

Can the European Court of Human Rights Shape European Public Order?

In this book, Kanstantsin Dzehtsiarou argues that, from the legal perspective, the formula ‘European public order’ is excessively vague and does not have an identifiable meaning; therefore, it should not be used by the European Court of Human Rights (ECtHR) in its reasoning. However, European public order can also be understood as an analytical concept which does not require a clearly defined content. In this sense, the ECtHR can impact European public order but cannot strategically shape it. The Court’s impact is a by-product of individual cases which create a feedback loop with the contracting states. European public order is influenced as a result of interaction between the Court and the contracting parties. This book uses a wide range of sources and evidence to substantiate its core arguments: from a comprehensive analysis of the Court’s case law to research interviews with the judges of the ECtHR.

Kanstantsin Dzehtsiarou is a professor in human rights law at the University of Liverpool. His research interests include interpretation of the European Convention on Human Rights, reform of the European Court, administration of international justice, and comparative constitutional law. Kanstantsin is an editor-in-chief of the *European Convention on Human Rights Law Review*.

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UNIVERSITY PRESS

CAMBRIDGE
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University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi - 110025, India
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108497367
DOI: 10.1017/9781108608794

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First published 2022

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-49736-7 Hardback

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Cambridge University Press
978-1-108-49736-7 — Can the European Court of Human Rights Shape European Public Order?
Kanstantsin Dzehtsiarou
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For Anastasiia

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Series Editors' Preface

It takes a degree of boldness to argue that a Court should cease using a well-established term within its case law. But this is exactly what Kanstantsin Dzehtsiarou does in his new monograph, *Can the European Court of Human Rights Shape European Public Order?*, which we warmly welcome to the series *Cambridge Studies in European Law and Policy*.

As a legal concept, Dzehtsiarou concludes in this book, 'European public order' is too vague and unclear to be usable as the basis for reasoning in the Court's case law. Only a highly abstract notion of *European* public order could be identified as an element on which the contracting parties to the ECHR could agree, and, at that level of abstraction, it could in practice never be clarified sufficiently to be a useful legal tool. In an alternative sense, Dzehtsiarou also suggests that European public order is an analytical concept, and here his attempts to understand this descriptive category with vague frontiers and a contestable concept lead him to consider whether or not the European Court of Human Rights can helpfully operate as a 'herald', which would see it bringing together ideas in a European consensus. This question leads him into an institutional analysis of the Court, which draws on a variety of legal and analytical perspectives, including the views of some of the judges of the Court itself.

Ultimately, Dzehtsiarou's approach is shaped by his adoption of a minimalist perspective on human rights within Europe and a belief that the Court of Human Rights should not be acting as a strategic actor, constructing some sort of bulwark against the apparently inevitable erosion that human rights norms seem to be facing in Europe at the present time. Like his injunction to the Court to stop using European public order as a tool of legal analysis, his preference for the organic emergence of human rights standards based on feedback loops

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involving the Court's interventions in individual cases and the engagement of the contracting parties with the ECHR as a set of norms is a bold and perhaps controversial claim. Yet it is arguable that creating the intellectual framework for such a debate about European public order is – in and of itself – some sort of provocative contribution to the seemingly endless discussion on how to define *ordre public* and how to assess whether it is a useful concept.

In sum, this analysis, dealing with some of the more neglected norms and institutions of European law, represents a very welcome addition to the series.

Jo Shaw
Laurence Gormley
Mark Dawson

Acknowledgements

In 2015 I submitted my first monograph to Cambridge University Press. In that book I examined the particularities of European consensus in the case law of the European Court of Human Rights (ECtHR or Court). Back then, I considered the acknowledgements to be the most important part of the book and therefore spent plenty of time drafting them. Shortly after the book was published, I realised through some empirical study among my friends, that almost nobody actually reads acknowledgements. For that reason, I will keep these comparatively short.

As soon as I had finished my book on consensus, I firmly decided that I would never write another book. That promise lasted for three months, after which time I started working on another project that seemed promising. I quickly learnt that it would be difficult to put everything that I wanted to say regarding that project in a journal article. The project focused on a question that had bothered me for some time, namely, whether the ECtHR is capable of shaping European public order. I felt it important to discuss the question with the ECtHR's judges and therefore spent a few weeks in September 2018 and September 2019 in Strasbourg, France, doing just that. I would like to express my gratitude to the Registry of the Court and to all those judges who found time to talk to me: Paulo Pinto de Albuquerque, Arnfinn Bardsen, Vincent A. De Gaetano, Dmitry Dedov, Yonko Grozev, Lətif Hüseyinov, Ivana Jelić, Helen Keller, Egidijus Kūris, Julia Laffranque, Paul Lemmens, Roderick Liddell, Iulia Motoc, Angelika Nußberger, Péter Paczolay, Darian Pavli, Guido Raimondi, Linos-Alexandre Sicilianos, Robert Spano, Ksenija Turković and Ganna Yudkivska.

I presented the core ideas of this book in Edinburgh, Sheffield, London, Santiago and Liverpool and I am very grateful to all participants

XX ACKNOWLEDGEMENTS

of the seminars and workshops who commented on the ideas that ended up (or not) in this monograph. I also benefited hugely from two research leaves from my other academic duties; I would never have been able to finish this book without them. I thank the School of Law and Justice of the University of Liverpool for making this possible. In particular I would like to thank Professors Debra Morris, Warren Barr, Pdraig McAuliffe and Mike Gordon for supporting my applications. I would also like to thank Anna Vowles and other professional support staff of the University of Liverpool because they have always been kind to me.

Plenty of my friends helped me to shape my ideas, and read and commented on my drafts. Of course, any silly mistakes that are left in this book are my own, but my friends did their best to fix them. It would lengthen the acknowledgements considerably were I to mention all of them, so I will stick to my promise to keep them short and mention only a few: Filippo Fontanelli, Vassilis P. Tzevelekos, Tobias Lock, Colm O’Cinneide, Fiona de Londras, Donal K. Coffey, Ed Bates, Alan Greene and Rumyana van Ark. My thanks should also go to Amandine Garde for helping me to translate French quotes. I would also like to thank my research assistants Chryssa Mela, Maisie Law, Ewan Anthony and Eve Stott.

I would like to thank Kirill Koroteev for helping me to select the cover of this book. It is Wassily Kandinsky’s painting ‘Non-Objective’, which can also be translated from Russian as ‘Subjectless’. In this book I argue that the legal term ‘European public order’ does not have a clear content and this beautiful painting by Kandinsky illustrates this argument well. I also thank Maria Giginshvili for putting me in touch with ‘Krasnodar Regional Art Museum named after F.A. Kovalenko’, which has kindly allowed me to use this image.

I would like to thank my friends and family for supporting me and for their unconditional love. Perhaps the biggest thanks go to my partner Anastasiia.

The staff at Cambridge University Press were very helpful and supportive during the preparation of the book. I would especially like to thank Finola O’Sullivan and Marianne Nield for their help.

In August 2020, while I was writing the last chapters of this monograph, the presidential elections took place in my country of origin – Belarus – which is neither a member of the Council of Europe nor under the jurisdiction of the ECtHR. The elections were followed by peaceful protests against the government’s fraudulent activity and lies. These protests were brutally dispersed: people were tortured and killed;

journalists were arrested; almost all human rights were systematically violated. This shows how fragile is the system of human rights protection and how important it is to ensure that the regional mechanism of human rights protection operates effectively.

Finally, the COVID-19 pandemic, which was in full swing in 2020, will likely have long-lasting consequences for how we perceive European public order. However, I hope that the protection of human rights will remain a priority irrespective of the political, economic or epidemiological climate in Europe.

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Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HUDOC	Human Rights Documents Database
NATO	North-Atlantic Treaty Organization
TRNC	Turkish Republic of Northern Cyprus
UK	United Kingdom
UN	United Nations
USA	United States of America