

# 1 Introduction

## 1.1 The Core Questions

The European Court of Human Rights (ECtHR or the Court) makes a difference in Europe. It creates standards that are applicable in the forty-seven contracting parties to the European Convention on Human Rights (ECHR or Convention). The impact of the ECtHR has been extensively explored in academic literature.<sup>1</sup> The Court intervenes in the most fundamental, sensitive and controversial issues that the European nations debate;<sup>2</sup> it sets the standards for how European authorities should treat people under their jurisdiction; it creates and maintains the meaning of European human rights and develops the legal ideology of human rights protection. According to the Court, the Convention is a constitutional instrument of European public order.<sup>3</sup> Having said all this, there are limits to what the Court can do and how

<sup>1</sup> See, for example, Courtney Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change' (2014) 20 *Eur J Int* 1100; Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 *EJIL* 763; Sameera Dalvi, 'Homosexuality and the European Court of Human Rights: Recent Judgments Against the United Kingdom and Their Impact on Other Signatories to the European Convention on Human Rights' (2004) 15 *U Fla JL & Pub Pol'y* 467; Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008); Iulia Motoc and Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016).

<sup>2</sup> Issues related to legality of abortions in *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010; euthanasia in *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III; LGBTI rights in *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; and *Bayev and Others v. Russia*, nos. 67667/09 and two others, 20 June 2017 and many others.

<sup>3</sup> *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, para. 75.

far it can intervene within European public order. The key questions that this book is posing are what exactly does European public order mean and how can it be shaped; and, more importantly, should an institution like the ECtHR aim to shape it?

Although legislators and courts have used the term ‘public order’ for a very long time, its meaning remains conveniently vague. It seems to refer to something fundamental, a set of principles so basic that they define a people, society, community or group of communities. These principles can perhaps trump any other rule or regulation. However, despite their fundamental importance, the precise content of these principles is unclear and can be disagreed over. The idea of this book is to explore whether the ECtHR can translate something very vague and imprecise into legal reality. One of the major challenges of this project is that one can intuitively (although sometimes wrongly) guess what European public order might mean but, as Chapter 3 shows, it cannot be properly defined. In this book, I will ask what European public order includes, who can shape it and how it can be done. I will examine whether the concept of European public order is at all helpful and whether it should be used by the ECtHR or rather be removed from the Court’s vocabulary. I will also critically assess whether the ECtHR’s ambition of being a herald of European public order is far-fetched or misplaced.

At the outset, I have to say that the answers to these questions often depend on the political standpoint of the particular observer. Many of them require value judgements on the role of human rights in social life and the degree of proper intervention of international human rights institutions in the national decision-making process. This book is based on a theory of minimalist effectiveness of the Court. By this, I understand that the best strategy of the Court is not to make revolutionary long-term strategic changes but to gradually adjust the standards in conformity with what is possible and acceptable at the national level. Therefore, this monograph suggests that a proper function of the ECtHR does not include strategically building European public order.

## 1.2 The Approach of the Monograph

### 1.2.1 *The Rationale of the Monograph*

This book is the first exhaustive analysis of the Court’s role vis-à-vis European public order. Many commentators have examined issues that

are closely connected to the notion of European public order. Some work has been done on questions of the proper functionality of the Court, its effectiveness and reach. A lot of academic papers have looked into more precise infrastructural issues such as the value of particular procedures or detailed discussion of certain judgments or groups of judgments. This monograph builds on these discussions but goes one step further. This monograph looks at the Court's ability to shape European public order from many angles. It approaches the interaction between the Court and European public order holistically, trying to consider what is possible, desirable and necessary for the Court to impact it.

Since 2006, when Steven Greer published his monograph,<sup>4</sup> it seems that there has been no comprehensive attempt to assess the role and vision of the ECtHR or to find its place vis-à-vis the contracting parties to the Convention in the form of a monograph. At the same time, since 2006, Europe has changed considerably: the backlash against the Court has intensified,<sup>5</sup> politically there has been a steady rise of illiberal democracies,<sup>6</sup> and some states now supply the ECtHR with a major number of applications alleging violations of the most fundamental rights. This monograph takes this context into account and tries to explain the recent developments of the ECtHR. It also attempts to build a normative argument as to why the ECtHR should not put forward an overly ambitious task of shaping European public order. This task might undermine the legitimacy and effectiveness of the Court.

This monograph suggests that the Court is likely to be more successful in achieving its aim if it develops its law incrementally through careful adjudication of individual complaints. The Court's impact on European public order happens as a logical consequence of its individual judgments. The Court should not use individual applications as an

<sup>4</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006).

<sup>5</sup> See Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 *LCP* 141; Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 *Int'l Stud Q* 770; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *Int'l JLC* 197.

<sup>6</sup> See Wolfgang Benedek, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 1 *Eur Conv Hum Rights L Rev*, 151; Ineta Ziemele, 'Liberal Values, Covid-19 and the Judiciary' (2020) 1 *Eur Conv Hum Rights L Rev* 159.

excuse to introduce revolutionary changes. This conclusion might be deemed useful in the context of other human rights tribunals with a weak system of implementation and quick rotation of judges.

Human rights can be understood very broadly. Moreover, they can be explained differently, for example as limits or trumps<sup>7</sup> to certain policies or as expressions of certain interests.<sup>8</sup> Human rights assume a role in law as well in other regulatory frameworks like politics, social justice, equality and others.<sup>9</sup> However, they have slightly different meanings in all these areas. Such iterations of meanings are heavy baggage for any court adjudicating human rights claims. The ECtHR is not an exception in this sense. It is not easy to distil human rights as a legal notion from the additional layers of meaning. This is true not only in relation to the overarching notion of human rights but also in relation to other notions deployed by the ECtHR. They include democracy, rules of law, fair trial and European public order.

This monograph reflects on the inherent dualism of European public order and therefore distinguishes between European public order as a legal category that leads to a particular outcome – and in this case it is expected that it has an identifiable scope – and European public order as a descriptive category that includes multiple layers of meanings and might not have an identifiable content, only vague frontiers and instinctively appreciable scope.

### 1.2.2 *Minimalist Approach to Human Rights*

This book does not purport to investigate the rationale behind human rights or to change the broader understanding of human rights from the perspective of legal and political philosophy; it is much more practical in its contribution to legal scholarship. This monograph assumes that effective human rights are minimal; they highlight only the most significant and pertinent failures of state authorities. Here, this assumption is applied to the operation of the ECtHR. This idea creates a background principle for the discussion in this monograph.

Relatedly, the role of a human rights court is to ensure that minimal rights are properly protected while avoiding ‘human rights inflation’,<sup>10</sup> which was defined as ‘the tendency to frame any grievance as a rights

<sup>7</sup> See Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing 2013).

<sup>8</sup> See Joseph Raz, ‘On the Nature of Rights’ (1948) *Mind* 194, 195–6.

<sup>9</sup> Hurst Hannum, *Rescuing Human Rights* (Cambridge University Press 2019) 8.

<sup>10</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 90.

violation'.<sup>11</sup> Such inflation can be presented in plenty of forms; this monograph looks at the Court's desire to frame European public order as one of the representations of human rights inflation by which it contributes to the body of scholarship that rejects the overly expansionist view of human rights.

It is important to explain why human rights inflation is in fact a negative phenomenon. The key reason is that expanded human rights divert attention from the core rights and offer a more fertile ground for backlash. This monograph does not argue that issues that can be included in the scope of human rights should not be protected – perhaps they should – but they should not be labelled human rights. This wrongful labelling removes the sharp focus and stigma from the violations of what can be called a core of human rights. Mendus argued:

[H]uman rights [are] seen as an expression, not of philosophical optimism, but of political pessimism: they . . . serve rather as a warning against overenthusiastic attempts to create solidarity. [H]uman rights are bulwarks against evil, borne [sic] of an acknowledgement of difference, not harbingers of goods consequent upon a commitment to similarity, whether created or discovered.<sup>12</sup>

There is no consensus, even among those theorists who can be called 'human rights minimalists', as to what exactly should be included in the core of human rights. For Ignatieff, they are most fundamental freedoms that are supported by consensus.<sup>13</sup> For Rawls, it is the 'special class of urgent rights'.<sup>14</sup> This monograph does not set out to clearly identify what constitutes the core of human rights; rather, it aims to test the activities of the ECtHR against this understanding of human rights as minimal core legal rights enshrined in the ECHR. From this perspective, the Court's ambition to engage in shaping European public order is excessive and can lead to human rights inflation and inflation of the role and function of the Court as an interpreter of the ECHR. In turn, this would undermine the ability of the Court to defend the core of human rights as it would dilute the stigma of violations.

<sup>11</sup> Dominique Clément, 'Human Rights or Social Justice? The Problem of Rights Inflation' (2018) 22 *IJHR* 155, 155.

<sup>12</sup> Susan Mendus, 'Human Rights in Political Theory' in David Beetham (ed.), *Politics and Human Rights* (Blackwell 1995) 23.

<sup>13</sup> Ignatieff (n. 10). For a more in-depth discussion, see Monique Deveaux, 'Normative Liberal Theory and the Bifurcation of Human Rights' (2009) 2 *Ethics and Global Politics* 171.

<sup>14</sup> John Rawls, *The Law of Peoples* (Harvard University Press 2002) 79.

At the end of the day, it is the states who agreed to comply with some minimal core of human rights and they will determine how far beyond this minimum core they will allow the Court to go. As Posner pointed out: ‘Although countries give the ECHR formal power to order them about, they limit its practical power by starving it of resources and limiting the remedies that it may award, and mediating its effects through the Council [*sic*] of Ministers, a political body that can take into account political constraints on the member states’ ability or willingness to comply with judgments.’<sup>15</sup>

The ECtHR perhaps needs to leave the development of European public order to the state parties to the ECHR. Ambitious interferences with European public order can be used as an excuse by the states authorities to ignore even those judgments that condemn violations of the core of human rights.

### 1.2.3 *Diversity of Methods*

Until now, I have tried to explain the overall approach to the subject matter of the monograph. This short section outlines the specific methods that were used to explore European public order from various angles. European public order is a vague and complex notion and it requires a creative and multi-faceted approach for its examination – this monograph aims to offer such an approach. The monograph begins by presenting an exhaustive content analysis of the case law of the Court. Chapter 2 explores all published judgments and decisions of the Court where the formula ‘European Public Order’ was mentioned and then it categorises the results into six distinct groups. Chapter 3 uses the comparative law method to consider how public order was used in various areas of international and national law. This survey is not comprehensive, but it shows that in every context the notion of public order is vague and unclear and this vagueness is exacerbated when the notion of public order is transferred from the national to the international level.

Chapters 4 and 5 locate the findings of Chapters 2 and 3 in the current debates surrounding the ECtHR. They review the academic debates of the function of the ECtHR and infrastructural innovations developed by the Court and the contracting parties and then consider their implications for the Court’s ability to shape European public order. Finally, Chapter 6 uses interviews to establish what the ECtHR judges think about European public order. This chapter is based on a set of semi-structured interviews

<sup>15</sup> Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014) 51.

and tries to establish the rationale behind the deployment of the notion of European public order in the case law of the Court as well as its role in deliberations.

### 1.3 The Core Arguments

The core argument of this monograph is twofold. First, I argue that it is hardly possible to define European public order and, therefore, using this notion in the Court's judgments is not helpful for the clarity of the Court's reasoning. If one accepts the fact that clarity is one of the factors that affects the legitimacy of Court's judgments, then such fundamentally vague notions can undermine such legitimacy. Second and conversely, European public order can be used as a descriptive notion which is not expected to lead to any legally significant outcomes. Here, European public order is seen as a set of fundamental values shared by the contracting parties to the Convention. In this respect the monograph argues that the ECtHR does impact the understanding of these shared values and standards, but such impact cannot and should not be a strategic aim of the Court.

#### 1.3.1 *The Vague Concept*

The Court cannot shape European public order because the definition of this 'order' is ambiguous. European public order is a very abstract notion that has different meanings in different contexts. In order to reconceptualise European public order, one needs to look at it from two fairly distinct angles. First, European public order is an analytical tool that helps to explain the impact of the ECtHR on the European standards of human rights protection. To say that the ECtHR shapes European public order would mean that the Court influences the key principles that are shared and accepted by the contracting parties. In this sense, it is less important to know what these principles are precisely; what is more important is to agree that the Court can change the applicable standards of human rights protection. As I have already mentioned, this is perhaps so. The Court's instigated changes, irrespective of how small they are, do impact European standards of human rights protection. The Court has been and will continue to be instrumental in various areas of law and legal practice across Europe.<sup>16</sup> In this sense, European public order offers

<sup>16</sup> See the Report of the Parliamentary Assembly of the Council of Europe: 'Impact of the European Convention on Human Rights in States Parties: Selected Examples' (*Council of Europe Portal*, 8 January 2016) [www.coe.int/en/web/execution/-/the-impact-of-the-european-convention-on-human-rights](http://www.coe.int/en/web/execution/-/the-impact-of-the-european-convention-on-human-rights).

a useful tool for analysis of the Court's activities; it can be used to indicate a general set of highly abstract rules that the ECtHR can impact upon. This approach examines European public order from the perspective of an uninvolved observer; any claims that the Court engages with European public order do not have tangible legal consequences in a particular case. For instance, in the case of *Lopez Ostra v. Spain*, the ECtHR considered whether the right to a clean environment is relevant to Article 8 of the Convention and decided that it is.<sup>17</sup> One can argue that this novel interpretation of the Convention had consequences for European public order as an analytical concept, but it would make little sense to say that European public order can be used here as a legal justification for this new approach of the Court to the scope of the Convention.

The second meaning of European public order is the legal one: it is deployed by the ECtHR in its case law as a justification for a certain outcome. For example, in some early cases, the Court declared an application inadmissible in accordance with Article 35 of the Convention and then stated that no reasons of European public order would justify declaring it admissible.<sup>18</sup> In these cases, the Court treated European public order as an argument that can justify a departure from the strict interpretation of the wording of the Convention. This meaning requires a lot more precision than the analytical one as the former is used in the Court's reasoning as a justification for a particular outcome of a case. Where the Court uses European public order in a legal sense, it needs to establish some applicable scope and common understanding of this concept; in other words, such utilisation requires a clear meaning.

Although the Court mentions European public order in its case law, often it is used as *obiter dicta* with unclear meaning and vague relevance to the matter at issue. Deployment of vague terms, such as European public order, that can mean almost anything<sup>19</sup> undermines the legitimacy of the Court. To the contrary, deployment of clear reasoning which does not point to numerous meanings can enhance the legitimacy of the Court's judgments.<sup>20</sup> In a legal sense, when the Court mentions

<sup>17</sup> *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C.

<sup>18</sup> *De Becker v. Belgium*, 27 March 1962, Series A no. 4; *Paez v. Sweden*, 30 October 1997, Reports of Judgments and Decisions 1997-VII.

<sup>19</sup> See Chapter 3 for a detailed analysis of the definition of European public order.

<sup>20</sup> Lady Justice Arden lists the qualities that the ECtHR should demonstrate to improve the implementation of the Convention system. 'Quality of reasoning and ability to communicate clearly with their constituents' was one of these qualities. Mary Arden, 'Address at the Seminar "The Convention Is Yours" Organised by the ECtHR', Dialogues Between Judges (Council of Europe 2010) 23.



European public order, it should provide at least some indication of its measurable content. This content might be fairly abstract, but there should be some criteria that can be applicable and testable. I will use another fairly vague concept to illustrate my argument here. Take the doctrine of the margin of appreciation, which has often been criticised for its unclear scope.<sup>21</sup> However, in the case of the margin of appreciation, one can understand how this concept works, just as one can predict what will be taken into account when the Court considers the scope of the margin. If the responding state is acting within the margin, then the Court will not find a violation of the Convention. If the respondent state goes too far then the Court will find a violation. In *S. and Marper v. the United Kingdom*, the Court listed a set of criteria for determining the borderline of the margin:

The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider.<sup>22</sup>

When the ECtHR refers to European public order, the indicators that would help establish the scope of this order with at least some degree of certainty are not provided; its consequences are unclear and, when used, it can consist of anything – even mutually exclusive components.<sup>23</sup> European public order can include almost all human rights enshrined in the Convention;<sup>24</sup> it can also relate to the limitation of a qualified right;<sup>25</sup> it can support the extraterritorial application of

<sup>21</sup> See, for example, Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 *Colum J Eur L* 113; Anthony Lester 'Universality vs. Subsidiarity: A Reply' (1998) 1 *EHRLR*, 73, 75; *Z. v. Finland*, no. 22009/93, Partly Dissenting Opinion of Judge De Meyer.

<sup>22</sup> *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008, para. 102.

<sup>23</sup> See Chapter 2 for more detail.

<sup>24</sup> *Deweert v. Belgium*, 27 February 1980, Series A no. 35, para. 49; *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12, para. 65.

<sup>25</sup> *Ahmed and Others v. the United Kingdom*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, para. 52.

the Convention;<sup>26</sup> and it can justify the admissibility of a particular complaint.<sup>27</sup> Therefore, it is central to the line of argument of this monograph to distinguish between the analytical and the legal applications of this concept and to show that deployment of European public order in the latter sense in the judgments of the ECtHR is not particularly effective or helpful. One can, however, argue that, by this notion, the Court merely flags the importance of a particular issue to the contracting parties of the Convention. I would respectfully disagree with such a view. To say that something is part of European public order must mean more than simply highlighting its importance. There are multiple ways of emphasising the value of a particular issue. Saying that such issue is part of European public order means that the Court has the ambition to frame and shape this order in a way that might not be shared by the contracting parties. This brings me to the second line of argument that this book explores in detail.

### 1.3.2 *Why Should Not the ECtHR Aim to Shape European Public Order?*

The ECtHR should not explicitly or implicitly attempt to impose its view of European public order. At the outset, I need to admit that it is almost impossible to clearly separate those cases where the Court conscientiously tries to influence European public order from those where the Court just cannot avoid formulating a more general rule in order to apply it to the situation at hand. In other words, the latter situation happens when the Court has to define broader rules specifically to explain why a particular case was decided in such a way. By adding explicit references to European public order in its judgments, the ECtHR makes a claim of authority that is superior to that of the contracting parties. Although the judgments of the ECtHR are binding, its authority is tightly constrained by a great number of factors. The Court simply cannot regularly deliver judgments that are explicitly questioned and criticised by the contracting parties,<sup>28</sup> otherwise the Court's effectiveness would be undermined. Of course, this statement requires clarifications. First, in cases concerned with violations of well-established rights, the Court should not 'think' about the states'

<sup>26</sup> *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, para. 142.

<sup>27</sup> *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010. See similar reasoning in *Finger v. Bulgaria*, no. 37346/05, 10 May 2011. Chapter 3 describes all these and some other possible meanings in more detail.

<sup>28</sup> See Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press 2014).