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The European Court of Human Rights: anti-democratic or guardian of fundamental values?

Roundtable of Parliamentarians and Experts, co-hosted by Chatham House and Parliamentarians for Global Action

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1. Introduction

Established in 1950 under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the European Court of Human Rights (ECtHR) is a leading institution on the global human rights stage. Based in Strasbourg, the ECtHR resolves thousands of disputes brought each year by individuals from the 47 member states of the Council of Europe, covering more than 800 million people. Its extensive case law covers a diverse array of cultural, political, social and economic issues, often involving difficult and disputed questions.

In recent years, the relationship between the ECtHR and contracting states has come into sharper focus, with debate about the proper role and remit of the Convention and the ECtHR and what it means to be part of the Convention system. Some states have voiced concerns that the ECtHR is too intrusive, encroaching on areas of national sovereignty and constitutional importance. Certain judgments on issues such as prisoner voting rights and the deportation of suspected terrorists have led to an increasingly difficult relationship between the ECtHR and the UK in particular, leading to questions about the amount of deference that the Court should show to contracting states in its judgments and the balance to be struck between judicial activism and self-restraint. This has generated wider debate about how the ECtHR fits with not only national sovereignty but also parliamentary sovereignty, and the relationship between democracy and the rule of law.

Parliamentarians for Global Action and Chatham House convened a high-level roundtable to consider these sovereignty concerns. The discussion examined the status of the ECtHR and other regional courts in a global context. The relationship between the ECtHR, the UK parliament and the domestic judiciary was explored, particularly in light of recent proposals by the Conservative Party to change the UK's human rights laws.

Participants included parliamentarians, members of the judiciary, lawyers and academics, as well as representatives of governments, international organizations and civil society.

The meeting was held under the Chatham House Rule.

2. Regional Courts and the Protection of Human Rights

The impact of regional courts globally

The ECtHR is one of three principal regional human rights courts, along with the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (the African Court). The three regional courts form part of a wider global human rights system, which includes the UN treaty-based bodies, such as the Human Rights Committee established under the International Covenant on Civil and Political Rights, and UN bodies such as the Human Rights Council, as well as national human rights institutions. The three regional courts help to set and inform international human rights standards. It was observed that the ECtHR is one of the most effective global tools in improving human rights. It was the first international human rights court and is one of the largest, having jurisdiction over 47 states. It plays a leading role in setting human rights law standards around the world and helps to develop the international common law. One participant noted that countries such as Colombia, Nigeria and Tanzania look at the ECtHR's case law and apply it in their domestic cases, and the IACtHR and African Court often refer to its case law in their own judgments.

The IACtHR, which came into being in 1979, has had a major structural impact on Latin America. Its judgments have led to reforms including the demolition of amnesty laws, the adoption of freedom of information acts in many states, recognition of political rights, and the access of indigenous people to ancestral lands. The IACtHR has enabled the insertion of human rights on the agenda of states and domestic courts, which previously would not have considered human rights, and has strengthened the rule of law in the region. Although the death penalty remains an issue of controversy in the region, in several cases the IACtHR's rulings against the death penalty in Guatemala have prevented executions.

The African Court is much younger, having been established in 2004. It issued its first judgment in 2009, and therefore has not produced anywhere near the same output as the other two regional courts. It was stated that it will be crucial for the African Court to have greater financial resources and political support if it is to overcome the structural constraints which currently impact its effectiveness.

The impact of the ECtHR in its region

Council of Europe enlargement and the extension of the Convention to the Central and East European democracies has involved the ECtHR in examining a much broader range of issues in the last decade, including the violation of basic rights such as prison conditions, unfair trial processes and discrimination against vulnerable groups such as the Roma in Central and Eastern Europe. Convention principles have been guiding the direction of law reform in these and other areas. In most cases, judgments are implemented and damages paid when awarded by the states concerned. It was observed that in one contracting state, the ECtHR had made significant improvements to the conditions of prisons and prisoners as a result of thousands of cases brought against the state on this issue, which had resulted in changes in domestic legislation by parliament. The Court has also helped to tackle incidents of anti-Semitism in certain parts of Europe.

It was noted that the Parliamentary Assembly of the Council of Europe (PACE) plays an important role in holding ministers and states parties to account for human rights issues. PACE has 636 members drawn from the parliaments of each Council of Europe member state, 18 of whom are from the UK. It elects judges to the ECtHR and has the power to block the entry of new member states into the Council of Europe. It plays a critical role in the shaping of new Council of Europe treaties. PACE also highlights

human rights violations in member states and has the power to suspend membership rights or expel members states from PACE or from the Council of Europe itself as a sanction of last resort.

The ECtHR, which hears complaints under the Convention against the 47 member states of the Council of Europe, is to be distinguished from the European Court of Justice, which interprets and applies the law of the European Union (EU), made up of 28 member states. But there is increasing crossover between the two institutions, especially since the Charter of Fundamental Rights became binding under the Treaty of Lisbon.[1] It was observed that the role of ECtHR in the region is likely to grow if the EU becomes a party to the Convention, as it is legally obliged to do under the Treaty of Lisbon. A draft accession agreement was signed in April 2013 at negotiators level, and the next step is authorization from the EU Council. It was stated that from an institutional point of view, the EU's accession to the Convention would send a strong signal of coherence between the EU and the 47 countries belonging to the Council of Europe, and would afford EU citizens protection against the EU in a way similar to the protections they currently enjoy against their own states. This is particularly relevant given that EU Member States have transferred substantial powers to the EU. It was argued that accession of the EU to the Convention would also contribute to the harmonious development of the approach and case law of the European Court of Justice and the ECtHR in the field of human rights, and that the courts would together add to the system of human rights protection rather than compete with one another.

It was observed that the ECtHR has also helped to shape the human rights policies of the EU's Parliament, the European Parliament. The 2012 ECtHR ruling that push-back operations by EU agencies on the high seas are a violation of the Convention[2] has fed into debates in the European Parliament and in states under the jurisdiction of the ECtHR on how to address the issue of European border control, particularly in light of the growing number of migrants crossing from Africa to the Mediterranean each year.

The impact of the IACtHR in its region

The IACtHR was inspired by the design of the European system, but has been influenced by a different political and historical context, which has given it its own shape. Like the original Convention system before it was amended in 1998 by Protocol 11 to the Convention, the IACtHR has both a commission and a court. The commission makes thematic reports, country visits, has rapporteurs on specific rights, and analyses individual petitions, deciding which to refer to the court. It is effectively the court's gatekeeper, receiving around 1,500 petitions a year and referring just 10–15 to the IACtHR, which is much smaller than the ECtHR. The average time from filing an application until final judgment is seven-and-a-half years, which makes it harder for individuals to follow an application themselves, and most applications are brought by non-governmental organizations (NGOs) or by individuals with NGOs.

It was observed that whereas the ECtHR grew up in the framework of strong democracies and the rule of law, the IACtHR emerged in the context of dictatorships and serious violations of human rights such as forced disappearances, torture and executions. It was stated that the ECtHR has traditionally used domestic court decisions as a source of its rulings, making it a more conservative tribunal; whereas the IACtHR, working in the context of weak democracies and judiciaries, has been more bold and creative. The two courts also have different approaches to remedies: the ECtHR may hold that the judgment itself is a sufficient remedy, and if not may require general measures (for example legislative reform or dissemination of the judgment) or individual measures (for example payment of damages to the victim).

[1] Article 6, 2007 Treaty of Lisbon.
[2] *Hirsi Jamaa & Others v Italy*, Application No. 27765/09, 23 February 2012.

The IACtHR's remedies are more wide-ranging, comprising at least 12 options, including the creation or reform of public institutions, investigating and sanctioning, and the protection of witnesses and victims.

Despite these distinctions, it was observed that the decisions of the two courts have increasingly more in common. The rise of democracy in the 1990s forced the IACtHR to look at other issues such as freedom of expression and judicial independence. The accession of countries from Eastern Europe to the ECtHR has required it to look at some of the more serious and structural violations issues, which the IACtHR first examined. There is a dialogue between the two courts, which increasingly take into account each other's case law and standards.

Compliance with judgments of the IACtHR varies, and to date the rate has generally been lower than the ECtHR's overall. The Inter-American Commission of Human Rights promotes friendly settlements, which have a higher compliance rate (54 per cent) than judgments (29 per cent). It was noted that the tension between an international court and national legislation, and the democratic implications involved, is not unique to the ECtHR. The domestic courts of some Latin American states, such as Colombia and Peru have a tradition of compliance, but the courts of certain other states – for example in Brazil, Venezuela and the Dominican Republic – have sometimes resisted implementation. In a recent case against Argentina, the Argentinean Supreme Court explicitly disagreed with the IACtHR ruling, but held that it was under an obligation to comply with the ruling because Argentina had submitted itself to the IACtHR's jurisdiction and was therefore obliged to comply with its decisions.[3] In a recent case against Uruguay, the IACtHR held that amnesty provisions were inadmissible because they violated non-derogable rights, even though the provisions had been voted through a referendum.[4] This ruling has triggered debate in the region about the democratic legitimacy of the decisions of international organizations as opposed to decisions adopted by popular election.

How the ECtHR discharges its mandate

Judge Robert Spano of the ECtHR spoke on the workings of the ECtHR and its reforms. A copy of Judge Spano's speaking note is available in full on the Chatham House and PGA websites.

The ECtHR published 916 judgments in 2013, of which 48 per cent were against just four states: Russia, Turkey, Romania and Ukraine. In the same year, there were eight adverse judgments against the UK, making up just 1 per cent of the ECtHR's caseload. Three of the judgments against the UK contained rights of the most fundamental importance: the right to life (two cases) and the prohibition of torture and inhuman or degrading treatment or punishment (one case).[5] Between 1999 and 2010, 97 per cent of cases brought against the UK were declared inadmissible. Of all the applications brought against the UK, 1.8 per cent eventually resulted in a judgment finding at least one violation. The UK therefore 'lost' in around one in 50 cases brought against it. If adjustment is made for repetitive cases (where multiple applications result from the same root cause, such as in the prisoner voting rights cases), the rate of defeat falls to 1.4 per cent, or one in 70 cases.[6] Overall, the number of judgments against the UK has been coming down in the last few years.

[3] *Bulacio v Argentina*, 18 September 2003, Series C No. 100.
[4] *Gelman v Uruguay*, 24 February 2011, Series C No. 221.
[5] *McCaughey v UK*, Application No. 43098/09, 16 July 2013 and *Hemsworth v UK*, Applications No. 58559/09, 16 July 2013 on excessive delay in investigations into deaths at the hands of security forces in Northern Ireland, and *Vinter and others v UK*, Applications No. 66069/09, 130/10 and 3896/10 on the imposition of whole life tariffs without the possibility of review.
[6] Participants were referred to figures taken from A. Donald, J. Gordon and P. Leach, '*The UK and the European Court of Human Rights*', Research report 83 (Manchester: Equality and Human Rights Commission, 2012), pp. 34-35, http://www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf.

Reforms

It was acknowledged that the ECtHR has a complex job in ruling on sensitive issues involving the balancing of rights and values, and that as a human institution it is not infallible. While the ECtHR has been instrumental in setting human rights standards regionally and globally, it has also faced pressure to change its approach in a variety of areas in recent years. Since 2010, reform of the ECtHR has been the subject of three high-level conferences, held at Interlaken in 2010, Izmir in 2011 and Brighton in 2012. Issues considered at these conferences have included the processing of applications, admissibility criteria, the election of judges, and interactions between the ECtHR and national authorities.

It was observed that as a result of the reform agenda, and of internal changes such as the introduction of the single judge system, the ECtHR's performance and case management has improved. In accordance with the Brighton Declaration of April 2012,[7] the ECtHR aims to deal with all incoming cases within a year – either rejecting them or communicating them to the government concerned – and then, if communicated, to deal with the cases within two years. The ECtHR has made significant progress in reducing the backlog to its caseload in the last few years: the total number of pending cases has dropped from around 160,000 in 2011 to around 85,000 in 2014. One participant noted that the ECtHR's Registrar has predicted that by the end of 2016 the total backlog will be down to about 17,000 cases.

Compliance

It was noted that of the circa 84,000 cases currently pending before the ECtHR, nearly 40,000 are repetitive ('clone') applications, which concern matters of well-established case law and which remain on the docket because contracting states have not implemented the original judgment. As well as being a severe drain on the ECtHR's resources, it was observed that the danger of judgments being perceived as not being implemented is that the Court is no longer seen as a system of law, and consequently its efficacy starts to erode. It was noted that the pilot judgment procedure (under which a single 'pilot' judgment is issued to deal with a large group of pending cases that derive from the same underlying problem) is a direct consequence of failure by states to implement judgments. Differences in compliance records between contracting states can also affect relations between those states: for example if a prisoner in state A cannot be transferred to state B because of its compliance record, there is an issue for state A where its taxpayers are effectively taking on responsibility for compliance by state B.

It was argued that there now needs to be much greater focus on compliance by contracting states, and implementation of judgments, rather than further reform of the ECtHR. Strengthening national compliance with Convention standards and judgments of the ECtHR is central to ongoing efforts to preserve and reinforce the Convention system. But it is not clear that there is currently sufficient political appetite to tackle this issue, either at the level of the Council of Europe's Committee of Ministers (CoM) or at the national level. The CoM has primary responsibility for the implementation of judgments, and it was observed that the process of implementing judgments can take years before there is a formal resolution of the case. NGOs and civil society have been involved in a project to help the CoM with its mandate by providing information on implementation. PACE is increasingly supporting the CoM on compliance issues, led by its Committee on Legal Affairs and Human Rights, which focuses on cases that reveal systemic problems or judgments where there have been considerable delays in implementation. It was observed that particularly in cases against Russia and Ukraine, work on implementation has been very inadequate. Currently, the European Parliament follows up with countries outside the EU on their implementation record, but lacks structures or appetite to debate implementation by EU member states. It was highlighted that it is also crucial for domestic authorities to understand their own responsibility in

[7] http://hub.coe.int/20120419-brighton-declaration.

enforcing their obligations, which in turns allows them to have an impact on the way the Convention system can work at the national level.

3. The Sovereignty Debate

The relationship between the ECtHR, national parliaments, governments and domestic courts

The Convention system is based on the principle of subsidiarity, under which contracting states have primary responsibility for securing the rights and freedoms in the Convention for everyone within their jurisdiction. Where an individual considers that the state has not discharged its obligations, he or she must first exhaust remedies in the domestic courts. Only once those remedies have been exhausted is there a right of appeal to the ECtHR. In signing the Convention, contracting states agree to the collective enforcement of human rights by the ECtHR, as the authoritative interpreter of those rights, and to abide by the final judgment of the ECtHR in any case to which they are party.[8] It was observed that the Convention system is therefore premised on a pooling of sovereignty by contracting states and acceptance that an international court will be the final arbiter on human rights matters. As a matter of international law, contracting states are bound by the terms of the Convention, and cannot therefore pick and choose with which of the ECtHR's judgments they comply.

The issue of democratic deficit is at the heart of the debate on the relationship between the ECtHR and contracting states, including their parliaments. It was observed that there is an inherent democratic deficit involved in the transfer of national sovereignty to an international human rights court such as the ECtHR. Human rights are a break on majoritarianism. As such, they recognize that democracies can, on occasion, be oppressive. Human rights are designed in the interests of vulnerable groups and minorities (including unpopular minorities such as prisoners and terrorists). There was a consensus after the Second World War that, at least theoretically, the protection of human rights should no longer be left exclusively to national governments. Winston Churchill championed this cause, and the founding fathers set up a Convention system in which countries agreed to pool their sovereignty in relation to human rights matters into the ECtHR. At the same time, in the context of the democratic deficit debate, it was observed that the decision to transfer national sovereignty in this area to the ECtHR was made by the democratically elected governments of contracting states.

It was stated that the ECtHR invented the concept of 'margin of appreciation' because it understood the importance of national sovereignty. Under this concept, the ECtHR, when considering whether national authorities have done enough to uphold their obligations under the Convention, takes into account the degree of scrutiny that national authorities have given the matter and whether justifications for any limitations on rights are reasonable. If national authorities have taken the general principles of its case law into account in their domestic assessment, the application of those principles to the facts of the case falls, in principle, within the core of their margin of appreciation, not to be touched by the ECtHR. It was also observed that contracting states have a degree of discretion in how they implement the ECtHR's judgments. A decision by the ECtHR does not automatically invalidate national law. Often, the ECtHR's decision itself prescribes very little as to how the judgment should be implemented, so there is scope for democratic debate within the contracting state on the options available.

In the UK, there is an ongoing tension over who has the final word on human rights issues and whether the correct balance has been struck. There is also a growing tension between a general trend towards

[8] Article 46 of the Convention.

greater international jurisdiction at the expense of national sovereignty on the one hand (as manifested for example in relation to international criminal law, EU law, and cross border corporate and financial crime), and an equally strong trend towards national self-determination on the other. It was argued that the question of degree was critical when considering the yielding of national sovereignty to an international court. While the UK might have agreed to give up a certain amount of sovereignty in ratifying the Convention in the 1950s, it was questioned whether it envisaged the degree of sovereignty currently yielded to the ECtHR, including on issues of constitutional and political importance, particularly without prior discussion in parliament. In the UK, at least, it was argued that there is a growing perception that the ECtHR, as a 'supranational court', is exercising jurisdiction in relation to matters over which it does not have the confidence of the electorate.

National vs parliamentary sovereignty

It was observed that the debate about the UK and the Convention involved not only the external issue of national sovereignty (the transfer of powers by the UK to the ECtHR), but also the internal issue of parliamentary sovereignty (parliament's relationship with the executive and domestic courts in the UK), and these two concepts sometimes got confused in discussions on these issues. It was argued that much of the debate in the UK is ultimately about how the institutions of the UK as a sovereign democracy – parliament, the executive and judiciary – relate to each other, and on what terms. It was stated that this issue has been thrown into sharper relief in the UK by an emerging credibility gap between politicians and the public, with the relevance of parliament, and the extent to which it represents the electorate, questioned. The traditional monolithic political structures in the UK, involving a two-party system in which the government can usually push its proposals through parliament, have broken down into something more fluid. The rise of the UK Independence Party and the push for greater devolution in Scotland are two manifestations of this trend which reflect the growing emphasis on national self-determination.

It was observed that another dynamic relevant to the debate in the UK is the degree of oversight vested in parliament regarding the entry by the UK into international agreements such as the Convention. Unlike the legislature of many countries, the UK's parliament does not have the power to decide the entry by the UK into treaties; that takes place at the executive level. At the same time, it was observed that parliament was given the opportunity to have greater powers in relation to treaties a few years ago, as part of the debates on the bill that ultimately became the Constitutional Reform and Governance Act 2010, and while that Act increased parliamentary oversight of treaties to some extent,[9] parliament chose to maintain the position that there is no statutory requirement for a debate or vote on a treaty, and that parliament cannot amend treaties.

It was noted that some of the key expansions to rights under the Convention have in fact been the consequence of the UK's own domestic judgments, with the higher courts showing leadership about how human rights standards should be applied, and with the government not always happy with the result. But it was argued that the term 'sovereignty' is often relied on by those who wished to dismantle the current arrangements, as though it were the ECtHR leading the way and causing problems.

[9] If either House objects, the government must give reasons why it wants to ratify before it can proceed, but the House of Commons can block ratification indefinitely.

Has the Court's living instrument doctrine led to an expansion of the rights under the Convention? In particular, has the Court struck the right balance in its decisions on prisoner voting, counterterrorism measures and deportation?

Certain judgments of the ECtHR in the last 10 years on prisoner voting rights, the deportation of suspected terrorists (including Abu Qatada)[10] and counterterrorism measures have excited hostile reactions in certain quarters of the UK. The Conservative Party proposals for protecting human rights in the UK ('the Conservative Party proposals'), published on 3 October 2014, argue that 'the ECtHR has used its "living instrument doctrine" to expand Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it'.[11]

It was observed that the living instrument doctrine – under which the Convention is interpreted by the ECtHR in light of present conditions – is on one level uncontroversial: it is natural that rights such as freedom of expression are applied to modern developments such as the internet, otherwise the Convention risks becoming outdated and irrelevant. The common law itself is a living instrument, and is interpreted as such by national courts in common law jurisdictions; indeed, judges in the UK have often led the way in developing human rights jurisprudence under the common law. But it was noted by some participants that on another level, the evolution of the ECtHR's case law in certain areas has been more controversial, particularly where the ECtHR has adopted an expansive interpretation of the state's obligations in relation to national practices that are effectively part of the constitution of the state, or where the ECtHR veers into areas of social or national security policy. It was observed that over time, the Convention has taken on the character of a 'European Bill of Rights', and that the conception of the ECtHR in this capacity has been controversial in the UK.

It was argued, however, that the characterization of the living instrument doctrine as a form of 'mission creep' is over-simplistic. The doctrine, as a method of interpretation, aims to ensure that human rights protection is effective, and to reflect the evolution of international human rights law standards and the importance that society attaches to certain rights over time. On the issue of the 'gap' between what the founding fathers conceived when they created the Convention and the ECtHR's case law of today, it was noted that the judgment of *Tyrer v UK* (1978),[12] in which the ECtHR first espoused the 'living instrument' doctrine, was decided by a Chamber that included one of the pre-eminent drafters of the Convention, Pierre-Henri Teitgen.

It was observed that the ECtHR's recent case law suggests that the Court is showing greater deference to national authorities, acknowledging their 'direct democratic legitimation', recognizing that national authorities are better placed than an international court to evaluate local needs and conditions, and giving special weight to the role of the domestic policy-maker.[13] Contrary to the idea of mission creep, there are increasing examples where the ECtHR has shown restraint in challenging controversial laws passed at national level, evoking the doctrines of margin of appreciation and subsidiarity. In a recent case challenging France's prohibition on the wearing of the burka in public places, the ECtHR accepted France's reasons for the policy and found there had been no violation of the right to freedom of religion or the right to privacy.[14]

It was also noted that the controversy around human rights in the UK centres on only a limited number of cases. Prisoner voting rights have been one of the main issues, with the ECtHR's judgment of 2004 in

[10] *Othman (Abu Qatada) v United Kingdom*, Application No. 8139/09, 17 January 2012.
[11] https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf, p. 3.
[12] Application No. 5856/72, 25 April 1978.
[13] E.g. *Animal Defenders International v UK,* Application No. 48876/08, 22 April 2013.
[14] *S.A.S. v France*, Application No. 43835/11, 1 July 2014.

Hirst v UK,[15] in which the Court held that a ban on all prisoners from voting was a violation of the Convention, still not implemented in the UK. Implementation of this judgment and *Greens & MT v UK* (a pilot judgment issued in 2010 that was designed to address the large number of prisoner voting rights applications currently pending against the UK)[16] requires a change in primary legislation that has been met with repeated opposition in parliament. But it was observed that the need to amend legislation in order to implement a judgment has been part of the Convention system for decades. It was also noted that in the *Hirst* judgment, the ECtHR did not specify a remedy and left it to parliament to decide how to adapt the UK's system in order to uphold its obligations under the Convention. Subsequent decisions by the ECtHR on prisoner voting rights, in particular *Scoppola v Italy (No. 3)*,[17] have made it clear that although legislation is required in the UK, there is a wide range of options open to governments for implementation on this issue, and it was noted that the laws of most contracting states conform with the ruling.[18]

Similarly, the issue of whole life tariffs has also been controversial in the UK, following the ECtHR's judgment that a whole life tariff without the prospect of review is contrary to Article 3 of the Convention (inhuman and degrading treatment).[19] But it was noted that contrary to reports in the media, and statements in the Conservative party proposals, the ECtHR's judgment does not proscribe life orders. The Court has accepted that, given what constitutes a just and proportionate punishment is the subject of debate and disagreement, states have a margin of appreciation, and that under the UK's constitution it is for parliament to set the framework under which the judge decides in an individual case whether a whole life order is a just punishment. Parliament therefore has a range of options on which to base its policies on this issue.

In both the prisoner voting and whole life tariff cases, it was observed that the reporting in the UK media on the workings of the ECtHR and the Convention was often inaccurate and misleading, to the detriment of a fair and rational debate on the substantive issues.

Should the matter be handed back to national parliaments?

It was noted that handing the matter back to national parliaments would contravene the terms of the Convention, under which contracting states have committed to abide by the judgments of the ECtHR. But where the ECtHR requires national parliaments to change the law, and parliament resists, there is a conundrum. Human rights are profound, constitutional rights, and it was observed that this creates a particular tension in the UK, which has an unwritten constitution that is now being significantly written at the human rights level.

Discussion centred on whether the ECtHR's use of the doctrines of margin of appreciation and subsidiarity were sufficient to address concerns about national sovereignty. One participant argued that while these concepts were helpful, they were not sufficient in themselves. There was a pressing need for a new canon of treaty interpretation by the ECtHR, under which the Court would have greater regard for national sovereignty, particularly in areas of social policy. The views of Sir Gerald Fitzmaurice were cited,

[15] *Hirst v UK (No. 2),* Application No. 74025, 30 March 2004.
[16] *Greens & MT v UK*, Applications No. 60041/08 and 60054/08, 23 November 2010. There are currently more than 1,000 prisoner voting rights applications pending against the UK before the ECtHR. Under the terms of the pilot judgment, these would be struck out by the Court if the UK implements the judgment.
[17] Application No. 126/05, 22 May 2012.
[18] Of 43 contracting states examined in a comparative law study referred to by the ECtHR in a 2012 judgment, 19 contracting states placed no restrictions on the right of convicted prisoners to vote. In 17 contracting states, whether or not a prisoner can vote depended on the type of offence and length of custodial sentence. The six contracting states that automatically deprived all convicted prisoners of the vote (along with the UK) were listed as Armenia, Bulgaria, Estonia, Georgia, Hungary and Russia (*Scoppola No. 3 v Italy*, paragraphs 45–47).
[19] *Vinter v UK*, Applications No. 66069/09, 130/10, 3896/10, 9 July 2013.

who argued (as the UK judge sitting in the ECtHR in the case of *Golder v UK*) the need for 'a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting states obligations they had not really meant to assume, or would not have understood themselves to be assuming'.[20] It was argued that it is not unusual for courts to have periods of activism followed by periods of restraint, and this was a time when there needed to be greater sensitivity to this issue, otherwise the system risks collapse.

The possibility of a 'democratic override' for contracting states was also discussed, based on the idea of a procedure akin to the use of 'declarations of incompatibility' under section 3 of the UK's Human Rights Act, under which judges have the power to make a declaration that they consider the terms of a statute to be incompatible with the UK's obligations under the Human Rights Act 1998. Declarations of incompatibility have been used sparingly in the UK, but are significant in providing a mechanism to ensure that Parliament has the final say. It was noted that Canada has a similar mechanism under its Charter of Rights and Freedoms. It was argued by one participant that a democratic override process could be created that would be subject to proper procedures, including full debate in parliament where there is a proposal to override a court ruling. Such a procedure would need to be applied to all contracting states as it would not be possible for the UK to receive special treatment while remaining a party to the Convention. It would also need to be combined with greater emphasis on compliance in relation to all other ECtHR judgments. While legislatures would retain the final say, the ECtHR should be taken seriously, its role being akin to the 'canary in the mine' – there to warn of impending disasters.

It was observed, however, that the idea of a democratic override is at odds with the entire philosophy of the Convention system, under which states have committed to respect the final and binding judgments of the ECtHR. It was also questioned whether granting a democratic override to parliaments in contracting states with a much weaker human rights record would be a good idea. It was argued that sovereignty and democracy go hand in hand with the rule of law, and parliamentary sovereignty must be balanced against the role of national and international courts, which uphold the fundamental values enshrined in the Convention, including the interests of minorities. It was observed that, at least in the UK, judges at the national level have significant experience in deciding, on the facts of each particular case, whether they should decide the matter or whether it should be left to parliament. It was also noted that sovereignty concerns have been raised in the past by other contracting states (and not always by conservative politicians) including the possibility of a state withdrawing from the Convention system and rejoining it on a qualified basis, by making reservations about the application of the Convention to that state. But the broader view had prevailed that supporting the Court was important, especially if states were to uphold human rights not just in the Council of Europe and the EU but also in the UN and other international forums.

The reforms to the ECtHR agreed at Brighton in April 2012 encourage the ECtHR consistently to apply the margin of appreciation and subsidiarity in its judgments,[21] and provide for the insertion of a direct reference to subsidiarity and margin of appreciation into the preamble of the Convention through the agreement of Protocol 15.[22] It was argued that when the Convention is considered in the context of these reforms, the argument for a democratic override, and the question of who has final say, are less powerful. It was suggested that one option to address concerns about sovereignty would be to add a further provision to the Convention's preamble, stating that it is part of the function of the ECtHR to respect the constitutional traditions of contracting states. This would replicate a similar provision in the Treaty of

[20] Dissenting judgment in *Golder v UK*, Application No. 4451/70, 21 February 1975, para 39.
[21] Para 12 of the Brighton Declaration.
[22] Protocol 15, Council of Europe Treaty Series No. 213, 24 June 2013 (not yet in force).

Lisbon in relation to the function of the EU. Another suggestion was the idea of changing the composition of the ECtHR's Grand Chamber to a non-permanent body, composed of specially appointed judges who are still active in the Supreme Courts of the contracting states. This would be a way of creating a system similar to the one before Protocol 11, when the ECtHR had a commission. The idea of re-creating a commission was also raised, in light of the experience and practice of the IACtHR, as a means of helping the ECtHR on issues such as fact-finding, filtering of cases, etc. It was observed that the current reforms were making improvements in at least some of these areas already.

4. Withdrawing From the Court, and Other Options

One approach to rebalancing the sovereignty issues is through the creation of a new settlement for the UK on human rights. In October 2014, the Conservative Party published proposals for changing the UK's human rights laws, which would make a number of significant changes to the existing arrangements. At the heart of the proposals is a change in the form of domestic legislation that the UK should have, replacing the Human Rights Act 1998 with a UK British Bill of Rights and Responsibilities.

A British Bill of Rights and Responsibilities

Under the proposals, a British Bill of Rights and Responsibilities would enshrine the text of the Convention verbatim, as the Human Rights Act 1998 currently does. At the same time, the proposals reject the philosophy of the ECtHR, in particular the 'living instrument' doctrine and the concept of proportionality. The aim of the proposals is to generate a domestic dialogue on human rights, giving the UK courts, rather than Strasbourg, the final say over human rights in interpreting Convention rights, 'as clarified by Parliament'. It was noted that there had been some criticism about the ECtHR infringing national sovereignty under the last Labour government, so sovereignty concerns were not new in the UK. It was also observed that the Conservative Party proposals are not a government proposal, and that the draft Bill is yet to be published. The meeting explored the substantive and practical implications of the proposals.

It was observed that the purported aim of the proposals to make the UK courts supreme appears to sit oddly with the practical effect of the proposals, which would give parliament greater sovereignty over the domestic courts, by reducing the scope of the domestic courts to interpret human rights law. The proposals would remove the power of UK judges to bring statutes into conformity with the ECHR, restrict the domestic courts' use of the proportionality principle, and constrain judges' interpretation of human rights. This raised the question of how UK judges could interpret Convention rights under the new British Bill of Rights and Responsibilities if the interpretation resulted in a different conclusion from the previous authoritative decisions of the UK court. As human rights laws would be limited to the 'most serious cases' under the proposals, some claimants would have to apply to the ECtHR rather than bringing claims before domestic courts, with the consequence that the role of the national courts would be undermined rather than bolstered. It was noted that the proposal to sideline 'trivial' rights and focus only on 'serious' rights also seemed at odds with the central tenet of human rights, which is that they are for every individual, and it was observed that what may seem trivial to one person may not be to another.

It was also queried whether the proposal to constrain the scope of the Convention to UK territory was workable, given the developing case law in this area, and the major dispute it would create between the executive and the national courts. It was noted that to date the Human Rights Act 1998 has been used by families of military personnel who they alleged had suffered while on duty, for example through dehydration or lack of adequate equipment, and therefore the Act had been used to reinforce the rights of

soldiers.[23] Under the proposals for the British Bill of Rights and Responsibilities, this would no longer be possible.

It was observed that it was unclear how the proposals for a British Bill of Rights and Responsibilities would affect the devolved administrations of Scotland, Wales and Northern Ireland, and this is likely to complicate the application of the proposals in practice. Under the settlement with the devolved administrations, human rights legislation is built into the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998. So while technically under the doctrine of parliamentary sovereignty it would be open to Parliament at Westminster to enact legislation imposing the British Bill of Rights and Responsibilities on the devolved administrations, it was observed that in practice it would be necessary to consult them on any changes, and this would be likely to raise problems of an acute political character. If the devolved administrations did not want the proposed changes, it could leave England alone with a more restricted human rights regime. In Northern Ireland, it was noted that a withdrawal from the Convention could also place the UK in breach of its international obligations under the Belfast Agreement (also known as the Good Friday Agreement) of 1998 between the UK and Ireland, under which incorporation of the Convention into Northern Irish law is a fundamental tenet.

Would withdrawing from the Court's jurisdiction address sovereignty concerns?

It was noted that the Conservative Party proposals do not call for the UK's immediate withdrawal from the ECtHR. But a number of participants were concerned that they had been framed in a way that seemed to engineer a political pretext for the UK's withdrawal from the ECtHR.

One participant cautioned against the argument that the UK leaving the ECtHR would be untenable for the UK, a 'cursus horribilum' under which withdrawal would inevitably lead to the UK's forced exit from the Council of Europe and the EU. To say that the UK parliament is effectively stuck with the ECtHR undermines the argument (in favour of the Court) that parliament freely accepted the ECtHR's jurisdiction, which is not incompatible with parliamentary sovereignty. It was argued that it is important to acknowledge that the UK can leave the ECtHR, as sovereignty and political freedom require the possibility of change and exit, and maintaining that the UK is unable to withdraw is only likely to destroy confidence in the ECtHR. It was also important to recognize that there is a genuine underlying constitutional issue at stake here. At the same time, having a positive dialogue with the aim of resolving this conundrum is very different from giving an ultimatum or from wishing to create a situation where exit becomes likely or inevitable.

While the political choice to withdraw from the ECHR remains open to the UK, there was doubt whether this would fully address sovereignty concerns. It was argued that while it would remove the 'taint' of an international court passing judgments which the UK has to implement, it was hard to see how it would be possible for parliament to 'micromanage' the interpretation of rights such as Article 3 (inhuman and degrading treatment) and Article 8 (family life). Even if the Bill of British Rights and Responsibilities did become a reality, it would be likely that 99 per cent of the time the interpretation of Convention rights under the Bill would be the same as under the ECtHR. A few differences would be evident – for example on the particular cases proving controversial for the government such as prisoner voting rights and the deportation of suspected terrorists – but, it was argued, these cases do not go to the fundamental issues. The proposals involve the repeal of section 2 of the Human Rights Act 1998 – under which UK courts must take Strasbourg judgments into account – and section 3 – the obligation to interpret the law in conformity with the ECHR as far as possible. But it was observed that long before the Human Rights Act

[23] For example in *R (Smith) v Secretary of State for Defence* [2010] UKSC 29 and *R (Gentle) v Prime Minister* [2008] 1 AC 1356.

1998 came into effect, the higher judiciary had already developed and refined the principle of legality, under which any ambiguity should be construed in favour of fundamental rights. It was questioned whether the British Bill of Rights and Responsibilities would ultimately satisfy people, as it risked creating as many problems as it would solve, especially when the international angle was also taken into account.

Impact on EU commitments and other obligations under international law

It was stated that the Conservative Party proposals lacked an international legal perspective. The statement in the proposals that 'In all matters related to our international commitments, Parliament is sovereign' was incorrect from an international law point of view. While the proposals called for engagement with the Council of Europe on the proposal for ECtHR judgments to be treated as advisory only until the UK parliament has considered the judgment, it was observed that the only way to achieve the proposals' suggestion of the ECtHR being an advisory body would be for there to be a treaty amendment to the Convention. As it was highly unlikely that other contracting states would agree to this, in practice the UK would have no choice but to withdraw from the Convention if these proposals became law. As membership of the Convention is a condition of membership of the Council of Europe, it would most likely be necessary for the UK to leave the Council of Europe as well.

The impact of withdrawal of the UK from the Convention on the UK's EU commitments would be complicated. It was observed that there is a growing trend for the European Court of Justice to develop its case law in areas of human rights law. It was hard to see how UK membership of the EU could continue while it was violating Convention norms. The withdrawal of the UK from the Convention, and consequently possibly also from the Council of Europe, therefore posed difficult questions for the UK's membership of the EU.

Even if the UK were to withdraw from the Convention, it was observed that the UK would remain bound by a raft of other international human rights law commitments. These include the International Covenant on Civil and Political Rights (which replicates many if not all of the rights in the Convention), the UN Convention Against Torture, the UN Convention on the Elimination of Discrimination Against Women, and the UN Convention on the Rights of the Disabled, to list but a few of the human rights treaties to which the UK is party. It was observed that even if the UK took the radical step of seeking to withdraw from some or all of these treaties as well as the Convention, the UK would remain bound by those principles of human rights law that had attained the status of customary international law, for example the principle that a person cannot be sent back to their country of origin where they face a real risk of torture. Customary international law cannot be changed without convincing the generality of states to amend the norm in question. Therefore, the UK would continue to be bound in many respects by international human rights law, even if it withdrew from the Convention under the proposals.

The Conservative Party proposals suggest that the Ministerial Code, under which ministers have a duty to uphold international law, should be amended 'to remove any ambiguity in the current rules about the duty of ministers to follow the will of Parliament in the UK'. It was observed that this raises wider implications for other areas of international law – including the duty of ministers to abide by the UK's obligations under EU treaties and other international treaties – and sits oddly against the UK's major role in the international community and its commitment to uphold and promote international law.

Impact on foreign policy

It was observed by many participants that the UK's withdrawal from the Convention would come at a price in terms of the UK's position internationally. The UK has a historical reputation as being the creator

of the rule of law in Europe, and serves as a model for states around the world. It was one of the 10 founding fathers of both the Council of Europe and the Convention, and has been at the forefront of promoting human rights internationally. Withdrawal from the ECtHR by the UK would have profound consequences for the UK's international standing, not only in the Council of Europe, but also in the EU, UN and in other international forums.

With reference to the proposals by the Conservative Party for the ECtHR to have advisory status only, it was argued that it was unrealistic to envisage that the UK could ask the Council of Europe for a unique British status while expecting other states such as Russia and Ukraine to implement judgments against it. The Conservative Party proposals send a message internationally that states can 'pick and choose' which treaty obligations to abide by, to the detriment of international law. Talk of withdrawal by the UK could put the whole regional human rights system in jeopardy, with major consequences for victims across the region, particularly in Eastern European states, where the Convention is currently being used as a basis to bring cases on behalf of people detained and tortured by Russian separatists, and by human rights defenders detained in Azerbaijan.[24]

It was also noted that the debate about the UK leaving the Convention is being carefully followed by states with a weaker record on human rights. Russia threatened to withdraw from the Council of Europe in April 2014, following the decision of PACE to suspend it from the assembly over its actions in Crimea and Ukraine. President Uhuru Kenyatta of Kenya, in his speech to the Kenyan legislature on 6 October 2014 before leaving to appear before the International Criminal Court in The Hague on an indictment for crimes against humanity, cited the commitment of the UK Prime Minister to reassert the sovereign primacy of the UK parliament over the decisions of the ECtHR in support of his arguments against the interference of the International Criminal Court. Talk in the UK of withdrawal from the Convention, and the assertion of national sovereignty as an argument against the ECtHR, inevitably undermined the ability of the UK to influence states with a weaker human rights record to uphold their obligations under international treaties and to cooperate with international institutions.

5. The Way Forward?

The meeting considered the challenge of having a constructive and respectful debate on these issues, across ideological and national lines and based on accurate information, in order to broaden perceptions of the ECtHR in the UK, and to increase its legitimacy in the eyes of both parliamentarians and the public. The meeting explored various ways in which this could be achieved.

Myth-busting

Given the important political, legal and constitutional implications of this issue, the democratic debate must be based on the facts and realities in order for it to be useful and productive. It was noted that too often the discussion about the ECtHR in the UK was mired in misinformation. The example was given of the often-quoted claim that ECtHR judges are unelected, when in fact they are elected by a cross-section of European parliamentarians sitting in the Council of Europe's Parliamentary Assembly, among them UK MPs. A more rigorous process of scrutiny of judges has also been introduced in recent years.

[24] Subsequent to the roundtable, families of victims of the Beslan massacre of 2004 (in which 331 people died as a result of a three-day siege by Chechen separatists) spoke to the European Human Rights Advocacy Centre (EHRAC) on this issue while attending a hearing of their case against Russia before the ECtHR in Strasbourg. They stated that, 'The European Court of Human rights exists as a deterrent to totalitarian regimes … [if the UK were to withdraw] it would be an excuse for the [Russian] government to say "We don't like it either!"… The UK has to understand; we all live in the same world and we all have an impact on one another. The UK must not think only of itself, because this will lead to other countries completely disregarding the rule of law'. The full interview is available on EHRAC's website at https://www.facebook.com/pages/European-Human-Rights-Advocacy-Centre-EHRAC/151995828247481.

It was argued that the only way to reverse the tide of media myths on human rights is to make it no longer politically attractive to continue to attack the Court. The most effective contributions to the media have been by politicians who have had the courage to take to the floor and argue that human rights should no longer be a political issue. It was noted that this is an enormous challenge and is unlikely to be resolved before the general election in May 2015.

Action by the Council of Europe and the ECtHR

Reform process

The ECtHR has shown itself to be open to reform in a number of important respects, but it was noted that there has as yet been little time to see whether the various reforms to the ECtHR agreed in the Brighton Declaration of 2012 would bring improvements. Improvements have already been seen in areas such as the backlog of cases and the election of judges, and it was argued that it was important to give these reforms time to take effect.

Outreach

It was observed that both the Council of Europe and the ECtHR need to continue to stay in touch with national political concerns on human rights law issues and national case law on human rights. In order to improve perceptions of the ECtHR's legitimacy, it was suggested that there should be greater outreach from both institutions, as there is increasingly from NATO and the UN. The ECtHR has positive messages to impart about what it is doing across 47 contracting states, producing thousands of high-quality judgments every year which are published on the Court's website, most of which are implemented, and many of which promote human rights in difficult regions. It was argued that there is an important educational role for the Court in getting the broader message out there about its work, and putting into perspective how few cases actually concern the UK. Increased dialogue between the ECtHR and national parliamentarians could also help to foster common understandings and address national concerns. National parliaments, through their committees on human rights, could invite representatives of the ECtHR to discuss issues of general concern and the Court's approach to interpretation of the Convention.

Dialogue

It was noted by many of the participants that judicial dialogue between the ECtHR and national courts is critical. The UK's higher courts have a strong relationship with the ECtHR, based on mutual respect, and there is growing dialogue between them. This occurs at both a formal level through judgments – for example on the issue of the use of hearsay evidence in criminal justice in the UK,[25] on which the ECtHR ultimately upheld national practice – and extra-judicially, through meetings to discuss their respective understandings of key issues and interpretative methodology.

Judgments

It was suggested that Protocol 15 to the Convention (agreed by Contracting States in 2013 but not yet in force) represents an opportunity for the ECtHR to signal that there is a significant change of approach in taking national parliaments more seriously. The Court's registry, which processes all cases (including liaison with states) and provides administrative assistance to the ECtHR, could be more proactive by making clear to governments that if they wish to invoke the margin of appreciation, evidence of this should be provided in their submissions of how at the national level the Convention has been taken into account when deciding a measure is justifiable. The ECtHR could make clearer, as it has started to

[25] In *R v Horncastle & Others* [2009] UKSC 14, the Supreme Court declined to follow the ECtHR's Chamber judgment in *Al-Khawaja v UK*, Applications No. 26766/05 and 22228/06 of 20 January 2009. The Grand Chamber took account of the national court's reasoning on hearsay evidence in *R v Horncastle* and found no violation against the UK in its judgment of 15 December 2011.

recently,[26] that it is considering this material and the role such evidence plays in the decisions it reaches. It was observed that the more the ECtHR can demonstrate that it is taking seriously these arguments and recognizing the limits on its own authority, the more this helps to inform parliamentary debates and to address the legitimacy problem.

Informed parliamentary debate

It was argued that the responsibility for upholding rights in the Convention is a shared one, between the ECtHR and contracting states, with all arms of the state involved, and without either the state or the ECtHR having to assert ultimate authority. The quality of domestic assessment by all branches of government, both at the legislative stage and before the courts, is crucial when the ECtHR is considering application of the margin of appreciation. It was argued that legislatures in contracting states could do more to factor in human rights issues when debating policy choices and making the law, which the ECtHR would in turn take into account when exercising its judgment. This would result in an approach based on shared responsibilities and shared premises.

But it was observed that in order for the state to engage properly, it is vital to have sufficient mechanisms in place to enable those debates to take place, and the difficulty to date has been a lack of political appetite in the UK to create such mechanisms. Mainstreaming human rights into parliamentary structures and process would help governments and parliaments to engage with human rights in an informed and properly advised way. Indeed, there is enormous scope for parliamentary and democratic discussion on how to respond to decisions of the ECtHR, which would facilitate ownership by parliamentarians of these issues. The UK parliament's Joint Committee on Human Rights (JCHR) has been singled out by PACE as exemplary in its monitoring of the execution of ECtHR judgments and vetting of draft legislation for compliance with Convention standards, but it has just 12 members and often struggles to get substantive human rights issues debated in parliament. It was pointed out that Protocol 15 requires parliamentary ratification, and therefore there will be an opportunity for the UK parliament to debate these issues when the protocol is laid before it. The JCHR will be reporting to both houses on the implications of the text, though it is not yet clear when the protocol will be laid.[27]

It was observed that there also needs to be better awareness of human rights. Parliamentarians need to be sufficiently informed of the global context, in which the UK is at the forefront of promoting human rights, to its ultimate benefit, and the damage that the UK will do to itself if it is obstructive to the ECtHR. Parliamentarians (among whom, it was observed, there are fewer lawyers these days) and ministers need to work harder at explaining human rights – and human rights law institutions – to their constituents. Recent surveys of the public's views on human rights issues shows a very mixed, and sometimes contradictory, picture, suggesting that a structured and informed debate on this subject is currently lacking. 'Branding' may also have a part to play: the ECtHR is often dismissed as something from Europe, with 'Europe' as a dirty word. Situating the ECtHR within an international law context, as one of a number of regional human rights courts working for the good of the international community, could help to change perceptions. It was observed that only once armed with the correct information, and the wider perspective, can there be a proper cost-benefit analysis of the issues involved.

[26] The case of *Animal Defenders International v. UK* (reference at footnote 13) was cited as an example.

[27] The government has since laid the text of Protocol 15 before parliament. The written ministerial statement of 28 October 2014 is available at: http://www.parliament.uk/documents/commons-vote-office/2014-October/28th%20October/5.JUSTICE-Protocols.pdf. The Explanatory Memorandum on Protocol 15 is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367916/No._17_Cm_8951_-_Protocol_No_15_amending_the_Convention_-_HR___FF.pdf.

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