In order to be effective, international tribunals should be perceived as legitimate adjudicators. *European Consensus and the Legitimacy of the European Court of Human Rights* provides in-depth analyses on whether European consensus is capable of enhancing the legitimacy of the European Court of Human Rights. Focusing on the method and value of European consensus, it examines the practicalities of consensus identification and application and discusses whether State counting is appropriate in human rights adjudication. With over 30 interviews from judges of the European Court of Human Rights and qualitative analyses of the case law, this book gives readers access to first-hand and up-to-date information and provides an understanding of how the European Court of Human Rights in Strasbourg interprets the European Convention on Human Rights.

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EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS

KANSTANTSIN DZEHTSIAROU

University of Surrey
For Larisa
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4.3. Judgments of the Grand Chamber in which comparative law materials were deployed and where both comparative and international law materials were deployed (1998–2013). 97
In her introductory remarks to the Dialogue between Judges, held on the occasion of the opening of the judicial year 2005, Françoise Tulkens described the ‘complementary relationship between the domestic legal order and the international order’ as being vital to the defence of fundamental rights. This complementarity is essential in order to maintain the delicate balance in the relationship between the Strasbourg system and the domestic systems. The margin of appreciation doctrine enables the European Court of Human Rights to impose self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute. The technique in question remains a topical subject, lying at the heart of a debate opposing judicial activism and restraint, and has given rise to significant consideration in recent years. This has resulted in point 12 (b) of the Brighton Declaration (19–20 April 2012), which calls for the Convention to be amended by the inclusion of a reference to the margin of appreciation in its Preamble and also suggests that the Court should apply this doctrine when examining the admissibility of applications.

Among the factors used in particular to circumscribe the extent of the national margin of appreciation, a major role is played by the existence or absence of European consensus, derived from a comparative analysis. Admittedly it is not always a decisive factor, but it may confer particular legitimacy on the Court’s judgments. Having thoroughly discussed the concept of European consensus, Kanstantsin Dzehtsiarou explores the different types of consensus. Based on examples from case law, he identifies four types: consensus identified through comparative analysis of the legislation of Contracting Parties; international consensus identified through international treaties; internal consensus in the respondent State; and, lastly, expert consensus.

In a note to which I contributed for the Dialogue between Judges in 2008, the notion of consensus was described as follows: ‘Consensus in the context of the European Convention on Human Rights is generally understood as being the basis for the evolution of Convention standards’
through the case law of the European Court of Human Rights.’ The Convention is indeed commonly referred to as ‘a living instrument which . . . must be interpreted in the light of present-day conditions’ and, as stated in its Preamble, it was adopted in particular for the further realisation of human rights and fundamental freedoms. It is clear therefore that the rights and freedoms enumerated in the Convention are not set in stone with regard to their substantive content, which has to evolve along with developments in law, society and science. This evolutive interpretation of the Convention makes it possible to adjust the Convention norms to new challenges generated by the complex development of European societies. While the emergence of European consensus enables the Court to underpin its evolutive interpretation of the Convention, no weakening in the level of protection could be established from any less protective consensus that may be discerned in the future.

An absence of consensus is not necessarily an obstacle to jurisprudential evolution. While the Court generally shows restraint where there is no consensus, the adoption of innovative solutions concerning questions that are not the subject of consensus is sometimes perceived as a sign of judicial activism. Such a conclusion may appear hasty and excessive. It is true that the lack of a common legal approach has not prevented the Court from identifying the existence of a general trend. Thus, in its Christine Goodwin judgment of 11 July 2002, concerning a lack of legal recognition of a gender change and the inability for a transsexual having undergone such an operation to marry a person of the opposite sex, the Court attached ‘less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals’. However, rather than judicial activism, I would prefer to speak here of a pragmatic progressivism.

European consensus, as has already been said, is sometimes not the decisive factor. This has been shown by recent developments in case law. Even where there is consensus, the Court may impose on itself a degree of restraint. The following example gave rise to a dissenting opinion by Françoise Tulkens and a number of other judges. Despite the existence in a majority of Council of Europe Member States of a consensus towards allowing abortion on broader grounds than those admitted in Irish law, in A., B. and C. v. Ireland (judgment of 16 December 2010) the Court
nevertheless did ‘not consider that this consensus decisively narrow[ed] the broad margin of appreciation of the State’.

Can it therefore be said that the Court’s approach to the notion of consensus is becoming increasingly relativised?

Lastly, it is also possible to look at the reasons for the existence or absence of consensus in order to resolve an issue. While it is easier to identify a consensus in the light of State practice (legislation, case law, practice of public authorities), the reasons for an absence of consensus are often difficult to fathom (lack of any official stance on a very new problem, political reasons, lack of interest in questions which are of concern only to minorities, etc.). When faced with an absence of consensus, or even with a comparative legislative vacuum concerning a real question of society, the self-imposition of judicial restraint may not always be the best answer. For a ‘negative consensus’ may, in extremely rare cases, stem from the deliberate policy of a State not to legislate. But a lack of will to legislate may also be explained by general indifference. Can we still talk of consensus, albeit in a negative sense? In such situations, could a lack of common ground necessarily entail consequences as to the possibility of self-limitation on the part of the Court? This remains rather doubtful.

Kanstantsin Dzehtsiarou’s research is based on comparative analysis within the Court. His critique is essential to an appraisal of the legitimacy of the Court and its judgments. Based on a pertinent dialogue with the interviewed judges, Kanstantsin Dzehtsiarou’s book is an important contribution to legal scholarship.

Dean Spielmann

President of the European Court of Human Rights
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This book is the result of seven years of research, which was fun most of the time and painful on some rare occasions. I want to thank everyone who helped me during these seven years. They were truly unbelievable.

If anybody told me ten years ago that in ten years I would be a law lecturer in the United Kingdom and that I would publish my book with Cambridge University Press, I would have thought that it was a bad joke. About ten years ago, I was finishing my undergraduate studies in law in Gomel State University in Belarus with the prospect of being a prosecutorial investigator somewhere in rural Belarus. This has not happened.

There have been a few unbelievable turns in my career during the last ten years. In 2005, I won a highly competitive Chevening/Soros Foundation scholarship to do a master's course in contemporary European studies at the University of Sussex. I thank the Soros Foundation and the British Foreign and Commonwealth Office for this. When I came to the United Kingdom, I hardly knew what contemporary European studies was. That said, I did manage to graduate successfully. Then, I received a fantastic Ad Astra Scholarship from University College Dublin, which made some parts of my research project on European consensus possible. I would like to thank UCD School of Law and I would also like to personally thank Colin Scott, John Jackson, Joseph McMahon and Imelda Maher for giving me this chance. My thanks also go to my PhD supervisors, Marie Luce Paris and Graham Finley, for their helpful comments and support. I would also like to address a special thank you to Fiona de Londras, who was one of my supervisors and someone who influenced this book very much. She is a wonderful mentor and a very good friend.

I then moved to the University of Surrey as a law lecturer, and this university has also supported me by funding some of my numerous trips to Strasbourg. The main purpose of these trips was to annoy judges by asking them questions about European consensus. I wish to thank Rob Jago and Indira Carr for their support.
Throughout these years, I discussed the ideas of the book with nearly all my colleagues irrespective of the area of law they were working in. I would like to thank a few of them – Rudy Baker, Eva Brems, Filippo Fontanelli, Sergey Golubok, Theodore Konstadinides, Luke Mason, Alastair Mowbray, Arman Sarvarian and Vassilis Tzevelekos – for their comments on various chapters of this book.

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Constitutional Rights Project and another v. Nigeria, Communication No 43/95 and 150/96 (1999)
ABBREVIATIONS

ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
ECJ European Court of Justice
EU European Union
HUDOC Human Rights Documents (the ECtHR database)
IACtHR Inter-American Court of Human Rights
ICJ International Court of Justice
LGBT lesbians, gays, bisexuals, transsexuals
MP member of parliament
NGO non-governmental organisation
UK United Kingdom of Great Britain and Northern Ireland
UN United Nations
UN HRC United Nations Human Rights Committee
US United States of America
VCLT Vienna Convention on the Law of Treaties
WTO World Trade Organization