The Law Society

The Law Society Human Rights Committee's Response to the Council of Europe's call for evidence on the

'Longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights'

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Summary

This paper has been prepared by the Law Society's Human Rights Committee. The paper focuses on Judicial interpretation. Judicial interpretation is a subject that is extremely relevant as it raises the question of the remit of the European Court of Human Rights ('the Court') to challenge the powers of government, for instance to consider prisoners' voting rights.

The European Convention on Human Rights ('the Convention') has been subject to a number of different interpretative approaches by the Court. The structure of the Convention and its open textured language allow the Court choice for interpretation. Some of these approaches have been criticised for allowing for judicial creativity and democratic illegitimacy. The lack of a consistent interpretative approach has led commentators to argue that the Court is making law, which is not the role of the judiciary. The climate of hostility towards the role of the Court in interpreting the Convention is often based on narrow understandings of the role of courts in domestic situations.

Whilst applying the 'restrictive' approach to interpretation and margin of appreciation may accommodate ideas of state sovereignty and democratic legitimacy, it does not accurately reflect the aims and purpose of the Convention. The Convention was devised in order to hold governments accountable for their human rights obligations under the Treaty. The Court's primary role is then to interpret the Convention in the light of European standards of human rights. This necessarily requires the Court to explain and develop normative standards, and to apply standards of interpretation that accord with international law.

Main Submission

1. The following examines the interpretative methodology of the European Court of Human Rights, insofar as the main sources of international law state the laws governing interpretation and the jurisprudence of the Court itself.

2. The Court is currently able to interpret the Convention dynamically: the *Vienna Convention on the Law of Treaties 1969 ('the VCLT')* necessarily demands a dynamic and evolutive interpretative methodology in order to properly interpret any in-force treaty with true objectivity.

3. Consequently, without the aid of an amending Protocol to the Convention, it would be difficult for the Court to justify adopting an interpretive methodology more activist than it already uses.

4. The Convention is, at its core, a treaty. Consequently, interpretation by the Court is technically governed by customary international law pertaining to the law of treaties, codified in 1969 by the *VCLT.* The Court itself has acknowledged the customary nature of the *VCLT* provisions, such as in *Golder v United Kingdom*,[1] where the Court held that it was

> '…prepared to consider… that it should be guided by Articles 31 to 33 of the [VCLT]. That Convention has not yet entered into force… but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" – the Council of Europe – within which it has been adopted' (at [29])

5. The default interpretive position the Court should be assuming, therefore, can be called neither 'restrictive' nor 'dynamic'[2] but, rather 'teleological'[3] As *VCLT Art 31(1)* provides:

   'A treaty shall be interpreted in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*.'

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[1] *(1975) Ser A 18; (1979-1980) 1 EHRR 524*

[2] For the sake of clarity, the term 'dynamic' in this note is being used as a universal term for 'evolutive', 'progressive', 'teleological', etc. interpretive methodologies.

[3] Or 'textual', if you prefer

6. This general rule is qualified by the additional interpretive factors found in *VCLT Art 31(2), 31(3), and 31(4)*: contextual elements, subsequent agreement regarding interpretation, subsequent practice that establishes agreement, relevant rules of international law, and special meanings attached to particular terms. These rules and the supplementary means of interpretation found in *VCLT Art 32* are, however, clearly rules of interpretation that inhabit the periphery of the general rule, only to be applied when the situation demands it, albeit holistically alongside *VCLT Art 31(1)* when it does.

7. The literal rule found in *VCLT* already provides the Court with substantial discretion in interpretation. It is difficult to contemplate a situation in which the Court *could* take a more liberal interpretation of the Convention without a substantial redrafting of the Convention provisions or the creation of a *lex specialis* rule of interpretation. This submission argues that the literal rule *as applied by the Court* is inherently dynamic and evolutive, and that the term 'dynamic and evolutive' is not in and of itself a form of interpretive methodology but rather a necessary condition for a truly objective literal interpretation.

8. In practice, the Court most often turns to – though rarely mentions – the literal methodology found in the *VCLT,* by finding and applying either 'the ordinary meaning given to the terms of the treaty in their context', or 'in light of its object and purpose', or both, in a way that accounts for the changing circumstance of European society and international norms. The Court has justified its approach with the following reasons:

> First, the Court (and its counterparts) recognise that human rights treaties or, more generally, treaties that concern obligations owed by the State to the individual, are fundamentally different from inter-State treaties. Bernhardt, former President of the Court, wrote:
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> > 'Human rights treaties have a unique character. They are not concerned with the mutual relations and exchange of benefits between sovereign States… It is the internal order of these States and their behaviour towards their own citizens (as well as aliens…) which are the subject of human-rights treaties.'[4]
>
> This was echoed by the Court in *Soering v United Kingdom,*[5] where the Court held that, 'regard must be had to [the Convention's] special character as a treaty for the collective enforcement of human rights and fundamental freedoms.' (at [87])

[44] Mowbray, 'The Creativity of the European Court of Human Rights' *(2005) 5 HRLR 57*, citing Bernhardt, Thoughts on the interpretation of Human-Rights Treaties' in Matscher and Petzold (eds.) *Proteting Human Rights: The European Dimension* (Koln: Carl Heymanns Verlag, 1988)

[5] *Ser A 161 (1989); (1989) EHRR 439*

Second, the Court recognises that the 'ordinary meaning given to the terms of the treaty in their context' is an objective test to be applied in light of the norms of the time of the case, rather than the norms of the time of drafting.

This is known in the Court's jurisprudence as the 'living instrument' principle. In *Tyrer v United Kingdom*,[6] the Court, in addition to labelling the Convention as a 'living instrument', held that it '…must be interpreted in the light of present-day conditions' (at [31]). *Tyrer* was a case that concerned judicially-administered corporal punishment, which, by the time of the hearing, had been discarded by the majority of European States. The Court consequently held that the continued use of corporal punishment fell under the definition of 'degrading punishment'. Similar interpretative methodologies by the Court with respect to the procedural definitions of the Convention can be found in *Loizidou v Turkey (Preliminary Objections).*[7]

Third, when the Court interprets the Convention in light of its 'objects and purposes', it arrives at the conclusion that the definition of any of the protected Convention rights must be one that, when properly protected, yields tangible effects.

In *Airey v Ireland*,[8] the Court made it clear that the 'Convention is intended to guarantee not rights that are theoretical or illusory but rights that are *practical and effective*' (at [24]). The preambular text, which states, 'Considering that this Declaration aims at securing the universal and *effective* recognition and observance of the Rights therein declared,' combined with the recognition that human rights treaties are unique, presumably allowed the Court to sustain such a definition.

Fourth, and finally, the Court has in practice managed to apply these methods of interpretation so that it is able to achieve a dynamic approach to interpretation without crossing the line into express policy-making.

In *Soering*,[9] the Court found that although "no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a contracting State under the relevant Convention guarantee. What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be,

[6] *Ser A 26 (1978); (1979-80) 2 EHRR 1*

[7] *Ser A 310 (1995); (1995) 20 EHRR 99*

[8] *Ser A 32 (1979); (1979-80) 2 EHRR 305*

[9] *Ser A 161 (1989); (1989) 11 EHHR 439*

suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State." Para 85.

9. In *Pretty v United Kingdom*[10], the Court demonstrated that it would not dictate the potential trajectory of international norms in order to expand the definitions of Convention rights past its present accepted form when it refused to read into *Articles 2 and 3* of the Convention a right to assisted suicide. Such an interpretation was recognised by the Court to be incompatible with any definition of the Convention rights. In the case of *Pretty*, the only option for a right to assisted suicide would be an amendment to the Convention via a *Protocol*.

Conclusion

As suggested above, the Court is required by International Law to take a dynamic approach to Human Rights Law. This should not be surprising. All modern systems of law have, to a greater or lesser extent, evolved ways of enabling the law to reflect developing mores. This is particularly the case in the common law of England and Wales. Inevitably, there is a balance to be struck between judicial activism and policy making but we do not consider that, properly understood, the Court has materially got the balance wrong. Inevitably, there will be times when individuals in good faith consider that the Court has overstepped the mark or reached a wrong decision. This is likely to arise in any judicial system. It does not, however, mean that the system is fundamentally flawed or needs changing. In the Society's view, more needs to be done to educate about the purpose of the Convention and the Court so that decisions can be debated in a properly informed way.

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[10] *(2002) 35 EHRR 1*,