

# Introduction: The Reception of the ECHR in National Legal Orders

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The European Convention on Human Rights<sup>1</sup> is the most effective human rights regime in the world. The Convention (ECHR), which entered into force in 1953, established a basic catalogue of rights binding on the signatories, and new institutions charged with monitoring and enforcing compliance. Distinctive at its conception, the ECHR has since evolved into an intricate legal system. The High Contracting Parties have steadily upgraded the regime's scope and capacities, in successive treaty revisions. They have added new rights, enhanced the powers of the European Court of Human Rights (ECtHR), and strengthened the links between individual applicants and the regime. For its part, the Strasbourg Court has built a sophisticated jurisprudence, whose progressive tenor and expansive reach has helped to propel the system forward. Today, the Court is an important, autonomous source of authority on the nature and content of fundamental rights in Europe. In addition to providing justice in individual cases, it works to identify and to consolidate universal standards of rights protection, in the face of wide national diversity and a steady stream of seemingly intractable problems.

This book focuses on the impact of the Court and the Convention on the domestic legal systems of the regime's members, a topic that has been understudied, given its increasing importance. Two previously published pieces of research inspired and guided this project. The book entitled "The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context",<sup>2</sup> published in 1998, presented a series of single-country reports and comparative analyses of how the national courts reacted to, and ultimately, accommodated the European Court of Justice's doctrine of the supremacy of European Community

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, signed on 4 November 1950, entered into force on 3 September 1953. The Convention has now been ratified by 47 countries (31 December 2007).

<sup>2</sup> Slaughter, Stone Sweet and Weiler (1998).

law. One premise of that earlier volume, which we share, is that national judges are important actors in their own right in the process through which European law becomes effective in national legal orders. This volume's scope is somewhat wider, in that the reports examine the role of all national officials, not only judges, in facilitating or resisting the influence of the Convention. The basic template for the research was established by Helen Keller's pilot study entitled "Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms in Poland and Switzerland",<sup>3</sup> an agenda we extended for this project.<sup>4</sup>

A first point of departure was the view that the Court is today institutionally well-positioned to exercise such influence. The Court has final jurisdiction over disputes concerning the content of the Convention, the compliance with the Convention of the High Contracting Parties, and the scope of its own jurisdiction (*Kompetenz-Kompetenz*); it has a burgeoning caseload in the form of individual applications; and it has produced a case law that defines what States owe to their own citizens under the Convention. A second point of departure was the observation that the regime's influence on national officials and their decision making varies widely across States and across time. Indeed, as our research shows, the Court's impact has been broad and pervasive in some States, and weak in others. Moreover, in those States that have been heavily influenced by the Convention, impact has been registered through quite different processes. How national officials use Convention norms, and the extent to which they resist or adapt to the Court's case law, has also changed across time, sometimes radically. Our major objective, then, was to describe and analyse this variance, as systematically as possible, and to take some initial steps toward explaining it.

This volume reports our results. Each of the nine substantive chapters examines comparatively what we will call "the reception of the ECHR" in two States. By reception, we mean how – that is, through what mechanisms – national officials confront, make use of, and resist or give agency to Convention rights.<sup>5</sup> The book is fundamentally a work of comparative law, albeit with a twist. The project focuses empirical attention on the capacity of an international regime, and its transnational court, to shape law and politics at the domestic level. It thus addresses some of the same basic questions asked by students of the Europeanization of law and politics, of multi-level governance, and of the constitutionalization of treaty-based legal systems. The project also has a normative dimension, namely, to identify how the effectiveness of Convention rights in national legal orders has been, and can be, enhanced over time. We chart how the status of the Convention in domestic law and politics has changed over time, and examine, from a comparative perspective, the regime's overall effectiveness.

<sup>3</sup> Keller (2005).

<sup>4</sup> See *infra* Section B.1.

<sup>5</sup> For an extensive discussion of reception, see *infra* Section B.1.

## A. The Convention and its Court

### 1. *Origins and Evolution*

In 1950, the new Council of Europe<sup>6</sup> completed its first major venture: the drafting of the ECHR. The Convention was negotiated in the immediate aftermath of a cataclysmic war, against the background of economic, social, and political reconstruction, the results of which were then far from certain. This context heavily conditioned the “original intent”<sup>7</sup> of the fourteen States that would sign the Treaty, understood as the aims and purposes that the Council of Europe expected the ECHR to serve. Most important, States considered the Convention to be one instrument, among others, to prevent future European wars, bolster liberal democracy, oppose Communism, and express a common European identity, through their joint commitment to rights.

From today’s vantage point, it is obvious that the underlying nature and purposes of the Convention system have changed. The broader environment in which the regime is embedded has undergone deep systemic transformation. In the 50’s and 70’s, West European States successively embraced a new constitutionalism,<sup>8</sup> entrenching constitutional rights and their protection; NATO and the EU succeeded in providing security and market and political integration; the EU was gradually constitutionalised, through the consolidation, in national legal systems, of the European Court of Justice’s doctrines of direct effect and supremacy; the Cold War ended and the Soviet bloc disintegrated. In the post-1990 period, the territorial scope of European commitments to rights-based constitutionalism, to the EU and NATO, and to the Convention further widened and deepened. Since 1990, membership in the ECHR has increased by 24 States, covering a territory of roughly 450 million people. Today, the Convention’s territorial scope is truly pan-European, covering 47 States and more than 800 million people.

Over this same period, the ECHR experienced its own “evolutionary, sometimes revolutionary changes”.<sup>9</sup> To take the most telling example, the founding signatories of the Convention were deeply divided on the question of establishing an autonomous legal system with supranational authority to monitor and enforce compliance. In 1950, they agreed to disagree. After voting seven to four against creating a Court with compulsory jurisdiction, they made acceptance of the Court’s authority voluntary, through an optional Protocol. When objections were levied against proposals to allow individual applications, States made the individual petition optional as well. Additionally, they placed an administrative

<sup>6</sup> The Council of Europe was established by the Treaty of London, which was signed on 5 May 1949 by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. For an overview of the Council of Europe and a survey of its main functions, see Winkler (2006).

<sup>7</sup> See Nichol (2005); Moravcsik (2000); Simpson (2001).

<sup>8</sup> Shapiro and Stone Sweet (1994); Stone Sweet (2000).

<sup>9</sup> Shelton (2003), 100.

body, the European Commission of Human Rights (which began operation in 1954), between applicants and the Court (which began operating only in 1959). Until it was abolished in 1998, it was the Commission's task to process applications, whether interstate or individual. Petitions reached the Court only after the Commission had completed its work, and only under certain conditions. Today, the High Contracting Parties are "locked-in"<sup>10</sup> to a transnational system of rights protection that is managed and supervised by a supranational Court. State acceptance of the individual application and the compulsory jurisdiction of the Court is mandatory.

The High Contracting Parties have been complicit in the expansion of the legal system's autonomy and supranational character. The process has not taken place without the knowledge and consent of the Parties, or against their will. On the contrary, the ECHR and its Court have had remarkable success in socialising the regime's members into the logics of collective, transnational rights protection, and in enlisting participation in the Convention's expansionary dynamics.

These dynamics are easily observed. Although the ECHR was originally considered to have established minimum, and largely minimal, standards for basic human rights, the Strasbourg Court has interpreted Convention rights in a progressive manner. According to the Court, the ECHR is not static but a living instrument,<sup>11</sup> and its contents must be read to secure effective rights protection for individuals, as European society evolves.<sup>12</sup> Alongside this teleology of purpose and effectiveness, the Court has developed an overarching comparative methodology, one result of which is to ensure a creative lawmaking role for itself. In defining the content and scope of Convention rights, for example, the Court will typically survey the state of law and practice in the States, and sometimes beyond. Where it finds an emerging consensus on a new, higher standard of rights protection among States, it may move to consolidate this consensus, as a point of Convention law binding upon all members.

Formally, the Court's role is restricted to determining whether a State has infringed upon Convention rights in any specific case. The Court regularly invokes the principle of subsidiarity and its doctrinal corollary, the margin of appreciation (the discretion to define the scope of Convention rights in the first instance) afforded national authorities. And it regularly reminds States that it does not possess the *de jure* power to revise the Convention on its own. Increasingly, however, the Court appears to consider that an important oracular, rights-creating, function inheres in its jurisdiction. Today, the Court is the unrivalled master of

<sup>10</sup> *Ibid.*, 101.

<sup>11</sup> *Tyler v. United Kingdom* (appl. no. 5856/72), Judgement (Chamber), 25 April 1978, Series A, Vol. 36, para. 31; *Loizidou v. Turkey (Preliminary objections)* (appl. no. 15318/89), Judgement (Grand Chamber), 23 March 1995, Series A, Vol. 310, para. 71.

<sup>12</sup> The Court requires national authorities to interpret Convention rights so as to make them effective for individuals, in fact. See *Soering v. United Kingdom* (appl. no. 14038/88), Judgement (Plenary), 7 July 1989, Series A, Vol. 161.

the Convention, a posture it uses to construct European fundamental rights in a prospective and progressive way.

Although the Court routinely identifies and develops what appear to be, from the perspective of at least some States, new rights and remedies, States have not mounted a campaign to roll back their commitments, or to curb the Court. On the contrary, they have added new rights to the Convention catalogue, using a series of optional protocols (each of which has gained adherents over time). States have also introduced major organizational and procedural changes, the most important of which came through Protocol no. 11. That Protocol, which entered into force in 1998, abolished the Commission of Human Rights, and centralised administrative authority to process claims in a new Court and its staff, the Registry. Under Protocol no. 11, individuals may petition the Court after exhausting domestic remedies. Within national legal orders, most States have clarified and enhanced the nature and status of the Convention through the incorporation of the Convention into domestic law. In most cases, incorporation means that individuals may plead Convention rights before national judges, who can directly enforce them.

As a result of these and other developments, scholars and judges now engage a lively debate about the regime's constitutionalization, and its possible constitutional futures.<sup>13</sup> In Greer's view, for example, the Court "is already 'the Constitutional Court for Europe', in the sense that it is the final authoritative judicial tribunal in the only pan-European constitutional system there is".<sup>14</sup> This debate is an important indicator of the regime's transformation. It is undeniable that, in the 21st century, the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe, a point to which we will return<sup>15</sup>. Further, the Court itself has come to see its role in constitutional terms. In a 1995 decision, the Court called the ECHR "a constitutional document" of European public law.<sup>16</sup> And, in 2000, the President of the Court, Luzius Wildhaber, writing in a personal capacity but echoing prevailing sentiments on the Court, argued strongly in favour of enhancing its constitutional role and authority.<sup>17</sup>

We take no position here on how best to characterize the nature of the regime. For our purposes, the constitutionalization debate is of interest in that it focuses attention on the structural relationship, as it has evolved, between the Convention and national legal orders.<sup>18</sup> Structural questions once dismissed as

<sup>13</sup> Alkema (2000); Flauss (1999). See also Greer (2006), discussing the constitutionalisation of the ECHR and the constitutional justice dispensed by the European Court of Human Rights.

<sup>14</sup> Greer (2006), 173.

<sup>15</sup> See *infra* Section B.2.

<sup>16</sup> *Loizidou v. Turkey* (*supra* note 11), para. 75.

<sup>17</sup> Wildhaber (2000).

<sup>18</sup> The debate is also data, indicating that something important is happening. At the very least, how these debates are settled will determine how the regime evolves in the future.

largely academic are now being urgently debated by judges and politicians. Is the primary role of the Convention system to provide individual or constitutional justice? To what extent does, or should, the Court's rights jurisprudence bind national judges, including those sitting on supreme or constitutional courts? What *erga omnes* status, if any, should important rulings of the Court be given? Can the principle of subsidiarity be reconciled with the Court's preferred interpretive strategy, that of a forward-looking, living instrument approach?<sup>19</sup> In the context of enlargement, can the Court maintain consistent standards of rights protection, or is the emergence of a two-track Europe inevitable? The contributions to this volume respond in various ways to these and other questions, from the perspective of national legal systems.

## 2. *Determinants of Impact*

We designed this project on the presumption that the Court is well positioned to exert influence on national legal systems, a presumption that deserves a defence. Other things equal, no judicial body anywhere will accrete influence over its broader legal and political environment in the absence of three conditions: (1) the institutional competence to determine the law in an authoritative manner; (2) a regular caseload; and (3) a minimally robust conception of precedent. In the ECHR context, too, these three factors are necessary conditions for strengthening, over time, the Convention's effectiveness in national legal orders. They are not sufficient conditions, since the Court cannot, on its own, give agency to its jurisprudence in domestic legal orders. National officials – legislators, executives, and judges – have made choices about how to respond to the evolution of Convention norms. For the Convention to make a difference domestically, officials must take decisions that will strengthen its effectiveness. We will turn now to each of these conditions.

### a. **Jurisdiction**

Since the entry into force of Protocol no. 11, at least, the Court has possessed all of the formal power required for it to acquire and exert dominance over the evolution of the Convention system. Indeed, the jurisdictional basis of its power compares favourably to that of the European Court of Justice, and exceeds that of most national constitutional courts.<sup>20</sup>

As presently constituted, the ECHR is characterized by structural judicial supremacy. Consider the situation in light of contemporary delegation theory. In the jargon of that theory, "principals", those in power at the *ex ante* constitutive

<sup>19</sup> Nichol (2005). Nichol argues for the more expansive, evolutionary approach and against minimalism, while showing that the debate between minimalists and activists (those who desire a progressive construction or rights), has gone unabated since 1950.

<sup>20</sup> In comparison to rights under the ECHR, it is usually easier for a national constitution to be revised by those seeking to overturn a constitutional court decision, although there are exceptions to this rule (as when rights provisions are made immune from revision).

moment, delegate power to “agents”, in order to help them manage their responsibilities, *ex post*. A “trusteeship” situation is created when the principals (in this case, the High Contracting Parties) transfer significant “political property rights” to a new organ, the *trustee* (in this case, the Court), in order to help them govern themselves collectively.<sup>21</sup> A trustee, then, possesses legal authority to govern the principals in light of priorities – legal commitments – to which the latter has agreed. By definition, a trustee court possesses final authority to determine the scope and content of the law, and the principals have reduced means of overruling judicial determinations that they may find objectionable. A paradigmatic example of such a trustee, the Strasbourg Court exercises extensive “fiduciary” authority over the Convention. Under Article 46 ECHR, the High Contracting Parties, acting collectively as the Committee of Ministers of the Council of Europe, “supervise [the] execution” of the Court’s final judgements.<sup>22</sup> In this account, structural judicial supremacy is legitimized by the fact that States designed the system for their own express purposes, and they help to make it effective on a continuous basis.

The core of the Convention is a catalogue of rights, as supplemented by the various optional protocols.<sup>23</sup> Under Article 1 ECHR, the High Contracting Par-

<sup>21</sup> For a discussion of judicial trusteeship, see Stone Sweet (2002), building on the contributions of Majone (2001) and Moe (1990).

<sup>22</sup> For an overview of the Council of Europe’s system of supervision and enforcement of the Court’s judgements, see Polakiewicz (2001).

<sup>23</sup> Articles 2–14 comprise the substantive core of the Convention, beginning with the right to life (Article 2), the right to be free from torture, and inhuman and degrading treatment (Article 3), and the right not to be held in slavery or servitude (Article 4). Basic procedural guarantees are established in the form of rights to personal liberty and security (Article 5), a fair trial (Article 6), and no punishment without law (Article 7). Articles 8–12 provide for: the right to respect of one’s privacy and family life, and to marry; and the freedom of thought, conscience, religion, expression, assembly, and association. Article 13 states that “everyone whose [Convention] rights and freedoms are violated shall have an effective remedy”; and Article 14 proclaims that “the enjoyment” of Convention rights “shall be secured without discrimination on any ground”, including race, sex, language, social origin, and religion, among other categories. Optional protocols have added: rights to property, education, and free elections (Protocol no. 1); freedom of movement and the rights of nationals not to be expelled from their own State, and of aliens not to be expelled collectively (Protocol no. 4). Protocol no. 6 abolishes the death penalty except in times of war, and Protocol no. 13 outlaws the death penalty in all circumstances. Protocol no. 7 enhances certain due process requirements, including rights to appeal and compensation for wrongful punishment. Finally, Protocol no. 12 (2002) establishes a general prohibition on discrimination “by any public authority on any ground”, while permitting affirmative action policies. With the exception of provisions on torture, inhuman, and degrading treatment (Article 3), and on slavery and servitude (Article 4), which may be considered absolute, other rights are explicitly “qualified” in various ways. Articles 8–11, for example, are qualified by a necessity clause. States may only “interfere” with the exercise of these rights when “necessary in a democratic society” and “in the interests of” some specified public interest. States purposes mentioned include “national security”, “public safety”, “the economic well-being of the country”, “the prevention of disorder or crime”, “the protection of health or morals”, and “the protection of the rights and freedoms of others”. Even in times of war and other public emergency, States may not derogate from Articles 2, 3, 4(1) and 7 ECHR (*e contrario* Article 15(2) ECHR). Under Article 18, states may not impose restrictions on rights “for any purpose other than those for which [restrictions] have been prescribed”.



ties are legally required “to secure to everyone within their jurisdiction the rights and freedoms” this catalogue contains. The Court’s duty is to ensure that States meet this obligation, and its authority to do so is largely insulated from the latter’s control. Article 32 ECHR grants the Court exclusive, final jurisdiction over “all matters concerning the interpretation and application of the Convention”, and gives the Court the competence to determine the limits of its own jurisdiction. Under Article 46 ECHR, the Parties “undertake to abide by the final judgement of the Court in any case to which they are parties”. The High Contracting Parties, as principals, could overturn an objectionable interpretation of the Court, but only by revising Convention norms. In practice, the prospect is a virtual impossibility, given the decision-rule governing the regime’s revision: unanimity of all of its members.

In addition to direct grants of authority, States can be said to have indirectly conferred additional powers on the Court, as the system has evolved. Convention norms, like modern rights provisions generally, are relatively open-ended and incomplete. Few rights are expressed in absolute terms; most rights are qualified in terms of public interest goals that States may legitimately pursue. As research on the *travaux préparatoires* shows,<sup>24</sup> the founding States were never able to settle differences concerning the nature and content of the rights they enshrined. They disagreed, for example, about whether the Convention expressed minimum common denominator conceptions of basic rights and nothing more, or established a legal foundation for a more expansive evolution of rights. This disagreement necessarily conditioned attitudes toward establishing a court. In 1950, the founding States were not prepared to establish a judicial mechanism for settling these disagreements. It is difficult to imagine the Convention today without its Court, but only because States have chosen, over time, to strengthen their commitment to adjudication. In doing so, States have transferred authority to “complete” or “construct” Convention rights, rendering them more determinate over time for all members, despite national diversity.<sup>25</sup>

Given structural judicial supremacy, it is not surprising that the Court dominates the process through which Convention rights are given concrete expression. Inspired by German constitutional doctrine, for example, the Court embraced proportionality as a basic balancing approach to rights adjudication. Proportionality is an analytical framework that is particularly well suited to managing the

<sup>24</sup> See Nichol (2005).

<sup>25</sup> As with most constitutions and treaty-based regimes, the ECHR can be analyzed as an “incomplete contract”. And, like any complex instruments of governance designed to last indefinitely, if not forever, the Convention is a “relational contract”. Rights provisions are expressed in general terms. Generalities and vagueness may facilitate agreement at the bargaining stage. But vagueness, by definition, is legal uncertainty, and legal uncertainty threatens to undermine the reason for contracting in the first place. The establishment of the Court can be seen as an institutional response to the incomplete contract, that is, to the problems of uncertainty and enforcement. Adjudication then functions to clarify the meaning of the constitution over time, and to adapt it to changing circumstances. Milgrom and Roberts (1992), 127–33.



litigation of qualified rights. Through it, the Court resolves conflicts between a pleaded right, on the one hand, and the public interests that may justify its limitation, by public authority, on the other. Despite its advantages, proportionality review is one of the most intrusive forms of judicial supervision known: it requires courts to stand in judgement of the policy choices of State officials. In the “necessity” stage of the analysis, courts deploy a “least-restrictive means” test, censuring government if its preferred policies infringe more on a right than is necessary to achieve an otherwise legitimate public purpose. For many rights, including those enumerated in Articles 8–11 and 14 of the Convention, individuals today possess a right to proportionality analysis under the “effective remedy” requirement of Article 13. This development is momentous, considering that proportionality analysis was native only to the legal systems of Germany and Switzerland.<sup>26</sup> It has diffused, through Europeanization, under the tutelage of the Court.

There are important signs that the nature of the Court’s jurisdiction is currently undergoing an important expansion. As formally constituted, the ECHR is geared toward the rendering of individual justice. The Court is activated by applications from individuals, and its decisions have, technically, only *inter partes* effects (Article 46 ECHR). Further, if the Court finds a State to be in violation of a Convention right, it may, under Article 41, award damages to the injured party. With enlargement and the advent of Protocol no. 11, the system has become flooded with dozens, often hundreds, of virtually identical complaints generated by a systemic defect in a national legal order. In this situation, how to control the docket, and how to mete out justice, are problems that necessarily overlap. In 2004, the Committee of Ministers of the Council of Europe invited the Court, in the ordinary course of its work, to identify the source of systemic failure, to suggest systemic solutions to the problems identified, and to recommend appropriate remedies for the class of individuals who have been injured by such failures.<sup>27</sup> In response, the Court has begun issuing what it calls pilot judgements,<sup>28</sup> whose underlying purpose is to make Convention rights effective for victims of systemic dysfunction, in effect, as a class of plaintiffs. When it does so, it acts managerially, proposing law of a general and prospective quality for a State whose existing arrangements are defective.

<sup>26</sup> In the 80s, Turkish courts also used an approach akin to proportionality when it adjudicated certain fundamental rights, although it did not do so consistently. See in this volume Kaboğlu and Koutnatzis, Section F.2.b.

<sup>27</sup> The Council of Europe, Committee of Ministers, Resolution (Res(2004)3) on Judgements Revealing an Underlying Systemic Problem, 12 May 2004. The Council of Europe, Committee of Ministers, Resolution (Res(2004)6) on the Improvement of Domestic Remedies, 12 May 2004.

<sup>28</sup> E.g., *Broniowski v. Poland* (appl. no. 31443/96), Judgement (Grand Chamber), 22 June 2004, Reports 2004-V, 1. See Krzyżanowska-Mierzewska, this volume, Section G.1.

**b. Activity**

In order to exert influence on national legal orders, the Court must have a caseload. In this book, we focus on the individual application, because it constitutes the primary means through which the regime generates the kinds of outcomes in which we are concerned. Individual rights claims make up, almost entirely,<sup>29</sup> the Court's docket. Each petition contains a detailed record of the domestic law and procedures that, allegedly, have failed to protect the applicant. Petitions thus provide a window into the internal workings of the national legal order. It is through this window that the Court will observe and review national law and practice in light of Convention requirements.

This system is a victim of its own success. Not only does the Court receive a steady stream of cases, the rising tide of applications now threatens to overwhelm the Court. A brief survey of annual rates of activity in this area is revealing.<sup>30</sup> The European Commission of Human Rights received 49 individual applications in the decade of the 60's, 163 in the 70's, and 455 in the 80's. With the enlargement and entry into force of Protocol no. 11, the numbers have exploded. In 1998, the Registry of the Court received 18,200 individual applications, a figure that has increased every year thereafter, to 50,500 in 2006. Although some 98% of all applications will be determined to be inadmissible for one reason or another, the Court is nonetheless overloaded.<sup>31</sup> Today there are nearly 100,000 applications, in the post-admissibility phase, pending before the organs of the Court. The delay between application and a decision on the merits, has now reached more than five years (though only 5% of applications judged admissible will reach the merits stage). The annual rate of judgements on the merits rendered by the Court shows a similar pattern. Through 1982, the Court had rendered, in its history, only 61 such rulings pursuant to applications by individuals. It issued 72 such rulings in 1995; 695 in 2000; 1,105 in 2005; and 1,560 in 2006.

Sheer numbers tell only part of the story, and nothing about the nature of the claims and of the domestic contexts that generate the applications. Simplifying a complex set of issues, we can distinguish between quite different situations, or types of general problems, that the Court now regularly confronts. In a first situation, the Court seeks to enhance standards of rights protection, on the margins, in States that otherwise have a relatively good record of compliance with the Convention. The Court identifies gaps in rights protection and encourages States to adjust their law to fill those gaps. In this mode of operation, the Court may also develop new rights for discreet communities (e.g., of transsexuals) or for

<sup>29</sup> Through 2003, there were only twenty interstate applications, although some of these have resulted in important Court judgements.

<sup>30</sup> The source for these data is the annual *Survey of Activities* published by the ECtHR on its website: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/> (most recently checked 31 January 2008).

<sup>31</sup> The Court itself, in its *Survey of Activities 2006*, *ibid.*, p. 3 states: "This enormous caseload has raised concerns over the continuing effectiveness of the Convention system."

specific situations (e.g., religious teaching in the schools). In post-Protocol no. 11 Europe, the Court will never want for such opportunities. Where Convention standards for rights protection are higher than those in domestic legal orders, the Court can expect to be activated – systematically – by individuals seeking to change domestic law. And the more the Court undertakes to interpret the Convention in a progressive, expansive, and open-ended way, the more likely it is that rights protection in one or several States will routinely fall below Convention standards, creating pressure for national adaptation. In this situation, the Court arguably plays the role of a European Constitutional Court.

The Court faces a second, qualitatively different, type of problem when it encounters systemic failures to protect rights. Across Europe, many States find it virtually impossible to meet Convention standards, under Article 6(1) ECHR, for ensuring that judicial proceedings are initiated and completed in a reasonable time. In this area, floods of clone applications from certain countries, such as Italy, have become chronic.<sup>32</sup> With enlargement into East and into the Balkans, the Court now confronts a third kind of problem: massive State failures to provide even minimal protection of the most basic rights, including the prohibition of torture and inhuman and degrading treatment laid down by Article 3 ECHR. In some States, institutional capacities to protect rights are simply under-developed; in others, including Georgia, Russia, Turkey, and the Ukraine, political officials and judges fail to uphold even the most basic principles of rule of law. At present, the majority of judgements<sup>33</sup> concern serious problems of either systemic or massive failure to protect Convention rights. In this situation, the Court arguably plays the role of a High Court of Appeal, or Court of Cassation.

Given these challenges, it is difficult to see how the Convention regime can prosper, if the Court sees its role primarily as providing individual justice. Indeed, as discussed, the Court has had little choice but to explore other options, such as the pilot judgements, in which it takes on the mantle of judicial lawmaker for States, in the context of a specific problem. To the extent that it does, of course, the Court positions itself to exercise relatively direct impact on domestic legal systems.

### c. Jurisprudence

If, arguably, the ECHR has evolved certain “constitutional” features, the regime remains a creature of international law. Most important, unlike national constitutional or supreme courts, the Strasbourg Court does not possess the authority to invalidate national legal norms judged to be incompatible with the Convention. The absence of such authority constitutes a serious disadvantage to the ex-

<sup>32</sup> See also in this volume Candela Soriano, Section C.2.b.

<sup>33</sup> In 2006, 964 of the 1,560 rulings (63%) of the Court concerned just six states: Italy, Poland, Russia, Slovenia, Turkey, and the Ukraine. Data reported in European Court of Human Rights, *Survey of Activities 2006* (*supra* note 30).

tent that the regime is expected not only to render retrospective justice in individual cases, but also to construct Convention rights and to ensure their general effectiveness across Europe, prospectively. The Court can count on the Council of Europe's support of a robust doctrine of *pacta sunt servanda* (under Article 46 ECHR), and for the development of innovative approaches to systemic failures, such as pilot judgements. Such support, along with the good will and good faith of most States, should not be underestimated. The Court would fail at its mission without them. Nonetheless, the ECHR is an autonomous legal regime. The Court does not preside over a hierarchically constituted judicial system in which it exercises appellate review, or cassation powers, when it comes to decisions of national courts. Put differently, the Court's command and control capacities are weak, at best. They are primarily reduced to the ordering of compensatory damages to be paid in just satisfaction to successful applicants.

In consequence, the Court performs its most important governance functions through the building of a precedent-based case law.<sup>34</sup> Through precedent, the Court seeks to structure the argumentation of applicants and defendant States, to ground its rulings, and to persuade States to comply with findings of violation. The Court also relies heavily on precedent-based rationales to develop Convention rights, and to manage a complex environment, prospectively. The Court does so in the name of "legal certainty and the orderly development of [its] case law".<sup>35</sup> Convention rights, like the rights provisions of national constitutions, have been judicially constructed, and precedent both enables and constrains the Court's creativity. The Court will abandon a line of case law in order to correct an earlier error, or "to ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions".<sup>36</sup>

This mode of governance – through precedent – raises an empirical issue that is at the heart of our concerns. Convention rights will only have impact beyond any individual case to the extent that national officials take into account the Court's jurisprudence in their own decision making. Incorporating the Convention directly into national legal orders, as directly enforceable law, may induce, or may legally require, national officials to do so. But incorporating the Convention in this way is not obligatory. National officials, including judges, will always possess some measure of discretion as to how to make use of the Court's case law. They may decide to ignore the Court's interpretation of the Convention, even when on point, and even where Convention rights have been domesticated through incorporation. Thus, the development of a coherent jurisprudence is a third necessary condition, but not sufficient in itself, for the ECHR to exert influence on national legal orders.

<sup>34</sup> See Shelton (2003), 127.

<sup>35</sup> *Cossey v. United Kingdom* (appl. no. 10843/84), Judgement (Plenary), 27 September 1990, Series A, Vol. 184, para. 35.

<sup>36</sup> *Ibid.*

In summary, the Court possesses all of the formal power required for it to acquire dominance over the evolution of the Convention regime; today, its *de facto* dominance over the regime is fully secure. On the input side, we can expect that most important violations of Convention rights will be referred to Strasbourg, by one or more applicants. On the output side, the Court has produced a dense and elaborate case law that provides an authoritative construction of Convention rights and, thus, guidance to national officials who mean to apply the Convention on their own. If and how national officials actually do so is the major preoccupation of this book.

## B. Nature and Scope of the Project

### 1. *Methodological Considerations*

The goal of this volume is to assess, cross-nationally and across time, the impact of the Convention on national legal orders. Each chapter pairs two relatively “like cases” for comparative analysis, and the book as a whole should be read comparatively, across relatively “unlike cases”. Our coverage is wide, comprising countries in Western Europe (Ireland/the UK; France/Germany; Austria/Switzerland; Belgium/the Netherlands); Central and Eastern Europe (Poland/Slovakia; Russia/Ukraine); Southern Europe (Greece/Turkey, Spain/Italy); and Scandinavia (Sweden/Norway). For each report, authors responded to the same research questions, collecting and analysing the same types of data. In addition, external experts – including judges on the Strasbourg Court, national judges, and senior litigators and academics – were integrated into the project from the beginning.<sup>37</sup> They attended our workshops, consulted with reporters in the course of their research, and commented on drafts of the reports.

For purely pragmatic reasons (space and resource limitations) this book does not cover all the Member States of the Council of Europe. Nonetheless, we chose a representative sample of States that vary on dimensions thought to be pertinent. States vary in terms of their length of time in the regime, region, difference in legal tradition, domestic experience with rights protection, and so on. We therefore selected a mix of older and newer members, of States belonging to different families of legal systems, and of systems that had and did not have strong national experience with rights protection. We also considered the importance of national systems as sources of applications to the Court. A considerable amount of case law stems from Central and Eastern Europe, so it was crucial to have State Parties of this region represented (Poland, Slovakia, Russia, and Ukraine); the same can be said of Southern Europe (Greece, Italy, and Turkey). At the same time, we also needed to include States that generate relatively few applications, not least, in order to evaluate the extent to which lower numbers of applications might be

<sup>37</sup> See the Acknowledgements, this volume.

due to how these States have incorporated the ECHR into domestic law, and developed effective mechanisms of coordination. In any event, we chose to pair countries represented in this volume for reasons both theoretical and practical. The focus on States that are “alike” in certain ways helps us to control for certain common factors, while focusing more attention on contrasts that make a difference to the overall reception process. In fact, this type of design can eliminate some *prima facie* similarities between countries as important factors impinging on reception (see, for example, the chapter on Ireland and the United Kingdom<sup>38</sup>). While there is no denying that comparing two legal systems always poses methodological challenges, this volume shows that the advantages of comparison far outweigh the disadvantages, if we are to gain a better understanding of the impact of the ECHR on national legal systems.

Comparative case studies are typically designed with specific purposes in mind. Since ours is no exception, it is important to be clear about what this project is, and is not, about. It bears emphasis up-front that this type of research is constrained in three important ways. First, well-specified, causal theory on the impact of the ECHR on its members does not exist. Thus, we could not design the project to test a specific set of hypotheses, or to adjudicate among contending theories. Second, extant empirical knowledge on the topic is sparse, and even the best research is rarely comparative.<sup>39</sup> This project involves comparison at two levels: each of the nine chapters compares reception in two countries; and the book compares across eighteen State Parties to the ECHR. We chose a comparative approach to the national reports in order to maintain the advantages of in-depth, empirical case studies, while avoiding well-known problems associated with “generalising” the findings of a single case. The authors of the national reports themselves engage in comparison as a mode of explanation. Further, the reports raise important issues that would not have come to light in the absence of comparison. In the concluding chapter of the volume, we evaluate reception across all of our cases, in light of the data collected and the preliminary comparisons undertaken by the national reporters. Third, research of this kind can be fiercely difficult. Our approach is not limited to consulting published legal materials, but requires original research into matters outside the formal law. Indeed, each of the reports presents data that had never been collected before.

We recognize that for many of our readers, the most important contribution of this book may well be the presentation of basic data on the status and effectiveness of the ECHR in the various States under consideration. We nonetheless designed the research to move beyond basic description. We hope to offer useful insights on the dynamics of reception, and on the effectiveness of the ECHR, insights that can only be obtained through relatively systematic data collection and comparative analysis. Each chapter provides a comparative analysis of similarities

<sup>38</sup> See in this volume Besson, Section IV.

<sup>39</sup> Blackburn and Polakiewicz (2001) is an excellent exception.

and differences found in two cases, and the concluding chapter of this volume is devoted to a broad summary of findings across all cases.

Although we did not set up our project to test a set of pre-existing hypotheses in any formal, scientific sense, we nonetheless defined our research problem in ways that would maximize prospects for building more general theory. Our empirical focus is on the reception of the ECHR regime within national legal orders. By “national legal order”, we include the domains of the legislature, the executive, and the judiciary. It is through the decision-making of national officials that the Convention is given domestic agency. By national officials, we mean all agents of public authority – including judges, legislators, and administrators – who are authorised to take decisions that are capable of affecting the status of the ECHR within the national legal order. Reception may entail decisions that serve to enhance the effectiveness of the ECHR, as when officials adjust the law to comply with the judgements of the Strasbourg Court. Reception may also involve resistance to the Convention, as when officials seek to limit its domestic reach and scope. To understand the extent to which the ECHR and national legal systems are coordinated over time, one must pay attention to both kinds of reaction.

This project therefore conceptualizes “reception” broadly, as a process that is not reducible to “compliance” with the ECHR in a strict legal sense. Our empirical focus is on how the Convention and the Court’s case law impact upon the decision making of domestic officials, primarily legislators, administrators, and judges. If and how national officials institutionalize specific mechanisms for the ongoing coordination of national law with the ECHR, as the latter evolves, is of particular interest. First, officials may develop preventive procedures for assessing future compliance problems, whether related to ratification or with day-to-day lawmaking after accession. Second, the Court’s judgements themselves may push officials to develop new practices that will impinge on reception: to comply with concrete rulings and to monitor future compliance; to translate and disseminate judgements; to implement pertinent recommendations of the Council of Europe; to amend laws and practices. Further, specific Court’s rulings may attract the interest of the media, and of scholars or other elites, which, in turn, may shape how officials react. Third, some mechanisms of reception operate at a more general level: on legal scholarship and education; on media coverage and public awareness, and on how police officers, judges, members of parliament, and other officials are trained. As discussed in the next section, our research project is designed to assess reception on each of these three dimensions.

Stated in the language of the social sciences, our dependent variable (the phenomenon to be explained) is the effectiveness of the ECHR within national legal systems. Effectiveness varies both across legal systems, and diachronically within any single State. The ECHR can be said to be effective to the extent that national officials give agency or enforce Convention rights, within national legal orders, through their decisions. The Court’s evolving jurisprudence comprises the



main independent variable (the external catalyst of change in the national legal systems). Over time, the Court has progressively constructed Convention rights in ways that pressure national officials to adapt, or coordinate, the national legal systems with the ECHR. The various mechanisms of reception and coordination that the chapters describe constitute intermediate variables (determinates of how the independent variable acts upon the dependent variable), in that these processes condition if, how, and to what extent Convention rights influence national legal orders.

As a matter of comparative method, the book presents a series of “structured-focused comparisons”,<sup>40</sup> in which authors evaluate the parallel experiences of two countries with reference to data collected on the same research questions. The method of structured-focused comparison is commonly used to organize research on topics that are under-developed, both empirically and theoretically. We employ the method for classic purposes, namely, to develop (a) appropriate concepts, (b) a theoretical lexicon for analysing reception, and (c) empirical measures of effectiveness. Each is a preliminary stage in the derivation of candidate hypotheses to explain variance in the reception process. Single case studies are sometimes employed to perform some of these same tasks. Nonetheless, comparing two – relatively “like” – cases, as we do in each chapter, provides a stronger basis on which to build a more general comparative and theoretical framework.<sup>41</sup> Moreover, as discussed in the concluding chapter, the scope of our research enables us to compare across “unlike” cases, as we move from report to report.

We also proceeded in light of specific candidate propositions, which entailed collecting basic information on the various factors that we thought, *a priori*, might condition the reception process. Each of the chapters, for example, assesses the influence of national constitutional law, separation of powers doctrines, and the organization of the judiciary. The reports also evaluate various mechanisms for coordinating national legal orders with the ECHR, not all of which may operate effectively in any given national system. In their research, reporters searched for these and other mechanisms, and were asked to trace their origins and consequences. Thus, the project began with some basic *ex ante* hypotheses on the table. We did not assume, however, that any of the hypotheses would be validated through empirical scrutiny. On the contrary, we had good reason to expect<sup>42</sup> that the reception process would be the product of a complex mixture of the factors and social logics. The reports evaluate these propositions for each paired comparison, and we revisit our findings as a whole in the concluding chapter.

<sup>40</sup> The classic statement of the method is George (1979). For an updated and extended discussion, see George and Bennett (2005).

<sup>41</sup> For a discussion of the aims of different research designs, see Eckstein (1975) and Lijphart (1971).

<sup>42</sup> See Keller (2005). The model for the template that follows was derived from this paper by participants in the project.

## 2. Empirical Questions

For each chapter, reporters respond to the same empirical questions. They present data collected on the same variables and indicators of effectiveness; they identify the processes and mechanisms of reception that have developed; and they assess the importance of these mechanisms over time, in two national cases. Taken together, the reports chart cross-national variance in the impact of the ECHR on national legal systems, and they provide materials for generating hypotheses that might explain this variance.<sup>43</sup>

### a. Historical Context: Accession and Ratification

The chapters provide basic accession information for two States, reporting on the procedures through which they signed and ratified the Convention and the various protocols. Over time, States have acceded to the regime more smoothly, reflecting the growing political legitimacy of the Convention and its Court. In the 50's, the leaders of most States assumed that ratifying the Convention would not require any meaningful adjustment on their part, in that they considered that the level of national rights protection was more than adequate. Yet they were more reticent to accept the right of individual application and the compulsory jurisdiction of the Court, and they took, on average, longer to ratify the Treaty instruments. Of the original signatories, five (Belgium, France, Italy, the Netherlands, and Turkey) took more than three years to move to ratification. France decided to ratify the ECHR only in the 1970s, more than 20 years after it signed the ECHR; and Greece ratified the Convention twice, in 1953 and for a second time in 1974 (the military regime had renounced membership in 1969). After the entry into force of the Convention, no State that signed the ECHR took more than three years to ratify it. By the 80's, every new signatory was well aware that ECHR membership would require substantial adjustment, but the benefits of membership by then far outweighed the inconveniences. Today, membership in the ECHR confers a kind of certificate of approval on States.<sup>44</sup> The reports also consider national debates on ratification, on lodging reservations, and on the degree to which these decisions reflected concern for how much change in domestic law would be required by membership in the regime. The more a State fully accepts its obligations under the Convention, of course, the more it will be exposed to the influence of the Convention.

<sup>43</sup> Of course, one cannot both test hypotheses against the data used to construct the hypotheses. One could, however, test such hypotheses in research on cases of reception that fall outside of our study. See the concluding chapter for further discussion of this point, Section A.

<sup>44</sup> Thus, in the 90's, membership became obligatory for states who wished to join the European Union.

**b. Status of the ECHR in National Law: Formal (Doctrinal) Elements**

Certain factors – especially constitutional structure – will help to determine how the ECHR enters into and subsequently affects the national legal system. Of fundamental importance is the question of whether Convention rights possess viable supra-legislative status in the national legal order that judges may directly enforce. A first set of issues concerns national constitutions deal with the law of international treaties. Every chapter explores the extent to which the national constitution contemplates monist, as opposed to dualist, solutions to conflicts between treaty law and national law, including statutes. A State that adopts a more monist posture to the ECHR – including the abandonment of the *lex posteriori derogat legi priori* principle – will be much more capable of building stable mechanisms for coordinating the ECHR with the national legal order than a State that maintains a strong dualist posture. A functionally equivalent situation can be created through the legislative incorporation of the ECHR into the national legal system, if the incorporation statute provides for the direct effect of Convention rights and their supra-legislative status. Thus, each report considers if, how, and with what effect on the national legal order the ECHR has been incorporated, and each assesses the extent to which incorporation changes outcomes. As discussed in the concluding chapter,<sup>45</sup> some States that are formally dualist (Belgium) or that have traditionally denied the direct applicability of treaty law in the domestic legal system (Austria) have nonetheless conferred on Convention rights constitutional or quasi-constitutional status, with truly transformative effects.

A second set of issues concerns separation of powers doctrines (or other explicit provisions of public law) that permit or prohibit the judicial review of legislative and executive acts with reference to higher norms. It could be supposed that the more experience national judges have with judicial review and rights adjudication, the easier it will be for the Convention to gain traction in the national legal order. Informed by research on the reception of the EU's doctrines of supremacy, we also considered that the opposite might be true. In States without secure systems of rights and review, the ECHR might fill the void, substituting for constitutional rights, especially if monist doctrines or incorporation confers on Convention rights primacy over legislation. We find as much in monist Netherlands, and in dualist UK, after incorporation. In States that have well-established systems of constitutional justice, such as Germany and Ireland, litigators are far more likely to plead domestic constitutional law, rather than the Convention, before national judges. National judges, especially those sitting on constitutional courts, will have a weaker interest in developing Convention rights; they may even be jealous of their positions, and resist recognizing the primacy of Convention rights when they come into tension with constitutional rights.

A third set of issues concern how the State is organized. Among other factors, the reports examine the influence of federalism, the relationship between

<sup>45</sup> See Keller and Stone Sweet, this volume, Section A.3.b.

parliaments and executives, and the organization of the judiciary. Of particular importance is the question of how many high (or supreme) courts exist. In some countries, one supreme court, of general jurisdiction, sits at the apex of a unified judiciary (e.g., Ireland, the Netherlands, Norway). In others, the legal system is itself divided into functionally differentiated sub-systems, each of which has its own high court (e.g., France, Germany). In the former case, the Supreme Court may be asked to clarify the law given divergent interpretations percolating up from below, or asked to ratify new interpretations of national law in light of the ECHR. In the latter case, different supreme courts may take varying doctrinal positions on the status of the ECHR, and these differences may or may not be subject to harmonisation.

With respect to rights protection, Europe today is characterized by a complex pluralism<sup>46</sup> in which various sources of law and multiple courts interact to produce outcomes. In those countries in which constitutional courts hold a privileged position, it is usually the interactions between constitutional judges and the ECHR that are crucial, although the positions of the European Court of Justice may also weigh heavily. In other countries, Belgium being a good example, the high ordinary courts may use the Convention in ways to assert their own authority over rights, undermining the presumptive monopoly of the constitutional judge. In virtually every country, the Convention has enhanced judicial authority *vis-à-vis* the legislative and executive branches. Most of the reports therefore explore these complex judicial politics in some detail, as we do in the concluding chapter.

### c. Overview of the Activity of the Court

For each State covered, authors present basic information on the formal interactions between the Strasbourg Court and the national legal order, including data on the following activity: the annual number of applications filed against each State; the annual number of judgements on the merits since national accession; the Article(s) of the ECHR concerned for each application and judgement; and the decision of the Court on these applications (violation or non-violation of Convention rights). A State that generates relatively more applications and more findings of violation is a State placed under relatively more pressure to adapt to the ECHR. National officials may resist adaptation, of course. After all, it may be that relatively higher levels of censure by the ECHR are artefacts of past failures to adapt on the part of national officials.

The data, which are comprehensive through 2006, provide a dynamic, multi-dimensional view of the Court's direct interactions with national legal orders. They also show wide cross-national variation, and raise questions in and of themselves. Why do some countries generate more application than others? Why does the same country generate more applications in some domains than others? The

<sup>46</sup> Krisch (2008).

data reveal these and other puzzles, many of which we are not in the position to resolve. Nonetheless, in their analyses, reporters depict and seek to explain variation across their cases, and we discuss these matters further in the concluding chapter.

#### **d. The European Court's Case Law**

In this Section, authors focus on the impact of the Strasbourg Court's rulings on applications originating from the legal systems on which they report. The extent of the Court's influence can be assessed most directly following a finding of violation on the part of the Court. Such rulings challenge national officials to take decisions that will render national law compatible with the Convention. The chapters identify the most important ECHR findings of violation for each State covered, and then trace how national officials in fact responded to these rulings. The Court's rulings on admissibility, on national law finding no violation, on applications originating in other members, might also influence the decision-making of national officials, to the extent that the Court has given guidance as to how the right must be interpreted and applied in national legal orders. The question then would be whether national officials take these clarifications on board in making their own decisions.

#### **e. Mechanisms of Coordination**

One of the most important and difficult tasks facing the authors of the reports was the analysis of the various mechanisms of coordination that have emerged in national legal orders over time. Reception takes place through those procedures that enable national officials to adapt national law to the evolving dictates of ECHR law. These procedures may be legislative, administrative, or judicial; they may be *ad hoc* or fully entrenched; and they may be more or less successful at rendering Convention rights more effective. The chapters trace the development of these mechanisms and evaluate how they operate, in light of the project's overarching concern for the effectiveness of the ECHR in national legal orders.

As discussed, one basis on which stable mechanisms of coordination may emerge and institutionalize is through conferring on the ECHR both direct effect and primacy in any conflict with statute and infra-legislative norms. Some States have done so through adopting a strong monist posture; others have incorporated the Convention through special statutes that are recognized as having supra-legislative status. In doing so, States open the door to the development of practices (mechanisms) designed to promote the effectiveness of the ECHR in the national legal orders. Judges may assert a new, or more robust, authority to review the Conventionality of legislative and administrative acts; and executives and legislators may evolve new procedures for scrutinizing, *ex ante* and in-house, the compatibility of new law with Convention rights.

Many States have, in fact, evolved such mechanisms, altering, sometimes pro-

foundly, how parliamentary governance operates in Europe. In States where the dogmas of legislative sovereignty had previously gone unchallenged, the development of stable, effective mechanisms of coordination will, inevitably, subvert traditional separation of powers arrangements and expectations.<sup>47</sup> In countries that possess a catalogue of national constitutional rights and a supreme or constitutional court, it has generally been left to the constitutional judge to determine the status of Convention rights. In most countries, supreme and constitutional courts have found ways, over time, to enhance the effectiveness of Convention rights in the national legal order while maintaining the centrality of their own positions, even in the face of dualism. We will discuss these points at length in the concluding chapter, with reference to the book's findings.

Mechanisms of coordination are typically embedded in larger governmental processes that take account of important public interests and priorities beyond protecting Convention rights. A national judge who is placed under a duty to interpret a statute in light of Convention rights may still be bound by that statute, which is itself a product of legislative authority. A national judge who controls the proportionality of a national statute reviews how the legislature has already balanced the ECHR and the public good. The legislative committee charged with evaluating the Conventionality of a parliamentary bill submitted by the Government is made up of Members of Parliament who have agendas beyond protecting rights. We could go on. The broader point is that mechanisms do not organize coordination in any mechanical or linear way. National officials have choices to make, and these are conditioned by a complex structure of incentives, many of which do not flow from the national legal orders relationship to the ECHR.

Generally, national officials will not work to enhance the effectiveness of the ECHR in national legal orders if they do not see it in their interest to do so. One of the more ambitious goals of this volume is to chart, over time, changes in the interests of national officials. In some States, hostility and resistance to the Court have been replaced by a cooperative attitude (e.g., France). In other States (e.g., the Scandinavian countries), we find judges and politicians starting to take notice of the regime that they all but ignored over many decades. In some situations, it may be that the incentives in place are basically negative: in the face of a rising number of negative rulings by the Court, national officials develop mechanisms of coordination to help them insulate the national legal order from censure in Strasbourg. In other situations, judges and politicians may invoke and give agency to Convention rights for their own purposes. Judges may wish to expand their capacity to control elected politicians; a governing party may wish to enshrine rights that will constrain other parties when the latter come to power; officials may be responding to an increasing societal demand for enhanced

<sup>47</sup> As discussed in the concluding chapter of this volume, the reception of the European Court of Justice's doctrines of supremacy and direct effect have had effects in the same direction, see Keller and Stone Sweet, this volume, Section A.3.b.

rights protection. In any case, reception provokes dynamics of change and some of these changes will alter the strategic setting of national officials which will, in turn, alter the choices they make.

#### **f. Remedies and Proportionality**

The effectiveness of national remedies for violations of Convention rights is itself a direct indicator of the effectiveness of the ECHR in national legal orders. The reports examine the evolution of national systems of remedies, as they have evolved with reference to the ECHR. The Convention does not stipulate remedial requirements beyond the terms of Article 13 ECHR, which requires States to provide victims of a violation of their rights with “an effective remedy before a national authority”. Nonetheless, in its case law on Article 13 ECHR, now dense and sophisticated, the Court has steadily raised standards. Today, Article 13 covers virtually every aspect of how national legal systems are organized and function. Applicants routinely invoke Article 13, leading the Court to review how national systems of justice operate at a deep structural level. When the Court finds violations of Article 13, it exerts heavy pressure on the State to reform its institutions and established practices, or risk ongoing exposure to ECHR censure. As the reports vividly show, the Court goes far beyond the rendering of individual justice in this area. Indeed, many of its decisions concern how the national legal order must be reformed structurally, and such reforms are often constitutionally significant.

The impact of Article 13 on national legal orders has also been registered on judicial doctrines and, in particular, on standards of judicial review. As discussed above, the Court adopted proportionality balancing as a standard approach for managing conflicts between Convention rights and the government’s interest in pursuing collective goods that may qualify those rights. Proportionality analysis, however, was not native to most States. In a series of cases involving the UK, the ECHR gradually adopted the view that Article 13 required judges to engage in proportionality review of government acts that infringe upon certain core Convention rights, Articles 8–11 and 14, in particular. In doing so, the ECHR destroyed the viability of the traditional “reasonableness” tests long employed by UK judges and others. As the Court noted in *Peck v. United Kingdom*,<sup>48</sup> under that test, individuals would have to show that UK authorities had acted “irrationally in the sense that they had taken leave of their senses or had acted in a manner in which no reasonable authority could have acted”<sup>49</sup> in order to have their claims reviewed. The ECHR’s position, in contrast, is that, once a *prima facie* case for a violation of Convention rights has been established, judges must move to necessity analysis, which involves applying a least-restrictive means test. Stated

<sup>48</sup> *Peck v. United Kingdom* (appl. no. 44647/98), Judgement (Fourth Section), 28 January 2003, Reports 2003-I, 123.

<sup>49</sup> *Ibid.*, para. 105, quoting the High Court ruling rejecting Peck’s appeal.



in American parlance, the adaptation requires a shift from a “rational basis” to a “strict scrutiny” standard, although proportionality analysis also leaves room for deference to the States under the margin of appreciation doctrine.<sup>50</sup>

Under the Court’s supervision, proportionality – today a transnational, constitutional principle in Europe – is in the process of diffusing to every national legal order in Europe. The reports examine this process and assess its impact on rights protection at the national level.

### **g. Knowledge and Practice**

To this point we have focused on relatively direct and formal measures of impact, such as the institutionalisation of judicial and legislative mechanisms of reception, and the reform of national law after a finding of violation by the Court. To measure the more sociological influence of the Convention, at the level of cognition, practice, and social reproduction, for example, it is necessary to go beyond a focus on formal procedures and law. The chapters report if, how, and the extent to which three types of practices – lawyering, teaching, and scholarship – have changed as a result of the reception of the ECHR in national legal orders. Each of these practices may track and measure impact.<sup>51</sup> Changes in these practices may also reinforce reception, or accelerate it. The more lawyers, teachers and students, and doctrinal authorities consider and reference the ECHR, the more they may help to institutionalize mechanisms of coordination, for example. Indeed, it may even be useful to consider their activities, under certain conditions, to be supplementary mechanisms of coordination. Changes in knowledge and practice may alter the mix of costs and benefits that national officials consider when deciding how to make reception-relevant decisions. Each chapter thus reports on how the ECtHR’s ruling are disseminated domestically, and on the extent to which lawyering, teaching, and scholarship have changed over time.

## **C. A Europe of Rights**

The ECHR has evolved into a sophisticated legal system whose Court can be expected to exercise substantial influence on the national legal systems of its members. In the 21st Century, Europe is a Europe of rights. The Convention system constitutes an authoritative, dynamic, and transnational source of law. At the same time, most High Contracting Parties have incorporated the ECHR, thereby “domesticating” it in important ways. We therefore proceeded on the view that the Convention’s legal system, post-Protocol No. 11, ought to be conceptualized

<sup>50</sup> For a general overview of the doctrine of margin of appreciation in the ECHR, see Arai-Takahasi (2002). The inconsistencies in how the ECHR deploys the doctrine of margin of appreciation have come under a great deal of criticism, see Letsas (2006) and Bruach (2005).

<sup>51</sup> This list is not exhaustive, indeed, there are many other indirect measures that can and should be the focus of research.

broadly (rather than in more narrow, formalistic terms) to include the reception of the ECHR, by national officials, at the domestic level. As the reports that follow this introduction show, one cannot understand how the Convention system actually functions without paying close attention to how that system interacts with, and impacts upon, national law. In the concluding chapter of this volume, we will return to these themes in light of this volume's most important findings.

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<sup>52</sup> See also the bibliography to the concluding chapter.

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