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INTERVENTION BY THE RIGHT HON LADY JUSTICE ARDEN DBE, MEMBER OF THE COURT OF APPEAL OF ENGLAND AND WALES

IS THE CONVENTION OURS?

SEMINAR TO MARK THE OFFICIAL OPENING OF THE JUDICIAL YEAR

EUROPEAN COURT OF HUMAN RIGHTS

29 JANUARY 2010

President, distinguished judges, ladies and gentlemen:

1. The theme for the Opening of the Legal Year of the European Court of Human Rights this year is "The Convention is yours". I have been asked to address that theme from the perspective of a judge in the United Kingdom. So I ask: "Is the Convention actually ours?"
2. I should like to start by saying that in my view human rights have made an important contribution to civil society in the United Kingdom. For example, a major challenge since 9/11 has been the balancing of freedom and security in relation to terrorism issues. Decisions of our domestic courts on human rights have played a crucial role in the resolution of these issues. So have decisions of the Strasbourg court. We have had a very recent example of this. In *Gillan v United Kingdom,*[1] the Fourth Section of the Strasbourg court held that the United Kingdom was in breach of article 8 of the Convention because it had enacted a broad power to stop and search individuals for articles which could be used in connection with terrorism even when the police officer had no grounds for suspecting the presence of articles of that kind. The Strasbourg court held that this power was excessive and did not contain sufficient safeguards. In this respect, its decision differed from those of both appeal courts in England. Liberty is a very precious right, and, living in a law-abiding country, we can forget that it is important to maintain this right. The benefit of decisions of the Strasbourg court is that they encourage domestic courts vigorously to enforce fundamental rights, and correct our decisions if we forget the importance of those rights.
3. As regards the reception of Strasbourg jurisprudence in the United Kingdom, the Convention is virtually self-executing in our courts (save with regard to primary legislation which is incompatible with the Convention). The courts have a duty to act in accordance with the Convention and to interpret legislation so far as possible compatibly with the Convention. The courts of the United Kingdom take their

[1] Application No. 4158/05, 12 January 2010.

obligations very seriously. However, the courts cannot strike down primary legislation that violates the Convention.

4. However, a problem for national courts arises when the Strasbourg court has sought to develop its jurisprudence in a manner which appears to demonstrate a misunderstanding of the domestic law position. For instance, the conclusion of the Strasbourg court in *Osman v United Kingdom*[2] was that it was a violation of article 6 on access to court for the English court summarily to dismiss a case where it had been concluded that it was not fair, just or reasonable to impose a duty of care. Under domestic law, however, this was just a mechanism for determining as a matter of substantive law when a cause of action in negligence would not lie. Happily a different conclusion was later arrived at in Z *v United Kingdom.*[3] So far as the United Kingdom is concerned, these occasions are relatively rare, but they can occur in areas of the law that are very important in practice, thus causing substantial difficulties for the national legal system.
5. We are not the only member state to have had this experience of decisions of the Strasbourg court that cause great disruption in the domestic system. For example, in *Princess Caroline's case,* the German Federal Constitutional Court ruled in favour of freedom of expression that the rights of the Princess to protection of her personality under the German constitution had not been violated by intrusive press photography.[4] Princess Caroline was a public figure trying to lead a private life. The Federal Constitutional Court held that she was a figure of contemporary history and that she only enjoyed protection of her private life outside her home if she was in a secluded place out of the public eye. Princess Caroline took her case to Strasbourg where the Third Section of the Strasbourg court reached a different conclusion on the balance to be drawn between press freedom and privacy, and held that the Princess's right to respect for her private life had been violated.[5] This decision caused enormous difficulty for the German Federal Constitutional Court. It found itself in the embarrassing position of having to revise its interpretation of the constitutional right.
6. Nonetheless, in the great scheme of things, we all gain more than we lose by having the Strasbourg court. We need a court with ultimate authority to interpret the Convention. Moreover, a supranational system of human rights has considerable advantages for each of the contracting states to the Convention. It subjects the institutions of the state to outside scrutiny, and that is particularly important where, as in the United Kingdom, there is a strong doctrine of Parliamentary sovereignty. In addition, in the United Kingdom, unless Convention rights are involved, a high level of unreasonableness on the part of an organ of the state must in general be shown in administrative law before an act of such an organ can be reviewed by the court. The existence of a supranational court, establishing human rights principles, empowers the domestic judiciary and strengthens their independence as against other institutions of their own state. Furthermore, the Convention system gives us a legitimate interest in how other countries in Europe treat their citizens. This is a more powerful position than could be achieved at the political level alone. The Strasbourg court can bring about remarkable change in the raising of standards throughout Europe. In addition, in my experience, its influence stretches far beyond the shores of Europe. As things stand, we have the opportunity to influence and contribute to its jurisprudence.
7. So we gain more than we lose. The real question is how the Convention system can be improved. I am not going to talk about what improvements national courts can make. I am going to turn the tables around and ask what the Strasbourg court can do

[2] (1998) 5 BHRC 293.

[3] (2001) 10 EHRR 384. See [87]. [98] and [101] of the Judgment of the Grand Chamber and my Concurring Opinion.

[4] *Re C* (1999) 10 BHRC 131.

[5] *Von Hannover v Germany* (Application no 59320/00) (2004) 16 BHRC 645.

to improve the implementation of the Convention system. But to answer that question we must first ask ourselves what qualities the Strasbourg court should demonstrate. I suggest to you that at the highest level of abstraction the qualities which the Strasbourg court should aim for include the following:

i. *Independence*. This goes without saying and I need say no more about it.
ii. *Effectiveness in creating a principled body of law within their jurisdiction*. This too is self-evident. We need a court to take the lead in human rights, and to create substantive law meeting the highest standards.
iii. *Quality of reasoning and ability to communicate clearly with their constituents.* This is a matter that I need to enlarge on below.
iv. *Respect for the role of national institutions*. By this, I mean an awareness of where the boundaries are between its role and that of the national institutions, including courts, a sensitivity to national traditions and national legal systems and an appreciation that there may be constitutional ramifications for the national institutions flowing from their decisions. This is really a call for judicial restraint by the Strasbourg court, and a sharing by it of its responsibilities for judging whether a breach of human rights has occurred.

8. Once we have understood what makes a good or bad supranational adjudication by the Strasbourg court, we are better able to think about what can be done to make the Convention system work better. I next move to the various suggestions that I want to make. I call this my “toolkit”.

MY TOOLKIT FOR MAKING IMPROVEMENTS IN THE CONVENTION SYSTEM

9. My toolkit of suggestions for improving the system of supranational adjudication of human rights contains four main tools: (1) more dialogue, meaning both dialogue between national judges and judges of the Strasbourg court and dialogue between the judges of the different national courts among themselves; (2) more subsidiarity; (3) more temporal limitations; and (4) clearer judgments.

(1) More Dialogue

10. Dialogue can take several forms and achieve several objectives. I start with informal dialogue between judges of the national courts on the one hand and judges of the Strasbourg court on the other hand. There is a great value in personal contact. There can be an enriching exchange of experiences. The informal discussion can also give the national judges an input into the process of developing jurisprudence at the supranational level. In addition, the national judges can explain where the shoe pinches most and how the new jurisprudence can best be absorbed into their own system.
11. Furthermore, I see judicial dialogue of this kind as of constitutional importance in the European legal order. Any supranational court needs to be subject to checks and balances. In the case of the Strasbourg court, dialogue with the national courts is an important means of providing such checks and balances.
12. Another form of judicial dialogue takes place at plenary meetings of judges from different member states, either with or without the judges of the Strasbourg court. I would like to see more meetings between judges of national courts with interests in common, such as the judges of the common law jurisdictions within the European Union. This would enable them to forge a common approach. We also need meetings between judges in Europe who do not, on the face of it, have interests in common. This enables us to increase our understanding of our European legal heritage. I would particularly like to see a conference of judges from all the contracting states to the Convention after the Interlaken conference has taken place

to discuss whether and, if so, how the judiciaries of the contracting states can take forward the recommendations which the contracting states agree upon at Interlaken.

13. Another very important means of dialogue is through judgments. It is obviously of great benefit to the United Kingdom in terms of influencing the direction of the jurisprudence in the Strasbourg court that the United Kingdom courts are, as a result of the Human Rights Act 1998, able to give judgments interpreting the Convention rights in domestic cases rather than domestic constitutional rights. The national court can in effect send a message to the Strasbourg court by reflecting its views on the Strasbourg jurisprudence in its judgment either in a case before it goes to Strasbourg or in some other case raising the same issue. The Strasbourg court is not bound to accept what the national court says but it has gone a very long way towards recognising the role of superior national courts:

    > "Where…the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law."[6]

14. This authority, which refers to *Z v United Kingdom*, means that the Strasbourg court would equally be willing in an appropriate case to reconsider an earlier decision in the light of disagreement expressed by the superior national court. In my view, that is a good reason why in an appropriate case the superior national court should not simply apply the Strasbourg jurisprudence with which it has a serious disagreement, but should state its disagreement and, if it reaches a different conclusion from the Strasbourg court, leave the applicant to his remedy in Strasbourg, where the national government can argue the matter fully. If necessary, it can seek a reference to the Grand Chamber of the Strasbourg court.
15. But, to some extent, our domestic courts have been disabled from having an active dialogue. This point derives from the way in which section 2 of the Human Rights Act 1998 has been interpreted. Section 2 provides that when the court determines a question which has arisen in connection with a Convention right, it must *take into account* any jurisprudence of the Strasbourg organs, whenever made or given, so far as in the opinion of the court it is relevant to the proceedings in which the question has arisen. Section 2 imposes a much weaker obligation than that imposed on British courts to give effect to the law of the European Union.[7] However, section 2 has been interpreted at the highest level as generally requiring our domestic courts to follow Strasbourg jurisprudence "as it evolves over time: no more but certainly no less."
16. There are advantages in this approach, which has become known as the *Ullah* approach after the case in which it was laid down.[8] It recognises the function of the Strasbourg court as the organ for the authoritative interpretation of the Convention, and at the end of the day domestic courts have to respect its authoritative role. Moreover, from the perspective of minimising the risk of a decision of the national court being the subject of an application to the Strasbourg court, and a finding of violation against the member state in question, this approach makes good sense.
17. There are also disadvantages to this approach. It does not, for instance, acknowledge that the Strasbourg court is only laying down minimum guarantees. More fundamentally, it is difficult to have an effective dialogue if the courts start from a position of deference. That deference must colour the national court's approach.

[6] *Roche v United Kingdom* (Appliction no. 32555/96) (2005) 20 BHRC 99 at [120].
[7] See section 2 of the European Communities Act 1972.
[8] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

18. It is said that the majority of courts in the other contracting states do not take the view that they are effectively bound by Strasbourg jurisprudence.[9] However, in these jurisdictions there are usually written constitutions so that precedence can be given to the rights contained in the constitution. In Germany, for instance, the obligation is again to take account of Strasbourg case law, which means that the courts attach considerable importance to the Strasbourg jurisprudence and must justify not following it. However, they are not bound by it.[10]
19. What we need in the United Kingdom is to be able under our domestic law to say to the Strasbourg court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decisions on the legal system in the relevant part of the United Kingdom. I do not suggest there should be a free for all, or that domestic courts should be free to reinvent the wheel on human rights jurisprudence. However, I would argue in favour of an approach which is more flexible than the *Ullah* approach.
20. The attitude of the UK courts may be changing. In the case of *Horncastle* decided in December 2009[11], the new Supreme Court of the United Kingdom, our new final appeal court, approved a departure from Strasbourg jurisprudence in the knowledge the same point was likely to come before the Grand Chamber of the Strasbourg Court in another case. The Supreme Court did not refer to the earlier case of *Ullah* at all, which leads me to the conclusion that it contemplated the following scenario:
    a. the Strasbourg court decides a point which the national court considers fails properly to evaluate the compatibility with the Convention of national law;
    b. in a later case on the same point, the domestic court then respectfully disagrees with the conclusion of the Strasbourg court in the earlier case, giving reasons;
    c. the Strasbourg court considers the point again in another case.
    d. dialogue between the national court in the Strasbourg court then ensues through their respective judgments.
21. The Supreme Court did not limit the course of action it was taking to a final court of appeal, and one may expect to see this approach being adopted by other courts of the United Kingdom.[12]
22. It is important to give both the national and supranational court the chance to think again. Dialogue cannot go on for ever but I very much expect that by the end both national case law and Strasbourg jurisprudence will end up in a different place from where it started.

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[9] See *The Relations between the Constitutional Courts and the other National Courts including Interference in this Area of the action of the European Courts*, General Report to the XIIth Conference of European Constitutional Courts, May 2002 (2002) 23 HRLJ 304 at 327.

[10] *Görgülü* BVerfGE 111. See further Hans-Jürgen Papier, *Execution and Effects of the Judgments of the European Court of Human Rights from the perspective of German National Courts* [2006] 27 HMLJ 1.

[11] *R v Horncastle* [2009] UKSC 14. Lord Phillips, giving the judgment of the court, held :

> 11. … The requirement to "take into account" the Strasbourg jurisprudence will normally result in this court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.

[12] See, for example, the decision of the High Court of Justiciary of Scotland in *HM Advocate v Maclean* 2010 SLT 73.

23. There was no discussion in *Horncastle* of the respective roles of the Strasbourg court and the national court in the new European legal order, but there is a movement towards a practical solution, and a willingness on the part of the national court to engage in a form of dialogue.
24. In addition, after the 14th Protocol comes into effect, domestic courts may, before they rule on the effect of a decision of the Strasbourg court on their domestic law, wish to allow time for a case to be referred back to the Strasbourg court for clarification by the Committee of Ministers under article 46 of the Convention, as amended of article 16 of that Protocol.
25. Before I leave this topic I should refer to the extension of Strasbourg jurisprudence. Some people are concerned by the development by the Strasbourg court of its own jurisprudence. The Strasbourg court adopts what is known as evolutive or dynamic interpretation. The language of the Convention is open-textured, and the Strasbourg court gives it a dynamic interpretation so as to keep the Convention in line with present-day conditions. Strasbourg has for example to keep pace with changes in technology, such as the storage of DNA. Lord Hoffmann, for instance, criticises the liberal way in which the Strasbourg court interprets the Convention.[13] However, if the national Parliament does not like some development of the jurisprudence by the Strasbourg court, it is always open to it to pass primary legislation preventing our domestic courts from giving effect to that development. It will then be for the government to justify that course in Strasbourg. In appropriate cases, the Strasbourg court should be willing to reconsider its jurisprudence. That still leaves the Strasbourg court in the driving seat, but that position is inevitable, short of an amendment to the Convention.

(2) More subsidiarity

26. Subsidiarity for this purpose is the principle that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level.[14] It inevitably follows from subsidiarity that it is recognised that there can be a diversity of solutions to a particular problem.
27. Subsidiarity is consistent with democracy, and with the right of the individual to self-realisation reflected in article 8 of the Convention. This means that, so far as practical, decisions should be taken by the appropriate authorities in the areas most affected by those decisions. Examining the degree to which the Strasbourg court implements the principle of subsidiarity is therefore one way of testing my fourth quality: respect for the role of national institutions.
28. In Strasbourg jurisprudence, the doctrine of subsidiarity is well established. The Strasbourg court is not a "fourth instance". Its role is supervisory. In general domestic remedies must be exhausted before any application can be made.
29. An allied doctrine is the doctrine of the margin of appreciation. The expression "margin of appreciation" is used to describe those cases where the Strasbourg court recognises that the domestic authorities are in the best position to decide on measures in a particular area. The Strasbourg court has held that there is a margin of appreciation in cases where the contracting state has asserted a derogation in times of a public emergency, or where there is a question of, for example, morals or the length of statutes of limitation on which there is no consensus among the member states. The doctrine is often controversial. Some feel that having a doctrine of margin of appreciation effectively compromises the role of the Strasbourg court as the guardian of human rights because it leaves it to the national authorities to provide remedies, and they may fail to do so. After all, the most serious cases about breaches of human rights arise because the rights of some unpopular minority have been infringed.

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[13] Lord Hoffmann, *The Universitality of Human Rights*, Judicial Studies Board Annual Lecture, March 2009.

[14] Oxford English Dictionary.

30. But the margin of appreciation is not solely about the protection of rights. The margin of appreciation ought not to be just about cases where there is no consensus in the contracting states. It is also about the comparative institutional competence of the Strasbourg court and national institutions.[15] This aspect of the doctrine of the margin of appreciation should be recognised and developed. It is again relevant to my fourth quality: respect for the role of national institutions.
31. My view is that subsidiarity, including the margin of appreciation, is a concept which the Strasbourg court should strengthen in its jurisprudence. It should also build on the idea of subsidiarity in another direction. The Strasbourg court has a daunting burden of work. In 2008, the Strasbourg court issued 30,200 decisions but it received 50,000 applications, increasing its backlog of cases to 97,000.[16] Some of these cases may be capable of being dismissed summarily as manifestly ill-founded. However, that would still leave a large residue. The only solution as I see it is to share the load with the national courts: however distasteful it may be to a human rights court, the Strasbourg court should, at least until matters improve, seek to focus on the more important cases and leave the cases which are less important to be dealt with by the national courts without further recourse to the Strasbourg court even if the litigant is dissatisfied with the result. There would have to be a clear definition of which cases were less important to contracting states in general, and the Strasbourg court would have to have a discretion, but the definition ought to exclude cases which raise issues in areas of law where there is already a clear and constant case law, and with which the national courts ought to be able to deal. The Strasbourg court might be able to use its "pilot judgment" procedure for this purpose. Excluding these cases would enable the Strasbourg court to focus on areas of its jurisprudence that most call for its special expertise.
32. The Strasbourg court has to resist the temptation of deciding matters which properly fall within the margin of appreciation. At the moment, in other cases, the Strasbourg court is bound to decide all the questions which need to be decided in the case before it. It is in general unable to remit questions back to the member state, because national remedies have been exhausted. If necessary, the Interlaken process should consider whether an amendment to the Convention is necessary to impose on contracting states an obligation to allow an applicant to have a matter reopened in the domestic courts if the Strasbourg court so requires. That would give the Strasbourg court an extra tool. It could require the domestic courts to apply its jurisprudence, which it would identify. Involving national courts in this way may help to change the culture in jurisdictions where Strasbourg jurisprudence is less well understood or less readily applied.

(3) More temporal limitations

33. The Strasbourg court has from time to time imposed temporal limitations but in the normal course it will be much less easy for it to do so as it will simply be dealing with the instant case and not with its impact on the domestic legal system. Nonetheless, there may be cases where, consistently with justice and subsidiarity, a temporal limitation should be imposed.

(4) Clearer judgments

34. The clarity of judgments from the Strasbourg court is also sometimes an issue. We should continue to press the Strasbourg court to maintain high standards in this regard. Acceptance of its jurisprudence by the contracting states depends on the clarity of its jurisprudence. However, there is a partial remedy in the 14th Protocol in

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[15] See, for example, the speech of Lord Hope in *R (Kebilene) v Director of Public Prosecutions* [2000] 2 AC 326 at 380 to 381.

[16] Speech by President Jean-Paul Costa printed in *Dialogue between Judges*, European Court of Human Rights, 2009 at page 84.

that the Committee of Ministers will be able to refer cases back to the Strasbourg court for clarification.[17]

CONCLUSIONS

35. What I have sought to do in this intervention is to pose some questions about what makes for effective supranational adjudication by the Strasbourg court. I have sought also to put forward some criteria for assessing its work on a principled basis.
36. So to conclude. The United Kingdom has obtained substantial benefits from Strasbourg jurisprudence. So have other contracting states. The relationship has been beneficial and in general harmonious. However, in this intervention, I have identified a number of practical issues, and suggested solutions directed to achieving the most effective Convention system.
37. So, the answer to the question: Is the Convention ours? has to be: No. It is not ours. But, importantly, it is not the sole preserve of the Strasbourg court either. The Strasbourg court is of course the authoritative court for the interpretation of the Convention. But each of the national courts has its own part to play as well in the development and enforcement of human rights jurisprudence as well.
38. All these courts must have appropriate respect for each other's role, and in particular, as I have explained in this intervention, the Strasbourg court has to have respect for the national institutions if the Convention system to achieve its true purpose.
39. In summary, in this intervention, I have advocated:
    - More dialogue between judges, and in particular a plenary meeting of judges of the national courts with judges of the Strasbourg Court after the Interlaken conference,
    - more subsidiarity, including an option for the Strasbourg court, when it gives judgment, to remit a case back to the national courts to reconsider afresh in the light of identified principles of Convention jurisprudence,
    - continued vigilance with respect to clarity in judgments and, where appropriate, greater use of temporal limitations.
40. Finally, I would like to thank the President and Judges of the Strasbourg Court for organising this valuable opportunity for an exchange of views, and to wish them well for the year ahead.

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[17] Article 16.