Chapter 4: Interaction between Morality-focussed and Ethos-focussed Perspectives: Triangular Tensions and Instrumental Allegiances

I. Introduction

Should European consensus be used by the ECtHR? Should agreement or disagreement among the States parties to the Convention play a role in the justification of its decisions, or should they be based on a moral reading of the Convention? Should judgments based on European consensus be allowed to prevail over positions reached within the more developed democratic procedures at the national level? The preceding chapters will have made clear that the answers to these questions depend on the perspective from which one approaches them. The morality-focussed perspective, for example, would focus on substantive normative reasoning and disparage the reliance on European consensus as perpetuating prejudice against intra-State minorities; the ethos-focussed perspective, by contrast, would charge proponents of the morality-focussed perspective with arrogantly substituting their own reasoning for majority opinions as expressed within democratic procedures, be in within individual States (national ethe) or in cumulated form as European consensus (pan-European ethos).

These ideal-type perspectives are helpful for teasing out the way in which European consensus relates to various broader controversies such as the relevance of disagreement to legal argument or the role of the is-ought distinction. Yet in the stark form in which I have been presenting them so far, they leave the interested observer in an overly simplistic normative environment: either one accepts the notion of a pan-European ethos and, accordingly, the ECtHR's use of European consensus – or one does not, either because one favours the morality-focussed perspective or because one does not accept the move to the transnational level within ethical normativity. This would discount the way in which European consensus is situated within a broader context, one of many arguments within the ECtHR's reasoning. To account for this fact, the stark edges of the different kinds of normativity considered thus far need to be softened. Accordingly, this chapter aims to explore the *interaction* between different forms of normativity despite their diametrically opposed starting points, insofar as it relates to European consensus.

These interactions tend to crystallise around certain constellations in which the tensions between the different perspectives become most apparent; they may best be captured by distinguishing between those cases involving the spur effect (in which consensus is at conflict, at a minimum, with the national ethos of the respondent State) and those involving the rein effect (in which consensus is often at conflict with the morality-focussed perspective).[568] I set out to explore these tensions by reference to a framework which might, if it were considered convincing, mitigate them to some extent: the epistemic approach based on the Condorcet Jury Theorem, which has been argued to justify the ECtHR's use of European consensus by Shai Dothan. On this account, majoritarian decision-making constitutes a way of identifying truth, and European consensus – because of its transnational vantage point building on a large number of independent decisions within domestic legal systems – provides a particularly strong instance of such truth-identification (II.1.). If this was uncontroversially the case, then it would both straddle the divide between the morality-focussed and the ethos-focussed perspective by exchanging the focus of the latter on self-government with the logic of truth constituted by aggregated opinions, and it would justify the reference to European consensus in the face of a divergent position by the respondent State. However, I will argue that the tensions just mentioned persist: they are built into the starting assumptions of the Condorcet Jury Theorem and destabilise its claims both in cases involving the spur effect (II.2.) and those involving the rein effect (II.3.).

If this is correct, then it seems more profitable to deal with the tensions between the different forms of normativity head-on. The second half of this chapter therefore aims to provide a broader framework within which to situate the tensions identified while discussing the epistemic approach. I will argue that because they each involve certain idealisations (III.1.), they are always liable to be undermined by criticism from opposing perspectives; and I will illustrate this by reference to the oscillation between the ethos-focussed perspective underlying European consensus, on the one hand, and the morality-focussed perspective, on the other, in cases involving so-called "core rights" (III.2.). Yet while the oscillation between these two perspectives is arguably the most foundational within Western metaphysics, the tableau in the context of regional human rights law contains additional complications. Because the tensions at the transnational level are triangular in the sense that the ethical normativity is further bifurcated

568 See generally Chapter 1, III.

according to the relevant macrosubject (national ethe or pan-European ethos), there is room not only for direct tensions between opposing forms of normativity pointing towards different results, but also, in some cases, for instrumental allegiances between them (III.3.).

In light of all this, the overall aim of the chapter is to demonstrate, first, that the tensions between the various forms of normativity discussed so far persist regardless of alternate frameworks such as the epistemic approach; second, that their triangular interrelation leads to different constellations of opposition and allegiance in cases involving the rein effect and the spur effect, respectively; and third, that the idealisations involved in any one form of normativity leads to its susceptibility to challenge by others, which in turn results in the oscillation between different perspectives in the reasoning that sets out to justify concrete norms of regional human rights law. With regard to European consensus, this means that while its use may, in principle, be justified as a variant of the ethos-focussed perspective adapted to the transnational context of the ECtHR, it is by no means "natural" in the sense that it can and should not be challenged. The focus then shifts from the justification of European consensus in the abstract to the specifics of the manner in which it is used (IV.).

II. An Attempt at Reconciliation: The Condorcet Jury Theorem

1. European Consensus as Collective Wisdom

Let me begin, then, by introducing a framework which, if accepted, might mitigate the tensions just mentioned: the epistemic approach, which combines the truth-claims of the morality-focussed perspective with the democracy-based argument of the ethos-focussed perspective and uses the transnational context of the ECtHR to read them together. The argument goes roughly as follows: by basing its judgments on (among other things) the approach taken by the majority of the States parties, itself based on the decisions of democratic intra-State majorities, the ECtHR may learn from their experiences and increase the likelihood of reaching the right decision. Consensus should therefore be accorded normative force – in form of the spur effect when it favours the applicant, and in form of the rein effect when it favours the respondent State.

In its most formal and substantiated form, the argument builds on the so-called Condorcet Jury Theorem, according to which a decision made by

a number of independent jurors who are, on average,[569] more likely than not to individually make the correct decision between two options,[570] is more likely to be correct the greater the number of jurors.[571] If applied to large groups of people, accordingly, the statistical likelihood that a majority favours the correct result (under the conditions specified) becomes extremely high. Given the large number of people typically involved in the voting procedures of modern democracy, this insight is sometimes taken to constitute an argument in favour of the results favoured by democratic majorities.

Arguments in favour of democracy based on the Condorcet Jury Theorem are known as *epistemic* arguments,[572] for they see the virtue of democ-

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569 Condorcet himself assumed that *each* juror is more likely than not to be correct, but see Bernard Grofman, Guillermo Owen, and Scott L. Feld, "Thirteen Theorems in Search of the Truth," (1983) 15 *Theory and Decision* 261.

570 Again, this is the initial formulation; it has since been argued that even if more than two options are admitted, the Condorcet Jury Theorem may hold under certain conditions (see Christian List and Robert E. Goodin, "Epistemic Democracy: Generalizing the Condorcet Jury Theorem," (2001) 9 *The Journal of Political Philosophy* 277 at 286), although it breaks down and indeed transforms into the so-called Condorcet Paradox in others. In human rights law, formulating the issue in binary terms will often be a simplification, but it does relate to the choice ultimately to be made between a finding of a violation and a finding of no violation (on which see Schlüter, "Beweisrechtliche Implikationen der margin of appreciation-Doktrin" at 44), and it resonates with the way in which European consensus is often used (see Chapter 1, III.); more complex approaches to vertically comparative law, however, will encounter problems with this binary structure, as acknowledged in Dothan, "Judicial Deference Allows European Consensus to Emerge" at 414-418; see critically also Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 207. I will mostly bracket these issues here, but they are worth noting since they constitute yet another reason why the merits of the Condorcet Jury Theorem are likely to be limited in practice (and indeed relate to some of the reasons I will foreground); see further on framing the issue for comparison Chapter 7, I.

571 Originally proposed by Condorcet in *Essai sur l'application de l'analyse à la probabilité des decision rendues à la pluralité des voix* (1785); for a succinct summary, see e.g. Dothan, "The Optimal Use of Comparative Law" at 23 and many of the other works cited in what follows.

572 Cohen, "An Epistemic Conception of Democracy" at 35; List and Goodin, "Epistemic Democracy: Generalizing the Condorcet Jury Theorem" at 277; José Luis Martí, "The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy," in *Deliberative Democracy and its Discontents*, ed. Samantha Besson and José Luis Martí (Aldershot: Ashgate, 2006) at 38-39.

racy in its assumed tendency to reach correct results, or, perhaps more provocatively formulated: to identify truth.[573] In this, they differ from what I have been calling the ethos-focussed perspective, since on that account, the ethical-volitional aspect of democracy qua self-rule – the authors and addressees of laws being identical – is seen as inherently valuable, an end in itself.[574] Applying the Condorcet Jury Theorem does not necessarily imply self-rule: one might, for example, imagine taking advantage of the epistemic virtues of a certain large group of people but applying the result to a different group of people. If one leaves such scenarios aside, however, then the epistemic approach is congenial to the ethos-focussed perspective, and the two are often combined.[575] In fact, the prototypical ethos-focussed account by Rousseau has increasingly been given an epistemic reading based on Condorcet:[576] in particular, the Jury Theorem supplies mathematical grounding for the claim that a majority decision on the common good constitutes the infallible general will.[577] I will return to the differences and similarities between the epistemic approach and the ethos-focussed perspective in a moment; let me first introduce how the prior relates to European consensus.

The Condorcetian logic has been applied to comparative reasoning by national courts by Eric Posner and Cass Sunstein, who argue in favour of

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573 See Bernard Grofman and Scott L. Feld, "Rousseau's General Will: A Condorcetian Perspective," (1988) 82 *The American Political Science Review* 567 at 568 (voting as "a process that searches for 'truth.'").

574 Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 218; Besson, "The Authority of International Law - Lifting the State Veil" at 354; see also Habermas, *Between Facts and Norms*, at 100 ("intrinsic, noninstrumentalizable value of civic self-organization").

575 E.g. Waldron, *Law and Disagreement*, at 134-136; see Samantha Besson and José Luis Martí, "Introduction," in *Deliberative Democracy and its Discontents*, ed. Samantha Besson and José Luis Martí (Aldershot: Ashgate, 2006) at xviii ("conceptually compatible").

576 Brian Barry, *Political Argument* (London: Routledge & Kegan Paul, 1965), at 292-293; Grofman and Feld, "Rousseau's General Will: A Condorcetian Perspective", passim; David M. Estlund, "Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited," (1989) 83 *The American Political Science Review* 1317 at 1318; Waldron, "Rights and Majorities: Rousseau Revisited" at 63; Hélène Landemore, *Democratic Reason. Politics, Collective Intelligence, and the Rule of the Many* (Princeton and Oxford: Princeton University Press, 2013), at 69-70 (but also qualifying this reading at 74); Dijn, "Rousseau and Republicanism" at 12; see also Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 218-219.

577 Rousseau, *The Social Contract*, at 39 and 135.

such reasoning based on its informational value.[578] The basic idea, on their account, is that so long as each State, taken individually, is more likely than not to provide a correct answer to any given issue, following the lead of a majority of States drastically increases the overall likelihood of a correct decision.[579] The conditions that Posner and Sunstein identify are that first, States must be making judgments based on private information; second, they must be relevantly similar; and third, they must make decisions independently, rather than following each other's lead.[580]

This last condition leads to the problem of so-called informational cascades: precisely because of the presumed informational benefits of comparative reasoning, States may defer to the judgement of other States in making their own decisions and thus fail to provide their own information, undermining the Condorcet Jury Theorem's premise.[581] If used by national courts, the Theorem would thus turn self-defeating: "courts should learn from each other in order to reach better results; but if all courts learn from each other, their decisions are not independent and other courts should not learn from them".[582] To avoid this problem, Shai Dothan has suggested that instead of applying the Theorem to national courts, one might look instead to regional courts such as the ECtHR.[583] Because of the vertical position of the ECtHR vis-à-vis the States parties, it is placed outside the vicious circle in which they would get caught up.[584] On Dothan's account, the national courts and States more generally should therefore make decisions independently of each other;[585] in this way, the path is freed for the ECtHR to use the Condorcet Jury Theorem and learn from their experi-

578 Eric A. Posner and Cass R. Sunstein, "The Law of Other States," (2006) 59 *Stanford Law Review* 131 at 140.

579 Ibid., 141-143.

580 Ibid., 146 et seqq.

581 Ibid., 160-164; Kai Spiekermann and Robert E. Goodin, "Courts of Many Minds," (2011) 42 *British Journal of Political Science* 555 at 564-565.

582 Dothan, "The Optimal Use of Comparative Law" at 24, building on Posner and Sunstein, "The Law of Other States" at 163.

583 Dothan, "The Optimal Use of Comparative Law" at 22.

584 Ibid., 27.

585 The "should" here makes clear that this is, of course, one of the many counterfactual assumptions on which the epistemic defence of European consensus operates; for, as Føllesdal has noted, "European states do look to each other's jurisprudence in law making": Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 206; see further Dothan, "The Optimal Use of Comparative Law" at 30-38.

ence. European consensus is the condensed form of that experience and, for that reason, obtains normative force.[586]

This justification of European consensus is thus particularly conscious of the fact that consensus, unlike some forms of comparative reasoning in other contexts, refers to a multiplicity of States rather than to individual legal orders: it not only builds on the verticality of European consensus to avoid informational cascades, but also on its prism of commonality to establish a broader basis on which to build by means of the Condorcet Jury Theorem. Waldron has described comparative references to a large number (or "accumulation") of foreign legal systems as "more than the sum of its parts"[587] since it represents "the accumulated wisdom of the world".[588] The same could be said of European consensus – and indeed, Steven Wheatley has described it, with echoes of Waldron, as the "collective wisdom of the peoples of Europe".[589] This also resonates with those contributions that focus on the informational value of consensus – Dzehtsiarou and Lukashevich, for example, have argued that "the Court is likely to produce a 'good, just, or right decision' if all relevant [comparative] information is duly taken into account".[590] That is precisely the intuition which the approach based on the Condorcet Jury Theorem aims to capture and formalise.[591]

The idea that the positions taken by the States parties' legal systems, when considered through the prism of collectivity, constitute more than the sum of their parts is reminiscent, to some extent, of the notion of a pan-European ethos, as discussed in the preceding chapter. The potential overlap between epistemic and ethical-volitional justifications of democracy which I mentioned above shines through again here, since European consensus is conceptualised as building on democratic decisions. For example, Dothan picks up on the epistemic defence of democracy and argues that reference, by means of European consensus, to States parties' laws is

586 Dothan, "The Optimal Use of Comparative Law" at 26.

587 Jeremy Waldron, "Foreign Law and the Modern Ius Gentium," (2005) 119 *Harvard Law Review* 129 at 145.

588 Ibid., 138.

589 Wheatley, "Minorities under the ECHR and the Construction of a 'Democratic Society'" at 783.

590 Dzehtsiarou and Lukashevich, "Informed Decision-Making" at 277; insofar as they argue that an informed decision also "*present[s]* itself as more fair and better" (ibid., emphasis added), their argument collapses back into the strategic approach based on sociological legitimacy, discussed in the Chapter 9.

591 See Posner and Sunstein, "The Law of Other States" at 136.

particularly apt in the case of democratic States.[592] Samantha Besson, while relying primarily on the volitional, ethos-focussed argument in favour of democracy, notes that majority rule may "in certain deliberative conditions be vested with epistemic qualities".[593] She also notes that justifications for the subsidiarity of international human rights law tend to be both epistemic and democratic and that "the combination is not surprising in the light of the epistemic justifications often put forward for democratic procedures themselves".[594] In principle, epistemic and ethos-focussed justifications of democracy point in the same direction – majority rule – and can provide support for European consensus in tandem.

Nevertheless, the differing justifications of democracy lead to different perspectives from which European consensus is approached. For one thing, the rein effect and spur effect are delineated from one another differently – because of the Condorcet Jury Theorem's focus on majorities above the fifty percent mark, the middle category of a "lack of consensus", normally associated with the rein effect, loses its importance. I will return to this in the next chapter which deals in more detail with numerical issues involved in establishing consensus. For now, the more fundamental difference to the ethos-focussed perspective (which also underlies the numerical issue) is that, because the democratic credentials of consensus are appreciated for different reasons, consensus itself, too, is valued for different reasons. On the epistemic approach, consensus is approached not so much as an expression of the collective will of the peoples of Europe, but rather as a way of identifying the best way to regulate any given issue based on their experience. As Lovett puts it in a discussion of Rousseau, the epistemic reading relies on "a sort of cognitive exercise in discovering what the general will or common good already is".[595] Similarly, Joshua Cohen has described the epistemic approach more generally as involving "a *cognitive* account of voting".[596]

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592 Dothan, "The Optimal Use of Comparative Law" at 28; see also Posner and Sunstein, "The Law of Other States" at 158-160.

593 Besson, "The Authority of International Law - Lifting the State Veil" at 354; see also on the epistemic qualities of national courts Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 50.

594 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 95.

595 Frank Lovett, "Can Justice Be Based on Consent?," (2004) 12 *The Journal of Political Philosophy* 79 at 83.

596 Cohen, "An Epistemic Conception of Democracy" at 34 (emphasis in original).

The epistemic justification of democracy – and hence of European consensus – thus has a certain affinity to the morality-focussed perspective and its emphasis on moral-cognitive elements. And yet, because it runs in parallel to the ethos-focussed perspective in relying on majoritarian procedures to discover the "truth", it also presents a different, more approving take on the use of consensus than that of the morality-focussed perspective. The reliance on majoritarian procedures and the mathematical grounding given to any truth claims further avoids the problem of disagreement usually associated with substantive moral argument – or so it seems at first. In the following subsections, I would like to test how the epistemic defence of European consensus plays out in more detail, by reference to the spur effect and the rein effect, respectively.

2. The Spur Effect and the Similarity Condition

Shai Dothan, in applying the Condorcet Jury Theorem to European consensus, seems to be concerned primarily with those cases in which European consensus speaks in favour of the applicant. He speaks of "emerging consensus" and introduces it as follows: "if the majority of European states protect a certain human right, the [ECtHR] will read the Convention as ensuring protection of this right and will find states that infringe this right in violation of the Convention".[597] Dothan's focus is thus on the spur effect of consensus: the argument would be that, on statistical grounds, the position taken by a majority of the States parties within Europe is likely to be correct, even if it conflicts with the position taken by the respondent State and a number of other States parties.

Consider, first, the similarities and differences to the morality-focussed perspective. I have argued that while the morality-focussed perspective is less opposed to the spur effect than to the rein effect of European consensus since the prior has a less immediate (or less harmful) impact on diversity management at the national level, consensus nonetheless is not considered to have independent normative force on its own terms: rather, if accepted at all, it merely constitutes an add-on to a result that was already justified by means of normative argument independent of consensus.[598]

597 Dothan, "The Optimal Use of Comparative Law" at 25; a similar formulation is at 22, and the focus on this scenario is clear throughout as well as in other articles.

598 Chapter 2, III.

Dothan's argument, by contrast, *proceeds in the opposite direction*: rather than accepting the argument from consensus if it conforms to independently discovered truth, truth is discovered *by means of* consensus.[599] This reprioritising of consensus as the primary argument brings Dothan closer, in substance, to the ethos-focussed view.

The epistemic approach also reaches similar conclusions to the ethos-focussed perspective as regards the object and purpose of the ECHR. Though it does not use the assumptions underlying the ethos-focussed perspective, it performs a conceptual shift that is similar to the one evidenced in the move from national ethe to a pan-European ethos; for example, in discussing the need for States to decide independently of one another in order for the effects of the Condorcet Jury Theorem to unfold, Dothan juxtaposes profitable choices for individual States with the "European interest".[600] Ultimately, the focus on the collectivity of European States is tied up with the very rationale underpinning the Condorcet Jury Theorem: to make reference to a multiplicity of decision-makers in order to improve the probability of a correct result.

Dothan is also well aware that this means overriding those States that find themselves in a minority position: he very clearly posits that the spur effect of consensus means that "human rights standards that are respected by at least a *majority* of the countries in Europe" are "then required from *all* European countries".[601] The implication is that the ECtHR should "strive to *harmonize* how human rights are protected in different states in Europe"[602] – harmonisation being understood here not in the general sense of setting uniform standards, but in the strict sense of non-incidental harmonisation as part of the very object and purpose of the ECHR, as discussed in Chapter 3.[603] While the underlying motivation, on the epistemic approach, is that such harmonisation will identify and give normative force to the best solution to the issue before the Court, rather than giving expression to a pan-European ethos, the two lines of argument are clearly compatible.

This compatibility is confirmed, in fact, by a glance at Dothan's further writings which go beyond the confines of the Condorcet Jury Theorem.

599 Dothan, "The Optimal Use of Comparative Law" at 43.
600 Ibid., 32.
601 Dothan, "Judicial Deference Allows European Consensus to Emerge" at 397 (emphasis in original).
602 Dothan, "The Optimal Use of Comparative Law" at 26 (emphasis added).
603 Chapter 3, IV.4.

His baseline assumption in those writings has been that, insofar as "states represent their citizens", the ECtHR should adopt restrictive rulings so as not to contradict the democratically bolstered "will of the public under the Court's jurisdiction".[604] By contrast, Dothan advocates for more expansive interpretation where it "does not contradict the established will of the citizens of Europe".[605] The language of "will" used here is, of course, volitional and thus wedded to the ethos-focussed perspective. Furthermore, speaking of "the established will of the citizens of Europe" clearly assumes the existence of a pan-European ethos as opposed to merely co-existing national ethe – it mirrors the language of proponents of the ethos-focussed perspective who have spoken, for example, of the "collective will of the community of European states",[606] though Dothan is more resolute in lifting the "State veil"[607] and dealing directly with the political self-determination underlying it.[608]

The main point here, however, is that as with the more cognitively oriented approach underlying the Condorcet Jury Theorem, the relevant collectivity shifts, at least in part,[609] from the individual State to the European community of States as a whole. Dothan does not deal explicitly with the spur effect of European consensus in this context, but his reference to (what amounts to) a pan-European ethos once more confirms the congeniality of the epistemic approach and the ethos-focussed perspective despite their differing theoretical assumptions. The Condorcet Jury Theorem might thus be understood as a further justification for the reference to the States parties as a collectivity and the harmonising purpose which follows from it.

Yet from the perspective of the respondent State – and other States whose position is overruled by decisions of the ECtHR based at least in

604 Dothan, "In Defence of Expansive Interpretation in the European Court of Human Rights" at 516.

605 Ibid., 518.

606 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 105-106, citing Polakiewicz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe" at 248; see also, in the Inter-American context, Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 114 ("the will of OAS member states").

607 Besson, "The Authority of International Law - Lifting the State Veil".

608 See Chapter 3, IV.2.

609 Contrast e.g. Dothan, "In Defence of Expansive Interpretation in the European Court of Human Rights" at 519, speaking of the will of citizens in an individual State.

part on the spur effect of European consensus – the claim that a position contrary to theirs is "better" based on the collective wisdom of other States is bound to appear no more convincing than the claim that it constitutes the will of the majority of States within Europe. Jeremy Waldron has formulated this quite clearly in the context of comparative references by American courts: he argues that they can be justified on epistemic terms so long as one adopts a vision of "law as reason" rather than "law as will".[610] Those who adopt the latter approach "do not see any reason why expressions of will elsewhere in the world should affect [their] expressions of will in America", whereas those who adopt a less volitional approach might rely "not just on [their] own reasoning but on some rational relation between what [they] are wrestling with and what others have figured out".[611] The notion of a pan-European ethos complicates the understanding of law as will by introducing a volitionally conceptualised macrosubject beyond the individual State, but the gist of Waldron's statement remains valid: if one focusses on ethical-volitional normativity by reference to individual States, then the reason-by-majority approach expressed by an epistemic defence of the spur effect will not seem convincing.[612]

To some extent, this is acknowledged within Dothan's framework, though in a manner internal to the Condorcet Jury Theorem. States parties can put forward special justifications to counteract the spur effect of European consensus, in particular, by challenging whether the "similarity condition" is fulfilled in their case. As one of the preconditions for the Condorcet Jury Theorem to apply at all, that criterion demands that the legal orders referred to "must be sufficiently similar to make learning from them useful".[613] With regard to the spur effect of European consensus, this means that "where European states are dissimilar, the adoption of the same policy by the majority of the states in Europe does not necessarily indicate that it is a good policy".[614] This seems intuitively sensible: collective experience should be drawn on only if it is relevant. Indeed, consensus has sometimes been described as "measur[ing] attitudes and legal solutions adopted

610 Waldron, "Foreign Law and the Modern Ius Gentium" at 146.
611 Ibid., 146-147; see also Posner and Sunstein, "The Law of Other States" at 149-151.
612 In that vein, see Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 207.
613 Dothan, "The Optimal Use of Comparative Law" at 23.
614 Ibid., 30.

in respect of *similar* socio-political dilemmas".[615] However, the requirement of similarity departs from the otherwise formal approach of the Condorcet Jury Theorem by opening the door to difficult questions: given that all States are liable to differ from one another in some ways and be similar in others, how should one decide whether the States being referred to by way of comparative reasoning are, as Posner and Sunstein put it, "sufficiently similar *in the right way*"?[616]

Dothan's main example for a case of dissimilarity is the ECtHR's ruling in *Leyla Şahin v. Turkey*, according to which the Turkish ban on religious clothing within universities did not violate the right to freedom of religion (Article 9 ECHR). He points to the ECtHR's focus on the Turkish principle of secularism and the historical context within which it developed[617] and argues that they "set Turkey apart from the rest of Europe", thus justifying a finding of no violation despite the existence of a European consensus in favour of the applicant.[618] The tension at issue here mirrors that which could, in the language of ethical normativity, be described as the tension between a pan-European ethos and the individual national ethos of the respondent State. That tension thus persists in cases involving the spur effect, even when it is framed in terms of the similarity condition within the epistemic approach. For how to decide between relevant similarity and dissimilarity?

Even if we grant that the religious history of Turkey sets it apart from other European States (itself, of course, a matter of interpretation), it remains a clearly normative question whether the claimed dissimilarity is relevant for assessing the ban on religious clothing. Since the application of the Condorcet Jury Theorem depends on the answer to this question, it cannot be answered from within that Theorem, and thus depends on argument external to it. This, in turn, reimports the tensions between different forms of ethical normativity, as well as the kind of substantive moral argu-

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615 ECtHR, Appl. No. 57792/15 – *Hamidović*, dissenting opinion of Judge Ranzoni, at para. 27 (emphasis added).

616 Posner and Sunstein, "The Law of Other States" at 148 (emphasis in original).

617 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at paras. 114-116.

618 Dothan, "The Optimal Use of Comparative Law" at 30; Dothan also points to the general diversity of States parties' approaches to the issue of religious symbols in educational institutions as cited in ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109; see further on that aspect of the judgment Chapter 7, III.1. and Chapter 8, III.2. The issue could also be approached through the lens of intransitivity between more than two options: see supra, note 570 and the examples given by Dothan in the passage there cited.

ment favoured by the morality-focussed perspective. Is it sufficient, for example, for Turkey to claim that the principle of secularism is of such importance within its historical context that it establishes sufficient dissimilarity vis-à-vis other European States (national ethos), or does the assessment of the dissimilarity's relevance depend, conversely, on the weight accorded to secularism elsewhere in Europe (pan-European ethos)? Or should one shift perspective entirely and assess the relevance of any given dissimilarity by reference to external standards – which might mean, for example, dismissing the relevance of any potential dissimilarity in the case of *Leyla Şahin* because Turkey's ban on religious clothing might be driven by prejudice (morality-focussed perspective)? In brief: by reference to which kind of normativity should controversies surrounding the relevant similarity condition be resolved? This, in turn, points to deeper questions pertaining to the foundational assumptions of the epistemic approach: what kind of normativity lurks behind its ostensibly formal and mathematical grounding? These issues become even more apparent in cases concerning the rein effect of consensus: it is to these that I now turn.

3. The Rein Effect and Bias Across States

Dothan's main focus, as mentioned above, seems to be on cases involving the spur effect of consensus. One might, however, also apply the epistemic justification of its use to cases involving the rein effect: if there is a consensus among the States parties to the ECHR in favour of the respondent State rather than the individual applicant, then the application of the Condorcet Jury Theorem would lead the ECtHR to believe that the majority position is likely to be correct, and consensus would therefore speak against finding a violation of the Convention.[619] In a sense, this follows as the flip side of applying the Jury Theorem to the spur effect, even if one does not phrase the finding of a non-violation in the strong language of establishing legal or moral truth but rather in more doctrinal and contingent terms such as the granting of a margin of appreciation to the respondent State.[620] Dothan does discuss issues usually connected with the rein effect in his defence of consensus: he notes potential criticism based on the idea that

619 This differs from the way the rein effect is usually approached, by way of a "lack of consensus": for a more detailed juxtaposition, see Chapter 5, III.3.

620 It is in that vein that I read Dothan, "Judicial Deference Allows European Consensus to Emerge" at 398.

there may be "a European consensus that restricts human rights instead of protecting them", and in particular the problem of political majorities and prejudice.[621]

Dothan's discussion of prejudice is telling, since it succinctly encapsulates the way in which the epistemic approach is ambivalently perched between the morality-focussed perspective and the ethos-focussed perspective. I already mentioned above that while its results cohere with the latter, the epistemic approach is, at heart, more cognitive than volitional, and thus seems closer to the outlook of the morality-focussed perspective. The discussion of the similarity condition in the preceding sub-section also showed that, for all its formality and mathematical grounding, the Condorcet Jury Theorem cannot disavow normative assumptions. These are not limited to the similarity condition: ultimately, normative assumptions are built into the foundational claim that any given State is more likely than not to make (legally or morally) *correct* decisions[622] – the standards for that correctness must be identified "along some specified evaluative dimension",[623] which in turn implies "an *independent standard* of correct decisions".[624]

Such standards external to the Condorcet Jury Theorem shine through clearly, for example, when Posner and Sunstein postulate that some States are "better" suited as a source of comparative materials because their "population is heathier, freer, happier, and wealthier".[625] Dothan similarly refers to "the relative success of states" as a potentially relevant criterion, but acknowledges that this involves a choice between what are, in effect, various moral positions – for example, he cites the "happiness of the population", which would imply a utilitarian approach, or "the protection of political rights", which implies a liberal moral theory.[626] Briefly put: "any epistemic justification of democracy" – or, by extension, of the use of European consensus – "is committed to the claim that political questions can

621 Ibid., 402.
622 See Posner and Sunstein, "The Law of Other States" at 149; Dothan, "The Optimal Use of Comparative Law" at 23.
623 Grofman and Feld, "Rousseau's General Will: A Condorcetian Perspective" at 569.
624 Cohen, "An Epistemic Conception of Democracy" at 34 (emphasis in original).
625 Posner and Sunstein, "The Law of Other States" at 174.
626 Dothan, "The Optimal Use of Comparative Law" at 28.

have substantively right or wrong answers",[627] and thus needs to clarify which standards are considered relevant and how they should be justified.

In light of this, the problem of prejudiced external preferences that drove the morality-focussed perspective to argue for anti-majoritarian procedures returns in full force. As we saw in the preceding chapter, the ethos-focussed perspective sidesteps these issues by questioning the concept of prejudice: on a more volitionally oriented epistemology, it becomes unclear and thus subject to majority decision whether a certain position is, in fact, prejudiced.[628] The epistemic approach cannot make use of that argument, however, since it must set up a certain normative standard and substantiate its claim that the decision-makers are, on average, more likely than not to correctly identify that standard.[629] On the other hand, it is "more grounded" than the morality-focussed perspective which looks "just to philosophic reason",[630] referring, as it does, instead to decisions *actually* made by voters and thus including factual elements rather than emphasising the "critical edge" of the is-ought distinction.[631] Measured against the prepolitical normative standard, however, these factual elements may be a vehicle of prejudice.

Condorcet himself regarded prejudice as one of the most serious barriers to achieving that goal in practice: "there must be a reason why [a voter] decides less well than one would at random. The reason can only be found in the prejudices to which this voter is subject".[632] Or, as John Rawls later put it, "clearly society is not a stochastic process" of the type envisaged by the Jury Theorem:[633] discrimination of certain groups, from a morality-focussed perspective, will always distort decision-making on at least some issues, particularly individual rights.[634] It is worth noting that on those

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627 Cristina Lafont, "Is the Ideal of a Deliberative Democracy Coherent?," in *Deliberative Democracy and its Discontents*, ed. Samantha Besson and José Luis Martí (Aldershot: Ashgate, 2006) at 11.

628 Chapter 3, II.

629 See Martí, "The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy" at 41.

630 Waldron, "Foreign Law and the Modern Ius Gentium" at 134.

631 Tellingly, analogies are often drawn in this regard between moral and factual (scientific) knowledge: in that vein ibid., 143; Posner and Sunstein, "The Law of Other States" at 149.

632 Cited from Waldron, "Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited" at 1323.

633 Rawls, *A Theory of Justice*, at 147, contra Edgeworth; directly on the Condorcet Jury Theorem see ibid., 314-315.

634 See Dworkin, "Constitutional Cases" at 176.

premises, the Jury Theorem would actually constitute an argument *against* majoritarian procedures since it works both ways: if decision-makers are more likely than not to reach the correct decision, bundling their votes increases the likelihood of a correct overall decision; but if they are individually more likely than not to reach the wrong decision, then the Jury Theorem teaches us that it becomes extremely likely that the decision made by a great number of them will be wrong.[635] On the Theorem's terms, then, the existence of prejudice might actually constitute an argument in favour of leaving questions of individual rights to individuals or small groups – such as judges.

Dothan is aware of these problems for an epistemic defence of majoritarian democracy at the national level: although he remains optimistic that States' decisions "are probably better than random in most cases", he also acknowledges that in cases of discrimination, States' decisions "may be worse than random".[636] According to him, however, the problem disappears when one introduces the transnational vantage point of the ECtHR in using European consensus – for, qua Dothan, "even if one state discriminates against a certain group, other states may not discriminate against the same group" and therefore "the laws chosen by the majority of the states will not be systematically biased".[637] Here, we have reached a point in the argument which already shone through in earlier chapters.[638] We saw there that minority rights were regarded as necessary by the morality-focussed perspective to counter prejudice, the existence of which was substantiated by an appeal to history. We also noted that given the transnational context, critics of European consensus must argue that prejudice tends to exist with regard to the *same* minorities across the States of Europe: hence Carozza's misgivings since the "history of the human rights movement makes it lamentably obvious that even large groups of states might share internal norms that all violate some basic aspect of human dignity"[639] and Letsas's claim that hostile external preferences will be

635 Waldron, "Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited" at 1322 (also elaborating on the problem of prejudice on the following pages).

636 Dothan, "The Optimal Use of Comparative Law" at 31; see also Dothan, "In Defence of Expansive Interpretation in the European Court of Human Rights" at 520-522.

637 Dothan, "The Optimal Use of Comparative Law" at 31.

638 Particularly Chapter 2, II.2.

639 Carozza, "Uses and Misuses of Comparative Law" at 1228.

found "across Contracting States generally".[640] Dothan opposes such statements in claiming that different States will discriminate against different groups.

That latter claim, however, seems to be somewhat detached from the way in which discrimination works in actual fact: discriminatory practices do not usually end at State borders. For example, Condorcet himself wrote even in 1790 that "*all* races have […] had a legal inequality between men and women".[641] Today, too, one is likely to encounter discrimination of similar groups across Europe: women and gender non-conforming persons, sexual minorities, disabled persons, ethnic and religious minorities, people of colour, poor persons, immigrants, etc.[642] The discrimination of such groups is social and thus in principle historically contingent rather than natural, so of course counter-examples may be found; but the morality-focussed perspective on European consensus in any case assumes historically similar discrimination of certain minority groups across Europe,[643] and thus would not be deterred by epistemic arguments but rather remain critical of according normative force to European consensus in its rein effect.

Recognising this problem, Dothan has further specified his position in more recent publications and argued that "there is no reason to think that all countries will discriminate against the same minorities *in the same way*".[644] His example goes as follows: a third of the States parties violate the right of minorities to a fair trial, another third their freedom of speech, and yet another third their privacy; since the Condorcet Jury Theorem would always favour the majority position over the third of States violating any given right, "their biases will balance themselves out and the majority's opinion will be optimal".[645]

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

641 Marquis de Condorcet, "On the Emancipation of Women. On giving Women the Right of Citizenship," in *Condorcet: Political Writings*, ed. Steven Lukes and Nadia Urbinati (Cambridge: Cambridge University Press, 2012) at 161 (emphasis added).

642 On the "embarrassed 'etc.'", see Judith Butler, *Gender Trouble. Feminism and the Subversion of Identity* (New York and London: Routledge, 1999), at 196.

643 As does the ECtHR: see with regard to the schooling of Roma children ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others v. the Czech Republic*, Judgment of 13 November 2007, at para. 205.

644 Dothan, "Judicial Deference Allows European Consensus to Emerge" at 402.

645 Ibid.

It is true that discrimination of minorities does not always work "in the same way"; in particular, it is experienced differently along different, often intersecting axes of oppression.[646] However, this is not the point Dothan is raising, and I am not convinced that his rather abstract example and the conclusion which he draws capture the issue in a helpful manner. His way of framing discrimination makes it seem as though minorities are discriminated against in different contexts almost at random, with different rights impacted upon in different States, rather than viewing the matter through the lens of complex intersecting structures. In reality, however, structures which marginalise certain groups tend to have broad effects on various aspects of life and thus touch upon many different rights. In addition, and the first point notwithstanding,[647] controversies in human rights law will often crystallise around certain issues relating to the specific group – accessible legal gender recognition and transition-related health care for trans persons, decriminalisation and later access to recognised partnerships and marriage for gay people, permissibility of religious attire for religious minorities, and so on. Both of these points make the neat division into different rights violations in different States rather unlikely.

Dothan's response is that "[e]ven if the European majority cannot be trusted in such issues, any individual country is" – by virtue of the Condorcetian logic that less jurors lead to worse results – "even less trustworthy",[648] thus arguing that the commonality-based approach of European

646 Angela Y. Davis, *Women, Race & Class* (New York: Random House, 1983) remains an absolutely foundational study of these intersections; another account I find helpful is Sara Ahmed, *Queer Phenomenology* (Durham and London: Duke University Press, 2006), at 136-137; particularly in the legal context, the classics (and the origin of the term "intersectionality") are Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," (1989) *University of Chicago Legal Forum* 139 and Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," (1991) 43 *Stanford Law Review* 1241; in the context of the ECHR, the issue is touched upon e.g. by Alexandra Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights," (2011) 11 *Human Rights Law Review* 707.

647 The disconnect here, I think, arises at least in part because legal discourse tends to *neglect* the intersections just mentioned, particularly insofar as economic disadvantage is at issue: see critically e.g. Hilary Charlesworth, Gina Heathcote, and Emily Jones, "Feminist Scholarship on International Law in the 1990s and Today: An Inter-Generational Conversation," (2019) 27 *Feminist Legal Studies* 79 at 83.

648 Dothan, "Judicial Deference Allows European Consensus to Emerge" at 403.

consensus is preferable to the position of any one State. But this cannot mitigate the criticism of the morality-focussed perspective which would trust neither individual States *nor* the community of European States taken as a whole. Thus, even on the epistemic approach, European consensus remains "an imperfect tool", and Dothan is forced to acknowledge that "in cases that involve a persistent bias against a certain minority", it might be more apt to "rely on abstract moral principles to justify intervention" which, sometimes, "is the only reasonable option".[649]

But if this is the case, then we are left with a similar dilemma to cases involving the similarity condition: by which standard should we evaluate when a "persistent bias against a certain minority" is at issue? I argued in Chapter 2 that this always involves a normative assessment; and, as with the similarity condition, this assessment is prior to the application of the Condorcet Jury Theorem so it cannot be answered by its own logic. The ethos-focussed perspective would avoid the issue: it would consider the examples given over the course of the preceding paragraphs (or similar examples to the same effect) non-conclusive since it would not accept the prepolitical standards against which the political will of a collectivity is measured. If the epistemic perspective were to adopt this stance so as to retain its faith in majoritarian decision-making, however, then it would lose its distinctive claim to supply not just a form of ethical-volitional normativity, but also a substantively correct decision in broader moral terms. If a morality-focussed perspective is retained, by contrast, then the problem of prejudice remains unsolved. The normative presuppositions of the epistemic approach are built into its starting assumptions and thus partially obscured, but no less controversial for it: it cannot, therefore, resolve the tensions between different kinds of normativity nor, in consequence, the controversies surrounding European consensus.

649 Ibid.; to avoid this conclusion, Dothan switches to a legitimacy-based argument (ibid.): on this type of justification for European consensus, see Chapter 9; for morality-focussed elements in his argument, see also Shai Dothan, "Three Interpretive Constraints on the European Court of Human Rights," in *The Rule of Law at the National and International Levels. Contestations and Deference*, ed. Machiko Kanetake and André Nollkaemper (Oxford and Portland: Hart, 2016) at 245.

III. Triangular Tensions and Instrumental Allegiances

1. Persistent Tensions Due to Differing Epistemologies and Idealisations

Since the epistemic approach cannot, as I have argued, mitigate the tensions between the different perspectives discussed over the course of the preceding chapters, these tensions must be grappled with directly. Insofar as the morality-focussed perspective and the ethos-focussed perspective are concerned, this problem is well-known from the national level; as will have become clear at this point, the transnational context of the ECtHR further complicates matters by partitioning ethical normativity according to different macrosubjects within which it is developed: the primary reference point becomes a pan-European ethos so as to enable the ECtHR's supervisory function, even as individual national ethe likewise remain relevant because of their more developed democratic procedures. We are thus faced with what might be deemed a *triangulation* of the tensions familiar from the national level: rather than a mere dichotomy, tensions now persist between moral normativity, ethical normativity coined within individual national ethe, and ethical normativity based on the notion of a pan-European ethos. As the discussion of the epistemic approach showed, these tensions materialise in different ways depending on whether the rein effect or the spur effect of European consensus is at issue.

This section is dedicated to illustrating the way in which the various different perspectives interact with one another in the context of European consensus. I begin by recalling the different epistemologies which underlie the morality-focussed and the ethos-focussed perspective and connecting them to different idealisations (III.1.). Because of the counterfactuality involved in these idealisations, none of the perspectives can claim absolute validity. As a result, the accounts of the various perspectives in their "pure" form given in the preceding chapters need to be complexified by demonstrating the argumentative shifts which occur, in practice, *between* the different perspectives. I demonstrate this by reference to the example of "core rights" which are assumed to carve out a space in which European consensus is irrelevant (III.2.). Finally, I will argue that the triangulation of tensions at the transnational level leads to the possibility of instrumental allegiances between the otherwise opposed perspectives and suggest that the air of compromise which surrounds the notion of a pan-European ethos in that context may have contributed substantially to the popularity of European consensus (III.3.).

To begin, then, with the differing epistemologies and idealisations of the different perspectives involved: the morality-focussed perspective, as argued in Chapter 2, proceeds by side-lining democratic processes and majoritarian decisions and foregrounding the moral-cognitive over the ethical-volitional moment. In so doing, it places a great deal of faith in courts reaching the correct decision on the basis of the judges' substantive reasoning. For example, it is assumed that the ECtHR would adequately enable the moral self-determination of the individual if it did not refer to European consensus. There is a clear potential for judicial hegemony here, with judges deemed competent to disregard State will entirely.[650] It is not for nothing, perhaps, that proponents of the morality-focussed perspective often write in the Dworkinian tradition, treating adjudication as a Herculean task.[651] As Dworkin himself put it: "the institution [of rights] requires an act of faith".[652] Since that faith cannot be placed in States and national laws which are regarded as the most important point of crystallisation of prejudice, faith is placed, instead, in judges[653] – specifically, those that constitute the ECtHR.

The ethos-focussed perspective, discussed in Chapter 3, is quick to point out that assigning Herculean roles to judges involves an idealisation, but its own solution – to instead rely on ethical-volitional normativity as expressed by means of political autonomy – involves the opposite idealisation, as it were. The ethos-focussed perspective avoids the problem of prejudice by virtue of its different epistemological approach: since it disavows reliance on normative claims about prepolitical rights in light of persistent disagreement about them, the very concepts of "minority" and "prejudice" must themselves be specified within the democratic process. Yet, from the perspective of the morality-focussed view, this seems like a weak excuse.

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650 See Mégret, "The Apology of Utopia" at 487: "hegemony never thrives as much as on utopia" (in the Koskenniemian sense).

651 Critically on the idealisations involved in Dworkin's theory Habermas, *Between Facts and Norms*, at 213 ("The theory requires a Hercules for its author; this ironic attribution makes no secret of the ideal demands the theory is supposed to satisfy.").

652 Dworkin, "Taking Rights Seriously" at 246; for an account of "faith" in human rights in a slightly different sense, critical of "naturalist" accounts of rights reminiscent of the morality-focussed perspective, see Henri Féron, "Human Rights and Faith: A 'World-wide Secular Religion'?," (2014) 7 *Ethics & Global Politics* 181.

653 See in a different context Milanovic, "On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese's Last Book" at 1046, criticising that Cassese "puts too much faith in courts and judges".

The fact of disagreement is not considered directly relevant to normative argument in light of the is-ought distinction[654] – all the more so since disagreement between the applicant and the respondent State lies, by definition, at the heart of every proceeding before the ECtHR.[655] To emphasise it as strongly as the ethos-focussed perspective does seems like an epistemological ploy to foreground ethical normativity and deny recourse to normative standards that are independent of the political will of a society. One is then reduced to judging "simply contingently in terms of existing social fact or social power",[656] or, to use the terminology often invoked by the morality-focussed perspective: one paves the way for a tyranny of the majority.

The ethos-focussed perspective's response to this issue is based on the faith it places in democratic structures to prevent the subjugation of intra-State minorities. Faith is now placed not in judges, but in citizens voting in accordance with civic virtues. As Waldron acknowledges, this involves an idealisation: the assumption that votes are conducted in good faith has "an aspirational quality";[657] more critically, Habermas has spoken of an "overexertion of the virtuous citizen".[658] To make this point more generally, one might say that democratic processes as they actually exist are transformed into what Susan Marks calls "venerable fictions" based on "a conception of citizenship and political participation abstracted from informal political processes, socio-economic contexts and membership of particular communities".[659] Thus, where the critics of European consensus idealise

654 Supra, Chapter 2, II.3.

655 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 53-55.

656 Allott and others, "Thinking Another World" at 274; see also Allott, *Eutopia*, at 88.

657 Waldron, *Law and Disagreement*, at 14; see further Chapter 3, III.

658 Habermas, "Volkssouveränität als Verfahren" at 611 (my translation); see also Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy" at 241, criticizing the assumptions underlying the margin of appreciation doctrine as "highly optimistic" and "not adequately meet[ing] political reality".

659 Marks, *The Riddle of All Constitutions*, at 51 and 72; see also the important distinction between "the People" as a "rhetorical trope", on the one hand, and an "empirical fact", on the other, drawn by de Londras, "When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of *A, B & C* v. *Ireland* and Referendum-Emergent Constitutional Provisions" at 327 in the context of referenda.

the ECtHR and its substantive reasoning, the ethos-focussed perspective idealises the democratic process within the States parties.[660]

Insofar as a pan-European ethos is concerned, a further idealisation lies in the fact that the States parties, *as a collectivity*, are taken to constitute the relevant macrosubject within which ethical normativity is developed. In particular, if ethical norms "give objective embodiment to the concrete life of a political community", as Pheng Cheah puts it,[661] then the notion of a pan-European ethos immediately raises the question of how the relevant political community is constituted. At the national level, the ethos-focussed perspective points to democratic procedures. At the transnational level, such procedures are largely absent; hence, as I argued in Chapter 3, the reference to a majority of the States parties by means of European consensus in their stead. Even if one accepts this approach due to the transnational context within which the ECtHR is situated, however, it remains difficult to conceptualise a "European polity" – at most, one might think of "an imbricated polity made of the 47 European national polities".[662] Or, more provocatively in the words of Frédéric Mégret: "the projection of, say, a 'European society' can no more hide that it is a fiction".[663]

Within the triangular tensions between moral normativity, ethical normativity coined within individual national ethe, and ethical normativity based on the notion of a pan-European ethos, we are thus left with differing idealisations for each perspective – one might say, echoing Mary Ann Glendon, that they choose to pin their hopes on different institutions and processes.[664] The controversies surrounding the rein effect of European consensus can be reframed, in other words, as a dispute over *which idealisation is more adequate* – which institutions and processes to pin one's hopes on. In David Luban's words, much depends on "political-philosophical

660 Fredman, "From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote" at 297-298; this idealisation is increasingly put into question for certain Eastern European States (tending in that direction e.g. Peat, *Comparative Reasoning in International Courts and Tribunals*, at 176-177), but the idealisation as such holds true for all States parties and the answer to the question of when it is appropriate in turn depends on the perspective from which it is approached.

661 Cheah, *Inhuman Conditions. On Cosmopolitanism and Human Rights*, at 150.

662 Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 134; see also Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 88.

663 Mégret, "The Apology of Utopia" at 482.

664 See Glendon, *Rights Talk*, at 182.

commitments" to, say, nationalism or internationalism, which in turn involves "[t]rust or mistrust" of different institutions.[665]

2. From Tensions to Oscillation: The Example of Core Rights

So, which idealisation *is* more adequate? Since critics and proponents of consensus approach this issue from different Archimedean points, with different epistemological assumptions, it is difficult if not impossible to find common ground from which such a judgement could be made. As Gerard Hauser has described the related opposition between moral universalism and cultural relativism: "Both rely on fundamentally different assumptions that are difficult to translate into the other's perspective".[666] Yet this also points towards the limitations of any one perspective taken on its own – because of the differing idealisations involved, each perspective constantly remains subject to challenge simply by pointing out the counterfactuality involved and approaching the issue from within a different epistemology. As a result, the different perspectives tend to depart from their "pure" form, which I have mostly been taking as the basis of the discussion until now, and integrate elements of one another into their accounts.

This may take place in different ways and between different forms of normativity within the triangular tensions just described – indeed, the following chapters will largely be dedicated to tracing the oscillations which result from the interaction of different forms of normativity. My intention in this subsection is merely to set the scene by providing an example from academic commentary on European consensus – and in so doing, to give additional nuance to the accounts of the morality-focussed and ethos-focussed perspectives in the preceding chapters. For my example, I take the tensions between the European consensus, based on the notion of a pan-European ethos, and the morality-focussed perspective as my starting point; I do so partly because they are, in a sense, more foundational than the tensions between different kinds of ethical normativity (i.e. they not only foreground different macrosubjects but build on different epistemologies altogether), and partly because the differences and tensions be-

665 David Luban, "Human Rights Pragmatism and Human Dignity," in *Philosophical Foundations of Human Rights*, ed. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Oxford: Oxford University Press, 2015) at 264.

666 Gerard A. Hauser, "The Moral Vernacular of Human Rights Discourse," (2008) 41 *Philosophy & Rhetoric* 440 at 451.

tween different kinds of ethical normativity were already touched upon in the preceding chapter. Moral and ethical normativity, by contrast, have so far been presented independently of one another, albeit engaged in mutual criticism. My aim here is to show how this criticism translates over into an oscillation between the two kinds of normativity.

Some of the authors cited throughout the preceding chapters do adhere quite strictly to one form of normativity, for example to a liberal theory of rights exemplary of the morality-focussed perspective.[667] Many will, however, also acknowledge its limits and hence admit elements of other forms of normativity. For example, given the morality-focussed perspective's concern with protecting the prepolitical rights of intra-State minorities against a tyranny of the majority, its proponents will often be more open to elements of the ethos-focussed perspective where it is not minority rights, but "matters that affect the general population in a given society" that are at stake[668] – hence the importance of specifying what counts as a "minority" matter.[669] In other matters, these commentators would acknowledge the limitations of substantive argument in light of disagreement, and hence be amenable to stronger deference to democratic procedures by way of European consensus.

Conversely, the criticism facing the ethos-focussed perspective – in particular, the charge that it does not adequately confront the problem of prejudice by virtue of its focus on factual disagreement which blunts the critical edge of the is-ought distinction – has led to certain concessions with regard to the role of European consensus. As the above discussion of the epistemic approach has shown, the prism of commonality through which European consensus approaches domestic laws does little to mitigate this kind of criticism: at least in some cases, prejudice will manifest itself in similar ways across Europe, and European consensus hence risks perpetuating such prejudice despite its reliance on a multiplicity of domestic legal systems. Proponents of European consensus have therefore (more or less explicitly) acknowledged the idealisations involved in the ethos-

667 E.g. Letsas, who arguably maintains his anti-consensus stance most consistently and within the most developed and self-aware theoretical framework.

668 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 847; the strong focus specifically on minority rights is echoed e.g. by Bribosia, Rorive, and Van den Eynde, "Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience" at 20.

669 See Chapter 2, II.1.

focussed perspective by proposing different ways to mitigate the problem of prejudice.[670]

One of the most popular ways of doing so within academic commentary has been by reference to the notion of "core rights" (or a right's core[671]), which I would like to discuss in this subsection. This notion is often used to demarcate *an area within which European consensus will have no normative relevance*: particularly in those cases which are liable to be marked by prejudice or in which the proper functioning of democratic procedures is otherwise implicated, this kind of caveat mitigates the concerns of the morality-focussed perspective to some extent. There is some resemblance, perhaps, to the way in which human rights have sometimes been conceptualised at the global level when confronted with the debate between universalists and relativists. The core of a right is then seen as a last bastion against relativism while allowing cultural diversity on the periphery. As Eva Brems has put it, "[t]he core is essential and universal, while the periphery should permit cultural variations".[672]

In a similar vein, then, a right's core might be seen as a bastion again the use of consensus, particularly when used in its rein effect. Many proponents of consensus – even those otherwise very strongly insistent on its merits – have advocated for such a "safe zone",[673] although they rarely elaborate further, contenting themselves instead with brief and categorical statements. Thus it has been said that "[i]f a core right is at stake, the Court should not base itself on consensus"[674] or that "a certain 'hard core' of human rights should be defended even against the majority or the consen-

670 Besides the discussion of core rights which follows, see also Chapter 8, III.2.

671 I will leave the distinction between "core rights" and the "core *of* a right" aside here; see generally, on the rhetoric of framing an issue as its own "right to …", Andreas von Arnauld and Jens T. Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'," in *Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric*, ed. Andreas von Arnauld, Kerstin von der Decken, and Mart Susi (Cambridge: Cambridge University Press, 2020).

672 Eva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse," (1997) 19 *Human Rights Quarterly* 136 at 147.

673 See also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 6 ("consensus exclusion zones").

674 Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 887.

sus".[675] Some judges at the ECtHR have likewise announced their support for such an approach: Judge Dedov has opined in a concurring opinion that because "the right to life is absolute, and is one of the *fundamental* rights, neither the margin of appreciation nor sovereignty nor consensus is a relevant factor";[676] and former President Wildhaber, writing extra-judicially with Hjartarson and Donnelly, has noted in passing that European consensus should be supported since, "*[a]part from core or elementary rights*, there can be no harm in leaving adequate room for human rights diversity and pluralism".[677]

The silence as to the details is telling, for those who do try to provide further details invariably run into problems stemming from the tension between the morality-focussed and the ethos-focussed perspective. As proponents of consensus, they will usually approach the issue from an ethos-focussed perspective – based on the impossibility of proving strictly normative statements about morality and hence focussing instead on a factually-oriented epistemology that favours volitional elements and reference to democratic procedures. From within that perspective, consensus would itself indicate which aspects of a right should be considered its core. For example, according to Ostrovsky, consensus "aids the court in determining whether […] a universal (or European) core right is actually being threatened", and thus to "draw a line around core rights".[678] However, on this approach, the notion of a right's core would merely describe the conclusion thus reached rather than claiming independent force as an argument: it would not serve as the kind of "safe zone" in which European consensus plays no role, as envisioned above.

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675 Péter Paczolay, "Consensus and Discretion: Evolution or Erosion of Human Rights Protection?" (Dialogue between judges, European Court of Human Rights, 2008), at 78.

676 ECtHR (GC), Appl. No. 46470/11 – *Parrillo v. Italy*, Judgment of 27 August 2015, concurring opinion of Judge Dedov, at para. 8 (emphasis added).

677 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 252 (emphasis added).

678 Ostrovsky, "What's So Funny About Peace, Love, and Understanding?" at 57; Ostrovsky is technically referring here to the margin of appreciation, but the prior pages make it clear that his main focus is its relation to European consensus; see also Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" at 455 and 458; on consensus-based demarcation of core rights more generally, see also Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, at 181, and at 218-219 in the context of the ECtHR.

Most commentators therefore take a different approach and simply postulate that certain issues belong to a right's core, independently of the state of European consensus – popular candidates include those rights which are vital for democracy to function and the most important rights for the purposes of protecting intra-State minorities.[679] The mention of intra-State minorities is revealing, for it reflects the concerns of the morality-focussed perspective; and indeed, the reasoning at this point usually switches to substantive normative reasoning of the kind that is likewise typical of the morality-focussed perspective. It is symptomatic when Brems describes a right's core as "essential and universal".[680] As Koskenniemi has rather lyrically put it, in order to uphold the distinction between core rights and other rights we must "fall back on [a] naturalist (or 'mythical') conception of basic rights"[681] – on precisely the kind of purely normative argument, in other words, which the ethos-focussed perspective seeks otherwise to avoid. There is a clear parallel, here, with the way in which Dothan acknowledges that sometimes the epistemic approach may not be able to mitigate the problem of prejudice and that, accordingly, reliance on moral principles would be preferable to reliance on European consensus.[682]

My point is not at all to criticise this argumentative move in substance, but merely to show how it destabilises the overall argument at issue: for if reasoning on the basis of the morality-focussed perspective is admitted here, why not elsewhere? Take Samantha Besson's approach as an example. Although otherwise highly focussed on national ethe and thus a strong

679 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 101 ("non-discrimination rights and the fundamental core of human rights"); von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 330 ("those rights particularly endangered in a democracy, e.g. minority rights, and those which are vital for its functioning, e.g. political rights", my translation); Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus" at 65 ("discriminatory infringement of a right safeguarded by the Convention or the impairment of the essence of such a right"); see also, though not directly relating to consensus, Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 112 ("the maintenance and promotion of the ideals and values of a democratic society, and human dignity and human freedom").

680 Supra, note 672.

681 Koskenniemi, "The Effect of Rights on Political Culture" at 148.

682 Supra, II.3.

proponent of giving European consensus normative force,[683] she has recently added a caveat to the effect that "the existence or absence of European democratic consensus only works as a test for human rights substantive subsidiarity within the egalitarian limits of subsidiarity, i.e., provided non-discrimination rights and the fundamental core of human rights are not at stake".[684]

But this seems oddly out of place in an otherwise ethos-focussed account. Echoing Jeremy Waldron,[685] Besson has herself repeatedly emphasised that persistent and reasonable disagreement applies to all issues of morality and justice including human rights, and hence advocated majoritarian solutions rather than strong judicial review, and reliance of European consensus rather than substantive moral argument.[686] Yet the same line of reasoning applies to the limits she now mentions – including the "fundamental core" of human rights, which is bound to be no less subject to reasonable disagreement than human rights in general.[687] In order to defend the "fundamental core" despite such disagreement, even Besson must thus allow elements of the morality-focussed perspective into her reasoning and build a substantive normative argument. This does not emerge more clearly only because she does not further elaborate on which specific (aspects of) rights are considered part of the "fundamental core".

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683 Particularly clear e.g. in Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators".

684 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 101; see also ibid., 96.

685 Waldron, *Law and Disagreement*, e.g. at 212-213.

686 E.g. Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 125; see in the context of consensus Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 61, arguing for States' "core duties" to be based on consensus.

687 Brems notes that the ECtHR may not have elaborated on the "substance" or "essence" of rights much because there is widespread agreement on these issues so that not many cases of this kind come before it: Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 290; this is probably true, but should be read as a pragmatic rather than a theoretical point; and in any case which *does* come before the Court, disagreement is implied simply by virtue of the fact that the proceedings have reached it (see supra, note 655); since the ethos-focussed perspective makes use of a broad, factual understanding of reasonableness (see further Chapter 5, II.), it is liable to also be considered reasonable disagreement – irrespective of whether that disagreement is framed in terms of a right's "core".

As an example, consider Judge Dedov's claim, mentioned above, according to which the right to life is a core right of such fundamental importance that "neither the margin of appreciation nor sovereignty nor consensus is a relevant factor".[688] Certainly, many would agree in the abstract that the right to life is of particular importance. Judge Dedov's concrete concern in the case at hand, however, was the right to life of *embryos* – and *that*, as the ECtHR itself has noted,[689] is an area which is particularly liable to generate controversy and in which agreement is not even remotely on the cards. Judge Dedov thus inadvertently demonstrates how claims to core or "fundamental" rights sweep controversy under the rug, and how the turn away from consensus in cases involving core rights involves positing a "core" by reference to a morality-focussed epistemology.

The same goes for "non-discrimination rights". The thorny question is precisely which specific (aspects of) rights are included under this heading. Many of the most controversial cases in which the ECtHR used European consensus – particularly its rein effect – involved arguably discriminatory rules or practices vis-à-vis intra-State minorities: that is precisely the criticism made of these cases by the morality-focussed perspective. For example, does the case of *Schalk and Kopf v. Austria* not involve an anti-discrimination right (i.e., not to be excluded from the institution of marriage) which might qualify as a core right?[690] The ethos-focussed perspective would usually express doubt as to the normative assessment involved in the claim that a certain group constitutes a minority subject to prejudice or that a certain practice constitutes discrimination as opposed to merely different treatment, and defer to majoritarian procedures as the best way of arbitrating between opposing claims – hence, for example, the ECtHR's reliance on consensus in *Schalk and Kopf*.[691] The caveat of "non-discrimination rights" as core rights thus again begs the question of how to identify which claims are covered by "non-discrimination rights" and thus remain untouched by the state of European consensus.

In sum, while many proponents of European consensus acknowledge that it should not be used in certain cases – often deemed the "core" of human rights – it is telling that such proposals are not usually fleshed out.

688 Supra, note 676.

689 See Chapter 7, II.

690 See e.g. Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 247.

691 See Chapter 1, II.; as usual, an alternate reason for relying on consensus is its ostensible legitimacy-enhancement: see the chapter by Lau just cited and in more detail Chapters 9 and 10.

For if the core is itself specified by reference to consensus, then it cannot fulfil the function assigned to it; but if it is specified in other ways, then the argument is liable to slip into the environs of the morality-focussed perspective and build on precisely the kind of purely normative epistemology which the ethos-focussed perspective would otherwise reject. The difficulty lies in demarcating the boundaries between the differing epistemological perspectives involved without a fixed point from which to do so. The notion of the "core" of a right provides a way of doing so, though without resolving the underlying tensions or providing a clear account of what counts as inside or outside of the core.

3. Instrumental Allegiances

While the preceding subsection has demonstrated the oscillations between different forms of normativity resulting from their respective idealisations by reference to the limitations of European consensus in cases dealing with minority rights, it bears repeating that this is not the only idealisation nor the only tension at issue. In particular, tensions also persist between nationalist and internationalist commitments – for example, between individual national ethe as the primary location of democratic procedures, on the one hand, and the notion of a pan-European ethos with its reliance on an imbricated macrosubject of the States parties to the ECHR viewed as a collectivity, on the other. The triangular tensions described above explain both why counter-arguments to European consensus are always easy to find (its idealisations can be countered) and why they remain difficult to put in reasoned relation with European consensus (they build on other forms of normativity). Given the double idealisation involved in the case of European consensus (first, the faith in democratic procedures that is typical of the ethos-focussed perspective; and second, the shift to the transnational level in which the States parties' legal systems are added up into an idealised form of European macrosubject), it also comes as no surprise its use has remained extremely controversial.

Why, then, has European consensus remained so prevalent in practice and so popular in academic commentary despite these controversies? Part of the answer may be that it has, rightly or wrongly, developed connotations of legitimacy: I deal further with this issue in Chapters 9 and 10. For now, I would hazard a guess that consensus also enjoys the prevalence and popularity it does because of the way it interacts with different forms of normativity within the triangular tensions which I described above. Be-

cause they are triangular rather than dichotomous (as the opposition between the morality-focussed and the ethos-focussed perspective would be at the national level), there is room for various interactions along different axes, involving not only tensions but also instrumental allegiances.[692] The easiest way to demonstrate this is to return, once again, to the distinction between the rein effect and the spur effect. The tensions described in the preceding sub-section are operationalised differently depending on which of these is at issue. Since the two scenarios, by definition, reinforce or oppose the national ethos of the respondent State, *different allegiances between the varying perspectives can be formed in either case*.

Consider, first, the rein effect of European consensus. Because it refers to a lack of consensus (or a consensus in favour of the respondent State) *among European States*, it is based on the notion of a pan-European ethos. The core tension here, as the example of core rights shows and the case of *Schalk and Kopf* exemplifies, is with the morality-focussed perspective; because it constitutes an argument in favour of not finding a violation and thus leaving the matter to democratic procedures at the national level, the pan-European ethos works in tandem with national ethe. Still, the two kinds of ethical normativity do stay in tension, even as they also relate to one another: as discussed in Chapter 3, from the perspective of ethical normativity developed at the national level the position of other States parties seems irrelevant. Thus, there remains a disconnect between the two forms of ethical normativity within the *reasoning* employed; however, in cases of the rein effect European consensus constitutes an argument against finding a violation of the Convention and therefore points towards a *result* that is favourable to the respondent State.

A similar structure, though with different allegiances at play, can be observed in cases involving the spur effect. Since it speaks in favour of finding a violation of the ECHR, the primary tension here is between European consensus and the national ethos of the respondent State. In Chapter 2, I noted that the morality-focussed perspective occupies a somewhat ambivalent position in these cases: because the spur effect does not speak against finding a violation of the Convention and is thus regarded as less dangerous to minority rights and more compatible with a critical stance

692 For the traditional binary structure of critical international legal theory within which European consensus would represent an area of middle-ground between utopian and apologetic reasoning, see Chapter 1, IV.3.; the sense of consensus as a compromise would then relate precisely to the notion of a "middle-ground" solution.

vis-à-vis the respondent State, it seems less alarming from a human rights perspective. European consensus is not supported for its own sake – the morality-focussed perspective continues to rely on substantive *reasoning* – but, at least in some cases, it is admitted as a form of concurrent rather than conventional morality since it speaks in favour of a *result* which protects prepolitical minority rights. This allegiance is more brittle than that between European consensus and national ethe in cases involving the rein effect: much depends on the substance of the case at issue and the theory of rights being applied by proponents of the morality-focussed perspective, and not all cases of the spur effect will be supported. Nonetheless, it some cases at least the results achieved by reference to moral normativity and by reference to a pan-European ethos will cohere.

In sum, the triangular tensions between moral normativity, ethical normativity coined within individual national ethe, and ethical normativity based on the notion of a pan-European ethos may play out in different ways depending on whether the rein effect or the spur effect is at issue, with different allegiances being formed. Arguably, one of the reasons why European consensus has become increasingly prominent in the practice of the ECtHR is not so much by virtue of a strong justification on its own terms but *because it can potentially strike up such allegiances with both the morality-focussed perspective and with national ethe, depending on the case at issue* – there is, in other words, an air of compromise surrounding it.[693] Promoting ethical normativity by reference to individual national ethe may run counter to the idea of review by a regional court,[694] but the rein effect of European consensus will achieve the same result. Insisting on normative reasoning independent of will-formation within individual States may seem epistemologically suspect, but the spur effect of European consensus will provide backing for claims otherwise made in the language of prepolitical rights.[695]

One consequence of thinking about European consensus in this way is to highlight the crucial issue of how (a lack of) consensus is established: since this will determine whether the rein effect or the spur effect takes hold, it is clearly of paramount importance.[696] Chapters 5 to 7 will take up

693 See Chapter 1, IV.3.; for more on how these allegiances work in practice, see Chapter 8, III.

694 See Chapter 3, IV.2.

695 See Chapter 2, III. and Chapter 5, II.

696 Aalt Willem Heringa, "The 'Consensus Principle': The Role of 'Common Law' in the ECHR Case Law," (1996) 3 *Maastricht Journal of European and Comparative Law* 108 at 130.

the ECtHR's case-law in that regard. Here, I would like to highlight a different (though related) aspect. If we acknowledge that the prominence of European consensus is due in large part to its flexibility in establishing allegiances with other forms of reasoning, then it becomes all the more important to keep in mind that such allegiances do nothing to mitigate the potential for hegemony involved in the idealisations which reliance on a pan-European ethos entails. It is sometimes implied that the rein effect and the spur effect justify one another. For example, the rein effect may run counter to minority rights from the morality-focussed perspective, but the spur effect actually supports such rights, so the use of consensus is considered to be justified.[697] My point here is the opposite: European consensus may strike up allegiances with other forms of reasoning (with the morality-focussed perspective, in the example just given) but this does not defuse the deeper tensions discussed throughout this chapter. Any justification for the use of European consensus in the abstract, I would therefore suggest, needs to be complemented with a more specific account of its use and the way its idealisations are to be mitigated in any given case, regardless of whether it involves the rein effect or the spur effect.[698] In that spirit, forms of normativity which run counter to European consensus remain crucially important.

IV. Interim Reflections: Against Naturalisation

My aim in this chapter has been to move from the static representation of different "pure" types of normativity to the way they interact. I have argued that European consensus might be conceptualised as based on a form of ethical normativity developed within a pan-European macrosubject, but

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697 This is a sense I often get from reading arguments in favour of European consensus, though seldom made explicit; most clearly Peat, *Comparative Reasoning in International Courts and Tribunals*, at 157-159; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 123 and 142; Robert Wintemute, "Consensus Is the Right Approach for the European Court of Human Rights," *The Guardian*, 12 August 2010. The "overall" evaluation of both rein effect and spur effect also relates to the way in which consensus is conceptualised in the context of legitimacy-enhancement: see Chapter 9, II.4. and Chapter 10, III.2.

698 Of the authors just cited, Dzehtsiarou grapples with this problem most extensively: see Chapter 8, III.2. and III.3.

that it must be viewed in a broader context in which other forms of normativity – specifically, ethical normativity coined within individual national ethe as well as moral normativity – likewise remain relevant. Depending on whether the rein effect or the spur effect is at issue, the triangular tensions between these different kinds of normativity manifest in opposition or in instrumental allegiances; because the idealisations involved in any one perspective can always be challenged by the others, the result is an oscillation between them.

This may seem like a rather mundane conclusion. Despite the occasional argument in favour of relying only on a moral reading of the ECHR or only on the position established by European consensus, the vast majority of commentators takes it as a matter of course that *some* kind of counter-point to the primary form of normativity which they champion should be allowed[699] – the discussion of the notion of core rights in this chapter is merely one particularly tangible example of this. I would nonetheless emphasise the importance of foregrounding the idealisations of any one perspective and the resulting oscillation between them because it *opens up space to challenge whichever form of normativity claims a hegemonic position*. It *denaturalises* static and absolutizing accounts of normativity, in other words.[700] In the context of human rights, this is a well-known response to the morality-focussed perspective. Because of the "moral exigency" it claims for its ostensibly prepolitical positions,[701] it carries a particularly strong tendency to naturalise them: hence the common charge that human rights, understood as innate and inalienable, claim to be "antipolitics".[702]

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699 As discussed in Chapter 1, IV.1. and V., my descriptions of morality-focussed and ethos-focussed perspectives in the previous chapters are intended merely as ideal-type depictions of certain presumptions and epistemologies, and most commentators in practice incorporate elements of both *with differing points of emphasis*.

700 On naturalisation as a mode through which ideology operates to render social arrangements – or corresponding kinds of reasoning, in this case – "obvious and self-evident", see Marks, *The Riddle of All Constitutions*, at 22; on the aim of denaturalisation, see Chapter 1, IV.5. and Chapter 11, II.

701 Mouffe, *The Democratic Paradox*, at 24.

702 See critically e.g. Wendy Brown, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism," (2004) 103 *The South Atlantic Quarterly* 451 at 453; Balakrishnan Rajagopal, "International Law and Social Movements: Challenges of Theorizing Resistance," (2003) 41 *Columbia Journal of Transnational Law* 397 at 420; Başak Çalı and Saladin Meckled-García, "Human Rights Legalized - Defining, Interpreting, and Implementing an Ideal," in *The Legalization of Human Rights. Multidisciplinary Perspectives on Human Rights and Human Rights Law*, ed. Saladin Meckled-García and Başak Çalı (London and New York:

A similar though inverted tendency can also be observed with regard to European consensus, however. Because the ethos-focussed perspective underlying it is sceptical of any prepolitical claims to normativity, the political aspect involved is more apparent and naturalisation seems less likely.[703] Nonetheless, by taking the notion of a pan-European ethos to be self-evident, some proponents of consensus do present the use of European consensus as "natural". On these accounts, regional systems of human rights protection *invariably* call for vertically comparative reasoning. For example, Paul Mahoney and Rachael Kondak have stated that European consensus is "not merely a useful interpretative tool to which the Court can choose to have recourse now and again if it so wishes", but that it "is *inherent* in the application and development of the Convention";[704] and Maija Dahlberg has argued that the ECtHR, situated "at the crossroads of the forty-seven Contracting States", is "*by its very nature* a 'comparative' institution" and that the use of consensus "is thus somewhat *natural and obvious*".[705] In fact, according to interviews conducted by Kanstantsin Dzehtsiarou, it is not an uncommon view among the ECtHR's judges that

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Routledge, 2006) at 4; critically on the morality-focussed perspective in the ECtHR context in this regard Ben Golder, "On the Varieties of Universalism in Human Rights Discourse," in *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts*, ed. Petr Agha (London: Hart, 2017) at 49.

703 See Carozza, "Uses and Misuses of Comparative Law" at 1219 and 1236; on which, see further Chapter 11, IV.2.

704 Mahoney and Kondak, "Common Ground" at 119 (emphasis added); see also Zoethout, "The Dilemma of Constitutional Comparativism" at 804; Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights" at 45; the implicit notion of a *duty* to refer to European consensus is also treated, through the lens of treaty interpretation, e.g. by Legg, *The Margin of Appreciation*, at 106; Monica Lugato, "The 'Margin of Appreciation' and Freedom of Religion: Between Treaty Interpretation and Subsidiarity," (2013) 52 *Journal of Catholic Legal Studies* 49 at 64; Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 59.

705 Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" at 76 (emphasis added); Mahoney and Kondak, "Common Ground" at 120 also speak of European consensus as "natural"; Rozakis, "The European Judge as Comparatist" at 269 mentions the ECHR's "'natural' legal environment"; parallel claims have been made with regard to the European Court of Justice: see e.g. Lenaerts, "Interlocking Legal Orders" at 874 ("As an international institution, the Community judicature is '*naturally*' brought to adopt a comparative approach", emphasis added).

consensus is "simply an inherent and natural argument for the Court as a regional human rights court".[706]

Yet while there is a certain intuitive connection between European consensus and the institutional setting of the ECtHR – and, indeed, this intuition is borne out by the practically oriented justification of European consensus which relies on the transnational context within which the ECtHR operates, as discussed in the previous chapter[707] – it is important to keep in mind that use of consensus appears "natural" *only* on the basis of ethical normativity by reference to a pan-European ethos,[708] and that this sense of self-evidence is potentially dangerous since it leads to the naturalisation of one form of normativity and its idealisations.

This is all the more so in light of the argument made above: that European consensus has gained prominence not so much because of a strong justification for its use on its own terms, but because it is capable of establishing shifting allegiances with other forms of normativity depending on whether the spur effect or the rein effect is at issue. In other words: rather than accepting it as "natural", we must continue to pay attention to *why* European consensus is used so as to create room for questioning the underlying idealisations – be they those of a pan-European ethos or of the other forms of normativity with which European consensus may be temporarily aligned. Quite contrary to suggestions that the judges of the ECtHR should "commit themselves to the outcomes of the consensus research *no matter what*",[709] then, it becomes important to *contextualise* any argument based on European consensus.

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706 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 182.

707 Chapter 3, IV.3.

708 Or, on a different plane, by reference to considerations of legitimacy: but see Chapters 9 and 10.

709 Tom Zwart, "More Human Rights Than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How It Can Be Done," in *The European Court of Human Rights and Its Discontents: Turning Criticism Into Strength*, ed. Spyridon Flogaitis, Tom Zwart, and Julie Fraser (Cheltenham: Edward Elgar, 2013) at 93 (emphasis added).

On this approach, the various perspectives we have been discussing appear less as absolute commitments and more as differing points of emphasis. The crucial question, then, becomes how they are set in relation to one another – which point of emphasis should be used in which context, how this should be determined, and ultimately how European consensus should be operationalised in practice. To come to grips with these questions, the following chapters turn to an examination of the ECtHR's case-law insofar as it relates to European consensus.