

Jan E. Helgesen

***“What are the limits to the evolutive interpretation of the
Convention?”***

***The European Court of Human Rights
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1. Introductory remarks

Distinguished *President Costa*, *Judge Tulkens*, ladies and gentlemen!

I feel very privileged to be invited to this important seminar.

I am, of course, not representing the Venice Commission, I am representing myself. I will, however, also try to present not only a Norwegian, but rather a more Nordic view on the issues before us.

1.0. Case of *Golder v. The United Kingdom* 1975

Like *Baroness Hale*, I will start on a very personal note. There is a long line leading from Strasbourg today to my first visit here, more than 35 years ago.

I would like to start with the *Golder* case. *Judge Tulkens* has already told us the importance of the *Golder* case. This could in itself have been a plausible reason for starting with exactly this judgment: It was here the evolutive interpretation started, immediately followed by other important cases: The three trade union cases (*National Union of Belgian Police v. Belgium* 1975, the *Swedish Engine Drivers' Union v. Sweden* 1976, *Schmidt and Dahlstrøm v. Sweden* 1976), *Danish Sex Education (Kjeldsen and others v. Denmark)* 1976, *Ireland v. UK* 1978, *Tyrer v. UK* 1978 (and later cases).

Between 1975 and 1980 the interpretation by the Court progressed and developed in a most visible way.

The reason for my focus on the *Golder* case is more personal, though. The *Golder* case was my first serious involvement with the European Convention on Human Rights. My professor, *Torkel Opsahl*, brought me to Strasbourg for the first time. Again, being personal, I am very pleased to see that there are friends from those days among the audience today.

My master thesis at the Law School of the University of Oslo was an analysis of *Golder*. I published the thesis in 1974, half a year before the judgment was delivered. I predicted the outcome, that the Court would interpret Article 6 so as to imply a substantive right to access to courts. However, may I add that the evaluation committee at the Law School looked with great scepticism on my dissertation. Never during my time at Law School did I receive such a poor grade. This is interesting, in view of the perspective I am supposed to operate from today. One of the members of the evaluation committee was among the founding fathers of the Convention in 1950. He told the young law student that Article 6 was never meant to be interpreted like that!

I mention this personal experience to testify that for more than three decades, I have been a very close friend of the Court. I have consistently and vigorously defended the Court. Today, I will present also some views which may sound critical. I sincerely hope you hear this not as criticism pure and simple, rather as constructive criticism. I am convinced that Europe will need the Court for many years to come and that is why we, the friends of the Court, must find different ways to support its sound development.

1.1. Not invited to analyse or justify the theory of “evolutive interpretation”

I’m not invited to analyse or justify the theory of evolutive interpretation. Although this is not within my mandate, let me nevertheless remind us that it was exactly from *Golder* and onwards the Court established the famous doctrine of interpretation; the principles which the present Court still applies: the reference to the Vienna Convention on the Law of Treaties, the Convention (ECHR) is a living instrument, must be interpreted in a dynamic and evolutive way, must meet present days conditions, must be interpreted according to the purpose of the Convention, must be interpreted so as to make the rights practical and effective, the Court must elucidate, safeguard and develop the rules instituted by the Convention.

Let me add another theoretical observation. The Convention is seen as some kind of a three-partite agreement, between the States, the Court and the individual. This is a special kind of international convention, which necessitates a special doctrine of interpretation.

1.2. The distinction “dynamic”/“evolutive” interpretation: not necessarily stringent concepts

1.2.1. “Evolutive” interpretation : the Court’s answer to new facts

1.2.2. “Dynamic” interpretation: the Court’s new answer to old facts

The title given to us contains the concept “evolutive”, not “dynamic”.

None of these concepts are extremely precise or stringent. They are partly used as synonyms, partly applied with slightly different connotations.

In legal theory there is a discussion on these two concepts. May I offer my small contribution? I would rather use the word “evolutive” as covering the situation where the Court gives answers to new facts, societal changes, an issue which has never been before the Court. While “dynamic” interpretation, to my mind, refers primarily to the situation where the Court gives new answers to old facts.

1.3. “Limits”

1.3.1. According to Webster Encyclopedic Unabridged Dictionary of the English Language: “the final or furthest bound or point as to extent, amount, continuance, procedure etc.”

In the title given to us, I find the word “limit”. Being a non-English speaking person, I immediately go to my dictionary. According to *Webster’s Dictionary*, a “limit” is the final or furthest bound or point as to the extent, amount, continuance, procedure.

1.3.2. *We are not there yet. My remarks will focus on roads/avenues which possibly might lead the Court to the “limits”*

I don’t think we have reached the limits. I am not going to define the limits. I will rather, metaphorically, try to define six clusters of problems, some kind of avenues. The Court can travel on these avenues. The further the Court goes down these avenues, the closer the Court will approach the limits.

2. *Six clusters of problems, six avenues which possibly might lead the Court to the “limits”*

2.1. “Legal methodology”

My first problem, or cluster of problems, is what I call “legal methodology”. Although a law professor, I must admit that the problems we discover along this avenue are the least interesting when analysing the limits for the Court.

We shall, nevertheless, have to approach these at two levels.

2.1.1. *At the meta level: The Court provides the ultimate interpretation of the Convention (Art. 32)*

The legal limits is not a very interesting issue to discuss today, because it follows clearly from Article 32 that the Court provides the ultimate interpretation of the Convention, although guided by the doctrine of legal methodology in public international law. At the

end of the day, the Court decides its own interpretation of the Convention. The Court must always keep in mind, however, that ECHR is a very special kind of convention.

2.1.2. At the infra level: The Court's position vis a vis its own jurisprudence

At the lower level, one might of course analyse the legal limits from the perspective to what extent the Court is bound by previous decisions. So far the Court's position has been that it must attach considerable weight to previous case-law. The magical formula frequently used: "while the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart without good reason from precedents laid down in previous cases" (*Goodwin v. UK* 2002, *Mamatkulov and Askarov v. Turkey* 2005).

For sure, this doctrine may be debated. There might probably be reasons to believe that this would be challenged in the future. I would not recommend, however, that this position be changed. If the Court would like to reorient itself, to take one step back, it would necessitate an analysis whether there exists some kind of legal limitation. The Court is for the time being bound by its doctrine of precedent.

2.2. "State sovereignty"; the principle of "consent"

My second cluster of problems relates to the question of State sovereignty, the principle of consent. This is certainly also a legal dimension. International protection of human rights does represent a restriction on State sovereignty.

Torkel Opsahl always claimed, however, that one should turn this around and claim that when a State binds itself to a treaty, the State is not restricting its sovereignty, the State is exercising its sovereignty.

I will not pursue this legal dimension today. I will rather elaborate on a more emotional or political dimension to sovereignty. To what extent do people in a national State wish to be governed by an international institution? In my own country, in Norway, and also partly in the Nordic countries, this is a very important issue. There is a sad fact in Norway that people tend to confuse Strasbourg and Brussels. As I published a textbook on legal methodology, I received a letter from a colleague. He wrote "*it is a good book, but you are far too expansive on the application of international human rights provisions in domestic law. Long live national sovereignty! Down with Brussels, down with Strasbourg!*" I think it is a sad fact that in a Nordic country, at least in Norway, this turns out to be a common reaction. Scepticism towards the European Union is also influencing the attitude towards the Council of Europe and the Court.

2.3. The “legitimacy” of the Court’s judgments; “ownership” to the Convention

The third cluster of problems is what I call the legitimacy of the Court’s judgments, or what is often referred to as “ownership to the Convention”. This dimension is certainly not primarily an emotional one. This dimension takes us into theories on democracy and the rule of law.

One may ask what makes a judgment from the European Court legitimate? Legitimate for whom? Parliament, Government, people at large? Obviously, it must be legitimate for Parliament and Government. But in a modern, open democratic society, the judgment must be legitimate also for the public out there in the streets.

These issues are normally, at the domestic level, discussed within a paradigm which is often formulated as judicial activism v. judicial restraint. The same paradigm often applies also to the discussions concerning the ECtHR. In my view, this is slightly misleading. One should be careful when transferring concepts and problems from the domestic level to the international level. If one wishes to defend the Court, one must remember that if the Court would refrain from being active and creating new norms, there would be no normative development at all. The Court cannot, like a domestic Supreme Court or Constitutional Court, leave the challenge to develop norms to the legislator. The ECtHR cannot leave the legislative action to the States. They will certainly not act. This is a very important difference from the parallel discussion within a domestic political system.

However, those, like voices in the Nordic countries, who would criticise the Court, would emphasise that it is particularly dangerous for an international court to create new norms, since there is no political body which may correct and control the court. The international society lacks a Parliament.

This dilemma illustrates that there are tensions today between two fundamental principles, on which the European States are built: the principle of democracy and the principle of the rule of law. We experience this all over the world.

In 2009, The Venice Commission arranged, in cooperation with the South African Constitutional Court, a large conference on constitutional law in Cape Town. Some 100 Supreme Courts or Constitutional Courts were represented. In my capacity as the President of the Venice Commission, I gave a press conference, together with the President of the Constitutional Court of South Africa. All the journalists immediately approached the President of the Constitutional Court. Their question: “*Sir, why do you think that your court has the competence to intervene with acts of Parliament?*” In the South African context, we all know that the question really was: why and how can the Constitutional Court intervene with the decisions of the ANC? After some five minutes, I asked patiently, if I could add something.

I said that this is not primarily a South African discussion, this is a global discussion; it is also going on in the Nordic countries. These discussions illustrate that there are tensions

between two fundamental principles, on which our European states are built: The principle of democracy and the principle of the rule of law.

I would like to inform the distinguished audience today about a discussion which has been more and more articulated in Norway during the last decade. Seen from Venice, I have, however, observed the same conflict in other states, inside and outside of Europe.

In Norway, the Government appointed some ten years ago a committee mandated to analyse the distribution of powers in society. The committee submitted their report in 2003. A main conclusion is that during the last decades, power has been transformed from politicians to judges, from Parliament to courts. This development has accelerated as Norway has ratified the international human rights conventions; political power is transferred even to international courts. The committee interprets this development as a threat to our democracy; politicians are answering to the electorate, while judges are answering to no one but themselves.

There has been an active discussion in the aftermath of this report. Two extreme positions have been exposed: Parliament should have the ultimate power to interpret its own competence. Or: the Supreme Court must be the ultimate guard and protector of the individual.

As you are aware of, the five Nordic countries do not have a Constitutional Court. The ordinary Supreme Court does have the competence to review the constitutionality of acts of Parliament. This is also implemented, to different degrees.

Consequently, The Nordic position towards the ECtHR must be read from this perspective. In some sceptical circles, the scepticism does not necessary relate to protection of human rights per se, but rather who should control the national implementation of these rights. These discussions certainly have bearings on the attitude also towards ECtHR.

Let me draw a line between the Nordic countries and Venice. The Finnish government submitted a request to the Venice Commission to evaluate certain aspects of the Finnish Constitution of 1999. The Commission addressed also this important issue. In the opinion (420/2007), the Commission first expresses its general position, normally a state should establish a special constitutional court. The Commission adds, however, that if the existing Finnish system protects and guarantees the same values and interests as does a fully fledged Constitutional Court, the Commission recognises that the principle of the rule of law is satisfied. The Commission mentions also explicitly that the system of judicial review must be seen in its historical context.

Today, we can learn from this opinion that, according to the Venice Commission, in a modern democratic state, governed by the rule of law, independent courts must have the competence to control the Parliament.

Personally, I fully support such a position.

In his previous capacity as President of the Norwegian Parliament, *Thorbjørn Jagland*, initiated the appointment by Parliament of a Constitutional Commission to analyse whether a modern human rights catalogue shall be included into the Norwegian Constitution, on the occasion of the 200 years anniversary in 2014. One of the items according to the mandate is to discuss the control of human rights provisions. I am very pleased to serve on this Commission.

There is general agreement that the Convention and the Court have changed dramatically during these 60 years. This development may also be analyzed from the perspective I now elaborate.

When one studies the drafting of the ECHR, one is struck with to what degree the Second World War marked the Convention in 1950. The Convention should be a barrier against a new disaster. It was to become a safeguard against Nazism and Soviet communism. It was to guarantee a free democratic Europe, or rather, Western Europe.

Forty years thereafter, in 1990, the President of the Court, *Rolv Ryssdal*, gave a guest lecture at King's College in London. Here, he expresses his futuristic visions for the Court: *"It is my firm conviction that if the Court continues in the course that it has followed since its early days it will consolidate more and more its emergent role as a European constitutional court"*. What a dramatic change, from a bulwark against war and oppression, into a pan-European constitutional court.

In 1996, *Rolv Ryssdal* stated that this process of transition was completed. He writes in an article *"the Court's position as a quasi-constitutional court for the whole of Europe is now widely accepted"*. And he adds: *"as we approach the end of one century and the beginning of the next, the Convention community of States has with some courage embraced a new era"*.

I am convinced that *Mr Ryssdal* was right, both in 1990 and 1996. I doubt, however, that he would have expressed the same views if he were present here today. Actually, shortly before he passed away, *Rolv Ryssdal* expressed deep concern as to the Court's and the Conventions's future. He asked whether a Convention system based on subsidiarity and the fact that rights are protected at the national level, whether such a system could work with more than 40 States. He argued further that one would have to rethink the whole system, one might have to go back to *"the fundamental aim of the Convention and what the system can reasonably be expected to achieve."*

I leave here *Rolv Ryssdal's* very wise thoughts and ideas. However, this dimension is, in my humble view, part of the reason for the problems facing the Court today. Seen from many domestic political and legal systems, the Court does not have legitimacy as a pan-European constitutional court.

Still however, one might hear voices claiming that if the Court in the future is not to be drowned in tens of thousands of trivial complaints, it must rise as a court of European Principles. As I see this, I am afraid that such an avenue will eventually lead into a dead

end. For the two reasons I have just explained: scepticism in many countries concerning judicial review at the national level. Even greater scepticism, at least in the Nordic countries, for judicial review at the international level.

2.4. “Efficiency”; the judgments must be construed in a form which allows States to implement/execute them

I have labelled my fourth cluster of problems “efficiency”. Disturbingly, one observes more and more that the fight for respect for human rights is not settled when the Court delivers the judgment. What remains, is the effective execution of the same judgment. It is obviously also a consideration relating to the limits of evolutive interpretation that the Court must be able to give guidance to Governments, as to how they should best implement judgments. There has been lot of focus within the Council of Europe on the execution of judgments. This is still a problem. It falls outside my mandate to look into this aspect. I hear, however, from time to time that Governments feel that the directions from Strasbourg are far too detailed and leave too little to the discretion of the national authorities.

2.5. “Capacity”; new areas/issues protected will lead to even more complaints

Luckily, we are not asked to provide ideas as to how the Court should effectively deal with the enormous backlog. Allow me, nevertheless, to point to one pretty obvious factor. If the Court in the future were to expand into even more areas of the life of the States and the individuals, the number of applications would certainly increase even further.

2.6. “Cross over effects”; increasing concern/scepticism by States vis a vis new human rights commitments, in particular mechanisms of individual complaints

Being personal again, going back to my own analysis of the *Golder* case, I was some 35 years ago sincerely convinced that the interpretation which, in an optimal way, would promote and protect human rights, was exactly the conclusion which the Court finally reached. I will also always remember meeting enthusiastic members of the Commission and the Court in Strasbourg, who were proud of being in the forefront in the protection of human rights. We all did this with the very best intentions.

Along the way, however, something went wrong. Today, I’m unable to indicate what went wrong. Probably this: we left the Governments behind, we lost them. It is disturbing today to see how Governments are reluctant to enter into new human rights commitments.

I experienced this in the United Nations, I was for many years chairing the drafting of the Declaration on Human Rights Defenders. It took years and years. The Governments knew perfectly well that an open formulation in the text later would be held against them.

Such scepticism does not only apply when new substantive commitments are negotiated. Even more disturbingly, many Governments are reluctant to accept mechanisms in optional protocols of individual complaints.

In conclusion, this expansive dynamism has created some kind of a backfire effect. There is a lack of trust between many Governments and the international supervisory bodies. There is an urgent need to restore this trust.

3. Some techniques which the Court may apply to avoid approaching the “limits”

I will then turn my attention to some techniques which the Court might apply to avoid approaching the “limits”. These techniques give remarkable discretion for the Court. The Court can cut deeply into the souls of Governments; or the Court can give considerable leeway to the States.

3.1.1 The principle of “subsidiarity” - a general principle in disguise

The concept of “subsidiarity” has become **the** word in the legal vocabulary during the last years. I see this as a general principle in disguise. It is given different connotations in different areas.

In the Strasbourg context, I would plead that the issues I list under **3.1.** all are elements contained in a broad concept of “subsidiarity”, as understood in the context of ECHR.

There is neither time, nor is it needed before this elevated audience, to dig deep into the many elements I list here. Suffice it to reflect on certain general aspects of these questions.

3.1.1. “Subsidiarity” seen from the perspective of the States

This principle must be seen both from the perspective of the States and from the perspective of the Court. At the outset, if we see this from the perspective of the States; if a State claims that it is better placed to implement human rights than the Strasbourg Court, then the State must act accordingly. The State must actively guarantee that the three branches of Government implement and secure the rights protected in the Convention. This relates to everything from information about the standards to the political will to comply with those standards. Furthermore, the State must create effective domestic remedies which will allow individuals to seek redress at home rather than spending years before the ECtHR. It is even implied in my statement that the State should

also recognise the binding effect of the Court's jurisprudence, even though the State is not strictly speaking a "party" according to Art 46. I tend to agree with those who claim that such a *de facto erga omnes* effect follows from Art 1 and Art 19.

3.1.2. "Subsidiarity" seen from the perspective of the Court

On the other hand, seen from the Court's perspective, the Court must also take the principle of "subsidiarity" "seriously", to borrow *Dvorkin's* famous phrase. The Court has given itself enough effective tools to do so. I have listed some here:

3.1.2.1. "Margin of appreciation"

3.1.2.2. "4th instance"

3.1.2.3. The "facts" of the case

3.1.2.4. "Proportionality"

3.1.2.5. "Necessary in a democratic society"

These tools, these principles, are designed so as to allow States room for manoeuvre, not outside, but within the Convention. The Court may also, however, if it so wishes, refrain from applying these principles, giving the States the feeling of being overruled in an issue of great importance to them.

If I were to advise the Court, I would have pleaded in favour of applying these principles in a favourable way, with a basic understanding that a State is better placed than the Court to decide on the details.

3.2. Interim measures (Rule 39)

Yet another issue which is much debated these days, is the question of interim measures. In a sophisticated judicial system, such measures are certainly needed. Without them, justice cannot be done, because the case is in reality closed before the court can open the legal work. The applicant has been expelled.

On the other hand, Governments often feel that their hands are bound for a long period, waiting for the outcome of the case. Again, the joint partnership between the States and the Court is at stake. Again, I would advise that the Court should not interpret its competence in this area too broadly.

3.3. Major challenges from Interlaken

"..... ensuring the clarity and consistency of the Court's case-law"

"..... preserving the impartiality and quality of the Court"

"..... a shared responsibility between States Parties and the Court"

Interlaken has left us with major challenges.

I will focus on one single aspect only. Being a rather boring lawyer, I see consistency as a basic prerequisite for credibility. And I shall have to add, I am not alone in Europe. I have a good friend, who is much more creative than me; he told me once that consistency was for boring people like me. But I think in the long run, even people who are more innovative and creative, would expect the Strasbourg Court to be consistent. If not, the Court will not only lose its credibility, it will lose its relevance.

I see, with great enthusiasm, the techniques developed by the Court itself, as well as by the States, to maintain consistency. It is my sincere hope that the Court would avail itself of these opportunities.

Allow me towards the end to raise two issues (3.4 and 3.5.) which are both politically sensitive and legally complicated. I think, however, that sooner or later they will have to be addressed.

3.4. Looking into the crystal ball: 47 member States: “a common European standard” or “different European standards”??

Since the early days, The Commission and the Court were establishing what they called “a common European standard”. States who were lagging behind or falling below these standards would have to be prepared to lose their case in Strasbourg.

Since then, two major events have occurred. Firstly, the Convention now covers 47 Member States. Secondly, the protection of human rights in Europe has reached a level of sophistication which was unimaginable to those who were struggling to establish “a common European standard”. Looking into the future: Is it realistic to pretend that the whole continent will be covered by a “common European standard”, in each and every aspect of an individual’s life?

3.4.1. Links between “standards” and “margin of appreciation”

Of course, from a theoretical point of view, one might claim that the already established principles, in particular “margin of appreciation” and “necessary in a democratic society” give the Court an opportunity to avoid raising this very general issue.

I feel, however, that sooner or later, the Court – and we outside the Court – will have to address this challenge up front.

3.4.2. “Universalism” v. “relativism”

As I said, the problems under 3.4. are very sensitive and difficult. Today, we can only touch them.

In the United Nations, this discussion has been going on for decades: Are human rights really universal, or do we have to recognise regional differences? As we all know, the Western position is that one should defend the principle of universalism and oppose the position according to which the protection of human rights must be interpreted in a regional, relative context.

But we are in Europe, where regional differences certainly exist, but to a much lesser degree than at the global level. This makes a similar discussion less complicated here.

The Court has over the years brought a sophisticated level of human rights protection to Europe. My challenge, which might possibly be discussed in the years to come: Is it conducive to accept a more relative interpretation of the human rights protection, taking into account sociological, historical and other basic factors?

3.4.3. Differentiation according to rights?

While struggling to find the answers to the last question, maybe I should be even more courageous today? In the future, is it necessary to differentiate between different rights according to the Court's jurisprudence?

Could we envisage a future where the Court, in order not to approach, or even overstep, the "limits", will establish a jurisprudence according to which there are some "hard core" rights which are universal, while other rights are to be interpreted in a relative context?

3.5. Another perspective, from the theory of legal reasoning: "conflict between norms" v. "harmonization of arguments"

The very last issue I bring forward today is very dear to my theoretical heart. Again, I can only touch it here. This is a problem from legal methodology. Normally, we discuss a potential conflict between international and domestic law according to this model: interpretation of international treaties (ECHR) on the one hand and interpretation of domestic statutes (Norwegian penal procedural law) on the other. This is seen as some kind of conflict between different norms.

I have for many decades presented another model. Legal argumentation is a process where one harmonises different kinds of arguments in one single, comprehensive process.

I hope that the Court in the future could also look into this.

I am extremely pleased to see that *Judge Tulkens* in *The Georgian constitutional law review*, expresses the following position: "*It seems better to see if some compromises from both sides could be reached in order to avoid sacrifice on either side*". In your

excellent article on the Court's recent jurisprudence, Madame, you spend at least one page on this issue, which I find extremely promising and very interesting.

Distinguished *President Costa*, *Judge Tulkens*, ladies and gentlemen, thank you for your attention.