HUMAN RIGHTS AND CRIMINAL JUSTICE

First Edition

by

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III. *Permissible limitations must not impair the essence of a Convention right*

2–17 Another aspect of the doctrine of practical and effective interpretation is the principle that limitations and conditions imposed on the exercise of a Convention right must not impair its very existence or deprive it of its effectiveness.[62] In *Fox, Campbell and Hartley v. United Kingdom*[63] the government argued that a power of detention which was exercisable on the ground of "genuine suspicion" was sufficient to meet the requirements of Article 5(1)(c) which permits arrest or detention on "*reasonable* suspicion" of the commission of an offence. The Court held that the difficulties associated with policing terrorist crime, including the need to protect informers, "cannot justify stretching the notion of 'reasonableness' to the point where the essence of the right secured by Article 5(1)(c) is impaired". In *Golder v. United Kingdom*[64] the government sought to argue that Article 8, which protects (amongst other things) the right to respect for a person's correspondence, applied only to state interference with existing correspondence rights, and did not therefore restrict the state's right to control or prohibit correspondence to and from prisoners. Not surprisingly, the Court rejected this argument, holding that "it would be placing an undue and formalistic restriction on the concept of interference with correspondence not to regard it as covering the case of correspondence which has not yet taken place, only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed".

IV. *Evolutive interpretation*

2–18 The Convention has been described as a "living instrument which must be interpreted in the light of present day conditions".[65] It calls for an evolutive and dynamic approach to its interpretation rather than a static and historical one. The concepts used in the Convention are therefore to be understood in the context of the democratic societies of modern Europe, and not according to the conceptions of 50 years ago when the Convention was drafted.[66] As Lord Hope pointed out in *R. v. Director of Public Prosecutions ex parte Kebilene*[67] "the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules".

2–19 Whilst evolutive interpretation has an important role to play in ensuring that rights remain relevant, a court applying the Convention cannot, through the process of interpretation, create wholly new obligations which the contracting parties have not undertaken. Thus, in *Soering v. United Kingdom*[68] the Court

[62] *Mathieu-Mohin and Clerfayt v. Belgium* (1988) 10 E.H.R.R. 1 at para. 52; *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528 at para. 57. *Winterwerp v. Netherlands* (1979–80) 2 E.H.R.R. 387 at para. 60; *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329 at para. 194; *Philis v. Greece* (1991) 13 E.H.R.R. 741 at para. 59.

[63] (1991) 13 E.H.R.R. 157 at para. 32.

[64] (1979–80) 1 E.H.R.R. 525.

[65] *Tyrer v. United Kingdom* (1979–80) 2 E.H.R.R. 1 at para. 31; *Airey v. Ireland* (1979–80) 2 E.H.R.R. 305 at para. 26.

[66] It is for this reason that the *travaux préparatoires* are of only marginal relevance in the interpretation of the Convention.

[67] [1999] 3 W.L.R. 972.

[68] (1989) 11 E.H.R.R. 439.

rejected the submission of Amnesty International that "evolving standards in Western Europe regarding the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3". The Court observed that Article 3 could not have been intended by the drafters of the Convention to include a general prohibition on the death penalty since the death penalty was expressly permitted by Article 2. Noting that the death penalty in peacetime had in fact been abolished by all contracting states, the Court observed;

> "Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention, Article 3 cannot be interpreted as generally prohibiting the death penalty."

2–20 Similarly, in *Cruz Varas v. Sweden*[69] the Court held that in the absence of a specific provision in the Convention enabling the Court to make a legally binding order for interim relief, a failure by a state to comply with a request for interim measures could not be regarded as an interference with the right of individual petition. Despite the history of almost invariable compliance with such requests, the Court could not "create new rights and obligations which were not included in the Convention at the outset".

2–21 Evolutive interpretation thus requires the Court to strike a careful balance, which recognises that it is not the task of the interpreter to change the content of a norm established in the Convention, whilst at the same time acknowledging that if the content of a norm "has undergone a change in social reality, the interpreter must take account of this".[70] As a former President of the Court has put it[71]:

> "Human rights treaties must be interpreted in an objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when the treaties were drafted retain hardly any continuing validity. Nevertheless, treaty interpretation must not amount to treaty revision. Interpretation must therefore respect the text of the treaty concerned."

The court must, in the end, make a judgment as to whether a new social or legal standard has achieved sufficiently wide acceptance to affect the interpretation and application of the Convention. In making this judgment a consideration of comparative law and practice within Europe and elsewhere may be relevant, as may other international agreements which the contracting parties (or the majority of them) have concluded.

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[69] (1992) 14 E.H.R.R. 1 see paras 1–33 to 1–38 above.
[70] Sereni *Diritto Internazionale* 1 (1956), p. 182 cited in F. Matscher, "Methods of Interpretation of the Convention" in R. St. J. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), p. 70.
[71] R. Bernhardt, *The European Dimension: Studies in Honour of Gérard J. Wiarda* (Koln, 1988), p. 65 at p. 71.

2–22 Many Convention concepts are obviously rooted in the current legal and social standards of the contracting states. The requirements of the "protection of morals", for example, or the question of whether an interference with a Convention right is "necessary in a democratic society" can only be judged according to contemporary standards, and the Court has been particularly willing to adopt an evolutive approach to such questions. Thus, in *Dudgeon v. United Kingdom*[72] the Court observed that:

> "As compared with an era when [the legislation] was enacted there in now a better understanding and, in consequence, an increased tolerance of homosexual behaviour to the extent that it is no longer considered to be necessary or appropriate to treat homosexual practices [between consenting adults in private] as in themselves a matter to which the sanctions of the criminal law should be applied. The Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states."

2–23 *Dudgeon* was concerned with the position of male homosexuals over the age of 21. It took a further 15 years before the Convention organs came to accept that the same principle should apply to those aged over 16. In *Sutherland v. United Kingdom*[73] the Commission overturned its previous caselaw,[74] holding that the potential application of the offence of gross indecency to consensual sexual activity between 16 and 17 year old males was in breach of Articles 8 and 14. In coming to the conclusion that a differential age of consent for homosexuals could no longer be justified, the Commission referred to "major changes" which had occurred in professional opinion on the need to protect young male homosexuals and the desirability of an equal age of consent. The Commission considered that it was "opportune to reconsider its earlier case law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences".

2–24 This requirement for a dynamic interpretation is not however confined to the qualified rights in Articles 8 to 11. It applies generally, and governs the interpretation of all aspects of the Convention. In *Tyrer v. United Kingdom*[75] the Court held that judicial birching was in breach of Article 3, saying that it "could not but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe". In the Court's view it was the standards which were currently prevalent which were decisive of the issue, and not those which were prevalent when the Convention was adopted: Article 3 embodied the *concept* of inhuman and degrading punishment and not the particular *conception* which may have been held in 1950.

2–25 Similarly in *Winterwerp v. Netherlands*[76] the Court found that the term "person of unsound mind" in Article 5(1)(e) was;

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[72] (1982) 4 E.H.R.R. 149 at para. 60.
[73] (1997) 24 E.H.R.R. CD 22.
[74] *X v. United Kingdom* (1980) 19 D.R. 66.
[75] (1979–80) 2 E.H.R.R. 1 at para. 31.
[76] (1982) 4 E.H.R.R. 228.

"[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 greater understanding of the problems of mental patients is becoming more widespread."

And in *Borgers v. Belgium*[77–78] the Court held that the requirements of a fair trial in Article 6 had undergone a "considerable evolution" in the Court's caselaw, particularly as regards the importance attached to the appearance of fairness, and the increased sensitivity of the public to the fair administration of justice.

2–26 The inevitable consequence of this approach is that the strict doctrine of precedent does not apply to decisions of the European Court and Commission of Human Rights. Older Convention caselaw must be approached with this principle in mind. Where there is some evidence that standards may be in transition, the Court may be willing to reconsider its own decisions at relatively frequent intervals, and sometimes even calls for a particular situation to be kept under review. In *Rees v. United Kingdom*,[79] for example, the Court rejected a complaint under Article 8 brought by a transsexual who had been denied the right to a change of legal status. Nevertheless the Court said that it was "conscious of the seriousness of the problems affecting these persons and the distress they suffer", and continued; "The Convention has always to be interpreted in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review, having regard particularly to the scientific and societal developments". In the subsequent cases of *Cossey v. United Kingdom*[80] and *Sheffield and Horsham v. United Kingdom*[81] the Court adhered to its earlier decision in *Rees*, but by a diminishing majority in each case. In the *Sheffield* case, the finding of no violation was by a majority of only 11 to nine, and the Court openly criticised the United Kingdom for its failure to carry out a review of the need to maintain the existing arrangements. Whilst voting with the majority "after much hesitation" the British judge, Sir John Freeland, suggested that further inaction by the United Kingdom "could well tilt the balance in the other direction".

2–27 The Court's evolutive approach to interpretation does not, however, mean that the parties can simply ignore a previous decision of the Court which has been reached after hearing full argument. Whilst the strict doctrine of precedent has no place in Strasbourg, there is, in practice, a heavy onus on an applicant seeking to persuade the Court to depart from a recent decision. In *Wynne v. United Kingdom*,[82] a case concerning the rights of a mandatory life sentence prisoner, the Court suggested that it would require "cogent reasons" to depart from the conclusion that it had reached on the nature of the mandatory life sentence three years earlier in *Thynne, Wilson and Gunnell v. United Kingdom*.[83]

[77–78] (1993) 15 E.H.R.R. 92.
[79] (1987) 9 E.H.R.R. 56.
[80] (1991) 13 E.H.R.R. 622.
[81] (1999) 27 E.H.R.R. 163.
[82] (1995) 19 E.H.R.R. 333 at para. 36.
[83] (1991) 13 E.H.R.R. 666.

V. *Practice in other jurisdictions*

2–28 The Court has observed that the main purpose of the Convention is "to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction".[84] Thus, the Court has consistently held that the existence of a "generally shared approach" in other contracting states is relevant to the application of the Convention[85] although "absolute uniformity" is not required.[86] The Court has no systematic means of establishing the comparative law position on a particular issue, even within the Council of Europe. It relies on the collective experience of the judges of the Court, on the research of the parties, and on any *amicus* interventions[87] for its information.

2–29 As we have seen, the Court was heavily influenced by commonly accepted European standards in *Tyrer v. United Kingdom*[88] and *Dudgeon v. United Kingdom*.[89] On the other hand, when considering the length of a criminal sentence the Commission has held that "the mere fact that an offence is punished more severely in one country than in another does not suffice to establish that the punishment is inhuman or degrading".[90] And in *T and V v. United Kingdom*[91] the Court referred to the absence of a European consensus on the age of criminal responsibility in concluding that the prosecution of two boys for a murder committed when they were 10 was compatible with Article 3 of the Convention.

2–30 When called upon to determine whether an interference with freedom of expression is justified under the protection of morals exception in Article 10(2), the Court has often stressed that "it is not possible to find in the legal and social orders of the contracting states a uniform Europen conception of morals".[92] Thus, in *Handyside v. United Kingdom*,[93] the Court attached little significance to the fact that the book to which the applicant's conviction related had been distributed elsewhere in Europe without attracting prosecution. Similarly, in *Wingrove v. United Kingdom*[94] where the applicant's complaint under Article 10 related to the English offence of blasphemy, the Court observed that;

> "[T]here is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely

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[84] *Belgian Linguistics Case (No. 1)* (1979–80) 1 E.H.R.R. 241 at 250 para. [e].
[85] *Marckx v. Belgium* (1979–80) 2 E.H.R.R. 330 para. 41; *Tyrer v. United Kingdom* (1979–80) 2 E.H.R.R. 1 para. 31; *Dudgeon v. United Kingdom* (1982) 4 E.H.R.R. 149 para. 60; *X, Y and Z v. United Kingdom* (1997) 24 E.H.R.R. 143 para. 52.
[86] *Sunday Times v. United Kingdom (No. 1)* (1979–80) 2 E.H.R.R. 245 para. 61; *Muller v. Switzerland* (1991) 13 E.H.R.R. 212 para. 35; *Wingrove v. United Kingdom* (1996) 24 E.H.R.R. 1 para. 58; *F v. Switzerland* (1988) 10 E.H.R.R. 411 para. 33. *Monnell and Morris v. United Kingdom* (1987) 10 E.H.R.R. 205 para. 47.
[87] See para. 1–152 above.
[88] (1978) 2 E.H.R.R. 1.
[89] (1982) 4 E.H.R.R. 149.
[90] *C v. Germany* (1986) 46 D.R. 176.
[91] (2000) 30 E.H.R.R. 121, paras 73–74.
[92] *Muller v. Switzerland* (1991) 13 E.H.R.R. 212 para. 35; *Handyside v. United Kingdom* (1979–80) 1 E.H.R.R. 737.
[93] (1979–80) 1 E.H.R.R. 737.
[94] (1997) 24 E.H.R.R. 1 at para. 58.

it on one side or the other. He told the jury that there were such creatures as witches and that they were to ask themselves two questions: whether or not the children were bewitched and whether the prisoners were guilty of bewitching them. The jury had heard all the evidence and it was for them to decide. It is not possible from reading the report to discover whether Hale was satisfied with the evidence or not. To say that Hale failed to sum up strongly against acquittal is to misunderstand the whole position. He would have regarded such action as usurping the functions of the jury. It was for the judge to tell the jury what the law was and for the jury to find the facts. It was the duty of the judge to refrain from making any comments which might influence the jury in coming to their decision. Hale's attitude to summing up may well be unique stemming from his strict probity and anxiety not to misrepresent any of the facts to the jury.

Hale's attitude towards witchcraft is compared very unfavourably with that of Sir John Holt. Notesein says: "without doubt Chief Justice Holt did more than any other man in English history to end the prosecution of witches".[27] One of his best known witch cases was the trial of Richard Hathaway as a cheat and impostor in 1702 (State Trials, vol. XIV, p. 639). Richard Hathaway, the apprentice to a blacksmith, Thomas Welling, was subject to fits and was accused of pretending to be bewitched by Sarah Murdoch. He claimed that only by scratching Sarah Murdoch could he be freed from his fits and fasting. A clergyman from Southwark, Dr Martin, was asked to come and pray with him but, thinking Hathaway was a fraud, arranged for him to scratch another woman and straightaway Hathaway was cured of his fit and could take food. Sarah Murdoch continued to be persecuted by the rabble and fled from Southwark and took lodgings in London. She was not allowed to rest in peace and was brought to trial as a witch and acquitted. Hathaway continued his persecution, claiming corruption both of judge and jury and Sarah remained in danger of her life from the mob. Hathaway was arrested and put in the charge of Mr Kensy, a medical man in Fetter Lane, who was instructed to examine him and make a report for the court. Although he was supposed to be fasting the maid supplied him with food, saying she had quarrelled with her master. At the trial there was evidence that he secreted pins in his clothing for use when vomiting, but when the chamber pot was held by someone else no pins appeared in it. Holt summed up very strongly against Hathaway and the jury found him guilty without retiring.

There is no doubt at all that in a case of this nature there would

have been a conviction if the trial had taken place before Hale. Holt had no inhibitions about summing up trenchantly, but in the particular circumstances of Hathaway's case the evidence was so clear that a jury with Hale as judge would have convicted. It must be remembered in comparing the attitudes of Hale and Holt that Holt was operating thirty years later than Hale when public opinion was changing and that Holt presided over many more witch trials than Hale. Hale certainly conducted the trial at Bury St Edmunds and possibly the trial of Isabel Rigby in Lancaster in March 1669 when Isabel Rigby was sentenced to death by Hale for bewitching two neighbours at Hindley,[28] but we have no evidence of any others. Hutchinson records six trials presided over by Holt[29] and states that witches were acquitted by him on eleven occasions so that his experience in conducting this kind of trial was certainly greater than Hale's. Holt had a more sceptical nature than Hale and was more a man of the world. He had no scruples about leading a jury to his way of thinking and summing up strongly against a conviction if minded to do so. Nevertheless it does seem to be a sign of weakness in Hale that he failed to sum up the evidence and point out to the jury the failure of the experiment. His conduct on this occasion indicates the credulity and superstition which mingled with his religious beliefs.

NOTES

1 See also *A Tryal of Witches at the Assizes held at Bury St Edmunds by a person then attending the court.* This report is repeated verbatim in *6 State Trials.*
2 R. Baxter, *The Certainty of the Worlds of Spirits*, p. 80.
3 ibid., p. 3.
4 R. T. Davies, *Four Centuries of Witch-belief*, p. 13.
5 33 Henry VIII cap. 8 1542.
6 Wallace Notestein, *A History of Witchcraft in England from 1588–1718*, p. 12.
7 ibid., p. 14.
8 ibid., p. 52.
9 Davies, *Four Centuries of Witch-belief*, p. 15.
10 C. L'Estrange, Ewen, *Witch Hunting and Witch Trials*, p. 31.
11 Davies, *Four Centuries of Witch-belief*, p. 21, n. 2.
12 ibid., p. 22.
13 Ewen, *Witch Hunting and Witch Trials*, p. 20.
14 Notestein, *Witchcraft in England*, p. 105.
15 ibid., p. 97.
16 ibid., p. 140.
17 *Calendar of State Papers (Domestic) 1611–18*, p. 398.

18 Davies, *Four Centuries of Witch-belief*, p. 153.
19 Notestein, *Witchcraft in England*, p. 206.
20 Sir Frederick Pollock and Frederick Maitland, *The History of English Law*, 2nd ed., vol. 2, p. 556.
21 Ewen, *Witch Hunting and Witch Trials*, preface xii.
22 Notestein, *Witchcraft in England*, p. 206.
23 Ewen, *Witch Hunting and Witch Trials*, p. 43.
24 ibid., p. 43.
25 Notestein, *Witchcraft in England*, p. 320.
26 Ewen, *Witch Hunting and Witch Trials*, appendix II, p. 267.
27 Notestein, *Witchcraft in England*, p. 320.
28 Davies, *Four Centuries of Witch-belief*, p. 177.
29 Francis Hutchinson, *An Historical Essay Concerning Witchcraft*, p. 41.