Chapter 2: Morality-focussed Perspectives: European Consensus as an Infringement on Prepolitical Rights

I. Introduction

I begin with the criticism of European consensus. By setting out the perspective of those commentators who argue *against* its use, it will become possible from the very beginning to highlight areas of tension in which the use of consensus is particularly controversial, and to tease out the epistemological perspective to which consensus is arguably a deliberate counterpoint. I therefore focus, in this chapter, on what I will call the *morality-focussed perspective* on regional human rights adjudication, which underlies the most popular grounds for criticising European consensus: the worry that its use will undermine the substance of regional human rights protection, particularly insofar as minority rights are concerned.

Within the national context, Habermas introduces the morality-focussed perspective as follows. Its proponents "conceive human rights as the expression of moral self-determination" and "postulate the priority of human rights that guarantee the prepolitical liberties of the individual and set limits on the sovereign will of the political legislator".[200] This position has been highly influential in political morality and, above all, in theories of individual rights. It resonates with the idea, already mentioned in Chapter 1 in the context of moral theories of human rights, that individuals have rights merely by virtue of being human.[201] As Amartya Sen has put it, there is "something deeply attractive in the idea that every person any-

200 Habermas, *Between Facts and Norms*, at 99-100.

201 E.g. in different ways Griffin, *On Human Rights*, at 48; John Finnis, *Natural Law & Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), at 198; Michael Boylan, *Natural Human Rights. A Theory* (Cambridge: Cambridge University Press, 2014), at 13; Jack Donnelly, *Universal Human Rights*, 3rd ed. (Ithaca and London: Cornell University Press, 2013), at 7; in the context of European consensus: Brauch, "The Dangerous Search for an Elusive Consensus" at 288; see also the description of this position by Gearty, "Building Consensus on European Consensus" at 448-449.

where in the world, irrespective of […] territorial legislation, has some basic rights".[202]

Of course, the rights contained in the ECHR are not, in a strict sense, prepolitical or (merely) moral: The Convention itself was, after all, created by the consent of the States parties.[203] It could thus be argued "that the ECHR itself is a form of consensus";[204] the ECtHR sometimes makes use of this perspective when emphasising the particular importance of some provisions, as when it argues that Article 2 ECHR (the right to life) "enshrines one of the basic values of the democratic societies making up the Council of Europe".[205] Proponents of the morality-focussed perspective acknowledge and indeed emphasise the consent of the States parties to be bound by the ECHR:[206] their point is not to reduce the legal qualities of the ECHR to a purely moral account. The point, rather, is that moral principles should guide the interpretation of the Convention and the justification of the ECtHR's decisions. Thus identified and justified, the concrete norms of regional human rights law set by the ECtHR would be prepolitical in the double sense of, first, restraining politics at the national level based on, second, moral considerations rather than European consensus.

In this chapter, I will follow this juxtaposition between the morality-focussed perspective and European consensus to give shape to the prior and, by virtue of contrast, the latter. I begin with the morality-focussed perspective's focus on the prepolitical rights of intra-State minorities – its concerns about prejudice, a "tyranny of the majority" and the conception of "minority" at play (II.1.). Because of the transnational vantage point of the ECtHR, these concerns must be broadened to encompass not only in-

202 Amartya Sen, "Elements of a Theory of Human Rights," (2004) 32 *Philosophy & Public Affairs* 315 at 315.

203 On the tension inherent in this, see further Chapter 6, III. in the context of human rights law more generally.

204 Christian Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 77.

205 ECtHR (GC), Appl. No. 56080/13 – *Lopes de Sousa Fernandes v. Portugal*, Judgment of 19 December 2017, at para. 164.

206 See the commitment-based argument in George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy," in *Constituting Europe. The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013) at 136.

tra-State majorities, but also other domestic processes and institutions such as courts. The rationale for opposing European consensus, however, remains similar to that for opposing majority decisions in matters affecting the relationship between majority and minority within any given State: The verticality of European consensus, on the basis of the morality-focussed perspective, appears paradoxical because the ECtHR refers back to the very States parties it is supposed to be supervising (II.2.). More generally, this implies a role for regional human rights law in which the ECtHR is conceived of as primarily critical and confrontational: any given State party's political decisions and legal system could be subject to review by the Court, and European consensus is conceptualised as merely the sum of these parts, and hence likewise subject to criticism rather than a justificatory element for the ECtHR. This, in turn, implies an epistemology which strongly emphasises the is-ought distinction and follows a strict form of normativity which leaves no room for elements which are conceived of as factual (II.3.).

In principle, these critical points apply to any use of European consensus; but because the primary concern of the morality-focussed perspective is to prevent the infringement of prepolitical minority rights, it takes issue, in particular, with the rein effect of consensus which prevents the vindication of such rights.[207] The morality-focussed perspective's take on the spur effect, which constitutes an argument *in favour* of finding a violation of the Convention, is more ambivalent: While European consensus is still not accorded independent force as a normative argument, it seems less suspect and is sometimes admitted as a secondary consideration so long as it corroborates independently established normative standards (III.). This raises the question of how to establish these standards in the first place, and who should be competent to do so: questions which will lead us towards the morality-focussed perspective's main rival, the ethos-focussed perspective (IV.).

II. Morality-focussed Criticism of European Consensus

1. Minority Rights and the Tyranny of the Majority

When Habermas introduces the morality-focussed perspective as based on "the priority of human rights that guarantee the prepolitical liberties of the

207 For the distinction between rein and spur effect, see Chapter 1, III.

individual and set limits on the sovereign will of the political legislator", he notes that its proponents "invoke the danger of a 'tyranny of the majority'" to justify such limits. Indeed, the dangers of majority rule for such pre-political rights have long been highlighted. Alexis de Tocqueville popularised the phrase "tyranny of the majority" which Habermas mentions.[208] It was taken up, for example, by John Stuart Mill who referred to it as "among the evils against which society requires to be on its guard": there is always the danger, he argues, that the ruling majority may oppress those in the minority within a certain society.[209] The majority, in brief, cannot be *trusted* to uphold minority rights.[210]

This morality-focussed preoccupation with the relationship between intra-State minorities and majorities has been the main ground for criticism of European consensus, particularly insofar as its rein effect is concerned – indeed, the "tyranny of the majority" has explicitly been cited as the underlying problem in that regard.[211] Concerns have been aired, in particular, by Eyal Benvenisti. He does not necessarily oppose the use of European consensus in general, but sees it as "inappropriate when conflicts between majorities and minorities are examined"[212] since consensus refers back to the approaches of the States parties but minority values are "hardly reflected in national policies".[213] In other words: national laws are made by intra-State majorities, so they should not be given normative force in the reason-

208 Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of De la démocratie en Amérique*, trans. James T. Schleifer (Indianapolis: Liberty Fund, 2010), vol. II, chapter 7.

209 John Stuart Mill, "On Liberty," in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) at 8; but see also his cautioning note on the conservative misuse of the phrase "tyranny of the majority" in John Stuart Mill, "De Tocqueville on Democracy in America [II]," in *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society*, ed. John M. Robson (Toronto: University of Toronto Press, 1977) at 156.

210 See Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 103; Ely's theory is hardly a paradigmatic example of the morality-focussed perspective (see infra, note 241), but in this regard, at any rate, there is a certain affinity.

211 Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 96; see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 13 in footnote 51 on the "omnipresen[ce]" of the counter-majoritarian question in debates on consensus.

212 Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," (1999) 31 *New York University Journal of International Law and Politics* 843 at 847 (on the margin of appreciation).

213 Ibid., 851.

ing of the ECtHR which should rather aim to counterbalance national inequalities.[214] To do otherwise would be to further enhance "the inherent deficiencies" of democratic systems.[215]

It is seldom made clear how exactly an intra-State "minority" should be defined (and, of course, its use may vary from one author to the next). On a broad understanding, the protection of human rights by a court such as the ECtHR is conceptually and inescapably concerned with the protection of minorities since it contrasts with majority decisions previously made by individual States;[216] this would be a *functional* understanding of minorities as encompassing any stances that happen to not receive political support at a certain moment. But this is not usually what motivates the concern with minority rights that drives the morality-focussed position:[217] rather, its proponents make use of a more loaded understanding of minorities.

Benvenisti, for example, makes it clear that he does not necessarily oppose the use of European consensus when "certain matters that affect the general population in a given society" are at issue: he cites restrictions on hate speech and statutes of limitations for actions in tort as examples.[218] His understanding of "minorities" is thus more circumscribed than the functional view. He refers to minority *groups* that "tend to be *persistently* outvoted" because they belong to certain ethnic, national or religious communities, or to other "political outcasts" with distinct interests such as gay persons or persons with disabilities.[219] More recently, Benvenisti has also drawn attention to other "outsiders" such as refugees or asylum seekers.[220] Although there is no precise definition, then, the focus is laid on those minority groups that have been traditionally disenfranchised in some way.

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214 Ivana Radačić, "The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups," (2010) 31 *Zb. Prav. fak. Rij. 599* at 600; Joanna N. Erdman, "The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom," (2003) 2 *Journal of Law and Equality* 318 at 346.

215 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 847.

216 See Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," (2014) 14 *Human Rights Law Review* 487 at 488.

217 See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999), at 159.

218 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 847.

219 Ibid., 848-849 (emphasis added).

220 Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy" at 242; see also Buchanan, *The Heart of Human Rights*, at 119-120.

Similarly, Helen Fenwick has noted that giving normative force to European consensus can "lead to acceptance of detrimental treatment of groups traditionally vulnerable to discrimination, including women and sexual minorities".[221]

Both the focus on these traditionally disenfranchised minority groups and the morality-driven concern with ensuring their prepolitical rights also emerge clearly in the argument of George Letsas, specifically in the way he builds on the jurisprudence of Ronald Dworkin in criticising the use of European consensus. Since Dworkin's approach and the context in which it was developed remain pertinent in discussing the controversies surrounding European consensus, it may be helpful to recap them in some detail. Dworkin's theory of rights stands in the tradition of anti-majoritarianism mentioned above: he argues that rights must be prepolitical since they would be devoid of purpose if defeated by an appeal to the majority will. Therefore, on his view, a right "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".[222] Rights are crucial because they represent "the majority's promise to the minorities that their dignity and equality will be respected".[223]

Dworkin developed this argument partly as a response to utilitarianism, a theory that is well-known for being hostile to individual rights given its emphasis on the aggregated good of society as a whole.[224] The argument goes roughly as follows. The appeal of utilitarian theories, according to Dworkin, lies in their ostensible egalitarian nature: everyone's preferences

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221 Helen Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?," (2016) *European Human Rights Law Review* 248 at 249; see also Holning Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference," in *Diversity and European Human Rights. Rewriting Judgments of the ECHR*, ed. Eva Brems (Cambridge: Cambridge University Press, 2012) at 248.

222 Ronald Dworkin, "Taking Rights Seriously," in *Taking Rights Seriously* (London: Bloomsbury, 2013) at 234; see also Ronald Dworkin, "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984) at 166.

223 Dworkin, "Taking Rights Seriously" at 246.

224 See Bentham's infamous dictum that rights are "nonsense on stilts": Jeremy Bentham, "Nonsense upon Stilts, or Pandora's Box Opened," in *The Collected Works of Jeremy Bentham*, ed. Philip Schofield, Catherine Pease-Watkins, and Cyprian Blamires (Oxford: Oxford University Press, 2002) at 330; the classic rights-based response to utilitarianism is John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) e.g. at 24.

are counted equally.[225] At first sight, it might seem that such a view concords with Dworkin's likewise egalitarian approach. However, Dworkin draws a distinction between personal and external preferences. The prior are directly connected to one's own situation, while the latter refer to one's own preferences regarding the situation and opportunities *of other people*.[226] Such external preferences, Dworkin argues, distort the allegedly egalitarianism of utilitarian reasoning: because they make one's opportunities depend on the preferences of other people, different ways of life are not seen as inherently equal but rather dependent on the approval of others.[227] The argument thus reconnects to the anti-majoritarian purpose of rights that Dworkin favoured from the very beginning: utilitarianism fails because it makes individual rights dependent on the external preferences of a society's majority.[228] This is also the gist of Dworkin's famous conceptualisation of rights as "trumps": it gives rights a reason-blocking function which excludes external preferences and hence (insofar as it involves those external preferences) utilitarian reasoning as a ground on which decisions may be based.[229]

Especially in his earlier works, Dworkin seems to deny normative force to any kind of external preferences. However, he also gives special attention to certain situations: in particular, he does not oppose, in theory, a utilitarian argument based solely on personal preferences – but he does claim that utilitarianism will usually fail because personal and external preferences cannot be untangled, which is "especially true when preferences are affected by prejudice".[230] Prejudices are understood as judgements which run counter to foundational moral ideas indicating the moral equality of all persons rather than their inferiority based on morally irrelevant characteristics.[231] H.L.A. Hart brought this aspect to the fore by insisting that only certain kinds of external preferences are normatively problematic in the first place – those influenced by the kind of prejudice which

225 Dworkin, "Rights as Trumps" at 154.
226 Dworkin, "Reverse Discrimination" at 281.
227 Ibid., 282.
228 On Dworkin's connection of utilitarianism and majoritarian democracy, see H.L.A. Hart, "Between Utility and Rights," (1979) 79 *Columbia Law Review* 828 at 837-838; see also, more generally, Jeremy Waldron, "Rights and Majorities: Rousseau Revisited," (1990) 32 *Nomos* 44 at 45-46 and 51.
229 Dworkin, "Reverse Discrimination" at 283; see also Dworkin, "Taking Rights Seriously" at 242; Dworkin, "Rights as Trumps" at 158.
230 Dworkin, "Reverse Discrimination" at 283.
231 Dworkin, "Liberty and Moralism" at 299.

(though Hart does not emphasise this aspect) Dworkin initially integrated into his theory only in a second step, as a device for connecting personal and external preferences. In Hart's own terms, their problem is not one "of the mere externality of the preferences that have tipped the balance but of their content: that is, the liberty-denying and respect-denying content".[232] Dworkin's response to this is not entirely clear: on the one hand, he does not concede Hart's point; but on the other, his response is noticeably devoid of reference to "external preferences". Instead, he retains his anti-majoritarian focus by denying normative force to what is now called "the majority's moralistic preferences about how the minority should live"[233] and again refers to the background assumption that people must be treated as equals.[234]

A further aspect of note in Dworkin's approach is that he refers, throughout, to discrimination as it exists in current societies. The examples he chooses reflect this point: he refers above all to racial minorities and homosexuality, i.e. to minority groups similar to those that Benvenisti is concerned with.[235] The element of disenfranchisement they face is reflected in the fact that prejudices against them are said to be "widespread and pervasive".[236] This is why, in his early writings, Dworkin could make the jump from opposing external preferences to opposing utilitarianism as a whole: he assumed that prejudice such as racism is so inextricably entwined with personal preferences and economic structures that it can never be shown that the utilitarian argument would succeed in the absence of prejudice.[237] In his later writings, too, he advocates rights as a prepolitical bar to legislation in those cases where "the ordinary political process is antecedently likely to reach decisions that […] could not be justified, in political theory, except by assuming that some ways of living are inherently wrong or degrading".[238] This *likelihood* of prejudiced decisions – later explicitly based

232 Hart, "Between Utility and Rights" at 843; see similarly John Hart Ely, "Professor Dworkin's External/Personal Preference Distinction," (1983) *Duke Law Journal* 959 at 985.

233 Dworkin, "Rights as Trumps" at 161; he also speaks of "political preferences" (at 158); in Ronald Dworkin, *Law's Empire* (Oxford: Hart, 1986), at 384-386, the focus is directly on preferences arising from prejudices.

234 Dworkin, "Rights as Trumps" at 162.

235 On the significance of this point in understanding Dworkin's theory as a whole see Kennedy, *A Critique of Adjudication (fin de siècle)*, at 127-129.

236 Dworkin, "Reverse Discrimination" at 284.

237 Ibid., 285.

238 Dworkin, "Rights as Trumps" at 163

on an argument from history[239] – is an empirical assessment referring to the regular discrimination of certain minority groups.[240]

All this illustrates the difficulty in pinning down a precise understanding of those "minority" rights which the morality-focussed perspective takes as central when it invokes the "tyranny of the majority". Although the point of departure is the individual – *any* individual – and there are vestiges of the broad, functional understanding of a "minority", for example in Dworkin's early insistence that *any* external preferences should be trumped by rights, the focus ultimately shifts to a more restricted understanding. While not an exact definition, Dworkin's account helps to crystallise two characteristics of a minority in this more loaded sense: firstly, it is discriminated against in a way that suggests its alleged moral inferiority, in contrast to the fundamental idea of moral equality (a *normative element*);[241] and secondly, there is widespread prejudice against it embedded within society (an *empirical element*, often backed up by a historical retrospective). The exact formulations of both these elements may vary, but the reference to both of them is recurring, both in Dworkin's writing and in other references to minorities.[242]

As mentioned above, George Letsas has explicitly built on this Dworkinian framework in order to develop a criticism of European consensus.[243] He takes up the typically liberal anti-majoritarian framework for rights, arguing that "it makes no sense to allow the majority itself to decide

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239 Dworkin, *Law's Empire*, at 384 and 396; see also the appeal to history by Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 96; Buchanan, *The Heart of Human Rights*, at 90.

240 See Hart's criticism that on Dworkin's view, rights will depend on what "prejudices are current and likely at any given time in any given society": Hart, "Between Utility and Rights" at 840; Dworkin would accept this as a positive aspect of his theory: Dworkin, *Law's Empire*, at 396.

241 Ely differs from fully-fledged proponents of the morality-focussed view by denying that the normative element is necessary: Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 153-154; the appeal to normative self-evidence within the very same passage, however, makes this approach questionable; see also Paul Brest, "The Substance of Process," (1981) 42 *Ohio State Law Journal* 131.

242 See also Lourdes Peroni and Alexandra Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," (2013) 11 *International Journal of Constitutional Law* 1056 at 1059 on descriptive and prescriptive aspects of "vulnerability".

243 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 5 and 110-119.

what rights individuals have in controversial legal cases".[244] On the basis of Dworkin's theory of rights, the morality-focussed objection to European consensus can be put as follows. Rights should be seen as trumps that prevent certain reasons – in particular, prejudiced external preferences – from unfolding normative force.[245] It follows that European consensus should not be used in interpreting the ECHR because "consensus in each Contracting State – and across Contracting States generally – is bound to contain hostile external preferences" vis-à-vis certain minorities such as gay people, trans persons, or those adhering to unpopular religions.[246] Because such minorities are commonly discriminated against and "cannot bring about a change in domestic law through legislative process" (the empirical element),[247] the national laws that make up European consensus are likely to reflect the intra-State majority's view that they "should not enjoy some liberty on the basis that their plan of life is inferior" (the normative element).[248] Simply put: the use of consensus "might well give effect to biased and prejudiced considerations"[249] – precisely those considerations that rights as trumps are supposed to prevent from gaining normative force.[250]

The criticisms by Benvenisti and Fenwick, discussed above, can also be viewed through this framework. Benvenisti refers to "traditional" minorities that are "persistently" outvoted and other "political outcasts": groups that are commonly disenfranchised, as I noted above, which constitutes the empirical element. The normative element is more implicit in his account, but it shines through, for example, when he describes gay people as "seek[ing] society's recognition and respect" – recognition and respect which, it remains unsaid, is currently being denied on the basis of the al-

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244 Ibid., 119; see also Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 123.

245 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 102.

246 Ibid., 121.

247 Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 123.

248 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 121.

249 George Letsas, "No Human Right to Adopt?," (2008) 1 *UCL Human Rights Review* 135 at 149; see similarly (less focussed on minorities, but likewise questioning States' good intentions) Paul Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus" (Dialogue between judges, European Court of Human Rights, 2008), at 58.

250 George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer," (2010) 21 *European Journal of International Law* 509 at 540.

leged immorality of gay people.[251] Both the normative and the empirical element are likewise present in Fenwick's reference to "groups traditionally vulnerable to discrimination":[252] discrimination, in its loaded sense as different treatment that is *unjustified*,[253] carries the normative element within it, while the *traditional* vulnerability to discrimination encompasses the empirical element. Fenwick's account is also helpful in that it explicitly includes women as a group traditionally vulnerable to discrimination,[254] thus making plain that talk of "minorities" need not be understood in a numerical sense. Small numbers may be an indication of political disenfranchisement;[255] however, given how deep-rooted and pervasive the discrimination of women is, their numbers alone cannot be decisive.[256] Insofar as both the normative and the empirical element are considered to be present, proponents of the morality-focussed perspective are likely to invoke the danger of a hegemony of the majority regardless, in principle, of how many people are concerned.

Finally, it is worth noting that many of the examples discussed thus far pertain to minorities that can be subsumed under what is commonly called "identity politics", i.e. minorities with an allegedly coherent group identity. Certainly the "assess[ment of] group identity claims" is often made "according to the unfounded presumptions and stereotypes held by dominant cultural groups"[257] so that this is one important case of a minority in the more loaded sense discussed here; the examples commonly given by critics of European consensus (women's rights, gay rights, trans rights, rights of disabled persons, rights of ethnic or religious minorities) reflect

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251 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 848; see also his description of the majority as "questioning [the] different culture and tradition" of ethnic minorities.

252 Supra, note 221.

253 See ECtHR (Plenary), Appl. Nos. 1474/62 et al. – *Belgian Linguistics Case (Merits)*, Judgment of 23 July 1968, at para. 10.

254 Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 249; see also, in the context of European consensus, Radačić, "Rights of the Vulnerable Groups" at 600; and, more generally, Dworkin, "Liberty and Moralism" at 299; Dworkin, *Law's Empire*, at 386.

255 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 848; Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 123.

256 Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 248.

257 Avigail Eisenberg, *Reasons of Identity. A Normative Guide to the Political & Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009), at 2.

this. However, the examples given also demonstrate that a "minority" can be understood more broadly, so long as a case can be made out that both the normative and the empirical element discussed above are present with regard to a certain person, group, situation or practice.[258] Benvenisti mentions those who "seek better procedural guarantees of due process in criminal trials",[259] and Letsas points to the confiscation and seizure of obscene books or paintings as involving the moralistic preferences of the majority.[260] Ian Cram sees a counter-majoritarian role for the ECtHR in cases involving unpopular or dissenting opinions.[261] Ambiguities thus remain, depending on how broadly both the normative and the empirical element are interpreted.

We may summarise these arguments as follows. A hallmark of the morality-focussed perspective is its embrace of prepolitical rights that serve to protect individuals against their subjugation by majority rule. Critics of European consensus take up this perspective to ensure the protection of minority rights by the ECtHR. This may be understood to refer, in particular, to those groups or practices that have traditionally been subject to discrimination and prejudice which denies their moral equality – although

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258 While this will not be a focus of mine in what follows, it is important to at least note in passing that ostensibly broad understandings nonetheless retain the typically liberal focus on civil and political rights at the expense of socio-economic rights; one can "watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing", as Ely memorably put it (Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 59); an explicit example in the context of the ECHR is Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 129-130; critically on the prioritisation of civil and political rights e.g. Benjamin Authers and Hilary Charlesworth, "The Crisis and the Quotidian in International Human Rights Law," (2013) 44 *Netherlands Yearbook of International Law* 19; Madeleine Rees and Christine Chinkin, "Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights," (2016) 48 *New York University Journal of International Law and Politics* 1211; Marks, *The Riddle of All Constitutions*, chapter 3; the latter is particularly interesting in the present context, for Marks emphasises the exclusionary effects of socio-economic injustice within democratic processes, which casts a stark light on the absence of such rights in discussions of democratic "outcasts" by liberal proponents of the morality-focussed perspective.

259 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 849.

260 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 121.

261 Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" at 497.

the exact meaning remains fuzzy, and the border between a functional and a more loaded understanding of "minorities" is thus not clearly delineated. Whatever the precise understanding of minorities at issue, the worry is that the States parties' legal systems will reflect discrimination against them – so the ECtHR should not refer back to those legal systems by incorporating European consensus in its reasoning. For the morality-focussed approach, the point of regional human rights is to prevent the discrimination of intra-State minorities – if necessary, against the prevailing majority opinion.

2. Regional Human Rights Law and Distrust of States

In light of the above, it is clear that the morality-focussed view sees it as one major purpose of human rights law to give legal voice to the concerns of minorities that would otherwise struggle to be heard. This is reflected in the criticism of consensus as giving too much normative force to intra-State majority views – a perspective that builds strongly on liberal positions developed in the national context. One can further develop that criticism by shifting one's perspective to the ECHR as a specifically regional instrument of human rights protection. Where Habermas described the morality-focussed view, in the national context, as setting limits on "the sovereign will of the political legislator",[262] the more transnational perspective would be that the ECHR sets limits on the sovereign will of States.

The additional transnational aspect can be exemplified by the transition from Dworkin's approach (initially developed for national law) to that of George Letsas (specifically developed for the ECHR). Dworkin argues that the purpose of (national) law and rights is "to guide and constrain the power of *government*".[263] Letsas takes up the gist of this approach, now formulated in transnational terms: "the purpose of human rights treaties is […] to prescribe what a *state* may not do to its own people".[264] Note that I do not intend to set up these specific formulations in strict opposition to one another: in fact, Letsas himself has elsewhere combined them by refer-

262 Habermas, *Between Facts and Norms*, at 100.

263 Dworkin, *Law's Empire*, at 93 (emphasis added).

264 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 9 (emphasis added); see also ibid. at 72-73; on the importance of purposive interpretation, see Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 533.

ring to the accountability of *States* for the violation of rights that individuals have against their *government*.[265] My point is, rather, that the transnationality of the ECHR adds another layer of complexity to the problem.[266]

The transnational aspect of the morality-focussed view takes up the verticality of European consensus that was mentioned in Chapter 1.[267] If human rights are, as Letsas supposes, about constraining States' choices, then why take a comparative survey of those very States to establish what those constraints should be? The verticality of consensus is central here, for it seems paradoxical, when evaluating State conduct, to accord any normative force to precisely that State conduct in the form of European consensus.[268] Carozza has summarised what many proponents of the morality-focussed perspective take to be the main problem: "To base the content of obligations on what the states are actually doing has the potential to amount to no more than a vulgar form of positivism, one that certainly contravenes the spirit of international human rights' normative aspirations and idealism."[269] Or, as Örücü succinctly put it: "Can the ECHR be led by

265 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 540.

266 The procedural side of this includes the requirement to exhaust domestic remedies, Article 35 (1) ECHR, which means (national) judges will typically have already been involved in the matter before the case reaches the ECtHR; on the inclusion of courts in the national ethos that the morality-focussed perspective is sceptical of, see more generally infra, text to notes 277-279.

267 Chapter 1, III.

268 On the paradoxical aspect, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp et al.: Intersentia, 2002), at 196; Antje von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip," (2013) 51 *Archiv des Völkerrechts* 312 at 329; and, at least "at first glance" (my translation), W.J. Ganshof Van der Meersch, "La référence au droit interne des Etats contractants dans la jurisprudence de la Cour européenne des droits de l'homme," (1980) 32 *Revue internationale de droit comparé* 317 at 319.

269 Carozza, "Uses and Misuses of Comparative Law" at 1228; see similarly Macdonald, "The Margin of Appreciation" at 124; Jeffrey A. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law," (2004-2005) 11 *Columbia Journal of European Law* 113 at 146; Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 195; François Ost, "The Original Canons of Interpretation of the European Court of Human Rights," in *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions*, ed. Mireille Delmas-Marty (Dordrecht et al.:

what it is to govern?"[270] Precisely because of this verticality, consensus is seen as "incompatible with the Convention's aim of providing protection of certain fundamental rights"[271] or as an "obstacle for the effective protection of Convention rights".[272]

What all these criticisms reveal is, at heart, a *distrust* of States – as Marko Milanovic has provocatively summarised Antonio Cassese's views, "States cannot be trusted […]. It is perhaps only a slight exaggeration to say that states are the enemy, the problem that needs fixing".[273] The reasoning for that distrust runs in parallel, at a more general level, to that we have already encountered in the morality-focussed perspective on the tensions between intra-State minorities and majorities. Within that focus on individual States, one argument in favour of prepolitical rights was that majorities should not be the judge in their own cause.[274] In particular, on the Dworkinian approach sketched above, the problem is that majority decisions are likely to contain prejudice against certain minorities. Whether this is the case should not be judged by the majority itself, since "one is less likely to recognize these illegitimate grounds in [one]self than in others".[275] One possible way of institutionalising minority rights is therefore the creation of a relatively strong constitutional court, or other forms of judicial or for that matter non-judicial oversight vis-à-vis the majoritarian legislature.[276]

However, especially when prejudice against certain minorities is strong, constitutional and other forms of review may still fail to provide redress: judges, being recruited from much the same societal strata as legislators,

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Kluwer, 1992) at 308; McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" at 691; see also (as advocatus diaboli) Angelika Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte," (2012) 3 *Zeitschrift für rechtswissenschaftliche Forschung* 197 at 206.

270 Örücü, "Whither Comparativism in Human Rights Cases?" at 239.

271 Daniel Regan, "'European Consensus': A Worthy Endeavour for the European Court of Human Rights?," (2011) 14 *Trinity College Law Review* 51 at 52.

272 Radačić, "Rights of the Vulnerable Groups" at 600.

273 Marko Milanovic, "On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese's Last Book," (2012) 23 *European Journal of International Law* 1033 at 1046.

274 Dworkin, "Constitutional Cases" at 175; Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 119.

275 Dworkin, "Liberty and Moralism" at 303.

276 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 118-119.

may fall prey to the same prejudices.[277] Benvenisti has argued that in those cases where the national judicial process – "itself dominated by judges of the majority" – fails to protect such groups, "international judicial and monitoring organs are often their last resort and only reliable avenue of redress".[278] In this way, distrust is extended, from the transnational vantage point, to individual States as a whole. In avoiding the use of European consensus, the aim is to not only prevent intra-State political majorities (legislative majorities or the "government", in the phrasing by Dworkin and Letsas cited above), but also States as a whole from being judges in their own cause.[279]

It is true, of course, that the use of European consensus does not necessarily equal giving the States parties carte blanche to do as they please entirely. Proponents of consensus argue, in particular, that the danger of circumventing human rights standards is mitigated by the fact that consensus refers not to a single respondent State but rather to the community of States parties as a whole.[280] This has not convinced critics that minority rights will be any less endangered, but it has important conceptual implications. Dworkin's argument dealt with distrust of the government within an individual State, especially within the United States of America. Why should there be occasion for distrust? As we saw above, empirical support for Dworkin's assumptions was derived from his referral to forms of prejudice and discrimination actually found within society, particularly in light of historical retrospective: his focus was on groups that have been "historically the target of prejudice" in the United States.[281]

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277 See Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 168.

278 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 848.

279 See (albeit in a different argumentative context) Buchanan, *The Heart of Human Rights*, at 113.

280 E.g. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115; see also the more critical stance taken by proponents of European consensus on what they call "internal consensus" within a single State: e.g. Kanstantsin Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights," (2011) *Public Law* 534 at 552 (basing his argument on the tyranny of the majority); Fiona de Londras and Kanstantsin Dzehtsiarou, "Grand Chamber of the European Court of Human Rights: A, B & C v Ireland, Decision of 17 December 2010," (2013) 62 *International and Comparative Law Quarterly* 250; more on this move from national ethe to a pan-European ethos in Chapter 3, IV.3.

281 Dworkin, *Law's Empire*, at 396.

Similar arguments based on historical failures are made when criticising European consensus: for example, Carozza has stated that the "history of the human rights movement makes it lamentably obvious that even large groups of states might share similar internal norms that all violate some basic aspect of human dignity".[282] But, given the transnational context, the focus has shifted. If certain forms of discrimination were to be found only in individual States, then the consensus argument would, in fact, serve to protect the minority in question – it would unfold its "spur effect" rather than the "rein effect" we are considering here. As Carozza rightly emphasises, the empirical assumption underlying criticisms of European consensus is therefore that the majority of national laws will reflect prejudices vis-à-vis the *same* minorities. This is why Letsas claims not only that hostile external preferences will be found within the legal systems of individual States parties to the ECHR, but "across Contracting States generally".[283] The underlying empirical assumptions are given a broader reach.

In sum: the morality-focussed approach builds on a distrust of States due to which their actions must, on this view, be constrained. The presumed purpose of the ECHR reflects this: it is proposed that the human rights contained therein, prepolitical precisely in order to be removed from the political arenas tainted by distrust, serve to constrain the behaviour of States. The argument in favour of prepolitical minority rights discussed in the last section then emerges as a paradigmatic example of this more general approach – a case where distrust of the majority is seen as particularly appropriate. When transferred to the transnational level in criticising the use of European consensus, this involves the assumption that the States parties to the ECHR will fall prey to *similar* prejudices, tainting their national laws in such a way that they should not be given normative force even when viewed collectively.

3. The Is-Ought Distinction and Strict Normativity

Taking the morality-focussed view implies a certain epistemological approach – as Habermas put it, "the moral-cognitive moment predominates".[284] Such epistemological assumptions come through very clearly in

282 Carozza, "Uses and Misuses of Comparative Law" at 1228.
283 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 121.
284 Habermas, *Between Facts and Norms*, at 100

morality-focussed criticism of European consensus, and this subsection is dedicated to spelling them out. Not all those cited above as articulating morality-focussed reasoning will necessarily have in mind a particular, principled epistemological approach, of course; their concern may be more pragmatic, with epistemological elements following as an afterthought from the focus on minority rights. Therefore, it will once more prove helpful to put the spotlight on the argument of George Letsas, for its proximity to Ronald Dworkin's jurisprudence gives it a theoretical foundation that is particularly well-developed and thus lends itself to analysis.

Developing the framework that Dworkin had devised at the national level, Letsas argues that "the ECHR enshrines human rights that are both legal and liberal […]. Legality and liberalism are objective values of political morality that should shape and guide the interpretation of the ECHR".[285] These objective values take pride of place, leading Letsas to conclude that "legal truth transcends communal understanding and acceptance".[286] He develops the slogan: "Truth Not […] Consensus".[287] At a more general level, Dworkin later put the matter thus: "I believe that there are objective truths about value. I believe that some institutions really are unjust and some acts really are wrong no matter how many people believe that they are not."[288]

There are two aspects of particular note here. The first is the explicit reliance on "objective values of political morality" or moral truth. The belief that such a strong form of normativity should guide the ECtHR is commonplace among critics of European consensus, though often mentioned only in passing. Consider the following examples: "the Court should be guided by the values of autonomy, equality and human dignity, on which international human rights law is based, rather than on the question of consensus";[289] "it would be preferable for the Court to set out autonomous standards of Convention norms and abandon its search for consensus among the Contracting States";[290] "instead of using mathematical formula, the better approach to an autonomous interpretation of the convention is

285 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 5.
286 Ibid., 52.
287 Ibid., 74; see further infra, III.
288 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011), at 7-8; on the "language of objectivity", see Dworkin, *Law's Empire*, at 81.
289 Radačić, "Rights of the Vulnerable Groups" at 600 (and see also at 611).
290 Regan, "A Worthy Endeavour?" at 52.

to look to its inherent values".[291] What all these quotations have in common is some approving reference to *normative* standards ("the values of autonomy, equality and human dignity", "autonomous standards", or "inherent values" of the Convention), which are then contrasted to the reliance on consensus.

This brings us to the second point: the way in which European consensus is *contrasted* to such normative standards. Arguing as a devil's advocate against consensus, Judge Angelika Nußberger has made this particularly clear by posing the question: is it permissible to derive normative conclusions (how *ought* the ECHR's provisions be interpreted) from the factual circumstances of what the law *is* in the States parties?[292] She is referring, of course, to the old distinction between the *ought* and the *is*. Generally seen as having been firmly established as an epistemological axiom by David Hume,[293] it has served as the baseline for legal theories as different as those of Dworkin[294] and Hans Kelsen.[295] It is no surprise, then, that it should also resurface in the argument advanced by Letsas. While interpretation is conceptualised as inherently normative, European consensus is there introduced as a factual element based on "empirical inquiries".[296]

Needless to say, Letsas recognises that the gap between norms and facts can be bridged: as he puts it, "facts are relevant if […], in the chain of justification, there is ultimately a fact-independent normative reason making them relevant".[297] So the heart of his argument is found in the reasons *not* to make consensus relevant in the justification of the ECtHR's decisions – in particular, as discussed above, to avoid the reference to prejudiced exter-

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291 Beate Rudolf, "European Court of Human Rights: Legal status of postoperative transsexuals," (2003) 1 *International Journal of Constitutional Law* 716 at 721.

292 Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte" at 206.

293 David Hume, "A Treatise of Human Nature," in *Hume. The Essential Philosophical Works* (Ware: Wordsworth, 2011) at 409; for historical contextualisation, see e.g. Finnis, *Natural Law & Natural Rights*, at 37.

294 E.g. Dworkin, *Justice for Hedgehogs*, at 17 and 44.

295 E.g. Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press, 1945), at 37.

296 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 540; see also Frances Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights," (2018) *European Human Rights Law Review* 33 at 34-35 ("fact-dependent approach").

297 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 534; this can be assumed to be the case with regard to the empirical element of identifying relevant minorities, as discussed above.

nal preferences. The formal logic of the is-ought distinction is not itself central. It is nonetheless interesting that Letsas and other critics of consensus frame their arguments along these lines, for the *rhetoric* of the is-ought distinction coheres neatly with the overall approach of the morality-focussed perspective. While this kind of rhetoric is not out of the ordinary for any account which seeks to establish a form of normativity reaching beyond law as it currently stands, the way in which the is-ought distinction is brought to bear on European consensus is perhaps particularly revealing by virtue of how it positions consensus within the relations between the ECtHR and the States parties to the ECHR. To demonstrate, let me once more return to the context in which Dworkin developed the theory of rights on which Letsas builds.

One of the examples that Dworkin frequently recurred to was the vindication of gay rights, specifically the decriminalisation of homosexuality. When he first advocated his theory of rights as trumps, this was a controversial and much-discussed issue. The mainstream debate had been kick-started by the so-called Wolfenden Report, published in 1957, which among other things recommended the decriminalisation of "homosexual behaviour between consenting adults in private".[298] Lord Devlin disputed this conclusion in his Maccabaean Lecture, where he argued that any society is dependent on a "common morality" and may therefore properly legislate on how its members should live their lives.[299] This "common morality" is established from "the viewpoint of the man in the street": a "reasonable" or "right-minded" person.[300] Note that the requirement of reasonableness is *not* understood in the neo-Kantian sense (as *reason-able*) now so familiar to us from its central position in the theory of John Rawls.[301] Rather, Devlin is explicit that a society's "common morality" is established not by philosophical argument or reason but that it should be taken as it stands and "may be largely a matter of feeling".[302] In this way, he arrives at his infamous conclusion that if a society views homosexuality as "a vice so

298 Report of the Departmental Committee on Homosexual Offences and Prostitution (1957), at para. 62.

299 Patrick Devlin, "Morals and the Criminal Law," in *The Enforcement of Morals* (Indianapolis: Liberty Fund, 2009) at 10; for the overall structure of the argument see ibid. at 7-8.

300 Ibid., 15.

301 E.g. Rawls, *Political Liberalism*, at 48-50; see further Chapter 5, II.

302 Devlin, "Morals and the Criminal Law" at 15.

abominable that its mere presence is an offence", then it may criminalise (or, in his words, "eradicate") it.[303]

Devlin himself recognised that, in a sense, this approach makes morality and immorality a question of fact[304] – rather than arguing for a certain position on normative grounds, he would lead us to examine what a given society's current stance on the issue is. Much of the criticism levelled against Devlin focussed on this aspect. H.L.A. Hart, in particular, cited the distinction between "positive" and "critical" morality: the prior referring to the "historical fact"[305] of a morality "actually accepted and shared by a given social group", the latter used to criticise it.[306] Devlin's approach is seen as problematic in large part because it gives such strong force to positive morality and thereby "withdraws [it] from the scope of any moral criticism".[307] The essence of Dworkin's argument in response to Devlin is, in this respect, very similar to that of Hart. He, too, distinguishes positive from critical morality – in his terms, morality in the "anthropological sense" referring descriptively to the attitudes of a certain group, and "in a discriminatory sense" which contrasts with "prejudices, rationalizations, matters of personal aversion or taste, arbitrary stands, and the like" found in anthropological morality and is used normatively for "justification and criticism".[308] The connection to his broader theory of rights as trumps is immediately clear: on Dworkin's terms, Devlin's argument fails because it is dependent on the factually ascertained anthropological morality which is bound to contain the kind of prejudiced external preferences that should

303 Ibid., 17; for a thorough and recent criticism, see Martha C. Nussbaum, *From Disgust to Humanity. Sexual Orientation & Constitutional Law* (Oxford: Oxford University Press, 2010).

304 Devlin, "Morals and the Criminal Law" at 23; see also Devlin, "Democracy and Morality" at 91 and 100.

305 H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), at 24.

306 Ibid., 20; see also Boylan, *Natural Human Rights. A Theory*, at 117 where he criticises accounts of rights in "*descriptive* terms" by noting that on those terms, "[n]o definitive *reason* can be given" (emphases in original); for an application of the notion of critical morality in the context of the ECtHR, see Christopher Nowlin, "The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms," (2002) 24 *Human Rights Quarterly* 264.

307 Hart, *Law, Liberty, and Morality*, at 73; H.L.A. Hart, "Immorality and Treason," in *Morality and the Law*, ed. Richard A. Wasserstrom (Belmont: Wadsworth Publishing, 1971) at 53-54.

308 Dworkin, "Liberty and Moralism" at 297.

be given no argumentative weight.[309] This is precisely the aspect that George Letsas has taken up at the transnational level.

What emerges from all this is the sense that by classifying something as a fact, the morality-focussed perspective sees it as something to be criticised. It has been said that the is-ought distinction itself is historically related to the increased freedom of the human mind which allowed it to gain a "critical edge".[310] Hart and Dworkin explicitly contrast the factually understood positive or anthropological morality with "critical" morality. On this account, anything that *is* remains under scrutiny whether it *ought* to be differently.

Now law is widely recognised as combining both factual and normative elements. Habermas famously indicated as much in the title of his monograph on the discourse theory of law, *Between Facts and Norms* (*Faktizität und Geltung*),[311] and Koskenniemi opens *From Apology to Utopia* by pointing to the relevance, for international law, of both "descriptive theories about the character of social life among States and normative views about the principles of justice which should govern international conduct"[312] – in brief, the tension between "facts and norms in international life".[313] Law can be understood as an institutionalised amalgam of facts and norms. When in action, however, it tends to define itself by its regulatory and hence normative force: it "perceives facts as what actually happens, and requires the separation of rules and facts in the sense that the former prescribe the regulation of the latter".[314]

Accordingly, when it is law itself that is being scrutinised by another (usually hierarchically superior) law, then the tendency will be to emphasise the normativity of the latter, but conversely, the factual element of the prior: Kelsen called this the *relativity* of the is-ought distinction.[315] A clear example may be found within human rights law itself, or even within in-

309 Ibid., 304.
310 Larry Siedentop, *Inventing the Individual. The Origins of Western Liberalism* (London: Penguin, 2015), at 218.
311 Habermas, *Between Facts and Norms*; orig. Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5th ed. (Frankfurt a.M.: Suhrkamp, 2014).
312 Koskenniemi, *From Apology to Utopia*, at 1.
313 Ibid., 4.
314 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), at 111.
315 Hans Kelsen, "Natural Law Doctrine and Legal Positivism," in *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1945) at 393.

ternational law more generally: it is quite uncontroversial that the law of the respondent State in judicial proceedings before regional or international courts be treated as a matter of fact.[316] While nobody would deny that the very same national law is also imbued with normativity within its own legal system, its factual side is emphasised because, in the concrete situation before an international court, it is not itself setting standards but rather being measured against the standards of international law. It is not criticising but being criticised.

Consider now the extension of this approach to European consensus. Given how the ECtHR makes use of it within its reasoning, one might consider that "the real question here is the interpretation and application of the Convention" and hence emphasise the normative side of national laws.[317] One might also retain the focus on the factual element, but introduce it as part of a fact-dependent epistemology rather than the strictly binary is-ought distinction.[318] The morality-focussed approach instead sees European consensus as a factual element within that distinction, and thus distances itself from it even within its epistemological assumptions. By likening consensus to the way in which the law of the respondent State is treated before the ECtHR, the morality-focussed approach draws attention to the fact that it is made up of the national laws of other States parties, *each of which could likewise become a respondent before the ECtHR on the same issue*. The epistemological framework of the morality-focussed view thus rhetorically brings the "critical edge" of the is-ought distinction to bear on

316 Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart, 2013), at 115; see also Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, at 112.

317 Tobias Thienel, "The Burden and Standard of Proof in the European Court of Human Rights," (2007) 50 *German Yearbook of International Law* 543 at 558; contra: Alix Schlüter, "Beweisrechtliche Implikationen der margin of appreciation-Doktrin," (2016) 54 *Archiv des Völkerrechts* 41 at 61; this micro-debate concerns the issue of whether consensus should be established by reference to the law of (factual) evidence or to the principle of "iura novit curia" according to which (normative) legal conclusions are drawn by the Court itself; given its specific doctrinal context pertaining to the ECtHR's rules of procedure, it is only indirectly related to the epistemological issues considered here. For the same reason, the ECtHR's own introduction of the comparative materials that make up consensus under the heading "The Facts" (see e.g. Dean Spielmann, "The European Court of Human Rights: Master of the Law but not of the Facts?" (Speech to the British Institute of International and Comparative Law, 2014)) is not conclusive within a broader context.

318 Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 137; see further Chapter 3, II.

European consensus and serves to illustrate the distrust of States that underlies its approach.

This way of framing the issue not only underlines once more the substantive criticism of consensus, it also ties in with what Habermas called the "moral-cognitive" approach.[319] Normativity is conceptualised as prepolitical and thus independent of volitional elements, the latter being relegated instead to the realm of facts (the "facticity of the existing context", as Habermas puts it[320]). The morality-focussed approach stands in the Kantian tradition according to which, as Seyla Benhabib has summarised it, rights claims are "not about what there *is*", but rather, emphatically, "about the kind of world we reasonably *ought* to want to live in".[321] What *ought* to be can only be known by virtue of normative argument; but such argument can be better or worse.[322] Whether it is adequate must in turn be established by further argument, and so forth. One must proceed in this purely normative and ultimately circular fashion for lack of other possibilities[323] – an aspect that will become particularly relevant in considering the ethos-focussed perspective's response to this epistemology. For now, we may conclude by recalling that the morality-focussed approach allows a categorical distinction to be made between permissible normative argument and factually conceptualised "positive morality": only on normative terms could the latter become relevant.[324] Since the national laws making up European consensus are regarded as tainted by prejudice and thus distrusted, no such bridge between norms and (what is taken to be) facts is built, and consensus is, as a result, considered to have no normative force whatsoever.

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319 Supra, note 284.

320 Habermas, *Between Facts and Norms*, at 156.

321 Seyla Benhabib, "Another Universalism: On the Unity and Diversity of Human Rights," in *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity Press, 2011) at 66 (emphases in original); Habermas names Kant as an example of a more morality-focussed view: Habermas, *Between Facts and Norms*, at 100-101.

322 See the comments on Kantian morality in Philip Allott and others, "Thinking Another World: 'This Cannot Be How the World Was Meant to Be'," (2005) 16 *European Journal of International Law* 255 at 273.

323 Dworkin, *Justice for Hedgehogs*, at 37-38.

324 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 534; see Hart, *Law, Liberty, and Morality*, at 17 and 82.

III. Ambivalent Morality-focussed Perspectives on the Spur Effect

As will have become clear at this point, the main concern of the morality-focussed perspective is the use of human rights law to protect intra-State minorities. Accordingly, critical engagement with European consensus by morality-focussed commentators has been overwhelmingly focussed on its rein effect. When (lack of) consensus "reins in" the ECtHR, it points towards a finding of no violation and may thus, on the morality-focussed view, prevent the acknowledgment of minority rights by giving argumentative weight to intra-State majorities. This has been the main focus of academic criticism of European consensus.

The opposite constellation, in which the spur effect of consensus is employed and it thus provides an argument in favour of finding a violation, has been less discussed by commentators adopting the morality-focussed perspective. Since the spur effect of consensus does not justify a restrictive understanding of the right at issue, it is simply perceived as less relevant – or, more dramatically, as less dangerous. Some critics of European consensus simply do not mention the spur effect at all, but rather focus exclusively on the rein effect and the wide margin of appreciation which it implies.[325] However, it seems clear that the broader theoretical implications of reasoning based on European consensus – for the justification of the ECtHR's judgments and the conceptualisation of regional human rights law as a whole – do not disappear simply because it is used to argue in favour of a violation of the Convention, rather than a finding of no violation. It is thus worth investigating the spur effect from the morality-focussed perspective in more detail.

Perhaps the most obvious approach is to simply replicate the position reached with regard to the rein effect of consensus, i.e. to argue against according it any normative force whatsoever. This would amount to a principled refusal of using European consensus in any context, insisting instead on purely normative argument relating to the right at issue in substance. Indeed, in many critical commentaries one finds such a rhetoric of rejecting consensus *per se*. For example, Jeffrey Brauch argues that use of consensus "endangers human rights" – the primary concern, as usual, is clearly with its rein effect – but continues without further distinction that rights should be protected "no matter what current opinion polls or national

325 E.g. Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards".

laws reflect".[326] Similarly, the slogan of George Letsas – "Truth Not Current Consensus"[327] – makes no distinction between the rein effect and the spur effect in its rejection of consensus; indeed, the fact that it opposes the reference to *current consensus* (in favour of the applicant), and not merely a lack of consensus, underlines its principled opposition to according normative force to consensus in any context. Letsas's opposition to "rights inflation", i.e. the expansion of rights beyond those required by his liberal theory,[328] also implies that he does not approve of the spur effect of consensus, which might expand rights in precisely this way and only serves – on Letsas's account – to dilute the importance of human rights.

Others seem, at least at first glance, to take a different approach. Junko Nozawa has been the most explicit in this regard. Reviewing the ECtHR's case-law on gay rights, her main argument is typical of the morality-focussed perspective. Building on a prepolitical conception of human rights, she opposes the use of consensus in its rein effect due to its negative impact on intra-State minorities: "where there is no uniformity in the discriminatory practice of states on the basis of sexual orientation," as she puts it, the rein effect of consensus "has detrimental effects for the protection of fundamental human rights".[329] However, Nozawa does not oppose the spur effect of consensus: "a clear consensus [in favour of the applicant] remains an important marker for the Court in determining objective standards consistent with its evolutive interpretation".[330] She does not explain this approach in detail, but one important point would seem to be that there is less danger of perpetuating national prejudice when consensus is employed in favour of the individual applicant.[331] A similar motivation might be read into certain extra-judicial comments of Christos Rozakis:

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326 Brauch, "The Dangerous Search for an Elusive Consensus" at 289; see also Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" at 146; Regan, "A Worthy Endeavour?" at 52.

327 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 74.

328 Ibid., 129; see critically infra, note 1640.

329 Junko Nozawa, "Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14," (2013) 29 *Merkourios* 66 at 67.

330 Ibid., 73; see also the overall gist of Helen Fenwick and Daniel Fenwick, "Finding 'East'/'West' Divisions in Council of Europe States on Treatment of Sexual Minorities: The Response of the Strasbourg Court and the Role of Consensus Analysis," (2019) *European Human Rights Law Review* 247.

331 See the juxtaposition at ibid., 74-75.

while not opposed to the use of European consensus in principle, he argues that "in situations where there is no consensus, the Court is free to […] produce its own reasoning",[332] i.e. to use the kind of substantive argument that is dear to the morality-focussed perspective rather than giving normative force to European consensus in its rein effect. Its use with regard to the spur effect, in contrast, does not seem to trouble him.[333]

My impression is that these ostensibly differing approaches within the morality-focussed perspective – the principled rejection of consensus in any context on the one hand and its possible acceptance when used in favour of the applicant on the other – reflect a certain ambivalence and difference of emphasis rather than deep-rooted disagreement. To clarify, let me return once more to the approach of George Letsas, whose account of the spur effect of consensus is tied up with the analysis of certain key judgments by the ECtHR, but nonetheless shines light on the morality-focussed perspective's take on the spur effect more generally. For example, on his reading of *Marckx v. Belgium*, the ECtHR's mention of "common ground […] amongst modern societies"[334] was "a mere addition to a chain of substantive reasoning"[335] – the substantive reasoning being, qua Letsas, the crucial aspect.

This becomes even more clear on his reading of the Court's judgment in *Dudgeon v. the United Kingdom*, which makes reference to "a better understanding, and in consequence an increased tolerance, of homosexual behaviour" as reflected in the decriminalisation of "homosexual practices" across Europe.[336] This amounts to a use of European consensus in its spur effect, since the consensus among the States parties was in favour of the applicant – but Letsas points out that the Court "takes contemporary understanding in Member States to be *better* and not merely different than the time when anti-homosexual legislation was enacted".[337] The description of

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332 Christos L. Rozakis, "Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation," in *La conscience des droits: Mélanges en l'honneur de Jean-Paul Costa* (Paris: Dalloz, 2011) at 536.

333 See his description of the spur effect at ibid., 535-536; Rozakis, "The European Judge as Comparatist" at 272; Rozakis's view is further discussed, in juxtaposition with the ECtHR's usual approach, in Chapter 5, III.2.

334 ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 41.

335 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 78.

336 ECtHR (Plenary), Appl. No. 7525/76 – *Dudgeon*, at para. 60.

337 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 79 (emphasis in original).

consensus as "better" implies its normative evaluation and thus points, once again, to the *primacy of substantive reasoning rather than reliance on consensus as such*.

Whatever one makes of this as an analytic account of the ECtHR's approach,[338] I think it accurately captures the morality-focussed perspective's own take on the spur effect of European consensus and, in fact, can be used to elucidate the ambivalence mentioned above. Because of the primacy of substantive argument, the spur effect of consensus is accepted (only) in so far as it reflects the result which said argument would, in any case, espouse:[339] the existence of European consensus in favour of the applicant can "only corroborate a pre-existing standard inherent in the convention".[340] For example, Ivana Radačić criticises the rein effect of European consensus for its detrimental effects on the rights of vulnerable groups and recommends that the ECtHR should "look instead at the international human rights instruments or progressive developments in comparative jurisprudence on the issue in question".[341] While less focussed on identifying a majority among the States parties than the ECtHR usually is, this nonetheless constitutes an endorsement of the use of "comparative and international law as an indication of a consensus".[342] The key qualifier, however, lies in the adjective "progressive".[343] Like the notion of "better" consensus on Letsas's reading of Dudgeon, it implies an independent normative standard (expressed, in this case, through the temporal lens of progres-

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338 See further Chapter 5, IV.

339 See Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 531.

340 Rudolf, "European Court of Human Rights: Legal status of postoperative transsexuals" at 721; see also (for "intangible rights") Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus" at 65; and see (though empirically rather than normatively) Besson and Graf-Brugère, "Le droit de vote des expatriés, le consensus européen et la marge d'appréciation des États" at 949; Mahoney and Kondak, "Common Ground" at 121.

341 Radačić, "Rights of the Vulnerable Groups" at 612.

342 Ibid., 605, citing *Marckx* and *Goodwin* as examples over the following pages; see similarly Regan, "A Worthy Endeavour?" at 63; Letsas arguably takes a similar approach, though more focussed on international law (on which, see further Chapter 6): Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 540-541; Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 122.

343 For similar vocabulary in the Court's case-law, see e.g. ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at para. 86 on "social progress", as well as the concurring opinion of Judge Turković in that case, at para. 11.

sion) against which the developments in question must be measured before being admitted into the Court's reasoning.[344]

In Dworkinian terms, one might thus conceptualise references to European consensus as a case of concurrent rather than conventional morality. Both involve an agreement on a normative rule, but while the actors involved in the prior "do not count the fact of that agreement as an essential part of their grounds for asserting that rule", those involved in the latter do.[345] By acknowledging references to European consensus only when the direction of the substantive argument is already clear, proponents of the morality-focussed perspective regard it as an aspect that is concurrent to their reasoning, but not essential to it. In a sense, this ties in neatly with the general epistemological assumptions of the morality-focussed perspective: as discussed above, it conceptualises consensus as an issue of fact which should have no place in normative reasoning, unless the gap between the is and the ought is bridged by "a fact-independent normative reason making [it] relevant".[346]

However, one might question the argumentative relevance of European consensus, even in its spur effect, for the morality-focussed views just described.[347] If the normative force of consensus is entirely dependent on its evaluation as a "good" or "progressive" consensus, then it does not have normative force in and of itself at all: rather, it would constitute what oth-

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344 For a general discussion of normatively loaded qualifiers describing developments in international law as progress, see Tilmann Altwicker and Oliver Diggelmann, "How is Progress Constructed in International Legal Scholarship?," (2014) 25 *European Journal of International Law* 425 at 432-434; on narrativisation as a legitimising factor of ideology, see Marks, *The Riddle of All Constitutions*, at 19-20. I have previously critiqued a particularly strong instance of such temporal rhetoric in Jens T. Theilen, "Pre-existing Rights and Future Articulations: Temporal Rhetoric in the Struggle for Trans Rights," in *Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric*, ed. Andreas von Arnauld, Kerstin von der Decken, and Mart Susi (Cambridge: Cambridge University Press, 2020).

345 Dworkin, "The Model of Rules II" at 73; see also the discussion in Dworkin, "Rights as Trumps" at 162.

346 Supra, note 297.

347 See Gerards, "Giving Shape to the Notion of 'Shared Responsibility'" at 44 (in footnote 132): "doubtful […] whether such an application can still be considered an example of purely consensus-based reasoning"; see also Dinah Shelton, "The Boundaries of Human Rights Jurisdiction in Europe," (2003) 13 *Duke Journal of Comparative and International Law* 95 at 134; Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 12.

er commentators have deemed a merely "decorative"[348] use of consensus. My point here is not to raise charges of cherry-picking in the sense of discussing potential disparities between processes of discovery and processes of justification;[349] rather, I am interested in the ambivalence of the morality-focussed perspective with regard to the reference to European consensus within the ECtHR's judgments (i.e. its process of justification) in cases involving the spur effect.

Based on the above analysis, I would suggest that the conceptualisation of consensus as a form of concurrent morality is the main source of this ambivalence. On the one hand, the spur effect is perceived as less of a danger to the rights of intra-State minorities than the rein effect – or even, in cases like *Dudgeon*, to assist in justifying such rights. On the other hand, consensus is not given independent normative force as part of that justification, so its presence seems somewhat out of place: as Dworkin warned in a different context, it may "distort the claim" being made in cases of concurrent morality when societal consensus figures in the justification of the normative claim.[350] Or, differently put: decorative references to comparative law are seldom (if ever) *purely* decorative but rather take on an argumentative function by virtue of their very inclusion in a Court's process of justification.[351] This oscillation between normative relevance and irrelevance accounts for the morality-focussed perspective's ambivalence when faced with the spur effect of European consensus.

IV. Interim Reflections: Tackling Prejudice

To summarise: the morality-focussed perspective focusses on prepolitical rights of minorities in order to prevent their subjugation by intra-State majorities. In the context of European consensus, this distrust of intra-State majorities is extended to a distrust of States more generally; they are con-

348 Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" at 88.

349 See Chapter 1, IV.5.

350 Dworkin, "The Model of Rules II" at 73

351 See Ed Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 53; Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" at 94.

ceptualised as potential respondents whose laws as they stand should be scrutinised with a view to changing and improving them, rather than giving them normative force by way of European consensus. The ECtHR, on this view, should identify the values of political morality underlying the ECHR, and justify its decisions by reference to those values rather than the factually-oriented argument based on consensus. The case for this is particularly clear when the rein effect is at issue, since it may prevent the ECtHR from finding a violation where minority rights could otherwise have been protected. The morality-focussed perspective takes a more ambivalent position on the spur effect, which seems less likely to directly endanger minority rights in this way even though it still does not cohere with the morality-focussed perspective's underlying epistemology.

Rather tellingly, criticism of consensus along the lines just sketched is often voiced in comments dealing specifically with individual cases or lines of case-law[352] – academics dealing primarily with substantive rights, one might hypothesise, have had copious contact with the various forms of

352 Some examples on gay rights: Nozawa, "Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14" at 73-75; Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 249 and 270; Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria" at 173; Emmanuelle Bribosia, Isabelle Rorive, and Laura Van den Eynde, "Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience," (2014) 32 *Berkeley Journal of International Law* 1 at 18; on religious minorities: Tom Lewis, "What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation," (2007) 56 *International and Comparative Law Quarterly* 395 at 405; Kristin Henrard, "How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion," (2015) 4 *Oxford Journal of Law and Religion* 398 at 414; Antje von Ungern-Sternberg, "Anmerkung zu S.A.S. ./. Frankreich - Burkaverbot," (2015) *MenschenrechtsMagazin* 61 at 63; on criminalisation of incest: Shu-Perng Hwang, "Grundrechtsschutz unter der Voraussetzung des europäischen Grundkonsenses?," (2013) *Europarecht* 307 at 314; on trans rights: Rudolf, "European Court of Human Rights: Legal status of postoperative transsexuals" at 721; Erdman, "The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom" at 346; Jens T. Theilen, "Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition," (2018) *European Human Rights Law Review* 249 at 256-257; on data protection: Karen C. Burke, "Secret Surveillance and the European Convention on Human Rights," (1980-1981) 33 *Stanford Law Review* 1113 at 1133; on free speech: Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" at 493-494.

prejudice obstructing the development of such rights and therefore have less patience for the relatively formal argument from consensus,[353] instead placing their hopes on the ECtHR as an external institution which might instigate change. One might see this as an appeal to what Amartya Sen has called "open impartiality": the invocation of judg(e)ments from those "outside the focal group" in order "to avoid parochial bias".[354] In this case, the focal group would be the States parties to the ECHR, and the ECtHR would be conceptualised as external to them, and hence more impartial, by virtue of its status as a court that is both counter-majoritarian and transnational – "an international court distanced from local politics".[355]

The idea of open impartiality may indeed be one important reason for States to submit to scrutiny by a transnational court.[356] However, for the cases under consideration here, it is taken as a given that the ECtHR has jurisdiction; the question is, rather, whether it should refer to European consensus in exercising it. As argued above, the distrust of consensus implies that the majority of national laws will reflect prejudices vis-à-vis the *same* minorities; it also implies that not only intra-State majorities, but also national judges are likely to fall prey to prejudices. Against that backdrop, the ECtHR's impartiality-qua-remoteness seems less plausible: why should the ECtHR's judges, themselves elected by the States parties (Article 22 ECHR), be exempt from otherwise widespread prejudice?[357]

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353 This need not, of course, imply a principled epistemological position against consensus in any context, but may instead be restricted to certain (minority) rights in certain scenarios: see supra, II.3., and further Chapter 4, III.2.

354 Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), at 123.

355 Paulo Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights," (2018) *European Human Rights Law Review* 119 at 126; see also Egbert Myjer, "The Succes[s] Story of the European Court: The Times They Are A-Changin'?," (2012) 30 *Netherlands Quarterly of Human Rights* 264 at 270; Masuma Shahid, "The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights," (2017) *Erasmus Law Review* 184 at 193-194.

356 A point which is sometimes made even by critics of the morality-focussed perspective: see Richard Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights," (2014) 25 *European Journal of International Law* 1019 at 1039.

357 See in the national context Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 299; Richard Bellamy, "Republicanism, Democracy, and Constitutionalism," in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (Malden, Mass.: Blackwell, 2008) at 183.

The ECtHR's track record on minority rights does not necessarily serve to allay such doubts. While it has undoubtedly contributed to their advancement is some cases, other judgments have been highly restrictive. In some of these latter cases, at least, it was the substantive reasoning of the Court itself that arguably perpetuated prejudice, while it either did not mention consensus at all – as when it infamously took up anti-Muslim stereotypes and opined that wearing a headscarf "is hard to square with the principle of gender equality"[358] – or it twisted consensus in such a way as to fit the general picture – as when it upheld a burqa ban in public spaces and claimed lack of consensus on the issue in blatant contradiction of the quasi-unanimity in favour of the applicant among States parties' legal systems.[359] Against the backdrop of these and similar judgments, charges of islamophobia have repeatedly been raised against the ECtHR.[360] In various dissenting opinions – typically more overt and expressive than the majority judgment[361] – individual judges have also made flagrantly homophobic remarks.[362] The list could be extended, but the general implication is clear: the ECtHR's transnational status does not shield it from the very prejudices it is supposed, on the morality-focussed view, to combat.

This insight need not undermine criticism of consensus based on the morality-focussed view: two wrongs hardly make a right, and one might well argue that giving normative force to consensus, at least insofar as its

358 ECtHR, Appl. No. 42393/98 – *Dahlab v. Switzerland*, Decision of 15 February 2001, at p. 463.

359 ECtHR (GC), Appl. No. 43835/11 – *S.A.S. v. France*, Judgment of 1 July 2014, at para. 156; more generally on cases of quasi-unanimity, see Chapter 5, III.1.

360 E.g. Alicia Cebada Romero, "The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam," (2013) 11 *New Zealand Journal of Public and International Law* 75; see also Ratna Kapur, *Gender, Alterity and Human Rights* (Cheltenham: Edward Elgar, 2018), at 124; Jens T. Theilen, "Towards Acceptance of Religious Pluralism: The Federal Constitutional Court's Second Judgment on Muslim Teachers Wearing Headscarves," (2015) 58 *German Yearbook of International Law* 503 at 518.

361 Kenji Yoshino, "Of Stranger Spaces," in *Law and the Stranger*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Palo Alto: Stanford University Press, 2010) at 220-221.

362 ECtHR, Appl. Nos. 48420/10, 36516/10, 51671/10 and 59842/10 – *Eweida and Others v. the United Kingdom*, Judgment of 15 January 2013, joint partly dissenting opinion of Judges Vučinić and de Gaetano, at para. 5 (contrasting "gay rights", in scare quotes, with fundamental human rights); ECtHR, Appl. Nos. 67667/09 et al. – *Bayev and Others v. Russia*, Judgment of 20 June 2017, dissenting opinion of Judge Dedov, e.g. at p. 40 (implying a connection between homosexuality and paedophilia).

rein effect is concerned, only exacerbates the problem. Simply put: the ECtHR's judges may or may not be prejudiced with regard to a certain minority group or practice, but the rein effect of European consensus would in either case constitute an obstacle to overcoming prejudice. With regard to the spur effect, things are, again, a tad more complicated. On the one hand, in its pure form, the morality-focussed perspective would continue to admit it, if at all, only as a form of concurrent rather than conventional morality. However, the problem of prejudice among the ECtHR's judges points towards a slightly different position, based on an observer's rather than a (hypothetical) judge's standpoint: perhaps the spur effect of European consensus could also prod the Court to find violations where individual judges' prejudices might otherwise give them pause?[363]

Posing this question refocuses our attention on the institution that makes the decisions at issue in practice. This line of thinking raises questions of who should be in a position to decide what constitutes prejudice and which prepolitical rights minorities have – in other words, who takes on the Herculean role of reaching a decision within the theoretically endless string of normative argument envisaged by the morality-focussed view? Asking what kind of reasons the ECtHR *should* use involves a tendency to conflate the observer's standpoint with that of a (hypothetical) judge: it is tempting to simply argue that the Court *should*, of course, neither make reference to national laws that discriminate against intra-State minorities, nor discriminate itself! But how to deal with disagreement between the observer and the judges as to, for example, what constitutes discrimination? Such questions lead us to the ethos-focussed perspective, which is the subject of the next chapter.

363 See Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge: Cambridge University Press, 2019), at 161-162; however, the malleability of consensus casts some doubts on this line of argument; see e.g. Johnson, *Homosexuality and the European Court of Human Rights*, chapter 3; on various ways in which this malleability manifests, see Chapters 5 to 7.