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European Court of Human Rights and national courts: a challenging dialogue?

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Mr Chairman, ladies and gentlemen

There is a popular misconception that the European Court of Human Rights in Strasbourg regularly runs roughshod over the decisions of national courts. This is simply wrong. It has been convincingly demonstrated that in the great majority of cases, for example, against the United Kingdom – where the criticism has been most strident – that the Strasbourg Court has followed the conclusions reached by the appeal courts in the three United Kingdom jurisdictions in the great majority of cases. In 2010 some 1200 applications were considered by the Strasbourg Court – of these 23 were declared admissible (less than 3% of the total) and resulted in a judgment of the Court , several of which ended in a finding of no violation. The figures for 2012 are little different.[2]

This misconception is at the heart of our subject this morning. I want to address two topics related to it. The first concerns the underlying philosophy of the ECHR system of rights protection and the rules that the European Court of Human Rights has developed to delineate its proper role *vis à vis* the national authorities. The second relates to the conception that the Strasbourg Court has of the notion of "dialogue" and how in the exercise of its functions this has come to assume, perhaps surprisingly, a role in this area that is constantly developing.

The ECtHR attaches considerable importance to the concept of dialogue. It may not be immediately obvious why this is so since the notion of a court engaging in dialogue appears rather strange at first sight. Courts habitually reserve dialogue for the lawyers representing the parties that appear before them to argue a particular case. We can speak of a form of forensic dialogue in that sense. As we shall see later European superior courts also engage in dialogue with the ECtHR. To understand the need for dialogue we need to go back to the philosophy underlying the ECHR and the notion of the ECtHR as a subsidiary body.

The notion of subsidiarity essentially means that that the task of ensuring respect for the rights and freedoms enshrined in the Convention lies first and foremost with the authorities, including national courts, in the Contracting states rather than with the European Court. The Court should only intervene when the national authorities fail in that task. This was recognised as early as 1968 in the

[1] Deputy Registrar of the European Court of Human Rights. All remarks are made in my personal capacity.

[2] Sir Nicolas Bratza, The relationship between the UK Courts and Strasbourg, 5 EHRLR, pp505-512.

Belgian Linguistic Case in the following terms: "the court cannot disregard the legal and factual features which characterise the life of the society in the State which, as a Contracting Party has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention". The Court in its case law has also recognised that it is the national judge who is best placed to investigate allegations of human rights violations and to put right any alleged breaches of the Convention. *(Varnava v. Turkey*)

The subsidiarity principle is also reflected in the requirement in Article 35 of the Convention that an individual who wishes to bring a complaint to Strasbourg must first have exhausted all domestic remedies and in the Article 13 obligation that the national authorities must provide an effective remedy before the national courts in respect of alleged violations of Convention rights.

To help articulate the relationship between the national authorities (and courts) and the Strasbourg Court, the Court has through its case law developed two important and well-known doctrines – the fourth instance rule and the famous/infamous margin of appreciation. Under the fourth instance doctrine the Court considers that its role is not to act as a court of appeal from national court decisions on questions of fact or domestic law. It is therefore not the Court's function to examine the guilt or innocence of the accused in criminal proceedings. This also extends to the interpretation of domestic law by the national courts. The Court takes the view that it is not its role to go behind or "second guess" how questions of domestic law are interpreted by the courts. These are exclusively matters for the national courts of first instance and appeal. The same self-restraint is exercised concerning the admissibility and assessment of evidence at a criminal trial.

The margin of appreciation doctrine has also been devised as a method of delineating the proper role of the Court when it is called upon to examine policy choices that have been made by the national authorities, including the local courts. These authorities are thus left with considerable autonomy in applying the Convention. It confers what some commentators have described as a mild form of immunity entailing a level of Strasbourg review that is less intense than the review that the Court is entitled to perform on the basis of its full jurisdiction. Instead of being fully reviewable those acts will be scrutinised only if their effects overstep the scope of the margin of appreciation left to the national authorities.

Time does not permit a detailed examination of this important doctrine that has become central to the work of the court when reviewing the choices exercised by the national authorities including the courts when balancing individual rights against important public interests. In recent case law it has meant that the Court is unlikely to find a violation of the Convention when a national court has considered the issues, for example, of freedom of expression or a clash between freedom of expression and privacy rights, by taking into account the principles that the Court has developed in its case law and providing clear reasons for its

decisions.[3] To paraphrase a remark by Judge Bernhardt - I may disagree with the result arrived at by the national court in the particular case but that is not the question. The proper question is whether the national court was entitled to reach the view it did reach in the exercise of its margin of appreciation.[4] The Court will only intervene when it considers that the national courts have not understood or properly applied the Court's case law, where the decision is considered to be an arbitrary one or where its application has given rise to issues of proportionality.

To get a more graphic picture of how the margin operates in practice consider the following statements by the Court in two recent Grand Chamber judgments. The first case – *S.H v. Austria* - concerned the choices made by the Austrian legislature and subsequently upheld by the Austrian Supreme Court to limit *in vitro* fertilisation treatment to the use of sperm or ova from a married couple.

> "*Since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see X, Y and Z v. the United Kingdom, cited above, § 44). The State's margin in principle extends both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests (see Evans, cited above § 82). However, this does not mean that the solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices."*

The second case – which illustrates a different aspect of the margin of appreciation - *Taxquet v Belgium* - concerned the question of whether in a complex trial involving many co-defendants a jury should give reasons for its decision in order to satisfy the requirement of fairness.

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[3] See, for example, *Von Hannover v. Germany (No 2[GC] and Axel Springer A.G. v. Germany [GC]*, judgments of 7 February 2012. The Court followed the balancing of interests carried out by the German Courts in *Von Hannover* but not in *Axel Springer* where it considered that the proper Article 10 test concerning the requirement that public figures show greater tolerance to reporting on their private lives had not be respected.

[4] "Personally I am not convinced that the video film "visions of ecstasy" should have been banned – and this conviction is*, inter alia*, based on my impression when seeing the film. But it is the essence of the margin of appreciation that, when different opinions are possible and do exist, the international judge should only intervene if the national decision cannot reasonable be justified" – Concurring opinion of Judge Bernhardt in *Wingrove v. United Kingdom*, judgment of 25 November 1996.

> *"The Court notes that several Council of Europe member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions (see paragraphs 43-60 above). This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them. A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention."*

One can see immediately from both quotations that the Court, in choosing the type of review it will apply in the case before it, articulates the reasons for respecting the role played by the national authorities (the legislature and the courts) in recognition of the subsidiary nature of the Court's function. It is thus clear from what I have been saying about the relationships that there is a shared responsibility in ensuring the protection of Convention rights between the High Contracting Parties, i.e. the States, and the Court. This has been recognised in the Interlaken reform process and most recently in the Brighton Declaration on reform of the Court. However it is also clear that for each side to fulfil their responsibilities conscientiously a certain dialogue must take place between the different actors, independently of adjudication, bearing in mind that the Court acts as a final instance in respect of 47 European jurisdictions and that there is no appeal against judgments of the Grand Chamber.

It is vital that the Court has the opportunity, in an appropriate forum, to explain its case-law and its techniques of interpretation to those most affected by it and to address the misconception that commonly arise in respect of it. It is especially important that it engages in dialogue with national superior courts who are the Court's natural interlocutors and who are not only keen to familiarise themselves with the development of the case-law but also to explain the particular difficulties which they might have with issues such as the consistency and forseeability of the Court's case-law or the Court's understanding of issues of national law and practice.

So what form does this dialogue take?

The Strasbourg Court attaches great importance to meetings with national superior courts and other international courts including the CJEU (the Court of Justice of the European Union). Many of these meetings take place at the seat of the court in Strasbourg but it is not unusual for delegations from the Court to travel to the countries concerned. There are regular yearly or bi-annual meetings with the delegations from, for example, the French Cour de Cassation or the Conseil d'état, the German Constitutional Court, the United Kingdom Supreme Court, and other European supreme or constitutional courts from smaller jurisdictions. Meetings have also taken place with members of the Irish

Judiciary both at home and abroad. Such meetings are usually structured with members of each delegation presenting papers on some aspects of the Court's jurisprudence that gives particular concern. The purpose of such meetings is not to discuss pending cases. A common theme relates to complaints that the law has developed in Strasbourg is not consistent and is thus difficult to apply in the national system signalling perhaps that there was a problem for the Grand Chamber to resolve. The principle of subsidiarity is another topic that is frequently raised by superior court judges who express concern about particular trends in the case-law or particular judgments of the Court which in their view trespass impermissibly on the preserve of the national courts. For example it is no secret that the Swiss Federal Court judges (and they are not alone) have difficulties with the case law concerning interpretation of the 1980 Hague Convention on the abduction of children and especially a requirement that the Court articulated in the *Neulinger and Shuruk v. Switzerland* judgment that the national courts carry out an in-depth enquiry into the family situation before accepting a request for a return of the child. The Federal Court also had difficulty with the Strasbourg Court's view that the child should not be sent back to Israel contrary to its own finding.

Such meetings are valued by national judges. As one experienced national participant in such meetings has put it:

> "There is great value in personal contact. A quiet conversation between judges can head off steps which might prove ill-advised. It 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".

These meetings with national courts are thus considered to be especially valuable by those who participate in them since they deepen the understanding of all concerned and address directly the need of national judges to grasp what the Strasbourg case law really says as opposed to how it is reported in the newspapers or in learned legal commentaries. It also affords an opportunity for the Strasbourg Court to explain how it operates in practice and to discuss important issues relating to the reform process.

The Court also has an annual meeting with a delegation from the CJEU. These exchanges are particularly important at a time when the draft agreement on accession of the EU to the ECHR is being negotiated. The CJEU has an interest in having a better understanding of the Strasbourg case law in areas that are the subject of litigation before it and the European Court of Human Rights has an obvious interest in learning about the specificity of EU law and how the EU Charter of Rights and Freedoms has been interpreted by the Court of Justice of the EU. These encounters are vital, in my view, if the accession project is to succeed since that requires the existence of an important degree of mutual trust and confidence between the two judicial bodies. This is borne out by the fact that such discussions have already had a direct impact on the negotiation process. The provision in the Draft Agreement (still under negotiation)

concerning the prior involvement of the CJEU (Article 3§6 of the Draft Agreement) that provides a possibility for the CJEU to assess the compatibility of a provision of EU law with the Convention rights at issue where this has not yet taken place - is the fruit of an agreement reached between Presidents Costa and Skouris during one of the regular meetings between the two courts.

Dialogue also takes place through participation in judicial conferences or by official visits made by the President to national courts. For example, President Costa, a former President of the Court, in his three-year term as President visited some thirty-seven jurisdictions including Ireland. During these visits it is customary to meet with representatives of the highest courts and to explain particular problems that the Court has encountered with the country concerned. For example in a recent visit to Serbia the current President of the Court, Sir Nicolas Bratza, explained his concern that with more than 9000 cases against it, Serbia now occupied the sixth place on the list of countries with the highest number of cases, and this because of problems concerning the non-enforcement of national court decisions in different areas which had led to a dramatic increase of repetitive cases. To bring such problems to the attention of Parliament or the Minister of Justice or other key actors may not lead to an immediate solution but as an awareness raising strategy it is certainly an important step in the right direction.

Another important means of judicial dialogue is through judgments. This occurs when Strasbourg judgments are the subject of considered criticism by the national courts. The case of *Al-Khawaja and Tahery v. the United Kingdom* is an excellent illustration. This case concerned the hearsay rules in the United Kingdom. Both applicants had been convicted on the basis of evidence which they had no opportunity to cross-examine in Court. A Chamber of the Court found that the evidence against them was the "sole and decisive" evidence leading to their conviction and found a violation of Article 6 on the basis of the Court's established case-law. Following this decision the United Kingdom Supreme Court in its judgment in *R v Horncastle and others* maintained that the "sole and decisive" rule was developed by the Court with reference to continental systems which, in contrast to the common law, do not have a comparable body of jurisprudence or rules governing the admissibility of evidence. It was considered that safeguards concerning the admissibility of hearsay evidence contained in the relevant Criminal Justice legislation were sufficient to ensure the fairness of the proceedings. Under the 1998 Human Rights Act the UK Courts were obliged to take account of Strasbourg Jurisprudence and apply principles that were clearly established but, on rare occasions, where the Court was convinced that the Strasbourg judgment did not sufficiently appreciate or accommodate some aspect of English law, the Courts could decline to follow it. In *Horncastle* the Supreme Court declined to follow the Chamber's judgment in *Al-Khawaja*.

The case was referred to the Grand Chamber of the Court which eventually held that the "sole and decisive" rule was not to be applied in an inflexible manner and must take into account the specificities of the particular legal system concerned in reaching its conclusion that there was no violation of Article 6. For

the Grand Chamber the inability to cross examine key testimony would not lead automatically to a finding of a violation of Article 6 but was a very important factor to be balanced in the scales and would require sufficient counter-balancing factors or strong procedural safeguards to overcome it. In the case of *Al-Khawaja* the Court attached considerable weight to the safeguards and other features highlighted by the Supreme Court in *Horncastle* and found no violation. However it did uphold the Chamber's finding of a violation in the case of *Tahery* as it was not satisfied that .there were sufficient counter balancing factors.

In his concurring opinion, Judge Bratza considered that the case-law was a good example of judicial dialogue between national courts and the European Court on the application of the Convention. In an article on the relationship between the United Kingdom Courts he made the following comment which illustrates well what I have been saying about how reasoned and informed criticism is perceived in Strasbourg:

> "I believe that it is right and healthy that national courts should feel free to criticise Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices. But I also believe that it is important that the superior national court should, as Lord Phillips put it in the *Horncastle* judgment, on the rare occasions when they have concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of the domestic process, "decline to follow the Strasbourg decision, giving reasons for adopting this course". If, as has happened in the case of *Al-Khawaja*, Strasbourg is given the opportunity to reconsider the decision in issue, what takes place may indeed as Lord Phillips put it, "prove to be a very valuable dialogue between this court and the Strasbourg Court". I firmly believe that such dialogue can only serve to cement a relationship between the two courts which, whatever criticisms may be levelled against the Strasbourg Court, is a sound and solid one."

Al-Khawaja is an example of a European court being influenced by criticisms of a national court. But the reverse situation where the national court adjusts its case law to bring it into line with Strasbourg case law is also an essential part of the judicial dialogue. One recent example is the case of *M. v. Germany*. This concerned the addition of a period of preventive detention for security reasons following the end of a term of imprisonment in the case of a violent offender. In a judgment of 24 November 2009 the European Court found that the applicant's continued detention beyond a ten-year period - which had been the maximum allowable period for preventive detention under the legal provisions applicable at the time of the commission of his offence – amounted to a violation of Article 5 §1 (the right to liberty) and Article 7 (prohibition of the retrospective imposition of a penalty). In a judgment of 4 May 2011 the Federal Constitutional Court of Germany brought its case law into line with the Strasbourg judgment holding that although the European Convention on Human Rights ranked below the German Basic Law the provisions of the Basic Law are to be interpreted in a

manner that is open to the influence of international law and that the case-law of the European Court of Human Rights serves as in interpretational aid for the determination of the scope and contents of the fundamental rights enshrined in the German Basic Law.

However it is important to note that dialogue with the Court is not confined to the action and reaction that occurs in relations between the Strasbourg Court and the national court. It may also take place through the intervention of third parties in the proceedings before the Strasbourg Court. I refer in this respect to the Court's liberal practise of admitting third-party intervention. In many – if not most – of the cases heard by the Grand Chamber NGOs or other groups have filed third-party interventions bringing to the Court's attention perspectives and case law developments in the relevant area of law under examination that might not have been reflected in the parties' pleadings. It is common also for third-party states not directly involved in the proceedings to intervene as third parties. In the famous case of *Lautsi v. Italy* concerning the presence of the crucifix in classrooms, nine states intervened in the procedure in addition to thirty-three members of the European Parliament (acting collectively) and ten NGOs. In the *Taxquet* case concerning the issue of whether juries should give reasons for their decisions Ireland intervened. The participation of non-parties in this way is another form of dialogue which is both necessary and constructive, ensuring that the Court has access to the broadest spectrum of opinion and arguments on the issues before it. The case of *Saadi v. Italy* which concerned the Court's case law under Article 3 where the removal to Tunisia concerned a suspected terrorist and the case of *Scoppola (No 3) v. Italy* concerning the hotly debated issue of a prisoner's right to vote – are other examples.

As I have indicated it has been recognised in the Brighton Declaration that the effective implementation of the Convention is a shared responsibility between the States and the European Court of Human Rights. It is clear that the States have a major role in this partnership since they must ensure in their national law and practice the protection of the rights of the Convention. It is also clear that this process will not be able to proceed in a harmonious manner if dialogue is absent. Dialogue as I have described it has become a fundamental feature of the European system of human rights protection. It enables the Strasbourg judges to better understand issues of national law and practice; it permits national judges to better understand the implications of leading Strasbourg Court judgments and provides a constructive platform from which to criticise Strasbourg case law. It also ensures that the Court does not become detached from reality and is kept up to date with relevant developments in the Contracting Parties. One reality is that the international protection of human rights in today's world has become a highly complex exercise and that the European Court must ensure that human rights are <u>effectively</u> protected in a manner which respects the principle of subsidiarity and does not trample impermissibly on the prerogatives of the national judges. Dialogue between the different actors enables these inherent complexities and subtleties – not always apparent from the parties' pleadings – to be better taken into account.

The necessity of dialogue has increased in proportion to the growth and significance of Strasbourg case-law. Where an international court has power to make binding pronouncements on the compatibility of national law with human rights principles in a manner that is binding on the State and with no possibility of appeal, it is imperative that the Court fully understands national law and the decisions of national superior courts. It must also be attentive to the legal position of other countries with a view to determining whether there exists a consensus on the matter under examination. The Court must also be sensitive to the views of national judges since it is the national judges who must apply the principles of the Convention in their daily work. A failure on the Court's part to recognise the need for dialogue would undermine the proper performance of that role and would lead to outright confrontation and antagonism between the national judge and the Strasbourg Court. Such a negative development would call into question the legitimacy of the Court's work and ultimately lead to profound loss of confidence in the Strasbourg Court.

But are there limits to dialogue as I have described it? In my view there are very few. Strasbourg justice is not a cloistered virtue. Judge Bratza has indicated it must be open to judges in their decisions to provide a reasoned critique of Strasbourg case-law. As we have seen from the judgment in *Al-Khawaja* this is a model of how Strasbourg law can develop. The only restraint is one that is observed naturally by independent judges when they meet, namely to confine the discussion to case-law principles and not to discuss pending cases that await adjudication. This in my view is a reserved domain where dialogue is properly confined to exchanges between the Court and the lawyers who appear before it. Indeed far from restricting dialogue the current trend is to allow it to develop in a more structured manner. The Court has itself called for the States to consider the possibility of Advisory Opinions being requested by the superior courts of the Contracting Parties. The issue was taken up in the Brighton Declaration and is currently being examined in Strasbourg by the Council of Europe's steering committee. It is an important initiative which, if it bears fruit, will go a considerable way to avoiding the clashes between the Strasbourg Court and the national courts that, inevitably, occur from time to time[5] since an advisory opinion system will result in the national judges and the Strasbourg judges being part of the same team.

[5] See, for example, the Court's judgment concerning the retention of DNA of persons convicted or charged with criminal offences, *S and Marper v. United Kingdom [GC],* judgment of 4 December 2008 and *Konstantin Markin v. Russia [GC],* judgment of 22 March 2012 where the Court disagreed with the Russian Constitutional Court on an issue concerning paternity leave for soldiers.