

Summary of the main points

In recent years the Court has issued a number of judgments on controversial moral and ethical issues. These decisions, based largely on creative interpretations of the Convention, override national sovereignty and undermine the Court's legitimacy. The evolutive interpretation of the Convention gives the judges license to fabricate new rights and unless more judicial restraint is exercised, there is a danger that the Court will lose its legitimacy and its claim to being "the conscience of Europe."

Combined with the Court's evolutive interpretation of the Convention is its use of "European consensus" to reduce Member States' margin of appreciation. There is no reason why a majority of countries legislating in one direction should force the remaining minority to conform to the trend, yet that is exactly what the "European consensus" approach does; resulting in a "tyranny of the majority" on morally controversial issues.

CONTRIBUTION:

INTRODUCTION

1. In recent years the European Court of Human Rights ("the Court") has issued a number of judgments on controversial moral and ethical issues. These decisions, based largely on creative interpretations of the European Convention on Human Rights ("the Convention"), override national sovereignty and undermine the Court's legitimacy. The evolutive interpretation of the Convention gives the judges license to fabricate new rights and unless more judicial restraint is exercised, there is a danger that the Court will lose its legitimacy and its claim to being "the conscience of Europe."
2. Combined with the Court's evolutive interpretation of the Convention is its use of "European consensus" to reduce Member States' margin of appreciation. There is no reason why a majority of countries legislating in one direction should force the remaining minority to conform to the trend, yet that is exactly what the "European consensus" approach does; resulting in a "tyranny of the majority" on morally controversial issues.
3. While there are many issues relevant to the future of the Court, this submission will focus on the role of the Court in interpreting the Convention.

1. THE COURT'S "EVOLUTIVE INTERPRETATION" OF THE CONVENTION

4. Since the 1970s, the Court has taken a so-called "evolutive approach" to the meaning of the European Convention on Human Rights. As Jean-Paul Costa, the then-President of the Court, recently put it, the Court has "taken the view that the text should be interpreted, and applied, by adapting it to the changes that

have taken place over time – to changes in society, in morals, in mentalities, in laws, but also to technological innovations and scientific progress.”¹

5. The Court bases its authority to adopt an evolutive approach on the European Convention on Human Rights² and its preamble, and the Vienna Convention on the Law of Treaties.³ The Convention’s Preamble states that one of the purposes of the Court is “the *maintenance* and *further realisation* of human rights and fundamental freedoms.”⁴ According to Françoise Tulkens, the former Vice President of the Court: “‘Maintenance’ requires the Court to ensure in particular that the rights and freedoms set out in the Convention continue to be effective in changing circumstances.... ‘Further realisation’ allows for a degree of innovation and creativity, extending the reach of Convention guarantees....” These provisions, taken together, form the legal justification for the Court’s evolutive approach.⁵
6. However, in recent years there appears to be no limit to the extent to which judges may “extend the reach” of the Convention. Such reinterpretation undermines the authority of the Court and the importance of the Convention. As detailed below, there are several examples where the Court has moved well beyond the original text and meaning of the Convention.
7. In the case of ***Koch v. Germany***⁶ the Former Fifth Section of the Court held unanimously that there had been a violation of Article 8 of Convention guaranteeing the right to respect for private and family life. Although the Court fell short of declaring that a right of privacy includes a right to assisted suicide, it held that Germany breached Article 8 because domestic courts refused to examine the merits of a motion to purchase lethal drugs. Thus the Court found that a “procedural aspect” of Article 8 had not been respected by the German public authorities.

¹ Jean-Paul Costa, “What are the limits to the evolutive interpretation of the Convention?”, *Dialogues between Judges* (European Court of Human Rights, Strasbourg. 2011), p. 5.

² Article 32 § 1 of the ECHR sets out the jurisdiction of the Court, and gives the Court jurisdiction over the “interpretation and application” of the ECHR.

³ The Court has looked to Article 31 of the VCLT to develop its interpretative approach. Article 31 § 1 of the VCLT “establishes the *purposive/teleological* method of interpretation, giving priority to the *object* and *purpose* of treaties,” while Article 31 § 2 states that a treaty’s preamble is properly part of the context for the interpretation of a treaty.

⁴ ECHR Preamble.

⁵ Françoise Tulkens, “What are the limits of the evolutive interpretation of the Convention?”, *Dialogues between Judges* (European Court of Human Rights, Strasbourg. 2011) p. 6.

⁶ Application No. 497/09, Judgment of 19 July 2012.

8. The Court started its analysis with a striking and potentially dangerous assertion – “that Article 8 of the Convention may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established.”⁷ The assertion is dangerous in two ways: (1) it invites judicial activism (“the substantive right in question had yet to be established”), and (2) it can create a very uneven application of the newly invented procedural guarantees (“Article 8 may encompass a right to judicial review”).
9. Based on this novel approach, the Court held that the refusal of German administrative and judicial bodies to examine the merits of the applicant’s motion interfered with the applicant’s right to respect for private life. This conclusion is all the more frightening because the settled jurisprudence of the Court to date had been that of accepting procedural guarantees relating to Article 8 *only* in cases where the existence of a substantive right was not in doubt. Indeed this is the only approach that makes any logical sense. Thus, the Court in *Koch* invented a new three prong test on legal standing and found procedural “penumbras” emanating from non-existent Article 8 substantive rights. In essence, a violation of Article 8 was found because the national bodies refused to consider a request for lethal poison. The Grand Chamber refused to hear the appeal.
10. In ***Costa and Pavan v. Italy***,⁸ the second section of the Court unanimously held that Italy had violated of Article 8 (right to respect for private and family life) of the Convention. The case concerned an Italian couple who are healthy carriers of cystic fibrosis. The couple wanted to guarantee, with the use of medically-assisted procreation (IVF) and genetic screening (preimplantation diagnosis), that any future child they conceived would not have the disease. Preimplantation diagnosis is unlawful under Italian law due to concerns over eugenic selection and the possible impact on the dignity and freedom of conscience of the medical professions.
11. The European Court noted that preimplantation diagnosis “raises sensitive moral and ethical questions” but nevertheless stated that “the solutions reached by the legislature are not beyond the scrutiny of the Court.” In overriding the position of the Italian legislature, the Court held that a lack of access to genetic screening constituted an interference with Article 8 of the Convention, which, in the case of *Costa and Pavan*, could not be justified. In essence, a violation of Article 8 was

⁷ *Koch*, *ibid* at § 53.

⁸ Application No. 54270/10, Judgment of 28 August 2012.

found because the national bodies refused to allow medically-assisted procreation and genetic screening. The Grand Chamber did not accept Italy's appeal.

12. Going into the case of **Gross v Switzerland**,⁹ the clear jurisprudence of the Court had been that there is no right to assisted suicide or euthanasia under the Convention, nor are there any positive obligations on the State in regard to these issues, save the positive duty on the States to protect life under Article 2. Moreover, the Court had unanimously ruled on the issue of assisted suicide in the very similar case of **Haas v Switzerland** in 2011,¹⁰ holding that restricting access to lethal drugs was not in violation of the Convention.
13. Despite the previous case-law of the Court¹¹ and the obvious risks involved in liberalizing the distribution of lethal poison, the Court nevertheless held that, "the applicant's wish to be provided with a dose of sodium pentobarbital allowing her to end her life falls within the scope of her right to respect for her private life under Article 8 of the Convention."¹²
14. Having found that the right to a lethal poison comes within the scope of the Convention, the Court then assessed whether there had been a breach of this "right". Rather than tackling the issues head on – having done this in *Haas* and with a unanimous decision against the applicant – the Court instead focussed on the guidelines issued by the Swiss authorities. It concluded that, "Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There has accordingly been a violation of Article 8 of the Convention in this respect."¹³ The ruling was a four votes to three decision and in the dissenting opinion, three judges stated that the Swiss guidelines, "sufficiently and clearly defines the circumstances under which a medical practitioner is allowed to issue a prescription for sodium pentobarbital."¹⁴
15. Therefore, four judges found that the right to poison *is* protected under the Convention and unclear guidelines surrounding this "right" are in violation of the Convention. In contrast, three judges found that the guidelines were clear, that the applicant did not qualify and that the position of the Swiss authorities was

⁹ *Gross v Switzerland*, Application no. 67810/10, judgment of 14 May 2013.

¹⁰ *Haas v. Switzerland* (2011) 53 E.H.R.R. 33.

¹¹ For example, *Pretty v. the United Kingdom*, Application no. 2346/02, ECHR 2002-III; *Haas v. Switzerland* (2011) 53 E.H.R.R. 33.

¹² *Gross* at § 60.

¹³ *Gross* at § 67.

¹⁴ Joint Dissenting Opinion of Judges Raimondi, Jočienė And Karakaş, at § 1.

plainly justifiable under the Convention. Although the case is currently before the Grand Chamber and the decision of the Second Section is not final, the fact that the majority of the second section held that a wish to be provided with lethal poison was guaranteed by the Convention again illustrates the extent to which judges are prepared to extend the scope of Convention rights.

16. There are also a number of other cases currently before the Court where the meaning and scope of Article 8 of the Convention is being considered and could potentially be extended. In *Menesson v France*,¹⁵ *Labassee v France*,¹⁶ *Paradiso and Campanelli v Italy*¹⁷ the Court will decide on the issue of commercial surrogacy and egg donation. In *Parrillo v Italy*¹⁸ the use of embryos for scientific research is being adjudicated upon, and in *A. K. v Latvia*¹⁹ the Court will assess the use of pregnancy screening as a means of avoiding giving birth to disabled babies. In all of these cases it is being argued that the right to respect for private and family life has been violated. The cases involve highly sensitive moral and ethical issues that have already been decided by national legislatures. Should the Court rule that the Member States are in violation of the Convention, the scope of Article 8 will be expanded further still.

17. However, the scope of Article 8 of the Convention cannot be considered limitless, nor can Article 8 be interpreted as "a right to do whatever I want." Even taking account of the Court's evolutive interpretation of the Convention, the Court has long recognized that such interpretative methods must have their limits.²⁰ As the Court has held on numerous occasions, while the Convention must be interpreted in the light of present-day conditions, the Court cannot, by means of an evolutive interpretation, "derive from [it] a right that was not included therein at the outset."²¹

2. THE COURT'S USE OF "EUROPEAN CONSENSUS"

¹⁵ Application No. 65192/11, Communicated 12 February 2012.

¹⁶ Application No. 65941/11, Communicated 12 February 2012.

¹⁷ Application No. 25358/12, Communicated 9 May 2012.

¹⁸ Application No. 46470/11, Communicated 28 May 2013.

¹⁹ Application No. 33011/08, Communicated 11 November 2011.

²⁰ See, for example, "What are the limits of the evolutive interpretation of the Convention?", *Dialogues between Judges* (European Court of Human Rights, Strasbourg. 2011).

²¹ *Johnston and Others v. Ireland*, Application no. 9697/82, judgment of 18 December 1986 § 53 and *Emonet and Others v. Switzerland*, Application no. 39051/03, judgment of 13 December 2007, § 66.

18. At the heart of the evolutive approach is “European consensus” – a principle that allows the Court to apply evolutive principles when the responding state’s actions are considered to be “out of step” with other European countries.
19. Such an approach was first developed in the 1970s. In ***Tyrer v. United Kingdom***²² the Court held that “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions.”
20. A few months after ***Tyrer***, the Court invoked European consensus to help decide ***Marckx v. Belgium***.²³ In ***Marckx***, an unwed mother challenged a Belgian law that denied automatic recognition of maternal affiliation of illegitimate children as violating Articles 8 and 14 of the Convention. In deciding in favour of the claimant, the Court admitted that discrimination between legitimate and illegitimate family was “permissible and normal” at the time of the Convention’s drafting, but citing ***Tyrer***, wrote:

The Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim ‘*mater semper certa est*’.²⁴

21. In support of its claim of evolving consensus, the Court cited two treaties, both of which had been ratified by only four members of the Council of Europe.²⁵ The Court attempted to buttress this weak evidence by arguing that “both the relevant Conventions are in force and there is no reason to attribute the currently small number [of parties] to a refusal to admit equality between ‘illegitimate’ and ‘legitimate’ children.”²⁶ The mere existence of the treaties “denotes that there is a clear measure of common ground in this area.”²⁷ Hence, the concept of European consensus does not even require consensus.

Recent Examples of the use of “European Consensus”

22. Increasingly, the concept of “European consensus” is allowing the Court to liberally interpret the Convention. This principle is used to undermine the position of Council of Europe member states, as the following examples demonstrate.

²² *Tyrer v. United Kingdom*, Application no. 5856/72, 1978.

²³ *Marckx v. Belgium*, Application no. 6833/74, 1979.

²⁴ *Id.* at para. 41.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

23. In ***Goodwin v United Kingdom***²⁸ the Court noted the “clear and uncontested evidence of a continuing international trend” in favour of the legal recognition of transsexuals.
24. In ***A, B and C v Ireland***²⁹ the court noted the broad consensus on permitting abortions, but concluded that Ireland’s abortion restrictions were within the margin of appreciation.
25. In ***Schalk and Kopf v Austria***³⁰ the Court stated that there was “an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade.” However, the Court concluded that there is not yet a majority of States providing for legal recognition of same-sex couples. It therefore concluded that same-sex “marriage” must be “regarded as one of evolving rights with no established consensus.”
26. In ***X and Others v. Austria***³¹ a discussion on European consensus regarding same-sex adoption was prevalent throughout the Court’s judgment. There was no such consensus, and the Court went on to hold that “no conclusions can be drawn as to the existence of a possible consensus.”
27. In ***Vallianatos and others v Greece***³² the Court noted that “there is no consensus among the legal systems of the Council of Europe member States” regarding same-sex relationships. However, it went on to state that “a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships.”
28. Thus, on issues such as the legal recognition of transsexuals and the legal recognition of same-sex relationships, the Court applied the principle of “European consensus” in overriding the position of the country in question. On other issues where no such consensus exists, for example, same-sex “marriage”, the reasoning of the Court makes it clear that once more countries change their laws; other countries will no longer have the ability to decide the issue for themselves.

²⁸ Application No. 28957/95, Judgment of 11 July 2002.

²⁹ Application No. 25579/05, Judgment of 16 December 2010.

³⁰ Application no. 30141/04, Judgment of 24 June 2010.

³¹ Application no. 19010/07, Judgment of 19 February 2013.

³² Application nos. 29381/09 and 32684/09, Judgment of 7 November 2013.

29. However, the whole comparative method used by the Court to declare wide or narrow margins of appreciation is totally unsound and potentially dangerous. Why should the mere fact of a majority of countries legislating in one direction force the remaining minority to conform to the trend – in the absence of a clear substantive right based in the text of the Convention? “Progress” should be declared by the representatives of the people in a democracy and not invented from thin cloth by the European judicial elite.

CONCLUSION

30. The legitimacy of the Court is at its highest when the decisions of the Court have a clear textual basis in the Convention. The Member States respect the Court’s judgments because they are viewed as a result of genuine adjudication process, not as ideological decisions coming out from a dominantly political process.

31. The more that judges are empowered to creatively interpret the Convention, the greater the risk of the Court becoming politicized. For example, in the recent case of *Lautsi v Italy*³³ involving the removal of crucifixes in public classrooms, the second section of the court unanimously held (7 – 0) that there had been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention. The decision was completely out of step with the Court’s previous case-law and legal commentators referred to the decision as being ideologically driven. However, following a major outcry, the Grand Chamber reversed the unanimous second section decision by 15-2. Such a major swing on an essentially political and sensitive topic was remarkable and also begs the question – what “violation” did seven judges in the second section see that 15 judges at the Grand Chamber did not?

32. Thus, there is a real danger that if the Court continues to override the national sovereignty the member states by treating the Convention as a “living tree”, expanding its scope in ever more far-fetched and controversial ways, the Court will lose its legitimacy and respect. To reiterate what has been held many times in the past, the Court cannot, by means of an evolutive interpretation, “derive from [the Convention] a right that was not included therein at the outset.”³⁴ For the long term future of the Court to be secured, it must return to this principle.

³³ Application no. 30814/06, Judgment of 3 November 2009 and 18 March 2011 [G.C.].

³⁴ *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment of 18 December 1986, § 53.

