

**Research Proposal**  
**JUSTIFYING JUDICIAL REVIEW BY THE ECHR**  
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The European Court of Human Rights (ECHR) reviews the human rights practices of states and often decides that states should change their behavior. Some commentators argue against this intervention, contending that the ECHR is no more likely than the states to reach good decisions. Others argue that the ECHR should not be allowed to contradict the will of democratically accountable states.

This project will provide some answers to these arguments by: first, identifying situations in which the ECHR can reach better decisions than the states by the use of the Emerging Consensus doctrine; second, identifying situations in which the ECHR can legitimately impose obligations on states that they did not willingly take upon themselves; and third, describing the doctrines that should guide the ECHR in light of this analysis.

**What Emerges From Emerging Consensus**

One of the arguments for the use of comparative law by national courts is that learning from the experience of other nations can improve the quality of the legal decisions made by national courts. This argument has been advanced by Eric Posner and Cass Sunstein<sup>1</sup> using the Condorcet Jury Theorem and its proposition that, if a decision is made by a number of independent “jurors”, that decision is more likely to be a correct decision—and so also a decision worth following. Applied to the context of comparative law, the theorem suggests that, if a number of individual states reach the same legal decision, that decision is probably a correct decision and so also a decision worth following.

Yet there is a problem with this argument, as Posner and Sunstein themselves acknowledge: if states learn from each other’s law, their decisions are no longer independent and therefore the theorem’s condition of independent jurors is no longer met. In fact, in learning from states in other parts of the world, states may fall prey to information cascades in which they harmfully follow each other’s lead without analyzing any new information. With that risk in mind, Posner and Sunstein argue that states who want to support the global interest and provide new information on how to improve the law should therefore not imitate others. But while Posner and Sunstein’s framework answers the problem of information cascades, it does so at the expense of maximizing the benefits to be gained from comparative law—namely, allowing all states to learn from each other’s experience.

This paper suggests an alternative framework, one which recovers the benefits of comparative law without risking the development of information cascades. At the heart of this alternative framework is the doctrine of Emerging Consensus currently used by the ECHR. Under this doctrine, the ECHR examines whether a particular practice has been outlawed by a critical number of states; if so, the ECHR declares that practice to have violated the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).<sup>2</sup> In other words, the ECHR aggregates the

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<sup>1</sup> Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

preferences of a wide range of states, each of which has already made an independent decision. The resulting rule allows for the benefits of comparative law—because all states can then adopt the ECHR’s rule independently—without the risk of information cascades, since the rule was based on the “emerging consensus” of states who had already made their decisions independently.

This paper examines the benefits of the Emerging Consensus framework and proposes solutions for the obstacles facing international and regional courts who might wish to apply it—namely, that strategic behavior by states may prevent these courts from reaching good decisions and these courts may have other motivations besides applying Emerging Consensus directly.

### **Expansive Interpretation in the ECHR and its Benefits**

In the course of interpreting the Convention, the ECHR commonly invokes a wide variety of jurisprudential approaches and policy based arguments that have had the effect of expanding the obligations the Convention imposes on its signatories—often requiring them to assume obligations that go far beyond those they contemplated when they signed the Convention. Commentators have widely criticized these aspects of the court's operation. They argue that even though the court has special expertise in protecting human rights (as compared to that of signatory states), it should not be given the authority to expand the rights of signatory nations. These commentators explain that because the ECHR is not democratically accountable its expansion of treaty obligations undertaken in the guise of interpretation may well have the effect of thwarting the democratic decisions of signatory states.

This paper suggests that while there are many situations in which the court's tendency towards expansive interpretation may indeed be inconsistent with democratic decisions of signatory states, there are two important contexts in which its approach may in fact be more consistent with democratic theory (and hence the court's normative legitimacy) than a more narrow approach to interpretation: first, when a democratic state voted or would have voted for a treaty amendment whose inclusion was thwarted by the opposition of other states; second, in situations where the state itself fails to represent its citizens, that is in situations where there has been some type of democratic failure. In such cases, the ECHR will sometimes be able to engage in expansive interpretation, while either retaining, or perhaps enhancing, its normative legitimacy.

### **Three Interpretive Constraints on the European Court of Human Rights**

As the ECHR sets out to fulfill its goal of effectively protecting human rights in Europe, it operates under three interpretive constraints: it should show deference to the policies of the state whose behavior is scrutinized, it should limit its demands from that state to the obligations that the state took upon itself when it ratified the European Convention and its protocols, and it should follow the consensual view within Europe, the so called "Emerging Consensus".

Often these constraints on the ECHR's interpretive discretion contradict each other. For example, the Emerging Consensus may expand states' obligations over and above what they agreed to in the Convention and more than the current policies of the state under review. This paper argues that in cases of contradiction between the constraints, the ECHR should follow the constraint that is likely to lead to the best

possible decision, provided that it gives the proper deference to democratically accountable institutions and is therefore normatively legitimate, while digressing from the other constraints. The paper will draw on public choice insights to find the situations under which each one of the three constraints is likely to lead to a better and a more legitimate decision than the other constraints.

The interpretative constraint that directs the ECHR to defer to the state's policies was termed the Margin of Appreciation Doctrine. The rationale for this doctrine is that in some situations a state is likely to make better decisions regarding the rights of its citizens than the ECHR because it has better institutional capacities or because it has unique needs that the ECHR cannot fully understand. Furthermore, sometimes the state can make more normatively legitimate decisions than the ECHR because it has well-functioning democratic institutions. If these conditions hold, the ECHR should show more deference to the state than if these conditions do not hold.

The interpretive constraint that directs the ECHR not to expand the obligations of the state whose conduct is scrutinized more than the obligations that the state willingly took upon itself reflects the illegitimacy of overriding the will of the state, which represents its public by democratic institutions. Yet in some situations it is normatively legitimate for the ECHR to digress from the obligations that the state took upon itself—namely, when these obligations do not reflect the will of the state because the state's decision was subject to strategic behavior by other states, and when the state fails to properly represent its citizens because of internal democratic failures.

The interpretative constraint that directs the ECHR to follow Emerging Consensus, reflected by the decision of the majority of states in Europe, should be followed, provided that it is normatively legitimate to do so, if the majority of states are likely to support good laws. If all the states in Europe made an informed decision independently from each other, and if these states are sufficiently similar to each other and to the state whose practices are scrutinized, there is reason to believe that the law chosen by the majority of states will be good. Consequently, there is a justification to follow the Emerging Consensus, so long as two conditions hold: first, it must be normatively legitimate to digress from the obligations the state took upon itself; second, there must be no reason to show deference to the state's policies.