

CONTENTS

<i>List of figures</i>	<i>page</i>	xi
<i>Foreword</i>		xiii
<i>Acknowledgements</i>		xvi
<i>Table of cases</i>		xviii
<i>Abbreviations</i>		xxiv
1	Introduction	1
2	The concept of European consensus	9
	2.1 Introduction	9
	2.2 Definition of European consensus	10
	2.2.1 Terminology	10
	2.2.2 Level of consensus	14
	2.2.2.1 Consensus at the level of rules	15
	2.2.2.2 Consensus at the level of principles	16
	2.3 Spread of European consensus	17
	2.3.1 Importance of consensus	17
	2.3.2 Reasons for limited deployment of consensus	21
	2.4 Application of European consensus	23
	2.4.1 European consensus in action	24
	2.4.2 Limits of application of the European consensus argument	30
	2.4.2.1 Text of the convention and protocols	30
	2.4.2.2 Historical and political justification	32
	2.4.2.3 Moral sensitivity of the matter at issue	34
	2.5 Conclusion	36
3	Types of consensus	38
	3.1 Introduction	38

Cambridge University Press

978-1-107-04103-5 - European Consensus and the Legitimacy of the European Court of Human Rights

Kanstantsin Dzehtsiarou

Table of Contents

[More information](#)

viii

CONTENTS

3.2	Typology of consensus	39
3.2.1	Consensus based on comparative analysis of the laws and practices of the Contracting Parties	40
3.2.2	European consensus based on international treaties	45
3.2.3	Internal consensus within the respondent State	49
3.2.4	Consensus among experts	55
3.3	Interactions between different types of consensus	56
3.3.1	Interaction between European consensus based on comparative law and European consensus based on international treaties	57
3.3.2	Interaction between European consensus and internal consensus	60
3.3.3	European consensus and international trends	65
3.4	Conclusion	71
4	Behind the scenes: Comparative analysis within the Court	72
4.1	Introduction	72
4.2	Purposes of comparative law	74
4.2.1	Fit and vision	74
4.2.2	Information and persuasion	77
4.3	What is wrong with comparison? Criticism of comparative legal research conducted by the Court	78
4.4	Evolution of comparative legal research	82
4.4.1	Limited factual justification	82
4.4.2	Recourse to previous findings	84
4.4.3	Comparative law research prepared by the ECtHR	86
4.4.4	Comparative research conducted by third parties	97
4.5	Key challenges	101
4.5.1	Comprehensive comparative research	102
4.5.2	Legal provisions in context	105
4.5.3	Subject matter of comparison	109
4.5.4	Translation of legal terms	111
4.6	Conclusion	114

Cambridge University Press

978-1-107-04103-5 - European Consensus and the Legitimacy of the European Court of Human Rights

Kanstantsin Dzehtsiarou

Table of Contents

[More information](#)

CONTENTS

ix

5	Criticism of European consensus	115
5.1	Introduction	115
5.2	'Anti-majoritarian argument' against consensus	116
5.3	The minority rights challenge	122
5.4	Criticism of European consensus as a determinant of evolutive interpretation and the margin of appreciation	129
5.4.1	Criticism of evolutive interpretation and the margin of appreciation	130
5.4.2	European consensus: Between margin of appreciation and evolutive interpretation	132
5.4.2.1	European consensus and the margin of appreciation	132
5.4.2.2	European consensus and evolutive interpretation	138
5.5	Conclusion	142
6	Legitimacy of the Court and legitimacy of its judgments	143
6.1	Introduction	143
6.2	Lost legitimacy?	144
6.3	International constitutional challenges	149
6.3.1	State consent	149
6.3.2	Dialogue between the ECtHR and the Contracting Parties	155
6.3.3	Consensus as a source of international law	158
6.3.4	Subsidiarity	165
6.4	National constitutional challenges	167
6.5	Conclusion	175
7	European consensus: Perceptions of the ECtHR judges	177
7.1	Introduction	177
7.2	Research design and methodology	178

Cambridge University Press

978-1-107-04103-5 - European Consensus and the Legitimacy of the European Court of Human Rights

Kanstantsin Dzehtsiarou

Table of Contents

[More information](#)

x

CONTENTS

7.3	Why does the Court use European consensus?	182
7.4	How persuasive is European consensus?	189
7.5	How satisfactory is comparative research that leads to European consensus?	196
7.6	Criticism from within the palace walls	201
7.7	Conclusion	206
8	Conclusion	207
	<i>Appendix 1: List of interviewees</i>	212
	<i>Appendix 2: List of the Grand Chamber judgments with international or comparative law</i>	215
	<i>Index</i>	225