Articles

Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners

By Kanstantsin Dzehtsiarou and Alan Greene***

A. Introduction

In April 2011, University College Dublin (UCD) School of Law research students held their Fifth Annual Postgraduate Conference, the theme of which was "The Legacy and Future of the European Court of Human Rights (ECtHR). Evaluating Sixty Years of the European Human Rights Project." The articles contained in this special edition of the German Law Journal reflect the efforts made at this conference by its participants. While the papers presented vary quite widely in their substantive content, they are connected by a recurring theme— that the ECtHR faces a crisis of legitimacy. A judgment is legitimate if it is persuasive to the civic society constituted by the European Convention of Human Rights (ECHR), and perceived as authoritative by the subjects affected by the ECtHR's decision.[1] The judgments of the ECtHR are fiercely criticized and their legitimacy is repeatedly questioned by the Contracting Parties and media in particular, and by civic society in general. As it stands, the ECtHR is suffocating from the overwhelming number of applications lodged, and even the tiny percentage of those applications that are decided by it face "a barrage of hostile criticism," as Michael O'Boyle outlines in his article. The ECtHR's future, to a major extent, depends on how this crisis is tackled.

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[1] *See* for example, BAŞAK ÇALI, ANNE KOCH AND NICOLE BRUCH, THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE VIEW FROM THE GROUND (2011).

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B. A Victim of its own Success?

As highlighted by Justice Hedigan, the phrase that is often repeated in relation to the ECtHR is that it is a "victim of its own success."[2] However, it would not be an innovative statement to say that the ECtHR's docket crisis is at least partially due to some Member States' failure to fully implement the ECtHR judgments.[3] The ECtHR has itself contributed to the problem of overwhelming applications by issuing sometimes unclear and inconsistent rulings, and by failing to distinguish clearly between admissible and inadmissible cases. As outlined in Andrew Tickell's article, the ECtHR's admissibility decisions very often resemble those made on the merits in their content. If it would clarify its approach and delineate reasons as to why specific applications are declared inadmissible, this would arguably reduce the amount of applications. The ECtHR should not surprise parties with arbitrary results, but should clearly articulate the logic behind its decisions and judgments. In a situation when the ECtHR faces a docket crisis of such magnitude, it is in its own interest to clearly state the meaning of the ECHR and let the national courts implement this.

It is not suggested that the docket crisis can be wholly overcome by issuing clear and consistent rulings. To counter repetitive application, the ECtHR came up with the idea of pilot judgments.[4] Additionally, the *erga omnes* effect of the ECtHR judgments is also often mentioned.[5] Ideally however, each and every one of its judgments should be a "pilot," which means that the respondent party and effectively all other High Contracting Parties

[2] *See* for example, MARK JANIS, RICHARD KAY & ANTHONY WILFRED BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 881 (2008); Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime* 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125 (2008); Aidan O'Neill, *Reform of Strasbourg Court: a Modest Proposal*, UK HUMAN RIGHTS BLOG (28 Mar. 2011), available at http://ukhumanrightsblog.com/2011/03/28/reform-of-strasbourg-court-a-modest-proposal-aidan-oneill-qc/ (last accessed: 27 September 2011). This phrase was used in the brochure published by the Council of Europe. *See* European Court of Human Rights, *European Court of Human Rights: The ECHR in 50 Questions*, (2010), available at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf (last accessed: 27 September 2011).

[3] *See* Helfer, *supra* note 2 at 129-130; Fiona de Londras, *The European Court of Human Rights, Dual Functionality, and the Future of the Court after Interlaken*, 45 UCD WORKING PAPERS IN LAW, CRIMINOLOGY & SOCIO-LEGAL STUDIES RESEARCH PAPER (2011). Available at http://ssrn.com/abstract=1773430 (last accessed: 27 September 2011).

[4] *See* Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 57 NOMIKO VIMA 1890 (2009).

[5] *See* Interlaken Declaration of 19 February 2010, available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf (last accessed: 29 September 2011) and Izmir Declaration of 27 April 2011, available at http://www.coe.int/t/dc/press/news/20110427_declaration_en.asp (last accessed: 29 September 2011).

should amend their practice to be in compliance with the ECHR. A responsible attitude of national states to the ECtHR therefore is a crucial requirement for its future success.[6]

The delay caused due to its inability to handle the ever-increasing wave of applications also negatively affects the legitimacy of the ECtHR. As the saying goes, "Justice delayed is justice denied." The ECtHR's ability to deliver judgments promptly is seen as one of the most important criteria of legitimacy by stakeholders;[7] however, the ECtHR cannot deliver prompt judgments when it operates under the growing pressure of new complaints. In such circumstances national authorities should properly implement its judgments.

It can be argued that the ECtHR should be more specific in those general measures that it requests for governments undertake. Moreover, Contracting Parties should be willing to implement these general measures. On a recent Russian chat show the ban of the gay pride parade in Moscow was the topic of discussion.[8] One of the discussants mentioned that the ECtHR found the previous ban in violation of the ECHR and awarded 3000 Euros for just satisfaction to the victims – the organizers of the banned gay pride parade.[9] In response, a Member of the Russian Parliament, Alexander Khinstein, pointed out that Russia was ready to pay 3000 Euros every year to the organizers of gay pride parades but there would be no such parades in Moscow. Perceptions of ECtHR judgments as merely awarding just satisfaction are damaging to its effectiveness as a whole. Therefore, the importance of general measures should be emphasized by the ECtHR, and their meaning should be clear. Moreover, the Council of Europe should place an appropriate level of interstate pressure on governments to implement these measures.

The ECtHR cannot strike down a piece of legislation it is called to review. Moreover, it cannot often affect the outcomes of its judgments. One can argue that this is less the case after Protocol 14[10] came into force. Article 46 of the ECHR as amended by Protocol 14 allows the Committee of Ministers of the Council of Europe to refer cases back to the ECtHR if they are not executed. In such cases the latter can deliver a decision confirming

[6] *See* Helfer, *supra* note 2; de Londras, *supra* note 3.

[7] *See* BAŞAK ÇALI *et. al.*, *supra* note 1.

[8] *See* the chat show on the Russian state-owned television channel: *A Duel* (RTR Television broadcast 26 May 2011).

[9] *See* Eur. Court H. R., Alekseyev v. Russia, Eur. Ct. H.R. (2010), available at: http://archive.equal-jus.eu/290/1/ECtHR-Alekseyex_v_Russia-2010-10-21.pdf (last accessed: 29 September 2011).

[10] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (May 2004), available at http://conventions.coe.int/Treaty/en/Treaties/html/194.htm (last accessed: 29 September 2011). Protocol 14 came into force on 1 June 2010; it enshrined a number of procedural amendments to the ECHR including single-judge formation of the ECtHR, new admissibility criterion, and 9-year terms for judges to hold office, amongst others.

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whether or not a state has executed the judgments.[11] The ECtHR however, has not yet delivered any such decision, and therefore, this mode of execution has mainly had a psychological effect on the Contracting Parties to the Convention so far. Moreover, even if the ECtHR delivered a decision about non-execution of the judgment, the Contracting Party would arguably still have had broad discretion as to the means of implementation of the judgments.

The inability of the ECtHR to process all applications submitted to it is criticized less frequently than its actual judgments in sensitive cases. As an example, Michael O'Boyle outlines the reaction in the British press on the recent prisoners' voting ban.[12] Here, the British backbench Parliamentarians questioned the legitimacy of the ECtHR, and its principle role as a human rights arbiter. Mr. Jack Straw,[13] for example, pointed out that

> A ban on convicted prisoners voting while in jail has existed in this country at least since 1970. Post-war, the question has been considered under a Labour Administration in 1968, a Conservative Administration in 1983 and a Labour Administration in 1999-2000. On each occasion, the position was confirmed by an overwhelming cross-party consensus. On each occasion, amendments could easily have been moved in the House by those who supported an end to the ban, and voted on. On none of those occasions, and on no other occasion that I can recall, has this ever been a matter of active pursuit for Members of any party in this House.[14]

This criticism maintains that the ECHR is not legitimate to adjudicate on domestic human rights issues. In circumstances when the legitimacy of its judgments is constantly questioned, the ECtHR must base its validity on a consistent application of the ECHR and Protocols, clear rulings, dialogue between ECtHR and national authorities, and by providing clear guidance to Contracting Parties. To some extent, the future of the ECtHR depends on its ability to enhance its legitimacy and authority among these Parties. In short, the

[11] According to Article 46 of the ECHR, if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party, and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the European Court of Human Rights (ECtHR) the question of whether that Party has failed to fulfill its obligation to execute the judgment.

[12] *See* Hirst v. the United Kingdom, Judgment of 6 October 2005, (2006) 42 Eur.Ct.H.R. at 41 (2006); Greens and M.T. v. the United Kingdom, Judgment of 24 November 2010, 160 N.L.J. 1685 (2010).

[13] The Right Hon Jack Straw, Acting Shadow Deputy Prime Minister 2010 (Labour Party).

[14] *See The Backbench Parliamentary Debates:"Prisoners' right to vote"* UK PARLIAMENT WEBSITE (10 Feb, 2011). Available at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm (last accessed: 27 September 2011).

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willingness of the ECtHR, national states, and legal and academic communities to cooperate can help to enhance the ECtHR's legitimacy.

C. National Discourse and the *Foreign Entity*

It is unsurprising, given the UK's dualist approach to international law,[15] its strong Euro-skepticism (of both the European Union (EU) and the ECHR) in certain aspects of the media[16] and its principle of parliamentary sovereignty,[17] that its politicians have presented a huge challenge to the ECtHR's legitimacy. The political reaction to *Hirst* was merely the crystallization of this long-held skepticism towards Europe, rather than a vehemently held opposition to prisoners' right to vote.[18] This skepticism posits the Convention as a *foreign entity*, encroaching upon the domestic legal sphere. This perception is incorrect from the legal point of view, as the ECHR *is* a part of the domestic legal sphere of all Contracting Parties, monist and dualist.[19] Thus in essence, domestically recognized norms are being used to facilitate compliance with human rights obligations.[20] The ECHR merely represents the minimum base of agreement between states. National authorities, including courts, are therefore free to raise human rights standards above this baseline.[21] This advancement

[15] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 71-72 (1995).

[16] See, as discussed in Michael O' Boyle's article (this issue), The Future of the European Court of Human Rights, 12 GERMAN LAW JOURNAL (2011), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1388 (last accessed: 27 September 2011). *See also*, *infra* note 18.

[17] *See generally* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-48 (1902).

[18] Such is the view of Labor MP Yasmin Qureshi, who stated that "[T]he debate is about whether prisoners should have the right to vote, but it seems to have been turned into an opportunity to bash the European Court of Human Rights, the ECHR and the Human Rights Act." *See* 523 PARL. DEB., H.C. (2011) 535 (U.K). During the course of this debate, Conservative MP Nick Boles urged the government to find a way to tell the ECtHR to go "Back in your (*sic*) box." *See* 523 PARL. DEB. (2011) 56 (U.K). Many quarters of the British media also seemed to corroborate Qureshi's assertion; *see* James Slack, *Stop meddling in asylum cases, unelected Euro judges warned by 47 countries* (title of archived article is different from original cited. Please check to see if they are the same), DAILY MAIL, 27 Apr. 2011. Available at: http://www.dailymail.co.uk/news/article-1381351/Stop-meddling-asylum-cases-unelected-Euro-judges-warned-47-countries.html (last accessed: 27 September 2011); Leo McKinstry, *We have to ditch the European Court of Human Rights*, THE EXPRESS, 14 Apr. 2011, available at: http://www.express.co.uk/posts/view/240547/We-have-to-ditch-the-European-Court-of-Human-Rights (last accessed: 27 September 2011); Dominic Raab, *What happens if we defy Europe? Nothing; The Government should refuse to enact EU laws that make no sense-like votes for prisoners* THE DAILY TELEGRAPH, 3 Feb. 2011, available at: (last accessed: September 27, 2011).

[19] *See* HENKIN, *supra* note 15.

[20] AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT (1998) 146 (2009).

[21] FIONA DE LONDRAS & CLIONA KELLY, EUROPEAN CONVENTION ON HUMAN RIGHTS ACT: OPERATION, IMPACT AND ANALYSIS 166-169 (2010).

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of human rights can, however, be more palatable if it is effectuated by national bodies, as the *foreign entity* argument evaporates. Thus any advancement of human rights by the UK Supreme Court, or indeed, by any domestic court may, as advocated by Justice Hedigan, be a more palatable vehicle to advance the scope of the ECHR— at least at a domestic level— further than that which is currently done by the ECtHR.[22]

Lord Hoffmann's dissent in the House of Lords in *A v. the United Kingdom*[23] as discussed in Alan Greene's article reflects this proposed approach of a national judge prepared to advance obligations contained in the ECHR further than the ECtHR, for the purpose of the protection of human rights. It is with some irony that Lord Hoffmann's approach is being advocated as a means of increasing the legitimacy of ECHR's evolution, given his strongly-worded criticisms of the ECtHR, as documented by Michael O' Boyle and Kanstantsin Dzehtsiarou. However, Lord Hoffmann's argument in this instance is that the laws of one Contracting Party are essentially being used to change those of another.[24] It does not however, preclude domestic authorities (e.g. national courts) from using the ECHR— enshrined in domestic law— to advance these human rights obligations themselves. By advocating for more pro-active national courts, the legitimacy of the ECHR and the ECtHR can be advanced, as the norms recognized become a catalyst for change at the domestic level, rather than having a Contracting Party brought to account before an international body.[25] When this general level of protection sufficiently increases with respect to the majority of the Contracting Parties, it can become an ECHR standard through the medium of European consensus.

In addition, Justice Hedigan's discussion of the ECtHR's web casting project may also be of assistance to increase the legitimacy of the ECtHR in this regard. By allowing the public a mode of easy access to see how the ECtHR operates in practice, it may increase the feeling of proximity between the ECtHR and citizens of Member States by casting down the walls of a perceived ivory tower, and replacing them with the clarity of a computer screen. In turn, the ECtHR could be viewed less as a foreign and unknown entity and more as a vital cog in national legal systems, implying that its judgments ought to be respected and adhered to.

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[22] *See* however the debate *infra* note 26, relating to the criticisms that can be levied on all aspects of the judiciary engaging in "activism" due to the "democratic deficit" they suffer from.

[23] A v. The United Kingdom, 2 WLR 87 (2005).

[24] Lord Hoffmann, *The Universality of Human Rights*, 125 LAW QUARTERLY REVIEW 416, 428-429 (2009).

[25] *See* Fiona de Londras, *International Human Rights Law and Constitutional Rights: In Favour of Synergy,* 9 INTERNATIONAL REVIEW OF CONSTITUTIONALISM 307 (2009).

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D. Evolution, Not Revolution

Advocating an increased level of judicial activism on the part of national courts is itself subject to criticism. Judges lacking a democratic mandate may be considered inappropriate to decide certain politically sensitive issues.[26] Any advancement of the scope of the ECHR by national courts or the ECtHR will therefore inevitably face some legitimacy challenges. At the same time, the ECHR has to develop and ensure that the rights protected are effective and up-to-date. In his article Kanstantsin Dzehtsiarou argues that evolutive interpretation should be based on European consensus to avoid arbitrary judgments. The issue of the legitimacy of evolutive interpretation should therefore be even more important after the EU becomes a party to the ECHR.

With the accession of the EU— a body itself often described as suffering from a "democratic deficit"[27]— to the ECHR, a new dimension to this debate is created. Noreen O'Meara flags the potential issues that will invariably arise once secession is complete. While the legitimacy of ECtHR judgments may not be a primary concern for the EU, what may warrant attention from the latter is the potential effect of an ECHR ruling that undermines directly applicable[28] EU law at a national level. Ordinarily, under ECtHR judgments, only those that constitute a party to a case have obligations upon them to conform to its judgments.[29] However, in such instances where a piece of EU law is found to be inconsistent with the ECHR, an obligation would be on the EU to ensure change, even though the effects of this compliance would be felt at a domestic level across the whole of the EU. With the potential of the ECtHR to effectuate such powerful change across the EU, it is all the more important that the ECtHR ensure its legitimacy by clear, cogent reasoning and methodology.

Roderic O'Gorman's advocacy of the accession of the EU to the ECHR after the Lisbon Treaty as an opportunity for the European Court of Justice (ECJ) to improve the protection of economic and social rights illustrates the limitations the ECHR faces by operating alone in the protection of human rights. If the ECtHR were to expand its jurisdiction to recognize these rights, its legitimacy would be clearly undermined. Instead, O'Gorman's solution envisages vindication of these rights through the EU, and a meaningful understanding of Union citizenship. It is important therefore, for the ECtHR to recognize its limitations and work with others in order to advance the human rights project.

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[26] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L. J. 1346 (2006).

[27] *See* Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 JOURNAL OF COMMON MARKET STUDIES 533 (2006); Kevin Featherstone, *Jean Monnet and the 'Democratic Deficit' in the European Union 32* JOURNAL OF COMMON MARKET STUDIES 149 (1994).

[28] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen 1963 ECR 1, 1970 CMLR 1.

[29] According to Article 46 of the ECHR, *supra* note 11, the High Contracting Parties undertake to abide by the final judgment of the ECtHR in any case to which they are parties.

That conceded, the ECHR was never seen as an "end game,"[30] but rather, is perceived as a "living instrument," capable of evolution. According to Hayek however, an integral aspect of the rule of law is that directives that bind government action are "fixed and announced before hand— rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[31]

In this process of evolution therefore, the ECtHR must strike a balance between change and consistency, in order to preserve its legitimacy. Sarah Lucy Cooper presents the ECtHR jurisprudence on LGBT rights, a particularly sensitive issue amongst certain Contracting Parties as unclear, inconsistent and oscillating between advancing and hindering the scope of these rights. This stands out of line with the clear and rational rule of law approach, as advocated by Hayek. Rather, the ECHR must evolve in a predictable, consistent manner and in doing so, can increase its legitimacy. Kanstantsin Dzehtsiarou's article shows how "consensus" can ensure evolutive interpretation of the ECHR (when its principles? policies? judgments?) are controlled and applied in a predictable manner. The foreseeable nature of evolution that consensus may produce has the potential to objectivize the ECtHR's judgments, reducing the strength of any allegations pertaining to an underlying conservativism at the heart of the ECtHR, as suggested by Sarah Cooper's article. This in turn has the potential to increase the persuasiveness, and consequently the legitimacy, of the ECtHR's judgments, as they would then be the result of logical, clear reasoning and methodology.

E. Conclusion— Standing on the Shoulders of Giants[32]

Like the ECtHR and the burgeoning caseload it faces, a conference with as broad a mandate as "The Legacy and Future of the European Court of Human Rights" can never hope to give due attention to all issues that come within its ambit. If it even attempted to do so, little value would have been gained, and the persuasiveness of any potential contribution diluted. Instead, by focusing in detail on selective issues and giving due consideration to these, one can glean recurrent trends, methods and solutions that may be applicable across the spectrum. The UCD School of Law Postgraduate Conference on Human Rights coincided with the launch of a new Masters program in Human Rights, to be run jointly by the School of Law and UCD School of Politics and International Relations. The

[30] Jared Wessel, *Relational Contract Theory and Treaty interpretation: End-Game Treaties v. Dynamic Interpretation,* 60 ANNUAL SURVEY OF AMERICAN LAW 149 (2004).

[31] FRIEDRICH A HAYEK, THE ROAD TO SERFDOM 75-76 (1944).

[32] Letter from Isaac Newton to Robert Hooke, 5 February 1676. *See* JEAN-PIERRE MAURY, NEWTON: UNDERSTANDING THE COSMOS (1992).

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Conference brought together legal academics studying in the field of Human Rights, and practitioners with hands-on experience of the inner workings of the ECtHR, who possess special insight into its projected evolution.

These two perspectives— looking in on the ECtHR and looking out from within, when taken together, give a more complete and balanced picture of the ECtHR. This symbiotic relationship between academics and practitioners is oftentimes neglected, with divergent views on perspective opinions and problems. A closer relationship has never been more necessary, given the legitimacy crisis that the ECtHR faces. Only by academia being grounded in reality can any solutions proffered from the law school be persuasive to those who operate within the Council of Europe. Similarly, any solutions offered from practitioners must respect and withstand academic scrutiny, so that those entrusted with the education of future lawyers have faith in the institutions that epitomize the beliefs and truths they espouse. The UCD School of Law Conference on Human Rights endeavored to do so, and the papers presented in this edition stand as a testament to its achievements in this regard.

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