

# THE CONSTITUTIONAL POTENTIAL OF THE EUROPEAN COURT OF HUMAN RIGHTS

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*The European Court of Human Rights (ECtHR) is widely recognized as having the features of what can effectively be called a constitutional court. But what is the proper definition of a constitution and in what way can the ECtHR be properly considered a “constitutional court”? Constitutions are considered by citizens and jurists alike to be the most profound expressions of national commitment, but to what extent does the ECtHR operate constitutionally vis-a-vis the States within its jurisdiction? This paper attempts to briefly answer these questions and elaborate upon the implications of having the constitutional atmosphere of the EU interpreted and influenced by the ECtHR. This paper also deals with the EU’s constitutional structure as States interact and submit to the constitution-like machinations of the ECtHR. The paper proceeds to investigate the ECtHR as a constitutional apparatus and examine the unique challenges to the idea of a “constitutional court”. It concludes with case studies from the United States and Scotland and finally questions what could be done to further understand the constitutional nature of the ECtHR.*

## I. DEFINITIONAL ASPECTS OF A CONSTITUTION

The ECtHR is widely recognized as having the features of what can effectively be called a constitutional court.<sup>1</sup> But what is the proper definition of a constitution and in what way can the ECtHR be properly considered a “constitutional court?”. Constitutions are considered by citizens and jurists alike to be the most profound expressions of national commitment.<sup>2</sup> They are clear legal statements giving rights to citizens and setting limitations for governments. These rights are not earned but granted freely on the basis of being a citizen and a human, and they do not change except perhaps to be enhanced by the evolution of the given society. They transcend individual governors and leaders and accordingly embody and institutionalize rules and rights that exist

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<sup>1</sup> Robin White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights* 9(1) HUMAN RIGHTS LAW REVIEW 37 (2009).

<sup>2</sup> DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION 3 (2008).

high above the fray of ordinary politics.<sup>3</sup> Constitutions are intended to serve certain predictable legal functions in the form of a “pre-commitment strategy” of those who believe in its legal authority and purpose.<sup>4</sup> In essence, constitutional rights are foundational.

Many European nations do in fact have their own constitutional courts. For example, Germany has the Federal Constitutional Court and France has its *Conseil constitutionale*. The constitutional guarantee of human rights can currently be found in the vast majority of national constitutions, although the scope of these constitutions can and do vary widely as will be detailed later. Most constitutions attempt to describe and limit the power of the government and the manner of its exercise by protecting individual rights against the potentially intrusive power of the State. Constitutions also guarantee security to their citizens by preventing the oppression of minority groups and those who lack power in the majoritarian political process.<sup>5</sup>

Constitutions do not, in and of themselves, grant citizens their rights, but they simply recognize them in order for their perpetual protection. Human rights will always predate any enumeration of them and good constitutions (and constitutional courts) must understand that their duty is to ensure the protection of these human rights rather than encouraging governmental encroachment on them. Good constitutions protect human rights as they are understood naturally rather than only in the manner that they are delineated in documents, charters and courts.<sup>6</sup> Some constitutions do this better than others as is discussed later. The ECtHR is a constitutional court in part because of its identity as an institution designed to protect and recognize those rights that belong to the citizens of Member States. The most important link between the definitional aspects of a Constitution and the ECtHR is that both entities define what rights a government owes its people and vice-versa. While a State Constitution provides how a government may rule its people, the ECtHR effectively constitutionalizes domestic law by establishing through judicial interpretation the guidelines, norms and expectations of European law throughout the region. Some nations have a permanent founding document, while others look continually to the ECtHR to define the shape of legal relationships and policies in modern Europe.

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<sup>3</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 161 (1993).

<sup>4</sup> Anne Peters, *Precommitment Theory Applied to International Law: Between Sovereignty and Triviality, a Comment on Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, U. ILL. L. REV. 239, 241- 242 (2008).

<sup>5</sup> Andrew Byrnes & Catherine Renshaw, *Within the State* in INTERNATIONAL HUMAN RIGHTS LAW 506 (2010).

<sup>6</sup> BLACK'S LAW DICTIONARY 1044 (1933).

## II. THE COURT AS A “CONSTITUTION”

The focus of the European Convention on Human Rights (‘ECHR’) is on political and civil rights that have been recognized and shared by developed Western legal systems.<sup>7</sup> These rights are the reasonable legal expectations of citizens from their respective governments. In November 1998, the ECtHR adopted the individual petition procedure.<sup>8</sup> This was done so as to give citizens of Member States the right to participate in a judicial complaint process including the right to file an individual complaint directly.<sup>9</sup> The right to individual application along with binding judgments was a monumental and unique accomplishment in the field of international law and went far in establishing a constitutional culture of the ECtHR. Many important jurists view the ECtHR as having a distinctly constitutional role and have described it as such as far back as 2002.<sup>10</sup>

The ECtHR has boldly defined itself not merely as a simple court rendering decisions but as a “constitutional instrument of European public order”.<sup>11</sup> Labeling the ECtHR as a constitutional court can mean many things. According to Professor Laurence Helfer, it means at least three things. First, an acknowledgement that Strasbourg judges will test the validity of legislation against higher rules designed to protect individual rights, in a manner similar to how national Supreme Courts operate (including reviewing both the content of laws and claims of illegality). Second, an approach of using constitutional review as its primary method of judicial decision-making, and third, a didactic approach to its case law, shaping it to socialize the domestic institutions of Member States to the rule of law that the ECHR envisions.<sup>12</sup> This means that courts hold cultural power to shape the way that both jurists and the public perceive constitutionalism.

The ECtHR sometimes acts as a functional supreme constitution of Europe (or as a self-regulating non-reversible constitution and constitutional Supreme Court rolled into one) in its overriding and regulating national constitutions, as it did in Bosnia in 2009. In the case of *Sejdic and Finki v. Bosnia and Herzegovina*, a Jew and a Roma brought a suit against a clause in the Bosnian Constitution that only allowed candidates of Bosnian, Croat

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<sup>7</sup> JIM MURDOCH & ROBERT REED, A GUIDE TO HUMAN RIGHTS LAW IN SCOTLAND 61 (2001).

<sup>8</sup> ECHR Memorandum to the States 1 (July 3, 2009).

<sup>9</sup> Steven Greer, *Europe* in INTERNATIONAL HUMAN RIGHTS LAW 459 (2010).

<sup>10</sup> Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HUMAN RIGHTS LAW JOURNAL 161 (2002).

<sup>11</sup> *Loizidou v. Turkey*, 310 ECtHR (Series A) 27 (1995).

<sup>12</sup> Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19(1) EUR. J. INT’L L. 125-159 (2008).

or Serbian ethnicities to run for political office.<sup>13</sup> The ECtHR found this rule to be discriminatory and accordingly contrary to Art. 14, Art. 3 and Protocol numbers 1 and 12 of the ECHR. This case assumes significance as it demonstrates the ECtHR acting constitutionally not only in preserving and protecting the rights of individuals against certain State behaviors but also in protecting them against the domestic constitutional mechanisms themselves. The court in coming to its conclusion treated the constitution both as a document and a process. As a result of such an approach, the ECtHR became a constitution to the constituent nations and a true embodiment of the highest law in the country. It will be interesting to see whether in the future the constitutional nature and assumed (yet not mandated in each home country) authority of the ECtHR will hold up in a legal battle against domestic constitutional adversaries that are more established, traditional and revered than Bosnia.

The trend towards a further constitutionalisation of the ECtHR is continuing forward. As much of Europe is seeing an increase in right-winged rhetoric and stricter austerity measures, the power of the ECtHR remains firmly ensconced as the primary culture-shaping institution in Europe (at least in terms of legal and political influence). As much of Europe is in turmoil, the ECtHR has only become more legitimate in the opinion of most academics and jurists. It remains a bay of security while many of the other European questions (such as the destiny of the Euro and the European financial community) remain unanswered. Just as a national Constitution is often considered to be the unchanging faithful document to guide the nation during a crisis, the ECtHR is flexible, resilient and relevant as it keeps ahead of European societal trends by making sense of the legal questions in front of it. Just as so many Americans treasure the history and tradition of the US Constitution, European jurists and academicians value the potential of a European court functioning as a Constitution both in safeguarding rights and legal expectations.

Luzius Wildhaber believes that the future role of the ECtHR will be increasingly constitutional in nature based on the need to “accommodate States with very advanced levels of constitutional protection and States whose constitutional protection is still in the process of consolidation”.<sup>14</sup>

Of course, the ECHR and the ECtHR are not currently designated as an official constitution and constitutional court, as the idea of a formal

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<sup>13</sup> *Sejdic and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, European Court of Human Rights; *ECtHR Holds Bosnian Constitutional Provisions Violate European Convention on Human Rights*, January 11, 2010, available at <http://www.harvardilj.org/2010/01/ecthr-holds-bosnian-constitutional-provisions-violate-european-convention-on-human-rights> (Last visited on May 17, 2011).

<sup>14</sup> Luzius Wildhaber, General address presented at XIII Congress of the Conference of European Constitutional Courts, Nikosia, Cyprus: *The place of the European Court of Human Rights in the European Constitutional Landscape* (2005), available at <http://www.confcoconsteu.org/reports/Report%20ECHR-EN.pdf> (Last visited on May 17, 2011).

European constitution has never been formally accepted or adopted. This does not however prevent the ECtHR from taking on strong constitutional aspects that enable it to function practically on a near constitutional level. For those who think that Europe needs a formal and permanent constitution, the ECHR and the ECtHR acting as a binding set of legal norms may be their last hope and an even more appropriate exercise of constitutional functions. With changing EU law, European politics, worldwide strife, shifting cultures and the myriad other unrests sweeping across Europe, any attempt to write an immovable permanent European constitution would be “no more than a snap shot”.<sup>15</sup> The timely and fluid constitutional aspects of the ECHR and ECtHR make it an extremely effective, relevant and important institution in the realm of modern European constitutionalism. The judges actively intervene their opinions into the lives of citizens hence shaping the social and constitutional culture of the people verdict-by-verdict, opinion-by-opinion.

### III. UNIQUE CHALLENGES TO THE IMPLEMENTATION OF A “CONSTITUTIONAL COURT”

As with any vast and important undertaking, there always are pitfalls and trials that must be endured before and during its successful implementation. The court has taken great steps to be an efficient institution but has still had to face the unique challenges of garnering authority and being utilized effectively while dealing with the staggering number of cases before it.

#### A. THE AUTHORITY AND IMPLEMENTATION OF THE ECtHR

The ECtHR is widely considered to be the Council of Europe’s most important achievement and is celebrated by human rights scholars and lawyers as the world’s most successful international human rights tribunal.<sup>16</sup> The ECtHR is considered by many to be the “crown jewel” of the world’s most advanced international system for protecting civil liberties and human rights.<sup>17</sup> Though according to individual holdings and statements, the ECtHR may be “hit or miss” in regard to important protections, this paper submits that the bulk of the blame for citizens being unprotected and vulnerable lies with governments and their frequent refusal to harmoniously operate as insurers of these rights. Unfortunately, history is testimony to the fact that governments are slow to react to the human rights protections and expectations of its people. When

<sup>15</sup> Leonard F. M. Besselink, *The Notion and Nature of the European Constitution after the Reform Treaty*, January 18, 2008, 2,10, available at <http://ssrn.com/abstract=1086189> (Last visited on May 17, 2011).

<sup>16</sup> Greer, *supra* note 9, 454.

<sup>17</sup> Helfer, *supra* note 12, 125.

Member State governments refuse to seriously and immediately take steps to implement the protections required by the ECtHR, ECHR and Protocols, it is then the populace, Member State government and the ECtHR that suffer.

*B. THE COURT IS MOST EFFECTIVE WHEN UTILIZED AS A “CONSTITUTION”*

There is an incumbent duty on State governments to recognize their constitutional obligations to provide for the rights contained in the Conventions and Protocols. If these governments proactively provide and protect these rights, the overload on the ECtHR will considerably reduce and it will be free to appropriately handle the important and groundbreaking cases in a progressive fashion. Petitioners will continue to bring new cases before the court when they perceive their government to be their enemy and an impediment to justice. If governments function as enthusiastic supporters of the rights guaranteed by the ECtHR, ECHR and Protocols, then they will be entrusted to properly resolve the complaints of the people even before that charge comes before the ECtHR. Government officials need to be seen as officers of the ECtHR instead of its adversaries. This is the only way by which justice can be done and by which the ECtHR can effectively fulfill its mandate.

*C. THE AUTHORITY OF THE ECtHR SHOULD BE RESPECTED AND REVERED JUST AS A TRADITIONAL “CONSTITUTION”*

Governments need to work in accordance with the ECtHR, not try to evade the expectations of the ECtHR by legal, political or other means. Indeed, as has famously been said, “justice delayed is justice denied”. For the Member States to contribute to this delayed justice by not taking the duties that are required of them by the ECHR seriously is itself constitutive of a human rights violation that should not be excused or tolerated. The backlog of cases in the ECtHR is very significant. As on this date there are 138,200 pending cases with 57,100 applications allocated, 2,395 judgments and 33,065 other decisions including inadmissible or struck-out cases.<sup>18</sup> A true commitment to the principles contained in the ECHR would mandate an expedient resolution of this growing backlog.

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<sup>18</sup> Philip Leach, Address at the University of Glasgow School of Law, United Kingdom: The Current Statistics of Cases Before the European Court of Human Rights (March, 2011).

#### IV. BRIEF CASE STUDY: THE UNITED STATES OF AMERICA

The Constitution of the United States of America has been important and paramount since its founding. As Patrick Henry, one of the founding fathers of America, said “The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government.”<sup>19</sup> America does not have the liberalised, inclusive, European-style human rights definitions and guarantees that the ECtHR, ECHR and Protocols do. The US, however, is a country and legal system that is steeped in the idea of constitutional limitations and protections. In countries such as the US where the Constitution itself is held sacrosanct by its citizens, the government is often times more inclined to be limited by it when it comes to personal protections. While it is true that law enforcement officers, politicians, bureaucrats and others are frequently accused and often guilty of constitutional infringements, it is by the authoritative correction of the courts that are designed to specifically interpret the Constitution that the wrongdoers are punished. The US government is far from perfect but potential wrongdoers fear only one thing: a constitutional challenge in court. Where this challenge is anticipated, those who might seek to infringe rights are held at bay by the compliance that the constitution promises.

A basic example is that no police officer or other law enforcement agent would ever coerce a confession out of a suspect, not because police officers are afraid of beating suspects, but because the confession (and very likely the entire case) would be thrown out of court due to the government’s infringement of the suspect’s Fifth Amendment constitutional rights. Police officers must give arrested individuals their constitutional “*Miranda*” rights, even if the arrested person is unaware of them or not interested in hearing them. This is because confessions and information learned from arrested people who have not been read these rights are inadmissible in court.

In these basic cases, it is the US Constitution that is prevalent and powerful enough to restrain the government from acting in a certain way without each violation being brought to court. If these unconstitutionally obtained confessions or divulgements are attempted to be used against the defendant in court, they are systematically thrown out. The point here is not that the American government is a strict constitutional paradise, or that America is the only nation that enshrines protected rights as a matter of usual criminal procedure. In fact, there is a constant suspicion that police officers do often attempt to abridge the constitutional rights of their suspects. It is, however, a government that takes seriously its constitutional obligations and this approach

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<sup>19</sup> See *Constitutional Crisis* available at <http://constitutionality.us/TheConstitution.html> (Last viewed on June 26 2012).

leaves its courts the time and energy to decide important and novel cases in a timely matter. This system allows for more immediate handling of constitutional complaints, both large and small.

The American court system, while radically different from the European model, does provide an interesting example of the idea of a single Supreme Court working to protect the constitutional rights of citizens, who already have at least one other form of constitutional protection. Briefly put, each individual American state has its own state constitution, which is regulated by, and superseded by, the national Federal Constitution and its amendments. The so-called “supremacy clause” of Art. 6 provides for the US Supreme Court (a constitutional court and the highest court in the land) to effectively protect the rights of each citizen of each state as the highest court of the land, guaranteeing them the full coverage of the Federal Constitution if necessary. There are many other differences, (no right to individual application, for example) but it can be said that the American constitutional experiment has had some high points of success along with its many disappointments and a careful study of its history could prove beneficial to scholars of the court. I do not at all contend that Europe should copy the American model, however I believe that understanding both models better will lead to a thorough understanding of and answer to the question of how a constitutional court can be best understood and implemented.

As an international apparatus, the ECHR and ECtHR are bound to reflect their constitutional characteristics in a manner perhaps different from many national constitutions. This is mainly due to the activist nature of the court ruling without domestic constitutional review. This in no way makes it any less of a functioning constitution, only that it applies constitutional protections uniquely and perhaps more effectively. It is true that the ECHR does not seek to be a constitution at par with the world famous US Constitution. Its history and mission is unique to its position in its own culture and institution. Comparing it to this most well known constitution in all of history, the ECHR is openly activist and positivist in its interpretations of rights, assurances and protections. The ECHR promotes a collective culture of active human rights participation while the US Constitution is more often seen from a strictly individualist viewpoint.<sup>20</sup> The ECHR explicitly states when human rights protections do not apply,<sup>21</sup> whereas the US Constitution has no such provisions. The ECHR seems to have a militant approach to giving the limits of its provisions while the US Constitution uses a more tolerant idea to the exercise of rights.<sup>22</sup>

Where the US Constitution is silent, the subject matter then falls to the individual state constitutions via the federalism mechanism of the 10<sup>th</sup>

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<sup>20</sup> STEFAN SOTTIAUX, *TERRORISM AND THE LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION* (2008).

<sup>21</sup> *POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 7-8 (2007).

<sup>22</sup> *Id.*



Amendment.<sup>23</sup> The current wording of the ECHR and the activist approach of the ECtHR leaves little room for such a strict and predictable method of deferring to lesser authorities, though the court obviously will often refuse to overturn matters that they feel are best left up to the domestic jurisdiction of states. This however is at their discretion rather than mandated by a strict constitutional rule such as the 10<sup>th</sup> amendment of the US Constitution.

## V. BRIEF CASE STUDY: SCOTLAND (RE: THE *CADDER* DECISION)

The *Cadder* decision<sup>24</sup> is of immense importance to the present discussion because it represents the ECtHR acting as a traditional constitutional buffer against the illegal acts being perpetrated against the Scottish people by their own government. In this case, the ECtHR ensured the accused in Scotland certain fair trial and due process guarantees that the Scottish (and the United Kingdom) traditional legal structure and documents (including anything of a constitutional nature) would not protect. In 2010, the *Cadder* decision held that the fair trial requirements of the ECHR<sup>25</sup> were to be maintained for Scottish suspects. It was ruled that the treatment of Cadder was against a decision of the ECtHR in 2008,<sup>26</sup> which upheld a suspect's right to access to a lawyer as fundamental to him receiving a fair trial. European human rights legislation was written into the Scotland Act of 1995, which is the piece of Westminster legislation that establishes devolution and as such, is binding on the Scottish government. The Scottish Supreme Court judgment stated that, "The ECHR requires that a person who has been detained by the police has the right to have access to a lawyer prior to being interviewed."<sup>27</sup> There are 3,471 cases that may be reconsidered due to the Cadder ruling.<sup>28</sup> It is worth briefly noting that Scotland is not a contracting party to the ECHR, rather the United Kingdom as a whole is the contracting State.

In *Cadder*, we witness a domestic state ignoring the dictates of EU law as prescribed by the decisions and work of the ECtHR. Those Scottish citizens appealed to the ECtHR to act as a safeguard for due process liberties

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<sup>23</sup> Constitution of the United States of America, Amendment X.

<sup>24</sup> *Cadder v. Her Majesty's Advocate*, 2010 UKSC 4.

<sup>25</sup> ECHR, Art. 6(1).

<sup>26</sup> UK Supreme Court Press Release 1 (October 26, 2010), available at <http://www.law.ed.ac.uk/sln/blogentry.aspx?blogentryref=8423>

<sup>27</sup> *Id.*

<sup>28</sup> *Cadder v. Her Majesty's Advocate*, 2010 UKSC 4, available at [http://www.supremecourt.gov.uk/docs/UKSC\\_2010\\_0022\\_Judgment.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf) (Last visited on May 17, 2011); see also BBC, Q&A: Cadder case ruling, 26 October, 2010, available at <http://www.bbc.co.uk/news/uk-scotland-11627386> (Last visited on May 17, 2011); The Guardian, *Scotland loses key case that could undermine criminal convictions*, October 26 2010, available at <http://www.guardian.co.uk/uk/2010/oct/26/scotland-convictions-criminals-questioned-lawyers> (Last visited on May 17, 2011).

in nearly the same way as an American citizen would appeal to the basic US constitutional protections of the 5<sup>th</sup> amendment. Much like a domestic state weighs the interest of the state and private citizen when interpreting the varying interpretations of the domestic Constitution, the EU has prescribed such duties to the ECtHR as seen in the *Cadder* decision.

Unfortunately the Scottish government was neither proactive nor compliant in its implementation of ECHR human rights protections leading up to the *Cadder* decision. This is an example of a Member State government ignoring the requirements of the ECHR to the disadvantage of its citizens and itself. When this happens, the ECtHR can and often does step in as a constitutional court to ensure basic protections to European citizens. John Scott, accordingly states:

“The catalyst for change should have been the *Salduz v Turkey* decision of the ECoHR in 2008. Despite its obvious importance, Scottish authorities tried to wish it away and the police carried on as before. The appeal court in Scotland missed a final opportunity at the end of 2009 to address the problem and instead concentrated on other safeguards such as the inability to convict on an admission made in custody alone and the requirement that there be corroborated evidence. As the Supreme Court said in *Cadder’s* case, these safeguards are commendable but beside the point.”<sup>29</sup>

### A. WHAT CAN BE DONE?

Much of the success of the ECHR and ECtHR is due to the fact that it has been performing functions that are similar to those performed by national constitutions and national constitutional courts across Europe.<sup>30</sup> Ironically, and perhaps unfairly, it is often states with well-established systems of domestic constitutional appreciation that tend to shy away from using the ECHR as a constitution-like authority during domestic pleadings.<sup>31</sup> As jurisprudence across Europe develops in those areas lacking in a rich existing constitutional history, we are perhaps more likely to see the ECHR wielded there by citizens, lawmakers and jurists as a constitutional authority and as an enhancement of the ECHR’s constitutional elements. I am of the opinion that this would be a positive trend so long as traditional differences between different legal cultures and histories are still respected while ensuring the protection of those basic human rights and human rights norms that transcend cultures.

<sup>29</sup> *Id.* (UK Supreme Court Press Release).

<sup>30</sup> Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, 15, Yale Faculty Scholarship Series, Paper 89 (2008), available at [http://digitalcommons.law.yale.edu/fss\\_papers/89](http://digitalcommons.law.yale.edu/fss_papers/89) (Last visited on May 17, 2011).

<sup>31</sup> *Id.*, 28.

Perhaps states without vibrant constitutions could model their emerging legal systems into an apparatus that includes a state constitution, ECtHR authority and domestic appellate courts. If modern Europe is to achieve its full potential in terms of law and human rights protections, it would do well to acknowledge and appreciate ECtHR's growing role as a constitutional court for the region.

