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THE RELATIONSHIP BETWEEN THE STRASBOURG COURT AND NATIONAL COURTS

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II. INTRODUCTORY REMARKS

In many ways the European Court of Human Rights in Strasbourg ("the Strasbourg Court") is the proverbial ivory tower, cut off from ordinary people in the countries of Europe. In this country in particular, the Strasbourg Court is a largely unknown and often misunderstood beast. I myself have spent most of my professional career outside the United Kingdom. I am therefore very grateful to the Benchers of the Inner Temple for inviting me here tonight to talk to you, in order to present what, hopefully, is a less controversial facet of the Strasbourg Court than some other facets that are periodically the subject of media attention.

For some time there has been much talk, at international and comparative-law conferences and in learned articles, of the value of judicial dialogue or judicial exchange between judges from different legal systems. The topic tonight is a variation on that theme. The intention is to give a necessarily somewhat sketchy overview of the ways in which national judges and international Strasbourg judges can influence one another in forging a European "common law" of human rights under the European Convention on Human Rights ("the Convention"), a "common law" workable at all the different levels at which courts throughout the 47 European Convention States are called upon to resolve human rights issues. From this standpoint, the British courts furnish just one illustration of a more general phenomenon – albeit representing, I believe, one of the praiseworthy examples of national courts loyally playing the game, delivering extremely high-quality judgments going into Convention law and consciously seeking to make the Convention system successful.

There may be taken to be three aspects to the relationship between the Strasbourg Court and the national courts, namely *domestic remedies, the facts* and *the law:*

(1) *domestic remedies*: the obligation of applicants to exhaust domestic remedies before being able to have the merits of their complaint examined on the international level by the Strasbourg Court;
(2) *the facts*: the incidence, in Strasbourg proceedings, of (i) previous fact-finding by the national courts and (ii) the content of and compliance with the applicable domestic law – this latter point coming under the head of "facts", since for the Strasbourg Court domestic law is a fact that has to be established as much as the particular facts of the case;
(3) *the law*: meaning the legal issue arising under the European Convention.

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Although there is much to be said in regard to both exhaustion of domestic remedies and the two "factual" points, the third aspect is doubtless the one that is the most interesting and also the source of most difficulty. I therefore propose to leave the first two aspects aside tonight and talk about the third aspect.

To begin with a couple of general comments.

In the abstract, there exist various options for regulating the relationship between the Strasbourg Court and the national courts, ranging from a strict hierarchical approach involving the judicial equivalent of micro-management by the Strasbourg Court to a more collaborative approach between international and national judges where the responsibilities are shared. My impression is that the relationship has been oscillating up and down this scale, with the working model not yet definitively settled. How the emphasis will be placed in the future will be one factor shaping the kind of overall system of human rights protection that we will have in Europe. As you will gather from what follows, my own preference is for the second, collaborative approach.

For me, therefore, the guiding principle is the so-called subsidiary character of the international enforcement system set up under the Convention. From the early years of the Strasbourg Court's existence, starting in 1968 with the *Belgian Linguistic case*, which concerned the use of languages in education in Belgian schools – the ever continuing conflict between French- and Flemish-speakers, it has been reiterated that the international enforcement machinery, by its very nature, is subsidiary to protection of human rights at national level, with the primary responsibility for implementation of the guaranteed rights and freedoms falling on the national authorities, in particular the courts.

III. JUDICIAL CONTROL OF COMPLIANCE WITH HUMAN RIGHTS STANDARDS IN GIVEN CASES

Let us therefore look more closely at this question how, within the system set up by the European Convention, the judicial control of the State's compliance with human rights standards in given cases operates from the point of view of the international judges and the national judges.

A. The Strasbourg perspective

Beginning then with the international side: how the Strasbourg judges treat rulings by national courts.

Given the obligation incumbent on applicants to exhaust domestic remedies, the Strasbourg Court, when reviewing the established facts for compliance with the Convention standards, may well be called on to go over the same terrain as that previously covered by the national courts, especially if, as in the United Kingdom, the national courts customarily take account of the Convention and its case-law in cases raising human rights issues. Does the Convention system therefore

involve the Strasbourg Court sitting in appeal, as it were, on judgments given by national courts?

The answer to that question is the typical lawyerly one of yes and no. The Strasbourg Court has developed a principle of interpretation known as the doctrine of the national margin of appreciation (in ordinary English, a doctrine recognising that an area of discretionary choice is available to the national authorities in certain contexts when they are regulating the exercise of a Convention right). The result of this principle of interpretation is that the Strasbourg Court will exercise a degree of judicial self-restraint vis à vis decisions taken by national authorities, in particular rulings by national courts.

The doctrine derives from the subsidiary character of the Convention machinery of control. It serves to delineate the dividing line between what, in political democracies, is properly a matter for each community to decide for itself at local level and what is so fundamental that it entails the same requirement for all countries, whatever the variations in legal traditions and culture. Its effect is to open up or shut down the degree of scrutiny of the Strasbourg judges, depending on whether the national "margin" of democratic discretion, if any, acknowledged to exist in the context is wide or narrow.

Generally speaking, to quote the words of my predecessor as UK judge on the Strasbourg Court, Sir Nicolas Bratza, "despite what is sometimes heard, the Court is highly respectful of national courts and their place in the Convention system". In practice, the closer the analysis of the national courts reflects the European Convention and its case-law, the more likely the finding will be that the national courts have remained within the domestic margin of appreciation. There will be less temptation for the Strasbourg Court to engage in micro-management and to disturb the rulings of the national courts if the national courts are operating domestic remedies with an eye to compliance with Convention standards and case-law. In other words, if the procedural aspect of subsidiarity is working well as regards the operation of domestic remedies, then the substantive aspect of subsidiarity, that is the extent to which the Strasbourg Court will reach into the Convention merits of judicial decisions taken at national level, will in turn be positively affected in favour of greater subsidiarity.

Going further, Sir Nicolas Bratza has added:

> *''National courts applying themselves the Convention can be highly influential in the way in which the [Strasbourg] Court's own interpretation evolves."*

Although there have been and will always be instances of the Strasbourg Court in effect reversing the national ruling on a human rights issue, many cases coming from the UK Supreme Court (and its predecessor, the House of Lords), as well as from the highest courts of other countries, have illustrated a judicial dialogue accomplished through judgments in decided cases. On a few occasions, as we will see from a German and then a British example in a few minutes, this

dialogue has taken the form of a continuing exchange, with the position on both sides progressively evolving in the light of the other's judgments.

A first point to make about this two-way traffic between the national and the international judges is that the careful review of the Strasbourg case-law, as well as of the British precedents on the Convention, by the UK courts has made the subsequent assessment of Convention-compliance to be carried out by the Strasbourg Court a much easier task than it was before the Human Rights Act of 1998 came into force in 2000: the conceptual legal framework situating the Convention issue in the context of the British legal system, whose concepts are alien for many non-British lawyers, is already there and is not infrequently used as the basis for the Strasbourg judgment. The *Diane Pretty* case from 2002 (concerning the right to life and assisted suicide) is often cited as an early example of exemplary national reasoning (in that case, in the House of Lords) metamorphosing into Strasbourg reasoning when the case has ended up there.

Thus, careful analysis of the relevant human rights case-law by the domestic courts can be seen to have helped the Strasbourg Court to develop its own jurisprudence when the case has subsequently come to Strasbourg. This kind of "borrowing" by the Strasbourg Court from the national courts has not always been possible, or not to such an extent anyway, in cases where the national courts, in particular the highest courts, analyse human rights issues solely in terms of the national constitutional law.

Despite such cross-fertilisation, it is fair to say that there is far from any consensus surrounding the margin of appreciation and its application. One can thus discern, from some Strasbourg judgments and some separate opinions of judges, different philosophies as to the deference to be accorded, or not to be accorded, to the assessment of human rights issues by national courts.

Some Strasbourg judges - and up till now they would seem to be the majority - take the view that if the independent and impartial national courts, who are better acquainted with the democratic society of their country, have properly and fully considered the contested legal measure on the basis of the relevant human rights standards, there will need to be strong reasons for them to substitute their own, different assessment for that of the national judges. You will find a statement to this effect in the judgment delivered by the Strasbourg Court in 2009 in connection with the fox-hunting ban, for example. This more deferential approach will be especially so in cases where two Convention rights are in conflict and there are in effect two (or more) potential Convention victims involved in the proceedings before the Court. In the British case of *MGN* from 2011, where the publisher of the *Daily Mirror* complained about the UK courts finding that it had breached Naomi Campbell's privacy by publishing articles and pictures about her drug-addiction treatment, the Strasbourg Court, in finding no violation of free speech, was evidently attentive to the manner in which the House of Lords had effected the balancing exercise in arbitrating between the competing interests of media freedom and individual privacy.

On the other hand, some Strasbourg judges, fearful of abdicating their ultimate responsibility for ensuring the observance of the Convention by the Contracting States, are minded to take a less deferential attitude. For them, each case is to be individually considered afresh in Strasbourg on its particular merits; the facts are simply to be measured against the Convention standard by the European Court - almost as a first-instance court would do; and national courts, including the superior courts, are to be "corrected" if they are judged to have erred in their assessment of the human rights issue, say on whether an extradition or expulsion of a given individual can be regarded as meeting the test of proportionality on its particular facts. This is the approach tending towards micro-management.

One unknown lying ahead is therefore whether the present, "highly respectful" dialogue – to use the vocabulary of Nicolas Bratza – between the Strasbourg Court and the national courts will be maintained or will veer off in another direction.

B. The perspective of national judges

On the other side of the relationship, there is the perspective of the national judges: how they react to judgments from the Strasbourg Court.

To begin with, where there has been a Strasbourg judgment finding a violation of a Convention right in respect of the country concerned, the national courts can on occasions positively contribute to the process of executing the international judgment by adapting their interpretations of national law, even constitutional law, so as to transpose the Strasbourg approach into national law.

This the German Constitutional Court did in relation to legislation allowing preventive detention of convicted dangerous criminals. In a first judgment, in 2004, the German Constitutional Court upheld the constitutionality of retroactive prolongation of such preventive detention. On application by the unsuccessful petitioner in Germany, this was found by the Strasbourg Court, in 2009, to give rise to a violation of the European Convention. The German Constitutional Court thereupon, in 2011, did an about-turn and denied the constitutionality of the preventive-detention scheme. The fourth round in this judicial exchange was the decision, later in 2011, by the Strasbourg Court not to set in motion the pilot-judgment procedure in relation to the many applications received in Strasbourg from German prisoners subject to the contested scheme – this in the light of the Constitutional Court's incorporation of Strasbourg case-law into its interpretation of constitutionality. The final chapter of this story was the enactment in 2013 by the German Parliament of new legislation drafted on narrower, Convention-compliant grounds.

This is a striking example, but generally speaking a greater willingness can be discerned on the part of the national courts, where this is possible of course, to translate the implications of individual judgments concerning their country directly into national law, thereby diminishing or even avoiding the need for intervention by the legislature or the executive.

Another, indeed perhaps the principal, question under this head is the extent to which national judges should feel bound by Strasbourg case-law. Here Strasbourg insiders are less qualified to speak, since this is something that will on the whole be regulated by national law or practice in each country – in the British case, by section 2(1) of the Human Rights Act 1998 – and, on its specifics, it is thus an issue for national judges to resolve.

Speaking from the standpoint of the UK Supreme Court, Baroness Hale, in an article from 2012, pointed, with apparent approval, to several examples where the Supreme Court had followed its own – British – line rather than a pan-European line, acting in accordance with British conditions and British values, so as either to extend a Convention right into a new context or, on the contrary, to accept a restriction on its exercise. As a matter of principle, I see nothing untoward in this. While the Contracting States have undertaken the commitment that their domestic authorities, including the courts, will observe the standards laid down in the treaty, the object of the Convention system, unlike that of the EU legal order, is not to bring about uniformity of national law or rigorously uniform implementation of the guaranteed rights in each one of the participating States.

Certainly, the Strasbourg judgments are not merely persuasive; they constitute the most authoritative source of Convention law for national judges. But, to my mind, that does not mean that every statement in every judgment has to be slavishly followed.

The starting point for British judges is frequently taken to be the famous dictum of Lord Bingham in the 2004 case of *Ullah*, where he said:

> *"The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."*

One or two subsequent decisions of the Supreme Court have led some commentators to query that an approach of doing the strict minimum should be derived from Lord Bingham's dictum. In a 2012 case called *Rabone*, for example, the Supreme Court held that, in the absence of ordinary tort liability in negligence for the suffering of parents deprived of the life of an adult child, the right-to-life clause under the European Convention (Article 2) provided a remedy for compensation in respect of negligent omissions by a psychiatric hospital to take appropriate steps to prevent the suicide of a voluntary patient. In his judgment, Lord Brown said that

> *"[if a domestic court is] content … to decide a Convention challenge against a public authority and believes that such a conclusion flows naturally from existing Strasbourg case-law (albeit that it could be regarded as carrying the case-law a step further), then in my judgment it should take that further step."*

What is the implication of decisions like *Rabone*? Does the principle of subsidiarity mean that national judges, when confronted with a novel or

jurisprudentially unresolved situation, may themselves have to apply or even "evolve" the interpretation of the Convention outside the strict confines of the existing Strasbourg case-law? "To leap ahead of Strasbourg", in the words of Baroness Hale in her article – although she foresaw more judicial caution when it was a question of challenging the legislature rather than evolving the common law. "Leading from the front", as another commentator (the Norwegian professor, Mads Adenas) has expressed it. In his view, the national protection of human rights should not be subsidiary to the international machinery, in the sense of national judges waiting on Strasbourg to give a ruling on a specific issue before making a move. In a study on whether the courts in France, Germany and the UK were undertaking evolutive interpretation of the Convention Professor Adenas, together with fellow Norwegian Eirik Bjorge, concluded that the supreme courts in these countries were playing an active role in developing the Convention, for example by filling gaps in the interpretative case-law, each supreme court doing this in its own, even distinct, way determined by the requirements of the relevant national legal order.

It should not be overlooked either that the margin of appreciation includes the freedom for the national courts, relying on their own national law and legal traditions, to provide a higher level of protection than the international minimum standards laid down in the Convention. The common law or British legislation, for example, may be interpreted by British judges as providing for more than is foreseen in the Convention.

However, as far as the power of British judges to develop the Convention law in a dynamic manner is concerned, a note of caution should perhaps be sounded in the light of dicta in a decision handed down by the Supreme Court in June of this year. The claims concerned the liability, or not, of the UK Government in respect of servicemen killed or seriously injured in active combat in Irak. In his judgment, Lord Hope said:

> *"Care must … be exercised by a national court in its interpretation of an instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court … Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg Court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's [that is to say, the Supreme Court's] own creation. In* Al Skeini (HL)*, paras. 105-106, Lord Brown saw a greater danger in construing the Convention too generously in favour of an applicant than in construing it too narrowly."*

Lord Mance was also circumspect. He said:

> *"If it is clear from prior authority or this Court is otherwise confident about what Strasbourg will decide, then we should decide the issue as we believe correct. But in the present very difficult case two considerations lead me to consider that caution is called for. First, having decided that the common*

> *law recognises no such duty or care or claims as the claimants advance, we should not lightly conclude, in so important and sensitive an area of national life, that the Strasbourg Court would take a different view. Second, since I have no confidence about the scope or application of any positive duty which the Strasbourg Court might recognise under Article 2 [the right-to-life clause] in the area, I believe it would be wrong for this Court to advance way ahead of anything that it has yet decided."*

Lord Mance was followed by Lord Carnwarth:

> *"Like [Lord Mance], I consider that our primary responsibility should be for the coherent and principled development of the common law, which is within our own control. We cannot determine the limits of Article 2. Indeed, the multiplicity of views expressed by the nine members of this court, when the issue was previously considered in* Catherine Smith*, shows how difficult and unproductive it can be, even at this level, to attempt to predict how Strasbourg will ultimately draw the lines."*

So there is room for some movement – certainly sideways, and even a little forwards provided that the Strasbourg case-law is sufficiently clear to allow what Lord Brown called "a further step" to be taken as flowing naturally from it. But, for British judges, the will of Parliament as embodied in the Human Rights Act has not been read as granting them a roving mandate to take the European Convention forwards in directions not safely supported by existing Strasbourg jurisprudence. That, at any rate, is how I understand the current state of play.

In terms of the minimum – universal - standard to be observed, a Strasbourg judgment will evidently sometimes furnish a direct precedent, especially when it concerns the country in question.

However, in so far as one can talk of the *erga omnes* effect of judgments, looking to the Strasbourg jurisprudence for authoritative guidance and orientation is often just about as much as can expected of the national courts when called on to take a decision with human rights connotations. By this I mean authoritative guidance and orientation on matters such as:

- the principles, values and considerations to be taken into account for the interpretation of the text of the Convention,
- the concrete meaning of the vaguely worded Convention standards in specific contexts,
- how to set the analytical weighing scales for striking the fair balance between competing societal interests in relation to the enjoyment of a given Convention right,
- the factors that point to the universal requirements of the right in issue, the requirements that are the same for all countries.

The same Norwegian author I cited a while ago, Eirik Bjorge, has also advocated more or less the same thing:

> *"The national courts ought not … to expend their energies seeking to align the case before them with the least dissimilar of the reported cases. Rather they should stand back from the case-law of the European Court, and apply the broad principles upon which the jurisprudence is founded."*

The variety of differing national legal environments, combined with the principle of subsidiarity and the margin of appreciation, make it difficult to envisage treating as a matter of principle Strasbourg judgments as binding throughout the whole community of 47 Convention States.

Recognising a truly *erga omnes* effect for Strasbourg judgments would be tantamount to imposing a rule, applicable within each national legal order, of primacy of Convention law as interpreted by the Strasbourg Court over national law. We are not yet at that point, I think. Certainly not as far as some national constitutional courts are concerned, anyway.

Not surprisingly, therefore, I therefore agree with Sir Nicolas Bratza that "it is right and healthy that national courts should continue to 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 practice". As demonstrated by the cases of *Horncastle* at home in 2009, followed by *Al-Khawaja* in Strasbourg in 2011 (where the problem posed was the admissibility of hearsay evidence of a witness who had died), even in the presence of a direct precedent from Strasbourg, national superior courts remain free to open a judicial dialogue with the Strasbourg Court by declining to follow the Strasbourg precedent and by, as both Sir Nicolas Bratza and Baroness Hale put it, explaining in the reasoning of their judgment why they believe that in the particular instance the Strasbourg Court has got it wrong. In *Al Khawaja*, the Strasbourg Court went some way towards meeting the concerns expressed by the House of Lords in *Horncastle* by qualifying the terms of the apparently inflexible test that it had spelt out in its previous case-law: it accepted that where a hearsay statement is the sole or decisive evidence against a defendant in criminal proceedings, its admission in evidence will not automatically result in a denial of fair trial; but in such circumstances there must be strong counterbalancing procedural safeguards in place, to compensate for the difficulties caused to the defence.

This urging of a principled, even robust, as opposed to "literal" attitude to the Strasbourg jurisprudence is not a clarion call for rebellion, civil disobedience and unbridled activism on the part of national courts. Rather it is a plea that the relationship between the Strasbourg Court and the national courts should not be taken to be a straightjacket. Ideally it should be perceived on both sides as being a flexible, open-minded cooperation directed towards enabling the national courts to resolve human rights issues so as to obviate the need for recourse to Strasbourg, with nonetheless, I believe, the Strasbourg Court having the last word in the event of interpretative disagreement. What is essential is to preserve, especially in those hopefully rare instances of disagreement, a feeling of respect between Strasbourg judges and national judges, a sense of

partnership. Certainly, my predecessors as UK judges on the Strasbourg Court have striven to foster that trust. I am endeavouring to follow their example.

III. CONCLUDING REMARKS

Since the main protection of human rights has to be secured by the national authorities, in the last resort by the national courts, much of the ultimate success of the Convention system will depend on the quality of the cooperation between the courts in the member countries and the Strasbourg Court. The judicial cooperation advocated tonight will be two-way. It should involve the Strasbourg Court's acknowledgement of the national courts' closer grasp both of the facts and of the national policy and other issues involved in balancing the respective interests of the community and the individual. On the other side, the closer the closer the analysis of human rights issues by the national courts reflects the standards and case-law of the Convention, the greater the deference of the Strasbourg Court is likely to be.

In sum, I am in favour of the centre of gravity for the judicial protection of human rights being firmly and solidly placed at national level.

All the foregoing is subject to the usual proviso that these are my personal views and that they should not be taken as representing the collective opinion of the Strasbourg Court, on which I am only one judge out of 47. On that modest note, I terminate.