

On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court

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In this essay, I seek to make the best argument for the claim that the European Court of Human Rights is a constitutional court.¹ The scope of the Court's authority is comparable to that of national constitutional and supreme courts; and it is, today well positioned to exercise decisive influence on the development of a rights-based, pan-European constitutionalism (I.A). Further, judges in Strasbourg confront the same kinds of problems that their counterparts on national constitutional courts do; and they use similar techniques and methodologies to address these problems (I.B). Finally, I will argue that the European Convention of Human Rights [ECHR] has been *constitutionalised* by the combined effects of the entry into force of Protocol No. 11, and the incorporation of the Convention into national legal orders (II.A). Today, the Court's basic constitutional task – its existential problem – is to manage the complex system of constitutional pluralism that has emerged. At the same time, the constitutionalisation of the Convention exacerbates the pluralism that already exists in many national legal orders (II.B). Far from being an oxymoron, “constitutional pluralism” describes a normal state of affairs in Europe.

I recognize that my position is a distinctly minority one, likely to be rejected by many readers of this volume. The Contracting Parties, after all, called the ECHR a “Convention,” not a “Constitution”; and they have never referred to the Court as a *constitutional* jurisdiction. Moreover, in contrast to the classic Kelsenian judge, the Strasbourg Court does not possess the authority to annul legal acts. The Convention's legal system provides, instead, for “individual justice”: the review of national acts by a transnational court, and the awarding of damages to individuals whose rights under the Convention have been infringed by one of the Contracting Parties. In short, there are strong reasons to deny, *a priori*, that the Court should be considered a constitutional jurisdiction.

In this special issue, other observers discuss many important aspects of the Court's jurisprudence, its organisational features, and its evolving relationship to the Council of Europe, to the European Union, and to the field of international human rights more broadly. I focus squarely on the impact of the Convention, and of the Court's jurisprudence, on

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¹ Others hold different views, for example, Jean-François Flauss, “La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle?,” 36 *Revue française de droit constitutionnel* 711 (1999); Stephen Greer, *The European Convention on Human Rights* (Oxford University Press, 2006); and Luzius Wildhaber, “A Constitutional Future for the European Court of Human Rights?,” 23 *Human Rights Law Journal* 161 (2002).

national legal orders, including the national constitutional order. At the very least, I hope to demonstrate that the Court and Convention can be analyzed and understood from the perspective of comparative constitutional law.

I. Authority and Governance

By definition, a written “constitution” constitutes a new legal system; it establishes the organs of authority that will govern within the framework of the new legal system; and it distributes powers among these organs of authority. A treaty establishing an international organisation, substantive norms, and procedures to monitor and enforce these norms is “constitutional” in at least this banal sense. Today, it is commonplace for us to define “constitutionalism” with reference to rights and to other juridical constraints on States. In his review of the concept, Rosenfeld concludes that although “there appears to be no accepted definition of constitutionalism, ... modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.”² With Protocol No. 11, the ECHR established a system of constitutional justice: a system that entrenches fundamental rights, and provides for the judicial protection of those rights, at the behest of individuals. The ECHR is, thus, “constitutional” in this more profound sense.

In 1955, when the Convention entered into force, Ireland was the only Contracting Party to the ECHR with any meaningful experience with the judicial protection of fundamental rights. The constitutions of Belgium, France, Luxembourg, the Netherlands, and the UK either did not contain such rights, or they denied the judiciary the authority to review the legality of statutes. The German and the Italian constitutional courts, newly born, were not yet operating. It is hardly surprising, therefore, that a majority of signatory States rejected proposals to give individuals a right of petition, and to make the jurisdiction of the European Court compulsory.

The transformation of the Convention system, most notably through Protocol No. 11, followed from certain deep, structural changes that Europe has experienced since the entry into force of the Convention. West European States successively embraced a “new constitutionalism,”³ with the protection of rights at its core. NATO supplied security, while market and political integration steadily proceeded under the EU. The EU was gradually “constitutionalised,” through the consolidation, in national legal systems, of the European Court of Justice’s doctrines of direct effect and supremacy, further undermining the dogmas of legislative sovereignty.⁴ The Cold War ended and the Soviet bloc disintegrated. In the post-1990 period, the territorial scope of European commitments to rights-based constitutionalism, to the EU and NATO, and to the Convention further deepened, and

² Michel Rosenfeld, *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994): 3.

³ Alec Stone Sweet, “Constitutionalism, Rights, and Judicial Power,” in D. Caramani, ed., *Comparative Politics* (Oxford: Oxford University Press): 217-39.

⁴ Anne-Marie Slaughter, Joseph Weiler, and Alec Stone Sweet, eds., *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Oxford: Hart Press, 1998)..

widened to the East. Today, the ECHR is a pan-European system of constitutional justice, overlaid onto national systems of varying effectiveness.

A. Competence

Since the entry of force of Protocol No. 11 (1998), the domestic legal systems of the Contracting Parties are fully exposed to the supervisory machinery of the ECHR. The ECHR deserves to be evaluated comparatively, with reference to how other systems of constitutional justice operate. Let us start with the most general theoretical point. No constitutional court can accrete influence over its broader legal and political environment in the absence of three conditions: the competence to interpret the law in an authoritative manner; a sustained caseload; and a minimally robust conception of precedent. In the ECHR context, too, these three factors are necessary conditions for strengthening, over time, the Convention's effectiveness in national legal orders.⁵

First, under Protocol no. 11, the Court possesses all of the formal power required for it to acquire and exert dominance over the evolution of the Convention system. As presently constituted, the ECHR is characterized by what I call "structural judicial supremacy." The Court possesses plenary powers to interpret Convention rights authoritatively, while supervising how the ECHR is applied in national legal systems. The Contracting Parties could overturn an objectionable interpretation of the Court, but only by revising the Convention itself. Given the decision-rule governing the regime's revision – unanimity – this prospect is a practical impossibility. Put in the terms of modern delegation theory, the Strasbourg Court is not an "agent" of the States. It is, instead, a "trustee" court, exercising extensive "fiduciary" responsibilities with respect to the Convention.⁶

Moreover, States have implicitly delegated additional powers on the Court, as the system has evolved. Convention norms, like the modern rights provisions found in most modern constitutions, are relatively open-ended and incomplete. Few rights are expressed in absolute terms; most rights are qualified in terms of public interest goals that States may legitimately pursue. As the *Travaux Préparatoires* show, the founding States were never able to settle differences concerning the content and scope of the rights they enshrined.⁷ They disagreed, for example, about whether the Convention expressed minimum common denominator conceptions of basic rights and nothing more, or established a legal foundation for a more expansive evolution of rights. This disagreement necessarily conditioned attitudes toward establishing a court. In 1950, the founding States were not prepared to establish a judicial mechanism for settling these disagreements. Today, it is difficult to imagine the Convention without its Court, but only because States have chosen, over time, to strengthen

⁵ This section is based on Alec Stone Sweet and Helen Keller, "The Reception of the European Convention on Human Rights in European Legal Orders." In H. Keller and A. Stone Sweet, eds., *A Europe of Rights: The Impact of the European Convention on Human Rights on National Legal Systems* (Oxford: Oxford University Press): 11-36.

⁶ For further elaboration, see Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy," 25 *West European Politics* (2002): 77-100.

⁷ See Danny Nichol, "Original Intent and the European Convention on Human Rights," *Public Law* (2005): 152.

their commitment to adjudication.⁸ In doing so, States have transferred authority to “complete” or “construct” Convention rights, rendering them more determinate over time for all members, despite national diversity.

Second, the Court must have a caseload. Not only does the Court receive a steady stream of cases, the rising tide of applications now threatens to overwhelm it. During the decade of the 1960s, the Commission received an average of 5 individual applications per year during the decade of the 1960’s, 16 per year in the 1970’s, and 46 per year in the 1980’s. With the enlargement and entry into force of Protocol no. 11, the numbers have exploded. In 1998, the Registry of the Court received 18,200 individual applications, a figure that has increased every year thereafter, to 50,500 in 2006. The annual rate of full judgments on the merits rendered by the Court shows a similar pattern. Through 1982, the Court had issued, in its history, only 61 such rulings pursuant to applications by individuals. It issued 72 such rulings in 1995 alone; 695 in 2000; 1,105 in 2005; and 1,560 in 2006. By these measures, the Court is the most active rights-protecting jurisdiction in the world.

Third, the Court performs its most important governance functions through the building of a precedent-based jurisprudence. Its command and control capacities are weak, primarily reduced to the awarding of damages (“just satisfaction”) to be paid to successful applicants. Through precedent, the Court seeks to legitimize its lawmaking, to structure the argumentation of applicants and defendant States, and to persuade States to comply with findings of violation. It does so in the name of “legal certainty and the orderly development of [its] case law.”⁹ The Court recognizes its own precedents, and will abandon them only in order to correct an earlier error, or “to ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions.”¹⁰

In summary, the Court possesses all of the formal authority necessary for it to acquire dominance over the evolution of the Convention regime. On the input side, we can expect that most important violations of Convention rights will be referred to Strasbourg, systematically, by one or more applicants. On the output side, the Court has produced a dense and elaborate jurisprudence capable of guiding the decision-making of those national officials who would choose to enhance the effectiveness of Convention norms. The conditions identified, though necessary, are not sufficient conditions. Convention rights will only have impact beyond any individual case to the extent that national officials – legislators, executives, and judges – take into account the Court’s jurisprudence in their own decision making. They may decide to ignore the Court’s interpretation of the Convention, even when on point, and even where Convention rights have been domesticated through incorporation.

⁸ The Contracting Parties have been complicit in the expansion of the legal system’s autonomy and supranational character. The process neither took place without the knowledge and consent of States, nor against their will. On the contrary, the Court has had remarkable success in socializing the regime’s members into the logics of collective, transnational rights protection, and in enlisting participation in the Convention’s expansionary dynamics.

⁹ Diane Shelton, “The Boundaries of Human Rights Jurisdiction in Europe,” 13 *Duke Journal of Comparative and International Law* (2003): 95.

¹⁰ *Cossey v. United Kingdom* (appl. no. 10843/84), Judgement (Plenary), 27 September 1990, Series A, Vol. 184, para. 35.

For the Convention to make a difference, domestically, national officials must take decisions that give agency to the Court's jurisprudence.

B. Balancing and Proportionality

The next part of my argument is of the following type: "if a duck-like creature looks, walks, and quacks like a duck, then it just might be a duck." In this instance, even if it is not really a duck, I am going to call it one. The European Court performs many of the same functions that most national constitutional courts do, using similar techniques, with broadly similar effects. The Court regularly confronts cases that would be classified, in the context of national legal systems, as inherently "constitutional." It resolves alleged conflicts between rights and State interests through balancing, in particular, through the application of proportionality analysis. Further, the Court's decisions place State officials "in the shadow" of its jurisprudence, provoking a politics of implementation and compliance, that is akin to the constitutional politics one finds in national systems.¹¹

The Strasbourg Court constructs rights in a dynamic and progressive way, in light of changing circumstances. Like other powerful constitutional courts, the Court performs an *oracular* function: the nature and scope of Convention rights are identified, clarified, and expanded through the Court's pronouncements, over time, as circumstances change. In my view, the Court's oracular (lawmaking) function is defensible to the extent that the fundamental rights in the Convention are defensible. If European States do not wish to have a transnational constitutional court developing and protecting transnational rights through progressive lawmaking, then they should leave the regime, or try to change it.

The Court's lawmaking is embedded in the adjudication of disputes of a particular normative structure, one that would be familiar to any modern constitutional court. In this structure, rights are qualified by public interests that States may legitimately pursue. As everyone knows, the Court adopted for itself a particular doctrinal framework – that of proportionality – as the standard technique for dealing with qualified rights. Developed as an unwritten, general principle of law by the German Constitutional Court, proportionality is an analytical procedure that is widely used by the world's most powerful constitutional judges to adjudicate disputes involving qualified rights. Indeed, as Jud Mathews and I have shown, proportionality has emerged as a global *constitutional* standard.¹²

Skeptics might object, invoking the principle of subsidiarity and its corollary, the "margin of appreciation" doctrine. Although commentators rarely state the point so bluntly, there is nothing left of the original doctrine. Margin of appreciation resembles an embarrassing organ that can do more harm than good to the body, if used on its own. As things stand, however, margin of appreciation has little or no autonomy; instead, the scope of deference the Court gives to States is a product itself of proportionality analysis.

¹¹ See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Western Europe* (Oxford: Oxford University Press, 2000), and Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central And Eastern Europe* (Dordrecht: Kluwer, 2005).

¹² Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2008) 68-149.

The Court's turn to proportionality was heavily conditioned by its confrontation with the UK, and its "*Wednesbury* reasonableness" test – a highly deferential standard of review which made it virtually impossible for British judges to give full effectiveness to Convention rights. The ensuing conflict – between German-style proportionality and UK-style reasonableness – implicated the most basic constitutional precepts of both legal systems. In the most important cases, *Smith and Grady v. United Kingdom* (1999),¹³ and *Peck v. United Kingdom* (2003),¹⁴ the Court strongly criticized U.K. courts for applying *Wednesbury*, rather than engaging in full substantive review of the merits under proportionality. In *Peck*, the Court noted that UK judges refused to entertain pleadings based on the Convention unless claimants could show that public authorities had acted "irrationally in the sense that they had taken leave of their senses." In both of these cases, the Court held that the absence of necessity review by the UK courts, *per se*, constituted a breach of Article 13, the right to an effective remedy.¹⁵ In *Hirst v. United Kingdom* (2005),¹⁶ the Court pointedly criticized the UK Parliament itself for having failed to deliberate the proportionality of certain legislative measures at the time of adoption.

Proportionality now constitutes a crucial mechanism of coordination, between the ECHR and national legal systems, and among the diverse national legal systems of the Contracting Parties. Proportionality is a highly intrusive form of review, involving necessity analysis and balancing. It requires the Court to review the substantive, political decisions of national officials in the context of national law, thereby reinforcing the Court's own structural supremacy. How the Court actually uses proportionality is conditioned by a simple, overarching comparative method for determining when "new" rights have emerged, or the scope of existing rights expands. Typically, the Court will raise the standard of protection, in a given domain of law, when a sufficient number of states no longer use public interest justifications to limit a right in that domain. The margin of appreciation enjoyed by States thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants.¹⁷

Under the Court's supervision, proportionality is diffusing to every national system in Europe, where it will typically be absorbed as a *constitutional* principle.¹⁸ For the vast majority of national judges operating under the Convention, adopting proportionality will significantly increase their authority relative to that of legislative and executive officials. In strongly monist Netherlands, where the prohibition of judicial review of statute trumps the bill of rights, the Convention now comprises a *de facto* charter of rights, since the ECHR is directly enforceable by the courts, whereas Dutch rights are not. Proportionality demands

¹³ *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

¹⁴ *Peck v. United Kingdom*, 36 Eur. H.R. Rep. 41 (2003).

¹⁵ The Court, in both cases, also noted that UK judges had strongly implied that they would have found for the applicants, but for the *Wednesbury* restriction. Thus, it can be argued that the Court was helping UK judges overcome a restriction that had made it impossible for them to fulfill their obligations under the Convention.

¹⁶ *Hirst v. UK*, App. No 74025/01 (Eur.Ct.H.R., ruling of Oct. 6, 2006).

¹⁷ The Court and its supporters can thus claim that there is some external, "objective," means of determining the weights to be given to the values in conflict, and they can usually (but not always) assert that the Court's bias is majoritarian, transnational, and pro-rights.

¹⁸ The spread of proportionality is discussed in every chapter of *A Europe of Rights*, *op cit.* (*supra* note 5).

that the Dutch courts to do what they had been forbidden to do, and they are now beginning to do it. In France, too, the courts now review the Conventionality of French statutes, despite the prohibition of judicial review. In many States, including Italy and France, proportionality is driving out not weaker standards of review, including manifest error, *ultra vires*, reasonableness, and so on. In Eastern Europe, the position of the Strasbourg Court helps to bolster the authority of national constitutional courts, most of which have embraced German-style proportionality to adjudicate fundamental rights. Thus, across Europe, the institutionalisation of proportionality at the national level is steadily reconfiguring separation of powers, enhancing judicial power. The major exception to the rule is Germany, where PA had already been constitutionalised.

II Constitutionalisation

With the entry into force of Protocol No. 11, the Strasbourg Court is well positioned to receive virtually every major constitutional controversy involving rights that arises in the Contracting Parties. The Court determines if and how these practices have violated the rights of the applicant; it routinely gives guidance to States on how their law or practices must change in order to comply with the dictates of the Convention; and States typically react to these decisions by making appropriate changes. Further, the Court deploys the same jurisprudential techniques that the most powerful European constitutional courts use, in order to process the same types of cases. These facts support my argument.

Nonetheless, unlike most constitutional courts, the Strasbourg Court does not possess the competence to invalidate legal norms that are found to be incompatible with fundamental rights. The absence of such authority constitutes an important institutional weakness if one expects the Court not only to render retrospective justice in individual cases, but also to ensure the effectiveness of Convention rights, at the domestic level, across Europe. The fact that the Court's remedial authority does not include annulment powers may also comprise a serious objection to the argument that the Strasbourg Court is a type of constitutional court.

I have two responses to this objection. First, there would seem to be no *a priori* reason to deny an international court's "constitutional" status, within a Treaty regime, on the basis of that court's lack of competence to exercise constitutional authority *externally*, that is, *within* national constitutional orders. A second response would be to confront the underlying question: why, and to what extent, does it matter that the Court does not have authority to annul national norms and acts as "unconstitutional" under the Convention? Though the question is a complex one, I have a simple response. The more any State has incorporated the ECHR into the national legal order, as a judicially-enforceable text, and the more that State has conferred upon the Convention supra-legislative status, the less important is the objection. Conversely, where the Convention has not been incorporated into national law at a rank above statute, and given direct effect, the Court's capacity to impact upon State law and practices, in ways that are comparable to a national constitutional court, are reduced. In the following sections, I briefly explore these points.

A. Incorporation

The ECHR is no longer a self-contained regime (if it ever was), operating in its own separate sphere. Instead, the Convention has been steadily incorporated into domestic law. In the recent book, *A Europe of Rights: The Reception of the ECHR in National Legal Systems*,¹⁹ a team of scholars trace the process of incorporation in eighteen States, and assess the impact of incorporation on the work of legislators, administrators, judges, lawyers, and law professors. Although the mode, timing, and depth of incorporation vary across systems, the Convention is today an important, structural element of domestic law in all of the Contracting Parties.²⁰ Further, the book shows that the Strasbourg Court, through its jurisprudence, is capable of changing how national politico-legal systems operate, in a wide range of policy settings, at the most fundamental levels.

It is now possible to defend the claim that the Convention has been meaningfully *constitutionalised* – at the national level – through incorporation. Constitutionalisation is a variable (in the social science sense of that term): the extent of constitutionalisation varies across the legal systems of the Contracting Parties, and over time in any specific State. In some States, the ECHR has been explicitly incorporated – by statute or judicial decision or constitutional amendment – at a constitutional or quasi-constitutional level, giving the Convention rights supra-legislative rank. A few States have sought to limit the Convention’s potential impact, by denying the Convention’s supra-legislative status. As *A Europe of Rights* demonstrates, however, one finds elements of constitutionalisation in all 18 of the States examined, including in the “problem” cases of Greece, Russia, Turkey, and the Ukraine. Here, I have space only to mention some of the major features of the constitutionalisation-by-incorporation dynamic.²¹

Through incorporation, the Convention now functions as a “shadow constitution,” or “surrogate charter of rights,” in many States that did previously possess their own judicially-enforceable Bills of Rights. Such is the case, for example, in Belgium, France, the Netherlands, Switzerland, and the UK, where the ECHR, once incorporated, filled certain “gaps” in the national constitution, enabling the courts to review the lawmaking of all public authorities, including Parliaments, for their conformity with Convention rights. This type of incorporation is deeply structural – one might say, *constitutional*. A variation on the theme, Norway and Sweden adopted new Bills of Rights in the 1990s, which they modeled on the ECHR, in effect, “nationalizing” the Convention.

In other States, where national Constitutions already provided for a system of constitutional justice, the ECHR now functions as a supplement to national rights protection. We find this situation in many States, including Germany, Ireland, Spain, Italy, and across Central and Eastern Europe. The Spanish Constitutional Tribunal, for example, has consistently worked to enforce the ECHR as a quasi-constitutional body of law. The Tribunal will strike down statutes that violate the Convention as *per se unconstitutional*; it

¹⁹ *A Europe of Rights, op cit. (supra note 5)*. The book takes no position on the constitutional status of the ECHR.

²⁰ See also Lawrence Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,” *European Journal of International Law* 19 (2008): 125.

²¹ For a broader discussion and references, see Helen Keller and Alec Stone Sweet, “Assessing the Impact of the ECHR on National Legal Systems,” *A Europe of Rights, op cit. (supra note 5)*, 682-97.

interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court's case law, as a matter of *constitutional* obligation. If the judiciary ignores the dictates of the Convention, individuals can use the *amparo* procedure to appeal the issue directly to the Constitutional Tribunal. The German Federal Constitutional Court has recently taken a similar position. In the Czech Republic, Hungary, Poland, and Slovakia, constitutional judges routinely invoke the Convention, and the Strasbourg Court's jurisprudence, as authority, in order to enhance fundamental rights, and their own positions, in the national constitutional order.

Strikingly, some States have explicitly given the Convention constitutional or even supra-constitutional rank. The Austrian Constitution provides for a Constitutional Court, but it contains only a short list of rights in comparison with the Convention. The Constitutional Court's initial position, which the administrative and civil courts followed, was that the ECHR neither possessed supra-legislative status nor was directly enforceable in the domestic legal order. In 1964, the political parties revised the Constitution, conferring upon the Convention constitutional status and direct effect. Today, conflicts between the Austrian Constitution and the ECHR are governed by the *lex posteriori derogat legi priori* rule, an apparently unique situation. In the Netherlands, pursuant to a constitutional provision,²² any conflict between the ECHR and the national constitution would normally be resolved in favor of the Convention. In Belgium, the Constitutional Court has given the ECHR supra-legislative, but infra-constitutional, rank, whereas the Supreme Court of Appeal holds that the ECHR possesses supra-constitutional status!

One could continue on in this vein, multiplying examples of incorporation, but my major point should be obvious. Modes of incorporation are capable of altering the constitutional precepts of any given legal order and, especially, doctrines associated with separation of powers and parliamentary sovereignty.²³ Constitutional scholars have every reason to evaluate acts of incorporation alongside, and in comparison with, other types of constitutional amendments. They would find that, in most States, the incorporation of the Convention has had greater consequences for the exercise of public authority than has any formal act of constitutional revision.

It is important to stress, as Polakiewicz has,²⁴ that the ECHR does not require any specific mode of incorporation. Until the 1980s, the French position was that the Convention had virtually no legal status in the internal order. In that State's view, a Contracting Party, faced with a violation of the Convention, discharged its responsibilities merely by

²² Article 93 of the Dutch Constitution.

²³ A *Europe of Rights*, *op cit.* (supra note 5), provides responses to the following questions, for the domestic legal systems of 18 States. First, does a given constitutional order adopt a monist or dualist posture with respect to international treaty law? Second, what rank does the legal system assign to the Convention in the national hierarchy of norms? Third, are the Convention's guarantees directly binding on public authority, can they be pleaded before national courts, and can judges directly enforce them against conflicting national norms, including statute? And, fourth, have the answers to these questions changed over time, and through what procedures? The national reports then trace the impact of these formal elements on the decision-making of national officials.

²⁴ J. Polakiewicz, "The Status of the Convention in National Law," in R. Blackburn, and J. Polakiewicz, eds., *Fundamental Rights in Europe* (Oxford, 2001), 31.

compensating the injured applicant. The State incurred no obligation to change its internal law even when the Court had ruled that law to be in breach of the Convention. Virtually all of the Contracting Parties have now incorporated the Convention, albeit in different ways, and no State argues in favor of the former French position.

Why then have national governments, legislatures, and judges chosen to domesticate the Convention? Simplifying what is a fiercely complex topic, there are two basic logics that work in favor of incorporation. The first is an “avoidance of punishment” rationale: giving direct effect to Convention rights in the legal order will make a State less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second set of reasons is embedded in domestic, institutional politics. Judges and elected politicians entrench and give agency to Convention rights in pursuit of their own interests and purposes. Judges may wish to expand their capacity to control elected politicians; a governing party may wish to enshrine rights that will constrain other parties when the latter come to power; officials may be responding to an increasing societal demand for enhanced rights protection. What is clear is that, as the ECHR has matured – as a transnational system of constitutional justice in its own right – national legal orders have been induced to strengthen their own systems of rights protection.

B. Constitutional Pluralism

Among those who debate the “constitutionalisation” of international law and treaty regimes,²⁵ there would appear to be emerging consensus on the following statement: the more “pluralistic” the juridical authority structure of any overarching system, the more difficult or impossible it is to claim that the system has a constitutional basis. My response – the final part of my argument – is to reject this view as indefensible from the perspective of comparative constitutional law. If we were to apply this reasoning to national systems in Europe, we would be forced to reach the absurd conclusion that most are not “constitutional.” After all, “constitutional pluralism” is the normal state of affairs in Europe – even at the national level. I will briefly illustrate the point here with reference to rights protection in France, Germany, Italy, and Spain, but the basic argument is relevant to most European legal systems that have specialized constitutional courts.²⁶

The legal systems of these four States are pluralist: jurisdiction is fragmented rather than unified; and final authority to determine outcomes is distributed among autonomous supreme courts, who manage functionally-specialized legal domains. These domains are vertically-integrated hierarchies that are insulated in various ways from the authority of the constitutional courts. In each of our four cases, this structure – one of internal legal pluralism – inevitably raised certain crucial *constitutional* questions, but pluralism meant that these

²⁵ This section is based on Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes,” *Indiana Journal of Global Legal Studies* 16 (2): 621-45.

²⁶ Lech Garlicki, “Constitutional Courts versus Supreme Courts,” 5 *International Journal of Constitutional Law* (2007) 44. Gaps in the authority of constitutional courts are the normal state of affairs in Europe. For a discussion of the situation in France, Germany, and the EU, see the symposium on Alec Stone Sweet, “The Juridical *Coup d’État* and the Problem of Authority,” *The German Law Review* 8 (10): 915-28

questions could not be answered in any pre-determined way. To what extent do constitutional rights “radiate” from the constitution to permeate other domains of law? If the power to invalidate a law as unconstitutional is exclusive to the constitutional judge, then to what extent can or should the ordinary judge interpret and apply the constitution on her own? If the constitution binds the exercise of all public authority, including judicial, to what extent is the case law of the constitutional court binding on the ordinary courts? It is relevant that these and many other important questions are debated under the label, “*la constitutionalisation du droit*.”²⁷

Simplifying what are complex dynamics, constitutional courts have labored to “constitutionalize” the legal order, but with mixed results. The German Federal Constitutional Court, for example, famously ordered the civil courts to give effect to rights, and to its rights jurisprudence, in their application of the German Civil Code.²⁸ Resistance, and a long struggle with the Supreme Court, ensued, and it continues today. Nonetheless, in any specific conflict with the ordinary courts, the German Court has the resources to impose its view on how the Civil Code must accommodate fundamental rights. Pursuant to a constitutional complaint, it can do so, but only by intervening in the ordinary judge’s (once presumptively exclusive) domain, reweighing the values and interests in tension, and then quashing the latter’s decision. Today, more than 90% of all individual complaints are *de facto* appeals of judicial decisions that allegedly conflict with the German Courts rights jurisprudence. In Spain, too, “constitutionalisation” has depended critically on the use of the individual complaint (*amparo*); and, again, as constitutionalisation has proceeded, so has the intensity of the conflict between the Spanish Constitutional Tribunal and the Supreme Court.²⁹ In Germany and Spain, then, we find a great deal of constitutional pluralism. Constitutionalisation has steadily proceeded, as the friction that inheres in pluralist environments has been confronted and managed, but meaningful pluralism persists.

The Italian Constitutional Court has been far less successful. In the absence of an *amparo* procedure, the Italian Court is rarely able to impose its will on ordinary judges, if the latter choose to resist. Instead, the Court’s authority depends critically on its ability to negotiate a cooperative relationship with the *Corte di Cassazione* and the *Consiglio di Stato*. “Wars of judges”³⁰ periodically break out, which the Constitutional Court does not always win.

The incorporation of the ECHR into national orders challenges the authority of national constitutional courts, since national rights provisions and the ECHR typically overlap. If the ordinary courts may interpret and apply Convention rights, what need does the legal system have for a constitutional court? Does the fact that some ordinary courts refuse to apply the ECHR, or the Strasbourg Court’s jurisprudence, raise a national constitutional issue? To what extent should a national constitutional court strive to reduce conflicts between the national legal order and the ECHR? As noted above, from its earliest decisions, the Spanish Tribunal fully embraced the quasi-constitutional features of the

²⁷ Alec Stone Sweet, *Governing With Judges, op cit. (supra note 11)*, 116-17.

²⁸ German Federal Constitutional Court, *Lüth*, BVerfGE 7, 198 (1958).

²⁹ See Stone Sweet, *Governing with Judges, op cit.*, 119-21.

³⁰ *Id.* at 121-22.

ECHR, a position facilitated by monist constitutional provisions. For their parts, the German and Italian constitutional courts initially maintained classic dualist positions, ruling that the Convention had no more status than ordinary treaty law, and thus could be trumped by statutes adopted later in time. In a landmark ruling of 2005,³¹ the German Court ruled that the ECHR furnished “guidelines” for its interpretation of German fundamental rights, and that individuals could bring constitutional complaints against judges who take decisions that contravene the Convention or the dictates of the Strasbourg’s Court’s jurisprudence. In 2007, the Italian Court, for the first time, annulled a national statute on grounds that it violated a Convention right. It also held that when ordinary judges are not able to interpret national law in harmony with the ECHR, they must refer that law to the Constitutional Court.³²

The French case offers a dramatic example of how incorporation can accentuate the constitutional pluralism of a national system. In 1975, the Constitutional Council made a strategic error that no other European constitutional court has made: it declared that the ECHR fell outside the scope of its jurisdiction.³³ In the beginning, the *Cour de cassation* and the *Conseil d’état* resisted the invitation to become judges of the “Conventionality” of French legal norms, due to separation of powers dogmas (the prohibition of judicial review of statute). Ultimately, they chose to incorporate the Convention into French law, giving it a rank superior to statute; then they gradually began to enforce it. These same courts also successfully asserted their own independent authority to interpret and apply constitutional rights, not least, because the Constitutional Council does not possess competence to review or annul judicial rulings.

The result: over the past fifteen years the *Cour de cassation* and the *Conseil d’état* have become *de facto* constitutional judges, applying both French constitutional rights and the Convention. Further, each of the two supreme courts now perform the (inherently constitutional) task of coordinating French and European law with one another, over time, while the Constitutional Council is reduced to watching from the sidelines. In 2008, the Constitution was revised, which will permit, for the first time, the high courts to send statutes in force to the Constitutional Council for review, formally destroys the last vestiges of parliamentary sovereignty in France. The new *exception d’inconstitutionnalité* procedure will accentuate, rather than reduce, constitutional pluralism in France.³⁴

In systems characterized by strong constitutional pluralism, the potential for intra-judicial conflict is omnipresent. What matters – that is, what determines how the constitutional system will evolve – is how these conflicts are resolved. Today, in Europe, national and European rights overlap one another. In so far as these norms span across hierarchies and State boundaries, and to the extent that these norms are overarching and

³¹ German Federal Constitutional Court, *Görgülü*, BVerfGE 111, 307 (2004). In 1987, the German Court had decided that federal statutes adopted later in time did not automatically take primacy over the ECHR, in effect, making the Convention a form of *lex specialis*; BVerfGE 74, 358 (1987).

³² Italian Constitutional Court, 24 October 2007, no. 348, *Gazzetta Ufficiale*, 31 October 2007; Italian Constitutional Court, 24 October 2007, no. 349, *Gazzetta Ufficiale*, 31 October 2007.

³³ French Constitutional Council, DC, Jan. 15, 1975, Rec. 19.

³⁴ See Alec Stone Sweet, “Le Conseil constitutionnel et la transformation de la République,” 25 *Les Cahiers du Conseil Constitutionnel* (2008), 65-69.

shared, they are *constitutional* – at the transnational level. Because multiple high courts assert final jurisdiction over these same norms, the wider, pan-European, system is pluralistic.³⁵ It is to their credit that, in the post-Protocol No. 11 era, most national constitutional courts, and other high courts of appeal, have decided, if sometimes after initial resistance, to require the ordinary courts – as a matter of constitutional obligation – to enforce the ECHR and to apply faithfully the Strasbourg Court’s jurisprudence. At the same time, most constitutional courts have stressed that the Convention does not have formal constitutional rank, and that it is the national Constitution that ultimately regulates the relationship between the domestic legal order and the Convention system, not the ECHR or the Strasbourg Court.³⁶ These moves are by their nature constitutional, and they highlight the emerging constitutional nature of the Convention and its Court.

The Strasbourg Court’s role in this pluralistic order is multi-dimensional. In its oracular guise, the Court works to enhance standards of rights protection, on the margins, even in States that otherwise have a relatively good record of compliance with the Convention. The Court identifies gaps in protection and encourages States to fill those gaps. In this mode of operation, the Court develops new rights for discreet communities (e.g., of transsexuals) or for specific situations (e.g., religious teaching in the schools). Where Convention standards for rights protection are higher than those in domestic legal orders, we can expect the Court to be activated by individuals seeking to change domestic law. And the more the Court undertakes to interpret the Convention in a progressive, expansive, and open-ended way, the more likely it is that rights protection in one or several States will routinely fall below Convention standards, creating pressure for adaptation. In this system, national judges in this system have a powerful interest to stay in front of the Strasbourg Court; to the extent that they do so, they will become increasingly powerful lawmakers in their own rights.

The Court has a quite different role to play when it encounters systemic compliance failures. Many States find it virtually impossible to meet certain Convention standards, under Article 6(1) or Protocol No. 1, for example. In these areas, a flood of applications issuing from the same systemic problem, have become chronic. Like other powerful constitutional courts, the Court may find itself playing the role of an executive, or supervisory, law-maker, to the extent that it seeks to resolve such problems through pilot judgements and other broad-gauge rulings. Sadly, the Court also routinely confronts a third kind of problem: massive State failures to provide even minimal protection of the most basic rights, including standards laid down in Articles 2 and 3. In some States, institutional capacities to protect rights are simply under-developed; in others, including Georgia, Russia, Turkey, and the Ukraine, political officials and judges fail to uphold even the most basic principles of rule of law. In consequence, scholars and judges fiercely debate whether the Court can effectively perform its various roles without further strengthening the ECHR, and the Court’s, constitutional features.³⁷

³⁵ See also Lech Garlicki, “Cooperation of Courts: The Role of Supranational Jurisdiction in Europe,” 6 *International Journal of Constitutional Law* (2008), 509.

³⁶ See Nico Krisch, “The Open Architecture of European Human Rights Law,” 71 *The Modern Law Review* (2008) 183-216, and Wojciech Sadurski, “Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments,” 9 *Human Rights Law Journal* (2009) forthcoming.

³⁷ See Stephen Greer, “Protocol 14 and the Future of the European Court of Human Rights,” *Public Law* (Spring

Conclusion

I have argued that the European Court of Human Rights is a transnational constitutional court whose authority, jurisprudence, lawmaking capacities, and impact on legal and political systems deserves to be compared to that of even the most powerful national constitutional courts. I have also argued that that the Convention has been *constitutionalised*, as an increasing number of States conferred upon it direct effect and supra-legislative rank, domestically. As we find in many national systems, including Germany, the “constitutionalisation of the law” has been the product of a complex process in which judges and other elites, operating in otherwise autonomous domains, have struggled to find stable accommodations with one another. The constitutionalisation of the ECHR, too, has neither been linear nor frictionless. Instead, it has introduced a great deal of normative uncertainty, pressure for procedural change, and the potential for constitutional conflict and transformation, at both levels, national and transnational. Finally, I have argued, at least implicitly, that the ECHR regime is part of an overarching European constitution. This constitution is comprised of two basic elements: (1) shared legal norms and modes of argumentation (fundamental rights, procedures, jurisprudential techniques), and (2) interactions, both formal and informal, between the ECHR – as a system of constitutional justice – and national systems of rights protection. These claims, of course, are controversial. But the fact that the constitutional status of the Convention and its Court are now being actively debated by judges, elected officials, and scholars across Europe tells us that some profoundly important is, indeed, happening.

2005): 83; Lawrence Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,” *op cit.* (*supra* note 20).