

[Review] Jonas Christoffersen and Mikael Rask Madsen
(2011) The European court of human rights between law and
politics

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The European Court of Human Rights between Law and Politics, Edited by Jonas Christoffersen and Mikael Rask Madsen, Oxford, Oxford University Press, 2011. 236 pp.

The European Court of Human Rights (ECtHR) faces considerable challenges, not least a burgeoning caseload and increased reluctance of Member States to enforce its jurisprudence. This book brings together leading academics and practitioners to give a new perspective on the ECtHR and its on-going reform. The key premise of the editors Jonas Christoffersen, Executive Director of the Danish Institute for Human Rights, and Mikael Rask Madsen, Professor of European Law and Integration and Director of the Centre for Studies in Legal Culture at the University of Copenhagen, is that just over fifty years since its inception, the ECtHR is at a crossroads, institutionally and politically. By examining the ECtHR in its historical, legal and socio-political context, this book seeks to provide a better understanding of what has facilitated and impeded the ECtHR to date and the likely impact of these factors going forward.

The book is in two parts, Part 1 Politics and Institutionalization and Part 2 Law and Legitimization. Part 1 loosely takes a chronological path, starting with Ed Bates' examination (Chapter 2) of the background to the drafting of the European Convention on Human Rights (ECHR). Whilst one view might be that the post-war negotiations in a period of uncertainty are familiar territory, Bates' analysis is a reminder that the ECHR of 1950 was regarded by many as a great disappointment, particularly as ratification was possible without Member States accepting either the right of individual petition or the ECtHR's jurisdiction. Alongside setting out the historical context Bates highlights parallels between then and now, including national sovereignty and the ECtHR's constitutional role. This is complemented by Mikael Rask Madsen's discussion (Chapter 3) of the 1970s, a period in which he argues the ECtHR moved from cautious 'legal diplomacy' (48) to a far more progressive institution as reflected in the jurisprudence of the time. Madsen sets this development firmly in the changing socio-political context of human rights and the increased legitimacy of the ECtHR. An appreciation of the ECtHR's achievements, despite its shortcomings, recurs throughout the book and Madsen makes a convincing argument that it was the highly-skilled judges of the 1960s, through their understanding that the balance needed to be struck in favour of the Member States at that time, who 'paved the way for the progressive integrationist jurisprudence of the late 1970s' (60).

In Chapter 4 Erik Voeten extends the focus on the ECtHR's judges through an examination of the appointment process and the internal workings of the ECtHR. Voeten explores the tension between having truly independent judges, namely by eliminating the influence of

national governments on appointments, a move which he concludes would be unwise, and the political accountability and legitimacy that the appointment process brings.

The role of NGOs and social activists is explored in Chapter 5. Rachel Cichowski uses a comparative case study of minority rights cases against Turkey and the UK to scrutinise the relationship between the ECtHR and civil society. This, she argues, has been and continues to be, a two-way process, with groups such as Liberty focussing on strategically important cases and the ECtHR becoming increasingly receptive to the advisory function of NGOs which, she argues, is reflected in the jurisprudence. Cichowski describes the relationship with the NGOs as 'truly exemplary' (95) and envisages NGOs and social activists playing an important role going forward in the domestic system by pressuring the executive, legislature and national courts alongside providing advice and education on ECHR rights thus reducing the ECtHR's caseload. Desirable as this may be, one might reflect that it does not address the tension between NGOs' work to increase the accessibility of the ECtHR and the insupportable backlog of cases that this has resulted in.

Cichowski's analysis leads rather neatly to perhaps one of the most interesting chapters in which Anthony Lester QC, who argued his first case in Strasbourg over forty years ago, gives a personal insight into the workings of the ECtHR (Chapter 6). He argues, in line with a key theme of the book, that lessons from the ECtHR's history can be used to find solutions to the challenges of the present. Lester makes a convincing case for reform which would not curtail the right to individual petition but would instead be a judicial filtering system which, he argues, would enable the Grand Chamber to concentrate on cases of pan-European significance.

The second part of the book focusses on the legitimization of the ECtHR through law. The perspective of these chapters is different but they draw on many of the themes of the first part, which makes for engaging reading. Robert Harmsen (Chapter 7) revisits the new admissibility criterion in Protocol No 14 in the context of what the ECtHR's purpose is and should be. Harmsen suggests that the 'constitutional' and 'individual' justice visions no longer, if they ever did, suffice and that institutional reforms, rather than simply focussing on caseload, need to be placed in a wider geo-political context. The inadequacy of the constitutionalist-individualist view is taken up in Chapter 8, where Stephanie Henneke-Vauchez argues that the focus needs to shift from the ECtHR towards the national level and that the concept of one body of ECHR law is divorced from legal and political reality. The role of Member States is further explored by Jonas Christoffersen (Chapter 10) who calls for national authorities to step up and take the lead by undertaking proper, independent review of human rights cases in line with international standards.

Laurent Scheeck assesses the impact of the ECtHR's jurisprudence on EU law and the interplay between the ECtHR and the ECJ (Chapter 9). In the book's final chapter former

President of the ECtHR Luzius Wildhaber takes up the arguments in Chapter 6 and argues for a selection process to maintain credibility, suggesting that whilst the right of individual petition has 'many merits', it 'should not be understood as untouchable' (229).

Interestingly the editors explain that they have chosen not to include a concluding chapter because, given the on-going developments of the ECtHR and the ECHR any 'final' analysis could never be that. However, this well-written, well-edited and readable book does provide a basis from which to consider the legal and political direction of the ECtHR and the increased role Member States will undoubtedly have to play in enhancing the protection of human rights for around 800 million Europeans from 47 different countries (3).