Chapter One

The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities

Dia Anagnostou

1. Introduction

The European Convention on Human Rights (hereby ECHR or Convention) is widely recognised to be a transnational regime of rights review that has achieved a kind of authority and jurisdiction that is unique in the world. An instrumental role in its post-World War II evolution has been played by its judicial arm, the European Court of Human Rights (hereby ECtHR or Court). The expansion of the Court's jurisprudential scope and authority vis-à-vis national legal and political orders is evidenced in an unparalleled rise in its caseload since 1990.¹ Tantamount to a kind of European-wide 'rights revolution,'² such an increase reflects sustained judicial attention to rights claims, as well as a widespread sense of effectiveness of the judicial review exercised by it. The expansion of the Court's caseload cannot exclusively be attributed to the entry of 24 new states from central-east and southeast Europe and the former Soviet Union in the Convention system in the 1990s.³ Neither can it solely be seen to have resulted from the 1998 overhaul of the system that rendered mandatory the right to individual petition.⁴ It has, furthermore, and most importantly been accomplished by extending judicial interpretation of

¹ On the evolution of the ECtHR case load over the past 10 years, see The European Court of Human Rights – Some facts and figures 1998–2008 (Strasbourg: Council of Europe, 2008).
³ It is estimated that even if one adjusts for the increased number of contracting states that joined the Convention system in the 1990s, the number of individual applications between 1990 and 2002 still saw nearly a nine-fold increase. See R. Cichowski, 'Courts, rights and democratic participation', Comparative Political Studies 39/1 (February 2006), 50, at 58.
⁴ This became effective with the entry into force of Protocol no. 11 to the ECHR in November 1998, which also abolished the Commission and created a single Court.
Convention rights to a variety of claims, which at the inception of the system states were not initially intent upon addressing.

Exemplifying this development is the ECtHR’s growing attention to and engagement with rights claims originating from marginalised individuals and individuals from minorities. Even though there is no comprehensive count to document this, a cursory overview of existing case-law collections and databases clearly indicates a substantially upward trend from 1990 onwards. By the term ‘marginalised individuals and minorities’ we mean those segments of the society who, due to a variety of reasons, are silenced within the democratic process, or at least are significantly constrained in voicing and pursuing their claims through it. These include individuals who belong to ethnic, religious or national minorities, immigrants who may or may not be citizens of a state, as well as those seeking political asylum. It also includes individuals whose rights are curtailed because they are in confinement conditions, displaced or imprisoned. It can also encompass persons who are at a disadvantage because of their political beliefs or who are socially stigmatised because of their sexual preference and identity. This description of marginalised individuals and minorities reflects far from a coherent set of issues and rights. Who these individuals and minorities are is intrinsically linked to national context and therefore varies greatly across different states, as we discuss subsequently in this introduction.

Since the 1990s, marginalised individuals and minorities have appealed, alone or on behalf of a community, to the ECtHR with compelling claims arising out of particular national conditions, distortions or gaps in domestic rights protection. In an increasingly variegated set of cases, they have challenged national laws, policies and practices on grounds of violating their rights under the Convention. This has enabled the ECtHR to assume a more visible role in protecting disadvantaged and vulnerable individuals and minorities, and to promote their legitimate claims in the public sphere of member states. At the same time, it has also brought to the fore longstanding concerns about the role of judicial review in relation to the democratic processes, which are particularly apposite with regard to a European, compared to a national, judiciary.

The tendency of individuals from disadvantaged and vulnerable segments of society to resort to courts for the protection of their rights is far from a

---


6 Article 34 ECHR gives the right to file a petition to ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation’ of one of the Convention rights. Groups and organisations can bring claims but they must be victims in their own right.