

FOREWORD

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The 50th anniversary of the ECHR coincides with the entry into force of the Human Rights Act 1998 incorporating the provisions of the Convention and also the decision of the European Union to embark on the drafting of its own Charter of Fundamental Rights. Both incorporation and the decision of the European Union are a reflection of what has been achieved over the last 50 years. Few would have imagined when the Convention was being drafted in 1950 that it would eventually become part of the law of the United Kingdom to be applied by national courts with reference to the case-law of the Convention institutions. Indeed, at the beginning of the life of the old Court there was so little business that the Belgian judge in the Court – Henri Rolin – wrote an article entitled “Has the European Court got a future?” So what has happened over this period in response to Judge Rolin’s despondent interrogation? Four main developments have taken place.

In the first place the ECHR has taken root throughout Europe. Gradually, in the course of the sixties and seventies there was universal acceptance of the concept of a collective guarantee of human rights supervised by the Commission and Court in Strasbourg. States accepted the premise that a consequence of the right to be concerned with the protection of human rights in other countries was that the spotlight would also be shone on their own laws and practices. Following the tumultuous events of 1989, States from central and eastern Europe were required to ratify the ECHR as a condition of entry into the Council of Europe. By the end of the century the number of Contracting parties had grown to forty-one, including Russia and Ukraine. The Convention community thus extends from the Atlantic to the Pacific and embraces some 800 million people.

Secondly, an impressive corpus of international human rights law has developed over the years through the examination of cases by the Commission and Court. Most, if not all, areas of national law must now take account of Strasbourg jurisprudence. It also radiates its influence beyond Europe and has been taken into account by the superior courts of many Commonwealth countries. The judgments of the Court have led to many changes in national law and practice even in countries not directly concerned by the Court’s judgment. The importance to the new democracies of the standards reflected in these judgments should not be underestimated. They map the contours of their law reform agenda. The law on fair trial, the right to liberty, freedom of expression and association – shaped for the most part in the context of complaints against the established democracies of western Europe – has become an invaluable source and formulation of democratic standards to be factored into reforms of the codes of civil and criminal law.

The third development concerns the continuous efforts of member States to keep the ECHR in pace with the times. The First, Fourth and Seventh Protocols added a series of new rights to the core freedoms contained in the basic treaty. The Sixth Protocol provided for the abolition of the death penalty in peace time and, in recent years, the Eleventh Protocol created a

single European Court of Human Rights composed of full-time judges in an effort to speed up the examination of human rights complaints. The latest development comes in the form of a Twelfth Protocol providing for a general prohibition of discrimination which opened for signature in Rome on 4 November this year.

Lastly, and side by side with the developments described above, the concept of human rights has established itself as part of the political agenda in most countries. Human rights discourse is now an integral part of *inter alia* European political culture. It has become a central plank in foreign policy. Incorporation of the ECHR and the Draft Charter of Fundamental Rights in the European Union are the most recent examples of this reality. A less understood aspect of this is the development of a notion of reciprocity: that western countries cannot expect to influence human rights protection in other regions if they do not accept the same standards and procedures of supervision themselves.

But the 50th anniversary also coincides with a recognition that the Strasbourg system by growing at such a pace is facing serious difficulties in coming to terms with its increasing case-load (estimated at 15000 by the end of 2000) and achieving the aims of the Eleventh Protocol of dealing with cases within a reasonable time. It was unfortunate that the coming into being of the new Court – confronted with the tasks of developing new procedures and working methods – coincided with a period of unparalleled growth in membership of the Convention system. It is suggested that the situation will worsen dramatically if cases against Russia are brought with the same regularity as against other countries. As things stand the Court's docket is especially overburdened with cases against Turkey, Poland and Italy. Already voices are clamouring for a reform of the reform. These are likely to be most strident at the anniversary celebrations in Rome at the beginning of November. If the Court's capacity to deal with cases does not increase, linked to the necessity for States to provide the Court with budgetary resources commensurate to the spiralling growth in cases, there is the prospect of serious damage to the integrity and reputation of the institution. Many will claim that the European Union's new dynamism in the field of human rights and the interrogation of whether the Draft Charter should be legally binding and enforceable should not be seen, against this background, as a mere accident of calendar. We may have to wait for the next 50 years to answer Judge Rolin's question.

The excellent and varied collection of essays brought together in this special edition graphically depict the developments which have occurred over the last 50 years.

Lord Reed's reflections provide many insights into the consequences of incorporation and the expansion of the judicial role. He reminds Northern Ireland judges that they have some experience in the interpretation of broadly expressed constitutional provisions under the Government of Ireland Act and highlights specific Convention issues which have arisen in Scotland in the area of criminal law, some of which have already had far-reaching consequences (see the "temporary sheriffs" decision). Northern Ireland judges will undoubtedly take particular note. Three particular insights stand out. Incorporation will inevitably lead to and foster a growth of interest in comparative law. Judges will be confronted with references to case-law not

just from Europe but from the United States, Canada, Australia and South Africa. The internet has already become an indispensable judicial tool whose easy access to the law of other jurisdictions can only accelerate this trend. Secondly, the Convention may be expressed in broad terms but its application in a given case does not involve judges giving “free rein” to their own moral and political principles. They must examine the contents of Convention law and take account of generally prevailing standards in other jurisdictions. The novelty lies in the latter proposition which, in Lord Reed’s view, will “increasingly be the task of national courts in the century that lies before us” and does not require judges to jettison wholesale their own traditions. Lastly, he makes the valuable point that Strasbourg case-law may be of limited assistance not only because of the difference in context of particular cases but also because national judges may be called on to decide issues before the national proceedings have terminated – something the Strasbourg Court is loathe to do (see, in particular, the law concerning fair trial). To this I would add the observation that many issues may find little or no relevant case-law at all (see Olivier De Schutter’s article on “waiver”) or the judge may be confronted with a Convention standard that sets the threshold too low for a national court to be persuaded by (see Harvey and Livingstone’s discussion of cases concerning solitary confinement). His conclusion has an appropriate prophetic ring to it and sets the agenda for the future. The public will have to understand that there has been a constitutional change. The courts will have to adopt an international breadth of vision, a preparedness to depart from tradition where necessary and self-confidence in their constitutional role.

Conor Gearty’s contribution on democracy and human rights brings a provocative and critical touch to the discussion layered with refreshing “cautionary notes” and “complicating caveats”. His article is a must for the theorist who is profoundly concerned at the increasing power of the judges (but haven’t we been traditionally concerned with their conservatism?) and the incessant tendency of the Strasbourg Court to trample on the fine lawns of tradition and established dogma. *Bowman v United Kingdom* is perceived to be such an aggressive intrusion that he has no hesitation about its wrong-headedness. Plain wrong and that’s what happens when foreign judges fail to understand the dividing line between carefully worked out national solutions which they should be reluctant to tamper with and fundamental matters which require a uniform resolution. His discussion brings into sharp focus the rationale for the Court’s oft criticised doctrine of margin of appreciation (how will this be applied by national courts?). But when is a judgment “wrong”? True its consequences may be far-reaching and difficult to undo but where has the rule of law vanished to in this sense of outrage? Are we expected to pick and choose which judgments we subscribe to because they are more in harmony with what we believe the Strasbourg Court should be doing? It will come as no surprise to learn that many States are equally convinced for similar reasons that certain key judgments which trespass on national prerogatives are also “wrong” (see *Loizidou v Turkey* as the most recent and illustrative example). Strasbourg judgments may be perceived as misguided or political but it should be remembered that the law does not stand still and that the Court is always open to new argument in future cases – just like a national court. But Conor Gearty is certainly right when he asks “where are the cases against Russia concerning Chechnya?” because this raises concerns about the relevance of international adjudication

compared to other international actors when faced with large-scale human rights problems; and when he argues that there has been perhaps too much emphasis placed on the Court at the expense of other Council of Europe human rights activities such as the Committee for the Prevention of Torture, the European Social Charter or the Commissioner for Human Rights.

Jane Liddy – a former member of the European Commission of Human Rights – portrays in her thoroughly researched article the growth and development of Strasbourg case-law over the years by contrasting traditional Article 8 case-law concerning prisoners, immigrants, gypsies and the environment with four issues which have come to the fore in recent times (new forms of family life, intrusive publicity, medical privacy and modern forms of surveillance). Her remarks provide a tantalising glimpse of the “profoundly thought-provoking issues” which will be raised before the national courts and Strasbourg – and certainly before Parliament – concerning the right to respect for private and family life. Should insurance companies be permitted to require genetic testing in order to assess a person’s risk of inheriting a serious illness? Should the law permit financial institutions or employers to compel individuals to undergo such testing and to give access to the results? What are the implications of the Strasbourg Court’s case-law concerning Article 8 as regards routine video surveillance in public places or in private premises or in the work place? Is there a positive obligation on the State to protect people from the intrusive behaviour of the “paparazzi”? Issues concerning “bioethical tourism”, cloning, transgenetic therapy, germ-line therapy – and one might add – genetically modified crops, may well come before the courts for adjudication. One may question whether Convention jurisprudence can really be said to have “developed in an adequately measured pace” to meet such daunting challenges.

Aileen McColgan’s timely contribution on the rights of women draws heavily on her book entitled *Women under the law: the false promise of Human Rights*. As the title conveys, her thesis is that a constitutional charter of rights is an ill-conceived instrument for promoting equality in civil society and that the legal strides which have been made by women over the last decades are more thanks to the efforts of the legislature rather than the judiciary. There can be no quarrel with her assertion that rights cannot provide a substitute for political action and can threaten legislative action designed to ameliorate disadvantage. She illustrates her theme with extensive references to United States, Canadian and European jurisprudence in the areas of equality, affirmative action, abortion, rape and other forms of violence against women. In so doing she demonstrates the truth of Lord Reed’s prediction about the growth of interest in comparative law.

Incorporation will not solve these problems but a greater judicial sensitivity to the concerns of women must be high in the expectations of women’s groups. The latest Cabinet Office sponsored research concerning the earnings gap between similarly-skilled childless men and women over a lifetime and the statistics concerning the low conviction rate for rape – both set out in her paper – throw down the gauntlet.

Colin Harvey and Stephen Livingstone remind us that human rights “refer to personhood and not citizenship”. They address the extensive Convention case-law as regards prisoners, asylum seekers and immigrants – “silenced”

groups which lie beyond “the cosy world of democratic citizenship”. They recall that many of the leading cases concerning censorship of prisoners correspondence (*Golder, Silver, Domenichini, Petra*) have led to important changes in the law at home and abroad. However they criticise the failure of the Strasbourg system to find violations of Article 3 of the Convention when confronted with especially harsh prison conditions (*Krocher and Muller, Aerts*). They also touch on an important series of cases concerning the rights of prisoners serving discretionary life sentences to challenge the continued lawfulness of their detention as well as the leading judgments in the field of extradition and expulsion (*Soering, Cruz Varas, Vilvarajah, Chahal*). In all of these areas we may expect to see further developments under the Human Rights Act directly inspired by the leading cases referred to by the authors. There can be little doubt that national courts will in the near future be asked to consider whether prison conditions amount to inhuman and degrading treatment, whether expulsion of integrated aliens or second-generation immigrants is at all permissible, whether the standard of judicial review in extradition and expulsion cases passes muster under Articles 3 and 8 of the Convention and whether the procedures for dealing with asylum-seekers satisfy the requirements of Article 5.

Dr Ursula Kilkelly’s article examines the implications of the Human Rights Act for the detention and trial of young people, an important area which has received little attention. She draws particular attention to the *Assenov, Boumar, T & V* and *Hussain* judgments. This is certainly an area which is ripe for controversy and challenge as the *T & V* judgment demonstrates (see also Lord Reed’s remarks concerning this case). Does the law give sufficient attention to the principles of reintegrating and rehabilitating rather than punishing young offenders? Do the custodial procedures and arrangements concerning minors satisfy Convention requirements? What is meant by Article 5 § 1 (d) when it speaks of “the detention of a minor. . . for the purpose of educational supervision?” As the author points out, future cases in this area before both the national and the Strasbourg institutions will involve interpreting the relevant standards of the ECHR against the background of the UN Convention on the Rights of the Child. To this we should now add Article 25 (the rights of the child) of the Draft Charter of Fundamental Rights of the European Union.

Olivier De Schutter tackles the thorny question of waiver and rightly concludes that there is no general theory of waiver to be found in Convention jurisprudence although the question has been looked at in several cases. Allied to this is the complex issue whether the positive “right to” presupposes the negative “right not to”. The issues he examines are nonetheless central since they will be invoked time and time again in the course of human rights litigation. Can an individual waive his right to a fair trial or to be tried by an independent and impartial tribunal for example or are these rights so fundamental in a democratic society that no account should be taken of a personal decision to waive? Should an individual be permitted to contract out of the right to be treated in a manner fitting for human dignity because of some benefit conferred? (See his discussion of the decisions of the French administrative courts concerning the “dwarf-throwing” cases). While the Court’s judgments indicate a certain openness to the waiving of procedural rights, Strasbourg is uneasy with the idea that substantive rights can be waived or bartered away although in certain

decisions the Commission has indicated that a person can ultimately assert his/her religious freedom or freedom of expression – restricted by the terms of employment – through resignation. In the *Vagrancy* case the tone is set: “the right to liberty is too important in a ‘democratic society’ . . . for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention”.

The scholarship in the following pages covers a wide range of subjects that go far beyond the interests of the academic community for they speak directly to the concerns of practising lawyers involved in human rights litigation, judges who are called upon to give effect to the provisions of the Human Rights Act 1998, legislators contemplating the implications of incorporation, political theorists fascinated but perhaps sceptical about the democratic legitimacy of national law taking its cue from an international court and non-governmental organisations representing the interests of women, children, immigrants, and prisoners. Converts to the wisdom of incorporation, staunch allies of the ECHR, sceptics and outright detractors will find much fuel for their positions in this issue and much of substance to absorb and contemplate. In my experience it is rare for a single specialised issue of a human rights law review to succeed in providing such a judicious blend of hard law, critical theory and practice. It is clear that the era of self-congratulatory coverage of the ECHR is over and has given way to sharper critical reflection. One could think of no greater birthday present.