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Article

# Human Rights beyond Ideal Morality: The ECHR and Political Judgment

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**Abstract:** The aim of the article is to propose and defend a distinctively political reading of the European Convention of Human Rights. Drawing on a range of different sources, my core claim is that realistically construed considerations of political legitimacy, stemming from the institutional context within which ECtHR judges operate, can explain and justify a morally non-ideal understanding of Convention rights on the part of the Court. I call the kind of non-ideal reading of the ECHR that I defend ‘political’ because it results from distinctive concerns regarding the Court’s legitimacy in a wider context marked by the circumstances of politics, broadly understood. These concerns depend on apprehending the ECHR as a distinctive institutional-cum-legal regime or system whose stability has political underpinnings. Tackling them requires resorting to some form of political judgment aimed at working out how various normative parameters, including legitimacy and stability, interact with a morally ideal (or ‘first-best’) understanding of any given ECHR right.

**Keywords:** human rights; ECHR; interpretivism; political judgment



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## 1. Introduction

The aim of this article is to propose and defend a political reading of the European Convention of Human Rights (‘Convention’ or ‘ECHR’). Drawing on a range of resources from legal and political theory, my main claim is that realistically construed considerations of political legitimacy stemming from the institutional context within which European Court of Human Rights (‘the Court’ or ‘ECtHR’) judges operate can explain and justify a morally non-ideal understanding of Convention rights on the part of the Court. Importantly, the benchmark against which a morally ideal reading is defined throughout consists of apprehending Convention rights in the abstract. Morally ideal readings of the ECHR thus set out some abstract normative conception of the way states should respect the human rights of individuals within their jurisdiction (which includes but, according to the ECtHR, does not necessarily reduce to, their territory<sup>1</sup>), as well as more specific theories involving the abstract moral values protected by each Convention right. Some scholars defend the view that such readings, constrained by past institutional history, are the sole determinants of the truth conditions of propositions regarding ECHR rights (Letsas 2009). Many other scholars and the Court itself also seem to accept that moral considerations at least partially determine such conditions, even though they generally eschew the terminology of a ‘moral reading’ in favor of the more flexible formula of the ‘ideals and values of a democratic society’<sup>2</sup> underpinning the Convention (Gerards 2019, pp. 9–11).

In this article, the view that abstract moral values underpinning Convention rights at least partially determine the truth conditions of propositions regarding the ECHR is accepted for the sake of argument, as explained in Section 3. The article’s main claim is that these are not enough, together with past case law and general doctrine, to adequately

<sup>1</sup> For the complexities of so-called extraterritorial application of the ECHR see, among many other cases, *Loizidou v Turkey*, Application No 5318/89, Preliminary Objections, 23 March 1995 at para 62.

<sup>2</sup> The expression has been used by the Court in the case *Soering v the United Kingdom*, Application No 14038/88, Merits and Just Satisfaction, 7 July 1989 at para 87.

guide judges. It is thus argued that morally ideal abstract readings of the Convention and legal doctrine are necessarily supplemented by other kinds of considerations, which have not been widely explored in the pertinent literature. Two kinds of considerations stand out. First, there are distinctive concerns involving the Court's legitimacy in a wider context marked by the circumstances of politics broadly understood (Waldron 1999), where these include disagreement and potential conflict between strategically interdependent legal and political actors. Second, there are concerns to do with the practical efficacy as well as the overall and long-term stability of the ECHR order. As a result, individual judges sometimes find themselves caught in a dilemma. They can either stick to what they sincerely believe is the morally best (or 'first-best' or 'optimal') interpretation of the Convention in the abstract or, alternatively, they can mitigate their first-best interpretation, whatever it might be, in order to pre-empt criticism or backlash, including from other judges, and assuage legitimacy concerns, ensuring the long-term acceptability of the ECHR regime on the part of states and thus enhancing its stability. Tackling this dilemma requires resorting to some form of political judgment aimed at working out how various parameters, including legitimacy and stability, interact with optimal normative understandings of ECHR rights. Moreover, in most cases the trade-offs involved are negotiated under conditions of considerable uncertainty. This is due, among other things, to the fact that the structural complexity of the ECHR regime precludes easy or straightforward predictions of how state attitudes will evolve.

Two main kinds of arguments are provided in support of the above claims. Firstly, following the path-breaking work of Dimitrios Kyritsis (Kyritsis 2015), the point and purpose of the ECHR is construed in terms of a combination of considerations of content, i.e., considerations bearing on the substance of the specific rights protected by the Convention abstractly understood, and considerations of institutional design. The latter flow from the distinctive value of instituting an international court and charging it with the task of interpreting and implementing Convention rights vis-à-vis states parties. Secondly, it is contended that these specifications of the point and purpose of the ECHR are further constrained by certain political and institutional realities undergirding the ECHR regime. The realities comprise pervasive and reasonable disagreement concerning the content of specific ECHR-related claims, including among judges of the Court, and the fact that the Court typically relies on domestic institutional actors to effectively implement and enforce the Convention. These phenomena very often place judges in contexts of strategic interaction, i.e., contexts in which the outcome of joint action depends on how each interacting actor will decide, and all interacting actors know this. It is argued that the realities of strategic interaction at various levels require a supplementation of traditional normative theories. The main upshot is that, in some cases at least, identifying the right course of action for ECtHR judges involves more than normative reasoning on the substantive content of Convention rights, where this includes first-best moral reasoning: it also involves identifying 'second-best' or 'sub-optimal' solutions through the exercise of political judgment under conditions of uncertainty. The article then concludes by focusing on the specific example provided by the famous *Lautsi* cases<sup>3</sup>: the aim is to briefly and concretely illustrate how political judgment functions at the level of the ECtHR, with reference to devices such as the margin of appreciation<sup>4</sup> and the consensus approach<sup>5</sup> (on which see Gerards 2019; Dzehtsiarou 2015). It is claimed that these devices can be justified, among other things, by reference to the long-term stability of the ECHR regime under conditions of inevitable

<sup>3</sup> *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 3 November 2009 ('*Lautsi Second Chamber*'); *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 18 March 2011 ('*Lautsi*').

<sup>4</sup> The so-called 'margin of appreciation' doctrine was introduced by the Court in the *Handyside* case (*Handyside v. the United Kingdom*, Application No 5493/72, ECtHR 7 December 1976). Very roughly, it states that, for a number of reasons which include the subsidiary nature of the ECHR system of protection of human rights, national authorities have a 'margin of appreciation' when it comes to devising policies interfering with Convention rights such that, when they act within that margin, no violation of Convention rights shall be found by the Court.

<sup>5</sup> The so-called 'consensus approach' roughly states that the Court will accept a 'new' interpretation of the Convention insofar as some kind of 'consensus' on this interpretation can be recorded on the part of a sufficient large number of States Parties (or even non-party States and International Organizations).

strategic interaction among judges of the Court and between the Court and domestic actors charged with implementing the Convention as well as enforcing the Court's judgments.

In view of the above, the article makes several distinct but interrelated original contributions to the existing literature. First, it sets out and defends a significantly more complex account of normative reasoning with respect to the ECHR than the one provided by more standard narratives. At this level, the main targets are theories that insist on a normatively optimal understanding of rights irrespective of the political and institutional realities under which ECtHR judges operate (Letsas 2009). However, much more is at issue. To begin with, the article attempts to clarify why a normatively sub-optimal interpretation of the ECHR is an unavoidable consequence of the very conceptualization of the ECHR as a legal-institutional regime with its own, distinctive, stability prerequisites. Moreover, the article points to the more general need to develop more realistic normative theories of the ECHR. In fact, the phenomena of strategic interactions inherent in a more realistic reading of the ECHR, which are hardly unique to the ECHR regime, suggest that normative theories of adjudication for individual judges must make do with the phenomenon of normative sub-optimality. This more general issue is in the present article merely sketched, albeit, it is hoped, clearly enough to make conceptual room for more work to follow along similar lines.

## 2. The Court's Contested Legitimacy

The ECHR human rights regime is widely recognized as one of the most important and successful post-war achievements in the domain of international human rights protection (Lovat and Shany 2014). Briefly put, the regime was set up by the Convention in the context of its parent international organization, the Council of Europe. At the regime's centre is the European Court of Human Rights, whose main task consists of adjudicating applications lodged by individuals against member states alleging violations of the Convention (Lester 2011, p. 100), i.e., effectively discharging a function of 'individual justice' with respect to alleged human rights violations (Vogiatzis 2016, pp. 194–96). The Court's current prestige and legitimacy are not things to be taken for granted. Instead, they are important historical achievements which few would have predicted at the time of the negotiation of the ECHR, which took place between 1948 and 1950 (Madsen 2018).

Still, the system currently faces important challenges, which have been thoroughly analyzed by an ever-growing body of literature (see, e.g., Glas 2020). In what follows, two kinds of challenges that are usually thought to be of particular importance from the vantage point of the Court's legitimacy will be briefly sketched. To begin with, there are concerns related to what is widely known as the 'case overload' problem (see, e.g., Wildhaber 2011, pp. 223–26). The issue has resulted mainly because of the adoption of Additional Protocol No 11, which merged what used to be the European Commission on Human Rights with the Court, fully recognising a right to individual petition for the approximately 820 million residents of the 47 Council of Europe states parties. Case overload has lengthened proceedings considerably (Wildhaber 2011, p. 224). It has also incentivized the Court to use informal and potentially problematic mechanisms to dispose of cases. In particular, the extremely high rate of inadmissibility decisions since the entry into force of Additional Protocol No 11 to the Convention (Wildhaber 2011, p. 223) strongly suggests that the Court now uses the admissibility stage as an informal means of tackling the case overload issue. After the entry into force of Additional Protocol No 14, applications may be deemed inadmissible by a single judge not solely for strictly procedural reasons, such as the requirement that the applicant be a victim, the exhaustion of domestic remedies or the time limit, but also when applications fail to meet the 'significant disadvantage' criterion and are 'manifestly ill-founded' (Vogiatzis 2016, pp. 186–87). In fact, the Court may have been tempted to use this latter open-ended rationale to quickly dispose of cases based on a brief and relatively superficial examination of their merits (Vogiatzis 2016, pp. 199–203). Moreover, the problem is exacerbated by the fact that non-admissibility decisions generally do not set out detailed reasons and are not reviewable. Restriction of

access to the Court is thus not always adequately explained to applicants. Overall, then, the caseload issue, despite significant recent progress (Glas 2020), threatens the Court's legitimacy insofar as it results in the Court examining only a small fraction of applications seriously with respect to their merits.

To add to this, the ECtHR has tackled, in high-profile cases, a number of particularly controversial and 'sensitive' political issues, such as prisoners' voting rights<sup>6</sup>, the presence of crucifixes in public school classes<sup>7</sup>, the award of an unprecedented monetary sum for breaches of the right to a fair trial and the right to property<sup>8</sup> and the compatibility of restrictive abortion regimes with the ECHR.<sup>9</sup> In these high-profile cases, the Court typically found itself caught between two diametrically opposed kinds of criticisms. On the one hand, a growing number of governments<sup>10</sup>, higher domestic judges (see, e.g., Lord 2009; Kahn 2019) and academic commentators (see, e.g., Weiler 2010; Bossuyt 2010) have forcefully questioned the legitimacy of the ECtHR in 'sensitive' areas, claiming that the Court has gone far beyond what its remit, properly understood, requires. The gist of the criticism is that, despite its putative lack of democratic legitimacy, the Court sometimes imposes on states policies that clash with domestic expressions of democratic will.

Such criticisms of judicial overreach, moreover, are anything but purely theoretical or academic. They raise the thorny problem of non-compliance on the part of States Parties that firmly disagree with certain judgments issued by the Court, especially those that are deemed to be part of the 'hard core' of national moral culture<sup>11</sup> or, more generally, raise significant political issues.<sup>12</sup> The critics thus typically urge the Court to display a more robust attitude of self-constraint, leaving more leeway to states parties to decide disputed matters of human rights protection according to their own lights and constitutional traditions. To take a particularly prominent example, the Russian Constitutional Court ruled in 2015 that the execution of ECtHR judgments could be refused when these judgments are seen to contradict the Russian constitution (Smirnova 2015; Mälksoo and Benedek 2018; see also Oomen 2016 for worries raised by the Netherlands). Moreover, apart from national resistance to fully implementing the Court's case law, criticisms of the Court's stance have also fueled more formal institutional efforts to reform the Convention in order to rebalance the position of the Court vis-à-vis States Parties, reflected in the 2012 Brighton and 2015 Brussels Declarations.<sup>13</sup>

On the other hand, however, other commentators and activists hold the exact opposite opinion. They argue that the Court often does not do enough to help protect and effectively implement human rights in a consistent and principled manner (see, e.g., Tsakyrakis 2009; Zucca 2013). This is so, they insist, because the Court continues to uphold and deploy doctrines such as proportionality, the margin of appreciation and the consensus approach, which at best obscure its substantive reasoning and at worst endanger the consistent

<sup>6</sup> *Hirst v United Kingdom (No 2)*, Application No 74025/01, Merits and Just Satisfaction, 6 June 2005.

<sup>7</sup> *Lautsi Second Chamber and Lautsi* supra n 3.

<sup>8</sup> *OAO Neftyanaya Kompaniya Yukos v Russia* Application No 14902/04, Just Satisfaction, 31 July 2014.

<sup>9</sup> *A, B and C v Ireland* Application No 25579/05, Merits and Just Satisfaction, 16 December 2010.

<sup>10</sup> As stated in the main text, Russia probably provides the clearest example. For a critical overview of recent developments see Mälksoo and Benedek 2018. Still, the phenomenon is much more widespread. In relation to UK attitudes, see the former British Prime Minister David Cameron's speech on the European Court of Human Rights (D. Cameron, 'Speech on the European Court of Human Rights', available at: <http://www.newstatesman.com/politics/2012/01/human-rights-court-national>, last accessed 9 August 2021).

<sup>11</sup> A classical example is provided by the *Hirsch* case (supra n 6). It took the UK eleven years to comply with the Court's ruling and, unsurprisingly, the UK opted for minimal compliance when it grudgingly reformed its legal framework (Adams 2019).

<sup>12</sup> In this vein, the Council of Europe's Steering Committee for Human Rights (CDDH) has stressed that "[...] the execution of some cases is problematic for reasons of a more political nature, while the execution of some other cases is problematic for reasons of a more technical nature due notably to the complexity of the execution measures or the financial implications of the judgment" (CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights. COE Doc. CDDH(2015)R84 Addendum I, 11 December, Available at [https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH\(2015\)R84\\_Addendum%20I\\_EN-Final.pdf](https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH(2015)R84_Addendum%20I_EN-Final.pdf), accessed 21 September 2021).

<sup>13</sup> High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf) (accessed 21 September 2021); High-Level Conference on the 'Implementation of the European Convention on Human Rights, Our Shared Responsibility,' Brussels Declaration, 27 March 2015, [https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Declaration-Brussels\\_EN.pdf](https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Declaration-Brussels_EN.pdf) (accessed 21 September 2021).

protection of ECHR rights across different cases. As a result, these critics hold that the Court should adopt a more robust anti-majoritarian position to protect the human rights of minorities.

The Court, then, faces a vital workload and capacity issue that may well threaten its very *raison d'être* as a successful permanent international human rights court (Wildhaber 2011, pp. 224–26). At the same time, by using procedural mechanisms such as the manifestly ill-founded category to tackle its caseload, the Court is perceived by many to be balancing efficiency against transparency in a way that could undermine the public's long-term confidence in its integrity insofar as it undercuts the function of delivering individual justice (Vogiatzis 2016, pp. 192–94). The Court also routinely faces, in its everyday workings, public criticisms regarding the legitimacy of some of its most important judgments (Popelier et al. 2016). Moreover, to make things even more complicated, such criticisms often articulate plainly incompatible positions. In all these instances, the Court's perceived legitimacy is at stake. These issues, of course, do not by themselves entail a waning in the Court's legitimacy. If one uses rates of overall compliance with the Court's judgments as a (defeasible) indicator, states appear to mostly accept the Court's legitimacy (Dzehtsiarou 2015, p. 145). Be that as it may, the fact remains that in recent years the Court's legitimacy has come under increased pressure from various corners and on different and often incompatible grounds. Moreover, there is by now ample empirical evidence that ECtHR judges take these pressures seriously and are actively seeking to provide adequate responses to them (Dzehtsiarou 2015, chapter 7). The Court's legitimacy thus seems to be a standing concern for ECtHR judges, shaping their decisions and reactions regarding a wide range of issues. Hence, legitimacy both matters to judges of the Court and is constantly challenged by national governments, applicants, activists, and academic commentators (Popelier et al. 2016).

Under these conditions, how exactly should we understand the contested and open-ended concept of legitimacy in the context of the debate on the ECHR? We might begin by exploring what the legitimacy of a given political institution means in general, before narrowing our inquiry down to the more specific topic of the legitimacy of international judicial human rights institutions such as the ECtHR. At a first approximation, legitimacy refers to one's right to rule others, where 'one' may refer to a specific person or, more commonly, to an institution. Following Richard Fallon (Fallon 2005), we may initially distinguish between two ways of grasping the concept of legitimacy. Firstly, the term 'legitimacy' might refer to what Fallon calls the sociological concept of legitimacy (Fallon 2005, p. 1795). An institution exercising political rule wields legitimacy in that sense if subjects effectively believe that it has a right to rule them (sociological legitimacy in the strong sense) or if they otherwise acquiesce to the institution's claims of authority (sociological legitimacy in the weak sense). It follows that an institution's sociological legitimacy turns on social facts regarding the beliefs and behaviour of the institution's subjects. Secondly, the term 'legitimacy' might also refer to the moral concept of legitimacy (Fallon 2005, p. 1796). Legitimacy in the moral sense entails that an institution has an actual moral right to rule subjects, not simply that there is a (more or less widespread) belief in the existence of that right or a general behavioural pattern of acquiescence in the institution's demands. Establishing the moral legitimacy of an institution thus turns on substantive moral considerations. These do not necessarily depend on empirically identifiable attitudes towards the institution on the part of subjects.

With this initial distinction between sociological and moral legitimacy in place, some additional remarks are in order. To begin with, the concept of legitimacy appears flexible enough to be applicable to a wide range of different entities. These may include some particular institution, a set of related institutions forming a regime or system, and piecemeal political decisions. Secondly, since the sociological and the moral concepts of legitimacy are not coextensive, an institution might lack sociological legitimacy but possess moral legitimacy and vice versa. Likewise, a legitimate institution in any of the two senses might issue an illegitimate decision and vice versa. Thirdly, it appears that legitimacy in

both senses can come in varying degrees. To begin with, it is clearly the case that beliefs regarding an institution's right to rule or the moral appropriateness of its decisions can vary among subjects. They can also be held with degrees of robustness. In a similar if somewhat more controversial vein, moral legitimacy also appears to be a matter of degree. It is commonplace to distinguish between moral legitimacy and justice as different, albeit perhaps related, dimensions of moral evaluation of political institutions (Kyritsis 2018, pp. 7–10). In particular, legitimacy is widely thought to be a less stringent requirement than justice. This entails that a relatively unjust regime may nonetheless be legitimate. Moreover, political institutions may differ with respect to the degree to which they realize justice. Such institutions would then be deemed legitimate as regards their right to rule subjects, but not equally legitimate. The regime or institution that is more just has a superior claim to legitimacy than the less just one. Hence, in this view, moral legitimacy would be a scalar concept. Last, even though sociological and moral legitimacy are different concepts, they are connected in various ways. This is mainly because a certain degree of sociological legitimacy of an institution or regime might be important for its moral legitimacy. In the absence of sociological legitimacy, a reasonably just regime could become unstable and end up by being replaced by a less just or even unjust regime. Conversely, the moral legitimacy of an institution or regime that is confidently and publicly ascertained by subjects might also tend to foster its sociological legitimacy and hence its stability.

The preceding discussion can help us disentangle some of the issues concerning the Court's legitimacy highlighted above, allowing us to focus in a sharper way on the challenges the Court faces. This can be important because commentators do not always distinguish between different concepts of legitimacy (see, e.g., Dzehtsiarou 2015, chapter 6). Accordingly, the first point to clarify is that in the rest of the article focus shall be placed on the Court's moral legitimacy, and not on its sociological one. The moral legitimacy of the Court turns on substantive normative considerations to do with whether the Court may claim to *really* possess a right to rule over its subjects on ECHR issues. Subjects may be suitably divided into two main classes. First, the Court claims a right to rule States Parties, which are under a legal duty to abide by the Court's judgments<sup>14</sup> irrespective of whether they agree with them or not. Second, and through the effect of its judgments on the legal status of individual applicants, the Court also claims a right to rule the population which resides within states parties. Since the focus of this article is moral legitimacy, the ECtHR's sociological legitimacy shall only concern us to the extent to which it is made relevant by considerations of the Court's moral legitimacy. While there might exist significant links between the two concepts, the distinction between sociological and moral legitimacy entails, for example, that the mere social fact that some government reacts negatively to a particular judgment does not have moral relevance by default. Whether and how it might have such relevance remains to be determined through substantive moral argument. Still, one dimension that is crucial here, as already stated, is the contribution of sociological legitimacy to the stability of the ECHR regime, on the reasonable assumption that such a regime contributes to making States Parties more just and, therefore, enhances their moral legitimacy. Furthermore, the concept of moral legitimacy might apply wholemeal to the Court itself or piecemeal to any one of its judgments. The distinction implies that it is not the case that a particular illegitimate judgment, on some understanding of what that is, necessarily entails the illegitimacy of the Court, and vice versa.

Given the distinction between sociological and moral legitimacy, it is fair to say that at least some ongoing disputes on the Court's legitimacy typically focus on the moral rather than the sociological concept of legitimacy. When various actors and scholars make claims to the effect that the ECtHR inappropriately issued a judgment, they appear to refer, at least if their claims are taken at face value, to the Court's substantive moral power to hand down such and such a judgment, and not to what other actors think concerning the issue. In such disputes, substantive moral inquiry is required to determine the conditions under

<sup>14</sup> See Article 46(1) ECHR.

which the Court might effectively wield moral legitimacy. When those conditions are met, the Court's rulings ought to be followed as a matter of moral appropriateness; they are not merely applied as a matter of fact.

### 3. The ECHR and Moral Reasoning

The obvious question at this point is how the moral legitimacy of the Court and its judgments is connected to the legal issue of how the Court should decide cases. The answer turns on the distinctive methodological approach adopted in the present article. As already clarified in the introduction, this article begins, for the sake of argument, from the premise that the truth-values of propositions involving ECHR rights and duties depend, at least in part, on substantive moral considerations. Thus, it assumes that some form of legal interpretivism (Stavropoulos 2021) should be provisionally adopted with respect to these rights. An important implication of this choice is that ECHR law is approached as simply a part, albeit a distinctive one, of political morality. As a result, and *pace* Fallon's distinction between moral and legal legitimacy (Fallon 2005), which reflects a legal positivist viewpoint insofar as it distinguishes law from morality, the moral and legal legitimacy of the ECHR largely coincide. In this section, this choice in favor of a (provisional) legal interpretivist framework shall be suitably explained and justified.

The first thing to note is that the inclusion of moral considerations among the determinants of the content of ECHR rights should not be overtly controversial. The 'moral reading' of the ECHR is most clearly adopted by advocates of Dworkinian interpretivism (Letsas 2009, 2010). As already explained, on such an understanding of the ECHR, the Convention's legal legitimacy is just a distinctive part of political morality, i.e., the part that is roughly to do with justifications of state coercion on individuals in terms of international human rights. This is because, more generally, for interpretivist approaches legal legitimacy is not an independent category alongside moral and sociological legitimacy. Rather, it is simply the aspect of moral legitimacy of political institutions that refers to their distinctively legal activities: those whose function or point is to justify state coercion (Dworkin 1986, p. 93). However, Dworkinian interpretivists are not the only ones that give pride of place to moral reasoning when it comes to determining the content of human rights norms. In fact, many other approaches to legal interpretation, including most well-established versions of contemporary legal positivism (Raz 2009, chapter 13; Waluchow 1994), hold that moral considerations may be relied upon by judges when it comes to filling gaps left by indeterminate or vague legal norms. Of course, significant differences between anti-positivist and positivist approaches remain: the most important is that, for positivists, moral considerations become pertinent only to the extent that source-based law 'runs out'. However, such differences do not appear to be particularly important with respect to the topic of this article, which is to do with the role of moral considerations in fixing the content of ECHR rights. This is so for two main reasons. First, insofar as the formulation of ECHR rights contains abstract and open-ended terms such as 'inhuman and degrading treatment'<sup>15</sup>, 'fair trial'<sup>16</sup>, 'private and family life'<sup>17</sup> or 'freedom of expression'<sup>18</sup>, the Convention necessarily lends itself to judicial implementation using non-source-based methods, which puts both positivist and anti-positivist approaches on the same footing in that respect. Second, both approaches agree that at least part of these methods will consist of ideal moral reasoning, i.e., a form of reasoning that attempts to identify the moral point and purpose of the human right in question in abstraction from institutional and other kinds of strategic considerations. Last, but not least, the inevitability of (at least some) ideal moral reasoning when it comes to determining the content of ECHR norms is lent further support by the fact that this is what already appears to be happening in many landmark cases decided by the Court (Letsas 2010, pp. 521–32).

<sup>15</sup> Article 3 ECHR.

<sup>16</sup> Article 6 ECHR.

<sup>17</sup> Article 8 ECHR.

<sup>18</sup> Article 10 ECHR.



Assuming that ideal moral reasoning is, at least to some extent, inevitable when it comes to determining the content of Convention rights, the focus on moral, as opposed to legal, legitimacy also serves a useful methodological function. In fact, this article zeroes in on institutional, strategic, and political (in a wide sense) considerations that can, it is claimed, justify morally sub-optimal readings of the ECHR. If the arguments presented here are found to be convincing regarding ideally moral readings of the Convention, such as those typically insisted upon by Dworkinian interpretivists, then, *a fortiori*, they must also be found to be convincing regarding more mainstream ‘legal’ ones in the stricter positivist sense. This is because, as already noted, mainstream readings typically postulate that judges have a fair amount of discretion in general and, due to the open-ended formulation of ECHR norms, judges of the Court also enjoy discretion when it comes to determining the content of Convention norms (Gerards 2019, pp. 31–45). Hence, mainstream approaches would have less trouble than Dworkinian ones when it comes to incorporating the political considerations under discussion. It thus makes good methodological sense to assume, *arguendo*, the strongest possible version of an ideal moral reading in order to test the plausibility of considerations in favor of a morally sub-optimal approach.

On this assumption, the article proceeds by first briefly setting out some ideal normative considerations that co-determine in the abstract the content of Convention rights. It then makes a case for considerations that favor a morally non-ideal reading of the ECHR. To begin with, the article emphasizes considerations of institutional design, as opposed to considerations of abstract moral content. In doing so, it relies heavily on Dimitrios Kyritsis’s work, which has been dubbed ‘institutional interpretivism’ (Tsarapatsanis 2017). As we shall see, institutional interpretivism strives to do full justice to the persistent intuition that the law depends, among other things, on institutional principles specifying proper ways of relating governing institutions to one another and to the law’s subjects. These principles might be in competition with ideal or abstract moral considerations and thus favor a morally sub-optimal rendering of the ECHR, at least from the sole perspective of abstract moral considerations. Moreover, and irrespective of institutional design, it is also argued that moral sub-optimality can be the frequent outcome of strategic interaction between ECtHR judges, as well as between the Court as a whole and other kinds of institutional actors. It is argued that strategic interaction at various levels is a key realistic constraint on what the Court (and individual judges) ought to do. It is then claimed that, once the complexity of the relevant normative parameters of adjudication that determine how the ECtHR ought to decide cases is properly and realistically understood, judges of the Court will often have to exercise political judgment to determine whether it is appropriate to depart from whatever morally ideal or first-best normative understanding of the Convention they might initially favor. It is further suggested that exercising such judgment is more a practical skill of evincing the proper kind of sensitivity to the complexities of a unique situation, which results in inherently contestable rulings, than a kind of deductive reasoning from general premises. In what follows, each of these points is developed generally and in the specific context of the ECHR. The article then concludes by providing a brief illustration of political judgment through analysis of a specific example from the case law of the Court.

#### 4. Ideal Moral Considerations and the ECHR

As argued in the previous section, it can be methodologically helpful to begin with Dworkinian interpretivist approaches to the Convention when it comes to sketching out the role that abstract ideal moral considerations play with regard to determining the content of ECHR rights. This is because such approaches set out the considerations at play in a particularly clear way. Generally speaking, interpretivist theories of law take seriously Ronald Dworkin’s idea that the content of the law qua normative argumentative practice is sensitive to the practice’s point or purpose (Dworkin 1986, chapter 2). Accordingly, interpretivists of different stripes typically claim that, insofar as the law has the moral purpose of justifying state coercion, its content depends on moral considerations that both provide the best interpretation of this point and fit the totality of past institutional history.

Famously, interpretivist theories of law endorse ‘moral readings’ of such history and the materials it produces (Dworkin 1996). These can be past case law, constitutional texts or international conventions such as the ECHR. Importantly, interpretivists also claim that these moral readings are not part of a practice of reforming the law, i.e., setting out what the law should be, but, rather, part of the practice of working out what the law already is. Thus, under interpretivist approaches, the very content of the law, to wit, legal rights and duties, partly depends on considerations of political morality. As already explained in the previous section, Dworkinian interpretivism is not the only approach that gives pride of place to moral considerations along with strictly legal ones. In fact, whichever stance one adopts with regard to Dworkinian ‘moral readings’ of the law, there is broad consensus that moral considerations will have a role to play in judicial reasoning either as a statement of the law (for Dworkinians) or as a legitimate development of the law (for positivists). Thus, the present article remains non-committal with regard to the core of the issue that divides positivists and Dworkinian interpretivists, focusing instead on the area in which both approaches overlap, i.e., the role of abstract moral reasoning on the part of judges, and adopting in what follows an interpretivist stance with regard to the ECHR, merely for methodological reasons of clarity.

With those preliminary points out of the way, we may now concentrate more specifically on ideal abstract moral considerations justifying ECHR rights. In an interpretivist context, one of the most influential approaches to the Convention has been elaborated, developed and extensively defended by George Letsas in a number of important publications (Letsas 2009, 2010). According to Letsas, determining the truth-values of propositions of ECHR law necessitates engaging in substantive moral reasoning focused on specifying the abstract moral values underpinning ECHR rights, suitably constrained by the requirement that such reasoning both fit and justify past political decisions, including past case law of the ECtHR. Letsas’s work thus stands out as the most prominent and sophisticated attempt to provide an optimal moral reading of the Convention. Thus, to take one example among many, in order to determine the extent to which the Convention right to freedom of expression, set out in Article 10 ECHR, really protects individuals that belong to minorities against the external preferences of hostile majorities in, say, matters of blasphemy<sup>19</sup>, one needs to develop, by reference to a substantive abstract theory of liberal rights, and by resorting to political theory, a moral argument to do with the nature of the right to freedom of expression as well as with the range of permissible state interferences with that right. This argument should thus consist of identifying true moral principles that best fit, explain and justify past case law of the Court involving Article 10 ECHR.

Letsas contends that abstract moral reasoning of this sort is pervasive in the context of the ECHR, especially in hard cases, to wit, cases in which, as a matter of sociological fact, competent interpreters of the Convention disagree as to the appropriate outcome. Crucially, such reasoning has a number of important features. To begin with, from the point of view of its form, abstract moral reasoning typically contrasts with the conventionalist idea that the moral principles undergirding the interpretation of ECHR rights are reducible to the beliefs that majorities happen to have with regard to their content. Indeed, Letsas claims that it is an important desideratum of abstract moral reasoning concerning ECHR rights that political or social majorities might get the content of those rights wrong, which indicates that the moral truth concerning the best justification of ECHR rights transcends conventional understandings (Letsas 2009, pp. 37–57). Letsas has convincingly argued that the Court appears to be firmly committed to some such idea of objective truth (Letsas 2009, p. 52). This commitment, furthermore, is shared with other interpreters and commentators of the Convention. Letsas has dubbed the commitment of those actors to objective moral truth Strasbourg’s ‘interpretive ethos’ (Letsas 2010), arguing that it is an enticing construal

<sup>19</sup> See e.g., *I.A. v Turkey* (2005) Application No 42571/98, Merits and Just Satisfaction, 13 September 2005.

of the idea that the ECHR is a ‘living instrument’.<sup>20</sup> In Letsas’s interpretivist reading, the ‘living instrument’ approach can be understood as an update of the Convention on the basis of substantive moral discoveries regarding the true content of ECHR rights.

Furthermore, and this time from a more substantive point of view, abstract moral reasoning within the ECHR context is informed to an important degree by egalitarian and anti-perfectionist rationales (Letsas 2009, chapters 5 and 6). In Allen Buchanan’s helpful terminology, ECHR rights qua civil and political rights are typically understood to reflect the equal basic moral status of legal subjects (Buchanan 2013, pp. 68–72). Anti-perfectionist egalitarianism involves a commitment to the effect that no individual be deprived of an advantage or opportunity simply because she has adopted a way of life that happens to be frowned upon or despised by her more politically powerful fellow citizens. In that sense, the ECHR places deontic constraints on possible courses of state action, i.e., absolutely forbids such courses of action. Alternatively, in circumstances of less serious infringement, the Convention is typically understood to allow for some kind of balance between protected individual interests and collective goods, under a proportionality test (Gerards 2019, pp. 229–60). Moreover, and in addition to egalitarianism and anti-perfectionism, ECHR rights may also be understood in terms of their limited but noteworthy well-being (‘social and economic’) functions. In Buchanan’s terms, these functions are to do with ensuring that all individuals have the opportunity to lead a minimally good or decent life (Buchanan 2013, p. 70). Within the two-tier human rights system of the Council of Europe, the most important part of those functions is performed by the European Social Charter, which sets out a comprehensive scheme of social and economic rights protection, albeit at a lesser level of normative density than the ECHR. Still, the ECHR itself also appears to perform a subsidiary well-being function (Warbrick 2007). Leaving that limited well-being function of the Convention to one side, the status-egalitarian and anti-perfectionist normative roles of ECHR rights appear to cohere particularly well with the perceived objectivity of the rights’ content, especially when it comes to reviewing the compatibility of the Convention with state measures reflecting majoritarian preferences and restricting the liberties and opportunities afforded to individuals. In such cases, the Court seeks to decide whether the constraints stemming from the equal moral standing of each individual ‘really’ satisfied, quite irrespective of whether the respondent state or, indeed, a majority of states merely think (even in good faith) that they have (Letsas 2009).

### 5. A First Take on Moral Sub-Optimality and the ECHR: Considerations of Institutional Design

It is a major thesis of the present article that legal materials in the strict sense—to wit, mainly the doctrine contained within past case law of the Court, together with the abstract status-egalitarian and well-being abstract moral considerations roughly sketched in the previous section—are not enough to provide a complete normative picture sufficient to guide judges’ decision-making. Assuming that these considerations pull towards a reading of the Convention in terms of an abstract and morally ideal or optimal theory, this section and the next will set out some of the factors that pull towards the opposite, morally sub-optimal, direction. The present section will be devoted to normative institutional considerations realistically understood or, as Dimitrios Kyritsis calls them, considerations of ‘institutional design’ (Kyritsis 2015). These considerations are generally to do with the way in which it would be possible to justify the assignment to a specific body of a distinct and jurisdictionally circumscribed power within a wider scheme of institutional cooperation, given a realistic understanding of the body’s capacities (Kyritsis 2015, pp. 93–131). Considerations of institutional design inform the ways in which it is possible to conceive of issues such as the jurisdiction of an institution and its limits from the point of

<sup>20</sup> The so-called ‘living instrument’ approach was set out by the Court in the *Tyrer* case (*Tyrer v. the United Kingdom* [1978] Application No 5856/72, 25 April 1978) as follows (para 31): ‘The Court must also recall that the Convention is a living instrument which [ . . . ] must be interpreted in the light of present-day conditions’. Very roughly, the ‘living instrument’ approach consists of delivering an interpretive update of the Convention to cover situations which were not envisaged by the drafters of the ECHR in the 1950s.

view of both the attributes of a specific institution examined in isolation and its position vis-à-vis other institutions in a common project of governing through law. Adopting the perspective of institutional design opens up the distinctive possibility of justifying or criticising a given decision not because it is incorrect with respect to substance, i.e., from the point of view of reasons of content abstracted from institutional context, but because it flouts normative considerations to do with the appropriate division of labour between realistically construed political institutions within a common project of governing through law. To take just one example among many, on such an understanding theories of deference of the judicial branch to the legislature in the exercise of powers of domestic judicial review do not necessarily reflect the unlikely view that the legislature simply cannot make substantively erroneous decisions, perhaps on the ground that substantive correctness reduces to the legislature's beliefs on such correctness, but, rather, the idea that, in the midst of a common project of governing through law that is suitably shared between, among other things, legislatures and courts, a degree of respect is owed by courts to legislative decisions irrespective of their content because legislatures instantiate, to some degree, the value of democratic representation (Kyritsis 2018, chapter 7). Accordingly, normatively appropriate deference implies that, in some cases at least, legislative decisions might be allowed to stand despite the fact that they might also be thought to be deficient from the abstract, first-best moral perspective of the courts.

Normative institutional considerations thus have significant implications for judicial review involving fundamental or human rights. This is because they allow for the possibility that reasons of institutional design comprising values such as democracy, stability, efficiency and expediency might suitably combine with abstractly specified considerations of content to establish an all-things-considered duty on the part of courts. In this way of viewing things, appropriately implementing the Convention does not abstract from considerations of institutional design, as morally first-best approaches would require, but, rather, also requires inquiring whether it is within the power of the Court, given a realistic account of its relationships with other institutions, to authoritatively determine whether an all-things-considered violation of the ECHR took place. More generally, normative considerations of institutional design bear on judicial decision-making by specifying the proper extent of the powers of each institution within a shared project vis-à-vis other participants and legal subjects. The upshot is that sometimes the Court has to settle for an interpretation of the Convention that is not its abstractly specified first-best choice, but a second-best one that also incorporates institutional values such as democracy or expertise.

Now, while Kyritsis has mainly focused on considerations of separation of powers involving the institutional cooperation of legislatures and courts within domestic legal systems (Kyritsis 2018), we might try to briefly sketch here, without any ambition of comprehensiveness, reasons of institutional design that are operative at the level of the distinctive relationship that holds between the ECtHR and states parties. These are twofold. First, it is necessary to explain the decision to assign to the Court the institutional power to supervise ECHR compliance by states through the authoritative settling of disputes in the first place. Second, institutional considerations also circumscribe the Court's jurisdiction, i.e., the outer limit of its powers, properly understood, within the distinctive scheme of institutional cooperation instantiated by the ECHR regime.

We begin, then, with the fact that the Court has been allocated the power to authoritatively settle disputes between states and individuals as well as between states with respect to the interpretation and application of the ECHR to individual cases. How can this power be institutionally justified and what are its inherent limits? There are at least three important classes of considerations that might be thought crucial, once we discount the empirically rather dubious notion that, when it comes to identifying Convention violations, the Court might somehow, and quite mysteriously, have some kind of epistemic advantage in comparison to state authorities, where these include independent domestic courts. The first class of considerations pertains to the well-established international law notion of state consent, which was expressed by states parties when the Court was created (Letsas 2009).

State consent thus answers the fundamental question of why the Court may legitimately, as a matter of principle, settle the disputes that have been assigned to it. However, it does not speak to the further and more fine-grained issue identified in the discussion above, namely how intensively the Court should use its powers of review. Since, to use the canonical if somewhat vague terminology, these powers can be deployed in more or less ‘restrained’ or ‘activist’ ways, it is important, in order to fruitfully tackle the issue of intensity of review, to further enquire whether other kinds of institutional considerations might also be operative.

This line of reasoning prompts us to delve into the distinctive institutional benefits that the Court provides vis-à-vis the realistically understood capacities of domestic authorities as an international judicial human rights forum. Now, while it is impossible here, for reasons of space, to adequately analyze all the relevant institutional parameters, especially with regard to their empirical components, many of them can be understood as downstream manifestations of an abstract principle of subsidiarity unpacked in terms of the idea that the Court is institutionally tailor-made to provide merely a backup form of judicial protection of human rights operative in cases of alleged domestic failure (Buchanan 2013, pp. 107–8).<sup>21</sup> In this respect, we might briefly mention two interdependent factors. To begin with, the Court’s powers of review are only activated once states have failed to provide the proper kinds of responses to claims of violation of ECHR rights, when these claims have already been properly articulated by individuals before independent domestic courts.<sup>22</sup> It follows, first, that the independence of the Court from states parties is a necessary condition for spotting these failures, especially when they concern constraints on legitimate uses of state power. However, this is only part of the story. The fact that the Court provides a backup judicial forum entails that ECHR issues are not decided in an institutional vacuum but, rather, in the context of a normatively structured relationship with states parties, where equally independent (from domestic political branches) domestic courts are the first actors called upon to remedy alleged violations of the Convention. Subsidiarity is thus not merely the underlying rationale of a number of specific procedural devices, such as the rule of exhaustion of domestic remedies, but a more ambitious normative ideal, which includes the notion that States Parties, especially independent domestic judges, are treated as partners in a common project of efficient human rights protection (Tsarapatsanis 2015). Thus, subsidiarity integrates domestic courts within the ECHR system (Helfer 2008) and enhances the Court’s capacity, helping it as a matter of empirical fact to guide efficient implementation of the ECHR. Realistically, the system can only work efficiently if states largely refrain from violating Convention rights and domestic courts (and other authorities) largely sanction the violations that do occur (Tsarapatsanis 2015, pp. 690–91). This entails, among other things, that the Court has institutional reasons to pay heed to issues such as the reception of its doctrine by domestic judges, as well as the compliance of state authorities both with the specific operative provisions of its judgments in each instant case and with the more general doctrinal interpretations of the Convention that underpin those provisions. In order to do so, it must have at least some idea of domestic institutions’ realistically construed capacities and motivational propensities (Kosař and Petrov 2018). Indeed, there is ample evidence that the Court shapes doctrine and decides outcomes with an eye towards aiding its partners in carrying out their functions efficiently within this wider institutional division of labour (Tsarapatsanis 2015, pp. 694–97).

The second idea speaks to the issue of what constitutes a domestic failure to protect human rights and has been long stressed by theorists favoring so-called ‘political’ conceptions of human rights. These theorists, roughly, take the concept of human rights to be primarily applicable to violations that raise issues of international concern broadly construed (Rawls 2001, chapter 10). Within those conceptions, human rights comprise the specific subset of normatively important moral rights that can justify some form of interference with the decisions made by otherwise sovereign states. Accordingly, not all rights violations warrant

<sup>21</sup> On the structural importance of the notion of subsidiarity for the ECHR, which has been recently included in an Additional Protocol No 15 that entered into force on 1 August 2021, see, among many others, (Gerards 2019, pp. 3–8).

<sup>22</sup> See Article 35(1) ECHR.

such interference, since sovereignty normatively shields at least liberal democratic states from outsiders with respect to certain kinds of decisions. In the ECHR context, this idea would suggest that the Court's powers should be constrained by the requirement to exhibit some measure of respect for state sovereignty, inasmuch as the latter is an expression of an ideal of democratic self-determination (von Bogdandy and Venzke 2014). A certain degree of deference to determinations of ECHR-related questions by States Parties is thus appropriate out of respect for the rightful power of states to settle at least certain kinds of disputes. The issue then becomes not whether some ECHR right has been violated in the abstract, but, rather, whether an alleged ECHR violation is significant enough to warrant interference with a democratic and sovereign State Party. A related empirical issue is to do with the degree to which it can be realistically said that democratic deliberation at the domestic level indeed took place (Kleinlein 2017). In the settled practice of the Court, a degree of respect for state sovereignty clearly underpins at least certain uses of the proportionality and, more controversially, margin of appreciation doctrines, which involve, among other things, providing leeway to contracting states by lowering the intensity of review of state measures or else giving the power to states to pursue important collective goals while also legitimately interfering with individual rights (Gerards 2019, pp. 220–28). In such cases, the Court provides an interpretation of ECHR rights that diverges from a 'first-best' one, at least as the latter is understood from the perspective of abstract moral theory and even sometimes settled legal doctrine (Gerards 2019, pp. 160–97).<sup>23</sup>

Before we proceed further, two remarks are in order.<sup>24</sup> First, despite some obvious similarities with the approach that has been dubbed 'political constitutionalism' (Bellamy 2014), in the present article I refrain from framing the institutional points raised in these terms. This is because political constitutionalism, at least roughly understood, mainly insists on the primacy of the value of democratic legitimacy that flows from a sophisticated understanding of political equality (Waldron 1999; Bellamy 2007). Political constitutionalists mainly query the legitimacy of institutions that perform judicial and constitutional review of decisions arrived at by branches wielding democratic legitimacy, a practice that the Court also engages in. The present article, however, makes no assumption regarding whether democratic legitimacy and political equality enjoy the primacy afforded to them by political constitutionalists, and still less regarding whether these values are compatible with specific institutional practices and under which conditions. Still, there are very interesting overlaps, especially with Bellamy's work on the ECtHR (Bellamy 2014). It is impossible to deal with these here for reasons of space; however, they could and should be profitably pursued in future work.

Second, assuming that the considerations adduced up to this point are correct, instituting a permanent international court such as the ECtHR to supervise the human rights record of States Parties instantiates a distinctive institutional value that helps make the exercise of state power on individuals more legitimate. At the very least, this is so if we accept, as we should, that the Court is doing a reasonably good job at discharging its duties. It follows that, quite irrespective of disagreement on this or that specific case, the ECHR regime is valuable as a whole. Hence, there is a standing reason to promote its stability and, insofar as the latter depends on the Court's perceived standing by States Parties, to enhance its sociological legitimacy. This observation will become important in what follows.

## 6. A Second Take on Moral Sub-Optimality and the ECHR: Strategic Interaction

Institutional considerations such as those identified in the previous section go a long way towards explaining morally sub-optimal outcomes. However, they are only part of the story. The present section focuses on considerations stemming from pervasive phenomena of strategic interaction among multiple agents in the determination of judicial

<sup>23</sup> A striking example is provided by the *A, B and C v Ireland* case (Application No 25579/05, Merits and Just Satisfaction, 16 December 2010), which was to do with the compatibility of Ireland's stringent abortion regime with the Convention. Irrespective of whether the case was correctly decided, it appears that institutional considerations of democratic legitimacy played a significant role (see paras 28–76 and 239 of the judgment).

<sup>24</sup> I thank an anonymous reviewer for pressing me to clarify the points that follow.

outcomes. In particular, whereas the considerations sketched in the previous section specify normative relations between distinct types of institutions sharing authority, the present section zeroes in at the level of decision-making of individual officials. One important issue that arises at that level is the fact that, at least with regard to collegial courts such as the ECtHR, the outcome of a case, both in terms of the operative provision and of the doctrine chosen to justify it, depends not on what any individual judge will decide but on the combination of the opinions of many judges (Epstein and Jacobi 2010, pp. 345–46). A judge that sincerely expresses her opinion on what the law requires might thus fail to determine or even to marginally influence an outcome, since the latter depends on collective rather than individual judicial action (Epstein and Knight 1998, pp. 1–9). Moreover, such interaction scenarios can be thought to be particularly pervasive, especially in higher courts adjudicating hard cases, since in such cases judges often divide both on the content of the law and on its application to the case at hand (Epstein and Jacobi 2010, pp. 347–49). Last, scenarios of interaction are rendered even more complex by the possibility of decision in strategic contexts, i.e., by the fact that the decision situation involves interaction in the sense specified above and all relevant actors know that every other relevant actor knows this and might take such public knowledge under consideration when it comes to deciding (Epstein and Jacobi 2010, pp. 342–45). Under these circumstances, a recurring dilemma is whether actors ought to take strategic action, where that means not performing an action independently preferred, e.g., because it reflects the actor's 'first-best' interpretation of the law in a particular case, but, rather, an action that makes assumptions on how other actors are also likely to act, under a realistic understanding of the situation, in order to suitably influence the joint outcome under some 'second-best' criterion. In short, the argument of the present section is that the pervasiveness of strategic interaction in outcomes collegially determined substantially constrains any 'first-best' preferences that judges may take themselves to have when it comes to interpreting the Convention.

The considerations stemming from strategic interaction contexts pose a genuine normative problem to do with the extent to which individual judges should, under conditions of disagreement with their peers on the best interpretation of the ECHR, take strategic action when deciding how to opine on cases. For example, should a judge compromise by moving from the minority to the majority, thus modifying her position on the operative provision, if that could bring future judgments issued either by her own court or by other judges and officials with whom she interacts closer to her view on doctrinal matters (Epstein and Knight 1998, pp. 1–11)? The deeper source of such questions relates to the fact that, in contexts of interaction among multiple agents, an agent's decision to adopt a course of action which does not comply with what some other agent perceives as obligatory modifies the latter agent's duties themselves (Enoch 2018). In the circumstances of collegial judicial decision-making, different reactions to strategic contexts are possible. These can range from purely consequentialist views that uniquely value outcomes and thus justify unconstrained strategic reasoning along roughly game-theoretical lines, to purely deontological views which, by placing emphasis on institutional integrity, uniquely value judges' bona fide. On strict deontological views, a judge has no reason to modify her initial first-best view just because she will otherwise fail to influence the collective outcome, or, alternatively, she would need a particularly weighty overriding reason to do so, for instance, because of the special importance or urgency of the issue involved.

Now, it is not the ambition of the present article to sketch out a general normative theory of the duties of individual judges in their interaction with other judges in the context of collegial decision-making by courts in general or the ECtHR in particular. Such a task is particularly challenging and shall have to wait for another occasion. Instead, it will be assumed that adopting an intermediate position between the two extremes of consequentialist and deontological decision-making previously outlined is initially reasonable. This kind of position, roughly, would allow for principled and sincere judicial decision-making in cases where there is a sufficient degree of judicial convergence on a specific solution to a dispute, while also making space for, perhaps suitably constrained,

consequence-sensitive and strategic decisions in distinctively ‘high stakes’ cases. Important normative variables guiding judicial behaviour would include the relative urgency or importance of each case as well as the larger institutional context at play. Taking this tack allows one to avoid both an extreme form of full-blooded strategic consequentialism, which appears fundamentally at odds with judicial integrity, and the counterintuitive view of a strict duty to always opine according to one’s sincere ‘first-best’ judgment regarding the law irrespective of the consequences for both the litigants and the wider system of cooperation with other institutions, where these crucially include, in the case of the ECtHR, domestic courts and other public bodies.

If the above considerations are even roughly on the right lines, then in many cases decided by the ECtHR, judges will be justified in adopting a morally sub-optimal approach by their own lights. Judges may begin with strong views concerning the ‘first-best’ moral understanding of a particular Convention right. However, they might subsequently realize that their views, under conditions of disagreement, place them in the minority. At a second stage, they may thus choose to strategically modify their initial views on the basis of pertinent normative parameters. In any event, they need to equip themselves with a realistic understanding of the decision situation, i.e., make their best guess of how other judges are also likely to react. Moreover, the process of inter-court decision-making is only part of a complex web of nested strategic interactions. Synchronically, the ever-present possibility of strategic interaction with other types of institutions, both domestic and international, as well as among individual judges within the Court brings to the fore issues to do with, among other things, efficient cooperation between institutions placed at different levels of a wider institutional division of labour, systemic stability and perhaps even morally acceptable compromises (Wendt 2016) between judges finding themselves in disagreement over first-best outcomes. Diachronically, the possibility of feedback loops (e.g., domestic judges or other authorities questioning the guidance provided by the ECtHR on how to decide cases<sup>25</sup>) lays stress on the dynamic elements of strategic interaction. The upshot is that normative considerations of institutional design broadly construed, where these include strategic interaction among institutional actors, co-determine along with considerations of content not only the legal rights and duties that flow from the ECHR, but also the ways in which individual judges should opine when deciding on such rights and duties under conditions of disagreement.

## 7. The ECHR and Political Judgment

The arguments adduced in the previous two sections suggest that any approach that takes abstract first-best moral reasons to determine (in part or in whole) the content of ECHR rights has to be significantly supplemented, or perhaps even transformed, if proper sense is to be made of a number of pervasive institutional realities. A crucial aspect of these realities involves ensuring effective and efficient collective action in the face of disagreement on how to proceed. Following Waldron, we may call this the problem of the circumstances of politics (Waldron 1999, p. 102). In the past few years, and beginning with a posthumously published seminal paper by Bernard Williams (Williams 2005, pp. 1–17), there has been a renewed interest in the issue of the distinctiveness of a more realistic approach to problems of conflict resolution under conditions of disagreement when it comes to ensuring effective collective action and promoting the bases of peaceful social cooperation. While it is not possible, within the confines of the present article, to provide even a basic outline of the main tenets of the rich body of thought that political realism has now become, suffice it here to say that authors self-identified as political realists have broadly argued that the very nature of intra- and inter-societal conflict over fundamental moral values, which includes disagreement on justice and is fuelled both by different reasonable understandings concerning the fundamental terms of social cooperation and by

<sup>25</sup> A classic example from the case law of the Court is provided by the different views on the compatibility of the English law of negligence with the ECHR taken by the *Osman v the United Kingdom* (Application No 23452/94, Merits and Just Satisfaction, 28 October 1998) and *Z and Others v the United Kingdom* (Application No 29392/95, Merits and Just Satisfaction, 10 May 2001) judgments.



diverging passions and interests, entails that normative theorising on politics should not begin with abstract and a priori moral premises, only connecting with political reality at the moment of implementation of an abstractly identified principle (Williams 2005; Galston 2010). Instead, realists insist that such theorising should begin by taking proper account of the objective realities of political conflict. Political philosophy, they urge, is not just applied moral philosophy but a distinctive domain of inquiry that addresses a specifically political problem, to wit, the peaceful coexistence of multiple social actors that disagree on normative and factual matters and are torn by often-contradictory emotions or interests. Importantly, these forms of political realism are not to be construed as a kind of Realpolitik that eschews moral judgment altogether. Rather, they define a moral domain internal to politics. This domain is both part of morality and constrained by the need to take due account of putatively unavoidable political and institutional realities (Larmore 2018).

There are at least two ways in which the concerns raised by realists can inform a second-best interpretation of the ECHR. To begin with, many of the political facts that realists place emphasis on appear to be fully operative within the Convention context. These include disagreement on the content of Convention rights across a number of domestic and international institutional actors, as well as between individual Court judges. They are also to do with, as already noted, a number of important institutional constraints that the Court faces and which speak to its place within a wider institutional division of labour realistically understood. These encompass, among other things, the capacity of the Court to sway states parties so that they abide by its judgments and the practical requirement to convince domestic judges and, more generally, domestic public bodies to incorporate at least the main thrust of its doctrine in their own decision-making (Tsarapatsanis 2015, pp. 682–83). It follows that Court judges have to tackle the interpretation and application of the Convention not just as an issue to do with identifying the best abstract moral understanding of any given ECHR right but also, at the same time, as a genuinely political problem involving the ways in which largely stable cooperation among multiple institutional actors can be sustained over the longer term. In fact, ECtHR judges will systematically find themselves in situations in which their first-best understanding of what the Convention entails, informed by some abstract normatively ideal account, i.e., the interpretation that they would favor were they deciding and implementing the ECHR without the need to cooperate with domestic actors, will have to be balanced against considerations such as efficiency, institutional competence and stability. Moreover, judges will often have to make do with other judges who disagree with them on how to properly handle these same issues. Accordingly, as we have seen, in these cases judges will often have to decide whether to compromise on their first-best solution and, if so, to what extent. A wedge will thus be systematically driven between the morally ideal understanding of the ECHR under some conception of justice and the best option that can be collectively adopted within given, realistically understood, political circumstances.

Secondly, from the vantage point of a suitably realistic understanding of the political conditions under which the power of the Court is exercised, the crucial normative category is not that of justice, on which there is pervasive disagreement that must in some way or another be practically resolved in order to ensure action in common, but, rather, that of moral legitimacy. This is so because judges will not always be able to implement their considered first-best convictions concerning justice in the interpretation of the Convention. Thus, in many cases judges will try to discover realistic ways in which their preferred interpretations of the ECHR may be deemed normatively acceptable as exercises of power on states, even if these interpretations are not, given the political circumstances of their adoption, perfect implementations of any morally ideal conception of justice. This more or less guarantees, given the definition of legitimacy adopted in the present article, that the pertinent dimension of normative evaluation of the Court's activity is not so much that of (ideal) justice but, rather, that of (workable) moral legitimacy in the deployment of the Court's interpretive powers over states and individuals.

This brings us to the central point. Given the complexity of the relevant normative parameters, which are to do with, among other things, abstract moral considerations regarding international legal human rights, considerations of institutional design and various reasons stemming from strategic interaction among individual actors as well as among institutions, the chances of a comprehensive ordering of all applicable values appear rather slim, or even plainly improbable. In the absence of such a comprehensive ordering, judges will sometimes have no other option than to exercise contextual political judgment in order to identify the most realistically workable ways in which the relevant parameters can be reconciled. Such judgment is more a practical skill exemplifying a quasi-aesthetic capacity to perceive how various active factors interact concretely than a set of abstract directives stateable in the ordered form of comprehensive theorising.<sup>26</sup> Indeed, political judgment differs significantly from abstract theoretical reasoning, even if it is informed by it. It involves the practical ability to successfully balance contextual requirements, constraints and opportunities against the duty of integrity grounded in the judicial role. It is also to do with creatively imagining ways, given past experience, in which the Court's authority could be undermined by various decisional patterns once the anticipated reactions of all relevant actors are taken into account. Moreover, only some of the determinants of political judgment can be made fully explicit and, even in those cases, an inherent indeterminacy is to be expected, due to the complexity of the circumstances. In many such instances, as is generally the case in politics, success or failure will only be ascertainable *ex post facto*. Importantly, this also entails that there will typically remain a significant amount of disagreement among judges and other interested actors as to whether the courses of action licensed by such exercises of political judgment were in fact justified or not. It is thus submitted that, once the complex realities of judicial decision-making are properly brought into focus, the most that can be elucidated by way of theorising is a normative picture of adjudication that sketches the relevant challenges in as clear a way as possible, while leaving space to judges for contestable exercises of their faculty of judgment in what often appears to be a quasi-aesthetic mode (Clausewitz 2007, p. 99).

As such, how do judges concretely exercise political judgment to approach potential conflicts between first-order moral considerations and issues such as the stability or the long-term sustainability of the ECHR regime? Using a distinction first made by Michael Oakeshott in a somewhat different context (Oakeshott 1996), it is suggested that the kind of political judgment involved can be serviceably conceptualized in terms of a dialectic between two distinctive styles of reasoning, each of which assigns different kinds of priorities to the various normative factors at play. The first is a style of faith. It roughly corresponds to the optimistic idea that the interpretation of the Convention should be confidently pushed forward so as to make the case law as morally good as it ought to be, notwithstanding any contingent political and, more generally, realistically understood obstacles. Using this style of reasoning, considerations of the abstractly understood morality of human rights should normally, and barring wholly exceptional circumstances, call the shots. Conversely, considerations of institutional competence, strategic interaction or stability would only acquire momentum, if at all, in extreme cases: for example, when it would be abundantly clear that a certain choice would directly cause open revolt by States Parties, risking their withdrawal from the Convention system. The second one is a style of skepticism. This style detaches the interpretation of the Convention from any project of perfect ultimate understanding of human rights and focuses on the requirement to provide perhaps superficial but, in any event, roughly acceptable answers to the questions at hand with as full a consideration as can be realistically mustered of the underlying political forces potentially threatening the ECHR regime itself. A skeptical style places emphasis on the fallibility of human reason (including judicial reason) as well as on the fragility of any given complex political order (including the ECHR regime). Skepticism could thus be metaphorically captured by the image of a razor whose function is to trim down the exaggerated ambitions

<sup>26</sup> For one of the best available accounts of how such judgment functions in a different practical context, see (Clausewitz 2007, pp. 98–101).

of the style of faith. Crucially, both of these styles can be simultaneously present in most real-world cases. As Oakeshott observes referring to modern European politics, the two styles have evolved historically and are rarely expressed in an exclusive form (Oakeshott 1996, pp. 30–38). Rather, they define a spectrum of different possibilities situated between two extreme poles. It is contended that this conceptual spectrum can be profitably used to capture the range of attitudes that ECtHR judges may, and indeed do, adopt when confronted with the normative conflicts mentioned.

To be sure, the inevitability of political judgment, at least in certain cases, poses a number of significant problems. Some of them are more important than others. To begin with, ECtHR judges do not always make the relevant reasoning explicit. They prefer to talk in a rather generic way, and almost always extrajudicially, of the need to enhance the Court's legitimacy (Dzehtsiarou 2015, pp. 16–19), rather than directly address issues such as the stability or long-term sustainability of the ECHR regime in the rulings themselves. The familiar difficulty is that, under these circumstances, the public reasons provided only partly explain the judges' reasoning and, even then, do not necessarily focus on its most important component. Still, this in no way entails that judges act in bad faith or even that they conceal their reasoning. Indeed, as shall be argued in the next section while examining a specific example, the realistic considerations referred to in the present article are addressed by using such well-established concepts such as 'proportionality', 'consensus' and 'margin of appreciation'. Accordingly, the present argument could be understood as an explication of (at least some) uses of these concepts.

Moreover, it is true that the exercises of political judgment in question seem to be in tension with rule of law values as well as the ideal of judicial integrity, inasmuch as the latter requires recourse to principled, consistent and replicable reasoning. This is because the outcomes of political judgement appear to be, and probably are, ad hoc. This is a serious issue raising important worries concerning the Court's standing. However, such worries could perhaps be mitigated, if not altogether eliminated, once we take into account the following three thoughts. First, as a matter of the normal functioning of the ECHR regime, stability and practical efficacy are usually taken for granted. This should preclude, in most cases, the need to balance first-order abstract interpretive choices against institutional and strategic considerations. Likewise, in normal cases (under the conditions identified above), there will be a sufficient amount of judicial convergence on a single and principled first-order normative choice so as to preclude the need for strategic reasoning and ad hoc compromise among disagreeing judges. Indeed, the seemingly limited number of cases that, in the Court's own lights, appear to have necessitated recourse to ad hoc uses of the proportionality, margin of appreciation and/or consensus doctrines (Tsarapatsanis 2015) and thus, according to the present article, are explicable by recourse to distinctively political judgment, strongly suggests that, at least as things now stand, the ECHR regime is sufficiently stable to render such instances somewhat exceptional. Second, even under the assumption that some uses of these concepts by the ECtHR appear ad hoc, they are not to be understood as licensing States Parties to act in an illegal manner. Rather, they can be grasped as invitations to use principled legislative or judicial reasoning at the domestic level. This, after all, is the level at which rule of law values have real practical purchase (Tsarapatsanis 2015). Moreover, such a division of institutional responsibilities can be straightforwardly justified by reference to the principle of subsidiarity. Third, if the arguments pertaining to the existence, nature and importance of the institutional and interaction parameters highlighted in the previous sections is correct, it appears to follow that some form of political judgment on the part of judges at least in some cases is probably inevitable, unless one subscribes, rather implausibly, to a version of the idea that one should stick to one's first-best view irrespective of consequences. The point may be put in more general terms. It involves acknowledging that the ECHR regime is not merely a rule-of-law space of normative cooperation, but also a distinctive international political order that has its own internal logic of stability and legitimacy, as argued in Sections 5 and 6 above. In short, the ECHR regime is as much a political achievement as it is a more

narrowly moral and legal one. Accordingly, the regime's moral legitimacy, on which this article has focused, is Janus-faced: it is to do with both individual justice and systemic stability. From the latter perspective, effective neutralization of threats to the regime's long-term sustainability involves a reasoned identification of potential points of fragility as well as the recognition that state consent is not just a one-off event but an ongoing process of acquiescence. The active probing of potential dangers to the ECHR regime is even more important when the political tide changes, as seems to currently be the case (Voeten 2020). Insofar as the system's legitimacy increasingly comes under pressure (Popelier et al. 2016), the Court arguably needs to spend more of its political capital preserving, rather than actively expanding, the present repertoire of effectively protected human rights. Consolidating human rights gains as opposed to expanding them might sometimes seem like an opportunistic choice to proponents of the *fiat iustitia et perat mundus maxim*, but it can be a wise moral and political option in the real (as opposed to the ideal) world.

### 8. Political Judgment and the ECtHR: An Example

This penultimate section encapsulates the preceding analysis by focusing on a specific example from the jurisprudence of the ECtHR in order to illustrate the usefulness of a realistic reading of the Convention in the sense previously specified. The example is used to further elaborate on the suggestion that the margin of appreciation doctrine and the so-called consensus approach (Dzehtsiarou 2015, chapter 2; Letsas 2006) can, among other things<sup>27</sup>, be understood to have the function of navigating the tension between a morally ideal reading of the Convention and a second-order reconciliation of that reading with considerations stemming from political and institutional realities such as the effective resolution of disagreement and the long-term stability of the ECHR regime. As already argued, once the decision situation that ECtHR judges face is specified in this way, a certain kind of dilemma emerges. It consists of asking whether or not to push the interpretation of the Convention forward so as to make it conform to the judges' first-best views on ECHR rights (at least if these converge sufficiently), whatever these are. The problem at hand is reconciling such views with the requirement to also use the Court's interpretive power on States Parties in ways that are both morally legitimate as well as cognisant of the need to preserve the long-term stability of the ECHR regime.

More specifically, the suggestion is that the (in)famous *Lautsi* jurisprudential saga<sup>28</sup> provides a particularly appropriate point of entry into the political mode of analysis that the present article defends. This is for at least two sets of reasons. First of all, the case involved a change of position on the part of the Court, which could arguably be attributed, to an extent, to the political reactions that *Lautsi I* prompted. Second, the case is to do with what many states perceive as a 'sensitive' issue, to wit, the relationship between State and religion. The case thus casts light, along with cases such as *A, B and C v Ireland* which concerned access to abortion or *Hirst* which was to do with prisoners' voting rights, on a distinctive subset of the Court's practice to do with more or less firmly held moral beliefs held by majorities within States Parties.

As is well known, the saga consisted of two diametrically opposed judicial rulings. These revolved around the question whether the mandatory display of crucifixes in the classrooms of Italian public schools violated Article 2 of Protocol No. 1 to the ECHR, which protects the right of parents to educate their children in conformity with their convictions, in conjunction with Article 9 of the ECHR, which protects the right to freedom of thought, conscience and religion. Famously, in the first ruling the Second Chamber found that the display of crucifixes meant that the state took sides in the domain of religion and thereby infringed the freedom of religion of pupils. This Second Chamber ruling prompted critical reactions on the part of a significant number of academic commentators but also, and more importantly, of many powerful political actors. These included the Italian

<sup>27</sup> No assumption is made that the suggestion in the text is sufficient to unpack these complex concepts in their totality. For an overview of the diverse roles they play in the Court's reasoning see (Gerards 2019, pp. 93–107 and 160–97).

<sup>28</sup> See *Lautsi* Second Chamber and *Lautsi* supra n 3.

government, the Vatican, and a number of other European governments. These actors objected that an enhanced level of European supervision by the Court on issues of 'cultural importance' should be rejected. Subsequently, the Italian government requested that the case be referred to the Grand Chamber. In a tense context marked by the intervention of eight European governments in favor of Italy, the Grand Chamber reversed the original ruling by a majority of 15 to 2. Crucially, the Grand Chamber placed emphasis on the wide margin of appreciation enjoyed by Italy in relation to the mode of organization of its educational environment. It also underscored the fact that there is no European consensus on the issue of the presence of religious symbols in classrooms. The Grand Chamber thus ruled that Italy was in compliance with the Convention because it met certain minimal standards of protection of religious liberty. According to the Court, these standards comprised the absence of religious indoctrination of pupils and the opening of the educational environment to all religions with a general attitude of tolerance. The Court said that the requirement to remove crucifixes from classrooms went beyond those standards and could not be imposed on Italian authorities.

Lautsi came under fire from an important number of commentators; others, however, defended its main line of reasoning.<sup>29</sup> For the purposes of this article the key point to note is that many critics, as much as proponents, of Lautsi seemed to have primarily focused their arguments on the first-order issue of the best moral interpretation of religious liberty or, from the point of view of how the educational machinery of the state is organized, of religious neutrality. Thus, to take two characteristic examples, Dimitrios Kyritsis and Stavros Tsakyrakis largely articulated their criticism of Lautsi in terms of what they thought was the best abstract moral understanding of state neutrality. On the basis of their preferred understanding, justified by recourse to substantive first-order moral arguments, they then proceeded to claim that the Court had adopted an erroneous interpretation of religious liberty because it had failed to find that the presence of crucifixes in the classroom violated state neutrality in religious matters (Kyritsis and Tsakyrakis 2013, pp. 208–17). As a counterpoint to Kyritsis's and Tsakyrakis's analysis we might mention Weiler's response (Weiler 2013). Weiler agreed with the abstract moral understanding of state neutrality set out by Kyritsis and Tsakyrakis, but disagreed on how best to apply it to the instant case. His main contention was that state neutrality understood along the lines that Kyritsis and Tsakyrakis favor is compatible with a more pluralistic approach regarding the legitimate organization of the educational environment, which may include religious symbols.

It is not the aim of this article to take sides on the debate concerning whether Lautsi Second Chamber and Lautsi were appropriately decided. For the purposes of the present argument, it suffices to observe that both Kyritsis and Tsakyrakis and Weiler attempted to settle the issue through recourse to considerations to do with the best abstract moral rendering of the right to religious liberty. However, given the picture previously sketched, this is only part of what was at stake in Lautsi. Under a more realistic and politically salient reading of the ECHR, normative reasons pertaining to the best abstract moral understanding of ECHR rights will sometimes compete with institutional considerations as well as realistically understood requirements to promote the long-term stability of the ECHR order as a whole. It is thus contended that the analysis that preceded provides a way of grasping an additional dimension of what was at stake in Lautsi. To begin with, normative considerations of institutional design could speak in favor of either overruling or, in any case, significantly qualifying the sweeping initial holding of Lautsi Second Chamber. As already observed, institutional considerations in the ECHR context include the need to achieve efficient cooperation between the Court and domestic courts in the shared implementation of the Convention. Insofar as the strict and sweeping ratio of Lautsi Second Chamber could risk a kind of jurisprudential chaos once domestic judges attempted

<sup>29</sup> For a representative sample of criticisms see (Kyritsis and Tsakyrakis 2013; Zucca 2013). For a representative defense of the Grand Chamber's approach see (Weiler 2013).

to implement it, some kind of qualification of the ruling appeared desirable independently of how the abstract moral question was to be settled.

That is not all, however. The further and deeper question that called for political judgment was whether, even if one begins from the premise that Italy had in fact violated religious liberty under the best moral view of what that liberty entails in the abstract, the violation was important enough to outweigh what appeared to be, due to the mass intervention of European governments in favor of Italy, a clear and present danger to the sociological legitimacy and thus the long-term sustainability of the ECHR regime. The problem, indeed, appears to have been that *Lautsi* was one of a handful of cases that directly raises such issues. The Court answered that question in the negative and decided, at least for the time being, to stick to a less demanding understanding of religious liberty. It thus provided states parties with leeway to organize their educational environments in ways that allowed for the display of Christian religious symbols. To many critics, this move, justified by reference to the margin of appreciation and the consensus approach, seemed unacceptably unprincipled and ad hoc (Kyritsis and Tsakyrakis 2013; Zucca 2013). However, if the real problem was how to best balance first-best moral views regarding religious liberty against the risk of potential instability of the ECHR regime as a whole, a different picture emerges. On this picture, controversial references to the margin of appreciation and the consensus approach or contentious justifications of limitations to Convention rights through invocations of the principle of proportionality (Tsakyrakis 2009), are in reality expressions of the need for political judgment in the endeavour to identify the realistically most workable way of pushing forward the abstractly first-best interpretation of the Convention, whatever that might be. This, incidentally, could be the deeper reason why these concepts, as so many commentators have observed (Tsakyrakis 2009; Brauch 2004), are never precisely pinned down or formulated in ways that would once and for all eliminate uncertainty. If the argument offered in the article is correct, this is exactly what one should expect due to the unavailability of a kind of inherently controversial political judgment that aims to best negotiate irreducible normative tensions.

Is *Lautsi* an outlier or perhaps, even more simply, a single (and simple) legal mistake?<sup>30</sup> That it is not easy to frame it as a (simple) mistake seems to follow from the fact that legal experts and prestigious academics hotly debated its appropriateness. If there was a mistake, it was anything but evident. Rather, the deeper issue at play seemed to be that there was disagreement not only on the best understanding of religious freedom, but also on the best way (if at all) to balance whatever the best abstract understanding of that freedom against other arguably pertinent factors, such as state sovereignty and the overall stability of the ECHR regime. The more interesting question, however, is to do with whether *Lautsi* is an isolated example. An adequate answer to this question requires much more probing and empirically robust research of large swathes of the case law of the Court than the one provided in the present article. Still, while the *Lautsi* saga is here engaged with solely for purposes of illustration, several other landmark cases mentioned earlier seem to lend themselves to a comparable type of analysis. Thus, to take just two examples, the *Hirst* saga would provide an example of a judgment in which the Court could have overestimated the strengths of an optimal moral reading of the Convention, thus contributing to fueling a kind of backlash that eventually led to the adoption of the Brighton declaration (Bates 2014). As a counterpoint, the *A, B and C v Ireland* case, which has been criticized on a number of different grounds as far as the coherence of its main arguments is concerned (Cosentino 2015), could be understood in more political and realistic terms as a compromise designed to preserve the Court's (essentially contestable conception of) legitimacy, at least as that legitimacy was understood by the sitting judges themselves. Whether the kind of analysis sketched in the present article could be fruitfully extended to explain less 'sensitive politically' issues remains an open question that can only be addressed in future work.

<sup>30</sup> I thank an anonymous reviewer for pressing me to clarify the wider significance (if any) of the analysis of the *Lautsi* saga.

## 9. Conclusions

This article argues that, even if one subscribes to a Dworkinian interpretivist position that gives pride of place to objective first-best moral reasons in the interpretation of the ECHR, one must acknowledge that a full picture of adjudication under realistically understood institutional conditions should incorporate an element of contextual political judgment. The aim of such judgment is to trace out a morally legitimate way of balancing the aspiration to make the interpretation of the ECHR the best it can be in the abstract against the requirements stemming from normative considerations of institutional design and the need to respond to pervasive realities of strategic interaction, under conditions of disagreement on the best interpretation of the ECHR and against the background of a need for efficient cooperation with domestic institutions which can ensure the long-term stability of the ECHR regime as a whole. If the central thesis of the article is right, departing from what initially appears to be the morally ideal abstract understanding of ECHR rights will in many cases not only be unavoidable but also justified, all things considered.

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