Chapter 3: Ethos-focussed Perspectives: From National Ethe to a Pan-European Ethos

I. Introduction

European consensus, at this point, may seem like a rather disastrous undertaking: it endangers the prepolitical rights of intra-State minorities, paradoxically builds on the positions taken by the very States which the ECtHR is supposed to be supervising, and blunts the critical edge of the is-ought distinction. In the face of these charges, it is time to turn to the arguments adduced in defence of European consensus. I will argue in this chapter that, whereas European consensus is commonly criticised on the basis of the morality-focussed perspective discussed in the preceding chapter, its defence is typically proffered from what I termed the *ethos-focussed perspective*.[364]

At this point, I must provide a brief indication of what I mean when I speak of a subject's *ethos*. The meanings of the word in its original Greek are multiple and complex, so it carries a certain inherent ambiguity. Perhaps the most generalisable and accessible translation renders it to mean "character": for example, Aristotelian rhetoric understands ethos (as opposed to pathos and logos) to refer back to the speaker's character, i.e. their wisdom, virtue and good will.[365] But "character" can also be understood in a broader, less literal sense as relating to a subject's particularities in other contexts – most importantly, the distinctive values held dear by a certain person or society which shape their attitude towards moral questions. Ethical normativity eschews the universal aspirations of the morality-focussed perspective and focusses instead on norms valid only *in relation* to a certain person or group.

The focus is therefore, as Habermas has put it, on the "ethical-political will of a self-actualizing collectivity" which gives voice to "its own authentic life project".[366] The ECtHR might be said to have applied the idea of a

364 Or (and often in addition) on the basis of notions of legitimacy which I discuss in Chapters 9 and 10.

365 The distinction is introduced in Aristotle, *Rhetoric*, Book I Chapter 2, and the ethos is developed further in particular in Book II.

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

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State's ethos when it referred, in the *Belgian Linguistics* case, to "those legal and factual features which characterise the life of the society in the State".[367] As discussed in Chapter 1, the juxtaposition of morality-focussed and ethos-focussed perspectives is based on Habermasian terminology; but even as both "morality" and "ethos" are sometimes used interchangeably, the distinction between universalising and relative normativity is usually quite clear. Thus, one standard formulation of the ECtHR refers to the competence of national judges to gauge "the 'exact content of the requirements of morals' in their country";[368] the Court has also spoken of "the moral ethos or moral standards of a society as a whole".[369] Given the reference to standards *of a certain society or country*, both these formulations establish normativity in relation (only) to a specific group or macrosubject, and hence form part of what I will call ethical normativity.

Throughout this chapter, I will trace the implications of such a relative form of normativity to the debates surrounding European consensus, particularly insofar as it could be said to respond to the critical points raised by the morality-focussed perspective. I begin by outlining the epistemological approach of the ethos-focussed perspective: it challenges the morality-focussed perspective's reliance on substantive moral reasoning by pointing to persistent disagreement about human rights (II.). Ethical normativity provides an alternative; the question then becomes how it should be identified. As the citations just mentioned indicate, this issue has received the most sustained attention with regard to ethical normativity developed *within individual States*; I therefore set out main lines of the debate in that context (III.). Briefly put, while some ethos-focussed accounts have focussed on pre-existing cultural commonalities and traditions, the overwhelming majority of modern accounts instead (purport to) locate a State's ethos in the values expressed by way of its political system and legislative acts. In that vein, Pheng Cheah has described ethical normativity as referring to "binding substantive forms of ethical self-understanding that are arrived through consensual procedures of law enactment and political decision making"; it is *by means of these procedures* that ethical norms "give objective embodiment to the concrete life of a political community".[370]

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367 ECtHR (Plenary), Appl. Nos. 1474/62 et al. – *Belgian Linguistics Case (Merits)*, at para. I.B.10.

368 ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others v. Austria*, Judgment of 3 November 2011, at para. 94; see further on this line of argument infra, note 492.

369 ECtHR (Plenary), Appl. No. 7525/76 – *Dudgeon*, at para. 47.

370 Pheng Cheah, *Inhuman Conditions. On Cosmopolitanism and Human Rights* (Cambridge, Mass.: Harvard University Press, 2006), at 150.

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Having identified these general tenets of the ethos-focussed perspective, I turn to its application in the context of the ECHR, particularly with regard to the ECtHR's use of European consensus. One might imagine different ways of conceptualising ethical normativity at the transnational level – one option would be to refer to materials from regional organisations such as the Council of Europe (CoE), a possibility which I will return to in Chapter 6. For now, I retain the emphasis on democratic procedures at the national level as significantly more developed than any form of transnational democracy. In light of this point of emphasis, the ethos-focussed perspective takes a bottom-up approach to regional human rights law and conceptualises it as a form of cooperation between, rather than confrontation of, the States parties (IV.1.). European consensus then emerges as the continuation of this cooperation-based approach within the justification of concrete human rights norms: because it refers back to the legal systems of the States parties, it provides the ECtHR with a way of incorporating the results of democratic procedures at the national level into its reasoning; and the use of consensus could therefore be considered justified on democratic grounds (IV.2.).

Yet this involves a shift in perspective. Even as it builds on individual national ethe, European consensus also goes beyond them since it approaches the legal orders of the States parties through the lens of commonality. I will argue that this is the consequence of internationalist commitments, and that it implies a shift from national ethe to the notion of a *pan-European ethos* (IV.3.). The implication is that, particularly in cases involving the spur effect, European consensus becomes an instrument of harmonisation: it overrules the position of some States parties based on the combined democratic credentials of the position of *other* States parties (IV.4.).

It follows from all this that the use of European consensus could be considered justified as a form of ethical normativity based on a pan-European ethos building on democratic decisions made within the States parties, which in turn is due to the institutional context of the ECtHR as a regional human rights court without its own supporting democratic structures. It will also have become clear, however, that this is not an uncontroversial statement even on the ethos-focussed perspective's own terms, since it involves a shift away from the traditionally favoured macrosubject of the State in which democratic procedures are more pronounced; simultaneously, the morality-focussed perspective would continue to advocate for a different approach altogether. I conclude the chapter by reflecting on the dual difficulties facing the notion of a pan-European ethos, with particular

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reference to underlying assumptions of homogeneity at both the national and the transnational level (V.).

II. Against the Morality-focussed Perspective: Differing Epistemologies

Before returning to the notion of a pan-European ethos, I must establish some core elements of the ethos-focussed perspective more generally. An essential point which is common to any kind of ethical normativity is the distinct epistemological approach, which differs radically from that of the morality-focussed perspective and both explains and (on its own terms) justifies the differing focus. This section will therefore spell out that epistemology in more detail and, in particular, set it in contrast to the Dworkinian epistemology introduced in the last chapter – which, pro memoria, assumes that normative questions must be answered by further normative argument, itself contingent on yet further argument, and so forth. As Dworkin himself put it, this "may seem unhelpful, because it supplies no independent verification",[371] meaning that people will continue to disagree about which reasons are actually adequate. Dworkin noted that the question of whether a legal or moral question has an objectively true answer must be distinguished from the question of whether that truth can be demonstrated.[372] Although arguing in favour of the infamous "one right answer" thesis in response to the prior question, he always acknowledged the possibility and prevalence of disagreement in response to the second.[373]

Most proponents of European consensus do not take issue directly with the first prong of this epistemology – there is little indication that they take an entirely sceptical approach to morality.[374] Many have, however, been more preoccupied with the second prong of Dworkin's account: the lack of demonstrable proof in response to normative questions. This focus has an impressive pedigree: consider, for example, Jean-Jacques Rousseau,

371 Dworkin, *Justice for Hedgehogs*, at 37.
372 Dworkin, *Law's Empire*, at ix.
373 Dworkin, "Hard Cases" at 105; Dworkin, "Can Rights be Controversial?" at 336; for one contextualisation, see Kennedy, *A Critique of Adjudication (fin de siècle)*, at 35-36 and 123.
374 Explicitly Samantha Besson, "The Authority of International Law - Lifting the State Veil," (2009) 31 *Sydney Law Review* 343 at 375; see also Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1743 (acknowledging the "moral value of human rights").

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who provides a prototypical early account of the ethos-focussed perspective. "Doubtless", he says, "there is a universal justice emanating from reason alone", a justice which "comes from God"; however, "if we knew how to receive so high an inspiration, we should need neither government nor laws".[375] Rousseau therefore argues against a purely normative approach, since it leads only to circular argument "without arriving at an understanding".[376]

These considerations provide a different perspective, for example, on the debate on morality and law that followed the publication of the Wolfenden Report. In the last chapter, we considered Hart's and Dworkin's criticism of Lord Devlin, according to which his reliance on "positive morality" undermined critical engagement with the status quo. Devlin, however, approached the issue from an entirely different angle: while accepting "a man's own conscience" as "*for him* the final arbiter", he was concerned about the consequences of foregrounding that conscience, in the form of critical morality, for *society at large*.[377] With clear echoes of Rousseau, Devlin's argument for this conclusion was based on the prevalence of disagreement about moral issues: there could be no basis for privileging critical over positive morality when "men of undoubted reasoning power and honesty of purpose have shown themselves unable to agree on what the moral law should be".[378] (The positions of women or people of other genders, apparently, were not considered relevant in the first place.)

This approach is given its clearest modern presentation by Jeremy Waldron. He does not dispute the existence of objective moral truth in Dworkin's sense, but argues that, whether it exists or not, it is simply *irrelevant* since there is no way of uncontroversially accessing it.[379] His starting point is, instead, that "[t]here are many of us, and we disagree about jus-

375 Jean-Jacques Rousseau, *The Social Contract*, trans. G.D.H. Cole (Milton Keynes: Jiahu Books, 2013), at 49.

376 Ibid.

377 Devlin, "Democracy and Morality" at 92.

378 Ibid., 93.

379 Waldron, *Law and Disagreement*, at chapter 8; Waldron is here concerned primarily with moral realism, but see ibid. at 168-9 on Dworkin; see also Samantha Besson, *The Morality of Conflict. Reasonable Disagreement and the Law* (Oxford: Hart, 2005), at 45; Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights" at 1022 and 1024; Legg, *The Margin of Appreciation*, at 114; see also the commentary by Jürgen Habermas, "On Law and Disagreement. Some Comments on 'Interpretative Pluralism'," (2003) 16 *Ratio Juris* 187 at 189.

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tice".[380] Waldron's account is particularly relevant in the present context because he explicitly extends its scope to cover human rights: from a wholly ethos-focussed perspective, there is no ground to make any kind of epistemological exception for rights. They are just as controversial as other issues – if not in their abstract formulation, then certainly in the concrete application which is of interest for the reasoning of the ECtHR.[381] In fact, Samantha Besson has argued that in the case of the ECtHR, adjudicating cases pertaining to 47 States parties, it is even more important to take disagreement about the issues before the Court into account.[382]

The upshot of all this is that while Dworkin's epistemological account is not necessarily rejected,[383] the ethos-focussed perspective approaches the issue from an entirely different direction.[384] If moral truth is regarded as irrelevant and disagreement foregrounded instead, then there is no ground on which to distinguish between the merits of the various views which constitute that disagreement. The spotlight is shifted, in other words, from the universal validity which the morality-focussed perspective claims under the auspices of (cognitive) reason to the *person* whose reasoned *but disputed* views are at issue. From that perspective, it becomes "something of an insult",[385] "unpleasantly condescending"[386] or "flagrantly elitist"[387] to put one's own opinion above that of anybody else when making decisions

380 Waldron, *Law and Disagreement*, at 1; in this respect, Ely is closer to the ethos-focussed perspective: see Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 57-58.

381 Jeremy Waldron, "The Core of the Case Against Judicial Review," (2005-2006) 115 *Yale Law Journal* 1346 at 1366-1369; Waldron, "Rights and Majorities: Rousseau Revisited" at 53; Waldron, *Law and Disagreement*, at e.g. 198 and 245; see specifically on the ECHR ibid., 12.

382 Samantha Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box," in *Human Rights Protection in the European Legal Orders: Interaction Between European Courts and National Courts*, ed. Patricia Popelier, Catherine Van de Heyning, and Piet Van Nuffel (Cambridge: Intersentia, 2011) at 136.

383 Of course, some philosophers also draw that stronger conclusion. This does not seem to be a common view among proponents of European consensus, however; and the practical consequences for that topic would in any case be similar.

384 See Waldron, *Law and Disagreement*, at 160-161.

385 Ibid., 15; see also Waldron, "Rights and Majorities: Rousseau Revisited" at 71.

386 Waldron, *Law and Disagreement*, at 303.

387 Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 59.

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which affect society (or, in the case of the ECtHR, even a large number of societies).[388]

As an example, consider the case of minority rights. There is disagreement over which minorities should be protected or empowered by law, and in which fashion. Dworkin would insist that there is a correct answer to an interpretive controversy about rights, particularly minority rights, and that it must prevail over other, prejudiced views.[389] Waldron holds precisely the opposite: "The most dangerous temptation is […] to treat [an opposing view] as beneath notice in respectable deliberation by assuming that it is ignorant or prejudiced".[390] As argued in the preceding chapter, however, the claim of prejudice is central to the morality-focussed perspective's rationale for protecting minority rights. Furthermore, it implies a normative element: minorities are understood as subject to prejudice based on denial of equality, rather than a justified form of differential treatment. It is that normative element that the ethos-focussed perspective treats differently in light of its focus on disagreement: since the normative element is bound to be controversial, it may not be assumed; and any claim of prejudice is itself subject to disagreement.[391]

The epistemological shift in perspective may be best exemplified by the different understandings of *objectivity* used by the morality-focussed and

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388 See Steven Wheatley, "On the Legitimate Authority of International Human Rights Bodies," in *The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspectives*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013) at 102-103.

389 See Chapter 2, II.

390 Waldron, *Law and Disagreement*, at 111; see also Devlin, "Democracy and Morality" at 91 and 96, as well as Koskenniemi's critique of Philip Allott, arguing that a weakness of his writing lies in "a downplaying of the importance of actual disagreement, indeed the characterization of it in terms of the error or perhaps 'madness' of one (or both) of the parties": Martti Koskenniemi, "International Law as Therapy: Reading The Health of Nations," (2005) 16 *European Journal of International Law* 329 at 338-339.

391 See Waldron, "The Core of the Case Against Judicial Review" at 1398 and 1403-1404, where he acknowledges by reference to the *Carolene Products* footnote four that "prejudice against discrete and insular minorities" might lead to cases in which his argument fails since the preconditions which he posits (particularly what amounts to an assumption of good faith voting: see further infra, III., and Chapter 4, III.1.) do not hold, but also implies that this constellation should only be considered in rare and ultimately negligible ("non-core") cases, instead emphasising the importance of not all-too-hastily side-lining reasonable disagreement about rights.

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ethos-focussed perspectives.[392] The prior is concerned with moral objectivity: not usually in the sense of moral realism (as giving moral claims "a bizarre metaphysical base"), but referring to moral claims as established through normative argument rather than "mere reports of taste".[393] The ethos-focussed perspective, as discussed over the course of the last paragraphs, bypasses the issue of moral objectivity since it considers it unverifiable. By focussing instead on agreement and disagreement, it takes (what it conceptualises as) *an issue of fact* as its starting point.[394] For all the practical and theoretical difficulties involved, facts are regarded as empirically verifiable and hence objective in a more relevant sense.[395]

The controversies surrounding European consensus exemplify the differences between the two approaches. While Letsas invokes the critical edge of the is-ought distinction to argue against consensus in favour of purely normative reasoning based on "objective" values of political morality,[396] proponents of consensus point to disagreement about the requirements of morality.[397] Proposals for the ECtHR to follow a morality-focussed approach have been criticised as assigning it the role of a Platonic philosopher-king,[398] and it is suggested that the ECtHR's reasoning "cannot rest solely on the moral superiority of human rights, because, as Waldron has rightly argued, people can disagree about rights".[399] Since there is no uncontroversial way to establish moral truth, the ECtHR is said to face "an

392 See critically Koskenniemi, *From Apology to Utopia*, at 16, 63, 513 and, for a connection to the epistemological issues under consideration here, 516; see generally on the Koskenniemian framework Chapter 1, IV.

393 Dworkin, *Law's Empire*, at 81; see also Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," (1996) 25 *Philosophy & Public Affairs* 87, esp. at 98.

394 Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 65.

395 See Waldron, *Law and Disagreement*, at 178.

396 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 5.

397 Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 136.

398 See Legg, *The Margin of Appreciation*, at 115, criticising the Letsas-Dworkinian epistemology; for Dworkin's own wry take on philosopher-kings, see Ronald Dworkin, "A New Philosophy for International Law," (2013) 41 *Philosophy & Public Affairs* 2 at 6.

399 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 154; see also Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" at 77; Carmen Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?," (2017) *Public Law* 11 at 14; Kristin Henrard, "How the ECtHR's Use of European Consensus Consid-

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epistemological quandary";[400] it must provide "some *more objective* and palpable grounds other than a moral reading".[401] European consensus provides those grounds because it refers to States parties' laws which are "on the books" and thus injects a verifiable, "objective element" into the Court's reasoning.[402] The meaning of objectivity has shifted from a normative to a factual understanding: unlike purely normative reasoning, consensus refers to "empirical evidence"[403] – to "external circumstances that can be verified".[404]

Given this affinity towards factual objectivity, it is hardly surprising that proponents of consensus are less concerned with the is-ought distinction. While they do not deny the fallacy of deriving an *ought* directly from an *is*, they emphasise that "there is no fallacy in informing the *ought* with the *is*"[405] and the "manifold connections" that exist between (factual) practice

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erations Allows Legitimacy Concerns to Delimit Its Mandate," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 160.

400 Legg, *The Margin of Appreciation*, at 115.

401 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 154 (emphasis added); see also at 142.

402 Brems, *Human Rights: Universality and Diversity*, at 419; Mahoney and Kondak, "Common Ground" at 120 and 139; Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 13; Nozawa, "Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14" at 73 in fine; ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria speaks of "objective indicia used to determine consensus", which is echoed e.g. by Kukavica, "National Consensus and the Eigth Amendment: Is There Something to Be Learned from the United States Supreme Court?" at 366; see also (though acknowledging the limits of the ostensible objectivity of consensus) Janneke Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine," (2011) 17 *European Law Journal* 80 at 109-110.

403 Örücü, "Whither Comparativism in Human Rights Cases?" at 239; Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin," (1990) 11 *Human Rights Law Journal* 57 at 74 (also "objective evidence").

404 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1734 (footnote 31); see also Peat, *Comparative Reasoning in International Courts and Tribunals*, at 177 ("comparative law provides an objectively verifiable benchmark").

405 Samantha Besson and Alain Zysset, "Human Rights Theory and Human Rights History: A Tale of Two Odd Bedfellows," (2012) *Ancilla Iuris* 204 at 216.

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and normative decisions.[406] As Alix Schlüter has succinctly put it, "facts make law".[407] Just as Devlin was unapologetic about the facticity of positive morality and Habermas emphasised the facticity of the volitional moment on which the ethos-focussed perspective relies, so too the relevance of laws-read-as-facts is conceptualised by proponents of European consensus as a positive attribute, for it avoids the pitfalls of the morality-focussed perspective and its over-reliance on substantive reasoning.

III. National Ethe: From Traditions to Democratic Procedures

If there is no epistemology that allows for the mitigation of disagreement,[408] then the question becomes how to achieve concerted action in spite of it (the "circumstances of politics").[409] The argument traced so far merely counters the strictly normative approach of the morality-focussed perspective and suggests that an alternative approach would be preferable. I have mentioned that European consensus seems to avoid the pitfalls associated (from the perspective of proponents of consensus) with the morality-focussed perspective, but this only demonstrates that European consensus avoids some forms of criticism; it does not yet supply a positive argument *in favour* of using European consensus. To examine whether such an argument can be adduced, we must delve deeper into different ways of approaching the ethos-focussed perspective – for much depends on which ethos is regarded as relevant and how it is constructed.

To that end, consider once more the distinction between morality-focussed and ethos-focussed perspectives. Habermas describes the prior as assigning rational will-formation to the individual subject, which is why on that view "the individual's moral autonomy must reach through the political autonomy of the united will of all" in the form of prepolitical human rights.[410] By contrast, the ethos-focussed perspective is said to assume

406 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 326 (my translation).

407 Schlüter, "Beweisrechtliche Implikationen der margin of appreciation-Doktrin" at 55.

408 Waldron, *Law and Disagreement*, at 178.

409 Ibid., 102, developing the Rawlsian "circumstances of justice": see Rawls, *A Theory of Justice*, at 109-110; see also Bellamy, "Republicanism, Democracy, and Constitutionalism" at 167.

410 Habermas, *Between Facts and Norms*, at 103.

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that "the rational will can take shape only in the macrosubject of a people or nation", so that priority must be given to "the self-conscious realization of the ethical substance of a concrete community".[411] As mentioned in the introduction of the chapter, ethical reasoning thus eschews the universalising claims of the morality-focussed perspective in favour of a form of normativity which is *relative* to a certain macrosubject. For example, Waldron conceptualises law as aspiring not to justice tout court, but to "justice *of a community*",[412] Besson argues that it modulates moral rights to adapt them to the "moral-political circumstances of life in a [specific] polity",[413] and Cheah describes the "ethical realm" as the "political morality of the state of its (national) public sphere".[414]

Several of these formulations identify a people, nation or State as the relevant macrosubject, which clearly chimes with the dominant tradition within Western political theory. Before considering whether the ethos-focussed approach can be broadened to accommodate different macrosubjects, particularly at the transnational level, I would like to examine in more detail how the "self-conscious realization of the ethical substance" is thought to take place within individual States, particularly insofar as the relationship between intra-State majorities and minorities is concerned.

Let us begin, once again, with Rousseau.[415] We saw above that, while he does not dispute the existence of moral principles of justice, they cannot be ascertained by humans in a way that would foster agreement. Justice, "to be admitted among us", must therefore be "mutual" – it must be introduced in the form of general laws, in the making of which "the whole people decrees for the whole people".[416] These laws give birth to what Rousseau calls, in another passage, "the morality of a nation".[417] Such an understanding need not be expressed unanimously, however[418] – once a society is constituted by the unanimous social contract itself, majority vote

411 Ibid.
412 Waldron, *Law and Disagreement*, at 6.
413 Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights" at 240.
414 Cheah, *Inhuman Conditions. On Cosmopolitanism and Human Rights*, at 150.
415 For the centrality of Rousseau within the Habermasian framework, see Habermas, *Between Facts and Norms*, at 100; Habermas, "Über den internen Zusammenhang von Rechtsstaat und Demokratie" at 299; see also, with a different emphasis, Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 164-166.
416 Rousseau, *The Social Contract*, at 49.
417 Ibid., 161.
418 Ibid., 35 (at footnote 6).

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suffices to enact a law. The argument goes as follows: the citizens do not vote based on their individual interests, but rather state their opinion as to what the general will requires, i.e. they vote in the interest of the collective on which approach would best encapsulate the common good. Being outvoted, on those terms, means simply that one was mistaken as to what the general will requires.[419]

According to Rousseau (at least on some readings of him), this approach functions best when there is a certain level of homogeneity among the people united by a social contract: he argues that the "same laws cannot suit […] many diverse provinces with different customs" and that small States with strong social ties will have a greater chance at succeeding in self-government.[420] The collectivity thus gains a particularly prominent place in his theory, individuals being "fuse[d] together", as Habermas puts it, in "the ethos of a small and perspicuous, more or less homogenous community integrated through shared cultural traditions".[421]

The ethos-focussed view, on this account, finds the self-understanding or ethos of a group in its pre-existent culture and tradition, though it may be further developed by way of the social contract.[422] Glimpses of such an approach can sometimes be found in the ECtHR's case-law, as when it held, in *M.C. v. Bulgaria*, that "perceptions of a cultural nature, local circumstances and traditional approaches" must be taken into account.[423] In the passage just cited, Habermas also draws a connection between this kind of "shared cultural traditions" and a *homogenous* community. The notion of homogeneity has since developed a long tradition of influence within political and legal theory, ranging from the uncompromising and exclusion-

419 Ibid., 135.

420 Ibid., 61; for an illuminating summary in this regard, see David Miller, "Republicanism, National Identity, and Europe," in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (Malden, Mass.: Blackwell, 2008) at 133-136 and 139.

421 Habermas, *Between Facts and Norms*, at 102; see also Habermas, "Volkssouveränität als Verfahren" at 611.

422 For a more positive elaboration of Rousseau in Habermasian terms, focussing on the latter aspect, see Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 163-164 and 166; Annelien de Dijn, "Rousseau and Republicanism," (2015) *Political Theory* 1 at 15.

423 ECtHR, Appl. No. 39272/98 – *M.C. v. Bulgaria*, Judgment of 4 December 2003, at para. 154.

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ary postulate of national homogeneity by Carl Schmitt[424] to various rather more subtle mentions of "relative homogeneity" e.g. by Ernst-Wolfgang Böckenförde,[425] Hans Kelsen,[426] and – controversially – the German Federal Constitutional Court.[427]

Given the vagueness of any notion of homogeneity in light of the countless (and often cross-cutting) human differences and similarities,[428] it is difficult to evaluate the merits of such more nuanced formulations of the concept; but in any case, its popularity has dwindled significantly in the face of the undeniable lack of homogeneity in modern societies[429] as well as the unpleasant aftertaste left by the Schmittian undertones of the concept.[430] Habermas, for example, has argued extensively against any role for homogeneity in theories of political will formation,[431] rightly emphasising that "behind such a façade [of alleged homogeneity] there lurks the hegemonic culture of the dominant part" of society.[432] Chantal Mouffe has

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424 E.g. in Carl Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 2009).

425 See Mirjam Künkler and Tine Stein, "State, Law, and Constitution. Ernst-Wolfgang Böckenförde's Political and Legal Thought in Context," in *Ernst-Wolfgang Böckenförde: Constitutional and Political Theory. Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2017) at 12-14, as well as the essays by Böckenförde collected and translated in that volume.

426 Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925), at 324.

427 German Federal Constitutional Court, Judgment of 12 October 1993, BVerfGE 89, 155, at 186.

428 See Gertrude Lübbe-Wolff, "Homogenes Volk - Über Homogenitätspostulate und Integration," (2007) 27 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 121 at 127.

429 Ibid., 126; of course, this does not in and of itself resolve the issue: see e.g. Marks, *The Riddle of All Constitutions*, at 65 on how it can be ideologically shrouded, and Mouffe, *The Democratic Paradox*, at 18-19 on the necessity of a move from the "fact" of pluralism (Rawls) to fully acknowledging difference "as the condition of possibility of being".

430 See J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision," (1995) 1 *European Law Journal* 219 at 223, arguing that the German Constitutional Court's reference to Hermann Heller in the above-mentioned decision (note 427) served only to conceal a Schmittian framework.

431 Habermas, *Between Facts and Norms*, at 200; Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 159.

432 Habermas, "Der europäische Nationalstaat - Zu Vergangenheit und Zukunft von Souveränität und Staatsbürgerschaft" at 142.

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similarly held that homogeneity can always be "revealed as fictitious and based on acts of exclusion".[433]

In light of these insights, modern proponents of the ethos-focussed view typically disavow any reliance on (national) homogeneity;[434] instead, they explicitly take diversity and disagreement among individuals as their starting point and regard democratic processes based on alternating majorities as the most adequate way of overcoming the conceptual break between individual and collectivity.[435] In that vein, Jeremy Waldron has argued that jurisprudence should take up the challenges that law must face in a diverse society,[436] and that, to that end, it must "be careful to avoid building in any premise of ethnic and cultural homogeneity as a prerequisite in our models of politics and legislation".[437] Democratic self-governance combined with a political culture of human rights, albeit not prepolitical as on the morality-focussed view, are said to avoid the exclusionary effects of Schmittian theory and instead combine, in the best way possible, the diverse sub-groups and varying positions within a society.[438]

Against that background, the focus on a society's ethos is given a different twist: it switches from presuppositions of homogeneity to diversity and inclusion, from historically appropriated traditions to a communality continually constructed by way of majoritarian legislation.[439] Volitional self-realisation by way of democratic procedures thus emerges as the ethos-focussed counterpoint to the morality-focussed perspective's emphasis on cognitive reason: Rousseau emphasised the importance of general laws,[440] and Devlin appealed to "democracy and universal suffrage" to substantiate his reliance on positive morality, arguing that "in the end the will of the

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433 Mouffe, *The Democratic Paradox*, at 19.

434 I will return to the notion of homogeneity in the transnational context infra, V.

435 Laborde and Maynor, "The Republican Contribution to Contemporary Political Theory" at 16; see also Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 1 and 155; Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 222.

436 Waldron, *Law and Disagreement*, at 74; see also e.g. Lübbe-Wolff, "Homogenes Volk - Über Homogenitätspostulate und Integration" at 127; Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 172.

437 Waldron, *Law and Disagreement*, at 75.

438 See Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 166.

439 Ibid., 164 ("future-oriented popular sovereignty").

440 Supra, note 416.

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people must prevail".[441] Arguments such as these turn on formally egalitarian considerations: every person's view is given equal respect by counting it equally as part of the decision-making process.[442]

The hallmark of this emphasis on democratic self-government within a community is that it assumes what Habermas, commenting on Rousseau, calls "political virtues"[443] – that citizens actually will vote with the common good in mind, rather than being led astray by self-interest or prejudice. This characteristic of the ethos-focussed view is carried over to its more modern formulations: for example, in Jeremy Waldron's account it is assumed that votes are conducted in good faith, reflecting "considered and impartial opinions",[444] even if that assumption has "an aspirational quality".[445] This approach ties in with the focus on disagreement and scepticism about moral-cognitive epistemology: where the morality-focussed perspective would distrust majority decisions since they are liable to contain prejudiced external preferences, the ethos-focussed perspective not only emphasises the lack of proof for any given moral position but also replaces the distrust of majorities with the assumption of their good faith[446] – indeed, in a sense it must do so because, on its own terms, there is simply no uncontroversial normative standard available for assessing whether a certain position lacks good faith. Accordingly, the ethos-focussed perspective considers it important to "respect and trust the ability of each of us collective-

441 Devlin, "Democracy and Morality" at 91-92; contra: Hart, *Law, Liberty, and Morality*, at 77-81; Dworkin, "Liberty and Moralism" at 304.

442 Waldron, *Law and Disagreement*, e.g. at 109 and 114; 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.

443 Habermas, *Between Facts and Norms*, at 102; see also Samantha Besson and José Luis Martí, "Law and Republicanism: Mapping the Issues," in *Legal Republicanism: National and International Perspectives*, ed. Samantha Besson and José Luis Martí (Oxford: Oxford University Press, 2009) at 23 (acknowledging that the danger of a tyranny of the majority would otherwise loom large).

444 Waldron, *Law and Disagreement*, at 12-14; see also Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 252.

445 Waldron, *Law and Disagreement*, at 14; see also ibid., 305; Waldron, "The Core of the Case Against Judicial Review" at 1379; Jeremy Waldron, "Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited," (1989) 83 *The American Political Science Review* 1322 at 1326-1327; see also Joshua Cohen, "An Epistemic Conception of Democracy," (1986) 97 *Ethics* 26 at 33; Bellamy, "Republicanism, Democracy, and Constitutionalism" at 159 and 162.

446 Waldron, *Law and Disagreement*, at 221-222; Waldron, "Rights and Majorities: Rousseau Revisited" at 64-65; Miller, "Republicanism, National Identity, and Europe" at 141.

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ly" to make judgements on any political subject, including issues of human rights[447] – *particularly* on issues of human rights, in fact, since rights are said to protect precisely the kind of individual autonomy and responsibility that is expressed in democratic procedures, so that the two may not be separated.[448] Distrusting the majority would, on that view, "imply distrusting the very abilities human rights aim at protecting".[449]

Accordingly, the ethos-focussed view conceptualises the relationship between intra-State majorities and minorities very differently from the perspectives we discussed in the last chapter. The morality-focussed view perceives a tension due to the danger of the "tyranny of the majority" which may encroach on prepolitical rights of the minority. For the ethos-focussed view, however, rights are inherently political: they must be willed into being and fleshed out by joint ethical-political acts. Rather than constricting majoritarian decisions based on prepolitical rights, civil liberty is at once constituted through and limited by the general will.[450] Because the general will is deemed to be impartial and inclusive, minorities will not be discriminated against despite majoritarian decision-making procedures.[451] On the assumption of the majority's good faith, there are no grounds to not let it be "judge in its own cause" – Dworkin's argument to that effect was based on the difficulty of self-reflection with regard to prejudice,[452] but the good faith assumption stands opposed to the very foundation of that argument.[453] There is, then, no reason not to proceed by way of majoritarian decision.[454]

Against that backdrop, the tension between intra-State minorities and majorities takes on a very different form for the ethos-focussed perspective. Since rights are not conceived of as inherently counter-majoritarian, enforcing such rights over the will of the majority becomes problematic. Alexander Bickel famously coined the term "counter-majoritarian *difficul-*

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447 Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 125.

448 Waldron, *Law and Disagreement*, at 222.

449 Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 125.

450 See Rousseau, *The Social Contract*, at 29; on Rousseau's political conceptualisation of rights in contrast to natural law, see Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 140-141.

451 See Habermas, "Inklusion - Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" at 166.

452 See Chapter 2, II.

453 See Waldron, "The Core of the Case Against Judicial Review" at 1404.

454 Waldron, *Law and Disagreement*, at 297.

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ty" to describe this problem,[455] which becomes particularly acute when courts are tasked with delineating the content of human rights in a legally binding fashion. Thus, proponents of the ethos-focussed perspective may not be opposed in principle to weaker (non-binding) forms of judicial review,[456] since such review does not override majority decisions but rather stimulates further discussions on certain issues and redirects public discourse towards new solutions.[457] The overall focus of ethical normativity, however, remains squarely on majoritarian decision-making.

In sum, the ethos-focussed perspective provides a take on counter-majoritarianism which differs radically from that of the morality-focussed perspective discussed in the preceding chapter, and which lays the groundwork for a more positive evaluation of European consensus. Where the morality-focussed perspective aims to protect prepolitical rights, particularly those of intra-State minorities in the face of a "tyranny of the majority", the ethos-focussed perspective questions the claim to truth underlying prepolitical rights and relies instead, having disavowed any connections to national homogeneity, on democratic procedures as the location of ethical normativity. Because democratic procedures are most pronounced within the macrosubject of the State, it is unsurprising that the State has persisted as the primary reference point of the ethos-focussed perspective. Yet this raises the question of how to operationalise the ethos-focussed perspective in the transnational context of the ECtHR: it is to this question that I now turn.

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455 Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (New Haven and London: Yale University Press, 1986).

456 Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 333-336, arguing for a "limited model of judicial interpretation" where the "final interpretive competence […] shifts back to the legislature"; see also Waldron, "The Core of the Case Against Judicial Review" at 1354, clarifying that his "target is strong judicial review".

457 Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights" at 1029; Waldron, "The Core of the Case Against Judicial Review" at 1370; Waldron, "Rights and Majorities: Rousseau Revisited" at 69.

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IV. Ethos-focussed Perspectives at the Transnational Level

1. Lack of Regional Democracy and Human Rights as a Cooperative Venture

To round off the tableau within which European consensus becomes relevant on the basis of the ethos-focussed perspective, I would like to briefly consider the institutional context of the ECtHR as a regional human rights court. In light of the tenets of the ethos-focussed perspective as discussed so far, we can easily identify two challenges which it faces.[458] First, as a court it faces the counter-majoritarian difficulty; second, as a *transnational* court, it is institutionally disconnected from any one individual ethos. This latter point is crucial because it implies a disconnect from the democratic procedures which are taken to express ethical normativity. While various organs of the CoE may be considered to fulfil a certain representative function,[459] for example, they are not democratic in the way national institutions – or even those of the European Union (EU) – are, and hence it is commonly assumed that *no form of regional democracy has yet developed*.[460] Accordingly, transnational courts such as the ECtHR are left without a transnational, democratic constituency. Accordingly, the "central problem in the justification of international courts" has been identified by von Bogdandy and Venzke as lurking in the fact that "their public authority is not embedded in a responsive political system".[461]

This clearly poses a problem for the ethos-focussed perspective, for which human rights are seen as binding on a community only when "con-

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458 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 144; his point here and in following references is related to the ECtHR's sociological legitimacy (on which, see Chapter 9), but also stands on directly normative terms.

459 See Chapter 6, IV.3.

460 See Samantha Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling," (2011) 4 *Ethics & Global Politics* 19 at 29; Samantha Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?," (2016) 61 *The American Journal of Jurisprudence* 69 at 96; see also Wheatley, "The Legitimacy of International Human Rights Regimes" at 85 ("absence of a meaningful political community").

461 Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," (2012) 23 *European Journal of International Law* 7 at 19; for the ECHR, see Steven Wheatley, "Minorities under the ECHR and the Construction of a 'Democratic Society'," (2007) *Public Law* 770 at 789.

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sciously appropriated" by that community as a whole,[462] and for which, if "human rights are to be democratically legitimate, they ought to be the outcome of a legalisation process in which human rights-holders can also be the authors of their own rights".[463] The election of the ECtHR's judges by the CoE's Parliamentary Assembly,[464] from this perspective, carries little weight since it does not constrain the interpretive discretion which those judges later possess. Thus, from the outset, regional (and global) instruments of human rights protection seem more suspect than they do on the morality-focussed view, where they were welcomed as an additional chance at giving individuals' prepolitical rights legal relevance. Rather, the ethos-focussed perspective's reliance on democratic procedures leads to its insistence that human rights are "meant to be fleshed out at [the] domestic level".[465]

Therefore, while the morality-focussed perspective sees regional human rights as a necessary top-down institutionalisation of prepolitical rights, the ethos-focussed perspective must work *bottom-up*, from the individual ethical-political communities embodied in States.[466] Still, a variety of purposes can be imagined for the ECHR and other regional human rights treaties against this backdrop: they can be conceptualised as a guarantee against levelling-down from agreed-upon standards,[467] as protecting minimal requirements for the functioning of democracy at the national level,[468] or as a mechanism to cautiously spark domestic or pan-European debate

462 Habermas, *Between Facts and Norms*, at 100.
463 Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 30.
464 Article 22 ECHR.
465 Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights" at 242.
466 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 100; Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 59.
467 Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights" at 243; Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 30.
468 Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 210; see also, based on reading of Arendt's right to have rights, Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 28.

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on certain issues to enhance democratic deliberation.[469] What all these approaches have in common is that, unlike the morality-focussed perspective, they focus primarily on the influence that States should have on regional human rights, not vice versa: regional human rights should be "products of and controlled by an international system of normal democracy grounded in and attuned to the domestic systems of the contracting states".[470]

At the most general level, then, the object and purpose of the ECHR could be described as *cooperation* between those States. Kanstantsin Dzehtsiarou has been very clear on this point, arguing against the approach taken by George Letsas according to which distrust of States is built into the purpose underlying the ECHR. On Dzehtsiarou's account, the "Convention was signed and the Court was created *not to confront the Contracting Parties but to intensify cooperation* and collective protection of human rights":[471] the Convention is seen less as an external constraint and more as a common venture. Or, as Wildhaber, Hjartarson and Donnelly have put it: "the human rights of the ECHR imitate and reinforce those pre-existing in many domestic legal systems, so as to constitute their general principles".[472]

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469 Bilyana Petkova, "The Notion of Consensus as a Route to Democratic Adjudication," (2011-2012) 14 *Cambridge Yearbook of European Legal Studies* 663 at 671; Thomas Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control," (2017) 28 *European Journal of International Law* 871 at 888.

470 Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights" at 1030.

471 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 120 (emphasis added).

472 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251; see also Ganshof Van der Meersch, "La référence au droit interne des Etats contractants dans la jurisprudence de la Cour européenne des droits de l'homme" at 319 ("droit commun"); Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 13; Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 31; see also Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 162. A similar way of justifying the bottom-up approach in formal legal terms emphasises the proximity of European consensus to regional customary law: see further Chapter 10, III.2.

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2. The Democratic Credentials of European Consensus

On the ethos-focussed perspective, then, regional human rights can be conceptualised as a form of cooperation between the States parties. Yet this approach needs to be translated into more specific terms insofar as the ECtHR is concerned: since its decisions are legally binding, albeit only declaratory (as opposed to some form of direct effect leading to immediate invalidation of national laws),[473] they have a strong effect throughout Europe. Indeed, any standards set by the ECtHR could, in formal legal terms, be overruled only by amending the ECHR which, given the large number of States parties, is hardly a practical option. Because of the ECtHR's competence to deliver binding rulings, then, the ECHR is "largely withdrawn from the grasp of its individual makers", which "profoundly changes the relationship between law and politics".[474]

From an ethos-focussed perspective, this is a suboptimal state of affairs: even at the national level, most of its proponents would advocate at most for weak forms of judicial review, and this holds true all the more so for a transnational court. However, the fact of the matter is that the ECtHR, as a transnational human rights court with legally speaking relatively strong powers of review, *does exist*. Besides noting the possibility of institutional reform, proponents of the ethos-focussed perspective have grappled with this fact by proposing theories of adjudication for the ECtHR. Since the ECtHR itself cannot change its institutional context, the question then becomes how it should incorporate the concerns of the ethos-focussed perspective into its reasoning, so that the justification of its judgments may still proceed in a bottom-up fashion. This is where European consensus once again enters the scene.

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473 Articles 41 and 46 (1) ECHR; see Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 117; Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights" at 1037.

474 Von Bogdandy and Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification" at 21; see, in more detail, Gerards, "Judicial Deliberations in the European Court of Human Rights" at 414-415; Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 884; see also Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals," (2005) 93 *California Law Review* 1 at 56.

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In building a positive argument in favour of European consensus, one might consider it self-evident in "State-centred international law"[475] that sovereignty concerns necessitate reference to the State parties' positions within their domestic legal systems. That is how some critics, perhaps somewhat uncharitably, understand the rationale of European consensus: as subordinating human rights to "the importance of State sovereignty".[476] Few proponents of consensus would unreservedly agree, however.[477] From a normative perspective, the unquestioned formal sovereignty of States has long lost its appeal; it is usually seen instead as a placeholder for more substantive values. Samantha Besson has been particularly clear on this point. She argues that States "are not the bearers of ultimate value" since they "exist for the sake of human individuals".[478] On that premise, it is clear that "the value of state autonomy can only be explained in terms of the autonomy of the individuals constituting it", or more precisely: as "the product of [a State's] subjects' autonomy as a political entity".[479] State sovereignty serves to protect political self-determination.[480]

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475 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 150.

476 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 852; see also Hwang, "Grundrechtsschutz unter der Voraussetzung des europäischen Grundkonsenses?" at 319; Regan, "A Worthy Endeavour?" at 65.

477 See the measured response by Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 149-155; more sweepingly Legg, *The Margin of Appreciation*, at 113; and indeed in favour of relying on State sovereignty Michael R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights," (1999) 48 *International and Comparative Law Quarterly* 638 at 648; Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Leiden and Boston: Brill, 2019), at 95; see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 13, highlighting state sovereignty not as a matter of principle but in connection with the legitimacy concerns discussed in Chapters 9 and 10.

478 Besson, "The Authority of International Law - Lifting the State Veil" at 361.

479 Ibid., 364; in agreement: Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 100; see also von Bogdandy and Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification" at 41.

480 Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights" at 243; this view is also clear throughout, though implicit, in Shai Dothan, "In Defence of Expansive Interpretation in the European Court of Human Rights," (2014) 3 *Cambridge Journal of International and Comparative Law* 508.

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European consensus would be justified, then, because it *refers back to the forms of ethical-volitional self-realisation by means of democratic procedures which are not available at the transnational level*. Fittingly, Besson describes it as "European *democratic* consensus";[481] or, as Frances Hamilton has put it, consensus links the ECtHR's decisions "back to a democratic mandate of the legislatures of Member States".[482] Paul Mahoney has described it as indicative of the "common will of democratic [implied: European] society".[483] The ECtHR itself has taken up this idea: its standard phrase on the ECHR as a "living instrument", according to which it must be "interpreted in the light of present-day conditions",[484] is now sometimes extended. The Convention must be interpreted, according to the more recent formulation, "in the light of present-day conditions and of the ideas prevailing in *democratic* States today",[485] as expressed through vertically comparative law.

What critics see as the most important drawback of European consensus – its reliance on the positions taken by the States parties, and in particular by intra-State majorities – can thus be reconceptualised, by the ethos-focussed perspective, as its greatest strength. As Dzehtsiarou has put it: "The counter-majoritarian difficulty can be confronted by including European consensus" in the Court's reasoning, since the national laws referred to are "linked to democracy and majoritarian decision-making".[486] The democratic credentials of consensus, given its connection to intra-State majorities, are the reason for giving it normative force.

It should be noted that, as already encountered from the opposite perspective in the preceding chapter, the transition from the purely domestic

481 Besson, "Subsidiarity in International Human Rights Law - What is Subsidiary about Human Rights?" at 101 (emphasis added); see also Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 480.

482 Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 35; Hamilton connects this to the ECtHR's legitimacy, on which see further Chapter 9.

483 Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" at 75.

484 ECtHR, Appl. No. 5856/72 – *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, at para. 31.

485 E.g. ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 102; ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at para. 73 (emphasis added).

486 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 172; see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 13.

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to the transnational vantage point involves a broadening of scope from discussions of the relationship between intra-State majorities and minorities to a more unified view of individual States. The morality-focussed perspective had to explain why it distrusts not only legislative majorities and majority-led governments, but also domestic courts – recall Benvenisti's argument that those courts, too, are liable to be staffed with members of the intra-State majority.[487] Conversely, for the ethos-focussed perspective the reasons for trust must, at least to some extent, be extended from intra-State majorities to national courts. This move is not self-evident: as we saw above, the ethos-focussed perspective sees little cause for embarrassment in the reliance on majority decisions and conceptualises strong judicial review based on rights as problematic by virtue of its counter-majoritarian nature. Some European States do provide for strong judicial review; and, on the ethos-focussed perspective's terms, the democratic credentials of such review, or even of a statute promulgated only in response to it, must be significantly less than those of a legislative decision that was not dictated by judicial involvement.

On the other hand, the potential previous involvement of domestic courts provides the ethos-focussed perspective with a certain claim to reconciliation: for all its emphasis on majoritarian procedures, it can also claim to have integrated the ECtHR's admonition that "democracy does not simply mean that the views of a majority must always prevail".[488] In light of this, the concerns voiced by the morality-focussed perspective – so the argument might go – will already have been considered at the national level.[489] For the ethos-focussed perspective, this would still seem preferable than the interference by the ECtHR on the basis of morality-focussed reasoning. For one thing, even a domestic court with powers of strong judicial review remains – at least in theory – subject to democratic control by a democratic majority or super-majority, and its decisions are thus in princi-

487 Chapter 2, II.2.

488 ECtHR (Plenary), Appl. Nos. 7601/76 and 7806/77 – *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, at para. 63; see recently e.g. ECtHR, Appl. No. 57792/15 – *Hamidović v. Bosnia and Herzegovina*, Judgment of 5 December 2017, at para. 41; see generally Chapter 1, IV.3.

489 See e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 118-119 (though primarily on non-judicial "systems for checking compatibility with human rights norms").

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ple "revisable in the longer term".[490] For another, a domestic court is embedded in the ethical-political culture of its constituency and thereby closer to the democratic majority of that State than the ECtHR is.[491] Echoes of this view may be found in the ECtHR's own argument that national institutions – including the judiciary – may be "better placed" to identify what amounts to a national ethos, somewhat lyrically described by the Court as "the vital forces of their countries" with which national institutions are in "direct and continuous contact".[492] Ultimately, this is the same argument that Benvenisti made – except that, with the shift from the morality-focussed to the ethos-focussed perspective, the domestic context now has a positive connotation. Trust in intra-State majorities is thus expanded to trust in States.

If we connect this back to the institutional context of the ECtHR discussed above, then we may summarise as follows. For lack of transnational democracy, the ECtHR faces two challenges: as a court, it is counter-majoritarian; and as a transnational court, it largely evades the balance of powers otherwise prevalent in various forms at the national level. Insofar as European consensus takes up the majoritarian decisions which are usually reflected in the States parties' legal systems, it mitigates the counter-majoritarian difficulty which the morality-focussed perspective would face in full force. Insofar as the legal systems referred to themselves incorporate counter-majoritarian elements, for example due to the involvement of domestic courts, they still constitute the result of democratic procedures more broadly conceived, and European consensus thus mitigates the lack of democratic control available at the transnational level. The reference back to the States parties' laws as part of the justification of concrete norms of regional human rights law thus seems less paradoxical than it does from

490 Sandra Fredman, "From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote," (2013) *Public Law* 292 at 298; the details differ, of course, from State to State – though I am not aware of any constitutional practice in which high-profile court judgments are *actually* deliberately reversed on a semi-regular basis.

491 See Besson, "European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box" at 133. Chambers of the ECtHR include the judge elected in respect of the respondent State (Article 26 (4) ECHR), but this does not lead to a similarly strong level of embeddedness.

492 ECtHR (Plenary), Appl. No. 5493/72 – *Handyside v. the United Kingdom*, Judgment of 7 December 1976, at para. 48.

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the morality-focussed perspective,[493] since bottom-up verticality[494] is reconceptualised with a positive connotation.

3. From National Ethe to a Pan-European Ethos

Based on my argument so far, European consensus could be conceived of as a way of giving national ethe prominence in the reasoning of the ECtHR, since it is within these national ethe that democratic procedures are more pronounced. However, the reliance on national ethe cannot, in and of itself, entirely justify the use of European consensus. Simply put, the very notion of a *European* consensus (or lack thereof) goes beyond normativity developed within individual national ethe *even as it builds on them*.[495] Or, to use the terminology introduced in Chapter 1: because European consensus is a vertical form of comparative reasoning, it incorporates reference to national ethe into the ECtHR's reasoning; but because it does so through the lens of commonality, it reinterprets those national ethe as more than the sum of their parts. In this subsection, I will argue that this involves a crucial shift in the macrosubject within which ethical normativity is constituted: while national ethe remain relevant, the primary location of ethical normativity as implied by European consensus *shifts to the pan-European level*.

The spur effect of European consensus makes this particularly clear, since it pits the two different kinds of ethical normativity directly against one another: European consensus in favour of the applicant (pan-European ethos) constitutes an argument *against* the respondent State (national ethos). If one foregrounds individual national ethe, then, the spur effect of European consensus seems rather suspect. John Murray has made this point with particular force. He cautions against a "hegemony of the majority" and questions whether its spur effect is "consistent with respect for diversity among the democratic and sovereign States which are Contracting Parties to the Convention".[496] If ethical normativity is located within individual States, it seems bizarre to not celebrate such diversity among demo-

493 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 119 (at footnote 23); see also, more generally, Wheatley, "The Legitimacy of International Human Rights Regimes" at 105.

494 See Chapter 1, III.

495 See also ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, dissenting opinion of Judge Pinto de Albuquerque, at para. 35.

496 Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 26.

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cratic outcomes, and hence bizarre to accept an argument that is specifically geared at reducing diversity (at the transnational level)[497] by reference only to what *other* States have decided *for themselves*: from the perspective of those States finding themselves in a minority position, there seems to be no good reason to impose the majority position on them.[498] Giving spur effect to European consensus seems like an unjustified transposition of foreign ethe – a form of normativity developed relative to an entirely different context[499] – and thus overriding the respondent State's "own mores, heritage and culture" which constitute its own ethos and are "deeply rooted in the social fabric of its society".[500]

The difference between a pan-European ethos and traditional approaches foregrounding national ethe is less stark in the context of the rein effect since European consensus, in this scenario, argues against finding a violation of the Convention, thus allowing various different national ethe to persist.[501] Nonetheless, it is striking that the force of the argument depends on the lack of consensus among the States parties or the existence of a consensus in favour of the respondent State – in other words, it depends, once again, on the collectivity of States as a whole and not on any one State viewed individually. For example, Wildhaber, Hjartarson and Donnelly de-

497 Brems, *Human Rights: Universality and Diversity*, at 420.

498 See Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240 at 285, echoed by Francisco Javier Mena Parras, "Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights," (2015) 29 *Revista Electrónica de Estudios Internacionales* 1 at 13; Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte" at 205; Gerards, "Giving Shape to the Notion of 'Shared Responsibility'" at 44; Carozza, "Uses and Misuses of Comparative Law" at 1228; Shelton, "The Boundaries of Human Rights Jurisdiction in Europe" at 134; von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 334; Daniel Matthias Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats," (2015) *Europarecht* 148 at 154; Tzevelekos and Dzehtsiarou, "International Custom Making" at 326; Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 204.

499 Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 150.

500 Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 46.

501 On how consensus and national ethe work together by means of the margin of appreciation, see in more detail Chapter 8, III.1.-2.

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fend the use of European consensus by arguing that "genuinely democratic decisions should be treated with due respect" and that, accordingly, the ECtHR should accept "the diversity of responses to human rights issues".[502] The spur effect of European consensus obviously runs counter to such diversity – but in cases involving the rein effect, though the result may cohere with the sentiment expressed by Wildhaber, Hjartarson and Donnelly, the reasoning nonetheless seems slightly mismatched.[503] If democratic decisions should be treated with respect, why compare them to other democratic decisions in the first place? If, as the ECtHR has put it, "it is for each State to mould its own democratic vision",[504] then why make an argument in favour of the respondent State dependent on the democratic decisions of *other* States parties by means of European consensus?

When posed in this stark form, these questions seem almost ludicrous – at least to those with a precommitment to regional or international human rights.[505] It is worth noting, at this point, that consensus-based reasoning first emerged within the ECtHR's case-law, in *Tyrer v. the United Kingdom*, not so much as a counterpoint to the morality-focussed perspective but in explicit juxtaposition to "local circumstances" on the Isle of Man.[506] The ECtHR emphasised that the Isle of Man has, "[h]istorically, geographically and culturally" always been "included in the European family of nations",[507] thus shifting the relevant macrosubject for the establishment of ethical normativity from the local to the European level. It was in this context that it made reference to the laws of "the great majority of the member States of the Council of Europe".[508]

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502 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 252; for a similar point in very ethos-steeped language with regard to the margin of appreciation, see Yuval Shany, "All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee," (2018) 9 *Journal of International Dispute Settlement* 180 at 188.

503 See further, on this mismatch between reasoning and result, Chapter 4, III.3.

504 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International v. the United Kingdom*, Judgment of 22 April 2013, at para. 111.

505 Moyn has argued that "the central event in human rights history is the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation", i.e. precisely such an internationalist commitment: Moyn, *The Last Utopia*, at 13.

506 ECtHR, Appl. No. 5856/72 – *Tyrer*, at para. 37, in the context of then-Article 63 (3), now Article 56 (3) ECHR.

507 Ibid., at para. 38.

508 Ibid.

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Such a shift is hardly surprising – for if the focus were indeed laid exclusively on national ethe, then regional human rights protection could play only a very limited role. The ECHR's role would then be limited to a narrow form of cooperation which might be deemed *cooperation as entrenchment* – in that vein, Samantha Besson speaks of international human rights which "rely on national guarantees to formulate a minimal threshold that they reflect and entrench".[509] Given the extremely limited role for regional (and international) human rights which would result from such an approach,[510] few (if any) commentators follow through on this line of argument.[511] Instead, it is generally acknowledged that requiring the consent of all States parties to any given interpretation would lead the judicial review by the ECtHR ad absurdum.[512] The ECtHR itself, too, has long proceeded on the understanding that giving primacy to individual national ethe would undermine its supervisory role – not only in the specific context which characterised its judgment in *Tyrer*, but also in its case-law more generally.[513] From this, there follows what Janneke Gerards has summarised as "an unavoidable tension between the national desire to protect

509 Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 29.

510 At least insofar as challenges to the status quo are concerned; entrenchment clearly fulfils important (though dubious) roles with regard to the perpetuation of the status quo: See more generally Chapter 10, III.2. and IV.

511 Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* comes closest; he treats cases not involving utter unanimity, "when the respondent State does not participate in the consensus" at issue, as "hard cases" in a "grey area" (at 99).

512 See Ost, "The Original Canons of Interpretation" at 305; Marisa Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights," (2017) 15 *International Journal of Constitutional Law* 393 at 402; Fiona 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," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 317; see also Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 142. As Amy Gutmann has put it in a different context, a "human rights regime […] cannot consistently defend […] the absolute sovereignty of a people": Amy Gutmann, "Introduction," in *Michael Ignatieff, Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton and Oxford: Princeton University Press, 2001) at xv.

513 Most clearly in its case-law on autonomous concepts: see Chapter 8, II.; occasional dissenting opinions implying otherwise (e.g. arguing that "[c]hanges which occur in some States can never affect the scope of the other States' en-

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fundamental rights in a way the state thinks fit", on the one hand, and "the ECtHR's task to supervise the compliance of national fundamental rights protection with the Convention", on the other.[514]

The use of European consensus, and the notion of a pan-European ethos which undergirds it, can be understood as an attempt to simultaneously retain a meaningful role for regional human rights law *as well as* an ethical-volitional rather than a moral-cognitive form of reasoning. This kind of shift is perhaps best illustrated by Gerald Neuman's argument in favour of increased consensus-based reasoning in the Inter-American system of human rights protection. Seeking to refute the charge of "State voluntarism", he claims that

> To be sure, letting each state be the judge of its own human rights obligations, free to redefine or retract prior commitments, would negate the effect of the American Convention. But that observation does not entail that the substantive evolution of the regional human rights regime must be independent of the regional community of states.[515]

On this line of argument, reference to European consensus would be justified because it constitutes a kind of ethical normativity that can be operationalised in the specifically transnational context in which the ECtHR is situated, and in which ethical normativity based on individual national ethe cannot take centre stage in a transnational setting since it conflicts too directly with the very idea of judicial review by a regional court.

The shift exemplified so clearly in Neuman's argument can also be observed in a similar argumentative move performed by Kanstantsin Dzehtsiarou, who suggests that consensus "can be conceptualised as an up-

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gagements": ECtHR, Appl. Nos. 26431/12, 26742/12, 44057/12 and 60088/12 – *Orlandi and Others v. Italy*, Judgment of 14 December 2017, dissenting opinion of Judges Pejchal and Wojtyczek, at para. 2) are in clear contradiction of the ECtHR's case-law (and, it may be noted in passing, quite transparently driven by retrogressive agendas).

514 Gerards, "Judicial Deliberations in the European Court of Human Rights" at 20.

515 Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115; see also Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 25; 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 329-330.

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dated consent of the Contracting Parties".[516] Having noted the problem of overriding the consent of those States that find themselves in a minority, Dzehtsiarou is forced to clarify what he means by State consent: it is not, in fact, the consent of individual States as traditional international law would have demanded it, but rather "a collective acceptance of a particular rule or a particular approach – a common European attitude or commonly accepted rules that build up European public order".[517] The register remains that of the ethos-focussed perspective, with its emphasis of collectivity; the focus has shifted, however, from the "collective acceptance" of a rule at the national level (individual State consent in the formal sense) to its collective acceptance *at the European level*.

Antje von Ungern-Sternberg has similarly defended the spur effect of European consensus by arguing that the ECHR should be conceptualised as expressing "European standards for the protection of fundamental rights, based on a European community sharing common values".[518] The "European community sharing common values" mirrors Dzehtsiarou's "common European attitude" or "European public order". The ECtHR itself has used similar language in specifying, for example, that it will "look for any consensus and common values emerging from the practices of European States"[519] or for a "generally shared approach"[520] among them; and several judges have spoken of consensus as "an expression of the common ground required for the collective approach underlying the Conven-

516 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 149.

517 Ibid., 154; "common attitude" is also used by Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" at 74; see also Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis," (2006) 43 *Common Market Law Review* 629 at 653 ("common norms of European human rights law").

518 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 330 (my translation); see also Ostrovsky, "What's So Funny About Peace, Love, and Understanding?" at 50; Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights," (2001) 15 *Emory International Law Review* 391 at 455.

519 ECtHR, Appl. No. 33401/02 – *Opuz v. Turkey*, Judgment of 9 June 2009, at para. 164.

520 ECtHR (GC), Appl. No. 21830/93 – *X, Y and Z v. the United Kingdom*, Judgment of 22 April 1997, at para. 44.

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tion system".[521] All of these notions are typical of the ethos-focussed perspective in that they are geared towards a form of normativity that is relative to a certain group; they are atypical, however, in that their focus shifts from the individual State to the States parties as a whole, understood as constituting their own ethical collectivity. Rousseau's "morality of a nation"[522] becomes the morality of a continent[523] or "regional standards of justice".[524] What ethos-focussed supporters of European consensus rely on is the notion of *a pan-European ethos*.

In sum, while European consensus may be justified on the basis of the ethos-focussed perspective, it takes the States parties of the ECHR as a collectivity to constitute the relevant macrosubject. It can thus be understood as an attempt to operationalise the merits of the ethos-focussed perspective – attention to disagreement and, though only indirectly, reliance on democratic procedures – in the context of a regional court that is not itself directly embedded within democratic procedures. As Judge Paulo Pinto de Albuquerque recently summarised it, from the ECtHR's use of European consensus there "emanates a vision of an [sic] deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all".[525] The notion of a pan-European ethos transfers the majoritarian approach known from the national level to the transnational level: this also implies that the majority of States parties on the basis of which the pan-European ethos is identified is, in cases involving the spur effect, "entitled

521 Anatoly Kovler et al., "The Role of Consensus in the System of the European Court of Human Rights" (Dialogue between judges, European Court of Human Rights, 2008), at 19; see also Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 257 ("general agreement").

522 Rousseau, *The Social Contract*, at 161.

523 Indeed, the French version of ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 84 speaks, with clear echoes of Rousseau, of the "volonté générale des Etats contractants" (less clear in the English version, which speaks only of the "general wish of Contracting States); ECtHR (GC), Appl. No. 7334/13 – *Muršić v. Croatia*, Judgment of 20 October 2016, partly dissenting opinion of Judge Pinto de Albuquerque, at para. 20, points out the symbolism involved in "this historically and philosophically much charged expression".

524 ECtHR (Plenary), Appl. No. 14038/88 – *Soering v. the United Kingdom*, Judgment of 7 July 1989, at para. 102, citing the amicus curiae brief by Amnesty International.

525 Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 124; see also his various dissenting opinions, e.g. as cited in the previous footnotes and ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, dissenting opinion of Judge Pinto de Albuquerque, at para. 35.

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to impose its will on other parties".[526] The next subsection will consider the implications of this aspect of European consensus in more detail.

4. Implications of Harmonisation: Human Rights and European Integration

I have argued that European consensus can be understood as an expression of a pan-European consensus. When approached in this way – rather than merely the combination of various national ethe – the understanding of the ECHR as a form of "cooperation" among the States parties undergoes a subtle transformation. As the citations from the Court and the descriptions by Dzehtsiarou and von Ungern-Sternberg canvassed above demonstrate, reference is still made to commonality ("common values", "common European attitude", "collective acceptance"); but with a focus on Europe as a whole rather than individual States as the relevant collectivity, commonality takes on a more flexible meaning that allows for majoritarian approaches rather than demanding the consent of every individual State.[527] Cooperation is thus understood not merely as *reaffirming* the lowest common denominator but as *developing* a common position based on pre-existing similarities.[528] Elsewhere, this has been described as combining "descriptive" and "prescriptive"[529] or "retrospective" and "prospective"[530] elements: a certain measure of commonality was already present, but it is expanded

526 Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 124.

527 See von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 334.

528 See Dzehtsiarou's position which I have repeatedly cited (e.g. supra, note 471), according to which the ECHR's object and purpose is to *intensify* (!) cooperation; Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus" at 54 ("*building* a democratic European society", emphasis added); see also Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights" at 405 (connecting cooperation and incrementalism).

529 Gráinne de Búrca, "The Language of Rights and European Integration," in *New Legal Dynamics of European Union*, ed. Josephine Shaw and Gillian More (Oxford: Clarendon Press, 1995) at 43; see also Günter Frankenberg, "Tocqueville's Question. The Role of a Constitution in the Process of Integration," (2000) 13 *Ratio Juris* 1 at 6.

530 Andreas von Arnauld, "Rechtsangleichung durch allgemeine Rechtsgrundsätze? - Europäisches Gemeinschaftsrecht und Völkerrecht im Vergleich," in

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and deepened by means of the cooperative venture at issue. Cooperation as entrenchment becomes cooperation as *harmonisation*.[531]

In this subsection, I would like to further dwell on the implications of approaching the spur effect of European consensus as the expression of a pan-European ethos, since the concept of harmonisation which I just invoked requires some clarification. In a broad sense, most cases in which the ECtHR finds a violation of the Convention will constitute a demand for harmonisation: while its judgments technically bind only the parties to the case according to Article 46 (1) ECHR, it is clear that they also have a broader effect. According to the Court itself, its judgments serve "more generally, to elucidate, safeguard and develop the rules instituted by the Convention", thereby "extending human rights jurisprudence throughout the community of the Convention States".[532] Or, as Judge Zupančič has very palpably put it in one of his concurring opinions: a judgment by the Court concerns the interpretation of human rights in the respondent State "and also, after [the] case, elsewhere in Europe".[533]

While it is controversial how it should be conceptualised in detail,[534] it is thus clear that the Court's judgments have an erga omnes effect of *some* sort.[535] With the possible exception of certain cases decided on the basis of

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Rechtsangleichung: Grundlagen, Methoden und Inhalte, ed. Karl Riesenhuber and Kanako Takayama (Berlin: de Gruyter, 2006) at 247.

531 Mena Parras, "Democracy, Diversity and the Margin of Appreciation" at 8; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000), at 21; contra: Dominic McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee," (2016) 65 *International and Comparative Law Quarterly* 21 at 30.

532 ECtHR, Appl. No. 25965/04 – *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, at para. 197; see also e.g. ECtHR (Plenary), Appl. No. 5310/71 – *Ireland v. the United Kingdom*, Judgment of 18 January 1978, at para. 154; ECtHR, Appl. No. 40016/98 – *Karner v. Austria*, Judgment of 24 July 2003, at para. 26; ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin v. Russia*, Judgment of 22 March 2012, at para. 89.

533 ECtHR (GC), Appl. No. 64569/09 – *Delfi AS v. Estonia*, Judgment of 16 June 2015, concurring opinion of Judge Zupančič.

534 E.g. Samantha Besson, "The 'Erga Omnes' Effect of the European Court of Human Rights," in *The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives*, ed. Samantha Besson (Geneva: Schulthess, 2011).

535 Gerards, *General Principles of the European Convention on Human Rights*, at 44; Theilen, "Levels of Generality in the Comparative Reasoning of the European

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very narrow grounds specific to the respondent State,[536] then, any finding of a violation by the Court will have a harmonising effect. This is independent of the broader theoretical framework within which the ECHR is placed. For example, it would hold true when the justification offered for the judgment is based on the morality-focussed perspective. The reasoning would then focus on prepolitical normative standards without paying heed to the legal situation within the States parties: finding a violation of the Convention on those grounds would still have a harmonising effect due to the erga omnes effect of the Court's judgments, but it would be *incidental* to the postulation of a certain human rights standard.

By contrast, giving normative force to the spur effect of European consensus implies a conceptualisation of the ECHR in which harmonisation is tied up with its very object and purpose.[537] This notion of non-incidental harmonisation has been emphasised, in particular, by various dissenting

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Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" at 393; Eva Brems, "Human Rights: Minimum and Maximum Perspectives," (2009) 9 *Human Rights Law Review* 349 at 351; Legg, *The Margin of Appreciation*, at 223; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 102-103; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge: Cambridge University Press, 2018), at 37; more cautiously e.g. Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," (2008) 19 *European Journal of International Law* 125 at 136, citing the "orthodox view" on inter partes effects, but also acknowledging that the "practical effects" of the Court's judgments are "often more extensive"; in more detail on the latter aspect from an empirical perspective Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe," (2014) 68 *International Organization* 1.

536 For example, on a popular (though doubtful) reading: ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*; see also the cases focussing on democratic procedures in the respondent State discussed in Chapter 8, III.3.

537 For connections between European consensus and harmonisation, see Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 89; Mena Parras, "Democracy, Diversity and the Margin of Appreciation" at 12; see also Gless and Martin, "The Comparative Method in European Courts" at 40 (on comparative reasoning being applied "in order to unify"); Christos L. Rozakis, "The Accession of the EU to the ECHR and the Charter of Fundamental Rights: Enlarging the Field of Protection of Human Rights in Europe," in *The EU Accession to the ECHR*, ed. Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (Oxford and Portland: Hart, 2014) at 330 (consensus as a means of achieving "homogeneity"); for further references to harmonisation, though it is not entirely clear whether they are referring to the strong sense discussed here or the broader sense mentioned above, see Pär

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opinions in cases where the majority within the Court avoided giving spur effect to European consensus. For example, in *S.H. v. Austria*, several dissenting judges argue that European consensus should have been accorded greater weight "considering that one of the Court's tasks is precisely to contribute to harmonising across Europe the rights guaranteed by the Convention".[538] More lyrically, dissenting judges in the case of *A, B and C v. Ireland* describe the spur effect of consensus as "commensurate" with "one of the paramount functions" of the Court, which is to "gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence":[539] cooperation as non-incidental harmonisation.

Thinking of the ECHR in these terms has invited comparisons with the other prominent institution concerned with a European conception of human rights: the EU. In fact, the debates surrounding European consensus, on the one hand, and the development of general principles by the European Court of Justice (ECJ) based on "constitutional traditions common to the Member States",[540] on the other, are in some respects strikingly similar;[541] in particular, the shift from a focus on national ethe to the reliance on a European ethos can be traced in much the same way, albeit with dif-

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Hallström, "Balance or Clash of Legal Orders - Some Notes on Margin of Appreciation," in *Human Rights in Contemporary European Law*, ed. Joakim Nergelius and Eleonor Kristoffersson (Oxford: Hart, 2015) at 73; Vassilis Tzevelekos even says of the ECHR that "the idea of European integration is its *raison d'être*": Vassilis Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?," (2010) 31 *Michigan Journal of International Law* 621 at 644 (emphasis in original).

538 ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, at para. 10.

539 ECtHR (GC), Appl. No. 25579/05 – *A, B and C v. Ireland*, Judgment of 16 December 2010, joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, at para. 5.

540 ECJ, Case 11/70 – *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970, ECLI:EU:C:1970:114, at para. 4.

541 Generally on the similarities and differences between the use of comparative reasoning by the ECtHR and the ECJ, see Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium"; Senden, *Interpretation of Fundamental Rights*, at 66-69; one crucial difference is the level of

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ferent emphases in light of the differing institutional contexts. As with the ECtHR, proposals to restrict vertically comparative law to the "lowest common denominator" never had a significant impact on the ECJ's case-law;[542] and nowadays it is generally acknowledged that the ECJ conducts an "evaluative" or "critical" comparative survey which does not at all depend on unanimity among the Member States.[543]

While this can also be attributed in part to reliance on arguments more typical of the morality-focussed perspective and thus constituting harmonisation only in the broad sense discussed above, it also involves a shift towards reliance on a specifically European ethos. In fact, the ECJ's typically more vague and obscure references to common constitutional traditions among the Member States, without further disclosure of the comparative background,[544] lend themselves to emphasising a unitary European collectivity rather than discussing in detail the similarities or differences among the Member States.[545] The Charter of Fundamental Rights likewise refers to the collective "peoples of Europe" who, "in creating an ever closer union among them, are resolved to share a peaceful future based on common values".[546] The reference to both pre-existing "common values" but also to an "ever closer union" yet to be accomplished epitomises the harmonising approach by way of both descriptive and prescriptive or both ret-

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generality at which comparative reasoning is usually used, a point to which I will return in Chapter 7.

542 Franz C. Mayer, "Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They Are Made - A German Perspective," (2013) 11 *International Journal of Constitutional Law* 1003 at 1007.

543 E.g. ECJ, Case C-101/08 – *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others*, Opinion of AG Trstenjak, 30 June 2009, ECLI:EU:C:2009:410, at para. 69 (explicitly contrasting this approach with that of using "the lowest common denominator method") and para. 73; ECJ, Case C-550/07 P – *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, Opinion of AG Kokott, 29 April 2010, ECLI:EU:C:2010:229, at para. 94; for an early rebuttal of the "lowest common denominator" approach in the context of then-Article 215 EEC, see ECJ, 5/71 – *Aktien-Zuckerfabrik v Council*, Opinion of AG Roemer, 13 July 1971, ECLI:EU:C:1971:96, at p. 989.

544 Koen Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law," (2003) 52 *International and Comparative Law Quarterly* 873 at 874; C.N. Kakouris, "Use of the Comparative Method by the Court of Justice of the European Communities," (1994) 6 *Pace International Law Review* 267 at 275-276.

545 Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" at 413.

546 Charter of Fundamental Rights of the European Union, Preamble.

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rospective and prospective elements as described above.[547] The form of non-incidental harmonisation which reliance on a European ethos implies can thus be framed as a project of integration which both the ECJ and the ECtHR are involved in. As Sionaidh Douglas-Scott has influentially put it, "these two transnational courts are engaged in a common project of European integration, albeit one which is conducted by different means".[548]

The juxtaposition with the EU has, however, also been the basis for criticism of the harmonising aim which the spur effect of consensus implies. Murray has argued, for example, that while harmonisation is "required by the defined nature and express objectives of the EU itself, i.e. to lay the foundations of an ever closer political union", the "Convention system is evidently of a different nature".[549] The ECJ, in other words is situated in an institutional context within which non-incidental harmonisation may have its place:[550] can the same by said of the ECtHR?

Supporters of the spur effect have attempted to counter such criticism in various ways.[551] For example, Antje von Ungern-Sternberg has clarified that "one can only speak of a community sharing common values when *an*

547 See supra, notes 529-530.

548 Douglas-Scott, "A Tale of Two Courts" at 653; Tobias Lock, "The Influence of EU Law on Strasbourg Doctrines," (2016) 41 *European Law Review* 804 at 814; on the ECHR as part of European integration, see also Rozakis, "The European Judge as Comparatist" at 272; Ignacio de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine," (2006) 7 *German Law Journal* 611 at 622; Mikael Rask Madsen, "The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011) at 58-59.

549 Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 43; see also Lucas Lixinski, "The Inter-American Court of Human Rights' Tentative Search for Latin American Consensus," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 339.

550 See generally on the differing institutional contexts Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," (1997) 107 *Yale Law Journal* 273 at 297; Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 102-104.

551 E.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 153, arguing that the ECtHR "does not hold that there is a violation of European consensus, but that there is a violation of the Convention"; this is trivially true, but does not redress the deeper issue since consensus forms part of the justification for whether or not such a violation is found.

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overwhelming majority of States truly forms part of it, that is when only few States exhibit contradictory values and rules".[552] Such concessions speak to the continued relevance of national ethe even if they are not foregrounded entirely, an issue I will return to in Chapter 5. For now, it suffices to note that while this move may mitigate the criticism based on national ethe somewhat, it cannot undermine it entirely: even if the respondent State is the "lone dissenter"[553] and all other European States are in agreement, the conceptual framework implied by the spur effect of consensus remains that of non-incidental harmonisation by reference to a pan-European ethos. This is, I would suggest, the consequence of applying the ethos-focussed perspective in the transnational context, with the internationalist commitments implied by the very existence of a *regional* system of human rights protection.[554]

V. Interim Reflections: Vestiges of Homogeneity

European consensus can be understood – or so I have been arguing – as an expression of a pan-European ethos, i.e. an application of the ethos-focussed perspective at the transnational level. By contrast to the morality-focussed perspective, it gives more argumentative relevance to factual disagreement, and consequently relies on majoritarian procedures as the fairest way of dealing with such disagreement. This applies, first, with regard to the relation between majorities and minorities at the national level: contrary to morality-focussed concerns that the reference to European consensus perpetuates a tyranny of the majority at the national level, democratic procedures are favoured over prepolitical minority rights given the disagreement surrounding the latter. Because European consensus builds on the positions taken by the legal systems of the States parties but also goes beyond them in applying the lens of commonality, the majoritarian approach also holds true at the transnational level: diversity among States is protected in some cases (rein effect) but specifically reduced in others by

552 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 336 (my translation, emphasis added).

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

554 See also, in that vein, Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights" at 405 (referring to the commitment which States made upon becoming members of the CoE as a justification for the spur effect).

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means of non-incidental harmonisation (spur effect). In contrast to the universalising angle of the morality-focussed perspective, the notion of a pan-European ethos understands the ECHR as seeking "to protect certain values within a very specific geographic, cultural, social, political, and economic *milieu*, namely the European continent".[555]

An argument can be made that European consensus operationalises the merits of the ethos-focussed perspective imperfectly, but as well as possible in the context of a regional human rights court: given the lack of democratic procedures at the transnational level, indirect reference to the States parties' legal systems is the next best thing, as it were. Yet some doubts remain. While modern iterations of the ethos-focussed perspective typically present themselves as basing ethical normativity on democratic procedures rather than, say, pre-existent traditions or national homogeneity,[556] their orientation towards any given macrosubject as the locus of normativity does carry a certain tendency towards homogeneity. Because European consensus remains focussed on the dominant position within the States parties, as expressed by their legal systems, it is difficult to adequately represent diversity *within* individual States, i.e. at the national level. As Seyla Benhabib has argued, the reference to States as "the relevant units" in this way "reduces peoples and their histories to a *holistic counterfactual*, which then results in the flattening out of the complex history of discourses and contestations within and among peoples".[557] The charge, in other words, is that the very *reference to States as a holistic entity ignores those not part of the intra-State majority and thereby reintroduces homogeneity* through the back door.

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555 Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?" at 627 (emphasis in original); see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 5.

556 Supra, III.

557 Benhabib, "Is There a Human Right to Democracy? Beyond Interventionism and Indifference" at 84 (emphasis added); see also Martha C. Nussbaum, *Frontiers of Justice. Disability, Nationality, Species Membership* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2006), at 245 and 253. These comments are in response to Rawls's approach in Rawls, *The Law of Peoples*; for similar criticism in the context of European consensus, see e.g. Hwang, "Grundrechtsschutz unter der Voraussetzung des europäischen Grundkonsenses?" at 315-316; Lewis, "What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation" at 405.

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Interestingly, this issue also arises – even more clearly, in fact – in the relations *between* States, i.e. at the transnational level. In that context, proponents of European consensus *explicitly rely on the supposed homogeneity* of European States to ground the notion of a pan-European ethos: Dzehtsiarou, for example, describes consensus as having "at its heart a strong emphasis on commonality between states"[558] and cites the fact that European States "are much more homogeneous in terms of human rights protection than States worldwide" as a justification for its use.[559] While often only mentioned in passing, others have made similar arguments, stressing the "homogeneous regional setting"[560] or the "homogeneity of the common background of the member states" as "an important element distinguishing regional human rights protection systems" from their counterparts "at the world level".[561]

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558 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1745.

559 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 129.

560 Lize R. Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents," (2017) 17 *Human Rights Law Review* 97 at 99, citing Jörg Polakiewicz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe," in *Developments of International Law in Treaty Making*, ed. Rüdiger Wolfrum and Volker Röben (Heidelberg et al.: Springer, 2005) at 287.

561 Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 301; see also Shany, "All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee" at 189; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010), at 144; Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" at 462-463; Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" at 74; Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights" at 60 with further references; Posner and Yoo, "Judicial Independence in International Tribunals" at 55 go so far as to claim that Europe forms a "political community" whereas "the rest of the world does not"; also on homogeneity, though acknowledging "real" differences, Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," (2003) 97 *American Journal of International Law* 38 at 75; Dothan, "Judicial Deference Allows European Consensus to Emerge" at 404; Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?" at 644; see also de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine" at 623; for the

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Statements such as these can claim to build on the Preamble to the ECHR itself, which describes the States parties as "like-minded" and possessing "a common heritage of political traditions, ideals, freedom and the rule of law".[562] The point is not so much to directly challenge this claim by means of a counter-claim geared at postulating general characteristics of sameness or difference, but rather to question the reasons for which the claim is raised at all, specifically in the context of European consensus. Generally speaking, can one meaningfully "divide human reality" into the ostensible homogeneous European States and "others" based on "generalities"?[563] Specifically with regard to European consensus, why does the supposed (relative) homogeneity within Europe supply a reason for further harmonisation – for imposing a certain human rights standard on those States which, by virtue of the fact that the spur effect of consensus is working against them, evidently do *not* form part of a homogeneous position on a certain issue?[564] For all the conceptual differences that might be highlighted between the national and the transnational level, is this not precisely the kind of hegemony that Habermas and Mouffe caution against when they remind us that behind ostensible homogeneity there lurk hegemony and exclusion[565] – now occurring as the "hegemony of the majority" that John Murray criticised in the context of the spur effect of European consensus?[566] Is it not, also, precisely the kind of false unity which critical comparatists have cautioned against?[567]

I would argue that, even if one accepts an ethos-focussed justification of European consensus in principle, the hegemonic potential of these homogenising tendencies needs to be taken seriously. This implies neither European consensus nor the notion of a pan-European ethos which under-

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opposite perspective emphasising diversity among the States parties, see e.g. Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford: Oxford University Press, 2012), at 2-3 (but see also at 11); Regan, "A Worthy Endeavour?" at 58; more generally Richard H. Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights," (2018) 9 *Journal of International Dispute Settlement* 154 at 160.

562 Preamble to the ECHR, fifth recital.

563 See generally Said, *Orientalism*, at 45.

564 See critically Carozza, "Uses and Misuses of Comparative Law" at 1229; and, though more cautiously, Petkova, "The Notion of Consensus as a Route to Democratic Adjudication" at 693.

565 Supra, notes 431-433.

566 Supra, note 496.

567 E.g. Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" at 453.

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girds it should be accepted at face value, but rather placed in a broader context which also recognises their downsides. This, in turn, leads to a more nuanced take on the various kinds of normativity we have been considering so far: in the next chapter, I will suggest that they must be read alongside one another rather than merely opposed to one another.

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