

The Rule of Law, the European Court of Human Rights, and the UK: A New Court for a New Era?

Event Report

Date: 20 April 2016

Venue: The Bingham Centre for the Rule of Law

Keynote speaker:

- The Rt Hon Dominic Grieve QC MP

Speakers:

- Merris Amos (Reader in Human Rights Law, Department of Law, QMUL)
- Dr Ed Bates (Senior Lecturer in Law, University of Leicester)
- Richard Clayton QC (UK member, Venice Commission; Deputy High Court Judge; and 4-5 Gray's Inn Square)
- Prof Dr Martin Kuijer (Chairperson of the Council of Europe Working Group on the Longer-term Future of the System of the ECHR; Substitute member, Venice Commission; Senior Legal Adviser, Netherlands Ministry of Security and Justice; and Professor Human Rights Law, Vrije Universiteit Amsterdam)
- Prof Philip Leach (Professor Human Rights Law, School of Law, Middlesex University London; and Director, European Human Rights Advocacy Centre)
- Rob Linham OBE (Assistant Director, Europe and Domestic Human Rights, UK Ministry of Justice)
- Dr Matthew William Saul (Postdoctoral Fellow, PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, Faculty of Law, University of Oslo)
- John Wadham (Associate, Doughty Street Chambers)

Chairs:

- Dr Alice Donald (Senior Lecturer, School of Law, Middlesex University London)
- Jessica Simor QC (Matrix Chambers and Bingham Centre external fellow)

Organisers:

- This event was co-organised by the Bingham Centre for the Rule of Law and the University of Leicester. It was convened by Dr Ed Bates (Senior Lecturer in Law, University of Leicester) and Lucy Moxham (Associate Senior Research Fellow, Bingham Centre for the Rule of Law).

It may be argued that, in the light of the Interlaken-Izmir-Brighton-Brussels reform process, the European Court of Human Rights/Convention system has reshaped itself significantly over the last five or so years, possibly reflecting a new distribution of powers between Strasbourg and the member states. This may or may not be a good thing. Does it reflect a natural evolution of the Convention system, or the necessary adjustments required of a Court that is under pressure and strain?

This half-day event, held on the fourth anniversary of the [Brighton Declaration](#) of April 2012, provided an opportunity to hear leading experts consider how the Strasbourg Court has evolved in recent years and reflect upon its longer-term future. Speakers also considered how the reform process has informed debate in the UK about the European Court/Convention system and a possible British Bill of Rights.

Part one of the event addressed how the Court has evolved in recent years, in terms of the approach it adopts to resolving certain cases on their substantive merits. Part two looked more specifically at the reform process initiated at Interlaken and Brighton. A focal point was the CDDH's report on the '[Longer-term Future of the system of the European Convention on Human Rights](#)', and its implications.

Opening Remarks

Dr Ed Bates gave some opening remarks. The title of the conference asks whether the European Court of Human Rights (ECtHR) has transformed itself in recent years, both with respect to its substantive case-law and aspects of its approach to decision-making; and with respect to its functioning more generally. The Convention is held in high esteem internationally. However, in light of proposals for a British Bill of Rights, he noted that human rights discourse in the UK is often influenced by a misunderstanding of the ECtHR and the Convention system. In his view, the case law of the last five years in particular offers a strong rebuttal to impressions that Strasbourg disrespects national decision-makers. He also emphasised that the importance of the Convention has never been greater, as have the threats to it. On the fourth anniversary of the Brighton Declaration, he welcomed the opportunity to reflect on recent developments and to look ahead to the future of the ECtHR.

Part One: Subsidiarity and Distribution of Powers in Strasbourg Decision-Making in the Post-Brighton Era

Merris Amos discussed the dialogue between Strasbourg and domestic courts on the meaning and substance of Convention rights. Adopting a definition of "dialogue as deliberation", she considered dialogue conducted through the judgments of the courts. She noted that the ECtHR is very open to dialogue with domestic courts, for example noting the Court's approach to the principle of subsidiarity, the margin of appreciation and Article 13 of the Convention (right to an effective remedy). She noted that the UK's Human Rights Act 1998 (HRA) facilitates the scope for dialogue (for example in Section 2) and stressed that the importance of maintaining dialogue should be uppermost in the minds of those drafting a new British Bill of Rights. Ms Amos pointed to a number of positive outcomes from this process of dialogue, including possible improvements in the legitimacy of the ECtHR's judgments. However, she also emphasised that where the Strasbourg and national courts are aligned in their views, progress may be difficult if campaigners place too much reliance on the courts to be a catalyst for change.

Dr Matthew William Saul presented an analysis of Strasbourg case law and its recognition of national parliamentary processes when addressing human rights issues. He noted Judge Spano's [view](#) that the ECtHR is "in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity", including through

consideration of the quality of national processes. Some have questioned the authority and expertise of the ECtHR to be making such evaluations. Dr Saul categorised a set of cases according to the level of clarity with which the ECtHR offered recognition of the quality of the parliamentary process in its determination of the margin of appreciation. He noted that in some cases, the Court makes this link clear (e.g., *Animal Defenders International v UK*). However, he pointed out that in other cases, the Court leaves implicit the connection between the margin and parliamentary process (e.g., *SAS v France*). Further still, there is a third category of cases where there is only a possible connection between the Court's discussion of the relevant parliamentary process and the margin of appreciation (e.g., *Lindheim v Norway*). He concluded that it is probably a low level approach to recognition of parliamentary process that will continue. In his view, even with this low level approach, it is reasonable to talk about "deeper subsidiarity" in relation to domestic parliaments.

John Wadham asked what we should make of recent Strasbourg case law concerning the UK. He noted [comments](#) made by the then Deputy Registrar of the ECtHR, Michael O'Boyle, that "The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011" [this was at a time when MPs were debating prisoner voting]. He considered recent case-law concerning the UK and asked whether the judges of the ECtHR are responding in their decision-making to political pressure in the UK – including the continued failure to implement judgments of the ECtHR concerning prisoner voting rights, and possible withdrawal from the Convention system and repeal of the HRA. In conclusion, he stressed the important role and influence of judgments against the UK in other jurisdictions.

Keynote Speech

The Rt Hon Dominic Grieve QC MP began by stating that the ECtHR has been a great success. He noted that it has undergone a process of adaptation, including the opening up of the Court to applications from individuals and the expansion of the membership of the Council of Europe. The ECtHR has managed to evolve alongside these changes and has produced many landmark cases. If the Convention were not a "living instrument", it is difficult to see how these case law developments would have been made. However, what the government inherited in 2010 [when Mr Grieve was appointed Attorney General], in terms of the UK's relationship with the ECtHR, was "not satisfactory". Mr Grieve described the Court as a "victim of its own success". He pointed for example to the Court's decision in *Hirst*, which he saw as resulting from a failure to apply the principle of subsidiarity and to allow an appropriate margin of appreciation.

Turning to the Brighton Declaration, Mr Grieve noted that the objectives leading up the Brighton Conference were clear. They included reducing the backlog of cases; having greater regard for the principle of subsidiarity and the margin of appreciation, with greater deference being given to national courts; and improving the quality of the judiciary through changes to the appointments process. He noted that the latest review of the Court and Convention system suggests that the transformation has been remarkable. In particular, he noted that a dialogue has opened up between the UK judiciary and the ECtHR, which is also seeking to include national parliaments (see e.g., *Animal Defenders*). He stressed that the opportunity is here for a new era for the UK's participation in the ECtHR.

Looking to the future, Mr Grieve commented on the Conservative government's proposals to introduce a British Bill of Rights. He noted that the option which is increasingly hinted at is that a Bill will essentially look very similar to the HRA in terms of the substantive rights, but with changes for example to limit "reading down". He noted that some wish to reduce the discretion given to judges regarding interpretation, and to increase the role of Parliament. Before embarking on a complicated process, which may simply be a "cosmetic solution", he hopes we ask whether we need to do anything at all.

Part Two: The Strasbourg Reform Process: CDDH Report on the Longer-Term Future of the System of the ECHR

Prof Dr Martin Kuijer presented an overview of the CDDH Report on the Longer-term Future of the Convention System. He began by looking at the backdrop of the CDDH Report and its position in the overall reform process. Prof Kuijer then considered the CDDH Report in more detail, noting that it considers four key areas: national implementation of the Convention; the authority of the ECtHR; the execution of judgments and its supervision; and the place of the Convention system in the European and international legal order. He highlighted two issues in the Report. First, he noted that recent reforms have been aimed at further strengthening the principle of subsidiarity. In this respect, he emphasised the need for better national implementation of the Convention. Second, he spoke about strengthening the authority of the Court and in particular highlighted concerns regarding the quality of judges and the judicial appointments process. Professor Kuijer concluded that radical reform is not necessary. Instead, a real challenge concerning the future of the Convention system lies back home, i.e. the need to convince the wider public of the continued need for European supervision in the field of human rights.

Rob Linham OBE discussed the CDDH Report and whether the caseload crisis at Strasbourg can be resolved. In particular, he asked whether we can ever get to zero “Brighton backlog”. [The Brighton Declaration sets out targets for the processing of cases: deciding whether to communicate a case within one year, and making all communicated cases the subject of a decision or judgment within two years of communication. Where applications do not meet these criteria, they are referred to as “Brighton backlog”.] For Mr Linham, the key issue is how the Court can direct its attention where it is most needed. Finally, he also noted that concerns have been raised about the impact on the Court of Protocol No 16 to the Convention (concerning advisory opinions).

Richard Clayton QC presented a practitioner perspective on the CDDH Report and the future of the Convention system. He expressed concern about some of the assumptions underlying the CDDH Report. In particular, while acknowledging the important steps taken to reduce the strain of the number of cases, he viewed the backlog of cases as an ongoing substantial problem. Further, he questioned whether the Court can deal with “systemic” breaches. In this regard, he highlighted the 19 April 2016 decision of the Russian Constitutional Court concerning the implementation of an ECtHR judgment (concerning prisoner voting rights). Others at the conference spoke about the “risks of contagion” in this respect. In conclusion, Mr Clayton thought it unduly optimistic to see the domestic protection of human rights as being an end point.

Prof Philip Leach offered an NGO perspective on the CDDH Report and the continuing importance of the Convention system. He began by emphasising that we need to remember the origins of the Convention system and the Council of Europe, and that the UK is one of 47 member states. He pointed to many instances in which the Court has found breaches of the Convention in cases concerning egregious violations of human rights. He highlighted judgments arising out of the conflict in Chechnya and the Nagorno-Karabakh conflict. He also noted cases before the Court relating to the South Ossetia conflict, to events in Eastern Ukraine and to the ‘foreign agents’ law in Russia. Rather than being a victim of its own success, Prof Leach saw the Court as being a victim of the failure of member states to implement some of its decisions. He noted that, as compared to 2014, the number of action plans and reports submitted by states fell in 2015, and that fewer payments of just satisfaction were made on time in 2015. He concluded with some comments about the “risks of contagion” from non-compliance with certain judgments and possible UK withdrawal.

Jessica Simor QC made some closing remarks. She noted that a key theme of the conference was the beneficial effect of mutuality between the ECtHR and national courts. A key message from the conference concerned dialogue and empowerment, ensuring both greater respect for

human rights and empowering national courts, parliaments and other actors. This could reduce the Court's caseload and increase respect for and implementation of its judgments. The importance of external scrutiny for all in Europe was discussed during the conference. Ms Simor noted that if the system fails, that is "good for nobody" and there is a "real risk of contagion". She concluded that the UK has the potential to play a positive role in Strasbourg. We should not underestimate the role the ECtHR may well have had in preventing conflict in Europe and the UK has got a role in making sure it survives.

The panels and the keynote presentation were each followed by Q&A with the audience.

This report was prepared by Lucy Moxham, Associate Senior Research Fellow at the Bingham Centre for the Rule of Law and Toby Shevlane, Bingham Centre intern.

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