

THE NATURE OF EVOLUTIVE TREATY INTERPRETATION: DOES EVOLUTIVE TREATY INTERPRETATION OPERATING UNDER VCLT?

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ABSTRACT

Treaty is not static, evolutively interpreted. Interpretation as it seems has always had a prominent and contentious place in international adjudication, and its application has been further enhanced for a century. The significance attached to the interpretation of treaties cannot be overemphasized, because it is of great importance that only the intent of a treaty is activated. The Vienna Convention on the Law of Treaties has been applied towards the interpretation of treaties. This treaty covers the issue of interpretation and the various methods which shall be applied during adjudication with respect to interpretation of treaties. It is necessary to consider the nature and operation of evolutive treaty interpretation in various bilateral and multi lateral treaties-Whether it is operating under Vienna convention law of treaty or under separate heading.

INTRODUCTION

Treaty is not static, evolutively interpreted. Hence, evolutive treaty interpretation is open to adapt to emerging norms of international law, and current standards of environmental protection, Human rights, peace full commercial transaction, international relation, and open further opportunities for domestic mobilization; vindicating economic, social, and cultural rights (Djeffal, 2016). Even if the text of treaties is not formally amended, the meaning of the treaties can develop through interpretation. So, in this Article I try to analyses evolutive treaty interpretation as operating under VCLT, conditions of evolutive interpretation; intention, object and purpose, the nature of treaty terms and ascertaining capability of evolutive nature and lastly I will put concluding remarks.

WHAT IS EVOLUTIVE INTERPRETATION?

There is no clear cut and standard definition of the term ‘evolutionary interpretation’. Separately, interpretation relates to the Latin expression *pretium*, which translates as meaning, a price or value. While according to Webster dictionary, Evolutive refers to gradual development. Different scholars suggest different meaning. However the common consensus is that, the evolutive interpretation is about interpretation in light of some current meaning in which the legitimate expectations of true meaning of the treaties are likely to be found. Since the Treaty is not static, and is open to adapt to emerging norms of international law, and that the meaning of treaty terms may be liable to change over time, without the specific intervention of the parties to amend or modify the treaty terms (Wei, 2018).

When the method of evolutive interpretation first appeared is not agreed up on. But some scholars argued that, Evolutive interpretation has been considered since the times of *Gentili* and *Grotius* and others argued that it was first indicated and appeared by ECHR in *Tyrer case* where the Court had to decide whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning of article 3 of the Convention. However, the undeniable fact is that, the mechanism of evolutive treaty interpretation has been used by international courts, Tribunals and regional human rights courts for many years (Bjorge, 2011).

EVOLUTIVE TREATY INTERPRETATIONS AS OPERATING UNDER THE PROXY OF VCLT

Some scholars argued as evolutive interpretation is separate doctrine of treaty interpretation which operates out of proxy of VCLT. However, arguably, it is possible to say that, evolutive interpretation is not different and isolated doctrine of treaty interpretation principles provided by VCLT. Because, the principles in the VCLT Article 31.3.c allows any relevant rules of international law applicable in the relations between the parties to be taken into account when interpreting treaties and offer general rules for interpretation of treaties. These rules are set out in Articles 31 to 33 of the

VCLT and reflect customary international law binding on all states. When we closely look to article 31-33 of VCLT, it offers general guidance's as to treaty interpretation. *Inter alia*, the principles of common intention of the parties object and purpose of treaty, good faith and others. In other hand when we see the evolutionary interpretation of treaties, it can be explained by a proper understanding of the intention of the parties, objects and purpose of treaty in finding the current meaning of treaty (Rozakis, 2005). This reveals that, the evolutionary interpretation of treaties is under umbrella of VCLT and it is not a separate method of interpretation; rather the result of a proper application of the usual means of interpretation, as means by which to establish the intention of the parties with object and purpose of the treaty. Also In case of Judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ recognized evolutive interpretational an acceptable and operating method of treaty interpretation within Article 31 VCLT. Special Rapporteur Georg Nolte has also strength this position. So generally it is possible to conclude that, Evolutionary interpretation is not a separate method of interpretation; rather under umbrella of VCLT and it is the result of a proper application of the usual means of interpretation (Sinclair, 2017).

CONDITIONS TO EVOLUTIVE INTERPRETATION

The factors that necessitate the Evolutive interpretations and the factors which it depends on are argumentative; However, arguably it is possible to say that, the dynamic nature of the treaty meaning, the social changes and the developing notion of Environmental and human rights concern may be considered as a factor. In other hand, *Rozakis* has argued that, the rudimentary nature of Treaty provisions and the age of the instrument have acted as the main driving forces behind an evolutionary interpretation. However in this sub-topic, I only relies on the factor that should be taken in to consideration when treaty is evolutionarily interpreted, those such as the common intention of parties, purpose and the object of treaty and the terms of the treaty (generic term).

The common intention of the parties

It is generally agreed that, the purpose of treaty interpretation is to give effect to the intentions of the parties to treaties, the original will of the parties. Evolutionary interpretation finds the basis of justification in the original intention of the parties as reflected in the text of the treaty. However, reaching at original meaning is very difficult and impossible especially treaty of very long time. But in some decisions the Court said, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the VCLT, can result in a departure from the original intent on the basis of a tacit agreement between the parties (Helmersen, 2013). It appears that the intention of the parties in those cases was a legal fiction or at most a presumed intention. In a sense, the recourse to the fiction may be difficult to come up with true intention and when the original will of the parties to a treaty remains unclear. It can be argued that the Court has no

choice but to rely on a presumed intention with a view to securing consistency with the canon of treaty interpretation (Islam, 2022). But the effectiveness of presumed intention is questionable for arriving at the true. Hence, on this point I argued that, since true common intention of the parties cannot be ascertained through presumed intention, it is meaningless to relying only on intentions without connecting with the purpose and objects of the treaty to the evolutive interpretation. In Iron Rhine case the distinguished Tribunal observed that, the object and purpose of a treaty taken together with the intentions of the parties are the prevailing elements for interpretation. So I strongly recommend that, since the intention of the treaty concluded before a thousand years ago is not ascertainable, we should have to rely on intention cumulatively with the purpose and objects of the treaty (Islam, 2021).

The circumstances of the time of application

In evolutionary treaty interpretation, the term is further interpreted in the light of present day conditions, taking account of various circumstances that arose after the conclusion of the treaty; this approach explains that the treaty can be interpreted in the light of conditions at the time of its application since the parties intended so at the time of the conclusion of the treaty. The legal or factual circumstances are relied on in the process of interpretation. In this regard, the adjudicatory bodies employed the circumstances: subsequent development of international Law, subsequent practice and a change of the meaning of the terms. In the *Namibia* advisory opinion, the ICJ found that the concepts in the Article 22 of the Covenant including 'sacred trust' were by definition evolutionary and justified this decision by observing the parties to the Covenant must consequently be deemed to have accepted them as the present circumstance. This finding suggests that the ICJ found the basis of justification in the present circumstances since all states are independent by now and self-sufficient (Islam, 2019).

Generality of treaty term

When we consider the evolutive interpretation, one of the key elements may be the generic nature of the terms used in the text of a treaty. The meaning and scope of a generic term may vary depending on the circumstances when it is interpreted. In this sense, the generic term could be considered to give mobile reference to the law which will subsequently evolve with time. In fact, according to the different ICJ decision 'generic' terms in long-term treaties were presumably intended to be interpreted evolutively. where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to be evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

Judge *Higgins*, in the *Kasikiliv.Sedudu Island* case, expressed the view that a “generic term” is a known legal term, whose content the parties expected would change through time. The evolutionary nature of the generic term has been affirmed by different regional Human rights courts, international courts and tribunals. For instance, in the 1978 *Aegean Sea Continental Shelf* Judgment, the ICJ interpreted the expression “the territorial status” used in Greece’s reservation to the General Act of 1928 in an evolutive manner due to the generic nature of the concept of territorial status and continuing duration of the General Act (Bernhardt, 1999).

Object and Purpose of the Treaty

As we have been seen above, in the law of treaties the intention of the parties is a key element when it has been seen with the purpose and object of treaty. Rosalyn Higgins has underlined the close relationship between the intentions of the parties and the object and purpose of a treaty by saying that treaty interpretation must be conducted by application of the wider principle- intention of the parties, reflected by reference to the objects and purpose- that guides the law of treaties. It is also indicated under article 31 of VCLT as the object and purpose of the treaty are considered as a key element to evolutive treaty interpretation.

In other word, intention of the parties is often to be deduced from the object and purpose of the agreement. Hence, to a certain extent at least, the object and purpose of treaties provide guidance for determining whether or not the parties to the treaty were thought to have committed themselves to a programme of progressive development. Sometimes evolutionary interpretation has a character of teleological interpretation. This view is correct as far as purpose and objects are a key element in evolutive interpretation, and as well as some adjudicatory bodies have referred to the effective realization of the object and purpose of treaties as a reason why the treaties should be interpreted in the light of present day conditions. Such an approach was adopted by the different Arbitral Tribunals (Islam, 2013).

Evolutive interpretation in light of the object and purpose of parties at the time of drafting and, interpretation of treaties in light of the subsequent practice of parties yields different results in different cases. However, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose are an appropriate in attaining on some current meaning in which the legitimate expectation of true meaning of the treaties are likely to be found (Helmersen, 2013).

WHO ASCERTAIN THE CAPABILITY OF EVOLVING?

It is worth noting that, when international courts or regional courts deciding a dispute and dealing with rival claims, they interpret different legal instruments and treaty provisions, if the parties to a case disagree about the meaning of a provision or individual words in it. In such

situations, those claims are based on texts, objective and purpose, intention of the parties and the court in question has to choose any different readings of texts and contemplate on any principle of interpretation seems to be appropriate (Islam, 2019).

Because, in the justifications of their decision, courts frame their argument by basically replicating the way it came up with conclusion, whether evolutive interpretation and the meaning of treaty is capable of evolving. In other words, if there is a tendency towards more decision-making there will be more instances to re-evaluate previous decisions. This could explain or substantiate the 'trend towards evolutive interpretation. Practically, In the case of Namibia and South West African case, the Court found that the term was evolutionary and should be interpreted in the light of present day conditions. And also in the case of Tyri and UK case, the ECtHR has affirmed dynamic interpretation of the ECHR by stating that at the European Convention is a living instrument and that it should be interpreted in the light of present day conditions. This reveals that, the capability of evolutive meaning of the treaty interpretation has been decided by courts and can be concluded that a certain treaty meaning is capable of evolving nature (Djeffal, 2016).

CONCLUSIONS

Evolutive interpretation is about interpretation in light of some current meaning in which the legitimate expectation of true meaning of the treaties are likely to be found. However, it is not separate method of interpretation rather it is operating under general guidance of VCLT and the result of a proper application of the usual means of interpretation, as means by which to establish the intention of the parties. Arriving at true intention of the parties is difficult especially for the long-time treaties since they are simply used presumed intention. But presumed intention does not fully ascertain the true meaning of the treaty. So, in the evolutive treaty interpretation, the intention of the parties should be seen with purposes and objects of the treaty.

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