Brno, 19 September 2022

European System of HR Protection

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European road to HR regime

1. Rights conferred on people by an enlightened ruler
2. Rights seized by the people
3. Rights existing outside of the realm of politics (God, Nature)

Magna Charta 1215

- Subjective rights
- But limited in the category of subjects
- **Rights conferred on subjects of Crown or taken by subjects of Crown?**

The petition of rights 1628

- Charles I x Parliament

- X. They do therefore **humbly pray your most excellent Majesty**, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without **common consent by act of parliament**; and that no one be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof` and **that no freeman, in any such manner as is before mentioned be imprisoned or detained**;

The Bill of **Rights** 1689

- Granted freedom from taxation by royal prerogative, **freedom to petition the monarch,** freedom to elect members of parliament without interference, **freedom of speech and of parliamentary privilege**, freedom from cruel and unusual punishment from fine and forfeiture without trial.

John Locke

- Self-evidence rights
- Right to life, liberty, freedom from arbitrary rule, property
- State of nature
- REJECTION OF MAGNA CHARTA

- “The state of nature has a law of nature to govern it which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.”

Declaration of Independence 1776

- We hold these truths to be self-evident, that **all men are created equal**, that they are endowed by their Creator with certain **unalienable Rights**, that among these are **Life, Liberty and the pursuit of Happiness**.
- …
- That to secure these rights, Governments are instituted among Men, **deriving their just powers from the consent of the governed**,
- …
- That whenever any Form of Government becomes destructive of these ends, it is **the Right of the People to alter or to abolish it**, and to institute new government

France: Declaration of Rights of Man and Citizen 1789

- The **representatives of the French people**, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration **the natural, unalienable, and sacred rights of man**

- **Men are born and remain free and equal in rights**. Social distinctions may be founded only upon the general good.

- **The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.**

Bill of Rights 1791 – 10 US Constitution Amendments

- Amendment I.

Congress shall make **no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press**; or the right of the people **peaceably to assemble**, and **to petition the Government** for a redress of grievances.

- Amendment II.

A well regulated Militia, being necessary for the Security of a free State, the right of the people to **keep and bear Arms** shall not be infringed.

Post WW2 – Universal Declaration of Human Rights

- FDR: Search for 4 great freedoms
  - Freedom from fear
  - Freedom from war
  - Freedom to speak
  - Freedom of religion

- *We the people of United Nations are determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.*

- *- E. Roosevelt: human rights start in small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the factory, farm, or office where he works*

Post WW2 – Universal Declaration of Human Rights

- „Disregard and contempt for human rights have resulted in barbarous acts which have **outraged the conscience of mankind**, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. …. **All human beings are born free and equal in dignity and rights.”**

- Central idea = inherent dignify of human beings and the universality of their rights

- Recognition of pre-existing rights

- Focus on socio-economic rights along the more familiar civil and political rights

European HR Regime (CoE) and European Union

1. Strasbourg: Council of Europe

2. Luxembourg: European Union

Council of Europe

Global physical integrity rights

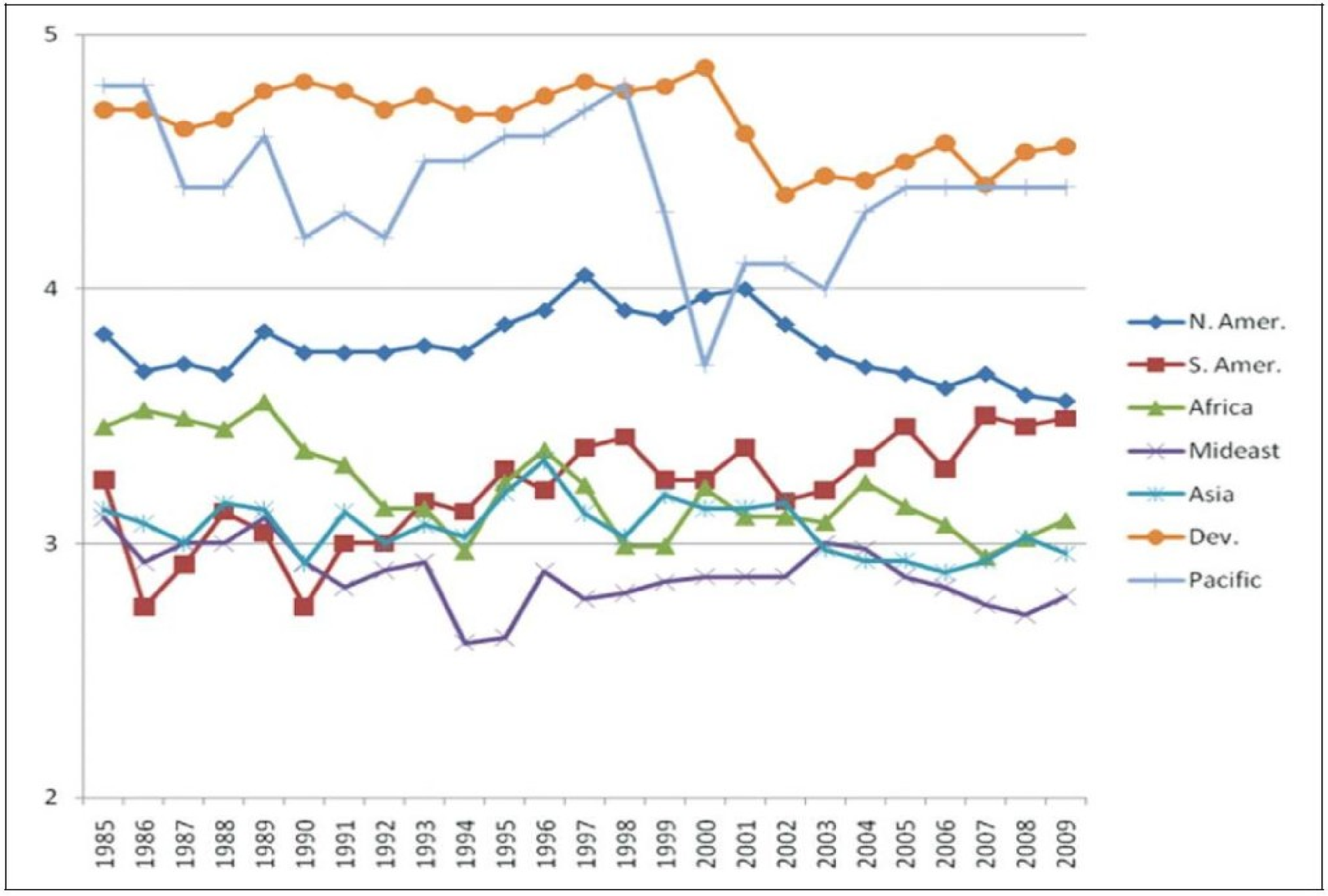


Figure 2. Global physical integrity rights (Political Terror Scale), 1985–2009.

Walker (2012) *PS*

Global physical integrity rights

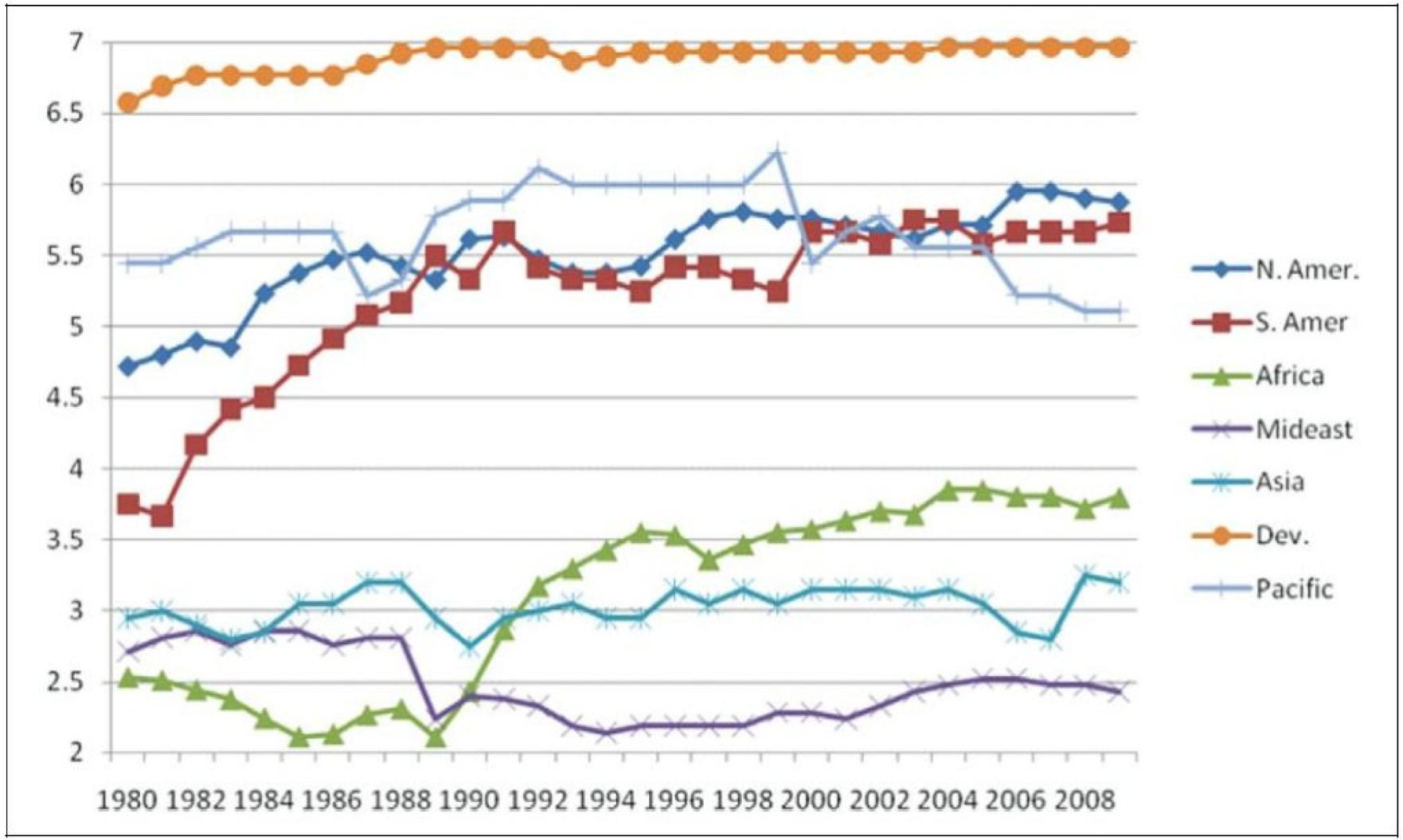


Figure 4. Global political rights (Freedom House), 1980–2009.

Walker (2012) *PS*

Differences across regions

- Europe
- Americas
- Africa
- Islamic states

- **European states the most willing to be internationally bound**

Why do States Ratify Treaties?

1. Why is it important?

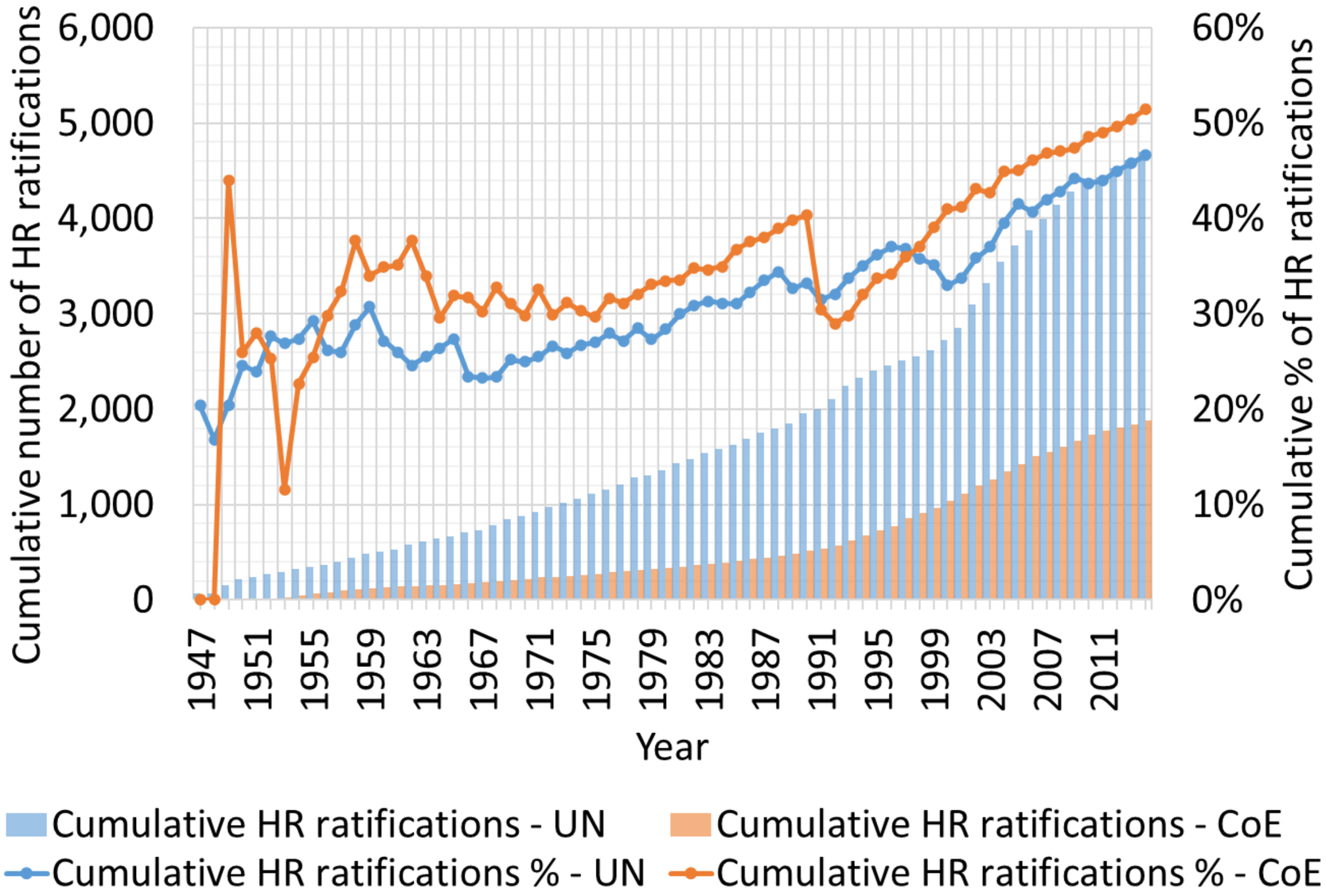
2. What is a ratification?

Differences across regions

- In the text of a convention
- In the activity of the control mechanism

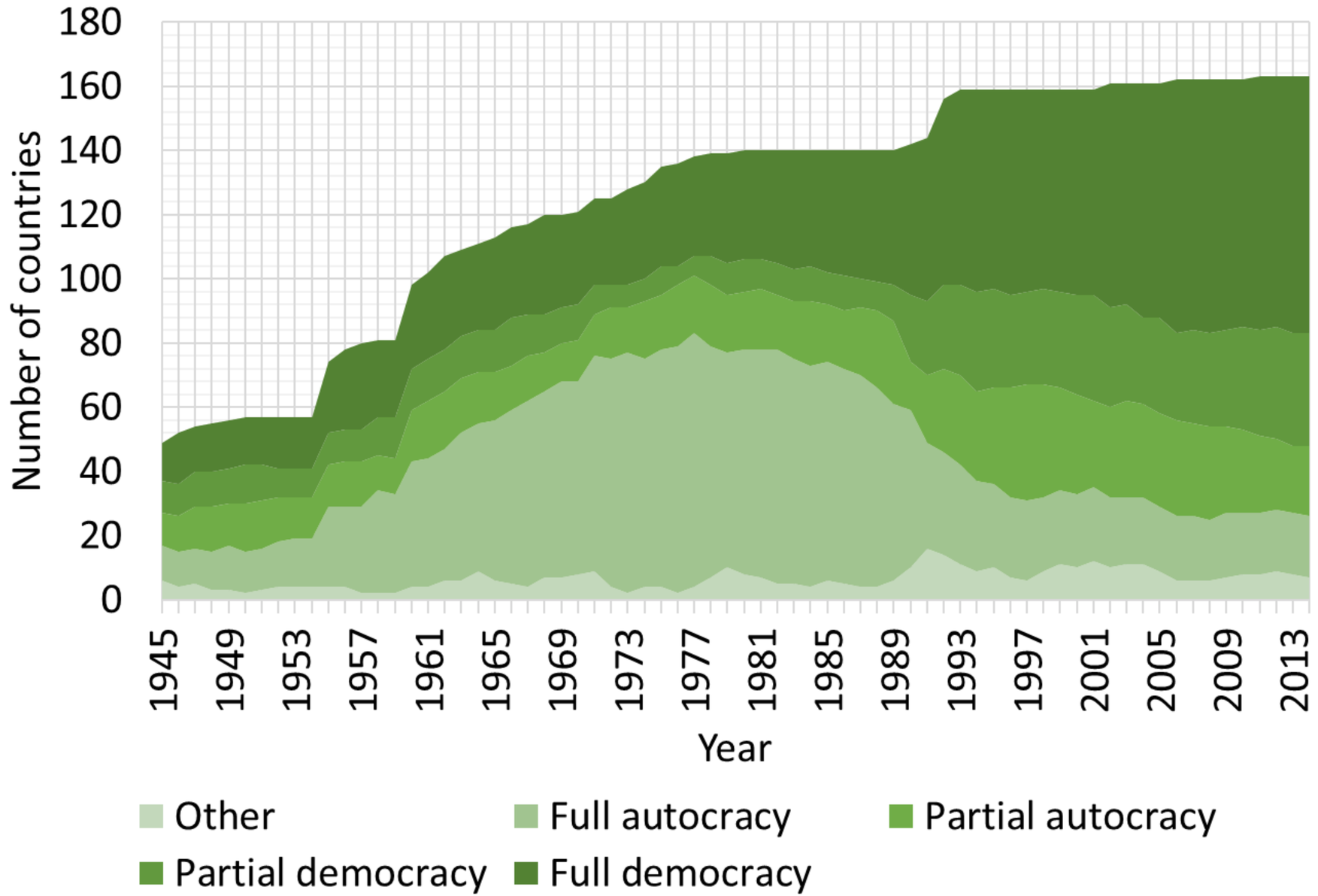
- Western approach?
- European approach?

Expansion of rights (in IR)

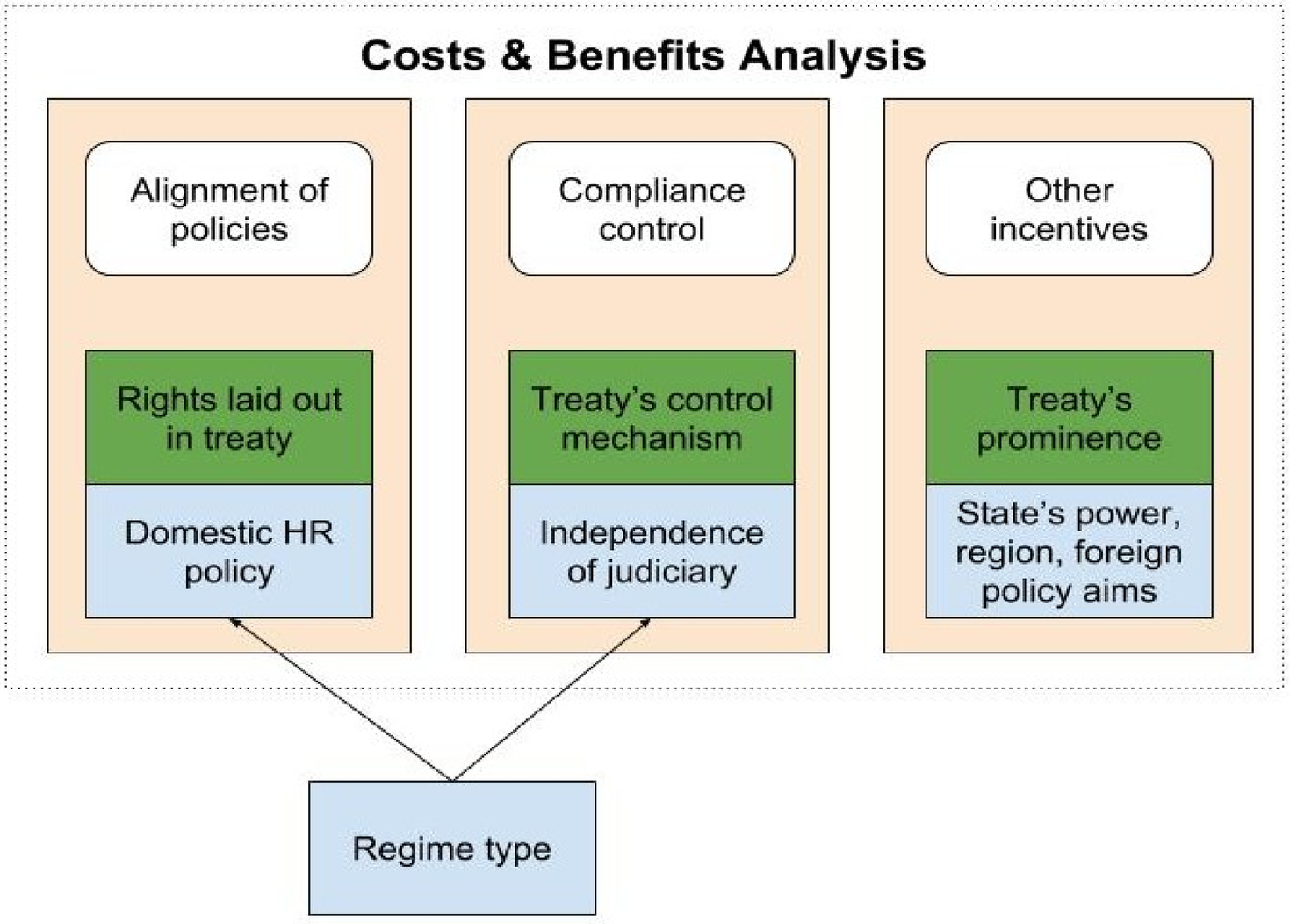


Smekal, Šipulová, Pospíšil, Janovský, Kilian, Making Sense of Human Rights Commitments: A Story of Two Emerging European Democracies, MUNI Pre

Expansion of rights (NUMBER)

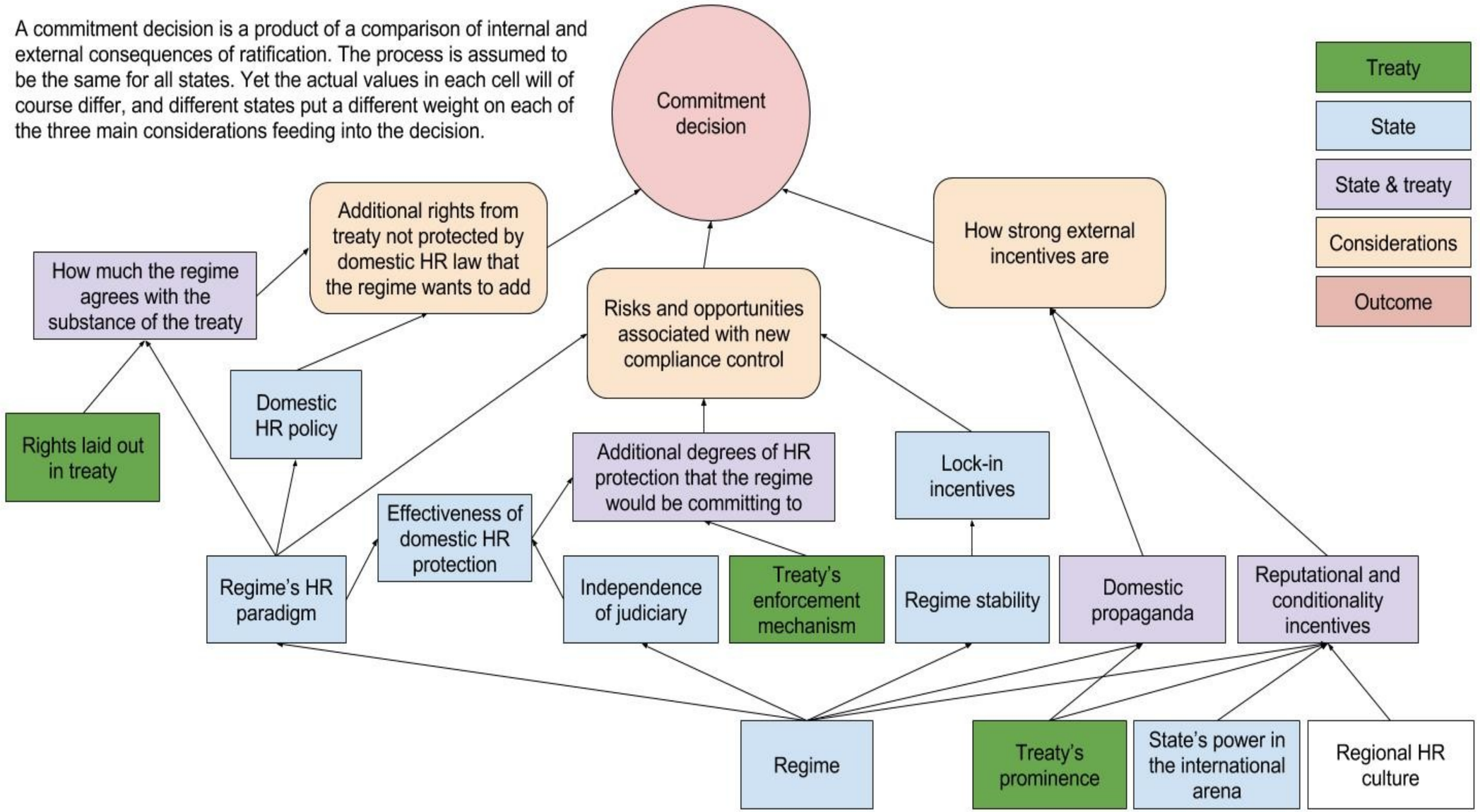


Expansion of rights: Why do states ratify HR?



Expansion of rights: Why do states ratify HR?

A commitment decision is a product of a comparison of internal and external consequences of ratification. The process is assumed to be the same for all states. Yet the actual values in each cell will of course differ, and different states put a different weight on each of the three main considerations feeding into the decision.

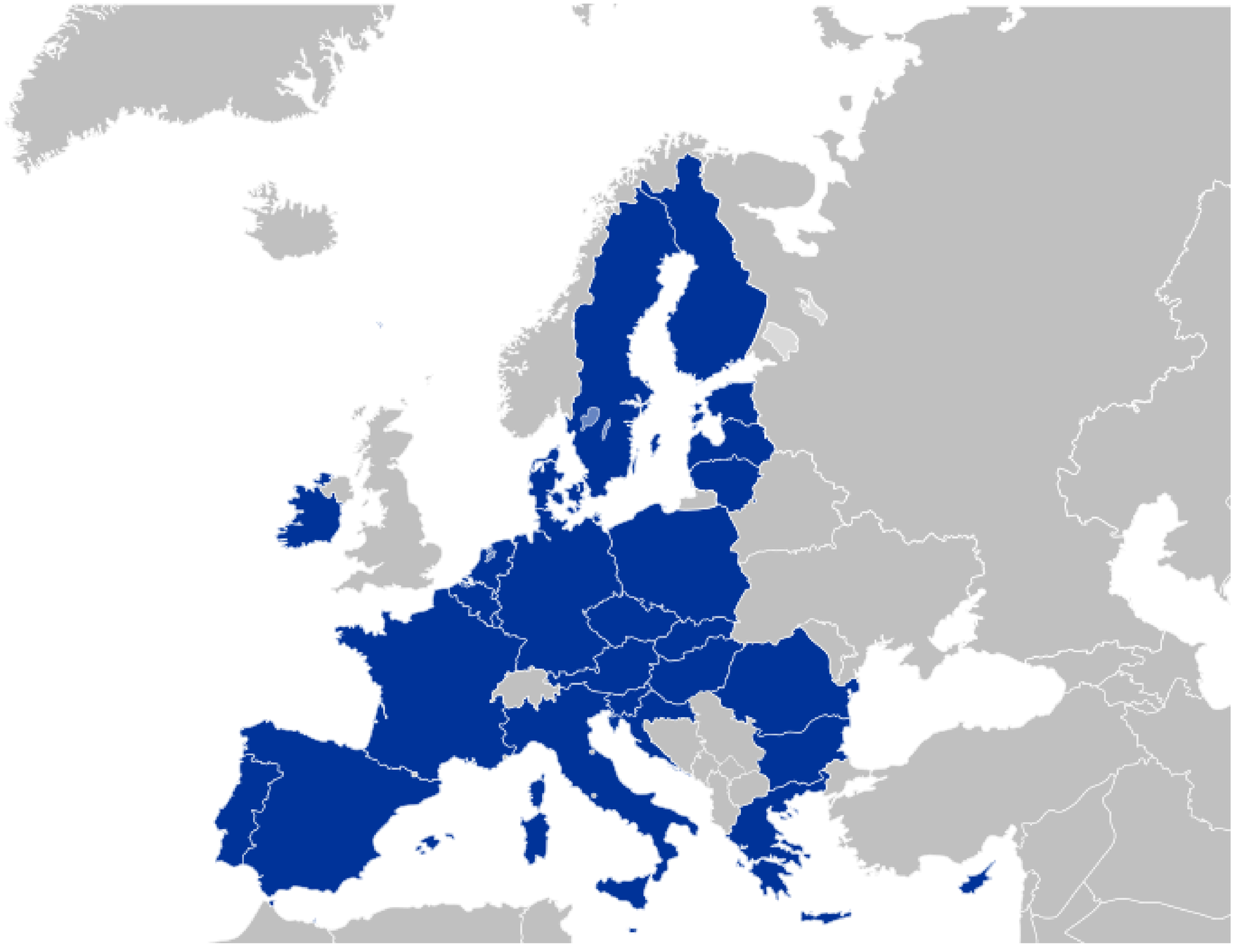


European Approach?

- Differences among states? (right to life)
- Differences within the states

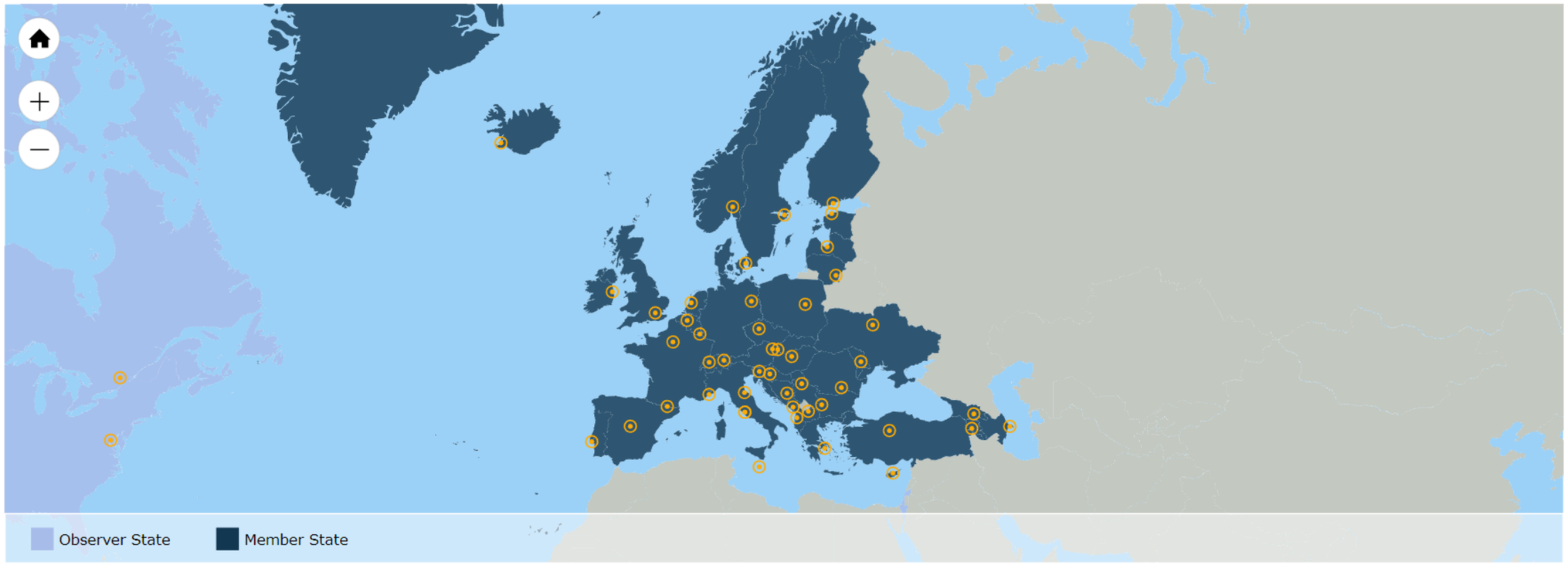
- Highest level of norm diffusion – treaties, constitutions, supranational courts + constitutional courts (frequent references, conferences ,academia, activists, …)

EU



CoE

46 Member States



Council of Europe

- Established 1949
- Intergovernmental (compared to EU)
- ECtHR and a network of various bodies
- ECHR plus more than 200 treaties
  - European Social Charter
  - European Convention on Human Rights
- 47->46 members

Winston Churchill – Zurich Speech

“What is this sovereign remedy? It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and freedom. We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. The process is simple. All that is needed is the resolve of hundreds of millions of men and women to do right instead of wrong and to gain as their reward blessing instead of cursing.

We all know that the two World Wars through which we have passed arose out of the vain passion of Germany to play a dominating part in the world. In this last struggle crimes and massacres have been committed for which there is no parallel since the Mongol invasion of the 13th century, no equal at any time in human history. The guilty must be punished. Germany must be deprived of the power to rearm and make another aggressive war. But when all this has been done, as it will be done, as it is being done, there must be an end to retribution. There must be what Mr Gladstone many years ago called a “blessed act of oblivion”.

Winston Churchill – Zurich Speech

I am now going to say something that will astonish you. The first step in the re-creation of the European family must be a partnership between France and Germany. In this way only can France recover the moral and cultural leadership of Europe. There can be no revival of Europe without a spiritually great France and a spiritually great Germany.

…

I now sum up the propositions which are before you. Our constant aim must be to build and fortify the United Nations Organisation. Under and within that world concept we must recreate the European family in a regional structure called, it may be, the United States of Europe, and the first practical step will be to form a Council of Europe. If at first all the States of Europe are not willing or able to join a union we must nevertheless proceed to assemble and combine those who will and who can.

Council of Europe

- Hague 1948: The Congress of Europe

Message to Europeans

Europe is threatened, Europe is divided, and the greatest danger comes from her divisions.

Impoverished, overladen with barriers that prevent the circulation of her goods but are no longer able to afford her protection, our disunited Europe marches towards her end. Alone, no one of our countries can hope seriously to defend its independence. Alone, no one of our countries can solve the economic problems of today. Without a freely agreed union our present anarchy will expose us tomorrow to forcible unification whether by the intervention of a foreign empire or usurpation by a political party.

The hour has come to take action commensurate with the danger.

Together with the overseas peoples associated with our destinies, we can tomorrow build the greatest political formation and the greatest economic unit our age has seen. Never will the history of the world have known so powerful a gathering of free men. Never will war, fear and misery have been checked by a more formidable foe.

Between this great peril and this great hope, Europe's mission is clear. It is to unite her peoples in accordance with their genius of diversity and with the conditions of modern community life, and so open the way towards organised freedom for which the world is seeking. It is to revive her inventive powers for the greater protection and respect of the rights and duties of the individual of which, in spite of all her mistakes, Europe is still the greatest exponent.

Human dignity is Europe's finest achievement, freedom her true strength. Both are at stake in our struggle. The union of our continent is now needed not only for the salvation of the liberties we have won, but also for the extension of their benefits to all mankind.

PLEDGE

(1) We desire a United Europe, throughout whose area the free movement of persons, ideas and goods is restored;

(2) We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

(3) We desire a Court of Justice with adequate sanctions for the implementation of this Charter;

(4) We desire a European Assembly where the live forces of all our nations shall be represented;

(5) And pledge ourselves in our homes and in public, in our political and religious life, in our professional and trade union circles, to give our fullest support to all persons and governments working for this lofty cause, which offers the last chance of peace and the one promise of a great future for this generation and those that will succeed it.

Council of Europe: Statute

- Preamble
  - Convinced that the pursuit of peace based upon **justice** and international co-operation is vital for the **preservation of human society and civilisation**;
  - Reaffirming their devotion to **the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law**, principles which form the **basis of all genuine democracy**;

Council of Europe: Statute

- Membership
  - **Article 3**

    Every member of the Council of Europe **must accept the principles of the rule of law** and of the **enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms**, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

  - Article 4

    Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be **invited to become a member of the Council of Europe** by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.

  - **Article 8**

    Any member of the Council of Europe which **has seriously violated Article 3 may be suspended from its rights of representation** and **requested** by the Committee of Ministers to **withdraw** under Article 7. If such member does not comply with this request, the Committee may decide that it has **ceased to be a member** of the Council as from such date as the Committee may determine.

ECtHR

Bringing a case to ECtHR

- Who
- When
- Where
- Which rights?

Proportionality test

- Relative rights – any limitation to the right must be

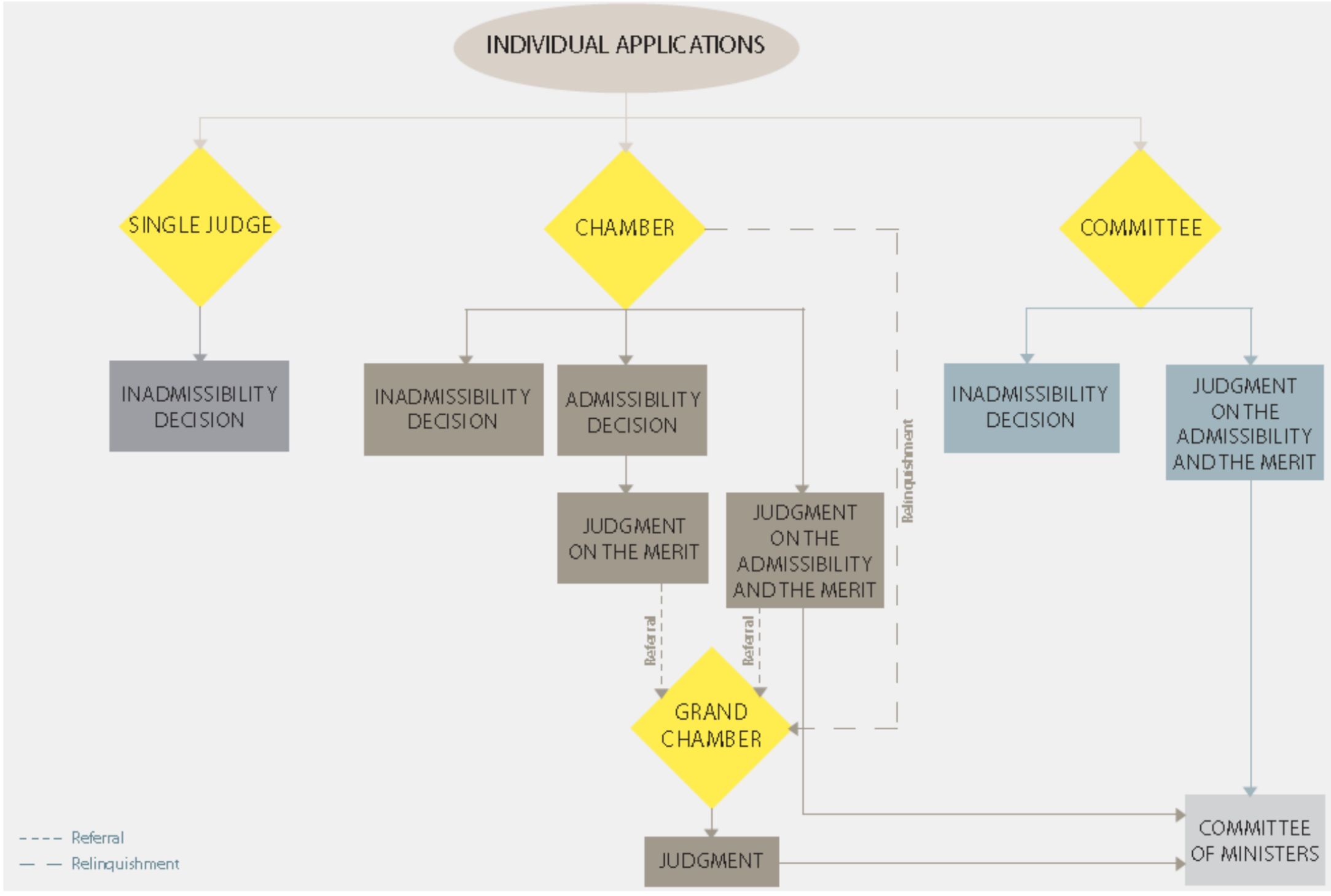
  - Prescribed by the Law
  - Necessary in democratic society
  - Pursuing legitimate aim

  - **Proportionality** means that the interference must be **no more than is absolutely necessary** to achieve one of the aims in the HRA/Convention

ARTICLE 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. **There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



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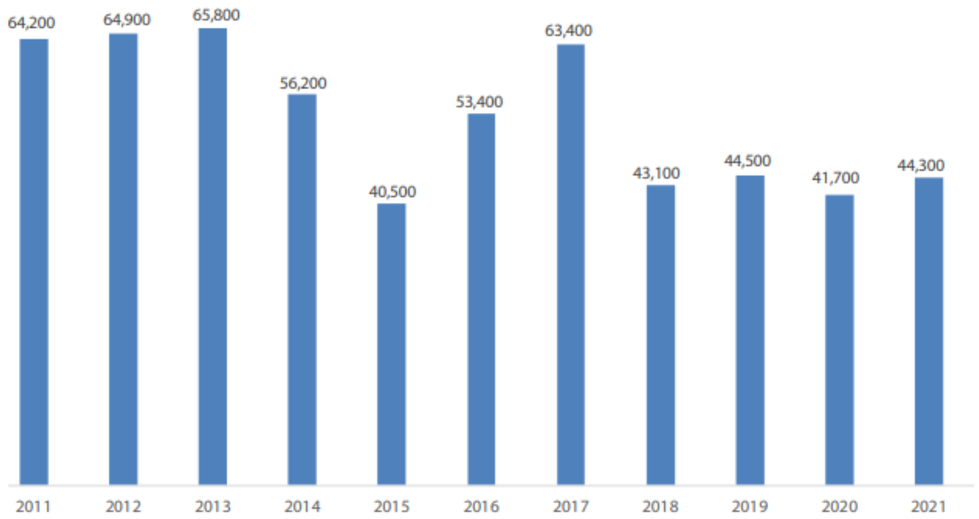
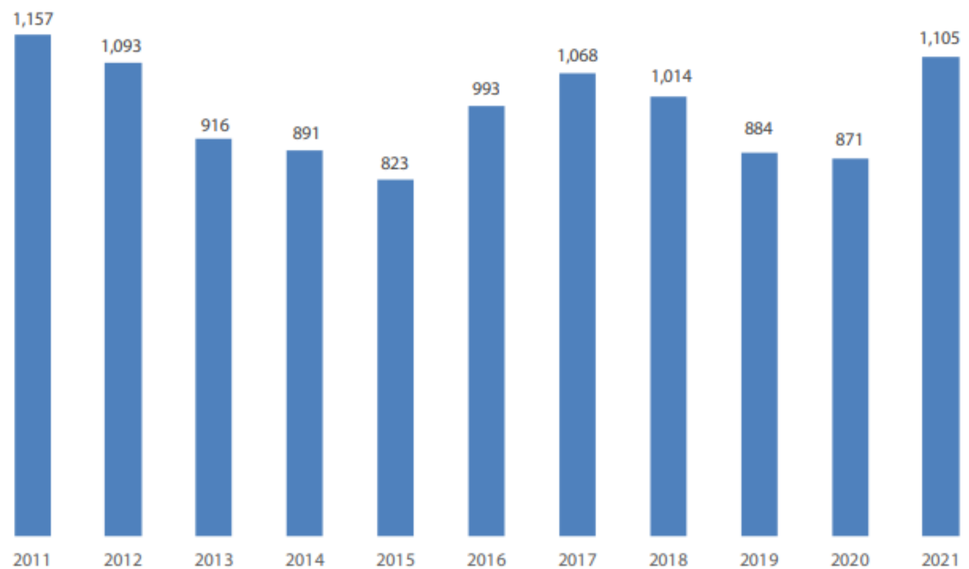
ECtHR

ALLOCATED APPLICATIONS (2011-21)

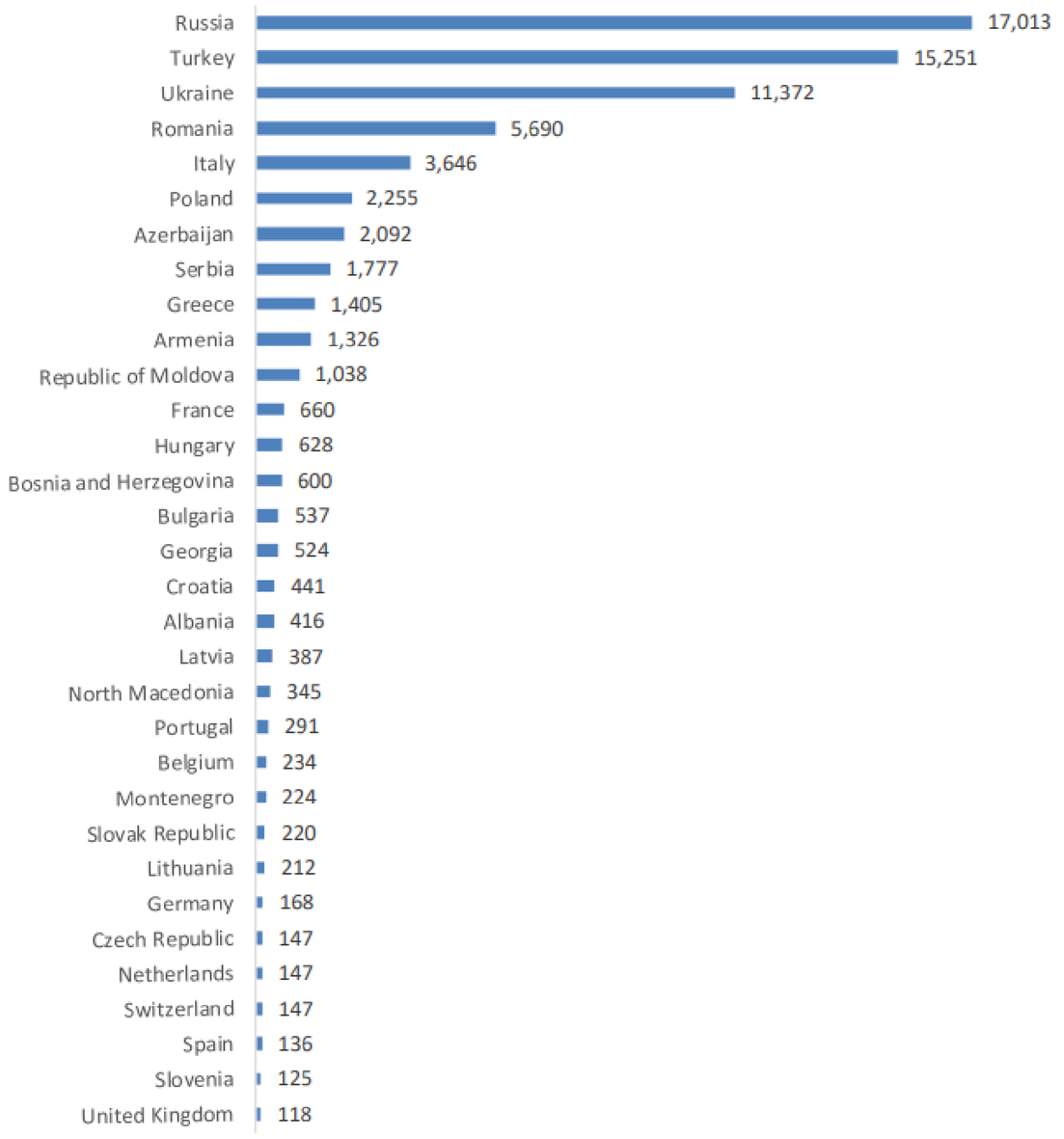


JUDGMENTS (2011-21)



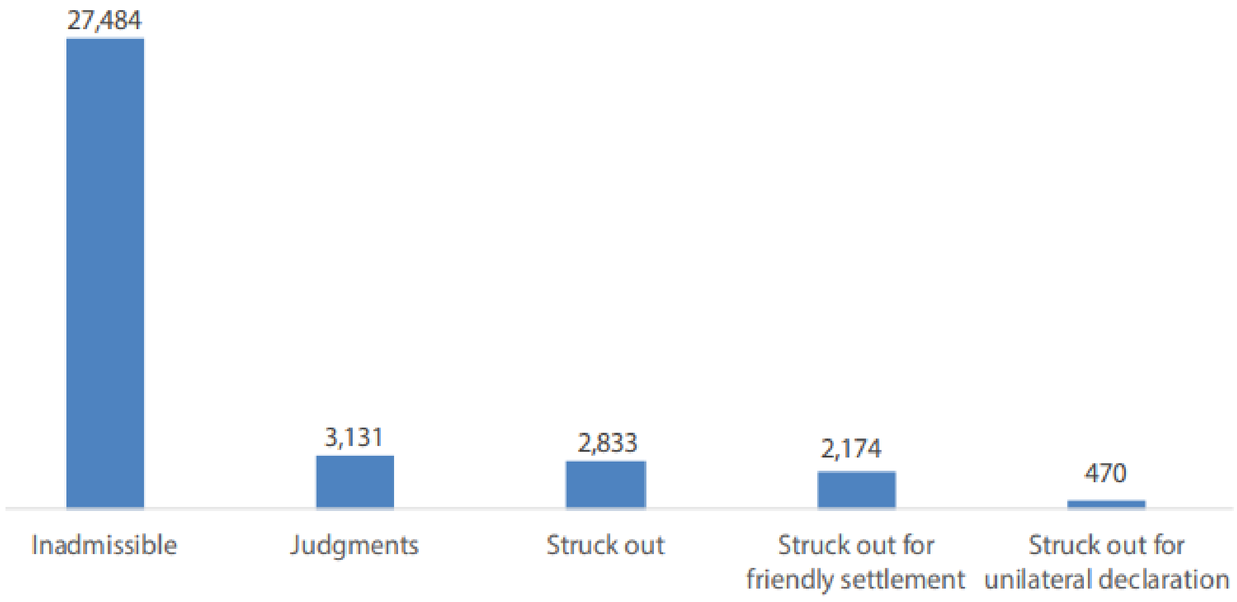
ECtHR

PENDING CASES (BY STATE)



ECtHR

DECIDED APPLICATIONS



Council of Europe Credit

Selection of ECtHR judges

- 46 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

ECtHR key dates:

- 5 May 1949 - Creation of the Council of Europe
- 4 November 1950 - Adoption of the Convention
- 3 September 1953 - Convention enters into force
- 21 January 1959 - First members of the Court elected
- 23-28 February 1959 - Court's first session
- 18 September 1959 - Court adopts its Rules of Court
- 14 November 1960 - *Lawless v Ireland*
- 1 November 1998 - Protocol 11 in force -> **The New Court**
- 1 June 2010 - Protocol 14 enters into force
- 1 August 2018 - Protocol 16
- 16 March 2022 - Russia ceases to be a member state of the CoE

Current issues

- 3 crises negatively impacting the ECtHR's legitimacy

  - Backlog (victim of its own success)
  - Non-implementation
  - Populist challenge to ECtHR
  - 4th? Russia's exit?

- Judicialization
- Independence
- Backslash / pushback against the ECtHR

(Populist) challenge to ECtHR

- Non-majoritarian difficulty squared

  - A. Bickel: counter-majoritarian difficulty of constitutional review
  - Waldron: institutions must respect the fact of deep conflict among citizens on substantive issues
    - only unconstrained majority rule among elected parliamentarians treats all citizens as political equals. Human rights constraints based on judicial review of legislation, on the other hand, violate citizens' equal dignity
    - "it is where responsible representatives of the people engage in what they would probably describe as the self-government of the society."

  - Any constraint of the legislator = x self-government

(Populist) challenge to ECtHR

- 5 Objections towards constraints on legislator:
  - 1. power of judges cannot be more than power of citizens
  - 2. skewed outcomes
  - 3. role of state (Bellamy: too much focus on negative social and political rights)
  - 4. Mistaken conception of the person (democracy does not endanger individual, tyranny of majority is limited by a sense of justice)
  - 5. damage to public political culture
    - Bellamy: political institutions should allow perpetual contestation about interests, rights, policies

(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

International Journal of Law in Context

Article Metrics

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]

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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

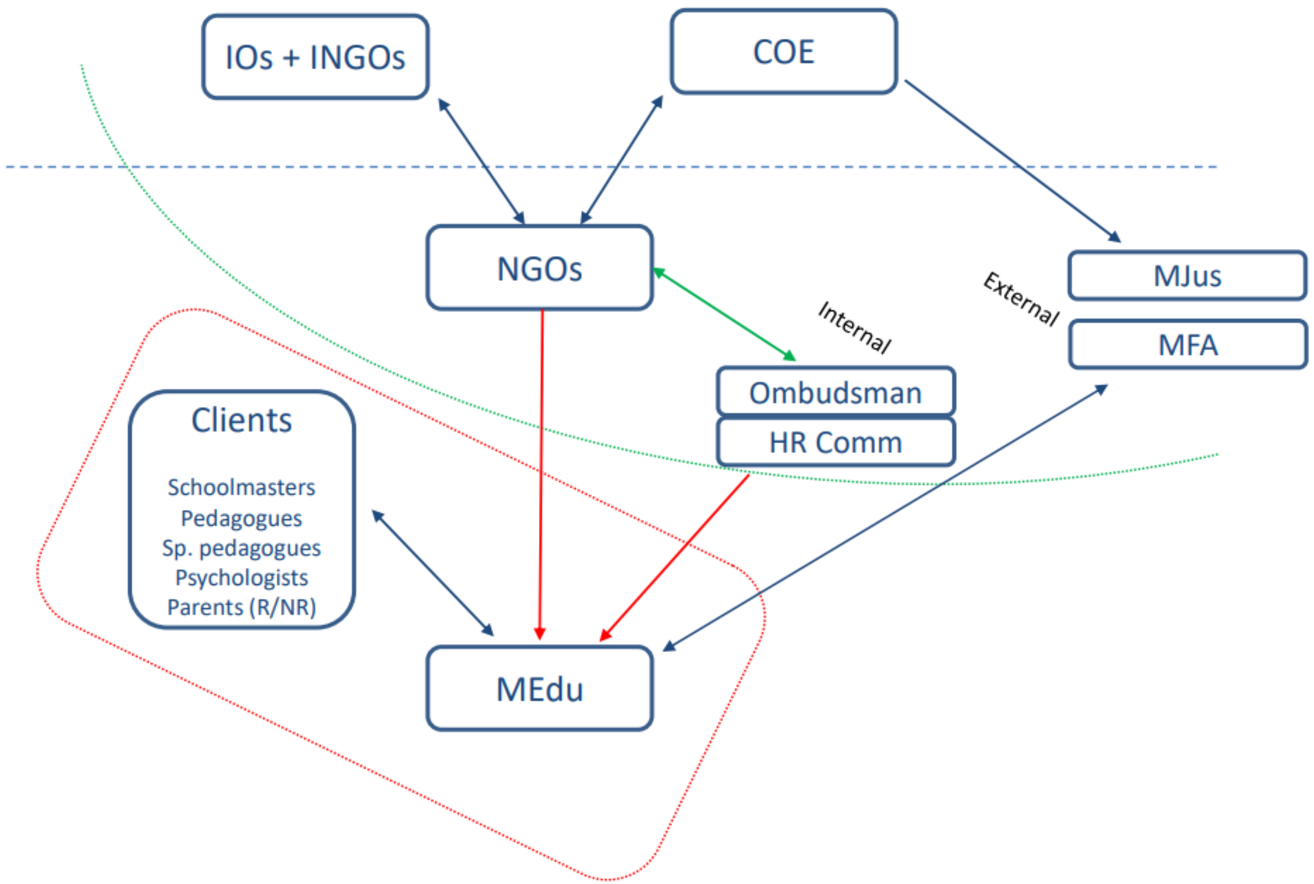
MIKAEL RASK MADSEN*

I

DH vs Czech Republic

Ostrava

DH vs Czech Republic



SQ (MEdu + Clients) > Change (Internal + External)

ECtHR v Russia

- 15 March
- 16 March
- 16 September

- ECtHR?
- Russian judge?

- Civilians?

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