BUILDING CONSENSUS ON EUROPEAN CONSENSUS

Should prisoners have voting rights? Should terminally ill patients have a right to assisted suicide? Should same-sex couples have a right to marry and adopt? The book examines how such questions can be resolved within the framework of the European Convention on Human Rights. 'European consensus' is a tool of interpretation used by the European Court of Human Rights as a means to identify evolution in the laws and practices (primarily) of national legal systems when addressing morally sensitive or politically controversial human rights questions. If European consensus exists, the Court can establish new human rights standards that will be binding across European states. The chapters of the book are structured around three themes: a) conceptualisation of European consensus, its *modus operandi* and its effects; b) critical evaluation of its legitimacy and of its outputs, and c) comparison with similar methods of judicial interpretation in other legal systems.

PANOS KAPOTAS is a senior lecturer in law at Portsmouth Law School, University of Portsmouth. His research interests range from equality and anti-discrimination law to European Human Rights law and European Union law. He holds a PhD in law from the London School of Economics (LSE), a LLM from University College London and a first degree in law from the National and Kapodistrian University of Athens. He has published in leading law journals on a range of issues with a particular focus on equality. He has taught EU law and Human Rights law at the LSE, City University London, SOAS, the University of Essex and Queen Mary University London. He is qualified with the Athens Bar Association.

VASSILIS P. TZEVELEKOS is a senior lecturer in law at the School of Law and Social Justice, University of Liverpool. He is a general international law lawyer with a special interest in human rights protection. He has published extensively in these areas. He holds a PhD in international law from the European University Institute, where he also did a masters on legal research. He studied European Politics at the College of Europe and International Law at Université Paris 1 Panthéon-Sorbonne. He completed his main studies in law (undergraduate) at the National and Kapodistrian University of Athens and is qualified with the Athens Bar Association.

BUILDING CONSENSUS ON EUROPEAN CONSENSUS

Judicial Interpretation of Human Rights in Europe and Beyond

Edited by

PANOS KAPOTAS

University of Portsmouth

VASSILIS P. TZEVELEKOS

University of Liverpool

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CONTRIBUTORS

MERRIS AMOS School of Law, Queen Mary, University of London

OR BASSOK School of Law, University of Nottingham

ED BATES Leicester Law School, University of Leicester

CHRISTIAN DJEFFAL Alexander von Humboldt Institute for Internet and Society, Berlin

SIONAIDH DOUGLAS-SCOTT Centre for Law and Society in a Global Context, School of Law, Queen Mary, University of London

KANSTANTSIN DZEHTSIAROU School of Law and Social Justice, University of Liverpool

LAURA VAN DEN EYNDE Center for Public Law, Faculty of Law and Criminology, Université Libre de Bruxelles

ANDREAS FOLLESDAL Faculty of Law, University of Oslo; PluriCourts, Centre of Excellence for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo

CONOR GEARTY Department of Law, London School of Economics

KRISTIN HENRARD Erasmus School of Law, Erasmus University Rotterdam

DIMITRIOS KAGIAROS Law School, University of Exeter

PANOS KAPOTAS Portsmouth Law School, University of Portsmouth

THOMAS KLEINLEIN Faculty of Law, Friedrich Schiller University Jena

JAKA KUKAVICA Department of Law, European University Institute

LUCAS LIXINSKI Faculty of Law, University of New South Wales, Sydney

FIONA DE LONDRAS Birmingham Law School, University of Birmingham

NIAMH NIC SHUIBHNE School of Law, University of Edinburgh

JENS T. THEILEN Walther Schücking Institute for International Law, University of Kiel

VASSILIS P. TZEVELEKOS School of Law and Social Justice, University of Liverpool

JAROSLAV VĚTROVSKÝ Faculty of Law, University of West Bohemia, Piilsen

FOREWORD

The European Court of Human Rights (ECtHR or the Court) is a tool of European integration. Through its case law and the binding character of its judgments, it aims to create gradually a harmonious application of human rights, protected by the European Convention on Human Rights (ECHR or the Convention), throughout its legal space, namely the forty-seven States that constitute the membership of the Council of Europe. This is made possible by the constant case law, and by its repetition in time, but also by the fact that the parties to the Convention are cautious to avoid perpetrating violations. Indeed, when a violation is found by the Court in a specific case, the respondent State does not – or should not – limit itself to repairing the damages caused by the violation. It is also expected to address the more general issue of the generating source of the violation – which can be a judicial decision, a legal rule or an administrative practice. This guarantees non-repetition of the violation and contributes to the prevention of future violations. But it is not only the State party to the dispute found to be responsible for a violation that must change its laws or its practices. Third States with the same conditions in their internal legal orders are also expected to align their national legal system with the ECHR case law, even if they are not parties to a dispute. Otherwise, sooner or later, they could face proceedings before the Court, leading to finding a violation against them. In the long-run we can see that this method of repetition of the case law leads inevitably to a more harmonious environment of protection of human rights and, consequently, to the integration of human rights in Europe.

That is why foreseeability of the case law of the Court is precious. Case law should only change if a good reason is given. Yet, change is part of life – and the Convention, with the sixty and more years of constant presence in protecting rights, cannot defy this. After all, this is what the drafters of the Convention – who aspired to its longevity – had in mind. That is why they prepared a general text that does not comprise definitions of the protected rights and left it to the Court to fill these gaps. At

the same time, the Court has time and again reiterated that the Convention is a 'living instrument' to be interpreted in light of the conditions existing at the time when a case is being examined.

Consensus, as a concept used by the Court, may run against predictability. But the role of the Court is to follow the changes of the European society – not to persist in the text of the Convention that was written in the middle of the last century. If some change has occurred in society, the Court should follow it, endorse it and adapt its case law to the emerging new circumstances.

An important role in the detection of changes is played by the Research Division of the Court, which undertakes in selective cases that have been previously earmarked by the judges, to carry out research in order to find the degree of the incurred changes, and to present to the Court the current state of affairs both in Europe and internationally. The case law of domestic courts and tribunals, administrative practices, legal rules and opinions of influential segments of society, all of them are presented in a report of the Research Division to the Court for evaluation and assessment.

The Court does not need to have strong indications of a general orientation of European society towards a specific change. Usually, in order for the Court to align its jurisprudence to the new situation, it suffices that a majority of States follows a new pattern of behaviour. Sometimes strong trends towards a certain pattern of behaviour are enough to convince the Court of the necessity to change old, or create new, case law.

The Court has used various terms when referring to the concept of European consensus that are meant to indicate the presence or absence of a common approach by the European States. The Court has used, for example, such phrases as 'international consensus among contracting States of the Council of Europe', 'any European consensus', 'common standard between the Member States of the Council of Europe' or 'general trend', etc. These variations in terminology have not affected the meaning of the consensus.

The concept of 'European consensus' is used to denote the result of comparative research regarding the presence or absence of common ground, especially in the law and practice of parties to the Convention on which the Court can found its conclusions. The standard plays a role in the broader or narrower character of the margin of appreciation set in a certain case. In this context, the lack of European consensus on the

subject matter of a case would normally result in a wide discretion being given to a State and *vice versa*.

The concept of consensus does not only refer to European States, but also to extra-European States. Consensus on the standards required internationally is an element that the Court will also consider. This explains why the Court so often refers to judicial decisions coming from countries with highly developed legal systems, such as the United States, Canada, Australia, South Africa and Israel.

The Court has employed consensus analysis to reach different conclusions in different cases. The absence of consensus led the Court to a *non-violation* finding, for instance, in cases of medically assisted reproduction (*S.H.* v. *Austria*, Grand Chamber, 3 November 2011), showing of religious symbols (*Lautsi and Others* v. *Italy*, Grand Chamber, 18 March 2011), legal effects of gender re-assignment (*Hamalainen* v. *Finland*, Grand Chamber, 16 July 2014), matters relating to the beginning of life (*Vo* v. *France*, Grand Chamber, 8 July 2004), euthanasia (*Pretty* v. *the United Kingdom*, 29 April 2002) and retraction of consent in a case of adoption (*Kearns* v. *France*, 10 January 2008). In several other cases the Court found a *violation* against a State based on the existence of consensus at the European level. This was the case in relation to the right to a name (*Unal Tekeli* v. *Turkey*, 16 November 2004), equality of children born outside marriage (*Mazurek* v. *France*, 1 February 2000), conscientious objectors (*Bayatyan* v. *Armenia*, Grand Chamber, 7 July 2011) and the elements defining the crime of rape (*M.C.* v. *Bulgaria*, 4 December 2008). Consequently, what these few examples show is that the concept of consensus (or the lack thereof) has been used by the Court on a wide range of rights, likely to be applied to any legal or moral dilemma to which the Court might be exposed. Consensus is part and parcel of the mechanism of dynamic interpretation applied by the Court, which treats the Convention as a living instrument, to be adapted to the ever-changing conditions of life.

The use of the consensus method is an important tool in the interpretative arsenal of the Court that allows it to effectively fulfil the tasks entrusted to it, namely protect human rights in Europe and contribute to European integration. This is the reason why the attempts of scholarship to study its conceptualisation and use by the Court, and to understand its function and mechanics are both welcome and, indeed, valuable. Understanding what consensus is and how it works will allow a better comprehension of its outcomes, but also of the reasons why the Court is

often employing this method of interpretation instead of others. The latter point refers to the normative *rationale* underpinning the consensus analysis and the advantages (but also possible disadvantages) that this particular method entails. As the editors of this book explain in Chapter 1, the study of consensus cannot be dissociated from the broader existential questions in liberal democracies on the appropriate institution and the correct criteria against which to answer sensitive political and moral questions pertaining to the protection of human rights.

This book by Dr Kapotas and Dr Tzevelekos is a very significant and timely contribution to the study of European consensus in particular and to ECHR scholarship more generally. The rich and thoughtful analysis by leading experts and bright younger scholars on a wide range of key questions – legal, political and philosophical – that relate to the use of European consensus is bound to become a reference point for students of human rights and of the Court's jurisprudence in years to come. Equally importantly, this book comes at a particularly critical juncture for the future of the ECHR system and, perhaps, for the future of Europe itself. In times such as these, when the Council of Europe State parties struggle to find the balance between supranational norms and national political choices, one can only hope that the efforts by the editors and authors of this fine volume to deepen our understanding of consensus analysis will find studious readers among judges, politicians and European citizens alike.

Christos L. Rozakis
***Emeritus Professor of Law, National and Kapodistrian University of Athens; Chair of the Administrative Tribunal of the Council of Europe*, former Vice President of the ECtHR**

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