

Adaptations of the european convention of human rights



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The function of the European Convention of Human Rights (ECtHR) articles protects the rights and fundamental freedoms of the people in all 47-member states of the Council of Europe. In turn the ECtHR has been popularly known as a living instrument mainly due to its power of being able to interpret the law effectively to keep up with the ever-changing times. This essay will outline the ways in which the ECtHR takes effect to allow the court to adapt cases involving certain issues, enabling flexibility for the development of the doctrine. So that the European Convention can be interpreted there are principles which must be followed such as proportionality, the margin of appreciation, the convention as a living instrument, rights which are practical and effective and positive obligations. Particular cases such as *Tyler v United Kingdom*[1] and *Hirst v United Kingdom*[2] represent the functionality of the ECtHR as a living instrument.

Tyler v United Kingdom, application No. 5856/72 , Judgement, April 1978

The *Tyler v The United Kingdom* case was put before the European Court of Human Rights. Whereby it was stated in the case judgment that the convention is a living instrument and ' must be interpreted in light of present-day conditions'[3] This followed the incident whereby a police officer had birched a young boy which supposedly breached article 3 of the Human Rights Act " No one shall be subjected to torture or to inhuman or degrading treatment or punishment'[4] and constituted degrading punishment.

However, it became clear that this type of punishment did not relate to juveniles at the time the incident took place. In today's modern legal era the law could not be more different, types of punishments such as these afflicted on children are amongst the worst types of crimes with serious

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consequences. This presents how the law and society has changed drastically.

Additionally, it was stated in the judgement of *Tyrer v The United Kingdom* that ' Modern opinion has come to regard corporal punishment as an undesirable form of punishment'.^[5]This puts great emphasis on the outdated ways in which punishment took effect and how the ECtHR's standpoint had altered in regard to the punishment of wrongdoers especially children. It was also mentioned in the judgement ' that such punishments may be undesirable and ought perhaps to be abolished'.^[6]The ECtHR have the ability to dissect and grasp a case with much deeper understanding and therefore can bring modern matters to light in a way in which other courts cannot.

In November 1990 the United Kingdom signed the convention on the rights of the child including fifty four articles, whereby it states under Article 2 ' States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment'.^[7]This was a major change within the law and how it regards childrens welfare. It is cases such as *Tyrer V United Kingdom* which cause the convention to reevaluate broad issues such as the treatment of children and further shape the law.

The ECHR as a living instrument its meaning and legitimacy- George Letas.

When the ECtHR looks into a case the living instrument is represented in three differet aspects. First the court must take into account the state of present day standards when interpreting the convention. " it will very rarely

inquire into what was thought to be acceptable state conduct when the
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Convention was drafted, or into what specific rights the drafters of the Convention intended to protect.”[8]Secondly, the court has to consider that the present day standards are common amongst other states. ‘ The Court does not make it a condition that all contracting states have expressly accepted the standard by way of legislative enactment.’[9]Lastly, the court is reluctant to give the respondent state chance to consider what an acceptable standard is. This is due to the fear that the respondent states practises are not in alignment with those of the European council. Moreover, the idea of the ‘ living instrument’ approach has been shifted.

Tyrer v United Kingdom was the main case which the European Court first recognised as having significant inconsistencies relating to the law. A decision had to be made to understand whether the punishment of minors was to be considered degrading punishment within the meaning of article 3 of the Human Rights Convention. The punishment of birching had been prescribed by law and was used as a form of punishment in the Isle of Man but had been abandoned in the rest of the UK. An argument was made that for the Isle of Man that ‘ judicial corporal punishment’ could not be considered a degrading punishment as it ‘ did not outrage public opinion in the Isle of Man’.

[10]Moreover, the court decided to reject this point it was stated that judicial corporal punishment could not be accepted as a criteria to be seen as degrading.

Additionally, it was suggested that the nature of the punishment goes against the article 3 of the Convention, which ultimately aims to protect. A punishment such as birching constitutes degrading treatment and an attack

on the individuals dignity. Furthermore, the fact that the punishment is acted out by a stranger and whilst baring all concludes a breach.

A second case which presented difficulties when aiming to interpret the convention was the *Marckx v Belgium* case. Whereby a child had been born illegitimately and his mother had made a complaint that the Belgian legislation constituted a violation to their right to have a life as a family under article 8 of the convention and felt that she had been discriminated against. Furthermore, the ECHR had concluded a breach of article 8 as it could be proven that 'Belgian law put illegitimate families under unfavourable and discriminatory conditions'.^[11] The Belgian government responded stating that under the law it was more likable to support a traditional family to ensure that it maintained social order. However, the Convention was able to differentiate between the meanings of legitimate and illegitimate. Moreover, the Convention aimed to demonstrate that having a child outside of wedlock could be a social norm, the court referred to conventions such as the European Convention on the Legal Status of Children born out of wedlock^[12] as a strategy to bring forward a sense of normality within the situation. These early cases present the character of the convention which can bring light to a situation and display and expose unfairness. During the 1980's and 1990's the old Court granted a wide margin of appreciation towards the respondent particularly in cases which involved private life and the freedom to willfully express.

Is the 'Living instrument' approach of the ECHR compatible with the ECHR and international law. *Hirst v UK*

The European Court of Human Rights is the single authority which is responsible for interpretation and application of the convention. The 'living instrument' has undeniably led the ECtHR to adjust the Convention rights to keep up with modern expansion and the changes in collective attitudes. The intention of the ECHR is to interpret the Convention that 'upholds individual rights as practical and effective, rather than theoretical and illusory protections.'^[13] According to former Lord Chief Justice Lord Judge and the Deputy President of the UK Supreme Court Lady Hale "the Human Rights Act has been the most significant development of the last 30 years.'^[14] However, the idea that the Human Rights Act could potentially be replaced by the 'British Bill of Rights' would steal rights which are currently being enjoyed under the convention and would limit the ECtHR therefore being quite the opposite of a living instrument.

As the ECHR has decided thousands of cases every year there are many case judgements which have not been well received. *Hirst v UK* stands out in particular due to it being misunderstood. Seemingly there has been a conflict involving provisions and the convention, an issue which had been raised by John Hirst arguing his case under the Human Rights Act regarding the right to vote as a prisoner.^[15] He argued his plea under the meaning of Article 3 of the Human Rights Act. Although, Article 3 is not an absolute right meaning that it can be limited by the state^[16]. In order for the courts to understand whether or not the limitation is compatible with the convention it first must be decided if it is recommended by law. 'Whether it is pursuant of a legitimate aim and whether it is necessary in a democratic society.'^[17] As regarded by the Divisional Court a blanket ban was proportionate and it was stated by

Kennedy LJ that 'prisoners had lost their moral authority to vote'.^[18] Mr Hirst attempted to appeal his case but did not succeed. Additionally, the ECHR had found that a violation had occurred and that a blanket ban was disproportionate and had breached the convention rights.

The ECHR and the living instrument doctrine

There have been many criticisms of the ECHR and its functionality as a living instrument which shows how very little is understood in regard to its purpose. It has been suggested that the Convention has expanded "beyond what the framers of the Convention had in mind when they signed up to it".^[19] However, this has allowed the convention to expand rights into many other areas to allow justice and fairness. Most importantly the convention must be treated as a living instrument to be able to deal with modern day situations such as IVF, CCTV, the internet and so forth. 'It is difficult to find fault with the 'living instrument' doctrine in principle, and upon closer examination, most of the objections towards the ECHR by Conservatives involves criticism of individual cases, rather than the 'living instrument' doctrine itself'. This further proves that the idea of a living instrument is a positive concept needed to cope with the evolution of society. Even though this notion has attracted some criticisms, it seems that the 'living instrument' is needed to overcome certain matters such as those previously mentioned in *Marckx v Belgium* and present them as societal norms.

In conclusion, cases such as *Tyrer v United Kingdom* has raised many issues which the Convention was able to make sense of and aim to make others aware that many more individuals are standing up for their rights with the

help of the 'living instrument' whether they succeed or not. Without it society would cease to evolve, the court is now able to tackle cases head on using case law and legislation to bring about fairness to those who may feel they are being treated unfairly. In turn this now makes us more accepting of others and their rights.

Bibliography

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[3] *Tyrer v United Kingdom*, application No. 5856/72, Judgement, April 1978

[4] Human Rights Act 1998, Article (3)

[5] *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978 para 11

[6] *Ibid para 11*

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[8] The ECHR as a living instrument its meaning and legitimacy- George Letas. Para 4

[9] *Ibid para 4*

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[15]**Hirst v United Kingdom (No. 2) : A Danger for Both the UK and Europe**

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