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Evolutive Interpretation: Has the ECtHR Really Gone Too Far? The Case of the Protection of Socio-Economic Rights

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1. **Introduction**

and commentators, however, have identified key concerns regarding the legitimacy of the ECtHR in using these interpretive methods.[ii] This paper is motivated by the criticisms of these methods. By looking at the case law of Articles 2, 3, 8 and 14 ECHR on the protection of socio-economic rights, this paper: 1) shows how the ECtHR has utilised the two methods in a specific context; 2) identifies a number of risks arising from the use of these methods; and 3) shows that, although such risks do exist, they are low in the particular context because the ECtHR does not significantly expand its interpretation of the aforementioned provisions.

2. **The ECHR case law on socio-economic rights**

By using evolutive interpretation (and by expanding on it) and the notion of 'effectiveness', the ECtHR has read into the ECHR rights that are not explicitly mentioned in the text and it has recognised rights that the drafters had intended *not* to protect. Moreover, the ECtHR has not only imposed positive obligations on States, but also obligations of a socio-economic nature. The case law on the protection of socio-economic rights, which will be explored in this section, exemplifies these trends. However, as we shall also see, the protection of socio-economic rights under the ECHR is still rudimentary. The limited protection of socio-economic rights can be attributed to the ECtHR's unwillingness to significantly expand its interpretation of the provisions in question.

2.1. Article 2

In *Powell v UK*[iii] the ECtHR used the notion of 'effectiveness' in order to develop positive obligations of a socio-economic nature under Article 2. This case concerned a boy who died due to failure to diagnose his curable disease in time. The ECtHR maintained that States have an obligation under Article 2 to take appropriate steps to safeguard life and that it would not exclude that 'the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2.'[iv]

Although it may be argued that the ECtHR went too far, in that it imposed on States obligations they had not intended to assume in ratifying the ECHR, the ECtHR was reluctant to offer a general theory of positive obligations in the field of health care. The ECtHR set limits on its interpretation of Article 2 as it declared that:

'where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient

2.2. Article 3

Some commentators have observed that a new approach to the interpretation of the ECHR, which extends the evolutive approach, can be discerned from some relatively recent cases.[vi] This is an approach which seeks to interpret traditional protections in the form of civil and political rights in a manner that encompasses violations traditionally considered to be of an economic and social nature.[vii] The case of *D v UK*, which concerned the planned removal of an AIDS patient to St Kitts where medical treatment was inadequate,[viii] is an illustrative example.

In *D* the ECtHR maintained that it must reserve to itself sufficient flexibility to address the application of Article 3 beyond 'traditional' cases, where the source of the risk in the receiving State stems from factors which cannot engage the responsibility of the State, or which, taken alone, do not in themselves infringe the standards of Article 3.[ix] The ECtHR therefore accepted that the decision to remove an alien who is suffering from a serious illness to a State where the medical facilities are inferior to those available in the Contracting State may raise an issue under Article 3. In *D* the ECtHR indisputably expanded the ambit of Article 3,[x] and also recognised that Article 3 may have implications of a socio-economic nature.

However, this development did not last long. Possibly as an acknowledgment of its expansive reading of Article 3 in *D*, in the subsequent case of *N v UK*[xi] the ECtHR set considerable limits. Although *N* can be distinguished on the facts from *D*, in that treatment was available in Uganda in contrast to St Kitts,[xii] in *N* the ECtHR was at pains to narrow down the scope of application of Article 3 in general. It did so by declaring that the ECHR is 'essentially directed at the protection of civil and political rights' and that the decision to remove an ill alien to a State where the medical facilities are inferior to those available in the Contracting State may raise an issue under Article 3 only in very exceptional circumstances.[xiii] The ECtHR also emphasised that the object of Article 3 is not to place an obligation on a State 'to alleviate…disparities [in medical treatment] through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.'[xiv] This was seen to impose too great a burden on the Contracting States.[xv]

2.3. Article 8

In *Marzari v Italy*, which concerned accommodation needs, the ECtHR emphasised that there are positive obligations inherent in effective respect for the rights guaranteed by Article 8.[xvi] It accepted that Article 8 sometimes requires positive measures to effectively respect a person's enjoyment of his/her home in the concrete physical sense.[xvii] This

However, in *Marzari* and in subsequent cases the ECtHR clarified that Article 8 does not afford a right to a home per se.[xviii] The ECtHR's statement that it is a matter for political not judicial decision whether the State provides funds to enable everyone to have a home in *Chapman v UK*,[xix] proves that judicial restraint is at the heart of the ECtHR's approach to Article 8. Thus, the wide margin of appreciation that is accorded to States in accommodation cases, and in the area of social and economic policy in general,[xx] indicates the ECtHR's readiness to set limits on how far it can go.

2.4. Article 14

In *Sidabras and Džiautas v Lithuania* the applicants complained that being banned from finding employment in the private sector for 10 years on the ground that they had been former KGB officers was in breach of Articles 8 and 14.[xxi] Having regard to the notions currently prevailing in democratic States, to the ESC and to the ILO texts, the ECtHR concluded that the ban applicable in the domestic legislation had constituted a disproportionate measure.[xxii]

Sidabras and Džiautas exemplifies the ECtHR's reliance on evolving trends and common values in international law ('present-day conditions') as a justificatory basis for finding a practice to be in breach of the ECHR.[xxiii] A concern then naturally arises as to whether the ECtHR may be imposing on States new obligations which they never intended to undertake, given that the international human rights materials relied on by the ECtHR include non-binding materials of international bodies and human rights treaties to which the respondent States are not parties.[xxiv] However, even without wanting to comment on the legitimacy of such an approach and of evolutive interpretation more generally, due to the fact that the ECtHR accords to States a lot of room for manoeuvre in fulfilling their obligations in relation to socio-economic rights,[xxv] the risk in question is inevitably minimised.

3. **Conclusion**

This paper is motivated by the concerns regarding the legitimacy of the ECtHR in using evolutive interpretation and the notion of 'effectiveness'. Arguably, both methods are necessary 'to keep European human rights effective and up-to-date.'[xxvi] The blunt application of the law is both impossible and ineffective given that social contexts evolve, calling for a novel interpretation of the legal texts. Consequently, the mere finding that these methods are used by the ECtHR already is not an argument in itself against it. The difficulty lies, not in the use of these methods, but in how far the ECtHR can embark on these methods without losing its legitimacy. As the case law shows, the risks arising from the use of these methods are currently low in the specific context of socio-economic rights because of the ECtHR's very restrictive approach to their interpretation, which in fact may be

nature, it has done so in a relatively restrictive manner.

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[iv] ibid 17-18.

[v] *Powell* (n2) 18.

[vi] See: Robin C A White and Clare Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 75. Virginia Mantouvalou, 'Work and Private Life: *Sidabras and Džiautas v Lithuania*' (2005) 30 ELRev 573, 574.

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[ix] ibid, para 49.

[x] Juliane Kokott and Heike Berger-Kerkhoff, '*HLR v France*' 1997 Reports of Judgments and Decisions 745 / '*D v United Kingdom*' 1997 Reports of Judgments and Decisions 777 (note) 524, 527.

[xi] App no 26565/05 (ECtHR, 27 May 2008).

[xii] ibid, paras 42, 48.

[xiii] *N* (n10), paras 44, 42.

[xiv] *N* (n10), para 44.

[xv] ibid.

[xvi] (dec) App no 36448/97 (ECtHR, 4 May 1999).

[xvii] ibid; Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart 2007) 77.

[xviii] *Marzari* (n15); *Chapman v UK* App no 27238/95 (ECtHR, 18 January 2001), para 99.

[xix] *Chapman* (n17), para 99.

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[xxv] *SS v UK and FA and Others v UK* (dec) Apps nos 40356/10 and 54466/10 (ECtHR, 21 April 2015), para 43.

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