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Book Reviews

Kanstantsin Dzehtsiarou. ***Can the European Court of Human Rights Shape European Public Order?*** Cambridge: Cambridge University Press, 2022. Pp. 224. £85. ISBN: 9781108497367.

1 Introduction

An old parable shows the importance of focusing on understanding actions and their motivations instead of focusing on words. The British king goes hunting with his entourage. Suddenly, one of the king's servants runs out of a bush, and when he sees the king aiming his gun at him, he screams: 'Don't shoot me. I am not a deer.' The king takes careful aim and shoots the servant dead. While everyone is rushing to the servant's dead body, a baron asks the king: 'Why did you shoot him? He said he is not a deer.' 'Really?' the king said. 'I thought he screamed: Shoot me, I am a deer.' The king clearly has a hearing problem, but the reason he shot the servant has nothing to do with his hearing. It has everything to do with his decision to listen to what he thought the servant said instead of building a reasonable theory of the identity of the English-speaking creature in his sights.

This review of Kanstantsin Dzehtsiarou's carefully researched and clearly written book argues that the book also perhaps gives too much emphasis to what the European Court of Human Rights (ECtHR) is saying and not enough emphasis given to what the court is doing. The book focuses on the language that judges use in their judgments and interviews – in particular, their use of the term 'European public order'. Even when an impressive array of evidence is gathered by Dzehtsiarou to show that this phrase means close to nothing, the book continues to focus on what the phrase could mean. The book not only tries to define European public order, but it also tries to examine a variety of potential interpretations of this term and to check them against the Court's doctrines and legal techniques. But the most interesting enigma that emerges from the many details in the book is that the phrase 'European public order' is repeated so consistently by the Court despite its ambiguous nature. This review argues that such repetition may involve a long-term strategy on the part of the Court.

Although the book tries to prove that the ECtHR cannot act strategically as a unified actor because of the diverse motives of the actors, this argument is unconvincing. To adopt a strategy as the most reasonable explanation for a court's behaviour, it is not necessary to ascertain exactly the motives of every individual judge involved. Instead, it is possible to infer judicial strategy when it provides the best possible explanation

for the Court's actions. The very fact that a meaningless phrase like 'European public order' is repeated so consistently by the Court and its judges hints that perhaps certain behaviours of the Court are designed to serve long-term goals, such as preserving its legitimacy with certain audiences by using commonly accepted forms of reasoning.

This review explores the difference between building a theory about the 'true' meaning of abstract legal terms and building a theory about the strategy motivating institutions. It argues that the study of international courts generally could benefit from a focus on the latter kind of investigation.

2 An Overview of the Book

In *Can the European Court of Human Rights Shape European Public Order?*, Dzehtsiarou shows that the ECtHR refers to the term 'European public order' on numerous occasions. The Court repeatedly declares that the European Convention on Human Rights (ECHR) is a constitutional instrument of European public order. However, despite the apparent fundamental importance of the term, the book demonstrates that the term 'European public order' is incredibly vague and that its meaning is unclear. The book proves this consistently in a series of detailed steps. In Chapter 2, the book recounts Dzehtsiarou's search for all judgments that refer to European public order. The judgments are categorized by topic, and every example of a judgment that refers to European public order is analysed with the legal context of that particular case. The different topics that Dzehtsiarou finds that refer to European public order are: (i) the Court's territorial jurisdiction; (ii) the interaction of the Court with other international organizations; (iii) the binding force of the ECtHR's interim measures; (iv) the criteria for admissibility of applications at the Court; (v) democracy as an aspect of the European public order; and (vi) the scope of the substantive provisions of the ECHR. The book's analysis of judgments is rich and, beyond supporting its argument, provides a useful overview of many of the ECtHR's doctrines of interest to anyone keen on understanding the Court's methods of reasoning.

Based on this analysis of judgments, Dzehtsiarou considers that there are several potential roles for the term 'European public order': (i) the term can be used to imply that the ECHR applies all over the territory of Europe; (ii) the term can be used to shape the interpretation of substantive rights in the ECHR; (iii) the term can be used to justify procedural innovation that would allow the ECtHR to expand its authority; and/or (iv) the term can be used to signal the relative importance of a right compared to others. All these possible roles of the term 'European public order' are shown by Dzehtsiarou to be unhelpful when they are applied in the ECtHR judgments.

As Dzehtsiarou shows in this chapter, the way in which the term is used is too abstract to assist in judicial interpretation because it can easily lead to contradictory results. For example, in situations that involve a balancing between certain rights, the only way to determine which right should receive priority is by stipulating which right is more essential for European public order. Because the Court does not specify which

rights are crucial for European public order, it does not provide any guidance on the proper result of balancing conflicting rights.

Chapter 3 looks at the term 'public order' in a variety of other contexts: the ECHR and its protocols, private international law and national law. The chapter shows that the term either has a different meaning in these settings than it has in the ECtHR's judgments or it is amorphous and imprecise in other contexts as well. For example, the ECHR refers to public order to indicate only the idea of preventing disorder to protect the societies of member states, but this is not the same way the term is used in the Court's judgments, which refer to European public order rather than to the public order that is internal to states. Further, at a national level, the concept of public order is amorphous and changes constantly. The chapter also argues that to be considered a useful concept, public order should comply with the following benchmarks: it should protect a common set of values, it should attempt to protect against some external intervention, it should set a hierarchy of human rights and it should have a viable enforcement mechanism to support its application. The ECtHR does not fully comply with any of these conditions regarding the use of the concept 'European public order'.

Dzehtsiarou then turns to the question of the legitimacy of the Court in Chapter 4, arguing that this will be undermined should the ECtHR attempt to shape the European public order; it is not a proper function for a court to undertake this task precisely because of the term's vagueness. Dzehtsiarou argues that courts fulfil a technical function of resolving cases and a meta-function of implementing more abstract goals, such as developing the law within their jurisdiction. Were the ECtHR to view the promotion of a vague notion of a European public order as one such meta-function, this attempt could only fail and, as a result, damage the Court's legitimacy. Dzehtsiarou identifies two reasons for this failure: (i) the term 'European public order' is too vague to create a clear programme for the Court; and (ii) there is no agreement by either scholars or judges that promoting European public order ought to be the purpose of the Court at all, and, therefore, attempting to promote this goal may be considered illegitimate by the member states.

Developing this idea further, Chapter 5 surveys the legal techniques, such as pilot judgments, that allow the ECtHR to set broad standards of behaviour across Europe. As Dzehtsiarou's argument goes, even if the term 'European public order' is too vague to be useful, the goal of shaping public order could be understood as attempting to reach the more clearly defined goal of promoting rules of general application in Europe. This more specific goal could be supported by integrating new legal techniques in the Court's judgments. In his examination of the Court's jurisprudence, Dzehtsiarou shows that doctrinal innovations such as the procedure of pilot judgments and the increasing use of interim measures help the Court promote general rules across Europe. This chapter also shows some of the ECHR's reform efforts that have been initiated by the contracting parties and examines what they are directed at doing. Dzehtsiarou explains that some of these reforms do not seem dedicated to allowing the ECtHR to develop rules that can be generally applied in Europe. For example, Protocol no. 15 to the Convention puts greater emphasis on subsidiarity and

the margin of appreciation.[1] These are doctrines that promote judicial restraint, limiting the ability of the ECtHR to mould a European public order by developing general legal rules. Other reforms, in contrast, have given the Court new tools that could potentially help it to develop European public order such as extending the use of advisory opinions in Protocol no. 16 and creating an infringement procedure at the ECtHR in Protocol no. 14.[2] The effectiveness of these tools in shaping European public order, however, is still questionable.

The next chapter moves from examining what judges say in the judgments they author to what they say in interviews that Dzehtsiarou conducted with them, providing a different perspective on the intentions of judges. Chapter 6 describes numerous interviews that Dzehtsiarou conducted with judges that reveal they are far from uniform in their views about the Court's role *vis-à-vis* the promotion of European public order. The chapter explains that unclear terms like European public order are repeated without any guiding strategy and spread through the Court's jurisprudence in what Dzehtsiarou calls the 'Brownian motion' of legal terms.

3 Eppur si muove

Dzehtsiarou's book argues that the ECtHR cannot shape the European public order both because this term is too vague to be useful and because the Court cannot behave strategically in the manner required to shape European public order. Both claims combine to show that, despite the frequent reference to European public order, the term does not serve a major role in shaping the ECtHR's case law. However, while the first claim is convincingly argued for, there are weaknesses in the argument for the second claim. In addition to the vagueness of the term European public order, Dzehtsiarou's book provides a series of reasons why setting out to achieve a coherent European public order is a bad goal for the ECtHR. Among these reasons is the claim that the Court should defer to the states to protect its legitimacy, given that the Court does not have an effective enforcement mechanism and consequently must rely on legitimacy to secure compliance. Furthermore, the Court is not designed to be a constitutional court that sets general standards for the conduct of European states. These reasons seem sensible and can certainly be supported by some of the Court's jurisprudence, as the book demonstrates well.

However, Dzehtsiarou's book also claims that the ECtHR cannot behave strategically, in general. This explicit claim rests on other arguments that are not as convincing. The book explains that the Court has 47 judges (although, at the time of writing, it is 46 after the Russian judge's position was eliminated), each of whom is equal and independent from the others. In addition, the Court's presidents, who could potentially lead a more unified strategy, have limited powers, and they change frequently. To

[1] Protocol no. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, ETS 213.

[2] Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2004, ETS 194; Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, ETS 214.

this must be added Dzehtsiarou's observation that the judges disagree with each other about the goals of the Court, preventing the possibility of forming a united strategic body.

Yet this only suggests that it is difficult to locate a particular person who exercises strategy in the ECtHR or a particular position from which such a strategy can be applied. This does not mean that the Court does not behave as if it is motivated by some underlying strategy. The economist Milton Friedmann explained that, when a scholar describes a complicated phenomenon, such as the existence of strategic behaviour, they should do so not by explaining accurately all the mechanisms that lead to this behaviour. Instead, the scholar should adopt assumptions about reality that lead to hypotheses that accurately predict the phenomenon.[3] The ECtHR is not a rational individual; it is a court that is led by many people with their own interests and wishes. But if assuming the Court behaves rationally can help to describe its behaviour based on the hypothesis that the Court is motivated by a certain strategy, then the best possible description of the Court is that it follows that strategy. Identifying a strategic trend in the Court's judgments does not indicate that all or any of the people involved in shaping the Court's judgments are fully aware of the trajectory of the Court, associate it with some strategic goal and consciously navigate the Court towards this goal. However, trends that seem to serve a certain logic indicate that the Court as an institution can be explained as if it is rationally and strategically pursuing a certain goal.

If there is no possible mechanism for collective behaviour that could support strategic behaviour by the ECtHR, this implies that scholars need to reject any description of the Court as behaving strategically. However, Dzehtsiarou's book does not prove that mechanisms that allow for strategic behaviour by the Court are impossible, only that these mechanisms are unknown. Dzehtsiarou also argues that a few potential forms of strategy, such as the collective action of the judges to consciously promote a common vision of European public order, are unlikely. Nevertheless, the book provides proof that judges can and do follow each other without the guiding hand of any individual. If that is true, this means that strategies can evolve spontaneously and be practised by judges who follow other judges who either devised a strategy or just luckily stumbled upon a form of behaviour that is useful for the Court or for themselves. The proof that judges do follow each other and, hence, can follow behavioural trends without a clear common intention comes from what the book calls the 'Brownian motion' of the concept of European public order. The 'Brownian motion' is the phenomenon of repeatedly referring to the concept of European public order in a variety of new circumstances without proper attention to the context in which the concept was born. Many different judges use the same terminology again and again without sharing any conscious goal for their practice. This type of behaviour proves that judges mimic each other, at least some of the time.

But if judges mimic each other when they refer to a common argument without any grand plan that they are aware of, as Dzehtsiarou's book suggests, why would

[3] See Friedman, 'The Methodology of Positive Economics', in D.M. Hausman (ed.), *The Philosophy of Economics: An Anthology* (3rd edn, 2007) 145, at 153–154 (arguing that assumptions need to be checked not by their truth value but, rather, by their ability to lead to a good hypothesis).

they not follow each other without being aware of the general strategy in other cases? Specifically, if there are actions that could help the reputation and legitimacy of the Court, perhaps judges can engage in these actions repeatedly, even if not all judges are fully aware of the consequences of these actions? For example, scholars have observed that, when courts are criticized by powerful political adversaries, judges tend to write fewer dissenting opinions.[4] There is no memo sent to the judges telling them to dissent less and agree more. But maybe some judges realize that dissents are counterproductive when they inflame the criticism of the Court, lead to unwanted attention[5] or increase the chances of overruling.[6] Their colleagues copy them and do the same. The Court as a whole would behave in a strategic manner that would help it to avoid backlash, with few judges or, possibly, even no judges at all articulating this goal and the means to achieve it.

To demonstrate a strategy in the behaviour of the ECtHR, it is not necessary to expose all the mechanisms of influence between the judges and other staff. It is only necessary to make the assumption that the Court is behaving as a strategic actor and to devise hypotheses about the way in which the Court would be expected to behave. If these hypotheses are confirmed by observation of the Court's behaviour, the assumption that the Court behaves strategically should be adopted. As mentioned, describing the Court as if it followed a strategy does not require identifying the individuals that lead the Court and engage in strategic behaviour. This is not to say that there is no evidence supporting the view that there are individuals in the Court with strategic ideas or the ability to fulfil them. Some presidents have been dominant in terms of their intellectual observation or agenda about the Court's future. Good examples are President Luzius Wildhaber and President Robert Spano who charted a vision for the Court even in their academic writing.[7] Furthermore, the fact that the Court's registrar directly controls the entire legal staff gives the registrar plenty of power to strategize by centrally shaping the opinions signed by many judges at the same time. The legal staff, and the registrar who controls them, have substantial power to influence judgments because the staff is absolutely essential for the work of many judges. Many judges need the help of their staff even to fully comprehend texts in English and French, the Court's two official languages.[8]

4 See Post, 'The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court', 85 *Minnesota Law Review* (2001) 1267, at 1314–1319 (arguing that, in the first half of the 1920s, the US Supreme Court suppressed dissents because of heavy criticism against it. When the criticism of the Court decreased, dissents appeared again. In addition to the strategic reason that could explain the tendency of the Court as a whole, the article suggests a variety of personal reasons such as the leadership of Chief Justice Taft and the composition of the Court, at 1319–1328).

5 See R.A. Posner, *How Judges Think* (2008), at 32.

6 See Fuld, 'The Voices of Dissent', 62 *Columbia Law Review* (1962) 923, at 927.

7 See, e.g., Wildhaber, 'The European Court of Human Rights: The Past, The Present, The Future', 22 *American University International Law Review* (2007) 521; Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasburg Court and the Independence of the Judiciary', 27 *European Law Journal* (2021) 211.

8 See McKaskle, 'The European Court of Human Rights: What It Is, How It Works, and Its Future', 40 *University of San Francisco Law Review* (2005) 1, at 26–31.

But the point of this review is not that there are influential individuals with a coherent strategy for leading the ECtHR. The point is that it does not matter what judges say or think if the aim is to build a theory of the Court's behaviour. If the goal is to establish a theory of the ECtHR's behaviour, then the relevant question is whether there is evidence that shows strategic behaviour that explains the Court's actions because it concurs with the available observations of these actions. Dzehtsiarou's book does not provide any reason to think that the Court does not act as if it is strategic. On the contrary, by proving that a peculiar phrase – European public order – is used repeatedly without anyone knowing why, the book proves that at least some strategy that is fully acknowledged by no one may certainly be considered the best explanation for the behaviour of the Court.

In conclusion, based on the rich and detailed information about the practice of the ECtHR provided by Dzehtsiarou, one cannot rule out the possibility that the ECtHR behaves strategically. A strategic explanation may describe a variety of the ECtHR's practices, including the strange practice of repeating certain forms of reasoning that mean very little. This review does not attempt to provide a full explanation for why the particular phrase 'European public order' is used. A potential guess is that, to sustain the feeling of a mutual endeavour, the judges need to share some form of terminology that they do not understand. Analysing the meaning of this terminology itself will not serve to decipher the strategy of the Court. But exposing the fact that this terminology persists despite being incredibly vague, as Dzehtsiarou's book does with great care, provides the first step towards a theory that would view the ECtHR as a unified actor acting strategically to maintain its legitimacy by repeatedly using a certain set of terms.

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