CONTINUITY AND CHANGE IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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1 INTRODUCTION

The European Convention on Human Rights was adopted in 1950. Its provisions, similar to many constitutional provisions on fundamental rights, are drafted in general terms. It is through the interpretative activities of the supervisory organs, especially the European Court of Human Rights that these abstract norms have been provided with content. Thus, the Court has defined, in its case-law, what is to be understood by “fair trial” within the meaning of Article 6, what amounts to an “interference” with “private and family life” mentioned in Article 8, and so on.

The Court’s interpretative role is, however, not limited only to a few basic definitions. The interpretation of the Convention is rather an ongoing process whereby the interpretations must be adjusted to the evolving values in the European societies and to the new human rights problems brought about by the advances in science and technology, which could not have been imagined back in 1950.

There is an inherent tension between this need for interpretative adjustments on the one hand, and on the other the need for legal certainty with its emphasis on the continuity and foreseeability of legal developments.

Below I will seek to outline how the Court, through its interpretative practice, tries to strike a balance between these contradictory interests which sometimes speak in favour of judicial activism, and sometimes in favour of judicial self-restraint.1

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1 While this contribution is essentially based on the case-law of the Court, it, of course, also draws on existing writing on the subject. A classical article on the subject is P. Mahoney,


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An important judgment in which the Court set out the basic principles concerning the resolution of this tension was given in Cossey v. the United Kingdom. In this case the applicant, a male-to-female transsexual, argued that the Court should change its position adopted in an earlier case according to which, the refusal by British authorities to make amendments to birth registration documents of the applicant so as to correspond to her new sexual identity was compatible with Article 8 of the Convention. The Court stated that while “it is not bound by its previous judgments... it usually follows and applies its own precedents, such a course being in the interest of legal certainty and the orderly development of the Convention case-law.” (para. 35) However, it went on to say, in the same paragraph, that

Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions...

The quoted passages express the basic principles regarding continuity and change in the case-law: first, the Court is not formally bound by its own precedents (there is no principle of stare decisis); secondly, as a rule it nevertheless follows its case-law, in the interest of legal certainty, without, thirdly, being prevented from departing from it exceptionally for the kind of reasons indicated. That the departure is not made without mature reflection is shown by the Cossey case itself. Despite strong indications to the contrary, the time was, in the Court’s view, not ripe for a change. The change

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3 Rees v. the United Kingdom, Judgment of 17 October 1986, Series A no. 106.