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The margin of appreciation doctrine: a low-level institutional view

The article argues that the margin of appreciation (MoA) doctrine of the European Court of Human Rights (ECtHR or Court), should be understood as, inter alia, an underenforcement doctrine, according to which Convention rights should not be applied to their full conceptual limits. Underenforcement is justified by institutional considerations relating to the Court's role and competence. Although institutional considerations have been theorised normatively, the article claims that 'low-level' empirical inquiry into the comparative institutional competence of different decision-makers across the Council of Europe is critical in explaining MoA. Such comparative empirical analysis ties shared institutional responsibility and subsidiarity with certain traits of decision-makers when determining Convention rights. In this context, the article briefly compares the decision-making abilities of different institutions. It concludes by stressing that under certain circumstances the Court can be worse placed than national authorities to decide on violations of Convention rights. This is corroborated by the Court's case law concerning Convention rights impinging on the economic and social policies of States Parties.

1. INTRODUCTION

The margin of appreciation doctrine of the European Court of Human Rights continues to steer disagreement when it comes to interpreting the European Convention of Human Rights (Convention or ECHR). Widely used by the Court to identify the duties that stem from the Convention,[1],the doctrine gives States Parties leeway in the identification of the content of Convention rights. MoA is thus commonly understood as an exercise of self-restraint on the part of the Court, since it implies applying doctrinal tests that fall short of

[1] See, eg *Lautsi and Others v Italy* App no 30814/06 (ECtHR 18 March 2011). For criticism of the Court's use of MoA in *Lautsi* see D Kyritsis & S Tsakyrakis 'Neutrality in the Classroom' (2013) 11 Int'l J Con L 217.

enforcing the Convention 'to its full conceptual limits'.[2] By invoking MoA, the Court appears to *underenforce* Convention rights.[3] It typically lowers the intensity of its review, accepts States' conceptions of ECHR rights, ritualistically states that Member States 'are better placed than the Court itself' to decide on the merits of cases[4] and ultimately declines to draw on an optimal understanding of Convention rights.[5]

Various critics think that this underenforcement aspect of MoA is deeply problematic.[6] They argue that the Court is vested with the responsibility, formulated in Article 32 (1) of the Convention, to interpret and apply the Convention and its Protocols following the lodging of individual applications, in order to ensure observance by the States Parties and protect human rights.[7] It is generally accepted, not least by the Court itself, that this responsibility requires determining whether a violation of the Convention took place *independently* of the arguments and views held by the respondent states.[8] Hence, critics

[2] See L Sager 'Fair Measure: the Legal Status of Underenforced Constitutional Norms' (1978) 91 Harv L R 1212 at 1213.
[3] The term 'underenforcement' has been coined by constitutional theorist Lawrence Sager; see L Sager above n 2 at 1212.
[4] The birthplace of this typical dictum is the case of *Ireland v UK* (18 January 1978), Series A no 25 at para 207. This case was also the one in which the expression 'margin of appreciation' was used for the first time.
[5] For a few seminal examples from the Court's case law, see *Leyla Şahin v Turkey* (10 November 2005), App no 44774/98 ECHR 2005-XI; *Wingrove v UK* (25 November 1996), ECHR 1996-V; *Evans v UK* (10 April 2007), App no 6339/05 ECHR 2007-IV; *Vo v France* (8 July 2004), App no 53924/00, ECHR 2004-VIII.
[6] See eg J A Brauch 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-5) 11 Colum J Eur L 113.
[7] See eg the partly dissenting opinion of Judge De Meyer in *Z v Finland* (1997) 25 EHRR 371: 'In the present case the Court once again relies on the national authorities' "margin of appreciation". I believe that it is high time for the Court to banish the concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies…. where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.'
[8] On this point see the Court's well-established case law on 'autonomous concepts', which was inaugurated by *Engel and Others v Netherlands* (1976) Series A no 22. For useful discussion of the 'autonomous concepts' method see G Letsas, 'The truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 Eur J Int'l L 279.

claim, insofar as it entails a suboptimal reading of ECHR rights, MoA is either an abdication of the Court's responsibility, or a doctrine that smacks of relativism.[9]

A standard way of resisting these criticisms is by distinguishing between substantive and institutional considerations in the determination of a workable scheme of internationally justiciable Convention rights.[10] Institutional considerations apply to the Court by virtue of its particular institutional role in a shared scheme of supranational human rights governance.[11] Institutional views insist, first, that the ECtHR is a *court* and, second, that it is an *international* court. The first feature entails that the Court implements the Convention by cooperating with political institutions other than courts, such as national legislatures. This points to concerns about the legitimacy of unelected judges reviewing decisions taken by democratic institutions[12], traditionally tackled by means of a theory of separation of powers.[13] The second feature necessitates balancing the sovereignty of states with a supranational system of decision-making[14], usually addressed by taking on a normative conception of *subsidiarity*.[15] Overall, MoA would result from the need to balance

[9] See eg the opinion of Judge De Meyer above n 7; E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998-99) 31 NYU J Int'l L Politics 843.

[10] On institutional considerations and their role in judicial decision-making see eg J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 Oxf J L S 409; A Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 U Tor L J 23 at 27; D Kyritsis 'Constitutional Review in Representative Democracy' (2012) 32 Oxf J L S 297.

[11] See eg S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press 2006) p 216; A von Staden 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 In'l J Con L 1023; A Legg *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press 2013).

[12] D Kyritsis above n 10 at 300.

[13] D Kyritsis above n 10; J Waldron 'Separation of Powers in Thought and Practice?' (2013) 54 B U L Rev 433.

[14] See L Helfer and A-M Slaughter 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale L J 273 at 316–317.

[15] A von Staden above n 11; A Føllesdal, 'Survey Article: Subsidiarity' (1998) 6 J Pol Phil 190; P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 Am J Int'l L 38.

both state sovereignty and the legitimacy of domestic democratic institutions against the authority of unelected international judges.[16]

In this article, I add a new strand to this institutional reading. The evolving institutionalist literature on the ECtHR has so far focused mainly on 'high-level' normative theories.[17] High-level theorizing predominantly unpacks the concept of subsidiarity in judicial review contexts and traces its normative implications[18] by resorting to democratic theory and to abstract conceptions of supranational constitutionalism and human rights.[19] While recognizing the importance of this kind of high-level normative analysis, I propose to supplement it with a substantially different approach. Taking my cue from the work of institutionalists such as Neil Komesar[20] and Adrian Vermeule,[21] I claim that 'low-level' empirical inquiry into the comparative institutional competence of different decision-makers across the Council of Europe is crucial in explaining and justifying MoA. My ultimate aim is to defend the normative relevance of an empirical research agenda alongside abstract high-level conceptual theorizing.

The article unfolds as follows. In section 2, I discuss the underenforcement features of MoA, which point towards the normative relevance of institutional concerns in the Court's decision-making process. Then, in section 3 I defend the view that institutional concerns

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[16] Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 Eur J Int'l L 907; A von Staden above n 11; A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 Eur J Int'l L 1.

[17] A von Staden above n 11; A von Bogdandy and I Venzke above n 16; A Føllesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40 J Soc Phil 595.

[18] A von Staden above n 11; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 Eur J Int'l L 907.

[19] A von Staden above n 11; A von Bogdandy and I Venzke above n 16; M Kumm above n 18.

[20] N Komesar *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press 1994).

[21] A Vermeule *Judging Under Uncertainty: An Institutional Theory of Interpretation* (Cambridge: Harvard University Press 2006).

also comprise comparative institutional abilities that can only be identified through concrete empirical research. More specifically, I argue in favour of a normative account that ties shared institutional responsibility and subsidiarity with the empirical features of a variety of decision-makers in the determination of the content of Convention rights. My central claim, which connects high-level normative with low-level empirical considerations, is that the Convention scheme of human rights governance is a scheme of cooperation that attributes to a wide variety of institutional agents, and first and foremost to national authorities, the *shared responsibility* of *effectively implementing* the ECHR. Under conditions of uncertainty, bounded rationality and reasonable disagreement on the content of Convention rights, the Court frequently has to take a decision as to whether it is better suited than other domestic institutions to correctly and effectively implement Convention rights, thus bringing comparative institutional abilities into play. In section 4, and in the current absence of extensive empirical research comparing the Court's abilities with those of domestic authorities, I briefly rehearse some of the *generic* arguments about comparative institutional abilities provided in the institutionalist literature. To the extent that these arguments apply to the ECtHR, they lend plausibility to the claim that under certain circumstances the Court is worse placed than (some) national authorities to decide on violations of Convention rights. Hence, in these cases, uses of MoA by the Court to lower its standard of review can be *pro tanto* justified. What might these circumstances be? I contend that a full answer should await further comparative empirical research, because justified allocations of decision-making power within the ECHR supervene upon complex empirical considerations. However, in section 5, I provide some further generic exploration of the subject, by reviewing the Court's case law concerning issues to do with the economic

and social policy of States Parties. This seems ideally suited for the purpose of presenting an initial defence of the normative relevance of empirical institutional characteristics, since the Court has consistently used MoA to dismiss out of hand the vast majority of applications alleging violations of Convention rights on the grounds that national authorities are 'better placed' than the Court itself to decide on these issues. I conclude by arguing in favour of an empiricist research agenda in order to shed further light on MoA.

2. MOA, UNDERENFORCEMENT AND INSTITUTIONAL REASONS

What does it mean to say that the Court underenforces Convention rights, and how is underenforcement related to MoA? The most influential conceptual account of underenforcement is due to constitutional theorist Lawrence Sager, who is also responsible for coining the term.[22] Sager proposes unpacking underenforcement in terms of a distinction between concepts and conceptions. According to Sager, an agent underenforces a legal norm whenever the agent puts forth a conception of the norm, or, in Sager's terms, a 'construct', that falls short of implementing the norm's 'full conceptual limit'[23], to wit, the concept contained in the norm. Thus, according to Sager the crucial feature of underenforcement is that the construct does *not* exhaust the conceptual limit of the norm. Hence, the underenforced norm retains its full validity as regards its application by agents other than the underenforcing agent.

[22] L Sager above n 2. For a related approach see R Fallon *Implementing the Constitution* (Cambridge: Harvard University Press 2001).
[23] L Sager above n 2 at 1213.

Sager believes that in the specific context of US constitutional law, the Supreme Court's case law on the application of the Federal Constitution's Due Process and Equal Protection clauses provides telling examples of such an underenforcement practice.[24] By relying heavily on the so-called 'rational basis' test in the vast majority of cases brought before it, the US Supreme Court refrains from substantively scrutinizing the choices made by states, especially when it comes to reviewing their schemes of taxation or business regulation.[25] As Sager notes: 'the test incorporates a theory and practice of extreme deference to the judgment of the enacting official body'.[26] However, Sager also maintains that judicial underenforcement of the Equal Protection clause does not imply that the clause is not otherwise valid to its full conceptual limits as regards officials other than the judiciary.[27] Accordingly, judicial underenforcement of legal norms is conceived as an exercise of self-restraint aimed at stopping short of interpreting or applying the norms to their full conceptual boundaries, while also recognizing that these boundaries potentially retain their validity in relation to other institutional agents.

Judicial underenforcement of legal norms in the above sense invites an immediate objection. On the face of it, underenforcement appears to be a renunciation of judicial responsibility, since it entails that the judge will lower her standard of review below the full conceptual boundary of a norm, despite the fact that her mission is precisely to

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[24] L Sager above n 2 at 1216; R Fallon above n 22 p 5.
[25] See, for example, *FCC v. Beach Communications, Inc.* (1993) 508 US 307 at 313-315: 'In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines [e.g. race, national origin, religion, or alienage] nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification…. This standard of review is a paradigm of judicial restraint…. [A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'; quoted by R Fallon above n 22 at 78.
[26] L Sager above n 2 at 1215 (internal quotation marks omitted).
[27] L Sager above n 2 at 1226.

interpret and apply that same norm to the case before her.[28] Sager answers this objection by arguing that judicial underenforcement can be explained and justified through reference to specific *institutional concerns* that apply to the judiciary.[29] Underenforcement thus rests on a distinction between substantive and institutional reasons in the interpretation and application of legal norms. Substantive reasons would correspond to what Sager calls the 'full conceptual boundaries' of a norm. They are the considerations by virtue of which the norms have their distinctive content. These considerations are operative *in abstraction* of their having to be applied by particular institutional agents. For example, and in the specific context of the ECHR, substantive reasons, identifiable by reference to theories of human rights and to principles of political morality[30], determine the content of Convention rights in abstraction of the fact that the ECHR is susceptible to be applied by national legislatures, administrative agencies and courts, *as well as* by the Court itself. On the other hand, institutional reasons apply *specifically* to the enforcing agent and determine the agent's powers and responsibilities within a wider scheme of institutional cooperation. In the domestic context, such institutional reasons are first and foremost identified through constitutional doctrines of the separation of powers. In view of the above, we can restate Sager's main idea in the following way: underenforcement of legal norms is a practice of deliberately abstaining from considering some of the substantive reasons determining the interpretation and application of the norms *because* of institutional reasons that apply specifically to the enforcing agent.

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[28] R Fallon above n 22 p 111.
[29] L Sager above n 2 pp 1222–1228.
[30] For a liberal construal of the substantive considerations that determine the content of Convention rights see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press 2009) pp 99–119.

The underenforcement function of MoA should by this point have become apparent. Typically, the Court uses MoA to lower its standard of review, claiming that Member States' authorities are 'better placed' than the Court itself to arrive at an all-things-considered judgment on alleged violations.[31] Two features make such invocations of MoA instances of underenforcement of the Convention in the sense specified above. Firstly, like the US Supreme Court and many other constitutional and supreme courts around the world,[32] the Court frequently refrains from reviewing the decisions of national authorities under the best substantive theory of Convention rights. Instead, its standard of review consists in setting a 'reasonableness' threshold.[33] Secondly, the Court explicitly states that underenforcement of Convention rights is justified on institutional grounds, to wit, by the fact that domestic authorities are 'better placed' than the Court itself to assess certain kinds of issues.[34] This attitude of the Court is prevalent in numerous areas of its case law.[35] Among other things, it informs the Court's approach when it comes to assessing limitations on the rights of Articles 8–11 of the Convention. The Court thus frequently resorts to the argument that the absence of consensus among States Parties affords the latter an MoA in

[31] See eg cases of the Court cited above n 5.

[32] To provide just one example, the French Constitutional Council commonly resorts to the argument that its 'power of appreciation' is not the same as that of the legislature, in order to lower its standard of review of the constitutionality of Parliament's acts. See eg its recent decision no 2013-341 QPC (27 September 2013) at para 6.

[33] For an extensive overview of the recent case law of the Court in this respect, see J Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 Nether Q Hum Rights 324 at 330: 'In all these circumstances the Court seems to use the doctrine as a vehicle which influences the strictness of the requirements imposed on States. When the margin is narrow, the bar for finding a violation of the Convention is presumably set high and the ensuing obligation is more stringent. The margin works here like a bar in a high jump competition.'

[34] See *Ireland v UK* above n 4.

[35] For an overview, see H C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Kluwer 1996); E Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights: Compliance or Cross-Purposes' (1996) 56 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 240; S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000); J Kratochvíl above n 33.

the determination of limitations to these rights, when it comes to balancing them with the realization of collective goals such as public order, security, health or morals.[36]

Construing MoA as an underenforcement doctrine justified by institutional reasons deflects some of the objections frequently marshalled against it. For example, critics argue that MoA amounts to a form of relativism by virtue of which the content of Convention rights would depend on the divergent moral conceptions of States Parties[37], or, especially in the context of restrictions to the rights enshrined by Articles 8–11 of the Convention, that it gives leeway to a rampant utilitarian calculus threatening the very concept of human rights.[38] In so doing, they simply assume that substantive reasons should be the sole determinants of the Court's outcomes. However, if one takes the view that institutional considerations stemming from the institutional structure of the ECHR could justify underenforcement of Convention rights, then one need make no concessions either to relativism or to utilitarianism. An objectivist (as opposed to relativist) and liberal (as opposed to utilitarian) theory of Convention rights is fully compatible with the claim that these rights are to be implemented in ways that depend in part on (equally objective) reasons that apply to the implementing agent because of its particular institutional position and characteristics.[39]

Before we proceed further, two caveats. Firstly, institutional considerations justifying underenforcement of Convention rights are only *pro tanto*. They can be overridden, in specific instances, by competing considerations that either favour full

[36] For an overview and a critical analysis of the Court's case law regarding Articles 8–11 on limitations of Convention rights on grounds of public morals see G Letsas above n 30 pp 92–98.
[37] E Benvenisti above n 9 at 844.
[38] See G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxf J L S 705 at 729.
[39] For a related point, see J A Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 Int'l Comp L Q 459.

examination of the substantive merits of a particular case or require abstention from recognizing an MoA to the respondent state because of the importance of the right involved.[40] Secondly, MoA is a complex and multifaceted legal doctrine[41] that can incorporate a large number of different and sometimes conflicting concerns, of which underenforcement is only a part. No claim is made here that MoA is *merely* an underenforcement doctrine, or that the Court always uses it in a coherent and justified way.[42] *A fortiori*, it is not argued that judicial uses of MoA for all practical purposes can be solely justified on institutionally informed underenforcement grounds. For example, George Letsas has usefully distinguished between the 'structural' and the 'substantive' concept of MoA.[43] According to Letsas, the substantive concept of MoA 'is to address the relationship between individual freedoms and collective goals'.[44] Conversely, the structural concept of MoA 'is to address the limits or intensity of the review of the European Court of Human Rights in view of its status as an international tribunal'.[45] What follows from the discussion thus far is merely that underenforcement of Convention rights relates to what Letsas dubs the 'structural' concept of MoA. There is no reason to suppose that all the practical concerns subsumed under the doctrine that the Court recognizes as 'MoA',

[40] As Dean Spielmann indicates: '… the margin of appreciation is virtually inexistent when it comes to the non-derogable rights (right to life, prohibition of torture, prohibition of slavery and forced labour, prohibition of retrospective legislation, the *ne bis in idem* rule).' (D. Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012), CELS Working Paper, at 11, available at http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf).

[41] On the notion of legal doctrine that is at issue here see M Berman 'Constitutional Decision Rules' (2004) 90 Virg L R 1; D Kyritsis 'Whatever Works: Proportionality as a Constitutional Doctrine' Oxf J L S (2014) 395.

[42] Some critics of MoA have insisted that the doctrine is indeterminate or even incoherent; see eg J Kratochvíl above n 33 at 336–343; J A Brauch above n 6; C S Feingold 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977-8) 53 Notre Dame L R 90.

[43] G Letsas above n 38 at 709–715 and 720–724.

[44] G Letsas above n 38 at 706.

[45] G Letsas above n 38 at 706.

including what Letsas calls the 'substantive' concept of MoA, could be explained and justified in the same way.

3. SHARED RESPONSIBILITY, SUBSIDIARITY AND COMPARATIVE INSTITUTIONAL ABILITIES

Even under the assumption that institutional considerations are genuine reasons justifying underenforcement invocations of MoA, the argument up to this point does not yet entail that they comprise empirical variables about the competence of various candidate decision-makers. Indeed, relying on *empirical* facts to justify underenforcing the Convention would appear to rest on a category mistake, since it flouts the distinction between the empirical and the normative.[46] In a nutshell, the objection would be that empirical facts about institutional abilities are entirely irrelevant when it comes to applying human rights and responding to the claims of applicants. Whatever the status of institutional reasons, application of the Convention would still be a normative, not an empirical matter. Hence, underenforcement aspects of MoA could be defended, if at all, only by resorting to high-level normative theorizing in the identification of pertinent institutional reasons.

My proposed response to the above objection is straightforward. Empirical facts about institutional abilities are not normatively relevant as such in the justification of underenforcement of the ECHR. They only become relevant through higher-order normative institutional considerations. Two kinds of normative considerations appear

[46] For a particularly forceful way of distinguishing between the empirical and the normative as regards legal facts, see H Kelsen *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press 1992) pp 7–14.

particularly promising in this regard. Firstly, to the extent that the ECtHR is a judicial institution, it raises concerns regarding the legitimacy of judicial review of legislation created through democratic procedures. These concerns point to traditional doctrines of separation and cooperation of judicial and legislative or executive powers in sharing the responsibility of implementation of the Convention in the particular ECHR context.[47] Moreover, we should also place emphasis on the fact that the Court seeks the help of domestic judicial institutions by asking them to infuse its reasoning into their decision-making about Convention rights. Secondly, inasmuch as the ECtHR is an international institution, it raises issues concerning the Court's relationship with domestic authorities. The supranational character of the Court underscores the role of the principle of subsidiarity, which purports to regulate the proper allocation of decision-making power between supranational and national institutions.[48] Taken together, these normative considerations make empirical facts about institutional abilities relevant, since they frequently point to the need to identify the decision-maker that has a comparative advantage when it comes to correctly implementing Convention rights under conditions of uncertainty, bounded rationality, time pressure and reasonable disagreement. In the following two sections I will take up these issues in turn. I stress, though, that my intention is not to offer a full account of shared institutional responsibility and subsidiarity. I shall merely focus on aspects that are pertinent for the purpose of my argument, which is to lend plausibility to the claim that justified uses of MoA are a function of, among other things, empirical institutional variables.

[47] D Kyritsis above n 10.
[48] See A von Staden above n 11; P Carozza above n 15.

(a) Shared responsibility

The ECtHR is a judicial institution that resolves disputes involving individuals on alleged violations of Convention rights. This is surely one of its most important roles.[49] However, reducing the Court's function to that of a dispute-resolution mechanism would be a mistake. The institutional role of the Court is much more intricate than that. As a judicial institution, the Court is placed within a wider division of institutional labour that has traditionally been conceptualized by means of doctrines of separation of powers.[50] To the extent that it performs one kind of review of national measures and practices, the Court's task comprises supervision of the decisions of national legislatures and control of the quality of the decisions of national courts which, in virtue of the rule of exhaustion of domestic remedies, are typically the first to hear complaints about alleged breaches of Convention rights. *Qua* court lacking in democratic legitimacy, the ECtHR must make use of its institutional independence with care, paying due respect to the political decisions of national legislatures.[51] The Court must also pay attention to the complex systemic effects of its judgments on other branches of national government in the overall project of implementation of the Convention.[52] Thus, far from merely interpreting the Convention or applying it to individual cases under its best understanding of Convention rights in the

[49] Thus, formally decisions by the Court only have an inter partes legal effect; it is debatable whether they also have erga omnes legal force and, if so, on what basis. See J B M Zupancic 'Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis' (2001) 2 *Germ L J* (available at http://www.germanlawjournal.com/index.php?pageID=11&artID=30).

[50] D Kyritsis above n 10; D Kyritsis *Shared Authority. Courts and Legislatures in Legal Theory* (Oxford and Portland Oregon: Hart 2015).

[51] D Kyritsis above n 10 at 315–318.

[52] On some of these systemic effects, see L Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 Eur J Int'l L 125 at 134–138; L Helfer and E Voeten 'International Courts as Agents of Legal Change: Evidence from the LGBT Rights in Europe' (2014) 68 Int'l Org 77.

abstract, the Court also assumes a central coordinating role in implementing the ECHR, by closely cooperating with national institutional agents, which comprise legislatures, courts and administrative agencies.

Implementation of the Convention is not a task that various national and supranational institutions could ever perform in isolation, but a complex collective endeavour demanding particularly painstaking efforts at close collaboration. Successfully implementing a human rights international instrument across 47 countries and 820 million citizens is an ambitious project that can only be brought about by multifarious patterns of institutional division of labour.[53] Implementation of the Convention is thus a joint endeavour, in which the Court and a variety of national institutions enter as partners. At the very least, this means that the Court ought to take seriously its partners' *bona fide* opinions regarding the content of Convention rights, especially if these partners wield democratic legitimacy.

As already observed, all courts, irrespective of whether they are domestic or supranational, have to pay heed to considerations stemming from their function in a particular form of institutional division of labour. However, such considerations are particularly pronounced as regards the ECtHR, because of two important and pervasive facts. Firstly, the Court is not part of the formal judicial hierarchy that characterizes domestic judicial decision-making and it thus lacks the coercive power that higher domestic courts exercise over lower ones.[54] Moreover, insofar as the Court's rulings, with a small number of exceptions, are not executable in the same way as rulings issued by

[53] L Helfer above n 52; L Caflisch 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 Hum Rights L R 403; S Greer above n 11 pp 136–192.
[54] L Helfer above n 52 at 135.

domestic courts, it is part of the Court's role to sway national authorities, in order to convince them to effectively implement its judgments.[55] Secondly, the Court issues its judgments under conditions of value pluralism and (frequently reasonable) disagreement in and among States Parties.[56] Here again, there is a difference of degree, if not of kind, from the domestic context: reasonable value pluralism in the enormous cultural and geographical space of the Council of Europe is considerably more pervasive and intense. While the Court's incremental and deferential approach is not justified without further qualification, since its correctness ultimately depends on the best way of balancing substantive against institutional reasons in the effective protection of human rights, it is clearly marked by a legitimacy-enhancing quest for consensus when it comes to resolving controversial moral and political issues.[57]

Thus, under the characteristic structure of the Convention partnership, national institutions are jointly responsible with the Court for upholding Convention rights. This collaborative aspect is recognized first and foremost by Article 1 of the Convention,[58] as well as by Article 13, which enjoins States Parties to provide effective domestic remedies for individuals alleging violations of their ECHR rights.[59] It has also been acknowledged by States Parties themselves, the vast majority of which have incorporated the Convention, thus creating an obligation addressed to national legislatures and courts to comply with the

[55] G Ress 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) 40 Tex Int'l L J 359 at 374; L Helfer above n 52 at 135.
[56] On the concept of reasonable disagreement see J Rawls, *Political Liberalism* (New York: Columbia University Press 1993). On the deployment of Rawls' conception of public reason to account for reasonable disagreement on the level of international law see J Rawls, *Law of Peoples* (Cambridge: Harvard University Press 2002).
[57] See eg K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) P L 534.
[58] Article 1 of the Convention reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'
[59] On the gradual jurisprudential construction of an expansive understanding of Article 13 see L Helfer above n 52 at 144–146.

ECHR and to use it actively in their own decision-making.[60] Moreover, various recent structural reforms to the Convention system, such as the 'pilot judgment' procedure,[61] which has been described as a sui generis institutional mechanism of 'class action under international law',[62] as well as proposals for future reform, such as the possibility for the Court to provide advisory opinions,[63] underscore the necessarily collaborative character of the joint endeavour. In pilot judgment procedures, the Court does not just address the claims of a particular individual applicant, but identifies general systemic defects that extend to large classes of individuals.[64] Thus, in the seminal *Broniowski v Poland* case,[65] the Court found that there had been a violation of the applicant's right to property, but refrained from awarding just satisfaction under Article 41. Instead, it held that 'the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question'.[66] Subsequently, the Court reviewed the solution chosen by the Polish legislature in the successful implementation of Article 1 (P1-1) after a 'friendly settlement' procedure took place.[67] The structural features of the Convention highlighted above point towards a more general conclusion. Under the

[60] L Helfer above n 52 at 141–149. Helfer calls this feature of the ECHR 'diffuse embeddedness', and contrasts it with 'direct embeddedness' (L Helfer above n 52 at 134–138).
[61] See the seminal judgment in *Broniowski v Poland* App no 31443/96 (ECtHR 22 June 2004); L Helfer above n 52 at 146–149.
[62] L Helfer above n 52 at 148.
[63] See the Draft Protocol No. 16, the Preamble of which reads as follows: 'Considering that extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity'.
[64] See *Broniowski v Poland* (above n 61) at para 193: 'Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected.'
[65] *Broniowski v Poland* (above n 61) at para 193.
[66] *Broniowski v Poland* (above n 61), fourth holding.
[67] *Broniowski v Poland* App no 31443/96 (ECtHR 28 September 2005); see H Keller, M Forowicz and L Engi, *Friendly Settlements Before the European Court of Human Rights: Theory and Practice* (New York: Oxford University Press 2010).

ECHR partnership, the Court trusts that all national institutions, courts, legislatures and administrative agencies alike, will give pride of place to its reasoning, so as to infuse their decision-making with Convention rights considerations in their ordinary functioning.[68]

Sharing responsibility with national authorities in the implementation of the Convention triggers considerations of comparative institutional ability, sometimes justifying underenforcement, in the following way. Under conditions of uncertainty, bounded rationality, time pressure and reasonable disagreement, members of the Court are sometimes presented with a difficult institutional choice.[69] Should they try to identify the substantive considerations of the case at hand on their own, or should they rather, at least in some circumstances, invoke MoA to underenforce the Convention and defer to the judgment of their partners, to wit, national institutions, at least if they sincerely believe that these institutions are more likely to reach a correct decision? In making up their mind, judges implicitly rest on a judgment regarding *comparative institutional abilities*, whose main variables are empirical.

Note that institutional choice in the above sense is normatively relevant because judges of the Court share responsibility with national institutions in the implementation of the ECHR. If the Court's institutional role did not consist, among other things, in participating in a shared project together with national authorities, but was strictly confined to passing judgment on individual complaints, judges would be under an unequivocal duty to do everything in their power to respond as best as they could to individual applications on their separate merits. Deferring to the decisions of national institutions would simply be out of the question. However, insofar as the Court cooperates

[68] L Helfer above n 52.
[69] A Vermeule above n 21 p 149. Vermeule calls this choice the 'institutionalist dilemma'.

closely with national institutions in the larger project of implementation of the Convention, it can sometimes legitimately conclude that national institutions, because of their specific abilities, are better placed than the Court itself to pass judgment on certain contentious issues. As part of this joint project, the Court relies on others not in order to abdicate its responsibility, but in order to discharge it as best it can. Underenforcement of the ECHR is justified *because* of judges' concern with its effective implementation, not *in spite* of it.

(b) Subsidiarity

Subsidiarity concerns warrant similar normative conclusions. The principle of subsidiarity is firmly grounded in the context of the ECHR system.[70] Not only has it been recently explicitly added to the Preamble of the Convention through the adoption of Protocol 15 along with MoA itself,[71] but it was also frequently mentioned by the Court even before Protocol 15 was made open for signature.[72] The principle seems to flow naturally from some of the most basic structural institutional features of the Convention system, to wit, the obligation of States Parties to primarily secure themselves the rights enshrined in the ECHR[73] and the procedural rule of exhaustion of domestic remedies, combined with the obligation to invoke alleged violations of Convention rights before national authorities, on

[70] P Carozza above n 15 at 40.
[71] See Article 1 of Protocol No. 15, which adds the following recital to the Convention: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'
[72] In this respect, see the seminal *Belgian Linguistic Case* (1968) Series A no 6 at para 10 and *Handyside v UK* (1976) ECHR 5; from the more recent case law see *Selmouni v France* App no 28503/94 (ECtHR 28 July 1999) at para 74; *Kudla v Poland* App no 30210/96 (ECtHR 28 October 2000) at para 152.
[73] Cf. Article 1 of the Convention.

pain of inadmissibility.[74] The Court itself ritualistically repeats that it is not a court of fourth instance and, with some notable exceptions,[75] that it has no independent powers of fact-finding. Besides, the principle of subsidiarity is hardly a normative *terra incognita*. The principle's content has been significantly explored in the context of EU law, and its most basic conceptual contours, along with its ambiguities, would seem by now to be firmly established.[76] There are solid, albeit disputed, reasons to think that the principle could be normatively appealing in its own right.[77]

As already stated, it is not my intention in what follows to provide a full normative account of subsidiarity, nor even a full account of subsidiarity within the ECHR system. I will confine myself to highlighting those features of subsidiarity that justify the thesis that empirical characteristics of candidate decision-makers are normatively pertinent in the justification of MoA. Subsidiarity applies in circumstances involving the distribution of powers between decision-making bodies located at different levels (typically a higher-level central unit and lower-level sub-units).[78] According to a standard definition, provided by Andreas Føllesdal, subsidiarity stipulates that when two bodies are concurrently responsible for exercising the same power, 'powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them'.[79]

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[74] Cf. Article 35 para 1 of the Convention. The Court holds that, in order to be admissible, the complaint that a Convention right has been breached must be raised 'at least in substance' before domestic courts. See *Castells v Spain* App no 11798/85 (ECtHR 23 April 1992) at para 32; *Azinas v Cyprus* App no 56679/00 (ECtHR 28 April 2004) at paras 40–41.
[75] L Helfer above n 52 at 142–144.
[76] See eg A Estella de Noriega *The EU Principle of Subsidiarity and its Critique* (Oxford: Oxford University Press 2002); P Craig, 'Subsidiarity: A Legal and Political Analysis' (2012) 50 J Com Market S 72.
[77] P Carozza above n 15 at 40–49; A von Staden above n 11 at 1033–1038; A Føllesdal above n 15 at 198–213.
[78] A Føllesdal above n 15 at 193–197.
[79] A Føllesdal above n 15 at 190.

Correspondingly, subsidiarity is understood as putting forward a criterion of efficiency when it comes to deciding whether to attribute decision-making power to a central unit in the realization of a commonly shared objective. Allocation of decision-making power to the central unit is justified only if that allocation is the best way of realizing the objective. Under this characterization of subsidiarity, the link with MoA as an underenforcement doctrine is direct: underenforcement of Convention rights is justified whenever national authorities, because of their superior institutional abilities, are better placed than the Court itself to effectively pass judgment on the interpretation or application of the ECHR. Conversely, the principle of subsidiarity is flouted whenever the Court tries by its own powers to decide on alleged violations of the ECHR, which could be more effectively tracked by deferring to the judgment of national institutions. The principle thus makes comparative institutional abilities normatively relevant in a straightforward way. In this respect, the efficiency reading of the principle of subsidiarity squares particularly well with the related principle of the effectiveness of Convention rights, first set out by the Court in its *Airey v Ireland* judgment: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[80]

To recap, translation of Convention rights into concrete social reality, as 'practical and effective' rights, presupposes the close collaboration of the Court with national institutions. Under conditions of uncertainty and reasonable disagreement, shared responsibility in the implementation of the Convention along with subsidiarity concerns

[80] *Airey v Ireland* (1979) Series A no 32 at para 24. The 'principle of effectiveness' is a well-established principle of interpretation in international law. See eg H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 Br Year Int'l L 48.

can justify deference to national decision-makers that are best suited, because of their particular institutional abilities, to pass judgment on a number of alleged violations. In these circumstances, underenforcement of the ECHR on institutional grounds is justified. Identifying the circumstances necessitates detailed empirical enquiry into the comparative institutional abilities of candidate Convention implementers. Hence, low-level empirical theorizing is necessary for the identification of the specific conditions under which underenforcement uses of MoA are justified.

4. COMPARATIVE INSTITUTIONAL ABILITIES: A GENERIC OUTLINE

Despite its importance from both an explanatory and a justificatory point of view, concrete empirical work on the institutional features of candidate decision-makers within the Convention scheme has only recently begun to take off.[81] This empirical work is primarily directed at studying the institutional workings of the Court itself and much less so at comparing the Court's abilities with those of national institutions.[82] This absence of empirical comparative research on the institutional determinants of legal interpretation is a more general phenomenon that cuts across jurisdictions and, possibly, legal cultures. In Adrian Vermeule's words, 'the institutional turn is still in its infancy'.[83] Still, there is an evolving institutionalist literature on generic features that can determine the comparative abilities of legislatures, courts and administrative agencies.[84] In this section I will briefly

[81] See eg E Voeten 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 Am Pol Sci R 417; L Helfer and E Voeten above n 56.
[82] E Voeten above n 81; Helfer and Voeten above n 52.
[83] A Vermeule above n 21 p 153.
[84] See eg A Vermeule above n 21; N Komesar above n 20; C Sunstein and A Vermeule 'Interpretation and Institutions' (2003) 101 Mich L R 885.

rehearse some of the arguments provided in this literature and discuss what they entail for the construction of an empirical research agenda on underenforcement aspects of MoA. In the final section I will review the Court's case law in the assessment of the economic and social policies of States Parties. I will argue that considerations of comparative institutional ability could be plausibly considered as a central part of the justification of underenforcement uses of MoA in this particular setting.

Following Andrew Coan[85] I will use the term 'competence' to refer to the actual ability of institutions to take reliably good decisions. Coan contrasts competence with 'capacity', by which he means the volume of decisions a given institution can take within a given amount of time, while maintaining its adherence to certain qualitative standards of decision-making.[86] The salience of actual institutional abilities becomes apparent once one considers the significant gap between ideal and non-ideal decision-making. Ideal decision-making would be the decision-making of an omniscient agent under ideal conditions, say, of a legislator, a judge or an administrative agency that is fully rational, fully informed, perfectly well-motivated and capable of deliberating without time restrictions.[87] From such a vantage point, institutions would be frictionless and their activity would bear no decision or information costs. This kind of frictionless functioning of institutions is to be contrasted with the real-life challenges faced by flesh-and-blood political agents. In the actual world, agents function under non-ideal conditions. Their rationality is bounded,[88] their access to information is limited,[89] their information-processing capacity is restricted and in the grip

[85] A Coan 'Judicial Capacity and the Substance of Constitutional Law' (2012) 122 Yale L J 100 at 102.
[86] A Coan above n 85 at 105–106.
[87] Such as Dworkin's fictitious judge Hercules, on whom see R Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1978) Chapter 4.
[88] A Vermeule above n 21 pp 154–156.
[89] A Vermeule above n 21 at 110–112.

of various cognitive biases,[90] and they are under relentless time pressure, due either to the vicissitudes of everyday politics or, more simply, to the ever-increasing volume of their caseload. The resources available to institutional agents thus place important constraints on their decision-making ability. Moreover, the fact that legislatures, courts and administrative agencies are multimember institutions implies that there is the permanent possibility of significant slack between optimal individual reasoning strategies and the potential results of the aggregation of these strategies.[91] Last, but not least, the possibility of strategic interaction with other agents places additional constraints and cognitive burdens on *bona fide* decision-makers.

In the specific context of the justification of judicial underenforcement of the ECHR, comparative institutional analysis aims to track the relative advantages and disadvantages of various candidate decision-makers in the implementation of the Convention. Thus, it is important to stress that pointing out the institutional limitations and constraints of a given decision-maker, say those of the Court, would be sufficient to ground a *pro tanto* reason in favour of underenforcement of the ECHR only once it had been established that other institutions, with which the Court shares responsibility in implementing the Convention, would be more likely than the Court itself to reach reliably good decisions. As Neil Komesar has forcefully suggested,[92] pointing to the limitations and deficiencies of a given type of institution in a complex scheme of governance justifies allocating decision-making power to some other institution *only if* it is shown that the second institution does not itself suffer from comparable deficiencies. Because no real-world institution is frictionless, Komesar

[90] A Vermeule above n 21 at 155.
[91] A Vermeule, *The System of the Constitution* (New York: Oxford University Press 2011).
[92] N Komesar above n 20.

contends that single-institutional analysis should be replaced by comparative institutional analysis, consisting in weighing the relative pros and cons of different kinds of institutions in distinctive kinds of decision-making contexts.[93] In the following sections, I will abstract from these specific contexts, as well as from the fact that the ECtHR is an international court, and briefly concentrate on four generic institutional variables that can determine the comparative institutional abilities of candidate decision-makers: cognitive limitations, time, scale and independence.

(a) Cognitive limitations

When compared to the frequently messy decision-making procedures followed by democratically elected legislatures, which include bargaining, responsiveness to the sometimes irrational preferences of constituents or opaque compromises made behind closed doors that are only partly assessed on their merits, courts are often understood to be bodies whose deliberation is of a particularly high quality. To take two particularly characteristic examples, John Rawls in *Political Liberalism* described courts as exemplary deliberative institutions upholding public reason[94], while Lawrence Sager maintains that courts are preferred venues for participating in the deliberative as opposed to the electoral mode of exploring answers to questions of fundamental rights.[95] In a nutshell, according to the conventional narrative in favour of constitutional review of legislation, democratically elected legislatures are habitually seen as tainted by a number of cognitive limitations

[93] N Komesar above n 20 pp 3–13.
[94] J Rawls above n 56 at 231-240.
[95] L Sager, *Justice in Plainclothes. A Theory of American Constitutional Justice* (New Haven & London: Yale University Press 2004) at 203.

which stem from their specific institutional structure, while courts are supposedly free of those limitations.

However, this conventional narrative has barely gone unchallenged. On the flipside, Adrian Vermeule has provided an in-depth and complex analysis of the cognitive limitations that are specific to courts, the main findings of which can only be cursorily examined here.[96] According to Vermeule, generalist judges formally trained only as lawyers are constrained, among other things, as regards the information to which they have access, their limited capacity to process that information given its complexity and the limited perspective of judges deciding issues on a case-by-case basis.[97] Because of these limitations, judges frequently have to make decisions under conditions of uncertainty, which extends both to the merits of the individual case before them and, more importantly, to the complex systemic effects of their choices.[98] Moreover, judges' deficiencies call for special monitoring and error-correcting institutional mechanisms, which can be unavailable in certain contexts or, if available, can considerably raise correction costs.[99] In a similar vein, administrative agencies may score high on the expertise dimension in comparison to both legislatures and courts, but are also cognitively limited by virtue of the fact that they issue directives solely for restricted domains falling within their jurisdiction, often overlooking the broader systemic effects of their decisions.[100]

Overall, cognitive limitations of legislatures, courts and administrative agencies are potential sources of error that place constraints on those institutions' competence and threaten their ability to systematically arrive at reliably good decisions. The specific forms

[96] For a fuller treatment of the cognitive limitations of judges see A Vermeule above n 21 pp 153–182.
[97] A Vermeule above n 21 p 77.
[98] A Vermeule above n 21 pp 123–129.
[99] A Vermeule above n 21 pp 77–79.
[100] J Rachlynski 'Rulemaking Versus Adjudication: A Psychological Perspective' (2005) 32 Fl St U L Rev 529.

they take can only be identified through concrete empirical analysis of the workings of these institutions. However, especially as concerns the cognitive side, generalist judges appear particularly disadvantaged when compared to specialized administrative agencies and legislatures in decision-making contexts involving either technical expertise or large-scale and complex calculations.[101] As Komesar remarks: 'Doubts [have been raised] about the ability of the adjudicative process to deal with large-scale social policy issues where there are many conflicting interests and a continuing need for implementation and oversight.'[102]

(b) Time

Time affects competence in a crucial but relatively underestimated way.[103] Normally, courts as well as administrative agencies are under a duty to deliver their decisions in a timely manner. The duty can either flow from informal norms of conduct or be formally recognized as a special legal duty: such, for example, is the case of Article 6 of the ECHR, which explicitly enshrines the right to a fair trial within reasonable time. Such a duty places a considerable constraint on courts and administrative agencies, since it reduces available time for gathering information and deliberating on the merits of a particular case, depending on the volume of those institutions' caseload.

[101] N Komesar above n 20 pp 139–140.
[102] N Komesar above n 20 p 139 (footnote omitted).
[103] A Coan above n 85.

In recent work[104] Andrew Coan contends that, in specific relation to courts, time constraints are exacerbated from the adherence of judges to certain professional and qualitative standards.[105] Indeed, both judges and administrative agencies could decide particular cases hastily, and therefore increase their capacity, but not without giving up their commitment to certain standards of deliberation and justification. These standards appear especially stringent as far as courts are concerned, since in their case there is a standing expectation of reason-giving of high quality. So judges have to keep the total volume of litigation in check without infringing their commitment to certain professional standards.[106] Likewise, administrative agencies often lack control of their capacity, since quantitative goals are hierarchically set. While both judges and administrative agencies can choose among a range of different rational responses to pressures resulting from the volume of their caseload,[107] limiting the amount of time devoted to each case appears as a necessary result. In this respect, those institutions' capacity can be usefully contrasted with that of legislatures. Legislatures have the ability, at least under certain circumstances, to expand their capacity at will, by extending the amount of time they afford to information-gathering and to deliberation, before proceeding to decision-making.

(c) Scale

Neil Komesar has underscored the importance of scale when it comes to comparing the institutional abilities of courts with those of legislatures. By 'scale' Komesar means 'the

[104] A Coan above n 85 at 103.
[105] A Coan above n 85 at 105–106.
[106] A Coan above n 85 at 110.
[107] A Coan above n 85 at 111-112.

resources of budget available to the judiciary and the constraints on the expansion of the size of the adjudicative process'.[108] The crucial consideration is that courts, unlike legislatures, do not exercise any kind of meaningful control on their size, which entails that they cannot take the initiative to expand in order to increase their capacity. The result of this mismatch in expansion ability is that the potential for creation of demand for adjudicative services cannot be as easily met on the supply side. As Komesar puts it, 'it is the relative ease with which the market and political process expand that creates the demands that strain the physical capacity of the adjudicative process'.[109] It seems clear, moreover, that Komesar's remarks also apply to administrative agencies, which are only exceptionally able to control their own size and normally meet the demand for administrative decisions by relying on resources that they cannot expand at will.

In relation to courts, Komesar points to a number of different possible rational strategies for addressing issues of increased demand for adjudication: creation of new courts, subject-matter specialization, control on the flow of litigation by decreasing the chances of success or the amount of damages awarded if successful, and articulation and imposition of simpler hard-and-fast rules providing easier solutions to help resolve potential disputes.[110] The important point is that only some of those strategies depend on the initiative of courts and, *mutatis mutandis*, of administrative agencies. Besides, the size of the judiciary impacts on the way it can effectively supervise the workings of legislatures and administrative bodies. So constraints of scale can become crucial when it comes to assessing the actual performance of institutions.

[108] N Komesar above n 20 p 138.
[109] N Komesar above n 20 p 142.
[110] N Komesar above n 20 pp 145–147.

(d) Independence

Independence is a key structural feature that differentiates courts from other kinds of institutional agents.[111] The independence of judges primarily consists in their being able to issue decisions in ways that are not constrained by electoral pressure or by the preferences of other institutional agents, and it stems 'primarily from their terms of employment'.[112] In terms of comparative institutional abilities, judicial independence is traditionally perceived as placing courts in a particularly advantageous institutional position when it comes to supervising other branches of government.[113] Independence underscores the courts' capacity to act as a 'forum of principle',[114] since courts 'operate in a deliberative environment outside the hurly-burly of partisan politics'.[115] Moreover, in legal systems authorizing forms of constitutional review of legislative acts, courts insulated from the political process enjoy a comparative institutional advantage *qua* institutional mechanisms, as they can act to correct potential failures of the workings of representative legislatures, especially majoritarian bias.[116] In a similar vein, independent administrative or regulatory agencies can also exemplify some of the above deliberative advantages within their particular domain of expertise, compared with the quality of deliberation proper to

[111] D Kyritsis above n 10 at 314–323; N Komesar above n 20 p 123; E Voeten 'International Judicial Independence' in J Dunoff and M Polack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press 2013) pp 421–444; L Helfer 'Why States Create International Tribunals: A Theory of Constrained Independence', in S Voigt, M Albert and D Schmidtsen (eds.) *International Conflict Resolution* (Tübingen: Mohr Siebeck 2006) pp 255–276.
[112] N Komesar above n 20 p 134. Regarding, more particularly, the appointment of judges to the ECtHR, see E Voeten 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 Int'l Org 669.
[113] D Kyritsis above n 10 at 320.
[114] R Dworkin *A Matter of Principle* (New York: Oxford University Press 1985) pp 33–71.
[115] R Fallon above n 22 p 40.
[116] D Kyritsis above n 10 at 321; A Føllesdal above n 15 at 600.

democratic legislatures, whose members are normally constrained to track the preferences of constituents.

Let us now assume that these generic and rough comparative institutional pros and cons, suitably adjusted for some of the important institutional particularities of the ECHR system[117], apply to potential ECHR decision-makers. These would comprise, apart from the Court itself, national legislatures, courts, as well as administrative agencies Even at this abstract stage, the emerging picture adds staggering complexity to candidate justifications of MoA. The relative institutional ability of the Court will depend in each particular case, or class of cases, on variables having to do with complexity of procession of information, uncertainty, costs of fact-gathering, calculation of systemic effects, time pressure and deliberative quality. The picture prompts two kinds of observations. Firstly, it is highly unlikely that it would be practically feasible to articulate in traditional doctrinal terms a one-size-fits-all theory for all legitimate underenforcement uses of MoA and for the totality of Convention rights. Depending on the specific configuration of relative institutional abilities and the kind of factual scenario with which it is confronted, the Court might do a better or worse job than national institutions in interpreting and applying different kinds of rights, or even the same rights in different kinds of factual circumstances. Correspondingly, different standards of review could be envisaged for different types of factual scenarios. To take one particularly salient example, at one end of the spectrum, international judges insulated from domestic politics seem better placed than national majoritarian representative institutions to decide upon the claims of oppressed minorities

[117] For an overview of which see L Helfer above n 52 at 134–141.

systematically facing the hostile external preferences of the majority.[118] At the other end of the spectrum, domestic legislatures along with specialized administrative agencies seem to have enormous cognitive advantages when it comes to adjudicating, say, questions of social and economic policy, which necessitate, among other things, complex economic calculations exceeding the judges' cognitive resources. But there is no *a priori* reason to think that all kinds of factual situations map neatly onto certain kinds of institutional ability. Likewise, there is no reason to assume that comparative institutional abilities are static. Indeed, all institutions can learn by their continued exposure to cases, thus enhancing their abilities. Finally, there is no reason to think that all national institutions belong to the same category, as far as their decision-making abilities are concerned. In fact, various national legislatures, courts and administrative agencies may differ significantly with respect to their empirically verifiable abilities, despite their falling under the generic categories of 'domestic legislatures', 'domestic administrative agencies' or 'domestic courts'. The complexity of the issues involved can provide an explanation as to why underenforcement uses of MoA have seemed to many commentators both intuitive and unprincipled, or even outright confused.[119] Because the justification of underenforcement uses of MoA supervenes on complex empirical factors, it resists formulation by simple doctrinal tests.

Secondly, given the astounding complexity of the institutional determinants of justified uses of MoA and the lack of available information, we should expect judges to

[118] See, from the recent case law of the Court, *Vallianatos and Others v Greece* Apps. No 29381/09 and 32684/09 (ECtHR 7 November 2013), which concerned a challenge to a Greek law creating a form of partnership other than marriage ('civil unions') excluding same-sex couples. The Court has consistently held that in cases involving discrimination on grounds of sexual orientation, differences in treatment 'require "particularly convincing and weighty reasons" by way of justification.… Where a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow.… Differences based solely on considerations of sexual orientation are unacceptable under the Convention.' (at para 77).

[119] See eg J A Brauch above n 6; J Kratochvíl above n 33.

rationally respond, when deciding cases under conditions of uncertainty, by resorting to various cognitive shortcuts, such as satisficing,[120] simply picking a solution among those available[121] or using fast and frugal heuristics.[122] Under conditions of complexity, uncertainty and time pressure, use of these and other cognitive tools as hard and fast rules may lead judges to more reliable decision-making than efforts to decide each case on its own merits under their optimal substantive understanding of the Convention.[123] On such a view, interpretive doctrines such as MoA sometimes do not reflect any deep underlying normative concerns about the nature of Convention rights themselves: they are merely forms of more or less reliable judicial heuristics under conditions of pervasive uncertainty that are due to the presence of constraints in decision-making.

The upshot is that there is potentially more to be learned about justified uses of MoA through empirical comparative institutional analysis than by a traditional conceptual approach. Once such a prospect is allowed, it becomes possible to compare patterns of underenforcement uses of MoA with corresponding types of comparative institutional analysis, in order to verify whether judges were justified actually, not just potentially, in thinking that they were worse placed than national institutions to decide on the merits of a particular case or class of cases. Moreover, unlike high-level normative analysis that focuses on abstract normative concepts such as supranational constitutionalism and

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[120] A Vermeule above n 21 pp 176–179. Under a satisficing reasoning strategy, a decision-maker seeks to make a 'good enough' but not necessarily the 'best' choice; see M Slote *Beyond Optimizing: A Study of Rational Choice* (Cambridge: Harvard University Press 1989).

[121] A Vermeule above n 21 pp 179–180.

[122] A Vermeule above n 21 pp 180–181. On cognitive heuristics outside contexts of judicial decision, see D Kahneman, P Slovic and A Tversky (eds.) *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press 1982).

[123] On rule-consequentialism as a decision procedure see J Harsanyi 'Rule Utilitarianism and Decision Theory' (1977) 11 Erkenntnis 25; J Harsanyi 'Morality and the Theory of Rational Behaviour' in A. Sen and B. Williams (eds.) *Utilitarianism and Beyond* (Cambridge: Cambridge University Press 1982) pp 39–62.

democratic legitimacy without usually making any distinction between domestic institutions that belong to the same generic kind, low-level empirical research can help chart important differences between them, contributing thus to unearthing potentially unexplored patterns. For example, it would be interesting to investigate whether the Court places the same amount of trust on the decision-making abilities of different domestic legislatures, courts or administrative agencies by deferring to those institutions' reasoning through uses of MoA. If not, a further question would be whether relevant differences can be explained by reference to the Court's perception of the quality of the decisions respectively made by these institutions. And it could also be asked whether the Court's perception of comparative institutional abilities reflects those abilities accurately, in which case it would be warranted, or whether it results from negative bias towards the decision-making capacities of certain domestic institutions.

5. MOA AND THE SOCIAL AND ECONOMIC POLICY OF STATES PARTIES

On the face of it, the Court's approach in judgments reviewing decisions regarding the social and economic policy of States Parties appears to exemplify exactly such an underenforcement pattern. In these kinds of cases, the Court typically adopts a double strategy. First, it offers a generous interpretation of ECHR rights, frequently accepting that such rights are *pro tanto* engaged despite the fact that the ECHR, unlike the European Social Charter, is not an international instrument specifically protecting socio-economic rights. Second, though, the Court also systematically uses an argument of comparative institutional abilities to lower its standard of review, offering leeway to respondent states

in the vast majority of cases and accepting the arguments of applicants only exceptionally.[124] The point, moreover, is not so much that in these kinds of cases the Court would have necessarily found a violation but for the presence of institutional reasons justifying underenforcement of the ECHR. That would plainly depend on the Court's substantive understanding of Convention rights and of the weight it attributes to institutional reasons when they conflict with substantive ones. The point, rather, is that the Court uses an argument of comparative institutional abilities to *abstain* from examining whether there has been a violation of an ECHR right in the first place, under an optimal substantive understanding of Convention rights.

Consider, in this regard, the seminal *James and Others* judgment of 21 February 1986.[125] The case concerned a challenge to the Leasehold Reform Act 1967 as amended, which gave tenants residing in houses held on long leases the power to purchase compulsorily the freehold of the property on prescribed terms. The applicants claimed, among other things, that the compulsory transfer of their properties to tenants amounted to a breach of their right to property, protected by Article 1 (P1-1) of the Convention. They argued that they were deprived of their possessions despite the fact that the 'public interest' test, set out in the second sentence of Article 1 (P1-1), was not satisfied, because their properties were transferred from one private individual to another for the latter's private benefit. In its judgment, the Court invoked MoA and justified underenforcing Article 1(P1-1) by using a typical *dictum* referring to comparative institutional abilities (at para 46): 'Because of their direct knowledge of their society and its needs, the national

[124] D. Spielmann above n 40 at 16–17: 'if the aim pursued concerns national security the margin will be a wide one. It will also be wide when it comes to social and economic policies'.
[125] *James and Others v UK* (1986) Series A no. 98.

authorities are in principle better placed than the international judge to appreciate what is "in the public interest".' It then went on to say that the notion of 'public interest' is necessarily extensive and that the legislature should have a 'wide margin of appreciation' in implementing economic and social policies. The UK legislature's policy choice would be deemed contrary to Article 1 (P1-1) of the Convention *only* if it were found to be 'manifestly without reasonable foundation'. The Court thus invoked MoA to underenforce the right to property. This interpretive choice determined the Court's approach with respect to the totality of the specific grievances made by the applicants. Not only did the Court accept that Article 1 (P1-1) does not guarantee a right to full compensation in takings (at para 54), but it also held that a legislative expropriation programme designed for many thousands of cases 'is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned' (at para 68). Hence, far from relying on a deep normative theory of the right to property to review the choices made by the UK legislature, the Court *relaxed* its standard of review and was satisfied that those choices were not considered 'so unreasonable as to be outside the State's margin of appreciation' (at para 69).[126]

The *James* mantra has been repeated in virtually all cases that are to do with alleged breaches of the right to property in the implementation of the economic and social policy of States Parties. For instance, it was the approach that the Court recently took in *Wieczorek v Poland*.[127] The case involved reviewing whether amending the legal framework pertaining to the right to receive a disability pension by reassessing the medical condition of

[126] The *James* approach has been recurrent in many cases relating to the regulation of the right to property; see eg *Lithgow v UK* (1986) 8 EHRR 329 at para 122 and *Former King of Greece v Greece* (2001) 33 EHRR 516 at para 87.

[127] *Wieczorek v Poland* App no 18176/05 (ECtHR 8 December 2009). The Court had already taken a similar approach in *Goudswaard-Van der Lans v Netherlands* ECHR 2005-XI.

recipients was compatible with Article 1 (P1-1) of the Convention. After repeating the *James* formula (*Wieczorek* at para 59), the Court went on to say that 'the Court has accepted the possibility of reductions in social security entitlements in certain circumstances…. In particular, the Court has noted the significance which the passage of time can have for the legal existence and character of social insurance benefits' (at para 67). Similarly, in *Stec and Others v UK*[128] the Court accorded the United Kingdom a wide MoA as regards the best way of taking into account differences between men and women in determining social security benefits for accidents at work. The Court followed a similar line of reasoning on alleged violations of the right to property after German reunification[129] and in the context of review of austerity policies following EU/IMF bailout packages.[130] In all of these cases, the Court has consistently held that the controlling test for considering whether a Convention right has been violated by a national authority will only be a relatively weak 'reasonableness' one.

The underenforcement approach of the Court regarding issues of economic and social policy can be also tracked in other complex policy areas, in which correct decision-making requires significant expertise. Consider, for example, the case of *Markt Intern Verlag Gmbh and Klaus Beermann v Germany* of 20 November 1989, which concerned balancing freedom of expression with fair competition considerations. The case was about an alleged breach of Article 10 of the Convention by German authorities enforcing sanctions under the Unfair Competition Act of 7 June 1909 on a publishing company that

[128] *Stec and Others v UK* ECHR 2006-VI.
[129] *Jahn and Others v Germany* ECHR 2005-VI. The Court has upheld this line in most cases to do with the 'change of political and economic regime'. See, among many others, the Court's judgments in *Berger-Krall and Others v Slovenia* App No 14717/04 (12 June 2014); *Zvolský and Zvolská v the Czech Republic*, App No 46129/99 ECHR 2002-IX.
[130] *Koufaki and ADEDY v Greece* Apps no 57665/12 and 57657/12 (ECtHR 7 May 2013); *Da Conceição Mateus and Santos Januário v Portugal* Apps no 62235/12 and 57725/12 (ECtHR 8 October 2013)

had criticized certain undertakings and had sometimes called for commercial boycotts. The Court first summed up the different kinds of considerations to be taken into account when devising a workable scheme of fair competition policies in market economies, while at the same time guaranteeing freedom of expression. It went on to say: 'All these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.'[131] The Court then invoked MoA to conclude that 'the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary' (at para 37). The Court thus made clear that it would only question the decisions made by national courts in balancing the complex factors involved in the determination of fair competition policies for commercial purposes if it could be shown that these were not 'reasonable'. Outside the domain of regulation of economic activity in the strict sense, the Court has taken a similar tack in matters of town and planning policies.[132] Crucially, these are issues typically dealt with first and foremost by expert administrative agencies.

A low-level institutional approach to MoA proposes a straightforward explanation to this strand of the Court's case law. In matters involving a high degree of technical complexity, it could plausibly be argued that the expertise, information-gathering and information-processing abilities of national legislatures, administrative agencies and even, under some circumstances, domestic courts, at least those specialized in particular types of litigation, are superior to those of the Court itself. In the absence of special conditions

[131] *Markt Intern Verlag Gmbh and Klaus Beermann v Germany* (1989) Series A no 165 at para 35.
[132] *Gillow v UK* (1986) 11 EHRR 355 at para 56.

warranting a greater degree of suspicion[133] the Court has a powerful, if not compelling, reason to underenforce Convention rights and defer to the decisions of national institutions, which could be comparatively more reliable than those of the Court itself.

6. CONCLUSION

The Court's partnership with national institutions in the collective project of the effective implementation of the Convention pulls in the direction of a special kind of supervision of the decisions made by national authorities. Underenforcement through MoA is a central component of that kind of supervision. Special institutional reasons constitute its normative basis. In the absence of a specification of the role of institutional considerations, MoA appears to be a doctrine leading to unacceptable forms of relativism or, worse, an abdication of judicial responsibility. Both of these alternatives are justifiably unattractive to friends of Convention rights. However, normative institutional reasons can justify MoA without leading to relativism and the abdication of judicial responsibility. Moreover, they make comparative institutional abilities relevant. Further specification of the ways institutional abilities impact on the Court's outcomes necessitates the construction of sophisticated empirical theories comparing the abilities of the Court with those of a variety

[133] See, for example, *Kjartan Ásmundsson v Iceland* ECHR 2004-IX, a case relating to the loss of disability pension entitlements, in which the Court said that it was 'struck by the fact that the applicant belonged to a small group of 54 disability pensioners (some 15% of the 336 persons mentioned above) whose pensions, unlike those of any other group, were discontinued altogether on 1 July 1997. The above-mentioned legitimate concerns about the need to resolve the Fund's financial difficulties seem hard to reconcile with the fact that after 1 July 1997 the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements' (at para 43). The Court found unanimously that Article 1 (P1-1) had been violated. On the basis of the fact that only the pensions of a very small group were discontinued, the Court was suspicious of the justification provided by the respondent state and tightened its scrutiny accordingly.

of national authorities. When it comes to laying down the conditions under which underenforcement doctrines such as MoA could be justified, high-level normative and low-level empirical theorizing go hand in hand. I submit, then, that it is high time we started opening the 'black box' of decision-making of the Court and of national authorities by resorting to low-level comparative institutional analysis.