UK and European Human Rights: A Strained Relationship Conference Report

On 23-24 May 2014 the Centre for European Law and Internationalisation, School of Law, University of Leicester, hosted a two-day conference, *The UK and European Human Rights: A Strained Relationship?* The conference brought together a number of high-profile speakers from across Europe; participants included judges and staff of the European Court of Human Rights, staff of the Council of Europe, the European Union, the United Nations and the International Court of Justice, serving and former UK judges, serving and former practitioners, politicians, representatives of NGOs and the media, as well as leading UK and European academics and researchers in the field.

The delegates came together to address a contentious and topical issue – that of the relationship between the UK and European legal institutions for the protection of human rights – encompassing both the UK's relationship with the European Court of Human Rights (ECtHR) in Strasbourg and the additional layer of human rights protection through the European Union. It sought to contribute to the debates in the UK, and elsewhere, about the relationship between the European Convention on Human Right (ECHR) and national courts. Discussion extended also to how these controversial relationships have been portrayed and shaped through the lens of the media.

This issue has fuelled increased discussion recently in the UK and elsewhere in Europe, and the Conference speakers examined some of the principal challenges posed by the dual mechanism of European human rights protection on the national courts. The contentious issues of the co-existence between the ECtHR and the Court of Justice of the European Union (CJEU) and the relationship of the national courts with the two European institutions were the overall themes of the Conference. Issues of sovereignty and subsidiarity as well as issues that concern the effective realisation of human rights were extensively discussed.

The Conference opened with an analysis by Judge Paul Mahoney of the judicial exchange between the UK and the ECtHR, focussing on the Strasbourg Court's treatment of national rulings. The principle of subsidiary which underlies the ECHR and which obliges the Strasbourg judges to exercise judicial self-restraint was analysed in depth as well as its expression in the interpretative doctrine of the margin of appreciation. Judge Paul Mahoney underlined that the judicial relationship advocated from the Strasbourg Court is one of cooperation, which involves the Court's acknowledgment of the national courts' better grasp both of the relevant facts and national policy. A cooperative relationship, Judge Mahoney argued, is to be preferred over a hierarchical one if the Court wishes to fulfil its judicial review role

within the limits set by the principle of subsidiarity. In contrast to Judge Paul Mahoney, The Right Hon Lord Kerr of Tonaghmore analysed the relationship between the Strasbourg Court and the national courts from the perspective of the UK's Supreme Court, highlighting the separate spheres of competence within which each tribunal operates.

Professor David Feldman focused his attention on the ideas of legitimacy and state sovereignty – both key concepts shaping the current debate. The Strasbourg Court is presented by some as a threat to the national sovereignty, rendering tension between the Strasbourg Court and national courts inevitable. The tension between them is evident in the 'prisoner-voting' case, where the UK has refused to comply with the judgment of the European Court. Although tension between the two institutions is inevitable, Professor Feldman emphasised that that tension can be managed if both parties are aware of the legitimacy of each other's role and of the limits of their own authority. This, in turn, can be achieved by separating national from legislative sovereignty and by distinguishing between moral, legal, social and political criteria for legitimacy, as he concluded.

Repeal of the Human Rights Act has been brought onto the political agenda in recent years, and it was a subject examined forensically by Professor Brice Dickson. His paper, entitled 'The Common Law's Approach to Human Rights', based its examination of this debate on the relationship between the common law and the ECHR. Professor Dickson explored the potential fall-out of any repeal of the HRA. In imaging the possible consequences of the Act's repeal, one of the main questions posed was whether the UK judges would continue to be guided by Strasbourg jurisprudence should such an event occur. A further concern raised by Professor Dickson was whether the common law would be in a position to adequately protect human rights in the UK. His analysis led him to conclude human rights are not, and never have been, as central to the common law as they would need to be in order to offer an adequate alternative to the HRA.

A further issue that arises is the question of how far the UK courts should be guided (or even constrained) by Strasbourg's jurisprudence when interpreting the Convention. Richard Clayton QC contended that the ECtHR's case-law must not operate as a ceiling that limits the scope of the UK courts' interpretation of Convention rights. He noted that the mirror principle, if understood as preventing a broader interpretation of the Convention's rights by the UK courts, cannot be justified on grounds of principle; such an approach is not consistent with Section 2(1) of the HRA, nor the pre-legislative history of the HRA. In his paper he asserted that the approach of the Supreme Court, where is has gone beyond Strasbourg's case-law and given a more generous scope to Convention rights, is not wrong in principle, particularly where supported by other international human rights jurisprudence.

In contrast to the majority of speakers who examined the role of the national courts in this area, Dr Alice Donald examined the role of the UK Parliament implementing the ECtHR's judgments. Given that the effective protection of Convention rights at domestic level is not dependent upon national courts only, her paper provided a crucial and novel insight into the relationship. Her paper focussed in particular on the role of the Joint Committee on Human Rights (JCHR) in monitoring the executive's response to adverse Strasbourg decisions. The effectiveness of the monitoring work of the JCHR was examined, leading Dr Donald to conclude that the JCHR's monitoring and scrutiny work is among the most rigorous in the Council of Europe. However, she cautioned that the monitoring and scrutiny work of the JCHR is subject to significant constraints, notably Parliament's inability to substantively influence the executive response to ECtHR judgments.

Dr Noreen O'Meara's paper addressed the numerous reforms of the ECHR and set out clearly and concisely the current state of play regarding changes implemented following the 'Brighton Declaration'. Protocol 16 ECHR, adopted at the Brighton Conference, introduces a number of changes, including an expansion of the Court's advisory jurisdiction. In her paper, Dr O'Meara critically questioned the extent to which Protocol 16 will lead alleviate the Court's backlog and enhance dialogue between the ECtHR and highest national courts. Her analysis suggested that expanding the Court's advisory function is likely to fail to achieve these objectives for several reasons. In contrast, the Protocol 16 has the potential, as she contended, to increase the Court's workload and undermine judicial comity where requests for advisory opinions are declined.

Having opened with a number of papers posing broad and challenging questions about the nature of the UK-ECHR relationship, the conference next turned to papers addressing a number of specific issues in the relationship. Dr Ed Bates opened this session looking at the 'prisoner voting' case, *Hirst v UK,* in which the Strasbourg Court ruled that the blanket ban on prisoner voting violates Convention rights. Dr Bates analysed how the litigation evolved as well as the broader background to it. He additionally criticised the stances adopted by the UK and the Strasbourg Court. From Strasbourg's perspective, as Dr Bates noted, the UK has come under increasing pressure to implement *Hirst*. As regards the British perspective, his paper noted that British MPs and some Parliamentarians supported the view that the Strasbourg Court is not entitled to have a say on matters such as prison voting given that it lacks constitutional legitimacy. Similarly, the Government's line was that it would do the minimum to comply with the judgment. In conclusion, Dr Bates highlighted the conflict that arises in cases where the UK simply asserts itself as 'sovereign'.

Dr Reuven Ziegler also discussed some issues which concern voting rights. His paper criticised the Strasbourg Court's approach in 'voting right' cases as being incomplete. He noted that while the Court pronounces the crucial importance of inclusion and of the principle of universal suffrage, it has not yet developed a principled approach

regarding the circumstances in which a 'departure' from the right may be justified. By analysing the Court's jurisprudence regarding the disenfranchisement of expatriates and convicts, he reached the conclusion that the Court's 'voting right' jurisprudence has conflated questions relating to choice of electoral systems with questions relating to voting eligibility. He contended that while the Court is correct in according a wide margin of appreciation to States in cases which concern the choice of system of government, the Court, by according to States a wide margin of appreciation in determining voting eligibility detrimentally affects the democratic rights of individuals. In other words, his paper suggested that the Strasbourg Court's approach in according a wide margin of appreciation to States in cases that concern such fundamental democratic rights is absolutely mistaken.

Speaking from his experience on the immigration tribunal, CMG Ockelton's paper entitled 'The UK, Strasbourg and Immigration' discussed the structure and basic principles of the special jurisdiction of immigration tribunals in the UK and critically examined the many problems judges encounter in deciding immigration cases – not least occasional institutional clashes with the executive. Equally topical, Professor Helen Fenwick's paper evaluated the relationship in the context of post-9/11 counter-terror cases, examining a number of crucial and recent ECHR cases brought against the UK. Her paper considered the interaction between the government arguments, Strasbourg and domestic judgments, in order to examine whether such interactions reveal an adherence to the dialogic approach. By considering the Interlaken, Izmir and Brighton declarations, which highlight the notion of 'enhanced subsidiarity', her paper also sought to determine whether that principle has an impact on the Court's counter-terror judgments. Her analysis led her to conclude that the notion of 'enhanced subsidiarity' has had an important impact on the Court's counter-terror recent judgments. Moreover, her analysis led her to conclude that the dialogic model of rights protection is evident in the Court's counter-terror recent judgments, possibly because of the Strasbourg Court's attempt to distance itself from criticism that it has been too activist.

The following session of the Conference brought to the table an additional and often over-looked system of human rights protection – that of the CJEU. This session opened with Professor Sionaidh Douglas-Scott's paper, which sought to contribute to the recent debates in the UK on the status of the EU Charter of Fundamental Rights (EUCFR). The relationship the UK has with the EU Charter, according to Professor Douglas-Scott, is marked by antagonism, indifference and confusion. That confusion has emanated from the debates as to whether the UK had indeed secured an effective 'opt-out' to the Charter with Protocol 30 of the Lisbon Treaty. Furthermore, the Charter affronts those who realise that the ECHR is not the only source of European human rights protection in the UK. Given the advantages the Charter has over the ECHR – advantages that were outlined in detail by Professor Douglas-Scott – those who support the application of the Charter in the UK are dissatisfied with the UK's 'opt-out'.

Professor Johan Callewaert considered the relationship between the EU and the ECHR. In particular, he examined the reasons why the accession of the EU to the ECHR has become even more pressing. According to his paper, the most significant reason why EU-accession is necessary is that it would bring an end to a significant anomaly. Given that the relationship of the two European systems is complex and as a result the two European systems of human rights protection usually drift apart and break up – something that it is evident in the legislation, and in particular in the Directives on procedural rights in criminal proceedings as well as in jurisprudence, and in particular in the case-law relating to the Area of Freedom, Security and Justice – EU-accession should help prevent this from happening. Consequently, as his paper concluded, it would prevent the traditional pan-European approach to fundamental rights from being fatally undermined.

Professor Andreas Th. Muller's paper examined the interplay between the ECHR, the EUCFR, and national laws (specifically the Austrian Constitution). Austria offers a particularly intriguing perspective on the interplay of human rights in Europe – because its system rests upon rights under the Austrian Constitution, the Convention, as well as those under the EUCFR. Professor Muller, after explaining in detail how this 'Europe-friendly', tripartite system of human rights protection has evolved and the general background to it, questioned whether the tripartite system of human rights protection is a positive development. While this development undoubtedly has positive effects, as he contended, the challenges it presents are not to be brushed aside. Austria's tripartite system of protection raises difficult questions regarding their interaction between the different layers of rights protection and further risks legal uncertainty.

The conference next turned to consider the relationship from the comparative perspective of a number of other European jurisdictions. Judge Luis Lopez Guerra examined the different ways by which the Contracting Parties can implement the Strasbourg Court's judgments. His paper argued that although States have freedom with respect to how they implement Strasbourg's judgments, the ECtHR has progressively assumed a proactive role and introduced instructions in its reasoning as well as in the operative part of its rulings as to how its judgments should be executed. His paper analysed the Court's instructions with respect to both individual obligations and obligations of a general nature. Judge Lopez Guerra used as an example of the latter case the pilot judgments in which the Court requires the States to take general measures reflecting a *erga omnes* effects of its rulings. He also discussed those judgments in which the Court has issued specific mandates to States. Thus, Judge Lopez Guerra's paper argued that the Strasbourg Court is now more willing to instruct member States on how they can remedy a Convention violation.

This session continued with an examination of the ECHR's position in the French legal system. Professor Constance Grewe started her presentation by clarifying that

while the French Constitution allocates international law a favourable position, the Constitutional Council's interpretation results in a separation between constitutional review, pertaining to the Constitutional Council's competence, and conventional review falling within the competence of the ordinary courts. Her paper then examined the periods that conventional review went through. The constitutional amendment which introduced the priority preliminary ruling on the issue of constitutionality had significantly affected the conventional review, as her paper highlighted. Professor Grewe noted that the Constitutional Council's case-law does not provide harmony between the constitutional and the conventional rights. However, the Cour de Cassation and the Conseil d'Etat succeeded in safeguarding and even improving the conventional review, according to her analysis. Thus, as she contended, the Convention's implementation in the French legal system has succeeded, at least to some extent.

The status of the ECHR in the Italian legal system was then examined. Dr Oreste Pollicino's paper analysed a number of key judgments of the Italian Constitutional Court that have shaped the status of the ECHR in the Italian legal system. Decisions 348 and 349 of 2007, according to his paper, marked a historic turning point as regards the status of the ECHR in the Italian legal system because they held that any national law that contravenes the Convention is automatically unconstitutional. His paper then proceeded in analysing and examining the approach of the Italian Constitutional Court after the 2007 rulings. His analysis maintained that the current approach of the Italian Constitutional Court is less favourable towards the ECHR something which is, according to Dr Pollicino, an unfortunate retreat.

The following paper focused on the status of the ECHR in the German legal system and on the relationship between the Federal Constitutional Court of Germany and the Strasbourg Court. Ms Rackow's paper analysed initially the cases of *Caroline Von Hannover* and *Görgülü*. In both cases, the two courts reached contrasting decisions. Even though the national court in the latter case developed the openness of the German Basic Law to international law – and as a result to the Convention as well – it stressed national sovereignty. Consequently, according to Ms Rackow's paper, the position of the Convention and of Court's judgments in the German legal system is not so favourable because of the priority accorded to the principle of state sovereignty. The paper also examined the *Preventive Detention* case of 2011. Her analysis had led her to conclude that the national court raised the Convention as well as the Strasbourg jurisprudence to a standard of review, while it did not consider a schematic transformation of the Convention necessary to perform a reception into the German constitutional order. That solution, as she had noted, is based on a cooperative view of subsidiarity conducted between the courts so, the conflict came to an end at least for now.

Dr Olga Chernishova's contribution sought to examine Russia's institutions responses to the Strasbourg Court's findings of systemic violations. Her paper started by

analysing the role of the Supreme Court's Plenary Resolutions. She then examined the role of the Russian Constitutional Court in the implementation of the Court's judgments. However, according to her paper, the most visible developments have arisen following two pilot judgments from the ECtHR, which were analysed in depth. Following *Burdov no 2*, the national authorities adopted a Federal Law on the basis of which the domestic courts started compensating individuals for delays in the enforcement of judicial decisions. Following the *Ananyev* case, the Russian Government has drawn up a wide range of measures to address detention related problems. As her paper concluded, despite Russia's attempts which give a hope that the 'bridge from words to actions' can be successfully crossed, areas of grave concern still exist.

The following paper continued the discussion of Russia, analysing in particular the factors that shape the nature of Russia's relationship with the Strasbourg Court. Professor Bill Bowring, highlighted that during the Soviet Union period the principles of state sovereignty and non-interference in the internal affairs of states – twin pillars of the Soviet approach to international law – were prominent in the Russian legal system. Although on ratification the ECHR has been highly ranked in the Russian legal system, conflicts between the domestic courts and the Strasbourg Court still exist to a great extent, as his paper noted. In short, Russia proved a fascinating case-study on the question of how the relationship is shaped by state sovereignty.

The Conference then turned to consider its final theme: the role of the media in shaping the relationship between domestic courts and the Strasbourg Court. Professor Robert Uerpmann-Wittzack's analysis of the Strasbourg Court's jurisprudence on Article 10 ECHR (freedom of expression) demonstrated that the Court considers the role of the media to be an important one as they act as a 'public watchdog'. His paper then examined the cases where the Court limits the right in issue because it violates the right to private life. An examination of its case-law in this area revealed that the balance – when the conflicting rights in issue are at stake – must be struck by domestic courts. Professor Uerpmann-Wittzack argued that the Strasbourg Court has, in this way, reaffirmed the importance of the principle of subsidiarity in cases which concern media freedom. So, the tripartite relationship in question – the media, the ECtHR and domestic courts – is highly complex. However, as the Court has made clear, if both the domestic courts and the media themselves exercise control which is no more than necessary over publications, then the Strasbourg Court will not intervene at all.

The next paper focused on the relationship between the British press and the HRA and on the effects of that relationship. Initially, Dr Lieve Gies's paper examined the role of the press in shaping the image of the HRA in Britain. Her analysis made clear that the press has created an image of the HRA as a 'villains' charter' in the minds of the public. Then, her contribution analysed the effects of the press action. The press, by constantly asserting that the HRA protects those who are not deserving of rights,

has formed an approach whereby the Convention is presented as benefiting the 'undeserving'. The paper examined whether this view is correct, and concluded that such an approach is inappropriate because of the idea of the universality of human rights. Her contribution also examined the factors which impact on the media framing of the deserving and the undeserving, such as the kind of rights abuse being complained of as well as the presence of 'politics of pity'. As her presentation concluded, the press's negative portrayal of the HRA is an unfortunate development.

The last paper of the Conference focused on media reporting of human rights cases in Britain. Professor David Mead's contribution (who had submitted a manuscript which was summarised at the conference by Professor Wicks) focused specifically on the misreporting of human rights stories under the ECHR and HRA in the British media. Firstly, his contribution analysed the more well-known types of misreporting, such as the conflating of 'the two Europes' and the overemphasizing of the human rights elements of cases. His paper also analysed the techniques of misreporting and highlighted that the problem does not lie only on the fact that the cases are not reported, but also on the language and tone of the publications. All these factors contributed to an 'unfavourable skew', as he had maintained. As his paper concluded, the misleading media portrayal of the HRA in Britain has serious effects on the image of human rights in the minds of the public.

To conclude, the Conference was of a great importance because it highlighted some of the obstacles which impede the effective realisation of human rights in the UK as well as in other European states. In addition, it emphasized the importance of the involvement of other bodies in the effective protection of human rights, such as that of Parliament and the executive. The Conference also extensively discussed the complex relationship between the Strasbourg Court and the Court of Justice of the European Union and aimed to illustrate that this complexity impedes the effective protection of human rights in Europe. As a result, the need for the EU-accession to the ECHR was stressed by a number of speakers and in the discussions. The principle of state sovereignty, as it had been made clear in the Conference, is what causes particular obstacles in the effective protection of human rights in most European states, including the UK, especially in 'sensitive' cases such as immigration and prisoner voting cases. Issues of reform of the ECtHR were extensively discussed as well as the role of the media in the area of human rights law. Overall, the Conference explored a wide range of issue – legal, political and social – impacting upon the relationship of three mechanism of human rights protection – the ECtHR, the CJEU and national courts, and the UK in particular. The relationship thus is a complex one. It may not simply be reduced to one label, even though at times political and media rhetoric in the UK gives rise to a concerning impression of a severely strained relationship.

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