

## INTERPRETATION

This paper intends to generate discussion on the issues of interpretation. There are two types of interpretation clause. The first type is positive clause. It directs courts to apply certain principles in interpreting the rights. It is more common in domestic bills of rights. The second type is a negative clause in which prevents the abuse and destruction of certain rights. This is common in international human rights instruments.

This paper examines the established case law in both negative and positive clause on the interpretation of such rights and freedoms, whether any differences between the two in order to secure those rights and freedoms in its jurisdiction.

I will also circulate a chapter, written by David Pannick and Lord Lester, on "principles of interpretation" which outlines the general issues of interpretation. I would like to spend some time to discuss the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 on judges' interpretive powers.

Negative Clause:

### 1. Constitution of India

Article 21 of the Constitution of India provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 32(1) further provided that "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."

The Supreme Court has interpreted the right to life in Article 21 in a broad manner. Thus, the right to life has been held to include the right to be free from sexual harassment (gang rape in this case) in the absence of domestic law to formulate effective measures to protect women (*Vishaka v State of Rajasthan*

[1997] 3 LRC 361); and the right to livelihood (forced eviction in this case): "The right to life conferred by Article 21 extended to protect the right to livelihood. Though the right to life was a wide and far-reaching right, and the evidence suggested that eviction of the petitioners had deprived the petitioners of their livelihood, the Constitution did not impose an absolute embargo on deprivation of life or personal liberty. Article 21 simply protected against deprivation not according to procedure established by law, which must be fair, just and reasonable. (Tellis v Bombay Municipal Corpn; Kuppusami v State of Maharashtra [1987] LRC (Const) 351)

Less controversially, the Indian Supreme Court has also relied on the right to life in order to tackle pollution: "Where a chemical industrial plant was established without the requisite permission and clearances and was then run in blatant disregard of the law to the detriment of the life and liberty of citizens living in the vicinity, the court has power to intervene in order to protect those fundamental rights guaranteed under Article 21 of the Constitution. Even assuming that the court was unable to award damages against the respondents, it was not prevented from directing the central government to determine and recover the costs of remedial measures from the respondents." (Indian Council for Enviro-Legal Action v Union of India [1996] 2LRC 226

Nilabati Behera v State of Orissa [1994] 2 LRC 99

This case involved Mr. Behera who had been taken into police custody in connection with the investigation of a theft. At about 8pm on 1 December 1987 the petitioner, his mother, had visited the police station with food which he ate. On the following morning he was found dead on the nearby railway track with multiple injuries and still wearing a handcuff. The petitioner wrote to the Supreme Court a letter which was treated as a writ petition, in the original jurisdiction of the court under Article 32 of the Constitution, claiming compensation for contravention of the fundamental right to life guaranteed by Article 21 of the Constitution.

The Supreme Court directed the District Judge to hold an inquiry into the facts; in his Report the District Judge found that the deceased had died from multiple injuries inflicted on him while in police custody. Before the Supreme Court the State of Orissa and the police officers disputed the District Judge's findings, alleging that the deceased had escaped from police custody and that his injuries indicated that he had been run over by a train. The Supreme Court found that the State of Orissa was in breach of Article 21 as a result of injuries inflicted on Mr. Behera while in police custody and were awarded compensation and costs for the breach as guaranteeing the fundamental right to life. This case makes no distinction between positive and negative clause in interpreting the bills of rights.

This case also dealt with the issue on remedies in which a claim in public law for compensation for contravention of human rights and fundamental freedoms guaranteed by the Constitution was a well-established remedy for the enforcement and protection of such rights, based on strict liability for their breach. This remedy was distinct from the private law remedy for damages for a tort resulting from breach of the fundamental rights. An important distinction between the two was that the defence of sovereign immunity, which might be available as a defence in private law, did not apply to the public law claim.

## 2. European Convention of HR & Fundamental Freedoms

Article 2 Protocol 1, rights for education: Costello-Roberts v UK (1993)  
EHRR 112

Article 2 provided that " No person shall be denied the right to education....  
"

This case is about using corporal punishment by a private school (no financial support whatsoever from the government) against a seven years old boy who breached the school discipline. The issue to be determined is whether a private school is in breach of Article 3, Article 8 and Article 2 Protocol 1 of ECHR.

Although negative phrased, the European Court of Human Rights has confirmed that the Convention provision nonetheless contains a right to education which must be secured to all children. "It recalls that the provision of the Convention and its Protocols must be read as a whole (see the Kjeldsen, Busk Madsen and Pedersen v Denmark judgment of 7 December 1976, Series A no. 23, pp.26 and 27, paras. 52 and 54, and the Soering v the United Kingdom judgment of 7 July 1989, Series A no. 161, p.40, para. 103). Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process (see, mutatis mutandis, the Campbell and Cosans v the United Kingdom judgment of 25 February 1982, Series A no. 48, p.14, para. 33). That a school's disciplinary system falls within the ambit of the right to education has also been recognized, more recently, in Article 28 of the United Nations Convention on the rights of the Child of 20 November 1989 which entered into force on 2 September 1990 and was ratified by the United Kingdom on 16 December 1991." (para. 27)

The right under Article 2 is to avail themselves of the means of instruction existing at a given time (Belgian Linguistic case (No.2) A.6 (1968) 1 EHRR 252). Any limitations on the enjoyment of the right not to be denied an education must be very strictly justified, as there is no provision in the Protocol for a range of exceptions, such as apply in relation to, for example the Convention's formulation of the rights to freedom of expression (Article 10) or freedom of assembly (Article 11).

Positive Clause: positive obligation under ECHR

Article 1: Obligation of State to secure those rights and freedoms its domestic law to everyone within its jurisdiction

The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure

those rights and freedoms in its domestic law to everyone within its jurisdiction (Young, James and Webster v. the United Kingdom, judgment of 13 August 1981). The Court has also consistently used this principle to apply to all rights and freedoms under the ECHR. Here is some of the key case law.

Article 2: Positive obligation of the State to take preventive operation measures to protect an individual whose life is at risk from the criminal acts of another individual

Osman v UK (1998) 29 EHRR 245

"The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. . . ." (para. 115)

Obligation to have effective official investigation

It is established by McCann, paragraph 161, Yasa v Turkey (1998) 28 EHRR 408, paragraph 98, Salman, paragraph 104 and Jordan, paragraph 105 that (as it was put in McCann):

"The obligation to protect the right to life under [article 2(1)], read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of

effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State."

Article 3: Effective investigations of alleged maltreatment

*Ilhan v Turkey*, Judgment of 26 October 2000

*Tzekow v Bulgaria*, Judgment of 23 February 2006

Article 4: Adopt and enforce criminal law measures prohibiting servitude

*Siliadin v France*, Judgment of 26 July 2005

Article 5: Take appropriate measures to protect the liberty of persons

*Storck v. Germany*, Judgment 16 June 2005

In *Storck* the Court reiterated the positive obligation of the State under Article 1 and its case law "enjoin the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or private parties." (para. 101) "Having regard to this, the Court considers that Article 5(1), first instance, of the Convention must equally be considered as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Article 2, 2 and 8 of the Convention. It would, moreover, leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is, therefore, obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see, *mutatis mutandis*, *Z and others v. the United Kingdom* and *Ilascu and others v. Moldova and Russia*." (para. 102)

Article 6: Provision of civil legal aid to the famous *Mclibel* case

Steel and Morris v. UK, Judgment 15 February 2005

"61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the law and procedure and the applicant's capacity to represent him or herself effectively...

69. ...the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal....

72. In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Article 6(1)."

Article 8:

1. Protection of private life from intrusive media reporting  
Von Hannover v. Germany, Judgment of 24 June 2004

"76 As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and article related exclusively to details of her private life.

77. Furthermore, the court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic Courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

80. There has therefore been a breach of Article 8 of the Convention."

See also UK case: *Campbell v MGN* [2004] 2 AC 457 (issue of horizontal effect)

## 2. Access to personal information

*Roche v. UK*, Judgment of 19 October 2005

"165. The Court's *McGinley* and *Egan* judgment did not imply that a disclosure procedure linked to litigation could, as a matter of principle, fulfil the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation."

3. Right to respect for the decisions to become/not to become a parent

Evans v UK, Judgment of 7 March 2006

"58. ....The question which arises under Article 8 is whether there exists a positive obligation on the State to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider."

Dickson v UK, Judgment of 18 April 2006

"30. However, in the present case, the Court considers that the impugned restriction does not limit a general entitlement already in place in a prison environment (for example, controlling the mechanics of contact with family and visits) but rather concerns the State's refusal to take steps exceptionally to allow something (the possibility of the begetting of children by prisoners) not already an existing general right or entitlement. The Court considers therefore that the applicants effectively complained that, in refusing access to artificial insemination facilities, the State failed to fulfil a positive obligation to secure respect for private or family life."