Convention through States' Eyes
The Embedding of the European Convention on Human Rights
by
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'People are trapped in history and history is trapped in them.'
James Baldwin, Stranger in the Village (1955)

'That principle [of the need for international guarantees of human rights] is grounded in the realization that the State, however firmly wedded to the tradition of human rights and freedoms, cannot be the final arbiter of the rights of man. Admittedly, affirmation of that principle is not a mere symbolic gesture.'
Hersch Lauterpacht, International Law and Human Rights (1950)

The European Convention on Human Rights entered into force in 1953 at a time when Europe was a war-shattered continent. The European Movement, with Winston Churchill as Honorary President, had called in 1948 for the creation of a European Court to secure the implementation of a European human rights treaty and for giving individuals, not just States, the right to bring cases. A mere academic and utopian thought materialized, although both features remained optional for States until the 1990s. Since its creation, the European Court of Human Rights has issued close to 25,000 judgments and decided on around a million applications.

In her dissertation, Sarah Lambrecht explores the different ways States have embedded the European Convention on Human Rights in their legal systems, how well States perform before the European Court of Human Rights and what factors explain why differences between States remain so significant. The comparative study encompasses 43 States Parties, only excluding micro-States.

Legislative and constitutional reforms, as well as more openness of the judiciary, gradually strengthened the status and influence of the Convention. Currently, the Convention can be directly enforced before courts throughout Europe, at least from a legal standpoint. Lambrecht explains how this was far from a given in the early decades when most States were convinced that the Convention did not need to be internalized.

Small States and post-totalitarian States took the lead in accepting the right for individuals to petition as well as the jurisdiction of the European Court of Human Rights. Especially in a post-war context, these States felt they had much to gain from a strong European system of rights protection. Over time, individual applicants were no longer viewed as mere 'vehicles' but became true parties to their own proceedings. Individuals were gradually granted more procedural rights, such as the right to participate in the hearing of their case and receive communications including the final report or judgment. In parallel, often after the first violation judgments, States started to strengthen the position of the Convention and the case law of the European Court of Human Rights in their legal systems.

For States transitioning away from a totalitarian past, the legal embedding of the Convention was often considered a crucial step in the democratization process, as well as a first step towards European integration. By the time the Berlin wall fell, the embedding of the Convention had progressed so much in older States Parties that the full acceptance of the supervisory system and a strong legal embedding were deemed evident. Several Central and Eastern European constitutions even explicitly refer to the Convention.

The dissertation demonstrates how the constitutional design and traditions of States are key to understanding the different ways States have internalized the Convention.

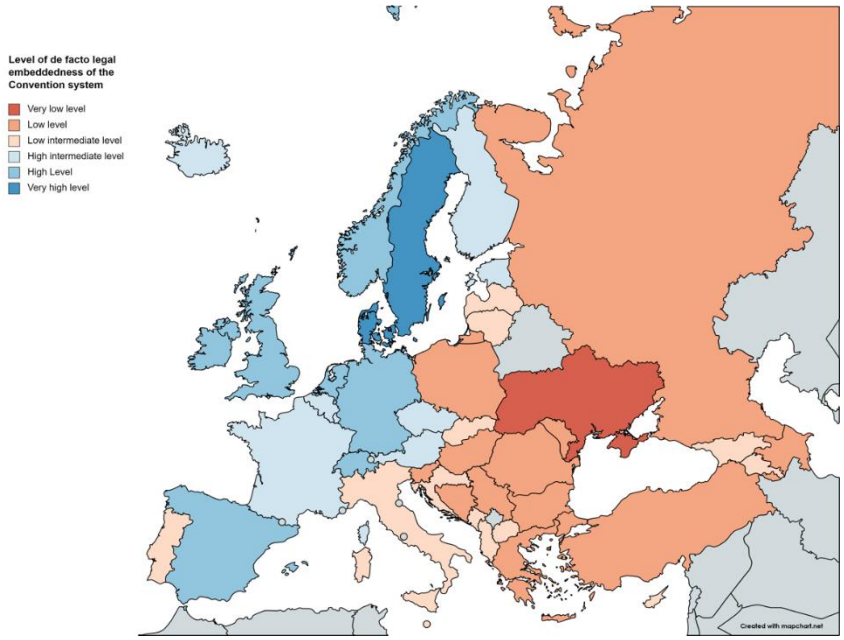
A first element is how States view international law. If States look at international law as separate and independent from national law (dualist view), the Convention requires incorporation into national law. The build-up of domestic pressure for incorporation can take a very long time. In the UK and the Nordic countries, parliaments only made the Convention part of domestic law in the 1990s. Under the influence of European law and further openness towards international law, more and more States chose for a unified, monist view. In these States, the Convention takes precedence over all parliamentary legislation and in some States like the Netherlands, even over the constitution. States joining the Convention after the 1970s, almost all embrace a monist view of international law.

A second crucial factor is the historical willingness to accept limits to national sovereignty. For example, France, Italy, the UK and Turkey were reluctant to have their actions submitted to international judicial review, particularly when they were either waning colonial powers or experiencing domestic turmoil. Historic arguments that the Convention encroaches too much on national sovereignty can still be heard today. Such arguments have especially a strong footing in States that perceive themselves as a great political power and have a persistent current of sovereigntist-style Euro-scepticism. These elements are present in the UK and France, where proposals regularly float around to reverse the Convention's embedding or even exit the system.

A third factor is the traditional role of courts. Since the Convention's entry into force, most European States have shifted towards a new dominant constitutional model with more external and internal limits on State action, including parliamentary legislation. In old stable democracies, granting courts the power to enforce rights often went hand in hand with the Convention's embedding. Criticism of the European Court of Human Rights for overreach is generally prevalent in States with a constitutional tradition of parliamentary sovereignty. This can be heard the loudest in the UK, but is also echoed in other Northern European States.

Depending on the type of constitutional system of rights protection, the Convention has taken up a different role. A long-standing tradition of strong constitutional review can be identified as a fourth factor. In States such as Germany, Italy and Ireland, the Convention has played a mere subsidiary or supplementary role and criticism tends to be directed at safeguarding sufficient autonomy in interpreting constitutional rights. On the other hand, in States where the Convention fills up large gaps in the constitutional system of rights protection, such as the Benelux countries, the Convention has taken up the role of a substitute constitution and legal practitioners are likely to invoke the Convention over the constitution. States with new constitutional designs, such as Central and Eastern European States, have mostly mirrored or integrated the Convention in their constitution.

Other factors also play a role in the embedding process. In addition to the self-perception as a political power and sovereigntist-style Euro-scepticism, democratisation and backsliding is a key factor. In periods of democratisation, the Convention becomes much more entrenched, with the reverse also being true. If democratic backsliding persists, the Convention is put under pressure and becomes brittle. This can be witnessed in Poland and Hungary. The introduction of a judicial blocking mechanism in Poland to not execute certain critical judgments of the European Court of Human Rights is reminiscent of the one in place in Russia since 2015. According to Lambrecht's findings, democratic backsliding is likely to pose the greatest challenge to the Convention system in the coming decades. The devastating effect of autocratization is most visible in Russia, where its brutal war against Ukraine has led to a forced exit from the Convention system.



In her dissertation, Lambrecht composes a model based on the four stages of the proceedings in Strasbourg—the number of incoming applications, the proportion of applications leading to a judgment, the percentage of judgments finding at least one violation and the implementation phase—to crudely assess the performance of each State.

The quality and stability of the liberal democracy in a State is closely connected to how well a State performs before the European Court of Human Rights. Denmark and Sweden share both the highest level of liberal democracy and outperform the other States before the European Court of Human Rights. On the other side of the spectrum, Azerbaijan, Russia and Turkey have had the worst level of liberal democracy, which is reflected in a poor track record. States that are backsliding, such as Hungary and Poland, also have a problematic performance before the European Court of Human Rights.

The wealth of a nation is another important factor for compliance with Convention standards. Richer countries tend to have a better track record in Strasbourg. Ukraine is one of the poorest countries in Europe. Combined with a bad quality of liberal democracy, it has by far the worst track record in Strasbourg.

The time States have been part of the Convention system can equally have a positive influence on the respect for the Convention standards. However, economic difficulties, structural dysfunctions or autocratization can negate this effect, as can be seen in Italy, Greece and Turkey.

The European Convention on Human Rights has never been more firmly embedded, based on Lambrecht's findings. The evolution over the last seventy years has overall been one of increasing internalisation, despite backlashes and tensions. This dissertation offers a toolkit on how to monitor the level of embeddedness in States Parties both in law and in practice, as well as predict and understand the occurrence of backlashes and tensions based on the particular features of a State. In this way, the dissertation aims to offer a contribution on how to carve out the Convention system's future during challenging times.