

EVOLUTIVE INTERPRETATION AND THE MARGIN OF APPRECIATION DOCTRINE - THE VIEW OF NATIONAL COURTS¹

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Abstract in original language

This working paper might provide more questions than answers because it is concerned with a highly complex issue of interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms. Particularly, it focuses on clash of three interpretational approaches - originalism and evolutive interpretation which might get further mixed up by the margin of appreciation doctrine. All this is analyzed from the perspective of national court asking - how should I interpret the Convention in the instant case? It is a working paper of a part of an article I am preparing on this issue.

Key words in original language

European Convention on Human Rights, European Court of Human Rights, originalism, textualism, evolutive interpretation, subsidiarity principle, margin of appreciation doctrine

Complexity of human rights protection in Europe poses national courts in a position one does not really envy. National judges especially at the highest courts often have to ask themselves: "Should I stick to the original text of the European Convention on Human Rights² and its meaning or should I stick to the existing case-law of Strasbourg Court or should I interpret the Convention evolutively and subsume the case under one of the rights and freedoms safeguarded by the Convention although I might be creating a "new" right which the drafters of the Convention never thought of?". There are many more questions we could add to this list, such as: "Does this fall within my margin of appreciation or am I on the verge of violating this party's right?" One last thought could also be: "It is going to be better, if I send this to Luxembourg, I will gain some time and those smart judges of the Court of Justice will tell me what to do, here."

In the following text, I will try to outline the many possibilities national courts and their judges have in their efforts to resolve the hard situations described above. With respect to the subsidiarity principle, the decision of a national judge on interpretation and application of

1 This working paper has been written in the course of implementing a grant project of Student grant competition "Antidiscrimination law and the margin of appreciation doctrine" no. PF_2011_002

2 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention")

the Convention in the case before him has far reaching practical and imminent consequences on the observance of human rights and fundamental freedoms of those involved.

1. EVOLVED VS. ORIGINAL

Basically, when applying the Convention, one might turn to multiple versions of it, depending on the doctrine they espouse. Judges are bound by the law on one hand, but pretty free in the methodology of interpreting it which gives them an enormous power in practice, as I will describe further. Judges generally have an option to choose between "original" Convention and "evolved" Convention. What are the pros and cons of such a choice?

Firstly, let us analyze the probable minority of judges which choose the "original" Convention. More precisely, they turn to the original text of the Convention and its meaning before they do anything else. If I were to paraphrase famous quotation by Justice David Josiah Brewer, who served as an Associate Justice of the United States Supreme Court in the turning point of 19th and 20th century, with respect to the Convention, I might say: "The Convention is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now."³ I could not have mentioned a better explanation of so-called "originalism" which has a number of supporters. Probably, the most significant of them still are Antonin Scalia and Clarence Thomas, current Associate Justices of the U. S. Supreme Court. Their arguments in favor of originalism are based on the formal nature of law as its purportedly most important feature. They say that law does not change in time. For law to change, it has to be amended by those who have the competence and mainly legitimacy to do so. In their opinion, if the law changed in time, principle of legal certainty would have gone to the dogs. And therefore, in accordance with the theory of originalism, we ought to interpret the text of a law (the Convention, in our case) correspondingly to what the text meant when it was legitimately adopted⁴. In case the law needed changing, originalists argue that the only way to do so is by amending the law.

There is one more strong argument put forward by originalists - they have easy answers to the most controversial issues. Why should there be a right to abortion since the drafters never gave it a thought and the Convention has not been amended in that respect? There simply isn't

³ see Letsas, G. *A Theory of Interpretation of the European Convention on Human Rights*. New York, Oxford University Press, 2009. p. 58; and mainly, see case *South Carolina v United States* 199 US 437, 448 (1905)

⁴ in detail, see Scalia, A., Gutmann, A. *A matter of interpretation: Federal Courts and the law*. Princeton: Princeton University Press, 1997 or Scalia, A., Ring, K. *Scalia dissents: writings of the Supreme Court's wittiest, most outspoken justice*. Washington, D.C.: Regnery Publishing, 2004.

any⁵. Correspondingly, how can there be any environmental rights arising out of the Convention if there is not a word about them in the text of it and Member States as the only subjects who can amend the Convention by means of new protocols have never done so? That is the usual line of argument followed by fans of originalism. They also usually say that every day is a new day and if evolutionists were right, then no one could be sure of what the law in his case is, actually.

To clarify and summarize the position of originalists, there are three pillars they love the most - textualism, formalism and legitimate changes of law. It follows that history also has an important part in the originalistic interpretation. We may go into a lot more detailed analysis of originalism but in my opinion, the information mentioned above is sufficient for the rest of this working paper.

On the other hand, supporters of the evolutive interpretation naturally have the opposite opinion. They claim that the Convention is a "living instrument which...must be interpreted in the light of present-day conditions"⁶. In their view, this position corresponds with the object and purpose of the Convention which must adapt to present standards and not the standards existing in the 50's when the Convention was adopted⁷. In other words, they respond to originalists: Why should we look back to history, if we're protecting human rights, now? Convention as a "dead instrument" would be useless in today's Europe as it might lead to actual violations of what is regarded as human rights today.

Well, what does the European Court of Human Rights respond to both groups of opponents? Leading case in this matter is the case *Golder v UK*⁸. *Golder* was the first case where both rivals clashed for the first time. The question was whether there is a right of access to court within the ambit of Article 6 of the Convention which regulates the right to a fair trial. It was the then British judge Sir Gerald Fitzmaurice who carried the flag of originalism against the evolutionist majority in his dissent to the *Golder* decision. His argument was in line with so-called intentionalist wing of originalists⁹ which argues that the drafters

5 I fully recommend to watch an interview with Justice Scalia on these issues available at the website of University of California here: <<http://www.uctv.tv/search-details.aspx?showID=20773>>

6 Harris, D., O'Boyle, M., Warbrick, C. et al.: *Law of the European Convention on Human Rights*, New York: Oxford University Press, 2009. p. 7, see also European Court of Human Rights decision in *Tyrer v UK*, Judgment of 25 April 1978, application no. 5856/72

7 Harris, D. et al.: *Law of the European Convention on Human Rights*, p. 7

8 *Golder v UK*, Judgment of 21 February 1975, application no. 4451/70

9 Letsas: *A Theory of Interpretation*, p. 60 and p. 64, the second wing of originalists is called textualism and it says that the text of the Convention has to be attributed with a meaning it had at the time of its enactment

should have expressly included this particular right in the text of the Convention if they thought that it ought to be safeguarded by it. Nonetheless, although his arguments might seem as persuasive to a reader, majority of the plenum chose to interpret the Convention evolutively and it began the history of evolutive interpretation of the Convention which prevails in its application up to now. The well-known concept of a Convention which "guarantees not rights which are theoretical or illusory but rights that are practical and effective"¹⁰ and a concept of the Convention as a "living instrument"¹¹ followed. From then on, we may speak of the "fall of originalism" in the interpretation of the Convention.

Why is that? In my opinion, it is simply because law has to accord society and as it changes, so the law has to adapt to it. As far as human rights protection is concerned, values of European society have tremendously changed in unforeseeable ways. And it is not feasible for the Contracting States to say at one point every fortnight: "Hey, haven't the values changed regarding this human right? They have, right? Ok, let's adopt a new protocol." Neglecting these sociological and economic impacts on law would only lead to broadening a gap between reality of life and the law, namely human rights protection. Besides, the text of the Convention is never capable of being applicable to all possible life situations and as such, there cannot be a better subject to make European human rights law complete, than the European Court of Human Rights. Currently, courts generally have to participate on law-making process and its deficiencies, mainly the gaps in written law. European Court of Human Rights is legitimized to "adapt" the law of the Convention in such a manner by the High Contracting Parties of the Convention which fully acknowledge the Court's case-law. Besides, as George Letsas aptly points out, Convention does not say a word about how it should be interpreted¹².

But before I entangle the whole issue a little with one more doctrine, let's get back to national courts, now. After the respective theories have been outlined and actual interpretative direction of the Convention has been pointed out, imagine you are a national judge in one of the countries of Council of Europe and you're dealing with a case where "inhuman and degrading treatment" has been argued. The case concerns an Asian employee who was verbally attacked by his boss by being repeatedly called names one might regard as offensive, another one might think the boss abuses his power to degrade the employee. You might reckon: "How do I objectively establish what is

10 see *Artico v Italy*, Judgment of 13 May 1980, application no. 6694/74, para. 33, see also Harris, D. et al.: *Law of the European Convention on Human Rights*, p. 15 or Jacobs, F. G., White, R., Ovey, C. *The European Convention on Human Rights*. New York : Oxford University Press, 2010, p. 74

11 see *Airey v Ireland*, Judgment of 9 October 1979, application no. 6289/73

12 Letsas: *A Theory of Interpretation*, p. 68

inhuman and degrading treatment"? You might try to find an answer in the existing case-law of the Strasbourg Court but what if you do not find an explicit answer? Knowing the subsidiarity principle poses the obligation of protecting human rights on you in the first place, can you adhere to evolutive interpretation and "find a new meaning" of the Convention's text which might even lead to "finding a new human right"? Or should you stick either to the text and the meaning you think it has or the existing case-law only which you follow to the letter? Doesn't the case-law begin to have similar features to originalism, if you simply follow it without even thinking of its possible evolving and future changing? How does it change, then? Is it only European Court of Human Rights who may indicate the direction in evolutive interpretation? If yes, then isn't that too late and doesn't that contradict the subsidiarity principle?

These are all very actual questions that national judges have to answer in practice. No wonder that more and more judges tend to adopt the best interpretational method - common sense. Methodological correctness of finding what is lawful in particular cases gets harder and harder and there is no doubt that judges in current multilevel system of laws get easily lost. And it can get even more complicated with the margin of appreciation doctrine. Let us see what consequences this doctrine may have in the next part of this paper.

2. HOW BIG IS MY MARGIN OF APPRECIATION?

Simply put, that is one more important question which may be raised by a judge of a national court. There are many cases in which the European Court of Human Rights has stated that states enjoy "certain" margin of appreciation¹³ in implementation of obligations arising from the Convention. In other cases, so-called "wide"¹⁴ margin of appreciation has been attributed to states, as well as a "narrow"¹⁵ one.

13 e.g. *Sunday Times v the United Kingdom*, Judgment of 26 April 1979, application no. 6538/74, para. 62 and many others

14 out of the more recent cases see e.g. *Stummer v Austria* (Grand Chamber), Judgment of 7 July 2011, application no. 37452/02, paras. 101 and 109 or out of the more historical ones see *James and others v the United Kingdom*, Judgment of 21 February 1986, application no. 8793/79

15 very interesting case in this regard is the case *S. H. and others v Austria*, Judgment of 1 April 2010, application no. 57813/00 where wide margin of appreciation was attributed although the actual analysis suggests a very narrow margin, see its para. 69 and Kratochvíl, J. The inflation of the margin of appreciation by the European Court of Human Rights. *Netherlands Quarterly of Human Rights*, 2011, vol. 29, no. 3, p. 347, regarding the narrow margin of appreciation see also *Tebieti Mühafize Cemiyeti and Israfilov vs Azerbaijan*, Judgment of 8 October 2009, application no. 37083/03, para. 67 or *United Communist Party of Turkey and Others vs Turkey*, Judgment of 30 January 1998, application no. 19392/92, para. 46.

Once again, national judges may get puzzled when after deciding on being evolutionist or originalist, they have to measure whether the law and their future decisions fit within the width of the margin of appreciation states have in specific cases. How to measure that? How does the judge know that he is still observing the human rights protection standard falling within the state's margin of appreciation or that he is actually violating the right?

Furthermore, the margin of appreciation doctrine also has a number of wings of supporters. You can be a progressivist claiming that it is the European Court of Human Rights only, who is responsible for safeguarding unified standards of protecting human rights or you can be conservative and claim that under the principle of subsidiarity, European Court of Human Rights ought to step into the case once the domestic authorities fail to protect human rights at domestic level¹⁶. Especially judges falling within the first category may cast a danger if they admit: "If I get it wrong, then they will get it right in Strasbourg, I'm sure." Therefore, the theoretical concept which the judge incorporates into his decision as to the margin of appreciation doctrine visibly has far-reaching consequences and in practice, it may lead to a whole lot of new questions. For example, what happens if the width of the margin of appreciation specified in the case-law of the European Court of Human Rights evolves and gets wider or narrower?

3. CONCLUSION

As I have mentioned in the beginning, this working paper was going to raise more questions than answers. With regard to all the theoretical concepts, it is probably not even possible to provide generally applicable solutions. Practical consequences of a judge's choice to decide as an originalist, intentionalist, textualist, evolutionist, progressivist or conservativist may lead to ends we are not even able to imagine, now.

It is worth noting that all judges bring their own values into their decision-making. Judges are not slot machines where you put factual background and you "win" a decision based only on the text of law and nothing else. Honestly, I am a bit scared of such an image of a judge as a robot. On the other hand, supporters of textualism prefer robotic judges, e. g. Antonin Scalia said in one of his interviews that an ideal rule for an honest judge when applying the law (i.e. meaning of

¹⁶ Greer, Steven. *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. Strasbourg: Council of Europe, 2000. p. 19 et seq.; Letsas: *A Theory of interpretation*, p. 91; Lavender, Nicholas. *The Problem of Margin of Appreciation*. *European Human Rights Law Review*, 1997. no. 4, p. 381; *Cossey v. the United Kingdom*, Judgment of 27 September 1990, application no. 10843/84 and many other following this judgment

its text when adopted) is "Garbage in, garbage out"¹⁷. Anyway, legal orientation in the mass of law is slowly reaching the very limit of human abilities. In practice, European judges have to apply domestic law, international law and EU law, all of them connected with tons of doctrines making the work of a judge unbearable.

Eventually, I would like to invite you to share your thoughts on the questions raised in this short working paper which may help me in finding as many answers as possible that I could include in the paper to be published in *International and Comparative Law Review*. Just like the judges in practice, I do not want end up in front of my computer not knowing what to do.

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¹⁷ see interview conducted by Peter Robinson of The Hoover Institution available under this particular link at : < http://fora.tv/2009/02/23/Uncommon_Knowledge_Antonin_Scalia >

