

Noter til Human Rights

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The interpretation of the Convention

The General Approach

The convention must be interpreted in accordance to international law rules on interpretation of treaties – these rules can be found in the “Vienna Convention on the law of treaties, 1969” (VCLT)

VCLT art. 31(1) → A treaty must 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 object and purpose

Emphasis Upon the Object and Purpose of the Convention

In accordance with the VCLT the considerable emphasis has been placed on the interpretation of the Convention through a teleological approach, that seeks to realize its “object and purpose”

→ Identified as the protection of human rights, and promotes the ideals and values of a democratic society.

The importance of the “object and purpose” of the Convention was illustrated in “**Golder v UK**”

→ The Preamble doesn’t include the rule of law in the object and purpose of the convention, but points to it as being one of the features of the common spiritual heritage of the member states of the Council of Europe.

→ “heave inroads” made by the Convention into an area previously within a state’s domestic jurisdiction, demanded “a cautious and conservative interpretation”.

Dynamic or Evaluative Interpretation

Upon the “object and purpose” of the convention, it must be given a dynamic or evaluative interpretation.

Tyler v UK → The convention is a living instrument, which must be interpreted in the light of the present-day conditions – however you can include conditions, there wasn’t intended when the convention was drafted.

Article 12, which guarantees the right to marry, cannot be interpreted to include the right to divorce, jf. Johnston v. Ireland.

When deciding a case by reference to the dynamic character of the Convention, the Court must make a judgment as to the point at which a change in the policy of the law has achieved wide acceptance in European state to affect the meaning of the convention.

Marckx v Belgium → The court Relied upon a new approach to the status on kids born out of wedlock, that had been adopted in the law of the great majority, but not all states.

The Execution of Strasbourg Judgments

Marckx and Belgium → A Court judgment is essentially declaratory – the judgment itself can't annul or repeal inconsistent national court judgments or national law.

Article 41 → In case of breach of the convention or its protocols, the Courts must, if necessary, award the victim compensation.

→ Understood to permit the award of monetary compensation and legal cost.

The court can't determine what remedial measures may be appropriate to satisfy the respondent state's obligations.

→ The Court must put an end to the breach and make reparation for its consequences in such way as to restore the situation existing before the breach.

→ Lately the Court has been specifying particular forms of restitution for the victims.

→ The Court has begun to include steps, that the States must follow to bring the law or practice into line with the Convention.

The judgments of the Court are binding in international law upon the parties to the case – The judgments are now binding for other parties and national court, and is only to be seen as a guide.

The Convention and the European Union

The EU has legislative and executive jurisdiction by which it may act against member states or private person in a way that impact upon their Convention obligation and rights respectively.

→ The EU may infringe the Conventions right.

The EU isn't a party thereto, and there for it can make an application to the Court, even though the EU is obligated to accede the Convention according to the TEU.

→ The ECHR controls EU conduct within its own legal order as the Convention has been incorporated into EU law.

The ECHR doesn't prevail over a conflicting provision of Union primary law, and interpretation and application of the ECHR remains a matter for the European Court of Justice, and not the Human Rights Court.

The ECHR allows member states to transfer sovereign power to an international/supranational organization, but their responsibility under the Convention remains.

→ A state isn't in a breach of its ECHR obligation, if its necessary to fulfil its obligations as a member of the organization, as long as the organization provides Human rights that is is equivalent to the ECHR.

Assault

= inhuman or degrading treatment or both, cf. Ribitsch v Austria, or simply a violation of art. 3, cf. Needet Bulut v Turkey.

VC v Slovakia → Threshold level for violation of article 3 is:

- Bodily harm of a certain degree of severity, e.g.:
 - Pain and suffering by gunshot wounds.
 - Broken jaw.
 - Other facial injuries such as loss of teeth, damaged ears etc.

Ribitsch v Austria → any recourse to physical force which isn't necessary.

Evidence → When determining whether article 3 has been infringed in assault cases, the Court looks for evidence of physical injuries to the required level of bodily harm.

- Applicant must provide reliable medical or other evidence e.g. eye-witness.
- The force has to be excessive – State must justify this.
- The State must provide a plausible explanation on how and why injuries were caused, cf. Selmouni v France.
- Burden of proof is upon the state.

Pepper spray → is not in contrary with article 3, if:

- Used as law enforcement
- Clear safeguards including immediate access to a doctor, cf. Ali Günes v Turkey.
- No directly aimed at one individual, cf. Abdullah Yasa and Others v Turkey.
- Use of pepper spray under police control is NEVER ok, cf. Ali Günes v Turkey.

Use of psychological interrogation techniques

E.g. Wall standing, hooding, subjection to noise, deprivation of sleep, food & drink, cf. Ireland v UK

- Inhuman treatment contrary to article 3.
- Caused intense physical and mental suffering

Conditions of detention and treatment of detainees

Such cases are commonly decided as a matter of degrading treatment, and not inhuman treatment – The Court applies art. 3 generally in some of the cases.

Extradition and deportation

A state's right to refuse to admit an alien to its territory is not affected by the convention – however discriminatory exclusion may be degrading treatment.

Extradition (UDLEVERING) → Not contrary to extradite a fugitive offender in breach of an extradition treaty or of national extradition law.

The interest to be protected by the interference

The weight of the interest to be protected

The reason for some interferences with rights is to protect the enjoyment of other rights – this occurs when the content of the right expands.

Von Hannover v Germany → The court indicated the approach that should be followed in cases of conflicts of rights. – as a matter of principle the rights are equal.

- List of criteria relevant to the balancing exercise.

The objectivity of the interest

Sunday Times v UK → the greater the prospect of obtaining the objective understanding of the interest, the narrower is the State's margin to determine what interferences are necessary.

The courts' jurisprudence on the standard of objectivity is weak.

The justiciability (RETSHÅNDHÆVELSE) of the interest

In the Greek case, the Commission rejected the argument that the assessment of the existence of an emergency within the terms of an article was beyond its competence on ground of non-justiciability.

The state always has to provide evidence for the reality of the interest, that the interference seeks to protect.

- The mere assertion (PÅSTAND) of an interest is not enough.
- Have to include the facts of the particular case
- Have to establish the factual accuracy of the general claims about the protected interest.

The weight of interference must be assessed by considering its effect in the circumstances of the particular application.

The resolution of the conflict between the different factors

The general approach

The exercise of the state's margin of appreciation may involve a variety of factors, and a not so simple balance between the human rights and the interests of the state.

- Solution between conflicting factors: have to look at what is NECESSARY, if it is, then the court will determine whether it is proportionate.

Assessing proportionality

Proportionality is the final factor, the Court takes into account, when determining whether an interference is necessary.

Campbell v UK → government claimed the right to open and inspect mail to prisoners.

to embryo screened but allowed medically-assisted abortion if the fetus has the disease. IVF was only ok in limited cases

- Violation of art. 8 – should have been allowed IVF-treatment.

Sexual activities

Sexual activity will generally fall within the scope of art. 8. Sexual life is the most intimate aspect of private life, cf. *Dudgeon v UK*.

Stübing v Germany → Criminalizing incest is NOT a violation of art. 8.

Laskey, Jaggard and Brown v UK → 3 men was convicted for assault and wounding as result of sado-masochistic sexual activities in private.

- Not all sexual activities in private falls within the scope of art. 8
- No violation of art. 8

ADT v UK → ADT was convicted for gross indecency between men (anal sex), even though the other men agreed to this, and it was in his private home.

- Violation of art. 8

Mosley v UK → Exposé in the press disclosed his sadomasochistic sexual activities and included pictures and video. Mosley claimed that the UK had a positive obligation to protect his privacy by providing a legal duty on the press to warn him in advance before publication so he could seek injunction.

- No such positive obligation → No violation of art. 8 – large margin of appreciation.
- Breach of positive obligation ONLY if there is no adequate remedy available.

Dudgeon v UK → Dudgeon complain about the existence of laws, that criminalized certain homosexual acts between consenting adult men.

- Sexual life is the most intimate aspect of private life
- Only particularly serious reasons can justify an interference.
- Criminalizing private, adult, consensual male homosexual acts are NOT necessary in a democratic society.

Press publications

Privacy

Every human being is entitled to a zone of privacy – even celebrities. Publication of private life details may therefore be a violation of article 8.

Von Hannover v Germany → Pictures of Von Hannover (princess) in Germany was published in Germany, and the German court held that she had to live with it since she is a public figure.