1

Introduction

Has the European Court of Human Rights (ECtHR or Court) lost its legitimacy? The answer to this question is perhaps 'no'. If this was the case, the Contracting Parties would stop executing judgments of the Court, the applicants would stop bringing their complaints to the Court and, finally, the Contracting Parties would denounce the European Convention on Human Rights (ECHR or Convention). Another option might be that the ECtHR would continue to exist without having any real impact on human rights standards in Europe, and its judgments would lose much of their value. This has not yet happened.

International tribunals, including the ECtHR, face a substantial structural deficiency; they operate within systems that lack the coercive capacity to enforce their judgments. International courts thus depend, to a greater degree than domestic courts, on the legitimacy of their judgments as a basis upon which to encourage, and in effect coerce, compliance. The *prima facie* legitimacy of the ECtHR and its judgments were confirmed by the consent of the Contracting Parties. However, the Court cannot endlessly justify each and every judgment, especially since the original intent of the drafters has never played a primary role in the decision-making of the ECtHR. This point can be substantiated by the recent fierce attacks on the ECtHR that occurred in a few States and which were backed up by the arguments of illegitimate judicial interventions. For this reason, it must be seen whether legitimacy can be generated other than from the 'original consent' model. The key argument of this book is that European consensus can enhance the legitimacy of the ECtHR and its judgments. In order to achieve this, European consensus should be based on real evidence and it should be consistently applied in the case law.

European consensus is a tool of interpretation of the Convention that the ECtHR uses in its decision-making. The reason for the application of European consensus is that the meaning of some Convention terms can be linked to their common usage by the Contracting Parties. European

consensus can be conceptualised as a tool of interpretation of the Convention which prioritises a particular solution to a complex human rights issue if this solution is supported by the majority of the 47 Contracting Parties. This support is identified through comparative analysis of the laws and practices of the Contracting Parties and international law. European consensus is a rebuttable presumption, which means that the Contracting Parties are presumed to be in violation of the Convention if their solution diverges from the solution adopted by the majority, unless they can provide sufficient and weighty reasons for such divergence.

This book is divided into two parts. The first part aims to establish how European consensus operates in the Court's reasoning. The overarching theme of this part is the method of application of European consensus. Chapters 2–4 explain the development of European consensus and examine how the Court has improved its methodology of identification and application of consensus. The central argument of this book is that only European consensus which is consistently applied and based on rigorous and verifiable data can enhance the legitimacy of the ECtHR. Chapters 2–4 mainly focus on the first part of the argument dealing with the application of European consensus.

It is suggested here that European consensus is actually not an entirely accurate term. The word 'consensus' presumes unanimity, while unanimity is nearly impossible to establish in real life and often it is useless for the Court's reasoning. Arguably, even if just one Contracting Party has a legal regulation which differs from the laws of all other Contracting Parties, then literal consensus cannot be established. One has to bear in mind that the consensus argument is often deployed by the ECtHR when the national legal norm or practice under scrutiny diverts from commonly accepted legal practices of the Contracting Parties. What the Court usually means by consensus is a 'trend'.

Identification of European consensus can be divided into three stages: preliminary stage, stage of assessment and stage of deployment. At the first stage, the Court prepares comparative law materials that describe the laws and practices of the Contracting Parties. It is a comparative exercise which happens behind the scenes, and the Court usually only includes a very short summary of often quite lengthy reports prepared by the Registry of the ECtHR. The Court's approach to comparative law has become much more professional in the last 10–15 years. The Court has invested resources in the creation and development of the Research and Library Division within the Court's Registry, which prepares

independent comparative law reports upon the request of the judge-rapporteur[1] in cases of high importance. The fact that the ECtHR has access to verifiable and objective information creates a foundation for the proper application of real, not just perceived, European consensus.

At the second stage, the Court analyses the outcome of a comparative study and decides whether consensus can be established. The Court does not need nigh unanimity to establish consensus. In a number of cases, a trend in a particular direction has been enough to trigger the European consensus argument. This stage is not automatic, and the judges have to decide on a number of dilemmas, including whether the number of States is enough to constitute consensus and the level of abstraction that European consensus should be established on. European consensus is possible on the level of principles or rules. If consensus is established at the level of principles, it reflects a general agreement of the Contracting Parties in relation to a certain fundamental issue that might need further interpretation. For example, the Contracting Parties might agree that national minorities must be protected, but this principle can lead to various, even sometimes mutually exclusive rules that ensure such protection. In contrast, rules offer much more precise regulations that prescribe certain behaviour. The level at which consensus or the lack thereof is established might have an impact on the following stage because consensus on the level of rules is much more straightforward and can claim a higher degree of persuasiveness in comparison with consensus on the level of principles.

At the stage of deployment, the Court considers whether consensus or lack thereof should influence the outcome of the case. It is argued here that European consensus establishes a rebuttable presumption in favour of the regulation adopted by the majority of the Contracting Parties. This means that European consensus is not applied automatically, and the ECtHR judges retain a great deal of discretion in applying it. Having said that, the Court should not apply consensus arbitrarily, and if the Court decides not to follow consensus, it has to clearly and convincingly explain its reasons. The particularities of the historical and political development of a respondent State or moral sensitivity on the matter at issue are among these possible reasons.

[1] Pursuant to Rule 49-2 of Rules of Court where an application is made under Article 34 of the Convention and its examination by a chamber or a committee seems justified, the president of the section to which the case has been assigned shall designate a judge as judge-rapporteur, who shall examine the application.

Consensus is not homogeneous as the Court uses various sources in order to establish consensus: national law and practice, international treaties, opinion of the majority of people within the Contracting Party and expert opinion. While there are situations in which all or some of these types of consensus point in the same direction, a more complex scenario is when different types of consensus contradict each other and the Court has to choose one. This book argues that European consensus can enhance the legitimacy of the ECtHR by improving the predictability and foreseeability of the Court's judgment. In order to achieve this, the Court should establish clear rules of selection on the type of consensus to be followed. It is suggested that European consensus based on comparison of rules and practices of the Contracting Parties usually contains more precise regulations than consensus based on international treaties. The latter ordinarily requires implementation and therefore it cannot claim the same level of persuasiveness as consensus based on laws and practices of the Contracting Parties. Having said that, the Court might have reasons to follow the consensus based on international treaties, but these reasons again have to be clearly articulated. European consensus can also support a standard that is contrary to the beliefs that are held by the majority of the population in a particular State. In this case, the Court should be very careful about 'trumping' European consensus, as such 'trumping' can negatively impact the legitimacy and the credibility of the ECtHR.

The method of identification and application of consensus has been criticised by a number of commentators. This criticism is conceptualised as procedural criticism, and it is argued that the Court has taken such critical comments on board. The ECtHR has become more consistent in its application of European consensus in recent years. It now influences the outcomes of cases and it is based on rigorous comparative legal analysis.

The second part of the book deals with the value of European consensus. It mainly discusses why European consensus can be conceptualised as a tool that enhances legitimacy and whether it is perceived as such by the key decision-makers at the ECtHR. Chapters 5–7 aim to examine this argument.

This part opens the analysis of the substantive criticism of European consensus, which claims that it is normatively wrong to rely on counting States in human rights adjudication. The key theme of this criticism is the 'anti-majoritarian' argument, which questions the appropriateness of majoritarian decision-making in human rights adjudication. Human rights norms are anti-majoritarian because they are supposed to protect

individuals who are often quite unpopular in society, such as minorities, prisoners or those on trial. Their interests are unlikely to be safeguarded through democratic majoritarian decision-making. Human rights are there to rectify this drawback of democracy. For that reason, one can argue that human rights are anti-majoritarian. At the same time, the European consensus argument relies upon what the majority of the Contracting Parties has decided; hence, it can be conceptualised as majoritarian decision-making. Those commentators who have developed the anti-majoritarian argument claim that this is a paradoxical situation, namely that a profoundly anti-majoritarian concept (human rights) relies on a majoritarian tool (European consensus) for its application. Chapter 5 argues that this description is not entirely accurate and that substantive criticism of European consensus is far-fetched.

This book offers a number of reasons in favour of rejecting the anti-majoritarian argument. The key counter-argument here is the manner in which the ECtHR has applied European consensus. It is not an absolute or automatic argument – even if European consensus is established, the Court continues to analyse the situation. If there are serious reasons to disregard or trump European consensus, it should be disregarded, but these reasons should be clearly articulated. If European consensus in fact endangers minority rights then it can be, and is likely to be, put aside by the Court. In contrast, this book shows that on a number of occasions consensual decision-making has been beneficial and furthers the protection of minority rights.

The anti-majoritarian argument does not take into account the fact that human rights are anti-majoritarian in the sense that they prevent arbitrary decision-making of the majority of people within a particular State or region. The Court does not normally take the opinion of the majority of the European population into account because it is very hard to identify, and the legitimacy of deployment of such opinion is doubtful. The Court uses norms and practices that have been approved by the authorities of the Contracting Parties. This is important for two reasons. First, it is presumed that national legal systems have domestic safeguards against human rights violations. It is perfectly possible that such a system has failed to operate in a particular case in a particular State but it is hard to imagine that it has failed across Europe. Second, European consensus operates in the European context, and there is a much higher average level of human rights protection in Europe than in some other regions or worldwide. Therefore, the threat to human rights protection as identified by the anti-majoritarian argument is far-fetched.

The proponents of the anti-majoritarian argument suggest replacing European consensus with reliance on the moral prevalence of human rights in legitimising the ECtHR judgments. Human rights norms are often abstract and do not offer a clear solution in hard cases. Moreover, people can disagree which solution is the most appropriate. This is the case especially if the Court wants to use evolutive interpretation to 'update' human rights protection to the current-day standards. European consensus offers the most objective and verifiable way of identifying the 'tipping point' necessary for evolution. Moreover, both the margin of appreciation and evolutive interpretation have been criticised for lacking clear and objective factors that would delineate their scope. This book argues that among the factors available to the ECtHR, European consensus is the most clear and objective if it is applied consistently.

After discussing the main strands of substantive criticism, the book turns to a discussion on the legitimacy of the ECtHR and shows why European consensus helps to minimise certain legitimacy challenges that the ECtHR is facing. European consensus is an implicit consent of the Contracting Parties to accept a particular solution as a common standard. Central to this book is the argument that European consensus integrates decisions made by national authorities within the Court's reasoning, thereby supporting a synergistic relationship between the ECtHR case law and the laws and practices of the Contracting Parties. Consensus is a means of dialogue between the ECtHR and the Contracting Parties, which can further their cooperation in the area of human rights protection.

It is also argued here that the Court's legitimacy can be improved if it is seen by the stakeholders as an institution that merely implements legal norms and not as an institution that pushes its own political agenda forward, concealing it behind a legalistic smokescreen. Human rights provisions are broad and they can often justify conflicting solutions for hard cases. The Court needs a more precise interpretatory mechanism that can be connected to the sources of international law. It is argued that European consensus can be linked to customary norms or to general principles of law, which are both sources of international law.

European consensus helps to enhance legitimacy through ensuring the Court's subsidiary function and preventing unacceptable judicial activism. The Contracting Parties continue to question the legitimacy of the Court's interferences into the areas which were traditionally covered by State sovereignty. The Contracting Parties even decided to include a

reminder that the Court's role is subsidiary into the text of the Convention.[2] It seems that the Contracting Parties take subsidiarity seriously; this means that the States wish to participate in deciding complex and sensitive human rights issues. European consensus is an avenue for such participation. Through consensus, the Contracting Parties can influence the interpretation of the Convention, and perhaps this creates a sense of common ownership of the Convention case law.

This books ends with a discussion on the perceptions that judges have about the European consensus argument. Chapter 7 is mostly based on the interviews that were conducted with the sitting and former judges of the ECtHR. Thirty-three judges and many more lawyers of the Registry were interviewed for this project, and the most representative quotes from these interviews are incorporated into this chapter. The aim here is to prove that the judges consider European consensus as a legitimate tool of interpretation. This chapter presents the views of the judges about the reasons why the Court deploys European consensus. While the legitimacy of a particular aspect of a judgment is hard to prove, the book aims to determine whether the judges see European consensus as such. If so, it is safe to suggest that the Court will continue to use European consensus in its reasoning. The majority of the judges interviewed considered European consensus as a legitimate tool of interpretation but they also saw its limitations. European consensus is a persuasive argument and this is evident on at least two levels: it is persuasive for the judges sitting in the case and it can be persuasive for the authorities of the Contracting Parties which are supposed to execute the judgments. Finally, the judges expressed their views in relation to the identification of European consensus. The majority of the judges were very satisfied with the level of comparative law reports that they received from the Research Division and they confirmed that these reports were enough to establish consensus. The judges did not blindly follow the solution provided by European consensus and they considered this aspect of application of European consensus as a sufficient response to the anti-majoritarian argument.

[2] When Protocol 15 to the ECHR comes into force, the references to subsidiarity and the margin of appreciation will be included in the preamble to the Convention: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.' Article 1 of Protocol 15.

The book is mainly built on the analysis of the case law of the ECtHR and academic commentaries. It argues that the benefits of legitimacy that flow from European consensus are undermined if the concept is unclear and its application by the ECtHR is incoherent. If this is so, it would be perceived as an arbitrary and illegitimate concept which does not amount to a legal standard. This book will seek to clarify the ECtHR's approach to European consensus by analysing its use in the case law and outlining its possible implications on the legitimacy of the ECtHR judgments. In order to do this, all cases of the Grand Chamber of the ECtHR, starting from the creation of the permanent court in 1998, will be analysed. Some key Chamber judgments and judgments of the ECtHR delivered before 1998 will be reviewed. The book analyses the judgments that were issued by the ECtHR up to 1 January 2014.

2

The concept of European consensus

2.1 Introduction

This chapter opens the discussion on the concept of European consensus in the case law of the European Court of Human Rights (ECtHR or Court). It sets the scene for deeper analysis of the rationale for European consensus and how it can improve the legitimacy of the Court's decisions. It also aims to identify patterns in the application of consensus by the ECtHR, to rationalise these patterns and to propose certain improvements to the Court's practice.

This chapter seeks to conceptualise European consensus as a presumption that favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties. This presumption can be rebutted if the Contracting Party in question offers a compelling justification. Such a conceptualisation implies that European consensus has a strong persuasive effect and its rebuttal should be supported by convincing and lucid reasons.

Principles such as transparency, clarity and consistency are key facets of the process legitimacy of the Court's decisions.[1] European consensus is assessed through these principles, and the proposals offered in this chapter are predicated upon them. It will be argued that, while there are discernible patterns to the Court's application of consensus, its methodology would be strengthened by clarification.

Section 2.2 of this chapter assesses the terminology that the Court uses to refer to European consensus. The Court calls consensus by 'many names', and, because of this, it will be argued that it should be more consistent in using this terminology. The Court should also consistently employ a single well-defined term to avoid confusion. Moreover, the concept of consensus is criticised for not reflecting the word's literal meaning. Section 2.3 of this chapter demonstrates that European

[1] This point is discussed in more detail in Chapter 6.

consensus is not an *ad hoc* argument but a well-established doctrine of interpretation of the European Convention on Human Rights (ECHR or Convention). Having said that, it cannot be applied in every case due to its 'elitist' nature: it is not required in cases of repetitive applications[2] or in unique cases.[3]

Section 2.4 of this chapter explains how the Court applies European consensus, and it is argued that the application of consensus can be conceived in three stages: (1) preliminary stage, (2) stage of assessment and (3) stage of deployment. This conceptualisation helps to identify certain specific challenges in each of these stages.

In the preliminary stage, the Court collects comparative law materials. This is followed by an assessment of these materials where the Court confirms whether or not there is consensus. Finally, at the stage of deployment, the Court considers how decisive consensus might be for the outcome of the case. This section principally addresses the stages of assessment and deployment, while the preliminary stage is analysed in Chapter 4. The preliminary stage is separated from the stages of assessment and deployment because the latter ones are in the spotlight and can be examined by analysing the reasoning of the Court, while the preliminary stage is hidden and requires particular attention.

2.2 Definition of European consensus

2.2.1 Terminology

The consistent and coherent application of any legal concept is difficult if its scope remains unclear.[4] Therefore, the fact that the Court has not

[2] The case *Burdov (no 2)* v. *Russia* has identified a structural problem of non-execution of final national judgments. The Court pointed out that '[t]he State has thus been very frequently found to considerably delay the execution of judicial decisions ordering payment of social benefits such as pensions or child allowances, of compensation for damage sustained during military service or of compensation for wrongful prosecution. The Court cannot ignore the fact that approximately seven hundred cases concerning similar facts are currently pending before it against Russia.' *Burdov (no 2)* v. *Russia*, Application No 33509/04, Judgment of 15 January 2009, para. 133.

[3] See, *Broniowski* v. *Poland*, Application No 31443/96, Judgment of 22 June 2004.

[4] Clarity of legal concepts is an important aspect of the rule-of-law principle. Fallon argues that '[t]he Rule of Law is an ideal that can be used to evaluate laws, judicial decisions, or legal systems'. R.J. Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse', *Columbia Law Review*, 97 (1997) 1, 8–9. The rule-of-law principle should be applicable to the ECtHR's methods of adjudication. See, J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', *Columbia Journal of European Law*, 11 (2004), 113, 124–5. For more detailed discussion of