

Risks of an Active Federal Judicial System

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The Risks of an Active Federal Judicial System

- 1) Democracies need to be dedicated to the promotion and protection of human rights.
- 2) The Council of Europe, the European Convention on Human Rights, and the European Court of Human Rights, all based in Strasbourg, France, represent the framework and mechanism for the promotion and protection of human rights among the 47 European nations that are members of the Council of Europe.
- 3) The Council of Europe's mission to promote and protect all human rights is broader than that of the Convention and ECHR, which focuses on civil and political rights.
- 4) Unfortunately, the Council's Secretariat and Parliamentary Assembly and the ECHR judges are interpreting the Convention as a "living" document to advance social rights not contained in the Convention.
- 5) As a result of several recent controversial decisions by the ECHR, citizens at the national level are questioning the agenda and impartiality of the ECHR.
- 6) During the past 40 years, to the detriment of state sovereignty and its credibility as an impartial arbiter of important legal matters, the Supreme Court of the United States engaged in a similar expansion of its powers.
- 7) The ECHR should limit itself to the protection of civil and political rights.

The Council of Europe, based in Strasbourg, France, now covers virtually the entire European continent, with its 47 member countries. Founded on 5 May 1949 by ten countries, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights.

The primary aim of the Council of Europe is to create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy, and the rule of law.

Objectives:

- 1) to protect human rights, pluralist democracy, and the rule of law;
- 2) to promote awareness and encourage the development of Europe's cultural identity and diversity;
- 3) to find common solutions to the challenges facing European society; and
- 4) to consolidate democratic stability in Europe by backing political, legislative, and constitutional reform

The Parliamentary Assembly of the Council of Europe (PACE) consists of a number of individual representatives from each member State. The parliamentarians who make up PACE come from the national parliaments of the Organisation's 47 member states. They meet four times a year to discuss topical issues and ask European governments to take initiatives and report back.

The European Court of Human Rights is an international court established in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. The Court consists of a number of judges equal to the number of Contracting Parties. Each judge is elected in respect of a Contracting Party by the Council's Parliament. There are no nationality requirements for judges, who are assumed to be impartial rather than represent any country. Judges are elected to six-year terms and may be re-elected.

The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The Convention, which was signed on 4 November 1950 in Rome, entered into force in 1953.

The Convention secures in particular:

- the right to life
- the right to a fair hearing,
- the right to respect for private and family life,
- freedom of expression,
- freedom of thought, conscience and religion and,
- the protection of property.

Additional rights may be added to the Convention through optional protocols which only come into force between ratifying member states (normally after a small threshold of states has been reached). For instance, Optional Protocol 2 provides for a right to education.

The Problem: At the very time when emerging democracies need for the ECHR to focus on promoting and protecting the civil and political rights contained in the Convention, ECHR judges are dedicating precious human and financial resources (and using up their limited political capital) by pursuing a “social justice” agenda not contained in the Convention.

Excerpt from the State of the Council of Europe Speech given by Thorbjorn Jagland, Secretary General of the Council of Europe, on 25 January 2010:

“I have always believed that social rights and human rights are closely linked. If we look at the social conditions in many of the large cities in Europe, one can easily understand why integration is failing, and tolerance is lacking, and why young people find ways to convey their frustration.

The danger is that extreme forces can exploit the situation to promote intolerance and hatred. A negative dynamic may develop, one which will be difficult to control.

I make this point because we need to recognise human rights and social rights as an integral part of the same struggle to create democratic stability.”

This effort to use the ECHR as a vehicle to promote an agenda beyond that agreed to by the signatories to the Convention mirrors the 40-year effort by similarly-minded individuals in the United States of America to use the Supreme Court of the United States as a vehicle for realizing social rights not contained in the U.S. Constitution.

To secure controversial social rights not contained in the U.S. Constitution, the U.S. Supreme Court invented a “right to privacy” from various Constitutional provisions, none of which expressly provide for such a right.

Griswold v. Connecticut (1964)

- Planned Parenthood officials distributed information, instruction, and medical advice to married couples encouraging the use of birth control.
- Connecticut officials arrested and convicted them under a Connecticut law that prohibited this practice, a law which, since its adoption many decades earlier, had never been enforced.
- The U.S. Supreme Court decided that, though the U.S. Constitution does not explicitly protect a general right to privacy, various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy, including the First (right of association), Third (prohibition against quartering of soldiers), Fourth (right to be secure in one’s home against unreasonable searches and seizures), and Ninth (rights not enumerated in the U.S. Constitution are retained by the people) Amendments.
- The Court struck down the Connecticut statute as violating the exercise of this “new” right of privacy

From the dissenting opinion of Justice Hugo Black:

“I repeat, so as not to be misunderstood, that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts, and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up, and, at the same time, threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time, and that this Court is charged with a duty to make those changes. For myself, I must, with all deference, reject that philosophy. The Constitution makers knew the need for change, and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and, being somewhat old-fashioned, I must add it is good enough for me.”

Roe v. Wade (1973)- the U.S. Supreme Court rules that the right to terminate a pregnancy is part of a woman's right to privacy.

Planned Parenthood v. Casey (1992)- in a plurality decision (no clear majority on all parts), the U.S. Supreme Court upholds the core decision of *Roe v. Wade*. Writing for three justices joining the plurality, Justice Anthony Kennedy explains: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

Lawrence v. Texas (2003)- U.S. Supreme Court decides that the right to liberty under the Due Process Clause of the U.S. Constitution gives consenting adults the right to engage in homosexual sex. The Court explains that the right to homosexual sex “has been accepted as an integral part of human freedom in many other countries.” The Court cites a decision of the European Court of Human Rights and an amicus curiae brief filed by Mary Robinson , former U.N. High Commissioner for Human Rights, and four human rights organizations and written by Harold Koh.

Koh now serves as the senior legal advisor to U.S. Secretary of State Hillary Clinton. Koh supports using international law and foreign legal precedent to inform the judicial decision making in the U.S.. He sees “transnational jurisprudence” as essential to a well ordered international legal system and argues that “concepts like liberty, equality and privacy are not exclusively American constitutional ideas but, rather, part and parcel of the global human rights movement.”

The European Court of Human Rights has followed the U.S. Supreme Court in “discovering” a right to privacy where none expressly exists.

In a series of cases from 2002-2010 the ECHR interpreted the Convention’s Article 8 right to respect for private life as protecting homosexuals from discriminatory adoption, sexual relations, and inheritance laws.

Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Frette v. France (2002): the ECHR Grand Chamber upheld France's decision to deny a single homosexual male the same right to adopt a child enjoyed by single non-homosexual adults on grounds that, although the Convention is a living document, there is no common view among European nations as to whether the best interests of the child are served by the adoption of a child by a single homosexual adult.

S. L. v. Austria (2003): ECHR held that it is a discriminatory interference with a person's right to respect for private life to make it a crime for an adult male to have sex with a male between the ages of 14 and 18. The Court noted that many European countries had decriminalized such behavior and that the Council of Europe had called for equal treatment of juvenile males and females in regards to their freedom to have sex with adults.

E.B. v. France (2008): ECHR Grand Chamber, in essence, reversed *Frette v. France*, holding that it was unlawful for a French municipality to deny a single lesbian woman the right to apply for adoption because she could show, unlike the applicant in *Frette*, that she was mature enough to handle the adoption, was in a committed relationship with another woman, and had extended family that included possible male role models. The Court noted that the applicant had provided evidence that views in Europe regarding the adoption of children by same-sex individuals had moved toward general acceptance of such arrangements.

Kozak v. Poland (2010): ECHR held that a Polish law that permitted only different-sex unmarried couples to succeed to a tenancy of a deceased partner as though they were in a *de facto* marital cohabitation relationship constituted discrimination against a homosexual male who had been denied the right to succeed to a tenancy in an apartment controlled by the local municipality. The Court ruled that the discriminatory statute interfered with the applicant's Article 8 right to respect for private life.

In each instance, the ECHR referred to the fact that the Convention is a living document, to be interpreted in accordance with changing conditions. The following language of *Kozak* is indicative of this sentiment:

“respect for family life 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 in the sphere of leading and living one's family or private life.”

In *S.L. v. Austria*, the Court has made it clear that it is European cultural developments that are decisive, not the national ones. In deciding that the law violated Article 14 read in conjunction with Article 8, the Court relied heavily on the fact that “there was an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations” and that “equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe.”

Not only is the ECHR abusing its authority by “inventing” social rights that are not contained in the Convention, it is ensuring that these new rights be protected against those who hold traditional religious views that challenge the moral underpinnings of these practices. These decisions are creating outrage at the national level that is hurting the credibility of the ECHR.

Leyla Sehin v. France (2005)- The ECHR upheld a Turkish law which bans wearing the Islamic headscarf at universities and other educational and state institutions. In the case, the ECHR endorsed the national authorities' view of the headscarf as being antagonistic of both secularism and gender equality of women who do not want to wear the headscarf, but who may feel pressured to do so.

Folgero v. Norway (2007)- The ECHR held that Norway had violated the right of avowed humanist parents to have their children completely exempted from participating in a state-sanctioned school course on Christianity, religion and philosophy even though the course had been designed as a method of teaching religion and ethics in a manner that did not seek to proselytise and convert.

Lautsi v. Italy (2009)- The ECHR held that crucifixes in Italian public school classes are contrary to parents' right to educate their children in line with their convictions and to children's right to freedom of religion. The Court could not impose the removal of crucifixes from school classes; however, it made Italy pay 5,000 euros for "moral

A, B, and C. v. Ireland (pending 2010 decision)- The ECHR will soon decide whether the Convention's "right to privacy" prohibits Ireland and other State parties to the Convention from banning or placing unjustifiable restrictions a woman's ability to secure an abortion.

Conclusions:

1. The Council of Europe has an important role to play in promoting human rights, including civil, political, economic, social, and cultural rights.
2. Except as otherwise provided by an Optional Protocol adopted by a group of State parties to the Convention, the European Convention on Human Rights deals only with civil and political rights.
3. By interpreting the right to private and family life contained in Article 8 of the Convention as creating a “right to privacy” that protects social rights such as homosexual relations and abortion, the ECHR is undermining its credibility and its ultimate effectiveness as a defender of civil and political rights.
4. ECHR decisions undermining non-violent expressions of religious faith at the national level may be perceived as being intended to eliminate threats to the new social rights.
5. The Council of Europe and ECHR should understand that similar judicial activism engaged in by the U.S. Supreme Court has generated intense debate that has resulting in a grassroots political movement demanding a return to the founding principles of judicial restraint, separation of powers, and limited government.
6. Concerned citizens of the State parties to the Convention should monitor the appointment of judges to the ECHR and demand that judicial activism be avoided.