EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Opening of the Judicial Year
Seminar

A Living Instrument: The Evolutive Doctrine
some introductory remarks

Speech by Rick Lawson, Leiden

Strasbourg, 31 January 2020

(1) Introduction: the Tyrer case and the origins of the evolutive doctrine

We all know by heart the famous passage of the Court's judgment in the *Tyrer* case (1978):

> "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions".[1]

This statement was the starting point for an impressive body of case-law, as set out in the excellent Background Document prepared by the Registry for this seminar.

In a way, *Tyrer* takes us back to the classic tale of nature and nurture. On the one hand, there is nature: the Convention has its basic characteristics enshrined in its DNA – "the very essence of which is respect for human dignity and human freedom".[2] This DNA encapsulates the consensus of the days after the Second World War: Europe was in need of an alarm bell, an early warning mechanism. The result was "an instrument designed to maintain and promote the ideals and values of a democratic society", equipped with "institutions that were set up to protect the individual".[3]

On the other hand, there is nurture: the impact of the surroundings. This is where *Tyrer* comes in. The evolutive approach introduced in the *Tyrer* case allows the Convention to respond to a changing environment, with all the opportunities and threats that it presents.

The very term "evolutive approach" reminds us of biology, which teaches us that the capacity to adapt may prove crucial for the survival of a species. For the survival of the Convention, both nature and nurture are indispensable. The "Conscience of Europe", to use Pierre-Henri Teitgen's famous expression, needs both. It needs the firmness of its founding principles, and it needs flexibility to accommodate and address the realities of modern life: the roots and branches of a living tree, as the

1 ECHR, judgment of 25 April 1978, *Tyrer v. UK* (no. 5856/72), § 31.
2 ECHR, judgment of 11 July 2002, *Christine Goodwin v. UK* (no. 28957/95), § 90.
3 ECHR, judgments of 7 July 1989, *Soering v. UK* (no. 14038/88), § 87, and 6 September 1978, *Klass a.o. v. Germany* (no. 5029/71), § 34.

Canadian Supreme Court has put it.[4] And so, following in the footsteps of the *Tyrer* judgment, the evolutive doctrine has become one of the main pillars of Strasbourg case-law, closely connected with the principle of effectiveness. This principle entails interpreting and applying the Convention in a manner that renders its rights practical and effective, not theoretical and illusory. [5]

But before moving on to explore the potential of the jurisprudence that builds on *Tyrer*, it may be worth pausing for a second to reflect on the wording of the famous passage in *Tyrer*. The Convention "is" a living instrument, we are told. This is presented to us not as a choice but as a blunt fact. The Court "must" "recall" that the Convention "is" a living instrument which "must" be interpreted in the light of present-day conditions. The words give the impression that the Court was stating the obvious, or even that it had no choice.

Of course, there was no express obligation to do so. True, the Court was given the task of "interpreting and applying" the Convention, which implies a certain latitude.[6] And using that latitude, the Court felt that a static or originalist approach – whereby one would continue to interpret the Convention as it was understood by its drafters in 1950 – would produce undesirable results. Such a "frozen" attitude could not guarantee the continued relevance of the Convention as our societies developed. A dynamic approach would surely be in keeping with the preamble of the Convention, which refers to "the maintenance and further realisation of human rights and fundamental freedoms". But a choice it was.

In this connection, it is interesting to observe that the Court in *Tyrer*, for once, prayed in aid the Commission. In the passage we just quoted, the Court remarked that "the Commission rightly stressed" that the Convention had to be interpreted in the light of present-day conditions. The verb "stress" is perhaps a bit grand. It is true that the Commission's Delegate, Mr Kellberg, made this point at the public hearing before the Court.[7] But actually, the Commission's Opinion in the *Tyrer* case, of December 1976, was completely silent on this issue! The Commission simply found it obvious that "judicial birching humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment". [8] The UK Government actually agreed, [9] and had no difficulty in accepting that the Convention had to be construed in the light of present-day thinking.[10]

So the evolutive doctrine found its place in the Strasbourg case-law with an ease that, especially in hindsight, is striking. The official summary of the judgment, in the *Yearbook of the European Convention*, did not even refer to the Court's characterisation of the Convention as a "living instrument". [11] Apparently it was not seen to be such a big deal.

---

4 See, e.g., Supreme Court of Canada: *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698 § 22.

5 Clearly a lot has been written and said about the interpretation of the Convention. For a recent discussion see J. Gerards, *General Principles of the European Convention on Human Rights*, Cambridge UP 2019.

6 Art. 32 ECHR. See also Art. 31 Vienna Convention on the Law of Treaties.

7 See Verbatim Report of the public hearings held on 17 January 1978, Eur. Court H.R., Series B, no. 24, *Tyrer case,* pp. 57, 86.

8 ECommHR, report of 14 December 1976, *Tyrer v. UK* (appl.no. 5856/72), § 35, reproduced in Eur. Court H.R., Series B, no. 24, *Tyrer case,* p. 24.

9 Judicial corporal punishment had been abolished in the UK, but was retained in the Isle of Man, which is where Mr Tyrer was birched. As a result, the British Government did not dispute that there had been a violation of Art. 3 ECHR, leaving it to the Attorney-General for the Isle of Man to try to defend the birching of Mr Tyrer.

10 See Verbatim Report of the public hearings held on 17 January 1978, Eur. Court H.R., Series B, no. 24, *Tyrer case,* p. 86, with a reference to Document Cour (77) 43, p. 47.

11 Council of Europe, *Yearbook of the European Convention on Human Rights*, vol. 21 (1978), p. 614.

(2) The evolutive doctrine as a bone of contention

Truth to tell, when *Tyrer* was discussed by the Commission, the issue of interpretation methodology was raised at one point: by its Irish member, Mr Kevin Mangan.[12] But he was *opposed* to an evolutive approach! In his dissenting opinion, Mr Mangan referred to the "concerns which moved the framers of the Convention". In his view "[t]he practices and views on punishment of young persons in the various communities involved in the preparation of the Convention, at the time it was concluded, and the really great evils against it was mainly directed, must be considered in determining what it was that the parties agreed to curb".[13]

There we have, in a nutshell, the two main arguments levelled against the "evolutive doctrine" as introduced in *Tyrer*. The High Contracting Parties were entitled to expect that the Court would only apply the obligations which they had agreed upon in 1950, and the Court should limit itself to dealing with the "really great evils".

The first argument quickly lost much of its force. In April 1978, when the *Tyrer* judgment was delivered, there were only 18 Contracting Parties. Even if some of them might have claimed that the Court's evolutive approach had taken them by surprise, this does not apply to the 29 States that joined the Convention after *Tyrer.* They knew full well that they were acceding to a living instrument. And *all* Council of Europe Member States, old and new, have expressed their support for the Court and its case-law on countless occasions.[14]

This does not mean, of course, that the limits of the evolutive interpretation will never be the subject of discussion. On the contrary: a judgment that is welcomed by NGOs as a progressive step ahead may be criticised by governments as legislation from the bench, an illegitimate limitation of their freedom to manoeuvre. Why does the Court not confine its attention to the "really great evils"? And a judgment that will be perceived by some as a missed opportunity to develop case-law, will be seen by others as the proper application of the principle of subsidiarity, needed to retain the Court's credibility among the High Contracting Parties. Within the Court, there will always be those who argue that "one *Salduz* judgment per year is enough",[15] and those who emphasise the need to move boundaries and enhance the protection of individual freedom and human dignity.

(3) The evolutive doctrine: a modest typology

---

[12] That in itself is a small miracle, as Mr Mangan was no longer a member of the Commission by the time the Report in *Tyrer* was adopted. His term of office had ended 1½ years earlier, in May 1975. A closer study of the archives brings to light an interesting puzzle. The Court's records suggest that Mr Mangan continued to be involved in the case after the end of his term of office: Eur. Court H.R., Series B, no. 24, *Tyrer case,* pp. 31-35. But according to the Commission's original report (a facsimile of which can still be found on Hudoc), his place was taken by his successor, Mr Brendan Kiernan. As a result Mr Mangan was not listed as one of the Commission members deciding this case (see p. 2 of the Report). Yet somehow, he managed to make his voice heard through a dissenting opinion. The latter scenario reminds us of the "ghost opinion" attached (initially) to the Court's judgment in the case of *D v. the UK* (2 May 1997, no. 30240/96), as recalled by Michael O'Boyle at the seminar on the occasion of his departure as Deputy Registrar of the Court, 13 February 2015.

[13] ECommHR, Report of 14 December 1976, *Tyrer v. UK* (appl. No. 5856/72), dissenting opinion of Mr Kevin Mangan, §§ 7 and 18, on Hudoc and in Eur. Court H.R., *Series B*, no. 24, *Tyrer case,* pp. 28, 30.

[14] For a recent example see the Copenhagen Declaration (2018), § 26: "The Court … authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions".

[15] Cf. E. Myjer, "One Salduz a year is enough", in D. Spielmann, M. Tsirli, P. Voyatzis (eds.), *La Convention européenne des droits de l'homme, un instrument vivant – The European Convention on Human Rights, a living instrument (Essays in Honour of Christos L. Rozakis)*, Bruylant 2011, pp. 419-430.

A look at the case-law makes it clear that there are various categories of situations where the evolutive doctrine is applied. The first one, obviously, is the scenario of *Tyrer* itself: the Court responds to what it perceives as a positive trend in the domestic law of the Council of Europe Member States. It may observe, for instance, that the rights of the child receive wider recognition. Against such a background, the Court may find that there is sufficient common ground to allow the corresponding rights and freedoms of the Convention to evolve; it codifies, as it were, the new consensus in Europe.

The second scenario is triggered by the emergence of new factual situations that pose new threats to human dignity and thus necessitate the articulation of relevant standards. In the case of *Szabó and Vissy*, for instance, the Court noted the technological advances of the last decades. It considered that a stronger protection of private life was required, in view of the possibilities of mass surveillance and the potential for interferences with our use of the Internet.[16]

In both cases, I suppose, the Court will need to make an effort to convince a potentially sceptical audience of its new interpretation. In the former category of cases, it needs to substantiate the claim, empirically, that there is common ground among the Council of Europe Member States. In the latter category, it will need to convince the reader that human dignity is *really* at stake and that the new approach is unavoidable. The better the Court manages to convey the message that its judgment is firmly grounded in a European consensus, or that it is actually dealing with "really great evils", the easier its judgments will be accepted. If it neglects this, it may be more vulnerable to criticism. Indeed, there will always be critics who are keen to dismiss a new interpretation as a mere nicety, a matter of subjective preferences, or even an act *ultra vires*.[17] But I will leave it at that, assuming that the other presentations of this seminar will address developments that belong to one of these two categories.

This allows me to focus on a third dimension, one that is perhaps rather overlooked in this connection – though I believe it is crucial. The Court's evolutive approach may also extend to procedural matters and lead to institutional adaptation. Sometimes, the Court will expressly refer to the *Tyrer* case – as it did in *Mamatkulov,* where it held that the failure of a Contracting State to comply with interim measures will amount to a violation of Article 34 ECHR.[18] But the Court developed its practice on many more occasions. When faced with problems of a systemic nature, the Court developed the practice of pilot judgments.[19] In 2003 it started to accept unilateral declarations, a practice now embodied in Rule 62 A of the Rules of Court.[20] And what about the countless measures the Court has taken over the years to cope with the ever-growing case load: do they not reflect the living character of the Convention?[21] Perhaps these procedural innovations provide the strongest illustration of the fact that the capacity to adapt is crucial for the Court's effectiveness – and, indeed, for its survival.

---

16 ECHR, judgment of 12 January 2016, *Szabó & Vissy v. Hungary* (no. 37138/14), § 53.

17 Cf. current discussions in Russia, as reflected in the press clipping "Constitutional amendments to protect Russia from free interpretation of European Convention on Human Rights – Kosachyov" (Interfax, 21 January 2020). For a wider analysis, see, e.g., M. Smirnova, "Russia", in F.M. Palombino (ed.), *Duelling for Supremacy - International Law vs. National Fundamental Principles*, Cambrdige UP 2019, pp. 297-319, and M. Antonov, *Formalism, Realism and Conservatism in Russian Law* (PhD Leiden, 2019).

18 ECHR, GC judgment of 4 February 2005, *Mamatkulov & Askarov v. Turkey* (no. 46827/99), § 121.

19 ECHR, GC judgment of 22 June 2004, *Broniowski v. Poland* (no. 31443/96).

20 ECHR, GC judgment of 6 May 2003, *Tahsin Acar v. Turkey* (no. 26307/95).

21 See, e.g., for an overview of the period 2000-2009: Council of Europe, *Reforming the European Convention on Human Rights – A work in progress* (2009).

(4) Precarious present-day conditions

It is important to keep this in mind, because the Convention's environment does not just offer opportunities that allow the Court to happily move on and enhance its standards. It also presents challenges. Indeed, the Convention's current environment features a genuine "climate change" which cannot be ignored by the Convention and the institutions established for its implementation. Pluralism, tolerance and broadmindedness – to use the famous expression from *Handyside*[22] – are in decline. It has been stated, and deplored, time and again by the Secretary General of the Council of Europe, the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission, and so on: the rule of law is under pressure.[23]

So we face new "present-day conditions"[24] – conditions that may have a direct impact on the very foundations of the Council of Europe: human rights, democracy and the rule of law. I am not saying that each and every one of those developments involves violations of the Convention. This is for the Court to decide; and that is the very problem. Virtually all the organs of the Council of Europe have expressed and continue to express their views regarding measures that allegedly affect our common values. They are often joined by the European Commission[25], the OSCE[26] and the United Nations[27]. But the voice that, if I may say so, matters most to us is rather muted. In the current debate we hear relatively little from the "Conscience of Europe": the Court.

To put it differently, and at the risk of simplifying matters: until about a decade ago there was, by and large, an overall consensus, in the areas covered by the Convention, about the direction in which society was supposed to develop. Perhaps prison conditions in some countries were poor, but their improvement was a matter of time (and money) – not a matter of principle. Time was on the Court's side. Certainly, there were delays in Strasbourg, and that was of course a source of frustration to many – and first and foremost to the individual applicants. But at least things were moving in the right direction. The Court's task was, in essence, to receive applications and use these, through its judgments, to remind the High Contracting Parties of their engagements. As long as the Committee of Ministers was able to effectively supervise the execution of its judgments, all would end well.

Today, the picture is rather different. In a number of countries there is increasing pressure on the independence of the judiciary, on civil society, on human rights defenders, on academic freedom. Controversial measures are rapidly adopted, creating facts on the ground: systemic changes which –

---

22 ECHR, judgment of 12 December 1976, *Handyside v. UK* (no. 5493/72), § 49.

23 See, e.g., Report by the Secretary General of the Council of Europe*, State of democracy, human rights and the rule of law* (2017), p. 15; PACE, *New threats to the rule of law in Council of Europe member States: selected examples* (Resolution 2188(2017)); Commissioner for Human Rights, *The independence of judges and the judiciary under threat* (Human Rights Comment, 3 September 2019); and the various Venice Commission opinions.

24 For reasons of brevity, I must leave aside the question whether these new conditions might lead to *lower* standards. The Court seemed to indicate that this is not the case: ECtHR, judgment of 28 July 1999, *Selmouni v. France* (no. 25803/94), § 101: "having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' (see … *Tyrer*…), the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes 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 democratic societies". In terms of nature/nurture, this would imply that the nature of the Convention allows only for the adoption of increasingly higher standards, leading to an irreversible *acquis*.

25 See, e.g., press release of 10 October 2019, *Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control,* at ec.europa.eu (IP_19_6033).

26 See, e.g., ODIHR, press release of 14 January 2020, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)* at https://www.osce.org/odihr/443731.

27 See e.g. United Nations OHCHR, press release of 25 June 2018, *Poland: Reforms a serious blow to judicial independence, says UN rights expert*, at www.ohchr.org.

if found to be in breach of the Convention – cannot easily be reversed. Time is no longer on the Court's side – it has become its enemy.

Justice delayed has always meant justice denied. But now the ramifications of delays may extend beyond the individual applicant and affect the entire system. What does this mean for the Convention as a living instrument?

(5) Independence of the judiciary: an attack on one is an attack on all

The well-known case of *Baka* illustrates the point. The President of the Hungarian Supreme Court complained about the premature termination of his mandate, which occurred in the context of a reorganisation of the judiciary. He brought his application in March 2012 and obtained a favourable Grand Chamber judgment – in June 2016.[28] But this victory did not bring about his reinstatement in his original position: a *fait accompli* had been created.

Of course, this is inherent in the *ex post* review exercised by the Court. A violation of the right to life cannot be undone either. However, there is a difference: what happened to Mr Baka was, *because of his function*, part of a much wider picture. The judiciary has a central place in the "human rights eco-system". This means that a measure affecting the position of the judiciary is *necessarily* capable of affecting the State's institutional capacity to secure effective protection of the rights and freedoms protected by the Convention. If *in this context* a breach of the Convention occurs, one might say: an attack on one is an attack on all.

Everyone will be familiar with the widespread concern that has been voiced, since the end of 2015, about the series of measures concerning the position of the Polish judiciary. The Government are seeking to defend their reforms, while critics are voicing the fear that judicial independence is being undermined. In this situation, one would like to know the Court's position on the various measures taken. A speedy and authoritative Court judgment is in the interests of all: the applicant who claims that his rights have been violated, and the respondent Government which claims that its policies are fully justified. A speedy and authoritative judgment provides legal certainty and guidance.

And it can be done! One only has to think of the speed and diligence with which the case of *Ástráðsson v. Iceland* was dealt with. The case was communicated within a month, a judgment was delivered well within a year. A Grand Chamber hearing took place 20 months after the case was introduced in Strasbourg.[29]

It is therefore difficult for an outsider to understand why something similar has not happened in the case of Poland. The Court clearly depends on applications being lodged, but the fact remains that a relevant case was brought in January 2018 but was only communicated in September 2019[30],that is to say 20 months later. Of course, the Court is facing an enormous case load and despite all its efforts it has a significant backlog. But that raises the question whether the Court should not reconsider its priorities. European judicial intervention is a scarce commodity, and it should be applied where and when it is most needed.

---

[28] ECHR, GC judgment of 23 June 2016, *Baka v. Hungary* (no. 20261/12).

[29] ECHR, Chamber judgment of 12 March 2019, *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18), now pending before the Grand Chamber.

[30] See the case of *Xero Flor v. Poland* (no. 4907/18). The case of *Bojara v. Poland* (no. 27367/18) was lodged in April 2018, communicated in September 2019. *Grzęda v. Poland* (no. 43572/18) was lodged in September 2018, communicated in July 2019.

(6) The evolutive doctrine and the need to preserve the State's institutional capacity to secure human rights and fundamental freedoms

Again, it is not my aim to express a substantive opinion on these cases, or to launch a debate on the situations in a number of other countries that come to mind. The point I wish to make is a different one. In cases where it is stated, *prima facie* on arguable grounds, that the very essence of the rule of law is under pressure, that structural changes may affect judicial independence, and that as a result the integrity, indeed the very core of the system for the protection of human rights is at issue, the Court ought to respond immediately. To my mind, this entails that the Court should review its policy on priorities[31] as well as its practice concerning interim measures.[32]

As to prioritisation, the current "Category II" features "Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) …" Consideration might be given to adjusting this, or adding a separate category: "Applications which raise issues that are capable of seriously affecting the State's institutional capacity to secure effective protection of the rights and freedoms protected by the Convention". Clearly such cases must enjoy top priority.

But it is equally important to reflect on the question *who* decides into which category a particular case should fall. It is imperative to ensure consistency across the Court's practice: similar problems must be categorised similarly, irrespective of the country concerned. A system involving two pairs of eyes may serve as an important guarantee.

When it comes to responding to challenges to the rule of law, inspiration may be taken from the Court of Justice of the European Union. The Luxembourg Court has had to rule on a whole series of cases involving the rule of law in various EU Member States. In doing so, it has been in a position to develop its case-law considerably, thus influencing the course of events.

Space does not permit us to analyse recent case-law in any detail. But two elements stand out: substance and procedure. As regards substance, the Luxembourg Court has developed its interpretation of the Member States' obligation to ensure effective judicial protection in the fields covered by EU law, linking it to judicial independence and the principle of irremovability of judges.[33] In the coming months and years, the Strasbourg Court too will face the challenge to ensure, somehow, that tribunals *are* established in accordance with the law, that domestic courts *are* independent, that judges *are* protected against unjustified dismissal, that vehement attacks on the authority of the judiciary *are* addressed. Many cases will involve the application of existing case-law. But there will also be cases that will require new, innovative interpretations of Article 6 of the Convention.[34]

---

31 See Rule 41 of the Rules of Court and https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

32 See *Practice Directions - Requests for interim measures* (Rule 39 of the Rules of Court): "The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied" (https://www.echr.coe.int/Documents/PD_interim_measures_ENG.pdf).

33 See, notably, CJEU, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16), § 37; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU), § 52; and of 24 June 2019, *Commission v. Poland* (C-619/18), § 55.

34 To single out a few examples: the Court may receive applications from judges who were subjected (or felt the threat of being subjected) to more or less subtle methods to "discipline" them. Complaints, from either judges or litigants, may concern vehement attacks in the press, or even by public authorities, on the judiciary. The Court may have to rule on the correlation between a perceived "systemic" lack of independence of the judiciary and the position of individual courts and judges. Can an individual complain about a systemic problem, without being able to show that "his" judge was under pressure, or is that an *actio popularis?*

Where procedure is concerned, the Luxembourg Court has been able to play its role by using expedited procedures and, where necessary, adopting interim measures. In doing so, it has managed to avoid being confronted with a *fait accompli* which might undermine the full effectiveness of any future final decision.[35] There is nothing to prevent the Strasbourg Court from doing exactly the same thing, starting today.[36]

This year we will be celebrating the adoption of the Convention 70 years ago. The *Tyrer* judgment was delivered more than 40 years ago. In line with its evolutive doctrine, the Court is responding to the changing environment of which it is part. Many have applauded the "living instrument" doctrine and the benefits it has brought. Others are more cautious, for instance because they feel that the Court should limit itself to dealing with the "really great evils". But all will agree that the Court was set up as the "Conscience of Europe". It must act decisively to protect what is really precious – decisively and quickly. An early warning mechanism must be early, or it will cease to be a warning mechanism.

[35] See, notably, CJEU, Order of 17 December 2018, *Commission v. Poland* (C-619/18 R), § 68 *et seq.*

[36] Seen from this perspective it would be helpful too, if an alternative procedure were established to allow situations to be brought before the Court, comparable to the infringement procedure under Article 258 TFEU. As has been proposed before, the Commissioner for Human Rights could play such a role. This, however, would obviously require an amendment to the ECHR.