

# 1. Introduction: The need for both international and national protection of human rights – the European challenge

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In opening a major international conference on judicial protection against the executive in 1968, the president of the German Federal Constitutional Court defined the constitutional state as ‘a state in which the system of government is, at least in principle, understood as a system ruled by law’. In such a system of government, the essential features are ‘the subjection of the supreme power to the law, the separation of powers and the respect for the general, fundamental rights of man’.<sup>1</sup> Since 1968 the legal world has changed in many ways. Today, it is impossible to consider issues of the rule of law and the protection of fundamental rights simply in terms of national constitutions.

In relation to the protection of human rights, national sovereignty must now be appraised in the light of international norms. As the great British judge Lord Bingham said in his book *The Rule of Law*, written in the last months of his life, ‘The interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.’<sup>2</sup>

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<sup>1</sup> Gebhard Müller, ‘Introduction’ in Hermann Mosler (ed.), *Judicial Protection against the Executive* (Carl Heymanns Verlag KG and Oceana Publications 1971) vol III, page 2.

<sup>2</sup> Tom Bingham, *The Rule of Law* (Allen Lane 2010) page 119.

## THE STRASBOURG COURT'S ROLE IN PROTECTING CONVENTION RIGHTS

This transformation in the rule of law in Europe has largely been effected by the European Court of Human Rights. During half a century this body has been the foremost regional mechanism in the world for enabling disputed questions of fundamental rights to be decided in a judicial forum. The Court derives its existence from the European Convention on Human Rights, first signed in 1950 by states in Western Europe that belonged to the young Council of Europe: it became a full-time court in 1998.<sup>3</sup> Since the collapse of Communism and the spread of democracy within Eastern Europe, no less than 47 European states (with a combined population of over 800 million people) are parties to the Convention. While a member State may initiate a case before the Strasbourg Court, the most significant aspect of the Convention has always been that individuals within the jurisdiction who claim that their Convention rights have been infringed should be able to take their claims to the Court.

In many ways the record of the Court in developing our understanding of the significance of the Convention has been a success story and its leading decisions have given depth to the bare text of the Convention rights. Among its earliest decisions, the Court held that the rule of law implies that 'an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary'.<sup>4</sup> The Court has long stressed that the Convention 'is a living instrument', to be interpreted in the light of evolving circumstances:<sup>5</sup> its meaning is not confined to what the original signatories of the Convention may have intended in 1950. Further, the Court has emphasised that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.<sup>6</sup>

In most European countries, the State's constitution recognises the importance of fundamental rights, but national mechanisms for protecting these rights are often ineffective: the chance of getting a remedy for a breach of rights may be limited by national traditions, by inertia in the

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<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Europ.T.S. No. 5; 213 UNTS 221).

<sup>4</sup> *Klass v. Federal Republic of Germany* App no 5029/71 (ECHR 6 September 1978) para 55.

<sup>5</sup> See e.g. *Tyrer v. United Kingdom* App no 5856/72 (ECHR 25 April 1987) para 31.

<sup>6</sup> See e.g. *Airey v. Ireland* App no 6289/73 (ECHR 9 October 1979) para 24.

legal system, or by political forces that reject or ignore the claims of vulnerable groups or individuals. Notwithstanding such factors, the Strasbourg Court provides a means by which individuals may gain a decision that their rights have been infringed and may sometimes be awarded compensation. A successful claim may lead to corrective action by the defendant State, if necessary at the behest of the Council of Europe's Committee of Ministers.

## CRITICISM FACING THE STRASBOURG COURT

A ruling that State authorities have violated the Convention will often be unwelcome to office-holders, politicians and the media in the State concerned. Recently in some European States attacks have been made on the legitimacy of the Court: why, it is asked, should this international body of lawyers be able to question decisions taken by the institutions of a European State? Another important question is whether the present system places an impossible burden on the Court to deal with violations of fundamental rights that result from repeated failings by some national legal systems to deliver justice?

Despite the success of the Court in giving flesh and blood to the bare bones of the Convention, the Strasbourg scheme will be in jeopardy if questions such as these are left unanswered. Otherwise, the ambition of maintaining a European-wide scheme for protecting human rights may falter, or be put into reverse. It is probably not coincidental that the need to address these problems has increased at a time when the movement for European economic integration is facing a dramatic crisis that brings into question some foundations of that movement. In the wide-ranging debate about European human rights, some defend the cause while others disagree with aspects of the Strasbourg jurisprudence and question the legitimacy of the assumptions upon which it was based.

A high-level meeting was held in April 2012 in Brighton, convened by the United Kingdom Government during its chairmanship of the Council of Europe. The resulting document, the 'Brighton Declaration', addresses the major problems affecting the role of the Court in protecting human rights in Europe. The assembled member States reaffirmed 'their deep and abiding commitment to the Convention' and 'their attachment to the right of individual application' to the Court.<sup>7</sup> They declared further that

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<sup>7</sup> European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration* (20 April 2012) paras 1 and 2.

the Convention States and the Court ‘share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity’ and ‘for ensuring the viability of the Convention mechanism’; and that there continued to be ‘deep concern that the deficit between applications introduced and applications disposed of continued to grow’.<sup>8</sup>

The Brighton Declaration makes many recommendations that are of great significance for the future of the Court. However, as the Declaration was adopted by a diplomatic process, which depended on the agreement of the participating States, it does not contain an in-depth discussion of the problems addressed by the Declaration, of the kind that is provided by this volume.

The aim of this volume is to examine criticisms of the Strasbourg Court and to consider the responses that ought to be given to well-founded criticisms. As a common saying in English law has it, ‘Justice is not a cloistered virtue’. Admiration for the achievements of the Strasbourg Court does not prevent its friends and critics from debating whether the Court is doing all it can to discharge its heavy responsibilities, examining the causes of the difficulties that confront the Court, and considering how the present scheme for protecting European human rights can be improved. What then, in summary, are the key criticisms currently made of the Court?

### **Volume of Applications**

First, and best known, is the immense backlog of cases that are awaiting decision at Strasbourg. Significant improvements in the procedure of the Court have been made since 1998. In 2011 some 47,000 applications to the Court were rejected as inadmissible and some 1,500 cases were decided by the Court, including those regarded as priority. But even so, some 54,000 cases remained awaiting decision, although the Court has stated that the backlog can be dealt with by 2015. As similar previous declarations by member States have made clear,<sup>9</sup> this is not an acceptable situation; it has arisen for many reasons, only some of which may be attributed to the processes of the Court.

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<sup>8</sup> Ibid, paras 3, 4 and 5.

<sup>9</sup> Declarations were made at the High Level Conferences on the Future of the European Court of Human Rights in Interlaken on 19 February 2010 and Izmir on 27 April 2011 <<http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/>> accessed on 14 October 2012.

One factor is that 61 per cent of the applications to the Court in 2011 came from five countries: Russia, Turkey, Italy, Romania and Ukraine. The Brighton Declaration, in a section headed 'Implementation of the Convention at national level', stresses that national institutions must bear the primary burden of protecting human rights,<sup>10</sup> that States should take practical steps to ensure that their laws and policies comply with the Convention and that knowledge and application of the Convention should feature in the ordinary work of national courts and tribunals. The Declaration also proposes means (for instance, by reducing the time-limit for applying to the Court from six months to four) that will raise the threshold that individual applications must cross to be accepted as admissible.<sup>11</sup>

### Questions of Legitimacy

A different but not unrelated criticism of the Court is that some of its decisions, many of which are based on an enhanced interpretation of the bare Convention rights, trespass too far into the authority of national institutions, whether legislative, executive or judicial. It is not surprising that judgments of the Court are criticised, since they often deal with claims by individuals who have little popular support in national politics.<sup>12</sup> Many Convention rights are not absolute but are subject to qualifications or restrictions that must be prescribed by law and 'necessary in a democratic society' for achieving stated purposes. When is a court of appointed judges justified in deciding that a law exceeds what is necessary in a democratic society when a national legislature has decided that the law *is* necessary?

The justification for such a judicial decision is usually that the legislation in question has gone further in impinging on individual rights than is justified by the standards that apply in most European countries.

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<sup>10</sup> As the Court stated long ago, 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights': *Handyside v. The United Kingdom* App no 5493/72 (ECHR 7 December 1976) para 48. See *Brighton Declaration* (20 April 2012) supra n 7, Section A.

<sup>11</sup> *Brighton Declaration* (20 April 2012) *ibid*, para 15.

<sup>12</sup> See for instance the decision by the Grand Chamber upholding a claim by an asylum seeker from Afghanistan that his Convention rights under Articles 3 and 13 ECHR were violated by both Belgium and Greece when acting under the EU Dublin Regulation: *MSS v. Belgium and Greece* App no 30696/09 (ECHR 21 January 2011). See also the decision relating to the detention and deportation of suspected terrorists, such as *Othman (Abu Qatada) v. The United Kingdom* App no 8139/09 (ECHR 17 January 2012).

Yet the doctrine of the ‘margin of appreciation’ has been developed by the Court (to a varying degree, depending on the Convention right in question) to enable national authorities to take decisions that are justified by the history and circumstances of their own country. The Strasbourg Court is prepared to accept that the national origin of an issue may directly influence the outcome and does not seek at all costs to impose a European uniformity.<sup>13</sup> However, the Court must retain power to rule against decisions made by national authorities, since this power is integral to its role as a tribunal applying supranational norms.

A variety of other criticisms may be made of the Court, which can only briefly be mentioned here. Judgments of the Court are criticised on grounds such as undue complexity in the decisions and the reasons given for them; inconsistency between different decisions raising the same issue of principle; a failure to understand key aspects of the national legal system under review (it is suggested that the Court should be more willing to enter into dialogue with national authorities);<sup>14</sup> and the tendency to exceed its supervisory and ‘subsidiary’ role by examining detailed matters of evidence afresh that should be left to the national authorities.

### **The Future of Individual Application and National Implementation**

It is said that the Court should confine its resources to dealing with instances where there has been a serious breach of a fundamental Convention right; and that the Court has gone beyond the proper scope of the Convention by giving a broad view of a member State’s ‘jurisdiction’ (within Article 1 ECHR) and thus expanding its scope to include extra-territorial actions by a State. While some aspects of these criticisms are calling for the Court to do better in the future, and guidance in meeting some of the criticism has been given by the Brighton Declaration, they cannot all be met if, as that Declaration emphasised, ‘The right of individual application remains a cornerstone of the Convention system’.<sup>15</sup>

There need be no reservations of principle regarding an issue that directly affects the volume of cases coming to the Court, namely the need for better implementation of the Convention at national level. The

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<sup>13</sup> See e.g. *Sahin v. Turkey* App no 44774/98 (ECHR 10 November 2005); and *Lautsi v. Italy* App no 30814/06 (ECHR 18 March 2011).

<sup>14</sup> For a recent example of ‘dialogue’ with a national court, see *Al-Khawaja v. The United Kingdom* App no 26766/05 (ECHR 15 December 2011).

<sup>15</sup> *Brighton Declaration* (20 April 2012) supra n 7, para 31.

Brighton Declaration emphasised that all national laws and policies 'should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention'.<sup>16</sup> There is also much scope in many countries for improving the knowledge of the Convention on the part of judges and practising lawyers, which is often inadequate, even where the national constitution claims to give effect to the rights guaranteed by the Convention.

All member States should deal with the obstacles that restrict the citation of Strasbourg decisions in national courts. Some of the UK's experiences under the Human Rights Act 1998 (that requires all courts and tribunals to take account of Convention case law where it is relevant to legal proceedings) are controversial, but at least the 1998 Act enables Convention requirements to be directly applied in the UK. The prevailing approach in Britain, as explained by the late Lord Bingham, is that it is for the national courts to reflect in their decisions the protection for rights provided by the Strasbourg Court: the protection should be 'no more, but certainly no less'.<sup>17</sup> This approach needs to become a reality in all member States, even though this may first require the enactment of national legislation or a constitutional amendment. Moreover, all systems of legal education in Europe should include the opportunity to become familiar with a wide-ranging area of law that essentially depends on knowledge and understanding of the principal decisions made by the Court.

### **Democratic Accountability and the European Convention**

Finally, to understand one underlying problem of the Convention system that bears upon the Court's legitimacy, we may return to the analogy of the constitutional state with which this chapter began. Many criticisms of the Strasbourg Court are similar to criticisms within a national legal system of unpopular decisions made by the supreme or constitutional court. Historic reliance on separation of powers and the rule of law does not require the judiciary in all difficult cases to have the last word on what the law should be, nor are the judges to be regarded as infallible. In most countries, the constitution provides a means by which, if a supreme court's decision and the rule that emerges from it are regarded by the

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<sup>16</sup> Ibid, para 7.

<sup>17</sup> *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] AC 323, para 20. This approach is not universally accepted in the UK. For an assessment of the criticisms, see R. Clayton, 'Smoke and Mirrors: the Human Rights Act and the Impact of Strasbourg Case Law' [2012] Public Law 639.

legislature as wrong, the rule may be altered for the future by legislation or, if necessary, by constitutional amendment.

A structural problem for the Convention system is that no comparable international process exists, except by the laborious negotiation of an amendment to the Convention endorsed by all of the member States. While many international treaties amplify and extend rights protected by the Convention,<sup>18</sup> it is difficult to envisage the process of international legislation as being able to bring home to the Strasbourg Court that a wrong and unacceptable decision has been made. This consideration does, however, explain the significance of the Strasbourg process in enabling third parties, such as other member States and NGOs, in submitting their views in cases of particular importance and difficulty.

As this process might indicate, difficult cases involving novel claims of rights are often capable of more than one 'correct' or acceptable decision. The Strasbourg judges cannot claim infallibility. However, while we may accept that some current criticisms of the Court are justified and must be attended to, such criticisms fall very far short of making the case for a return to a pre-Convention Europe, in which structures for the protection of human rights existed only at the national level.

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<sup>18</sup> For example the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 UNTS 85).