



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Solemn Hearing on the occasion of the Opening of the Judicial Year

Who Harmonises the Harmonisers?

Speech by Mr. Justice Clarke, Chief Justice of Ireland

Strasbourg, 31 January 2020

President Sicilianos,
Colleagues of the European Court of Human Rights and of the Constitutional and Superior Courts of the States of the Council of Europe,
President of the Parliamentary Assembly,
Madame Secretary General,
Distinguished Guests,

President Sicilianos, can I thank you and your colleagues for the great honour which you have done me by asking me to make this address. My only complaint is that, by revealing that my last formal appearance before this Court was as Advocate on behalf of Open Door almost three decades ago, you have made me feel and seem very old.

But more importantly, can I especially thank you for your kind comments about the contribution which Ireland has made to the Court both in practical terms, as you mentioned and also through the important jurisprudence deriving from Irish cases. We are a small country but we like to think that we contribute more than our size might suggest. That we, to use an English phrase, punch above our weight.

That will be particularly important for us in the context of Brexit which will, of course, occur at midnight tonight. While the United Kingdom will remain a member of the Council of Europe and will continue to contribute to this Court, there will be additional challenges for Ireland, and not least for the Irish legal system, as we become the largest remaining common law country within the European Union. But we are also, as you pointed out Mr. President, a legal system governed by a strong Constitution and thus our own national constitutional jurisprudence is richly informed both by the jurisprudence of this Court but also that of the Supreme Courts of other prominent common law jurisdictions. I would like to think that the diversity of influences which that brings to bear enhances our understanding and protection of human rights.

President Sicilianos,

When we consider the development of the international legal order that includes human rights, it is important to note the progress made in seventy years. This Court, and the Convention which it applies, have a long tradition which guides the shared approach to human rights protection.

But the development of human rights protection is, of course, subject to many other national and international influences. In reflecting on the progress achieved over the past seventy years it will be useful to discuss the challenges which await us over the next seventy years.

One of those challenges is the problem posed by populism for the rule of law, the independence of the Court and the recognition of the Court's authority.

However, that challenge has already been the subject of discussions within each State and, while it is very important, I propose to address a different issue facing national courts, one which is more subtle but nevertheless significant.

Like many titles for papers and speeches which are intended to be clever, today's title "Who Harmonises the Harmonisers?" is an over-simplification and a potentially inaccurate description of one of the issues which is likely to face all courts charged with vindicating human rights over the next 70 years.

I appreciate that not all of the States represented in the Council of Europe and, therefore, on this Court, are members of the European Union. I also appreciate that the term "harmonisation" as used generally in European Union law has a precise meaning which involves making the law in each member state of the Union coincide with that in all other member states subject to whatever discretion may be left to the member states by the terms of certain directives.

In that context I know that the objective of the Convention and of this Court is not to harmonise human rights law in that strict sense but is to ensure that minimum standards for the protection of human rights across the states of the Council of Europe are maintained whilst respecting the plurality of national and international fundamental rights protections. But that too is a form of harmonisation even though States may well be afforded, depending on the circumstances, a significant margin of appreciation and are, of course, also free to provide a higher level of protection for human rights under their national regimes.

But in addition, many of the States who are represented on this Court have subscribed to other international human rights instruments. These include those of general or global application such as the International Bill of Rights, which is comprised of: the Universal Declaration of Human Rights (1948) which proclaimed a "common standard of achievement for all peoples and all nations"; the International Covenant on Civil and Political Rights (ICCPR, 1976); and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976). Other international instruments relate to rights in specific areas or for particular beneficiaries including, for example, UN Treaties such as the Convention on the Rights of the Child (CRC, 1989) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) which are also complemented by the Council of Europe's European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment (1987) and the Convention on Action Against Trafficking in Human Beings (2005).

Finally, it must also be acknowledged that the precise way in which human rights instruments potentially influence the decisions of national courts can vary depending on the national legal order. There are significant differences between the way in which international treaties are applied. In that context my own jurisdiction is I think at one end of the spectrum given that Art. 29.6 of the Irish

Constitution expressly states that no international agreement is to be part of the domestic law of Ireland except in a manner determined by the Irish Parliament.

Other states, to a greater or lesser extent, do regard international treaties as potentially forming part of domestic law without parliamentary intervention. On the other hand, for those states which are members of the European Union, the precise status of Union law, so far as national constitutional arrangements are concerned, may, notwithstanding its general primacy, also vary to some limited extent. My State is, again, towards a different end of this spectrum in that the Irish Constitution expressly recognises the primacy of Union law to a significant extent.

I appreciate, therefore, that the precise way in which the many international human rights instruments which potentially influence the outcome of national proceedings can affect the proper determination of those proceedings in accordance with national law can vary quite significantly. However, that does not seem to me to take away from the underlying issue which is that we, as national courts, are now faced with a range of international human rights instruments which have at least the potential, in one way or another, to have a bearing on the result of individual cases and where, therefore, any potential differences, however subtle, between those instruments, may need to be considered.

I conduct that analysis against the background of the fact that, in almost all national proceedings, there must be a single result. A person claiming a breach of guaranteed rights will either win and obtain whatever remedy national law permits or will lose. A person who defends proceedings, perhaps brought by the State or its agencies, on the grounds of a breach of rights will either succeed in that defence or fail.

Where national courts have the competence to annul legislation or other state measures, proceedings will either result in annulment or they will not. While there may, in certain states and in certain circumstances, be types of proceedings which do not give rise to quite such clear cut results, nonetheless national courts are ultimately called on, to a great extent, to come up with a single answer.

It follows that, whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order.

In analysing those issues it should, of course, first be recognised that the problem should not be exaggerated. It might be described as a first world problem. Most international human rights instruments point in broadly the same direction. The kind of rights recognised are similar. It would be surprising, indeed, if we were to come across a state which had subscribed to two separate international regimes which pointed in different directions.

But those who are involved in regularly having to resolve individual cases know that the most difficult cases, at least from a legal perspective, are those which involve fine judgements, questions of weight and issues of balance. More than one right may be involved and the ultimate question may come down to deciding how to reconcile competing rights. States may have legitimate interests to pursue but the question may come down to whether the manner in which those interests are being pursued is permissible having regard to any diminishment of rights which the State may consider is justified for legitimate ends.

It is here that there may frequently be room for legitimate difference of opinion. While recognising the rights engaged, it may be open to legitimate debate as to how they are to be balanced. Many cases involving state measures come down to an assessment of whether legitimate ends are pursued in a way which is proportionate in the context of the diminution of any rights affected. All such cases are likely to resolve around a judgment involving balance.

Skilled advocates will, therefore, almost invariably seek to present their case, to the extent permissible within the national legal order, by reference to those human rights instruments and, insofar as relevant, decisions of international courts or other bodies charged with the enforcement or interpretation of those instruments, which give the greatest chance of the balance tipping in their favour.

Some human rights cases, of course, turn almost exclusively on their facts. If what is alleged actually occurred, it would undoubtedly represent an infringement of guaranteed rights. In such circumstances access to independent courts protected by the rule of law provides the greatest guarantee of respect for the rights involved. That is why maintaining the independence of the judiciary forms a vital ingredient of the protection of rights generally.

But there are also cases where the facts may not be in particular dispute or may have been resolved by the court having fairly analysed the evidence and where the issues may be ones involving the sort of balancing exercise which I have sought to analyse. In such cases the question is as to how best to ensure overall coherence when faced with a multiplicity of potentially relevant international instruments.

Can I first suggest that there is no magic bullet. National courts must interpret their national human rights instruments in accordance with their own norms. This Court must interpret and apply the Convention. Where relevant the Court of Justice must interpret and apply the Charter. It is also important to recognise that the text of these, and other, human rights instruments is important. Wherever one stands on the very interesting question raised at our earlier seminar by the Vice President of the Council of State of France, which concerned the extent to which it was legitimate to depend on interpretation of text for much of human rights law, I think text must matter at least to some extent even though I fully appreciate the point which you made, Mr. President, about the terms of human rights instruments being usually expressed in very general terms.

States spend a lot of time negotiating the terms of international treaties or considering whether they should accede to them. They do so on the basis of the text of the instrument concerned. The states who subscribe to the Council of Europe have adopted the Convention in the terms in which it stands and can amend it as they consider appropriate. Likewise, the way in which rights are guaranteed in national constitutions or equivalent human rights instruments involves language which the national system itself has chosen. The fact that different language might be used in separate instruments potentially influencing an individual case does not necessarily create problems but it can.

Can I suggest that developing the dialogue which already exists at a number of levels between courts and other relevant institutions provides the best means of ensuring coherence and enhancing an harmonious approach to international human rights. That dialogue can, of course, exist on a range of levels and can be conducted in many different ways.

First, there is the high level dialogue between courts each of which are charged with the cross-border enforcement of rights such as the dialogue between this Court and the Court of Justice. Second, there is the regular vertical interaction between national courts and supra-national courts. This, in itself, can operate on a range of levels.

President Sicilianos, as you know I have had the honour and pleasure of leading a delegation of senior Irish judges to a bi-lateral meeting with judges of this Court under the presidency of your distinguished predecessor President Raimondi. I have also, in the last few years, had the equal pleasure of arranging a meeting between all of the members of the Supreme Court of Ireland with the Court of Justice in Luxembourg. Both the formal, and if I might say equally the informal, aspects of these bi-lateral meetings are an invaluable contribution towards greater understanding of matters of mutual interest.

But there is also that form of dialogue which comes from courts considering each other's judgments. Admissible proceedings only come to be considered in detail by this Court where remedies within the national legal system have been exhausted. It follows that this Court has to consider the way in which national courts charged with protecting human rights have dealt with the case in question. Furthermore, the jurisprudence of this Court will clearly form part of the consideration given by national courts in such cases even if the precise way in which the Convention may apply within the national legal order may vary.

That latter form of dialogue is an inevitable but useful consequence of the way in which we are all required to go about our task of handling those cases which come before our courts.

It might, therefore, be said that the vertical dialogue between national courts and supra-national courts has developed to a reasonable extent. Perhaps the task for the future is both to ensure the continuance and the enhancement of that dialogue. There is a challenge for us all in making the time to engage meaningfully in such dialogue when we are all faced with significant caseloads and where it is natural that our first attention is directed towards what is, after all, our primary role which is to consider and fairly decide those cases which come before us.

Those challenges are potentially even more acute when considering what I suggest is the third, and by far the least developed, pillar of judicial dialogue in the human rights area. That dialogue involves a discussion, whether on a bilateral or multilateral basis, between national courts charged with enforcing human rights and, in particular, courts at the apex of national systems.

There have, of course, often been close contacts between the judiciaries of neighbouring countries and, in particular, those which share similar legal systems and traditions. It is also the case that national legal orders differ on the extent to which it is considered permissible or appropriate to have regard to the jurisprudence of the courts of other States in developing their own case law. But an understanding of how the apex courts of other states have dealt with similar problems can often be useful.

In that context the development both by this Court through the Superior Courts Network and by the Court of Justice through the Judicial Network of the European Union, of shared databases of relevant decisions taken by the higher courts in the national legal orders is, in my view, a most welcome development. So too are significant events such as the organisation by the Court of Justice and the Constitutional Court of Latvia of a meeting between its own members and senior members of national judiciaries which is due to be held in Riga in March. The topic of the conference is to consider, on a multi-lateral basis, the common constitutional traditions within the European Union.

I think it would be fair to say that a broad based horizontal dialogue between higher national courts (beyond the courts of those States which have already close historical links) is only in its infancy. It is a development, however, which, in my judgement, should be greatly encouraged. It can, like the horizontal dialogue with supra-national courts, involve both actual meetings, whether bi-lateral or multi-lateral, or, to the extent permissible within each national legal order, a consideration on a comparative law basis of our respective jurisprudence.

But there are challenges. The first challenge obviously stems from courts having the time and resources to devote to such dialogue. We cannot spend most of our time attending meetings and conferences no matter how interesting, valuable and pleasurable that might be. This is a particular challenge for a small country such as Ireland and one which can only be increased in the light of Brexit. It is also a particular challenge for courts, such as the Irish Supreme Court, which have competence in both constitutional and ordinary legal matters and who therefore have to engage across a wide range of areas and with a significant number of international bodies. However, it is, in my view, a challenge which must be faced.

Exactly how we come to be familiar with the case law of colleagues from other States may vary depending on national legal practice. Some courts have significant research departments which may, where appropriate, allow the Court to inform itself about relevant case law from other states. In the common law tradition from which I come there is an obligation on any advocate representing a party to research and place before the Court any relevant legal materials which might legitimately influence the Court's view of the law. This applies even where the material in question may be unfavourable to that advocate's case. This duty also includes an obligation to place relevant comparative material before the Court but, of course, the sheer volume of potential material now available online must place a practical limit on that obligation.

Perhaps one of the greater challenges stems from context. When we read the judgments of our own courts and of those supra-national courts which have a direct impact on us, we do tend to know the legal context in which those judgments were written. But unless we are familiar with the legal context within which proceedings in another State were conducted there can be a danger of being misled on the true question decided by the Court concerned. While the style in which judgments are written can vary significantly from legal system to legal system we all, I think, usually refrain from stating the obvious.

But what may be obvious to those operating within their own national legal order may not be at all so obvious to someone reading a judgment who comes from a materially different legal system. Superficially issues may appear to be the same but they may be significantly influenced by specific measures within the national legal order or, indeed, by differences between the way in which international instruments impact within that national legal order. I have to say that I have often had to emphasise to advocates appearing in our court that it is important, when referring to judgments of other respected courts from different States, to lay the ground properly by establishing that the Court concerned was really answering the same question that our court was being asked to consider.

There are, therefore, real challenges involved in seeking to enhance the extent to which we can attempt to establish a coherent and an harmonious human rights order by giving proper consideration to the views expressed in the judgments of colleague apex courts in other States. This does not, however, mean that we should minimise the benefits. The challenges can be overcome, or at least minimised, and the rewards are potentially well worth the effort.

If we consider it desirable that we develop a coherent and harmonious international human rights order which nonetheless respects appropriate national differences, then a deeper understanding amongst the senior national judiciaries of each of our States of the way in which common issues are addressed in colleague courts must surely be to everyone's significant benefit. Save to the extent that we may be obliged to take a certain course of action because of binding international obligations, such as, importantly, the minimum standards imposed on us all by the Convention, then we are, of course, free to differ. But that freedom to differ is, in my view, best exercised with understanding both of how common issues are approached in different States and the reasons why our colleague courts have come to the judgments which they have.

Can I suggest that one of the difficulties involved in building a coherent and harmonious approach to the vindication of human rights must require us to face the undoubted challenges of properly understanding and, where appropriate, applying the reasoning of respected colleagues across our many disparate States. We do not need to be the same but we have sufficient common legal traditions to make it important that we strive to ensure that we also share a coherent and harmonious human rights order.