Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights

The debate on judicial activism versus judicial restraint is very often presented in the form of a dilemma, in the sense that judges must choose between the two contradictory and unsatisfactory terms of an alternative. It seems to me more and more that this dilemma is an appearance, ideologically constructed, the main function of which is to classify the positions of the parties in separate camps. Within the European Court of Human Rights (ECtHR, Court), a way of presenting judicial activism and judicial restraint is often to assimilate the latter to traditionalism and conservatism, and the former to liberalism and progressivism, having in mind that both labels are more an accusation than a praise and that behind them ‘often lie concerns about substantive outcomes’.¹ Yet, the opposition between the realists and the idealists, between the pragmatists and the laxists, the responsible and the irresponsible, seems inaccurate.

In its numerous features (rules of interpretation, doctrine of precedent, positive obligations, horizontal application, procedural guarantees, extension of the notion of jurisdiction, and opening-up of the rights guaranteed), the ECtHR ranges between tradition and progress, between protection and the development of human rights, between flexibility and legal certainty. That

¹ F Zarbiyev, ‘Judicial Activism in International Law – A Conceptual Framework for Analysis’ (2012) 3(2) Journal of International Dispute Settlement 247. The author is making this observation for judicial activism, but I think that the same can be said at the European Court of Human Rights for judicial restraint.
is, the ECtHR oscillates between pairs of opposite values and objectives, the promotion of which relies on reciprocal concessions.² In this respect, I do not argue that judicial activism and judicial restraint are ‘two sides of the same coin’,³ that judicial activism prevails today over self-restraint in the jurisprudence of the Court,⁴ or the opposite, namely that the Court rather exercises self-restraint of its powers, as President Spano puts it.⁵ I am not going to make any attempt here to propose a definition of judicial activism and judicial restraint;⁶ rather, I will try to ‘capture’ the complexity of the reality, limiting myself to the question of interpretation. Indeed, the reality of human rights interpretation is much more complex than one may think. The Court’s role is to give concrete shape and content to the abstract terms of the ECHR, and to ensure that the European Convention on Human Rights (Convention) is relevant to modern times and remains effective. However, as I argue below, with this role comes responsibility.

1 A Complex Hermeneutic Process

The role of the judge in a court dedicated to human rights is unique. The Court’s process of interpretation consists of giving a meaning to a text and delineating boundaries with a view to the application to specific facts. Interpreting the Convention is thus a complex hermeneutic process, which necessarily and inevitably implies that judges make choices. As analysed by Bégin, fundamental rights have an open texture and their exact meaning remains still to be determined.⁷ Their application is consequently intrinsically linked to a process of interpretation by judges, who are certainly not just the ‘mouth of the law’.⁸ In other words, never can a fundamental right determine the conditions

⁵ R Spano, ‘Over-Reaching Or Under-Achieving? The Trajectory of the Case Law in the European Court of Human Rights’ (UCLouvain Faculty of Law, 11 March 2022), on file with the author.
⁸ F Rigaux, La loi des juges (Odile Jacob 1997) 65.
of its application. A fundamental right is general and abstract in nature, and acquires a concrete meaning in the particular context in which it is raised. Despite their universal and highly abstract nature – or perhaps precisely for this reason – fundamental rights lead to a contextualisation of the norm which, when assumed by the judiciary, translates into interpretative practices that are sensitive to the diversity of interests and values involved. These practices spell the end of the myth of literal meaning of norms and obviously mark an important shift away from the formalistic approach characterising 20th century legal thinking.

2 A Teleological Method of Interpretation

The Court’s methods of interpretation have always been guided by the Vienna Convention on the Law of Treaties of 1969, the provisions of which constitute, as Judge Matscher put it, ‘constraints on judicial interpretation’.9 Article 31(1) establishes the purposive/teleological method of interpretation (i.e., it gives priority to the object and purpose of treaties as a rule of interpretation).10 From the very beginning, the Court had, therefore, moved towards a purposive or teleological interpretation of the Convention, giving it priority over textual or historical interpretation. An open, dynamic interpretation, to ensure that the Convention remains a living instrument in line with present-day conditions since most of the provisions of the Convention are written in the present tense. In this respect, there is a clear difference with the national judge, who considers that one cannot make a text say everything. Quite the contrary, the ECHR is grounded on the assumption that the Court shall make the text say everything, and even more. As Ricoeur put it, ‘the meaning of a text is not behind the text but in front of it’.11 It is true that the Court is there to serve the Convention, but not in a position of allegiance. It must not necessarily seek the intention of the legislator – of the founding fathers here – or follow strong hermeneutic directives (such as the strict interpretation of criminal law). Such a mutation of perspectives may, in practical terms, result in an overturning of principles and ‘ideas’ of the law that were believed to be immutable. That is the case, for

10 On all of these issues, see the seminal book: G Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press 2007).
example, of the axiom of the broad interpretation of rights and freedoms and the restrictive interpretation of the limitations that may be imposed on them, as repeatedly affirmed by the ECtHR.

I agree with Zarbiyev, who argued that:

[a]s practice shows, recourse to the ‘object-and-purpose’ argument does not necessarily lead to an extensive interpretation. In the same vein, the use of travaux préparatoires does not necessarily amount to a conservative interpretation.12

I accept the objection that ‘there seems to be no necessary or logical correlation between judicial activism and specific interpretative approaches’.13 I also accept that, conceptually, interpretative methods alone can hardly be expected to dictate interpretative outcomes. Paraphrasing the Holmesian quote, one can say that ‘general methodological propositions do not decide concrete interpretative controversies’.14 However, this assertion ‘does not amount to denying that some interpretative methodologies are frequently associated with, and considered to support, judicial activism’.15 Judges can choose the method that better serves their preferable outcome in a particular case; by doing so, they can restrain or extend their own power to shape human rights standards.

3 The Living Instrument Approach

It is against this background that evolutive interpretation has to be considered and understood. ‘Human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions’.16 So, for instance, in Selmouni v France:

having regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’ […], the Court […] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamen-

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12 Zarbiyev (n 1) 7–8. Kudla v Poland [GC] 30210/96 (ECtHR, 26 October 2000) para 152, concerning the right to an effective remedy, is an apposite example to give.
13 Zarbiyev (n 1) 7.
14 Ibid.
15 Ibid 8.
16 Tyrer v the United Kingdom 5856/72 (ECtHR, 25 April 1978) para 31; Loizidou v Turkey [GC] 15318/89 (ECtHR, 23 March 1995) para 71; Christine Goodwin v the United Kingdom [GC]
tal liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.\(^\text{17}\)

In other words, the concepts used by the Convention are to be understood in the sense given to them by democratic societies today. The ‘living instrument’ approach to interpretation is the temporal dimension of the principle of effectiveness.\(^\text{18}\) The Christine Goodwin and I v the United Kingdom judgments, concerning transsexuals,\(^\text{19}\) and the Scoppola (No 2) v Italy case, concerning Article 7 of the Convention,\(^\text{20}\) are memorable experiences from the time that I was a sitting Judge of the Court. As a matter of fact, the Court interpreted the Convention as a living instrument that goes hand in hand with legal and social developments in European countries. The Grand Chamber judgment Scoppola (No 2) v Italy summarises the essence of this approach:

Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved [...]. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.\(^\text{21}\)

4 Clearing up Misunderstandings

I would like to take a moment to examine the nature and purpose of evolutive interpretation because it seems to me that there are some misunderstandings regarding this method of interpretation. Very often, evolutive interpretation is seen as a symbol of ‘activism’, or worse of ‘judicial imperialism’, even if it can also, in some cases, have the effect of restricting the scope of the rights
protected by the Convention.\textsuperscript{22} The \textit{Pretty v the United Kingdom} judgment is an example, wherein the Court – after referring to it – refused to apply the ‘living instrument’ theory in order to recognise that states, under Article 3 of the Convention, might have a positive obligation to permit the assisted suicide of a terminally ill person.\textsuperscript{23} In another recent example, \textit{Mangouras v Spain}, the Court justified, under Article 5(3) of the Convention, the high amount of bail in an environmental case (the ecological disaster caused by the Prestige ship that sunk off Galicia in 2002).\textsuperscript{24}

The misunderstanding that evolutive interpretation always leads to expansion of rights gives rise to the criticism that we often hear nowadays and which develops \textit{crescendo}. The Court ‘is going too far’ and is delivering judgments in situations that had not been envisaged by the founding fathers since, in the words of former Lord Chancellor Chris Grayling, ‘[w]hen the Convention was written, we had a situation where people were being sent to the gulags without trial, where we had just had the Holocaust in Europe […]’.\textsuperscript{25} This is echoed by tabloid newspapers, which do not hesitate to support the contention that the Convention is a ‘charter for criminals and parasites’.\textsuperscript{26} Lastly – and we are in the \textit{fortissimo} – , the Convention would infringe the sovereignty of states. With due respect, I believe that this criticism cannot be viewed as relevant because this is precisely the supervisory system that was called for by the Convention itself. While the state is the guardian of the general interest and this status confers sovereignty and immunity on it, the state is now also called upon to become a ‘defendant’ when it fails to fulfil its duties and obligations and to answer for it.

The fear of evolutive interpretation is also often linked to concerns of democratic legitimacy, which are undoubtedly relevant but overly instrumentalised. The main argument is well known. Can international treaties be interpreted in such a way as to impose more obligations on states than they are prepared to accept? More specifically, to what extent does the sovereignty principle admit

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\item Bacchini \textit{v Switzerland} 62915/00 (ECtHR, dec, 21 June 2005), in which the Court found that the publication of a judicial decision on the internet could in certain cases satisfy the requirement that the judgment be pronounced publicly, in accordance with Article 6(1) of the Convention.
\item \textit{Pretty v the United Kingdom} 2346/02 (ECtHR, 29 April 2002) paras 54–55.
\item \textit{Mangouras v Spain} [GC] 12050/04 (ECtHR, 28 September 2010).
\item A Wagner, ‘The Monstering of Human Rights’ (University of Liverpool, 19 September 2014).
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an interpretation that goes beyond the original intention of the treaty and modifies the obligations to which the states initially committed themselves? In the implementation process of the Convention, the general language of the Convention must be translated into specific principles and rules to respond to the case submitted to the Court. This does not, of course, mean that the Court can ignore the text of the Convention, but nevertheless allows the Court greater creativity. The Convention is obviously a treaty but, as the Court has been saying for a long time, it is not a treaty in the classic sense of the word, if only because it extends beyond the framework of reciprocity between states and creates a network of objective obligations which are guaranteed collectively. This specificity of the Convention is not purely formal, but it is substantial, and it is reflected in the interpretation of the rights and freedoms recognised by the Convention.

Strictly speaking, the function of the evolutive method of interpretation is the understanding (in the sense of formal logic) of concepts that designate situations which are defined in domestic law and covered by the Convention. As George Letsas explains, evolutive (or dynamic) interpretation ‘is a method by which the Court considers the development of European social and legal concepts to find grounds for attaching certain meanings to the Convention’s terms’.

5 Between Conviction and Responsibility

The ECtHR should lie between conviction and responsibility. On the conviction side, it should be borne in mind that Convention rights are not Dead Sea Scrolls. We are not museum curators but actors. We are here to think human rights, to bring them to life, and to meet this remarkable intuition of the founding fathers that, through the implementation of rights by the Court, these rights will have a meaning in the present reality. To my mind, conviction is an ethical imperative that must go on developing contact with what is real, in other words, with life. I am wondering whether the Court does not too often forget the imperative of conviction.

However, the ethics of conviction is inseparable from the ethics of responsibility. To ensure that human rights are implemented, we must inspire the confidence of states, explain ourselves, and allow for progressive developments. As legal theorists have observed, ‘the law must be stable yet it cannot stand still’.

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27 Letsas (n 10) 65.
Adaptation and modification have been constant features of the Convention since 1950, and continue to be so today. The Convention is now 70 years old, and the Court’s case law has been evolving alongside profound changes that have occurred in Europe over recent decades. The Convention has become a pan-European instrument of protection of human rights and, in many countries, has made it possible to achieve a level of respect for fundamental rights that would have been hardly imaginable in 1950, when the Convention was drafted. It would probably not have survived if it had not been regarded as a living instrument that has to be interpreted in line with developments in the society in which we live. The development of law is inseparable from the development of society.

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