

The limits of the European Court of Human Rights' interpretation and the involutive interpretation

I. The concept of involutive interpretation in the case-law of the ECtHR

By establishing the European Court of Human Rights as the sole authority competent to assess potential violations of the rights and freedoms enshrined in the European Convention on Human Rights, the States Parties have implicitly entrusted the Court with the role of authentic interpreter of the Convention. This interpretative authority is grounded in Articles 19 and 32 § (1) of the Convention, which confer upon the Court the jurisdiction to ensure the observance of the obligations undertaken by the States and to interpret the Convention in the context of adjudicating individual or inter-State applications. As such, the ECtHR's interpretation of the Convention provisions is binding: the meaning and scope of the rights and obligations enshrined in the Convention are determined through the Court's jurisprudence. Consequently, States Parties are obliged to comply not only with the text of the Convention, but also with its content as interpreted authoritatively by the Court.

Throughout its existence, the ECtHR has drawn upon the general rules of treaty interpretation, set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (1969). However, recognizing the special character of the Convention as a human rights treaty, the Court has also elaborated a distinct body of interpretative principles suited to the dynamic nature of human rights law. For example, these include the autonomous interpretation, evolutive interpretation and the use of European consensus, each contributing to the Court's ability to adapt Convention rights to contemporary social, moral and legal contexts.

The Court has long demonstrated a systemic commitment to expanding the scope and substance of Convention rights. This expansionist orientation is, in part, a product of the Court's unique access and jurisdictional framework, whereby individuals - not states - are the primary initiators of proceedings. As a result, the Court has developed methods of interpretation that not only respond to individual grievances but often interpret rights expansively, thereby encouraging further applications and reinforcing its role as a guardian of fundamental rights. Central to this dynamic is the ECtHR's view of the Convention as a "living instrument", a doctrine that has provided a normative basis for

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progressive interpretation in line with evolving social and political conditions.

Although the interpretative methods employed by the Court typically function to broaden the scope of rights and adapt the Convention to contemporary standards, the Court's case-law does not always follow a progressive trajectory. In certain judgments, the Court has exhibited a more restrictive or cautious approach, resulting in the narrowing of previously recognized protections or a refusal to extend them to emerging contexts. For the purposes of this paper, such instances will be referred to as involutive interpretation, that is, interpretative outcomes which reflect regression, stasis, or deliberate restraint in the evolution of human rights standards.

Accordingly, this paper has three main objectives. First, it aims to identify the limitations of involutive interpretation (II). Second, it seeks to examine the rationale supporting such an approach (III). Third, it aims to explore the implications of adopting an involutive interpretation (IV).

II. The limits of involutive interpretation

The Preamble of the Convention and Article 53 serve as the legal foundation for inferring the existence of a principle that prohibits the Court's involutive interpretation. In essence, the Court bears an obligation to safeguard and uphold the Convention rights to at least the level of protection they enjoyed prior to the judgment at issue. Each right recognized by the Court is built upon a jurisprudential foundation, established through its interpretative methods. Subsequent developments or extensions of that right, arising from the evolving nature of the Convention, are not mere additions but integral parts of a unified whole. These developments cannot be detached, ignored, or reversed without undermining the coherence and integrity of the Court's jurisprudence.

The Preamble's reference to the "*maintenance and further realisation of Human Rights and Fundamental Freedoms*" implies a minimum standard of protection that cannot be reduced. Logically, the Convention envisions only progressive realization and development of rights, not regression. Therefore, it can be argued that the Court is under a positive obligation to interpret the Convention in a manner that maintains or enhances existing standards. Any interpretative approach that diminishes rights already recognized by the Court would not only violate the spirit of the Preamble but also contradict Article 53, which prohibits interpretation that would limit or derogate from existing human rights protections. Accordingly, the Court must adopt a broad, purposive interpretation that protects both the existing content of rights and the obligations of States Parties to uphold them. This position is echoed in the separate opinions of several ECtHR judges, who have argued that the Court should not retreat from standards it has previously set. As it has been stated in a separate opinion "*a human-rights court must not relinquish a level of protection that it has already granted*"¹.

The Convention does not confer upon the Court any authority to engage in involutive

¹ *Ibrahim and Others v. the United Kingdom*, nos. 50541/08 and 3 others, 16 December 2014, Joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque § 2.

interpretation, nor does it permit any interpretative retreat from previously established standards. Once the Court has issued a final judgment that broadens or reinforces the meaning of a right, that interpretation becomes embedded in the normative content of the Convention. It is not an external or discretionary addition, but a binding articulation of the right's scope. Thus, such interpretations cannot be isolated or reversed without undermining the legal stability of the Convention system.

This logic gives rise to a principle of non-regression, which functions analogously to a ratchet mechanism²: it allows forward movement in the development of rights, but prevents backward steps³. The hallmark of the Convention system is that once rights are recognized and protected, they do not regress. Accordingly, even in the absence of an explicit non-regression clause, the structure and teleology of the Convention implicitly support a rule of continuous progression in the protection of fundamental rights. This principle ensures that human rights jurisprudence under the Convention evolves cumulatively, not cyclically, and that established guarantees cannot be diluted by subsequent restrictive interpretations.

However, despite these guiding principles, the Court has at times engaged in involutive interpretations. The first point to be acknowledged is that, so far, the Court has never expressly overturned a prior ruling in a rights-restrictive direction. What has emerged instead is a pattern of tacit regression. In the judgments that will be referred to in the following, it is often the minority or dissenting opinions that claim the Court has implicitly departed from settled principles. These judges have pointed to silent discontinuities in reasoning, omitted precedent, or narrowed application of established principles as evidence of an unacknowledged reversal. This silence raises concerns not only about the transparency of the Court's interpretative methodology, but also about its institutional credibility, particularly when departures from precedent occur without explicit justification or acknowledgment⁴. To illustrate this phenomenon, in the following we will examine several examples from the case-law where such interpretative regressions have been identified.

The judgment in *Gorou (no. 2) v. Greece*⁵ is a clear example of involutive interpretation in the case-law of the Court. Departing from both its prior jurisprudence and its ruling in *Gorou (no. 4)*⁶ - which involved identical parties, identical factual circumstances, and the same alleged violation - the Grand Chamber held by majority that the Prosecutor General was not required to provide reasons when rejecting an appeal to the Court of Cassation. This marked a sharp break from the Court's earlier position, which had consistently affirmed that reasoned decisions are a fundamental component of the right to a fair trial under Article 6 § 1. This reversal drew strong criticism from several dissenting judges.

2 F. Ost, *Le temps du droit*, Paris, Odile Jacob, 1999, p. 194.

3 C. Vassilis, *The limits of interpretation of the Strasbourg Court and the principle of non-regression*, in La Convention européenne des droits de l'Homme, un instrument vivant. Mélanges en l'honneur de Christos L. Rozakis, Bruxelles, Bruylant, 2011, p. 87.

4 L. R. Helfer, E. Voeten, *Walking Back Human Rights in Europe?*, EJIL (2020), Vol. 31 No. 3, 797–827, p. 804.

5 *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009.

6 *Gorou v. Greece (no. 4)*, no. 9747/04, 11 January 2007.

Judge Malinverni, joined by Judges Kalaydjieva and Power, expressed concern that the ruling not only contradicted previous judgments, but also signaled a worrying trend: “*The present judgment thus constitutes a step backwards in the protection of fundamental rights that I find both difficult to understand and regrettable.*”⁷ Even more pointedly, Judge Casadevall directly confronted the concept of involutive interpretation itself. He warned that while the Court might have taken a more restrained approach initially, once rights have been extended, the Court has a duty to preserve that level of protection unless a manifest error has occurred. As he put it: “*Acquired rights in the cause of human rights are at least as precious as acquired rights in other branches of the law, and therefore the principle of non-regression must prevail.*”⁸ His dissent offers a powerful articulation of the normative danger posed by unacknowledged reversals, reinforcing the view that judicial consistency and the integrity of rights protections must not be compromised by the Court’s evolving case-law.

The judgment in *S., V. and A. v. Denmark*⁹ provides a clear example of involutive interpretation by the Court. The case concerned the detention of football supporters for approximately eight hours without charge, carried out to prevent potential violence. The key question was whether such preventive detention fell within the scope of subparagraph (b) of Article 5 § 1 of the Convention. The Court recalled its 2013 judgment in *Ostendorf v. Germany*¹⁰, where it had held - using textual interpretation and relying on established case-law - that purely preventive deprivation of liberty outside criminal proceedings did not comply with Article 5. Specifically, the Court had ruled that the second alternative of Article 5 § 1 (c) applies only to pre-trial detention and not to custody aimed solely at preventing future offences by a person not suspected of having committed a crime. Despite this precedent, in *S., V. and A.*, the Court considered it necessary to clarify and unify its case-law to better address the challenges faced by modern societies. It referenced the earlier judgment in *Lawless (no. 3)*¹¹ (1961), which accepted that Article 5 allows deprivation of liberty either when there are reasonable grounds to suspect that an offence has been committed or when there are substantial grounds to believe detention is necessary to prevent an offence. As a result, the Court overturned its 2013 interpretation, ruling that preventive detention could indeed be justified under Article 5 to prevent offences. This reversal illustrates an involutive interpretation, as it effectively broadens the grounds for detention, moving away from the stricter protective stance of its previous case-law.

Two judges who submitted separate opinions, highlighted the original nature of the *S., V. and A. v. Denmark* judgment, noting that the Court typically employs evolutive interpretation to broaden the scope of rights and freedoms. However, in this case, the Court resorted instead to textual and historical interpretation in order to limit that scope. According to these judges, “*the European Court of Human Rights not only has failed to*

7 *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009, Partly dissenting opinion of Judge Malinverni joined by Judge Sajó, § 3.

8 *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009, Partly dissenting opinion of Judge Casadevall, § 8.

9 *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018.

10 *Ostendorf v. Germany*, no. 15598/08, 7 March 2013.

11 *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3.

develop a sufficiently coherent interpretative methodology within the discretion afforded by general treaty interpretation rules, but has often overlooked or even shied away from the applicable customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. Viewed from the domestic perspective, the role of the Court in building up a culture of interpretation is far from satisfactory."¹²

The ECtHR's case-law concerning a suspect's right to have access to a lawyer - exemplified in *Salduz v. Turkey*¹³, *Ibrahim and Others v. the United Kingdom*, and *Beuze v. Belgium* - provides another illustration of involutive interpretation. The landmark *Salduz* judgment of 2008 established the principle that every suspect is entitled to access a lawyer from the very first police interrogation. This doctrine shaped the Court's approach for nearly a decade. However, the *Ibrahim and Others* judgment introduced a significant exception, allowing for context-specific restrictions on this right under exceptional circumstances. The Court held that such restrictions, justified by compelling reasons such as an urgent need to prevent serious harm to life, liberty, or physical integrity, would not automatically constitute a violation of the right to a fair trial. Instead, the Court emphasized the need for an overall assessment of the fairness of the proceedings. A decade after *Salduz*, the *Beuze* ruling further regressed the protection afforded by Article 6. Rather than reaffirming the *Salduz* principle, the Court implicitly accepted that the general and absolute denial of access to a lawyer during police custody might not violate the Convention, provided that the Government demonstrates overall procedural fairness and minimum safeguards. This represents a significant loosening of the State's positive obligation to guarantee access to legal counsel during detention. In a joint concurring opinion, Judges Yudkivska, Vučinić, Turković, and Hüseyinov expressed serious concerns about this shift, warning that the Court's ruling "*distorts and changes the Salduz principle and devalues the right that the Court established previously. (...) The Beuze judgment in this respect represents a regrettable counter-revolution: it has overruled the 'as a rule' requirement – already repeated in more than one hundred judgments widely known as the 'Salduz jurisprudence' – and has dramatically relativised it to the detriment of procedural safeguards*"¹⁴.

The Grand Chamber's judgment in *Regner v. Czech Republic*¹⁵ provides another revealing instance of what dissenting judges have characterized as an involutive turn in the Court's jurisprudence. The applicant, a former Ministry of Defence employee, challenged the administrative revocation of his security clearance, arguing that the proceedings had denied him access to classified evidence, thereby infringing his right to a fair hearing under Article 6. In a strongly worded dissenting opinion, Judge Serghides expressed concern about the elevation of an absolute restriction above the principle of

12 *S., V. and A. v. Denmark [GC]*, nos. 35553/12 and 2 others, 22 October 2018, Joint partly dissenting opinion of Judges de Gaetano and Wojtyczek, § 3.

13 *Salduz v. Turkey [GC]*, no. 36391/02, ECHR 2008; *Ibrahim and Others v. the United Kingdom*, nos. 50541/08 and 3 others, 16 December 2014; *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018.

14 *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018, Joint concurring opinion of Judges Yudkivska, Vučinić, Turković and Hüseyinov, §§ 1, 6, 25.

15 *Regner v. the Czech Republic [GC]*, no. 35289/11, 19 September 2017.

effective judicial protection.¹⁶

These separate opinions suggest that the Court, at least in the eyes of some of its own judges, may have begun to retreat from previously affirmed standards of human rights protection in Europe. Such dissents do not merely express disagreement; they often signal concern over reversals and alert observers to subtle involutive shifts that may not be explicitly acknowledged in the majority reasoning.

III. Possible justifications for involutive interpretation

The hypothesis advanced in the first part of this paper is now confirmed: the European Court of Human Rights does, at times, engage in involutive interpretation of the Convention. However, what is particularly striking is the Court's lack of transparency in doing so. It often provides no justification for such interpretative reversals and, in many instances, fails even to acknowledge the precedents from which it departs, as though they had never existed. This omission raises serious concerns regarding the consistency, predictability, and legitimacy of the Court's reasoning.

In light of this silence, the present section seeks to explore and analyze the possible underlying reasons - whether legal, institutional, or political - that might explain or even legitimize such an approach. Rather than relying on the Court's stated reasoning (which is absent or minimal), the objective is to reconstruct potential justifications that could be inferred from the broader context in which these involutive judgments occur.

The role of the Court is not to give binding force to every positive development in the field of human rights at the European level by incorporating such developments into the Convention system without regard to the limits set by its text and structure. The principle requiring a concrete and effective interpretation of the Convention, in light of its object and purpose, is not a blank cheque for the judges of the Court to elevate every positive development in the States Parties to the level of an international binding norm, which would undermine the sovereign and democratic rights of States.¹⁷ For example, in their partly dissenting opinion in *X and Others v. Austria*¹⁸, seven judges cautioned against judicial activism, emphasizing 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.*”¹⁹ This dissenting opinion reflects a concern that the Court may, at times, exceed its legitimate interpretative role by imposing premature or overly ambitious standards that are not yet supported by a clear consensus among Contracting States. Within this logic, involutive interpretation may be seen not as judicial

¹⁶ *Regner v. the Czech Republic [GC]*, no. 35289/11, 19 September 2017, Partly dissenting opinion of Judge Serghides, § 71.

¹⁷ S., Van Drooghenbroeck, *Retour sur l'interprétation « involutive » de la Convention européenne des droits de l'Homme*, *Le droit malgré tout*, edited by Yves Cartuyvels et al., Presses universitaires Saint-Louis Bruxelles, 2018, <https://doi.org/10.4000/books.pusl.23712>, Accessed 13.07.2025.

¹⁸ *X and Others v. Austria [GC]*, no. 19010/07, ECHR 2013.

¹⁹ *X and Others v. Austria [GC]*, no. 19010/07, ECHR 2013, Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos, §23.

failure, but as institutional discipline - a deliberate choice to preserve the Convention's democratic legitimacy and to avoid overstepping the boundaries of what is politically or socially sustainable at a given moment. Therefore, a first possible justification for the Court's resort to involutive interpretation lies in its function as a counterbalance to evolutive interpretation, ensuring that the dynamic development of rights remains context-sensitive, proportionate, and compatible with competing legal interests.

Second, adaptation to new circumstances does not necessarily entail a regression in the standard of rights protection under the Convention. The need to respond to current conditions may indeed require a reassessment of factual or legal contexts previously considered by the Court. However, such reassessment does not automatically justify a diminution of rights. On the contrary, changing circumstances can sometimes call for a more vigilant and expansive protection of rights, reflecting the Convention's living instrument character. A clear example of this dynamic can be seen in *Hirsi Jamaa and Others v. Italy*²⁰, where the Court, facing the growing complexity of migratory flows, extended the scope of Article 4 of Protocol No. 4 to include collective expulsions on the high seas. This was a significant evolutive interpretation, responding to novel challenges in migration control in a way that strengthened the effectiveness of Convention rights. However, in *Khlaifia and Others v. Italy*²¹, the Court seemed to depart from the *Hirsi* doctrine, by holding that the specific migratory challenges invoked in *Khlaifia* were not relevant in assessing an alleged violation of Article 4 of Protocol No. 4. At first glance, this might appear as a regression from *Hirsi*. Yet, a closer reading reveals that the Court did not overrule its earlier jurisprudence, but rather distinguished the two cases based on their factual context. The ruling in *Khlaifia* was premised on the Court's view that the circumstances differed materially from those in *Hirsi*, justifying a different legal outcome.

Thus, this case illustrates that not all interpretative reversals constitute involution. Some may represent a contextual adjustment, aimed at maintaining coherence between legal standards and real-world complexity. It is therefore crucial to differentiate between genuine involutive interpretation, which implies a lowering of protection, and contextual adaptation, which preserves the normative framework while allowing it to respond to situational nuances.

Third, a bidirectional understanding of the Convention's adaptability over time may, in fact, be essential to preserving the Court's credibility and institutional legitimacy. If the ECtHR's interpretative approach is to remain responsive to "present-day conditions," then logically, those conditions - whether progressive or regressive - should influence the Court's interpretation in both directions. While favourable societal or legal developments may justify evolutive interpretation, more challenging or restrictive contexts could, conversely, warrant an involutive approach.

As such, it must be acknowledged that what may constitute "good conditions" for one human right might simultaneously constitute "bad conditions" for another, especially in cases involving conflicting rights. In such scenarios, an evolutive interpretation of one right may necessitate an involutive interpretation of another. The judgment in

20 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

21 *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016.

*Mangouras v. Spain*²² is a pertinent illustration. In this case, the Court relaxed its previous jurisprudence under Article 5 § 3 concerning the proportionality of bail in order to reflect the increased weight granted to environmental protection - an objective increasingly emphasized in contemporary society. This resulted in a trade-off, whereby guarantees of individual liberty were reduced to advance the evolving demands of environmental protection.

Similarly, certain cases arising during the COVID-19 pandemic illustrate this dynamic. Temporary derogations or restrictions on individual rights, justified by public health emergencies, can be seen as context-driven involutive interpretations, where urgent societal needs take precedence over pre-existing rights standards.

The expansion of the Convention system to include Eastern European countries in the 1990s raised similar concerns about the stability of established rights standards. Given the diverse legal, political, and social traditions of the new member states, it has been argued that the integration of an ever broader circle of member States should result in a lowering of already established standards.²³

IV. Conclusions and implications of involutive interpretation

So far, the Court has, at least not explicitly, overturned its prior case-law in a rights-restrictive direction. Such a move would constitute a dramatic and politically sensitive break from core interpretative methods and principles the Court has long championed, such as the living instrument approach and the reliance on European consensus to justify the progressive expansion of rights.

Instead, the analysis conducted in this paper showed that the Court appears to be achieving substantively similar results by more subtle means. This technique allows the Court to present its jurisprudence as consistent, even when the outcome reflects a clear shift toward restricting individual protections. For many within the Court itself, however, such reconciliatory efforts are unconvincing and problematic. In response, an increasing number of judges have used separate opinions to express their dissent, sometimes in forceful and unambiguous terms. These opinions often accuse the majority of tacitly abandoning prior precedent in order to accommodate political sensitivities or the demands of national governments. As such, separate opinions have become critical tools for exposing what may be a gradual, covert erosion of previously affirmed human rights standards.²⁴

An analysis of the Court's use of involutive interpretation would not be complete without an analysis of its potentially dangerous implications.

While there may be principled arguments in favor of involutive interpretation in certain circumstances - such as preserving legal certainty or respecting democratic

²² *Mangouras v. Spain [GC]*, no. 12050/04, ECHR 2010.

²³ L. R. Helfer, E. Voeten, *Walking Back Human Rights in Europe?* EJIL (2020), Vol. 31 No. 3, 797–827, p. 803.

²⁴ L. R. Helfer, E. Voeten, *Walking Back Human Rights in Europe?* EJIL (2020), Vol. 31 No. 3, 797–827, p. 823.

sovereignty - it is essential to remain vigilant against the risk of its instrumentalization. Once involutive interpretation and regressive reversals are accepted as legitimate, they may be used as strategic tools to appease dissenting States or to shield the Court from political backlash. This dynamic could undermine the independence, authority, and normative integrity of the Court, leading to a form of jurisprudential retreat disguised as judicial caution.²⁵ This risk was identified by Judge Pinto de Albuquerque in his dissenting opinion submitted in the judgment *Hutchinson v. the United Kingdom*²⁶. According to him, the judgment marked a high point in an increasingly visible trend toward the downgrading of the Court's authority vis-à-vis certain domestic jurisdictions, creating a serious risk that the Convention will be applied according to double standards. In these circumstances, the Court risks transforming into something akin to a non-judicial commission composed of qualified and politically legitimized experts - an advisory body that no longer issues binding judgments, at least with respect to certain Contracting Parties, but merely offers recommendations on what domestic authorities "ought" to do in fulfilling their obligations.

Similarly, the *Scoppola v. Italy (no. 3)*²⁷ judgment offers particularly important insight in this context. During the proceedings, the United Kingdom intervened as a third party and attempted to persuade the Court to abandon the position it had established in *Hirst (no. 2) v. the United Kingdom*²⁸, which had found the automatic disenfranchisement of prisoners to be incompatible with Article 3 of Protocol No. 1. In its judgment of 22 May 2012, the Grand Chamber did not rule out the theoretical possibility of reversing the Hirst precedent, should there be a significant shift at the European level, or within the Convention system, that would warrant re-examining the established principles. However, the Court ultimately rejected the call for reversal, reasoning that the emerging European consensus on prisoner voting rights was actually moving away from automatic disenfranchisement, not toward it. On its face, this reaffirmation of *Hirst (no. 2)* might appear reassuring. Yet, the logic underlying the Court's reasoning is problematic. By implicitly grounding its refusal to regress on the direction of consensus, the Court appears to suggest that had a majority of States chosen to restrict prisoner voting rights even further, then such a consensus could have justified abandoning the protections previously affirmed in *Hirst (no. 2)*.

This introduces a dangerous interpretive mechanism into the Court's jurisprudence, one in which the level of protection is contingent on majoritarian trends, even if those trends are regressive. Such an approach risks undermining the very counter-majoritarian function of the Court and contradicts the idea that Convention rights form minimum standards rather than a variable product of political popularity.

25 S., Van Drooghenbroeck, *Retour sur l'interprétation « involutive » de la Convention européenne des droits de l'Homme*, Le droit malgré tout, edited by Yves Cartuyvels et al., Presses universitaires Saint-Louis Bruxelles, 2018, <https://doi.org/10.4000/books.pusl.23712>, Accessed 13.07.2025.

26 *Hutchinson v. the United Kingdom [GC]*, no. 57592/08, 17 January 2017, Dissenting opinion of Judge Pinto de Albuquerque, § 38.

27 *Scoppola v. Italy (no. 3) [GC]*, no. 126/05, 22 May 2012.

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