



**British Institute of
International and
Comparative Law**

'The European Court of Human Rights: Master of the Law but not of the Facts?'

Event Report

Date: 6 November 2014

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Keynote speaker

- Judge Dean Spielmann, President of the European Court of Human Rights

Chair

- Steven Kay QC, 9 Bedford Row

Closing Thanks

- Dame Rosalyn Higgins DBE QC, President of BIICL; Former President, International Court of Justice

On 6 November 2014, the British Institute of International and Comparative Law (BIICL) hosted a seminar entitled, 'The European Court of Human Rights: Master of the Law but not of the Facts?' The event featured Steven Kay QC (9 Bedford Row) as chair and Judge Dean Spielmann (President of the European Court of Human Rights) as the keynote speaker; Dame Rosalyn Higgins DBE QC (President of BIICL and Former President, International Court of Justice) delivered the closing thanks.

Steven Kay QC initiated proceedings by introducing the keynote speaker. He spoke of Judge Spielmann's expertise in human rights as well as international criminal law. He also informed the audience of Judge Spielmann's involvement in forming the European Criminal Bar Association.

Judge Spielmann commenced by framing his lecture as an analysis of the formal structure of the powers enjoyed and exercised by the European Court of Human Rights (the ECtHR) and the limits of imposed on those powers. He proceeded to give a two-pronged analysis of the ECtHR's jurisdiction with regards to issues of law as well as issues of fact.

Referring to the title of the talk, Judge Spielmann reasoned that although that the phrase 'master of the law' is not derived from Strasbourg case-law, it is an accurate description of the



ECtHR's procedural as well as substantive powers under Article 32 of the European Convention of Human Rights (the Convention). Article 32, in combination with cases such as *De Wilde, Ooms and Versyp v Belgium*, thus endows the ECtHR with full jurisdiction on issues of fact and of law as well as the limits to its own jurisdiction.

Judge Spielmann went on to concede that the jurisdiction of the ECtHR is limited by its institutional purpose as articulated in Article 19 of the Convention. Given the wording of Article 19, it is clear that the ECtHR is not primarily or generally a tribunal of fact; its powers to ascertain and evaluate facts is derived from its powers to take cognisance of matters of law. Facts may also be used to characterise complaints. Thus, he affirmed that the ECtHR applies the maxim *jura novit curia*.

Judge Spielmann then proceeded to give examples of manifestations of the ECtHR's mastery of the law, namely: the ECtHR's approach to interpretation of the Convention and its conduct of proceedings and of procedure. With regards to interpretation powers, the ECtHR is able to apply autonomous meaning to terms used in the Convention. Judge Spielmann argued that the rationale for this approach is based on the need to ensure interpretations are consistent with the object and purpose of the Convention as well as the need to ensure conceptual coherence in European human rights law. He opined that the ECtHR's role as 'master of the law' in this regard stood to be enhanced by Protocol No. 16, which will allow the highest courts at the national level to seek advisory opinions from the ECtHR 'on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'.

The ECtHR's mastery of proceedings is grounded in Article 38 of the Convention; it lays a duty of co-operation on states to enable proper and effective examination of applications. The ECtHR has also been vested with full and exclusive rule-making power by virtue of Article 25(d). Judge Spielmann emphasised the fact that the ECtHR had thus effectively been twice conferred with sole power over the rules. He explained that this power is vital to the functioning of the ECtHR as it ensures flexibility to develop procedures and methods and enables the ECtHR to remain independent from states.

Moving on to the second prong of the lecture, Judge Spielmann explained that facts, in the context of the ECtHR, encompass not only the facts of the case but also the relevant domestic law and practice, relevant international comparative legal materials, as well as other types of material that is deemed relevant to the ECtHR's examination of the case. Thus, the ECtHR may treat questions of domestic law, including a domestic court's interpretation and application of the law, as issues of fact. He explained that, while the ECtHR does not act as an additional layer of the domestic legal system, it will intervene in exceptional circumstances in which domestic courts have reached decisions that are arbitrary or manifestly unreasonable or contrary to the right to a fair trial under Article 6(1) of the Convention. Where the ECtHR's power of review has been enlivened, it will verify the procedural as well as the substantive aspects of the case at hand and ascertain whether the effects of the domestic court's interpretation are compatible with the Convention.

In contradistinction to Article 6, Articles 5 and 7 of the Convention necessitate that the Court exercise its power of review with regard to questions of fact. Given the use of the word 'lawful'



in each of the grounds of Article 5, he explained that it is a failure to comply with domestic law that entails a breach of the Convention. It therefore follows that the Court must review whether the law has been complied with. Similarly, the nature of the right under Article 7, which holds that there cannot be punishment without law, requires intense scrutiny of the legal grounds for conviction.

Under Articles 32 and 38 of the Convention, the Court has the power to consider factual issues if they have not been sufficiently dealt with at the domestic level. Judge Spielmann revealed that there have been investigative, fact-finding measures undertaken in almost 100 cases that have involved site visits and the hearing of witness testimony. Under Protocol No. 14, the Council of Europe Commissioner for Human Rights, as well as other bodies and groups, may intervene in a case and thus contribute to the factual matrix through on the ground knowledge. He added that the Court has responded jurisprudentially to the inadequacy of facts by deriving a duty on authorities to conduct effective investigations into violations, or possible violations, of human rights through Articles 2, 3 and 5 of the Convention.

The Court has determined, through case-law, that while it is not bound by the factual findings of domestic courts, it would normally require cogent elements in order to depart from them. The Court is also not constrained by particular rules of evidence. Turning to the application of the margin of appreciation concept, Judge Spielmann emphasised that the Court occupies a supervisory role in which it constructs a framework that will assist domestic courts in executing their role under the Convention, using case-law examples.

Judge Spielmann concluding his lecture by stating that, having examined the Court's powers, there is no bright line division between matters of law and fact at Strasbourg. This, he reasoned, would enable the Court to discharge its mandate under the Convention while responding to the circumstances, context and the nature of the complaint.

During her closing thanks, Dame Higgins summarised the salient points she drew from Judge Spielmann's lecture. She noted the differences between the practice of the ECtHR and the International Court of Justice, particularly with regard to issues relating to the facts. She also highlighted the relevance of the talk given the backdrop of current debates in England over various elements relating to the ECtHR and the law.

This Report was written by Chanu Peiris.

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