

Whither Judicial Dialogue?

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Ladies and Gentlemen,

It is my great pleasure to take the floor this evening to deliver the Sir Thomas More Lecture of 2015.

It is a mark of the openness of this historic and venerable institution that it convenes each year a lecture that, for its subject-matter, looks beyond these shores, to Europe.

Previously, this lecture has been delivered by eminent judicial figures. So I regard it as a great honour for me personally, but - more importantly - for the European Court of Human Rights, to address you today.

If I may, I would interject a personal note already by saying how strong my own ties are to this country. I have great respect, appreciation and esteem for it. The culture of the common law has been for me an important part of my own formation as a lawyer – I bear, very happily, the enduring imprint of my legal education in this country. As a European judge, the distinctive English approach to human rights, which rest on that great landmark that is the Human Rights Act, has never ceased to command my attention.

It is something of a commonplace to say that the Convention itself also bears an “English imprint”, if I can put it that way. This refers to the prominent, well-documented and oft-invoked role of British representatives in the nascent Council of Europe. In this context, the name of Winston Churchill must always be spoken – his association with Strasbourg has been cherished ever since.

But mentioned in the next breath is another Conservative politician, David Maxwell-Fyfe, later Lord Kilmuir. It may be that the waters of time have closed

over his achievements on the national stage in the mid-part of the twentieth century – one gathers as much from a recently published short biography of the man (by Neil Duxbury). Yet his name endures in the annals of European law, for he was a prominent proponent and dogged defender of the idea of the Convention, of the nature of the Convention and the shape of the system that should be built around it to give it life.

In this last regard, Maxwell-Fyfe was convinced that the enforcement of the Convention had to rest on an international judicial mechanism. The text of the Convention had to be capable of interpretation and application by the judges appointed to the task. Europe needed, and Europeans deserved, something more effective and more concrete than the text proclaimed by the United Nations the year before – the Universal Declaration of Human Rights. In his concluding reflections, his biographer notes the presumption that some of the developments at Strasbourg must – as the saying goes – have set the late Lord Kilmuir spinning in his grave.

And yet.

In his public statements, Maxwell-Fyfe made the case for States accepting the final word from Strasbourg in the matter of fundamental human rights. He perceived the law, and not just the Convention, as something organic, which must adapt and evolve to fit the constantly changing world around it. To this cast of mind, the idea of the Convention as a “living instrument” would not have been a form of legal heresy. Would this founding father of the Convention be content with his grown child today? His biographer – wisely - leaves the question open. As shall I.

Before I close this historical parenthesis, though, let me simply add my own word of esteem for the statesmanship that is David Maxwell-Fyfe’s legacy to Europe and its peoples.

My theme tonight brings me to the present day, and, by asking the question “whither?”, to the possible future.

This lecture comes almost at the end of my term as President of the European Court of Human Rights, my three years concluding on the last day of this month. That will also mark the end of my tenure as a judge at Strasbourg. While this is not quite my swan song, there is even so an air of the valedictory to my remarks, a looking back and a summing up. And in that summing up, the development of judicial dialogue will be prominent. It has been a constant theme in my presidency.

As I have seen it, to preside the European Court is to take on an outgoing, outward-facing role, to be the first interlocutor with the judicial authorities of

the States that compose the wide community of Convention States. There is an important *peripatetic* aspect to the role. To take a phrase from the French legal system, it is not a case of *magistrature assise*.

And it also implies a continuing openness to listen and willingness to explain.

For me, judicial dialogue is intrinsic to the very nature of the Convention system. It is intrinsic also to the over-riding concern that the protection of fundamental human rights be effective – a concern that I attribute to the authors of the Convention, no less than to the successive generations of jurists who, down to the present day, have applied themselves to concretely vindicating the rights of those under the protection of the European Court.

What I will discuss this evening are the means and ends of that dialogue.

Being here in London I will take as my first example the direct dialogue that takes place between European judges and the upper reaches of the judicial system of this country. This has included discussions hosted by Lord Neuberger and his colleagues at the Supreme Court. A similar exercise then took place in Strasbourg involving the Lord Chief Justice, accompanied by senior figures from the three jurisdictions of the United Kingdom. It is not over yet, as it happens, since I will shortly return to London for my final official engagement, leading a delegation here at the invitation of Lord Thomas. The frequency of these contacts with the United Kingdom leaves no doubt, I think, of the real interest they hold for both sides.

I would add that since the membership of the European Court changes quite often on account of the single-mandate rule, it is all the more important for dialogue to be regular. In this respect, the name of Lady Justice Mary Arden deserves most honourable mention. Lady Arden is the moving force behind the strong relations that exist between here and there; her commitment to the dialogue with Europe is exemplary.

Having spoken in such glowing terms about that dialogue, I hope it will not disappoint you when I say that judicial discretion does not allow me to comment on the substance of these discussions. By the very nature of the exercise, the content of our exchanges is not placed on any public record. But I will stress how important and beneficial it is for both sides. Such encounters make for a sounder grasp of the other's perspective. The two perspectives are, of course, necessarily different. Each has its own legitimacy. The national judge is the embodiment of the rule of law in his or her country, a primordial principle of the modern state and a free society. And, at the apex of national systems, the national judge is a guardian of the constitutional order.

The European judge embodies the principle – championed by Maxwell-Fyfe as noted earlier – of *external review*. In recalling this basic *raison d'être*, I am mindful of the criticism often directed against the Convention, that it stands for “foreign meddling” in national affairs. What purpose does it serve to question the choices or disturb the settled order of this or that democratic state? The whole subject is once again a politicised one in the United Kingdom, and it is not my intention to enter into it tonight. But I must stress the validity of the external viewpoint. It must, of course, be an informed one, but it will also be a detached one. Furthermore, the external perspective is a collective one, and from it come the common principles and standards that make up what has been called the *ius commune* of human rights in Europe.

In order to round out the picture, let me say that the dialogue we pursue with judges in this country takes place in essentially the same way with many other Convention States. Not all of them – we would be stretched rather thin if we were to engage with such intensity with the judiciary in every one of the 47 States in the system. I might add that the degree of receptivity can vary from one country to another. There is, in practice, an element of variable geometry here. But our links with, say, the highest French courts (the *Cour de Cassation*, the *Conseil d'Etat* and also the *Conseil Constitutionnel*), or the Federal Constitutional Court of Germany in nearby Karlsruhe, are as close as with the judicial authorities in this country. These judicial exchanges, both bilateral and multilateral, will certainly continue, and in so doing we have the favour and encouragement of the political authorities of the Convention States – I refer here to the Brighton Declaration on the future of the European Court of Human Rights, and to this year's Brussels Declaration.

I have described for you the existing practice of direct dialogue between European judges and their counterparts at the national level. What of the future?

I have two points to make here.

The first concerns the new initiative launched last week at Strasbourg – the Network of superior courts. This represents a concrete follow-up to a point that is often put to us by national judges in the course of our dialogue with them, and that is: how can the national judge remain fully informed and continuously abreast of the Court's case-law? As you will know, the body of Convention case-law is considerable, and ever-expanding. National courts called on to decide issues governed by, or in some way linked to, the Convention have a very practical need for aid in identifying the relevant Strasbourg precedents. Of course, in this jurisdiction, famed for the excellence of its advocacy, the courts

are assisted to the very highest standards by counsel. Even so, I believe that our Network will be of service to courts in this country as much as elsewhere.

So the first purpose of the Network is to allow the participating courts to consult directly, and with minimum formality, the Court's Registry.

The second purpose is to aid the Strasbourg Court in its work, for we too have very concrete needs. Comparative law is an established part of the Court's methodology, in used to gauge the degree of consensus that exists in Europe as regards a particular issue. That is no easy exercise, and our expectation from the Network is that via our partner courts we will have access to the relevant and reliable information we require.

My second point, looking to the future, is Protocol No. 16 to the Convention. This is an additional Protocol to the Convention, whose potential should not be underestimated. In brief, it creates an advisory procedure allowing the highest national courts to seek guidance from the European Court on questions of principle regarding the interpretation or application of the Convention. The idea of an advisory jurisdiction is no novelty in international law. It is an important dimension of the International Court of Justice. It is also part of the machinery operated by the Inter-American Court of Human Rights. In future – and I hope in the near future – it will be part of the Convention system too. I see great potential in the Protocol to contribute towards the improved implementation of the Convention nationally. In very practical terms, it can cut out a waiting time that is usually measured in years while cases are brought to Strasbourg and wait for decision. More substantively, I see it as an instrument for realising subsidiarity, in the sense of the sound vindication of Convention rights directly within the domestic legal order. I see the procedure as an instance of dialogue between courts that represent different limbs of the Convention system. For me, it fills a discernible gap in the Convention machinery, permitting direct interaction between the national and the international judge. I do not regard it as a mere adjunct, but as a new dimension for the Court to perform the task that the Convention entrusts to it.

When will it become reality? Let me recall that the authors of the Protocol decided that there should be ten ratifications before it could come into force. At the present time there are five. Another eleven States have taken the first step of signing the Protocol – ratification should normally follow in due course. It has been suggested that the Protocol's prospects have been damaged by the negative opinion given by the Court of Justice last December on the accession of the European Union to the Convention. Among the many objections raised by the Luxembourg Court, one concerned Protocol 16. The problem there, for the Court of Justice, was that courts in EU states might make use of the

advisory procedure at Strasbourg so as to circumvent the preliminary reference procedure at Luxembourg. I note that the Advocate General saw the potential problem, but considered that the duty of national courts was clear in this respect – the Article 267 procedure must take priority over any other procedure.

I will go no further into that issue, which would be a whole lecture in itself. It does merit one more comment, though, as regards judicial dialogue at the European level, that is to say, dialogue between Strasbourg and Luxembourg. It is, in my view, quite natural for the two European courts – “both alike in dignity” – to conduct a dialogue in much the same way as this occurs with Supreme Courts and Constitutional Courts. That has in fact been the practice going back many years now. This point was noted in a declaration at the 2007 Intergovernmental Conference that adopted the Treaty of Lisbon, which looked forward to a reinforced dialogue once the Union accedes to the Convention. Out of that dialogue came the idea, taken up in the draft Accession Agreement, for the prior involvement procedure, which was presented to States by the two Court Presidents.

While the EU Court was seized of the question of the Accession Agreement, we considered it appropriate to adjourn our annual meetings, out of respect for the principle of impartiality. We have yet to resume our official contacts. That is something that I hope will happen in the near future, and that the two new Court Presidents – Guido Raimondi and Koen Lenaerts – will continue to develop what is a key relationship between two important European institutions.

I have one more point about the means by which judicial dialogue is conducted, or, more exactly, might be conducted. Again, it arises out of the discussions that we have with national courts. It concerns the situation in which the task of executing a Strasbourg judgment falls to a domestic court, where it should modify case-law or judicial practice so as to comply with the Convention. In case of ambiguity or unclarity in the ECHR judgment, how can this be addressed? The Convention may offer a procedural solution here, albeit untested thus far. What I am referring to is the procedure set out in Article 46 § 3. This permits the Committee of Ministers to ask the Court about the correct interpretation of a judgment. The reason for this provision, which was part of Protocol No. 14, is plain. On occasion, the Committee of Ministers’ supervisory role – which is a vital one – has been complicated by competing interpretations of a judgment of the Court. Of course, if the Court already has another such case on its docket, it will have the opportunity to rule on the efficacy of the steps taken to implement the previous judgment. This is not unusual – many

examples can be given. But might one not regard the Article 46 § 3 procedure as existing not only for the purpose of providing guidance to the Committee of Ministers, but also to the national judge? Could it not, via the Committee of Ministers, serve as a channel of communication in the interests of effective compliance with a judgment of the Court? The idea may be innovative, but it is by no means far-fetched. I think that it merits consideration in the ongoing inter-governmental discussions on the future of the Convention system.

Having described the means – existing and potential – of dialogue, I come now to the ends.

What purpose does judicial dialogue serve?

Here let me refer to an example *par excellence* of judicial dialogue, which occurred between the Supreme Court - the *Horncastle* case - and the Grand Chamber – the *Al-Khawaja* case. I think the example is so well known as to not require a detailed description. In brief, the Supreme Court opened the exchange by setting out with care and in detail the difficulties created for English law by the Strasbourg case-law on the question of the use of hearsay evidence in securing convictions. With a masterful analysis of the development of the European jurisprudence, the Supreme Court invited Strasbourg to take account of its reasons for not applying the “sole or decisive” test, and applying instead the provisions of the Criminal Justice Act 2003. In order to reply, the Court referred the *Al-Khawaja* case to the Grand Chamber, and used the occasion to both clarify and affirm the principles developed in its case-law. Both courts viewed this exchange as a process of dialogue.

Said Lord Phillips:

“There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.”

Said Sir Nicolas Bratza in his separate opinion:

“The present cases afford, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring.”

In due course, the Horncastle case itself came before the European Court, raising complaints about two sets of criminal proceedings – one involving an assault, the other a kidnapping. This provided the opportunity for a Chamber of the Court to examine the fairness – or unfairness – of the trials in the light of the dialogue that had taken place between London and Strasbourg. Applying the case-law as clarified in *Al-Khawaja*, the Chamber conducted a meticulous assessment of the two trials. Regarding the applicants Horncastle and Blackmore, the Chamber concluded that in their trial for assault there had indeed been sufficient counterbalancing factors to compensate for any difficulties caused to the defence by admitting the statement of the deceased victim. Thus no violation of Article 6. It reached the same conclusion regarding the other applicants, finding that the evidence of the absent victim – too terrorised to testify – had not in fact been decisive in securing their conviction. This judgment, delivered last December, brought this laudable judicial dialogue to its conclusion.

There is a second example of judicial dialogue that I will mention, and it involves a court I have already mentioned, Germany's Constitutional Court. I am mindful, in giving this example, that the President of that Court, Andreas Voßkuhle, was the speaker at this event years ago, as he has also been the invited speaker at the solemn opening of the judicial year of the European Court of Human Rights. On that occasion he suggested to us the very telling image to depict the relationship between national courts and the European courts – the image of a mobile, its different elements held in a dynamic balance, linked together by wires or strings that one should not get tangled.

The subject-matter at issue in this example is the provisions of Germany's criminal law on the preventive detention of very dangerous persons. This was the subject of a Strasbourg judgment in 2009 – *M v. Germany*. The applicant complained that, having served his five-year sentence, followed by an additional ten years of preventive detention (the maximum allowed under Germany law at the relevant time), he continued to be detained under provisions that had been enacted some years after his trial and conviction. At domestic level, his constitutional complaint had been rejected, the Karlsruhe Court taking ruling that the retrospective effect of the legislative amendment was not contrary to the Constitution, nor was it disproportionate in the applicant's case.

The European Court found that the situation was in violation of both the right to liberty under Article 5, and of Article 7, which prohibits the application of more severe penalties retrospectively. Following this, the Constitutional Court reversed its position. In a decision given in 2011, and drawing explicitly on the

M judgment, that Court ruled that the legislative provisions in question were contrary to the Constitution. What this case shows for the German system, and I refer here to the comment of President Voskuhle on it, is how the Convention is treated as an important guide to the interpretation of the corresponding provisions of the Constitution.

In 2012, it was the turn of Strasbourg to speak again on the matter. In the *Kronfeldner* case, a Chamber of the Court:

“welcome[d] the Federal Constitutional Court’s approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court’s case-law, which demonstrates that court’s continuing commitment to the protection of fundamental rights not only on national, but also on European level. ... [B]y its judgment, the Federal Constitutional Court implemented this Court’s findings in its ... judgments on German preventive detention in the domestic legal order. It gave clear guidelines both to the domestic criminal courts and to the legislator on the consequences to be drawn in the future from the fact that numerous provisions of the Criminal Code on preventive detention were incompatible with the Basic Law, interpreted, inter alia, in the light of the Convention. Its judgment thus reflects and assumes the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention.”

Returning to this jurisdiction, I will make one more reference, this from the judgment of Lord Mance in the *Chester* case, on prisoner voting. He said:

*“In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as *R v Horncastle* to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.”*

Indeed, one must sincerely hope never to find a situation in which a domestic court is placed in such a dilemma as to have no option but to defy the authority of the European Court. It would signal the clear failure of dialogue, which can only be detrimental to the full observance of the Convention.

The broader point here is subsidiarity. In the Convention system, this is a guiding principle, one that orders the relationship between its national and international limbs. It is the *leitmotif* of the reform process since its beginning in Interlaken in 2010, reiterated with emphasis at Brighton and then at Brussels this year. In due course, it will become part of the written law of the Convention, since Protocol 15 will insert the term into the Preamble. Likewise the margin of appreciation. Taking a positive view, this can be viewed as a “consecration” by States of two linked concepts developed in the case-law, now to be embedded in the wording of the treaty.

Last January, the Court held its annual seminar with the senior judiciary from all over Europe. The chosen theme was “Subsidiarity: A two-sided coin”. Speaking on this theme, the head of France’s *Conseil d’Etat*, Jean-Marc Sauvé, made a series of very lucid points. For him, that is to say from the perspective of the national judge, there is indeed a two-sided coin – one side is subsidiarity, the other effectiveness. This linking of the two concepts is convincing, and applies to the two limbs, or levels, of the Convention system. It affirms the complementary, mutually reinforcing nature of national and European review. On each level it lays a reciprocal duty of loyal co-operation.

There is, I sometimes detect, a sense that subsidiarity is code for something else, for less scrutiny from Strasbourg. That it means taking the “self” out of judicial self-restraint. But for Mr Sauvé, the concept does not marginalise the position of the European Court. Instead, it highlights the definitive nature of the Court’s role and its supreme authority in the interpretation of the Convention. At the same time, it describes the primary role of the national authorities. And what is their need or expectation vis-à-vis Strasbourg? A case-law that is clear, stable and consistent, so that domestic courts may rule with certainty on the cases before them without risking disavowal later on. The subsidiarity principle thus makes demands on us all.

Protocol 15 pairs the principle of subsidiarity with the margin of appreciation. Here we come to the core of judicial dialogue under the Convention. In my own speeches and writings I have described the margin of appreciation not as a concession, as it may sometimes be regarded, but as an incentive that is granted to the national courts to enter fully into their Convention role. That means to appropriate the principles and methodology of the European case-

law, notably proportionality, in the determination of the cases that present before them. This is a form of dialogue that is at the heart of vindicating Convention rights. Speaking first, the national judge details their analysis of the human rights issues at stake in the case, and their application of the corresponding jurisprudential principles. In sequence, the European Court assesses, and, as the case may be, rectifies or validates the analysis. This is, in two sentences, the story of the Human Rights Act in this country, as seen from Strasbourg, over the 15 years since it came into force. Indeed, it ought to be the story of all Convention States, or at least the great majority of them. This decentralised aspect of its enforcement, which hinges on the review performed by domestic courts, can be seen as a growing strength of the Convention system.

The image is sometimes conveyed of the European Court of Human Rights as an activist, over-reaching court, constantly pushing out the boundaries set in the text of the Convention. This is a caricature. Certainly, the Convention has been interpreted dynamically, for the sake of better protection of the individual. But this is done via settled methodology, which must itself be familiar to those who are familiar with Convention case-law. To return to Mr Sauvé again, he observes that as part of the Convention system, national courts need to internalise a two-fold perspective as they act within their margin of appreciation – along with their national perspective should be a European perspective, informed by European standards and consensus. This is where the Convention system as a whole can still develop further. This is where its effectiveness in guaranteeing the protection and enjoyment of human rights can be improved. And judicial dialogue, in the sense I have just described, is no doubt an integral part of this.

The Convention is a living instrument, yes, but also a maturing one. The ideal future that I envisage for it is one in which, State by State, the national authorities grow fully into the role that is naturally and rightfully theirs. In which the dialogue between the national authorities and the Strasbourg Court deepens, and with it the quality of protection of human rights. While I have concentrated on judicial dialogue this evening, that is not to disregard the importance of dialogue with the other domestic powers, the legislature in particular. I have no time to do justice to this emergent phenomenon, which can only further embed the principles of European human rights law in the legal order of the Contracting States. You have in this country perhaps the finest example of this in the form of the Joint Committee on Human Rights, which has been held out across Europe as a model for all States to take note of.

This brings me to my concluding remarks. In my decade and more at Strasbourg, there has been significant change in many quarters around Europe regarding the way in which the Convention is observed and applied at domestic level. Viewed from Strasbourg, the change is palpable. Notwithstanding episodes of controversy, in this country and elsewhere, I believe that the underlying tendency goes in the sense of subsidiarity in the sense I have used it in this speech. As a European judge, I am naturally inclined to look primarily towards my opposite numbers at national level, to study their engagement with the law of the Convention. The protection of human rights is our common cause in Europe, and, for judges particularly, our common task. In performing it, the dialogue between us is a necessity, a corrective and an incentive. With the existing means for that dialogue, along with those anticipated though yet to materialize, the conditions are surely right to improve further the observance of the Convention.

For me, judicial dialogue is the key – indeed, the golden key – to that desirable future for the protection of human rights in Europe.

Thank you.