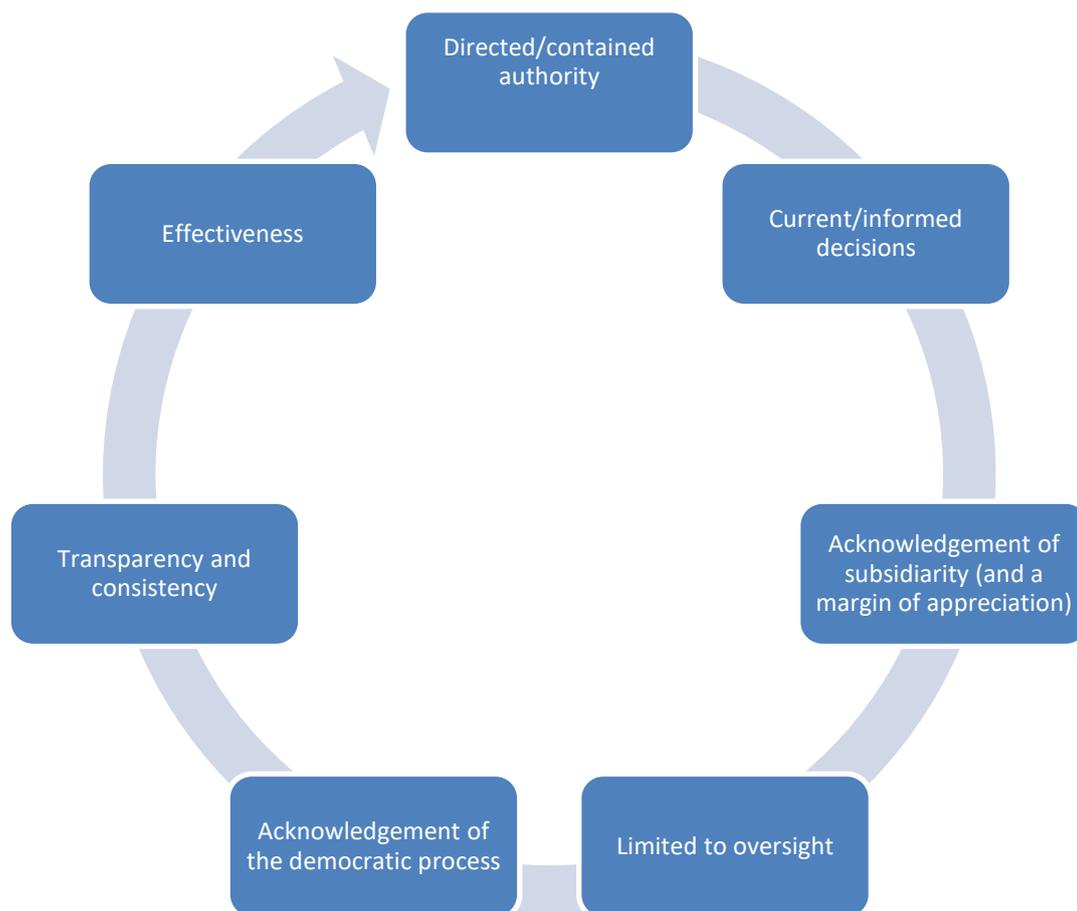


Fig. 5.1 Elements from the Framework of Analysis for Assessing the Legitimacy of ECtHR Procedure

This chapter represents phase five of the project, and explores and evaluates possible options for the development of a proposed corrective model in accordance with the elements of the framework to support legitimate and effective operation and evolution of the normative scope of the ECHR rights and the application of those principles of general application to particular circumstances.

Earlier analysis has concluded that the ECtHR, as agent to its principals, must act within its mandate if it is to claim legitimacy. One response to the question of unlimited growth of the ECHR system and directed/contained authority, would be to limit protection to the normative interpretations of the scope of the rights and the standards for application envisaged by the founding member states at the time when the ECHR was first signed.

However, it is suggested this would be too restrictive given the object and purpose of the ECHR and the need for it to remain current and informed. Nor is it in accordance with a progressive dialectical process of continuous reflection that moral social constructivism via the Principle of Generic Consistency (PGC) and the operation of democracy would recognise. As such, this work must determine a reasonable approach for development in line with that object and purpose, while still acknowledging the relative legitimacy that comes from a democratic process and the principle of subsidiarity, recognising the role of the ECtHR is only oversight of more local systems. Here, it is useful to remind the reader of the two stages the work has reasoned as required in the ECtHR's decision-making procedure; both require a transparent review by the Court in all cases and can now be further developed:

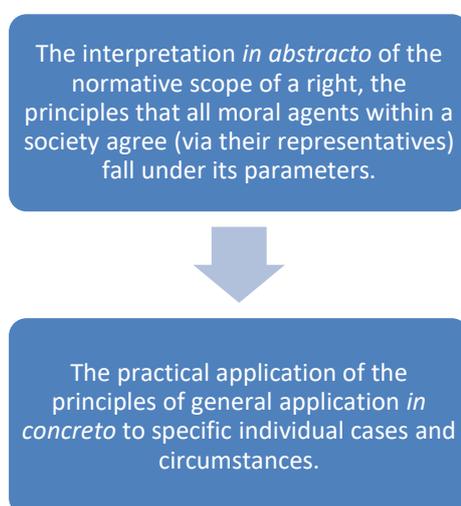


Fig. 3.3 [from Chapter Three] *The Two Stages in Resolving Human Rights Questions*

First, comes the *in abstracto* interpretation of the normative scope of the right at issue. This incorporates two steps:

- a) identification, via evidence of understandings from the democratic process of all member states, of the common norms recognised as falling under the scope of a right and any allowable reasons for restriction in particular circumstances, and
- b) definition of as a henceforth autonomous substantive legal principle of general application by the ECtHR, creating future consistency.

Second, is the *in concreto* application of the principle of general application to particular circumstances. This incorporates two steps:

- a) review of the respondent state's democratic decision-making process and use of relevant expert and factual evidence (overarching common democratic procedural standards of due process), and
- b) a ruling on the substantive validity of the state's ultimate decision in relation to the particular case, while acknowledging the democratic process, subsidiarity and that the ECtHR is limited to oversight (noting particular common standards for the substantive application of the given norm in similarly affected states).

The argument has been made that the first stage of interpretation is a generic question *in abstracto*, based on a democratic representation of the compromised dialectically "contingent" constructions of agents reasoning in accordance with the supreme principle of reason. It is that reasoning, in accordance with the PGC, which establishes the compromised version of principles a society agrees are of general application and form the underlying basis for justice and fairness. It is the task of authorities such as governments in states and international bodies to uphold these public goods, fulfilling a public or government purpose. For practical purposes, it is those principles constructed through democracy (unless immoral in that they could not have been generically reasoned²⁹⁶) which represent the ongoing societal construction of the normative scope of rights under the PGC.

This chapter will, after exploring other possibilities, consider consensus as the most appropriate tool for the ECtHR to adopt in determining that democratic agreement on norms within particular states has reached the stage of constructing a shared (rather than simply national) ECHR understanding between the contracting states. This common understanding must then inform the interpretation of a right by the ECtHR. This reinforces the democratic process but acknowledges that, while subsidiarity means norms presumably reflect only a particular nation, the ECHR agreement allows those principles which evolve consistently

²⁹⁶ Those which are not objectively reasoned but arbitrary, appealing to an alien authority or not possible for others. Note, however, as explored in Chapter Two that choices which can be reasoned as such are rare and represent the more extreme views at either end of the political spectrum.

across a representative majority of member states to hold the status of universality between ECHR members.

For the second stage of application of the principles of general application to particular circumstances *in concreto*, it is suggested that the choices of a democracy are more readily challenged. While the democratic process remains key, it cannot operate alone (in isolation) without reliance on expertise. While in some ideal world a society could aspire to the generic reasoning of as many agents as possible in identifying how to apply principles in each particular case, the reality is that particular skills and knowledge are needed at this point. Expertise relates not only to knowledge, but also the capacity to ensure that knowledge is applied properly. Not all agents have the aptitude, experience and training required for this level of detailed non-universalized reasoning.

There is also the need to for effective supervision in the second stage, to guard against the unfortunate reality that when it comes to the application of generic moral norms to the specific, this is the point at which the process of popular democracy poses the greater risk of agents either consciously (selfishness) or unconsciously (active prejudice against the particular inherent traits of others or simply being unable to identify with them) acting against the PGC. Not all agents have the degree of independence necessary to guard against inappropriate choices.

While it is primarily the role of the democratic representative to ensure that they act in the best interests of all, are informed by empirical reality and by current expert evidence, and have the skills to apply a due democratic review, they may not in practice always do so. They too may be affected by the same problems as their citizens and may bow to inappropriate choices based on popularism. Agents will find it more difficult to hold them to account given a lack of knowledge, interest and possible bias. Independent judicial oversight, as part of the principle of separation of powers, is thus critical in the second stage.

For these reasons, the work determines that to show compliant application of principles *in concreto*, the choices of the democratic representatives in the member states must be reached by following due democratic process and also be demonstrably informed and limited by relevant factual evidence (of the case and wider social background) and by nationally or

internationally recognized expert opinion. The ECtHR, therefore, has a vital oversight role under this second stage in accordance with the common overarching standards for democratic decision making.

The work forms the view that legality of actions in the second *in concreto* stage of application requires the member state only to adequately carry out the function of democracy. A failure to follow due procedure is argued to be a breach by the respondent state in its own right and must mean that the substantive conclusion is unsustainable. Provided, however, that a state has followed the requirements and thereby worked within its procedural duty, its response is strongly presumed to be substantively correct. Substantive challenge would then be possible only if the state decision was not one a reasonable person would reach after weighing the available factual and expert evidence.²⁹⁷ This could be the result of the state failing to manifest a norm with effective protection or, where an interference is necessary, responding disproportionality in limiting that protection as evidenced by conflicting consensus in expert evidence or in the common particular standards for substantively applying a right between similarly affected states.

Most of the time, given that republican liberalism supports national democratic systems as the best means to secure the rights, there will be no issue for the ECtHR to become involved in and on the occasional instances when it is called to, it will often rule in the member states favour.²⁹⁸ Recognition of this is not, as Spielmann has aptly put it, the ECtHR "simply waiving

²⁹⁷ The reasonable person who *would* come to a decision, as opposed to a higher threshold such as *Wednesbury* unreasonableness, is in accordance with the progressive ambitions of the ECHR project under a republican liberalism understanding. Unreason was famously explained by Lord Greene MR:

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority *could ever* have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require *something overwhelming*, and, in this case, the facts do not come anywhere near anything of that kind [emphasis added].

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 230.

²⁹⁸ In 2015, approximately 400 applications were declared inadmissible or struck out of the list by Chambers, and some 6,400 by Committees. In addition, single judges declared inadmissible or struck out some 36,300 applications. 'European Court of Human Rights: Annual Report 2015', ISBN: 978-92-871-9894-5 page 65, available at <http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf> accessed 10 December 2016.

its power of review” but rather it appropriately "attributing responsibility” to the national authorities.²⁹⁹

It has been suggested that a judgment of a court such as the ECtHR is more likely to be considered legitimate if: (1) those affected have had a say in it; (2) it reflects shared beliefs; or; (3) it has been made by an expert and authoritative person or institution.³⁰⁰

The stages of the ECtHR process as formulated in this chapter meet those elements of legitimacy. The requirement for democratic consensus on interpretation and the deference to democratic decisions on application means citizens enjoy, at least in theory, their say and that decisions reflect shared beliefs and experiences. The ECtHR is able to insist on the use of expert evidence as part of showing democratic process in relation to application, and may itself provide expertise on the reasonableness of an interpretations and on the proportionality of application.

5.2 Stage One – Interpretation

The ECHR system does not require a complete position on all of the candidate principles that might ever flow as norms from the rights. The ECHR Preamble tasks it only with furthering a “common” understanding and observance of the rights and to take the “first steps” for collective enforcement of “certain” rights. Its role is not to replace the local democratic orders in this regard. It does not, therefore, require a set of norms comprehensive enough to provide a final response to all of the questions that an individual state system must address with regard to the scope of rights and duties.³⁰¹ Only those understandings consistently developed

²⁹⁹ D. Spielmann, "Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", (2011-12) *14 Cambridge Yearbook of European Legal Studies* 381,381.

³⁰⁰ Amos, M., "The Dialogue between United Kingdom Courts and the European Court of Human Rights" (2012) *61 International and Comparative Law Quarterly* 557, 575–576.

³⁰¹ The state system must resolve issues at the national leaving no vacuum in the law, that is its function. In order to operate in that task, for national courts it may sometimes be necessary to fill gaps and thereby make a morally reasoned choice about a right in the absence of political guidance. The same is not true for the ECtHR. While a national court must always provide a settlement to any dispute between parties, the non-federal ECtHR is tasked only with resolving cases raising a commonly held European norm.

by agents within states forming the ECHR membership are those with common community democratic recognition. The task of the ECtHR in stage one and consideration *in abstracto* is thus to settle what is an ECHR wide constructed norm, under one of the higher rights categories in the agreement, that forms part of the common understanding of member state's duties.

It might, at least upon first consideration, be assumed that this will rarely be a challenging task for the ECtHR. The Articles under Section I of the ECHR set out the rights democracy understood to be universal at the time of signing, and also provide details on the then understood broad justifications for their limitation. However, as this analysis has considered, while various new norms have the potential to fall within the already recognised protection of a right, the rights never exist as wholly unconstrained by competing interests and so their scope is always reasonably debatable.³⁰² The limits that agents in general may accept are arguably even greater by having (at least theoretically) chosen to compromise by living in a society under a social contract. This makes the ongoing development of the normative parameters of the rights unpredictable. The problem of the unpredictability of the reasoning of agents for the ECtHR is set out by Gerards and Brems:

An illustration of this comes from possible moral principles that have been refused by states as proposed additions to their ECHR obligations. For example, the UK has not ratified: (1) ECHR Protocol 4, prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals, and prohibition of collective expulsion of aliens; (2) Protocol 7, procedural safeguards relating to expulsion of aliens, a right of appeal in criminal matters, a right to compensation for wrongful conviction, a right not to be tried or punished twice, and rights relating to equality between spouses; or (3) Protocol 12, a free-standing right to non-discrimination.

These examples also serve to show that the reasoned interpretations of moral justified norms by international bodies, those that such bodies believe "must" be supported by a liberal democratic state, do not always accord with the understandings in fact produced by democratic government. This type of discrepancy is why care must be taken in interpretations claimed to fall under the parameters of existing rights by the implied consent of the member states.

³⁰² The ECHR itself acknowledges the reality that, by living in a society, there is an acceptance that rights are not always absolute, classifying most of those as being either limited or qualified. These must be weighed to determine what the new sub-norm is and to determine the relative weighting of that new norm against other norms and needs. For example, it is now established that as human rights norms physical integrity, free press and the right to protest all have a special status as expectations. On the other side, matters of national security weigh heavily as limitations, as do matters of economic crisis.

The Court's task is made even more difficult by the very nature of fundamental rights. It is well accepted that most fundamental rights are not absolutes, but can be limited if such limitations are sufficiently justified by objective and weighty reasons, such as the fundamental rights or of important general interests. *One major question is whether the assessment of the reasonableness of an interference with a fundamental right could and should form part of the definition of that right, or whether definition and justification should be strictly separated [...]* When considering the prohibition of a book disclosing State secrets, in the end the actual scope of freedom of expression is determined both by the definition of that freedom and the balance that is struck between the freedom and the State's interests in keeping State secrets. After all, authors only know the extent to which they can really exercise freedom of expression if the limits to the exercise of that right are delineated [emphasis added].³⁰³

It is the view of this work that the rights in the ECHR are actually the outcome of reasoning by agents in the real world, creating solutions that apply in general to balance needs against limitations in accordance with the PGC. If it is the practical reasoning of agents, enabled through democracy, which resulted in the human rights recognised at the forming of the ECHR, then it must now be that same process of reasoning that is harnessed to develop them. The normative scope of rights under the ECHR is, therefore, to be delineated by the constructions of societal collective reasoning and the necessarily compromised underlying principles adopted via democracy on behalf of and acceptable to all agents. Until the stage where the ECtHR moves from *in abstracto* interpretation of the principles of general application to the second stage of *in concreto* application to particular circumstances, the outcomes of democracy have primacy (provided they are not unreasoned).

In the application stage, this work argues it is beyond the competence and capacity of ordinary agents to reason upon how those generic norms should apply, for example, in complex situations or to facts particular to a specific case without first relying upon expertise, experience and safeguards against subjective interests and error. In that stage, democratic outcomes must be measured in terms of their procedural compliance with the common standards for democratic decision-making and the reasonableness of the substantive decision, taking into consideration the level of commonality in substantive application by similarly affected member states.

³⁰³ E. Brems and J. Gerards (eds.) *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press: 2013) pages 1 and 2.

To provide an example of the distinction between interpretation and application with human rights, it is appropriate to start by considering a national example.³⁰⁴ The normative manifestation of protection of information about individuals within UK law was once limited to principles recognising protection against trespass, defamation and breach of confidence. It was not possible to adapt the existing legal principles to create a general right of privacy, this required a normative extension – a new interpretation as the public understanding developed through dialectic reasoning.³⁰⁵ In the UK, there was a marked unwillingness on the part of the courts to lead the way to a new general right of privacy, as they recognised that this was not the application of existing law but rather the interpretation of a new legal norm. It was only when UK courts gained the authority under the Human Rights Act 1998 to apply the ECHR rights and the jurisprudence of the ECtHR on normative scope, which included a general right to privacy, that this changed.³⁰⁶ The UK protection now extends to include ECHR interpretations including principles such as the forming of relationships and the protection of personal data. It has since applied the new principle of general application to numerous individual cases, raising specific circumstances such as whether the particular story raises an issue of public concern versus the potential impact on a person's career or family life.

This work argues that the interpretation of the rights should come from the common understood norms of the member states. It must be assumed that the norms developed commonly by the states are structured on the existing coherent principles within the ECHR community, as states continue to act in accordance with the government or public purpose

³⁰⁴ Given that the ECHR is based upon collective recognition, it is these changes at the national level that ultimately lead to a shift at the collective international one.

³⁰⁵ While the trigger for this shifting may have come from changing circumstances (as is the case for most social and legal reform) such as a public appetite greater media intrusion and advances in technology, it nonetheless involved a reevaluation of the general balance between privacy and wider interests such as societal interaction, security and freedom of speech. The result was that a new societal norm emerged.

³⁰⁶ That this was a political decision for the UK Government to take was affirmed in cases such as *Kaye v Robertson* [1991] FSR 62, *Douglas v Hello! Ltd* [2001] QB 967 and *Wainwright v Home Office* [2003] UKHL 53. This finally changed in *Campbell v Mirror Group Newspapers (MGN) Ltd* [2004] UKHL 22, by the time of the alleged interference with Ms. Campbell's rights the Human Rights Act 1998 was in force. On these developments, see G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726, 726-728.

that membership serves. But there is still the need for a consistent and reasonable means to determine what that collective ECHR member state reasoning now requires. Without settled common normative parameters of the widely drafted rights from which to start, the task of the member states and the oversight of the ECtHR in safeguarding their application becomes unintelligible. In drawing out the norms held in individual states and furthermore deciding whether they are now common within the ECHR signatories, it is clear from the work so far that the ECtHR must determine an approach that is reasonably in accordance with the object or purpose of the agreement.

5.2.1 Extrapolation

If societies, for example states and the ECHR community, reach moral dialectically-contingent compromises on moral principles then the role of a court tasked with their upkeep must be to extrapolate those principles as well as they can in order to then apply them. It must surely be assumed that the law is structured on coherent principles, which can be correctly constructively interpreted.

Dworkin's theory of law as integrity states, in keeping with the argument advanced by this work, that judges should identify legal norms on the assumption that they were all created by the community as an entity, and that they express the community's consistent moral principles. As Dworkin suggests, it should be possible to reasonably identify the principles of a community from trends in a particular system's law, or a coherence within it. There is a clear political aspect to that norm construction, he claimed:

I am defending an interpretation of our own political culture, not an abstract and timeless political morality.³⁰⁷

Dworkin considered that long-held traditions form part of the "deep structure" of political and legal concepts and that this can be used to construct the "right" answer to cases:

The deep structure of political values is not physical – it is normative. But just as a scientist can aim, as a distinct kind of project, to reveal the very nature of a tiger or of gold by exposing

³⁰⁷ R. Dworkin, *Law's Empire* (Harvard University Press: 1986) 216.

the basic physical structure of these entities, so a political philosopher can aim to reveal the very nature of freedom by exposing its normative core.³⁰⁸

Dworkin's "right answer thesis" states that proper interpretation would give the right outcome for that system. While it may be questioned whether there is ever only one outcome³⁰⁹, even if Dworkin's theoretically ideal Judge Hercules could be found, an important point is made about the need for the "best" coherent interpretation to be constructed in line with community moral principles on justice and fairness.³¹⁰ Dworkin separates constructive interpretation into three stages, the: (1) pre-interpretive stage; (2) interpretive stage; and (3) post-interpretive stage.³¹¹

In the pre-interpretive stage, all relevant rules and standards that constitute the practice of the community, which are to be interpreted, have to be first identified. Then, in the interpretive stage, the interpreter settles on some general (as opposed to private) justifications for the main elements of practices identified in the pre-emptive stage. At the

³⁰⁸ R. Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24 *Oxford Journal of Legal Studies* 1, 13.

³⁰⁹ The examination must keep returning to the challenge that no universal system of comprehensive answers may even exist. These, by now familiar, problems and their relevance here are summarised by Mahoney:

[A]n exercise in constructive interpretation does not seem capable of supporting the claim that some rights bind all persons. The convictions that are ratified by such an exercise are convictions that are too closely tied to a specific political and legal tradition to yield a Universalist understanding of rights [...] To establish that agents are bound to norms in this way requires a reason or principle that can be justified independently of an exercise in constructive interpretation.

J. Mahoney, "Objectivity, Interpretation and Rights: A Critique of Dworkin" (2004) *Law and Philosophy* 23: 187,207.

But even within a system with a specific political and legal tradition, the same types of issues must surely arise that require constructive interpretation which all agents within the society could accept as justified i.e. based on objective reasoning about what that society must demand and guarding against the subjective reasoning of some or even one agent. This, for reasons explored earlier, seems more appropriate where possible for a political legislative body to determine upon rather than the judiciary.

³¹⁰ Dworkin defines constructive interpretation as the process of:

'[I]mposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong.'

R. Dworkin (n 307) 52.

³¹¹ *ibid* 65-69.

post-interpretative stage, the interpreter reviews his decision to ensure it best serves the justification and is coherent with the principles and rules of the legal structure.

This raises the question of whether the ECtHR independently may extrapolate from ECHR community practices and existing rules what principles the ECHR rights must necessarily encompass in any new cases coming before it. To what extent is a deep structure for the right already discernible, and could the direction of development have been and continue to be predicted?

This work suggests that while the ECtHR should seek to find consistent practice in the member states, to then interpret into general justifications/moral norms, it should normally rely on the national government (including national courts) analysis of practices and how those are to be interpreted into general principles. We must remember that: (1) it is not easy to decide what is a moral norm; (2) appreciating the empirical reality behind practices may require an understanding of the social setting; and (3) directly elected political representatives of a particular community are the system that agents have recognised for reaching collective compromise on the principles of general application.

Even by accepting the confines of the PGC and requiring that a legal system be coherent in terms of building upon existing norms of principles, the deep structure is not simple to extract. As Alexy says, such coherence is in practice unobtainable as the system is never complete:

Just as norms cannot apply themselves, a legal system as such cannot produce coherence. To achieve this, persons and procedures are necessary for feeding in new contents.³¹²

What of arguments, such as that put forward by Alexy, that a court may use “legal reason” by applying the criteria of discourse theory to secure correctness in process and thereby the outcome. While this work would deny any theory based upon pure procedural justice, it does accept that a procedure may warrant what may legitimately be accepted as correct results provide it is, in turn, warranted by a moral basis such as the PGC.³¹³

³¹² R. Alexy, “The Special Case Thesis” (1999) 12(4) *Ratio Juris* 374, 383.

³¹³ Eriksen reasons:

Alexy's rules propose that every subject with competence to speak be allowed to take part in the judicial discourse, question assertions, introduce assertions, express attitudes, desires and needs, and be free from coercion in exercising those rights.³¹⁴ But is there sufficient normative *content* in these *procedural* ideals to allow legal reasoning to make *substantive* progress in this regard?

Toddington says:

[T]he crux of the matter is that Alexy thinks that the *D* principle of rational argumentation can be re-created in, and supervised by, legal discourses to feed in to legal decision-making the ethical substance required to operationalise the weighting and balancing strategies he identifies as the essence of legal reasoning at the level of principle [...]³¹⁵

However, Toddington goes on to quote Alexy himself that:

Discourse theory holds that it is the procedures that warrant the presumption that it is possible to reach correct decisions: A norm *N* is correct when it is the result the procedure *P* (Alexy. R. 1995: *Recht, Vernunft, Diskurs*. Frankfurt: Suhrkamp: 110). In a democracy the correctness of decisions depends solely on the procedures (Habermas (1996) "Reply to Symposium Participants, Benjamin N. Cardozo School of Law", 17 *Cardozo Law Review* 1477, 1495). In pure procedural justice it is fair procedures that ensure the right result; there is no independent criterion for such. For example, a chance procedure like gambling is a pure procedural model that ensures just outcomes without any reference to extra-procedural elements (Rawls *A Theory of Justice* (Oxford University Press: 1971) 86). But if it is the procedure itself that warrants correct results, what, then, warrants the procedure? There is a problem with a pure procedural conception of correctness, and hence with pure procedural conceptions of democratic legitimacy. Independent standards are required in order to evaluate the process or the outcome, according to constitutionalists. The latter make use of moral arguments, of substantive conceptions of what is right or good, in order to solve the problem of rational adjudication, without this 'substance' being neither legitimated nor tested democratically. It opens for jurist made law. The Supreme Court becomes the final arbiter of constitutional law.

E. Eriksen, "Democratic or Jurist Made Law? On the Claim to Correctness" in A. Menedez and E. Eriksen (eds) *Arguing Fundamental Rights* (Springer: 2006) 69,69-79.

³¹⁴ R. Alexy, "A Theory of Practical Discourse" in S. Benhabib and F. Dallmayr (eds.) *The Communicative Ethics Controversy* (MIT Press: 1990) 165

E. Brems and J. Gerards, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press: 2013) 1 and 2.

³¹⁵ S. Toddington, "The Moral Truth about Discourse Theory" (2006) 19(2) *Ratio Juris* 217,225.

General practical arguments have to float through *all institutions* if the roots of these institutions in practical reason shall not be cut off [...] [emphasis added]³¹⁶

The criteria proposed by proponents of discourse theory, such as Alexy, are relevant to a judicial procedural review of decision-making, in identifying whether proper communication that reinforces the demand for reason occurred. However, it is not discourse which provides a moral basis for society, but rather its reinforcements of the dialogical agent under the PGC as represented where possible by the political legislature.

Per Toddington:

The move from individual right to Civil Society and Law is a shift from natural morality to artificial morality, and it is the task of legal theory in the form of a theory of legal reasoning to frame a critical account of this artifice. Discourse Ethics cannot establish the fundamental canons of right that serve as the basis of Civil Society whereas, I have argued, the PGC can, but it can reinforce the universalising demands of reason and show us how Civil Society, once established, ought to value communicative institutions. From this point, the value of the distinction in Discourse Ethics between “ideal” as opposed to “distorted” communication can be fully expressed. Functioning within an established civil sphere and acknowledging the pre-discursive possibility of establishing fundamental and substantial norms of civil association, it can finally abandon (as it has largely abandoned) its ontological commitment to ethical truth as a property of “consensus” and the obfuscation of the appeal to the authority of the “communicative” or “dialogical” subject.³¹⁷

A court may then be part of a wider government system supporting dialectical reasoning and may use some of the more obvious suggestions of discourse theory to check that there was undistorted communication on the issue before it. The force of reason can prevail only when all affected are participants in a rational deliberative communication about a particular claim. However, this type of communication must pass through all institutions within a deliberative democracy including the political bodies and executive bodies if the “roots” are not to be cut. No court alone may produce a definitive response. As Eriksen comments:

The interconnections between law and politics are many and intricate. For one there is a mutual relationship as only politics can give the norms that courts act upon. It is the legislative process that furnishes the legal system with normative inputs. But politicians can not work unless they observe the legal procedures that judges monitor.

³¹⁶ R. Alexy N 312) 384.

³¹⁷ S. Toddington, “The Moral Truth about Discourse Theory” (2006) 19(2) *Ratio Juris* 217,228.

No valid law without politics and no legitimate politics without the law. Law is the lingua franca of democracy and democracy is the sole remaining legitimation principle in modern societies.³¹⁸

As the operation of PGC produce different dialectically-contingent results in a given society, in spite of existing ECHR law providing the same starting point, it remains the case that political systems and national courts have better authority and positioning to more ideally communicate upon and determine the societal norms principles and applications at the national level. Eriksen explains:

Even human rights require democratic legitimation and public deliberation to be correctly implemented. They are unfulfilled until they have been codified and interpreted (and subsequently transformed to basic rights). This means there are no fixed moral precepts, principles or concepts of justice that judges in a noncontroversial way can appeal to in order to adjudicate in case of conflicts.³¹⁹

The ECtHR is not representative of the wider public view and does not have the role of providing a public sphere for all citizens and affected parties to have their voices heard. As Erikson reasons:

Common action norms can only be legitimately tested in the wider public sphere where competent citizens and all affected parties are present.

“Once the judge is allowed to move in the unrestrained space of reasons that such a “general practical discourse” offers, a “red line” that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, the legal discourse of the judge should be confined to the set of reasons legislators either in fact put forward or at least could have mobilized for the parliamentary justification of the norm” (Habermas, "A short Reply" (1999) 12 *Ratio Juris* 447, 447)." ...

The general problem [...] is that judges should apply norms, not make them. Conceiving of the legal discourse as a special variant of the practical discourse blurs the distinction between legislation and application because it allows the judge to make use of normative reasons in general, not only the ones given by the legislators. Now Alexy may defend his thesis by pointing to the fact that in modern societies heavily strained by complexity the political system becomes overburdened and does not produce the required set of norms. When the legislator does not fulfil its function the courts have to intervene and upgrade the legal system so that it becomes possible

³¹⁸ E. Eriksen (n 313) 69.

³¹⁹ *ibid* 83.

to handle the complexities facing it. It leaves the generation of norms to be handled autonomously by the discretion of the judges - hence the prevalence of delegation and framework legislation. The politicians are not doing their job in furnishing the legal system with the required normative premises and leaves to the discretion of the judges to find the 'correct' normative basis for adjudication.³²⁰

A claim that pure procedure in a court can provide better responses on human rights issues is not in accordance with the principle of democratic legitimacy that citizens, when acting within the possible bounds of the PGC, should be the final arbitrator of constitutional law. Eriksen concludes that: 'Alexy's solution gives too much leeway to the discretion of the lawyers as they become authorized to choose the decisive reasons themselves.'³²¹ In terms of interpretation, what the ECtHR may appropriately claim is to be better positioned to: (1) in the pre-interpretive stage, to identify the practices of national governments (as opposed to the practices of agents directly); (2) in the interpretative stage, interpret the practices that are common between states to identify moral norms that are ECHR wide; and (3) in the post-interpretative stage, ensure that those norms as translated into ECHR law, when reviewed, best serve that interpretation and are coherent with wider ECHR laws.

A useful example of the implications of this for the ECtHR comes for the protection in the ECHR against torture or inhuman treatment.³²² At the time the ECHR was agreed, capital punishment would not have been considered to amount to an unacceptable practice and yet now it is. More recently, attitudes towards physical chastisement of children have begun to change. However, could the ECtHR (or any agent) have reasoned that this development in the interpreted understanding of the general norms falling under the normative parameters of Article 3 "must" have occurred? It is only as the new norms were reasoned consistently in the discourse of deliberative democracy, revealed by practices in the state, that their status was recognised as part of the right. It was because of that shift in the values of agents, through their national democratic representatives, that the ECtHR could argue that prohibition of

³²⁰ *ibid* 84-85.

³²¹ *ibid* 85.

³²² Article 3 of the ECHR.

certain levels of pain or anguish are now an ECHR community wide human rights norm to be protected.

5.2.2 Originalism

An extreme response to the challenges of the ECtHR exceeding its legitimate authority would be to require it to abide strictly by the understanding of the terms at the time the ECHR was negotiated (textualism) or the types of cases to which the drafter intended it to apply (intentionalism).³²³ The difficulties of this approach, and the relevance of the concerns it is a response to, are best illustrated through case law.

The case of *Golder v UK*³²⁴ required a decision on whether access to court for civil matters formed part of the Article 6 right to a fair trial. The argument made by the UK was that for a norm to be incorporated within the right it should have been explicitly included, and no reference was made under Article 6(1) to a right of access.³²⁵ In support of that position, reference was made to the wording of the ECHR Preamble in which signatory states declared a commitment only to taking the “first steps” for the collective enforcement of “certain” rights. As such, not all candidate normative interpretations that “could” be properly attributed to a fair trial were necessarily protected as a principle that “must” form part of the right. The drafters could be taken to have adopted a “selective process” in determining which norms would actually fall as a general duty under the ECHR right.

In response, the ECtHR accepted the UK position of the “selective nature” of the ECHR. This is in accordance with the argument of this work that state consent via the contract or treaty is paramount to the ECtHR’s mandate and its legitimate use of authority. However, the ECtHR went on to affirm, once more in accordance with the reasoning of this work, that those broad

³²³ A. Scalia, “Originalism: The Lesser Evil” (1989) 57 *U Cin L Rev*: 841, 854 quoted in M. Greenberg and H. Litman, “The Meaning of Original Meaning” (1998) 86 *The Georgetown Law Journal* 569, 583.

³²⁴ *Golder v the United Kingdom*, Application No. 4451/70, Judgment of February 21 1975.

³²⁵ Article 6(1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]

rights protected, must be interpreted considering the object and purpose in the Preamble, of recognising features of the “common” spiritual heritage of the member states of the Council of Europe. So, the real meaning of the normative scope of Article 6(1) does not come from constrictive reading of the text but instead is centred on the broader understood substance, as shared by member states. This work agrees that an understanding of the normative scope of the of the right must not be limited to the text itself, and there was the potential for the right to be interpreted to include access, as the ECtHR noted:

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded.³²⁶

The ECtHR considered it inconceivable that Article 6(1) should have described in detail the procedural guarantees afforded to parties in a pending lawsuit but not be understood as first protecting that which alone makes it possible to benefit from such guarantees. It reasoned that where there exists a dispute concerning civil rights and obligations, there should be a right of access to institute proceedings before courts. This is a reasoned interpretation of Article 6(1) that “may” properly be settled upon but it could be questioned whether it “must” be reasoned. If it is not a necessary interpretation³²⁷, this work would then argue that its recognition must be dependent upon common recognition in the practices of the member states.

In terms of the reasonableness of an alternative position to that suggested by the ECtHR, one could argue that there is a distinction between contestation of a claim prior to legal proceedings and during proceedings. It may be properly reasoned that only in the latter is there any responsibility for the state to secure standards. Certainly, this was the reasoning of

³²⁶ *Golder v the United Kingdom* (no 324), at para 32.

³²⁷ An interesting contrast relates to deaths in custody. In order to ensure the best protection of a recognised norm that life must be safeguarded when a person is arrested or detained, it “must” be necessary to require an effective (independent, prompt and transparent) investigation of deaths. Given the common understanding between states about the importance of the right to life (it has limited, as opposed to qualified status under the ECHR) it also seems one must presume causation i.e. if the state is unable to provide a plausible explanation how else harm occurred in such a controlled environment (*Salman v Turkey*, Application No. 21986/93, Judgment of 27 June 2000). The norms must follow from an effective protection, they are not an expanding understanding of the normative scope of Article 2 ECHR.

the UK³²⁸, and could explain why the ECHR text makes a distinction by referencing only a fair hearing as opposed to access.

In his dissenting opinion Sir Gerald Fitzmaurice (one of three ECtHR judges making similar points) warned about the consequences of reading an obligation, “which the Convention does not trouble to name, but at the most implies [...]”³²⁹ He argued that parties, “cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves”.³³⁰ Even when a norm “may” (as opposed to “must”) be reasoned to fall under the substance of a right:

It is for the States upon whose consent the Convention rests, and from which consent it alone derives its obligatory force, to close the gap or put the defect right by amendment, not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on *necessary inferences* drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired [emphasis added].³³¹

While this work would allow inferences beyond those “based solidly on the language of the text or on necessary inferences drawn from it,” it would agree that “it is not for a judicial tribunal to substitute itself for the convention-makers”. The text of the ECHR need not be read how it would have been understood on the date of signing, but should not be stretched beyond the understanding that the membership could today reasonably be interpreted as holding based on evidence from common practices.

³²⁸ The UK argued that:

‘[The] Convention does not confer on the [applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair [...]’

Golder v the United Kingdom (n 324), at para 322.

³²⁹ *ibid* at para 28.

³³⁰ *ibid* at para 30.

³³¹ *ibid* at para 37.

Another case is *Young, James and Webster v UK*³³², which considered whether closed shop unions are compatible with the Article 11 right to freedom of association. The UK submitted that there is no norm that a person cannot be compelled to join an association, as such a meaning ‘had been *deliberately* excluded from the Convention [emphasis added]’³³³. The UK relied upon the statement in the ECHR preparatory works that:

On account of the difficulties raised by the “closed-shop system” in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which “no one may be compelled belong to an association” [...]³³⁴

The ECtHR reasoned (assuming, for the sake of argument, the norm had been omitted initially from the ECHR per the suggestions of the UK) that:

[I]t does not follow that the negative aspect of a person’s freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the *very substance* of the freedom it is designed to guarantee [emphasis added].³³⁵

Again, objections were made against the ECtHR majority view. Three dissenting ECtHR judges commented:

Reference to the *substance* of freedom of association is not relevant in the present context. Although the Court has often relied on the notion of the substance of the rights guaranteed by the Convention, it has done so only when the question was *what regulation or limitation of a right was justified*. It has held that even in cases where regulation or limitations were allowed explicitly or by necessary implication, they could not go so far as to affect the *very substance* of the right concerned. In the present case, however, the problem is whether the negative aspect of the freedom of association is part of the substance of the right guaranteed by Article 11. For the reasons stated above the State Parties to the Convention must be considered to have agreed not to include the negative aspect, and no canon of interpretation can be

³³² *Young, James and Webster v the United Kingdom*, Application No. 7601/76; 7806/77, Judgment of 13 August 1981.

³³³ *ibid* at para 51.

³³⁴ Article 20(2) of the United Nations Universal Declaration, Report of 30 June 1950 of the Conference of Senior Officials, Collected Edn of the Travaux Préparatoires, iv, at 262.

³³⁵ *Young, James and Webster v the United Kingdom* (n 332) at para 52.

adduced in support of extending the scope of the Article to a matter which deliberately has been left out and reserved for regulation according to national law and traditions of each State Party to the Convention [emphasis added].³³⁶

The concerns raise an important distinction, supporting the view of this work that the ECtHR has less autonomy regarding the *in abstracto* interpretation of the “very substance” or normative scope of a right compared to the *in concreto* application of those principles of general application in particular circumstances when questioning “what regulation of limitation of a right was justified.”

This work would suggest that the ECHR preparatory works evidence the understanding at the time of the initial agreement, and that the member state understanding of their duties under Article 11 could develop subsequently. But it does accept the risks of new interpretations of the substance of rights identified by the dissenting ECtHR judges, in potentially moving beyond the points agreed upon by state parties. That the negative aspect of freedom of association “may” form a reasonable norm under the scope of the right is not the same as being a “must”. The choice of the original states to exclude it from the definition shows the potential reasonableness of its denial as forming a necessary principle. This work would argue that an extension of the scope of Article 11 for its inclusion could not be based on the ECtHR’s reasoning alone, but rather upon evidence from the practices of the member states showing common democratic recognition of a societal principle.

While this work rejects strict originalism as the solution for the ECHR agreement, it should not be ignored that there are a number of attractive points in such an argument. It is correct to be cautious about expanding a voluntarily entered agreement through uncontrolled interpretations, particularly one that seriously limits the legislative freedom of representatives. As succinctly put by Scalia in relation to the American Constitution dating back to 1791:

‘The principle theoretical defect of nonoriginalism [...] is its incompatibility with the very principle that legitimises judicial review of constitutionality.’³³⁷

³³⁶ Dissenting opinion of Judge Sorenson. *ibid* at para 4.

³³⁷ Justice Scalia:

Such traditional arguments of original understanding or originalism are rejected in this work; the examination relying rather upon the reasoning of necessary intendment. Given that the very design of the ECHR is to encourage progress and to continually monitor member states against common understandings of rights and their observation, it must be possible for its effect to alter, to enable it to promote improvement as a "living instrument", in line with how the understood moral norms develop in the ECHR community³³⁸ as new challenges arise.³³⁹

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality [...] [T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding that sort of novel enactment, that "[i]t is emphatically the province and duty of the judicial department" to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, as in England, prevail.

Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57 *University of Cincinnati Law Review* 849, 854.

At this point it is perhaps worth re-emphasising the problems caused where there is uncertainty whether interpretations are legitimately reached under the terms of the agreement. Note the views summarised in the report from the Commission on a Bill of Rights that the ECtHR is:

[I]n effect abusing its function and exceeding its jurisdiction by adopting interpretations of the Convention which the original signatories either *expressly rejected or would not have been willing to accept* [emphasis added].

Report of the Commission on a Bill of Rights, "A UK Bill of Rights? The Choice Before Us", Vol. 1 published on December 18, 2012 at p.24.

³³⁸ As the ECtHR explains in the interpretation of the ECHR, 'regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms'. *Loizidou v Turkey* (1995) 20 EHRR 99.

³³⁹ For a more recent example, see *Rantsev v Cyprus and Russia*, regarding whether human trafficking falls under Article 4:

[T]he absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited "slavery and the slave trade in all forms". However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features of the fact that it is a *living instrument which must be interpreted in the light of present-day conditions* [...] In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes slavery, servitude or forced and compulsory labour. Instead, the Court concludes that trafficking itself [...] falls within the scope of Article 4 of the Convention [emphasis added].

History shows that settling understandings of human rights norms is difficult, if not impossible. It seems therefore unrealistic to ascribe an opinion to the founders of the ECHR in entering into the agreement, that their understandings of norms drawn from empirical reality at the time would, could or should freeze future development. They must have had an awareness the meaning attributed to the rights and the standards for application would evolve to remain relevant, and that it was not expected that an express renegotiation of the agreement would be required to consider new views. This need for growth with society is argued by Greenberg and Litman, in relation to the American Constitution:

The flaw in the line of argument for fidelity to original practices is that original applications do not reliably reveal original meaning. In the light of the distinction, it cannot be assumed that the practices that were understood at the time to be consistent with a constitutional provision perfectly reflect the provision's original meaning.³⁴⁰

They continue:

Since the applications of a rule can change while the rule remains the same (because of changes in views about the relevant facts), holding the rules constant does not require holding the applications constant.³⁴¹

The argument progresses:

Truly respecting original meaning requires bringing to bear all available knowledge, and since modern and original substantive beliefs can differ, respecting original meaning may be inconsistent with respecting original substantive views.³⁴²

The implications of this acceptance of growth as part of an agreement such as the ECHR, are explained by Venske:

Rantsev v Cyprus and Russia, Application No. 25965/04, Judgment of 7 January 2010, at para 272.

³⁴⁰ M. Greenberg and H. Litman (n 323) 592.

³⁴¹ *ibid* 594.

³⁴² *ibid* 599.

The law cannot be tied down at any moment of formal (quasi-)legislation, in terms of legal sources or otherwise. It developed dynamically in the interplay between different actors who all pull and tug on what the law "really says".³⁴³

This approach of reading in norms not expressly mentioned within a right, or even contemplated at the time of adoption, may sometimes be contentious. It is, however, a reasonably necessary and predictable outcome of the overall object and purpose of the ECHR. As Letsas reasons, human rights are:

[M]eant to express a moral commitment to objective principles of *liberal democracy*. It follows that the European Court of Human Rights does not exercise illegitimate judicial discretion in looking for and allying these principles to unforeseen and controversial cases [emphasis added].³⁴⁴

There are, however, always going to be greater difficulties for an international court (as opposed to national government body) associated with developing the normative scope of rights beyond the understating held at the time of drafting. This is not to deny the ECHR as a living instrument, but to caution against an ECtHR that is too dynamic in interpreting new norms under rights, without evidence of some form of post negotiation acceptance by the principals.³⁴⁵ This work will argue states have impliedly accepted expansion via the operation of ECHR community consensus in national democratic practices. The work does so by accepting as an argument the broad principles under living originalism, and applying those to the ECHR.

³⁴³ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press: 2012), Preface to the Paperback Edition

³⁴⁴ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press: 2009) page 3.

³⁴⁵ The inability to go beyond the ordinary meaning of terms is apparent in ECtHR decisions such as: the right to life not extending to a positive obligation to assist suicide *Pretty v the United Kingdom*, Application No. 2346/02, Judgment of 8 July 2004; regarding the prohibition of inhuman treatment as extended to providing health care for a failed asylum seeker *N. v the United Kingdom*, Application No. 26565/05, Judgment of 27 May 2008; or extending protection of private life to include public activity (hunting) *Friend v United Kingdom*, Application No. 16072/06 and 27809/08), Judgment of 24 November 2009.

5.2.3 Living Originalism

Despite the rejection of the more traditional argument of original understanding as a basis for approaching interpretation and application of the ECHR, "living originalism" provides an interesting balance between safeguarding state consent and keeping the ECHR relevant. It would allow evolution, but within only the confines of the original basis for cooperation.³⁴⁶ Under the ECHR, that basis (the shared endeavour bringing people together) is that in accordance with republican liberalism democracies may form partnerships and thereby pool knowledge and resources in order to: (1) prevent any one member state sliding away from democracy as the governing political system; and (2) reinforce faith that individual member states are keeping pace with the progress wider democracy is making towards a moral construction of justified moral norms. In upholding these collective European interpretations of the normative scope of human rights and standards for their application, there are bound to be difficulties wherever any state does not agree with the ECtHR's interpretation of a common ECHR community position based on national government practices. For example, questions may be asked about whether a collective community norm has to be unanimous in its recognition by governments i.e. the ECtHR must identify practice across all member states that could be justified in line with a newly interpreted norm. Alternatively, for the system to be effective in continually promoting and reinforcing democracy, some may suggest the pace of change should be driven by the most active governments with the practices of a small number of states (or even one) able to advance the ECHR normative position. Really, this work suggests that the position rests somewhere between the two extremes of consensus.

The most restrictive approach to developing the normative scope of rights would accept that wherever there is still national dispute, judicial decisions may be viewed as "tainted" by politics, potentially undermining legitimacy. However, placing too much credence on political pluralism in determining the existence of an ECHR community norm or standard for application would be to undermine the effectiveness of the agreement. Notably, the arguments put forward by this work require it to be shown only that the object and purpose consented by the signatory states may be reasonably inferred as met by any new

³⁴⁶ See J. Balkin, *Living Originalism* (The Belknap Press of Harvard University Press: 2011).

interoperative development. To be effective as a judicial arbitrator, able to ensure that the partnership progresses, the ECtHR must be able to claim the authority to decide on reasonable (so not necessarily uniformly agreed) developments of that system relating to its interpretation and application. If so, it would suffice that the practices of some states may be interpreted as recognising new understood constructions of the rights. Part of the ECtHR's role is the stabilization of the normative expectations underlying the ECHR system and it surely it could not be expected to be driven by the least progressive of the contracting states.

The initial means of identifying the rights understood by the member states as applicable to all democratic nations for the purpose of the ECHR when it was drafted seems the reasonable means to apply in going forward. It is reasonable to accept that the ECHR represents a codification of norms that enjoyed customary recognition or consensus between the founding states at the time of signing.³⁴⁷ Yes, the exact wording used was the subject of significant negotiation but the states involved already claimed to respect them or were willing to accept them based on consensus. It was a codification of customary law, the practices of the member states, as Boucher explains:

The codification of customary law, of the standards and obligations to which states in their practices and pronouncements were already deemed to be obligated, would give formal recognition to internationally and universally accepted standards. This may appear to be a conservative and essentially non-progressive view of human rights, rooted in the status quo and unable to develop beyond what is already accepted. There is no need, however, to be so pessimistic. Just as the common law of England is constantly in flux, and articulated by the skilful interpretation and mediation of interlocutor lawyers well versed in the art of persuasion whose purpose is to construct a story into which their interpretation of what the law intimates "fits" better than that of another, so the business of international law resembles this model. In no area of

³⁴⁷ The process of recognising and drafting legal customs at international level is known as "codification", defined by Article 15 of the International Law Commission (ILC) Statute as:

'[T]he more precise formulation and systemisation of rules of international law in fields where there has already been extensive State practice, procedure and doctrine.'

Such codification does not mean that the principles then become static; the process of formalising their recognition may actually lead to a faster pace of customary law development.

law is legal formalism, that is, the view that the law has a literal meaning free of interpretation, less appropriate.³⁴⁸

The use of this process as a supportable means for development is endorsed by the ECtHR.³⁴⁹ New collectively reasoned understanding of the normative scope of the ECHR rights may be evidenced in the policies, practices and responses of individual democratic governments with, over time, patterns revealing consistency or areas of convergence in a sufficient range of states.³⁵⁰ Such evidence would mean the recognition of a new ECHR principle as falling under the scope of a right by the ECtHR, and the Court's interpretation, if reasonably based on evidence of common practice, could not be validly open to criticism for unlimited growth unconstrained by its member states. Nor could accusations be made that the ECtHR was inappropriately undermining democracy by usurping its role. Rather, the ECtHR would be challenging the democratic practices of a small number of states (or one) as against the common position across a larger number of ECHR democracies. This approach is in accordance with a process for development that states could reasonably have foreseen, pursuing the same process of customary law that was relevant to understanding the normative parameters of the rights at the time of signing in order to understand it today.

Villiger explains:

The full meaning and scope of written terms may become clear by reference to the underlying customary law: the customary rule may supply a plausible meaning, define the context, fill in any lacunae or confirm the interpretation of the written terms.³⁵¹

³⁴⁸ D. Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights" (2011) 59 *Political Studies* 753, 765.

³⁴⁹ Judge Dean Spielmann, making a speech as President of the European Court of Human Rights, explained:

"Comparative law is an essential part of the Court's methodology, used to gauge the degree of consensus that exists in Europe as regards a particular issue."

Dean Spielmann, 'Wither the Margin of Appreciation', UCL – Current Legal Problems Lecture, 20 March 2014, Page 5.

³⁵⁰ For example, see cases relating to gender reassignment and the role of government consensus in establishing this as a recognised medical condition and a socially accepted part of a person's sexual identity that there is a duty to protect.

³⁵¹ M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers: 2009) 21.

While the ECHR requires consensus only within its particular membership, the principles used to determine what constitutes (at least purportedly) a worldwide international custom, are useful in considering the reasonable requirements of proof that the threshold for European acceptance has been reached.³⁵² The reference to proof brings us to the question of what evidence is acceptable and what threshold is required, keeping in mind the object and the purpose of the ECHR in accordance with living originalism.

This proposition clearly has support in the case law of the International Court of Justice (ICJ), Villiger cites a judgment in which the ICJ explained in recognising an “inherent” right it was actually taking account of customary law as operating alongside the relevant international treaty and influencing its interpretation. In *Military & Paramilitary Activities (Nicaragua/USA)* ICJ Reports 1986 94, para 176:

Article 51 [of the UN Charter] [...] is only meaningful on the basis that there is a natural or inherent right of self-defence, and it is hard to see how this can be done other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter [...] does not go on to regulate directly all aspects of its content [...] [I]n the field in question [...] customary international law continues to operate alongside treaty law.

³⁵² Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1961 confirms that interpretation of treaty text should consider any relevant rules of international law. The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). The International Court of Justice has confirmed this includes customary law, see for example *Military & Paramilitary Activities (Nicaragua/USA)* ICJ Reports 1986 94, para 176:

Article 51 [of the UN Charter] [...] is only meaningful on the basis that there is a natural or inherent right of self-defence, and it is hard to see how this can be done other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter [...] does not go on to regulate directly all aspects of its content [...] [I]n the field in question [...] customary international law continues to operate alongside treaty law.

5.2.4 Finding Consensus

There is significant debate about the means to determine when something becomes part of customary law. Yet, the rule of law requires the concept to be defined as far as possible, to produce rules capable of being applied to enable effective use by the ECtHR.³⁵³

A good starting point is Article 38 of the International Court of Justice (ICJ) Statute, which defines it as, 'evidence of a general practice accepted as law.' This still leaves the question of what is meant by "evidence" of practice, and furthermore what level of recognition between states is required for it to be "general".

Evidence of Practice

Guzman summarises the difficulties of evidence. In terms of "practice", Guzman points out that it is unclear whether states must be actively protecting a norm or whether it is enough that they make statements which express support for it in theory. The problem is that:

State actions are more likely to reflect beliefs [...] but are much less frequent. Statements are more common but are quite likely to be made strategically and less reliably offer information about state beliefs.³⁵⁴

Guzman goes on to explain, however, that if the action element is focussed on too greatly, then provided conduct is widespread it may be allowed even though it is accepted as falling short of what is the theorised ideal. Guzman cites torture as an example. However, there are likely to be many such concerns. Democracy may sometimes be inconsistent or careless in particular implementation choices given practical pressures, dangers or prejudices or even because of simple inertia.

Applying this to the ECHR, the agreement's very government object or purpose is to further human rights norms across Europe. It is, therefore, designed to support the ongoing ECHR

³⁵³ For criticisms relating to lack of clarity in the approach of the ECtHR, see L. Widhaber, A. Hjartarson and S. Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248.

³⁵⁴ A. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008) 186.

community construction of the normative parameters of the rights. This means that limited recognition for only norms already actively protected, would be inappropriate for an ambitious project.³⁵⁵ As such, both statements of support and evidence of background understandings revealed in actions may reasonably be allowed as evidence allowing the interoperation of proper norms by the ECtHR.

Mullerson views non-value laden norms as requiring little evidence beyond application in practice to confirm the acceptance of their binding nature, whereas value laden norms, such as human rights principles, are more based on their subjective value and so less damaged by a lack of actual practice or even by contrary practice:

The more consistent and general a practice is, the lower the necessity to look for the subjective element confirming the acceptance of such a practice as legally binding. And on the contrary, strong *opinio juris generalis* is able to compensate the lack of consistency in “actual” practice.³⁵⁶

So, the ECtHR has the ability to consider a wide range of evidence of practice in determining the *opinio juris* of the national governments. In so doing, it is seeking to codify what states are, as evidenced through statements, trying to achieve, as well as what they actually do

³⁵⁵ The ICJ supports the argument that the requirement is more consistency in the recognition of a right rather than its effective protection. It confirms that contrary practice does not prevent the formation of a rule of customary international law if it is condemned or denied. In Nicaragua, a case relating to non-use of force and non-intervention, it stated:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. *The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule.* In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule [emphasis added].

ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, ICJ Reports (1986) 98,186.

³⁵⁶ R. Mullerson (1997) 2 *ARIEL* cited in B. Schlutter “Theory and Practice of the International Court of Justice and the International Ad hoc Criminal Tribunals for Rwanda and Yugoslavia” in *Developments in Customary International Law*, Volume 62 (Martinus Nijhoff Publishers: 2010) 32

achieve. These norms, while aspirational only, still exist despite a state failure to actually deliver (e.g. because of financial, economic, administrative or social constraints). They are manifest through their statements or actions.

Provided the ECtHR supports its decision on whether *opinio juris* exists in different member states (i.e. its interpretation of the justifications for government practices) it would be difficult to challenge the legitimacy of that ruling. Without the ECtHR assuming this role of interpreting the reasons for government actions and statements to find any standard moral justifications, there can be no effective system for identifying new collective convergences.

A General Practice

Moving to the question of when a practice becomes "general" for the purpose of the ECtHR interpreting a "common" justificatory norm under the ECHR, there needs to be a reasonable approach to determining what threshold or number of member states is required to show consensus.

Relying on the more traditional understanding of consent for recognising any new consensus (or the literal meaning of the word), the acceptance by each state must be "active" as opposed to more passive or implied acceptance. Clearly, that would be very restrictive, requiring open-ended intergovernmental negotiation and limited by the invocation of key national interests.³⁵⁷ Berridge has defined consensus decision making as:

‘[A]n attempt to achieve an agreement of all the participants in a multilateral conference [project] without the need for a vote and its inevitable divisiveness.’³⁵⁸

A useful example of how limiting this would be, comes from *Demir and Baykara v Turkey*.³⁵⁹ The ECtHR was required to consider whether the meaning or normative scope of the right of collective bargaining under Article 11 extended to include public sector servants

³⁵⁷ R. Collins, "Between Contract and Constitution: International Organisations and the Protection of Global Public Interests" in C. Michelon, G. Clunie, C. McCorkindale and H. Psarras (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate: 2012) 69.

³⁵⁸ G. Berridge, *Diplomacy: Theory and Practice* (Palgrave Macmillan: 2005) 24.

³⁵⁹ *Demir and Baykara v Turkey* (2008), 48 EHRR (2009) para 54.

administering the state as well as private employees. Turkey argued that there was no obligation towards civil servants under the Article, as it expressly provided that:

This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police *or of the administration of the State* [emphasis added].

As such, there was no need to demonstrate that the particular restrictions imposed were necessary and proportionate given there was no principle of general application to be considered. It also submitted that new obligations could not be implied in the absence of the state concerned having acceded to them.

The first point made by Turkey was that, at the time of the ECHR's negotiation, the accepted democratically reached agreement was to exclude (by non-inclusion rather than express denial) the public sector from the normative scope of collective bargaining rights. This work has already rejected such arguments based on traditional originalism, subject only to rights that are expressly constrained by the ECHR text in terms of their future development.

The second point made by Turkey related to the idea of requiring consent from each member state to allow the ECtHR to act. The ECtHR took the view that a trend towards recognising a principle sufficed. The judges reasoned:

[I]t is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law *of the majority of member States of the Council of Europe* and show, in a precise area, that there is common ground in modern societies [...] [emphasis added]³⁶⁰

This work would agree that requiring absolute and active consensus is simply not in keeping with the ECHR project, a point made by Dzehtsiarou:

It is clear that consensus in the Convention sense does not mean the unanimity that is needed for treaty amendment. It is more an expression of the common ground

³⁶⁰ *ibid* para 86.

required for the collective approach underlying the Convention system and the interaction between the European and domestic systems.³⁶¹

Even outside of a formal agreement such as the ECHR, with a built-in contractual agreement for contracting states to accept external norms where they are common to the ECHR community, such a limited approach has not been taken in relation to human rights. There is an accepted view in wider international law, that states failing to safeguard the most widely accepted human rights norms upon which there is a majority international consensus of understanding are nonetheless bound by them. This is often despite those few states consistently engaging in practices clearly contrary to them.³⁶² Recognised human rights form a type of norm treated as being somewhat special and automatically enforceable upon other states, even leading to military intervention. Requiring active consent is not a basis that fits with international human rights, and certainly not for the ECHR. The ECHR's very object and purpose is to drive change and to safeguard against any member states falling behind the democratic curve and failing to keep up at least the appearance that democracy is a consistent deliverer of the best reasoning on these norms.

One approach that fits well with the unique nature of human rights is to allow instead for "implied" consent of states to accepting as binding norms understood as fundamental by other governments. States, assuming they are not individually convinced by the arguments put forward, may nonetheless accept they are subject because the collective number of other governments that do consider the norm forms a legal right that has reached a critical point, at which failure to adhere to that principle has an unacceptable potential cost in inter-state relations.³⁶³ When that tipping point is reached, it may be seen as a "big bang" and this normally occurs when the norm is shared across a number of states willing to exert pressure.

³⁶¹ A. Kolver, V. Zagrebelsky, L. Garlickie, D. Spielmann, R. Jaeger and R. Liddell, "The Role of Consensus in the System of the European Court of Human Rights in Dialogues between Judges" (Council of Europe: 2008), p27 in K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press: 2015) 12.

³⁶² For example, at the Nuremberg trials or more recently the interventions made in the name of human rights in Kosovo, Iraq and Libya.

³⁶³ See Guzman, who proposes that: 'CIL [customary intentional law] should be defined as those norms that, because they are considered to be law, affect state payoffs.' A. Guzman (n 354) 190.

As Yee explains:

[O]ne makes the distinction between the process of formation and the ripening of customary international law [...] at which the *opinio juris* of the generality of States is formed, like a big bang. Before this moment, i.e. during the process of the formation of customary international law, a State may have its own *opinio juris*, not representing that of the community at large, may purposively champion it as that of the community, and may seek its blessing on that; but it nevertheless is acting at its own peril. That is to say, there is not yet fully-fledged *opinio juris* of the international community before this big bang moment.³⁶⁴

The point at which sufficient pressure will mount is hard to predict in wider international law. Some states will have more impact than others, through greater economic power or ideological influence, and be able thereby to command greater respect and potentially coordinate more effective intervention or to holdback such intervention should they disagree with the majority view.

With the ECHR, however, there is the benefit of an express agreement to help inform this process of value sharing and remove some of the unpredictability in how and when pressure is exerted to comply. Note that earlier the work dismissed a positivist basis for the agreement, so the relative power of the member states should not be a factor in its ongoing evolution.

Decisions of the ECtHR against a state are implemented through the Committee of Ministers of the Council of Europe. The Committee of Ministers receives reports about the progress of remedies with respect to violations and may apply pressure as necessary. Any member state failing to comply with any judgment will be under scrutiny. This overcomes to some extent the necessity for the ECtHR to factor in how strongly the membership support a new principle and the combined strength of the particular supporting states, in any decision about whether a judgment will be effective.

All of the contracting member states have equal status as equally democratic nations, with an equal role on the Committee of Ministers. Their reasoning on principles and application is presumably of equal worth. One response would be to demand unanimity in recognising new principle. We have, however, already dismissed this option. Unanimous consent may be

³⁶⁴ S. Yee, *Towards an International Law of Co Progressiveness* (Brill Academic Publishers: 2004) 34.

appropriate for some types of agreement but it is not in line with what this work has reasoned in relation to the nature of the ECHR as needing to evolve to remain relevant and not be held back in reflecting the common position by a small number of anomalous government practices.

The member states have contracted to cooperate widely, though not as widely as an idealist motivation would infer, based on republican liberalism. In order to continually reinforce national faith in democracy and promote democracy elsewhere, there is a necessity to give the agents within a democracy the reassurance that progress is being made and that democracy is taking them in the right direction. The ECHR is a response to a recognition that democracies may progress only by measuring against each other and mutually reinforcing the correctness of new government developments. Whatever democracies reveal consistently as a norm must be *prima facie* correct, and those states diverging have presumably fallen “behind the curve” of the commonly understood principles and standards for application.

While there is an implicit expectation of initial variation in interpretation of rights, given differences in historical, social and religious backgrounds, there is also anticipation and encouragement of the emergence of an ever more comprehensive shared set of principles – arguably moving towards a form of European constitution. This element of ambition means the project may look towards the aspirational norms adopted by some but not all of the member states in their practices.

Requiring a simple majority is an alternative to complete consent, but given that in stage one of the ECtHR process, which is judges considering central questions relating to the very scope of the rights guaranteed by the ECHR, this may go too far in striving to find a consensus. A middle ground is arguably more sensibly inferred. It is suggested that the first reasonable point at which national government practice could be used by the ECtHR to interpret a common justificatory principle falling under the scope of a right is when there is evidence that a quantitatively and geopolitically relevant group of states have explored the issue, and a majority of the group have adopted practices that accord with the possible new principle. [The meaning of significant in this context is explored more in Chapter Six.] *Prima facie*, it is then an interpretation supported by the practices of a majority of the member states, thereby the normal outcome of democratic dialect and an ECHR principle to be upheld by the ECtHR.

However, it should be recognised that there could be danger in accepting according practices from even a clear majority of states as always being the “big bang” for interpreting a new common understanding that must be legitimately accepted by other states.

Any apparent absence of recognition in the practice of other states may be put down to simple lack of consideration on their part. For the ECHR collective to work and the progressive vision for it be realised is, arguably, reasonable, to build positively with the materials that are available, to show a shared norm and not to lament about those which are not. Given the limitations of the existing machinery, the ECtHR being required to assume that a passive lack of recognition means disapproval, i.e. a lack of practice constitutes contrary evidence to the *prima facie* position, seems excessive.³⁶⁵

More challenging are those cases raising new principles and applications recognised by the majority of states, but actively rejected by others having considered the issue in detail. Considering the idea of equal status, wherever there is a significant number of objecting states, actually evidenced through contradictory statements or contrary national law, this must be a factor that is taken into consideration in the ECtHR’s view whether the *prima facie* position revealed by the majority understanding is correct as a common one.

Accepting that in determining consensus under the ECHR, a significant majority is only the starting point and makes it more likely that the decisions of the ECtHR are likely, on occasion, to be controversial. It could not be an exact process and there may even be some dispute among the judges in a particular case. When the objections of some states are sufficient to defeat the view of the majority it is not a question for which a precise formula is available to calculate the correct response.

The ECtHR’s considerations are partly a matter of how strongly the objections are voiced in comparison to how robustly support for recognition of a norm is, how that reasoning accords with the range of norms already recognised via existing ECHR case law and persuasive

³⁶⁵ If the membership of the ECHR desire to reduce the necessity of such assumption, one possibility is to update the machinery to allow the “gaps” in state views to be filled e.g. an opportunity for any member state to give views while a case is progressing or to “red flag” some developments. Such possibilities are discussed in Chapter Eight of this work, which considers possible reforms.

evidence from democracies external to the ECHR system. They cannot, therefore, be reduced to a question of numbers. Where there is any real cause for doubt about a consensus, in spite of majority support, the argument of this work is that lack of recognition as a newly established commonly understood principle should be the default, with the onus on the party claiming one to prove it. Once more, the examination returns to the notion that what is needed is that the response is explained so that its audience (citizens and the states) may understand it as demonstrating valid reasons for finding a consensus even in the midst of some objection by a minority of states. Chapter Six will explore the difficulties of such evidence in creating an approach for the ECtHR.

This more limited approach to consensus may mean that the normative growth of rights is to some extent curtailed and that some individuals miss out on ECHR understandings of norms that become common across the Convention community too late for them.³⁶⁶ But if it is the case that democracy leads to progress and enlightenment then such outcomes are unavoidable and preferable to miss-steps or lack of trust in rulings.³⁶⁷ The ECHR is not

³⁶⁶ It is worth noting the membership of a large proportion of contracting states to the European Union, which takes into consideration the ECHR when passing new laws. The authority of the EU to create new objects itself is driving greater consensus, meaning that change may not be as curtailed as first thought. A notable case on that potential is *DH and Others v the Czech Republic* which recognise the principle of indirect discrimination by using EU authority. *DH and Others v the Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007. However, too much reliance upon EU states only may impact upon the “significance” of the consensus – a point explored in the Chapter Six.

Additionally, in modern Europe it is now the case that most states unavoidably accept that they are no longer isolated and able to make domestic choices without external influence. Quite simply, what the rest of Europe does has an effect on citizens beyond the particular nation. People move with relative freedom between other countries and the ease of sharing information means that domestic values are informed by the wider view.

³⁶⁷ Lady Justice Arden provides a helpful illustration of the role of state consensus:

The use of consensus is somewhat like the use of state law by the US Supreme Court – Brandeis J famously referred [*New State Ice v Liebmann*, 285 U.S. 262, 311 (1932) 38] to the States’ laws as “laboratories of democracy”. He said “A state may, if it chooses, serve as a laboratory, and try novel social and economic experiments without risk to the rest of society.” They could experiment with new ideas, giving new rights to their citizens, and in due course the Supreme Court would consider whether those ideas were in fact also reflected in rights in the US Constitution.

Lady Justice Arden, ‘An English Judge in Europe: An article based on the Neill Lecture given in Oxford at the invitation of All Souls College, Oxford, on 28 February 2014 in celebration of the past Wardenship of Lord Neill of Bladen’, 25-26, available at <<https://www.judiciary.gov.uk/wp->

primarily concerned with individual justice and its Preamble protects only “certain” rights based on “common understandings”. In any event, the current legal order is already facing a uniquely challenging time, with the “perfect storm” of an economic crisis, refugee crisis and a rise in terrorism and armed conflict, so a more “stable” understanding of the responsibilities of states may be helpful in practice.³⁶⁸ It would allow greater reflection by states, turning a mirror on the delivery of accepted principles, and also free the ECHR machinery to concentrate on their application.³⁶⁹ From a legitimacy perspective, it would also avoid forcing new principles and duties ahead of agents (or rather their democratic representatives) commonly reasoning them through dialectic reasoning in line with the PGC.

content/uploads/JCO/Documents/Speeches/lj-arden-an-english-judge-in-europe.pdf> accessed 19 November 2016.

³⁶⁸ A point recognised by Linos-Alexandre Sicilanos, a judge at the European Court of Human Rights, in a recent speech:

There is no doubt that Europe is currently experiencing a serious crisis. Until recently it was thought that this crisis was primarily an economic one. The movement of refugees, unprecedented since the Second World War, has added a new dimension to the situation. Moreover, as has been clearly shown by the events in Paris in January, in the Isère, in Tunisia and in Kuwait in June 2015, and again in Turkey last Saturday, the rise in extremism and terrorism, with its barbaric violence, has taken on increasingly worrying proportions. In parallel, new armed conflicts have broken out, together with ongoing older conflicts, on our continent and in neighbouring regions.

L. Sicilanos, ‘The European Court of Human Rights at a Time of Crisis in Europe’, SEDI/ESH Lecture, ECHR, 16 October 2015, page 1.

³⁶⁹ Examples of important applications of existing law are provided in the speech by Sicilanos. For example, the detention conditions required by Article 3 have been undermined by the economic crisis:

One only needs to consult the most recent penal statistics of the Council of Europe to see that the economic crisis has negatively affected those conditions in European prisons, including in stronger States such as Italy or France. The large number of individual applications on the subject of detention conditions in Croatia, Greece, Hungary, Poland, Romania, Russia or Ukraine, clearly reflects the extent of the problem.

Another example regards the treatment of migrants and asylum seekers:

In the case of *Hirsi Jamaa and Others v Italy*, the Grand Chamber expressly emphasised the dimension of the problem when it observed, back in 2012, that “[t]he economic crisis [had] throw[n] up new challenges for European States in terms of immigration control”. I would go even further by saying that the economic crisis, together with the migration crisis, has led to a sudden rise in xenophobic and extremist reactions; reactions which, in their turn, threaten the very pillars which underpin the Convention.

ibid page 2

5.3 Stage Two – Application

Once a norm is settled as falling under the interpretation of a right, the ever-increasing range of now autonomous ECHR legally defined principles of general application must be applied *in concreto* to particular circumstances. The ECtHR must apply standards – rules, factors or criteria – relevant to protection, so that these may be applied against national decisions. Once established, these criteria also become an autonomous part of the extensive body of ECHR jurisprudence.³⁷⁰ As Allan explains, the rights are better understood as reasons informing the “specific content” and “application” of criteria to assess the exercise of national decision-making powers.³⁷¹

An ECtHR ruling on disputes to settle the criteria to show appropriate protection of a norm in both the decision-making process of the states and the substantive decision is necessary. Without some standardisation of the implementation factors there could not be practical, effective and cohesive protection. As the work has already argued, settling these is not a task for which all agents are equally suited once the question moves to application considerations *in concreto*.

Expert opinion is necessary but also expertise in the capacity to apply that expert knowledge appropriately and to combine it with wider evidence relating to the facts of the case and social background and shared moral values and social principles. While it is primarily the role of the organs of national democracy to apply that knowledge, oversight of that process is the type of task for which judges have particular aptitude, training and experience, making them

³⁷⁰ As Sedley notes:

‘[I]f you are serious about the universality of human rights the Convention cannot mean one thing in Britain and another thing, on indistinguishable facts, in Denmark or Russia.’

S. Sedley, “Human Rights and the Whirligig of Time”, *Edinburgh Law Review* (2016) 1,6.

³⁷¹ T.R.S. Allan, “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) *Law Quarterly Review* 96, 96.

uniquely well-suited. The removal from the constraints of elections also puts the ECtHR judges in a strong position of independence in such a reflective task.³⁷²

It is therefore to be expected that the ECtHR would enjoy stronger autonomy at this second stage of the judicial process. It is performing its most central function, safeguarding against the underlying risks of democracy which, at times, may give way to factors such as misinformation, stagnation, majoritarianism, utilitarianism, cost, or panic. An effective judiciary must keep in check the danger of larger classes within a population unfairly overriding the rights of others through convenience, fear, intolerance or out-dated understandings, or of the governing bodies failing to act reasonably in ensuring proper consideration, accountability and consistency.

Despite its stronger autonomy from the member states, similar concerns do still arise, as for stage one, if the autonomy of the ECtHR is argued too strongly. The risks of a prematurely decisive ECtHR imposing relatively uniform decisions, are highlighted by Lord Hoffmann:

In practice the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandize its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.³⁷³

To challenge the authority of the democratic states in relation to application, the ECtHR needs to show that: (1) the overarching common standard for democratic due process was not complied with by the state in making a decision; (2) there is evidence that was not factored into the decision-making process relating to facts (of the case and social background) or to opinion from relevant experts; or (3) the ultimate substantive decision of the respondent state was not that of a reasonable person. The procedural element (an informed democratic decision-making process, including a review of relevant evidence) and the substantive

³⁷² Regarding the advantages of political independence see J. Alvarez, *International Organizations as Law-Makers* (Oxford University Press: 2005).

³⁷³ Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009 available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> accessed 16 December 2017.

element form two different points of the margin of appreciation open to states when applying ECHR community principles.

In settling the criteria relevant to the procedural margin of appreciation, the ECtHR is empowered to perform the judicial role of determining whether overarching standards of democratic principles were upheld, facts and evidence properly identified and considered, and relevant national and international expert opinion factored.

In selecting expert opinion for this purpose, questions are raised about the propensity of the ECtHR to rely on a wide variety of international sources to show new standards. Given the nature of the ECHR as progressive and the strong autonomy of the ECtHR in this second stage, identification of relevant international evidence is to be welcomed as the Court being diligent and ensuring that the Convention keeps pace with wider legal developments. However, unlike nationally placed expert bodies or professions, assuming that a democracy must recognise the authority of international bodies without proof of democratic acceptance raises challenges of institutional legitimacy in relation to the ECtHR. As such, it is arguable that a consensus of the member states in their recognition of the expertise of an international institution on the subject area is necessary, in order for any common duty to take it into consideration. This is a point explored in more detail in Chapter Six.

Provided the procedural review requirements were complied with, given the trust in the democratic process under republican liberalism, there must be a *prima facie* presumption that the substantive response could be reached by a reasonable person, thereby requiring a less intensive review. Whereas, conversely, where due democratic process is not followed, the substantive decision must be unsupported and so a breach of the ECHR probably requiring remedial action by a fresh correctly conducted government review.³⁷⁴

³⁷⁴In *Animal Defenders v United Kingdom*, the ECtHR established a clear connection between the parliamentary process and the margin of appreciation. The majority opinion was that:

[T]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect [assessing the proportionality of the legislator's choices], including to the operation of the relevant margin of appreciation.

Animal Defenders International v the United Kingdom, Application No. 48876/08, Judgment of 22 April 2013, para 108.

It is helpful at this point to reiterate the point that the principle of subsidiarity means that the ECHR does not require an answer to all human rights concerns. The role of the ECtHR is to identify only: (1) whether ECHR community standards for democratic due process in decision-making were satisfied; and (2) to challenge a substantive decision of a state that is not one that a reasoned person would reach. The national legal system otherwise provides the answer, as guided by national constitutional values and national democratic representatives. The role of the ECtHR is not necessarily to create completely uniform law on delivering a generic moral norm in particular circumstances, but rather a uniform basis for assessment.

The ECtHR's task is to check that the factors applied in the procedural review would have allowed a reasonable person to reach the same conclusion as the state and to look for any deviation from responses to delivery that are commonly emerging. Therefore, the decision of whether there has been an interference with a norm and if so, for a non-absolute right, amounts to an unjustifiable interference by a member state in a particular instance, cannot be reduced to a binary question of yes or no and is rather a matter of degree. While the ECtHR must be trusted to perform its ultimate function of determining upon reasoning by governments, there always remains this allowance of choice, creating a margin of appreciation afforded to member states.³⁷⁵

The view taken by this work, that there is margin open to states in the determination of whether a norm has been interfered with is somewhat controversial, as the work has noted that legal definitions of the norms once recognised are autonomous. This may suggest that a state has no choice in determining whether there is an interference, there either is or there is not, with a margin left regarding only the question whether that interference was

³⁷⁵ Described by Gross and Ni Aolain:

Generally speaking, the doctrine stands for the notion that the authorities of each state party to the European Convention ought to be allowed a certain measure of discretion in implementing the standards enshrined in the Convention. Using the margin of appreciation, the Court gives the state coming before it a certain leeway in choosing the appropriate regulatory response to matters affecting rights protection within the state's territorial boundaries.

O. Gross and F. Ni Aolain, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights" (2001) 23 *Human Rights Quarterly* 625, 626.

necessary. This view can, however, be challenged by taking the most extreme example of a right, the norms of which the state is never permitted to interfere with and where the ECtHR has worked hard to provide an autonomous definition – the absolute protection accorded under Article 3. In spite of the ECtHR never referring to a margin of appreciation in its dealings with this Article, a review of its case law reveals that:

The Commission and the Court have always operated on the basis that whilst the prohibitions in Article 3 are absolute and in principle not negotiable, *assessment of the specific conduct under consideration can only be subjective* [emphasis added].³⁷⁶

Overall, with regard to Article 3 the ECtHR has established that “effective protection is not synonymous with total protection”.³⁷⁷ To suggest that the subjective element in determining whether, for example, particular conduct amounts to torture or that the risk of torture is too high for an individual to be exposed to it, is anything other than the provision of a margin is arguably failing to recognise a practical and necessary truth.

Moving to consider the substantive margin of appreciation, the degree of choice left to the state must depend upon factors including: (1) the importance of the principle(s) raised; (2) consensus in national and recognised international expert opinion required to have been considered as part of the procedural review; and (3) the extent that there are comparable/equivalent issues and the presence or absence of consensus in decisions on delivery by similarly affected member states. This last consideration means that the weighting of consistent expert opinion, may be undermined when challenged by the presence of divergent positions taken in response to it by states. This makes evidence of the membership declining to commit to an expert opinion (even that of a body they normally respect) or adopting contrary practices highly relevant. Where the operation of democracy reveals a flexible approach, that must be recognised. Under republican liberalism, the basis for cooperation was not an idealist stance that the decisions of all member states in observing the principles should be routinely challenged by judicial review but rather that the worth of

³⁷⁶ M. Addo and N. Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?” (1998) 9 *European Journal of International Law* 510, 517.

³⁷⁷ *ibid* 519.

democratic bodies should be reinforced in the conclusions they reach being normally reinforced as correct.

The ECtHR's relative insulation from everyday pressures and removal from the varied local cultural, economic, political and religious structures of member states is problematic. In assessing whether the decision is one that a reasonable person would reach, the ECtHR must be aware that it does not have an equal appreciation of the situation on the ground. Without appropriate evidence of judicial restraint, as the work has argued for the interpretive stage one of the ECtHR process, the concerns expressed by the contracting states of unlimited growth beyond mission and the undermining of democracy appear supported. While consensus is not determinative on the issue³⁷⁸, the ECtHR should be cautious in challenging the democratic process in the absence of state consensus on standards regarding application and it must be the key influencer of the substantive margin of appreciation.³⁷⁹ In the absence of lack of due democratic process, a manifestly wrong or excessive response, or weighty and consistent contrary expert opinion, the ECtHR is in difficult territory justifying its reasoning as superior on the issue to that of democratic government.

Even where there is consensus on substantive application, Dzehtsiarou suggests that:

European consensus is a rebuttable presumption, which means that the contracting parties are presumed to be in violation of the Convention if their solution diverges

³⁷⁸ Wildhaber, Hjartarson and Donnelly note following a review of its case law that, 'the [C]ourt has never indicated that it considers consensus as binding'.

L. Wildhaber, A. Hjartarson, S. Donnelly "No Consensus on Consensus? The Practice of the European Court of Human Rights" (2013) 33 *Human Rights Law Journal* 248, 262.

³⁷⁹ In *Animal Defenders v United Kingdom*, the majority of the ECtHR, in addition to the UK adherence to a due democratic process, attached weight also to the lack of a European consensus between the member States on how to regulate paid political advertising in broadcasting and that a lack of relevant consensus among could favour a somewhat wider margin of appreciation.

Animal Defenders International v the United Kingdom, Application No. 48876/08, Judgment of 22 April 2013, para 123.

For a review of the ECtHR's combined use of European consensus and the new procedural approach to the margin of appreciation, which has now been seen in several judgments, see T. Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" (2017) *European Journal of International Law* 871.

from the solution adopted by the majority, unless they can provide sufficient and weighty reasons for such divergence.³⁸⁰

Recognising this degree of choice afforded to member states is not to accept that the margin should be vaguely defined. Given the very essence or spirit of the ECHR is that shared community principles are better protected through centralised monitoring of democratic government compliance with standards, it is arguable that the margin allowable in each case should be as clearly set out as is supportable.³⁸¹ If the work of the ECtHR is carried out robustly, with reliance on appropriate evidence, it is difficult to challenge the legitimacy of what the Court then demands a member state must demonstrate as having being duly considered in its decision-making procedure and its conclusions relating to the effectiveness and proportionality of the outcome.

The element of choice left to states is not then to be seen as a concession to a respondent state, which may be simply increased or decreased “across the board”, as a simplistic reading of the demands in the Brighton declaration relating to the margin of appreciation may suggest. Rather it is something which must be, as far as possible, based on an objective view of the evidence available to support a conclusion on what member states must do to satisfy their responsibilities for a particular norm raised in that case. States require the best possible guidance on the factors they are required to, demonstrably, consider and balance. Without this, there are difficulties in terms of certainty, both for individuals making claims and for contracting states proactively seeking to fulfil their obligations.

5.4 Prioritisation of Serious Breaches

The concern of member states that remains (having considered the role of consensus and the margin of appreciation in relation to unlimited growth beyond mission and undermining democracy), is a lack of prioritisation of serious breaches.

³⁸⁰ K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press: 2015) 2.

³⁸¹ See J. Brauch, ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ (2004) 11 *Columbia Journal of Law* 113.

The ECtHR has the advantage of removal from political pressure and potentially the benefit of seeing the bigger and longer-term picture. This puts it in the better position for deciding whether particular cases, while not seen as a national priority, may be considered as important for the community as a whole. As a founding ECHR figure, Teitgen, explained, lesser transgressions must be stopped to prevent escalation. The Second World War had shown that:

Democracies do not become Nazi countries in one day. Evil progresses cunningly ... one by one freedoms are suppressed. Public opinion and the entire national conscience are asphyxiated [...] It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation.³⁸²

Overall, in its role as the interpreter of requirements, the ECtHR must enjoy strong autonomy determining when judicial review is needed to support a practical and coordinated response. It cannot be expected that contracting states could easily challenge decisions of the ECtHR on its view on the degree of seriousness of an alleged violation, provided reasonable supporting evidence and reasoning is provided.³⁸³ However, accepting that it is for the ECtHR to determine the level of seriousness, does not remove the Court from a responsibility to provide reasoning on why the threshold has been met.

Noting republican liberalism as the basis for cooperation, it may be argued that frequent questioning does not best reinforce democracy and that shifting too much focus from national to international systems may risk impeding change and development within states and undermine faith and engagement with the democratic process. The democratic state is authorised and entrusted to represent the reasoning and meet the needs of citizens in allocating limited resources effectively and in prioritising intervention and support. Where a

³⁸² Consultative Assembly, Official Reports (August 1949) 1158.

³⁸³ The introduction of the right to individual petition supports the autonomous principles as applied by the ECtHR being the driver for action, rather than States choosing when action is needed.

Although, as will be considered in Chapter Eight of this work exploring possible agreed reforms to the system, states could have a role in agreeing areas they accept are in urgent need of review. Then, independent of a particular case as required to trigger the ECtHR, awareness and debate could be encouraged and greater consolidated action possible.

breach is not serious, it may be that the member state is currently prioritising more pressing points.³⁸⁴

Increasingly, by settling all matters internationally, it may also result in people becoming less inclined to develop their own norms and routes for dispute resolution. While made in relation to the European Union, the point is well made by Everson and Joerges:

Europeanisation and globalisation determine that contemporary societies are experiencing an ever greater gulf between decision makers and those who are impacted upon by decision making. This schism is a normative challenge to democratic orders. Constitutional States can no longer guarantee voice for all persons impacted upon by their internal decision-making processes. The democratic notion of self-legislation, which postulated that the addressees of a law are also its authors, nonetheless demands the inclusion of the other. The conflicts-law approach builds upon this eternal observation; Member States are no longer in a position to guarantee the democratic legitimacy of their policies. However, at the outset of the 21st century, a democracy that pays no heed to the excluded other is no democracy at all. At the same time, "universalist organisation", the aspiration for unbounded social justice - at least as it is expressed in legal institutions - is at worst a chimera, at best, a still elusive goal [emphasis added].³⁸⁵

This, in turn, limits their usefulness as agents acting as the moral compass in accordance with the PGC, from a practical view and also reduces the sense of social responsibility to abide by our own reasoning of duties outside of any risk of legal sanction. To rely upon an international body to assist where it does not have the resources, may arguably be harmful, creating false hope of support in groups who may act to their detriment (or fail to act assuming international scrutiny will come to their aid). It may therefore be reasonable to limit the ECtHR to acting where it is satisfied of either: (1) a significant impact on the given individual; or (2) a question with the potential to significantly impact upon the respondent state or the ECHR community.

The decision of this work to suggest a "significant" impact rather than a "serious" impact upon the claimant is reached only after further considering the nature of the ECHR. Under a

³⁸⁴ Even what begins a less serious issues could, in time, develop into a serious breach if it continues for a prolonged period with the state falling further behind the standard and showing little indication of a serious commitment to change.

³⁸⁵ M. Everson and C. Joerges, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism" (2012) 18(5) *European Law Journal* 644,663.

republican liberalism view, the primary mission of the ECtHR is not to provide individual relief but rather more of a “constitutional” safeguarding and supporting of the overall operation of democracy. This does not suggest that every complaint must be heard, no matter its severity;³⁸⁶ there is no impetus to act where, for example, small sums of money are involved or a formal step missed that has no impact in practice. However, arguably, constitutional justice can be delivered only through the adjudication of individual complaints and there is no justice at all without an effective remedy.³⁸⁷ Following the introduction of the individual right to petition under ECHR Protocol 11 in 1994, this need was recognised. A reliance upon member states filing complaints against each other as contracting states was insufficient. Where there is a significant impact on the claimant, then the right of individual petition must provide access the ECtHR to settle the dispute.

Where, however, the impact is not significant on the individual, then the approach under a republic liberalism theory is to avoid unnecessary interference with the democratic process. Again, a test of whether the potential breach was sufficiently serious³⁸⁸ was considered. However, the ECHR process is not concerned with whether a state is to be held culpable. It is aimed rather at strengthening the process of democracy and the illumination/dissemination of its work to meet shared expectations. This means that the ECtHR should have the ability to intervene wherever the case in question could have a significant impact upon the respondent state or the wider ECHR community.

5.5 Chapter Conclusions

In summary the judicial model for a legitimate ECtHR process must be built upon a number of central tenets informing its structure:

³⁸⁶ C. Hioureas, “Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights” (2006) 24:2 *Berkeley Journal of International Law* 718, 732.

³⁸⁷ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), 165.

³⁸⁸ The EU approach to state liability is useful here. In *Brasserie du Pêcheur v Germany* (1996) C-46/93 [56]-[59], the Court of Justice advised a breach is to be regarded as 'sufficiently serious' by weighing a range of factors, such as whether it was voluntary, or persistent.

The authority and the autonomy of the ECtHR as a resolver of human rights stems from its recognition by the contracting member states.

The original government object and purpose of the founding states of ECHR sets the ECtHR's mandate and limits of its authority and autonomy, in the absence of clear consent subsequently by the contracting member states to a change.

That original understating relates not to how the founding states would have understood the normative scope and application of rights at the time but rather how they understood the object and purpose of the ECHR and, therefore, the means for its development, a type of "living originalism".

The object and purpose of the ECHR supports a "republican liberalism" objective, reinforcing democratic procedure and decisions and not primarily delivering individual justice.

The operation of democracy is accepted as the legitimate means to identify the normative scope of the ECHR rights and to deliver them in practice.

The role of the ECtHR is to interpret the normative scope of the rights, in accordance with the common practices of the member states, and to oversee the application of norms in accordance with standards for democratic due process, including consideration of expert evidence, and for reasonable substantive decisions in light of the findings from that process.

As an institution tasked with oversight of the operation of democracy and not itself a democratically representative body, the ECtHR is not expected to routinely question governments and thereby risk undermining faith in and engagement by citizens with the state. Therefore:

The ECtHR should find a case admissible where there is a significant impact upon the applicant or the potential for a significant impact upon the respondent state or the wider ECHR community.

Given that it is not possible to fully extrapolate all necessary meanings regarding the interpretation and application of the rights from the text of the ECHR, a reasonable route must be found. Democracy is the route for constructing societal norms. This allows for development of the rights by the ECtHR, in accordance with the role given to the democratic process as legitimising authority based on a Democratic Justification Thesis:

While questions are *in abstracto* principles are of general application and do not require expertise to reason upon, it is for agents in a society via a social contract based upon democracy to reason and to construct justified moral norms. The practices of governments evidence the democratic understandings of the underlying societal principles. Interpretation of government practices across the membership, to find common ECHR community understanding, is the role of the ECtHR.

Interpreting the moral principles which could justify common governments practices and translating them into substantive legal definitions, is a role to which ECtHR is uniquely suited. It is the body designed to provide an oversight of the big picture, to recognise commonality, and act as the expert legal thinker.

In keeping with living originalism, “consensus” in the practices of the governments of member states was the route for first recognising the norms constructed as human rights in the ECHR and is thereby recognised as a basis for consensual growth in international law in general. It provides the route forward in the absence of any other uncontested method.

The ECHR object and purpose of republican liberalism means that it is reasonable not to require the level of consensus called for elsewhere in international law. A significant majority consensus of member states reveals a clear democratic trend towards *prima facie* recognition of a new norm. Although, express contrary evidence from any member States must be factored in by the ECtHR against such acknowledgement.

Democracy is also the route for applying the generic ECHR principles of general application in particular circumstances, but this is subject to ECtHR oversight safeguards:

In the *in concreto* application, the ECtHR enjoys wider autonomy to identify and apply the factors for a compliant state decision. Here, the ECtHR prevents states from erring because of pressure, misinformation or bias.

In the *in concreto* stage, the reasoning of all agents is appropriately enhanced by the use of reasoning by experts and by oversight ensuring that the overarching common standards for democratic due process were followed and that a reasonable decision was reached based on that evidence and process.

In the procedural review, the deployment of a democratic process informed by appropriate factual evidence (of the case and social background) and expert opinion are used to assess state compliance.

Provided the state complies with the procedural requirements, there is a strong *prima facie* presumption that the substantive decision made is legitimate. If it does not, then the substantive decision is unsupportable as "democratic" and so unsustainable.

The reasonableness of the substantive decision reached by the democratic process may still be challenged as not corresponding with a decision a reasonable person would make. The degree of choice, or margin, left to the state varies, with consensus between states on the correct response to similar issues being a key factor.

The tenets underlying the structure for any legitimate judicial model for the ECtHR, to be developed into a full proposed improved model in Chapter Six, can be summarised as:

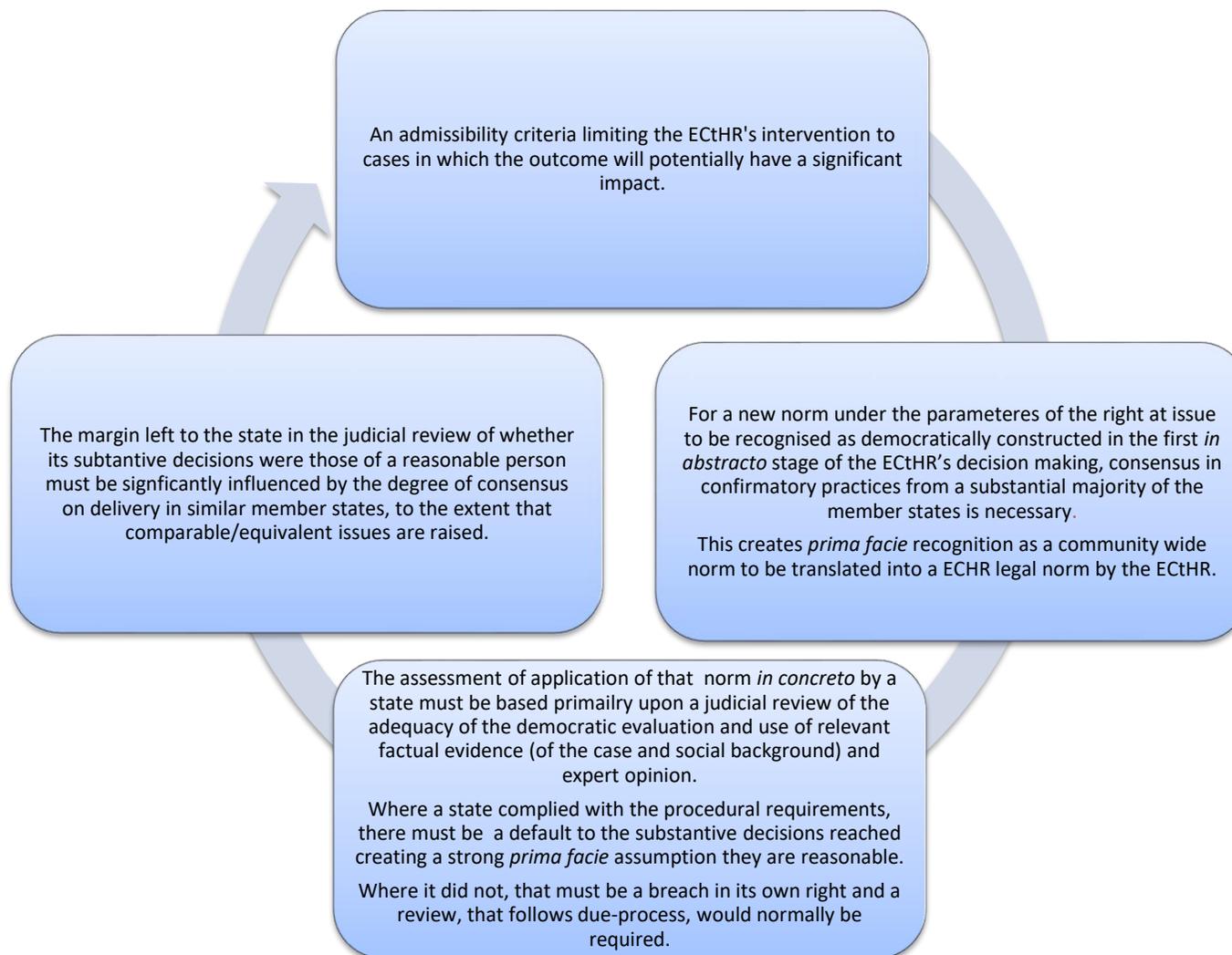


Fig. 5.2 Tenets Underlying the Structure for a Legitimate Judicial Model for the ECtHR

6 Chapter Six

Development of a Proposed Corrective
Judicial Model and Review of the Present
European Court of Human Rights Approach

An improved judicial model in line with the
analytical framework for assessment of the Court
procedure

6.1 Introduction

Phase six of the project is the formulation and explanation, using illustrative case law, of a proposed improved model for judgments by the European Court of Human Rights (ECtHR). This task is preceded by identification of the suggested shortfalls of the current approach.

The corrective model is built upon the analytical framework for assessing the legitimacy of ECtHR procedure under the European Convention on Human Rights (ECHR) presented in Chapter Four (identified in Fig. 4.3) and the conclusions with respect to the tenets underlying the structure for a legitimate judicial model presented in Chapter Five (identified in Fig. 5.2).

6.2 Stage One - Interpretation

6.2.1 Questions that Fall Under Stage One

This stage itself incorporates two questions:

- a) The normative parameters of the right at issue.

ECtHR case law already accepts that candidate norms that may fall under the scope of a right do not necessarily do so. There are “inherent” accepted limits on the scope of principles of general application. Such limits are, according to this work, those constructed by the societal moral reasoning of communicative and dialogical agents (represented via democratic representatives) in evaluating solutions to the generic issues faced by all agents and the expectations that form the minimum underlying common expectations.

For example, *Shindler v the United Kingdom*³⁸⁹ concerned election laws preventing people resident outside of the UK for more than 15 years from voting (Article 3 of the First Protocol: Right to free elections). The ECtHR accepted the need for such a limitation. In terms of interpretation of the meaning of the right to vote, the case suggests that the normative scope of the general right is limited to citizens actively involved in the given state. This was not reasoning only particular circumstances or people, it is a norm of

³⁸⁹ *Shindler v the United Kingdom*, Application No. 19840/09, Judgment of 7 May 2013.

general application. Nor was it guided by reasoning that required special expertise or experience. It was, in accordance with the reasoning of this work, an *in abstracto* analysis under stage one of a consideration by the ECtHR. (Conversely, the limitation to 15 years would have fallen under what this work terms the application stage).

b) The conditions that permit interference with that principle of general application (restrictions/limitations) in particular circumstances.

For example: the norms generally recognised under the right to privacy may be limited in particular circumstances where there is a danger to the public if details are not shared; freedom of speech may be restricted for reasons of public morality or security; and a life may be taken where there is a danger to the public or another individual. Returning to the right to vote, examples allowing legitimate interference in particular circumstances include criminality, mental incapacity, and non-residency.

These questions, while *in abstracto*, are those that this work has argued may be decided only by the ECtHR interpreting the practices of the democratic governments and finding understandings that could be reasoned to show support for moral principles. These are then the shared commonly understood points under the normative scope of the rights. A significant majority consensus means it can be reasonably presumed that it is an ECHR community norm. This does raise the issue of what is meant by a majority and what is meant by significant.

Some international law systems do provide a definition, for example the UN General Assembly calls for a two-third majority (66.7%) for important decisions³⁹⁰ and the EU requires 55% of countries and 65% of the EU population.³⁹¹ Even with a consensus that is quantitatively

³⁹⁰ The General Assembly is the main deliberative organ of the United Nations comprising all of its 193 Member States. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority.

³⁹¹ The Treaty of Lisbon established a dual majority system for adopting decisions. A qualified majority is achieved if it covers at least 55% of Member States representing at least 65% of the population of the EU. This system therefore assigns a vote to each Member State while taking account of their demographic weight. The Treaty of Lisbon also provides for a blocking minority composed of at least four Member States representing over 35% of the EU population. For more information see <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0008>> accessed 24 March 2017.

relevant, as Draghici notes, care is also needed to ensure that the consensus is geopolitically representative:

‘[I]f consensus operates by analogy with customary law, there cannot be entire sub regional blocs outside of the alleged normative trend.’³⁹²

The selection of the sample for the survey is important if it is to be significant. Ideally, all member states of an agreement would be included but it may be questioned whether this is feasible. On this point, the work of Draghici is again useful:

The doctrine could be reorganised around several cumulative criteria: a comparative survey encompassing all States or a sample representative of all major geopolitical blocs, as historically defined (e.g. Western Europe, Eastern Europe); [...] this 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 an geopolitical bloc (conversely, the departure of a minority of States from the rule should not bar its formation) [...] ³⁹³

Two points can be drawn from this. First, that it may be acceptable to use what evidence of practice is available from a sample. Evidence might not be available from all of the membership. For example, not all member states may have yet considered the issue (some might not even be faced with it). This work would suggest that the position taken by some states is significant, provided they are quantitatively and geopolitically relevant. Where a majority within a significant sample made up the states who have debated an issue have reached a similar view, this must be *prima facie* a new norm.

Second, member states may form a blocking minority. If member states form a blocking minority, the points they raise must be clearly considered and factored into the decision of the ECtHR to recognise a new principle. ³⁹⁴

³⁹² C. Draghici, “The Strasbourg Court Between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?” *Public Law* (2017) 11, 19.

³⁹³ *ibid* 21.

³⁹⁴ Alter, in relation to international courts generally, makes a strong point about the danger of reliance upon the view of some but not all states:

The requirement for methodological transparency in the ECtHR consensus analysis is demanding. But this at the point of *in abstracto* review of what the common understanding of the normative scope of the rights is i.e. the very duties to which the membership has agreed. Once an ECHR principle is interpreted from the common practices of the governments, it is then the role of the ECtHR to translate it into a henceforth autonomous substantive legal norm. For most cases that come before the ECtHR, the relevant norm and its general restrictions are already well established. It is the *in concreto* application (under stage two of the proposed judicial model) that is in question and it will be proposed by this work that consensus is less onerous as a requirement under that phase.

6.2.2 Questions that Cannot Fall Under Stage One

6.2.2.1 Norms that do not Apply Generally

Stage one concerns only generic norms that “all” agents could express as rights and duties acceptable to “all”. Any such the norm must be expressed generally, so that anyone “could” accept it, whatever the particular features or ends pertaining to an individual.

This means a norm is not generic if it applies unfairly against a group with inherent characteristics (i.e. is discriminatory). For example, a principle that, “Everyone who is white has the right to vote” could not be a generic principle. A generic principle could however include a general restriction, “Everyone of sound character and with capacity has the right to vote”.

States are concerned about slippage, meaning they are concerned about international judges interpreting the rules of the collective principal [States] in ways that were not intended and that the collective principal does not want and would not have agreed to. But here the problem of collective principals [...] manifests itself. The ICs [international court] interpretation may not be what the collective would agree to, but it likely does represent what a sub-set of States actually prefer. Thus IC slippage is really about ICs awarding victories in politically contested cases that state-litigants could not win in negotiations, and thus essentially rewriting through interpretation the law that States have agreed to. Even if a State-litigant chooses to ignore the IC ruling, the legal ruling itself can shift the political context by changing the status quo of what the law means in the eyes of others; by labelling a state’s extant policy “illegal” popular support for the policy can be undermined.

K. Alter, “Delegation to International Courts and the Limits of Re-Contracting Political Power” in D. Hawkins, D. Lake, D. Nielson and M. Tierney (eds.) *Delegation and Agency in International Organizations* (Cambridge University Press: 2008) 316.

The limitation to white persons would, then, fall under stage two of the proposed ECtHR model i.e. the point of applying the generic norm to specific circumstance or people. It would clearly fail the test as acceptable to a reasonable person, given clear victimisation based on objectively incorrect knowledge or self-interest.

Taking a modern example, gender self-identity is now recognised under ECHR case law as a protected aspect of a person's inherent self-identity. To now deny that right to those who are gender neutral could not be generic under stage one. Such a limitation would again fall under stage two and require justification beyond it being "different" minority condition of gender dysphoria.

That the norm must be general also means that different treatment of identified individuals could not fall under stage one. For example, "Everyone has the right to a fair trial, except for Mr X of whom the public have formed a strong dislike". Again, the question of the different treatment of Mr X would fall under stage two of the proposed judicial model.

6.2.2.2 Particular Circumstances

Stage one relates to the generic general norms of any society and not their application to a specific situation or localised national setting. For example, "There is a right to privacy, even in public spaces, but that is currently suspended in the UK because of a high terror alert status", this would fall under stage two of the process, as a particular non-general application due to a specific threat.

6.2.2.3 Requisite Expert and Technical Knowledge

The interpretation stage cannot raise points upon which an informed view could not be developed by all. Any point requiring expert knowledge falls under stage two. For example, "Abortion is allowed, but up to 24 weeks only" would fall under stage two, as an application of expert knowledge. "Abortion is allowed, until the foetus is viable" would fall under stage one. "Everyone aged over 18 years old has the right to vote" would fall under stage two, but "Everyone with the maturity to make an informed choice has the right to vote" could fall under stage one.

6.2.3 Distinguishing Between Stages One and Two

It is accepted that it may sometimes be difficult to determine whether a case requires (1) the adoption of an established existing principle to be applied *in concreto* to a new situation; or (2) an extension of the normative scope of a right to include a new principle.

A legal norm is autonomous once recognised, and that definition may thereafter be applied to any circumstances under stage two provided there is no reasonable alternative view on whether the right is raised/has been triggered. For example, to: (1) identify the real character of member state behaviour³⁹⁵; (2) be adapted to determine the impact of changes in modern living arrangements and relationships³⁹⁶, changes brought about by advent of new technology such as the internet or in vitro fertilisation³⁹⁷, the emergence of new organisational

³⁹⁵ For example, in *Tyrer v the United Kingdom*, the question of whether corporal punishment was degrading treatment under Article 3 was not determined by public opinion on whether it did so but upon the real nature or character of the punishment. *Tyrer v the United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978.

In *Engel and Others v the Netherlands* the ECtHR was asked whether proceedings in a military court against soldiers for disciplinary offences involved criminal charges within the meaning of Article 6. Regarding the classification of offences as disciplinary thereby avoiding the right to a fair trial, the ECtHR recognised that the true nature of the offence and the severity of the penalty actually determine whether an applicant is the subject of a 'criminal charge'. *Engel and Others v the Netherlands*, Application No. 5100/71, Judgment of 8 June 1976.

There can be no degree of relativity in the constructed definition interpreting a principle (only in its application). To allow that would be at variance with spirit of the ECHR providing for universal rights and freedoms.

³⁹⁶ For example, in *Nazarenko v Russia* it was held there may be family ties, with the legal test based around the development of a close emotional bond, between individual who are not biologically related. Irrespective of whether this is how people traditionally define family. *Nazarenko v Russia*, Application No. 39438/13, Judgment of 16 July 2015.

In *Zaunegger v Germany*, the position of a father in claiming custody post separation was considered and the Court found that:

[I]n this context that although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the *common part of departure in the majority of member States* appears to be that decisions regarding the attribution of custody are to be based on the *child's best interest* [...] [emphasis added].

Zaunegger v Germany, Application No. 22028/04, Judgment of 3 December 2009, at para. 60.

³⁹⁷ For example, in *Parrillo v Italy*, in considering whether embryos obtained from an in vitro fertilisation were part of the donor's private life under Article 8, the autonomous background understanding of genetic material being part of a person's identity could be applied. Protection was

structures³⁹⁸, or new threats such as human trafficking³⁹⁹; or (3) to respond to questions about the inclusion of particular activities within those rules.⁴⁰⁰

In such situations, the ECtHR decision as to whether the same normative principle is raised must be authoritative but it is suggested by this work that the Court proceed with caution, in order to claim legitimacy. The earlier analysis of this work in relation to formalism and to extrapolation demonstrates the dangers of expansive reasoning which constructs widely encompassing legal categories from existing text and rulings in response to a dispute.⁴⁰¹ Olsen and Toddington note:

What is wrong with constructing more general, more widely encompassing categories? The answer is, *nothing* – unless the attempt to find relevant and significant common characteristics among various disputes is in some way fallacious or erroneous or antithetical to what might be seen as the proper conception of valid or proper legal reasoning. For legal disputes arise in virtue of disagreement or confusion concerning various interests perceived in terms of entitlements or permissions and the duties and liabilities correlate to them. These *real* normative concerns are categorised and coded by the law and thereby transformed from social disputes into legal disputes [...] Formalist developments in legal reasoning ignores important differences in this regard in an attempt to develop a “one size fits all” model of legal rules. A blanket imposition of a maximally general rule appears as an “efficient” way of terminating growing numbers of disputes, but again [...] the rule, like a badly made suit, “fits” a particular dispute only where it happens, contingently, to “touch” it. In other words, the carefully reasoned, particular, tailor-made principles deemed to be substantively legitimate responses to prior conflicts of rights and interests are used fraudulently. They are used as collateral to lever up the dynamic range of authority to

therefore afforded (although ultimately the claim failed once it was decided that the limits imposed were legitimate). *Parrillo v Italy*, Application No. 46470/11, Judgment of 27 August 2015.

³⁹⁸ For example, in *Matthews v UK* the evolution of the EU European Parliament fell under the autonomous meaning of having an ability to vote in relation to a maker of domestic laws. The Parliament had the characteristics of a “legislature” in Gibraltar. *Matthews v the United Kingdom*, Application No. 24833/94, Judgment of 18 Feb 1999, at para 39.

³⁹⁹ See again, *Rantsev v Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010.

⁴⁰⁰ For example, in *X and Y v the Netherlands* in reasoning that respect for private life includes the right to establish and to develop emotional relationships with other human beings, of which sexual life must be an important part. *X and Y v the Netherlands*, Application No. 8978/80), Judgment of 26 March 1985.

⁴⁰¹ See Chapter Five extrapolation and Chapter Two on formalism (and the issues with a realist stance as a full resolution to those problems).

invent more general rules which [...] are mere fictions and thus, at least in some cases, are inappropriate or invalid responses to at least some disputes.⁴⁰²

The ECtHR must show that it is responsive to the communicative reasoning of agents via democracy as the means for constructing new moral norms under the rights. Where there is any doubt about whether or how an existing principle “touches” the case, a stage one review for consensus should be carried out. To do otherwise risks the ECtHR appearing to impose the subjective norms preferred by its judges and their worldview in settling the scope of the right at issue, without the relative legitimacy of the norms justified by operation of democratic process. Democracy is the agreed route for societal construction of compromised dialectically-contingent norms between agents in accordance with ethical reasoning under the PGC.

6.3 Stage Two – Implementation Requirements and Assessing Application

Following stage one, certain justified moral norms now have an autonomous substantive legal definition, as principles of general application they must now be executed *in concreto* in particular circumstances by the member states. Stage two of the proposed judicial model reviews the compliance with standards for that application.

That ECtHR process of review must be subject to an appropriate degree of choice left open to the respondent member state. A margin is necessary if democracy is to be allowed to operate and reinforced as the optimal context adopted for a moral societal reasoning on the law in accordance with the PGC. The intensity of questioning of a state decision must be heavily influenced by standards from: (1) the operation of due democratic process in decision making (procedural compliance); and (2) the degree of consensus between democracies in the substantive delivery (a reasonable substantive choice). While legal reasoning and expert opinion may challenge the outcomes of due democratic deliberations on an issue, the evidence would need to be particularly robust.

⁴⁰² H. Olsen and S. Toddington, “Legal Realism: In Search of a Science of Law” (2016) 4 *Retfærd* 22, 28-29.

The review of the choices made relating to application under the corrective model must therefore address two aspects. A procedural requirement and a distinct review of the merits of the substantive decision reached. The aspects may, however, as reasoned in Chapter Five, be usefully linked. Popelier and Van de Heyning explain:

Procedural rationality review, then, enters as a type of review that respects the primordial balancing role of national authorities while safeguarding the ECtHR from forsaking its supervisory role. Procedural rationality review implies that the Court takes the quality of the decision-making procedure at the legislative, the administrative as well as the judicial stage, as a decisive factor for assessing whether government interference in human rights was proportional, thereby avoiding intense substantive review. This type of review is also known as "semi-procedural review" or, in administrative law, as "process-review". It differs from pure procedural review in that it does not merely examine whether a decision was taken in compliance with specific procedural requirements laid down in some statute or regulation. Instead, when conducting substantive review of an act, the court refers to procedural elements.

Where an administrative act is challenged, elements of the decision-making process such as evidence from studies, statistics, impact assessments or consultations are taken into account to assess whether the contested measure is justified. Where a legislative act is concerned, the same elements play a part, as well as the intensity of the parliamentary debate.

Procedural rationality should, therefore, alter the impact on the intensity of the substantive review by the ECtHR. Hence, the suggestion of a strong *prima facie* presumption that compliance with the procedural requirements means a valid, substantive decision. Popelier and Van de Heyning continue:

Procedural rationality review is thus part of the substantive proportionality test, where scrutiny of the legislative or administrative record and the judicial reasoning process serves to underpin the conclusion of whether or not a measure is the result of an informed balancing exercise. If national authorities assess the proportionality of a measure on the basis of a careful and informed weighing of interests, the ECtHR will more easily be convinced that the measure is, indeed, proportional. In contrast to a strong substantive proportionality review, the Court will thus not weigh the interests or rights itself, but rely on the balancing in so far it is shown that the outcome follows from a duly informed and deliberated procedure. Where national courts may link this scrutiny with more detailed better regulation programs, the Court, overseeing a variety of legal orders, merely looks for evidence in parliamentary debates,

consultation papers and scientific reports that the government's interference is based on evidence and informed debate.⁴⁰³

The outcome of the judicial review of procedure thus significantly influences the substantive review. Furthermore, given that due procedure is a key aspect of showing a respondent state is responding to its duties, a lack of correct procedure means that its substantive decision is unsustainable as a correctly reasoned response and presumptively wrong. This means that the procedural review is the starting point for stage two of the proposed corrective judicial model.

6.3.1 The Procedural Requirements

The procedural review always involves the respondent state demonstrating that in reviewing its protection of the principle of general application in particular circumstances, it duly followed democratic standards and considered relevant evidence. Such evidence includes factual (of the case and social background) and expert evidence.

A member state found not to have complied with the procedural requirements of a democratic consideration would have failed in its duty to effectively protect a norm and be thereby in breach of the ECHR.⁴⁰⁴ To comply with the ruling, and thereby validate the same (or a revised) substantive decision on the issue, would require a state re-evaluation of the law in light of the shortfalls identified by the ECtHR with its first decision-making process.

In terms of the elements required in any democratic consideration the process must be:

⁴⁰³ P. Popelier and C. Van de Heyning, "Subsidiarity post-Brighton: procedural rationality as answer?" (2017) *Leiden Journal of International Law* 5,10

⁴⁰⁴ For example, see *Dickson v UK*, Application No. 44362/04, Judgment of 4 December 2007. The ECtHR found no evidence that in setting the policy on requests for artificial insemination by prisoners the UK had weighed the competing individual and public interests or assessed the proportionality of the restriction. A proper procedural review was, therefore, not administered by the Secretary of State or, because the policy was not embodied in primary legislation, by Parliament.

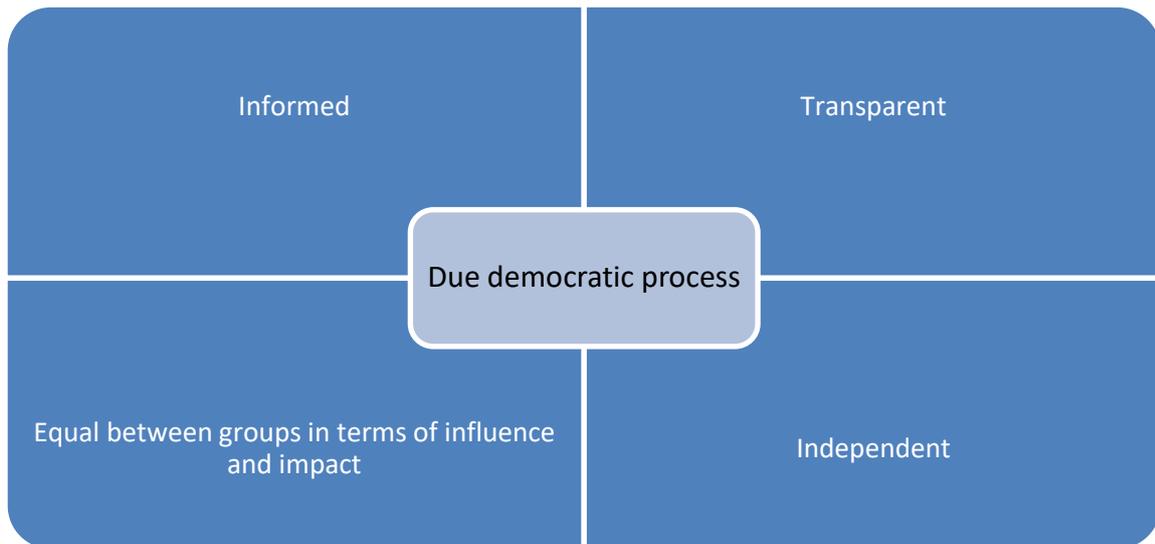


Fig. 6.1 Elements of Due Democratic Process

Building upon this, an informed choice would always be required to take into consideration relevant evidence:

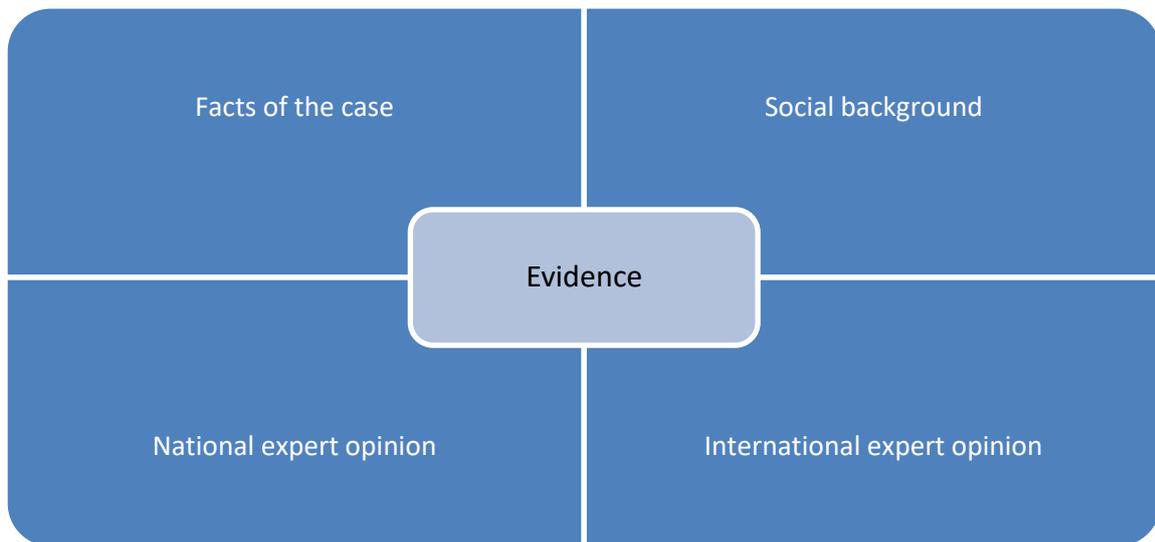


Fig. 6.2 Evidence for an Informed Decision

In relation to international expert opinion, it was noted in Chapter Five that there are potential challenges regarding the legitimacy of requiring international expert opinion to be factored in to the decisions of a respondent state. This is a real issue, given its routine use by

the ECtHR.⁴⁰⁵ Letsas, in a review of the ECtHR's interpretive approach, sets out a selection of the range of different sources identified as having been utilised in cases:

[T]he new Court has taken into account an impressive number of materials – most of which were non-binding on the respondent State – such as: recommendations and resolutions of Committee of Ministers and the Parliamentary Assembly, reports of the Venice Commission, reports of European Commission Against Racism, the European Social Charter, the EU Charter on Fundamental Rights, the European Convention on State Immunity, the Oviedo Convention on Human Rights and Biomedicine, the Aarhus Convention on Access to Information, the ILO Forced Labour Convention, and many others.⁴⁰⁶

The International Law Commission (ILC) has confirmed this potential, that '[i]n certain cases, the practice of international organizations also [as well as states] contributes to the expression, or creation, of rules of customary international law'.⁴⁰⁷ There are, arguably, two views that must be balanced in assessing when and how international organisations should contribute to the formation of customary law. Odermatt notes:

[A]n underlying tension between the view of international organizations as *independent actors* in international law, capable of contributing to its formation and development in an autonomous fashion, and the view of international organizations as little more than the collective *will of the member States*, whose contribution to international law "as such" is negligible at most [emphasis added].⁴⁰⁸

To suggest that only the collective will of ECHR contracting states as evidenced by their national practices is relevant, is to deny the legal autonomy that this work accepts has been given to such institutions by the membership. Provided those other international institutions

⁴⁰⁵ Rachovitsa in a review of the ECtHR's approach notes that:

'The Court, in fact, proclaims that not only it is entitled but that it also has a duty to read the ECHR by taking other PIL [public international law] norms into account.'

A. Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be learned from the case law of the European Court of Human Rights' *Leiden Journal of International Law* (2015) 863, 864.

⁴⁰⁶ G. Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" (2010) *European Journal of International Law* 509.

⁴⁰⁷ ILC, Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, ILC 68th Session (2016), para 20, available at <<http://legal.un.org/docs/?symbol=A/CN.4/695>> accessed 22 October 2017.

⁴⁰⁸ J. Odermatt, "The Development of Customary International Law by International Organizations" (2017) *International and Comparative Law Quarterly* 491, 492.

act within their own given mandate, they are part of the evidence of the practices of member states from which the ECtHR must be able to infer standards. However, as the ILC has stated:

International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions (“principle of speciality”). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.⁴⁰⁹

The use of all expertise is invaluable to the true operation of democracy and, when the ECtHR consideration of application moves from its procedural review onto the substantive review of the state’s ultimate decision, is also key to the judicial review of the reasonableness of that choice.⁴¹⁰ However, it is not in line with the primacy of democracy for the ECtHR to find international expertise influential, and certainly not determinative on an issue, if the member states do not commonly recognise the authority of the given institution.⁴¹¹ In accordance

⁴⁰⁹ Draft articles on the responsibility of international organizations, General commentary, para. 7 (Report of the International Law Commission 2011, A/66/10, para. 88), reproduced in M. Ragazzi (ed.), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff: 2013), at p. 449-451.

⁴¹⁰ For example: *Glass v United Kingdom* 75 ECHR (2004) where the ECtHR took account, in deciding about the requirements for doctors justifying an interference with Article 8 by providing medical treatment to a child without parental consent, of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997.

Öneriyıldız v Turkey where in determining the criteria for state responsibility under Article 2 in respect of dangerous activities the ECtHR referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998).

Taşkın and Others v Turkey (2003) in which the ECtHR built on its case law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) using principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (ECE/CEP/43).

⁴¹¹ It is also worth noting here that in its third report, the ILC emphasised that states remain the primary markers of international law:

States remain the primary subjects of international law and [...] it is primarily their practice that contributes to the formation, and expression, of rules of international law. It is also States that (for the most part) create and control international organizations, and empower them to

with consent, and the relationship between principals and agency, authority to settle an issue cannot be drawn from/recognised in any body unless first vested by the principals. Authority, under the PGC, cannot be taken. In international law, the principals are the states. Unless express or implied consent by a majority of the member states to recognise the authority of any given organisation can be found, its views are not commonly understood and thereby incorporated into the ECHR legal system. States must either give the given organisation independent autonomy to act within a remit or else willingly recognise elements of its output.

The ways identified by the ILC by which international organisations may contribute to international law are helpfully summarised by Odermatt as: (1) states acting through international organisations (for example, through resolutions of organisations composed of states); (2) international organisations acting as “catalysts” of state practice (for example, calling on states to respond to draft texts, activities or statements); and (3) the contribution of international organisations “as such”.⁴¹² In the last method, the ILC takes care to emphasise that such contributions are limited to state assigned competencies, which:

[R]elates to “operational activities” of the organizations that are akin to the activities undertaken by States, defined by one author as “the programmatic work of international organizations carried out as part of their overall mission or in fulfilment of a specific mandate”.⁴¹³ Such activities are extremely varied, and depending on the functions and powers attributed to international organizations, may range from enforcement measures by the United Nations to the Secretariat’s treaty depositary functions. Except in such fields, the acts and views of the Secretariat are unlikely to amount to practice.⁴¹⁴

perform, as separate international legal persons, a variety of functions on the international plane in pursuit of certain goals common to their members.

ILC, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, ILC 67th Session (2015), para 70, available at <<http://legal.un.org/docs/?symbol=A/CN.4/682>> accessed 22 October 2017.

⁴¹² J. Odermatt, “The Development of Customary International Law by International Organizations” (2017) *International and Comparative Law Quarterly* 491, 499-502.

⁴¹³ I. Johnstone, “Law-Making Through the Operational Activities of International Organizations”, *George Washington International Law Review*, 40 (2008) 87, 94.

⁴¹⁴ ILC, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, ILC 67th Session (2015), para 71, available at <<http://legal.un.org/docs/?symbol=A/CN.4/682>> accessed 22 October 2017.

Returning to due democratic process as a whole, provided the respondent member state has followed due democratic process it then enjoys a strong *prima facie* presumption that the actual decision taken is substantively legitimate. This wider margin for substantive decisions where due process is followed, is not to undermine the importance of the ECtHR's role. It is still vital in checking that democracy operated correctly in terms of the method and evidence deployed and, as the work will explore shortly, was ultimately reasonable in its decisions. As Judge Dean Spielmann, former President of the European Court of Human Rights, explains, the meaning of subsidiarity in regards to the margin of appreciation is:

Not, as some would have it, [subsidiarity] to State authorities in a broad or general way on traditional sovereignty grounds. Rather, the Convention mechanism is subsidiary to the *national systems safeguarding human rights* [emphasis added].⁴¹⁵

This means that there is what:

[O]ne might call the procedural aspect of the margin of appreciation. It is implicit in the very term used, "appreciation". The competent domestic authority, which may be a court, or parliament, or the administration, must engage in a process of appreciation, or assessment, of the rights and interests at stake.⁴¹⁶

This process of deliberation should normally have occurred at the national level, or to put the point more eloquently:

The Convention system has been hailed as a ground-breaking and uniquely influential international mechanism for protecting the individual. *The emphasis is on the word "system", of which the European Court is a part. But what is a flagship without a fleet* [emphasis added]?⁴¹⁷

⁴¹⁵ Judge Dean Spielmann, 'Wither the Margin of Appreciation', UCL – Current Legal Problems Lecture, 20 March 2014, Page 4.

⁴¹⁶ Judge Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', Max Planck Institute for Comparative Public Law and International Law, 13 December 2013, Page 4.

⁴¹⁷ Judge Dean Spielmann (n 415) Page 12.

This is a point that Chapter Eight of this work, considering possible ECHR reforms in line with proposals for the European union, will emphasise. As with the EU, national governments (including the national courts and tribunals) must be both empowered and normally trusted to make decisions in compliance with the ECHR. Otherwise, the ECtHR will continue to be overwhelmed and delayed in responses.

The centrality of due democratic process to the ECHR project is why a failure to comply with due process forms, according to the argument of this work, a breach in its own right of the duties of the member state.⁴¹⁸ Taking the point further, it is submitted also that such a breach must mean that any substantive decision made could not stand.

Placing greater emphasis on the procedural requirements as the primary determiner of the outcome of a case requires democracies to show their functionality. This supports the operation of democracy in line with the ideals of republican liberalism. Furthermore, a focus on showing due democratic process should enable the development of better democratic practices which will support the ECHR system's legitimate growth and enhance the agency of subjects in accordance with the PGC.

6.3.2 The Substantive Review

Where a respondent state complied with the procedural requirements, there will be a strong *prima facie* presumption of compliance meaning the intensity of the ECtHR's substantive review will be less. However, the ECtHR may still find either that a decision was not one a reasonable person would reach, this could be because: (1) a decision about the existence of

⁴¹⁸ Popelier and Van de Heyning argue the ECtHR should develop the quality of national decision-making processes as an independent standard of review under the proportionality principle, instead of as a factor that influences strictness of review under the margin of appreciation doctrine. Patricia Popelier and Catherine Van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" (2013) 9 *EuConst* 230, 248 and 261. Also, see Gerards, "The Prism of Fundamental Rights" (2012) 8 *EuConst* 173, 200.

The views held on the correct use of the margin of appreciation vary as to whether attention to the quality of national decision-making processes in complying with expected practice is as an independent standard of review or only a factor influencing the strictness or leniency of review under the margin of appreciation doctrine as applied to the particular state.

The difficulties are explored in depth by Arnardóttir, who also reviews case law and suggests that the ECtHR favours an approach of State practice informing the margin afforded to that particular State. Oddný Mjöll Arnardóttir, 'Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation', Conference Paper No. 4/2015 *ESIL Conference Paper Series*, Vol 5, No 4 available at <<https://poseidon01.ssrn.com/delivery.php?ID=437004004092116103121090002117091100113004071015039058088007023119000116065102127025101010116127126036124022105121064003019031016015022093033076002020021082120080069017091096103012120003125122094115118026115009073072102093015109118105091120018104027&EXT=pdf>> accessed 20 November 2016.

any interference failed to provide effective protection of the norm⁴¹⁹; or more commonly (2) that a discretion exercised in response to a legitimate reason for an interference was disproportionate and failed to provide effective protection.

Effective protection will not be present where a reasonable person would think the right not effectively safeguarded, which is not synonymous with total protection. Regarding the proportionality of denying that effective protection, Kumm explains how the principle of proportionality represents a rational exercise by courts, comprising four steps: (1) whether there was a legitimate aim for the interference; (2) the suitability of the means employed; (3) whether a less restrictive means was available; and (4) whether the determination based on those factors was disproportionate, resulting in a negative outcome that no reasonable person would think justified by the overall aim.⁴²⁰

The lack of reason may be apparent from disharmony in the law of the respondent state, an arbitrary decision or one which is inconsistent with other applications within that state.⁴²¹ In other cases, the question of reasonably necessarily involves the ECtHR in an assessment based

⁴¹⁹ For example, whether behaviour amounted to torture. A debate in relation to whether there as any interference (as opposed to an unjustified interreference) is most likely to focus on the absolute where the finding of any interference must be an ECHR breach.

⁴²⁰ M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice" (2004) 2 *International Journal of Constitutional Law* 595.

⁴²¹ The point relating to consistency is best demonstrated by an example. In *A and Others v the United Kingdom* the indefinite detention non-nationals suspected of involvement with terrorism was held unfair based, at least in part, on the same measures not being applied to nationals under the same suspicion. *A and Others v the United Kingdom*, Application No. 3455/05, Judgment of 19 February 2009. In *B and L v the United Kingdom*, a bar on a marriage between a former father-in-law and daughter-in-law was found inconsistent given that in some cases it had been lifted:

It [the ECtHR] observes that this bar on marriage is aimed at protecting the integrity of the family (preventing sexual rivalry between parents and children) and preventing harm to children who may be affected by the changing relationships of adults around them. These are, without doubt, legitimate aims [...] [However,] [f]rom the information before the Court, it transpires that individuals in a similar situation to these applicants have been permitted to marry [...] where there were also children in the household, it was declared that the impediment placed on the marriage served no useful purpose of public policy. The *inconsistency* between the stated aims of the incapacity and the waiver applied in some cases *undermines the rationality and logic* of the measure [emphasis added].

B and L v the United Kingdom, Application No. 36536/02, Judgment of 13 September 2005, at para. 36.

upon the evidence, as set out as relevant factors under the procedural review (facts of the case, social background, national expert opinion, and recognised international expert opinion). In cases where the decision is manifestly wrong or excessive, being clearly incompatible with the norm or evidence or being based upon flawed information, the ECtHR is bound to act. But, in most cases, the work has considered that there is likely to be room for debate on the right decision even when considering well defined principles and sound evidence. As such, it is determined that the state has a substantive margin of appreciation. In setting that margin, given the *prima facie* presumption that the democratic states are entrusted with substantive delivery on the ground, the degree of consensus (or lack thereof) between member state consensus on application regarding comparable issues must play a central role alongside legal reasoning in establishing a benchmark standard.

The degree of consensus on substantive application will be particularly important in the types of cases that raise: difficult moral balances⁴²², complex competing interests⁴²³, choices about the distribution of resources, responding to local needs and conditions⁴²⁴, and revising legal policy to “catch up” with dynamic social, economic or scientific developments. The last category raises its own questions about how long states should benefit from a lack of agreement on how to change the law. Time must be allowed for states to consider the best approach, and ideally a consensus will then emerge. But once sufficient time has passed, the ECtHR must then mandate that some action is taken. Otherwise, states may be allowed to simply “drag their feet”. How much time is allowed depends on the impact upon individuals and the trend towards protection.

For example, years passed between the ECtHR first recommending only that the UK reconsider its stance in regard to transsexuals having their adopted gender (as opposed to

⁴²² For example, see *Evans v the United Kingdom*, Application No. 6339/05, Judgment of 7 March 2006 regarding the relevance of the absence of a consensus on frozen embryos and the requirements for both parties to consent to in vitro fertilisation.

⁴²³ For example, see *Chapman v the United Kingdom*, Application No. 27238/95, Judgment of 18 January 2001 regarding a lack of consensus around the issue of denying permission for a gypsy family to live in a caravan on land that they had purchased.

⁴²⁴ For example, see *Animal Defenders International v the United Kingdom*, Application No. 48876/08, Judgment of 22 April 2013 regarding a lack of consensus around the issue of refusal to broadcast an advert that had political elements.

their sex at birth) recognised as their legal sex (on birth certificates and their National Insurance records) to ultimately requiring it. This is best explored by working through the development of ECHR case law on the point.

In *Christine Goodwin v United Kingdom*⁴²⁵ the ECtHR reasoned that the legal recognition of new identity was necessary for transsexuals to have their choice of a sex change recognised effectively. While there was a common understanding on the right to protection as principle of general application, shown by the practices of government, the application of that norm to the particular challenge of a workable records system was not consistent. There was, as the ECtHR accepted, still no consensus on the legal recognition of a new gender identity. In spite of this, the ECtHR found the UK to be in breach. The ECtHR explained:

In accordance with the principle of subsidiarity, it is indeed primarily for the contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the contracting States must enjoy a wide margin of appreciation. *The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals [emphasis added].*

This may appear out of line with the proposed model. However, the ECtHR does not deny the importance of the impact of consensus and recognises that there must be a wide margin because of the lack thereof. All that the ECtHR has required here is that there is action, which seems appropriate given the trend towards protection and that the UK had already been given a number of opportunities by the ECtHR to reconsider its position.⁴²⁶

⁴²⁵ *Christine Goodwin v the United Kingdom*, Application No. 28957/95, Judgment of July 11 2002.

⁴²⁶ See earlier cases:

Rees v the United Kingdom, Application No. 9532/81, Judgment of October 17 1986.

The applicant was a female-to-male transsexual. After changing his name to a male name, he requested an altered passport and birth certificate. The authorities refused. The ECtHR found that there was not yet any consensus on a duty to recognise changes in gender identity. However, the ECtHR was conscious “of the seriousness of the problems affecting transsexuals and of their distress” and recommended “keeping the need for appropriate measures under review, having regard particularly to scientific and societal developments” (para 47 of the judgment).

An issue with consensus is the use of international law. This raises the question of when it is acceptable for the ECtHR to rely upon international consensus outside of the membership of the ECHR. For example, in *Christine Goodwin v United Kingdom* in finding a trend the ECtHR relied upon evidence from Australia, New Zealand, Canada, the US, Singapore, South Africa and Israel. The use of practices from beyond the ECHR member states is common in the ECtHR's case law but raises a number of possible concerns.

Consensus may relate to the actual practices adopted by member states⁴²⁷, but also through their recognition of relevant international public law. This is accordance with the earlier

Cossey v the United Kingdom, Application No. 10843/84, Judgment of September 27 1990.

The ECtHR confirmed the approach in *Rees*. The applicant had undergone gender re-assignment and wished to marry. Authorities had informed her that she was legally still considered a man. The ECtHR stated that there were no reasons to depart from its judgment in the *Rees* case, since there were no scientific or social developments which would justify or require a different evaluation. It reiterated that "gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex" (para 40 of the judgment).

X, Y and Z v The United Kingdom, Application No. 75/1995/581/667, Judgment of April 22 1997.

The ECtHR noted evidence of a "clear trend within the contracting states towards the legal recognition of gender reassignment" (para 40 of the judgment).

Sheffield and Horsham v The United Kingdom, Application No. 22985/93, Judgment of 30 July 1998.

The ECtHR was not persuaded that it should depart from *Rees* and *Cossey*, 'transsexualism continues to raise complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among the Contracting States' (para 58 of the judgment). However, it reaffirmed 'that the area needs to be kept under permanent review by the Contracting States (para 60 of the judgment), in the context of 'increased social acceptance of the phenomenon and increased recognition of the problems which post-operative transsexuals encounter'.

⁴²⁷ For example, in relation to Article 14 and discrimination, whether the practice in question is regarded as non-discriminatory in other member States has been held as of 'major relevance'. See J. Schokkenbroek, "The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation" (1999) 19 *Human Rights Law Journal* 20, 21.

In *Konstantin Markin v Russia* it was held that attitudes towards care for children by father had changed and so requirements relating to parental leave:

[T]he legal situation as regards parental leave entitlement in the contracting States had evolved. In an absolute majority of European countries, the legislation now provided that parental leave might be taken by both mothers and fathers [...] This showed that society had moved towards a more equal sharing between men and women of the responsibility for the upbringing of their children [...] [T]here was no objective or reasonable justification for the difference in treatment between men and women as regards entitlement to parental leave.

Konstantin Markin v Russia, Application No. 30078/06, Judgment of 22 March 2012, at para.99.

reasoning of this work that state practice is not limited to actual practice, given the aspirational elements of the ECHR project. It may also be shown by *opinio juris generalis*. Where agreement on desired practice is clear from reputable and recognised sources, it is clearly relevant that a number of states actually do (or do not) follow that advice, but it is only one factor. However, this work would suggest that an agreement on the part of a state “to try” must at least be present.⁴²⁸ This is not to say that, particularly in borderline decisions where other evidence is balanced, international law could not be persuasive in tipping the ECtHR but rather that it cannot be substituted for consensus in the member states.⁴²⁹ The

For a case confirming the relevance of consensus, see *Belgian Linguistic Case*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of July 23 1968.

However, the ECtHR needs to show care in finding consensus where the evidence is not clear on the point. Returning once more to the case of *Zaunegger v Germany*, in which a requirement to subject custody arrangement between unmarried parent to scrutiny by national courts was confirmed based on the common principle that decisions be made in “the child’s best interests”. The lack of consistency in the actual approaches taken by member states was commented upon. Judge Schmitt delivered a dissenting opinion in which he voiced concerns:

Where there is no uniform approach it has to be accepted in my opinion that there are a number of possible ways of solving the conflict between the different interests at stake [...]

Zaunegger v Germany, Application No. 22028/04, Judgment of 3 December 2009, dissenting opinion of Judge Schmitt, at para. 5.

⁴²⁸ For example, in *Marckx v Belgium*, regarding the justification of a distinction in the treatment of legitimate and illegitimate children based on the protection of morals and public order, an emerging consensus in modern societies (reflected in two international treaties to which only four of the ECHR member states had signed) was sufficient to show a change in common attitudes and beliefs. The ECtHR reasoned at para. 41 that:

[T]he domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *mater semper certa est*.

Marckx v Belgium, Application No. 6833/74, Judgment of 13 Jun 1979, at para. 41.

In *Brauer v Germany* the ECtHR again based a finding of consensus upon the ratification of an international convention by a minority of ECHR member states.

Brauer v Germany, Application No. 3545/04, Judgment of 28 May 2009.

⁴²⁹ For example, in *M C v Bulgaria* the question was posed whether requiring physical force was legitimate in rape cases [at para. 156]:

The Court observes that historically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a *clear and steady trend in Europe and some other parts of the world* towards abandoning formalistic definitions and narrow interpretations of the law in this area [emphasis added].

use of international law forms an issue in the current approach of the ECtHR, as Rachovitsa explains:

It is not atypical for the Court to rely on PIL norms in the absence of common legal standards in national practice; or, all the more, when member States present contrary national practices. The Court, by virtue of interpreting the ECHR in light of PIL, also pervades areas in which States traditionally enjoyed a great margin of appreciation – the sphere of imposing criminal sanctions; the protection of the environment; or the immigration context. Hence, PIL norms have been dissociated and are independent from national practice. The external norms do not serve a role supplementary to the comparative interpretation, in establishing or strengthening the existence of national practice, but yet their impact to the interpretation process is decisive.

It is also clear that, despite the absence of discernible consensus, the Court still uses external PIL norms. The Court employs treaties in its judgments to demonstrate the existence of commonly accepted standards, even if said treaties are not ratified and accepted by the majority of States or are not yet in force. It seems that the ordinary requirement [in international law] of being accepted by the vast majority of States is not strictly followed⁴³⁰

Rachovitsa continues with an example:

The Court also disregards the absence of consensus among States, as clearly reflected in certain treaties. In the *D.H.*⁴³¹ and *Oršuš*⁴³² cases, even though the Framework Convention for the Protection of National Minorities (FCNM) prescribed programme-type provisions evidencing the explicit lack of agreement among States, the Court

This trend alone may have been enough to narrow the margin, but the reasoning that follows is also of great interest. The decision continues [at para. 162]:

The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, *have agreed* that penalising non-consensual sexual acts, “[including] in cases where the victim does not show signs of resistance”, is necessary for the effective protection of women against violence [...] and have urged the implementation of further reforms in this area [emphasis added].

So, statements made may be as relevant in finding consensus as the actual acts. Also [at para 164] there was an indication of expert opinion:

As submitted by the intervener, the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

⁴³⁰ A. Rachovitsa (n 405) 868-869.

⁴³¹ *D.H. and Others v Czech Republic*, Application no. 57325/00, Judgment of 7 February 2006.

⁴³² *Oršuš and Others v Croatia* Application no. 15766/03, Judgment of 26 March 2010.

interpreted the ECHR in light of the provisions of the FCNM and the progressive view of its Advisory Committee.⁴³³

This practice of over-reliance upon PILs affects the width of the substantive margin of appreciation making it too prescriptive, despite lacking actual endorsement as such by the democratic process.

The consensus required in this stage would come from exploring the standards and approach of other member states. In stage one, interpreting the rights, we have suggested a quantitative and geopolitically significant majority consensus across all member states is arguably required to show the scope of the human right claimed as one “any” human must hold as a principle of general application. But in this stage two regarding executing those principles in particular circumstances, a different basis is required. It is no longer a question of how rights would be interpreted by any agent, but rather one of how to guarantee them in particular circumstances. Such evidence may be, unavoidably, more limited. As Draghici comments:

A [...] problem is the correct basis for comparison, as the aspects in contention are not always socially significant or subject to legislative debate in all States.⁴³⁴

This, according to the corrective model put forward by this work, means that in the second stage the comparison and search for consensus may be reduced to a smaller number of similarly affected states. This is permissible, however, only provided the sample is geopolitically relevant and the socio-political circumstances comparable to those of the respondent state. In accepting this, one of the difficulties with the current, apparently “inconsistent”, use of consensus is lessened.⁴³⁵ The number of member states compared may

⁴³³ A. Rachovitsa (n 405) 869.

⁴³⁴ C. Draghici, “The Strasbourg Court Between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?” *Public Law* (2017) 11, 18.

For example, in *SAS v France*, it was noted that: “[T]he 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 the practice is uncommon.”

S.A.S. v France, Application No. 43835/11), Judgment of 1 July 2014, at para. 156.

⁴³⁵ For example, Draghici notes the following issues as examples:

permissibly vary, provided the ECtHR explains its choices and the selected population is neither random nor overlooking of inconsistent practices.

Where there is a lack of agreement, a much wider substantive margin is to be expected, often with cases involving matters that raise controversial issues of morality.⁴³⁶ There are some areas where a lack of clear direction or trend in standards among member states is particularly notable in resulting in a wide margin. For example, in relation to Article 15 and

Assessments based on a mere sample are doubtful when the population is randomly selected. For instance, the comparative study conducted in *Markin v Russia* [Application No. 30078/06, Judgment of 22 March 2012] was based solely on 33 States, with no discussion of the selection criteria (e.g. geopolitical representativeness) or impact on statistical relevance.

In *Vallianatos v Greece* [Applications Nos. 29381/09 and 32684/09, judgment of 7 November 2013 – exclusion of same-sex couples from civil unions], by reducing the comparison to the 19 States having introduced registered partnerships, 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* [Application No. 19010/07, Judgment of 19 February 2013], regarding second-parent adoption for same-sex partners, the GC limited the analysis to the ten States allowing second-parent adoption in unmarried couples. 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 legal mothers (or fathers).

C. Draghici (n 434) 18.

This is not to say that the ECtHR could not have come to the conclusions it did on the merits of the state choices (if no objective evidence could be put forward beyond discriminatory “perceptions” of same-sex relations not forming stable and nurturing partnerships), but rather that it should not have done so by suggesting such a degree of consensus on the point. A transparent and consistent ECtHR must use the correct basis. The lack of consensus on the issue as it similarly affected all states should have meant a wider margin of appreciation.

⁴³⁶ In *Evans v the United Kingdom* the ECtHR summarised:

Where [...] there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.

Evans v the United Kingdom, Application No. 6339/05, Judgment of 7 March 2006.

The facts of the case involved questions regarding the use of embryos post the breakdown of a relationship. In accordance with the stages for an ECtHR ruling, suggested by this work, stage one could find a consensus on a recognised value that could be understood by all and apply to all – a duty to provide infertility treatment. However, the questions raised in this case went well beyond what “all” could morally reason upon by raising considerations needing expert knowledge and (for example, the requirements of consent) and skills to respond to particular circumstances (for example, how to balance demand against realistic supply) and so were part of stage two. In the absence of expert agreement and consensus, the requirements for the state were flexible in how they might be interpreted and therefore the margin should have been wide.

the ability for member states to suspend rights in time of or war or threat to the life of the nation, there is a generous margin in the state's determination of whether that condition is met.⁴³⁷ Or Articles 8 to 11, safeguarding the right to private and family life, freedom of thought conscience and religion, freedom of expression, and freedom of assembly and association. All of these have allowed for a wide margin in respect of decisions made about the protection of public health and morals.⁴³⁸ Even with European consensus present,

⁴³⁷ See M. O'Boyle, "The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle" [1989] 19 *Human Rights Law Journal* 23.

For an example case, see *Lawless v Ireland*, Application No. 332/57, Judgment of July 1 1961.

⁴³⁸ For example, *Handyside v United Kingdom* in which the UK was permitted to ban the printing of an allegedly pornographic book as there was no European consensus on the issue of pornography. The ECtHR could not find a uniform conception of morals between the states because, "the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by far-reaching evolution of opinions on the subject". State authorities were, therefore, in a better position to assess the "necessity" of a particular measure because of their "direct and continuous contact" with the "vital forces of their countries" [para 48]. *Handyside v United Kingdom*, Application No. 5493/72, Judgment of 7 Dec 1976.

In *Stubbing v Germany*, the ECtHR considered provisions of criminal law prohibiting incestuous sexual relationships under Article 8 and private life. There was no consensus regarding criminal liability for sexual intercourse between siblings in Europe. In many member states, sexual intercourse between siblings was still considered a criminal offence. Additionally, the reasons which had guided the state authorities (e.g. protection of family, public health) were not unreasonable. Therefore, the ECtHR found that Germany had acted within its margin of appreciation. Consequently, the ECtHR did not find a violation of the right to private life. *Stubbing v Germany*, Application No. 4357/08, Judgment of 12 April 2012.

In *Laskey, Jaggard and Brown v the United Kingdom*, lack of consensus allowed for a wide margin for laws relating to consensual adult sexual activity in public and sado-masochism. *Laskey, Jaggard and Brown v the United Kingdom*, Application Nos. 21826/93, 21627/93, 21974/93, Judgment of February 19 1997.

But contrast this with *Dudgeon v the United Kingdom*. The case related to criminalisation of homosexual activities. The ECtHR reasoned that in a case such as this involving, "a most intimate aspect of private life [...] there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate [...]" [para. 52]. Such justifications are there were for criminalisation, principally moral conservatism in Northern Ireland, were outweighed by the effects on private sex life. In addition, better understanding and increased tolerance has resulted in decriminalisation elsewhere. *Dudgeon v the United Kingdom*, Application No. 35765/97, Judgment of 31 July 2000.

For these cases, it is tempting to assume that such issues are for stage one of the proposed ECtHR model i.e. with such a divided view on the limitations that apply is there not as yet a consensus on any principle to protect? However, note that for the exclusion of a principle enjoyed by some for others, the reason must not be based upon inherent personal characteristics. The reasons must be such that all agents "could" accept them. It is difficult to conceive of anything more inherently personal than sexual desires or what types of information will be engaging and stimulating. Sexual preference is

particularly sensitive issues may still be allowed a wide margin when it comes to application.⁴³⁹ The weighting given to a norm and the limitations to it determined in stage one, may also mean that a wider discretion is given to member states.⁴⁴⁰

Giving member states a wide discretion in making decisions on application until a consensus in practices on substantive protection forms will, over time, lead to a consensus on more standards emerging. Helfer and Slaughter explain that consensus:

[A]llows the Court to narrow the margin of discretion allotted to national governments in an incremental fashion [...] In the meantime, a state government lagging behind in the protection of a certain right is allowed to maintain its national policy but is forced to bear a heavier burden of proof before the ECHR, whose future opinions will in part turn on its own conception of how far the “trends” in European domestic law have evolved. The conjunction of the margin of appreciation doctrine and the consensus inquiry thus permits the ECHR to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.⁴⁴¹

considered particularly important and any interference will require reasoning beyond personal distaste to withstand particularly robust scrutiny.

⁴³⁹ For example, the emotiveness of expectations surrounding abortion. Despite its recognition as a protected meaning for women in the majority of states, a wide margin in delivery by individual states was recently confirmed because of the moral difficulties it raises. See *A, B and C v Ireland*, Application no. 25579/05, Judgment of 16 December 2010. Or matters upon which diametrically opposing views can be formed for equally valid reasons, for example, in *Leyla Sahin v Turkey*, Application No. 44774/98, Judgment of 10 November 2005, as Judge Tulken’s opinion points out that: “the comparative law materials [...] show that Turkey was in a tiny minority in prohibiting university students wearing the headscarf.” The ECtHR, however, came to the diametrically opposed conclusion that there was a lack of consensus on the headscarf issue which supported a much weaker analysis of the ban.

⁴⁴⁰ It has already been mentioned that some limitations are weighted particularly heavily, allowing for greater interference with expectations. This will clearly affect the appropriate margin. A serious threat to a national economy appears to be recognised as such. In *Koufaki and Adedy v Greece*, Application No. 57665/12 and 57657/12, Judgment of 7 May 2013. In contrast, some of the meanings attributed to limitations means no margin is available. Sticking with economic considerations, lack of resources cannot justify prison conditions which do not comply with Article 3, or failure to secure the right to a fair trial, or discriminating against vulnerable groups in relation to “essential” expectations such as education.

⁴⁴¹ L. Helfer and A. Slaughter, ‘The Effectiveness of the Council of Europe’s Human Rights Regime’ in B. Reinalda and B. Verbeek (eds.) *Autonomous Policy Making by International Organisations* (Routledge: 2005), 151.

In addition to a review of ECHR member state consensus in the application practices of states, the proposed model includes a more “local consensus”. Draghici explains this idea:

A different recourse to “local consensus” allows the ECtHR, 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.⁴⁴²

While an extended review of local consensus to every case would have advantages in a system tasked with individual justice⁴⁴³, this work argues that a republican liberalist focus means such intense questioning of the outcome of an ostensibly democratic process should be more circumspect. Its influence on the substantive margin should, thus, be reserved. Care is required, given the principle of subsidiarity, to suggest that the ECtHR was better placed to decide on the best interests and the internal values of a particular jurisdiction (state) in the absence of an overall ECHR member state consensus:

[T]he 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, national statistics officers, reputable NGOs; this has already been the Court’s practice for the purpose of comparative law reviews. 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 single Strasbourg judgment.⁴⁴⁴

In the absence of the factual evidence relating to the national social background revealing a stark contrast of the state’s decision with the public view, a challenge of unreason based only upon local consensus would be problematic. For example, challenge may be made where the

⁴⁴² Draghici argues:

State-specific assessments of compliance are a positive trade-off between controversial pan-European standards and localised but effective supranational control. A temporary “variable geometry” of rights is also preferable to reining in evolutive interpretation altogether whilst waiting for European consensus to crystallise [...]

C. Draghici (n 434) 25.

⁴⁴³ *ibid* 12.

⁴⁴⁴ *ibid* 26.

national judiciary has been clear that public values are not in keeping with the decision or that national experts are universally opposed.

The elements that interact to influence the substantive margin of appreciation can thus be illustrated as:

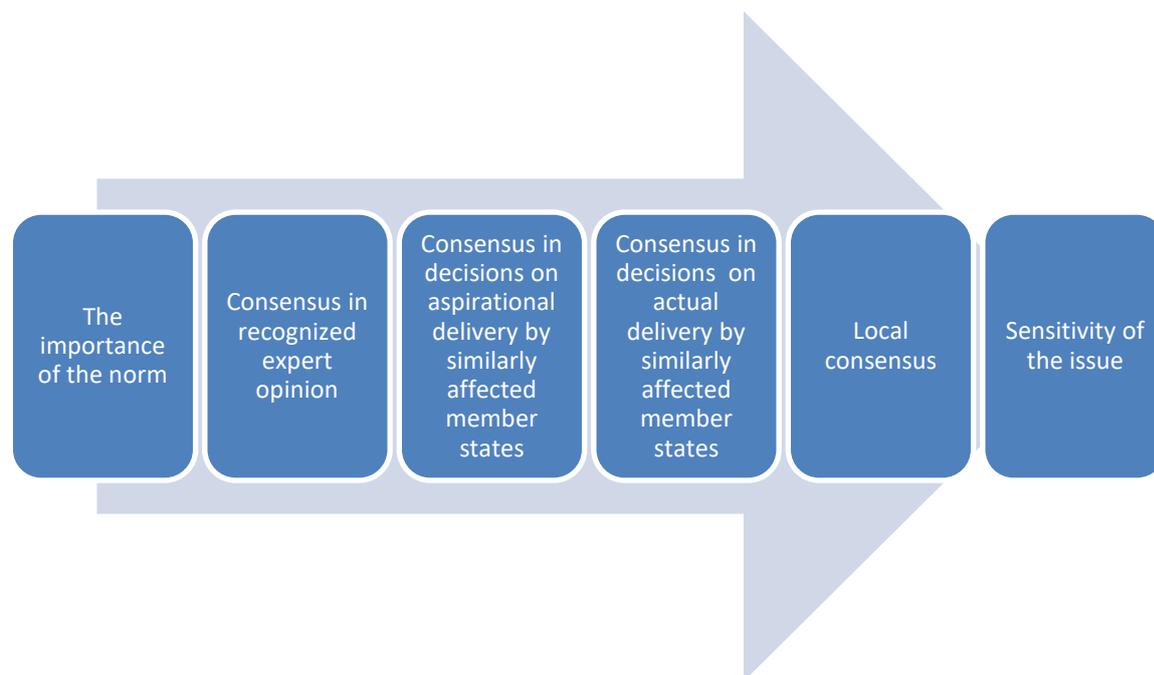


Fig. 6.3 Elements Affecting the Substantive Margin of Appreciation

6.4 Prioritisation of Serious Breaches

The analytical framework suggests that the ECtHR should act only where satisfied of either: (1) a significant impact on the given individual; or (2) a potentially significant impact upon the respondent state or the ECHR community.

This could fit with the ECtHR's already reformed admissibility criteria, following the entry into force of Protocol No. 14 on 1 June 2010. Article 35(3)(b)⁴⁴⁵ allows the ECtHR to declare

⁴⁴⁵ 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: [...]
(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the

inadmissible any case where the applicant has suffered no “significant disadvantage”. This is subject to safeguards: (1) the ECtHR might not declare such an application inadmissible where respect for human rights requires an examination of the application on the merits; and (2) no case may be rejected under this new criterion which has not been duly considered by a domestic authority.

The requirement of a significant impact upon the applicant is in keeping with the reasoning of this work. The case law of the ECtHR reveals that the severity may be significant either because of an objective impact upon the person’s life, for example a financial cost or a non-pecuniary cost⁴⁴⁶. The subjective importance of the case to the applicant is a relevant factor, but only if the subjective perception is justified on objective grounds.

In *Korolev v Russia* the ECtHR explained:

[A] violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is [...] relative and depends on all the circumstances of the case [...], taking account of both the applicant’s subjective perceptions and what is objectively at stake.⁴⁴⁷

application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

⁴⁴⁶ For example, in *Giuran v Romania*, Application No. 24360/04, Judgment of 21 June 2011 the ECtHR found a significant disadvantage because the proceedings concerned the applicant’s right to respect for his possessions and for his home. This was despite the fact that the complaint related to goods worth just 350 euros.

⁴⁴⁷ *Korolev v Russia*, Application no. 25551/05, Decision on admissibility, judgment of 1 July 2010, Part A. The ECtHR determined that the tiny and indeed almost negligible size of the pecuniary loss which prompted the applicant to bring his case was of minimal significance to the applicant.

See also *Ladygin v Russia*:

The Court reiterates that the main element contained in the new admissibility criterion is the question of whether the applicant has suffered a “significant disadvantage”. Inspired by the above-mentioned general principle *de minimis non curat praetor*, the new criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed, taking account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case.

Ladygin v Russia, Application no. 35365/05, Judgment of 30 August 2011.

Recognising the role of subjectivity is in accordance with republican liberalism as the basis argued by this work for cooperation under the ECHR, recognising that not only the substantive impact on a person but also perceptions are important to the wider trust and faith in democracy.

The first safeguard of an “important issue of principle” requiring an ECtHR examination is in accordance with the suggested approach of this work. Cases that the ECtHR has found raise questions of a general character affecting the observance of the ECHR in spite of not having a significant impact on the individual, are those that suggest a serious structural deficiency in the respondent state, affecting other persons in the same position as the applicant.⁴⁴⁸

For example, *Finger v Bulgaria*⁴⁴⁹ concerned a possible systemic problem of unreasonable length of civil proceedings and lack of an effective remedy. The ECtHR found it unnecessary to determine whether the applicant had suffered a significant disadvantage because respect for human rights required an examination of the case. *Nicoleta Gheorghe v Romania*⁴⁵⁰ concerned a question of presumption of innocence and equality of arms in criminal proceedings following a change in national law. The ECtHR considered the question was necessary for the national jurisdiction. In *Juhas Đurić v Serbia*⁴⁵¹, a police-appointed defence counsel complained of problems with the payment of fees in the course of a preliminary

⁴⁴⁸ See *Korolev v Russia*:

The second element contained in the new criterion is intended as a safeguard clause [...] compelling the Court to continue the examination of the application, even in the absence of any significant damage caused to the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires. [...] [In accordance with similar ECHR provisions] A further examination of a case was thus found to be necessary when it raised questions of a general character affecting the observance of the Convention (see *Tyrer v. the United Kingdom*, no. 5856/72, Commission’s report of 14 December 1976, Series B no. 24, p. 2, § 2).

Such questions of a general character would arise, for example, where there is a need to clarify the States’ obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant.

Korolev v Russia, Application No. 25551/05, Judgment of 1 July 2010.

⁴⁴⁹ *Finger v Bulgaria*, Application No. 37346/05, Judgment of 10 May 2011.

⁴⁵⁰ *Nicoleta Gheorghe v Romania*, Application No. 23470/05, Judgment of 3 April 2012.

⁴⁵¹ *Juhas Đurić v Serbia*, Application No. 48155/06, Judgment of 10 April 2012.

criminal investigation. The ECtHR found that this matter could not be considered trivial since it related to the functioning of the criminal justice system.

More recently, in *M.N and Others v San Marino*⁴⁵² the ECtHR explained:

“Furthermore, the nature of the issues raised is not *trivial*, and may have an *impact* both at the *domestic* level as well as at the *Conventional* one [emphasis added].”⁴⁵³

This safeguard is in accordance with republican liberalism, with the focus on ensuring a functional system. Systematic flaws are revealed by significant failures against individuals, or by what might be trivial for an individual but show a disregard for rights that must be investigated, confirmed and publicly pronounced. The adherence to republican liberalism is also demonstrated by the ECtHR declining to act against possible systematic breaches where an examination of a particular case by the Court would not bring any new elements.⁴⁵⁴ The ECHR is not primarily concerned with individual justice.

The second safeguard, “not duly considered by a domestic tribunal” is not in keeping with this work’s suggested framework of analysis for assessing the legitimacy of the ECtHR procedure or the tenets concluded as underlying the structure for a legitimate judicial model. The theory of republican liberalism revealed more of a constitutional undertaking on the part of the ECtHR rather than individual justice. If a matter is not significant for either the individual or

⁴⁵² *M.N and Others v San Marino*, Application no. 28005/12, judgment of 7 July 2015

⁴⁵³ *ibid* para. 39.

⁴⁵⁴ Cases in which the ECtHR declined to continue the examination include: those where the relevant law has changed (*Léger v France*, Application No. 19324/02, Judgment 30 March 2009 and *Adrian Mihai Ionescu v Romania*, Application No. 36659/04, Judgment of 1 June 2010); where the ECtHR has already addressed the issue as a systemic problem e.g. non-enforcement of domestic judgments (*Vasilchenko v Russia*, Application No. 34784/02, Judgment of 23 September 2010, *Gaftoniuc v Romania*, Application No. 30934/05, Judgment of 22 February 2011, *Savu v Romania*, Application No. 29218/05, Judgment of 11 October 2011; *Burov v Moldova*, Application No. 38875/03, Judgment of 14 June 2011, *Gururyan v Armenia*, Application No. 11456/05, Judgment of 24 January 2012).

These cases are a selection of those used in a Council of Europe and European Court of Human Rights Research Report, and other cases are also explored in the document. Council of Europe/European Court of Human Rights, ‘The New Admissibility Criterion under Article 35 § 3 (b) of the Convention: Case-law Principles Two Years On’ (Research Report, 2012) <http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf> accessed 21 December 2016.

for the respondent state or wider ECHR community, it is suggested that it is not part of the ECtHR's mandate. However, under Article 5 of Protocol No. 15, this element will be removed.

6.5 The Proposed Corrective Model

What follows is the structuring of the analytical framework introduced in Chapter Four (Fig. 4.3) and the tenets underlying the structure for a legitimate judicial model in Chapter Five (Fig 5.2) into a coherent and credible proposed improved model to support legitimate and effective operation and evolution of the ECHR through the ECtHR. A staged approach is suggested as the most appropriate:

A. The preliminary or initial question is whether a case meets the threshold for sufficient seriousness to be explored by the ECtHR. The ECtHR must consider that there is: (1) a significant impact for the given individual; or (2) a potentially significant impact upon the respondent state or the ECHR community.

B. Stage one asks *in abstracto* whether there is: (1) a relevant norm falling under the scope of an ECHR right, interpreted by ECtHR as a moral justification for the practices of a quantitatively and geopolitically relevant majority of member states who have debated the issue, with no "significant" resistance; and (2) the conditions that permit interference with that principle of general application in particular circumstances (restrictions/limitations). The ECtHR has the authority to determine what the *opinio juris generalis* is, and there is strong *prima facie* presumption that a majority consensus means the norm falls under the protection of the ECHR system. If the ECtHR identifies a new principle, it then produces a substantive legal definition. This means that, in many cases, stage one will be satisfied by reference to an earlier decision recognising the given norm claimed by an applicant along with acceptable reasons for its limitation.

C. Stage two, is an assessment of the actual application *in concreto* of the principle of general application in particular circumstances through judicial review of the state decision, subject to an appropriate margin of appreciation to be afforded to the respondent state.

The (1) procedural margin requires the respondent state to show that in reviewing its delivery, it followed overarching standards of due democratic process, including considering facts (of the case and social background), expert opinion from sources that are nationally recognized and from international bodies that are commonly recognized by member states. Provided the state carried out a satisfactory review process, it enjoys a strong *prima facie* presumption that the actual decision taken is legitimate. Failure to adhere to process will be a breach in its own right.

The (2) substantive margin allows the state discretion in how it protects the right and responds to any legitimate reasons to restrict it, but it must still act in accordance with what a reasonable person would conclude and act consistently. This requires effective protection of the right and a proportionate response where interference is justified. In assessing proportionality, the ECtHR will ask the following questions: (1) was there a legitimate aim for the interference with a norm; (2) were the means employed suitable; (3) were less restrictive means available; and (4) was the response disproportionate resulting in a negative outcome that no reasonable person would think justified by the overall aim? In assessing these different aspects, the margin allowed at this point may be wide or narrow. The determination of width of the margin places particular emphasis placed upon the standards for delivery revealed by a degree of consensus for comparable issues in practices for delivery by similarly affected member states.

6.5.1 Similar Issues

It is accepted that, once settled by the ECtHR in accordance with the above model, the determinations of the Court on the definitions of the norms and standards for application become autonomous. This means that a previous ECtHR ruling on a similar issue makes reconsideration on that point unnecessary. In cases of repetitive applications where no new legal norms or questions on correct application are raised, reevaluation would be wasted effort.⁴⁵⁵ It is suggested that these cases, where a full consideration has already been given and (ideally) a clearly reasoned and explained judgment made, fall into a category where a

⁴⁵⁵ As Dzehtsiarou stresses at the start of his consideration of consensus [at page 1], ‘the Court cannot endlessly justify each and every judgment [...]’. K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press: 2015) page 1

reconsideration would mean unnecessary delay. While the ECtHR is not bound to its own previous decisions, it must be able to rely on them to secure the unity and common understanding it is striving for. There is, to some extent, a *de facto* system of precedent. This is a view supported by the member states.⁴⁵⁶ It also means that the proposed corrective model does not require retrospective application. Established judgments that have been adopted and are now integrated into the practices of member states must not now be routinely unpicked. There is otherwise unacceptable and unnecessary risk to the wider web of decisions flowing from them, undermining the ECHR system, and altering the position of people who have relied upon them.

6.5.2 The Assessment of the ECtHR is Final

The proposed improved judicial model still involves significant assessment by the ECtHR when interpreting the practices of member states and when reviewing standards for application. The model for decision making proposed by this work would ensure that assessment is structured and that there is a checklist of relevant points to consider at each stage. But the ECtHR must have the freedom to make ultimate decisions on issues such as democratic due process, reasonableness, proportionality, consensus and inferences from state practices.

Consensus, in particular, has been given a prominent role in the proposed new model. As Helfer argues, if the ECtHR, ‘hope[s] to maintain institutional authority’⁴⁵⁷ and ‘expect[s]

⁴⁵⁶ See declaration 25 of the Brighton Declaration:

The Conference therefore [...] welcomes the Court’s long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases; and in particular, invites the Court to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation [...]

‘High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration’ (19-20 April 2012) available at <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 19 November 2016.

⁴⁵⁷ L. Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’, 26 *Cornell Int LJ* (1993) 133, 154.

states to comply with [its] increasingly rights protective judgments, [it] must provide a more precise explanation⁴⁵⁸ of consensus.

This presents a major difficulty if the basis is not set out as clearly as possible, leaving questions such as those posed by Helfer:

Does it mean what all or most citizens accept? Or does it rather mean what reasonable and fully informed citizens would accept? Moreover, how is the court to say when this common ground has been achieved? By consulting opinion polls? By relying on judges' limited personal experience?⁴⁵⁹

The proposed improved judicial model goes as far as it can in settling these points. Consensus relates to: (1) the norms that most, not necessarily all, of the national governments can be interpreted as accepting following an ECtHR review of their practices; and (2) standards for application that most similarly affected states adopt. It is the national governments, including political representatives and the national judiciary, whose practises the ECtHR reviews and not the citizens directly. In the absence of very clear contradictory evidence, the democratic and empirical validity of the practices of the national government must be *prima facie* presumed. This makes the task more intelligible for the ECtHR, not normally being required to look behind government practice to the citizens directly or to explore sources such as opinion polls. When it comes to searching for the common moral threads, the principles, that could justify those government practices, the ECtHR is well placed for that task. It is searching for any moral justificatory norms that could be generic for all agents, having the distance to see those underlying patterns may be helpful. In relation to delivery, again it is not necessary for the ECtHR it to appreciate fully the situation on the ground to be able to step-back and look for any general standards. Provided the ECtHR adopts a reasonable process in its search for significant consensus, its determinations must be respected as the body tasked with legal settlement.

In upholding norms of interpretation and application emerging from the practices of only some of the member states, the ECtHR is in effect raising the bar for others and must be aware

⁴⁵⁸ *ibid* 141.

⁴⁵⁹ *ibid* 138.

of the danger of forcing democratic evolution. As such, the ECtHR should err on the side of restraint and act only where there is clear evidence.⁴⁶⁰ However, provided evidence is cited, criticisms made about those developments being “judge made law” are minimised and allegations of activism reduced by limiting the pace of change to developments in democracies.

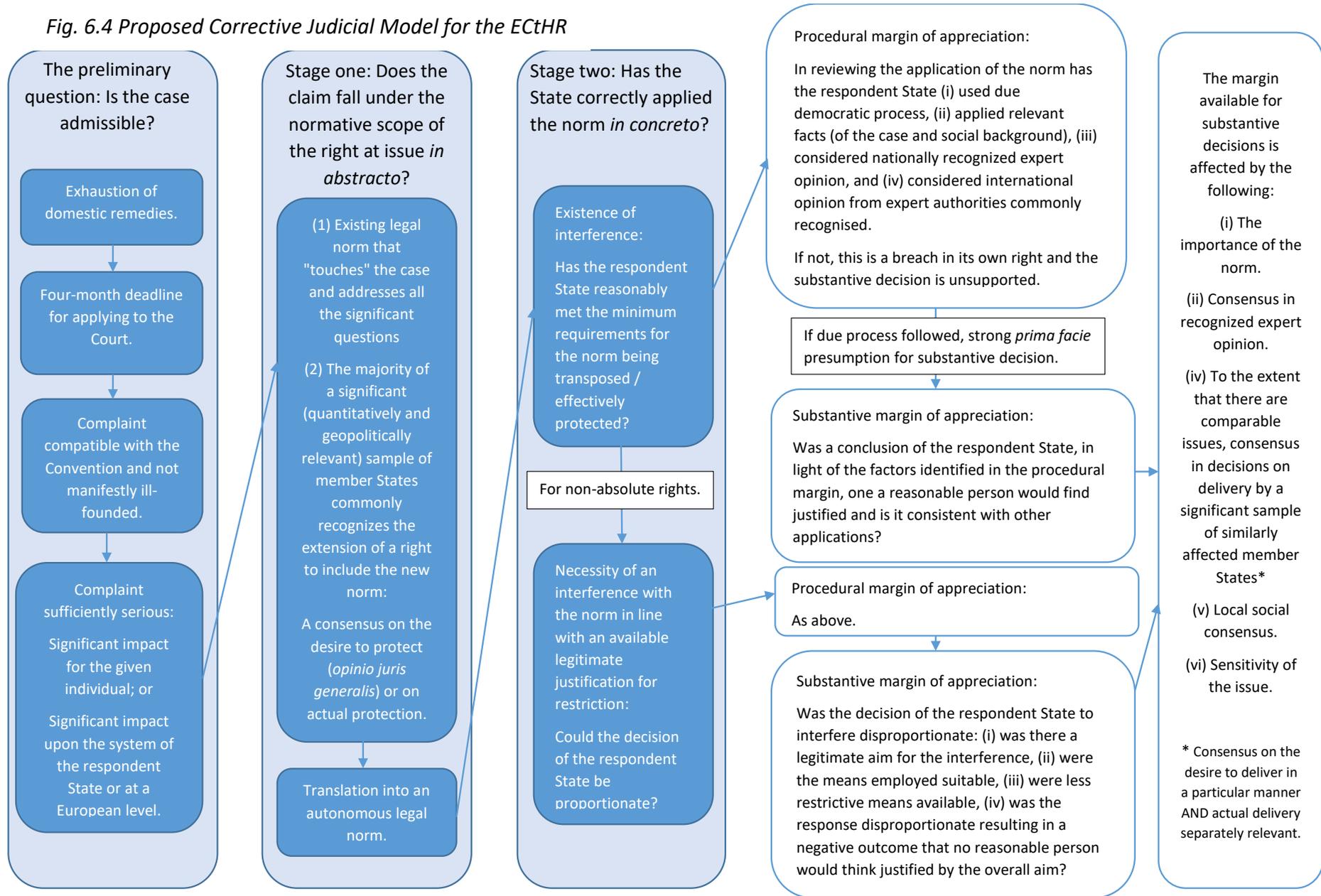
Individual decisions may still be subject to allegations that the ECtHR got it wrong, given the difficulties in the use of consensus but that is not a reason to abandon it. The legitimacy of the ECtHR procedure should include safety measures producing the most rigorous and disciplined approach to consensus practically possible.

⁴⁶⁰ Carozza cautions that:

The Court’s haphazard and overly casual assertions of similarities or divergences in national laws constitute a serious weakness that undermines the legitimacy of the Court by rationalizing its crucial turns in justification on little more than hunches about European commonality and patterns of legal, social, and moral development.

P. Carozza, “Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights” *Notre Dame Law Review* 73 (1997-98) 1217, 1225.

Fig. 6.4 Proposed Corrective Judicial Model for the ECtHR



6.6 The Ruling

The manner of rulings made by the ECtHR may better reflect the different stages set out by the proposed judicial model by including as routine judgments: (1) a rejection of any current breach but encouraging all contracting states to actively consider the point raised relating to interpretation or to application⁴⁶¹; and (2) providing a clear division between mandatory steps and recommendations of the ECtHR.

Where there is a breach then it is in accordance with subsidiarity and respect for due democratic process that the respondent state has the choice of how to comply, with an avoidance of overly prescriptive requirements.⁴⁶²

⁴⁶¹ Points which may, in turn, be taken up by the Parliamentary Assembly of the Council of Europe and the Committee of Ministers of the Council of Europe.

⁴⁶²The ECtHR has held, on a number of occasions that its judgments generally leave to states the means to discharge obligations under Article 41, which requires them to abide by judgments. See *Aleksanyan v Russia, Application* for an explanation:

The Court notes that the applicant did not request any pecuniary compensation under Article 41 of the Convention. As to the specific measures requested by the applicant, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention [...]

Only where it is, exceptionally, deemed necessary for just the types of situations that the proposed model envisages will the ECtHR go further:

However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist [...] In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure [...]

Aleksanyan v Russia, Application No. 46468/06, Judgment of December 22 2008, at paras. 238 and 239.

See also *Assanidze v Georgia*, Application No. 71503/01, Judgment of 8 April 2004; *Scozzari and Giunta v Italy*, Application Nos. 39221/98 and 41963/98, Judgment of 13 July 2000; and *Brumărescu v Romania*, Application No. 28342/95, judgment of 28 October 1999.

6.7 Illustrating the Issues

As the element of the proposed judicial model on the preliminary point regarding admissibility of cases is in keeping with the existing approach (that the questions it raises are “significant issues”), that aspect of the model will not be further evaluated in this work. It is once a case is admitted that the suggested corrective judicial model and current one appears to diverge.

As a starting point, there is currently no particular judicial strategy of the ECtHR once the case is accepted for its judgment. This means the approach to questions such as consensus and the margin of appreciation is unpredictable. In particular, this work has noted already that consensus is found with varying numerical and geopolitical significance in the evidence presented and, sometimes, very little evidence of member state practices at all. There appears to be significant reliance on international law, that might not always be recognised in the practices of the states. And, the impact of due democratic review appears to be more forceful in some cases compared to others, when it should be consistent in creating a strong presumption of compliance.

The work will now return to the speech made by Lord Hoffmann, considered in Chapters Four and Five.⁴⁶³ Three cases his lordship uses to illustrate his concerns relating to the current use of the margin of appreciation by the ECtHR, provide a useful means for this work to introduce the implications of the suggested corrective model and possible shortcomings of the current approach.

The first case reference concerns interpretation of a norm as falling under the scope of a right, it is particularly notable as the judgment arguably gave this norm the status of being absolute. The ECtHR appears to have done so without any consideration of whether member state practices could be reasonably interpreted as a showing consensus on the point.

The second case reference relates to the application of an accepted norm. The ECtHR appears to have set a narrow substantive margin of appreciation without considering the impact of consensus between member states or in expert opinion (or more accurately dissent in that

⁴⁶³ Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009. Chapter 4 (n 250) and Chapter 5 (n 373).

case). The substantive margin of appreciation was, therefore, arguably more restricted than the evidence on any shared standards for delivery supported.

The third case reference relates to both interpretation and application. This time it is the procedural margin of appreciation that is raised. The ECtHR's lack of explanation as to why it considered that the state procedures (which appeared to have met the requirements of democracy) inadequate is at issue.

Case One relates to a refusal by the ECtHR to allow any exceptions to the rule that evidence provided under compulsion could not be used in criminal proceedings.⁴⁶⁴ The UK had argued that while a defendant in a criminal trial cannot be compelled to appear as a witness at his own trial, the privilege against self-incrimination was not absolute.⁴⁶⁵ As such, it would be necessary to have regard to all the facts of the case, including the many procedural safeguards inherent in the system.⁴⁶⁶ The UK further emphasised, in respect of that balance, that 'whilst the interests of the individual should not be overlooked, there was also a public interest in the honest conduct of companies and in the effective prosecution of those involved in complex corporate fraud'.⁴⁶⁷

In response, the ECtHR did not, "find it necessary [...] to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances".⁴⁶⁸ It instead held, without consideration of any additional evidence on the point and certainly not the majority consensus in practices for which the corrective model calls, that it could not accept that the complexity of corporate fraud and the public interest in the investigation and punishment of such fraud could justify such a marked departure from one of the basic principles of a fair procedure. It considered that:

[T]he general requirements of fairness contained in Article 6, including the right not to incriminate oneself, *applies to criminal proceedings in respect of all types of criminal*

⁴⁶⁴ *Saunders v the United Kingdom*, Application No. 19187/91, Judgment of December 17 1996.

⁴⁶⁵ *ibid* at para. 62.

⁴⁶⁶ *ibid* at para. 63.

⁴⁶⁷ *ibid* at para. 64.

⁴⁶⁸ *ibid* at para. 74.

offences without distinction from the most simple to the most complex [emphasis added].⁴⁶⁹

Applying the reasoning of this work, this type of statement falls under stage one. It is part of the *in abstracto* reasoning interpreting a principle as it applied generally. Interpretation relates to what the norm is and in what particular circumstances it can be restricted. The question of the acceptability or not of self-incrimination in any criminal case is a generic one, raised in a generic situation and not requiring expertise. Asserting that there was no need to consider whether limitation was ever possible, making the right absolute, was an interpretation of a principle of general application and when it can be restricted. Without exploring state practices for a consensus supporting such an interpretation, the ECtHR gave the appearance of itself constructing the normative scope of the right based on its own values rather than democratically reached compromised constructions.

The result was a rather underdeveloped final outcome, later criticised as not showing sufficient deference to the detailed work of the national authorities, including national courts, in weighing up the competing considerations to establish safeguards for defendants. This national work would be, according to the corrective model, part of stage two, requiring democratic due process and a reasonable response by the national government. If the ECtHR had not effectively found the norm to be absolute despite the lack of evidence for such understanding, then under stage two the process adopted by the state may well have been sufficient to show a *prima facie* assumption that the actual decision made was legitimate with a resultantly widened margin of appreciation open to the state.

Case Two was a refusal by the ECtHR to allow the admission, in exceptional circumstances, of hearsay evidence in criminal trials. If allowed, such evidence could lead to a conviction based solely (or to a decisive degree) upon depositions made by a person of whom the accused has had no opportunity to examine or have examined.⁴⁷⁰

⁴⁶⁹ *ibid* at para. 74.

⁴⁷⁰ *Al-Khawaja and Tahery v the United Kingdom*, Application Nos. 26766/05 and 2228/06, Judgment of 15 December 2011.

Again, crucial to such a judgment is first a consideration in stage one interpreting normative scope. The Chamber accepted that the norm did not amount to an absolute right of challenge, but instead to the ability to challenge unreliable evidence or evidence rendered unreliable by virtue of the lack of an ability to cross-examine. The work will assume that there was evidence of consensus in state practices to support this as a commonly understood construction, focused on a public general understanding that an ability to challenge evidence is part of its reliability. Yet, in settling the margin of appreciation for securing that expectation in practice within the complexity of legal processes beyond the understanding of the public as a whole, the ECtHR gave the appearance of doing so without considering that delivery of non-absolute protection against unreliable evidence allows a member state to review differing options to secure that aim. The ECtHR's decision effectively determined that all "important" hearsay evidence be treated as unreliable. As the UK submitted, when the case was later referred to the Grand Chamber:

[T]he sole or decisive rule, as applied by the Chamber in its judgment, was predicated on the false assumption *that all hearsay evidence which was critical to a case was either unreliable or, in the absence of cross-examination of the witness, incapable of proper assessment* [...] The rule could produce arbitrary results; it could operate to exclude evidence simply because it was important, irrespective of its reliability or cogency. The Chamber had not explained whether or how the issue of reliability was relevant to the application of the rule [emphasis added].⁴⁷¹

In essence, the case removed any practical margin of appreciation for a norm that the ECtHR had accepted as not currently understood as being absolute. Under the procedural margin of appreciation, the ECtHR overlooked the detailed considerations of the national bodies and courts relating to the types of requirements that may safeguard that expectation in practice. If it had done so then it is likely that the following of due democratic process would have resulted in a *prima facie* presumption that the substantive UK decision was legitimate. While, under the substantive margin it would still have been open to ECtHR to make the same ultimate finding, that margin would have been wider and further influenced by absence of consensus in expert opinion and the standards established by the practices of other similarly affected states.

⁴⁷¹ *ibid* at para. 96.

Interestingly, the lack of reasoning provided also made the decision of the ECtHR set out unworkable. This appeared again in the UK's submission when the case was referred to the Grand Chamber:

It [the Chamber] had not conducted a full analysis of the safeguards available in England and Wales, nor had it appreciated the important difference between common-law trial procedures and those of other contracting member States. It had not explained when evidence would be decisive with sufficient precision to enable a trial court to apply the sole or decisive rule in practice or given adequate consideration to the practical problems which would arise by application of the rule in England and Wales.⁴⁷²

It is notable that in the Grand Chamber, the ECtHR came to a different conclusion. Here, it did consider the reasoning of the respondent state and a range of relevant comparative law from other similar jurisdictions to determine the type of balancing and safeguards utilised. On that point, under what the proposed model terms the substantive margin, it determined that for one of the challengers in this case, the protection had been fair.

Case Three relates to a decision to extend the hours of permitted flights at Heathrow, which was held by the ECtHR Chamber as a breach of the right to private and family life.⁴⁷³ The UK submitted that in deciding to introduce the scheme governing the airport it struck an appropriate and justified balance between the various interests involved and so any interference with Article 8 was justified.⁴⁷⁴ If the UK could show that it had used due democratic process under the procedural margin of appreciation, then it should have been afforded a *prima facie* presumption that the decision made was legitimate.

In support of its processes, the UK referred to the series of noise mitigation and abatement measures implemented at Heathrow airport⁴⁷⁵ and industry responses to a consultation project, all of which emphasised the economic importance of night flights and provided detailed information and figures to support their responses⁴⁷⁶. The UK claimed that active and

⁴⁷² *ibid* para. 96.

⁴⁷³ *Hatton and Others v the United Kingdom*, Application no. 36022/97, Judgment of July 8 2003.

⁴⁷⁴ *ibid* at para. 85.

⁴⁷⁵ *ibid* at para. 87.

⁴⁷⁶ *ibid* at para. 88.

detailed consideration had been and continued to be given to the issue of sleep disturbance and to whether the research undertaken to date needed to be supplemented and, if so, in what areas and on what scientific basis.⁴⁷⁷ Overall, the UK contended that, before deciding upon the scheme, they had considered extensive and detailed information. Given the range of interests involved, striking a balance is not straightforward, but was, 'something which the national authorities are particularly well placed to do'. As such, the balance struck should be found as fair and reasonable.⁴⁷⁸

The Chamber concluded that insufficient research was conducted by the UK Government. It accepted that it was, at the very least, likely that night flights contribute to the national economy as a whole but, critically, that the importance of that contribution had never been assessed, whether by the UK Government directly or by independent research on their behalf.⁴⁷⁹ It noted also that only limited research had been carried out into the nature of sleep disturbance and prevention.⁴⁸⁰ Overall, the Chamber did not accept that what it determined as "modest steps" at improving the night noise climate were capable of constituting "the measures necessary" to protect the applicants' position. It stated that:

In particular, in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the Government struck the right balance in setting up the 1993 Scheme.⁴⁸¹

In terms of the application stage of the proposed improved judicial model, this ruling found a procedural breach given an insufficient review and it followed that this meant the substantive decision was unjustified. This ruling would, therefore, hold under the proposed corrective model but only provided the norm itself was correctly defined under the *in abstracto*

⁴⁷⁷ *ibid* at para. 89.

⁴⁷⁸ *ibid* at para. 90.

⁴⁷⁹ *ibid* at para. 102.

⁴⁸⁰ *ibid* at para. 103.

⁴⁸¹ *ibid* at para. 106.

interpretation stage regarding the general balance between a quiet home and the economic interest of the public as a whole.

Notably, when the case was referred to the Grand Chamber it reversed the Chamber's decision.⁴⁸² The UK strongly objected to the "minimum interference" approach which had been adopted by the Chamber as the guiding principle of general application. The UK submitted that the test reduced to "vanishing-point" the margin of appreciation afforded to states in an area involving difficult and complex balancing of a variety of competing interests and factors.⁴⁸³ While such a requirement "may" have been a reasonable interpretation of the duty in relation to sound pollution, it was not a way in which it "must" be interpreted. As such, only a common government understanding between the states on the generic protection expected by all citizens could establish that as a binding commitment. If the ECtHR had been required to show consensus in support of its interpretation of the normative scope and had not found such a strict understood obligation, then its determination of procedural compliance may well have reached a different outcome. It, in essence, started off down the wrong path.

The UK further argued that there was no single correct policy to be applied regarding regulation of night flights. So, assuming that it was found to have followed due democratic process, it would have claimed a wide substantive margin. states could and did adopt a variety of different approaches, with a clear absence of consensus on delivery. Because of their 'direct and continuous contact with the vital forces of their countries', national authorities were better placed to evaluate local conditions and needs.⁴⁸⁴ The role of ECtHR was supervisory only, to ensure that the state did not follow a process which would result in the making of an arbitrary decision i.e. had it made itself sufficiently informed of the relevant

⁴⁸²The Grand Chamber noted that:

[R]egard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.

ibid at para. 98.

⁴⁸³ ibid at para. 87.

⁴⁸⁴ ibid at para. 88.

issues by carrying out an adequate investigation and had it adopted procedures to strike a fair balance.⁴⁸⁵ Provided the state procedurally complied then that following of due process, coupled with variation in the practices of similarly affected states, would mean that it enjoyed a very wide margin of appreciation, making it less likely for the ECtHR to find a breach.

The ECtHR Grand Chamber noted that:

Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.⁴⁸⁶

It therefore determined, emphasizing the importance of the procedural review, that a reasonable decision had been made based on the data available. If the proposed corrective model had been utilised, the need for this reversal could well have been avoided.

6.8 Chapter Conclusions

A comparison between the elements in the framework of analysis for assessing the legitimacy of the ECtHR procedure from Chapter Four (Fig. 4.3) and the proposed improved judicial model for the Court (Fig. 6.4) is now possible from the analysis in this chapter:

⁴⁸⁵ *ibid* at para. 89.

⁴⁸⁶ *ibid* at para, 123.

Element	Explanation	Risk	Response
Transparency and consistency	<p>Clearly explained reasoning for judgments.</p> <p>Decision-making process with clearly defined stages for interpretation and application, always applied.</p>	<p>Difficulty applying a decision outside of the specific facts of the case.</p> <p>Inconsistent development of law.</p> <p>Lack of clarity on what is required for a state to comply with its duty.</p> <p>Undermining of ECtHR accountability.</p> <p>Undermining of trust in the legitimacy of judgments.</p>	<p>Sequential stages for the judicial process, suitable for all types of case.</p> <p>Nature/requirements of judicial reasoning process explained in relation to each.</p> <p>Relevant factors identified, creating a checklist.</p>
Directed/contained authority	<p>Acts as agent to secure the objects of its principals (the member states as representatives of citizens).</p>	<p>Expansion beyond the mission, slippage from securing the principals' shared government object and purpose.</p>	<p>Stage one requires the interpretation of the normative parameters of a right to reflect common understandings constructed by social interactions between agents (interpreted via the practices of democratic governments).</p>
Current/informed	<p>Judgments need to keep pace with evolving understandings of the government purpose of the principals and to be informed by/harmonious with wider international law.</p>	<p>The ECHR ceases to be effective and relevant internationally.</p>	<p>Use of consensus to develop the stage one interpretation of the rights and to help settle standards for stage two substantive application.</p> <p>Recognized expert opinion, both national and international, forms part of the procedural review under stage two and helps to settle the substantive margin of appreciation.</p>

<p>Acknowledgement of subsidiarity and a margin of appreciation</p>	<p>Local variation means that national democratic government choices are presumed to be correct.</p>	<p>Unrealistic judgments.</p> <p>Judgments not in accordance with societal values and empirical reality.</p> <p>Unimplemented judgments and loss of public investment – meaning the ECHR ceases to be effective.</p>	<p>Interpretation under stage one requires consensus from a numerically but also geopolitically relevant majority.</p> <p>A procedural and substantive margin of appreciation is provided for, under stage two.</p> <p>Compliance with the procedural review requirements means a strong <i>prima facie</i> presumption that the substantive decision is correct, resulting in a less intensive review.</p> <p>Only unreasonable or disproportionate substantive decisions challenged.</p> <p>Consensus influential in determining how much variation is required, reviewing the absence or presence thereof only in similarly affected states.</p> <p>Sensitive issues given a wider substantive margin.</p>
<p>Limited to oversight</p>	<p>Not tasked with securing individual justice i.e. not an appeal court.</p>	<p>Excessive caseload, undermining local systems and overwhelming the ECtHR.</p>	<p>Admissibility criteria met only in cases with a significant impact on individuals or indicating a systemic issue.</p>

		Overly intensive review of local and democratic decisions.	<p>Compliance with the procedural review requirements under stage two means a strong <i>prima facie</i> presumption that the substantive decision is correct, resulting in a less intensive review.</p> <p>Evidence/changed circumstances from after the challenged national decision was made is not admissible when reviewing state compliance.</p>
Acknowledgement of the democratic process	<p>The ECtHR is tasked with upholding and reinforcing democracy.</p> <p>Democratic decisions on interpretation of right are correct is they could accord with the PGC.</p> <p>Provided the democratic process is followed national decision-making on application should, <i>prima facie</i>, be upheld with a wide margin of appreciation.</p>	<p>Undermining of the operation, relevance and faith in democracy as the best route to securing “human rights” and organising society.</p> <p>Undermining the very basis of the ECHR and the rights as listed in its text (themselves having been interpreted by the original states based upon the understandings commonly developed via democracy).</p>	<p>The moral balancing on the generic moral norms that fall under rights occurs in stage one, within democracies and overseen by national democratic government.</p> <p>In the stage two application of the principles of general application to particular circumstances, where a democratic process of review is followed, it is presumed that the decision is correct. In challenging that substantive decision, consensus in democratic state practices is a major influence.</p>
Effectiveness	Are judgments upheld and are the decisions of the ECtHR influential in driving forward wider reform?	Individuals do not secure an appropriate remedy and no systematic change.	The model, in securing the other elements of the framework, is more legitimate.

		<p>Decisions do not inform future law-making and public debate.</p>	<p>The evidence of a consensus in other states will add to pressure to comply.</p> <p>The actual implementation of a judgment is normally left to the state, making it more likely that any response will be sufficient to comply.</p> <p>Where there is not yet consensus on issues, the ECtHR is encouraged by the model to ask states to consider particular points and to make recommendations. This will engage states in a process for realistic and empirically valid development of principles and standards.</p>
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Fig. 6.5 Response of the Proposed Improved Judicial Model to the Framework of Analysis for Assessing the Legitimacy of ECtHR Procedure

Additionally, consideration of the cases highlighted by Lord Hoffmann demonstrates the potential usefulness of the proposed model for the ECtHR and shows the impact of some of the flaws identified in relation to the Court's current approach.

Notably, the ECtHR does not have a particular judicial strategy. Furthermore, its approach to settling points such as consensus and the margin of appreciation is unpredictable. Consensus is found with varying numerical and geopolitical significance in the evidence presented and, sometimes, very little evidence of member state practices at all. Arguably this results in expanding interpretations of the rights that are not recognised by the states as forming part of the agreement.

This represents an expansion of the ECHR project beyond its mission that undermines the democratic process. It also results in an artificially reduced margin for state application of the rights, narrowed by reliance upon expert opinion that is not recognised by states and consensus that has not been properly established. In the application stage, democratic due process is not always sufficiently factored into the margin left to the state. Another consequence is a move towards the ECtHR delivering individual justice, as opposed to oversight of democratic processes.⁴⁸⁷

However, the research question of this work, set out in Chapter One, requires us to consider whether cases such as these are an anomaly or are evidence of a more systematic problem:

⁴⁸⁷ See the work of Greer and Wylde, which notes that:

[R]ecent developments have tended to confirm the ascendancy of the "individual justice model" over the "jurisprudence of principles"/"standards for dialogue" alternative, the latter of which, in its various forms, has, nevertheless, become a particularly powerful and widely held view among scholars [...]

S. Greer and F. Wylde, "Has the European Court of Human Rights become a "Small Claims Tribunal" and Why, If at All, does it Matter?" (2017) *European Human Rights Law Review* 145.

Since its inception, the European Court of Human Rights has been charged with demonstrating an increased willingness to find member states in violation of the European Convention on Human Rights. While some evolution in the interpretation of rights is necessary and the requirements for application to secure rights are to be expected to become less fluid as the Court develops its *acquis*, some participants allege that the nature of these ongoing developments cannot be reconciled with the Court's mandate.

- (1) To what extent is the mandate of the Court identifiable and relevant to the scope and limits of its authority?
- (2) Based on that authority, what are the elements of a corresponding exercise of judicial autonomy (a framework) and has an expansive interpretation of rights and a reduced margin made available to member states in applying them, exceeded that authority?
- (3) If discrepancies are identified could a corrective model for decision making by the Court be proposed, to support more legitimate and effective operation and future evolution of the system?

Chapter Seven will apply the corrective model to a wider range of case law. It selects controversial case law which represents some of the most challenging issues the ECtHR has responded to, in order to robustly test the ability of the proposed improved judicial model to provide a more legitimate and effective solution.

7 Chapter Seven

Evaluation of the Proposed Corrective Model

Application and evaluation of the staged model
against key ECtHR rulings and hypothetical
consequences

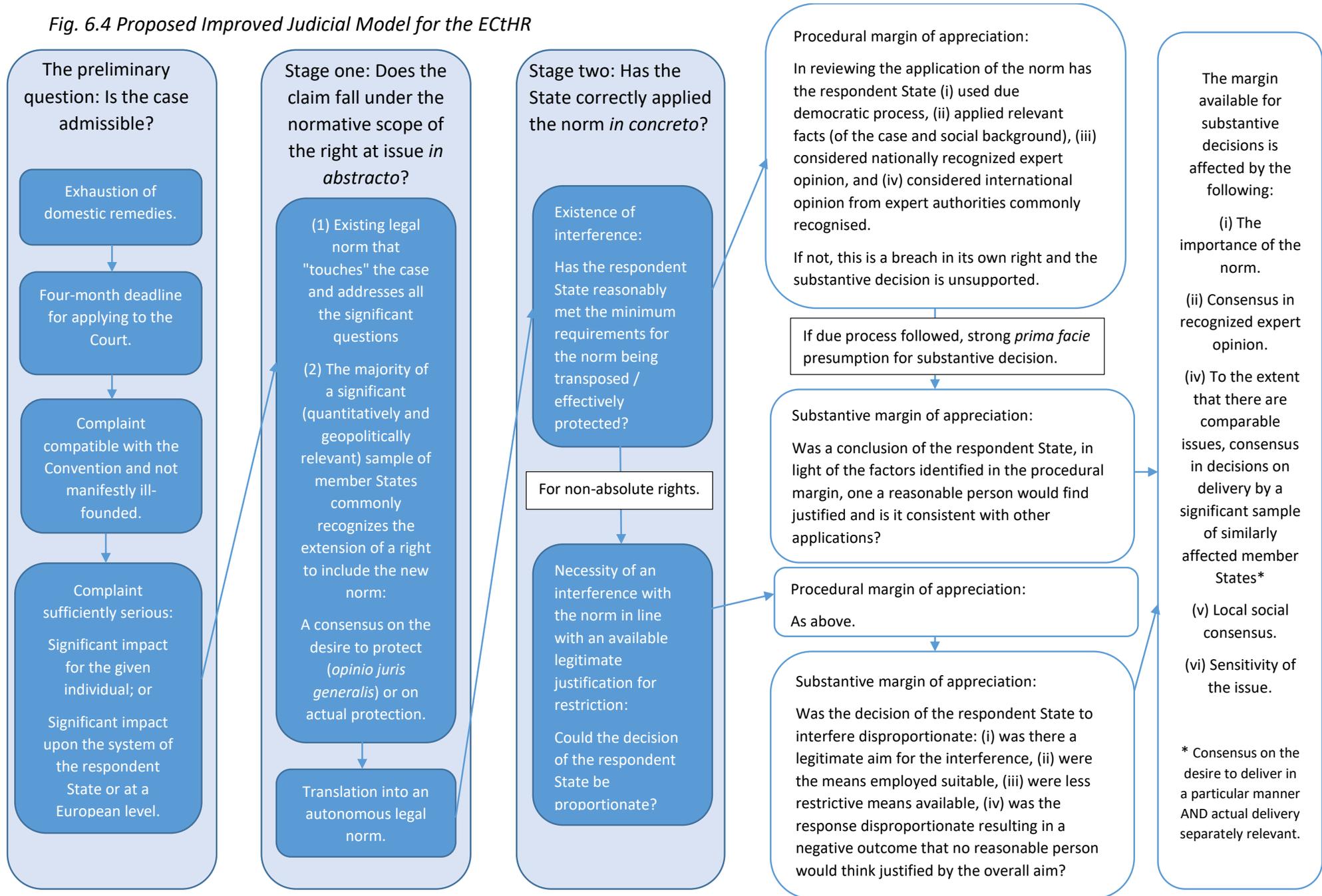
7.1 Introduction

Phase seven of the project provides a comparison of the jurisprudence of the European Court of Human Rights (ECtHR), based on appropriate case history, with the improved corrective judicial model proposed in Chapter Six (identified in Fig. 6.4). Key rulings from the ECtHR are analysed, in particular those that have resulted in controversy.

Noting that Chapter Six considered that the initial assessment for admissibility of a case currently in use by the ECtHR is in keeping already with the proposed judicial model (questions raised that are “significant” and “current”⁴⁸⁸), this chapter reviews only the two-stage approach to evaluating whether there has been a breach after a case has been accepted by the Court for judicial review.

⁴⁸⁸ Note that, under ECHR Protocol 15, the current time limit of six months from the national judgment would be reduced further to four months.

Fig. 6.4 Proposed Improved Judicial Model for the ECtHR



7.2 Terrorism Laws and Deportation

7.2.1 Torture and “Inhuman or Degrading Treatment or Punishment”

Absolute rights raise particular challenges for the balance of authority between the ECtHR and member states, given that a government can never restrict or take away any norms that fall under their parameters. There are only four rights in the European Convention on Human Rights (ECHR) which are absolute: (1) not to be tortured or to be inhumanly or degradingly treated or punished⁴⁸⁹; (2) not to be held in slavery or servitude⁴⁹⁰; (3) not to be convicted for conduct which was not an offence at the time it occurred⁴⁹¹; and (4) not to have a heavier penalty imposed for an offence than the one applicable at the time the offence was committed⁴⁹².

Decisions of the ECtHR based upon Article 3, normative principles under which relate to stopping deportation and the right not to be tortured or inhumanly or degradingly treated or punished, illustrate the importance of careful formation of the understood normative scope of an absolute right. It has been selected as an area for review as one that poses the greatest challenge for the proposed corrective model and demonstrates the potential impact of separating the proposed ECtHR judicial model into stage one for interpretation and stage two for application. Two cases illustrate clearly the impact of considering the normative scope of a right under stage one on Article 3: *Soering*⁴⁹³ in exploring the normative parameters of Article 3 beyond national borders and *Chahal*⁴⁹⁴ in considering the relevance, if any, of risks to national security allowing any restrictions to an absolute principle of general application in particular circumstances.

⁴⁸⁹ Article 3 ECHR.

⁴⁹⁰ Article 4 (1) ECHR.

⁴⁹¹ Article 7 (1) ECHR.

⁴⁹² Article 7 (1) ECHR.

⁴⁹³ *Soering v the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989.

⁴⁹⁴ *Chahal v the United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996.

7.2.1.1 Stage One (Interpretation)

Article 3 ECHR states:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment [emphasis added].'

There is a clear absolute guarantee of the normative scope of Article 3, meaning there can be no acceptable restrictions of the generally expected norms that fall within its parameters. There is no allowing of member states to limit the generally expected protection under stage two *in concreto* application to particular circumstances. This makes the first stage of the corrective model suggested by this work particularly critical, starting with the ECtHR interpreting the right's normative parameters *in abstracto*.

Article 3 leaves a number of aspects open to interpretation. The wording "torture or inhuman treatment" requires further reasoning on its meaning. What is meant by "subjecting" a person to such treatment is also unclear. While the wording of the Article clearly means that a state may not itself engage in the banned activity in any circumstances, it is not clear on any positive duty to actively safeguard against others practicing it. A further question is raised about the government's responsibility to safeguard people outside of its borders.

The *in abstracto* settlement of these points is, in accordance with the proposed model, via evidence of a majority consensus between the member states. Only if an already recognised norm can be adopted to necessarily cover the circumstances of a case, is a full stage one evaluation not required.

Soering required a determination of whether the normative scope of Article 3 reaches beyond prohibiting the state from causing torture or inhuman or degrading treatment within their own jurisdiction or to cover also exposing people to extraterritorial punishment conducted by other states.

Within a state's territory, the understood expectations extend demonstrably to the state not engaging in such treatment and also to a positive duty to prevent others from doing so. That position is well accepted, the consensus is clear and longstanding and forms an accepted legal norm between the states of the ECHR (and more widely). However, that principle does not

resolve whether removal to outside a state's territory still requires that duty of protection. As such, a new stage one evaluation was necessary, to find a new universally constructed norm. The ECtHR is able to adopt an existing norm to cover a different *in concreto* situation, but should not itself extend *in abstracto* principles to recognise a new claim. In terms of extraterritorial duties, the criteria of reason could be properly met with varying interpretations of the existing norms recognised as falling under Article 3 as defined in relation to domestic duties; from imposing no duty to not encouraging, not endorsing, or not knowingly putting an individual at risk (even here, there could be varying levels of acceptable risk).

Settling which of these interpretations forms the dialectically necessary construction is a matter upon which all agents may be expected to reason, as represented by their democratic representatives. Without a consensus on the right norm i.e. a consistent moral justification inferable from the practices of the governments of a majority of the member states, there is no ECHR principle to be applied by the member states and overseen by the ECtHR.

In the case, the applicant submitted that under Article 3:

[A]n individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.⁴⁹⁵

The UK contended that Article 3 should not be interpreted so as to impose responsibility on a member state for acts that occur outside its jurisdiction. It maintained that:

[I]t would be straining the language of Article 3 intolerably to hold that by surrendering a fugitive criminal, the extraditing State has "subjected" him to any treatment or punishment that he will receive following conviction and sentence in the receiving State.⁴⁹⁶

Note here the points made in Chapter Four about the risks of overzealous extrapolation. While the position of the applicant "could" be reasoned and could be coherent with existing understood norms, so could other interpretations. It "may" rather than "must" represent the

⁴⁹⁵ *Soering v the United Kingdom* (n 493) at para. 82.

⁴⁹⁶ *ibid* at para. 83.

moral normative understanding. With that in mind, the UK's position seems supportable given the ECHR guarantees only minimum common understandings. There is the potential to reason a distinction between committing or sanctioning violence within an area under one's control, and exposing a person to it in an area outside of one's control. This was not a necessary adoption of an existing moral norm to a new situation, but rather a significant extension of the right to include a new category.

In the alternative, if it had any duty, the UK submitted that the application of Article 3 in extradition cases involving criminals should be limited to those occasions in which the treatment or punishment abroad is "likely". Arguing that:

[T]he fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugitive criminals to justice, it requires a *very high degree of risk*, proved beyond reasonable doubt, that ill-treatment will actually occur [emphasis added].⁴⁹⁷

The elements of the arguments made by the state fit with that of this work. First, whether the practices within states reveal moral constructions by agents of any norms extending a duty beyond national boundaries. Second, whether the scope of any generally understood duty to protect criminals covered only cases with a particular degree of risk. The latter argument is not the same as recognising that, when it comes to application, effective protection can be limited in some particular circumstances, but rather that the generic level of protection claimed was never a protected normative duty in the first place.

The next consideration is how the ECtHR itself approached the claim. The ECtHR accepted that under Article 3:

The question remains whether the extradition of a fugitive to another State, where he would be subjected *or be likely* to be subjected to torture or to inhuman or degrading treatment or punishment, would itself engage the responsibility of a Contracting State under Article 3 [emphasis added].⁴⁹⁸

⁴⁹⁷ *ibid* at para 83.

⁴⁹⁸ *ibid* at para. 88.

It then adopted reasoning, that seems to be in accordance with requiring evidence of a common normative understanding across member states of the expectation. The ECtHR explained:

That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations [1984] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that ‘no State Party shall [...] extradite a person where there are *substantial grounds* for believing that he would be in danger of being subjected to *torture*’ [emphasis added].⁴⁹⁹

As wording agreed by the United Nations General Assembly, to which all member states of the Council of Europe are member, there was evidence of consensus among the ECHR’s member states that the scope Article 3 extended beyond borders, to cover any case where there are substantial grounds for believing there is a risk. But what of the second claim of the UK, that in criminal cases there must be a likelihood of torture occurring? “Substantial” grounds certainly require evidence that the risk is real, i.e. beyond imagination, theory or speculation. It could, however, also be reasoned to require that the evidence is weighty. This uncertainty about the meaning of a common principle on the lower threshold inferable from the practices of the member states should have resulted in the more minimal understanding of the UK, as requiring likelihood, to have been applied. The ECtHR requirement of only a real risk being needed would have required further evidence beyond that utilized by the Court to show any consensus.

The ECtHR continued by suggesting that it may have made a finding of extraterritorial protection even in the absence of such agreement. It considered that the expectation of protection under the ECHR extends beyond the UN agreement, which relates to only

⁴⁹⁹ *ibid* at para. 88.

torture⁵⁰⁰, to incorporate the wider category of inhuman treatment⁵⁰¹ and that substantial grounds means any real risk. The ECtHR concluded that:

The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that *an essentially similar obligation is not already inherent* in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this *inherent obligation* not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a *real risk* of exposure to inhuman or degrading treatment or punishment proscribed by that Article [emphasis added].⁵⁰²

The statement that the expectations relating to torture and inhuman treatment in other countries is "inherent" shows a problematic tendency. The ECtHR cannot legitimately claim the authority, in the absence of consensus, to know what is "inherently" required if another alternative candidate normative understanding could be properly reasoned as the outcome by a moral agent. That consensus had been shown to be present in relation to torture where there was weighty evidence making it likely, but it was not shown in relation to inhuman treatment or to a real risk of its occurrence being sufficient. The ECtHR reached its decision despite a note of caution that:

⁵⁰⁰ Defined in Article 1 of the UN agreement as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁵⁰¹ Protection against inhuman treatment is required under Article 16 of the UN agreement *only* within territory under a state's jurisdiction.

⁵⁰² *Soering v the United Kingdom* (n 493) at para. 88.

[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world become easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.⁵⁰³

In *Chahal*, given the establishment in *Soering* that Article 3 covers expulsions exposing an individual to a "real risk", the focus now shifted to whether it is possible to revoke that protection or require a higher threshold of risk in cases involving a danger to national security.

The UK argued its obligations under Article 3 in relation to ill-treatment could be revoked if the applicant might represent a danger to national security. The UK argued that the guarantees were not absolute, where the applicant posed a threat to national security:

[T]he guarantees afforded by Article 3 were *not absolute* in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required a difficult prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an *implied limitation to Article 3*, entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds [...] [emphasis added].⁵⁰⁴

Once the ECtHR took the view of *Soering* that the scope of principles under Article 3 extend beyond national borders and that a "real risk" sufficed, that now autonomous definition must apply to another case that also raises the same generic question of extraterritorial availability. That being so, the ECtHR was bound to reject the UK's argument. As the ECtHR explained:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to

⁵⁰³ *ibid* at para. 89.

⁵⁰⁴ *Chahal v the United Kingdom* (n 494) at para. 76.

Article 3, if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged [...]⁵⁰⁵

In the absence of the substantive legal norm absolutely prohibiting any “real risk” of torture and inhuman treatment by another state established in *Soering*, the UK’s argument would have merited consideration.⁵⁰⁶

The second argument made by the UK once more raised the question of the threshold of risk. The second submission was that:

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3. This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But *where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck* between protecting the rights of the individual and the general interests of the community [...]⁵⁰⁷ [emphasis added]

This would require a higher degree of risk to be shown where national security was a concern, requiring that ill-treatment be likely. However, given the similarity of the arguments to those raised in *Soering*, that now autonomous definition preventing any real risk must apply to another case that also raises the same question of a state exposing an expelled individual to real risk extraterritorially. The particular circumstances of an individual, such as being a security risk, simply cannot be a consideration under an absolute right to the same protection against inhuman treatment that is expected by all. The ECtHR concluded that:

⁵⁰⁵ *ibid* at para. 80.

⁵⁰⁶ Support for the potential have been able to reason differently comes from a treaty raised in the *Chahal* case. Article 33 of the United Nations 1951 Convention on the Status of Refugees provides:

1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country* [emphasis added].

⁵⁰⁷ *ibid* at para. 76.

It should not be inferred from the Court's remarks [in *Soering*] concerning the risk of undermining the foundations of extradition [...] that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 [...] is engaged.⁵⁰⁸

The implications of *Soering* shows the impact of norms that become autonomous after translating to a legal norm by the ECtHR. The clarity created by these legal norms is to be welcomed as providing the unity and certainty that the ECHR system is striving towards. Without this, the task of applying those principles to the array of situations in which they arise would be intelligible. But the very nature of those norms as being binding and inflexible means it is important that they are clearly democratically recognised by the membership as a general duty in the first place. There is, in accordance with the proposed judicial model, doubt about that status in relation to the position taken by the ECtHR with inhuman treatment and the sufficiency of real risk in all extraterritorial cases.

Having lost two cases and with the *Soering* approach firmly rooted, the UK may normally have accepted the position under ECHR law. However, such is the impact of the decision and the nature of the perceived threat to the state that it raised the questions again. When the UK intervened as a third party in the subsequent case of *Saadi v Italy*⁵⁰⁹ (with the support of the Italian government) to argue the points again.

The UK submitted that:

It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. *The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations, the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole [emphasis added].*⁵¹⁰

⁵⁰⁸ *ibid* at para. 81.

⁵⁰⁹ *Saadi v Italy*, application no. 37201/06, judgment of 28 February 2008.

⁵¹⁰ *ibid* at para. 120.

This does raise an interesting point. Given that the extraterritorial protection was based upon a new common understanding, developed well after the signing of the ECHR, could that norm not now be limited to the extent of its common recognition included generic limits? The ECtHR's own settled case-law shows that deciding the normative scope of a right (stage one) does not have absolute answers. For example, the ECtHR accepts that ill-treatment must attain a minimum level of severity and the likelihood of mistreatment must attain a minimum level before a criminal can demand not to be returned. It is arguable that generic reasoning could support a restriction where there is a threat to national security.

The problem is that Article 3, the right under which expansion into positive duties has been recognised, is absolute. Even if new norms commonly recognised under its parameters are also commonly understood to be limited in some particular circumstances, the express wording of the Article does not allow it. This does demonstrate the need, when drafting living instruments, to ensure that the wording is not too prescriptive. The modern practices of states may now favour an absolute negative duty on states not to violate Article 3 and an absolute right on their positive duty to provide reasonable protection within their borders, but it would appear that a different more limited duty may be preferred for the extraterritorial norm.

In regard to the nature of the offence being relevant to having rights under Article 3, the ECtHR reaffirmed its absolute position on extraterritorial ill-treatment:

[T]he Court cannot accept the argument of the United Kingdom Government, supported by the [Italian] Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole [...] Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule [...] It must therefore reaffirm the principle stated in *Chahal* [...] that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to

determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.⁵¹¹

The ECtHR did not refer back to the UN 1951 Convention, which we have noted showed a consensus in relation only to torture.⁵¹² However, the ECtHR did go on to refer to 2002 guidelines on human rights and the fight against terrorism adopted (post *Soering* and *Chahal*)⁵¹³ by the Council of Europe, Point XII the guidelines reads as follows:

It is the duty of a State that has received a request for asylum to ensure that the possible return ('refoulement') of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, *to torture or to inhuman or degrading treatment or punishment*. The same applies to expulsion [emphasis added].

This would have been sufficient to show that there is now a consensus on the right to protection against extraterritorial torture and also inhuman treatment. But, this work would note that 2002 Guidelines do not reveal a consensus that a real risk is always sufficient, talking only of a duty to "ensure" rather than prevent against ill-treatment. While that wording clearly means a robust response is required, it leaves the specifics vague and open to different interpretations.

Having reaffirmed its position on the relevant norm, the ability for the threshold of risk to vary in particular circumstances was responded to by the ECtHR as follows:

With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security stronger evidence must be adduced to prove that there is a risk of ill-treatment [...] the Court

⁵¹¹ Ibid at para. 138.

⁵¹² The UK made a sound argument why torture and inhuman treatment do not raise the same value considerations:

In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

ibid at para. 121.

⁵¹³ On 11 July 2002, at the 804th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe.

observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present one that it be proved that subjection to ill-treatment is 'more likely than not'.⁵¹⁴

7.2.1.2 Stage Two (Application)

This still leaves the ECtHR to apply the second stage of its process; to determine against standards the adequacy of the actual delivery in the UK. The proposed corrective model would split this into the procedural margin of appreciation and the substantive margin of appreciation.

Some have argued that there is no margin of appreciation for absolute rights, given the norms recognised as falling under them cannot ever be interfered with. The margin of appreciation has never been expressly invoked in respect of Article 2 (the right to life), Article 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment), or Article 4 (the right not to be held in slavery or servitude)⁵¹⁵ and it has had a very limited role in relation to Articles 5 and 6.⁵¹⁶ The margin of appreciation is not, however, found in the text of the ECHR itself and so any limit to the Articles of the Convention to which it can be applied would have to also be justified by the ECtHR. Notably, the ECtHR has never expressly imposed such a limit.

The reasoning of this work is that the principle of subsidiarity requires the democratic national governments to assess the evidence available when determining whether a norm is engaged and how to effectively meet the duty to protect it. As such, the lack of express consideration of the margin of appreciation remaining to the state in that task would not be in accordance

⁵¹⁴ *Saadi v Italy* (n 509) at para. 140.

⁵¹⁵ J. Callewaert, "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?" (1998) 19 *Human Rights Law Journal* 6.

⁵¹⁶ J. Schokkenbroek, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights" (1998) 19 *Human Rights Law Journal* 30, 34.

with the proposed model and its ambitions of openness, transparency and consistency from a structured approach.

In *Soering*, applying the “real risk” norm, the UK appears to have followed a democratic process, informed by relevant evidence, and to have provided reasoning for its decision. The reasons were fourfold:

The United Kingdom Government [...] did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 into play. Their reasons were fourfold.

Firstly, [...] the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a *prima facie* case has so far been made out against him. In particular, in the United Kingdom Government’s view the psychiatric evidence ... is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law [...]

Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty ... The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant’s age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings [...]

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out [...]

At the public hearing the Attorney General nevertheless made clear his Government’s understanding that if Mr Soering were extradited to the United States there was “*some risk*”, which was “*more than merely negligible*”, that the death penalty would be imposed [emphasis added].⁵¹⁷

The ECtHR troubled to note, when ruling in favour of the applicant:

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant’s surrender to the United States authorities in accord with the interim measures

⁵¹⁷ *Soering v the United Kingdom* (n 493) at para. 93.

indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling [...]⁵¹⁸

The UK has considered sufficient relevant evidence and there was no breach of process requirements in terms of the review of the risk. The level of risk identified is, therefore, *prima facie* presumed to be correct. The difficulty is that, whether legitimately or not, under stage one the ECtHR had determined that the norm not to a “likelihood” of ill-treatment but only a “real risk”. The problem with this emerges in relation to the substantive margin.

The substantive margin is narrower in this case because of the importance of the right, justifying a full review. The ECtHR explained:

It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked and in order to ensure the effectiveness of the safeguard provided by that Article.⁵¹⁹

A reasonable person would not think that the factual findings of the UK could justify a conclusion that there was no real risk. The UK had itself actually admitted that there was “some risk” beyond the merely “negligible”.

In *Chahal*, despite raising the arguments relating to interpretation explored earlier, the UK’s primary contention was in relation to application. It had identified in its review that no “real risk” of ill-treatment was established. According to the proposed model, provided it complied with the procedural requirements of considering the appropriate evidence, it should then have enjoyed a *prima facie* presumption that the decision it took on risk was appropriate. The substantive margin of appreciation, while narrower for absolute rights, could intervene with the UK’s finding on the facts only if there was an error regarding the facts or if a reasonable person could not think they justified the conclusion. Was the decision such that it was improbable or contrary to the evidence and how did it equate with the decisions of other

⁵¹⁸ *ibid* at para. 111.

⁵¹⁹ *ibid* at para. 90.

member states on comparable points e.g. their assessment of risks in that country and the veracity of undertakings?

It would have proved interesting to see how far the ECtHR was willing to question the findings of fact that the UK had made. But, ultimately, that point was not in effect considered, as the ECtHR did not limit itself to considering only those facts that were available to the UK at the time when the decision was made.

In accordance with the principle that the ECtHR is not an appeal court delivering individual justice but rather constitutional justice by checking the delivery of justice by the states, the applicant argued that the ECtHR should consider the position in June 1992, at the time when the decision to deport him was made final.⁵²⁰ The applicant reasoned that purpose of the stay on removal pending the case was 'not to afford the High Contracting Party [the UK] with an opportunity to improve its case'. Moreover, it was 'not appropriate that the Strasbourg organs should be involved in a continual fact-finding operation'.⁵²¹ In other words, the lawfulness of the UK's decision was to be assessed on that date when that decision became final.

However, the argument was rejected by the ECtHR:

In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3, the Court will assess all the material placed before it and, if necessary, material obtained of its own motion [...] Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case [...], it will be necessary to take account of evidence which has come to light since the [...] review.⁵²²

Under the proposed model, this is not in keeping with the role of the ECtHR. Its function under stage two is only to assess the delivery of the respondent state, not to consider the case

⁵²⁰ The applicant raised the argument as the evidence now suggested that the level of risk to him has lessened since the UK decision. The situation in India and in Punjab had significantly stabilised since that date.

⁵²¹ *Chahal v the United Kingdom* (n 494) at para. 84.

⁵²² *ibid* at para. 97.

anew.⁵²³ The position was, however, affirmed in *Saddi* despite the express acknowledgement by the ECtHR that this is an unusual position to have taken under the ECHR:

With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court [...] This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure [...] Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.⁵²⁴

Suspending the decision of a member state, in the absence of concerns about how it was made, may undermine faith in democracy and the authority still vested in the state to have made the final determination and trust in their decisions in future cases. That is not to say that the state may not be required to start new national proceedings in light of new evidence, which is different from criticising an existing judgment.

7.2.2 The Right to a Fair Trial

The next case selected is *Abu Qatada v UK*⁵²⁵, again relating to deportation but considering something other than an absolute right, specifically Article 6 and the right to a fair trial. The case concerned the risk of use of evidence obtained by torture, again there was debate about the normative scope of the right under stage one.

7.2.2.1 Stage One (Interpretation)

Article 6 states:

⁵²³ This is not to say that urgent appeals should not be available in the member state where conditions worsen in the destination country or that the member state could not reconsider deportation where conditions improve.

⁵²⁴ *Saadi v Italy* (n 509) at para. 133.

⁵²⁵ *Abu Qatada v the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Clearly the state is responsible under the wording to ensure that its justice system meets those requirements. What is not immediately clear is whether evidence obtained by torture may not be used in a fair trial and, if so, what level of risk of torture having occurred places a state under a duty not to utilise it. Furthermore, under the positive responsibility of states not to enable others to use torture evidence, it is uncertain: (1) whether the acceptable risk for torture having taken place varies in an extra-territorial context; and (2) how to respond to a risk that the foreign system would actually use that evidence in spite of any assurances to the contrary.

It was accepted by the UK that the “flagrant denial of justice”⁵²⁶ test was a relevant understood norm here. In the ECtHR’s case-law, the term has been synonymous with a trial that is manifestly contrary to the provisions of Article 6. The ECtHR noted that case-law serves to underline the view that flagrant denial of justice is a “stringent test” of unfairness and goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the respondent state itself. It determined that what is required is a breach “so fundamental as to amount to a nullification, or destruction of the very essence” of Article 6.⁵²⁷ This forms the starting point from which further interpretation of the norm and then application must start.

The ECtHR considered first whether the use at trial of evidence obtained by torture amounted to a flagrant denial of justice. It determined that it would: even if it resulted in real and reliable evidence. Given the positioning of the protection against torture as an absolute right, this was arguably a response that was inherent in any reading of Article 6. As the ECtHR explained:

⁵²⁶ It establishes that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country (*Soering v the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989; *Mamatkulov and Askarov v Turkey*, Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005; *Al-Saadoon and Mufdhi v the United Kingdom*, Application No. 61498/08, Judgment of 2 March 2010).

⁵²⁷ *Abu Qatada v the United Kingdom* (n 525) at paras. 258-260.

The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.⁵²⁸

In any event, the ECtHR concluded that international law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. The ECtHR cited the United Nations [1984] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The ECtHR noted that the UN Convention:

[R]eflects the clear will of the international community to further entrench the *ius cogens* prohibition on torture by taking a series of measures to eradicate torture and remove all incentive for its practice. Foremost among UNCAT's provisions is Article 15, which prohibits, in near absolute terms, the admission of torture evidence. It imposes a clear obligation on States. As the United Nations Committee Against Torture has made clear, Article 15 is broad in scope.⁵²⁹

This conclusion meant there was only one remaining issue for the ECtHR to consider under stage one; whether a real risk of the admission of torture evidence is sufficient for the State to have a duty not to expel.

The UK submitted that a "high standard of proof" should apply when, in the extra-territorial context, the applicant alleged that evidence obtained by torture or ill-treatment would be used at a trial in the receiving state.

In relation to proof that the evidence had been obtained by torture, the UK argued that no special test should apply to evidence obtained by torture or other ill-treatment than to any other factor which may render a trial unfair. Even if it did, when there was nothing more than a real risk that evidence had been obtained by ill-treatment, the admission of that evidence at trial would not amount to a complete nullification of the right to a fair trial.

The UK Government observed that the UK courts would themselves admit evidence where there is a real risk that it has been obtained by torture, provided that it was not established on the balance of probabilities that it has been so obtained. A flagrant denial of justice could

⁵²⁸ *ibid* at para. 264.

⁵²⁹ *ibid* at para. 266.

not arise unless it was established on a balance of probabilities or beyond reasonable doubt. The applicant had not, in the UK's assessment, so established that risk.⁵³⁰

The ECtHR determined that the flagrant denial of justice assessment required the same burden of proof as applicable for Article 3 in expulsion cases, i.e. a "real risk".⁵³¹ It did not rely on consensus to do so, but used its own judicial reasoning. The ECtHR considered that it would be unfair to impose any higher burden of proof because the same due regard must be had to the special difficulties in proving allegations of torture:

Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process. It is practiced in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim. All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment. In a criminal justice system where the courts are independent of the executive, where cases are prosecuted impartially, and where allegations of torture are conscientiously investigated, one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture. However, in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate.⁵³²

This is a decision that could be argued as being in line with the corrective judicial model proposed by the work. Effective protection against torture "must" include protection against the tainted fruits of its use by a government, there is no room for reasonable dispute on that issue with no sustainable opposing argument. The so called "evidence" collected being in violation of an agent's rights cannot then be used against them without further contributing to that same violation. Having once equated the moral dangers of the use of torture evidence with those of torture being conducted, it is also part of effective protection that any accepted understanding of when there is exposure to risk "must" be consistently deployed. No new considerations are raised concerning when the level of risk it is unacceptable just because of a different context for the same principle. The ECtHR went on to apply the same norm that applied to conduct of torture to the risk of such evidence being used. That norm is, itself,

⁵³⁰ *ibid* at paras. 242-245.

⁵³¹ *ibid* at para. 261.

⁵³² *ibid* at para. 276.

however, one that we have suggested is itself possibly beyond the common understanding of the member states. This illustrates why decisions of the ECtHR, which may at first seem constrained in their impact, can have wider consequences and importance in ensuring the legitimacy of “building blocks” in the expansion of rights into new contexts.

7.2.2.2 Stage Two (Application)

Under the procedural margin of appreciation, the UK did follow democratic due process in considering the relevant evidence and did come to reasoned conclusion on the level of risk. This is, therefore, presumed under the proposed model to be substantively correct. Given that the UK did determine that he was at real risk, just not one of a high degree, it must have been found to be in breach of its substantive duty, given how the norm is defined.

Even if a real risk was not admitted to by the UK, the presumption that its decision is correct may well not have withstood the substantive margin. The importance of the right, coupled with the availability of recognised expert opinion on the point, would have revealed an incongruity between expert consensus and the UK position:

Not only is torture widespread in Jordan, so too is the use of torture evidence by its courts. In its conclusions on Article 15 of UNCAT, the Committee Against Torture expressed its concern at reports that the use of forced confessions in courts was widespread [...] The reports of Amnesty International and Human Rights Watch support this view. Amnesty International has considered the State Security Court to be “largely supine” in the face of torture allegations, despite, in the ten years prior to 2005, one hundred defendants alleging before the State Security Court that they had been tortured into making confessions and similar allegations being made in fourteen such cases in 2005 alone [...] Human Rights Watch’s 2006 Report depicts a system in which detainees are shuttled back and forth between GID officials and the Public Prosecutor until confessions are obtained in an acceptable form [...] Finally, the NCHR has, in successive reports, expressed its own concerns about the manner in which statements obtained by coercion become evidence in Jordanian courts [...]

The Court recognises that Jordanian law provides a number of guarantees to defendants in State Security Court cases. The use of evidence obtained by torture is prohibited. The burden is on the prosecution to establish that confessions made to the GID have not been procured by the use of torture and it is only in relation to confessions made before the Public Prosecutor that the burden of proof of torture is imposed on the defendant. However, in the light of the evidence summarised in the

preceding paragraph, the Court is unconvinced that these legal guarantees have any real practical value.⁵³³

7.3 Prisoner Voting

*Hirst v UK (No 2)*⁵³⁴ involved the question of whether the right to vote under Article 3 of the First Protocol extends to protecting the ability of convicted prisoners to do so, during their incarceration. The ECtHR ruled that a blanket ban on British prisoners exercising the right to vote is contrary to Article 3 of the First Protocol. The case has caused much controversy⁵³⁵, arguably stemming from the uncertainties around a stage one question regarding normative interpretation.⁵³⁶

7.3.1 Stage One (Interpretation)

Article 3 of the ECHR First Protocol reads:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

That wording does not, on its face, confer rights on all individuals to vote or stand for election and may be generally limited in terms of expectations and restrictions in particular

⁵³³ *ibid* at paras. 277-278.

⁵³⁴ *Hirst v the United Kingdom (No 2)*, Application No. 74025/01, Judgment of 6 October 2005.

⁵³⁵ Note the lecture of Sir Nicolas Bratza, the then President of the European Court of Human Rights, regarding the attack made on the ECtHR judges:

The vitriolic - and I am afraid to say xenophobic - fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years. We are, as a Court, not unused to criticism by Government who think we have gone too far, by unsuccessful applicants and by NGOs, who think we have not gone far enough, and by certain sections of the media that miss no opportunity to attack the Court [...] But the scale and tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Westminster Parliament and by senior members of the Government has created understandable dismay and resentment among the judges in Strasbourg.

Sir Nicholas Bratza, "The Relationship between the UK Courts and Strasbourg" (2011) *European Human Rights Law Review* 505.

⁵³⁶ See the resolution on 10 February 2011 the House of Commons by 234 votes to only 22 that, 'legislative decisions of this nature should be a matter for democratically-elected law makers.'

circumstances. In its judgment in *Mathieu-Mohin and Clerfayt v Belgium*⁵³⁷, in considering the rights enshrined in Article 3, stated:

The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3.⁵³⁸

A norm allowing citizens to vote does not, therefore, definitely provide an answer that can be adopted to many significant remaining questions about the scope of the right. There are a number of recognised general reservations on who has the right that could form part of *the in abstracto* interpretation. For example, limiting the right to those residing in the State as engaged citizens.⁵³⁹ Or, perhaps more obviously, to those with the mental capacity to understand and engage in the voting process.

⁵³⁷ *Mathieu-Mohin and Clerfayt v Belgium*, application no. 9267/81, judgment of 2 March 1987, at para. 51.

⁵³⁸ *ibid* at para. 52.

⁵³⁹ In *Sitaropoulos and Giakoumopoulos v Greece*, citizens of another state claimed the right to vote in the state in which they now lived. The ECtHR found that neither the relevant international and regional law nor the varying practices of the member states revealed any consensus which would require States to arrange for the exercise of voting rights by *citizens* living abroad. Under stage one of the ECtHR process, the point was not within the scope of the duty that states are even under a duty to justify why it was not possible for resident non-nationals to vote. Only a consensus could demonstrate that as a universally held expectation. *Sitaropoulos and Giakoumopoulos v Greece*, Application No. 2202/07, Judgment of 15 March 2012.

Shindler v the United Kingdom concerned state election laws preventing people resident outside of the United Kingdom for more than 15 years from voting. The ECtHR accepted the relevance of the limit to the expectation. In terms of meaning, the case again suggests that the scope of the right is limited to citizens actively involved in the state. [The question of whether 15 years is an appropriate boundary for making that distinction in reality relates to a practical application or a justifiable response to that concern and within the margin of appreciation afforded to states. In considering the 'margin of appreciation', the ECtHR found that the election law in question had not gone too far.] *Shindler v the United Kingdom*, Application No. 19840/09, Judgment of 7 May 2013.

The Commission has considered it acceptable to remove political rights from persons convicted of "un-citizen-like conduct". For example, from a person sentenced to eight months' imprisonment for refusing to report for military service (*X v the Netherlands*, Application No. 6573/74, Commission decision of 19 December 1974, and *H v the Netherlands*, Application No. 9914/82, Commission decision of 4 July 1983). Or in *Patrick Holland v Ireland*, Application No. 24827/94, Commission decision of 14 April 1998, where the applicant was sentenced to seven years for possessing explosives.

Arguments, as raised in *Hirst*, of further possible exclusions based upon principles such as punishment and the need for a decent and moral electorate raise significant generic questions for any society. Such questions must be evaluated under stage one as generic problems requiring a societally compromised balanced solution.

The UK reasoning supporting a possible complete reservation was set out by Lord Justice Kennedy in the Division Court as follows:

So I return to what was said by the European Court in paragraph 52 of its judgment in *Mathieu-Mohin*. Of course, as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and "the free expression of the opinion of the people in the choice of the legislature". If an individual is to be disenfranchised that must be in pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of *punishment*, and also an element of *electoral law*. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things [emphasis added].⁵⁴⁰

The UK argument has the potential to fall within the PGC criteria for reason⁵⁴¹, the reasons are not, for example, arbitrary, incoherent, irrelevant or incapable of being the will of everyone. Punishment and forfeiture of the right to vote are not incoherent reasons and the identification of prisoners, as opposed to anyone convicted of a crime, is not arbitrary as imprisonment is a particular type of sanction (reserved for significant violations of societal rules) relevant to those reasons.⁵⁴²

⁵⁴⁰ *R (Pearson Martinez and Hirst) v Secretary of State for the Home Department; Hirst v Attorney-General* [2001] EWHC Admin 239, at para. 40.

⁵⁴¹ As cited by the UK, the United States Supreme Court rejected a challenge to the Californian Constitution's disenfranchisement of convicted prisoners (see *Richardson v Ramirez* [1974] 418 United States: Supreme Court Reports 24).

⁵⁴² In contrast to *Alajos Kiss v Hungary* in which the applicant lost his right to vote because he had been placed under protection on psychiatric grounds. The law of Hungary provided for an automatic and general restriction on the right to vote of persons placed under protection. After accepting that

As regards the UK's first argued purpose of promoting civic responsibility and respect for the law, denying prisoners the right to vote was in the ECtHR's opinion more likely to undermine respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flow from the right of every citizen to vote. This certainly is a reasonable view to take, it "may" be reasoned but it may be questioned if it "must" be necessarily more reasonable than that reached by a democratic body.

With regard to the second UK argument of imposing appropriate punishment, the ECtHR considered that there was no credible basis for denial of a fundamental democratic right as a form of state punishment. The ECtHR reasoned that neither the record nor common sense supported the claim that disenfranchisement deterred crime or rehabilitated criminals. Again, this "may" be a reasonable view but a counter view could be taken looking at punishment from the perspective of those affected by a crime and the rest of society. The ECtHR position was not one that "must" form part of the existing normative understanding.

That there was debate in relation to a complete ban being acceptable is suggested by a strong minority opinion from four of the ECtHR judges, who found that there was a reasonable and rational social or political philosophy.

The first objective recognised by the ECtHR minority related to the promotion of good citizenship. The minority judges considered social rejection of crime reflected a moral line which safeguarded the social contract and the rule of law and bolstered the nexus between individuals and community. The "promotion of civic responsibility" might be abstract or symbolic, but symbolic or abstract purposes could be valid of their own accord.

As regards the second objective, that of enhancing the criminal sanction, the minority ECtHR judges viewed that the measure clearly had a punitive aspect with a retributive function. The disenfranchisement was a civil disability arising from the criminal conviction. It was also proportionate, as the measure was rationally connected to the objectives and tailored to

the withdrawal of the right to vote pursued a legitimate aim, the ECtHR emphasised that it could not accept a blanket ban on the right to vote affecting all persons under protection regardless of their actual mental faculties. The response to the stated aim was clearly excessive in its arbitrariness, not all those placed in protection lack the capacity to understand and engage in the voting process. *Alajos Kiss v Hungary*, Application No. 38832/06, Judgment of May 2010.

apply only to perpetrators of serious crimes. The disenfranchisement of serious criminal offenders delivered a message to both the community and the offenders that serious criminal activity would not be tolerated by society. The minority noted the fact that there may be many possible reasonable and rational balances.

Disagreement between the highest Canadian courts, cited as evidence in the case by the UK, further demonstrates that showing that a decision to ban by a state could never be reached by a reasonable person is difficult.

The ECtHR majority view does make sound points about the issues with disenfranchisement of prisoners, similar points could also be made in relation to deprivation of liberty. Yet, imprisonment is still allowed in range of cases and loss of the right to vote is allowed (even following this ruling) for most prisoners. This suggests that the beliefs of the majority of the ECtHR judges about the illogic of loss of voting rights were not beyond dispute. Democratic consensus should, therefore, have played an important role in the interpretation of the minimum common understanding of the norm.

Consensus could be found on a norm: (1) that prisoners have a right to vote i.e. rejecting the possibility of disenfranchisement simply because of imprisonment as part of the sanction; and, if so, of (2) a level of criminality at which a state is released from its duty to recognise a right to vote.

In relation to consensus on the issue, practices of the member states were summarised by the ECtHR:

According to the [UK] Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction [...] while twelve countries prisoners' right to vote could be limited in some other way [...]

Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein.⁵⁴³

⁵⁴³ *Hirst v the United Kingdom (No 2)* (n 534) at paras. 33-34.

The practices could be interpreted by the ECtHR as showing a majority understanding of a norm that prisoners are not excluded from a right to vote by simple virtue of the sanction of imprisonment. There was, however, also significant evidence of direct opposition to that trend. Under the proposed model, the ECtHR would be required to consider whether this resistance was sufficient to possibly represent a blocking minority. The ECtHR was, however, quick to dismiss the relevance of that information.

The UK argued that:

[W]here the legislature and domestic courts have considered the matter and there is no *clear* consensus among contracting States, it must be within the range of possible approaches to remove the right to vote from any person whose conduct was so serious as to merit imprisonment [emphasis added].⁵⁴⁴

The ECtHR responded:

As regards the existence or not of any consensus among contracting States [...] it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote [...] However, the fact remains that it is a minority of contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even according to the [UK] Government's own figures, the number of such States does not exceed thirteen. *Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue* [emphasis added].⁵⁴⁵

Under the proposed model, such strong evidence of a significant blocking minority in direct dissent from the trend is difficult to ignore. This is particularly so given that the UK position could accord with the criteria for reason and that, where there was consensus, the ECtHR accepted that the practices were somewhat unsettled for interpreting a common moral justificatory norm behind them. There was no consensus, between those states that did allow some prisoners to vote, with regard to which prisoners were to be excluded from that right (e.g. only a "serious offender"⁵⁴⁶). Given such a position, perhaps the minority view that there

⁵⁴⁴ *ibid* at para. 78.

⁵⁴⁵ *ibid* at paras. 81.

⁵⁴⁶ This was the test suggested in a later case by the EU in *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde*, Case C-650/13, judgment of 6 October 2015. The ruling of the Court

was of yet no common recognition in practices suggesting that prisoners fall under the understood principle of having a right to vote should have received a more open evaluation.

If the ECtHR had fully explored the strength of the minority view from the states, and still found there to be a common norm of recognising prisoners as having the right to vote, this would have been within the remit of the Court and by showing it duly considered all of the evidence that would be legitimate. There would then be the second issue of what common minimum norm could be interpreted with regard to when that right may be lost based on the level of criminality.

What emerges from a review of member state practices is evidence of a consensus on criminal activity as a potential excluder from the right to vote, but only for the more “significant” offences rather than any anyone convicted of a crime. This appears to be the understanding that the ECtHR could interpret as the common position. However, in terms of the weighting between criminal activity versus the right to vote, a consensus is far from clear on what amounts to a significant crime. There was clear variation in the application of member States, including a minority in which a complete restriction was recognised. There would, therefore, be a wide margin for the state on what could represent such a crime with regard to the concrete application, under stage two of the corrective model.

7.3.2 Stage Two (Application)

On the assumption that the ECtHR was correct to discount a limitation allowing exclusion from voting as part of the sanction of imprisonment, because of practices showing a counter common position, there would be a procedural breach if the UK could not show it had acted reasonably in applying the alternative limitation that exclusion is possible for significant crimes.

Under the procedural margin of appreciation, the UK did consider the evidence, such as judgments, put forward by the applicant, from Canadian precedents. In particular, that of the

of Justice of the EU is not, however, sufficient to show a consensus on the point now given that it relates to voting for the EU Parliament only.

Canadian Supreme Court in *Sauvé v Canada (no. 1)*⁵⁴⁷ and that of the Federal Court of Appeal in *Sauvé v Canada (no. 2)*⁵⁴⁸. There was also no suggestion that the UK did not explore and then carefully weigh and apply evidence in reaching its decision.

The difficulty identified by the ECtHR was that in doing so the process used appeared not to have considered the different circumstances of prisoners but rather grouped them all together.⁵⁴⁹ There had been no decision-making process by the UK to differentiating why prisoners as individuals fall into the non-protected category. A complete ban could not demonstrate any tailoring to the actions and circumstances of the individual offender. The ECtHR explained:

Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing [...] It [the UK Act] strips of their Convention right to vote, a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison [...] *Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be [...]* [emphasis added]⁵⁵⁰

If the ECtHR were correct in assuming that a complete ban must be disproportionate and arbitrary there was, then, a breach in procedural requirements under the proposed model. Given that the UK would not have complied with an important part of the procedural requirements, this would mean under the corrective model that the substantive decision would not have stood. The substantive review asks whether the process used and grounds and evidence applied reached a conclusion that a reasonable person would think justified and proportionate.

⁵⁴⁷ *Sauvé v Canada (no. 1)* [1992] 2 Supreme Court Reports 438.

⁵⁴⁸ *Sauvé v Canada (no. 2)* [2000] 2 Federal Court Reports 117.

⁵⁴⁹ The ECtHR was heavily influenced in its ultimate decision by the Canadian Supreme Court decision in *Sauvé v Canada (no. 2)* *ibid.* The Canadian judges held, by five votes to four, that denying the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more was unconstitutional. The majority found that the Canadian Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test.

⁵⁵⁰ *Hirst v the United Kingdom (No 2)* (n 534) at para. 82.

However, it is unclear why individual positions must have been taken into consideration in order for the UK to show that it had properly considered the right of prisoners. In Chapter Six, the application of a right to have one's gender identity recognised was explored. The ECtHR in its initial case law allowed the UK for a number of years not to allow for any recognition of changes to gender self-identity in relation to gender legal-identity. This was because of the degree of variation in societal development and standards between member states.⁵⁵¹ There was no individualised consideration in that case, but rather a justifiable blanket decision. Ireland, because of its religious history and public morals was able to continue with a blanket ban on abortion rather than only if there is a real and substantial risk to the life of the expectant mother.⁵⁵² Later in this chapter, we will explore the position in relation to secondary strike action in which a blanket denial because of the particular situation of the UK was also allowed. This work would suggest that, provided the position is not unreasonable, disproportionate or arbitrary, there is no reason to assume that blanket bans cannot be justified. The particular circumstances in the UK, including how it as society morally viewed criminality or when crimes are significant, may permit a blanket approach. Although, the evidence supporting it would need to be strong.⁵⁵³ As Kennedy LJ explained in the UK Supreme Court, the margin within which a decision may be proportionate is wide on this issue:

The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of

⁵⁵¹ See *Rees v the United Kingdom*, Application No. 9532/81, Judgment of October 17 1986; *Cossey v the United Kingdom*, Application No. 10843/84, Judgment of September 27 1990; *X, Y and Z v The United Kingdom*, Application No. 75/1995/581/667, Judgment of April 22 1997; and *Sheffield and Horsham v The United Kingdom*, Application No. 22985/93, Judgment of 30 July 1998.

⁵⁵² *A, B and C v Ireland*, Application no. 25579/05, Judgment of 16 December 2010.

⁵⁵³ For principles that may vary in their application to individual people and circumstances, such blanket bans will always be problematic and require strong justification. For example, in protecting the individual welfare of a child, despite the acceptance of a wide margin of appreciation left to the states on these issues, a total ban on people over a certain age could be an arbitrary response in the application. Or a complete refusal of law to recognise a relationship between children born as a result of surrogacy treatment and their biological father (*Mennesson and Others v France*, Application No. 65192/11, Judgment of 26 June 2014 and *Labasse v France*, Application No. 65941/11, Judgment of 26 June 2014).

the Mental Health Act 1983), but, as is clear from the authorities, those States which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and like *McLachlin J* in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts.⁵⁵⁴

The result of the case, despite the controversy it has generated, also reveals how borderline the dismissal of a complete ban has proved to be. The minimum duty following the case could be defined as: the right to vote cannot be restricted only because a person is a prisoner, i.e. different circumstances must be considered. This is a duty allowing a great deal of flexibility in its actual delivery. That a wide range of decisions outside of a complete ban could be acceptable is suggested by the ECtHR's conclusion that:

Turning to the Government's comments concerning the lack of guidance from the Chamber as to what, if any, restrictions on the right of convicted prisoners to vote would be compatible with the Convention, the Court notes that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation [...]⁵⁵⁵

While the UK raises a valid point about the need for definitions from the ECtHR being as detailed as possible, under the proposed model it is actually to be welcomed that the ECtHR declined to define principles beyond the position upon which it found a consensus. The matter has been resolved recently by a compromise, accepted by the Council of Europe, that will see only around 100 prisoners gain the right to vote (who are on temporary release and at home under curfew).⁵⁵⁶ That a compromise has proved possible is to be welcomed, given

⁵⁵⁴ *R (Pearson Martinez and Hirst) v Secretary of State for the Home Department; Hirst v Attorney-General* [2001] EWHC Admin 239, at para. 41.

⁵⁵⁵ *Hirst v the United Kingdom (No 2)* (n 534) at para. 83.

⁵⁵⁶ D. Lidington, Rt Hon, MP, The Lord Chancellor and Secretary of State for Justice, 'Secretary of State's Oral Statement on Sentencing' (Oral Statement to Parliament, 2 November 2017)

concerns during the 12 years which elapsed between the ruling and the UK response about the implications for the ECHR's enforcement. Concerns, which echo those of this work about questions about the legitimacy of ECtHR rulings, could result in an undermining of the whole system.⁵⁵⁷ It is, however, notable that far from requiring a consideration of the position of individuals, the result is rather a shift from a blanket ban on prisoners from voting to a blanket ban on those prisoners still incarcerated in a prison. Such a total rather than nuanced result is arguably reflective that the reasoning of some states so strongly held against prisoner voting is not because of particular national circumstances, but a stage one strongly held moral conviction. To have allowed what comes close to a complete ban as a possible solution, not because of any particular national considerations, arguably makes the right for prisoners to vote illusory and raises the question whether there was in place a suitably strong common construction of that right in the first place.

As a separate point, before moving to the next case, it is interesting to note that the ECtHR was asked to consider as evidence, developments arising after the UK made the decision Hirst was challenging. With respect to the proposed corrective model; the use of evidence subsequent to the national decision under review, could not be relevant to assessing the state's delivery. The ECtHR may, however, note that some concerns causing a state to be in breach of its obligations have since been remedied.

<<https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>> accessed 21 December 2017.

⁵⁵⁷ For example, see the memorandum from Nils Muižnieks, Council of Europe Commissioner for Human Rights:

In my view, the UK's non-compliance with the Hirst (No. 2) and Greens and M.T. judgments has thus far not caused irreparable damage to the Court, the Council of Europe, or the UK's international reputation. However, I believe continued noncompliance would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe.

N. Muižnieks, Council of Europe Commissioner for Human Rights, 'Observations for the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill' (Strasbourg, 10 October 2013) <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933800&SecMode=1&DocId=2062696&Usage=2>> accessed 21 December 2017.

7.4 Secondary Strike Action

In *National Union of Rail, Maritime and Transport Workers v United Kingdom*, the ECtHR issued a judgment recognising secondary strikes⁵⁵⁸ as falling under the normative scope of Article 11.⁵⁵⁹ However, in then applying the margin of appreciation to implementation by the UK it took the unusual step of allowing a blanket ban. Once more, the crucial question was the existence of a commonly understood norm under the stage one interpretation of the right.

7.4.1 Stage One (Interpretation)

Article 11 provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the *protection of his interests* [emphasis added].

The UK submitted that the complaint regarding secondary strike action should be rejected as manifestly ill-founded, relying on an argument in line with this work's argument that interpreting the commonly understood normative parameters of a right is the first consideration:

They [the UK] considered that there had been no violation of, or even interference with, the applicant's right of freedom of association since *Article 11 did not confer any right to take secondary action*. Instead, it was plain from the very wording of that provision that *it contemplated collective action by workers to protect their own interests*. Sympathy strikes, which were no more than a show of solidarity with another group of workers, lacked the requisite nexus between collective action and the direct interests of the persons taking part in it [...] [emphasis added]⁵⁶⁰

The applicant's counter argument was in line with the idea of a "deep structure" of the right that could be inferred:

⁵⁵⁸ Sympathy action by workers in support of those employed by a separate enterprise.

⁵⁵⁹ *The National Union of Rail, Maritime and Transport Workers v the United Kingdom*, Application No. 31045/10, Judgment of 08 April 2014.

⁵⁶⁰ *ibid* at para. 49.

[H]aving identified collective bargaining as an essential element of trade union rights, *it must logically follow* that the *right to strike* was equally essential, since without the threat of industrial action, collective bargaining would be deprived of any effectiveness and be little more than “collective begging”. The ban on *secondary action thus impaired the essence of freedom of association* [emphasis added].⁵⁶¹

The first point regarding the right to strike is arguably a simple adoption of the existing norm necessary for its effective protection, akin to the right to protection life requiring investigation of possible problem deaths in order to be effective. But, for the reasons set out by the UK relating to whether it is the striker’s interests that are being protected, the extension of this to secondary strike action is not a direct link that “must” rather than “may” be reasoned.

Furthermore, the right to strike is not an absolute right as the UK noted:

[I]n light of the recent case-law of this Court, the right under Article 11 to join a trade union normally implied the ability to strike. But this was *by no means an absolute right* - it could be subject to conditions and restrictions in accordance with Article 11 § 2 [emphasis added] [...]⁵⁶²

Under stage one, there may therefore be limits upon when a society recognises any protected right to strike. Some of these may impose inherent limits on the norms recognised under a right, rather than limitations for application by experts to particular circumstances and individual cases under stage two of the model. It could be in accordance with the criteria for reason to determine that secondary striking simply always goes too far because of its potential to cause largescale disruption.

The question therefore required, according to the suggested corrective model, an evaluation under stage one. A majority consensus on the understood normative position must be inferred from the practices of the member states in order to establish any common duty towards secondary striking. The ECtHR’s assessment began by considering the applicability of Article 11. It determined:

What the [UK] Government propose is a literal reading of the second clause of the first paragraph of Article 11. Although it is possible to derive such a meaning from the language of the text taken on its own, the Court would recall that, as provided in

⁵⁶¹ *ibid* at para. 55.

⁵⁶² *ibid* at para. 62.

Article 31 § 1 of the Vienna Convention on the Law of Treaties, the provisions of a treaty are to be interpreted in accordance with their ordinary meaning, in their context and in the light of its object and purpose. Furthermore, it has often stated that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention of “any relevant rules of international law applicable in relations between the parties” [...]

In this regard, it is clear from the passages set out above [...] that secondary action is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter. Although the Government have put a narrower construction on the positions adopted by the supervisory bodies that operate under these two instruments, these bodies have criticised the United Kingdom’s ban on secondary action [...] The Government further queried the authority, for the purposes of the Convention, to be attributed to the *interpretative pronouncements* of the expert bodies tasked with supervising compliance with these specialised international standards [...] For now, it suffices to refer to the following passage from the *Demir and Baykara* judgment (§85): “The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.” [...] [emphasis added]⁵⁶³

When compared to the approach proposed in this work, such an argument appears dangerous. As the UK notes, the interpretations of expert bodies alone may be of questionable authority. For stage one *in abstracto* considerations, before the matter becomes too specialist for all agents to reasonably comprehend, it is only if the majority of member states accept (whether expressly, through statements in support, or practices that are in compliance) the expert interpretation, that it gains status as a common democratically recognised principle.⁵⁶⁴ For some type PIL agreements, for example the EU, member state acceptance is mandated for matters that fall under the competency of the expert body. But under many PIL agreements there may be questions surrounding the authority of an institution to automatically declare its decisions binding. Furthermore, even if an international body has the power to require compliance, should that decision not be adopted in practice, then for the purposes of the ECHR the authority may be doubted.

⁵⁶³ *ibid* at para. 76.

⁵⁶⁴ Notably, in the *Demir* case referenced, the ECtHR stated that PIL norms are based upon the existence of a European consensus.

Note here the arguments made by the UK:

The [UK] Government further observed that the ECSR was not a judicial or quasi-judicial organ, but simply an independent body that submitted its conclusions to the Committee of Ministers annually. It was the latter that had the power to adopt recommendations to States in relation to any instance of non-compliance with the Charter [...] In any event, that Committee was not a judicial or quasi-judicial body either, and its interpretation of ILO Conventions was not definitive. Rather, its role was to provide impartial and technical evaluation of the state of application of international labour standards. In fact, the question of a right to strike was currently the cause of sharp controversy within the ILO, as part of which the status of the interpretations given by the Committee of Experts had been called into question. In addition, the Government perceived a divergence of view between the Committee of Experts and the Committee on Freedom of Association, the latter regarding the right to strike as applying only to the defence of one's economic interests. It was noteworthy that the ILO Governing Body had refrained from taking any position on the situation. The Government thus did not accept that the United Kingdom was in breach of its obligations under Convention No. 87.⁵⁶⁵

Unless there is a majority consensus clearly shown in the member states accepting these "interpretive pronouncements" though their practices there is not as yet an accepted normative principle requiring protection of secondary strike action by the ECHR signatories. The UK argued:

[T]he United Kingdom was not alone in banning or significantly restricting secondary action. Given the great diversity of the different industrial relations systems in Europe, any superficial comparison on this precise point would be of limited assistance. Contrary to what the applicants asserted, that diversity pleaded in favour of a wide margin of appreciation.⁵⁶⁶

Similar concerns to those in relation to prisoner voting are again raised, with some states opposed to the recognition of secondary action in an area where the consensus that does exist is rather variable in its possible justificatory principles.

⁵⁶⁵ *The National Union of Rail, Maritime and Transport Workers v the United Kingdom* (n 559) at para. 69.

⁵⁶⁶ *ibid* 70.

7.4.2 Stage Two (Application)

If the ECtHR still interpreted a majority consensus of a general principle protecting secondary strike action, this would then move the decision taken by the UK not to provide that protection because of its particular circumstances to stage two. A wide margin would be expected, given that there is no consensus on standards, for example, is it always to be available or only to individuals in defence of one's own economic interest, or only where such an interest is "significant" etc.

Under the procedural margin of appreciation, the UK had reviewed its position. However, one may have expected, in a similar vein to prisoner voting, for the ECtHR to have found there to be a breach. The UK could not demonstrate it had taken into consideration the ability for individual circumstances to alter the availability of secondary strikes. If the ECtHR were to be consistent then whatever limitations there could be, a total ban would fall outside of any margin of appreciation for the interference:

The Court concludes therefore that the applicant's wish to organise secondary action in support of the Hydrex employees must be seen as a wish to exercise, free of a restriction imposed by national law, its right to freedom of association within the meaning of Article 11 § 1 of the Convention. It follows that the statutory ban on secondary action, as it operated in the example relied on by the applicant, constitutes an interference with the applicant's rights under this provision. To be compatible with paragraph 2 of Article 11, such interference must be shown to be 'prescribed by law', to pursue a legitimate aim, and to be 'necessary in a democratic society' to achieve those aims.⁵⁶⁷

The ECtHR held, however, that a ban was permitted:

The [UK] Government have argued that the "pressing social need" for maintaining the statutory ban on secondary strikes is to shield the domestic economy from the disruptive effects of such industrial action, which, if permitted, would pose a risk to the country's economic recovery. In the sphere of social and economic policy, which must be taken to include a country's industrial relations policy, the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*Carson and Others v. the United Kingdom* [GC], no. 42184/05, §61, ECHR 2010). Moreover, the Court has recognised the "special weight" to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely (see in the context of Article

⁵⁶⁷ *ibid* at para. 78.

10 of the Convention the case *MGN Limited v. the United Kingdom*, no. 39401/04, § 200, 18 January 2011, referring in turn to *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §97, ECHR 2003-VIII, where the Court adverted to the “direct democratic legitimation” that the legislature enjoys). The ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom. These considerations lead the Court to conclude that in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11.

The Court must also examine whether or not the contested restriction offended the principle of proportionality. The applicant argued that it did, given its absolute character, which completely excluded any balancing of the competing rights and interests at stake and prohibited any differentiation between situations. The Government defended the legislature’s decision to eschew case-by-case consideration in favour of a uniform rule, and contended that any less restrictive approach would be impracticable and ineffective [...]

The Court observes that the general character of a law justifying an interference is not inherently offensive to the principle of proportionality. As it has recently recalled, a State may, consistently with the Convention, adopt general legislative measures applying to pre-defined situations without providing for individualised assessments with regard to the individual, necessarily differing and perhaps complex circumstances of each single case governed by the legislation (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §107, 22 April 2013, with many further references concerning different provisions of the Convention and Protocol No. 1).⁵⁶⁸

The potential issue with the decision, as with prisoner voting, is the creation of a margin so wide that it may make the right to secondary action illusory. It is arguably difficult to view that the particular circumstances of the UK are so variable to those of other states that a complete ban was a solution because of its unique position, rather the point again seems that there was no morally constructed view that secondary strike action formed a right to be actively protected so far as possible.

⁵⁶⁸ *ibid* at paras 99-101.

7.5 Jurisdiction and Extra-territoriality

The territorial scope of the ECHR is governed by its Article 1, under which:

The High Contracting Parties [States] shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

It is not clear from the text of the Article what is meant by the term “jurisdiction”. In an evaluation of a range of case law on the point, Milanovic identifies two main strands of jurisprudence from the ECtHR on the interpretation.⁵⁶⁹ First, a narrower spatial model of jurisdiction (or “territorial”) based on effective overall control of an area. Secondly, a wider personal model of jurisdiction (or “state agent authority”) based on the exercise of authority or control over an individual or individuals.

According to the proposed judicial model, while the wider approach may fit within the normative scope of the right as a candidate principle, it can only be interpreted as an ECHR commonly understood minimum duty if inferable from the practices of a majority of the member states.

In *Bankovic v Belgium and Others*⁵⁷⁰, a case concerning deaths resulting from air strikes, this idea was reflected in reasoning by the ECtHR, in finding that the concept of jurisdiction under the ECHR is primarily territorial because of the ordinary or accepted meaning of the term:

As to the ‘ordinary meaning’ of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the *suggested bases* of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States [...] [emphasis added]⁵⁷¹

⁵⁶⁹ M. Milanovic, “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23(1) *European Journal of International Law* 121.

⁵⁷⁰ *Bankovic v Belgium and Others*, Application No. 52207/99, Judgment of 12 December 2001.

⁵⁷¹ *ibid* at para. 59.

The relevance of any understanding taking into consideration the nature of the ECHR as a project and the limits that places on the authority of the ECtHR was also referred to:

In short, the Convention is a multi-lateral treaty operating [...] in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting States [...] The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting States.⁵⁷²

However, in the case of *Al-Skeini v UK*⁵⁷³ the tide appears to have turned. The case had six applicants. Five of them were allegedly killed by UK British troops on patrol in Basra. The sixth applicant was taken to a UK detention facility and killed there. The applicants' families asked for an investigation of the deaths in compliance with Article 2.

The UK House of Lords dismissed the cases of the five applicants killed but found the sixth applicant to have been within the UK's jurisdiction. It considered that *Bankovic* precluded the application of the personal model and opted for the spatial model. As a matter of fact, the House of Lords determined that the UK did not have effective overall control over Basra. Therefore, the first five applicants were not within its jurisdiction. However, a military prison was held to have a special status akin to that of an embassy and so the sixth applicant was within the UK's jurisdiction.

It is the decision in relation to the five applicants killed by the patrol that is of interest for our purpose, given the difference in outcome compared to that of the House of Lords when the matter reached the ECtHR. The ECtHR reasoned:

It can be seen [...] that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of *some of the public powers normally to be exercised by a sovereign government*. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised *authority and control over individuals* killed in the course of such security

⁵⁷² *ibid* at para. 80.

⁵⁷³ *Al-Skeini v the United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011.

operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention [emphasis added].⁵⁷⁴

This applies the personal model of jurisdiction, in spite of, as was the reasoning of the House of Lords, previous case law having discounted a consensus having been reached on the availability of such arguments. Such a change in understanding, would have required adducing of new evidence of democratic recognition in support. While citing a range of previous case law under the ECHR, new information regarding State support was not adduced by the ECtHR.

With the territorial model already manifesting an expectation where the state has a high-degree of authority and responsibility⁵⁷⁵, one could argue it is a small step to recognising responsibility in situations where a state has a lesser degree of authority. However, that raises somewhat familiar “slippery slope” concerns. It is for the democratic process to lead the way in developments, however gradual they may be, in any direction.

7.6 Life Imprisonment

In *Vinter and Others v the United Kingdom*⁵⁷⁶ the ECtHR reviewed the ability for member states to impose whole life orders. The applicants complained that imprisonment for life amounted to inhuman and degrading treatment under Article 3, as they had no hope of release.

⁵⁷⁴ *ibid* at para. 149.

⁵⁷⁵ This is helpfully explained in the submissions of the respondent Governments in *Bankovic v Belgium and Others*:

As to the precise meaning of ‘jurisdiction’, they suggest that it should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law. The exercise of ‘jurisdiction’ therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State’s control. They also suggest that the term ‘jurisdiction’ generally entails some form of structured relationship normally existing over a period of time.

Bankovic v Belgium and Others, Application No. 52207/99, Judgment of 12 December 2001, at para.36.

⁵⁷⁶ *Vinter and Others v the United Kingdom*, Application Nos. 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013. See also *Harakchiev and Tolumov v Bulgaria*, Application Nos. 15018/11 and 61199/12, judgment of 8 July 2014.

A Chamber of the ECtHR had held that there was no violation as the applicants' sentences did not amount to inhuman or degrading treatment. In particular, it was not evident that continued detention served no legitimate penological purpose. When the case reached the Grand Chamber, it endorsed the Chamber's finding that only a "grossly disproportionate" sentence would violate Article 3. That test would be met only on rare and unique occasions.

However, in the instant case, the applicants had not sought to argue that their whole life orders were grossly disproportionate; instead, they submitted that the absence of an in-built procedural requirement for a review constituted ill-treatment from the moment the order was made. Under the proposed model, this raises a generic interpretation question under stage one. Did the practices of member states reveal a commonly understood norm that that all prisoners must have the ability to atone and thereby reduce prison terms. Alternatively, was consensus limited to a right to review for some levels of offence i.e. excluding the most serious in which a whole life sentence was not grossly disproportionate.

One reasoned interpretation would be that the justifications for life-sentences must include the ability for a prisoner to demonstrate that they no longer apply. As the ECtHR argued:

There are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review.

It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the [UK] Court of Appeal in *Bieber* and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the *balance between these justifications for detention is not necessarily static and may shift* in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never *atone for his offence*: whatever the prisoner does in prison, however

exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable [emphasis added].⁵⁷⁷

However, this is not the only possible reasoned interpretation of the principles that apply. As the UK House of Lords reasoned in the *Hindley*⁵⁷⁸ there was

[N]o reason, in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of *pure punishment* [...] [T]here is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence [...] [emphasis added]⁵⁷⁹

Reasons of punishment and deterrence are not necessarily affected by the behaviour of the prisoner, and so may not require the mandatory life-sentence to be subject to review on that basis.

Once more, a review of the practices of the member states was needed to interpret any common generic principle. The ECtHR did consider a range of evidence on practices. This included a review of the actual practices of member states to life sentences⁵⁸⁰, international law commitments as evidence of aspiration practice⁵⁸¹, and wider international practice.⁵⁸² The ECtHR found:

First, there are currently nine countries where life imprisonment does not exist [...]

Second, in the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law. Such a mechanism, integrated within the law and practice on sentencing, is foreseen in the law of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium

⁵⁷⁷ *ibid* at paras 110-112.

⁵⁷⁸ *R v Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410 and see also *R v Anderson* [2003] 1 AC 837.

⁵⁷⁹ *ibid* at 416-417.

⁵⁸⁰ *Vinter and Others v the United Kingdom* (n 576) from para 68.

⁵⁸¹ *ibid* from para 76.

⁵⁸² *ibid* from para 73. While international practice is not a replacement for European practice it is, under the proposed model, persuasive where there is doubt about the veracity of a numerically significant majority (e.g. to determine the significance of a possible blocking by a minority of States).

(15 with an extension to 19 or 23 years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment) [...]

Third, there are five countries which make no provision for parole for life prisoners: Iceland, Lithuania, Malta, the Netherlands and Ukraine. These countries do, however, allow life prisoners to apply for commutation of life sentences by means of ministerial, presidential or royal pardon. In Iceland, although it is still available as a sentence, life imprisonment has never been imposed.

Fourth, in addition to England and Wales, there are six countries which have systems of parole but which nevertheless make special provision for certain offences or sentences in respect of which parole is not available. These countries are: Bulgaria, Hungary, France, Slovakia, Switzerland (for sex or violent offenders who are regarded as dangerous and untreatable [...]) and Turkey.⁵⁸³

Strong evidence of minority dissent once more raises the question, under the model proposed by the work, whether that should have been sufficient to block any common norm that review must always (rather than normally) be required. The UK was joined by six other member states in prohibiting parole, and five that allow an application to be made but have no routine process for review. The ECtHR may still have reached the same outcome, given that the practices of the majority states were very consistent and wider PIL could tip the balance in favour of the principle, but the relevance of the dissent would have been expressly explored.

The existence of an element of doubt is introduced by the partly dissenting opinion of Judge Villiger in the ECtHR:

I respectfully disagree with the majority of judges in this case.

As a lawyer I can of course agree that an irreducible sentence raises different and at times highly problematic issues. But as a judge bound by the Convention, I am obliged to analyse this issue solely through the prism of Article 3.

⁵⁸³ *ibid* at para 68.

My disagreement stems from the method which this judgment chooses to examine the alleged breach of Article 3 of the Convention, namely that the irreducible sentence imposed on the applicants runs counter to this provision as such.

The Court has a time-honoured case-law as to the standards and conditions of applying Article 3, starting with its 1978 judgment in *Ireland v. the United Kingdom* (18 January 1978, § 162, Series A no. 25). In that case and in literally countless subsequent cases it has affirmed that whether or not an issue arises under Article 3 will depend on all circumstances of the individual case; that this provision contains different thresholds (namely “inhuman”, “degrading” and “torture”); that a minimum of severity has to be reached to attain the first threshold; and that the assessment of this minimum will be relative (see for a more recent case *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 219, ECHR 2011).

In the present judgment, the Court essentially finds a violation of Article 3 as there is currently no prospect of release and no possibility of review of the three applicants’ sentences. It adduces, inter alia, the arguments that the balance of the justification for detention may shift over time (at § 111 of the judgment); that whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable (at § 112); and implicitly that an irreducible sentence runs counter to human dignity (at § 113). The crucial point is that the judgment takes the position that the question of an irreducible sentence’s compatibility with Article 3 must be analysed from the perspective of the moment when a prisoner begins serving that sentence. Thus, at § 122 of the judgment it is stated:

“[A] whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3.”

In my opinion, this manner of analysing the complaints does not comply with the standards and conditions of Article 3 of the Convention as developed in the Court’s case-law for the following reasons.

To begin with, I note that in the judgment (for example, at §§ 121 et seq.) reference is made to the “standards” and “requirements” of Article 3. However, nowhere in the judgment are these standards and requirements explained, analysed and applied.

Second, the judgment assesses the situation for all prisoners serving whole life orders, thus in fact providing for a generalised interpretation of Article 3. However, Article 3 would normally require an individualised assessment of each applicant’s situation.

Third, by taking a prospective view of the prisoners’ situation - extending to many decades ahead in the prisoners’ lives (and also after the Court’s examination of the present case) – the judgment provides for an abstract assessment and fails to undertake a concrete examination of each applicant’s situation at the time when it is

examining the case. How can the Court know what will happen in ten, twenty or thirty years?

Fourth, this general and abstract application of Article 3 to the present case does not, in my view, square easily with the principle of subsidiarity underlying the Convention, not least when, as the judgment itself recognises, issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement (§ 105 of the judgment).

Finally, and not least, this manner of proceeding overlooks the different thresholds in Article 3. The judgment makes no reference as to whether the minimum severity of treatment has been attained in respect of the applicants in order to bring about the application of Article 3. Neither is there a qualification as to whether the irreducible prison sentence amounts to inhuman or degrading punishment, or indeed to torture. Reference is made solely to “Article 3” (see, for example, at § 122 of the judgment).

This manner of analysing Article 3 cannot, in my view, do justice to the cardinal importance of this provision within the Convention, as interpreted by the Court in its case-law.

Taking the second and third concerns of Judge Villiger, the proposed model would reduce the impact of them. The second concern is that the ECtHR should take a more individual, and less general approach to interpreting the ECHR. This is not in keeping with the model, which suggests that the role of the ECtHR is more constitutional in nature. The ECtHR’s first task should be establishing general principles, and then reviewing how the states apply them in practice. It has already been suggested that the application may include some blanket positions and not require every single individual’s position to be considered separately.

The third concern is connected with requiring that there be a significant impact on the individual bringing the case i.e. that some of the applicants were not yet in a position where it was realistic to expect that a review could in any event go in their favour (one had only been serving his sentence for just over five years). However, under the model, the the ECtHR should find a case admissible where there is a significant impact upon the applicant or the potential for a significant impact upon the respondent state or the wider ECHR community. Here, it was systematic failings being alleged against the UK process however trivial/theoretical the impact was for now on some of the applicants.

It is the fourth and fifth concerns of Judge Villiger that are the most notable for suggesting a different outcome under the proposed model. The fourth suggests that the majority view was

a “general and abstract application of Article 3”. It was not in keeping with subsidiarity, particularly given that the judgment itself recognises that the principles relating to just and proportionate punishment are the “subject of rational debate and civilised disagreement”. Until a consensus is clear on such difficult issues, interpreting there to be a general normative principle must be undertaken with care. The fifth concern raises similar issues, that the definition of what amounts to inhuman treatment is another issue upon which there remains a significant variation in interpretation.

7.7 Same-Sex Marriage

In *Schalk And Kopf v Austria*⁵⁸⁴, the applicants alleged that the legal impossibility for them to get married constituted a violation of their right under Article 8 to respect for private and family life and of the principle of non-discrimination. The central element of the debate would fall under stage one of the proposed judicial model; the general interpretation of what marriage is.

The applicants’ argument was that:

[T]he notion of marriage had evolved [...] In particular, the *procreation and education of children* no longer formed an integral part of marriage. In present day perception, marriage was rather a *permanent union* encompassing all aspects of life.⁵⁸⁵

If this held true as the commonly held norm as defined, then the respondent state was then very unlikely to be able to support exclusion for gay couples as being substantively reasonable, given it would not be an objective ground. As the applicants contended:

There was no objective justification for excluding same-sex couples from concluding marriage, all the more so since the European Court of Human Rights had acknowledged that differences based on sexual orientation required particularly weighty reasons. Other European countries either allowed homosexual marriages or

⁵⁸⁴ *Schalk And Kopf v Austria*, Application No.30141/04, judgment of 22 Nov 2010. See also *Parry v UK*, Application No. 42971/05, Judgment of 28 November 2006 in which it was determined that the choice of several states (insufficient to show a consensus) to allow same-sex marriage reflected their own vision of marriage, not ECHR obligations.

⁵⁸⁵ *ibid* at para 1.

had otherwise amended their legislation in order to give equal status to same-sex partnerships.⁵⁸⁶

The respondent state had been unconvinced by the argument. The Austrian Constitutional Court dismissed the applicants' case on 12 December 2003, reasoning:

Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by “men and women” in Article 12) require that the concept of marriage as being geared to the fundamental possibility of parenthood should be extended to relationships of a different kind.... The European Court of Human Rights found in its *Cossey* judgment of 27. September 1990 (no. 10843/84, concerning the particular position of transsexual persons) that the restriction of marriage to this “traditional” concept was objectively justified, observing:

'[...] that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage.'

[...] The fact that same-sex relationships fall within the concept of private life and as such enjoy the protection of Article 8 of the ECHR – which also prohibits discrimination on non-objective grounds (Article 14 of the ECHR) – does not give rise to an obligation to change the law of marriage.⁵⁸⁷

The ECtHR agreed, and the application failed. While same-sex couples are in a relatively similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, since practice in this regard is still evolving across Europe the contracting states enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order.

This is the correct outcome in accordance with the corrective model, until a general consensus emerged that the potential for parenthood was of no relevance to categorising the formal recognition of a partnership the member states were able to continue making such distinctions in practice.

⁵⁸⁶ *ibid* at para 1.

⁵⁸⁷ Verfassungsgerichtshof (VfGH), B777/03, 13.12.2003.

7.8 Civil Rights and Obligations

The final case for consideration shows the UK Supreme Court, very recently, questioning the legitimacy of an ECtHR judgment, and openly debating the correctness of following it.

The case of *Poshteh v Royal Borough of Kensington and Chelsea* [2017]⁵⁸⁸ concerned ECHR Article 6.1, which provides:

In the determination of his *civil rights* and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...] [emphasis added]

The UK Supreme Court held that the duty of a local housing authority⁵⁸⁹ to secure provision of “suitable” accommodation for a person who is homeless and in priority need, and has not become homeless intentionally, did not fall under Article 6.1. A civil right required the substance to be defined precisely, rather than be dependent upon the exercise of judgement by a local authority. This UK position was established in *Ali v Birmingham City Council* [2010]⁵⁹⁰, following a full review of UK law and ECtHR jurisprudence.

However, once the matter reached the ECtHR in *Ali v United Kingdom* (2015)⁵⁹¹, the Court held that article 6.1 did apply to the duty to provide accommodation.

In so doing, the ECtHR accepted that:

Article 6 § 1 does not guarantee any particular content for civil “rights and obligations” in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B, and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X). The starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A, and *Roche*, cited above, § 120). This Court would need strong reasons to differ from the conclusions reached by

⁵⁸⁸ *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36.

⁵⁸⁹ Housing Act 1996 Part VII.

⁵⁹⁰ *Ali v Birmingham City Council* [2010] 2 AC 39.

⁵⁹¹ *Ali v United Kingdom*, Application No. 40378/10, Judgment of 20 October 2015.

the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law [...]⁵⁹²

Furthermore, previous case law from the ECtHR provided support for the UK position that accommodation fell outside the scope:

It is now well-established that disputes over entitlement to social security or welfare benefits generally fall within the scope of Article 6 § 1 of the Convention (see, for example, *Tsfayo v. the United Kingdom*, cited above, § 40, *Feldbrugge v. the Netherlands*, 29 May 1986, Series A no. 99, *Deumeland v. Germany*, 29 May 1986, Series A no. 100 and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, Series A no. 263). The Court has even recognised a right to a non-contributory welfare benefit as a civil right (see, for example, *Salesi v. Italy*, cited above, § 19, and *Tsfayo v. the United Kingdom*, cited above, § 40). However, the present case differs from previous cases concerning welfare assistance, as the assistance to be provided under section 193 of the 1996 Act not only was conditional but could not be precisely defined (compare, for example, *Tsfayo*, in which the dispute concerned a fixed financial amount of housing benefit). It concerns, as the Government noted, a “benefit in kind” and the Court must therefore consider whether a statutory entitlement to such a benefit may be a “civil right” for the purposes of Article 6 § 1 [...]⁵⁹³

However, ultimately the ECtHR went on to find that Article 6.1. did apply:

It is true that accommodation is a “benefit in kind” and that both the applicant’s entitlement to it and the subsequent implementation in practice of that entitlement by the Council were subject to an exercise of discretion. Nonetheless, the Court is not persuaded that all or any of these factors necessarily militate against recognition of such an entitlement as a “civil right”. For example, in *Schuler-Zgraggen v. Switzerland*, 24 June 1993, Series A no. 263, in which the applicant’s entitlement to an invalidity pension depended upon a finding that she was at least 66.66% incapacitated, the Court accepted that Article 6 § 1 applied. In any case, the “discretion” in the present case had clearly defined limits: once the initial qualifying conditions under section 193(1) had been met, pursuant to section 206(1) the Council was required to secure that accommodation was provided by one of three means, namely by providing accommodation itself; by ensuring that the applicant was provided with accommodation by a third party; or by giving the applicant such advice and assistance to ensure that suitable accommodation was available from a third party [...]

In light of the above, as far as the applicability of Article 6 § 1 is concerned, the Court sees no convincing reason to distinguish between the applicant’s right to be provided with accommodation [...] and the right to housing benefit asserted by the applicant in

⁵⁹² *ibid* at para 54.

⁵⁹³ *ibid* at para 58.

Tsfayo. Article 6 § 1 therefore applies and, as such, the applicant had a right to a fair hearing before an independent and impartial tribunal.⁵⁹⁴

The UK Supreme Court in *Poshteh*, did not follow the ECtHR ruling in *Ali* and openly questioned the validity of the ruling. The first concern of the Supreme Court was that:

The Chamber acknowledged (in line with the Grand Chamber decision in *Boulois*) the weight to be given to the interpretation of the relevant provisions by the domestic courts. It is disappointing therefore that it failed to address in any detail either the reasoning of the Supreme Court, or indeed its concerns over “judicialisation” of the welfare services, and the implications for local authority resources [...]⁵⁹⁵

Furthermore:

Questionable also, with respect, is the Chamber’s reliance on the decision in *Schuler-Zraggen v Switzerland* as an example of entitlement subject to “discretion”. As Lord Collins pointed out in *Ali* (at para 61), it was treated by the 1993 court as a claim to an “individual economic right” flowing from “specific rules” laid down in the statute. The case report shows that the statute in question gave a right to a full invalidity pension where incapacity of at least 66.66% was established (para 35). Once that level of incapacity was established, the financial entitlement followed as a matter of right, not discretion. It is hard to see any fair comparison with the range of factors, including allocation of scarce resources, to which authorities are entitled to have regard in fulfilling their obligations under the housing legislation.⁵⁹⁶

The concerns of the UK Supreme Court are in keeping with the proposed judicial model. The interpretation of scope of the right had not previously extended to cover claims where there was any real discretion. Furthermore, even if it did so, under the application stage the UK courts would have been, presumably, better positioned to determine whether substantial discretion remained to the UK local authorities. The ECtHR did not explore the existence of consensus to support an expansion of the scope of the right, or conduct a significant review of the UK decision-making process to challenge its application.

The position of the UK Supreme Court in *Poshteh* reveals the significance a lack of clear process may have upon trust in an ECtHR decision:

⁵⁹⁴ *ibid* at paras 58-60.

⁵⁹⁵ *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, at para 33.

⁵⁹⁶ *ibid* at para 35.

Our duty under the Human Rights Act 1998 section 2 is “take account of” the decision of the court. There appears to be no relevant Grand Chamber decision on the issue, but *we would normally follow a “clear and constant line” of chamber decisions* (see *Manchester City Council v Pinnock* [2011] 2 AC 104, para 48). This might perhaps be said of some of the previous decisions referred to in the judgment, including most recently *Tsfayo v United Kingdom* (2006) in which the application of article 6 was conceded by the government. However, it is apparent from the Chamber’s reasoning (see para 58 cited above) that it was consciously going beyond the scope of previous cases. In answer to Lord Hope’s concern that there was “no clearly defined stopping point” to the process of expansion, its answer seems to have been that none was needed. That is a *possible view*, but one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime.

The scope and limits of the concept of a “civil right”, as applied to entitlements in the field of public welfare, raise important issues as to the interpretation of article 6, on which the views of the Chamber are unlikely to be the last word. In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the court in *Ali*. It is appropriate that we should await a full consideration by a Grand Chamber before considering *whether* (and if so how) to modify our own position [emphasis added].⁵⁹⁷

7.9 Chapter Conclusions

The proposed corrective judicial model provided a structured and effective procedure for approaching analysis of the challenging cases selected.

In keeping with legitimacy, the focus on democratic consensus means there is consent to new interpretations of the rights. Consensus enables recognition of new normative principles that, while not reasoned by some member states or strictly derivable from the higher rights, nonetheless form binding duties.

Deference to democracy is also recognized by a more visible and consistent basis for the margin of appreciation in relation to application of recognised norms; with the margin always influenced by the presence of overarching standards for democratic due process and the extent of wider democratic consensus on substantive application to particular circumstances.

⁵⁹⁷ *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, at paras 36-37.

ECtHR intervention for unreasoned choices requires clear evidence or judicial reasoning to rebut a strong presumption in favour of democratically reached outcomes.

In terms of impact, it is notable that the model could in some of the above cases have supported a change in the outcome (and thereby avoided some unfortunate reversals of decisions by a Chamber of the ECtHR, by the Grand Chamber⁵⁹⁸). In other cases, it would have provided for a more transparent and consistent approach to justifying the ruling and hence the level of acceptance.

It is concluded therefore that the model represents, at the least, a useful tool for analysis of ECtHR decisions, and has the potential to be considered as a more formal element in the continued operation and evolution of the ECHR. While the model is not claimed to provide the one definitive outcome for a case, it does provide a structure and process for the ECtHR to work with and thus provides the potential for greater transparency, legitimacy, consistency and sustainability in its decisions. This may help to promote more widespread acceptance of initial decisions of the ECtHR and reduce the incidence of disagreement and appeal against the judgments of the Chamber.

⁵⁹⁸ It has already agreed that in future all cases involving departures from ECtHR existing case law should be relinquished to the Grand Chamber.

'The Interlaken Process and the Court' (28 August 2013), page 11, available at <http://www.echr.coe.int/Documents/2013_Interlaken_Process_ENG.pdf> accessed 20 May 2017.

8 Chapter Eight

Conclusions and Recommendations

Critical review and evaluation of the work completed and identification of the need and potential for further work and development

8.1 Introduction

This chapter will provide an evaluation of the work completed and identify the extent to which the objectives set out in Chapter One have been satisfied. The need for further work and development will be discussed.

8.2 Satisfaction of Research Objectives

The research question set for the work was:

Since its inception, the European Court of Human Rights has been charged with demonstrating an increased willingness to find member states in violation of the European Convention on Human Rights. While some evolution in the interpretation of rights is necessary and the requirements for application to secure rights are to be expected to become less fluid as the Court develops its *acquis*, some participants allege that the nature of these ongoing developments cannot be reconciled with the Court's mandate.

- (1) To what extent is the mandate of the Court identifiable and relevant to the scope and limits of its authority?
- (2) Based on that authority, what are the elements of a corresponding exercise of judicial autonomy (a framework) and has an expansive interpretation of rights and a reduced margin made available to member states in applying them, exceeded that authority?
- (3) If discrepancies are identified could a corrective model for decision making by the Court be proposed, to support more legitimate and effective operation and future evolution of the system?

A response to the question was identified as requiring achievement of four objectives:

8.2.1 Objective 1 – To establish a basis for evaluating human rights systems and the relevance of consent to legitimate institutional oversight

The work accepts, in Chapter Two, Gewirth's principle of generic consistency (PGC) as the substantive justification for the recognition of justified moral rights under the ECHR. This follows: (1) a review and rejection of other potential footings, such as religion or natural law, as acceptable because they fail in the requirement of being acceptable to all as a basis for voluntary societal cooperation; and (2) dismissal of a purely positivist stance given that the purpose of ECHR is clearly idealistic in recognising natural rights.

The most concise synopsis of the PGC argument is that if an agent accepts that other agents hold certain rights, then they also accept that those agents are entitled to whatever generic conditions are required to exercise those rights. This foundational principle provides a starting point for a concept of legitimacy. Interpretations and applications of the ECHR rights must be capable of being framed as justified moral norms in general accordance with the PGC. The legitimacy of the European Court of Human Rights (ECtHR) expectation that its decisions will be followed was thus based upon the PGC as its substantive justification.

The difficulty is that the PGC does not purport to provide a complete answer but rather provides a reasonable basis for one being reached. The PGC gives only a basis for moral internal reasoning by agents. It is not, in itself a means of identifying what these general human rights principles are and practically require in action. It does, however, provide for a criterion of reason.

The criterion for reason may be deployed by a court such as the ECtHR to negatively determine clearly unreasoned responses. But these criterion for reason may also support the creation of a system for the positive construction by a society of morally justified responses. Moral agents interacting while going about their own ends in a mutually dependent society must consider and respect the rights of others, certain basic or general principles should emerge consistently as those understood as necessary to the freedom for the self to develop. These moral principles are at least dialectically contingent (as opposed to necessary) justified moral understandings of the rights and duties that underly that society as the basis for justice

and fairness. Such principles have legitimacy by being objective in the sense that they are reasoned for all, and in being effective in holding that society together.

The PGC was seen to require a reasonable process or procedural justification for making positive determinations on the interpretation and application of human rights to bind agents as a society. There is a moral need for social contract, that accords with reasoning that would emerge from the hypothetical original position of Rawls. As there may be more than one decision-making process that could accord with the criteria for reason, the question moved to which procedure has been consented to by agents and furthermore what authority they as principals vested in any regime's institutions. It was argued that such a system would need to ensure freedom and equal respect for citizens.

Once there is an acceptance of public goods that are objectively justified and morally valid, then any system must show itself to comply with that underlying conception of justice by building upon the PGC with a system that is effective in terms of people complying with it AND having the potential to support the dialectic methodology of the PGC. This compliance cannot ever be presumed merely because decisions are habitually followed. Instead, legitimate exercise of authority depends upon: (1) interpretations of the common moral principles having the potential to accord with objective reasonableness under the PGC (not manifestly unjust); and (2) a process for the settlement of interpretations and standards for application that respects agent participation and empirical validity.

Chapter Three considers in more detail the development of the concept of institutional authority under a procedural justification (procedural legitimacy) of legal systems via states and an assessment of the extent to which, over time, institutional authority has in part shifted from states to international bodies under an internationalised social contract with their own need for procedural justification.

State authority was considered to emanate from agreement under a type of social contract that has evolved over time to form a system of democratic government within nations. Social contracts are required to respond to the reality of limited resources, conflict and disagreement between agents. The normative dimension of social contract theory provides a basis for settling: (1) the principles of justice that bind citizens in a society (dialectically

contingent constructed norms under the PGC); and (2) the conditions under which a state may settle any dispute. The social contract response to both of these questions is built upon consent, reconciling the authority of government with the freedom and equality of all agents. The relevance of consent of agents means that a true government purpose behind legislation must be one that appeals to the public, rather than private values, and has empirical validity. It also means that the procedural requirements of the system consented to are crucial, for example those of a liberal democracy.

Traditionally, there has been an acceptance that nation sovereign states are to be seen as completely autonomous. In turn, international law was viewed as being built entirely upon state consent. However, given the recognition by this project of certain moral norms or objectively true forms of rationality, such a position is untenable in relation to the underpinning argument. More modern reasoning accepts that states are no longer viewed as the foundation for international law. Their very legitimacy is in fact grounded in their recognition as being in accordance with the conditions set by global law and acting within the areas of competency that fall within the national domain. It is possible to develop an internationalised democratic social contract theory, which values the sovereignty of states under the rule of law and which, in turn, sees the existence, protection and promulgation of human rights as intrinsic to this politico-legal model of internationalised civil society.

States are subject to the PGC and to the justified moral normative construction of global principles, but building upon the notion of consent to a national social contract, states as the representatives of their citizens may also consent to work together beyond the most basic principles. This type of cooperation for a particular object and purpose is called for to resolve the issues that arise between coexisting states because of limited resources and conflicting claims, but also to work towards a more internationalised cosmopolitan community able to promote: peace; economic wellbeing; social and cultural enrichment; resolution of shared threats; and, most relevant for our purposes, human rights. The ECHR represents such an express contract between states, and so its object and purpose may reveal consent to move beyond clear violations of the most basic human rights principles to a more ambitious protection of understandings between its membership. Any shared government object and purpose that can be reasonably attributed to the membership of ECHR both empowers the

ECtHR to legitimately pass judgment on the protection of human rights in member states and limits the extent of that authority. This sets, referring back to the normative dimension of a social contract, the conditions under which the ECtHR may settle any dispute.

What is clear is that, given an established cosmopolitan international society is still a distant aspiration (with recent events revealing disparities with regard to fundamental basic values) we are not yet at a stage where individual states cease to play the central role. For now, it remains the case that this collective of cooperating agents is primarily located at state level, the level at which most normative construction of at least contingently justified moral rights occurs.

International law continues to be state-centred, because it is assumed that the state system is the legitimate exercise of sovereignty in accordance with the consent of citizens. States continue to have a strong institutional order, demonstrably able to create, interpret and enforce laws followed by the majority of a population. States may not be a perfect social and legal systems, but they are well-established and effective in managing populations. As such, states retain a powerful role and state consent remains a central consideration in understanding any agreement.

Any international system that tries to move too fast, and does not incorporate the understandings relevant to the object and purpose of an agreement emerging from national systems of government, is liable to have legitimacy questioned. It is to be expected that the government object and purpose of the membership of the ECHR was not to provide the ECtHR with the ability to interpret and apply the rights guaranteed by the Convention without some degree of control and influence over those developments coming from the states.

8.2.2 Objective 2 – To establish the object and purpose of the ECHR and the consequences for a framework of analysis for assessing the legitimacy of ECtHR procedure in line with its authority

Chapter Three explores how consent to authority is present within nation states and how that has shifted to international bodies, such as the ECtHR. The chapter identifies how the rules governing international bodies have developed, including the key agreement of the Vienna

Convention on the Law of Treaties. This establishes the relevance of: (1) the text of an agreement; (2) the object and purpose; and (3) consensus as the key means for resolving uncertainties.

Given the nature of the PGC and the difficulties of its pursuit, the work concludes that such uncertainties are unavoidable despite the text of the ECHR setting out the rights protected and defining each broadly. Deriving justified moral norms from those already recognised is accepted by academics, including Gewirth, as far from a straightforward process. There are often multiple “candidate” norms that could fall under the parameters of an existing definition, there is not one that “must” be better than the others. It is suggested that the decision to originally draft the rights in the ECHR so widely may have been to allow the understandings of those rights to develop. If a new interpretation of the normative scope of a right is not to be conflated with recognising rights and duties beyond those to which the member states gave consent, what is needed is a route, or referring back to the normative dimension of the social contract the conditions, for settling dispute. That route must be in accordance with the consent of the states.

The ECHR Preamble refers to a “common understanding”, this suggests that it is not the ECtHR alone that must influence the development of normative understanding of the principles under rights. It also references “liberal democracy” as the accepted system for safeguarding the rights, which suggests it is the system for: (1) developing a moral understanding of their normative content; and for then (2) applying those principles of general application to particular circumstances. This view is reinforced by the work of Chapter Four.

Following a review of the origins of the ECHR, in Chapter Four, the work argues that the object and purpose of the ECHR is one of republican liberalism, to promote and support the national liberal democracies as the means of securing human rights in accordance with the PGC. In response to the research question, the mandate is therefore reasonably identifiable. As such, the primary route for settling the issues interpretation and application of the rights is by the operation of national democracy.

This conclusion of the primacy of democratic due process is supported by the wording of the ECHR, and is also in keeping with the PGC as the basis for the rights, by putting the internal

reasoning of agents and the compromises they must make with one another at the centre of a fair and equal society. This also supports subsidiarity as a key principle for the ECHR and the ECtHR acting not as a direct provider of individual justice but in a more constitutional role.

The consequences of a republican liberalism mandate for the conditions under which the ECtHR may operate legitimately is argued to be distinguishable in regard to the: (1) interpretation of the *in abstracto* normative scope of the rights; and (2) the *in concreto* application of those principles of general application to particular circumstances.

Interpretation must come from democracy operating within the states, where all citizens have an equal part in constructing understandings of the underlying rights and duties that are the foundation for justice and freedom. Unless the outcome of democracy is incapable of complying with the criterion for reason under the PGC, its choices must stand as opposed to the reasoning of unelected judges. The ECtHR may have an important role in interpreting the practices of member states to determine whether there is a “common” democratic understanding.

Application is also the function of democratic government, but the ECtHR has an important oversight function in ensuring that the standards for due democratic process were followed and ensuring that the ultimate government decision is one that a reasoned person would reach. Provided the democratic procedural requirements were followed, it would be expected that a state would enjoy a wide margin of appreciation in relation to its substantive choice.

The analysis in Chapter Four goes on to reason that the framework of analysis for assessing the legitimacy of ECtHR procedure, in keeping with the mandate of the Court, must therefore comprise principles that act as an affirmation of the democratic process, subsidiarity and oversight, as well as standard elements for international courts such as transparency, consistency, relevance, effectiveness and self-limitation to the role allocated to it by the signatories.

The framework for analysis of legitimacy is set out in Fig. 4.3.

Element	Explanation	Risk
Transparency and consistency	<p>Clearly explained reasoning for judgments.</p> <p>Decision-making process with clearly defined stages for interpretation and application, always applied.</p>	<p>Difficulty applying a decision outside of the specific facts of the case.</p> <p>Inconsistent development of law.</p> <p>Lack of clarity on what is required for a state to comply with its duty.</p> <p>Undermining of ECtHR accountability.</p> <p>Undermining of trust in the legitimacy of judgments.</p>
Directed/contained authority	Acts as agent to secure the objects of its principals (the member states as representatives of citizens).	Expansion beyond the goals/mission, slippage from securing government object and purpose, as represented by the signatory states.
Current/informed	Judgments need to keep pace with evolving understandings of the government purpose of the principals and to be informed by/harmonious with, wider international law.	The ECHR ceases to be effective for agents and relevant internationally.
Acknowledgement of subsidiarity and a margin of appreciation	Local variation means that national democratic government choices are presumed to be correct.	<p>Unrealistic judgments.</p> <p>Judgments not in accordance with public values.</p> <p>Unimplemented judgments and loss of public investment – meaning the ECHR ceases to be effective.</p>
Limited to oversight	Not tasked with securing individual justice i.e. an appeal court.	<p>Excessive caseload, undermining local systems and overwhelming the ECtHR.</p> <p>Overly intensive review of state democratic decisions.</p>

<p>Acknowledgement of the democratic process</p>	<p>The ECtHR is tasked with upholding and reinforcing democracy.</p> <p>Democratic decisions on interpretation of right are correct is they could accord with the PGC.</p> <p>Provided the democratic process is followed national decision-making on application should, <i>prima facie</i>, be upheld with a wide margin of appreciation.</p>	<p>Undermining of the operation, relevance and faith in democracy as the best route to securing “human rights” and organising society.</p> <p>Undermining the very basis of the ECHR and the rights as listed in its text.</p>
<p>Effectiveness</p>	<p>Judgments upheld and decisions of the ECtHR influential in driving forward wider reform.</p>	<p>Individuals do not secure an appropriate remedy and no systematic change.</p> <p>Decisions do not inform future law-making and public debate.</p>

Fig. 4.3 Analytical Framework for Assessing the Legitimacy of ECtHR Procedure

The framework is used, in relation to Objectives 3 and 4, to respond to the research question, by proposing a corrective judicial model (Objective 3) and hence provide support for analysis of ECtHR judicial procedure with respect to its institutional authority.

8.2.3 Objective 3 - To propose a corrective judicial model

In Chapter Five, possible routes to ensuring that the understandings of the normative scope of the rights and standards for the application are limited to those reached by the operation of democracy are explored.

The use of extrapolation, using the text of the ECHR and existing case law to reason further norms, is rejected as a sufficient response. While the ECtHR should be able to rely on earlier judgments to ensure consistency and a coherent legal system, there are many cases in which a candidate interpretation “may” represent a reasoned one but does not necessarily mean it “must” be. In those cases, expanding a norm to situations it does not clearly cover may represent judicial expansion beyond the ECHR Preamble commitment to “common” understood norms.

Strict originalism is also rejected. While restricting understandings to those understood by governments at the time of signing the ECHR would certainly respond to concerns about mission slippage, it would be too restrictive given the shared government object and purpose. The ECHR must be a living instrument if it is to be effective, and the signatory states must be taken to have accepted that as society continues to evolve so will the public principles understood as underlying that cooperation.

A better approach is reasoned to be commitment to an original purpose i.e. the mission to promote republican liberalism. This would allow for developments in line with that mandate. This would, as has already been noted, allow for interpretations of the normative parameters of the rights that now form the common understandings of the states. A common understanding is not the same as total agreement, and it is suggested that a significant consensus would suffice. This is in accordance with wider principles of international law, and also in keeping with how the rights included in the ECHR were originally negotiated based upon the common government understandings of the time. In terms of the application, the

overarching standards for democratic due process would always apply but in terms of assessing the reasonableness of the ultimate substantive government decision, the degree of consensus between states would again be relevant.

The tenets that must inform any legitimate judicial model are identified (Fig. 5.2) in accordance with the framework of legitimacy:

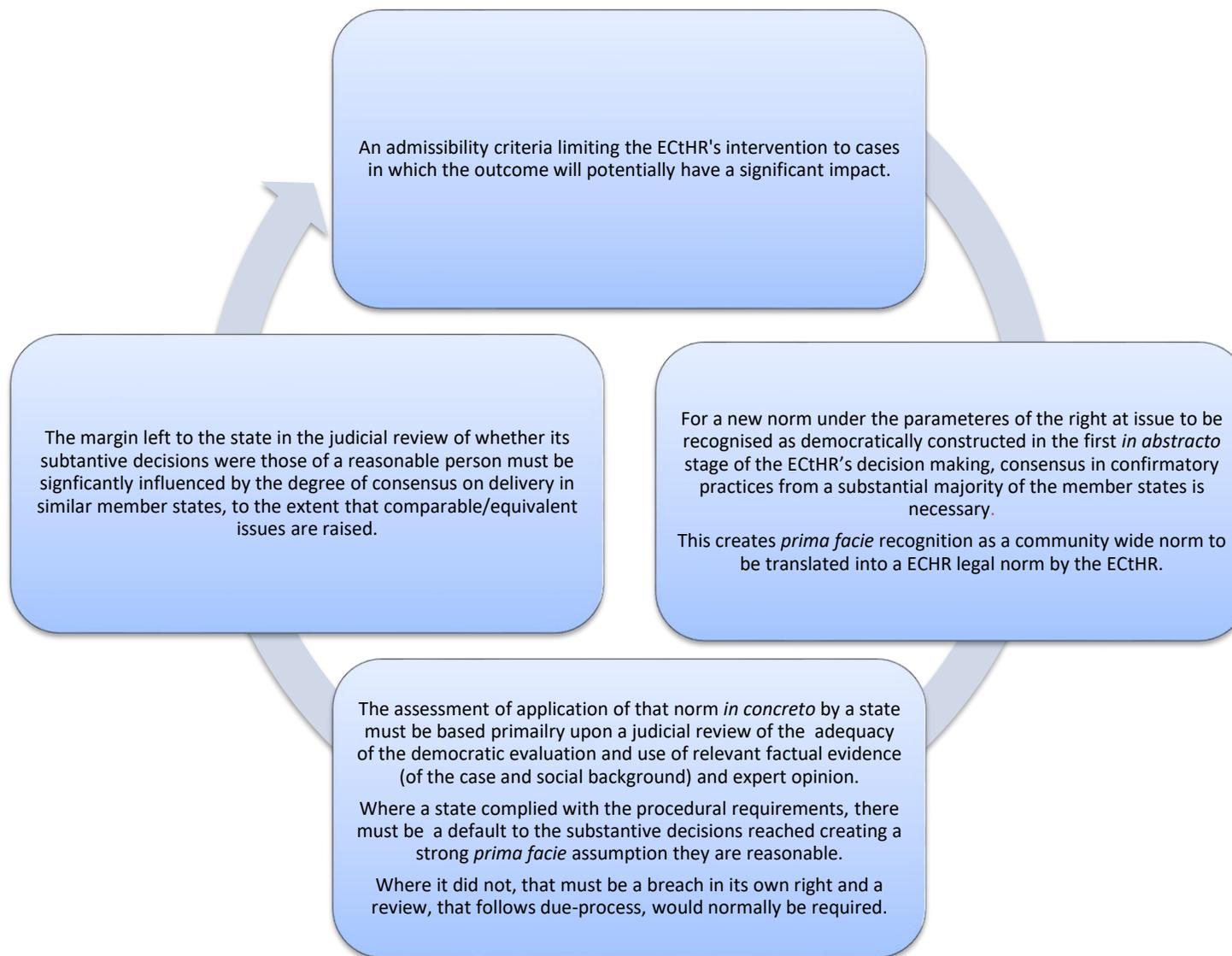


Fig. 5.2 Tenets Underlying the Structure for a Legitimate Judicial Model for the ECtHR

The tenets for a legitimate judicial model are then developed into a proposed judicial model in Chapter Six. The elements included within that corrective model are identified follows:

Respect for democracy as identifying the normative extent of human rights in their abstraction and respect for national democracies as having the best local appreciation of how to secure them in practice within a particular society.

This means that, provided all agents could have reasoned on a point, the consistently reached government understandings across democratic systems (provided it could accord with the criteria for reason) must be upheld as correct. In relation to the interpretation of the normative scope of rights as “all” must hold them, the work notes that there is no reason to accept that the reasoning of “experts” on such principles of general application is any more valid than that of other agents. At least for so long as the level of reasoning remains *in abstracto* i.e. in applying to everyone generally and raising questions that anyone can understand, the reasoning of every human is potentially as valid as that of any other. As such, a consensus within a significant majority of the democratic systems under the ECHR represents the collective or common understanding of what principles are included within a right.

Once the matter moves to the *in concreto* application, executing those principles in individual cases and within specific circumstance and societies, democracy still retains the ultimate authority to settle the matter at the local level. It is reasoned, however, to be subject to review by the ECtHR under a procedural and a substantive “margin of appreciation”.

In this application stage, during the hypothetical meeting of all of agents, they could not possibly comply with the criteria for reason without factual evidence and the support of experts. The criteria require that the reasons for a decision are coherent and informed, and agents could not possibly satisfy this without reliance on special knowledge. By extension, their democratic representatives must also appeal to and apply, expert opinion in reaching decisions on application. The margin must then include a procedural element, demonstrating that due democratic process was used and that relevant evidence was properly considered.

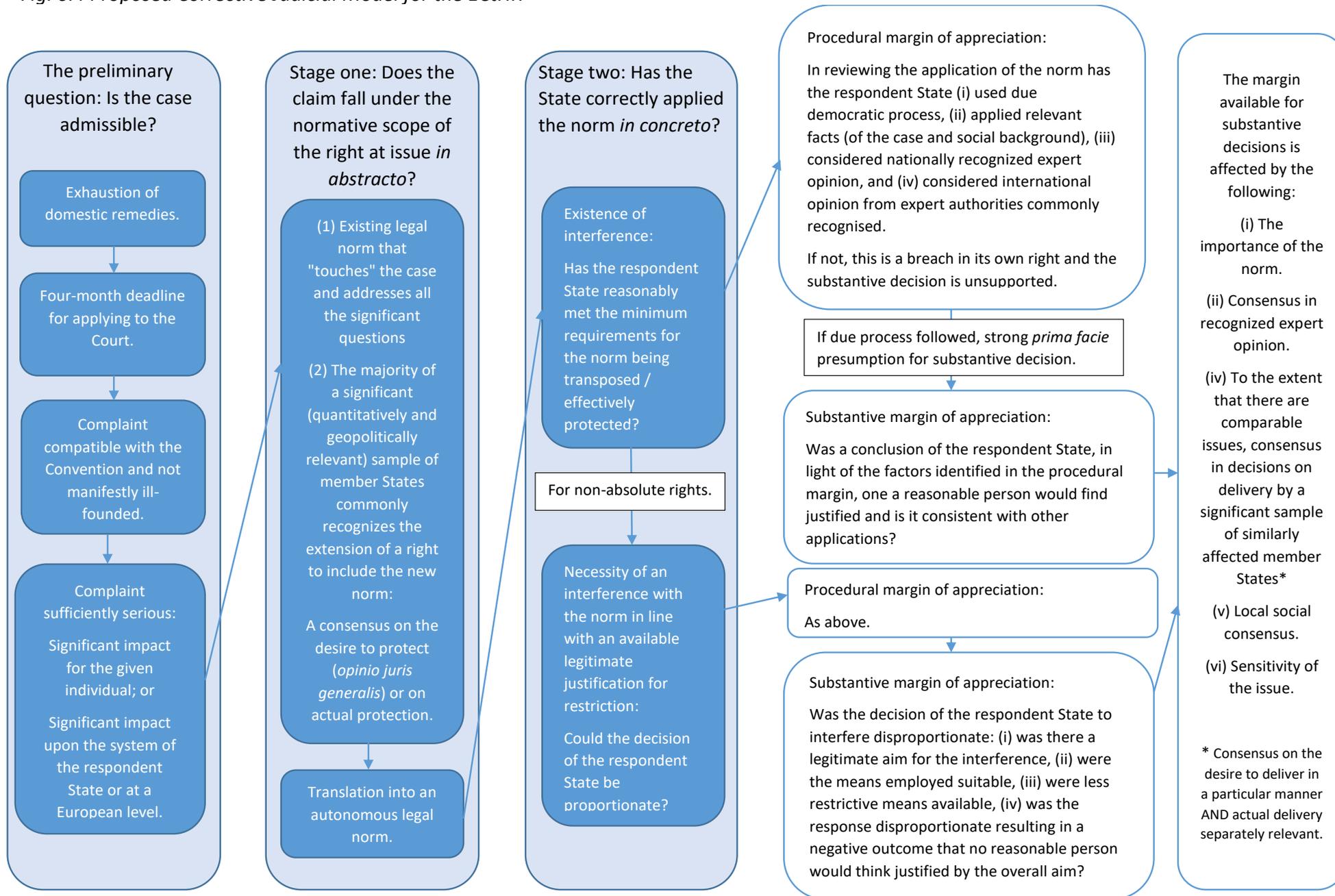
This application stage also introduces the risk, in moving beyond questions of interpretation that apply to all agents, that the reasoning will be affected by factors such as prejudice, self-interest or fear of the majority of agents overriding the rights of the minority. This means the margin must also include a substantive element. Even if the procedural margin was complied with, the substantive decision ultimately reached via that process may be questioned regarding its reasonableness and its proportionality.

Provided the state has followed the due democratic process, considering relevant evidence, its substantive determination should be *prima facie* presumed acceptable. While the substantive correctness may still be found invalid because of an unreasonable or disproportionate response, the intensity of review would be less. Failure to carry out a democratic review would result in the substantive decision being unsupportable.

In cases where the procedural review was complied with, the work has already noted that there is a presumption that the substantive decision reached should stand, unless it was not one a reasonable person would reach. While the ECtHR must be free to use judicial reasoning to decide of the point, the margin of appreciation left open to the State must be heavily influenced by the absence of consensus on application in similarly affected member states and consistency in recognized expert opinion.

The outcome of the analysis is a proposed staged judicial model (Fig. 6.4):

Fig. 6.4 Proposed Corrective Judicial Model for the ECtHR



8.2.4 Objective 4 – Evaluation of the proposed model using case law

The framework and proposed judicial model developed allows an evaluation in Chapter Seven of the validity of the ECtHR's current approach, based upon relevant case histories. The work determines from its review of case law that the ECtHR is mindful of the principles set out in the framework and proposed judicial model. The ECtHR does undertake to respect the national democratic process and includes self-limiting, initially, judge-made tools in its rulings. These procedural safeguards include the well-known doctrines of the margin of appreciation and proportionality, and the principles of subsidiary and consensus.

The work does, however, find that the manner of use of these tools and the point in a judgment at which they are applied is, arguably, inconsistent with the framework. Notably, the ECtHR does not have a particular judicial strategy. Furthermore, its approach to settling points such as consensus and the margin of appreciation is unpredictable.

When interpreting the normative scope of right, the ECtHR finds consensus between the member states with varying numerical and geopolitical significance in the evidence presented. Sometimes, very little actual evidence of member state practices is provided or there is over reliance on principles under wider international agreements to which states have not committed. Insufficient account may be taken of a significant minority dissent from the common position. Arguably this results in expanding interpretations of the rights that are not recognised by the states as forming part of the agreement. This may be seen as unlimited growth beyond the project mission, and as undermining trust in the democratic process as a fair and effective system to construct dialectically contingently justified moral norms under the PGC. The concerns of member states arguably have some objective basis.

In the application stage, democratic due process is not always sufficiently factored into the margin left to the state. Where democratic procedure is followed, the state should enjoy a wide discretion in its substantive choice. The procedural margin must form a separate consideration, with clear reference by the ECtHR to whether it is satisfied. For the substantive margin, there is sometimes an artificial or arbitrary reduction, narrowed in part by reliance upon expert opinion that is not recognized by states and reference to a consensus on

standards between states that has not been properly established. The ECtHR does not always recognise where there is disagreement or provide reasons for preferring some sources over others and may, as a result, be too ready to find consensus where it is lacking.

In response to the research question, the issues identified with the current approach of the ECtHR regarding: (1) interpretation of rights beyond evidence of a common democratic consensus on understanding; and (2) the reduced margin of appreciation for application in light of democratic due-process and level of consensus on application has, arguably, resulted in the ECtHR not appearing to clearly work within its remit to promote the PGC via democracy.

These conclusions are in keeping with some of the concerns raised by member states at the 2012 High Level Conference on the Future of the European Court of Human Rights in Brighton, identified in Chapter One:

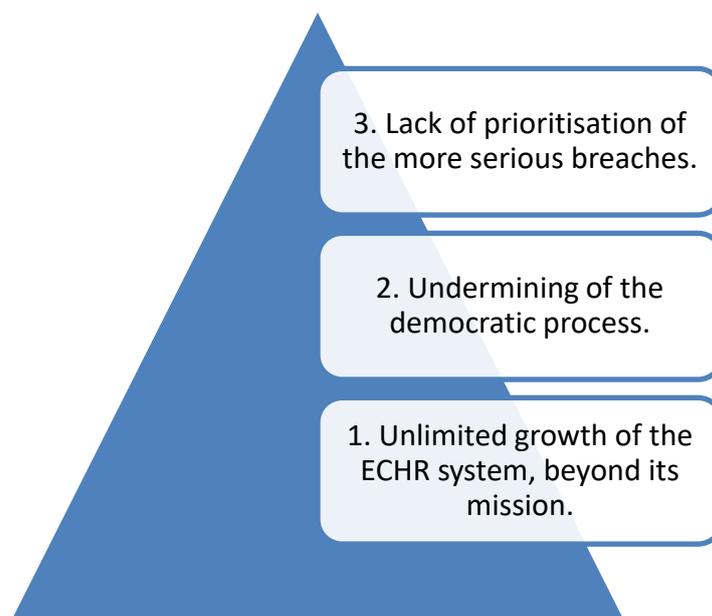


Fig. 1.4 Member State Concerns taken from the Brighton Declaration

Declaration 25 sets out the overall call from the member states:

The Conference therefore [...] Welcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the *clarity and consistency* of judgments are increased even further [emphasis added] ...⁵⁹⁹

The key outcome of that Conference, ECHR Protocol 15, requires an express change to the ECHR so that it makes express reference to subsidiarity and the margin of appreciation.⁶⁰⁰

The relevance of a new model that responds to these calls, which correspond to the framework, is clear. The ECtHR should be under no pressure to push for uniformity faster than the evidence allows, and the checklist of different factors to consider when settling the normative interpretation of a right and the margin for states in the application of the general principles to particular circumstances would provide for more transparent reasoning. The inclusion of principles that the ECtHR already recognized in the model also means that aspects of it are, to some extent, road tested as forming the basis for a workable partnership between the national and ECHR legal systems.

⁵⁹⁹ High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19-20 April 2012), available at <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 19 November 2016.

⁶⁰⁰ Declaration 12 is that, at the end of the ECHR Preamble, a new recital shall be added, which shall read as follows:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

The principle of subsidiarity was also emphasised at the Interlaken and Izmir conferences. High Level Conference on the Future of the European Court of Human Rights, 'Interlaken Declaration' (19 February 2010), available at <http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 19 November 2016.

High Level Conference on the Future of the European Court of Human Rights, 'Izmir Declaration' (26-27 April 2011), available at <http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 19 November 2016.

8.3 Future Areas of Work

While outside the scope of the current project, the framework of analysis reveals some concerns that a judicial model in keeping with the current ECHR regime cannot resolve. There are proposed reforms to the regime, and lessons from other systems, such as the European Union, which may need to be the subject of future consideration.

8.3.1 Yellow and Orange Cards

Under the proposed improved model, in keeping with the framework of analysis, consensus plays a central role in settling normative interpretations of ECHR rights and decisions on their application. However, even if the ECtHR is cautious in declaring new common understandings and standards for delivery, there are likely to be occasions where, despite a lack of objections before the case, serious objections are made afterwards.⁶⁰¹ Should there be a means of taking this into consideration and, within a prescribed and limited period of time, challenging the outcome of an ECtHR judgment?

The European Union introduced additional safeguards for subsidiarity and proportionality in the 2009 Lisbon treaty. The “yellow card” system allows a third or more of EU Member States to jointly, temporarily block draft laws within eight-weeks of the proposals. They submit a reasoned objection to the draft, outlining why the proposal does not fit with the principle of subsidiarity. The draft law must then be reviewed by the EU, which may decide to maintain, amend or withdraw it but only after giving reasons for that decision. The Commission can get around a yellow card by giving clearer justifications for its actions and proposing the law again. If more than half the EU Member States submit reasoned opinions and the institution decides to maintain the proposal, it must submit a reasoned opinion in support of this decision to the

⁶⁰¹ The procedure currently gives ECHR contracting states a right to intervene in any case but with so many judgments each year, it is often not feasible for states to do so before the impact of a decision by the ECtHR becomes clear and the membership is then effectively asking for revision to existing case law.

Council and European Parliament, each of which can defeat the proposal outright if national parliaments agree (the “orange card”).⁶⁰²

In the EU, this system only applies to “new” law, not to the interpretation and application of the requirements of law by the Court of Justice of the EU. However, the ECHR system develops its law in absence of an organised political system like that of the EU and is reliant upon the ECtHR to interpret state practices to find common understandings developed in the political systems of the contracting states. It must be accepted that, at times, the reasonable interpretation by the ECtHR of the government purpose behind those practices will not accord with the actual one. Unlike the interpretations of national courts in relation to national legislation, there is at present no way of “fixing” such an error by the legislature intervening and clarifying its purpose. As such, the EU card system has some appeal as a clear brake on the *prima facie* presumption of a majority consensus on an issue. The problem is at what point in or after proceedings could such a card be deployed to avoid delays and uncertainty.

8.3.2 Formal Input into Remedies

A relatively simple suggestion to increase the effectiveness of ECtHR judgments, and in keeping with the principle of subsidiary, is to allow those most closely affected by the outcome of a case to comment on the issue of remedies. While subsidiarity means it is accepted that the state is best placed to ultimately determine an appropriate response, more certainty on what elements that response must address would help with compliance and monitoring. As suggested by Keller and Marti:

[P]ossible negative effects on compliance or for the situation of the applicant could, to a certain extent, be anticipated by allowing both the applicant and the Responding State to comment on the issue of remedies.⁶⁰³

⁶⁰² See R. Raffaeilli, ‘European Parliament Fact Sheet’, (March 2017), available at <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf> accessed 20 May 2017.

⁶⁰³ H. Keller and C. Marti, “Reconceptualising Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments” (2015) *European Journal of International Law* 829, 841.

A time limit for compliance is also suggested, increasing pressure upon states to comply while a judgment still captures the attention of citizens and other member states.

8.3.3 Advisory Judgments Only

The UK Government has suggested that the judgments of the ECtHR should be only advisory (as opposed to mandatory). The work notes that for states with a well-embedded system of democracy and a history of compliance with international law, such an approach would be worthy of full consideration. However, given that Europe is facing a period of significant volatility and heightened challenge, combined with many of the contracting states of the ECHR having a problematic record even with widely accepted moral norms, it is suggested that it is not the time for such a radical change.

In spite of some states not always complying, the reputational costs and political embarrassment that comes from being in clear breach means this is not the norm. The acceptance of decisions as mandatory is a symbolic commitment by the states to a common understanding. The direct influence of the ECtHR's rulings on national legal systems also means that agents are aware of the rights under it, and to remove that link would weaken its incorporation into the thoughts and actions of agents in Europe and potentially stunt the on-going development of the rights and the desired unity.

8.3.4 Advisory Opinions

Protocol 16 would introduce a system allowing the highest courts and tribunals of a contracting state to request directly from the ECtHR an advisory opinion on 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto', in addition to clarifying the ECtHR's case-law.⁶⁰⁴

The given reasons for the change are very much in line with the framework used in this work; to provide further guidance to states by assisting them in avoiding future violations, enhance

⁶⁰⁴ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, paras. 1, 9.

the constitutional role of the ECtHR, and strengthen interactions between the Court and national authorities.⁶⁰⁵

While a significant and important step forward, it is clear that when compared to the preliminary reference procedure of the European Union this process is less integrative. The EU allows all courts and tribunals to make references, references are mandatory when there is no further national judicial remedy, and the preliminary ruling by the Court of Justice of the EU is binding. This is reflected by the fact that there is no individual right of appeal, EU citizens rely on the national courts to give effect to EU law.

Given the current issues of compliance in some of the ECHR contracting states, the positioning of Protocol 16 is appropriate. Even if a more robust version of the advisory opinion could be introduced and accepted by the contracting states someday, it is unlikely that the right of individual petition would be removed, given it is now embedded in the concept of safeguarding human rights. It has been argued that a key character of the ECtHR is that, 'it will hear any case, from anyone who claims to be a victim of the Convention'.⁶⁰⁶

⁶⁰⁵ Committee of Ministers, *Explanatory Report to Protocol No. 16 to the European Convention on Human Rights*, CM(2013)31, 2 April 2013, paras. 1-3.

⁶⁰⁶ Marie-Benedicte Dembour, "'Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' [2002] *European Human Rights Law Review* 604, 621.

While Protocol 14 ECHR has introduced a new admissibility criterion, meaning cases can be declared inadmissible if the applicant did not suffer a significant disadvantage, there was reluctance to be too restrictive in any qualifying criteria.

In their contribution to the Interlaken Conference 2010, the Non-Governmental Organisations (NGOs) stated that:

We oppose proposals: that would undermine the accessibility of the Court such as charging applicants fees, or adding new, more restrictive admissibility criteria. Lack of funds should never be an obstacle for bringing an application before the Court; that would give the Court discretion to decide on which admissible cases it renders judgment [...]

'Preparatory contributions: Interlaken Conference', page 35, available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0108.File.tmp/Brochure_contributions_preparatoires_en.pdf> accessed 20 November 2016.

In the Brighton Declaration, it was confirmed that:

The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights ("the Court") as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention.

8.3.5 Provisional Judgments

An interesting proposal for a new form of judgment was put forward by Lady Justice Arden prior to the Brighton process, the provisional judgment:

There are various ways in which provisional judgments can be used. Under one version, if the decision would significantly develop its jurisprudence, Strasbourg would not issue a binding decision but only a provisional decision [...] In that provisional judgment it would indicate how, provisionally, it proposed to interpret the Convention but give national courts the opportunity, and a generous period of time, to express their view on the practicality of this development.

Another situation is where a provisional judgment will simply indicate that Strasbourg's current view, was that unless there was a change in circumstances, it would decide, in an appropriate case, in say three years' time that a new interpretation would be given to a certain right. Contracting states would be able to intervene in the proceedings when the point next arose for final decision and file submissions for Strasbourg's consideration [...]"⁶⁰⁷

Subject to concerns about the administrative burden of this process⁶⁰⁸, this does appear a very worthwhile possibility to explore, not only for national courts to express views early in the development process but also national parliaments and other interested parties.

High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19-20 April 2012), page 1, available at <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 19 November 2016.

⁶⁰⁷ Lady Justice Arden, *An English Judge in Europe*, An article based on the Neill Lecture given in Oxford at the invitation of All Souls College, Oxford, on 28 February 2014 in celebration of the past Wardenship of Lord Neill of Bladen, available at <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-arden-an-english-judge-in-europe.pdf>> accessed 10 January 2017, pages 29-33.

⁶⁰⁸ The Council of Europe report of the Steering Committee for Human Rights concluded:

Another proposal suggested that the Court could have the possibility to issue provisional judgments. National courts would be given the opportunity to express their views on a Strasbourg decision that would significantly develop jurisprudence, and Contracting Parties would intervene in the proceedings involving a new interpretation of a particular right. It was argued that this would reflect the principle of subsidiarity, and help ensure acceptance by national actors of the development of the case law of the Court. The main arguments against this proposal included that it would lengthen proceedings before the Court, imply the creation of two different classes of judgments (the provisional and the final ones), and diminish the authority of the Court. The existing possibility of referral of cases to the Grand Chamber is a more appropriate legal tool in this context. In addition, the practice of the Court when finding

8.3.6 Redefining the Rights

Finally, the UK has suggested that some of the rights in the ECHR should be redrafted to expressly alter the law that has developed. The corrective model proposed by this work would not have retrospective application, norms already recognised as forming autonomous law can be applied to cases raising no significant new questions. As such, express alteration could be an option. However, such a move would need to be carefully considered and the changes kept to a minimum. It may otherwise start a slippery slope towards the notion that the fundamental human rights developed by democracies in Europe and established as core building-blocks of legal systems are wrong, a dangerous trend for the ECHR if it is to survive and to thrive for another 66 years.

8.4 Contribution of the Work

While it accepted that the framework of analysis and proposed judicial model for the ECtHR may not be accepted as legitimate by all, it is argued that it represents a valuable and credible step forward given: (1) its response to the concerns raised by the contracting states; (2) its adherence to elements in the framework of analysis for the exercise of its legitimate authority, developed from a reasoned inference of the shared member states' government object and purpose; (3) its links with the direction that the ECtHR has already taken to a more limited extent; and (4) its ability to alter the suggested outcome in key cases that generated dissatisfaction and even for reversals. To this extent, the framework and the model have value in making an original contribution to what is likely to be an ongoing debate in terms of

no violation, to signal, in light of the developments underway, that this is a matter/area where there might be a change in its future case law that "needs to be kept under review by Contracting States" was considered a serious counter-argument.

Council of Europe, 'The Longer-Term Future of the System of the European Convention on Human Rights' (adopted December 2015, published June 2016) report of the Steering Committee for Human Rights, page 68, available at <<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4>> accessed 9 May 2018.

analysing ECtHR decisions and in supporting development of improvements in the processes/operation of the Court concerning legitimacy, consistency and hence authority.

Development and validation of the analytical framework and judicial model represented a significant challenge, being based upon extensive and original analysis of existing published work and synthesis with relevant elements of: law process, morally justified legal reasoning and legal institutions. Hence it is proposed that the work represents an appropriate and original contribution to the body of knowledge.

The work has argued that the ECtHR is subject to limitations on its legitimate authority to make rulings in accordance with the object and purpose it has been given by agents, via the member states. Its autonomy is set not only by the express provisions in the text of the ECHR, but also by what can be reasonably inferred about its mandate from the nature of the agreement.

A review of the negotiation and wording of the original agreement indicates that republican liberalism is a reasonably inferable categorisation of the object and purpose and it, in keeping with the express terms, places the promotion and reinforcement of national democracy at the heart of the arrangement.

This has been used to produce a framework of elements for the legitimacy of the ECtHR's rulings which is applied to the current processes of the Court to assess any validity in the concerns raised by member states, the first original contribution of the work.

It is concluded that the process could be appropriately strengthened and a proposed new model for ECtHR rulings has been developed, the second original contribution of the work. The most important changes are: (1) the recognition of two stages to the ECtHR process, interpretation and application, each raising different evidential requirements; (2) evidence of significant majority consensus between the member states is essential to interpreting the normative scope of a right; (3) a separate procedural and substantive margin of appreciation should always be expressly considered in relation to application; (4) correct application of procedural requirements by the member states means a strong *prima facie* presumption that the substantive determination is acceptable; and (5) evidence of the presence or absence of

consensus in the practices of similarly affected member states on an issue must be factored in to determining the reasonableness of the substantive decision.

The two most promising possible future reforms identified by the work, which would be possible only via new express agreement, are identified as relating to formal input by respondent states and applicants in the choice of remedies by the ECtHR and the creation of provisional judgments, an idea put forward by Lady Justice Arden. These judgments would happen before a case even reached the ECtHR, where the Court views that it may soon significantly expand its jurisprudence. This would enable state understandings and practices to be communicated to the ECtHR, reducing the pressure on the Court base its interpretations and standards for delivery on potentially ambiguous government practice. It would also avoid debate taking place in a very public and potentially harmful context, only after a binding judgment has already been given.

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