

The Influence of the ECtHR on Human Rights' Policy-making in Europe

Based on the article 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', by Laurence R. Helfer and Erik Voeten, published in *International Organization*¹ in 2014.

Do International Courts' (IC) judgments exert an influence beyond the binding consequences for the parties participating in the judicial procedure in question? Do ICs facilitate policy change? How important are they in the promotion of human rights? These are the questions at the origin of Helfer and Voeten's research on the effects of the ICs' judgments on domestic policy, on National Courts (NC), and on member states' executive and legislature.

Making reference to such an inquiry is even more relevant since the research has been conducted on the basis of European Court of Human Rights' (ECtHR) judgments dealing with LGBT rights. Moreover, this research is also important for the future of the CoE because it helps to gauge the Organisation's leverage for human rights promotion in the pan-European space. There are additional reasons which explain why this paper deserves to be considered, as we will see below.

It has been traditionally assumed that the ECtHR case-law is a beacon of human rights standards. However, human rights defenders, as well as the CoE as such, do have a specific interest in measuring the precise influence of ECtHR's rulings on national policy. This is crucially important as the ECtHR's role is not only that of performing its functions as an international judicial body but also that of being the most relevant and authoritative source of information about the scope and interpretation to be given to internationally recognised fundamental rights and freedoms in today's context. This is, perhaps due to the fact that ECtHR's rulings are free from diplomatic or political constraints.

THE ERGA OMNES EFFECT

The broadest scope of the impact of the IC's rulings is achieved through the so-called ***erga omnes* effect**. As it is referred to technically, literally meaning "flowing to all", a law or legal act will have an *erga omnes* effect if it is applicable to every individual, person or state without distinction and not only to those which have been involved in a specific legal dispute. In this context, for example, a judicial declaration stating that a particular marriage is null would be considered to be *erga omnes* if it applies generally, to the world at large and not just to the defendant state. Similarly, if a statute is struck down (for constitutional reasons, for example) the decision will produce an effect not just for the parties to the litigation, but *erga omnes*, i.e. *vis-à-vis* the population in general. The concept is important since, legally speaking, judgments rendered by ordinary judicial bodies are formally binding only *inter partes*. In the context of the European Convention of Human Rights (ECHR) it means that **Contracting Parties to this treaty, sovereign states, have accepted the Court's jurisdiction and have agreed to comply with its decisions against it** but not by rulings resulting from litigation in which it was not a party. However, if ECtHR rulings exert, at least *de facto*, an influence even on those states which are not directly concerned with the specific judicial conflict, this would amplify significantly the influence of the ECtHR's decisions, which is increasingly considered, in any case, as the cornerstone of the European system for the protection of human rights.

¹ Helfer, Laurence R. and Voeten, Erik, International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe (February 13, 2014). 68:1 *International Organization* 77-110 (2014). Available at <http://dx.doi.org/10.2139/ssrn.1850526>

Indeed, there are cases where state parties to a treaty adopt a policy following the ruling of an IC on the interpretation of that treaty, even if the ruling in question was not issued against it and thus is not legally binding upon that state. This is the case, for example, when a particular ECtHR's ruling **determines**, under certain conditions, **what the public policy should be in a certain area for the common interest**, thereby extending the effectiveness of human rights' jurisprudence to all member states.

More generally, the ICs **do not have, by themselves, implementation power**, but they can exert an influence on other instances and bodies that do have that power, such as the executive, national courts, the legislature or international organisations (IOs). The pressure exercised by **interest groups** over government officials, holding them accountable for implementing international treaties and conventions, is another example of such an influence and may be a strong factor of policy change. The **reputation of compliance** with international law might equally be a strong incentive for change.

CONDITIONS FOR INFLUENCE EFFECTIVENESS

The *erga omnes* effect of ECtHR judgments may have a significant impact and play a **crucial role in promoting and broadening the scope of internationally recognised human rights and fundamental freedoms**. Thus the ensuing question, a crucial one, is about the conditions in which an IC's decision has the greatest influence on domestic policy development.

Part of the doctrine claims that IC's decisions play, sometimes, a crucial role in helping to overcome domestic resistance to policy change. This can be achieved through a three-fold **mechanism**.

- Member states may pre-empt **future litigation** on the same legal issues as those dealt with by an IC's prior judgment delivered against a third state, by reforming policy.
- The ICs **persuasive authority** can have an influence over compliant constituencies and NCs.
- ICs judgments may serve as a pretext for governments to **raise the importance of certain human rights issues** on the domestic political agenda or, on the contrary, to make ICs bear the burden of unpopular decisions by referring to changes introduced elsewhere. In both cases the human rights issue at stake is brought to the forefront of the national political debate by reference to an IC's resolution.

These mechanisms may be further boosted under certain specific conditions.

- The NCs may invoke international law as the reason for **striking down domestic legislation** (in NCs that have the power of judicial review).
- Governments in power may try to obtain **additional electoral support** by demonstrating scrupulous respect for international law and IC's resolutions (although this condition can easily backlash if public opinion is unstable for some reason²).
- **IOs can provide leverage** for IC rulings' implementation. Requiring accession candidates to the CoE (and the EU) to comply with the ECtHR judgments on LGBT issues is a good example of such a condition (the so-called "membership conditionality").

These conditions may, equally, help to create a **favourable narrative** towards respecting and promoting human rights and be amplified by the action of groups that seek compliance with international law.

The ECtHR's rulings on LGBT rights have been chosen as a basis for the research we are now considering for various reasons. The first one is the long record of ECtHR's judgments on issues

² This is the case, for example, during the present economic stagnation.

relating to LGBT rights. Moreover, the ECtHR has progressively developed its case-law towards a more favourable way of dealing with LGBT issues. The ECtHR started by considering that countries which criminalised consensual same-sex conduct acted in violation of the ECHR. Subsequently, it declared that imposing a higher age of consent for sexual relations in the case of gay men than in the case of heterosexual individuals was in breach of the ECHR. The ECtHR went on to establish that rules prohibiting lesbians and gay men from serving in the military violated the Convention. In a number of judgments it concluded that restricting the possibility for trans-sexual persons to officially change ID documents was not compatible with the ECHR. Finally, it seems logical to consider that this evolving interpretation may in the future – although this is not yet the case – contemplate the restriction to marry of persons of the same biological sex, upon which there is no “European consensus” today.

However, the article states, “The ECtHR has also reversed earlier NCs decisions in a pattern suggesting a **high degree of judicial discretion**”.

Consequently, over this long period, the ECtHR has progressively shifted its position regarding LGBT human rights. This **shift in the jurisprudence** has taken place in parallel with a similar evolution of law and policy in the member states, although this is, by no means, a universal trend. Mainly in the East of the continent, some governments have considered outlawing favourable public portrayals of gay men and lesbians and even re-criminalising homosexuality. As the present research shows, the ECtHR’s case-law should not be analysed in isolation from a more general social, economic and cultural trend present in European societies. A progressive view regarding LGBT rights has been the norm for a quite long period.

Judicial recognition of progressive legal and social trends and the resistance by some governments to abide by them characterises many European human rights conflicts. As Helfer and Voeten assert, the case of **prisoners’ voting rights** is a good example of the way in which the ECtHR has expanded human rights “to ensure that the **interpretation of the Convention reflects societal changes and remains in line with present-day conditions**”. Some ECtHR’s judgments expressly recognise the underlying trends regarding LGBT rights.

On that basis, the authors have codified a set of data that contributes to find out whether and when the policies of the 47 member states follow the ECtHR case-law on LGBT specific issues. In order to control the independent variable of influence, they identify the LGBT issues that are **not affected** by ECtHR rulings and explain that there exist other trends that might be instrumental to increase the protection of LGBT rights, **such as interest groups’ lobbying**.

THE FINDINGS

The first research outcome reveals that the ECtHR’s judgment against one nation **increases by 14% the likelihood** that all the CoE member states adopt the same pro-LGBT policy. In the case of the member state in which the violation is found, the likelihood of policy change increases by an **additional 11%**. This is partially explained by membership conditionality. Yet, the ECtHR judgments do influence other policy-makers, even in countries that are not subject to membership conditionality.

The second outcome shows that the **greatest marginal consequence** of the *erga omnes* effect of ECtHR’s judgments is stronger in countries where public support for LGBT rights is relatively low. This runs contrary to the sceptical prevailing opinion according to which human rights treaties, international law, and IOs matter more where they are less needed. Such a singularity can be partially explained by the fact that in these countries, the NCs can invoke the ECtHR rulings when

³ Cossey v. UK, 1990.

reviewing domestic law and statutes. This is especially effective if the executive is not supported by a religious, nationalistic, or rural party. If this is the case, the review of domestic laws has lower chances of achieving a higher recognition of LGBT rights.

The third conclusion is that an **ECtHR's ruling against a specific country** combined with favourable domestic political or institutional conditions helps to overcome the low public support for LGBT rights and, therefore, **increases the likelihood of policy change**. This is consistent with the hypothesis that the ECtHR follows a strategy of "majoritarian activism", using the laws and policies of the member states as a benchmark for developing international standards⁴.

CONCLUSIONS

The quantitative increase in how likely policy change can occur following an ECtHR judgment confirms a common-sense, widely shared view. It is obvious that the founders' purpose when creating the ECtHR was to promote common legal standards across the continent. However, the authors' conclusion about a greater marginal effect of an ECtHR's judgment in member states where public acceptance of homosexuality is low is counterintuitive. It is as if the ECtHR was more efficient with regard to issues which lack popular support. Should we see there a confirmation serving those who challenge the democratic legitimacy of the ECtHR decisions? The authors maintain that the ECtHR does not push countries aggressively to "adopt policies that governments and publics oppose. Rather, the Strasbourg Court engages in a kind of majoritarian activism". In any case, these findings would imply that **the CoE should contemplate additional accompanying measures aimed at balancing low public acceptance of specific ECtHR decisions**.

The increase of the probability of domestic policy change found during the research seems – in absolute terms – lower than it would have been expected from a legally binding mechanism such as an ECtHR ruling. This is especially true in the case of the member state found to be in violation of the ECHR (probability of triggering a policy change of a mere 25%). **It would appear prudent to say that in terms of a CoE strategy, it would be necessary to engage in a large reflection on how to increase the leverage of the ECtHR over policy-makers**.

The article's ambitious title suggests that gauging the influence of any IC on domestic policy-making is feasible. Yet, the authors' conclusions do not provide enough arguments in order to extrapolate the results established over the ECtHR's jurisprudence to any other IC nor to other human rights areas different than LGBT. The recourse to statistics does not provide further robustness to the arguments they develop. As the authors recognise themselves, the research misses the mark of compiling exhaustively the external variables influencing the ECtHR's *erga omnes* effect. The important role that interest groups may play and its lobbying activities in Strasbourg, for example, are among the variables that are not taken into account. A comparative analysis of a greater number of human rights issues could shed light on the ECtHR's genuine influence. **Such a wider picture could help, for example, to better design policies against populism and nationalism, which increasingly use minorities, such as migrants or LGBT people, to generate antagonism and fear**.

Yet, the research findings are relevant in some other ways. By recognising the limited *erga omnes* effect of the ECtHR judgments as such, it provides a **solid reality check of the influence of the CoE in domestic policy-making**. Additionally, the article stresses the link between social and political trends and the evolving interpretation of the ECHR by the judges. Recognition of the precise limits of the CoE's influence and a reflection on the extent to which it is embedded in society should help to better re-adapt its **internal culture of technical neutrality** to a world driven by interconnections and where experts' neutrality is at stake.

⁴ It recognises new rights claims that it had previously rejected when at least a majority of member states have already done so.

There is an open debate about the opposition between the evolving case-law and the necessary stability of the interpretation of the ECHR. Sometimes this debate leads, in some countries, even to threats of abandoning the European system of protecting human rights. The debate is about the **judicial activism** of the judges. The threat may, at the end of the day, unconsciously prompt a step backwards, triggering an **interpretative regression in future ECtHR judgments** if social and political changes taking place in pan-European societies continue evolving in the way they currently do.

Political debates in the member states oppose the limited scope of rights expressly recognised in the ECtHR to the necessary evolution of its *ratione materiae*⁵. **Both opposed arguments – i.e. maintaining the initial purpose and scope and avoiding anachronistic judgments – do not exclude each other and can be reasonably justified.** However, we are witnessing today an astute exploitation by politicians and ECtHR detractors of the notion of judicial activism. Critics assess in a deleterious new way the scope of rights and the interpretation currently guiding some of the ECtHR's judgments. Surprisingly though, the concept of "majoritarian activism" is recognised by human rights pundits as a logical positive evolution. This gap between the public and the specialist views clearly exposes a weak flank in the Organisation's image which apparently has not been addressed.

A case can be made, following the above, on whether **the ECtHR leads the evolution of the interpretation of the Convention or whether it merely follows pre-existing social and political trends**. Such a discussion would seem useful in order to analyse the ECtHR's role and influence over policy change in its jurisdiction. The debate would help to measure the impact of the CoE as such on policies of member states since more and more often the added value of the CoE is seen primarily in the activities of the Court. Yet, more importantly, the debate about the activism of the ECtHR seems to pre-suppose the possibility of a U-turn on the expansion of human rights. Anticipating the odds of a regression in the interpretation of LGBT and other specific minority rights appears to be cautious. The Organisation should anticipate strategic choices for such a scenario.

It is finally necessary to stress that the effective implementation of the ECHR takes place at a highly technical level, from which people feel increasingly estranged. If further efforts are not made **to open and communicate the work of the CoE's institutions**, the public – better informed, more educated and indeed massively accustomed to being approached through communication and advertisements than ever – may walk away from the institution, if not from its values. Simple measures such as translating relevant judgments in the member states' official languages are but a start.

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⁵ See above: "To ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions".