Chapter 8: Consensus in Context: Autonomous Concepts, the Margin of Appreciation, and Tensions within the Court's Doctrines

"In modern life, margin is everything."[1192]

I. Introduction

Over the course of the three preceding chapters, I have considered how the tensions between the morality-focussed and ethos-focussed perspectives play out with regard to the question of how (lack of) consensus is established – differently put, with regard to the question of whether and how (in the form of the rein effect or the spur effect) consensus is invested with normative force. However, this is not the only area in which these tensions emerge: because European consensus is usually not considered binding in the sense that it *wholly* predetermines the ECtHR's conclusions,[1193] it takes its place within the Court's reasoning *alongside other forms of argument*. Accordingly, in this chapter I would like to re-contextualise consensus to some extent by considering its connection to various doctrinal figures within the ECtHR's case-law, in order to show that the conflicting background assumptions of different kinds of normativity resurface even when consensus is not analysed in isolation.

It is clear that the Court has a plentiful array of varying arguments at its disposal, and I cannot here do justice to all of them. I would like to focus specifically on the kind of substantive argument foregrounded by the morality-focussed perspective, and to show how the interaction between such arguments and European consensus unfolds within the Court's case-law. In a sense, these are the paradigmatic cases of tensions between morality-focussed and ethos-focussed considerations – in contrast to the establishment of consensus where the morality-focussed perspective could be accused of "sneaking in" e.g. by framing its claims as reasonable agree-

1192 As Mrs. Erlynne quite rightly noted, albeit in an entirely different context, in the Second Act of *Lady Windermere's Fan* by Oscar Wilde.

1193 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 256.

ment,[1194] the cases I now have in mind involve a heads-on juxtaposition of different kinds of normativity. My main claim will be that while morality-focussed reasoning and ethos-focussed reasoning can be placed in proximity and connected by doctrinal figures such as autonomous concepts or the margin of appreciation, their epistemological differences persist and render any such combination inherently unstable. In that vein, any use of consensus-based argument can be unsettled by refusing to trust the States parties, emphasising the is-ought distinction and giving more prominence to substantive reasoning which puts their position into question – while any substantive argument can be unsettled by foregrounding reasonable disagreement about the question at issue and hence reverting back to ethical rather than moral normativity.

These tensions play out differently in various doctrinal contexts. As a general caveat, I should note that while the central tenets of the ECtHR's main doctrines seem to be well-established at first glance, scratching the surface often reveals uncertainties as to both their use and their rationales. My purpose here is not to give a comprehensive overview of either the doctrines at issue or the various analyses and assessments of them offered by academic commentators, but merely to introduce them insofar as they relate to European consensus and serve to underline the tensions that arise when it is used alongside other forms of reasoning. I shall consider two main doctrines which I take to be paradigmatically connected to different kinds of normativity: autonomous concepts (II.) and the margin of appreciation (III.). In the case of the first, the tendency is to give stronger weight to the morality-focussed perspective, although this does not fully resolve the tensions mentioned above. In the case of the margin of appreciation, the tendency is to give more weight to the ethos-focussed perspective – hence why use of European consensus has become so strongly associated with the margin of appreciation. In fact, the ethos-focussed perspective helps to explain some of the conceptual difficulties surrounding the margin of appreciation (III.1.). Nonetheless, tensions with the morality-focussed perspective persist here as well, particularly insofar as the rein effect of consensus is at issue (III.2.). In addition, in cases of the spur effect there is a secondary line of tension *within* the ethos-focussed perspective, depending on whether ethical normativity is located at the pan-European level or within the traditions or democratic procedures of the respondent State (III.3.).

1194 See Chapter 5, II.

Particularly in the context of the margin of appreciation, the tensions under discussion often arise in the form of counter-arguments to European consensus – at least this is how academic commentary approaches the case-law. When turning to the case-law itself, however, an analytical difficulty presents itself: it is relatively rare that the ECtHR itself presents European consensus as providing an argument in a certain direction (whether in its rein effect to argue against a violation of the Convention, or in its spur effect to argue in favour of a violation) but nonetheless reaches a contrary conclusion[1195] – in other words, it rarely presents explicit and "successful" counter-arguments to consensus. This fact may not be without significance, and I return to it at the end of the chapter (IV.). Until then, I will discuss a variety of cases which nonetheless demonstrate the triangular tensions at issue in some way, and occasionally refer at length to academic commentary in order to provide a clearer example of the tensions left implicit within the Court's judgments.

II. Autonomous Concepts

I would like to begin by taking up the notion of "autonomous concepts" within the Court's case-law. It captures the Court's approach to the interpretation of certain key terms contained in the Convention – such as "civil rights and obligations" or "criminal charge", the meaning of which is crucial for determining the scope of the right to a fair trial (Article 6 (1) ECHR). I will be fairly brief, for while autonomous concepts had a "tremendous impact" on the scope of Convention rights when they were

1195 See Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 176-177; Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 113; contra Peat, *Comparative Reasoning in International Courts and Tribunals*, at 145-146 who claims that "the Court has ruled contrary to the consensus approach on a number of occasions" but cites only *A, B and C* (in which the ECtHR relied on lack of consensus at a high level of generality, see Chapter 7, III.1.) and *Christine Goodwin* (in which the ECtHR relied on an international trend, see Chapter 5, IV.); similarly, Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court" at 453 et seqq. discusses a number of cases, most of which involve various complications at the level of establishing European consensus (as he notes at 459); at any rate, he does conclude that such cases are "not the norm" (at 460).

first proclaimed,[1196] the notion now seems almost *passé* – after all, there is a limited number of terms contained in the Convention to which it might apply, and the Court has, at this point, established a fairly consistent case-law on most of them. While it still makes reference to autonomous concepts, it usually does so only to then refer to its settled case-law on the interpretation of the term at issue, and goes on to apply the standards set out in prior judgments.[1197] Yet of course, the understanding of these terms is settled only so long as it is not challenged. I will come back to this aspect below; let me first briefly set out the case-law on autonomous concepts and their relation to European consensus, and to the morality-focussed perspective and the ethos-focussed perspective more generally.

A classic and much-cited phrasing is that of the European Commission of Human Rights in an early case. Interpreting the term "civil rights and obligations", it stated that it

> cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relates to an autonomous concept which must be interpreted independently, even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation.[1198]

The Court took a very similar approach in the leading case of *Engel and Others v. the Netherlands*, in which it was confronted with the question whether proceedings classified as merely disciplinary under Dutch law could nonetheless constitute a "criminal charge" for the purposes of Arti-

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1196 Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 304.

1197 E.g. on the established meaning of "home" in Article 8 ECHR as an autonomous concept: ECtHR, Appl. No. 3572/06 – *Paulić v. Croatia*, Judgment of 22 October 2009, at para. 33; ECtHR, Appl. No. 15729/07 – *Globa v. Ukraine*, Judgment of 5 July 2012, at para. 37; ECtHR, Appl. No. 7177/10 – *Brežec v. Croatia*, Judgment of 18 July 2013, at para. 35; ECtHR, Appl. No. 27013/07 – *Winterstein and Others v. France*, Judgment of 17 October 2013, at para. 69; ECtHR, Appl. No. 66610/10 – *Yevgeniy Zakharov v. Russia*, Judgment of 14 March 2017, at para. 30; on the autonomous concept "criminal charge" or "criminal offence" and the *Engel* criteria (see infra, notes 1199-1201), e.g. ECtHR, Appl. No. 46998/08 – *Mikhaylova v. Russia*, Judgment of 19 November 2015, at para. 51; for the notion of "penalty" in Article 7 see e.g. ECtHR (GC), Appl. Nos. 1828/06 et al. – *G.I.E.M. S.R.L. and Others v. Italy*, Judgment of 28 June 2018, at paras. 210-211.

1198 EComHR, Appl. Nos 3134/67 et al. – *Twenty-One Detained Persons v. Germany*, Decision of 6 April 1968, at II.4.

cle 6 ECHR. It ruled very emphatically that the classification exhibited by the respondent State, though not entirely irrelevant, plays only a minimal role in the justification of its decision: it "provides no more than a starting point" and has "only a formal and relative value".[1199] Instead, the Court proposed two substantive criteria which, as it later specified, are "of greater importance" for its conclusions:[1200] the nature of the offence and the severity of the penalty. Crucially for our purposes, it stated in *Engel* that they should "be examined in the light of the common denominator of the respective legislation of the various Contracting States".[1201]

The impression which these statements all give is that the notion of "autonomy" is intended primarily to establish the Court's interpretive freedom to discount classifications made by the legal system of the respondent State: as it later summarised, the terms contained in the Convention "cannot be interpreted solely by reference to the domestic law of the respondent State".[1202] Comparative references to the States parties seen collectively – the "common denominator" or what would now usually be termed common ground or consensus – are, by contrast, presented as significantly more important, and did indeed appear in several subsequent judgments involving autonomous concepts.[1203] The Convention would thus be autonomous vis-à-vis the respondent State, but not vis-à-vis the *collectivity* of

1199 ECtHR (Plenary), Appl. Nos. 5100-5102/71, 5354/72 and 5370/72 – *Engel and Others v. the Netherlands*, Judgment of 8 June 1976, at para. 82; see also e.g. ECtHR (Plenary), Appl. No. 8562/79 – *Feldbrugge v. the Netherlands*, Judgment of 29 May 1986, at para. 28; ECtHR (Plenary), Appl. No. 9384/81 – *Deumeland v. Germany*, Judgment of 29 May 1986, at para. 62.

1200 ECtHR, Appl. No. 13057/87 – *Demicoli v. Malta*, Judgment of 27 August 1991, at para. 33.

1201 ECtHR (Plenary), Appl. Nos. 5100-5102/71, 5354/72 and 5370/72 – *Engel and Others*, at para. 82; see also ECtHR (Plenary), Appl. No. 8544/79 – *Öztürk v. Germany*, Judgment of 21 February 1984, at para. 50.

1202 ECtHR (Plenary), Appl. No. 6232/73 – *König v. Germany*, Judgment of 28 June 1978, at para. 88.

1203 ECtHR (Plenary), Appl. No. 8544/79 – *Öztürk*, at paras. 50 and 53; see also the dissenting opinion of Judge Matscher in that case, arguing for a different interpretation of the vertically comparative references (at para. 2); ECtHR (Plenary), Appl. No. 8562/79 – *Feldbrugge*, at para. 29; ECtHR (Plenary), Appl. No. 9384/81 – *Deumeland*, at para. 63; ECtHR (GC), Appl. No. 63235/00 – *Vilho Eskelinen and Others v. Finland*, Judgment of 19 April 2007, at paras. 57 and 60; ECtHR (GC), Appl. Nos. 68273/14 and 68271/14 – *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, Judgment of 22 December 2020, at paras. 54-60 and 89; see generally Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 359.

States parties. This precisely mirrors the position taken by many proponents of European consensus:[1204] recall, for example, Neuman's argument that "letting each state be the judge of its own human rights obligations" would negate their effect, but that this "does not entail that the […] regional human rights regime must be independent of the regional *community of states*".[1205] On this account, autonomous concepts would, like consensus-based reasoning more generally, amount to an expression of a pan-European ethos.

Yet there are strong countervailing tendencies in the ECtHR's case-law on autonomous concepts. Consider again the reasons for proclaiming autonomy from the legal order of the respondent State: the most obvious reason is that, as Legg has put it, "states cannot merely attach their own labels to squirm out of their treaty obligations",[1206] which would be the consequence of deferring to the classifications made within the legal order of the respondent State – the effect of the Convention would otherwise "potentially be reduced to vanishing point".[1207] The Court itself made a similar point in *Engel*, stating that if "the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal", then "the operation of the fundamental clauses of Articles 6 and 7 […] *would be subordinated to their sovereign will*", which "might lead to results *incompatible with the purpose and object of the Convention*".[1208] In another leading case on autonomous concepts, *Chassagnou and Others v. France*, the Court later reiterated this rationale, this time with reference to the term "association" contained in Article 11 ECHR. It pointed out that

> [i]f Contracting States were able, at their discretion, by classifying an association as 'public' or 'para-administrative', to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Con-

1204 See in more detail Chapter 3, IV.3.

1205 Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115 (emphasis in original).

1206 Legg, *The Margin of Appreciation*, at 111.

1207 Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015), at 203.

1208 ECtHR (Plenary), Appl. Nos. 5100-5102/71, 5354/72 and 5370/72 – *Engel and Others*, at para. 81 (emphasis added); see also e.g. ECtHR (GC), Appl. Nos. 68273/14 and 68271/14 – *Gestur Jónsson and Ragnar Halldór Hall*, at para. 76.

> vention, which is to protect rights that are not theoretical or illusory but practical and effective.[1209]

It is interesting to note that in both these instances, the "Contracting States" are referred to in the *plural* form – while context may point towards the respective respondent State as the primary target of these remarks, they are thus also geared, in a sense, towards the States parties as a whole. One may likewise note the reference to the object and purpose of the Convention and, in *Chassagnou*, the insistence that rights should be "practical and effective". All of this sounds much less ethos-focussed, and rather more reminiscent of the kind of reasoning deployed by the morality-focussed perspective: the Court foregrounds the rights contained in the Convention as independent of the "sovereign will" of the States parties and instead nods towards substantive reasoning – "its own assessment"[1210] – which would give rise to prepolitical human rights. By formulating the distrust of the respondent State's classifications in the plural form, it in fact mirrors a rhetorical strategy often employed by critics of consensus:[1211] it draws attention to the fact that all States parties are *potential respondents*, and thus conceptualises their legal systems as objects of its own judgments rather than a potentially influential factor in justifying them.

On its own, pointing out the use of the plural form in these instances might well be considered something of an overinterpretation; yet it combines with other factors which likewise indicate that the ECtHR might, in cases concerning autonomous concepts, be operating on the basis of the morality-focussed perspective. For one thing, the reasoning just discussed was combined in other cases with an acknowledgment of "the moves towards 'decriminalisation' which are taking place – in extremely varied forms – in the member States of the Council of Europe".[1212] The refusal to subordinate the interpretation of terms contained in the Convention to the States parties' sovereign will, as cited above, followed this acknowledgment and was thus an *explicit response to an argument based on the lack of consensus* – a situation which would usually constitute a strong argument

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1209 ECtHR (GC), Appl. Nos. 25088/94, 28331/95 and 28443/95 – *Chassagnou and Others v. France*, Judgment of 29 April 1999, at para. 100.

1210 ECtHR, Appl. No. 19359/04 – *M. v. Germany*, Judgment of 17 December 2009, at para. 133; ECtHR (GC), Appl. Nos. 10211/12 and 27505/14 – *Ilnseher v. Germany*, Judgment of 4 December 2018, at para. 236.

1211 See Chapter 2, II.3.

1212 ECtHR (Plenary), Appl. No. 8544/79 – *Öztürk*, at para. 49; see also ECtHR, Appl. No. 46998/08 – *Mikhaylova*, at para. 53.

in favour of deferral. Similar argumentative patterns may be discerned in yet other cases dealing with autonomous concepts. For example, in *Pellegrin v. France*, the Court claimed that it must establish an autonomous interpretation so as to avoid, inter alia, "inequality of treatment from one State to another".[1213] Its mission here seems to be precisely to *prevent* divergence among the States parties rather than giving deference to lack of consensus among them – indeed, Janneke Gerards has noted that "[t]he existence of diverging practices here provided an important motive for the Court to offer strong and autonomous protection, rather than a reason to step back and refuse to give a uniform interpretation".[1214] Such an approach is, of course antithetical to the ethos-focussed perspective's insistence on the importance of democratic procedures and the diversity among States which follows from them.

My main point here is to demonstrate the difficulties in combining the morality-focussed and the ethos-focussed perspective. Formally, they are easy to place in juxtaposition, as when the Court states that it must "take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States"[1215] – the former, in light of the citations discussed above, implies substantive reasoning of the kind deployed by the morality-focussed perspective, whereas the latter implies an ethos-focussed scepticism of moral argument and the reliance, instead, on ethical normativity developed at the pan-European level. Yet it is difficult to relate these different forms of normativity to one another in the course of the further reasoning: it is difficult, in other words, to see the States parties *simultaneously* as the location of democratic procedures worthy of deference *and* as potential respondents whose legal systems should be subjected to scrutiny, not given normative force in justifying the ECtHR's judgments. It is entirely in line with this dilemma, for example, when Steven

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1213 ECtHR (GC), Appl. No. 28541/95 – *Pellegrin v. France*, Judgment of 8 December 1999, at paras. 62-63; see also ECtHR (GC), Appl. No. 37575/04 – *Boulois v. Luxembourg*, Judgment of 3 April 2012, joint dissenting opinion of Judges Tulkens and Yudkivska, at para. 10; though in a different way, a similarly unusual use of vertically comparative law can be found in ECtHR (GC), Appl. Nos. 65731/01 and 65900/01 – *Stec and Others v. the United Kingdom (Admissibility)*, Decision of 6 July 2005, at para. 50.

1214 Gerards, "Judicial Deliberations in the European Court of Human Rights" at 433; note that the subsequent judgment in ECtHR (GC), Appl. No. 63235/00 – *Vilho Eskelinen and Others*, which overruled *Pellegrin*, seems somewhat more open to consensus-based argument: see ibid., at paras. 57 and 60; see also Gerards, *General Principles of the European Convention on Human Rights*, at 73-74.

1215 ECtHR (Plenary), Appl. No. 6232/73 – *König*, at para. 89.

Greer describes the "principle of autonomous interpretation" as maintaining that "some of the Convention's key terms should be defined authoritatively by the Court independently of how they may be understood by member states" – but then immediately goes on to acknowledge that this principle is, "in its turn, […] constrained by the principle of commonality" which *does* refer to the States parties' understanding of certain terms.[1216] As Janneke Gerards has put it, the one seems "hardly reconcilable" with the other.[1217]

On the whole, my impression is that the morality-focussed perspective has carried more sway in cases dealing with autonomous concepts.[1218] Any statement as broad as this must of course make certain generalisations, and counter-examples can no doubt be found; yet on the whole, it seems to me that even in those judgments which paid lip service to vertically comparative references, consensus did not play a significant role.[1219] For example, Judge Matscher criticised the majority's approach in *König v. Germany* for

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1216 Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, at 18-19.

1217 Gerards, "Judicial Deliberations in the European Court of Human Rights" at 432.

1218 Though with a slightly different focus, this is also the main analytic claim in Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR"; Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, chapter 2; see also Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, at 203.

1219 Even in the leading cases: *Engel*, although it established the relevance of consensus for autonomous interpretation in theory, contained no comparative references itself on this issue – despite giving them strong argumentative weight with regard to a different aspect: ECtHR (Plenary), Appl. Nos. 5100-5102/71, 5354/72 and 5370/72 – *Engel and Others*, at para. 72; the other leading case, *Chassagnou*, does not mention consensus at all; and even insofar as it might be said to have considered "arguments about deference" (Legg, *The Margin of Appreciation*, at 111), these are found in a different section of the judgment, while the section on autonomous interpretation contains only substantive argument: ECtHR (GC), Appl. Nos. 25088/94, 28331/95 and 28443/95 – *Chassagnou and Others*, at para. 101; similarly in the recent case of ECtHR (GC), Appl. No. 19867/12 – *Moreira Ferreira v. Portugal (no. 2)*, Judgment of 11 July 2017, which does contain references to consensus (at paras. 34-39 and 91), but again not in relation to autonomous interpretation; the high-profile case of ECtHR, Appl. No. 19359/04 – *M.* includes a section on comparative law (at paras. 69-75) but makes no reference to it when discussing autonomous concepts (at paras. 120 and 126) or, for that matter, elsewhere in the judgment; the later case of ECtHR (GC), Appl. Nos. 10211/12 and 27505/14 – *Ilnseher* contains a comparative overview (at para. 98) and mentions the relevance of vertically compara-

giving too much weight to a "teleological interpretation" and thus "venturing into the field of legislative policy", when it should instead have established its "autonomous" interpretation by reference to the "common denominator" as "found through a comparative analysis of the domestic law of the Contracting States".[1220] My hunch is that, given the rhetoric of preventing subordination of the Convention to the will of the States parties – in the plural form, as discussed above – and its importance as the driving rationale behind the ECtHR's case-law on autonomous concepts, that line of case-law became associated with the morality-focussed perspective's distrust of not only the respondent State, but also the States parties as a whole. The ECtHR's classifications thus became, for the most part, autonomous from both, to the point that it is now argued that "it seems conceptually incorrect to carry out comparative exercises in combination with the principle of autonomous interpretation".[1221]

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tive law in the abstract (at para. 210), but makes no use of it and reverts back to the Court's "own assessment" (see supra, note 1210); ECtHR (GC), Appl. Nos. 68273/14 and 68271/14 – *Gestur Jónsson and Ragnar Halldór Hall* also contains relatively detailed comparative references, but refers to them only in passing later on (in the abstract at para. 77 and specifically at para. 89); finally, even cases with unusually detailed vertically comparative references in the context of autonomous concepts often end up being decided on substantive grounds which overrule a lack of consensus: e.g. ECtHR (Plenary), Appl. No. 8562/79 – *Feldbrugge*, at paras. 29-40; ECtHR (Plenary), Appl. No. 9384/81 – *Deumeland*, at paras. 63-74. See also Gerards, *General Principles of the European Convention on Human Rights*, at 71, who speaks of "a very limited number of cases" in which controversy among the States parties negated an autonomous interpretation.

1220 ECtHR (Plenary), Appl. No. 6232/73 – *König*, separate opinion of Judge Matscher.

1221 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 361; see also e.g. Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 179, citing autonomous interpretation as an "obvious alternative" to consensus; Peat, *Comparative Reasoning in International Courts and Tribunals*, at 144, who juxtaposes consensus with autonomous interpretation, the latter "understood in isolation from domestic legal systems"; Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?" at 639, associating autonomous interpretation with the ECtHR providing "one single pan-European definition" so as to prevent "cultural diversity and polyphony" from turning into "Babel"; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 24, who seems to conceptualise consensus-based argument and autonomous interpretation as separate from one another, al-

This claim remains entirely speculative, of course. I bring it up only because it relates to the observation with which I began this subsection: the relative negligibility of references to autonomous concepts in the Court's more recent judgments. In part, this can no doubt be attributed to the existence of settled case-law on formerly controversial issues – yet, as suggested above, challenges to that case-law are constantly underfoot and new interpretative controversies thus continue to abound.[1222] Perhaps the difference is that the Court now operates increasingly from within the ethos-focussed perspective and therefore *avoids the language of autonomous concepts and its morality-focussed connotations* when adjudicating on these issues.

Consider, for example, the case of *Vo v. France* on how negligent harm to a foetus should be treated. The Court held that its decision required a "preliminary examination" of "when life begins, in so far as Article 2 provides that the law must protect 'everyone's right to life'".[1223] This is precisely the kind of issue discussed in the various cases above – the interpretation of a term contained in the Convention (in this case, the term "life" in Article 2 ECHR) and its relation to classifications established by the States parties (in this case, whether unborn life is covered by the term). Yet the majority made no reference to the notion of autonomous concepts, instead stating that "the issue of when the right to life begins comes within the margin of appreciation", based in particular on the vertically comparative argument that "there is no European consensus on the scientific and legal definition of the beginning of life".[1224] The majority thus adopted a strongly ethos-focussed perspective, foregrounding disagreement among the

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though he later views them in tandem: Kanstantsin Dzehtsiarou, "European Consensus: New Horizons," 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 39-40.

1222 Compare e.g. ECtHR (GC), Appl. No. 33804/96 – *Mennitto v. Italy*, Judgment of 5 October 2000, at para. 27 with the dissenting opinion of Judge Ferrari Bravo, joined by Judge Butkevych, in that case. For another recent case of controversy, see ECtHR, Appl. Nos. 12096/14 and 39335/16 – *Rola v. Slovenia*, Judgment of 4 June 2019, as well as the comment by Bas van Bockel, "A Court Divided: Discord and Disagreement in Rola v. Slovenia" (Strasbourg Observers, 2019), available at <https://strasbourgobservers.com/2019/07/09/a-court-divided-discord-and-disagreement-in-rola-v-slovenia/#more-4365>.

1223 ECtHR (GC), Appl. No. 53924/00 – *Vo*, at para. 81.

1224 Ibid., at para. 82.

States parties rather than establishing standards independently of their views.[1225]

Judge Costa, in his separate opinion, adopted a different approach and gave less weight to the lack of consensus: he argued that the Court should instead have been prepared to "identify the *notions* – which may, if necessary, be the *autonomous notions* the Court has always been prepared to use – that correspond to the words or expressions" used in the Convention, and recalled the Court's prior rulings on terms such as "civil rights and obligations" and "criminal charges".[1226] The notion of autonomous concepts thus becomes associated with a morality-focussed approach critical of consensus-based argument,[1227] whereas the majority in *Vo* made use of European consensus but dropped the language of autonomous concepts. A similar structure can arguably be made out in the more recent case of *Boulois v. Luxembourg*: the majority relied, inter alia, on the rein effect of European consensus to establish that prison leave should not be considered a "right" in the sense of Article 6 ECHR.[1228] It made no mention of autonomous concepts, although it was considering the applicability of Article 6 ECHR based on the interpretation of the phrase "civil rights and obligations" – as Judges Tulkens and Yudkivska, writing in dissent, pointed out.[1229]

If my speculative reading of these cases – against the backdrop of the older cases on autonomous concepts – is correct, then it provides a further explanation for the dearth of recent references to autonomous concepts in recent judgments: the notion has simply been displaced in favour of other interpretive and doctrinal figures which are taken to be more open to the ethos-focussed perspective. One move which might be considered a partial "replacement" of the notion of autonomous concepts is the increasing ref-

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1225 In more detail on *Vo* as exemplary of the ethos-focussed perspective, see Chapter 5, III.2.

1226 ECtHR (GC), Appl. No. 53924/00 – *Vo*, separate opinion of Judge Costa joined by Judge Traja, at para. 7 (second emphasis added).

1227 See also ECtHR (GC), Appl. No. 46470/11 – *Parrillo*, dissenting opinion of Judge Sajó, at para. 3 (in footnote 4), where the term "autonomous concept" seems to be used in a non-technical sense precisely to argue against the rein effect of (lack of) European consensus.

1228 ECtHR (GC), Appl. No. 37575/04 – *Boulois*, at para. 102.

1229 Ibid., joint dissenting opinion of Judges Tulkens and Yudkivska, at para. 10; the case is less thorny than *Vo* in relation to consensus, since the disagreement between the majority and the dissenting judges primarily concerns, I think, the weight given to the law of the respondent State.

erence to the Vienna Convention on the Law of Treaties,[1230] which itself reproduces the tensions between the morality-focussed and the ethos-focussed perspective in its own way.[1231] More importantly however, the use of consensus has become associated with the margin of appreciation. Autonomous concepts and the margin of appreciation have long been regarded as "opposites on the same line",[1232] and indeed, the latter has gained increasing prominence even as references to the prior have dwindled – *Vo* provides only one example of this. It is, therefore, to the margin of appreciation that I now turn.

III. The Margin of Appreciation and Convention Standards

1. Two Concepts of the Margin of Appreciation – and of Consensus?

The margin of appreciation is, without a doubt, one of the most important and yet most controversial doctrines developed by the ECtHR. To describe it in brief terms is well-nigh impossible, given how its use has not only evolved over time,[1233] but also varies from case to case within the same period.[1234] Assessing these varying uses and their differing conceptualisations within the academic literature comprehensively is well beyond the scope

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1230 For example, in ECtHR, Appl. No. 26629/95 – *Witold Litwa v. Poland*, Judgment of 4 April 2000, the Court relied primarily on the VCLT (at para. 57) and only subsequently referred, in passing, to the "autonomous meaning" thus established (at para. 76).

1231 I cannot discuss the VCLT in detail here, but see Chapter 6, II. on its Article 31 (3) lit. c and Chapter 10, III.2. on its Article 31 (3) lit. b.

1232 Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 306; see also Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, at 204-205, arguing that autonomous concepts and the margin of appreciation should be considered two "disaggregated" elements.

1233 For an overview, see Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?"; analyses of the recent case-law are e.g. Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?"; Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights".

1234 Critically e.g. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, at 5; Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights" at 325; Patricia Popelier and Catherine Van de Heyning, "Procedural Rational-

of the present study, yet I will give a rough overview insofar as the underlying issues pertain to European consensus. I also leave aside, for the time being, those approaches to the margin of appreciation which emphasise its strategic use, concentrating instead on the principled tensions between the morality-focussed and ethos-focussed perspectives.[1235]

To provide for more analytic clarity in the Court's references to the respondent State's "margin of appreciation", George Letsas has proposed a distinction between what he calls the "structural" and the "substantive" margin. The distinction turns on the reasons given by the ECtHR for its conclusion in a certain case.[1236] Under the structural concept of the margin of appreciation, it establishes "the limits or intensity of [its] review […] in view of its status as an international tribunal";[1237] thus, this concept is at play, in particular, when the Court *defers* to the respondent State without scrutinising the matter at issue in substance[1238] – or applies standards of scrutiny of varying strictness.[1239] The structural margin thus deals with the relationship between the ECtHR, as a regional court, and the national authorities.

By contrast, when the Court rules directly on whether a right was violated in light of a theory of political morality, then the substantive margin is at play.[1240] Ultimately, the Court's references to a margin of appreciation in this sense are intended, qua Letsas, merely to reiterate that (most) Convention rights are not absolute; because the balance between individual rights and the public interest that follows from this limitability will be struck in light of substantive theories of political morality, reference to the margin of appreciation is "superfluous" and "misleading".[1241]

While the ECtHR has never formally ceded Letsas's point and continues to use the language of the margin of appreciation in those situations he deems "superfluous", it must also be noted that most references to the

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ity: Giving Teeth to the Proportionality Analysis," (2013) 9 *European Constitutional Law Review* 230 at 243-244.

1235 For strategic considerations, see Chapters 9 and 10.

1236 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 82.

1237 Ibid., 81.

1238 Ibid., 90.

1239 This aspect of "partial deference" is emphasised in Arnardóttir's response to Letsas's account: Oddný Mjöll Arnardóttir, "Rethinking the Two Margins of Appreciation," (2016) 12 *European Constitutional Law Review* 27 at 47.

1240 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 84.

1241 Ibid., 86 and 88.

margin, both in the Court's case-law and in academic commentary, are more concerned with what Letsas calls the *structural* concept.[1242] This is reflected in the commonly acknowledged connection between the margin of appreciation and the ECtHR's varying standards of scrutiny or intensity of review.[1243] It is also the usual understanding when different factors – such as European consensus – influencing the "width" or "breadth" of the margin of appreciation are discussed,[1244] the latter serving to indicate whether the Court's scrutiny will be strict (narrow margin) or lenient (wide margin). In accordance with Letsas's claim that the "margin of appreciation in itself clearly lacks any normative force that can help us strike a balance between individual rights and public interest",[1245] the *substantive* concept of the margin of appreciation is usually discussed instead by reference to notions such as proportionality or a "fair balance" between competing interests. Accordingly, when I speak without further specification of the margin of appreciation in what follows, then I am referring to ideas of deference and standards of review rather than to the Court's substantive proportionality analysis.

This clarification is important because European consensus has become associated with the margin of appreciation (in the sense of a structural margin determining the Court's intensity of review), to the point that they

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1242 See explicitly ECtHR (GC), Appl. No. 3455/05 – *A. and Others v. the United Kingdom*, Judgment of 19 February 2009, at para. 184: "the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court".

1243 E.g. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 204; Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Martinus Nijhoff, 2003), at 60; Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 105-106; Gerards, *General Principles of the European Convention on Human Rights*, at 196; Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights" at 344; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 145.

1244 E.g. recently Popelier and Van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" at 241-244; McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 24-25; though very dated, the overview by Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" also still proves helpful.

1245 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 86.

have arguably become *overly* intertwined in many accounts.[1246] To be sure, the margin of appreciation is deeply implicated in the ECtHR's use of consensus, and the two are cited alongside one another in an enormous number of cases. In one standard formulation:

> The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.[1247]

Thus, a common rendition of the way in which consensus functions holds that a lack of consensus or a consensus against the applicant will broaden the margin of appreciation, while a consensus in favour of the applicant will restrict it[1248] – in fact, the terminology of a "rein effect" and a "spur effect" that I have been using was developed by reference to the margin, with the authors stating that the vertically comparative analysis "helps to interpret Convention notions and to decide *whether a State's margin of appreciation should be wide or narrow*".[1249]

Yet this is not all that consensus does. In some cases, it is deployed without reference to the margin of appreciation[1250] – and in such a manner that it seems unrelated to the Court's intensity of review regardless of the language used – and occasionally, it is even used in a way that is explicitly *set apart* from the operation of the margin of appreciation. For example, in the case of *Şükran Aydin and Others v. Turkey*, the Court examined the proportionality of criminal sanctions for the use of minority languages during election campaigns. Having emphasised the importance of the free circulation of political opinions, especially in the context of elections, the Court

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1246 See e.g. ECtHR, Appl. No. 57792/15 – *Hamidović*, dissenting opinion of Judge Ranzoni, at para. 29, laying a strong emphasis on the connection between consensus and the breadth of the respondent State's margin with no mention of other uses of consensus.

1247 ECtHR, Appl. No. 8777/79 – *Rasmussen v. Denmark*, Judgment of 28 November 1984, at para. 40; see also e.g. ECtHR, Appl. No. 36515/97 – *Fretté*, at para. 40; ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 98; ECtHR, Appl. No. 22028/04 – *Zaunegger*, at para. 50.

1248 Mahoney and Kondak, "Common Ground" at 127; Popelier and Van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" at 243; Dothan, "Judicial Deference Allows European Consensus to Emerge" at 400.

1249 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251 (emphasis added).

1250 See the cases cited infra, note 1268.

noted that "Turkey stood apart from all of the twenty-two Contracting States surveyed" in the comparative material available to it, and that there was thus a consensus in favour of the applicants.[1251] In light of these arguments and "*notwithstanding* the national authorities' margin of appreciation", it found the Turkish ban to be disproportionate.[1252] Use of the term "notwithstanding", here, seems to me to indicate that consensus constituted an argument *in spite of* the (structural) margin of appreciation, and not as a factor indicating its breadth.[1253] It is thus important to keep in mind that while consensus is often used as a factor determining the ECtHR's intensity of review, this is not its only use and it may also be deployed as part of the Court's substantive argument once the intensity of review has already been established.[1254]

In fact, I would argue that the use of consensus in different, though related, doctrinal contexts within the Court's reasoning reflects the tensions between the various forms of normativity discussed in the preceding chapters, and specifically the way in which these tensions shift depending on whether the spur effect or the rein effect of European consensus is deployed. This claim is based on the observation that *the context in which consensus is most frequently invoked differs according to whether the rein effect or the spur effect is at play*: in cases involving the rein effect, lack of consensus is usually invoked as a factor broadening the (structural) margin of appreciation, which gives more space to the national ethos of the respondent State by lowering the ECtHR's intensity of review and renders further invocation of European consensus during the following substantive assessment largely obsolete. In cases involving the spur effect, by contrast, consensus may be invoked to narrow the margin of appreciation, but it is also and even primarily used to set standards in the substantive assessment which follows by reference to ethical normativity – an aspect of its use which those accounts that link consensus exclusively to the width of the structural margin of appreciation miss. The margin of appreciation thus provides the doctrinal backdrop for the notion of a pan-European ethos to

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1251 ECtHR, Appl. Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09 – *Şükran Aydin and Others v. Turkey*, Judgment of 22 January 2013, at para. 55.

1252 Ibid., at para. 56.

1253 Contrast the way a lack of consensus (on linguistic policies more generally) is directly connected to the margin of appreciation in the same judgment: ibid., at para. 51.

1254 A similar point is made by Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 364.

both *set* certain normative standards at the transnational level in cases of the spur effect of consensus, and to *refrain* from setting such standards in cases involving the rein effect. Let me now develop this argument in slightly more detail.

When the Court identifies a lack of consensus among the States parties (or a consensus in favour of the respondent State) and thus deploys the rein effect, it usually does so in connection to the margin of appreciation: "lack of consensus […] broadens the margin of appreciation".[1255] In cases involving the rein effect, as discussed in Chapters 2 to 4, the main tensions are between the morality-focussed perspective and the ethos-focussed perspective: the prior opposes the use of consensus because it is liable to contain prejudices or moralistic preferences which endanger prepolitical human rights, particularly those of minorities, whereas the latter has no such qualms since it trusts in the democratic procedures within the States parties. Instead, based on a more volitional approach foregrounding political self-determination, it regards the rein effect of consensus as an appropriate safeguard against the external imposition of alleged moral standards, and as an expression of the fact that the ECHR is an instrument of cooperation between the States parties. Because arguments based on the lack of European consensus refer to the States parties as a whole, they make use of the notion of a pan-European ethos; but because they work in favour of the respondent State, they are also compatible with accounts of ethical normativity developed at the national level.

The idea that the ECtHR's intensity of review should be reduced in favour of deferring to the respondent State's democratic choice resonates very strongly with the ethos-focussed perspective in this regard, for it expresses the idea that, at least in some cases, it is "not appropriate for the Court to substitute its judgment on a particular matter for the judgment of the challenged [national] authority".[1256] In other words, it is designed to

1255 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123; see also the cases cited infra, note 1308; note that Letsas primarily connects the ECtHR's references to a *lack* of consensus to the structural margin: Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 91.

1256 Macdonald, "The Margin of Appreciation" at 85; Macdonald is here describing a distinction very similar to the one later used by Letsas, and this phrase describes what the latter would then call the structural concept of the margin of appreciation.

prevent the ECtHR from relying on its own moral theory of rights,[1257] as the morality-focussed perspective would have it do. The implication, as Kratochvíl has described it, is that the ECtHR "places a certain amount of *trust* in States to correctly apply the proportionality test in the concrete set of circumstances of the case".[1258] Trusting States in this way is, of course, a hallmark of the ethos-focussed perspective,[1259] and using consensus to limit the intensity of the ECtHR's review gives it a particularly prominent role.[1260] Indeed, any attempt to apply a lack of consensus as a substantive argument must, from within the ethos-focussed perspective and its focus on reasonable disagreement, collapse into a *lack* of substance and thus lead back to the position taken by the national authorities as expressed in the accordance of a wide (structural) margin.[1261] Applying the rein effect of European consensus within the margin of appreciation thus constitutes an interplay between two kinds of ethical normativity working in tandem: because of the lack of consensus, no pan-European ethos can be identified,

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1257 George Letsas, "Two Concepts of the Margin of Appreciation," (2006) 26 *Oxford Journal of Legal Studies* 705 at 721; see also Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights" at 407.

1258 Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights" at 329 (emphasis added), on norm application, which he describes as "similar to Letsas's structural use" (at 328); on the connection between the margin and trust and States, see also McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 57; and see Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?," (2006) 16 *European Journal of International Law* 907, arguing that a limit to the margin is that "states must always exercise their discretion in good faith"; Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 87 states that deference is based on the "premise" that national procedures are working "faultlessly".

1259 Chapter 3, III. and IV.2. and Chapter 4, III.1.

1260 For this reason, Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" at 648 opposes its use in this context, though he sees it as an acceptable argument within the Court's substantive assessment.

1261 As Letsas acknowledges by citing Waldron's theory foregrounding reasonable disagreement as an instance of strong interaction between the substantive and the structural concept of the margin: Letsas, "Two Concepts of the Margin of Appreciation" at 730; see also Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?" at 275.

and it thus willingly cedes the ground to the national ethos of the respondent State in a particularly effective way.[1262]

When the spur effect of consensus is deployed, by contrast, there are different tensions involved. As described in Chapters 3 and 4, the pan-European ethos based on a consensus in favour of the applicant now *conflicts* with the national ethos of the respondent State. In some cases, this tension is mentioned by the ECtHR within the margin of appreciation, as when it stated in *S and Marper v. the United Kingdom* that "the strong consensus existing among the Contracting States […] narrows the margin of appreciation left to the respondent State".[1263] Yet if a narrow margin is identified, then the Court cannot content itself with assessing whether the respondent State's position is "manifestly without reasonable foundation"[1264] – one of its standard formulations for cases involving a wide margin – and must instead set out in detail the Convention standard against which to measure that position. The question then arises how that standard is to be justified.

The morality-focussed perspective would simply invite the ECtHR to develop a substantive theory of rights and proceed in its justification on that basis – using what Arnardóttir calls "merits reasons" or, pragmatically speaking, the ECtHR's "own assessments".[1265] Yet from the ethos-focussed perspective, any standards set by the Court should not be based primarily on moral normativity or its "own assessments", given that they would always be subject to reasonable disagreement.[1266] How, then, to justify standards which are external to the respondent State's ethos – since that is under strict scrutiny – but nonetheless ethos-based? Precisely by reference to European consensus and the pan-European ethos that undergirds it.[1267] It is thus unsurprising that consensus in its spur effect should consistently be

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1262 See Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 306.

1263 ECtHR (GC), Appl. Nos. 30562/04 and 30566/04 – *S. and Marper*, at para. 112; see also ECtHR, Appl. No. 45245/15 – *Gaughran*, at para. 84.

1264 E.g. ECtHR (GC), Appl. No. 44362/04 – *Dickson*, at para. 78.

1265 Arnardóttir, "Rethinking the Two Margins of Appreciation" at 47; see also supra, note 1210.

1266 See generally Chapter 3, II.

1267 See 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 in fine; Niamh Nic Shuibhne, "Consensus as Challenge and Retraction of Rights: Can Lessons Be Drawns from - and for - EU Citizenship Law?," in *Building Consensus on European Consensus. Judicial Interpretation of*

invoked, not only in the context of the margin of appreciation, but also *in direct support of the substantive standards set by the Court* as a result of its proportionality analysis or balancing test.[1268]

On the epistemic account of consensus based on the Condorcet Jury Theorem, this aspect becomes even more clear: if one believes that truth can be established by reference to the position taken by the majority of European States, then it seems more appropriate to regard consensus as establishing the correct human rights standard in substance, not merely a

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Human Rights in Europe and Beyond, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 426 and 442.

1268 E.g. ECtHR, Appl. Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09 – *Şükran Aydin and Others*, at paras. 55-56 (see supra, text to notes 1250-1253); ECtHR, Appl. Nos. 33985/96 and 33986/96 – *Smith and Grady v. the United Kingdom*, Judgment of 27 September 1999, at para. 104 (consensus connected to the Court's substantive conclusion at para. 105; contrast the prior determination of the margin of appreciation, at paras. 88-89 and 94); ECtHR (GC), Appl. No. 36760/06 – *Stanev*, at para. 243 (margin of appreciation mentioned at para. 241, but consensus explicitly connected to the Court's conclusion in substance at para. 245); similarly ECtHR, Appl. No. 49069/11 – *Nataliya Mikhaylenko v. Ukraine*, Judgment of 30 May 2013, at para. 38; ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin*, at para. 140 (in reaction to substantive arguments advanced by the Government, see para. 138; intensity of review established beforehand, at para. 137); ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at paras. 121-122 (citing consensus as an argument that Turkish law "did not correspond to a 'necessity'" under Article 11 (2) ECHR, rather than in the context of the margin of appreciation at para. 119); see similarly paras. 164-165 on the right for civil servants to bargain collectively; ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others*, at para. 91 (connecting consensus to the conclusion of a violation at para. 92; margin of appreciation already identified as narrow beforehand, at paras. 77 and 85); ECtHR (GC), Appl. Nos. 66069/09, 130/10 and 3896/10 – *Vinter and Others*, at paras. 114-118 (consensus cited as a reason for the substantive assessment that "there must be both a prospect of release and a possibility of review" in cases of life sentences, see paras. 110 and 119); ECtHR (GC), Appl. Nos. 52562/99 and 525620/99 – *Sørensen and Rasmussen*, at para. 75 (consensus used to argue that closed-shop agreements are not indispensable, wide margin of appreciation mentioned without reference to consensus at para. 58); it is telling, perhaps, that some commentators refer to consensus as "a means of mediation between dynamic interpretation and the margin of appreciation" (Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 23) – thus emphasising the connection between consensus and the margin only in cases concerning the rein effect; see e.g. Peters, "The Rule of Law Dimensions of Dialogues Between National Courts and Strasbourg" at 219-220; Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 7.

strong standard of review by the ECtHR.[1269] The ethos-focussed perspective, of course, approaches the issue on less cognitive and more volitional grounds, but it reaches similar conclusions as to substantive human rights standards developed within a pan-European ethos – in contrast to the national ethos of the respondent State.

The differing doctrinal context in which consensus is predominantly used can thus be explained, in part, by connecting it back to the notion of a pan-European ethos and the ensuing tensions with the morality-focussed perspective (in cases concerning the rein effect, where lack of consensus leads to a lenient standard of review and thus privileges the national ethos of the respondent State over moral argument made by the ECtHR itself) and with ethical normativity developed at the national level (in cases concerning the spur effect, where consensus among the States parties establishes not only a strict standard of review, but also the substantive standards against which the respondent State's position is measured). To be clear, however, this analysis is based on an overall impression of the ECtHR's case-law, and by no means applies in every judgment. For one thing, the case-law is simply not always consistent,[1270] and for another, there are still a large number of judgments which fail to clearly uphold the doctrinal distinctions introduced by the Court itself, even the most fundamental distinction between the intensity of review and the substantive assessment that follows from it. Thus, in some cases the ECtHR structures its reasoning along separate sections entitled "margin of appreciation" and "fair balance",[1271] or discusses these issues separately within the same section[1272] – yet in other judgments, it combines various different considerations under the overall title of "necessity in a democratic society" (or similar catch-all phrases) without providing further guidance,[1273] and it is well-nigh impossible to figure out which aspects of its reasoning, if any, pertain to the (structural) margin of appreciation and which to the substantive assessment.

1269 Shai Dothan does connect consensus to the margin of appreciation, however: see supra, note 1248.

1270 See generally supra, note 1234.

1271 E.g. ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*: see the headings to paras. 121 and 126.

1272 See many of the cases cited in note 1268.

1273 For example, I find it difficult to place the reference in ECtHR (GC), Appl. No. 16574/08 – *Fabris v. France (Merits)*, Judgment of 7 February 2013, at para. 69 (although consensus is clearly connected to the structural concept of the margin at paras. 58-59).

In those cases, it is difficult to describe the doctrinal context of European consensus, and I will thus revert back to the general notion that it is, in some sense, given normative force.[1274] The following sub-sections will consider consensus within the general context of the margin of appreciation and the proportionality analysis in this sense – paying attention not primarily to its precise doctrinal context (structural or substantive) but rather to the way it interacts with other reasons offered by the Court to justify its conclusions in either case. As in the preceding section, my focus will be on foregrounding the difficulties that arise from the combination of different kinds of normativity – moral normativity, ethical normativity at the pan-European level, and ethical normativity at the national level. These distinctions cut across the doctrinal placement of the arguments at issue: for whether we distinguish between "the *reason* for which the Court reaches the conclusion that there was no violation" (structural or substantive à la Letsas),[1275] or between "non-merits" and "merits" reasons à la Arnardóttir,[1276] the shift between moral normativity and different kinds of ethical normativity will determine how the very notion of a "reason" is understood. The following subsections will trace the tensions between these different kinds of normativity, first for cases involving the rein effect of consensus, and then for those involving the spur effect.

2. Contextualising the Rein Effect

The rein effect of European consensus, I have argued, is most commonly deployed within the *structural* margin of appreciation (as opposed to the substantive assessment which follows it), so it is in that context that I will examine the interaction of the various factors, including consensus, which determine the margin's breadth. A general difficulty in doing so is that the ECtHR does not, usually, provide a theoretical justification for the kind of reasons it deems influential in doing so, instead placing a vast array of different arguments in proximity to one another, often without much guid-

1274 See generally Chapter 1, IV.5.

1275 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 82.

1276 Arnardóttir, "Rethinking the Two Margins of Appreciation" at 29.

ance as to their interrelation.[1277] Even identifying the role played by European consensus in any given case has been described as "sheer guesswork".[1278] Yet generally speaking, we may at least note that the argumentative weight accorded to European consensus within the margin of appreciation seems to differ from case to case.[1279] In some cases, the Court only mentions lack of consensus in passing, or even states explicitly that it does not "play a weighty part in the Court's conclusion".[1280] In other cases, it clearly carries more weight – to the point that it may, though rarely, be the only argument offered within a certain section of the Court's reasoning.[1281]

Many commentators have concluded that, by and large, consensus plays a "key role" in determining the margin of appreciation[1282] – indeed, were it not for the argument's prominence within the Court's reasoning, it

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1277 See Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 242; Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" at 641; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 492; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 146; see generally Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?" at 638; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 99.

1278 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 356.

1279 Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" has made this point at length and distinguishes between a cognitive, decorative, directional and decisive function (e.g. at 76); Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 256 conclude that the Court considers consensus to be "of indicative, persuasive, in some cases probably decisive value"; see also Mahoney and Kondak, "Common Ground" at 139.

1280 ECtHR (GC), Appl. No. 27510/08 – *Perinçek*, at para. 257; for context on this particular instance, see Chapter 5, III.1.

1281 ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at paras. 104-106; see Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 292 and 298.

1282 Onder Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases," (2007) 8 *German Law Journal* 711 at 722 (and see also at 712); de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine" at 617; Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 36; see also Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 92 and 95-96; Radačić, "Rights of the Vulnerable Groups" at 604; Dean Spielmann, "Whither the Margin of Appreciа-

would hardly have become as controversial as it has. Broadly speaking, this points to the prevalence of the ethos-focussed perspective in the case-law on the margin of appreciation, especially when contrasted to the somewhat tentative references to (lack of) consensus in the case-law on autonomous concepts as described above. But the differing argumentative weight given to consensus in some cases, and the fact that is usually not on its own considered decisive for the margin's breadth, also makes it clear that other forms of reasoning likewise play a role. For example, Samantha Besson has expressed regret that consensus "is not the sole criterion or test at play in the Court's reasoning when setting the margin of appreciation"[1283] – since she is a firm proponent of the ethos-focussed perspective, it comes as no surprise that she deplores the inclusion of other forms of argument which may open the door to morality-focussed considerations.[1284]

Similarly, Andrew Legg has attempted to keep the margin of appreciation free of considerations with morality-focussed connotations, such as the "nature of the right".[1285] Yet this is in clear contradiction of the ECtHR's case-law.[1286] Thus the Court has stated that "in delimiting the extent of the margin of appreciation in a given case, the Court must also have regard to what is at stake therein"[1287] – the nature of the right being one such aspect of "what is at stake". Another standard formulation of the Court, insofar as the rein effect of consensus is concerned, goes as follows:

> A number of factors must be taken into account when determining the breadth of [the margin of appreciation]. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted […]. Where, however,

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tion?," (2014) 67 *Current Legal Problems* 49 at 53; Hallström, "Balance of Clash of Legal Orders" at 62; Mena Parras, "Democracy, Diversity and the Margin of Appreciation" at 11; Popelier and Van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" at 244; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 149; Nussberger, *The European Court of Human Rights*, at 87.

1283 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 100.

1284 But see Chapter 4, III.2.

1285 Legg, *The Margin of Appreciation*, at 200.

1286 Arnardóttir, "Rethinking the Two Margins of Appreciation" at 44; the nature of the right may still be determined by the Court from within the ethos-focussed perspective, however: see infra, text to notes 1306-1309.

1287 ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*, at para. 129.

> there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, […] the margin will be wider.[1288]

Needless to say, the Court often names other factors, or makes use of them in its reasoning without explicitly introducing them in the section in which it sets forth its "general principles" of justification.[1289] I will nonetheless focus here on the juxtaposition of these two factors – lack of consensus and the "particularly important facet of an individual's existence or identity" – for one thing because they constitute a recurring theme, particularly in cases concerning the right to private life, and for another because they showcase the tension between the morality-focussed perspective and the ethos-focussed perspective particularly well. It will quickly emerge that, as the discussion of core rights in Chapter 4 already indicated, this tension is difficult to resolve.

Assessing how the Court places the two factors just mentioned in relation to one another is rendered somewhat difficult by the fact that, as mentioned above, it rarely notes a lack of consensus only to then overrule it by means of other arguments and find a violation of the Convention. Some cases of that kind do exist, however.[1290] Consider, for example, the case of *A.P., Garçon and Nicot v. France*, in which the trans applicants challenged, inter alia, the requirement of sterilisation (or medical treatment with a high probability of entailing sterilisation) as a precondition for legal gen-

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1288 ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, at para. 67; see also e.g. ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, at para. 94; ECtHR (GC), Appl. No. 6339/05 – *Evans*, at para. 77; ECtHR (GC), Appl. Nos. 30562/04 and 30566/04 – *S. and Marper*, at para. 102; ECtHR, Appl. No. 23338/09 – *Kautzor*, at para. 70; ECtHR, Appl. No. 14793/08 – *Y.Y.*, at para. 101; ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at para. 232; ECtHR, Appl. No. 48009/08 – *Mosley*, at paras. 109-110; on this formulation with regard to numerical issues implied by the reference to lack of consensus ("no consensus"), see Chapter 5, III.1.

1289 For a recent overview of some of these, see Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, chapter 7; an excellent overview is Gerards, *General Principles of the European Convention on Human Rights*, 172 et seqq.

1290 A rare example is ECtHR, Appl. No. 65192/11 – *Mennesson*, at paras. 77-81; sometimes, the Court also mentions comparative materials which might be construed as a (lack of) consensus arguably contrary to its own conclusions, but does not refer to them as part of its reasoning beyond the initial mention in the section on "comparative law materials": see e.g. ECtHR (GC), Appl. No. 78117/13 – *Fábián v. Hungary*, Judgment of 5 September 2017, at para. 43.

der recognition.[1291] Considering the breadth of the margin of appreciation, the Court first acknowledged the lack of consensus among the States parties on this issue: more than half of them retained the sterilisation requirement.[1292] It went on to note, however, that "an essential aspect of a person's intimate identity, or even of their existence, is at the heart of the case" and, on that ground, found that the respondent State's margin of appreciation was restricted[1293] – and, ultimately, that the sterilisation requirement constitutes a violation of the right to private life.

In light of cases such as these, Kanstantsin Dzehtsiarou has suggested that the normative force of European consensus should be conceptualised as a "rebuttable presumption"[1294] – in the case of its rein effect, it establishes a presumption the respondent State enjoys a wide margin of appreciation.[1295] The Court may still argue in favour of a narrow margin despite the lack of consensus, and indeed ultimately rule in favour of the applicants – as it did in *A.P., Garçon and Nicot* – but it "has to justify the rebuttal of such a presumption".[1296] Based on his interviews with numerous judges of the ECtHR, Dzehtsiarou has suggested that many of them take a similar approach and "follow European consensus unless there [are] convincing reasons against it"[1297] – that is, unless counterarguments may be found. Dzehtsiarou has made use of this framework, in particular, to argue that the ECtHR's use of European consensus in its rein effect need not present a danger to the rights of intra-State minorities. As he puts it, if European consensus establishes a rebuttable presumption, then the Court "can disre-

1291 This is a different strand of the case than the part relating (directly) to trans pathologisation, discussed in the previous chapter.

1292 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at paras. 71 and 122; but see also paras. 124-125 on recent trends and international pronouncements in favour of a consensus. These aspects are considered in Chapter 5, IV.

1293 Ibid., at para. 123 (my translation).

1294 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 27; Tzevelekos and Dzehtsiarou, "International Custom Making" at 322; see also Peters, "The Rule of Law Dimensions of Dialogues Between National Courts and Strasbourg" at 220.

1295 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 28.

1296 Ibid., 29-30.

1297 Ibid., 190.

gard [it] if justification is provided, and the fact that the case concerns minority rights can be seen as such a justification".[1298]

If one reads this account of consensus as a rebuttable presumption within the margin of appreciation in light of the framework developed over the course of the preceding chapters, then it becomes clear that it involves tensions between the morality-focussed perspective and the ethos-focussed perspective. As with the notion of "core rights", morality-focussed considerations are introduced despite an ethos-focussed starting point. In fact, the ECtHR sometimes refers to "core rights" or "key rights" within its reasoning, sometimes connecting this notion to the more general formulation relating to a "particularly important facet of an individual's existence".[1299] When it is only "'supplementary' (as opposed to core) rights" that are at issue, the margin of appreciation is broad;[1300] conversely, when the case is deemed to concern a core right or key right, then "the margin will tend to be narrower".[1301] As with the more general phrase referring to important facets of an individual's existence, the notion of "key rights" has repeatedly been juxtaposed with a lack of European consensus as a countervailing factor within the margin of appreciation.[1302]

In Chapter 4, I noted that when morality-focussed and ethos-focussed considerations are placed in juxtaposition in this way, the question in-

1298 Ibid., 123-124; Dzehtsiarou also points out the flexibility of European consensus, which accords with the ECtHR's use of it – though not necessarily in favour of minority rights; see the remainder of this subsection, as well as Chapter 7, III.1.

1299 ECtHR, Appl. No. 14793/08 – *Y.Y.*, at para. 101 ("accordingly").

1300 The citation is from ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 177, where the ECtHR held that core rights were at stake; on that case, see further Chapter 5, IV.; for a case explicitly *not* involving core rights, see ECtHR (GC), Appl. No. 46470/11 – *Parrillo*, at para. 174 (on the right to donate embryos to scientific research, in contrast to cases concerning prospective parenthood); the juxtaposition between core and periphery is also reflected in ECtHR (GC), Appl. No. 42326/98 – *Odièvre*, joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, at para. 11.

1301 ECtHR, Appl. No. 66746/01 – *Connors v. the United Kingdom*, Judgment of 27 May 2004, at para. 82.

1302 ECtHR (GC), Appl. Nos. 30562/04 and 30566/04 – *S. and Marper*, at para. 102; ECtHR (GC), Appl. No. 42857/05 – *van der Heijden v. the Netherlands*, Judgment of 3 April 2012, at paras. 59-60; ECtHR, Appl. No. 14793/08 – *Y.Y.*, at para. 101; ECtHR (GC), Appl. No. 56030/07 – *Fernández Martínez v. Spain*, Judgment of 12 June 2014, at para. 124; ECtHR, Appl. No. 50001/12 – *Breyer v. Germany*, Judgment of 30 January 2020, at para. 80.

evitably arises in which cases the presumption established by consensus should be rebutted, and on which grounds – or, differently put, how to distinguish between key or core rights, on the one hand, and "supplementary rights", on the other. As Janneke Gerards has stated, the ECtHR itself has, so far, "omitted to provide clear and general criteria to determine which elements of rights belong to the core and which elements should be considered rather peripheral in nature".[1303]

Dzehtsiarou's proposal runs as follows: after initially speaking of any case which "concerns" minority rights – which would cast a fairly broad net, though still dependent on one's understanding of "minority rights" – Dzehtsiarou specifies that the presumption established by consensus should be considered rebutted in those cases which "unreasonably limit" minority rights.[1304] The issue then turns on how he understands *reasonableness*, a controversy familiar from Chapter 5. Since Dzehtsiarou is building an argument that serves to *rebut* the argumentative force initially attributed to consensus, his approach here seems to be based on the more circumscribed sense of "reasonableness" which excludes certain positions from consideration on the basis of morality-focussed considerations – but such an approach stands in contradiction to the emphasis on reasonable disagreement which forms part of the argument for according European consensus normative force in the first place.[1305]

A different approach is possible, and indeed shines through in the way in which the ECtHR sometimes frames the issue. When, according to the Court, is a "key right" or a "particularly important facet of an individual's existence or identity" at stake, pointing to a narrow margin of appreciation? According to the standard formulation cited above, it seems that this question would be answered by European consensus: note that the Court states it will grant a wide margin where there is a lack of consensus, inter alia, "as to the relative importance of the interest at stake",[1306] so that the consensus enquiry could be understood as determining whether a particu-

1303 Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 112.

1304 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 125.

1305 Again, this chimes with the discussion of core rights in Chapter 4, III.2.; for another example, see Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court" at 475, where everything turn on how one understands the phrase "where appropriate".

1306 Supra, note 1288.

lar facet of an individual's existence or identity *is*, in fact, "particularly important" – or not.[1307]

This would point to a prevalence of the ethos-focussed perspective, and indeed – contrary to Dzehtsiarou's morality-focussed suggestion of overruling lack of consensus in cases concerning minority rights – the Court often seems to have taken this approach. For one thing, there is a large number of cases in which the rein effect of European consensus seems to have been crucial in establishing the respondent State's wide margin of appreciation (and thus, ultimately, a finding of no violation) despite the subject-matter relating to minority rights.[1308] For another, some of these cases seem to make use of an ethos-focussed argument based on lack of consensus precisely *in order to dispute the importance of the interest at stake*. This brings us back to the level of generality at which consensus is used, as discussed in the previous chapter. In *Leyla Şahin v. Turkey*, for example, the ECtHR noted the lack of European consensus on the "significance of religion in soci-

1307 In the language of "core rights", this would mean that consensus is used to "draw a line around core rights", as argued by Ostrovsky, "What's So Funny About Peace, Love, and Understanding?" at 57; see further Chapter 4, III.2.; the ECtHR has similarly used the spur effect of consensus to "support" its argument as to the "very essence of the right to organise" for public servants: ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at paras. 97-98; for a case concerning the rein effect, see e.g. ECtHR, Appl. No. 45892/09 – *Junta Rectora del Ertzainen Nazional Elkartasuna v. Spain*, Judgment of 21 April 2015, at paras. 39-40; for a morality-focussed approach to the notion of a right's "essence", see Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, at 15.

1308 Some of the most obvious cases concerning minority groups are e.g. ECtHR, Appl. No. 36515/97 – *Fretté*, at para. 41; ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 105; ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*, at para. 156; ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 139; see also ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, at para. 74, where the Court referred to a lack of consensus but made no mention of its acknowledgment, in an earlier case on a similar issue, of the "direct and invasive effect on the applicants' enjoyment of their right to respect for their private and family life" which was at stake: for the latter, see ECtHR, Appl. No. 42971/05 – *Parry v. the United Kingdom*, Decision of 28 November 2006, p. 10; if the ambit is broadened to include minorities in the sense discussed in Chapter 2, II.1., the number of examples amplifies even more: see e.g. ECtHR (Plenary), Appl. No. 5493/72 – *Handyside*, at paras. 48, 53 and 57; ECtHR, Appl. No. 13470/87 – *Otto-Preminger-Institut v. Austria*, Judgment of 20 September 1994, at para. 50; ECtHR (GC), Appl. No. 42326/98 – *Odièvre*, at para. 47; ECtHR (GC), Appl. No. 30814/06 – *Lautsi and Others*, at para. 70; ECtHR (GC), Appl. No. 46470/11 – *Parrillo*, at paras. 175-182.

ety":[1309] this led to deference to the respondent State as to the significance accorded to religion, whereas the importance which the applicant herself attached to wearing the headscarf was side-lined entirely. A more morality-focussed approach would instead have picked up on the Court's dictum that freedom of religion makes up "one of the most vital elements that go to make up the identity of believers"[1310] and applied it more specifically to religious attire; yet by taking an ethos-focussed approach also to the question of the "relative importance of the interest at stake", though not in those words, the Court avoided this inconvenience.

Besides demonstrating the use of consensus at different levels of generality, then, cases such as *Leyla Şahin* also show that whether a case concerns a "particularly important facet of an individual's existence or identity" and the respondent State's margin of appreciation is therefore narrowed *can* be determined from an ethos-focussed perspective – but the important point is that this is by no means *necessary*.[1311] In other cases – as in the above-mentioned case of *A.P., Garçon and Nicot*, insofar as the sterilisation requirement is concerned – the argument that the case concerns "an essential aspect of a person's intimate identity", is introduced as a *counterargument* to the lack of consensus and thus relies instead on substantive reasoning of the kind preferred by the morality-focussed perspective.[1312] In *Perinçek v. Switzerland*, the Court even noted explicitly that, since "there are other factors which have a significant bearing on the breadth of the applicable margin of appreciation" – which included, inter alia, precisely such substantive reasoning – "the comparative law position cannot play a weighty part in the Court's conclusion".[1313] The structure of the Court's reasoning, in such cases, coheres neatly with Dzehtsiarou's account of consensus as a rebuttable presumption within the margin of appreciation – and thus also replicates the tensions inherent within it.

In sum, my argument is that while the margin of appreciation provides the doctrinal framework within which differing arguments can be brought together and juxtaposed by the ECtHR, it does not resolve the underlying tensions produced, in particular, by the differing epistemological assump-

1309 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109; see further Chapter 7, III.1.

1310 Ibid., at para. 104.

1311 A case for the "important facet" argument as a *counter* to lack of consensus is made by ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, joint dissenting opinion of Judges Sajó, Keller and Lemmens, at para. 5.

1312 Supra, note 1293.

1313 ECtHR (GC), Appl. No. 27510/08 – *Perinçek*, at para. 257.

tions of the morality-focussed and the ethos-focussed perspective. As Janneke Gerards has put it, there "does not seem to be a single standard that helps the court decide if intensity-determining factors pull in different directions",[1314] and the ECtHR is thus reduced to solving such dilemmas "by simply stopping short of making a real choice".[1315] Steven Greer has likewise noted that it is "impossible to set out in the abstract" how the different "principles of interpretation" which he identifies in connection with the margin of appreciation "interact with each other";[1316] and Samantha Besson has opined that the margin's application "remains largely unpredictable" specifically because factors other than European consensus are included within it.[1317] In part, such statements echo the vast swaths of commentators criticising the Court for its lack of clarity and consistence in applying the margin of appreciation[1318] – but there is also a sense that the criticism goes deeper, and that the tension between the morality-focussed and the ethos-focussed perspective makes it difficult to develop a clear standard at all. After all, any such unifying standard would be based, prima facie, in either moral or ethical normativity and thus favour one of the competing factors from the outset.

3. Contextualising the Spur Effect

As repeatedly touched upon over the course of the preceding chapters, the spur effect of European consensus involves somewhat different tensions: for while the differing approaches of the morality-focussed perspective and the ethos-focussed perspective persist – the prior more cognitive and the latter more volitional – and they may reach different conclusions accordingly, they are generally seen as less drastically opposed given that the spur effect speaks in favour of a broad understanding of human rights and thus presents less of a danger to individuals, particularly those belonging to intra-State minorities. This alignment is perhaps heightened even further in the context of the (structural) margin of appreciation. Whatever the moral-

1314 Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 114.
1315 Ibid., 115.
1316 Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, at 22.
1317 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 100.
1318 See supra, notes 1234 and 1277; and more generally Chapter 5, II.

ity-focussed perspective's take on the substantive issue at hand, it will be sceptical of trusting the respondent State by deferring to its judgment in light of a broad margin of appreciation,[1319] and thus work in tandem with the spur effect of consensus in that regard.

By contrast, insofar as the substantive assessment by the Court is concerned, conflict is more likely. Recall, in particular, that the morality-focussed perspective need not always be in favour of a broad understanding of human rights, for example to prevent their devaluation by means of "inflation".[1320] In such cases,[1321] the spur effect of consensus might speak in favour of a violation while the morality-focussed perspective demurs. Yet in practice, even when the spur effect of consensus is deployed as part of the Court's substantive assessment, the tension is not usually between the morality-focussed and the ethos-focussed perspective, respectively – rather, it is between different forms of ethical normativity, depending on whether it is located at the pan-European or at the national level. Giving spur effect to European consensus relies on the prior, since it takes the position of a majority of States parties to the ECHR to express a pan-European ethos – which then constitutes an argument *against* the respondent State and its national ethos.[1322] For example, in *Ebrahimian v. France*, the Court made this tension explicit by first implying that France was one of only five States parties identified "as prohibiting completely the wearing of religious signs by civil servants" (spur effect of consensus, leading to a narrow margin), but immediately juxtaposing this finding to the "*national context* of State-Church relations" within France (leading to a broad margin).[1323]

1319 See supra, III.1.

1320 See Chapter 2, III.

1321 Letsas cites the ECtHR's Chamber judgment in ECtHR (Third Section), Appl. No. 36022/97 – *Hatton and Others v. the United Kingdom*, Judgment of 2 October 2001 (the "right to sleep well") as an example of dangerous inflation: Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 127; contrast the dissenting opinion arguing in favour of a violation of Article 8 ECHR in the subsequent Grand Chamber judgment, relying in part on consensus-based reasoning: ECtHR (GC), Appl. No. 36022/97 – *Hatton and Others v. the United Kingdom*, Judgment of 8 July 2003, joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, at para. 1.

1322 See in more detail Chapter 3, IV.3.

1323 ECtHR, Appl. No. 64846/11 – *Ebrahimian*, at para. 65 (emphasis added); see further Chapter 7, III.1.: the ECtHR also made implicit reference to lack of consensus at higher levels of generality, by virtue of its reference to *Leyla Şahin*.

In this subsection, I would like to explore how these various tensions play out within the Court's case-law.

One of the clearest statements in favour of the spur effect of European consensus as an important factor in determining the breadth of the margin of appreciation was given in the case of *S and Marper v. the United Kingdom*, where the Court held that "the strong consensus existing among the Contracting States […] is of considerable importance and narrows the margin of appreciation left to the respondent State".[1324] In that case, European consensus very much took centre-stage in the determination of the margin's breadth. In other judgments, it explicitly worked alongside more morality-focussed forms of reasoning. Take the case of *Glor v. Switzerland*, which concerned the forced payment of a tax as a substitute for military service for persons with disabilities. The ECtHR again invoked the spur effect of consensus, stating that it "must have regard to the changing conditions […] within Contracting States" and respond to "any emerging consensus as to the standards to be achieved", which forms "one of the relevant factors in determining the scope of the authorities' margin of appreciation".[1325] The Court noted that this type of tax levied against the applicant in Switzerland "does not seem to exist in other countries, at least in Europe"[1326] – that there was, in other words, a consensus against the respondent State. In a more morality-focussed vein, it also noted that the tax posed a risk of discriminating against persons with disabilities, before concluding *in light of both these factors* that the margin of appreciation was "considerably reduced",[1327] and going on to find a violation of the Convention. Both the morality-focussed and the ethos-focussed reasons considered by the Court thus pointed in favour of a narrow margin – the latter being based on a pan-European ethos, with the national ethos of the respondent State receiving no specific mention.

Indeed, the national ethos of the respondent State has not traditionally been accorded a strong presence in determining the breadth of the margin of appreciation – instead, it usually makes its appearance during the substantive assessment once the appropriate level of scrutiny has been deter-

1324 ECtHR (GC), Appl. Nos. 30562/04 and 30566/04 – *S. and Marper*, at para. 112.
1325 ECtHR, Appl. No. 13444/04 – *Glor v. Switzerland*, Judgment of 30 April 2009, at para. 75; see also e.g. ECtHR (GC), Appl. No. 42202/07 – *Sitaropoulos and Giakoumopoulos*, at para. 66.
1326 ECtHR, Appl. No. 13444/04 – *Glor*, at para. 83.
1327 Ibid., at para. 84.

mined.[1328] Yet one countervailing tendency, in which aspects of the respondent State's national ethos are referred to as an element within the structural margin of appreciation, should be noted: these are cases in which the Court refers to the *quality of the democratic procedures within the respondent State*. Several commentators have noted that "the Strasbourg Court is currently in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States",[1329] and giving greater weight to the quality of democratic procedures in the respondent State is a major aspect of this reformulation. The paradigmatic example is the judgment in *Animal Defenders v. the United Kingdom*, in which the Court held that "[t]he quality of the parliamentary and judicial review of the necessity of [the legislative measure at issue] is of particular importance […], including to the operation of the relevant margin of appreciation".[1330] In cases in which the quality of democratic procedures within the respondent State was high – so the argument goes – the Court has more reason to trust the result they reached, and therefore to reduce the intensity of its review by allowing a wide (structural) margin of appreciation.[1331]

1328 See infra, text following note 1337, for cases involving the spur effect; in relation to the rein effect, the discussion of cases involving lack of consensus at high levels of generality (leading to a broad margin of appreciation) in relation to the resulting (though doctrinally distinct) focus on the national ethos of the respondent State in Chapter 7, III.1. also exemplifies this scenario.

1329 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" at 498.

1330 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 108; see also e.g. ECtHR (GC), Appl. No. 74025/01 – *Hirst*, at para. 79.

1331 The connection to the structural margin of appreciation is made explicit e.g. by Matthew Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments," (2015) 15 *Human Rights Law Review* 745 at 750; see also, though within her slightly different framework, Oddný Mjöll Arnardóttir, "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance," (2017) 15 *International Journal of Constitutional Law* 9 at 11; in that vein, see also Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 872 (in footnote 2); critically: Popelier and Van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" at 243; for an overview of cases in which national procedures played a role not in determining the width of the margin, but as the object of scrutiny within the substantive assessment in light of it, see Eva Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," (2013) 35 *Human Rights Quarterly* 176 at 195-198; contrast ibid., 200.

This clearly constitutes an argument steeped in ethical normativity developed at the national level, since it is precisely in democratic procedures that national ethe are commonly located nowadays.[1332] While the national ethos of the respondent State is not given free rein entirely – both because it must conform to certain standards in order to broaden rather than narrow the margin of appreciation, and because it continues to be subject to review by the ECtHR, albeit in limited form if the margin is broad – such an argument must perforce seem out of place from the morality-focussed perspective. As Tom Lewis has put it, "[i]t is difficult to see, from the rights-holder's perspective" – i.e. when foregrounding the individual rather than the political collectivity of the State, thus reflecting the concerns of the morality-focussed perspective – "why the quality and quantity of debate should have a determinative impact on whether there has been a violation of his or her rights".[1333]

But insofar as a high-quality process in the respondent State speaks in favour of a broad margin of appreciation, the national ethos of the respondent State is also set to conflict with the spur effect of European consensus as an expression of a pan-European ethos. Thomas Kleinlein has raised this issue most explicitly, while acknowledging that the Court's case-law thus far provides no answer as to how such cases should be handled.[1334] Yet he suggests that "[h]igh standards in domestic procedures can possibly rebut the presumption in favour of the solution adopted by the majority of Convention states".[1335] Kleinlein thus makes use of the notion of consensus as a rebuttable presumption in determining the breadth of the margin of ap-

1332 See Chapter 3, III.

1333 Tom Lewis, "*Animal Defenders International* v *United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?," (2014) 77 *Modern Law Review* 460 at 469; see also Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments" at 760; Eva Brems, "Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights," in *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, ed. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013) at 159; the more cognitive and outcome-based concerns of the morality-focussed perspective also comes through quite clearly in the position of several dissenting judges: see ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and de Gaetano, at paras. 9-10.

1334 Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 878.

1335 Ibid., 871.

preciation, as discussed above by reference to the rein effect.[1336] The tensions arising in the present context are similar, albeit perhaps somewhat less stark: while the reasoning remains rooted in the epistemology of the ethos-focussed perspective throughout, the presumption and its rebuttal locate ethical normativity in different macrosubjects (the collectivity of European States and the individual respondent State, respectively), thus making it difficult to mediate between them by reference to a form of normativity shared by both. Kleinlein's caveat that high democratic standards can "possibly" rebut the presumption established by consensus might, perhaps, be read as a concession to this difficulty.

The idea of consensus as a rebuttable presumption has carried some sway with regard to the spur effect of consensus more generally, not just as a factor within the structural margin of appreciation but also when applied within the Court's substantive reasoning (or, for that matter, in cases in which its doctrinal context remains somewhat unclear).[1337] Thus, Dzehtsiarou argues that the "presence of European consensus", like its lack, "also establishes a presumption" – this time "in favour of the solution adopted in the majority of the Contracting Parties".[1338] Despite this presumption, the State(s) in the minority position may prevent a violation of the Convention if they can offer "a particularly strong justification for the law in question even if this law is different to [the] common European trend".[1339] Hutchinson has similarly suggested that the Court must "take seriously any arguments laid out by a defendant State which suggested that, in its case, the general presumption [established by the spur effect of consensus] should not apply".[1340]

Though they have not usually been successful,[1341] counter-arguments to the spur effect of consensus based on the national ethos of the respondent State remain a distinct possibility within the Court's case-law, at least in

1336 Supra, III.2.

1337 See generally on these distinctions supra, III.1.

1338 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 29; critically on the merits of establishing presumptions within the ECtHR's balancing test Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 89.

1339 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1733.

1340 Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" at 648.

1341 See Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 22.

some scenarios.[1342] The case of *F. v. Switzerland*, while somewhat dated, makes this aspect particularly explicit. The applicant complained about a waiting period which prevented him from remarrying at the time of his choice. The ECtHR noted the existence of a European consensus against the respondent State: a waiting period akin to that found in Swiss law "no longer exists under the laws of other Contracting States".[1343] It recalled that the Convention must be interpreted in the light of present-day conditions and went on to find a violation – yet with regard to the spur effect of consensus, it nonetheless cautioned that the "isolated position" of one State "does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit".[1344] In other words, it juxtaposed the notion of a pan-European ethos with the national ethos of the respondent State, the latter not even based on democratic procedures but on the older notion of "cultural and historical traditions". It did not make clear how it would adjudicate between these two different forms of ethical normativity.

Another instance of these tensions – and one of the potential counterarguments to the spur effect of consensus cited by Dzehtsiarou[1345] – is the Court's reference to special historical or political considerations within the respondent State. For example, in the case of *The Republican Party of Russia v. Russia*, it was called upon to consider the dissolution of a political party because, inter alia, it did not have a sufficient number of regional branch-

1342 In cases involving difference of treatment on certain grounds (gender, ethnicity, etc.), the ECtHR has held that prevailing social attitudes in a particular country cannot, by themselves, serve as justification: see e.g. ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin*, at para. 127; ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at para. 78.

1343 ECtHR (Plenary), Appl. No. 11329/85 – *F. v. Switzerland*, Judgment of 18 December 1987, at para. 33.

1344 Ibid.; contrast ECtHR (GC), Appl. No. 30814/06 – *Lautsi and Others*, at para. 68 – though the Court found no violation in that case (based in part on the rein effect of consensus), it emphasised that "the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols".

1345 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1733; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 32-34; see also Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 160 ("unique circumstances"); Brems, *Human Rights: Universality and Diversity*, at 419-420 ("cultural, economic or other contextual factors"); see also Chapter 4, II.2.

es. The Court considered that "a review of practice across Council of Europe member States reveals a consensus that regional parties should be allowed to be established", yet emphasised that "notwithstanding this consensus, a different approach may be justified where special historical or political considerations exist which render a more restrictive practice necessary".[1346] This form of reasoning quite clearly makes reference both to the historical particularity of the respondent State's national ethos and to the democratic procedures within which ethical normativity at the national level is now commonly located, and thus seems to indicate that a national ethos may take precedence over ethical normativity developed at the pan-European level in some situations.[1347] Yet contrast the Court's position in *Tănase v. Moldova*, where it likewise indicated that special historical or political considerations might justify departure from a European consensus,[1348] but then went on to note that "historico-political considerations should be viewed in the broader context of the obligations which Moldova has freely undertaken" under international law.[1349] While still somewhat focussed on the respondent State and its ratification of the relevant treaties, the Court also referred to the latter as part of European consensus,[1350] as an aspect of "establish[ing] whether there is a common European standard in the field".[1351] It thus oscillated between ethical normativity developed at the national and at the pan-European level, once more without a clear indication of how to adjudicate between them.

Throughout all these oscillations between the two kinds of ethical normativity considered here, the continuing tensions with the morality-focussed perspective must not be forgotten. Its universalising normativity would be well-suited to adjudicate between the pan-European ethos underlying the spur effect of consensus and the national ethos of the respondent State, since it remains unmoved by both; yet from within the ethos-focussed perspective, that solution must remain unconvincing in light of

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1346 ECtHR, Appl. No. 12976/07 – *Republican Party of Russia v. Russia*, Judgment of 12 April 2011, at para. 126; in that case, that necessity was deemed to not be demonstrated (see paras. 127-130).

1347 See also ECtHR (Plenary), Appl. No. 5493/72 – *Handyside*, at para. 57, where the Court countered the spur effect of consensus by noting that the States parties "have each fashioned their approach in the light of the situation obtaining in their respective territories".

1348 ECtHR (GC), Appl. No. 7/08 – *Tănase*, at para. 172.

1349 Ibid., at para. 176.

1350 See generally, on international law as part of European consensus, Chapter 6.

1351 ECtHR (GC), Appl. No. 7/08 – *Tănase*, at para. 176.

reasonable disagreement. Furthermore, if the morality-focussed perspective did take centre-stage, then it would be open to question what role the spur effect of European consensus truly plays in the Court's reasoning: as argued in Chapter 2, it would then merely be concurrent to the conclusion reached independently, rather than unfolding normative force of its own accord. In other cases, ethical normativity developed at the national level might likewise be concurrent to morality-focussed reasoning – yet as soon as the conclusions reached differ, the tensions resurface.

These three-way tensions are reflected in differing conceptualisations of the spur effect of consensus within academic commentary. For example, Dzehtsiarou demands a "strong justification for divergence" to counter it, and emphasises this aspect of justification, i.e. *reason-giving*, as an advantage of other conceptualisations which merely speak of an "exception".[1352] While this does not resolve the question of how "reasons" should be understood, the sense is that, although the national ethos of the respondent State may play a role, it will be subject to significant scrutiny in light of other forms of normativity, particularly the morality-focussed perspective.[1353] By contrast, Samantha Besson speaks of "the possibility of a persistent objection to the transnational practice of states and their consensus".[1354] While the notion of a "persistent objector" is itself controversial and unstable,[1355] the connotations here would seem to be that the demand for reason-giving made by Dzehtsiarou is lessened: the respondent State

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1352 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 29-30; on the inverse relation between the margin of appreciation and the demand for reason-giving, see generally Eirik Bjorge, "Been There, Done That: The Margin of Appreciation and International Law," (2015) 4 *Cambridge Journal of International and Comparative Law* 181 at 188.

1353 For example, Dzehtsiarou refers – as he does in the context of the rein effect – to "reasonable" justification – Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1733 – which I take to be a concession to the morality-focussed perspective; see supra, text to note 1305.

1354 Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 61; for other mentions of the "persistent objector" topos, see Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 259; Tzevelekos and Dzehts 8288iarou, "International Custom Making" at 321; see also Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 25 who, dissatisfied with the possibility of persistent objection but caught in the framework of customary international law, proclaims the relevance (only) of a "collective persistent objector".

1355 See Koskenniemi, *From Apology to Utopia*, at 443-445.

can develop its own reasons internally, based on its national ethos; but externally, the mere fact of its persistent objection is considered sufficient and it need not justify itself within the framework of ethical normativity developed at the pan-European level, or of the morality-focussed perspective.[1356]

My point here, as before, is not to criticise any of these argumentative moves in and of themselves, but merely to showcase the tensions which inevitably emerge in the reasoning surrounding European consensus. In discussing counter-arguments to the spur effect of consensus, whether within the margin of appreciation or the Court's substantive assessment of the issue before it, the focus generally shifts from the pan-European ethos back to giving priority to the national ethos of the respondent State; yet the national ethos is rarely given free rein, but rather constrained in turn by either moral normativity or a shift back to the pan-European ethos. As Greer has summarised it: "the principle of commonality may argue in favour of harmonisation, while the principles of democracy and subsidiarity may pull in the opposite direction".[1357]

Caught between these different kinds of arguments, it becomes necessary for the ECtHR to clarify when the one or the other takes priority (e.g. when the presumption established by consensus should be rebutted) and, crucially, on which grounds. The form of argument used to establish this must in turn refer to either the pan-European ethos or the national ethos of the respondent State, or to moral normativity; while some of them may at times align in their conclusions, any reasons given will be open to challenge from the opposing perspectives when they do not. Carozza has stated that "inter-state comparison will not itself give us the reasons to choose in any instance whether to affirm a uniform international standard of human rights or whether to allow the play of difference and discretion among states".[1358] Within the framework I have been using here, one could subscribe to this claim and further specify that the abeyance which Carozza

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1356 See the brief but factually oriented comments in the classic cases of ICJ, *Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Rep. 1950, pp. 277-278; ICJ, *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, ICJ Rep. 1951, p. 131, as well as Besson's own description in Samantha Besson, "State Consent and Disagreement in International Law-Making. Dissolving the Paradox," (2016) 29 *Leiden Journal of International Law* 289 at 315.

1357 Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, at 21.

1358 Carozza, "Uses and Misuses of Comparative Law" at 1233.

mentions is due to different kinds of normativity pulling the conclusion in different directions.

IV. Interim Reflections: Instable Oscillations and Doctrinal Connotations

In this chapter, I hope to have made the case that, in examining the way consensus is contextualised within the ECtHR's broader reasoning by its proponents, we come across much the same tensions which we previously identified in arguments between proponents and critics of consensus more generally, and within the establishment of consensus itself. For example, in the case-law on autonomous concepts we find both references to the importance of incorporating vertically comparative references to identify the general principles of the legal systems of the States parties (ethos-focussed perspective), and a deep distrust of those very States parties, leading to a strong focus on substantive reasoning by the Court itself rather than giving weight to European consensus (morality-focussed perspective).

When determining the breadth of the respondent State's margin of appreciation and during the Court's substantive assessment which follows it, these tensions emerge in particularly complicated ways, and European consensus is arguably deployed somewhat differently depending on whether the rein effect or the spur effect is at issue. In both cases, however, it has been suggested that consensus is best conceptualised as a rebuttable presumption. On that account, the reasoning which counter-arguments are based on will usually switch once more from ethical normativity located at the pan-European level to either the morality-focussed perspective (especially when the rein effect is at issue) or to ethical normativity focussing on the national ethos of the respondent State (when the spur effect is at issue) – yet in both cases, the Court may also switch back the notion of a pan-European ethos. These argumentative shifts are emblematic of the Court's reasoning, yet they also render it unstable since there is no common standard connecting the different forms of normativity.

Thus, the triangular tensions between different kinds of normativity previously discussed as internal to the establishment of consensus re-emerge here in the form of counter-arguments to consensus, once it is contextualised within the Court's broader reasoning. The margin of appreciation, in particular, is well-known as the location of precisely these tensions: McGoldrick has described it, for example as "mediat[ing] between the idea of universal human rights and leaving space for reasonable disagreement,

legitimate differences, and national or local cultural diversity".[1359] The same is true for the principle of subsidiarity which is often said to underlie the concept of the margin of appreciation:[1360] Carozza famously described it as "a somewhat paradoxical principle" because it expresses – in the context of the ECHR – both the idea that it is primarily the responsibility of the States parties to safeguard human rights (thus limiting the role of the ECtHR) while also justifying external intervention when they do not do so appropriately (thus empowering the ECtHR).[1361] Many will accept this double-edged account of subsidiarity in the abstract, yet the difficulties lie in managing the tensions resulting from it when faced with particular cases. Moving between the two poles of subsidiarity will then require moving between the ethos-focussed perspective and the morality-focussed perspective, and hence lead back to the difficulties described throughout this chapter. It is precisely because of the mediating role assigned to doctrines such as the margin of appreciation that they end up caught between opposed epistemologies and become as unstable as many commentators charge them with being.[1362]

Yet the analysis of various different doctrinal contexts has also served to indicate that a limited form of stability may emerge, as certain doctrines become more associated with a particular role or perspective.[1363] For example, I argued above that autonomous concepts became associated with the morality-focussed perspective in this way, whereas the margin of appreciation is more strongly connected to the ethos-focussed perspective. I hope to have made it clear that such connotations are always contingent rather

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1359 McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 41; there is a veritable multitude of similar formulations, see e.g. Macdonald, "The Margin of Appreciation" at 83 and 122-123; Mena Parras, "Democracy, Diversity and the Margin of Appreciation" at 3; Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" at 451; Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 230; see also the excellent summary of differing positions of the margin of appreciation and their connection to the role assigned to the ECtHR by Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?" at 276.

1360 E.g. Arnardóttir, "Rethinking the Two Margins of Appreciation" at 38, with further references.

1361 Carozza, "Subsidiarity as a Structural Principle" at 44; see also e.g. Spielmann, "Whither the Margin of Appreciation?" at 63-64.

1362 See supra, note 1234.

1363 See generally Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," (2004) 17 *Cambridge Review of International Affairs* 197 at 202.

than necessary, since any demarcation is always open to challenge on the basis of a differing epistemology. In a sense, they also serve merely to relocate and perhaps even to obfuscate the problem:[1364] for it needs to be established in any given case which doctrine is applicable and why, thus reintroducing any tensions that might have been temporarily suspended *within* the application of that doctrine.

Let me end this chapter by again pointing to an aspect of the case-law already mentioned in its introduction: it is noticeable how rarely the ECtHR presents European consensus as providing an argument in a certain direction but nonetheless reaches a contrary conclusion on the basis of explicit counter-arguments. I would suggest that this may relate, in part, to the flexibility inherent to the establishment of (lack of) consensus, and to the way in which the triangular tensions between different kinds of normativity are internalised before the rein effect or spur effect of consensus are even deployed: it is not by accident that the chapters analysing the establishment of consensus within the ECtHR's case-law took up more space than the chapter dealing with its deployment once established. However, the lack of successful counter-arguments to consensus within the ECtHR's processes of justification *also* serves to position it as a powerful argument in its own right, once (lack of) consensus has been established. This prominence has been defended on the basis of the notion of a pan-European ethos, as previous chapters have shown. However, there is also a different line of argument undergirding the ECtHR's use of consensus: many commentators emphasise the importance of using consensus to bolster the ECtHR's legitimacy. That line of argument will be the subject of the following chapters.

1364 See e.g. the criticism made by Lewis, "*Animal Defenders International* v *United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?" at 470 of the ECtHR's shifting approach depending on whether a measure is conceptualised as a "general measure" or a "blanket ban", without further justification of one or the other.