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.
Cambridge Studies in European Law and Policy

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The European Convention on Human Rights: Achievements, Problems and Prospects
Steven Greer

Stefano Giubbioni

EU Enlargement and the Constitutions of Central and Eastern Europe
Anneli Albi
Can the European Court of Human Rights Shape European Public Order?

Kanstantsin Dzehtsiarou
University of Liverpool
For Anastasiia
Contents

Series Editors’ Preface .............................. page xvii
Acknowledgements ............................... xix
Table of Cases .................................. xxii
List of Abbreviations ............................. xxx

1 Introduction .................................. 1

2 European Public Order in the Case Law of the European Court of Human Rights ... 22

3 Defining European Public Order: An Impossible Task ......................... 62

4 The Function of the European Court of Human Rights .......................... 96

5 Institutional Infrastructure of the European Court of Human Rights and Its Ability to Shape European Public Order ..................... 130

6 Views of the ECtHR Judges on Their Role in Shaping European Public Order .......... 177

7 Conclusion .................................. 208

Appendix ........................................ 212
Index ............................................ 217
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Series Editors’ Preface</td>
<td>xvii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>xix</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>xxii</td>
</tr>
<tr>
<td>List of Abbreviations</td>
<td>xxx</td>
</tr>
<tr>
<td><strong>1 Introduction</strong></td>
<td></td>
</tr>
<tr>
<td>1.1 The Core Questions</td>
<td>1</td>
</tr>
<tr>
<td>1.2 The Approach of the Monograph</td>
<td>2</td>
</tr>
<tr>
<td>1.2.1 The Rationale of the Monograph</td>
<td>2</td>
</tr>
<tr>
<td>1.2.2 Minimalist Approach to Human Rights</td>
<td>4</td>
</tr>
<tr>
<td>1.2.3 Diversity of Methods</td>
<td>6</td>
</tr>
<tr>
<td>1.3 The Core Arguments</td>
<td>7</td>
</tr>
<tr>
<td>1.3.1 The Vague Concept</td>
<td>7</td>
</tr>
<tr>
<td>1.3.2 Why Should Not the ECtHR Aim to Shape European Public Order?</td>
<td>10</td>
</tr>
<tr>
<td>1.3.2.1 The Reason of Effectiveness and Legitimacy</td>
<td>12</td>
</tr>
<tr>
<td>1.3.2.2 The European Court of Human Rights Is Not a Strategic Actor</td>
<td>14</td>
</tr>
<tr>
<td>1.3.2.3 Poor Enforcement of the ECtHR Judgments</td>
<td>16</td>
</tr>
<tr>
<td>1.3.2.4 The European Court Is Not a Constitutional Court</td>
<td>17</td>
</tr>
<tr>
<td>1.4 The Structure of the Book</td>
<td>20</td>
</tr>
<tr>
<td><strong>2 European Public Order in the Case Law of the European Court of Human Rights</strong></td>
<td></td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>22</td>
</tr>
<tr>
<td>2.2 Territorial Jurisdiction of the Court</td>
<td>26</td>
</tr>
<tr>
<td>2.3 Interaction between the ECtHR and Other International Organisations</td>
<td>35</td>
</tr>
</tbody>
</table>

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xiv CONTENTS

2.4 Extent of the Binding Force of the Court’s Interim Measures 41
2.5 Criteria of Admissibility 46
2.6 Democracy as a Key Aspect of European Public Order 52
2.7 Scope of Substantive Provisions 57
2.8 Conclusion 60

3 Defining European Public Order: An Impossible Task 62
3.1 Introduction 62
3.2 The Multiple ‘Faces’ of Public Order: Various Meanings in Various Contexts 66
  3.2.1 Public Order as Security and Prevention of Disorder 66
  3.2.2 Public Order as a Tool of Private International Law 69
  3.2.3 National Public Order and Public Order of the ECtHR 73
3.3 The Vague Benchmarks of European Public Order 81
  3.3.1 Common Territory and Values 82
  3.3.2 The Outer Limits of Public Order and Protection of the ECtHR’s Autonomy 84
  3.3.3 Setting the Human Rights Hierarchy 91
  3.3.4 Proper Enforcement Mechanisms 93
3.4 Conclusion 94

4 The Function of the European Court of Human Rights 96
4.1 Introduction 96
4.2 What Are International Courts For? 98
  4.2.1 Technical Function 99
  4.2.2 Meta-function 99
4.3 Can the European Court of Human Rights Act Strategically? 101
4.4 What Is the European Court of Human Rights For? 104
4.5 What Is the Court’s Meta-function? 109
  4.5.1 The View on the Court’s Meta-function from Academia 109
4.5.2 Meta-function of the Court in the Court’s
Case Law 112
  4.5.2.1 The Views of the Majority 112
  4.5.2.2 Dissenting and Concurring Views 116
4.5.3 The Views of the Presidents of the ECtHR 123
4.6 Conclusion 128

5 Institutional Infrastructure of the European
Court of Human Rights and Its Ability to Shape
European Public Order 130
  5.1 Introduction 130
  5.2 The Court’s Institutionalisation of Its Strategic Impact 131
    5.2.1 Pilot Judgments 132
    5.2.2 Interim Measures 141
      5.2.2.1 The Effectiveness of Interim Measures 142
      5.2.2.2 Extending the Scope of Interim Measures 147
  5.3 Mixed Signals from the Contracting Parties 153
    5.3.1 The Contracting Parties’ Views on the Role of the Court 154
    5.3.2 Subsidiarity and Margin of Appreciation in the Preamble to the Convention (Protocol 15) 160
    5.3.3 Infringement Proceedings (Protocol 14) 163
    5.3.4 Advisory Opinions (Protocol 16) 169
    5.4 Conclusion 175

6 Views of the ECtHR Judges on Their Role in
Shaping European Public Order 177
  6.1 Introduction 177
  6.2 Methodology 178
  6.3 The Substantive Aspects of European Public Order 181
    6.3.1 The Definition of European Public Order 181
    6.3.2 The Components of European Public Order 184
    6.3.3 European Public Order v. National Public Order 187
    6.3.4 The Meta-function of the European Court of Human Rights 191
  6.4 Technical Aspects of European Public Order 197
6.4.1 The Role of European Public Order in the Case Law of the ECtHR 198
6.4.2 The ‘Brownian Motion’ of Legal Terms 200
6.4.3 European Public Order in Deliberations 203
6.5 Conclusion 206

7 Conclusion 208

Appendix 212
Index 217
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...
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 acknowledgments. 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, Latišf Hüseynov, 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.
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, Padraig 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 Gigineyshvili 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.
### Table of Cases

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**A**

Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no. P16-2018–001, French Court of Cassation, 10 April 2019.
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<table>
<thead>
<tr>
<th>Table of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, ECHR 2011.</td>
</tr>
<tr>
<td>Aleksanyan v. Russia, no. 46468/06, 22 December 2008.</td>
</tr>
<tr>
<td>Alekseyev v. Russia, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010.</td>
</tr>
<tr>
<td>Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia, no. 60642/08, 6 November 2012.</td>
</tr>
<tr>
<td>Amrollahi v. Denmark, no. 56811/00, 11 July 2002.</td>
</tr>
<tr>
<td>Anchugov and Gladkov v. Russia, nos. 11157/04 and 15162/05, 4 July 2013.</td>
</tr>
<tr>
<td>Association de solidarité avec les témoins de Jéhovah and others v. Turkey, app 36915/10.</td>
</tr>
<tr>
<td>Austin and Others v. the United Kingdom [GC], nos. 39692/09, 40713/09 and 41008/09, ECHR 2012.</td>
</tr>
<tr>
<td>Austria v. Italy, no. 788/60, admissibility decision of 11 January 1961.</td>
</tr>
<tr>
<td>Azerbaijan v. Armenia (43517/20).</td>
</tr>
<tr>
<td>B</td>
</tr>
<tr>
<td>Baka v. Hungary [GC], no. 20261/12, 23 June 2016.</td>
</tr>
<tr>
<td>Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99, ECHR 2001-XII.</td>
</tr>
<tr>
<td>Bayev and Others v. Russia, nos. 67667/09 and 2 others, 20 June 2017.</td>
</tr>
<tr>
<td>Beuze v. Belgium [GC], no. 71409/10, 9 November 2018.</td>
</tr>
<tr>
<td>Biao v. Denmark [GC], no. 38590/10, 24 May 2016.</td>
</tr>
<tr>
<td>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI.</td>
</tr>
<tr>
<td>Bouyid v. Belgium [GC], no. 23380/09, ECHR 2015.</td>
</tr>
<tr>
<td>Buntov v. Russia, no. 27026/10, June 2012.</td>
</tr>
<tr>
<td>Burmych and Others v. Ukraine (striking out) [GC], nos. 46852/13 et al, 12 October 2017.</td>
</tr>
</tbody>
</table>
**TABLE OF CASES**

**C**
Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no. 80.
Can v. Austria, 30 September 1985, Series A no. 96.
Catan and Others v. the Republic of Moldova and Russia [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012.
Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, ECHR 2014.
Centro Europa S.r.l. and Di Stefano v. Italy [GC], no. 38433/09, ECHR 2012.
Chahal v. the United Kingdom, 15 November 1996, Reports of Judgments and Decisions 1996-V.
Chiragov and Others v. Armenia [GC], no. 13216/05, ECHR 2015.
Christian Democratic People’s Party v. Moldova, no. 28793/02, ECHR 2006-II.
Christine Goodwin v. the United Kingdom [GC], no. 28957/95, ECHR 2002-VI.
Cumhuriyet Halk Partisi v. Turkey, no. 48818/17, 21 November 2017 (Decision of Inadmissibility).
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**D**
Deweer v. Belgium, 27 February 1980, Series A no. 35.
Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45.

**E**
Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22.
Enhorn v. Sweden, no. 56529/00, ECHR 2005-I.
Eskinazi and Chelouche v. Turkey (dec.), no. 14600/05, ECHR 2005-XIII.
Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I.

**F**
Fabris v. France [GC], no. 16574/08, ECHR 2013.
Finger v. Bulgaria, no. 37346/05, 10 May 2011.
Frodl v. Austria, no. 20201/04, 8 April 2010.
TABLE OF CASES  XXV

G
G.I.E.M. S.R.L. and Others v. Italy [GC], nos. 1828/06 and 2 others, 28 June 2018.
Gäßgen v. Germany [GC], no. 22978/05, ECHR 2010.
Garib v. the Netherlands [GC], no. 43494/09, 6 November 2017.
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Godelli v. Italy, no. 33783/09, 25 September 2012.
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Greens and M.T. v. the United Kingdom, nos. 60041/08 and 60054/08, ECHR 2010.
Güzelyurtlu and Others v. Cyprus and Turkey [GC], no. 36925/07, 29 January 2019.

H
Handyside v. the United Kingdom, 7 December 1976, Series A no. 24.
Hatton and Others v. the United Kingdom, no. 36022/97, 2 October 2001.
Hirst v. the United Kingdom (no. 2), no. 74025/01, 30 March 2004.
Hutchinson v. the United Kingdom [GC], no. 57592/08, 17 January 2017.

I
Ibrahim and Others v. the United Kingdom, nos. 50541/08 and 3 others, 16 December 2014.
Ilaşçu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII.
Inseher v. Germany [GC], nos. 10211/12 and 27505/14, 4 December 2018.
Ireland v. the United Kingdom, 18 January 1978, Series A no. 25.

J
Jalloh v. Germany [GC], no. 54810/00, ECHR 2006-IX.
Jersild v. Denmark, 23 September 1994, Series A no. 298.
xxvi  TABLE OF CASES

K
Khamtokhu and Aksenchik v. Russia [GC], nos. 60367/08 and 961/11, 24 January 2017.
Korolev v. Russia (dec.), no. 25551/05, ECHR 2010.

L
Lawless v. Ireland (no. 1), 14 November 1960, Series A no. 1.
Leyla Şahin v. Turkey [GC], no. 44774/98, ECHR 2005-XI.
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López Ostra v. Spain, 9 December 1994, Series A no. 303-C.

M
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Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, ECHR 2012.
Mozer v. the Republic of Moldova and Russia [GC], no. 11138/10, 23 February 2016.
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N
National Union of Rail, Maritime and Transport Workers v. the United Kingdom, no. 31045/10, ECHR 2014.
Navalnyy v. Russia [GC], nos. 29580/12 and 4 others, 15 November 2018.
Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, ECHR 2010.
Nolan and K. v. Russia, no. 2512/04, 12 February 2009.
**TABLE OF CASES**  xxvii

<table>
<thead>
<tr>
<th>O</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olaru and Others v. Moldova, nos. 476/07 and 3 others, 28 July 2009.</td>
</tr>
<tr>
<td>Othman (Abu Qatada) v. the United Kingdom, no. 8139/09, ECHR 2012.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>P</th>
</tr>
</thead>
<tbody>
<tr>
<td>P. and S. v. Poland, no. 57375/08, 30 October 2012.</td>
</tr>
<tr>
<td>Paez v. Sweden, 30 October 1997, Reports of Judgments and Decisions 1997-VII.</td>
</tr>
<tr>
<td>Parrillo v. Italy [GC], no. 46470/11, ECHR 2015.</td>
</tr>
<tr>
<td>Perinçek v. Switzerland [GC], no. 27510/08, ECHR 2015.</td>
</tr>
<tr>
<td>Petrovy v. Russia, no. 47429/09, 20 October 2020.</td>
</tr>
<tr>
<td>Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III.</td>
</tr>
<tr>
<td>Primov and Others v. Russia, no. 17391/06, 12 June 2014.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>R</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rantsev v. Cyprus and Russia, no. 25965/04, ECHR 2010, para 197.</td>
</tr>
<tr>
<td>Rinck v. France (dec.), no. 18774/09, 19 October 2010.</td>
</tr>
<tr>
<td>Roman Zakharov v. Russia [GC], no. 47143/06, ECHR 2015.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, ECHR 2008.</td>
</tr>
<tr>
<td>S., V. and A. v. Denmark [GC], nos. 35553/12 and 2 others, 22 October 2018.</td>
</tr>
<tr>
<td>S.A.S. v. France [GC], no. 43835/11, ECHR 2014.</td>
</tr>
<tr>
<td>Saadi v. Italy [GC], no. 37201/06, ECHR 2008.</td>
</tr>
<tr>
<td>Sadak and Others v. Turkey (no. 1), nos. 29900/96, 29901/96, 29902/96 and 29903/96, ECHR 2001-VIII.</td>
</tr>
<tr>
<td>Sandu and Others v. the Republic of Moldova and Russia, nos. 21034/05 and 7 others, 17 July 2018.</td>
</tr>
<tr>
<td>Sargsyan v. Azerbaijan [GC], no. 40167/06, ECHR 2015.</td>
</tr>
<tr>
<td>Savriddin Dzhurayev v. Russia, no. 71386/10, ECHR 2013.</td>
</tr>
</tbody>
</table>
### Table of Cases

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sc</td>
<td>Scoppola v. Italy (no. 3) [GC], no. 126/05, 22 May 2012.</td>
</tr>
<tr>
<td>Sed</td>
<td>Sedletskâ v. Ukraine, no. 42634/18.</td>
</tr>
<tr>
<td>Sej</td>
<td>Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009.</td>
</tr>
<tr>
<td>Sco</td>
<td>Skoogström v. Sweden, 2 October 1984, Series A no. 83.</td>
</tr>
<tr>
<td>Soe</td>
<td>Soering v. the United Kingdom, 7 July 1989, Series A no. 161.</td>
</tr>
<tr>
<td>Söy</td>
<td>Söyler v. Turkey, no. 29411/07, 17 September 2013.</td>
</tr>
<tr>
<td>Svi</td>
<td>Svinarenko and Slyadnev v. Russia [GC], nos. 32541/08 and 43441/08, ECHR 2014.</td>
</tr>
<tr>
<td>T</td>
<td>Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2), nos. 3002/03 and 23676/03, ECHR 2009.</td>
</tr>
<tr>
<td>Tys</td>
<td>Tysiąc v. Poland, no. 5410/03, ECHR 2007-I.</td>
</tr>
<tr>
<td>U</td>
<td>Ukraine v. Russia (I) (20958/14).</td>
</tr>
<tr>
<td>Vall</td>
<td>Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, ECHR 2013.</td>
</tr>
<tr>
<td>Vil</td>
<td>Vilho Eskelinen and Others v. Finland [GC], no. 63235/00, ECHR 2007-II.</td>
</tr>
<tr>
<td>Vin</td>
<td>Vinter and Others v. the United Kingdom [GC], nos. 66069/09 and 2 others, ECHR 2013.</td>
</tr>
<tr>
<td>Von</td>
<td>Von Hannover v. Germany, no. 59320/00, ECHR 2004-VI.</td>
</tr>
<tr>
<td>Yam</td>
<td>Yam v. the United Kingdom, no. 31295/11, 16 January 2020.</td>
</tr>
<tr>
<td>You</td>
<td>Young, James and Webster v. the United Kingdom, 13 August 1981, Series A no. 44.</td>
</tr>
<tr>
<td>Yum</td>
<td>Yumak and Sadak v. Turkey [GC], no. 10226/03, ECHR 2008.</td>
</tr>
</tbody>
</table>
Z

UN Human Rights Committee

US Courts

Swiss Courts

French Courts
Commune de Morsang-sur-Orge et Ville d’Aix-en-Provence, Council of State.
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