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From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics

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The history of the genesis and institutionalization of the European Convention on Human Rights offers a striking account of the innovation of a new legal subject and practice—European human rights—that went along with, but also beyond, the political and legal genesis of Europe *following World War II. The rise of the European human rights institutions shows not only how law and lawyers played key roles in the early politics of European integration but also how the subtle combination of law and politics—as both national and international strategies—continued to play a decisive part in the institutionalization of European human rights. The article generally argues that the interplay between law and diplomacy had a fundamental impact on the innovation of European law and that lawyers capable of playing an intermediary role between the two were particularly central to this development.*

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INTRODUCTION

This article analyzes the genesis and institutionalization of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as an example of the rise and transformation of European law since the postwar period. It centers on the role of the legal actors and their interface with diplomacy, and more generally politics, in the breakthrough of the European human rights institutions. It particularly explores the blurred boundaries between law and politics during the early period (1950–1975) and how this also influenced the subsequent institutionalization of the ECHR: how the initial lack of institutional autonomy of the European Court and Commission, as well as the absence of a yet developed legal science or general knowledge on European human rights, allowed *national* political interests and conceptions to influence this laboratory of European law and integration. This subtle legal-political interplay was further replicated in the practices of many of the advocates of the ECHR. A considerable number of the most ardent promoters of the Convention were indeed operating within both legal and political fields, as well as they zigzagged between—and strategically utilized—the more national and international levels of actions. Eventually, and as reaction to the initial dynamics, the ECHR system gradually gained a higher degree of legal autonomy, which was achieved through a set of interdependent processes of institutionalization, legalization, and even scientification of European human rights.

The argument is straightforward and follows what might be regarded as a Weberian rationalization process, which can be illustrated by two contrasting ideal-types. The initial launch of the ECHR system was in many ways a Cold War endeavor with clear geo-political connotations, and only later was it turned into the sophisticated legal system we know today. Its initial operation was dominated by a group of high-level legal experts who managed to both develop its legal functionality and appear unthreatening to central national political interests. These jurists deployed a tacit understanding of the relationship between law and diplomacy, using the latter when confronted with high-political questions related to decolonization or high national politics. This particular understanding of the role of the institution—a specific elite discretion—generally helped legitimate and empower the system vis-à-vis the national political and diplomatic interests. Over time, and building on this institutional platform, the institution embarked upon developing a more legalistic and dynamic understanding of the European Convention. This new enterprise took many of the member states by surprise as it sought both to harmonize the European protection of human rights and to create an up-to-date catalogue of rights, which was far more comprehensive than what could have been predicted from the wording of the original text.

To analyze the emergence of European human rights law in a manner that captures the various interplays of law and politics and the national and

international levels of action, this article insists upon viewing the national and international levels as interdependently connected, as well as interdependently producing the ECHR system. It thus examines the emerging ECHR system from both an intrainstitutional perspective and from the point of departure of national legal and political strategies (see Dezalay and Madsen 2006). Underlining the import-export mechanisms between national and international legal and political fields, this approach seeks basically to reconsider the question of European institutionalization in a way that integrates the internal and external production of this nascent institutional space (Madsen and Dezalay 2002).[1] The approach further emphasizes the agents as the transmitters and advocates of specific European agendas, yet analyzes these in regard to their national origins and interests. Ultimately, the objective is a sociology of Europeanization that centers on the *circulation* of ideas and models—how competing ideas and models were being promoted by a host of actors using their specific national and international resources, expertise, and other capitals, and how these exchanges helped produce European law and institutions (see Bourdieu 2002, 1986). As noted above, a particularly striking dynamic of the institutionalization process of European human rights in Strasbourg was the institution's balancing of the new European law with national political interests and strategies. Throughout the analysis, I therefore emphasize the interplay between law, politics, and diplomacy. In practice, these terms were blurred, yet, on the conceptual level, some working definitions can be provided. I consider *law* as a set of systematized practices informed by a differentiated legal methodology and tradition and *politics* as both an institutional and more informal process of promoting and negotiating specific interests. Finally, *diplomacy* is seen as a specific international variant of *politics*, which is equally both formal and informal, as well as it is influenced by a particular set of issues, for example questions of "national sovereignty," the "international common good," etc.

HUMAN RIGHTS AT THE COLD FRONT: THE GENESIS OF THE ECHR

The European Convention on Human Rights, and more generally the Council of Europe, continued a project already initiated by the United

1. In addition to using a basic framework deriving from the sociology of Pierre Bourdieu, this article further builds upon a conceptualization of *Europe* which suggests that the rise of human rights in Europe has to be seen in the context of the transformation of European states, internally and externally, and particularly the large-scale transformation of the European colonial powers and their political and social adjustments toward *Europe*. See further in Madsen (2004a) and Charle (2001, 17).

Nations of building international law and cooperation in order to safeguard against repetitions of mass-scale armed conflict. Besides these overriding objectives, the rapid drafting of the ECHR reflected a growing fear of, on the one hand, the rising power of the national Communist parties, and, on the other, Soviet imperial expansionism into Western Europe, notably in respect to Italy at the time of negotiation.[2] Effectively, none of the Eastern European countries ratified the ECHR, and the subsequent development of the system was to happen in a club of Western European countries that, regardless of their different interests in the Convention, were like-minded when it came to the protection of liberal European democracy.[3] From the onset, the European system was therefore freed from the kind of Cold War sabotage that was to hamper the U.N. human rights system for decades.[4] This specific like-mindedness should be underlined, as it also helps explain why the majority of the parties to the ECHR, to begin with, tended to perceive of European human rights as mainly a measure against an *external* threat. More precisely, the Convention was mainly assumed to provide the legal and political means for deterring the future rise of any sort of fascism in Europe—from within or from the outside—rather than, at least initially, being the instrument for substantially altering or unifying the practices of the legal systems of the member states.[5]

In spite of these constraints, the quasi-revolutionary idea of establishing a supranational European Court and Commission with the powers to enforce a Convention consisting of core European democratic values offered the framework for a potentially far-reaching plan for creating European law. Helping to realize these ambitious institutional arrangements, the objective relatively early on became to draft a *legally* binding Convention with powerful associated legal institutions—as opposed to drafting yet another *Declaration* in the style of the Universal Declaration of Human Rights (UDHR) only

2. Further, among the numerous former Resistance fighters participating in these negotiations, European human rights seemed to offer the measures to remedy the odious protection of fundamental rights that the "occupied" legal systems had furnished during WWII. See, for example, on France in Bancaud (2002).

3. Mirroring these Cold War tensions, a much debated issue was the question of whether to include a "right to property" in the ECHR. Not only would it hit right at the heart of the growing East/West divide and be unacceptable to Socialist governments, but it also posed a certain challenge to the great welfare state nationalization programs, which had been carried out in a series of European countries in order to ignite the economies following the destructions of WWII. The eventual inclusion of such a right in the Protocol No. 1 of 1952 consolidated what was already given: The system was to protect Western European human rights rather than more generally European human rights.

4. At the "Congress of Europe" meeting in May 1948, observers, mainly dissidents from Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia had been present.

5. This is of course not to claim that the legal contents of the Convention were not taken seriously but instead to underline what was regarded as the main function of the Convention at the time.

supported by "soft" legal institutions.[6] The key advocates of these plans were an all-star cast of lawyers and politicians of the period, whereof many had links to the national resistance movements. One of these many high-profile actors, Pierre-Henri Teitgen (see Box 1), law professor, important member of the French *Résistance*, Christian Democratic politician and anticommunist, became a key actor in regard to the drafting of the ECHR.

BOX 1. PIERRE-HENRI TEITGEN (1908–1997)[7]

Building on his credibility as a well-known Resistance fighter, Teitgen belonged to the inner circle of French law and politics of the postwar period. His father had been a *bâtonnier* [Head of the Bar], as well as Vice-President of l'Assemblée nationale, and Teitgen showed equally a great talent for combining legal and political careers. As a politician, he took part in the Christian democratic movement, which emerged strongly in the aftermath of WWII. He was a Christian-Democratic (MRP) deputy (1945–1958) and head of MRP (1952–1956). Under the Fourth Republic, he held a number of ministerial positions: Minister of Justice (1945–46), Defence (1947–1948), Information (1949–1950) and later Minister of "France d'Outre-mer [overseas]" (1955–1956); he was also Deputy Prime Minister (1948 and 1953–1954). As an academic, he held positions at several law faculties, including Nancy, Rennes and finally Paris where he cofounded the Centre d'Étude et de Recherche Européennes (CERES) in 1963, the first center of its kind in France. He was also the first French professor to teach European law during the semester 1963/1964. Finally, he was significantly involved with the large liberal daily *Ouest-France*.

Teitgen was appointed *rapporteur* of the Committee on Legal and Administrative Questions set up under the Council of Europe, a committee hosting an elite group of jurists including the Conservative British lawyer and politician, as well as former Attorney General and Prosecutor at the Nuremberg War Crime trials, Sir David Maxwell Fyfe, as president, and former Italian Minister of Justice and First President of the Italian Court of Cassation, Antonio Azara, as vice-president. The members of the Committee reflected the central role played by the European Movement and the Congress

6. Such a project had already been advocated by a number of European movements. Whereas these movements initially had been dominated by British actors, as well as gained funding from a variety of sources including U.S. covert funding, it was soon to develop in a fashion that mirrored the diversity of interests of the European continent. The idea of drafting a European human rights convention was further concretized under these auspices at the Congress of Europe meeting in May 1948. See further in Simpson (2004, 562).

7. See further in Teitgen (1998).

of Europe (1948) at this early point: Pierre-Henri Teitgen and Sir David Maxwell Fyfe, with Belgian international law professor and senator, Fernand Dehousse, and a number of others, had already at this point founded the International Juridical Section of the European Movement. This expert group had, in this capacity, drafted a European Bill of Rights and argued for a legal architecture that included a central Court to enforce the Bill. Drawing on these experiences, the Committee on Legal and Administrative Questions wrote the important *Teitgen Report* of 1949, which framed both the institutional and normative contents of the ECHR. Their proposal was then passed on to the Conference of Senior Officials for a final screening and fine-tuning prior to being presented to the interstate political level. Despite thus following normal protocol, this group of activist jurists managed to have a significant impact on the Convention—and this by combining the complementarities of their legal specializations and national political contacts. Also, it should be underlined, these jurist-politicians were well aware of the importance of pursuing their legal idealism of Europe in a pragmatic and politically acceptable way. Thereby, they differed from the more speculative critique, which had come out of the legal community at the occasion of earlier European integration projects, for example, the Briand-Project of 1929.[8]

The best example in this regard was the effective political engineering of the project by Pierre-Henri Teitgen. Drawing on his political experience, as well as his moral authority as a WWII freedom fighter, Teitgen played an instrumental role in pushing the project forward when it encountered its first substantial problems, such as the controversies over the scope of rights to be protected. In 1949, on behalf of the Committee, he emblematically stated:

> The Committee on Legal and Administrative Questions had first to draw up a list of freedoms which are to be guaranteed. It considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practiced after long usage and experience in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate. Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalization of social democracy (Merrills and Robertson 2001, 8).

8. See Vauchez and Sacriste (2004).

Besides advocating divisibility between the so-called two first generations of rights, another interesting aspect of the statement is the indication that he, as many of his contemporaries, worked with a larger optic on the prospects of a Council of Europe and European human rights. He basically assumed a natural bond between the general politics of European economic and political integration and the specificities of human rights.

A keen Europeanist and belonging to the circles around Robert Schuman, Teitgen, at this point, saw the Council of Europe as *the* European forum. But, the conflicting interests of European federalists and confederalists—as well as between the advocates of a European expert organization as opposed to a European political union—in practice deprived the Council of Europe such an all-encompassing European role. However, these initial conflicts indirectly contributed to the acceptance of the ECHR and the relative ease with which it was to develop. In respect to the more skeptical member states, it was vital that they, at this early point, were assured that the Council of Europe was not a pretext for developing a federal European master plan but rather an intergovernmental organization generally respecting the sovereignty of the member states. Yet, in regard to the prospects of a larger, more coherent European legal construction, this was the essential point of bifurcation of postwar European integration: retrospectively, we can observe that the ECHR became the "site" for a particular and specialized institutional framework safeguarding European human rights in Strasbourg, while the general process of integrating European economies was, by and large, to take place under the European Economic Community eventually built in Brussels.[9]

FROM POLITICAL TO LEGAL INSTRUMENT: THE INSTITUTIONALIZATION OF THE ECHR

Having its roots in both the postwar politics of European integration and the politics of the Cold War, the ECHR became the instrument for a gradual development of European human rights doctrine and expertise. The system consisted of two central organs—the Commission and the Court—which were to enforce and legally refine the broadly defined provisions of the Convention. Although the system was assumed to take a legal form, a fact underlined by the creation of a genuine Court, the relative nature of this objective was illustrated by the limited powers of the Commission vis-à-vis the Committee of Ministers. Indeed, if the Court was the vivid symbol of

9. Generally speaking, in the area of human rights the "Brussels path" was not to encounter the Strasbourg institutions until the 1990s with the Maastricht, Amsterdam, and Nice Treaties, as well as the European Charter of Fundamental Rights, opening up for a beginning reintegration of the two "Europes" (see Delmas-Marty 2004, 409).

the intra-European will in the area of human rights, its coexistence with a Commission having a key filtering role, yet being subjected to the Committee of Ministers, was the clear manifestation of the continuous interplay of law and politics in the area. Also the simple fact that the system was run by a miniscule staff and a group of judges and commissioners only spending a few days a month in Strasbourg suggested an inherent institutional fragility. Nevertheless, the system entered into force in the mid-1950s: in 1955, the Commission was competent to receive individual applications against contracting states; the Court was inaugurated in 1959.[10] What is striking about the nascent institutionalization of the Convention was how the interplay between national diplomatic interests and the entrepreneurship of the leading actors formed this institution and its initial practices. One way of analyzing this complex game of crossing interests and multiple levels of action is by first briefly analyzing the interaction of the member states with the emerging ECHR system.

A. Diplomatic Constraints: National Strategies Toward the ECHR

As already suggested, the specific Cold War context of the genesis of the ECHR caused European human rights to mainly appear as an export-trade of the member states to a new European legal and political terrain. This mental and political exteriorization of the reach of the Convention helps explain how, for example, French and British agents could pursue key roles in the drafting of the Convention, comfortably assuming that the ECHR was merely a Europeanization of their own national practices of respectively *libertés publiques* and civil rights—and this, at the same time, as they were battling mounting human rights problems in the colonies. As concerns the strategies of other founding member states, this exteriorized perception and conception of the system also prevailed. In the Scandinavian countries, for example, we find similar strategies of *externalization* as well as a number of country-specific issues being discussed. For these small countries, the overriding question of supranational control in an area of human rights was far from straightforward. Also, a number of more particular questions concerning the Scandinavian protection of human rights—for example religious freedoms vis-à-vis the privileged position of the Lutheran Church—were seriously discussed at the time (see Simpson 2004). Nevertheless, the case of the declining "imperial societies" of France and the United Kingdom provides the best illustration of the political constraints that this new

10. After its adoption, the ECHR system was amended five times in the following two decades. These amendments, known as the Protocols 1–5, covered a variety of issues from laying out internal procedures to gradually expanding the catalogue of rights.

institution faced during the postwar period. Not only had these two countries political and legal weight in Europe, their complex maneuverings between late-colonial interests and the building of Europe had an impact on the ECHR system at large.

The French stance toward the ECHR was generally structured around a latter-day imperialist balancing act consisting of both securing that colonial matters remained an issue of national politics and, simultaneously, continuing a tradition of supplying "universals" to the international level. Needless to say, the question of European human rights fit well into this line of "universalist diplomacy"—there was even a sense of obligation of imposing French traditions, as France, after all, was the cradle of human rights when seen from Paris (Pateyron 1998). The French investments in European human rights (but also U.N. human rights) were correspondingly very significant at the birth of these instruments. Yet, France did not ratify the ECHR until 1974 and did not allow individual petition before the European Court until 1981. Overall, this was due to a general disbelief in supranational control of the area of *libertés publique*, a sentiment only exacerbated during the colonial battles where the quest for sovereign control and nonintervention of the international community seemed paramount. Because of this legally limited engagement with the ECHR, France had initially only one representative at the Strasbourg human rights system. It was the law professor, Vice-President of the Conseil d'État and former legal adviser to General de Gaulle in London, René Cassin, who nevertheless went on to become both Vice-President and President of the Court.[11] Emblematically, his task consisted of judging the human rights record of all ECHR member states except France.

In terms of the development of what we might term the *institutional identity* of the ECHR system, the ambiguous French position had an important yet indirect effect. These prudent strategies generally showed that even a key founding member—which further claimed a general authority in the area—did not feel compelled to fully commit to the new European human rights. Basically, regardless of the impressive legal machinery being put in place, the French position suggested a vision of European human rights as a sort of "negotiated justice" rather than a universal commitment. In this sense, France continued a tradition of perceiving international law as being an issue subject to diplomatic calculations. As well, they sent a clear message

11. Despite having greatly contributed to the drafting of the ECHR, Teitgen was, thus, not appointed as the first French judge. He did experience a short-lived comeback in 1976 when he was appointed to complete Cassin's term from 1976–1980 at the Court. It should be pointed out that René Cassin had played a fundamental role in regard to the drafting of the UDHR and the setting-up of the U.N. Human Rights Commission. See further in Agi (1998).

to the high-profile envoys in Strasbourg of their intention of a measured development of the institution.

Although the British strategies toward the ECHR were different from the French, the outcome of the British practices was comparable. Above all, they also contributed to a diplomatic approach to the institution in the sense of an understanding that sought to balance legal progress with a tolerance of country-specific political interests. But, whereas the *Quai d'Orsay*—the French Foreign service—had relied on academics with links to the political world (notably Charles Chaumont, later René Cassin, and eventually Pierre-Henri Teitgen), the British Foreign Office, and specifically its small corps of legal advisers, were to largely control this new area of international law and diplomacy. After having first assured that the Council of Europe *only* developed as a sort of traditional supranational institution, the United Kingdom generally sought to play a leading role in the manufacturing of the human rights system. When the ECHR was ready for signature in 1950, the United Kingdom was the first state to sign; in 1966, after having overcome the debate as to whether it was acceptable that an international legal institution should oversee the celebrated British civil rights, the United Kingdom accepted the right to individual petition for British individuals under the ECHR, and, in 1967, for individuals of its dependent territories (Evans 1997, 88). However, the subject of international human rights was kept under a certain control by a nomination strategy that greatly favored Foreign Office legal advisers or other actors with "sound" diplomatic viewpoints.[12]

With the exception of the occasional *grand professeur* being promoted—but only after having passed the "test" of being understanding of British diplomatic interests—the Foreign Office legal advisers, as well as a few other qualified civil servants, dominated the new area of international human rights. Importantly, this appointment strategy greatly enhanced the significance of conventional approaches to international law in the ongoing process of conceptualizing and defining human rights. It also helped promote the diplomatic values of the Foreign Office at these venues, the latter being a policy of combining national interests and pragmatic internationalist diplomacy with "hard law" (see Morphet 2000).[13] The actual impact of this strategy can best be illustrated by the fact that the Cambridge law professor, Sir Hersch Lauterpacht (see Box 2), unquestionably the leading authority on international human rights law at the time, was never appointed to a central human rights office and only worked in the periphery of the field of human rights. Overall, the Foreign Office's offensive into the domain had

12. This point is based on a simple observation of the persons appointed, as well as interviews with actors of this small milieu. See further in Madsen (2005).

13. See further on this form of *symbolic violence* in Bourdieu (1994, 101).

BOX 2. SIR HERSCH LAUTERPACHT (1897–1960)

A Polish-born Jew immigrated to the United Kingdom, Lauterpacht's involvement in international human rights had a very personal dimension. Although he himself had moved to the United Kingdom before WWII and thereby was saved from the Holocaust, his family had suffered enormously from the Nazi persecution of the Jews. Lauterpacht, if any, personified also the extreme change in perceptions and outlook to which the emergence of international human rights corresponded. As shown by Martti Koskenniemi, his oeuvre changed course dramatically after the War from a prewar politics of cosmopolitanism to a grave legalistic focus on human rights and humanitarian ethics (Koskenniemi 2001, 398; see also Simpson 2004). But this new commitment also made him stand out among his contemporaries. Among colleagues of public international law, his visions were considered too ambitious to be effective (Koskenniemi 2001, 390, n. 175). In the Foreign Office, the sidelining of Lauterpacht was, however, justified by a reference to his ancestry, not being "British enough." Although thereby continuing a tradition of prejudice, which universal human rights was in principle seeking to eliminate, the head of the Foreign Office Legal Service, Eric Beckett, noted: "Professor Lauterpacht, although a distinguished and industrious international lawyer, is when all said and done, a Jew fairly recently come from Vienna. Emphatically, I think that the representative of HMG on human rights must be a very English Englishman imbued throughout his life and hereditary to the real meaning of human rights as we understand them in this country" (Sellars 2002, 12). It is however not so much that Lauterpacht was not English enough as that his strong commitment disqualified him as a British representative. As noted, the fundamental objective of the Foreign Office was to administer this new area using the logics of conventional international law and diplomacy, and this meant a sidelining of the more idealist jurists, even if they were the leading experts. Lauterpacht was however later placed on the International Court of Justice (ICJ) by the United Kingdom.

the effect of a diplomatic and legal pragmatic imposition in the production of the new European human rights law. The objective was basically to control and diminish the influence of the idealism that naturally went along with the new international human rights discourse, and in that sense these strategies resembled those of France.

B. "Cold-Blooded Law" as a Response to Political Conflict: The Beginning Autonomization of the ECHR

As these syntheses of the British and French diplomatic positions on the ECHR suggest, the postwar universalization and Europeanization of human rights, although the basic idea found political support, was far from free from conventional strategies of safeguarding national sovereignty and

interests.[14] Yet, the European Convention was more than just another international treaty: it was the crown jewel of the Council of Europe and more generally postwar Europe. It basically had a double construction as both a political and a legal instrument that produced some paradoxes. Regardless of the various diplomatic strategies outlined above, the two increasingly ex-empires indeed held the presidency of the Court in turn until the end of the 1960s, sending some of their finest jurists to take care of the "executive" roles of the system and its development. Analytically, this situation of grand legal build-up in the context of considerable diplomatic constraints highlights a key dynamic of the early European human rights institution and its key task of extricating law from politics. In practice, there was great need for investment in not only a novel legal science and practical knowledge of European human rights, but also, and particularly, in institutional politics that could convince the member states of the intra-European political importance and legal authority of this new institution.[15]

The initial recruitment to the task of developing European human rights law was, above all, marked by the fact that the system was only in the course of being built and was in need of both legal *savoir-faire* and institutional *legitimacy*. The national political impact on the initial institutionalization of the ECHR was reflected by the fact that the first judges and commissioners appointed were predominantly foreign ministry legal advisers and eminent law professors with international experiences—two roles quite occasionally embodied by the same persons, as many of the professors had acted as consultants or counsel to their governments. In terms of being a new legal knowledge, international human rights was generally perceived as a new subdiscipline of public international law—the law between nations—despite its inherent universal and transnational claims. Therefore, the question of European human rights was largely placed in the hands of lawyers trained in the diplomatic services, backed up by the judgment and authority of distinguished law professors. It was in these close and legally insightful circles of law and diplomacy that the task of concretizing both the institution and its jurisprudence was carried out.

These elite jurists listed in Box 3, together with a number of fellow European "clones"—the majority being top law professors—and a minuscule

14. Generally in the Western bloc, postwar international human rights was neither intended to greatly challenge the way Western democracies secured "legal justice," nor was it designed to undermine late colonial politics. In fact, the declining European powers had not only managed to keep the subject of decolonization out of both the UDHR and the U.N. Charter, they had also secured "colonial clauses" in the ECHR, allowing territorial limitations of the Convention and making the right to individual petition and the jurisdiction of the Court optional. In other words, the question of national sovereignty was generally kept in place in regard to decolonization.

15. For a more general analysis of the history of the construction of European law and institutions, see Madsen and Vauchez (2005).

BOX 3. THE "COLLECTIVE HABITUS" OF THE ECHR SYSTEM

The weak institutional positioning of these institutions generally privileged actors who could muster multiple qualifications in politics, diplomacy, and law: for example, the aforementioned René Cassin, but also his British counterpart, Lord McNair, who besides being a London School of Economics professor of public international law was a barrister and former President of the International Court of Justice in The Hague. Lord McNair's career at the Court was however cut short, and he was replaced by Sir Humphrey Waldock, Chichele Professor of Public International Law and Diplomacy at Oxford, who also had "a distinguished wartime career in the Military Branch of the Admiralty" behind him (Simpson 2004, 350). Some of the judges and commissioners of the ECHR system were even former professional diplomats, such as the Commissioner Sture Petrén, a chief legal adviser in the Swedish Ministry of Foreign Affairs who had been a key player in the drafting of the Convention as head of the Conference of Senior Officials. Besides the diplomatically well-acquainted actors, a very significant number were leading legal academics in their respective national legal fields. These included, for example, the Danish legal philosopher and expert of public international law and constitutional law, Alf Ross, the Austrian Alfred Verdross, Dean of the Vienna Law Faculty and eminent expert of public international law, the Italian professor G. Balladore-Pallieri, equally a highly regarded expert of public international law, as well as the high-profile Dutch professor of administrative law, Gerardus Johannes Wiarda.

bureaucracy, spent a few days each month in Strasbourg developing legally and institutionally the ECHR framework. Due to their "collective habitus," they were generally inclined to deploy an approach consisting of both a diplomatic understanding of European human rights with a more or less self-sustainable and conceptual *Professorenrecht*. But, making this balancing act delicate but also necessary, human rights had become a direct battle line in the cultural Cold War of the 1950s and 1960s, seeing the opposing camps of, respectively, the CIA-funded International Commission of Jurists and the Moscow-oriented International Association of Democratic Lawyers fiercely battling over the concept (Madsen 2004b; Dezalay and Garth 2002; Tolley 1994). This imposition of Cold War battle lines at the heart of international human rights only made the task of developing the legal autonomy of European human rights even more important.

The European system was, however, never to be paralyzed by legal bloc politics as the U.N. Human Rights Commission, and it was actually anti colonial inspired claims, rather than Cold War politics, that were to first test the European human rights institutions. This was possible because of the British decision to extend the reach of the Convention not only to mainland Britain but also its colonial dependencies—a decision made by the Foreign

Office in a complex game of late colonial maneuverings (Simpson 2004). Taking the system to its first real test, in the mid-1950s, Greece filed an *interstate complaint* concerning robust British practices on Cyprus. While the United Kingdom had never particularly sought to either justify or hide the use of force in the administration of the colonies, with this pending complaint, the need to *legalize* the colonial practices became increasingly "high-politics" (Simpson 2004; see also Fergusson 2003). The United Kingdom first deployed a variety of legal tricks related to the uncertainties of the definition of insurrection as a way of justifying the application of tough measures. But, a Council of Europe delegation was sent to investigate whether the situation was in fact grave enough for justifying such extraordinary measures. Headed by the distinguished Danish law professor, Max Sørensen, the Mission started actively gathering information.[16] Yet, what was building up to become a serious case in Strasbourg imploded with the 1959 Zurich settlement on Cyprus by the use of *diplomacy* rather than *law*. Shortly after, however, the so-called *Lawless* case concerning the use of detention without trial in Ireland—a procedure also increasingly used by the British in Northern Ireland—once again put the British Foreign Office on alert. The case concerned the citizen Lawless who was suspected of being a member of the IRA. For these reasons, he was arrested in the Republic of Ireland and kept locked up for a period of five months under an Irish legislation that allowed detention without trial in the interest of public order and peace. Both the European Commission and the Court unanimously held that this was not consistent with Article 5 of the Convention (right to liberty and security). The case nevertheless failed, because an interpretation of Article 15 (emergency situations) found that the Irish government had rightfully reasoned that the "life of the nation" was threatened.

If this was supposed to be a warning of the mounting force of human rights law, it helped draw some interesting conclusions in the European foreign services: the Irish victory in the *Lawless* case together with the, at least from the point of view of the British Foreign Office, diplomatically acceptable outcome of the *Cyprus* cases, contributed to the conclusion that the ECHR system was in fact not too dangerous if only handled in the right way using both legal and diplomatic guile (see Simpson 2004, 1086–88). This observation, which was obviously not only drawn by the U.K. Foreign Office, suggested that the system was generally understanding to the subtleties of diplomacy and, in particular, key national interests.

This image had in fact some real foundations. Generally, the Court and Commission were not very progressive for the first ten to fifteen years, a

16. Eminent professor of public international law and constitutional law Max Sørensen, who also happened to be an expert consultant to the Danish Ministry of Foreign Affairs in the area of public international law, later became a Commissioner and finally a Judge (1973–1979) in Strasbourg.

fact in part attributable to the key agents' habitus influenced by diplomacy and public international law, as well as by the basic uncertainties as to the reach of the institution in light of its genesis as a Cold War symbolic instrument. This self-limiting strategy had the crucial effect of not only helping the institution maneuver about the initial Cold War landscape but also turned out to be critical for gradually convincing the member states that it should be taken seriously. In the words of a former British judge at the Strasbourg Court:

> This had the very important and desirable effect . . . of building up the confidence of Governments in the system. They didn't feel that the system was going mad and that, you know, any applications from any old chap that felt his rights had been violated would be successful before the Commission (Interview April 25, 2001).

These remarks, drawn from an interview, evoke a key feature of the institutional identity of the original institution, which had a great impact on its subsequent development. The institution's gradual move toward taking over the position as the supreme European human rights court was greatly helped by this early representation of the institution as reliable, respectable, and legally conservative. In other words, the ECHR system appeared to pose no significant threat to the specificities of the national ways of securing human rights and justice—as long as they were *justified*. Progressively, these early dynamics translated into the ECHR jurisprudence. Most notably, the principle of the (national) margin of appreciation, which provided a sophisticated legal response to the built-in conflict between the (European) universalism of human rights and the safeguarding of the national particularities of the protection of human rights, was produced on the background of this initial approach.

A EUROPEAN HUMAN RIGHTS LAW: THE METAMORPHOSIS OF A COLD WAR INSTITUTION

Having survived both the heated Cold War and the politics of decolonization, the ECHR system benefited from the geopolitical changes of the 1970s, taking the air out of the anticolonial struggles and creating a new East-West dialogue. Also, the growing human rights movement was increasingly involved in the new cause of criticizing the more distant perpetrators of human rights in Latin America or South Africa (Sikkink 1996). As part of these transformations, the demand for human rights *law* was growing, reflecting, for example, the strategies of Amnesty International of putting the *law of human rights* before the *politics of human rights* in order to recreate human rights in a more *neutral* form (Buchanan 2002; Dezalay and Garth

2002). As a vitalization of the dormant but very considerable legal tools available in the Convention, the ECHR system began to step out of the cloudy smokescreen of postwar political strategies and jump on the bandwagon of this new legal practice of human rights.[17] This provided a further revelation. The network of grand professors and diplomats had in fact spent the period of Cold War inertia nourishing the institution and its mechanisms—an effect virtually intrinsic to the appointment of such a high-level group of jurists—and these "tools" were far sharper than what could be anticipated from the *Cyprus* cases and the *Lawless* case. Also, a new set of judges and commissioners were making their entrance in the 1970s and, with that, a new approach to the enterprise.

In the early 1970s, emblematic of the fundamental changes in the human rights field, it was ironically the Irish government that filed an interstate complaint against the United Kingdom concerning the draconian interrogation measures used in Northern Ireland. In its decision of 1978, the Court eventually found that the interrogation techniques used by the British security forces in Northern Ireland were in violation of the Convention.[18] The recourse to emergency arguments did not hold in this case—Article 3 (prohibition of torture) did explicitly not allow derogation in time of emergency (Article 15)—and it became an occasion that further underlined the beginning of the ECHR system's transformation, as well as the increased fine-tuning of its inborn legal utensils. Such cases of very serious violations of human rights, however, inevitably continued to push the system to the limit and were to be followed by routine allegations of politicized law—this was, for example, the case of the Thatcher government's response to the Court continuously finding the United Kingdom in violation of the ECHR during the 1980s (Ewing and Gearty 1990). But, at the same time, the ECHR started diversifying its business in the sense that it expanded its reach and was decreasingly only associated with these highly sensitive human rights cases. Whereas the restoration of justice in cases involving very serious claims, for example, torture, were a part of the institution's basic legal repertoire—and ultimately its justification—it was by developing a larger and far more comprehensive protection of a *procedural justice*, as well as an expansion of the catalogue of rights, that it defined a new legal terrain (see Mowbray 2006).

With the new corps of judges in place, the institution was increasingly venturing into imposing a sort of minimum standards of an effective legal

17. Contributing to this conversion, international human rights were officially "crowned" in the late 1960s and throughout the 1970s, illustrated by a steady flow of Nobel Peace Prizes to the pioneers of the area: René Cassin (1967), Sean MacBride, a signatory of the ECHR and leading member of Amnesty International (1974), and finally Amnesty International (1977).

18. The illegal practices included the so-called "five techniques" used by the security forces: wall-standing, hooding, continuous noise, deprivation of food, and deprivation of sleep.

procedure and an expanding catalogue of rights on the legal systems of the member states. These were drawn from the general terms of the ECHR but spiced up with the new ideal of interpreting the Convention dynamically. In addition to a set of younger new judges, among the central persons of the "new court," we find, for example, Pierre-Henri Teitgen, who made a comeback in the late 1970s to complete the term of René Cassin. The Court was however not unanimously progressive. As the development of the jurisprudence accelerated in the 1970s, so did the frequency of dissent from the English judge, Sir Gerald Fitzmaurice, another key judge of the court in the 1970s. A former legal adviser of the Foreign Office, Judge on the ICJ and member of the International Law Commission, Fitzmaurice's opposition to the new dynamic doctrines was considerable, and he sought to maintain the successful approach of the original Court (see Merrils 1982). Yet despite Fitzmaurice's many dissenting opinions, the game of European human rights law was changing. Good illustrations of this change are the cases of *Tyrer v. the U.K.* of 1978, which laid out the doctrine of the Convention as a "living organism," and *Marckx v. Belgium*, establishing the doctrine of an "effective and practical" protection of European human rights.

Tyrer v. the U.K. concerned Anthony M. Tyrer, a British citizen aged fifteen, who had been sentenced by the juvenile court of the Isle of Man to "three strokes of the birch" for his assault of a senior pupil. The issue was whether this corporal punishment was "degrading punishment" contrary to Article 3 of the ECHR. The response of the Court—with a ten-page dissenting opinion by Fitzmaurice—was that although such punishments might be acceptable to the citizens of the Isle of Man, the ECHR "is a living instrument . . . [and] must be interpreted in the light of present-day conditions . . . commonly accepted standards in the . . . members states" (para. 31). This allowed for a dynamic interpretation of the contents of the ECHR and, with that, a new ideal of an up-to-date human rights protection that was further developed in subsequent cases. In *Marckx v. Belgium*, another key doctrine was laid out, the one of a "practical and effective" protection. The judgment basically obliged the member states to provide effective and reasonable possibilities to its citizens to benefit from the protection of the ECHR. In basic terms, the protection of the rights of ECHR was not an *abstract* but a *concrete* obligation of the member states and a failure to provide effective, practical access was to be a violation of the Convention.

This new progressive human rights doctrine took many of the member states by surprise. While most member states had assumed that their legal systems were generally operating on the basis of, if not up-to-date then fair procedures, the enforcement of this novel doctrine of European human rights made the caseload grow significantly. Seemingly far from the original postwar and Cold War inspired objectives of the Convention, the build-up of this avant-garde law reflected how these institutions were increasingly managing to *neutralize* and even *naturalize* this originally politicized area of practice in

the sense of transforming the Convention into a deeply specialized legal practice and discipline (see Bourdieu 1986). This veritable metamorphosis of the ECHR system was obviously helped by the Court's initial balancing between a more diplomatic role and the development of its own jurisprudence. If the system for the first fifteen to twenty years had focused on the build-up of reliable and respectable legal machinery, it was now using this legitimacy for taking a far more dynamic and expansive direction. The project was successful in the sense that the Court increasingly represented an important legal forum for contesting the claims of a broader group of applications, including the media, trade unions, and many others. This ultimately helped consolidate the Court's position in the larger, more fluid European legal field, as well as it allowed it to increasingly assume its role as supreme European Court vis-à-vis national legal fields.

This process of gaining access to the national production of human rights law was further facilitated by the set up of institutions in the various member states with the objective of researching and thereby systematizing this new area of law. Pioneering human rights research centers—such as the Essex and Nottingham Centers in the United Kingdom, the Danish Center for Human Rights, the Wallenberg Center in Sweden, the French centers in Nanterre and Strasbourg, and countless others—strongly contributed to this development. This emerging "scientificization" and systematization of human rights was however hardly a fait accompli. In the area of human rights, the distinction between law and politics remained hazy, as the area tended to attract jurists with clear political agendas and interests well into the 1980s. Nevertheless, the subject was becoming increasingly legalized and, thereby, *also* the turf for less politically industrious lawyers. These "pure jurists," driven by an almost entirely professional engagement, increasingly sought to bring the new subject into more traditional disciplines (for example penal law), as well as impose an additional degree of "legality" on the subject. Above all, these intensified investments in European human rights were adding a new credibility to human rights *law*. It was a development where the law faculties played a key part but was soon followed by a significant number of private practitioners and national judges who also welcomed European human rights as a *legal* tool for reshaping and adjusting national ways of protecting human rights. Thereby, the Europeanized concept of human rights effectively entered the mainstream of the legal field, as well as it eventually became an issue related to the very politics of transforming the state (see Delmas-Marty 1989; see also Klug 2000).

This last paragraph should, however, not be read as an "end of history" account, a final step in what might be easily misread as a pure rationalization and institutionalization process. As argued elsewhere, Europe is always in the process of reconstruction (Dezalay and Madsen 2006). This was more true than ever in the 1990s when the European map had to be redrawn. While the ECHR system had greatly challenged the member states throughout

the 1980s and early 1990s, the democratization of Eastern Europe became a very considerable challenge to the ECHR system itself. The institution had to integrate a very substantial number of new member states into its institutional framework, as well as it had to monitor human rights in respect to legal systems that had only recently been refurnished. To respond to this new and larger role, the ECHR system underwent a very considerable transformation to secure the regime's functionality in the new post–Cold War era. In this regard, Protocol 11 provided the most significant reform. Coming into force in 1998, a new and permanent Court was set up and charged with an ever-increasing caseload derived from the approximately 800 million individuals from more than forty member states.[19] While this new European "megasystem" of human rights protection became the appeal court for the citizens of the new democracies of Eastern Europe—numerically a growing group of applicants—this did not, however, mean that the old member states had finally solved their human rights issues, only adding to an increasingly heavy caseload.[20] The question of delay, which had been imposed on national legal systems in hundreds of decisions, was illustratively swinging back to the ECHR system. Indeed, it seemed that the Strasbourg institutions were beginning to allow increasingly more *national* margin of appreciation as a way of limiting its own caseload. A new institutional balance was basically in the making.

CONCLUSION

This brief and obviously incomplete history of the ECHR is illustrative of the innovation of a new legal subject and practice that went along with, but also beyond, the political and legal genesis of the idea of *Europe*. Moreover, this story underlines the position of law as being both a unique social practice with clear links to the politics of the state and, at the same time, different from ordinary politics due to its differentiated ways of operating. Further, this sociological review of the constraints and issues that were at the center of the genesis and institutionalization of the ECHR provides an account of some of the original politics of European law and the role played by legal and quasi-legal actors in these processes. In great contrast to the

19. Protocol 11 replaced the Court of Commission of the "old" system with a new single, full-time Court. Among the many novelties, individual recourse was made mandatory under Protocol 11. On the new Court, there were also as many judges as there were parties to the Convention. In practice, the Court was divided into four sections with the option of referring a case to a grand chamber composed of seventeen judges. Replacing the closed down Commission, a number of judge *rapporteurs*, as well as committees, were to perform the task of screening the cases received by the Court.

20. During the three years following Protocol 11, the Court's caseload grew significantly. The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001.

current more or less naturalized category and practice of European human rights, this analysis underlines instead the constant interplay between law and diplomacy as a basic condition to the rise of postwar European law. As suggested, it was mainly due to the ability of the legal experts appointed to these nascent European institutions to navigate both Cold War tensions and the simultaneous process of decolonization that it managed to gain a position not only in the emerging European legal field but also eventually in the national ones. Thus, "coming in from the Cold" and indeed to the heart of the definition of European legal justice by imposing a novel doctrine of human rights law, these institutions came back with a curious boomerang effect, instigating not only a mere repatriation of Europeanized human rights law but also a more autonomous *European* human rights law as such (Madsen 2004b).

These basic conclusions drawn from the specific history of the emergence of European human rights are also more generally evocative of the processes of Europeanization when analyzed from the point of departure of law and lawyers. When examined empirically in-depth, it appears that the processes of Europeanization have always been marked by the exchanges of national and international models and strategies. This was particularly obvious in the case of the pioneers of Europe, such as Pierre-Henri Teitgen, who explicitly pursued double careers in law and politics on both the national and European levels. Using their unique positions and multiple specializations, they became not only the couriers of the European idea, but also the middlemen involved in the import-export between the multiple levels concerned (see Dezalay 2004). They thereby helped to circulate both national foreign models and interests. Also, from the onset, the very definition of the boundaries of Europe was essentially a part of the strategies of institutionalizing this uncharted legal and political terrain. This observation should not be seen as only applicable for understanding the history of a different epoch—of literally the genesis of Europe—but also of the more contemporary issues of Europeanization (Madsen and Dezalay 2006). While a number of European fields have clearly achieved a certain degree of autonomy and thereby differentiated professional careers and knowledge than what was the case at the genesis of Europe, current emergent European fields are equally formed by professional-ideological, as well national-international, double-games related to European integration. This is not only due to the immediate political and legal interests in the definition of the European space but also because the European venues have become increasingly strategic for challenging national practices and vice versa.[21] In the area of European human rights, for example, British lawyers involved in the battle with Thatcherism over civil rights and trade unionism

21. See the article by Yves Dezalay included in this symposium for similar observations.

during the 1980s started using European forums for relaunching and revalorizing their national policies, which ultimately helped accelerate certain European processes of human rights integration and institutionalization.

This last example from more recent European human rights politics highlights an essential feature of the European terrain, namely the continuous and striking interplay between its internal and external constructions. For the same reasons, the history of the European construction should not only be regarded as a story of the building of specific supranational institutions and the political interaction of states but also as the story of a particular set of political opportunities, which in turn contributed to the structuring of this social space. Among these, human rights offered a particular set of opportunities, which led to a European structuring process that both reproduced national knowledge and conventions. Yet, these were not only reinvented on the European level but were also reexported to the member states and, subsequently, to states in the periphery of the European construction seeking to comply with European law for entering the zone of Europe. In this sense, the European human rights system has become a very central institution continuously involved in translating the national-European exchanges into a European law, which reflects the changing political climates.

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