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# THE EUROPEAN COURT OF HUMAN RIGHTS—A EUROPEAN CONSTITUTIONAL COURT?

By Jacob Mchangama\*

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Legal discussions of constitutionalism will typically focus on national developments and differences between various national constitutional systems. However the focus of my remarks will not be on national constitutions and constitutional courts—at least not directly—but rather on the idea of supranational or European constitutionalism. This is an idea that holds great appeal to many lawyers and politicians.

The EU and the European Court of Justice (ECJ) is obviously central to any discussion of European constitutionalism, but my focus will be on the European Convention on Human Rights (henceforth ECHR) and in particular on the European Court of Human Rights (henceforth the Court) set up to enforce this convention.

There are those who believe that the ECHR has attained a constitutional character and that thus the Court has become a European constitutional court.<sup>1</sup> Proponents of this idea highlight that the ECHR has been incorporated into the national law of most member states of the Council of Europe, that the case law of the Court is often referred to by national parliaments and courts as well as by the ECJ, that the ECHR forms part of the basic principles of EU law, and that Article 6 (2) of the Lisbon Treaty formally commits the EU to become a party to the ECHR.

The notion that the ECHR is a constitutional document has been given some support by the Court itself. In the *Louizidou* case from 1995, the Court stated that the ECHR is “a constitutional instrument of European public order.”<sup>2</sup> For ten years the Court did not repeat this extraordinary claim but then did so again in the hugely important *Bosphorus* case in 2005, where the Court—however *sotto voce*—claimed that it—and therefore not the ECJ—has the ultimate competence to determine whether EU regulations comply with the ECHR when applied by member states.<sup>3</sup>

For lawyers and politicians in favor of individual freedom, the rule of law, and limited government, it might seem natural that one should support the constitutionalization of a convention and court explicitly set up to ensure the respect for such rights and values. However, there are very good reasons to be skeptical of attaching constitutional weight to the ECHR and of the Court assuming the role of a European constitutional court.

First of all, as noted in a much-debated speech by the now-retired English judge Lord Hoffmann, it is clear from the drafting of the ECHR that its founders—representing Western liberal democracies at the time—did not envisage the ECHR as a constitution for Europe but rather as a unifying bulwark

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against the reemergence of totalitarianism.<sup>4</sup> As noted in a document drafted by high-ranking UK civil servants engaged in the drafting of the ECHR: “The original purpose of the Council of Europe Convention on Human Rights was to enable public attention to be drawn to any revival of totalitarian methods of government and to provide a forum in which the appropriate action could be discussed and decided.”<sup>5</sup>

Judicial enforcement was to be the exception; in fact, it was assumed by drafters that the ECHR would not result in any significant problems for the state parties. The UK Attorney-General Sir Hartley Shawcross stated:

No other country engages, or need engage, in any over nice and meticulous comparison of its own municipal laws against its treaty obligations . . . . The most that can be sought in connection with such political manifestos as in effect are constituted by these Conventions on Human Rights is that in substance and principle, if not in every detail, our practice protects the rights laid down.<sup>6</sup>

The ECHR is an instrument of international law that differs in many respects from national law. Moreover, a constitutional order is not merely concerned with fundamental rights, however important; these are for individual freedom. A constitutional order sets out the basic structure and framework of the political and legal order of a nation state. As such a constitution should represent the specific history and political and legal culture of its people. An international convention agreed by diplomats of thirteen states and subsequently amended in order to accommodate all forty-seven member states of the Council of Europe is by definition ill-equipped to serve such a purpose. However important the role of human rights, an international convention for states with as different legal and political cultures as, say, Germany and Turkey or Denmark and Moldova cannot assume the unifying character and country-specific characteristics essential for a constitution.

It is, I think, also essential to stress that there is little evidence that international human rights conventions can secure individual freedom and the rule of law on their own. At the time of writing, there are 167 state parties to the International Covenant on Civil and Political Rights (ICCPR), which guarantees basic freedoms essential for individual liberty and a functional democracy. However, the state parties include numerous states with little or no tradition or respect for individual freedom and the rule of law, including North Korea, Iran, Kyrgyzstan, and Somalia, to whose rulers the ratification of such an international convention seems to mean very little. As for the ECHR, state parties include Russia, Azerbaijan, and Moldova, who are ranked as non-free (the former two) or partly free (the latter) in Freedom House’s annual Freedom of the World Report.<sup>7</sup> Moreover, these countries have all seen respect for civil and political rights decline in the past years despite being parties to the ECHR and subject to the jurisdiction of the Court. On the other hand, with a few exceptions the original

thirteen signatory states to the ECHR were established liberal democracies prior to adopting the ECHR.

These facts underscore that securing respect for human rights depends first and foremost on a national legal and political constitutional order committed to these principles. When such a national legal and political order is in place, the ECHR and the Court can play—and has in several cases played—an important subsidiary role by affirming these rights and freedoms and pointing to the most egregious transgressions thereof.

If we are to take seriously the idea that the ECHR is of a constitutional character and the Court a constitutional court, that in turn would entail that the Court would have the competence to—directly or indirectly—declare national laws “unconstitutional” whenever the Court finds a violation in specific cases. To a significant extent this is already happening as some countries, such as Sweden and Norway, have incorporated the ECHR into their constitutions (directly or through reference thereto) and most national courts turn to Strasbourg jurisprudence when interpreting national law. But in countries, such as Denmark, where the ECHR merely forms part of the ordinary law, national parliaments retain the ability to depart from the jurisprudence of the Court should they think that the interpretation is repugnant to their own constitutional principles. Should Strasbourg case law be considered as having constitutional status, that would arguably no longer be the case. And there are clear signs that this is the direction toward which we are heading. The newly-elected Danish government recently stated that it wishes to incorporate the ECHR into the Danish constitution. That would have dramatic effects on the Danish constitutional order and signify a further power shift from national parliaments (and courts) to Strasbourg.

The risks associated with this development have much to do with the interpretational principles employed by the Court, in particular the Court’s “dynamic” interpretation insisting on the ECHR as a “living instrument” to be interpreted according to “present day conditions,” which has seen the scope of the ECHR expand dramatically, touching virtually all areas of law from planning to social security and asylum. In some cases the Court acts more like a European Supreme Court than a Constitutional Court, let alone a human rights Court. This has seen the Court increasingly intrude on the powers of national parliaments and courts in areas that have very little to do with fundamental rights.

Until the 1970s, the Court and the now-defunct commission were actually very—perhaps even too—deferential to the member states. But in the 1970s this changed, and the Court became much more assertive. In 1979 the Court decided that a Belgian law that did not recognize babies born outside of wedlock violated, inter alia, Article 8 on the right to private and family life.<sup>8</sup> The Court stated that there “may be positive obligations inherent in an effective ‘respect’ for family life,” despite the wording of Article 8, which states that “there shall be no interference by a public authority” with this right, thus clearly envisaging a negative protection.

The Court’s evolutive interpretation prompted one of the most remarkable and eloquent dissenting opinions ever filed by a Strasbourg judge. The British judge Sir Gerald Fitzmaurice wrote:

It is abundantly clear (at least it is to me)—and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view—that the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the “domiciliary protection” of the individual. He and his family were no longer to be subjected to the four o’clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delays and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another,—in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that “private and family life . . . home and . . . correspondence” were to be respected, and the individual endowed with a right to enjoy that respect—not for the regulation of the civil status of babies . . . .

It seems to me that Fitzmaurice’s dissenting opinion in the *Marckx* case is an accurate description of the object and purpose of the ECHR and the role the Court should play as its enforcer. Yet, as the long line of dissenting opinions filed by Fitzmaurice testify, his view has long since been abandoned, and the scope of the ECHR has increased unrecognizably since.

The *Hatton* case is a good example of how the right to privacy and respect for the home has developed since the *Marckx* case based on the “dynamic interpretation.”

In the *Hatton* case eight applicants complained that night flights from the privately-owned Heathrow Airport in London disrupted their sleep and thus violated their right to privacy and respect for the home.<sup>9</sup> In the chamber judgment from 2001, the Court found in favor of the applicants, but that decision was reversed by the Grand Chamber in 2003. However, the Court went into a meticulous review of domestic UK legislation and procedure in order to ascertain that the UK authorities had struck the right balance between the right to respect for the home and the economic interests of the UK in keeping Heathrow operational during night. As such the Court assumed the role of a national administrative court, with the consequence being that Council of Europe states will have to consult ECHR case law whenever planning major construction works that may impact the quality of life of nearby residents. It seems to me that the *Hatton* case should have been rejected as manifestly ill-founded, or even *ratione materiae*, as noise pollution is hardly a practice apt to reintroduce totalitarian

measures in Europe and does not seem to touch upon human rights in any meaningful sense of the word.

The second example is a particularly worrying instance of judicial activism and rights inflation with potential wide-ranging effects for national sovereignty. Since 2005 the Court has interpreted the right to peaceful enjoyment of possessions—in essence private property—as encompassing state financed and non-contributory welfare benefits such as social security. In the *Stec* admissibility decision the Court stated:

In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on . . . welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfillment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding the ECHR to be applicable.<sup>10</sup>

In other words individuals affected by welfare reforms—such as those carried out or underway in many European countries due to the current debt crisis—may argue that the slashing of welfare benefits constitutes a violation of the right to property. First of all, this would seem a corruption of both the language and concept of private property and possessions. This was noted in a stinging criticism from the President of the Belgian Constitutional Court Marc Bossuyt, who stated that “[i]f social support has become a property right, then the Judges in Strasbourg have succeeded in making an owner of he who owns nothing. Even [Karl] Marx had not been able to do that!”<sup>11</sup>

Secondly, while member states have a wide margin of appreciation or discretion when it comes to welfare reforms, the possibility that years down the line such reforms may fall afoul of the ECHR greatly inhibits the efficacy of governments in the economic sphere and provides a political trump card disguised as human rights to those who oppose welfare reforms. Already we have seen two Danish unions announce that a recently-agreed reform limiting the possibility of early retirement in Denmark will be challenged in the courts. If successful in Strasbourg, the government will have to come up with a new plan for reducing the budget deficit with unforeseeable consequences for an economy that has factored in the early retirement reform. The Court’s jurisprudence in this area is particularly interesting, taking into account that the EU has been instrumental in pushing through austerity measures in European countries such as Greece and Italy, which include slashing or abolishing welfare benefits. As has been the case in Denmark, such measures may well be challenged in court, which could lead to a scenario where the Court is to decide whether such austerity measures fall afoul of the ECHR with potential wide-ranging consequences for the economy in the Euro-zone or (more likely) the Court being ignored by both the EU institutions and member states and thus marginalizing its own influence through judicial overreach.

It is difficult to envisage an area less suited to the judicial review of an international human rights court than economic and fiscal policies which to a large degree constitute the basis on which the electorate chooses its politicians and sets the course of the economic future of their country.

From the viewpoint of constitutionalism, the cases mentioned above have an obvious impact on the constitutional order of member states when national legislatures have to take into account Strasbourg case law on areas that have little to do with human rights. This development has most prominently seen the Conservative part of the UK’s coalition government exploring the possibility of reducing the influence of the Court through repealing the Human Rights Act (which incorporates the ECHR into domestic English and Welsh law) and replacing it with a “British Bill of Rights.” The British government is also in the process of drafting a declaration which it hopes will be adopted at a high-level meeting of the Committee of Ministers of the Council of Europe in Brighton in April 2012. The so-called Brighton Declaration aims to amend the ECHR in order to, inter alia, emphasize and strengthen the role of national governments and the subsidiary role of the Court, when it comes to safeguarding the rights of the ECHR.

Moreover, at a recent hearing before the Parliamentary Joint Committee on Human Rights, Lord Judge, the most senior judge in England and Wales, seemed to endorse the view that courts in the UK have been too accommodating of Strasbourg case law:

Most of the decisions are fact-specific decisions, they are not deciding any point of principle. They are just saying “here are the facts, here is the answer.” That is not precedent for anything . . . There has been a tendency to follow much more closely than I think we should . . . I think there is a realisation of that and I think judges generally are aware of this and are examining decisions of the European court that much more closely to see whether what you can spell out of it is a principle or just a facts-specific decision.<sup>12</sup>

The activism of the Court may also have ramifications for the EU. As mentioned the EU is formally committed to becoming a party to the ECHR, and the EU Charter of Fundamental Rights is to be interpreted in light of the ECHR and therefore in light of the jurisprudence of the ECHR. This gives the Strasbourg Court a significant say in the interpretation of not only national laws of the member states of the Council of Europe but also potentially in the interpretation of EU law, though one would expect the Strasbourg Court not to challenge the Luxembourg Court too boldly.

Of course, the accusation of judicial activism is one familiar to both American constitutional and European Union lawyers as both the U.S. Supreme Court and the European Court of Justice have been accused of such practices. Whatever the merits of such criticisms, there is an important difference between the Court on the one hand and the ECJ and the U.S. Supreme Court on the other. As noted by Lord Hoffmann, the U.S. Supreme Court forms one of the branches of government within a national constitutional system, and since *Marbury v. Madison* in 1803, it has been accepted that it has the competence to perform judicial review. The U.S. Supreme Court enjoys a high level of respect in the American population and is a part of the national fabric in a way that the Court can never hope to emulate. As for the EU, the member states have, for better or for worse, explicitly given up their sovereignty on a wide number of areas where the EU institutions are competent to legislate in order to unify and harmonize legislation. The

ECJ has a mandate to interpret and enforce EU legislation in these areas. The ECHR, on the other hand, is an international convention aimed at securing respect for basic rights not to unify or harmonize the policies of the member states of the Council of Europe.

In conclusion, I hope to have demonstrated the dangers in forming a supranational or Pan-European constitutionalism on the basis of a human rights convention interpreted by an international court. While such a rights enforcement machinery has its merits, it should be based on the principle of subsidiarity, not constitutionalism.

## Endnotes

- 1 See, e.g., Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court* (Faculty Scholarship Series, Paper 71, 2009).
- 2 *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).
- 3 *Bosphorus v. Turkey*, Appl. No. 45036/98 (June 30, 2005).
- 4 Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture (Mar. 19, 2009).
- 5 BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE* (2001).
- 6 *Id.*
- 7 The report is available at <http://www.freedomhouse.org/template.cfm?page=15>.
- 8 *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979).
- 9 *Hatton v. UK*, App. No. 36022/97 (2003).
- 10 *Stec v. UK*, 41 Eur. Ct. H.R. SE18 (2005).
- 11 Interview in *GAZET VAN ANTWERPEN*, May 11, 2010.
- 12 BBC, Nov. 15, 2011.

