

# THE DEMOCRATIC LEGITIMACY OF EVOLUTIVE INTERPRETATION BY THE EUROPEAN COURT OF HUMAN RIGHTS

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## ABSTRACT

The European Court of Human Rights has been highly criticized for its lacking democratic legitimacy to amend human rights documents through evolutive interpretation. This paper investigates the persuasiveness of the democratic legitimacy challenge against evolutive interpretation of the European Convention on Human Rights. It concludes that the critical arguments so far are unable to rebut the legitimate role of evolutive interpretation. This paper argues that evolutive interpretation must be legitimized on a case-to-case basis, and provides the theoretical framework of such a legitimacy model.

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## I. INTRODUCTION

The European Court of Human Rights (ECtHR) has been highly criticized for its lacking democratic legitimacy to amend human rights documents through evolutive interpretation. This paper will demonstrate that the democratic illegitimacy argument in literature displays some major weaknesses. Nonetheless, it takes the main concern of democratic legitimacy of international judicial review seriously. It will thus present a model for the legitimacy of evolutive interpretation of the European Convention on Human Rights (ECHR), which is responsive to the main concerns of the critics.

Two factors mainly fuel the legitimacy debate. First, neither the ECHR nor the Vienna Convention on the Law of Treaties (VCLT) explicitly mention evolutive interpretation as a legitimate tool for interpretation. It was thus the ECtHR, which developed this approach on its own from the late 1970s on, ever since it held in the case of *Tyrrer* that “the Convention is a living instrument,

which . . . must be interpreted in the light of present-day conditions.”<sup>1</sup>

Since then, the ECtHR has employed evolutive interpretation for departing from the established understanding of a norm in order to make the ECHR responsive to new developments. These developments can be of legal, societal, technological, or moral nature.<sup>2</sup>

From *Tyrer* on, notably, the United Kingdom has reproached the ECtHR for imposing its own conceptions of the ECHR rights on the member states by means of evolutive interpretation.<sup>3</sup> Recently, cases like *Hirst* have reactivated the discussion on the Court’s power among British politicians and judiciary.<sup>4</sup> The debate on evolutive interpretation has particularly given rise to debates on the democratic legitimacy of the ECtHR as an international court.<sup>5</sup> This increasingly critical attitude has highly influenced the Council of Europe reform meeting at the Brighton Conference of 2012 and the subsequent adoption of additional Protocol No. 15 to the Convention.<sup>6</sup> As soon as it enters into force, this Protocol will introduce a reference to the principles of “margin of appreciation” and “subsidiarity” into the Preamble of the ECHR.<sup>7</sup>

Although these amendments seem to have no relevance for evolutive interpretation, they influence evolutive interpretation for two reasons. First, the

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1. *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R., at 12, ¶ 31 (1978).

2. See generally EUROPEAN COURT OF HUMAN RIGHTS AND COUNCIL OF EUROPE, DIALOGUE BETWEEN JUDGES: “WHAT ARE THE LIMITS TO EVOLUTIVE INTERPRETATION OF THE CONVENTION?”, 5 (2011) [https://www.echr.coe.int/Documents/Dialogue\\_2011\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf).

3. Even in *Tyrer*, the British judge Sir Gerald Fitzmaurice dissented from this approach. See *Tyrer v. United Kingdom*, App. No. 5856/72, 19–28 (1978). Today the political debate is accompanied by several public lectures of British Supreme Court Justices. See, e.g., Lord Sumption, *The Limits of Law*, in LORD SUMPTION AND THE LIMITS OF LAW 15, 20 (N.W. Barber et al. eds., 2016) (discussing decisions of the ECtHR from the perspective of British judges and academics); ALICE DONALD & PHILIP LEACH, PARLIAMENTS AND THE EUROPEAN COURT OF HUMAN RIGHTS 5–10 (1<sup>st</sup> ed. 2016) (summarizing the political criticism of the Convention system).

4. *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187 (2005) (highlighting the tension between British politics and the ECtHR by holding that the United Kingdom’s law preventing prisoners from voting constituted a violation of the ECHR).

5. See Lord Sumption, *supra* note 3, at 22 (noting that lack of legitimacy presents a problem for ECtHR given that it produces subjective judge-made law); see also Lord Justice Laws, *The Common Law and Europe*, Hamlyn Lecture at the Judiciary of England and Wales: The Common Law and Europe, at 7, ¶ 21 (Nov. 27, 2013) (addressing concerns about the expansion of human rights law and how it pushes judges into political positions thereby diminishing appearances of judicial restraint).

6. DONALD & LEACH, *supra* note 3, at 60–63; Council of Europe, Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, June 24, 2016, C.E.T.S. No. 213 [hereinafter *Protocol No. 15*].

7. As of April 18, 2019, forty-five member states have ratified the additional Protocol. Entry into force of this Protocol needs the ratification of all contracting states, as it amends the wording of the Convention. *Protocol No. 15*, *supra* note 6, at 2.

margin of appreciation doctrine will be the only interpretive approach to be explicitly mentioned in the ECHR from now on. It thus calls on the ECtHR to show more deference to the human rights conceptions of the member states in interpreting the Convention. Second, Protocol No. 15 is the first amendment to the Preamble since the creation of the ECHR. Considering that the preamble of a constitution serves the purpose of defining the identity of a nation state,<sup>8</sup> redesigning it is a clear political sign towards the desired identity of the Council of Europe. The political trend in the Council of Europe is thus to strengthen the role of national human rights interpretations and to diminish the relevance of evolutive interpretation by the ECtHR in the interpretation of the Convention.

These political developments are accompanied by criticism of democratic illegitimacy of evolutive interpretation in academia, again notably by British scholars. John Finnis' account summarizes the core of the democratic legitimacy critique: evolutive interpretation amounts to placing on top "present-day attitudes and/or opinions (so far as these are shared by a majority of some court, commission or tribunal) about better political or social arrangements."<sup>9</sup>

It is time to take a closer look at the main arguments behind this debate in order to scrutinize whether evolutive interpretation really is irreconcilable with democratic legitimacy. This paper investigates the persuasiveness of the democratic legitimacy challenge against evolutive interpretation of the ECHR. The aim of this paper is thus to reply to the major democratic legitimacy arguments, which have been put forward against evolutive interpretation. It concludes that the critical arguments so far are unable to rebut the legitimate role of evolutive interpretation in the judicial review system of the ECtHR.

This paper will elaborate on the democratic legitimacy critique in three parts. Part II will analyse the two main arguments of the critique. The analysis will reveal two problems in the debate—a conceptual problem and a problem with the role accorded to evolutive interpretation. In Part III, this paper will thus add conceptual clarity and will define a model for the legitimate role of evolutive interpretation of the ECHR. This paper ultimately argues that evolutive interpretation can only be legitimized on a case-to-case basis. The legitimacy debate should thus focus on the parameters, which should guide this choice. Part IV will present some preliminary remarks on the requirements for these parameters and help to define a research agenda in this field.

## II. DEMOCRATIC LEGITIMACY CRITIQUE

Numerous voices criticize evolutive interpretation. It is said to interfere with core guarantees like sovereignty or the rule of law, and to cause an inflation of

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8. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1271–73 (1999) (discussing the significance of a constitution's preamble through an analysis of the Irish Constitution's Preamble).

9. John Finnis, *Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR*, in LORD SUMPTION AND THE LIMITS OF LAW 85 (N.W. Barber et al. eds., 2016).

human rights.<sup>10</sup> Most critics, however, argue that evolutive interpretation suffers from a democracy problem, as it circumvents and even overrules democratic decisions in the member states about important societal questions. This is the strand of criticism which this paper seeks to rebut.

The argument regarding democratic illegitimacy makes two main claims: first, that evolutive interpretation leads to results which people may legitimately disagree about; and second, that evolutive interpretation distorts the democratic, political process in the long run.<sup>11</sup>

### ***A. Evolutive Interpretation Tampers with Issues of Legitimate Moral Disagreement***

The first claim of the critics holds that by means of evolutive interpretation, the ECtHR turns truly political questions into legal questions.<sup>12</sup> The first sighting of this critique dates back to the dissenting opinion of ECtHR Judge Sir Gerald Fitzmaurice in the *Tyrer* case, which marked the birth of evolutive interpretation in 1978. He made his point very subtly, though, when he argued that:

The fact that a certain practice is felt to be distasteful, undesirable, or morally wrong and such as ought not to be allowed to continue is not a sufficient ground in itself for holding it to be contrary to Article 3 . . . [This] would mean using the Article as a vehicle of indirect penal reform, for which it was not intended.<sup>13</sup>

Judge Fitzmaurice closed his dissenting opinion with this phrase, while at the same time initiating a years-long discussion with it—turning exactly on the point that international judges misuse the living instrument doctrine for indirectly engaging in national politics.

Today, controversy about evolutive interpretations mostly arises in cases where the Court dismisses domestic policies, which are deemed to justify an interference with the Convention in the name of national interests. The ECHR allows for limitations of rights enumerated in the Convention if they are “necessary in a democratic society.”<sup>14</sup> The scholarly debate thus focuses on the argument that the ECtHR is not in the position to judge which national interests and values are “necessary,” and thus justify an interference with the ECHR in the respective member state.

According to the British Supreme Court Judge Lord Sumption, national authorities are in a better position to take decisions in matters of social policy,

10. See Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GER. L. J. 1730, 1734–35 (2011) (noting key concerns that challenge the legitimacy of evolutive interpretation).

11. See KENT GREENAWALT, *INTERPRETING THE CONSTITUTION* 84 (2015) (discussing the two claims as the main democratic arguments against judicial activism).

12. Lord Sumption, *supra* note 3, at 21; Lord Justice Laws, *supra* note 5, at 7, ¶ 21.

13. *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R., at 27–28, ¶ 14 (1978) (Judge Sir Gerald Fitzmaurice, dissenting).

14. See, e.g., European Convention on Human Rights, art. 9, E.T.S. No. 005 (1950) (noting that freedom of thought, conscious, and religion may be limited as necessary to preserve the public safety, public order, health and morals, or protection of others in a democratic society).

which require a political debate in correspondence with national traditions and needs.<sup>15</sup> The ECtHR thus decides on contentious political issues, which should be decided in a democratic process rather than in a judicial one. Put differently, the moral questions at the core of human rights claims should be left for political, and hence, democratic deliberations before they find their way into the Convention system. Yet, even Lord Sumption acknowledges that some matters touching upon human rights should be open to judicial control. He singles out “cases of real oppression,” in which he accepts constraints on democratic decisions.<sup>16</sup> All other cases, however, are within the realm of “legitimate political debate”<sup>17</sup> in the member states. These cases touch on legitimate disagreements among citizens, which should be solved by achieving a political result that is accepted by the majority of the people.<sup>18</sup>

Similar to Lord Sumption’s argument, Finnis argues that an evolutive interpretation takes a decision about “a morally optional preference for one kind of social life over other reasonable kinds” and is thus “reforming the culture by changing the law.”<sup>19</sup> Unlike Lord Sumption, he does not even uphold an exception for “cases of real oppression.”<sup>20</sup> He thus posits that all moral questions at the core of human rights claims are subject matters over which people may reasonably disagree.<sup>21</sup> Finnis argues that in these matters only the people in the respective member states should decide which rights their states should grant to which persons.<sup>22</sup> Whatever decision they make needs to be accepted. The Court’s task is then to safeguard the compliance with these rights.<sup>23</sup> It follows that the ECtHR must not anticipate society’s decision of how to deal with new conflicts in human rights.<sup>24</sup> Finnis acknowledges that, naturally, society will take some bad decisions, but the same may be true for judicial decisions, which are not immune to errors either.<sup>25</sup>

### ***B. Evolutive Interpretation Undermines the Democratic State***

The second claim of the democratic legitimacy challenge does more than just criticise evolutive interpretation for taking decisions from the people. Rather, it reproaches it for constituting a threat to democracy as a political system. Again, it is Lord Sumption who argues that by imposing its own conceptions on what is “appropriate to a democratic society,” the ECtHR constantly dismisses democratic

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15. Lord Sumption, *supra* note 3, at 21.

16. *Id.* at 22–23.

17. *Id.*

18. *Id.* at 25.

19. Finnis, *supra* note 9, at 120.

20. *Id.*

21. *Id.* at 90–91.

22. *Id.* at 91.

23. *Id.*

24. *Id.* at 90–91.

25. Finnis, *supra* note 9, at 91.

decisions and thus waters down the meaning of democracy.<sup>26</sup> At first, this argument seems to make the same claim as the first one discussed in the previous section. However, the claim is stronger in the sense that it stresses the long-term consequences of excluding the people from decisions about the changing needs of human rights protection. “The judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method of mediating compromises among ourselves.”<sup>27</sup> By conveying too much power to external legislators, democracies are imperilled and might subtly develop into a different kind of political system.<sup>28</sup>

Lord Sumption’s assertion fits a strand of arguments which has been put forward in the more abstract debate about constitutional judicial review and its democratic legitimacy. In this context, Waldron argues that something is taken from democracy if an external, non-elected institution determines which rights are essential in a democratic society.<sup>29</sup> This loss in democracy mainly manifests as a loss of the political equality of citizens<sup>30</sup> and results in a development towards Aristotelian “aristocracy.”<sup>31</sup> He defends the view that if we consider constitutions as “living organisms,” we should not exclude citizens from the adaptation process of constitutions to new situations and should not leave the decision to judges.<sup>32</sup> The argument thus stresses that the outsourcing of important political questions to judicial bodies weakens the participative process of democratic decision-making in the long run. This consequently weakens the democratic political system.

### III. THE EVOLVING CONVENTION IN A DEMOCRATIC SOCIETY: A NEW PICTURE

The foregoing analysis of these two main accounts of the democratic illegitimacy challenge will serve as a starting point for the main argument of this paper. First, I will argue that the critique lacks conceptual accuracy concerning the main concepts at stake.<sup>33</sup> I will try to fill this gap by providing a more accurate concept of evolutive interpretation on the one hand and by shedding light on its connection with the concept of legitimate moral disagreement on the other hand. Second, I will criticise the concrete role which critics accord to evolutive

26. Lord Sumption, *supra* note 3, at 23.

27. *Id.* at 24.

28. *Id.* at 26.

29. Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335 (1998). Jeremy Waldron has written many articles and books on the intersection of politics and law, with a specific focus on issues such as constitutionalism, democracy, and the philosophy of international law. *Jeremy Waldron*, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=26993> (last visited Jan. 24, 2019).

30. Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335, 342 (1998).

31. JEREMY WALDRON, LAW AND DISAGREEMENT 264 (1999) [hereinafter LAW AND DISAGREEMENT].

32. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 43 (1993) [hereinafter *A Right-Based Critique*].

33. See *infra* Part III.A for a discussion of the issues involved in conceptualizing democratic illegitimacy.

interpretation in the ECtHR's review system.<sup>34</sup> I will not follow the idea of the critics that the legitimacy of evolutive interpretation may be answered in an either-or fashion, but will defend instead that it is a matter of degree.

### A. *Tackling the Conceptual Problem*

The presented critique about evolutive interpretation of the ECHR is characterized by an imprecise understanding of the two crucial concepts at stake: evolutive interpretation and legitimate moral disagreement. The critics' main argument holds that evolutive interpretation is illegitimate because it circumvents democratic decisions about controversial moral questions. But none of the presented arguments shed light on the notion of evolutive interpretation, nor on the question of when moral disagreement may be considered legitimate. The following discussion will add conceptual clarity to these terms. Once this conceptual fundament has been set up, it will turn out that the democratic legitimacy critique only aims at specific types of evolutive interpretation. The destructive effect of the criticism is thus severely narrowed down to these specific cases. Furthermore, I will demonstrate that the legitimacy model I defend can mitigate the concerns of the critics even in these instances of evolutive interpretation.

#### 1. What is Evolutive Interpretation?

The first observation, namely that the concept of evolutive interpretation is far from clear, holds true for most of the literature about evolutive interpretation, be it supportive or dismissive of the concept. Some take it as an interpretive method, others as an interpretive principle, and most literature does not even address the concept but takes a concrete judgment of the ECtHR as a starting point for discrediting evolutive interpretation in general.<sup>35</sup>

The term *evolutive interpretation* itself is misleading, as it indicates an interpretive method. Interpretive methods provide arguments for defining the meaning of a legal norm (e.g., textual, historic, intentional, teleological, or comparative arguments.)<sup>36</sup> However, by means of evolutive interpretation, one cannot identify the meaning of a norm. Instead, evolutive interpretation should be characterised as an interpretive *principle*, which complements the methods of interpretation.<sup>37</sup> An interpretive principle serves as a guiding factor in cases where

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34. See *infra* Part III.B for a discussion of how the critique incorrectly bases itself on faulty assumptions about the role played by evolutive interpretation.

35. See HANNEKE SENDEN, INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM: AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 71 (2011) (providing an overview of the varying perspectives on the concept of evolutive interpretation).

36. Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties), *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/167 (1964).

37. SENDEN, *supra* note 35, at 71–72. Djéffal also rejects the conceptualization of evolutive interpretation as a “means of interpretation” and describes it as “a class of results of interpretations.” CHRISTIAN DJÉFFAL, STATIC AND EVOLUTIVE TREATY INTERPRETATION 22 (2016).

a judge faces several interpretive results. The application of interpretive methods will often reveal several possible meanings of a legal norm. For example, a historic interpretation, which takes into account the intention of the drafters, will often lead to a different outcome than a teleological interpretation, which gives effect to the rational purpose of a norm. Given the fact that international law lists several interpretive methods in article 31 of the VCLT,<sup>38</sup> the application of these methods by the ECtHR will regularly produce a plurality of possible interpretive outcomes.

These meanings can be positioned on two different spectrums in two different dimensions of interpretation: on the one hand, there is a material dimension of interpretation with a spectrum from subjective to objective meanings;<sup>39</sup> on the other hand, there is a time dimension of interpretation with a spectrum from static, or historic, to evolutive, or contemporary, meanings.<sup>40</sup> Each end of a spectrum stands for a principle or aim of interpretation<sup>41</sup>, and evolutive interpretation is one of these principles. Evolutive interpretation represents one possible guiding factor for the choice among interpretive results in the time dimension. The time dimension of interpretation refers to a spectrum of interpretive results. On the static end of the spectrum, the interpretations are closer to the human rights conceptions at the time of enactment. On the evolutive end of the spectrum, the interpretations are closer to the conceptions at the time of the interpretation. If the ECtHR chooses an interpretive outcome, which is close to the end of evolutive interpretation, it thus decides to fully realize this principle and not the other.

This picture of interpretive principles and methods clearly shows their different functions in the interpretive process. In a first step, the substantive content of the interpretation is identified by the application of interpretive methods.<sup>42</sup> When faced with a plurality of possible interpretations, a second step is required to determine the aim of the interpretive endeavour, which should guide the choice among various possible interpretations. There is an important premise to this account. It accepts interpretive methods like objective-teleological interpretation, systematic arguments, or comparative analyses, which tend to be more open to present-day conditions in society as *prima facie* legitimate. This premise guarantees that all relevant considerations of a case are taken into account in the interpretive process. However, this *prima facie* legitimacy of the method must be distinguished from the legitimacy of the evolutive result, which these methods produce. Whether this result is legitimate in the end depends on further

38. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

39. This paper will not further investigate this dimension, but it may be added that the controversy about intentionalist arguments versus objective rationality arguments focuses on this spectrum.

40. AXEL MENNICKEN, *DAS ZIEL DER GESETZESAUSLEGUNG: EINE UNTERSUCHUNG ZUR SUBJEKTIVEN UND OBJEKTIVEN AUSLEGUNGSTHEORIE* 17–18 (Verlag Gehlen 1970).

41. Axel Mennicken, *Das Ziel der Gesetzesauslegung: Eine Untersuchung zur subjektiven und objektiven Auslegungstheorie* (Verlag Gehlen 1970) 17-18 (defining the possible aims of interpretation more generally).

42. See SENDEN, *supra* note 35, at 72 (distinguishing interpretive methods that dictate a specific process and outcome from interpretive principles that supplement or guide the interpretive process).

justification.<sup>43</sup>

I conclude that the focal point of interest of any legitimacy debate about evolutive interpretation should thus be on the legitimate choice of the evolutive principle over the static principle in the selection between interpretive results.<sup>44</sup> Therefore, the legitimacy debate lacks precision as long as it turns purely on the argument that evolutive interpretation is an interpretive method, which substantively amends the law. This does not correspond to the nature of evolutive interpretation as an interpretive principle, which is on its own unable to determine the meaning of a legal norm.

Notwithstanding its lack of substantive content, evolutive interpretation still informs the choice between the results of the application of interpretive methods, which do provide such content. Therefore, it seems reasonable that some authors further differentiate between intensities of evolutive interpretations by referring to content.<sup>45</sup> A lower degree of intensity would thus be an interpretation, which takes into account new “social facts” like technological or scientific developments. For example, taking the “social facts” into account asks how the right to freedom of expression applies in the context of the internet, a technology which did not exist at the time of enactment.<sup>46</sup> The intensity would be higher if an interpretation also takes into account developments in “moral values.”<sup>47</sup> An example of development in moral values is the equal treatment of legitimate and “illegitimate” children as guaranteed by the ECtHR since *Marckx v. Belgium*.<sup>48</sup> This differentiation between intensities also fits the picture of the time dimension scale, on which some results will be closer to the “evolutive end” and others will be farther away from it.

If we consider the arguments of Lord Sumption and John Finnis in light of this conceptual background, it seems obvious that they both address—although not explicitly—the case of higher intensity of evolutive interpretation, which takes into account new developments in moral values. Hence, they might accept evolutive interpretation in its lower intensity, but neither author discusses this point. One could rephrase their argument against evolutive interpretation in more general

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43. See *infra* Part III.B.2 for further discussion on the legitimacy model.

44. See SENDEN, *supra* note 35, at 154 (observing that most of the literature forgets about the critical question on how to establish an evolutive interpretation).

45. See *id.* at 148 (presenting evolutive interpretation as operating on a wide scale with varying forms, from broad to narrow versions).

46. In the American debate, the late Antonin Scalia also made a distinction between these two poles, although his analysis is not as analytically clear. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Gutmann ed., 1997) (discussing disagreements among practitioners of originalism in how to account for new social facts).

47. See SENDEN, *supra* note 35, at 148 (noting that a broad version of evolutive interpretation would consider a range of facts, such as moral and social facts). For Scalia, only the high intensity pole seems to refer to the concept of a “living Constitution” or evolutive interpretation. Scalia, *supra* note 46, at 41–45.

48. *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. (1979).

terms: if new moral values are in conflict with old moral values, it is, in a democracy, on the people and not on courts to resolve this conflict because it constitutes a case of legitimate moral disagreement. This significantly narrows the scope of their critique to evolutive interpretations with a high intensity. In the following section, I will thus take a closer look at this specific version of evolutive interpretation and will try to rebut the critique.

## 2. What is legitimate moral disagreement?

This section needs to begin with another conceptual clarification. My second observation of the critical discussion is that the concept of *legitimate moral disagreement* is also a nebulous one. In the discussion of individual Strasbourg judgments, critics often assume that the legal question is a matter of legitimate moral disagreement, without substantiating this claim.<sup>49</sup> The differentiation is crucial for the democratic legitimacy debate, however. This is because if people legitimately disagree about moral questions connected to human rights claims, the disagreement must be settled in a political process. This would render the judicial settlement of the disagreement illegitimate.

Literature on human rights judicial review provides important insights into the negative side of this conceptualisation, being the concept of when moral disagreement is not legitimate. There are two main arguments that are of special interest. The first argument refers to the corrective function of judicial review for weaknesses, which that naturally occur in democratic systems. Judicial settlement of moral disagreement in these cases would fulfil a corrective function for a flawed deliberative process. Kumm has identified four specific deficiencies of democratic decisions: “[i]thoughtlessness . . . [ii]illegitimate reasons relating to the good . . . [iii]government hyperbole or ideology . . . [iv]capture of the legislative process by rent-seeking special interest groups.”<sup>50</sup> *Thoughtlessness* and *illegitimate reasons* both refer to a historically induced bias of politics, which is prone to hardening existing unfairness.<sup>51</sup> Føllesdal adds that not only political decisions but also national judicial review may be biased or disproportionately disadvantageous due to national traditions and historical events.<sup>52</sup> This bias may influence the perception of national judges about what is necessary in their respective societies and about what justifies an interference with a human right.<sup>53</sup> Therefore, external,

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49. See, e.g., Lord Sumption, *supra* note 3, at 23 (questioning judicial review of human rights because it occurs outside the democratic process); *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 681 (2005) (deciding the legal question of whether prisoners have the right to vote based on moral and ethical reasoning).

50. Mattias Kumm, *Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review* 26–27 (N.Y.U. Pub. Law and Legal Theory Working Paper No. 09-10, March 2009).

51. *Id.* at 26.

52. Andreas Føllesdal, *Tracking Justice Democratically*, 31 SOCIAL EPISTEMOLOGY 324, 331 (2017).

53. See *id.* at 331–35 (arguing that international judicial human rights review is compatible with the underlying values of democracy by laying out the different applications of judicial review).

international judicial review offers an additional benefit to domestic judicial review. This benefit lies in the critical and objective examination of the reasonableness of domestic justifications.<sup>54</sup> *Government hyperbole* or *ideology* refers to scenarios in which governments create a concern or threat, which lacks reasonable justification.<sup>55</sup> If these risks, as identified by Kumm, are realized in political decisions to the detriment of an individual or group, it is on judicial review to detect these flaws. It is important to note, though, that the court's decision is not meant to replace any political action in cases of reasonable disagreements.<sup>56</sup> As Kumm has put it: "Courts are not in the business of settling reasonable disagreements. They are in the business of policing the line between disagreements that are reasonable and those that are not."<sup>57</sup>

The second scenario of illegitimate moral disagreement occurs in the context of minority rights. Various scholars consider the protection of minority rights from majoritarian domination a special function of judicial review.<sup>58</sup> Benvenisti argues that human rights bodies should show deference to national human rights conceptions only if they provide effective mechanisms for protecting minorities from majoritarian abuse of power.<sup>59</sup> Domestic authorities thus need to give a reasonable justification for any interference with the rights of a vulnerable group. Only "when these domestic guarantees are non-existent or fail . . . international institutions must react with resolve."<sup>60</sup> He uses this argumentative basis for defending the legitimacy of international human rights bodies as a "collective supranational voice of reason and morality" if domestic protection mechanisms fail.<sup>61</sup> If we recall Lord Sumption's argument, even he explicitly acknowledged exemptions from the primacy of political decisions in cases of "real oppression" of a vulnerable group.<sup>62</sup> He did not further clarify the term "real oppressions," however.

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54. See *id.* at 331–32 (discussing the potential legitimacy of international human rights judicial review in light of the drawbacks of domestic judicial review); see also Kumm, *supra* note 50, at 23 (discussing the potential dangers of domestic democratic decision-making based on tradition, conventions, and preferences).

55. Kumm, *supra* note 50 at 27.

56. *Id.* at 30.

57. *Id.* at 36.

58. For the debate on evolutive interpretation, see George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21(3) EUR. J. INT'L L. 509, 532–540 (2010), which explores the underlying judicial philosophy that guides treaty interpretation for the European Court of Human Rights. For the seminal work on the general debate, see JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–80 (Harvard Univ. Press 2002) (1980).

59. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 847–49 (1999).

60. *Id.* at 849.

61. *Id.* at 852.

62. Lord Sumption, *supra* note 3, at 22 (explaining that while the Convention constrains democracy, it is necessary to ensure that groups facing real oppression are protected, yet issues relating to groups that are not facing "real oppression" should be solved politically).

The two presented arguments lead to important insights for the concepts of legitimate or illegitimate moral disagreement. Although they do not provide a conclusive concept either, they help us to narrow it down. They illustrate at least two possible scenarios in which moral disagreement should not be legitimate: if it lacks reasonableness or if it infringes the rights of the weakest members of society. These scenarios require enhanced scrutiny of the rationality of disagreements in society and thus contribute to the legitimacy of judicial review.<sup>63</sup> Therefore, it is on courts to delineate the line between legitimate and illegitimate moral disagreement according to the specific circumstances of the case.

From this conceptual analysis, I draw two implications for the relationship between evolutive interpretation and moral disagreement. First, if the Court comes to the conclusion that there is a case of *legitimate* moral disagreement, the resolution of this conflict should be left to political debate. This implies that there is no room for evolutive interpretation concerning contemporary societal issues and that the ECtHR should show deference to national politics in this specific case. It does not imply the general illegitimacy of evolutive interpretation in other cases, however. Second, if the Court comes to the conclusion that the moral disagreement is *illegitimate*, the conflict may be legitimately settled by the ECtHR. Again, even this scenario does not necessarily imply the use of evolutive interpretation. This is because cases of moral disagreement are not necessarily conflicts, which manifest themselves in the time dimension. As we have seen in the beginning of this section, the same holds true vice versa.<sup>64</sup> Cases of evolutive interpretation are not necessarily cases of moral disagreement. The concept of evolutive interpretation also encompasses cases of scientific or technological progress, which are more unlikely to be subject of moral disagreement.

The upshot of these implications is that the problem of the resolution of moral disagreement is not an exclusive problem of evolutive interpretation. On the contrary, it is well known in the debate on the democratic legitimacy of judicial review in general.<sup>65</sup> Hence, it appears to me that the critique of Lord Sumption and John Finnis is truly a general critique of judicial review by the ECtHR and not specifically one of evolutive interpretation. More precisely, it is a critique about who should be in charge of resolving moral disagreement in fundamental rights disputes. This question is related to evolutive interpretations, which touch upon sensitive moral issues, but it is not identical with the question of whether evolutive interpretation is legitimate in a specific case. Hence, the critical argument of moral disagreement in a democratic society is neither strong enough nor subtle enough to render evolutive interpretation illegitimate.<sup>66</sup>

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63. See Aileen Kavanagh, *Strasbourg, The House of Lords or Elected Politicians: Who Decides about Rights after Re P?*, 72 THE MODERN LAW REVIEW 828, 843 (2009) (explaining that while judges are limited by the law, they should also consider the social context in which the claim arises).

64. See *supra* Section III.A.1 for a discussion on the different intensities of evolutive interpretation.

65. See LAW AND DISAGREEMENT, *supra* note 31 for an example of Waldron's seminal work on this topic.

66. See generally Sandra Fredman, *Living Trees or Deadwood: The Interpretive Challenge*

This section has further demonstrated that cases of illegitimate moral disagreement exist. If we accept that judicial review is vital in these cases for the effective protection of human rights, then we may also be able to define a legitimate role for evolutive interpretation in these cases. Again, these cases may or may not raise questions of evolutive interpretation; but if they do, there is room for justifying this approach as legitimate. In the following section, I will shed light on this legitimate role for evolutive interpretation, while tackling the second strand of the democratic legitimacy critique.

### ***B. Framing the Legitimate Role of Evolutive Interpretation***

This section will challenge the second strand of the critique, which claims that evolutive interpretation constitutes a threat to the concept of democracy. In making evolutive interpretation responsible for the doom of democracy, the critics overestimate the legitimate role of this approach in the ECtHR's methodology. More precisely, this critique builds on two contestable premises about the role to play by evolutive interpretation.

The first premise is that evolutive interpretation will replace democratic decision-making in the long run. However, just like human rights judicial review in general, evolutive interpretation does not establish a dead end to political discussions. It could even add value to democratic deliberations.<sup>67</sup> This point is widely defended in literature on judicial review in general. I will thus only briefly introduce the main arguments of this debate to the discussion about evolutive interpretation.

The second premise is that if one accepts evolutive interpretation as legitimate, this legitimacy is unconditional and holds true for all cases. However, evolutive interpretation is not an isolated approach, which dominates the interpretive process of the ECHR. We should not perceive the ECHR as being either static or evolutive, but rather as a combination of both. A reasonably justified choice between both poles does not constitute a threat to democratic decisions but lives up to exactly the reason why judicial review was institutionalized in the first place. These two premises will be discussed in the following section.

#### **1. Is there a Political Debate After Evolutive Interpretation?**

Many authors have stressed the ability of human rights review to have a positive influence on democracies. They do not see courts' judgments as the last word in a political debate, but support the view that "there is political life after 'last

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*of the European Convention on Human Rights, in LORD SUMPTION AND THE LIMITS OF THE LAW* 45, 64 (N.W. Barber, et al. eds., 2016) (explaining that while there are many different interpretive approaches, it does not make evolutive interpretation illegitimate).

67. See Richard Bellamy, *The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR, in LORD SUMPTION AND THE LIMITS OF THE LAW* 193, 202 (N.W. Barber et al. eds., 2016) (explaining that the structure of the judicial system helps ensure that all nations are treated fairly and equally).

words . . . .”<sup>68</sup> Lafont holds that one crucial participatory right in a democracy is the *right to legal contestation*, which amounts to the right to have one’s arguments heard and one’s case scrutinized by means of reasoned arguments.<sup>69</sup> By exercising this right, citizens launch a process of public debate, in which the court’s role is to add principled arguments to the political arguments. The court is only a *conversation initiator*, however. The public debate continues after a judgment, with the benefit of being enriched by the court’s arguments.<sup>70</sup> Grimm also sees the advantage of judicial review in the fact that they add vital legal arguments to the political debate.<sup>71</sup> King stresses the relevance of this conversation-initiating function of judicial review for the political consideration of the minority perspective.<sup>72</sup> He argues that, in lack of powerful special-interest groups, politics often do not explicitly address minority issues until they come up in court proceedings.<sup>73</sup> Hence, it is highly probable that there is no profound discussion on the situation of minorities until court proceedings occur.<sup>74</sup> He supports this view with a case-law study, which reveals that in the United Kingdom, one-third of incompatibility cases of U.K. law with the ECHR concerned issues of under-represented groups, which had never been discussed in politics before the Strasbourg ruling.<sup>75</sup> He concludes, “legislative review . . . appears to have promoted rather than impeded the value of equality that inspires any convincing conception of democracy.”<sup>76</sup>

Føllesdal also argues that court decisions in the cases of vulnerable groups do not replace political debate, but rather add reasonableness to the follow-up debate in that they will add an increased understanding of the minority perspective.<sup>77</sup> Some authors also refer to the fact that although the judgments of the ECtHR have binding force on the parties to the case, the Court cannot invalidate domestic statutes. Therefore, the political debate necessarily continues after the judgment.<sup>78</sup>

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68. CONRADO HÜBNER MENDES, *CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY* 186 (Martin Loughlin et al. eds., 2013).

69. Cristina Lafont, *Philosophical Foundations of Judicial Review*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 267, 271 (David Dyzenhaus & M. Thorburn eds., 2016).

70. *Id.* at 276–77.

71. Dieter Grimm, *Constitutional Adjudication and Democracy*, in *JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE: LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY* 103, 110–11 (Mads Andenas ed., 2000) (explaining that the judicial system prevents those in power from silencing dissenting voices and thus adds to the political debate).

72. Jeff King, *Three Wrong Turns in Lord Sumption’s Conception of Law and Democracy*, in *LORD SUMPTION AND THE LIMITS OF THE LAW* 141, 149 (N.W. Barber et al. eds., 2016).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Andreas Føllesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 *J. SOC. PHIL.* 595, 603 (2009).

78. See Bellamy, *supra* note 67, at 210 (noting how the ECtHR operates as a legislative body because its actions lead to further changes). But see Aileen Kavanagh, *What’s So Weak About “Weak-Form Review”? The Case of the UK Human Rights Act 1998*, 13 *INT’L J. CONST.*

Considering these arguments, evolutive interpretation no longer appears to be undermining democratic procedures or detached from public debate. It raises awareness for contemporary human rights concerns, which have been brought to the ECtHR precisely by people who live in these democracies. Judicial review by the ECtHR thus contributes to giving a voice to those people who are easily barred from effective political participation.

## 2. Is the Legitimacy of Evolutive Interpretation Unconditional?

Now I turn to the second premise of the argument, namely that evolutive interpretation—once accepted—becomes the dominating interpretive approach of the ECtHR. Previously in this paper, I defended that any theory about the legitimacy of evolutive interpretation must deal with the question of the legitimate choice between evolutive and static interpretation.<sup>79</sup>

It makes a difference whether one takes this choice on a case-by-case basis or in a general manner.<sup>80</sup> In the first scenario, the static, as well as the evolutive pole of the time dimension, play a legitimate role in the interpretive process of the ECtHR, and the choice between them must be justified in each case in which the time dimension is relevant. In the second scenario, only one of the two approaches is legitimate in all cases and hence needs no further justification if applied in a specific case before the Court. If we make use of the picture of the time dimension spectrum, most of the current discussion about the legitimacy of evolutive interpretation may be described as turning on the question: which of the two poles of the spectrum is preferable in general. Critics of evolutive interpretation would argue in favor of the static end, and proponents in favor of the evolutive end. With these two scenarios in mind, one can see that the critics might only have a point in the second option by saying that evolutive interpretation will dominate the interpretive process. The second option amounts to the definite decision that the ECtHR should follow an evolutive approach to interpretation.

I argue, however, that this mindset of either static or evolutive is not fruitful. I will argue that only the first scenario, which accords a legitimate role to the whole spectrum, is desirable for the ECtHR from a normative point of view. This is because the judicial process should strive for achieving outcomes that are as correct as possible.<sup>81</sup> This includes the obligation of a judge to consider all relevant arguments in a case.<sup>82</sup> In order to fulfil this criterion, the consideration of static as well as evolutive arguments is indispensable. This is because both poles of the time dimension serve vital objectives of the ECHR. Whereas the static approach serves

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L. 1008, 1024 (2015) (arguing that international law obligates member states to change their domestic laws in light of judgements even without formal invalidation by the Court).

79. See *supra* Part III.A.1 for a discussion on evolutive interpretation.

80. MENNICKEN, *supra* note 40, at 85–87.

81. Robert Alexy, *Recht und Richtigkeit [Law and Correctness]*, in *THE REASONABLE AS RATIONAL?: ON LEGAL ARGUMENTATION AND JUSTIFICATION*, Festschrift for Aulis Aarnio 32 (Werner Krawietz et al. eds., 2000).

82. *Id.* at 33.

values of the formal rule of law, the evolutive approach serves justice in a true-to-life fashion.<sup>83</sup> It would cause severe difficulty for any legal system for the protection of human rights to take a general decision on which of the two values is more important. Determining which of the values should prove superior can only be assessed in each individual case after due consideration of all the relevant aspects of a case.<sup>84</sup>

This finding also corresponds to suggestions in literature that the legitimacy of judicial review is greater if judges follow a well-reasoned casuist approach instead of strict consistency.<sup>85</sup> In the German constitutional debate, Peter Häberle argues that the usefulness of constitutional change through interpretation cannot be answered on a general basis but only in each individual case.<sup>86</sup> A general decision for one of the poles would relieve the judge from this justificatory burden, but at the same time would act as a constraint for fairly rendering justice in any individual case.<sup>87</sup> This scenario cannot be desirable in the Council of Europe society, in which we expect courts to deliver well-reasoned arguments in such delicate matters as human rights cases. Therefore, the choice between evolutive interpretation and static interpretation should be justified in each case individually and not once and for all. This legitimacy model increases transparency in the interpretive process, and it enhances the burden of justification for the interpreter.

The analysis of the ECtHR's practice shows that the case-by-case approach to evolutive interpretation is already practiced by the Court. However, case law analysis also reveals that the justification of its choice in the majority of living instrument cases does not go beyond the reference to comparative arguments.<sup>88</sup> The ECtHR keeps repeating the phrase that the ECHR is a living instrument, which must be interpreted in the light of present-day conditions.<sup>89</sup> The Court then usually embarks on two considerations: first, whether there exists a consensus among Council of Europe member states that would support the choice of evolutive interpretation;<sup>90</sup> second, whether the matter falls within the margin of appreciation of the member states that would support the rejection of the evolutive approach.<sup>91</sup>

83. Mennicken does not address the issue of evolutive interpretation, but instead touches on the tension between historic and contemporary interpretations. MENNICKEN, *supra* note 40, at 86. Friedman similarly concludes by favoring dynamism in the American debate on the living constitution. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 652 (1993).

84. MENNICKEN, *supra* note 40, at 85, 86, 106.

85. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 323 (1997).

86. Peter Häberle, *Zeit und Verfassung [Time and Constitution]*, in PROBLEME DER VERFASSUNGSINTERPRETATION: DOKUMENTATION EINER KONTROVERSE 323 (Ralf Dreier & Friedrich Schwegmann, eds., 1976).

87. MENNICKEN, *supra* note 40, at 86.

88. SENDEN, *supra* note 35, at 282–83.

89. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 21, ¶ 74 (2002) (“A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.”).

90. See, e.g., *id.* at 29; *Tyrer v. United Kingdom*, App. No. 5856/72, 15 (1978); *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. 15–16, ¶ 41 (1979).

91. See, e.g., *Sheffield and Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. (1998)

In some equality cases, the ECtHR has further substantiated its evolutive approach with the argument that it needs to accelerate change in the protection of vulnerable groups.<sup>92</sup> Sometimes, the Court also refers to the need to keep the ECHR “practical and effective . . . .”<sup>93</sup> However, these arguments do not amount to a real balance between static and evolutive interests. Repeating a shallow formula is not enough to establish a well-justified judgment for an individual case. Given the fact that evolutive interpretations regularly deal with sensitive societal issues, which are subject to controversial debates, this methodological vagueness is unacceptable.

We can thus conclude from this Part that evolutive interpretation fulfills the vital function of not only pushing political debate but also adding principled legal arguments to the debate. The ECtHR is right to apply evolutive interpretation on a case-by-case basis and not as an overarching principle of its interpretive methodology. However, more clarity about the concrete criteria that guide its choice of evolutive interpretation is desirable in its case law.

#### IV. CONCLUSIONS

Societies, political climate, and challenges to human rights protection in Europe change constantly. Evolutive interpretation allows for a continuing high level of protection of the vital rights preserved in the ECHR. This paper has scrutinized the main argument against the legitimacy of evolutive interpretation—the democratic illegitimacy of the approach. The foregoing analysis has revealed lacking conceptual clarity and analytical depth in this debate. This paper has sought to fill this gap: first, by clarifying the concept of evolutive interpretation as an interpretive principle; second, by presenting a legitimacy model for evolutive interpretation, which is able to guarantee effective human rights protection on the one hand, while respecting democratic decisions in the member states on the other hand.

I have argued that accepting evolutive interpretation as legitimate does not imply that citizens and the member states lose their say in human rights protection. However, any interference with an ECHR right needs reasonable justification, which is subject to the scrutiny of the ECtHR. This is a vital function of the Court in order to keep human rights protection effective in the case that national policies are biased or disproportionate. The ECtHR certainly has to scrutinize whether democratically legitimized domestic policies are responsive to contemporary

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(discussing a lack of consensus among Member States and how that may play into a decision); *A, B, and C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, 259–234 (2010) (discussing whether the inference was necessary in a democratic society).

92. *See, e.g., Marckx v. Belgium*, App. No. 6833/74 15–16, ¶ 41 (detailing that changing customs among Member States dictates change within the Convention, specifically regarding the rights of illegitimate children).

93. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. at 21, ¶ 74 (“It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”); *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 46, ¶ 175 (2012) (quoting the same language as in the *Case of Christine Goodwin* regarding practical and effective interpretation).

challenges for human rights. As this paper has demonstrated, this review does not necessarily amount to an illegitimate interference with democracy, however. Evolutive interpretations may only interfere with democratic decisions, if these decisions result from an unduly flawed or biased decision-making process. This paper has identified at least two scenarios in which moral disagreement should not be considered legitimate and which allow for the ECtHR to legitimately interfere with democratic decisions.

This paper has further outlined the legitimate role of evolutive interpretation in the judicial review system of the ECtHR. The suggested model accords to evolutive interpretation a complementary function to traditional canons and other principles of interpretation. It serves as an interpretive principle, which guides the decision of the ECtHR in cases where new societal developments call for an interpretation that differs from the previous understanding of a right. As such, it does not replace the role of static interpretation, but rather complements it. This paper has argued that it would not be desirable to accord legitimacy to evolutive or static interpretation in an either-or fashion for all cases. Rather, we need mechanisms in order to determine its legitimacy on a case-by-case basis. This paper introduces a balancing model for all those cases, which face a conflict in the time dimension of interpretation. This model suggests a balancing of the arguments supporting static interpretation with the arguments supporting evolutive interpretation on a case-by-case basis. The interpretive result, which is supported by better arguments, will consequently come out on top. This legitimacy model will increase the level of justification in the ECtHR's judgments, which, in turn, may augment the rationality of the political debate afterwards. It would further add more methodological clarity to the judgments of the ECtHR and would thus render its decisions more steadfast against criticism.

A research agenda for academia would be to define more specifically the relevant aspects in the ECHR framework, which need to be considered in this choice between evolutive and static interpretation. From a preliminary point of view, considerations about legal certainty and individual justice are definitely among these relevant aspects. Moreover, the fact that a case touches upon a sensitive moral issue in a member state is certainly a vital consideration, which might enhance the burden of justification of the ECtHR to opt for an evolutive interpretation instead of following the democratic decision of a member state. Instead of discarding the democratic legitimacy critique in general, this paper thus tries to include it into a theory on the legitimacy of evolutive interpretation. This model also ensures that the national interests at stake are properly taken into account in the balancing exercise.

However, the discussed risks of majority decisions have also made clear that democratic considerations cannot be the only relevant factor in the legitimacy debate—neither for legitimizing evolutive interpretation, nor for discrediting it. This paper further stressed the relevance of judicial review for the protection of rights of vulnerable groups like minorities or non-citizens. Therefore, the fact that a case deals with the rights of a vulnerable group is also a relevant consideration for the balancing exercise. Apart from that, one could also think of other factors, which that seem to be important for such a decision: for example, considerations

about the form and the rationality of the reasoning provided by the domestic decision under review, the subsidiarity of the ECtHR's review, material rule of law principles or comparative arguments like consensus, *et cetera*.

This paper has set up the framework for this balancing model of legitimacy of evolutive interpretation of the ECHR. This model is able to address the concerns of the democratic legitimacy critique. The upshot of the findings in this paper is that evolutive interpretation and democratic legitimacy are reconcilable concepts.