CONTENTS

List of figures page xi Foreword xiii Acknowledgements xvi Table of cases xviii Abbreviations xxiv

- 1 Introduction 1
- 2 The concept of European consensus 9

2.1 Introduction 9

- 2.2 Definition of European consensus 102.2.1 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

vii

2.4.2.1 Text of the convention and protocols 302.4.2.2 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

3.2 Typology of consensus 39 Consensus based on comparative analysis 3.2.1 of the laws and practices of the Contracting Parties 40 European consensus based on international treaties 45 3.2.2 Internal consensus within the respondent State 3.2.3 49 Consensus among experts 55 3.2.4 3.3 Interactions between different types of

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

consensus

viii

4 Behind the scenes: Comparative analysis within the Court 72

56

- 4.1 Introduction 72
- 4.2 Purposes of comparative law 744.2.1 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

CONTENTS

1X

- Criticism of European consensus 115 5
 - 5.1 Introduction 115
 - 5.2 'Anti-majoritarian argument' against 116 consensus
 - 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

- Criticism of evolutive interpretation and the margin of 5.4.1appreciation 130
- European consensus: Between margin of appreciation and 5.4.2 evolutive interpretation 132
 - European consensus and the margin of 5.4.2.1 appreciation 132
 - 5.4.2.2 European consensus and evolutive interpretation 138
- 5.5 Conclusion 142
- Legitimacy of the Court and legitimacy of its 6 judgments 143

6.1 Introduction 143

6.2 Lost legitimacy? 144

6.3 International constitutional challenges 149

State consent 6.3.1 149

- Dialogue between the ECtHR and the Contracting 6.3.2 Parties 155
- Consensus as a source of international law 1586.3.3
- Subsidiarity 165 6.3.4

6.4 National constitutional challenges 167

6.5 Conclusion 175

- European consensus: Perceptions of the ECtHR judges 177
 - 7.1 Introduction 177
 - 7.2 Research design and methodology 178

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

Appendix 1: List of interviewees212Appendix 2: List of the Grand Chamber judgmentswith international or comparative law215Index225