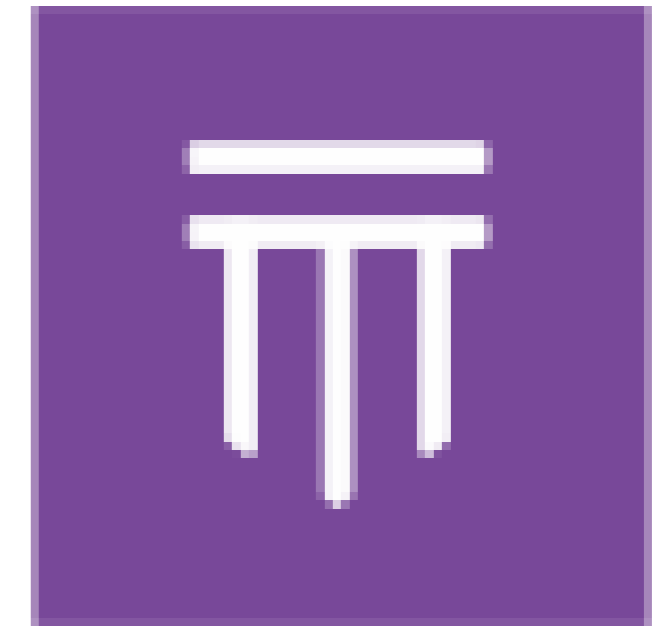


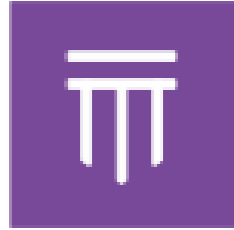
Brno, 29 September 2021

The Strasbourg court and its challenges



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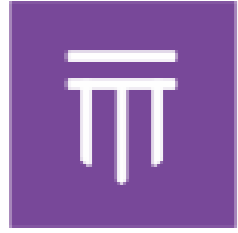
Katarína Šipulová



Selection of ECtHR judges

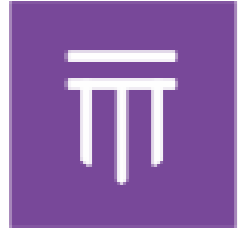
- 47 judges
- Decide in formations:
 - Single judge
 - Three-member chamber
 - Seven-member chamber
 - Grand chamber
- Each state nominates 3 candidates
- PACE interviews and selects one judge per country
- Many controversies
- New Czech judge: Kateřina Šimáčková





(Populist) challenge to ECtHR

- ECtHR's response
 - Margin of appreciation
 - Principle of subsidiarity
 - Weak review
- A. Follesdal:
 - Liberal contractualism: social institutions must satisfy principles of legitimacy
 - Democratic rule with constraints on legislatures may provide important assurance why citizens should trust institutions
 - The least dangerous branch (risk of domination is small)
 - ECtHR does not replace political, democratic domestic contestation
- BUT: the real challenges
 - Quality of judicial deliberation
 - Risk of unaccountable judges
 - Social legitimacy



Backlash against international HR courts

- Resistance to ICs
 - Who?
 - Why?
 - How?
 - pushback
 - backlash
- UK confusion
- Russian dissonance



Volume 14, Special Issue 2 (Resistance to International Courts) June 2018 , pp. 197-220

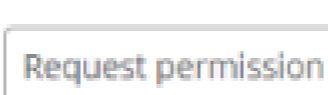
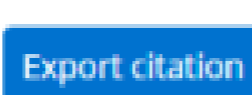
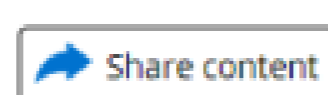
Backlash against international courts: explaining the forms and patterns of resistance to international courts

Mikael Rask Madsen ^(a1), Pola Cebulak ^(a2) and Micha Wiebusch ^(a3)

<https://doi.org/10.1017/S1744552318000034> Published online: 29 May 2018

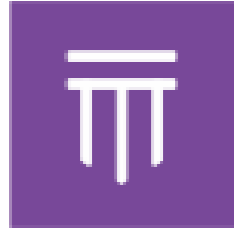
Abstract

The paper investigates and theorises different forms and patterns of resistance to international courts (ICs) and develops an analytical framework for explaining their variability. In order to make intelligible the resistance that many ICs are currently facing, the paper first unpacks the concept of resistance. It then introduces a key distinction between mere pushback from individual Member States or other actors, seeking to influence the future direction of a court's case-law, and actual backlash – a critique triggering significant institutional reform or even the dismantling of tribunals. On the basis on the proposed theoretical framework, the paper provides a roadmap for empirical studies of resistance to ICs, considering the key contextual factors necessary to take into account in such studies.



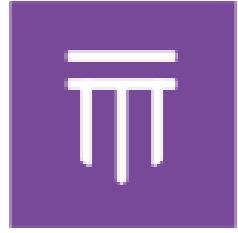
THE CHALLENGING AUTHORITY OF THE EUROPEAN COURT OF HUMAN RIGHTS: FROM COLD WAR LEGAL DIPLOMACY TO THE BRIGHTON DECLARATION AND BACKLASH

MIKAEL RASK MADSEN*



ECtHR most important issues

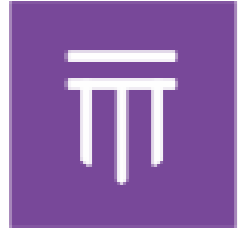
- Political Rights
 - Article 3, Protocol 1 (free elections)
 - *Sejdic v Finci v BiH case*
 - *Hirst case*
 - *Rolandas Paksas v Lithuania*
 - *Baka v Hungary*
 - Freedom of Speech (A9)
 - *Vajnai v Hungary* (totalitarian symbols)
 - Freedom of Assembly (A10)
 - *Ollinger v Austria*
- Discrimination
- Foreign policy
 - *Georgia v Rusia*
 - *Armenia v Azerbajdzan*



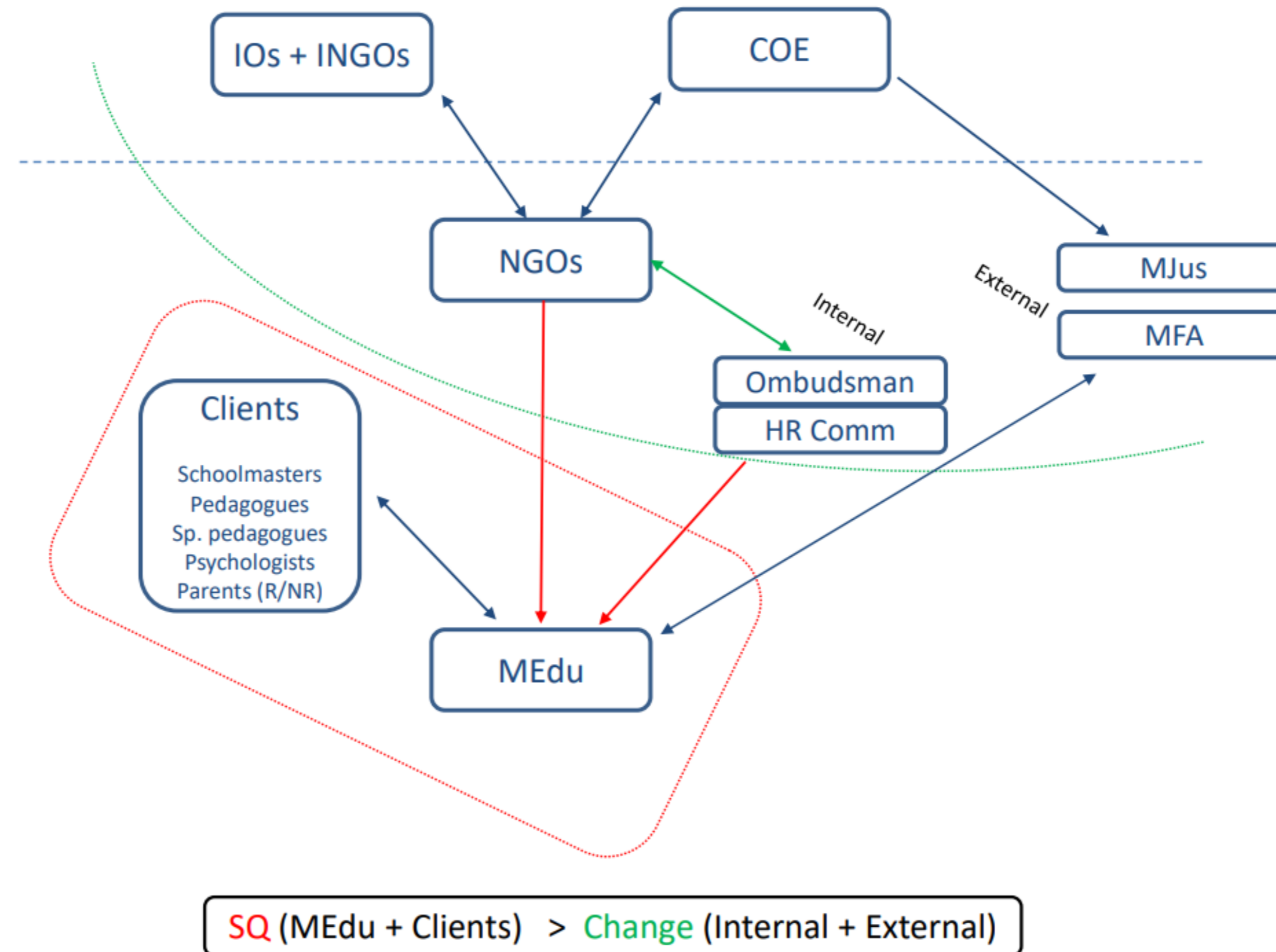
DH vs Czech Republic

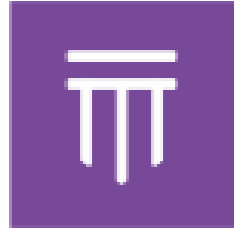


Ostrava



DH vs Czech Republic



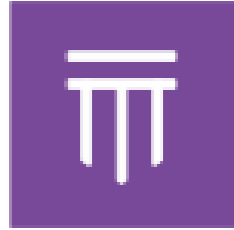


ECtHR: Carter v Russia

- 21 September 2021,
- Article 2
 - procedural
 - substantive



"The ECHR hardly has the **authority** or technological capacity to possess information on the matter. There are still no results from this investigation and making such claims is, at the very least, unsubstantiated". (Dmitry Peskov)

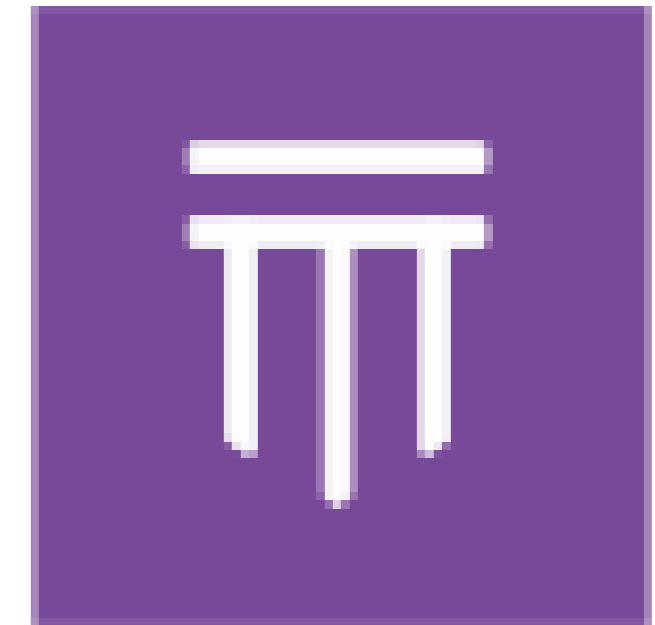


ECtHR: Carter v Russia

- Why is the judgment important?
 - the first case where ECtHR held that ECHR applies to extraterritorial assassinations
 - ~ Bankovic case: dropping a bomb on a person from an airplane is insufficient to create a jurisdictional link
 - Here: personal jurisdiction
 - One-off use of lethal force (drone strikes?) is more deserving of protection than massive use of lethal force
 - Principle of proximity
 - ILC Articles on State Responsibility: assassins acted under the direction and control of Russian authorities
 - Fact finding!

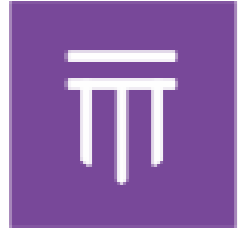
Brno, 29 September 2021

European Union System of HR Protection



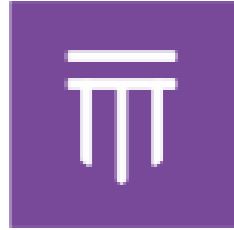
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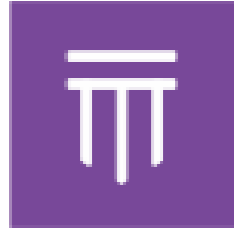
EU Law

- Primary law
- Secondary law



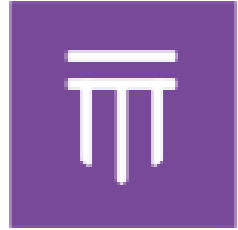
HR as a field of study

- Politically very salient issue
- Vehicle behind the triple transformation
 - Change of competences
 - Change of actors (and interaction between actors)
 - Change of the nature of EU (constitutionalisation)



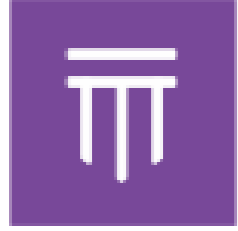
Why to study HR

- Traditionally part of national sovereignty
- HR in international organisation x federal entity
 - Who does create & control the norms?
 - Who applies the norms?
 - Who solves the conflict of laws?



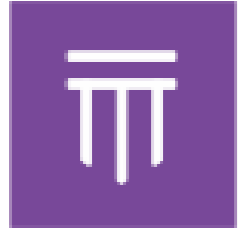
Weiler: Transformation of Europe





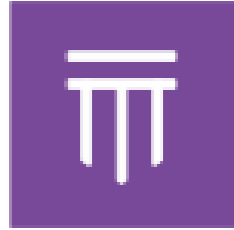
Weiler's Transformation of Europe

- *What is his major argument/point raised in the article?*



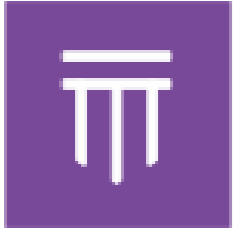
Where are the (human) rights?

- ECSC and EEC and EURATOM
 - X
- . *Why there are no HR in Community?*



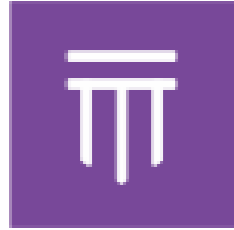
Where are the (human) rights?

- ECSC and EEC and EURATOM
 - X
- *. Why there are no HR in Community?*
 1. Economic activity (coal, nuclear energy, economic integration) + CoE (IG)
 2. Salience: political integration failed
 3. IL generally seen as weak, presumptions that in conflict of national and international (EC) law, domestic law prevails -> This would endanger HR
 4. No real legacy of judicial protection of HR



Article 119 EEC (141) equal pay without discrimination on sex

- *1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*
- *2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*
- *3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*
- *4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

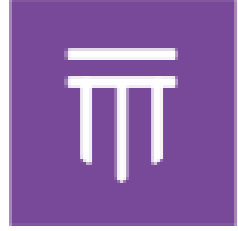


Where are the rights?

- SEA: Preamble
- Maastricht Treaty: HR as one of the aims of the EU + EU respects the FR
- Amsterdam, article F: *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*
- Constitution – Charter of fundamental rights – Lisbon treaty: legally binding character

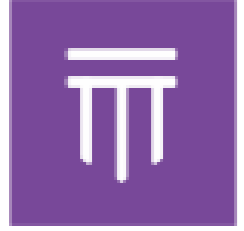
TEU, Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

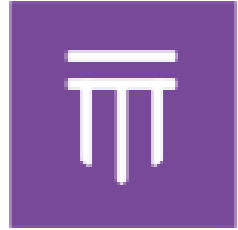


How HR permeated the EU

- Constitutionalisation of the aquis
 1. Spill-over of jurisdiction (authority)
 2. Enlargement process (foreign policy)
 3. Empowerment of the ECJ



I. Spill-over of jurisdiction

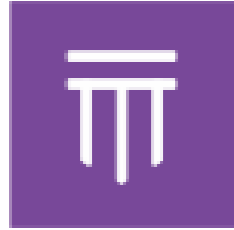


Weiler's Transformation of Europe

- *What is his major argument/point raised in the article?*
 - Conceptualization of the transformation of the relationship between

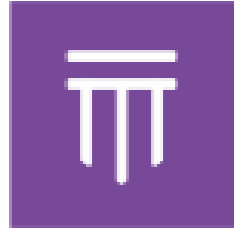
Member states x Community (EU)

- Constitutionalisation of the Treaties on behind of the HR proliferation in the EU's acquis
 - This is not an isolated result of SEA
 - *What does he say?*
 - *It is not a result of intergovernmental decision, but a logical result of slow transformation*



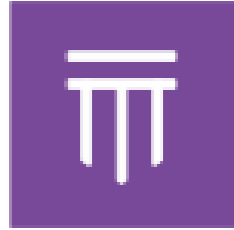
Weiler's Transformation of Europe

- *Exit and voice?*
- *Landmark doctrines of ECJ*
 - *Direct effect*
 - *Supremacy*
 - *Implied powers*
 - *HR*
 - *State liability principle*
 - *Effet utile of EU law*



Weiler's Transformation of Europe

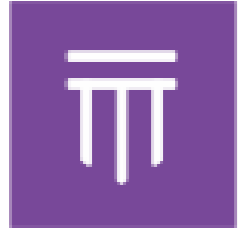
- *How does the EU judicial review work?*
 - *Review of all European law measures*
 - *Review of the acts of member states*
- Judicial empowerment both supranational and domestic



ECJ's role

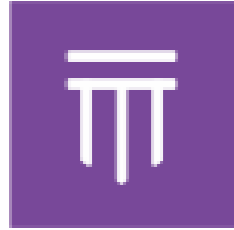
- *Review of all European law measures*
- *Review of the acts of member states*

- Infringement proceedings (**enforcing** the law)
- Actions for annulment (**annulling EU** legal acts)
- Actions for failure to act (**ensuring** the EU takes action)
- Preliminary rulings (**interpreting** the law)
- Actions for damages (**sanctioning EU institutions**)



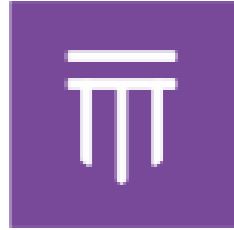
Weiler's Transformation of Europe

- *Mutation of Jurisdiction and competences*
- JURISDICTION AREAS
 - 1. No jurisdiction of the EU
 - 2. Autonomous jurisdiction (authority) of the EU
 - 3. Overlap of EU/member states authority



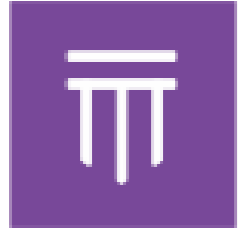
~ Competences of EU

- *X not a sovereign, does not have inherent powers, but conferred competences (by Treaties)*
 - Principle of conferral
 - *Under the principle of conferral, the Union shall act only within the limits of competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*



Problem?

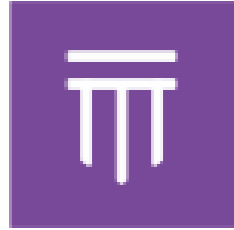
- Treaties do not set out a list of conferred competences
 - They attribute legal competence for every EU's activity in respective titles
 - Thematically limited competences in distinct policy areas
- Threats:
 1. Teleological interpretation (spill over)
 2. Rise of EU's general competences
 - Article 114 TFEU
 - Article 352 TFEU
 3. Doctrine of implied external powers



I. Spill over in secondary law

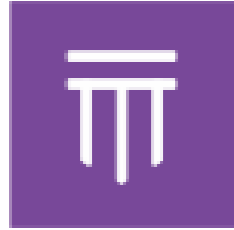
- Who should interpret the competences?
- Enaction of norms in competences delegated upon the EU
- Spill-over of EU competences

- MUTATIONS
 - Extension
 - Absorption
 - Incorporation (*Stauder v Ulm*, *Solange implementation*)
 - Expansion



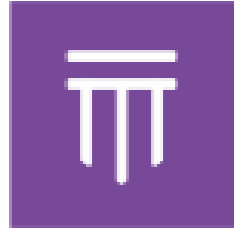
Specifics of discrimination

- Amsterdam Treaty:
 - Fight against discrimination on the grounds of sex, race, ethnic origin, religion, belief, health, age, sexual orientation
 - Legislation in EU: unanimity (Council of EU)
 - BUT: directives regulating equal treatment (race, gender, labour discrimination)
 - Basis for robust ECJ jurisprudence
- JUSTICE area
 - Cooperation in criminal matters
 - Fifth freedom: common market of judgments
 - Principle of mutual trust
 - Borders and asylum seekers
 - Digital rights Ireland (Directive 2006/24/ES Data Retention Directive)



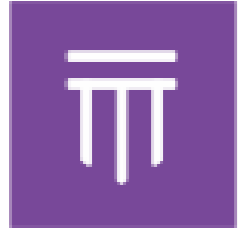
2. General competences

- Article 114 (The harmonization competence)
- (ex Article 95 TEC)
- 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
- 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.



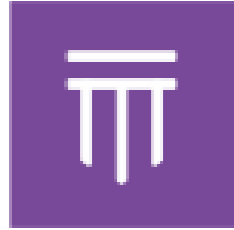
2. General competences

- Tobacco Advertising case
- Germany: harmonisation power could only be used to promote the internal market, not to ban activity
 - The ECJ annulled the European law as going beyond the harmonization power
 - 3 constitutional limits of harmonization power
 - EU must harmonize national laws
 - A simple disparity in national laws is not enough to trigger harmonization = obstacle in trade needed
 - EU legislation must contribute to elimination of obstacles to free movement or distortion of competition



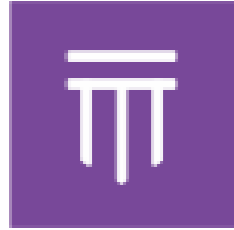
Article 352 (ex 308 ~ 235 EEC Treaty) – the residual competence

- 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and **after obtaining the consent of the European Parliament**, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
- 2. Using the procedure for monitoring **the subsidiarity principle** referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
- 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.



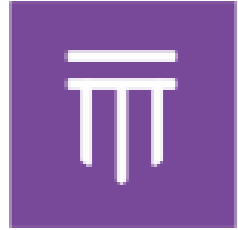
Article 352 (ex 308 ~ 235 EEC Treaty)

- If **action by the Community** should prove **necessary to attain**, in the course of the operation of the **common market**, one of the objectives of the Community, **and this Treaty has not provided the necessary powers**, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.



3. Implied powers

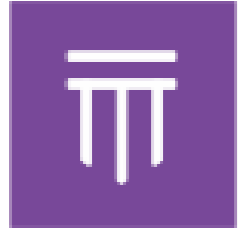
- Originally only international agreements under the Common Commercial Policy with 3rd countries and IOs
- Expansion
- Article 216
- 1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.



Where are the rights?

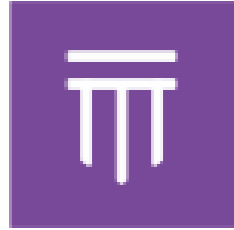
II. Enlargement process

- 1994 Václav Havel: European Union is a community based on “a large set of values, with roots in antiquity and in Christianity, which over 2000 years evolved into what we recognize today as the foundations of modern democracy, the rule of law and civil society.”
- To be a model for CEE transitions
- raison d'être behind the integration project?



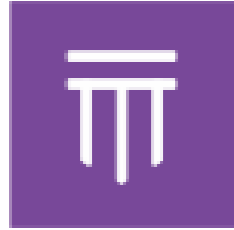
HR in the enlargement process

- *Which enlargement?*



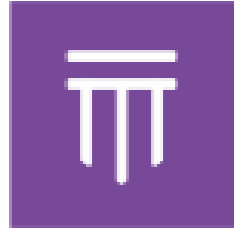
HR in the enlargement process

- Mudde-Sedelmeier and Merlinger: Eastern enlargement
 - 1. attempt to use the enlargement to spread HR and democratic norms
 - EC declarations, Phare, ...
 - 2. accession condition
 - Copenhagen criteria 1993 (HR and democracy)
 - 3. normative revision of Treaties



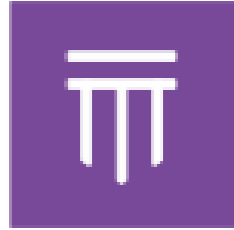
HR in the enlargement process

- 1962 Birkelbach report
- Declaration on the European Identity
 - Relationship of 9 EC members towards the third countries
 - *Determination to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights.*
- 1977 Joint Declaration (EP, Council, Commission)
 - To defend the FR derived from the national constitutions and the ECHR, adopted by CoE
 - Although protection of HR is not the main task and goal of the EC
- 1978 Declaration on Democracy (EC)
 - First election of the EP
 - Objection of EC should any of the member states backslide to authoritarian government
 - *Matthews v Doego* case



HR in the enlargement process

- *Matthews v Doego case*
- *'Article 237 of the EEC Treaty must be interpreted as meaning that, in addition to the requirements which it lays down for the application and agreement, it permits the accession of a State to the European Economic Community only if that State is a European State; and its constitution guarantees, on the one hand the existence and continuance of a pluralistic democracy and, on the other hand, effective protection of human rights.'*
- *The Draft Treaty establishing the European Union 1984 (Spinnelli)*
- *1989 EP resolution Declaration of Fundamental Rights and Freedoms – one of EC tasks is to contribute to the propagation of democracy based on respect of FR*
- *Democratic reunification of Europe*



Copenhagen Criteria

- Definition of fundamental values and political conditions of membership
- Take over the definition of democratic character imposed by A237 EEC Treaty
 - To minimize the risk of backsliding
 - Democracy
 - Rule of law
 - Functioning of market economy
- 1998: transformed into Council Regulation EC No 622/98
- The very same year, democratic principles in Preamble and Article F TEU = new Grundnorm
- Amsterdam: transfer of Copenhagen criteria into Article 7
- And membership criteria: Article 49



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