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Quasi-constitutional court of human rights for Europe? Comments on Geir Ulfstein

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Abstract: This short comment offers two additional arguments, missing from Geir Ulfstein's account, which may bolster the case for constitutionalisation of the ECtHR. The first is about the 'pilot judgments' through which the Court addresses systemic deficits in national legal systems and thus ensures a minimal synchronisation of human rights protection throughout the CoE system. The second manifestation of constitutionalisation of the ECHR system is the increasing role of the ECtHR in the implementation of its own judgments. Ultimately, the legitimacy for the constitutional ambitions of Strasbourg Court should be located primarily in the argumentative resources of the court and in its pursuit of 'public reason'.

Keywords: European Convention on Human Rights; European Court of Human Rights; implementation; pilot judgments; public reason

I. Introduction

In his incisive and fully convincing account, Geir Ulfstein shows how the European Court of Human Rights (ECtHR) has acquired an important and legally relevant presence in the domestic legal orders of the Council of Europe (CoE) member states. In particular, he explains, the judicial review of national laws or decisions conducted by the Court has important legal effects in national law, mainly by virtue of national courts' recognition of the Court's practice. Its constitutional role, he urges, hinges on the fact that such review has legal consequences for two spheres of legal relationships within domestic orders: those between the state and its citizens insofar as the meaning and contours of constitutional rights are concerned, and those regarding the relationship between various national constitutional branches.

I fully agree with Ulfstein's analysis, and my comment aims only at adding some extra insights rather than questioning or challenging his assessments (with the exception of one point, which I will make rather tentatively). In this short comment, I will offer two additional arguments, missing from

Ulfstein's account, which may bolster the case for constitutionalisation of the ECtHR, namely regarding 'pilot judgments' and the Court's enhanced role in overseeing the implementation of its judgments. At the end, I will articulate a tentative doubt regarding the democratic legitimacy of the Court, as viewed by Ulfstein.

Right at the outset it may be useful to make explicit what is often only implicit in the burgeoning debate about 'constitutionalisation' of the Court: what is *at stake* in characterising the Court as constitutional? There are different constitutional courts around the world, and adopting any single model as paradigmatic may be seen as arbitrary. After all, some courts perform such functions as impeachment of top officials, validation of elections, or banning political parties – none of which applies even remotely to the ECtHR. But these are ancillary and contingent functions only, from the point of view of the core function, which is judicial review of statutes under constitutional standards.[1] The question about whether the ECtHR is 'constitutional', in that sense, boils down to the question of whether it can strike down national laws as inconsistent with the European Convention.[2]

A simple answer to this question is, of course, no. But among various constitutional (and supreme) courts around the world there is a broad spectrum of the finality, grounds, immediacy and strength of judicial review; hence, debates about the 'Commonwealth model', 'weak judicial review' etc. 'Constitutionalisation' of a court is therefore a matter of degree: some courts are more and others are less 'constitutional'. Regarding the ECtHR, the initial simplistic question should be therefore rephrased as the question about whether the Court figures on this continuum at all. If it does, then the question is whether (with all the caveats and reservations, the effect of which will be to place the Court at a weaker end of the spectrum) the judgments of the Court play a role in deeming national laws (as opposed to individual national decisions) 'un-Conventional'. In other words, it is a question about whether the Court's judgments may be seen as appearing in the causal chain which eventually leads to invalidation of a law, for its inconsistency with the Convention.

[1] For a critical assessment of this function, see in this issue J Waldron, 'The Rule of Law and the Role of Courts' (2021) 10 *Global Constitutionalism* 91–105; and BZ Tamanaha, 'Always Imperfectly Achieved Rule of Law: Comments on Jeremy Waldron' (2021) 10 *Global Constitutionalism* 106–117.

[2] I deliberately focus on this indicium of constitutionalism which seems to me to be the strongest of all. Of course, various courts around the world may *also* be deemed 'constitutional' on many other grounds, including that they are apex courts in the appellate chain of judicial decision-making, and the ECtHR meets this criterion easily, as a special 'super-appellate' court.

An answer to *such* a question is evidently 'yes', or 'yes, but …' – and Professor Ulfstein offers some good reasons for such an answer. In what follows, I will provide some additional reasons.

II. Pilot judgments

A puzzling omission from Professor Ulstein's account (omitted perhaps because it is so obvious) is the emergence of pilot judgments, which may be seen as the epitome of the evolution of the Court from the 'individual' to a 'constitutional' justice paradigm.[3] As Steven Greer and Luzius Wildhaber characterise it in a 2012 article, it is 'the boldest attempt to tackle the problem of defective national legislation or practice'.[4] The procedure, invented by the Court, of identifying *systemic* defects in a state's legal system transcends the traditional understanding of the Court as constituting the final, extraordinary, super-appellate instance, when all the domestic remedies against a national decision have failed to give satisfaction to the claimants.

The process ostensibly goes against the fundamental consensus in the background of setting up the Convention system in 1950, that all the member states of the CoE have laws fundamentally consistent with the Convention (divergences being attributable to legitimate diversity, eventually to be permitted under the margin of appreciation), and the role of the Council's adjudicatory body was only to undo aberrational decisions when all domestic remedies had been exhausted, rather than to reform the law itself.[5] This post-1950 consensus was always to some extent a fiction, and occasionally (but as an exception to a general rule) the Court undertook to deem laws, not just decisions, contrary to the Convention.[6] But with the enlargement of the Council into the Central and Eastern part of the Continent, this fiction could no longer be maintained,

[3] For a detailed discussion of pilot judgments, see W Sadurski, 'Partnering with Strasbourg: Constitutionalisation 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' (2009) 9 *Human Rights Law Review* 397.

[4] S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655, 671.

[5] Admittedly, there is a certain oversimplification in this proposition, in order to make my point sharper. Surely, after the horrors of the Second World War the possibility that in one or more European states systemic failures may occur must have weighed on the Founders' minds. But at the time of setting up the system they all considered themselves as easily meeting some basic liberal-democratic baseline.

[6] *Marckx v Belgium*, Judgment, ECtHR App No 6833/74 (13 June 1979), dissenting opinion of Judge Sir Gerald Fitzmaurice, para 28.

and it became necessary for the Court to issue rulings triggered by the systemic defects of the law rather than individual aberrational decisions of appellate courts.[7] Hence the idea of pilot judgments, which is the most evident symptom of the constitutionalisation of the Court. It is indeed no coincidence that a large majority of all fully fledged 'pilot judgments' so far have originated from Central and Eastern Europe.

Formally speaking, it was the political branch of the CoE that was the catalyst for change. In 2004, the Committee of Ministers (CoM) adopted a resolution and a recommendation which provided the political grounding for pilot judgments, while carefully avoiding constitutional terms. The Resolution invited the Court 'to identify in its judgments … what it consider[ed] to be an underlying systemic problem and the source of that problem, in particular when it [was] likely to give rise to numerous applications'.[8] The Court happily adapted to this role, as evidenced by its own case law, but at the same time some judges (who I will refer to in a moment) expressed their misgivings about openly adopting constitutional language.

To be sure, in the operative parts of its 'pilot judgments' the Court never uses explicitly 'constitutional' language, which is its way of avoiding admitting what is obvious to any observer.[9] The central reason provided by the Court to support its use of a pilot-judgment approach is that of docket control. This was the rationale given in the Court's first pilot judgment, *Broniowski*, when it seized upon the opportunity provided by the Committee of Ministers to discern 'systemic' problems: '[T]he measures adopted [by the respondent State] must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from

[7] For the impact of the enlargement of the ECHR system on the constitutionalisation of the Court, see W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, Oxford, 2012) Ch 1.

[8] CoE Committee of Ministers, Resolution CM/Res (2004)3 of 12 May 2004 on judgments revealing an underlying systemic problem; see also CoE Committee of Ministers, Recommendation CM/Rec(2004)6 of 12 May 2004 on the improvement of domestic remedies, which points out that, in addition to individual remedies, states have a general obligation to solve the problems underlying rights violations.

[9] Markus Fyrnys made the connection between 'pilot judgments' and the constitutional function of the Court explicit: 'The very fact that pilot judgments are focused on the identification of systemic malfunctioning of the domestic legal order … normatively extends the binding effect of the Court's judgments and changes their legal nature, accentuating the Court's constitutional function'; see M Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' in A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking* (Springer, Berlin and Heidelberg, 2012) 329, 331.

the same cause.'[10] So, in the authoritative statement of the Court itself, it is the spectre of a 'lengthy series of comparable cases' which triggers the new procedure.

But this non-constitutional rhetoric is not convincing.[11] Indeed, the issue of legitimacy of the ECtHR in challenging national legislation was seized upon by some of the judges of the Court. Judge Zagrebelsky in his (partly) dissenting opinion to the 2006 Grand Chamber judgment in *Hutten-Czapska v Poland*, the second pilot judgment in the Court's history, argued that when the Court indicates the need for a State to amend its legislation in order to solve a general problem affecting individuals other than the applicant, it is usurping the role of the Committee of Ministers and exceeding its authority as set by the Convention.[12] To make the point even sharper, he added that the judgment 'entrust[ed] the Court with duties outside its own sphere of competence'.[13]

The 'c' word has not appeared in the dissent by Judge Zagrebelsky – but it did in an emphatic separate opinion by Judge Zupančič in the same case. Specifically rebutting the idea of the ECtHR's constitutionalism, Judge Zupančič writes: 'The Court clearly does not have, *with the usual paraphernalia of constitutional law*, an interest in meddling in what national legislation should or should not do. … *We are not and cannot be constitutional court* for the 46 countries concerned.'[14] While Judge Zupančič defended the very concept of pilot judgments he nevertheless characterised them in strictly pragmatic rather than constitutional terms: as a measure of docket control, and akin to a class-action approach.

But this sounds like protesting too much. Judge Zupančič claims that the Court *would* be behaving in a constitutional (thus, improper) way *if* the judgment were formulated *in abstracto* and *if* the Court were saying 'that a particular piece of national legislation that had been the cause of the case before us was incompatible with the Convention, or in other words "un-conventional"'.[15] But this is precisely what the Court *was* saying in *Broniowski*, *Hutten-Czapska* and subsequent pilot judgments. By reproducing in its judgment in *Hutten-Czapska*, with approval, the long passages of the Polish Constitutional Tribunal's

[10] *Broniowski v Poland*, Judgment, ECtHR App No 31443/96 (22 June 2004) para 193.

[11] The figures of potentially similar cases supplied in *Broniowski* and *Hutten-Czapska* seem quite fantastic, see Sadurski (n 2) 422, fn 76.

[12] *Hutten Czapska v Poland*, Judgment, ECtHR App No 35014/97 (19 June 2006), partly dissenting opinion of Judge Zagrebelsky.

[13] Ibid.

[14] *Hutten Czapska v Poland* (n 12) partly concurring, partly dissenting opinion of Judge Zupancic, part II (both emphases added).

[15] Ibid.

judgments of unconstitutionality of the Rent Act, the European Court was effectively endorsing the Tribunal's judgments of unconstitutionality and 'un-conventionality'.

Judicial misgivings about the Court's adopting a constitutional role (not necessarily in so many words) have been reiterated, as the practice of issuing pilot judgments has continued. In his dissent of a 'semi-pilot case'[16] *Lukenda v Slovenia*, Judge Zagrebelsky noted bluntly, 'the Court is requesting the Government to change the national system in law and in practice. Nothing more, nothing less.'[17] It is difficult to find a better description of the constitutional role – although (or rather, especially because) it came from a strong opponent of such practice.

III. Implementation of the ECtHR's judgments

An important aspect of the constitutionalisation of the ECtHR and its increasing autonomy vis-à-vis member states of the CoE is the evolution of its role concerning the execution of its own judgments. The mechanism for execution of the judgments is set out in Article 46 of the Convention which provides that judgments are binding on the respondent states (paragraph 1), and that their execution is subject to the supervision of the CoM – hence, an intergovernmental body of the CoE. Originally, the Convention did not envisage any role for the Court in the execution phase, but Protocol 14 (which entered into force in 2010) modified the process by allowing the CoM to seek interpretative assistance from the Court to clarify obligations arising from a judgment and also to institute proceedings before the Court to determine whether the respondent State had complied with a judgment. Hence, a traditional division of tasks between the Court and the CoM, whereby the exclusive responsibility for monitoring execution rested with the intergovernmental body, has been undermined, and the Court has acquired significant powers in the process of execution of its judgments. This is particularly pronounced with regard to 'pilot judgments', already mentioned above, where the Court has assumed a responsibility hitherto exercised by the CoM and started pronouncing specifically on the remedial measures to be undertaken by the respondent State.

[16] The concept of 'semi-pilot' (or, as they are sometimes called, 'quasi-pilot') judgments applies to those judgments which place the 'systemic violation' or 'systemic problem' language only in its *reasoning* on the merits, but not in the *operative* parts; in such cases, the Court does not expressly describe the judgment as a 'pilot judgment'.

[17] *Lukenda v Slovenia*, Judgment, ECtHR App No 23032/02 (6 October 2005, final 6 January 2006), partly dissenting opinion of Judge Zagrebelsky.

This practice became consolidated and formalised in the Rules of the Court: the new Rule No. 61, adopted by the Court in February 2011, provides that the Court is to identify the type of remedial measure which the State is required to take at the domestic level, including that the Court may indicate a specific time frame for the adoption of remedial measures. As has been observed, 'the Court might be said to be straying further into the territory of the Committee of Ministers, since it not only indicates the type of remedial measure required but also engages in a form of supervision of the process'.[18] This increasingly active role of the Court in the execution process is one of the indicia of its growing autonomous authority and emancipation from the states as guardians of implementation and execution of judgments, traditionally viewed as only declaratory in character, with the execution stage left to the political will of the member states of the CoE.

It should be explained why the growing control by the Court over the implementation of its judgment may be properly seen, as I claim, as an indicator of its 'constitutionalisation'. After all, domestic constitutional courts usually have only very meagre powers – if any at all – over the implementation of their judgments. But the ECtHR is not a domestic court, and its pattern of rapports vis-à-vis the political branch of the CoE is different from the relations between national constitutional courts and the executive branches in their states. The ECtHR, in order to make good the claim for the constitutional character of its judgments, must be able to reach out directly to the states, with as little intermediation by the CoM as possible. On the spectrum of the forms of control of implementation of the ECtHR judgments, the more the Court can control the implementation, the more it corresponds to being embedded[19] in the national legal system – thus playing an autonomous role at this stage (namely, at the stage of implementation). Such embeddedness is a mark of its constitutional character – it becomes part and parcel of the national legal system, just like a domestic constitutional court is.

IV. Democratic legitimacy of the Court

In his article, Professor Ulfstein engages with the question of the democratic legitimacy of the Court by appealing to the delegation of powers by

[18] See European Court of Human Rights, 'Seminar Background Paper – Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility?' 5 (footnote omitted) <http://www.echr.coe.int/Documents/Seminar_background_paper_2014_ENG.pdf>.

[19] For the concept of 'embeddedness' of supranational institutions in national legal orders, see RO Keohane, A Moravcsik and A-M Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457, 458.

democratically accountable national bodies to the Court to make binding judgments. This 'democratic support' by national bodies is seen to be the cornerstone of the democratic legitimacy of the Court. I am not quite sure that the matter can be resolved so neatly. For one thing, while the Treaty pedigree of the Convention may enhance the democratic character of the ECtHR qua the Convention's authoritative interpreter (because of democratic process leading to the Treaty's adoption and ratification in CoE member states), on the other hand, a requirement of consensus for Treaty change renders the entrenchment of the Convention even stronger than that of national constitutions.[20] After all, it is one thing to say that the rules of a particular supranational body had been, at its birth, agreed upon by the member states the executives of which had had full democratic legitimacy (as was the case within the CoE) and another thing altogether to say that this original democratic pedigree puts repeatedly and forever a stamp of democracy upon whatever the Court does, along the trajectory of its further evolution. In other words, there seems to be a non sequitur from the democratic pedigree of a supranational court to an ongoing democratic functioning of the court.

In the case of the ECtHR the non sequitur is amplified by the growing 'autonomisation' of the Court. In the scholarship on international organisations, the concept of 'autonomisation' has been coined to describe the growing independence of inter- or supranational bodies from states' consent as their main legitimating factor.[21] When autonomisation occurs, it is no longer realistic to assert, as the traditional idiom goes, that states are 'masters of the treaties', and that an institution's will expresses the sum, or a consensus, or a common denominator, of the member states' wills.

This has been, emphatically, the case in respect of the ECtHR. While the member states have endowed the Court, by mutual consent, with the legal grounds for its rulings (the Convention, including its successive Protocols), the Court has imposed, through an interpretation of the Convention, more specific obligations upon states which they had not necessarily anticipated and to which they would not have necessarily consented: they tied their own hands in ways going beyond their control. The Court has established and consolidated this authority by a number of argumentative moves, and in particular through an inventive use of the doctrine of effectiveness (*effet utile*) – an important device in the array of its argumentative strategies,

[20] I am grateful to an anonymous reviewer for focusing my attention on this point.

[21] For a good discussion of different meanings of 'autonomy' of international organisations, see A Peters, 'The Constitutionalisation of International Organisations' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Hart, Oxford, 2011) 253, 257–61.

which requires that the provisions of the Convention should be interpreted so as to make it safeguard rights that are 'practical and effective' rather than 'theoretical and illusory'.[22] This justified an expansive interpretation of Convention rights, including the recognition of broad positive obligations on states, not necessarily immediately detectable in the abstract articulation of a right itself.[23] Another argumentative device serving the expansion of protection of rights has been the doctrine of 'autonomous meaning' of the terms used in the Convention: the Convention meaning is independent of the meaning of those (or equivalent) terms used in the domestic law of the member states. This means, in practice, that the Court will protect European citizens' rights, despite what their member states have actually committed themselves to: the 'concepts' serve as shells for the 'conceptions' developed by the Court, regardless of and often contrary to the 'conceptions' recognised at a state level.[24] Between them (and with the addition of the doctrine of 'evolutive' rather than static interpretation, where the Convention is seen as 'a living instrument which must be interpreted in the light of present-day conditions'),[25] these doctrines have served as the platform for expanding, or even 'inventing' new rights, well beyond what could have been anticipated by the contracting states. Tom Zwart lists *inter alia* the following 'new rights' found by the Court in the Convention: due process in administrative law, the right not to be exposed to pollutants, and the rights of aliens to reside with their spouses, to receive financial support, and not to be removed if they are at risk of being exposed to inhuman treatment.[26]

For all these reasons, it is difficult to claim that the legitimacy of the ECtHR in the national orders of member states of the CoE is primarily due to the consent given to it by democratically constituted national governments. But from the fact that the Court is not primarily *democratically* legitimated it does not follow that it is not legitimate at all; what does follow is that its sources of legitimacy lie elsewhere. I have claimed that

[22] *Airey v Ireland*, Judgment, ECtHR App No 6289/73 (9 October 1979) para 24.

[23] On the link between the doctrine of effectiveness and the finding of positive obligations, see P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International, The Hague, 1998) 75.

[24] For a discussion of this point, see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007) 37–57.

[25] See, e.g., *Matthews v United Kingdom*, Judgment, ECtHR App No 24833/94 (18 February 1999) para 39.

[26] T Zwart, 'More Human Rights Than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done' in S Flogaitis, T Zwart and J Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism to Strength* (Edward Elgar, Cheltenham, 2013) 71, 87–8.

the main source of legitimacy of supranational adjudicative bodies such as the Court is in the sort of reasons they give for their judgments, and more particularly, that they are exponents of 'supranational public reason'.[27] This resonates with Allen Buchanan's theory of international human rights based on epistemic requirements of a credible public justification. As Buchanan observes: '[t]he legitimacy of an international order grounded in the commitment to human rights depends in part upon whether there is a credible public justification for human-rights norms and decisions by international human rights institutions'.[28] These requirements amount to an overall general threshold quality for legal decisions. This is what Armin von Bogdandy and Ingo Venzke call 'the legitimatory significance of justifying legal decisions in a way which lives up to the standards of the profession and that meets expectations of participants in legal discourse'.[29]

This short comment is not the place to articulate this argument at any length; all I need to say here is that these different types of legitimation, democratic and through the type of justification of decisions, are mutually complementary and coexist in different proportions at different levels. At a pan-European level, a quasi-constitutional court such as the ECtHR must make up for deficits in democratic legitimation by appealing to other sources of legitimacy available to it.

V. Conclusion

The Court has, strictly speaking, no power to invalidate national laws, and the *erga omnes* force of its rulings is questionable. But it has established itself as a quasi-constitutional supranational court and has become recognised as such by its audience: national constitutional courts, legislatures and executives, as well as other actors such as NGOs, the legal community, journalists and public opinion in general which view it as an authoritative interpreter and adjudicator of rights. In consequence, the Court's rulings have affected the shape of the domestic laws of member states, beyond the determination of a specific remedy to a particular victim for a breach, and have often paved the way towards effecting legislative change, governmental

[27] W Sadurski, 'Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities' (2015) 4 *Global Constitutionalism* 396. See also W Sadurski, 'Conceptions of Public Reason in the Supranational Sphere and Legitimacy beyond Borders' in W Sadurski, M Sevel and K Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press, Oxford, 2019) 161.

[28] A Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39, 63.

[29] A von Bogdandy and I Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking' (2011) 12 *German Law Journal* 1341, 1344.

practice and judicial decisions. This has been most visible in the 'pilot judgments' it has been issuing since 2004, and in the Court's increased control over implementation of its judgments. But its legitimacy in entering upon the constitutional field has been always questionable, and attempts to rest it on traditional democratic grounds are less than convincing. Whatever compliance effect it has acquired – and it is high – is largely due to the argumentative resources it employs, combined with strategic alliances with national municipal actors (especially constitutional courts) which have incentives to form a coalition with the European Court.