

Jens T. Theilen

European Consensus between Strategy and Principle

The Uses of Vertically Comparative Legal Reasoning
in Regional Human Rights Adjudication



Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Herausgegeben von
der Max-Planck-Gesellschaft
zur Förderung der Wissenschaften e.V.,
vertreten durch Prof. Dr. Anne Peters
und Prof. Dr. Armin von Bogdandy

Band 303

Jens T. Theilen

European Consensus between Strategy and Principle

The Uses of Vertically Comparative Legal Reasoning
in Regional Human Rights Adjudication



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Kiel, Univ., Diss., 2020

ISBN 978-3-8487-8091-4 (Print)
978-3-7489-2509-5 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8091-4 (Print)
978-3-7489-2509-5 (ePDF)

Library of Congress Cataloging-in-Publication Data

Theilen, Jens T.

European Consensus between Strategy and Principle
The Uses of Vertically Comparative Legal Reasoning
in Regional Human Rights Adjudication

Jens T. Theilen

497 pp.

Includes bibliographic references.

ISBN 978-3-8487-8091-4 (Print)
978-3-7489-2509-5 (ePDF)

1st Edition 2021

© Jens T. Theilen

Published by

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8091-4 (Print)
ISBN 978-3-7489-2509-5 (ePDF)

DOI <https://doi.org/10.5771/9783748925095>



Onlineversion
Nomos eLibrary



This work is licensed under a Creative Commons Attribution – Non Commercial – No Derivations 4.0 International License.

For T.T. and I.T.

Acknowledgments

This study started life as a doctoral dissertation, submitted to the University of Kiel in September 2019, with the viva taking place in July 2020. Case-law and literature were updated for publication in January 2021. I would like to thank my supervisor, Prof. Dr. Andreas von Arnould, not only for his feedback on my dissertation but also for his support in many ways throughout the years. Thanks are also due to Prof. Dr. Nele Matz-Lück for her comments as second examiner of the dissertation, and to Prof. Dr. Anne Peters and Prof. Dr. Armin von Bogdandy for accepting the final product to be published in the present series.

Throughout the process of writing my dissertation, I was lucky enough to have the support of many people both in Kiel and beyond. Heartfelt thanks go to my friends and colleagues at the Walther Schücking Institute for their company and feedback throughout the years, notably Dr. Stefan Martini, Sinthiou Buszewski, and Katharina Wommelsdorff. Particular thanks to Wiebke Staff and Isabelle Haßfurther for bringing some joyous utopianism to Kiel!

Thanks are also due to all those who offered feedback at the various conferences, workshops, and seminars at which I presented on the topic of European consensus. Dr. Vassilis Tzevelekos and Dr. Panos Kapotas in particular provided support and encouragement even at a very early stage.

In late 2017, I spent several months at Queen Mary, University of London, where Prof. Dr. Merris Amos and Dr. Paul Gragl were kind enough to read and comment on several draft chapters, and many others likewise offered helpful feedback. Dr. Isobel Roele's questions at the staff seminar were particularly helpful, as were the many avid discussions (years ago in Oxford and again in London!) with Dr. Violeta Moreno-Lax.

For reading draft chapters, summaries, or related papers and providing detailed feedback, I would also like to thank Prof. Dr. Shai Dothan, Prof. Dr. André Nollkaemper, and Prof. Dr. Ben Golder. A special thanks to Prof. Dr. Janneke Gerards for repeatedly taking the time to offer feedback and advice.

I have also profited greatly from inspiring conversations with friends and colleagues at many a conference and workshop, whether in the context of European consensus, human rights in general, or other topics altogether – and for that matter over dinner and via Skype or e-mail. I would

Acknowledgments

like to thank, in particular, Prof. Dr. Eva Brems, Prof. Dr. Philip Allott, Dr. Kay Lalor, and Dr. Damian Gonzalez-Salzberg. Thanks also to Prof. Dr. Sigrid Boysen for her invaluable support during the final phases of the dissertation.

And of course, none of this would have been possible without those who provided the foundations for me to pursue a doctorate in the first place and who have continued to offer material and emotional support over the last few years, especially in times of exertion and grief. My greatest thanks to my friends and family for every small – or large! – loving gesture. Thank you to Babs and Ulli for the welcoming homeliness of a writing retreat in Kassel, to Erika for her unconditional love and support in so many ways, and to Felix, for everything.

Table of Contents

<i>Chapter 1: Justifying Concrete Norms in Regional Human Rights Law: The Uses of European Consensus in the Court's Processes of Justification</i>	15
I. Human Rights Adjudication: High Stakes and Little Guidance	15
II. Introducing European Consensus	19
III. Key Characteristics of European Consensus	23
IV. European Consensus and Critical International Legal Theory	32
1. Different Perspectives on Consensus: Structuralist Methodology	32
2. Human Rights between Apology and Utopia	35
3. Morality-focussed and Ethos-focussed Perspectives	38
4. Strategic Considerations and Consensus as Legitimacy-Enhancement	45
5. The Indeterminacy of Processes of Justification	49
V. Outline of the Following Chapters	55
 <i>Chapter 2: Morality-focussed Perspectives: European Consensus as an Infringement on Prepolitical Rights</i>	 60
I. Introduction	60
II. Morality-focussed Criticism of European Consensus	62
1. Minority Rights and the Tyranny of the Majority	62
2. Regional Human Rights Law and Distrust of States	72
3. The Is-Ought Distinction and Strict Normativity	76
III. Ambivalent Morality-focussed Perspectives on the Spur Effect	84
IV. Interim Reflections: Tackling Prejudice	89
 <i>Chapter 3: Ethos-focussed Perspectives: From National Ethos to a Pan-European Ethos</i>	 94
I. Introduction	94

Table of Contents

II. Against the Morality-focussed Perspective: Differing Epistemologies	97
III. National Ethic: From Traditions to Democratic Procedures	103
IV. Ethos-focussed Perspectives at the Transnational Level	111
1. Lack of Regional Democracy and Human Rights as a Cooperative Venture	111
2. The Democratic Credentials of European Consensus	114
3. From National Ethic to a Pan-European Ethos	119
4. Implications of Harmonisation: Human Rights and European Integration	126
V. Interim Reflections: Vestiges of Homogeneity	132
<i>Chapter 4: Interaction between Morality-focussed and Ethos-focussed Perspectives: Triangular Tensions and Instrumental Allegiances</i>	137
I. Introduction	137
II. An Attempt at Reconciliation: The Condorcet Jury Theorem	139
1. European Consensus as Collective Wisdom	139
2. The Spur Effect and the Similarity Condition	145
3. The Rein Effect and Bias Across States	150
III. Triangular Tensions and Instrumental Allegiances	157
1. Persistent Tensions Due to Differing Epistemologies and Idealisations	157
2. From Tensions to Oscillation: The Example of Core Rights	161
3. Instrumental Allegiances	168
IV. Interim Reflections: Against Naturalisation	171
<i>Chapter 5: Establishing Consensus (I): Numerical Issues</i>	176
I. Introduction	176
II. Consensus as Reasonable Agreement: But What Is Reasonable?	180
III. Factually Oriented Approaches to European Consensus	184
1. The Conventional Account: Asymmetry in Favour of the Rein Effect	184

2. The Ethos-focussed Perspective versus Consensus-Agnostic Middle Ground	188
3. The Ethos-focussed Perspective versus the Epistemic Approach	193
IV. Morality-focussed Elements: Trends and Directionality	196
V. Interim Reflections: Statistical and Ideal Majorities	206
<i>Chapter 6: Establishing Consensus (II): International Law as European Consensus</i>	210
I. Introduction	210
II. European Consensus and Systemic Integration	212
III. Ethos-focussed and Morality-focussed Perspectives on International Law	220
IV. Different Kinds of Regional and International Law	225
1. Taxonomies of International Law References	225
2. Law of the European Union	227
3. Council of Europe Materials	229
4. Global International Law	234
5. Soft Law	237
6. Non-Representative Documents	240
V. Consensus based on International Law versus Consensus based on Domestic Law	242
VI. Interim Reflections: International Law as Grounded Yet Aspirational	249
<i>Chapter 7: Establishing Consensus (III): Different Levels of Generality</i>	252
I. Introduction	252
II. Levels of Generality in the Court's Use of European Consensus	255
III. The Implications of Shifting Levels of Generality	261
1. Different Constellations within Triangular Tensions	261
2. Shifting Levels of Generality as a Search for Reflective Equilibrium	269
IV. Interim Reflections: Beyond the Goldilocks Level of Generality	279

Table of Contents

<i>Chapter 8: Consensus in Context: Autonomous Concepts, the Margin of Appreciation, and Tensions within the Court's Doctrines</i>	285
I. Introduction	285
II. Autonomous Concepts	287
III. The Margin of Appreciation and Convention Standards	297
1. Two Concepts of the Margin of Appreciation – and of Consensus?	297
2. Contextualising the Rein Effect	307
3. Contextualising the Spur Effect	316
IV. Interim Reflections: Instable Oscillations and Doctrinal Connotations	326
<i>Chapter 9: The Strategic Approach: Consensus as Legitimacy-Enhancement</i>	329
I. Introduction	329
II. European Consensus as Legitimacy-Enhancement	331
1. Investing Sociological Legitimacy with Normativity	331
2. The Background Assumption: Overcoming a “Legitimacy Crisis”	335
3. The States Parties as Agents of Legitimacy	337
4. European Consensus as the Basis of Incremental Development	342
5. The Court as the Object of Legitimacy: Strategic Implications	346
III. The Practical Limitations of Consensus as Legitimacy-Enhancement	350
IV. Interim Reflections: Abstract Strategizing	364
<i>Chapter 10: Of Conflation and Normalisation: European Consensus between Strategy and Principle</i>	367
I. Introduction	367
II. Non-Ideal Theory: The Dilemma of Strategic Concessions	369

III. European Consensus as a Conflation of Strategy and Principle	374
1. Different Perspectives on Consensus within Non-Ideal Theory	374
2. Consensus and an Impression of Objectivity	380
3. The Normalisation of a Strategic Approach to Consensus	392
IV. Interim Reflections: Rethinking the Role of the Court	398

Chapter 11: Engaging with Indeterminacy: Imagining Different Uses for Vertically Comparative Legal Reasoning 402

I. Pulling Together the Threads: Beyond Consensus as Compromise	402
II. Indeterminacy and the Motivation for Critique	405
III. The Role of Human Rights Courts	412
IV. Justifying Concrete Norms in Regional Human Rights Law, Revisited	417
1. The Indeterminacy Thesis in the Judicial Context	417
2. European Consensus and the Perpetuation of Current Power Structures	424
3. A More Openly Political Court?	432
4. Vertically Comparative Law as a Reflective Disruption of Equilibrium	438
V. Outlook: Future Articulations of Human Rights	446

Table of Cases 450

Bibliography 461

