

Schiedermair | Schwarz | Steiger (eds.)

# Theory and Practice of the European Convention on Human Rights



HART



Nomos

---

**Leipzig Studies on International,  
European and Foreign Public Law**

**Edited by**

**Prof. Dr. Markus Kotzur**

**Prof. Dr. Stephanie Schiedermair**

**Prof. Dr. Dominik Steiger**

**Prof. Dr. Mattias Wendel, Maître en droit**

**Institute for International Law, European Law and  
Foreign Public Law at the University of Leipzig**

**Volume 24**

Stephanie Schiedermaier | Alexander Schwarz  
Dominik Steiger (eds.)

# Theory and Practice of the European Convention on Human Rights



HART



**Nomos**



Onlineversion  
Nomos eLibrary

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN:     HB (Nomos)                   978-3-8487-7966-6  
          ePDF (Nomos)                   978-3-7489-2350-3

**British Library Cataloguing-in-Publication Data**

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

ISBN:     HB (Hart)                   978-1-5099-4597-9

**Library of Congress Cataloging-in-Publication Data**

Schiedermaier, Stephanie | Schwarz, Alexander | Steiger, Dominik  
Theory and Practice of the European Convention on Human Rights  
Stephanie Schiedermaier | Alexander Schwarz | Dominik Steiger (eds.)  
310 pp.  
Includes bibliographic references.

ISBN     978-1-5099-4597-9   (hardcover Hart)

1st Edition 2022

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2022. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the editors.

## Contents

Preface	7
<b>A. Human Rights and Procedural Law</b>	
Protecting Human Rights Through Criminal Law: The Revival of the Procedural Obligations	13
<i>Jacopo Roberti di Sarsina / Katharina Braun</i>	
The European Court of Human Rights and Article 18 – An Indicator for the State of Democracy in Europe?	35
<i>Christiane Schmaltz</i>	
The Copenhagen Declaration: Wrapping up the Interlaken Reform?	55
<i>Helga Molbæk-Steenisig</i>	
<b>B. Fundamental Human Rights Principles Facing New Challenges</b>	
How many Strikeouts are too many? The ECtHR’s Evolving Approach to Repetitive Cases and the Limits of Efficiency	81
<i>Edith Wagner</i>	
Protection of Human Rights Defenders and Whistleblowers under Human Rights Law	103
<i>Veronika Bílková</i>	
The ECtHR’s Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective	133
<i>Hanaa Hakiki</i>	

## Contents

Protecting Democratic Elections Against Online Influence via “Fake News” and Hate Speech – The French Loi Avia and Loi No. 2018–1202, the German Network Enforcement Act and the EU’s Digital Services Act in Light of the Right to Freedom of Expression <i>Dominik Steiger</i>	165
A Culture of Justification or a Culture of Presumption? The Turn to Procedural Review and the Normative Function of Proportionality at the European Court of Human Rights <i>Alain Zysset</i>	215
<b>C. Human Rights and National Legal Orders</b>	
Judicial and Prosecutorial Independence in Europe: How Politicized Judges and Prosecutors Undermine the Right to a Fair Trial in Eastern Europe and Central Asia <i>Stefanie Lemke</i>	235
The Role and Impact of the European Convention on Human Rights Beyond States Parties: The curious case of the ECHR in Kosovo <i>Beti Hohler and Barbara Sonczyk</i>	261
Extraterritorial Application of Human Rights Law – New Developments with regard to Germany <i>Robert Frau</i>	291
List of Authors	307

## Preface

This book is the product of a collaborative international project of the Law Faculty of the University of Leipzig and the Center for International Studies (Zentrum für Internationale Studien) of Technische Universität Dresden, Germany. Two years ago, the two institutions decided to organize a summer school on human rights protection under the European Convention on Human Rights. Over 20 speakers and about 100 participants from 30 countries turned our first Human Rights Summer School in Leipzig into a space of lively discussion. The positive responses from the participants encouraged us to continue with the Summer School and have a second round in 2021 – this time taking place in Dresden.

One of the Summer School's special ingredients is that speakers include both academics as well as practitioners, offering the unique opportunity to gain insights into current theoretical discussions as well as the everyday challenges of practicing law. This approach also provides the basis for the collection of authors provided in this volume, for which internationally renowned practitioners as well as scholars were invited to contribute.

The book is divided into three overarching focal points. The first part deals with the important procedural aspects of human rights protection (A.). Human rights in general face the problem of a theoretically high level of protection on the one side and an often ineffective enforcement on the other. The question how to implement human rights best, is therefore a crucial one. The opening essay by *Jacopo Roberti di Sarsina* and *Katharina Braun* deals with that question by analyzing the ECtHR's increasing engagement with procedural obligations of the member states to criminalise, investigate, and prosecute, which has partly been criticized as an undue restriction on State's prerogatives. The second chapter deals with a problem from the present ECtHR's judicature as well: *Christiane Schmaltz* reflects on Article 18 ECHR, which limits restrictions on rights to only the reasons listed in the Convention, as an underestimated provision of the ECHR system, whose presence or absence in the jurisprudence of the ECtHR can be taken as an indicator for the state of democracy in the member states. In the third chapter, *Helga Molbæk-Steenig* takes a close look into the Interlaken Process

supposed to deal with the overload of cases the ECtHR is confronted with.

The second part is dedicated to new challenges arising for fundamental human rights principles (B.). Here *Edith Wagner* deals with the ECtHR's quest to deal more efficiently with repetitive cases and the rise of strikeouts under article 37 para. 1 lit. c ECHR. The chapter also critically examines the ECtHR's largest-ever strikeout that led to the dismissal of 12,148 cases. The following two chapters turn to the protection of especially vulnerable groups. *Veronika Bílková* analyses the special needs of Human Rights Defenders and Whistleblowers, who are often victim of abuses by states and non-state actors due to their activities. The chapter is followed by *Hanaa Hakiki* looking critically at the ECtHR's recent application of the prohibition of collective expulsions at European borders. Two recently much-debated phenomena provide the basis for the reflections of *Dominik Steiger* who analyses the limits of legislation countering fake news and hate speech in the light of the ECHR's guarantee to freedom of speech. A procedural-related challenge is the topic of *Alain Zysset*'s contribution on the turn to procedural review and the normative function of proportionality at the ECtHR. The article is one of the rare accounts of the turn to procedural review dealing with its broader significance and the impacts for our understanding of the Court's nature, function and legitimacy.

The third part turns the gaze to the legal orders of the member states (C.). *Stefanie Lemke* explores how judges and prosecutors deal with politically sensitive cases and uphold European human rights standards, particularly with regard to the right to a fair trial, in three member states: Azerbaijan, Russia and Ukraine. A special relationship is examined by *Barbara Sonczyk* and *Beti Hohler* who explore the role and impact of the ECHR in Kosovo, thus investigating an example of the Convention's potential to influence human rights protection in non-state parties. The volume is concluded by *Robert Frau*, who takes in developments in Germany by reflecting on the various approaches of the German Federal Constitutional Court concerning the extraterritorial applicability of the ECHR.

The editors would like to thank everyone who made this book possible. First of all, the speakers of the Summer School for their live and written contributions and their time spent on preparation of the chapters of this volume. Secondly, the support from Gabriel Armas-Cardona (Esq., NYU) in proofreading and editing cannot be overestimated. Further thanks go to David Koppe, without whose

support the first edition of the summer school would not have been possible.

Lastly, we would like to express special thanks to the Friends of the University of Leipzig (Förderverein der Juristenfakultät der Universität Leipzig) as well as to the Technische Universität Dresden, where one of the editors holds the Chair of Public International Law, European Union Law and Public Law, for their financial support of this volume.

Leipzig/Tunis/Dresden, July 2021

*Stephanie Schiedermaier, Alexander Schwarz & Dominik Steiger*

