

RETROSPECTIVE OF THE DYNAMIC AND EVOLUTIVE INTERPRETATION OF ECHR: FRAMING THE STRASBOURG'S INTERPRETATIVE ETHIC

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Abstract

Through the years of jurisprudence, the European Court of Human Rights has developed a quite unique and interesting dynamic and evolutive interpretation of ECHR. Starting from the *Tyrer case*, the Court has shaped the Convention using the doctrine of 'living instrument' and till today it has shown the capacity to evolve in the light of social and technological developments, and more importantly, to adapt its opinion on important Convention's rights. This paper will try, first of all, to explain the distinction between dynamic and evolutive interpretation of ECHR by giving an answer to new facts and giving new answers to old facts. Further, it will make a retrospective of the cases in which the Court gave dynamic or evolutive interpretation explaining that the '*ECHR is a living instrument which should be interpreted in present-day conditions*'. Finally, the paper will discuss the latest developments concerning the ECHR's interpretation, the criticism of being too narrow and morally ethic and the justification, for example in the case of *Selmouni v. France*, where the Court reiterates from its judgment delivered in the case of *Ireland v. the United Kingdom* explaining that '*certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future*'. Perhaps this could mean that in future the Court should look beyond present conditions and condemn such acts more gravely thus becoming a true modern developer of the Convention's rights.

Keywords: dynamic interpretation, evolutive interpretation, living instrument and ECtHR

I. INTRODUCTION

The importance of the European Court of Human Right (ECtHR, or the Court) can be seen not only in the process of delivering judgments, but also in interpreting a very specific international document for the protection of human rights and fundamental freedoms such as the European Convention on Human Right (ECHR, or the Convention). This paper will focus on evolutive and dynamic interpretation as one of the methods for interpretation of ECHR. When we speak about treaty interpretation, it is true that the Vienna Convention for the Law of Treaties (VCLT) is a starting point for interpretation, but also it is obvious that the Court has developed its own interpretative methods which suit the Convention's provisions. In exercising its adjudication process, the Court is doing an extensive interpretation of the fundamental rights contained in ECHR and sometimes imposes certain positive or negative obligations to respective states.

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Through the retrospective of several cases, this paper will focus on the principle of dynamic or evolutive interpretation that enables the ECtHR to change the originary conceptions of how terms were elaborated and defined and to endorse significant changes in doing interpretation and in the same time to emphasize the nature of the ECHR ‘as a living instrument which should be interpreted in present-day conditions’. Moreover, these methods of interpretation allow the Court to be bold and to abandon some principles which do not allow introducing innovative methods for interpretation. Particularly, behind this doctrine of a living instrument, we will see how when the Court is satisfied that evolutive interpretation should be deployed, a previous judgment or judgments may be overruled. Although, previous judgments are not binding for the Court, however, it should not depart from a precedent without good reasons. By doing this, the ECtHR is leaving some out-standing opinions and is replacing them with new findings which correspond to the living instrument doctrine. This paper will argue that, in certain cases, in order to protect legal certainty, to preserve its own process legitimacy (although it is allowed to overrule judgment because that is the point of the dynamic interpretation) and to prevent chaos, the Court left some “issues” not to be tackled, although it admitted that some acts that were considered as inhuman or degrading treatment, may be considered as torture in future.

II. DEFINING ECHR INTERPRETATION WITHIN THE FRAMEWORK OF VCLT AND BEYOND

The ECHR¹ represents a unique document, drafted after the atrocities of the Second World War, with a purpose to establish a set of rights and freedoms, which will give proper recognition and safeguards to the right of life, private and family life, marriage, religion and freedom of expression. The Convention at the same time strongly prohibits torture, slavery and deprivation of liberty in specific circumstances. Having a character of an international document, its interpretation automatically falls within the scope of the Vienna Convention on the Law of Treaties² (VCLT) which codifies the “*means of interpretation admissible for ascertaining the intention of the parties*”.³

In Article 31, the VCLT sets the general rule of interpretation by stating that: “*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 the light of its subject and purpose*”. Further, it establishes the ordinary meaning of a treaty as a central mode of interpretation. This ‘ordinary meaning’ of treaty terms is at times ambiguous, as drafters often do not include detailed definitions or because the meaning has simply changed over time. According to Forrowicz, the analysis of the Court's case law reveals that the use of preparatory work has rarely been premised on strict adherence to the rule contained in Article 32 VCLT. Moreover, the Court does not seem to have adopted a coherent and rationalized approach to the *travaux préparatoires* of the ECHR. Rather, its methodology was adapted on a case-by-case basis depending on the context of a given situation.⁴ Therefore, the interpretation often goes further towards a more detailed analysis of the intentions of the parties, the object and the purpose of the interpretation. If we analyze the core intention of settling the

¹ European Convention on Human Rights 1950

² Vienna Convention on the Law of Treaties 1969

³ Reports of the International Law Commission on the work of its eighteenth session (ILC Ybk 1966/II, 1966) 218.

⁴ Forrowicz, Magdalena: *The reception of International law in the European Court of Human Rights* (Oxford Scholarship Online 2011) 68. See page 69: “The Court has applied Article 31 and 32 of the VCLT in a diverse manner, which renders the task of deducing a single approach to the VCLT interpretation rule more difficult.”

general rule of interpretation and the supplementary means of interpretation⁵, the purpose would be to set the framework for interpretation, but not at the same time posting limits or boundaries. As van Dijk and van Hoof pointed out “*the rules of VCLT do not provide clear-cut solutions to all problems of treaty interpretation,*” especially when the problems arise from situations resulting from changing social norms not envisioned by the drafters of the ECHR.⁶ That is the reason why evolutionary treaty interpretation occurs when a term contained in a treaty is capable of evolving, as opposed to being rigid and traditionally settled.

Thus, it is not actually wrong to say that the ECHR nor the VCLT explicitly mention evolutive interpretation as a legitimate tool for interpretation.⁷ It was thus the European Court of Human Rights (ECtHR or Court), which developed this interpretative concept, firstly mentioned in the *Tyrer case*. The ECtHR stated several times that the purpose of the ECHR, of general protection of human rights of the individual, are different in essence from general international law, and should be subject to different rules than the rules of interpretation enshrined in the VCLT.⁸ The Strasbourg Court for the first time explained the manner of interpretation in the case of *Golder v. the United Kingdom* where the Court considered itself to be “*guided by Article 31 to 33 of the VCLT*” although in that time the VCLT was not into force. The rules were, however, deemed applicable by the Court as they “*enunciate in essence generally accepted principles of international law*” already relied upon by the Court in earlier cases.⁹

The legitimacy of the ECtHR to conduct interpretation arises from Article 32 ECHR where it is explained that the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. The ECtHR has introduced new techniques of interpretation in its practice and jurisprudence which in fact lead to the fragmentation of interpretative rules and has opted for the ‘moral reading’ of the Convention rights, thus VCLT rules on interpretation play a limited role in the Court’s interpretation.¹⁰ The last one should not be interpreted wrongly, as something that breaks the common rules established in the VCLT. Principles of evolutive interpretation enable the Court to abandon traditional conceptions of how terms were originally understood by the VCLT because none can reconsider the impacts over a convention or other international instruments, which could affect their interpretation. However, these should not be interpreted in a negative connotation.¹¹ The evolutive and/or dynamic interpretation means getting out of the strict boundaries of what means traditional interpretation, analyzing the facts of the case, current circumstances, the relation with the supposed violated right from ECHR and the story, facts behind that violation and searching for similar violations in other

⁵ See Article 32 VCLT: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

⁶ Van Dijk, Pieter and Hoof, G.J: *Theory and practice of the European Convention on Human Rights* (Martinus Nijhoff Publisher 1998) 72

⁷ Sonnleitner Lisa, ‘The democratic legitimacy or evolutive interpretation by the European Court of Human Rights’ (2019) 33(2) Temple Int’L & Comp. L.J <[33.2 Sonnleitner Article3.pdf \(temple.edu\)](#)> accessed 17 January 2021

⁸ Orakhelashvili Alexander and Williams Sarah: *40 Years of the Vienna Convention on the Law of Treaties* (British Institute Of International and Comparative Law 2010) 93

⁹ *Golder v UK* App no 4451/70 (ECtHR, 21 February 1975) § 29

¹⁰ Letsas George, “Strasbourg’s interpretative ethic: Lessons for the international lawyer” [2010] 21(3) EJIL, 509

¹¹ Although dynamic and evolutive interpretation and afterwards the doctrine of “living instrument” are not mentioned in VCLT, undeniably they arise from Article 31 and 32 but modified to fit the purpose of interpreting the Convention in present-day conditions and to keep up with the changes in society. Moreover, as mentioned previously, they were used by the Court to create the doctrine of interpreting the ECHR as a “living instrument”.

Court's cases. There is nothing wrong in getting out of these borders, having in mind the fact that the ECHR evolves as a result of social, economic, political and other influences. However, what should be of utmost importance is the ultimate respect for protection of the Convention's rights and freedoms. The ECtHR should be able to resist to current political or other climate in Europe, to be able to see beyond the violated human right and to punish that violation even more rigorously in order to set standards for future in similar cases and similar ECHR's violations that such behaviour will be condemned.

1. Distinction between dynamic and evolutive interpretation

The methods of interpretation that the Court use are innovatory and adapted to the nature and special meaning of the ECHR. Although these methods do not derive from VCLT, in conducting interpretation, the Court has been guided by the VCLT. Article 31 (1) establishes the purposive/teleological method, giving priority to the object and purpose of treaties.¹² In fact, interpretation is the Court's first adjudication process. To establish a wide case law and to deliver judgments in which it establishes a violation of the Convention's rights or not, the Court first and foremost must do an extensive interpretation of the fundamental rights contained in the ECHR. By conducting interpretation, the Court defines the rights and obligations from the respective Convention's rights and its judicial task of defining where on right begins and other ends. This means that the Court may interpret some right from ECHR, but also by doing that, it can impose certain positive/negative obligations to the respective state. In the case of *Soering v. the United Kingdom*, the Court found "for the first time that State's responsibility could be engaged if it decided to extradite a person who is at risk of being subjected to ill-treatment in the requesting state".¹³ Similarly, in the *El-Masri case*, the Court held Macedonia directly responsible for ill-treatment of the claimant carried out by the US Central Intelligence Agency (a substantive violation of rights as opposed to a procedural violation of rights) on the basis that Macedonia actively facilitated and failed to take any measures that might have been necessary to prevent it from occurring.¹⁴ Furthermore, by managing its judicial obligations the Court uses different methods of interpretation such as the method of effectiveness, commonality, autonomous interpretation and several others. This paper will focus on the dynamic and evolutive interpretation of the ECHR, distinction and effects from them.

The principle of dynamic or evolutive interpretation enables the Court to change the originary conceptions of how terms were elaborated and defined and to endorse significant changes in doing interpretation and in the same time having in mind the public opinion, social climate in Europe and many other factors which could have affected the process of interpretation. The evolutive interpretation has been defined in the following way: where the parties have used generic terms in a treaty, the parties necessarily have been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into force for a long period, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.¹⁵

¹² White Jacobs and Ovey: *The European Convention on Human Rights* (5th edition, Oxford University Press 2010) 4

¹³ Stefanovska Vesna: *Violation of human rights in the process of extradition: a legal perspective* (Doctoral dissertation South East European University 2016) 8

¹⁴ *El-Masri v. Macedonia*, App no 39630/09 (ECtHR, 13 December 2012) § 211

¹⁵ The words 'evolutionary interpretation' International Court of Justice explained in *Navigational and Related Rights* are referring to: "Situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not fixed once and for all, so as to make allowance for among other things, developments in international law." For more information's see:

According to Jan Erik Helgesen, there is a distinction between dynamic and evolutive interpretation. Although in legal theory there is a discussion on these two concepts, thus some legal experts consider them as synonyms, they have slightly different connotations. The word 'evolutive' is used for covering a situation where the Court gives answers to new facts, issues resulting from societal changes, and issues that have never been considered before by the Court; whereas 'dynamic' interpretation refers primarily to the situation when the Court gives new answers to old facts.¹⁶ Commonly, in legal theory and in practice these two methods of interpretation are used as synonyms, because in certain circumstances and depending of the case, the Court's answer to the new fact may be indeed a new answer to the old fact if we have similar cases with same fundamental rights which have been violated. Thus, the evolutive or dynamic interpretation allows the Court to be bold and to let off some principles which do not allow introducing innovative methods for interpretation. Fitzmaurice argues that dynamic interpretation, especially at the early stages of its developments, must have been an unacceptable violation of the sacred principles of international law as consent and sovereignty are the core elements of classical international law.¹⁷ These theses lead us to the presumption that the ECtHR must always keep a balance between the core protections of the Convention's rights and the needs, social, political and other situation in the respected state that will need to execute the judgment. In fact, on many occasions, it has proven that it is hard to keep up with this balance, so in some cases, the Court makes 'omissions' in order not to provoke chaos or legal uncertainty. By revising a case the Court could have applied the evolutive or dynamic interpretation and determine a graver violation of ECHR as opposite to the previously delivered judgment.

Controversy about evolutive interpretation arises in cases where the Court dismisses domestic policies, which are deemed to justify an interference with the ECHR in the name of national interests. The ECHR allows for the limitations of right enumerated in the Convention if they are "necessary in a democratic society".¹⁸ The scholarly debate thus focuses on the argument that the ECtHR is not in the position to judge which national interests and values are necessary and thus justify an interference with the ECHR. The debate about evolutive interpretation goes further by examining if evolutive refers to interpretative principle or just a method of interpretation. Senden argues that by means of evolutive interpretation, one cannot identify the meaning of a norm. Instead, evolutive interpretation should be characterized as an interpretative principle, which complements the methods of interpretation.¹⁹ Hence, despite its nature or purpose, the evolutive interpretation represents an important segment of the Court's interpretation by giving answers to new facts and thus creating a substantive case-law which is a model not only for national courts in order to implement the Strasbourg judgments, but also a guideline for other international courts which deal with human right's violations.

Bjorge E, 'The Convention as a living instrument: rooted in the past, looking to the future' (2017) 36 (7-12) HRLJ <[HRLJ 243-260 A01Bjorge 310817.indd \(bris.ac.uk\)](#)> accessed 17 January 2021

¹⁶ Helgesen Jan Erik, 'European Court of Human Rights. Dialogue between judges – What are the limits to the evolutive interpretation of the Convention' (European Court of Human Rights 2011) 19-28

¹⁷ Fitzmaurice Malgosia, "Dynamic (Evolutive) interpretation of treaties - Part II" [2008] 151 Hague Yearbook of International law, 1730-1745.

¹⁸ Sonnleitner Lisa, 'The democratic legitimacy or evolutive interpretation by the European Court of Human Rights' (2019) 33(2) Temple Int'L & Comp. L.J <[33.2 Sonnleitner Article3.pdf \(temple.edu\)](#)> accessed 17 January 2021

¹⁹ Senden Hanneke, 'Interpretation of fundamental rights in a multilevel legal system: An analysis of the European Court of Human rights and the Court of Justice of the European Union' [2011] Intersentia

2. Doctrine of ‘living instrument and present day conditions’

The doctrine of considering the ECHR as a ‘living instrument in present day conditions’ is widely acknowledged as the unique characteristic of the Convention’s interpretation and considered as the best method which captures the Court’s interpretative ethic. It features prominently in debates on whether the Court’s interpretation practice undermines its legitimacy when it changes or expands the scope of fundamental rights crystallized by states through the ECHR.²⁰ The notion of ‘living instrument’ refers to the Convention by emphasizing that it is capable to evolve, it is proficient to deal with social, cultural and political developments in Europe and among the Council of Europe Member States. Based on the research presumption that the ECtHR is interpreting the ECHR and not making law because according to the ECHR, policy-making is not one of the Court’s duties, we must ask a question, does this mean that the Convention can be interpreted differently over time? The answer could be partly logic and partly answer to the doctrine of a living instrument, explaining that the ECtHR shall be interpreted in present day conditions depending of the right inflicted and the special circumstances of the case. This approach, in fact, reflects the contemporary standards through updating the Convention law.

This doctrine was introduced for the first time in *Tyrer case* where the Court had to decide whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning of Article 3 ECHR. The punishment, having a form of bare-skin birching carried out by a policeman at a police station, was prescribed by law and practice in the Isle of Man, a dependent territory of the United Kingdom with a significant degree of legislative autonomy. At that time, judicial corporal punishment had been abolished in the rest of the United Kingdom and was also not to be found in the vast majority of the other Contracting States.²¹ Consequently, the Court stated the following: “*the Court must recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.*”²² Few months after *Tyrer*, in *Marckx case* the Court argued about a possible violation of Article 8 – right to respect for family life in relation to discrimination upon Article 14 ECHR committed to a child and his mother. Belgian law, at the time, did not confer maternal affiliation by birth alone concerning illegitimate children, contrary to the so-called *mater certa semper est maxim*. Unlike in the case of legitimate children, maternal affiliation between a child born out of a marriage and its mother could be established only either by voluntary recognition or by a court declaration. Since then, the Court has used the terms ‘living’, ‘evolutive’ and ‘dynamic’ interchangeably when invoking the doctrine of ‘living instrument’. For example in *Stafford v United Kingdom*,²³ the Court revisited its earlier finding that mandatory life sentences for murder in the UK constituted punishment for life and therefore that re-detention after release on a license could be justified on the basis of the original conviction and need not be the subject of new judicial proceedings. The

²⁰ Yuwen Fan, ‘Revisiting ECtHR interpretation of the ECHR: Living up to a living instrument’ (2016) 65 FICHL Policy Brief Series <[Revisiting ECtHR Interpretation of the ECHR: Living Up to a Living Instrument \(toaep.org\)](https://www.toaep.org/en/publications/policy-brief-series-revisiting-ecthr-interpretation-of-the-echr-living-up-to-a-living-instrument)> accessed 17 January 2021.

²¹ Letsas George, “Strasbourg’s interpretative ethic: Lessons for the international lawyer” [2010] 21(3) EJIL, 528

²² *Tyrer v UK* Application no 5856/72) § 31

²³ *Stafford v UK* App no 46295/99 (ECtHR, 28 May 2002) Applicant Stafford had been convicted of murder and released on licence after completing the punitive element or tariff of his sentence. He was subsequently convicted and sentenced for an unconnected non-violent offence. His continued detention after completing the second sentence under the first mandatory life sentence found to be in breach with Article 5 (1) ECHR.

Court took judicial notice of the evolving position of the British courts as to the nature of life sentences in an interesting example of a two-way process.²⁴ In this process developments in the domestic legal system influence Strasbourg to change its case law. Which in turn results in the consolidation of the evolution at a national level. Thus, the Court held that “*a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement*”.²⁵ Having in mind the significant developments of the case at domestic level, the Court agreed to re-assess using the phrase ‘in the light of present day conditions’.

The ‘living instrument’ doctrine allows the Court to update the application of Convention rights to reflect the increasingly high standard being required in the area of the protection of human rights. If we make a retrospective of the usage of this doctrine, it would be obvious that it has received its most frequent expression in relation to Article 8 ECHR. This is due to the fact that precisely the right to private and family life is most likely to be affected by changes in society more than for example right to life or prohibition of torture and other ECHR provisions, although they are also covered with this doctrine.²⁶

A perfect example of the application of living instrument doctrine in Article 8 ECHR is the Christine Goodwin case. Previously in other several judgments, the Court had found that UK’s refusal to accord legal recognition to transsexuals’ new personalities had not breached Article 8. Particularly in the *Goodwin case*, the Court unanimously held that at the time of its decision, there was “*clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals*”. Due to these reasons, it declared that UK had violated obligations under Article 8 ECHR.²⁷ Moreover, the Court emphasized that the ECHR is applied in a manner that renders its rights practical and effective, not theoretically and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.²⁸ The living instrument doctrine has been applied also in the *Loizidou case* where the Court took into account ‘present day conditions’ in the protection of human rights. The Court stressed that the provisions from ECHR cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago. “*In addition, the object and purpose of the ECHR as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied as to make its safeguards practical and effective...*”.²⁹ In the case of *Demir and Baykara*, the Court devoted, however, a full section to “The practice of interpreting Convention provisions in the light of other international texts and instruments”.³⁰ In the argumentation of the case, the application claimed that Article 1 ECHR was violated since Turkey had denied them the right to form trade unions, to engage in collective bargaining and to

²⁴ Wildhaber Luzius, ‘The European Court of Human Rights in action’ (2004) 21 *Ritsumeikan Law Review* <[wildhaber.pdf \(ritsumei.ac.jp\)](#)> accessed 17 January 2021

²⁵ Lee Ka Yee Rosa, ‘Expansive interpretation of the European Convention on Human Rights and the creative jurisprudence of the Strasbourg’s Court’ (2014) 1(1) *Mercury-HKU Journal of Undergraduate Humanities* < [Microsoft Word - Rosa Lee.docx \(hku.hk\)](#)> accessed 17 January 2021

²⁶ In the light of the present-day conditions, the right to full legal recognition of transsexual’s post-operative gender has developed from being deemed a matter left to the national discretion of the Member State to being recognized as conferring a positive obligation under Article 8. See: Doctoral dissertation: The principle of dynamic interpretation- a matter of legitimacy. The ECHR principle of dynamic interpretation from a constitutional perspective (2009) < [208 \(uio.no\)](#)> accessed 17 January 2021

²⁷ *Goodwin v UK* App no 28957/95 (ECtHR 11 July 2002) § 85

²⁸ *Ibid*, § 74

²⁹ *Loizidou v Turkey* App no 15318/89 (ECtHR 18 December 2006)

³⁰ *Demir and Baykara. v. Turkey*. App no 34503/97 (ECtHR 12 November 2008) § 65-86

enter into collective agreements. Thus, the Court delivered a judgment determining the living nature of the Convention and it has taken account of evolving norms of national and international law.

3. Evolutive interpretation: overruling judgments or guarding the legal certainty?

If the ECtHR is satisfied that evolutive interpretation should be deployed, a previous judgment or judgments may be overruled. It also means that this change will affect the process legitimacy of the ECtHR. Process legitimacy of judicial rulings is guarded by the principle of consistency, legal certainty and predictability of the case law.³¹ On a number of occasions, the ECtHR has reiterated its adherence to these principles and pointed out that although previous judgments are not binding for the Court, however, it should not depart from a precedent without good reasons such as discovering new facts that influence the current situation due to certain developments in law or changes in the legislature of the domestic law of the respective state. For example, in the *S.W. v. the United Kingdom*, the Court approved evolutive interpretation of domestic British courts in relation to marital rape and stated that there was an evident evolution, which is consistent with the very essence of the offence of the criminal law and that the evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.³²

The special *problématique* in these overruling cases is that questions of evolutive interpretation will often only arise when the existing jurisprudence on the matter is overturned by a judgment. Lack of consensus may prevent the Court from a dynamic interpretation of ECHR or from overruling its previous judgment. In *Sheffield and Horsham v. the United Kingdom*, the ECtHR considered whether the failure to change the birth certificates after gender reassignment surgery violates Article 8 of ECHR. The Court stated that it cannot depart from previous case law because for it, this continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.³³ Several years after, in Christine Goodwin case, the ECtHR dealt with similar facts and overturned the decision in *Sheffield and Horsham* by stating that there is a “*continuing international trend in transsexuals’ rights recognition*”.³⁴

In *Ireland v. United Kingdom*, the situation is diametrically opposite by challenging the different points of view of the Commission and the Court regarding the issue of what constitutes torture and which conduct amounts to torture. The Commission considered that the purpose of the five techniques was to obtain information from the 14 persons subjected to them, while the Court defended its point of view that those acts would fall under Article 3 ECHR but as inhuman and degrading treatment and not torture.³⁵ Twenty years after, in the case of *Selmouni v. France*, the Court considered that certain acts which in the past might have been classified as 'inhuman or

³¹ Dzehtsiarou Kanstantsin, ‘European Consensus and the evolutive interpretation of the European Convention on Human Rights (2011) 12(10) German Law Journal <[European Consensus and the Evolutive Interpretation of the European Convention on Human Rights | German Law Journal | Cambridge Core](#)> accessed 17 January 2021

³² *S.W. v UK* App no 20166/92 (ECHR 22 November 1995)

³³ Dzehtsiarou supra note. 31, 1741

³⁴ *Goodwin v UK* App no 28957/95 (ECtHR 11 July 2002) § 85

³⁵ Stefanovska Vesna, ‘Reassessment of the Ireland v. the United Kingdom ECtHR case: A lost opportunity to clarify the distinction between torture and ill-treatment (2019) 29 (1) Torture Journal <[Reassessment of the Ireland v. the United Kingdom ECtHR case: A lost opportunity to clarify the distinction between torture and ill-treatment | Torture Journal \(tidsskrift.dk\)](#)> accessed 17 January 2021

degrading treatment' as opposed to 'torture' could be classified differently in future. It took the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democracy. Even in 2018 when the Court had an opportunity to overrule its previous judgment under submitted case revision upon Rule 80 of the Court Rules, it decided not to do that. With the decision not to revise the judgment in March 2018, the ECtHR lost a historical opportunity to establish a clear limit between ill-treatment and torture:

- (a) By giving full consideration to the intentionality criteria,
- (b) Considering the suffering criteria according to present time conditions expressed in *Selmouni v. France* which admits the existence of both physical and physiological components of torture and finally
- (c) Lost a chance to clarify its position to third parties that use the sentence to justify conditions that clearly are of severe nature than just ill-treatment.³⁶

III. WHAT ARE THE LIMITS OF EVOLUTIVE INTERPRETATION OF ECHR

The first and the most important obligation arising from the ECHR is the need for protection of the fundamental human rights and in specific circumstances, if some of the Convention's right is violated, the Court will deliver a judgment in which will find a violation of one or more guaranteed human rights. The structure and the binding nature of the ECHR is very complex due to the fact that the Convention does not legally entail a vertical system of obligation and does not have the power to enhance its judgments. It is a system based and conditioned on the acceptance of the Member States of Council of Europe and having regard to the principle of *pacta sunt servanda* prescribed in Article 26 VCLT.³⁷ This means that if some Member State refuses to execute a Court's judgment, the Committee of Ministers will refer the matter to the Court, whether the state has failed its obligations under the provisions from ECHR.

When we discuss about the limits of evolutive interpretation, the first question which arises is whether interpretative limits can exist and if they do, where are those limits expressed? It is quite difficult to give just one answer to these questions. However, is for sure that there could not be imposed limitations to the evolutive interpretation of ECHR, but at the same time, what is of utmost importance is the protection of fundamental rights and freedoms. This means that criticism has been pointed towards the Court for being too narrow and traditionally oriented while objecting to act as a true moderator of the ECHR. According to the former ECtHR judge Françoise Tulkens, the notion of a "European consensus" has long played an important role in regulating the pace of Convention development.³⁸ Another issue, which may represent a certain restriction to ECHR interpretation, is state sovereignty because international protection of human rights does represent a restriction to state sovereignty. In certain circumstances, it is extremely difficult to achieve consensus between all 47 Member States of the Council of Europe and signatories to the ECHR, thus it is easier to make a legal intervention in the domestic legislation of one Member States. Consistency of the Court is related to its credibility. However, this consistency should not harm or

³⁶ Ibid.

³⁷ See Article 46 of ECHR – "Binding force and execution of judgments. Moreover, Article 32 VCLT prescribes that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

³⁸ Françoise Tulkens, 'European Court of Human Rights. Dialogue between judges – What are the limits to the evolutive interpretation of the Convention' (European Court of Human Rights 2011), 6-11

have a negative impact on the protection of fundamental rights and freedoms or in declaring violation of some Convention rights or keeping the harmony between the relation among the ECtHR and the other Member States.

IV. CONCLUDING REMARKS

It is quite inevitable to say that the ECtHR has developed its own interpretative techniques slightly different from those written in VCLT in respect of treaty interpretation. The use of evolutive or dynamic interpretation is justified as a result of the fact that the ECHR is a living instrument that should be interpreted in present day conditions. However, restrictions or limitations in interpretation appear when consistency, legal certainty, European consensus or constitutional issues are put into question in some cases. This has been proven to be true in the case of *Ireland v. the United Kingdom* when the Court in *Selmouni case* reiterated from its previous opinion and stated that ‘certain acts which in the past might have been classified as inhuman or degrading treatment as opposed to torture could be classified differently in future’. Although the Court had its second chance in 2018, it decided not to re-open the case and overruled the revision, justifying the decision that it could lead to the creation of legal uncertainty and chaos.

Having in mind the above mentioned, although in many judgments the Court points out the need to address the ECHR as a living instrument, thereby, occasionally returns to its self-restraint approach instead of being a proactive protector of Convention's rights. Thus, the question that should be raised is: Can the Court in some way measure the issue of protection of human rights and the need to save legal certainty and which one will prevail? The answer should be located in the fact that the protection of human rights is of utmost importance the same as the need to condemn such violations of the guaranteed human rights.

This paper tried to elaborate that the Court if acted as a true modern developer of human rights and established torture, back then in 1978, then it would demonstrate a willingness to protect human rights and to severe punish acts, which could be considered as torture. The purpose of dynamic or evolutive interpretation of the Convention is to assist the Court in changing its original conceptions of how terms were elaborated, but in these circumstances having in mind the public opinion, the need for protection of human rights and many other crucial factors which may affect the process of interpretation.

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