Jurisprudential Foundations of Human Rights Adjudication In the European Court Of Human Rights: Judicial Creativity, Democratic Legitimacy And Interpretive Trends

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Adopted in 1950, the European Convention on Human Rights[1] predominantly came into existence to unify Europe in the back drop of communism subversion.[2] The European Court of Human Rights was set up under the aegis of the convention to protect the Rights enshrined in it and the protocols.[3] Since its inception, the Court has served to protect the rights in various capacities, often through surprisingly bold interpretation of the given rights in the convention. This note outlines the various approaches and methods used by the court to arrive at its decisions and critically analyses the implications behind the rationales.

Introduction: Interpretation of the Convention

The European Convention on Human Rights lays down this dual system of effective international law for the protection of human rights and one of the most advanced international legal processes today.[4] This dynamic almost imparts a duty on the court to interpret its provisions in the most effective ways. Given its nature as a treaty, the Convention is required to be generally interpreted as per the prevalent international law rules in the interpretation of treaties.[5] The international rules for this purpose are to be found in the Vienna Convention on the Law of Treaties[6] and the basic rule mandates that the treaty is interpreted 'in good faith in accordance with the ordinary meaning given to the terms of the

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[1] Hereinafter European Convention
[2] David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, Second Edition, 2009) 1
[3] Ibid at 3.
[4] Mark W. Janis & Richard S. Kay, *European Human Rights Law* (Oxford Publication, 1990) 1
[5] *Golder v UK* A 18 (1978); 1 EHRR 524 para 29 PC and *Johnston v Ireland* A 112 (1986); 9 EHRR 203 para 51 PC.
[6] 115 UNTS 331

treaty in their context and in the light of its object and purpose'.[7] One of the best examples of this approach taken by the court is seen in *Luedicke, Belkacem and Koc v FRG*[8].

In this case, the applicants claimed a violation of Article 6(3)(e) of the Convention and also alleged discrimination on account of language.[9] The court took the 'ordinary meaning' approach to the words in question; 'gratuitement' and 'free', in both the authentic language texts of English and French or Article 6(3)(e). The court found the meaning was as per the 'object and purpose' of Article 6 and terms in the Convention were to be interpreted in their 'ordinary' sense.[10] In the event of conflict between the two authentic texts, unlike the *Luedicke* case, the court is required to abide by Article 33(4) of the Vienna Conventions and reconcile them as far as possible'. And in the absence of a possible reconciliation, the 'object and purpose' becomes the decisive factors, as was seen in *Wemhoff v FRG*[11].

Teleological approach

The Vienna convention emphasizes upon the teleological approach as a predominant mode of interpretation of the Statute.[12]The core principle of this approach is to realize the 'object and purpose' of the Convention and is otherwise identified as 'the protection of individual human rights.'[13] The teleological approach was best illustrated by the Court in the *Golder v UK*[14] case. The case concerned a violation of Article 6 of the Convention. Golder was accused of having taken part in a violent incident in the prison and subsequently, penalized. Golder, being innocent of the allegations, attempted to pursue the matter with higher authorities, but, his communication was intercepted by relevant prison officials on account of not being pursued through 'proper channels'. After being denied the right to a solicitor to plead his case, Golder claimed that his 'right to access' was violated. Here, the court read that 'the right of access to a court came under the fair trial guarantee under Article 6'.[15] The court did so in the absence of clear textual wording, relying on the 'object and purpose' of the Convention as seated in the Preamble. The rationale behind this judgement saw the court take

[7] Ibid Article 31(3)
[8] A 29 (1978);2EHRR 149 para-46
[9] Ibid.
[10] Ibid
[11] A 7 (1968); 1 EHRR 55
[12] Harris, (n 2), at 5
[13] Soering v UK A 161(1949);11 EHRR 439 para 87 PC
[14] Golder, (n 4)
[15] Harris, (n 2) at 6

into account the fact that the drafters of the statute intended the collective enforcement of certain basic rights in furtherance of protection and enforcement of rule of law:

> 'Article 6 para. 1 does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.'[16]

The court decided to be guided by the Vienna Conventions Article 31 to 33 as generally accepted principles of international law previously referred to by the court; This, despite the fact that it had not entered into force at the time of this judgment and, by virtue of its Article 4, had no retroactive effect.[17] This was deemed to be a very flexible and non-conservative interpretation of the object of the Convention. The court also upheld its previous decision of *Wemhoff* where it stated that when interpreting provisions of a law making treaty, it is necessary to seek the interpretation most appropriate to the fulfilment of the aims and objectives of the treaty and not restrict it to the one that fulfils the obligations of the parties.[18]

This decision and interpretation was vehemently opposed by Judge Fitzmaurice who stated in his separate judgment that such 'heavy inroads' by the Convention into what constitutes the State's domestic jurisdiction demanded a much 'cautious and conservative' interpretation.[19] He made a distinct observation against the court's liberal interpretation:

> 'There is a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains.'[20]

[16] Golder (n 4) at para 28
[17] Ibid at 29, 30 and 31.
[18] Wemhoff, (n 11).
[19] Harris, (n 4) at 6
[20] Golder, (n 4), Judge Fitzmaurice separate opinion at 32.

This is in stark contrast to *Wemhoff* where the court relied on the paradigm of Article 31(1) of the Vienna Conventions follows the paradigm of Article 31(1) of the Vienna Convention, which emphasize that the ECHR Articles need an interpretation be interpreted in accordance with the ordinary meaning of the terms in their context and in the light of the Convention's overall object and purpose'.[21] If one is to look at judge Fitzmaurice's opinion carefully, a very pertinent point is raised. How far may a court go in interpreting provisions beyond the scope of the text? While the teleological approach clearly strives to uphold the treaty ideals, the 'object and purpose' method liberally derogates from the 'textual' context.

Falling back on *Wemhoff* and *Golder* principle, interpretation of the text requires the judges to go beyond the standard definitions of the term and place them within the originally intended conceptual framework by the drafters.[22] This gives rise to a very fierce debate. For instance, the teleological approach is often deemed to be an extended application of a principle of interpretation known as the principle of effectiveness: A view shared by the rigid textualists as well.[23] For example, it has been pointed out that the teleological approach is an application in extended form of a principle of interpretation which all textualists would accept, namely the principle of effectiveness. The principle encompasses the idea that 'particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'[24] Thus, asserting the textualist or the Fitzmaurice position that any wider interpretation must always proceed from the text itself. This is in clear conflict with the teleologist approach.

The textual justification stems from the Fitzmaurice standpoint in *Golder*:

> 'The factors which distinguish the ECHR from other treaties could justify even a somewhat restrictive interpretation of the Convention, but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a

[21] Delmas-Marty, Mireille and Christine Chodkiewicz, *The European Convention for the Protection of Human Rights : international protection versus national restrictions*, (Martinus Nijhoff, 1992)
[22] Ibid
[23]Campbell, Tom, K. D. Ewing, and Adam Tomkins, *Sceptical Essays on Human Rights*(Oxford University Press, 2001) 10-16
[24] Ibid

> cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain.....'[25]

But pitted against the approach taken by the court, one natural question follows: What criteria may the court apply in order to create a referential framework to interpret its provisions. Francesca Klug advances the following three criteria for consideration: (a) 'the broad philosophical approach to human rights as this was constructed by the Universal Declaration of Human Rights (b) the promotion of the commonly accepted ideals and values of a democratic society and the (c) principles characterised by pluralism, tolerance and broadmindedness.'[26] However, these do not appear to be very concrete to resolve the existing debate.

Evolutive Interpretation or the living instrument principle

Taking off from the 'object and purpose' scenario, it clearly follows that the convention must be given evolutive or dynamic interpretation. The court took this approach in *Tyrer v UK*[27] whereby it stated that the Convention is 'a living instrument whereby it must be interpreted in light of the present day conditions.' The determining factor was held to be the conditions currently prevalent in the European society and not those present during the time of adoption of the Convention.[28] The court stressed that following the protection of individual rights, domestic courts need to adopt a dynamic and forward-looking approach.[29] Also known as the 'doctrine of evolutionary law', the idea is to incorporate sociological and cultural differences. As per this, the newest case law tends to be most persuasive.[30]

For instance, Article 3 of the Convention provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Interpretation of this right will require determining what criteria are relevant to decide if a violation has occurred or not. As per academic literature, there are two ways of going about this: a) the first takes the Convention in the form that it was adopted in 1950 and the second involves a more contemporary approach.[31] The first aims to look at the clear intention of the signatories to define 'degrading

[25] Golder, (n 4), Fitzmaurice para 40
[26] Klug, Francesca and Helena Kennedy, *Values for a Godless age : the story of the UK's New Bill of Rights (*Penguin Books, 2000) 34-56
[27] 2 EHRR 1 para 31
[28] Ibid
[29] Klug, (n 26), at 18
[30] Ibid
[31] Ibid

punishment' as they construed it to be during the formulation of the Statute. This intention is most likely to be identified from travaux preparatoires, as was done in the case of *Johnston v Ireland*[32]. The second purports that despite the fact that the government had a clear perception of the definition at the time of formation of the Convention, they also left room for the court to incorporate contemporary ideas for interpretation.

On those grounds, in *Tyrer*, the judges ruled that 'Article 3 is to be interpreted as embodying the concept of inhuman and degrading punishment, rather than any conception which may have been held in 1950 and, more importantly, indicated that it would be prepared to take a similar approach to other parts of the Convention.'[33]

A similar approach was taken by the court in *Winterwerp v Netherlands*[34]. The court was called upon to decide whether a violation of Article 5(1)(e) had occurred or not. The court held that

> 'the terms in not one that can be given a definitive interpretation...it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more widespread.'[35]

A plain view of the judgement will reveal that a fair amount of flexibility has been adopted by the court. As a matter of fact, it has been claimed by several commentators that the court resorted to a number of interpretation methods in order to be able to change its mind to adequately respond to changing public perceptions.[36] If this construction is taken to be true, then the Court's approach is likely to give rise to three potential problems.[37]

1. Lack of uniformity:

Rule of law requires law to be consistent in its application, be it statuatory or common law. If the Convention leaves room for inconsistency in its interpretation, then there is potential for

[32] 9 EHRR 203 para 52 PC
[33] Ibid
[34] 2 EHRR 387 para 46
[35] Ibid
[36] Klug, (n 26), at 34
[37] Harris, (n 2), at 8-17

rule of law to be destroyed.[38] The Convention cannot be interpreted arbitrarily and its clauses 'need to be read, understood and implemented uniformly within the Council of Europe'.[39]In a situation like this, one pertinent question that the court must consider is if the 'living document' approach erodes the consistency in its judgements and disrupts the basic uniformity of rule of law . The court's official position seems to be clear through a variety of judgments such as *Johnston, Soering* etc that both the principles need to be weighed in equal measures before reaching a decision that could undermine either. [40] This puts a check on the court and prevents it from exceeding its powers that have already been defined by the Convention itself. As also held in *Soering,* a change to the power arrangement needs to gain authorisation by the parties to the convention and each case must be judged on its own merits.[41] Therefore, the court cannot surpass the intention of the Convention no matter how flexible the approach.

2. Unexpected developments:

It has often been noted that the court has found itself anticipating developments before they have occurred yet. A classic example would be *Marckx v Belgium*[42]. In the current case, the court was required to decide if a given Belgian legislation which distinguished between the status of legitimate and illegitimate children violated the right to respect for family guaranteed by Article 8 of the Convention. The Court held that it did, on the ground that although such a distinction was traditional the Convention must align its interest in the light of present-day conditions and events.[43] While delivering the judgment, the judges said that they could not help 'but be struck by the fact that the domestic law of the great majority of the member states of the Council of Europe has evolved and is continuing to evolve in company with the relevant international instruments.'[44]

However, it has been long feared and contended that turning a blind eye and refusal by the court to recognise the changes that have emerged in the society will lead to grave injustice. This was seen first-hand in the *Cossey*[45] case and the court's existing jurisprudence on the

[38] Klug, (n 26) at 34
[39] Ibid
[40] Johnston, (n 31) para 27
[41] 11 EHRR 439 para 89 PC
[42] 2 EHRR 330 para 41 PC
[43] Ibid
[44] Ibid para 52
[45] *Cossey v UK* 13 EHRR 622 para 40

transsexual's rights. In the case at hand, the applicant who was a transsexual converting from male to female alleged that the rights under Articles 8 and 12 have been breached. While the court rejected these claims, they split over the interpretations of the Articles. With eight dissenting judges on Article 8 and four on Article 12, the debate was open. They said: 'The status of transsexuals is one where legal solutions necessarily follow medical, social and moral developments in society'.[46] The dissenting judges also noted that since *Rees v UK*[47] yet another case dealing with transsexual rights, there have been 'clear developments in the laws of the contracting state which demanded a fresh approach'.[48] A few years after Cossey, the case of *Christine Goodwin v UK*[49] fundamentally altered the nature of interpretation of transgender issues and changed the course of English law also with respect to change of names, marriage, social security, birth certificates, employments, pensions and other social constructs.[50]

3. Creating new obligations:

The third danger involves creation of new obligations. Chalking the way back to what dissenting judge Fitzmaurice said in Golder '...extensive construction might have the effect of imposing upon the contracting states obligations they had not really meant to assume or would not have understood themselves to be assuming...'.[51] However, this problem is far more remote in nature than the other two. It may be explained through dual reasons.[52] First, Vienna Convention binds the interpretation of these provisions and thus protects creation of new obligations. Under Article 31(4)' A special meaning shall be given to a term if it is established that the parties so intended' thereby omitting possibilities of extensive interpretation. Secondly, as seen in *Luedicke* and *Tyrer,* the court interprets the ordinary meaning of a word or phrase under the assumption of it being self-explanatory and usually refrains from elucidating.[53]

Other modes of Interpretation: Principle of Proportionality and Margin of Appreciation Doctrine.

[46] Ibid
[47] 9 EHRR 56 para 37 PC
[48] Cossey, (n 45)
[49] 2 EHRR 330 para 41 PC
[50] Ibid.
[51] Golder, (n 4), Fitzmaurice.
[52] Campbell, (n 23), at 12
[53] Ibid.

The Evolutive approach naturally leads up to the next big question: Whether the court ought to be influenced by policies in European states in its interpretation.[54] Through decisions like *Lingens v Austria*[55] where the court emphasized the importance of freedom of speech and of the press in a democratic society, it was apparent that existing European consensus exerts considerable influence on the interpretation which taps into the 'longstanding values that generally underpin European society'.[56] In absence of a European consensus, the Court has been seen applying the 'lowest common denominator' or the 'margin of appreciation' doctrine as in applied *in Mathieu-Mohin v Belgium.*[57]

This doctrine has played a very key role in the interpretation of the Convention by the court. The doctrine refers to the space for manoeuvre that is made available to the state parties while interpreting the Convention and fulfilling their obligations under it.[58] The court uses it as an interpretive process within the Convention through the help of various principles. The first case where this principle was established was the *Handyside*[59] case. Here the Court was required to examine if the forfeiture of the Little Red School Book on grounds of obscenity violated freedom of expression and stated that:

> 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.'[60]

One of the most effective principles to qualify this doctrine is that of subsidiarity. It means that a state retains the democratic capacity to decide what serves itself best.[61] This allows a

[54] Harris, (n 2), at 8
[55] 8 EHRR 407 para 41 PC
[56] Ibid.
[57] 10 EHRR 1 para 11 PC
[58] Harris, (n 2), at 10-11
[59] *Handyside v. The United Kingdom* 1 EHRR 737 PC, para 47-48
[60] Ibid
[61] R. Clayton, H. Tomlinson ,*The Law of Human Rights* (Oxford, 2000) 285

state permissible interference with convention rights which is yet another qualifying principle for margin of appreciation.[62]

Best elucidated in the *Malone*[63] case, the court held 'that there must be a measure of legal protection against arbitrary interference by public authorities with the right in Art.8, especially where a power of the executive is exercised in secret and the risk of arbitrariness is evident.'[64] This interpretation saw the court tweaking the nature of the Conventions right in order to meet the state's need. The measure was also deemed proportional to the object, brining into play the doctrine of proportionality, which is at the heart of the court's interpretative mechanism when restricting Conventional rights.

Proportionality is also what the court uses to determine the reasonableness of a restriction imposed. The approach set out in *Handyside* is appropriate as far as fundamental rights go and can be set out in four parameters:

1. Pressing social need for restriction
2. Restriction proportional to the need
3. Proportionate response to the need
4. Sufficiency and relevance of reason.[65]

While dealing with the inter-relationship of proportionality and margin of appreciation the court has interpreted the Convention with minimal judicial creativity and caution. In *Delcourt v. Belgium*[66] the court said that when applying the two together, the significance of the right in question must be taken into account. This is so because some rights are characterized as fundamental such as right to a fair trial, freedom of expression etc.[67] The second relevant factor should be the objectivity of the restriction, as was held by the court in *Sunday Times*[68]. Here, the Court distinguished between 'the objective nature of maintaining the authority of the judiciary (which left a narrower margin of appreciation for the state) and the subjective nature of the protection of morals, where the Court should defer to domestic views.[69] And

[62] Ibid
[63] *Malone v. The United Kingdom*, 25290/94 HUDOC 1996
[64] Ibid
[65] Handyside, (n 59)
[66] 10 YB 238 at 270(1967)
[67] Ibid
[68] 2 EHRR 245 PC
[69] Ibid

thirdly, in the event of consensus of law and practice among the states, as in *Marckx*[70] the Court acknowledged 'an emerging consensus about the legal treatment of illegitimate children' and accordingly struck down laws of inheritance which discriminated against such children. So, it is clearly evident then despite the cautious and limited creativity, the general tenor in the court's judgement has been evolutive.

The court has shown a progressive inclination in its interpretive mechanism and has been less cautious in the notion that its Articles are not dead letters or purely textual. Instead, the court has peppered its judgements with judicial creativity, such as, *Rees*, allowing the Convention to be a 'living document' and letting it adapt to current needs, social and cultural changes taking place within the European Council.[71] This policy however, is not by any means, developed to dilute the homogeneity of the rule of law which acts as fulcrum of interpretation of any treaty instrument. Quite the contrary, it is intended to 'enhance the Convention's applicability throughout the Council'.[72] The human rights norms are dynamic and evolve with the societies within which they are born and implemented. Undoubtedly, human rights norms are not meant to be static. Subsequently, the interpretation of such norms can never be purely textual and devoid of bold flexibility, as seen in *Golder*. Therefore, the approaches undertaken by the court seem to a balanced blend of the evolving law and the written frame.

[70] Marckx, (n 42)
[71] Harris, (n 4), at 15-17
[72] Ibid