Article

# Human dignity: an illusory limit for the evolutive interpretation of the ECHR?

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When speaking about human rights protection at the national, regional or worldwide level, an idealist would never put any limits to it. The sole fact of limiting an evolution of norms protecting human rights would be seen as counterproductive or even illogical. To claim that human dignity might be a limit for evolutive interpretation of the European Convention on Human Rights (ECHR) could be seen by an idealist as a nonsense. However, the ECHR as an international treaty is not floating in a legal, political and social vacuum, but it is still anchored in a legal, historical and political reality. The aim of this article is to portray some basic elements of the relationship between the concept of human dignity and the evolutive interpretation. The author is unable to give a final answer to the question in the title of this article, but the purpose is more to spread out key elements, notions and considerations for further thoughts. The article will first present some basic issues related to the subject matter, will then focus on the evolutive interpretation, and finally outline the role of human dignity in the case law related to the evolutive interpretation.

## 1. WHAT IS ON THE STAGE?

During its 65 years of existence, since it was adopted in 1950 by 10 Council of Europe Member States and entered into force in 1953, the ECHR has made important changes to the design and content of the national legal orders of all contracting states (47 Council of Europe Member States). Moreover, through its case law the ECHR has implicitly and sometimes explicitly created the European Public Order (one can count more than 100 judgments and decisions where the European Court of Human Rights (ECtHR) refers to this concept). In spite of being a classical international treaty, the Convention – for its content, the ECtHR's jurisprudence, and the phenomenon of constitutionalisation – is well and truly immersed in the day-to-day life of Europeans. However, the court has never given up treating the Convention as an international treaty and so it is for states – the contracting parties. Thus, the Convention is in a material way something more than a formal international treaty, and so the interpretation of such a treaty clashes with the very specific legal, political, social, cultural situation and environment in Europe. It is not possible to treat the Convention as only a classical reciprocal international treaty, even though basic technical processes definitely apply to it. This is true, for example for the process of interpretation. On several occasions, the ECtHR referred in its judgments to the Vienna Convention on the Law of the Treaties and to the rules of interpretation enshrined in it and applicable also to the ECHR. For the purposes of this article, I can use the general definition of interpretation which is given in the *Max Planck Encyclopaedia of Comparative Constitutional Law* (Mattias Herdeger, "Interpretation in international law", R Wolfrum (ed), vol VI (Oxford University Press, 2012):

> *Interpretation in international law essentially refers to the process of assigning meaning to texts and other statements for the purposes of establishing rights, obligations. Interpretation is both a cognitive and a creative process.*

With regard to the changes of meaning over time, different adjectives are coupled with the term "interpretation" to portray the dynamic/evolutive/evolutionary interpretation. It means there is a new meaning with respect to the subsequent practice of states, new technologies, new norms etc (Julian Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences", *The Law & Practice of International Courts and Tribunals,* vol 9, (Brill, 2010)). With regard to the ECHR, evolutive interpretation lies within the concept of the Convention as "a living instrument" (see *Tyrer v UK* (1978) 2 EHRR 1), to be interpreted in "present-day conditions" (see *Tyrer v UK, Marckx v Belgium* (1979) 2 EHRR 330) where the protection of rights embedded in it must be "practical and effective and not theoretical and illusory" (*Airey v Ireland* (1979) 2 EHRR 305).

As mentioned above, the Convention and the adjudicatory power of the ECtHR lies within the legal, political and social environment of Europe. The issue of evolutive interpretation touches other different topics that are more or less related. The author will not examine them in detail, but rather list five main perspectives, as they are important in the overall

understanding of the topic.

(i) ***Theoretical perspective – judicial activism and judicial self-restraint***

Judicial activism or judicial self-restraint are theoretical approaches to the judicial activity of higher courts in general (the theory was first applied to the US Supreme Court). Some authors describe the relationship between those approaches as a "tension between continuity and creativity" (Archibald Cox, "The Supreme Court: Judicial Activism or Self-Restraint?" 47 *Maryland Law Review* 118, 138). The judicial activism approach was also widely debated with respect to the decision-making activity of the ECtHR, and so for the purposes of evolutive interpretation (eg *Marckx v Belgium*). Different theoretical analyses and outcomes have been presented since. Paul Mahoney opined that "as far as the European Convention on Human Rights is concerned, the dilemma of activism versus restraint is more apparent than real" (Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 HRLJ 57, 59). He concludes (at p 88): "judicial activism and judicial self-restraint are not diametrically opposed and irreconcilable attitudes to adjudication, but are rather essential and complementary components of the process of on-going enforcement of the Convention´s fundamental rights through judicial interpretation".

Judge Popović points out that those "basic approaches are to some extent parallel" (Dragoljub Popovic, "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights", (2009) 42 Creighton L Rev 361, 395). She further concludes (at p 396) that: "A range of various techniques used by the court, such as evolutive interpretation, innovative interpretation, interpretation contrary to the drafters' intent, and autonomous concepts, prove that judicial activism has prevailed in the court's jurisprudence". If in general terms this conclusion of Judge Popović seems to be acceptable and logically justified by the previous jurisprudential activity of the ECtHR, it does not establish per se any adjudicatory limit to the so-called activism of the court. The court has to face different types of opposition, especially from contracting states (cf the 2018 Draft Copenhagen Declaration, where the High Level Conference states in point 14 that:

> *[it] affirms the importance of securing the ownership and support of human rights by all people in Europe, underpinned by those rights being protected predominantly at national level by State* ***authorities in accordance with their constitutional traditions and in light of national circumstances*** [emphasis added].

The wording of this paragraph was criticised in the court's opinion on the draft Copenhagen Declaration and has not been finally adopted by the Conference.

(ii) ***Practical perspective - intentionalism and textualism revisited***

Intentionalism and/or textualism is another topic closely related to evolutive interpretation. In the author's opinion this is the other side of the same coin to judicial restraint. Textualism or intentionalism in a material way corresponds to what judicial self-restraint is in a theoretical and procedural way. In the same sense, evolutive interpretation (or purposive interpretation) corresponds to judicial activism. In other words, if on the one hand judicial activism or self-restraint represents a theoretical approach to adjudicatory activity of the ECtHR, intentionalism and textualism, and evolutive interpretation on the other hand are practical manifestations of those theoretical approaches. As for judicial activism, textualism/intentionalism are originally linked with US Supreme Court adjudicatory activity. For the purposes of the Convention, Letsas speaks about originalist theories. (George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, 2007), 60). He differentiates textualism which "argues that a legal provision must mean what it was taken to mean originally, ie at the time of enactment" from intentionalism, which claims "that a legal provision must apply to whatever cases the drafters had originally intended it to apply". As Popović's conclusion was the predominance of judicial activism over self-restraint, Letsas´s conclusion was that there had been a failure of originalist theories and a predominance of object and purpose approach with respect to the interpretation of the ECHR. Recently, the contradiction between textualism and the purposive approach has been somehow reconciled by Judge Sicilianos in the case of *Magyar Helsinki Bizottság v Hungary* (Grand Chamber judgment, 8 November 2016, Application no 18030/11). In his separate opinion, referring to the evolutive interpretation he claims that:

> *this interpretative method allows the text of a convention to be continuously adapted to "present-day conditions", without the need for the treaty to be formally amended. The evolutive interpretation is intended to ensure the treaty's permanence. The "living instrument" doctrine is a condition sine qua non for the Convention's survival!*

Sicilianos also stressed the importance of travaux préparatoires for the interpretation of the Convention, however assigning to them the role of subsidiary means.

(iii) ***Political perspective – the issue of sovereignty of contracting states (doctrine of in dubio mitius)***

The issue of the sovereignty of contracting states must be considered at this point. If the contradiction between judicial activism and judicial restraint was wrapped up as a theoretical adjudicative approach, with textualism and purposive interpretation its practical manifestation, sovereignty issues with respect to the

evolutive interpretation reflect legal-political aspects in international law and relationships in the framework of regional human rights protection. There are two different approaches: a traditional one, meaning that in the event of doubt an international treaty – the Convention – should be interpreted restrictively in order to protect state sovereignty, and a new one claiming that in case of doubts the Convention should be interpreted with regard to larger human rights protection (what supports more judicial activism etc). The doctrine of *in dubio mitius* is closely related to classical international law and restrictive theory of interpretation. It was widely developed by the Permanent Court of International Justice in the *Lotus* jurisprudence. Nowadays, the traditional approach of *in dubio mitius* is to be applied for international treaties on human rights, rather than (to the opposite) in cases of such treaties the interpretative presumption is considered as a presumption of effectiveness (*effet utile*) which is used by adjudicatory bodies (see Mattias Herdeger, cited above). For the sake of reconciliation between sovereignty issues mirrored in cultural-societal situations of contracting states and the principle of effectiveness, the ECtHR has created through its jurisprudence the doctrine of margin of appreciation. Macdonald puts it in these words: to "avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention" (Ronald St J Macdonald, "The Margin of Appreciation" in R St J Macdonald, F Matscher, H Petzold (eds), *The European System for the Protection of Human Rights*, (Dordrecht: Martinus Nijhoff, 1993) at 123).

*(iv)* ***Structural perspective – the ECHR as a** sui generis **treaty creating European constitutionalism***

The ECHR is far from being classical international treaty, creating reciprocal rights and obligations to states. Here, the individual is a unique holder of rights in opposition to states. Thus the conventional system creates a special situation where reference can be made to the European public order (cf the ECtHR judgment in Ireland v United Kingdom, 18 January 1978, Application no 5310/71, §239, which stated:

> *Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".*

Again, we may observe a certain tension between treating the Convention as a pure international treaty with, for example, rules of interpretation and the position of states and their autonomy on one hand, and the Convention and its case law creating a unique constitutionalised order for the region.

*(v)* ***Consequential perspective – the question of predictability (legal certainty)***

This final topic with reference to evolutive interpretation diverges a little from previous patterns. The question arises of whether and how states can themselves be aware of the evolution and when necessary change their national legislation in order not to violate Convention rights.

All five perspectives presented relate closely and intervene somehow in the sole phenomenon of evolutive interpretation and its possible limits. The ECtHR assesses changes in societal issues through the technique of the European consensus. The technique was, especially at the beginning, widely criticised by many authors for the lack of transparency and legal predictability, and the low level of legal certainty (for a developed survey of those critical approaches cf Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights,* (Cambridge University Press, 2015) at 115s). Nowadays, the ECtHR and its research unit provide a better understanding and offer empirical data on national legislation relating to the issue at stake (Luzius Wildhaber, Alrnaldur Hjartarson, Stephen Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights", (2013) 33 HRLJ 248, 259). The European consensus is mostly based on the national legislation of Council of Europe Member States only. Sometimes the court refers to other instruments – international treaties, soft law documents etc – in what is sometimes criticised for being judicial activism. One can understand the need for the ECtHR to ascertain what present day conditions are. What can trigger criticism is the fact the court relies on national legislation and does not introduce any other values which might be taken into consideration to support its arguments. It is fascinating to see the easiness of the process, a simple arithmetic counting carried out by the court to examine whether or not there is a change in societal perception of the issue at stake.

From the ECtHR's perspective, evolutive interpretation is not based upon subsequent practice (for a general survey on subsequent practice see Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013), but rather perceived as changes in societal and/or delicate issues. This fact reconfirms the specific feature of the Convention as a human rights treaty. It would be difficult to perceive societal changes in contracting states as mere subsequent practice to the treaty within the meaning of Article 31 § 3(b), which stipulates: "that shall be taken into account, together with the context" any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. This subsequent practice should thus lead to an agreement (James Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties" in *Treaties and Subsequent Practice*) which is not the case when the ECtHR has to deal "only" with the European consensus. But what arouses

controversy is the total reliance of the court on changes in societal issues. To put it more bluntly, one may ask whether and to what extent the court is "bound" by the consensus among contracting states in any situations involving changes of societal issues. Should the court respect the "democratic principle" of the creation of new evolutive interpretation in its entirety? It could be said that the court should respect the democratic procedures and national law-making procedures at national level, even though they might be guided by political opportunism, ideologies etc.

Here we come to a stumbling block. The court relies on consensus among Member States, which subsequently leads to evolution in interpretation of human rights norms, without assessing whether this "subsequent practice" of states itself conforms to the protection of human rights. The court accepts this process as an evolution in societal perception.

These doubts lead the author now to examine evolutive interpretation and possible limits thereto.

## 2. EVOLUTIVE INTERPRETATION

This section is divided into three parts, presenting first some conceptual issues with regard to the evolutive interpretation, followed by applied accounts on the phenomenon within general international law, and finally displaying practical cases of limits with regard to the ECHR.

### *(i) Evolutive interpretation as a concept*

Evolutive interpretation is not a specific means of interpretation (compared for example to historical, teleological or contextual) but is rather a specific technique dealing with interpretation of generic terms of the treaty at points in time. Fitzmaurice puts it in another way:

> *The concept of the dynamic (evolutive) interpretation is often equated with the principle of contemporaneity, the teleological interpretation of treaties as well as the principle of effectiveness* (Malgosia Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties", (2008) 21 HagueYIL 101, 102).

As interpretation of international treaties in general and the Convention specifically is "both a cognitive and a creative process" (see the quotation from M Herdeger, above), we may ask about any existence of limits to the *evolutive* interpretation concerning situations, principles or phenomena defined and/or existing in the legal system which would stop the evolution in interpretation. As those limits are not at all explicitly mentioned and elaborated on in the doctrine of international law, and neither have they been pointed out in the international jurisprudence, it is rather difficult to grasp the phenomenon. The same is true with respect to the ECHR. We may ask whether there might be some interpretation, which leads where it should not, goes beyond some limits, and could thus be assessed as an erroneous evolutive interpretation, even though grounded on European consensus. In fact, in this situation shall the societal changes be taken into the consideration? Should they form the basis for the switch of evolutive interpretation or not? Or put it in differently, do those societal changes reflected in national legislation have to be *adjusted (corrected)?*

This claim, however, would require a thorough analysis of the creation of legal norms of (international) law, the concept of law itself, and the role interpretation plays in this process – something outside the scope of this paper. (For a deep analysis of the authority of international law see for example Samantha Besson, "The Authority of International Law – Lifting the State Veil", (2009) 31 Sydney L Rev 343). However, in assessing this phenomenon two general methodological approaches towards international law come into consideration: conceptual analysis and focal analysis. Those rather philosophical concepts may oscillate between legal positivism and natural law theory. On one hand, for conceptual analysis we may ask what makes the authority of international law. In this regard Besson, referring to Joseph Raz, speaks about legal normativity of international law or a claim to create obligations to obey the law that in principle precludes some countervailing reasons for action (Samantha Besson, "Theorizing the Sources of International Law´ in S Besson, J Taioulas (eds) *The Philosophy of International Law* (Oxford University Press 2010, 173). From the perspective of voluntaristic or positivist theory, the consent of the state backed by state practice is crucial for the existence of international legal normativity. As long as the practice of states evolves, the concept of law being backed by this consensual practice cannot be limited. On the other hand, for focal analysis, however, we are not looking at the concept, but focusing on a goal or aim of the system. Patrick Capps speaks in this regard about "social practices conceived of as purposive phenomena" (Patrick Capps, Human dignity and the Foundations of International Law (Hart Publishing 2009) at 40). It might be for international law, for example "peaceful coexistence of the state" or "cooperation between states". With the change of paradigm one can now witness in international law (see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016), the author asks whether human dignity could be the ultimate purpose of international law (see Patrick Capps, cited above).

### *(ii) Evolutive interpretation in international and European adjudication*

As it was outlined above, the evolutive interpretation of treaties is a common interpretative technique in international law, related to a purposive interpretative approach and "part of the teleological principle" (Malgosia Fitzmaurice, cited above, at 117). As dynamism or evolution should reflect changes in state practice or changes in societal issues in states (for human rights issues), the evolutive interpretation presents an element of stabilisation of international relations and then a destabilising ingredient. Bernhardt puts it in this way:

> *If it is the purpose of a treaty to create longer lasting and solid*

> *relations between the parties or to guarantee personal freedoms to citizens as well as foreigners, it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation* (Rudolf Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", 42 German YM Int'l L 11 (1999) 16-17).

Thus in international adjudication, the phenomenon of evolutive interpretation has served for the creation of stabilised relations. The International Court of Justice, for example, interpreted in a evolutive way the obligations with regard to the mandate in South-West Africa (ICJ, *International Status of South-West Africa*, Advisory Opinion, 1950); the watershed line principle in the delimitation of boundaries (ICJ, *Case concerning the Temple of Preah Vihear,* 1962) the Martens clause with regard to the use nuclear weapons (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996); or inserted newly developed norms on environmental protection into a treaty (ICJ, *Gabčíkovo-Nagymaros Project Case*, 1997) and similarly with respect to environment impact assessment (ICJ, *Case concerning Pulp Mills on the River Uruguay*, 2010) and recently with respect to the International Convention for the Regulation of Whaling (ICJ, *Whaling in the Antarctic*, 2014). However, it is in the case opposing Costa Rica and Nicaragua (ICJ, *Dispute regarding Navigational and Related Rights*, 2009) where the ICJ displays developed reasoning concerning an evolutive approach in interpretation. The ICJ distinguishes on the one hand the use of generic terms which in accordance with the intentions of the parties, especially for treaties "entered into for very long period" or "of continuing duration" (§66 of the cited judgment) are subject to evolution, and on the other hand the subsequent practice of states which "can result in a departure from the original intent on the basis of a tacit agreement between the parties" (§64 of the cited judgment). Evolutive interpretation of generic terms of the treaty is not the issue. The original intention of the parties having authority for the change through the mechanism of generic terms is somehow replaced rather by subsequent practice possibly backed by new intentions of the parties. This clear distinction is rather difficult to find in the judgments by the ECtHR.

With regard to the evolutive interpretation before the ECtHR, we are in the presence of neither *typical* generic terms states intended to be evolved in time (see above the dichotomy between the intentional and purposive approach), nor characteristic state practice which would lead in an "agreement" within the meaning of the Article 31 §3 (b) of the Vienna Convention on the Law of Treaties (VCLT). The adjudicative practice of the ECtHR with respect to evolutive interpretation is rather varied. Recently, Djeffal described a deep analysis on evolutive interpretation before the ECtHR where he pinpoints that "the court has shifted its method between balancing and interpretation, consensus and the VCLT, as well as between various ways to interpret the VCLT" (Christian Djeffal, *Static and Evolutive Treaty Interpretation* (Cambridge University Press, 2016) 343). This again confirms a specific characteristic of the Convention where rights and obligations are not reciprocal and so the classical theory applicable to international law is unlikely be applied.

By way of contrast, in an actual case the court is assessing specific, particular national legislation and the conduct of a state whether it conflicts or not with the obligations arising out of the Convention. In order to entail international state responsibility the court has to find that the particular conduct of a state violated the conventional rights of the applicant. It means that, in the situation of evolutive interpretation based on European consensus, in a given case the court, when assessing the particular conduct of a state (sometimes based on its municipal legislation) relies on other conducts, behaviours, and practices of other states. In any event, seen from the perspective of legal certainty and state responsibility it is quite difficult to grasp the phenomenon. On one hand, it is evident a state cannot reason its conduct by its proper national law (see Art 26 of the Vienna Convention on the Law of Treaties which reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.") On the other hand, until the judgment of the ECtHR finding a violation of the Convention is delivered, a state is not aware of the evolutionary shift of the interpretation. The ECtHR when facing this phenomenon has answered in *Vallianatos*:

> *The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention (see F v Switzerland, 18 December 1987, § 33, Series A no 128). Nevertheless, in view of the foregoing, the court considers that the government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 in the present case"* (ECtHR, GCh, judgment in *Vallianatos and Ors v Greece* (Applications nos 29381/09 and 32684/09), 7 November 2013, § 92).

Similarly, the court ruled with regard to a (weakly justified) policy choice of a State that: "given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life". (ECtHR, Ch judgment in *Schalk and Kopf v Austria,* (Application no 30141/04), 24 June 2010, § 139.)

In fact, newly developed intentions of States reflecting societal changes and being mirrored by their national legislative practice (and occasionally by their soft law or

hard law instrumental agreements) can be labelled as a vis creativa for interpretational shift to be accomplished by the court. A dimmed perception of this phenomenon would be to characterize it as a vicious circle – States´ practice is making up the evolution and at the same time State practice not taking part in the evolutionary shift is examined by newly interpreted rules. The author could rather opt for a spiral-viewed perspective. Remains then the question of possible limits to this spiralled evolution.

**(iii) Limits**

Even though the phenomenon of evolutive interpretation is rather well anchored not only in general international adjudication but especially in the human rights adjudication, the question of possible limits to it has not been presented by scholars ….The only exception is a conference organized by the court in 2011 on a regular scheme of *Dialogue between Judges* ("Dialogue between judges, European Court of Human Rights, Council of Europe, 2011" – "What are the limits to the evolutive interpretation to the Convention") It is worth to highlight that no speaker has questioned the sole existence of such limits to the evolutive interpretation. In his introductory remarks, then President of the Court Jean-Paul Costa put it in these words: "But our seminar will also pose a question: what are the limits to the dynamic nature of that interpretation? That presupposes that such limits exist – we may at least presume they do. In any event, if there are limits what are they? Do they lie in the European consensus or absence of consensus? Are they circumscribed by the intent of the States which, as masters of the treaties, have adopted a number of additional Protocols to the Convention? Is that intent always indicated expressly? Or does evolutive interpretation exist by tacit consent?"

One can see, those limits portrayed either by Judge Costa, or later in her speech by judge Françoise Tulkens are all oriented to the very question of the States´ stance and role in the creation of international legal norms (intent of States, practice of States etc.) In other words, those limits lie in a centre of the court´s adjudicatory role as an international institution created by and for States. We can find similar conclusions in two separate opinions, where judges made an explicit concerns about limits of evolutive interpretation to the Convention. In *X and Others v Austria* (ECtHR, GCh judgment Application no 19010/07, 19 February 2013, §23), in their partly dissenting opinion seven judges, pinpointing on judicial activism, argue that "the point of the evolutive interpretation, as conceived by the court, is to accompany and even channel change; it is not to anticipate change, still less to try to impose it.". By the same token, however in a more comprehensive argumentation, Judge Sicilianos delineates his accounts on limits to evolutive interpretation in the case of Magyar Helsinki Bizottság (ECtHR, GCh Application no 18030/11, 8 November 2016, §§10 -17). The Greek judge, after portraying that intentions of the parties not clashing with the evolutive interpretation, gives three limits to it, to wit: the evolutive interpretation cannot be a contra legem interpretation, cannot go against the object and purpose of the Convention and has to reflect present-day conditions. All three seem to be at first sight very logical.

First, the *contra legem* argument. Sicilianos writes: "it is important that the proposed interpretation remains within the limits of the terms used by the Convention and does not directly contradict them". At first glance, to "remain within the limits of the terms" is a nice example of textualism. However, it is barely difficult to understand the real meaning of this sentence. If it is the very interpretation which gives to the terms their genuine meaning, it is not easy to imagine how the terms to be interpreted might be limiting the interpretation as such. Moreover, there might be a logical problem as well. Admittedly it works for very clear examples Sicilianos gives (right to life does not encompass right to die, right to marry cannot be interpreted as right to divorce). An X being interpreted cannot lead to negation of X. Does it work also, if we only lightly switch the interpretation every, let´s say, two years and with the help of magic ´living instrument´, after 10 years we get from ´X´ a ´negation X´? (One can compare eg the arguments in the *Pretty* and *Vincent Lambert* cases).

Then, object and purpose argument. Sicilianos speaks about the "golden rule of any interpretative approach" enshrined in the Art. 31 §1 of the VCLT. So, what in fact is a rule that applies for every type of interpretation (interpretation not compatible with the object and purpose of the treaty is not permitted by rules governing interpretation methods), cannot serve as a limit for specific technique of interpretation. Moreover, the purposive approach has been frequently used as theoretical ground for evolutive interpretation. Can a propelling force be at the same time a hindrance for the sake of interpretation? And with regard to the evolution of different terms and concepts within the Convention, could we imagine as well a change of the "object and purpose" through evolutive interpretation?

Lastly, the present-day conditions argument. Sicilianos points out that the interpretation should reflect "present-day conditions" not those which might prevail in the future; he alludes to the phenomenon of judicial activism, or court as a law-maker issue. What is rather a consequential description of adjudicatory activity of the court then a "proper" limit to be applied by it.

All three limits presented in the case *Magyar Helsinki Bizottság* by Judge Sicilianos reflect more or less stances which were depicted in theoretical way in section I of this paper. One can rejoice the fact that judges of the court start (explicitly) mentioning issues which have been already put by scholars into consideration years ago. Now it is the question of how those systemic limits will be in fact implemented into the court´s adjudicatory practice. However, at the end of the day, those limitations will still reflect theoretical controversies which arise from the concept of law based on will or practices of States. Would the concept of human dignity be a plausible limit for evolutive interpretation?

## 3. HUMAN DIGNITY

After all the atrocities perpetrated during the 2WW, the concept of human dignity has started to play an importatnt role of a principle or at least an element of constituitionalism. Since the Second World War, one can encounter the concept of human dignity being intimately related not only with national constitutionalism (Aharon Barak, *Human dignity: the constitutional value and the constitutional right,* Cambridge University Press, 2015), but anchored in the constitutional pattern of law in general (Catherine Dupré, *The Age of Dignity, Human rights and constitutionalism in Europe*, Hart Publishing, 2015; Christopher McCrudden (eds), *Understanding human dignity* (Oxford University Press 2013). It is not the purpose of this article to make an elaborate (historical) depiction of the concept of human dignity. In this paper, I will just take as an assumption that before becoming a very legal concept after WW2 and enshrined explicitely eg in the German constitution (Art 1) and the 1948 UN Universal Declaration of Human Rights (Art 1), human dignity has been thoroughly discussed as a philosopical concept for at least two centuries before. (Dupré, cited above, at 29). Conceived primarily as a leading notion of constitutional law, the concept of human dignity has started to play a *constitutional* role even in the realm of international law as well.

The author has portrayed above that with reference to focal analysis the authority of international law may be based on specific purpose (cooperation of States, peaceful coexistence of States). It means that, even though the will of States is needed for the creation of particular norms of international law, the existence of international norms reflects a specific purpose of the system. The history of international law shows us different objectives and functions States were aiming at. Nowadays, as the international community comprises also other subjects then States, different stakeholders play an important role in the creation of international norms and the humanity aspects is more and more apparent in all activities on international scene. The focus of the international law has been changed since. Present international law is witnessing a new current stipulating a changeover of the paradigm (*cf* Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (Cambridge University Press. 2016); Antônio Augusto Cançado Trindade, ´International law for humankind: Towards a new ius gentium.(I) ´/ (II) (2005) 316/317 Recueil des Cours de l'Académie de Droit International). These scholars put forward individuals (their protection, their special position) in international law as an ultimate aim of the legal system. Can we so claim that human dignity (protection of humanity) is an ultimate aim of international law? Until now, this approach to international law through the perspective of focal analysis has not been yet accepted by general doctrine, neither the concept of human dignity as a very aim and motive of international law. However, the author is deeply convinced that the concept of human dignity will play a pivotal role in a future construction of international law doctrine, what one can already experience in different areas of international law. Thus, as a functional aim of international law, the concept of human dignity has to play a critical juncture in the realm of the interpretation of international law. As it is to be understood quite logically within different areas and concerns of international law (protection of environment, use of force, humanitarian intervention, reparation for injuries, State immunities etc), a question arises on the usefulness with regard to my research topic. In general, human rights protection per se should aim to this very goal of international law. So, we may argue, whatever, or however human protection is carried out by the court, it should be within the realms of human dignity. In other words, at first sight every ruling of the court should fulfil less or more the concept of human dignity. Is it so conceivable to claim human dignity as a limit to evolutive interpretation?

From a methodological point of view, there might be two stances how to approach the concept of human dignity with regard to the jurisprudence of the court – a philosophical (extra-legal) one, and legal one.

Philosophical approach would seem to be more efficient in posing limits for evolutive interpretation. It could work as *Deus ex machina* principle which is above and which poses limits to the system. Different philosophical positions and perceptions of (human) dignity have been presented throughout history. Different cogitators dealt with the topic of dignity sometimes not even grasping it in *our* modern conception (*cf* Aristotle, Thomas Aquinas). It is not the purpose of this article to portray in detail a total overview of those conceptions, but here is a reminder of some of them: the conception of human dignity based on *imago Dei* (human being has been created as an image to God); the Kantian conception (Kant speaks about an "inner freedom" – all human beings possess an "inner transcendental kernel" – a value which is "end in self"); free-will conception with the element of self-determination; human dignity based on the person as a gift; or human dignity derived from common goods of human rights (by John Finnis). However, in our pluralistic liberal society it would be inconceivable to choose only one conception of human dignity and based on it legal reasoning in human rights adjudication. It is perhaps the reason why Catharine Dupré, refusing any kind of human dignity conception referring to religion or to God, puts it in more stringent way: "human dignity is a heuristic concept" (Dupré, cited above, at 16), "[i]n order for human dignity to be an effective problem-solving tool of constitutionalism, it has to be considered as a good belonging to all, shaped by all, and for all." (Dupré, cited above, at 21). No matter how Dupré´s approach seems to be logic and plausible for the sake of "pure" constitutionalism, especially with regard to its heuristic motivation, human dignity cannot be reduced to "all to all" narrative. And legal scholars or practitioners (for example constitutional judges) should not narrow their intrinsic reflections with regard to human dignity to an "effective problem-solving tool". The concept of human dignity has a transcendental origin (and is inherently engraved in our

existence). Thus it is hardly conceivable that it is grasped solely as a good "shaped by all". "Shaped by all" approach implies rather intertemporal interchangeability and relativeness that is not typical for human dignity as a constant and lasting concept. However, Dupré´s approach can be now freely employed (as an interim way) and human dignity may form an interpretative guidance for the human rights adjudication in general and interpretation of the European Convention on Human Rights, especially arises.

The legal approach to human dignity within the system of the Convention resigns to any philosophical references to the concept of human dignity. The court in its adjudicatory capacity rather proceeds in a quite opposite way and tries to fill the concept of human dignity by specific jurisprudential elements on case-by case basis. The term "human dignity" is mentioned neither in the Preamble of the Convention nor in its operative articles. (However, it appears in the Preamble to the 2002 Additional Protocol to the Convention n°13 abolishing the death penalty in all circumstances). In practice, the concept of human dignity is mostly closely linked with the Article 3 of the Convention (prohibition of torture and other inhuman and degrading treatment or punishment – 932 cases out of 1597 mentioning the term *dignity*), where both facets of this right – substantive one and procedural one – are at stake. (*Cf* for example Natasa Mavronicola, ´Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution´, (2014), *The Modern Law Review,* 77(2), 292. The Court, however, is referring to the concept of dignity in its other jurisprudence as well. In the case *Pretty v UK* (ECtHR, Ch judgment, 29. 7. 2002 Application no. 2346/02), the Court held with respect to the Article 8 (right to private and family life) that "[t]he very essence of the Convention is respect for human dignity and human freedom." Thus, grounding the principle of personal autonomy on the basis of human dignity, the court repeated this in many different cases (eg *Svinarenko and Slyadnev, Bouyid, Christine Goodwin, Vincent Lambert*). However, should the concept of human dignity play a more creative role for the sake of interpretation of particular provisions of the Convention, one would expect the court to develop its characteristics, content and aspects more in detail. Which is not the case. That is why, we can see in the doctrine (for example Michael Rosen, ´Dignity: The Case Against´, Christopher McCrudden (eds.), *Understanding Human Dignity,* (Oxford University Press), 2013; Ruth Macklin, ´Dignity Is a Useless Concept´, (2003) "BMJ" 327 (7429) or in some dissenting opinions (*cf.* joint partly dissenting opinion in the case *Bouyid v Belgium*, ECtHR, GCh judgment, 28 September 2015, Application no 23380/09, § 4) arguments claiming that the concept of human dignity is superfluous or nugatory, as we cannot use it as a proper source of human rights, and rather as a façade. Even though those critiques cannot deny the sole fact the court is referring to the concept of human dignity in its case law, they are somehow relevant in terms of the applicability, relevance and practicality in general in the interpretive struggling of the court. Being framed in future as an internal concept, the concept of human dignity could pose or frame a limit for interpretation such as other jurisprudential principles or concepts do. (Eg the principle of effectiveness of human rights protection, or the principle that differences based on sexual orientation required particularly weighty reasons by way of justification).

In this regard, two explications have to be given. First, if we compare the concept of human dignity to other concepts or principles used by the court, one great difference is apparent. Whereas, those other concepts rest totally on the court jurisprudence and are strictly inherent to the system, the concept of human dignity is per se independent to the Convention, playing a sort of guest role. And so it is treated like that. For the time being, the concept of human dignity in the court´s case-law has been always put in the typical State-individual relationship (and it is usually perceived even in the national constitutional normativity). Nevertheless, human dignity cannot be narrowed down to a sort of individual good as opposed to State power or interests (so even Dupré´s concept of "human dignity as *Res Publica*" would not work here), or vis-à-vis others´ individual autonomy. Entirely implemented and effective, human dignity of one person fructifies human dignity of other person and both of them contribute to the flourishing of humanity in general. (Pavel Bureš, 'Consensus on Human Nature? The Concept of European Consensus in the Case-law of the Court in Strasbourg', *Czech Yearbook of Public & Private international law* Vol 7, 2016, 197). Thus, being a legal concept for the purposes of human rights adjudication of the court, human dignity has to originate in philosophical concept.

Second, with regard to human dignity as a legal concept, The author argues, that like other concepts within the conventional system, it can pose some limits or at least shape a certain framework where the interpretation of the Convention takes place. However, is human dignity actually able to be a limit for evolutive interpretation of the Convention? Is there anything in human rights protection that State practice shaping evolution in societal matters cannot overcome? The concept of human dignity seems to be at first sight a logic and plausible account. However, if we look closely at the jurisprudential machinery, it is rather difficult to imagine for now such a situation.

## 4. CONCLUSION

Human dignity – based on philosophical accounts and jurisprudential developments of the court – could play this role of limit for the evolutive interpretation as a general extra-legal phenomenon being anchored in the system of human rights adjudication. However, it requires at least some renunciation of pure conceptual approach to human rights protection and restricted perception of pure legal positivism (less norms and more values). Evolutive interpretation of the Convention, even though being based on interpretative technique of European consensus and fuelled by the principle of effectiveness, can however be analysed focusing on human dignity only. Nevertheless, this focal analysis would require a softly different legal perception to human rights protection.

Our restricted regard and reasoning to the protection of human rights through lenses of State-to-individual relation only makes quite impossible to see the stance of individual and his role as a member of human society. It however means to let the State (as a sociological conglomerate of individuals) to bear intrinsic values as well. We will not contribute to the development of human dignity and to its main facet which is free will by annihilating the position and role of the State. Or, is it our goal to become totally free, without any ideological, political, religious or whatever interference of State and society? Would this make us more human?

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