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

Alec Stone Sweet, Yale Law School

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Abstract
In this essay, I seek to make the best argument for the claim that the European Court of Human Rights is a constitutional court. 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.

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11.4 Case Law from the European Court of Human Rights Related to Armed Conflict. Against a background in which both doctrine and case law have established the convergence between the two bodies of law, the fact that this has had so little influence on the case law of the Strasbourg Court is striking. There are several different reasons, some legal and some political, why the ECHR has almost never explicitly referred to elements of complementarity between the ECHR and IHL. The Court therefore manages to elude IHL by not classifying situations. Both of these reasons are certainly correct, legally and formally speaking.