Reforming the European Court of Human Rights: The Draft Brighton Declaration

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Guest Blogger So 4 Mrz 2012

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By NOREEN O'MEARA

Efforts to reform of the European Court of Human Rights are defining the UK's chairmanship of the Council of Europe, a six-month term which comes "once in a generation". With the docket and adjudicatory problems affecting the Strasbourg court well-known, the UK is seeking to build on previous recent efforts to streamline practices at the Court, most notably measures agreed at high-level conferences at Interlaken (2010) and Izmir (2011).

In contrast with the public and sound-bite infused speech in which Prime Minister David Cameron outlined the UK's motivations for using its chairmanship to advance reform of the European Court of Human Rights last month, the Draft Brighton Declaration was finally leaked yesterday (first in French, later in English), following its transmission to High Contracting Parties last week. The Draft Declaration will be subject to intense negotiations in the lead-up to the Brighton Ministerial Conference on 18-20 April 2012. Indeed, there will be much to discuss: the draft, informed by discussions within the Council of Europe, puts (almost) everything in relation to the Court's adjudicatory role, and national courts' relationship with it, on the table. A sign, perhaps, that the government appreciates the limited prospects of securing unanimous agreement on many of the aspects covered by the Draft. Nevertheless, the proposals raised by the Draft Declaration make interesting reading, particularly in light of the ECtHR's Preliminary Opinion of the European Court of Human Rights adopted on 20 February 2012. This post focuses on a select few.

Proposals on subsidiarity?

The most prominent feature of the Draft Declaration is its emphasis on 'subsidiarity'. In his recent speech, David Cameron emphasised strengthening subsidiarity, promising proposals "pushing responsibility to the national system" in order to "free up the Court to focus on the worst, most flagrant human rights violations".

The Draft seeks to do this via a range of methods. First, paragraph 19(b) calls for the enhancement of the principles of subsidiarity and the margin of appreciation "by their express inclusion in the Convention". As Antoine Buyse has noted, it is unclear what impact, if any, including these principles would have in practice. It would be trite to recount the extensive case law showing that the Strasbourg judges are conscious of and respect the principle of subsidiarity. Most recently, and in the UK context, the Grand Chamber's judgment in *Al-Khawaja* on the use of hearsay evidence showed a clear example of dialogue in action between the UK Supreme Court and ECtHR. Interestingly, the Draft mentions a range of ways in which this dialogue could be enhanced, though judgments, the work of the Steering Committee for Human Rights and though Government influence on amending Rules of Procedure of the Court.

Secondly, a raft of measures are suggested in Section A aimed at strengthening national systems through their implementation of the Convention. Some proposals are laudable (internal checks on compatibility of legislation with

the ECHR (para 12(c)(i) and (ii)); new domestic remedies where appropriate (para 12(c)(iv); greater training for public officials (para 12 (c)(vii) and (viii)). There is much scope for rationalising domestic human rights adjudication in the jurisdictions of High Contracting Parties. However, it is surprising that more is not made of the remedies point (perhaps being a subtle reference to the inappropriate "small claims court" sound-bite in Cameron's speech). Making better provision for remedies at the national level may well avoid recourse to Strasbourg for many claimants. But what about the appropriateness of remedies awarded by Strasbourg? Is 'just satisfaction' just? The absence of a consideration of remedies at both national and ECtHR levels is an odd omission—deferred for future consideration in the longer-term (para 42(e)(iii)).

Thirdly, measures which tie subsidiarity in with jurisdiction and docket control. The Draft's proposed 'advisory opinion' mechanism (para 19(d)) would allow highest national courts to refer questions to Strasbourg, and allow national courts to apply the opinions provided to the facts of the case. Presumably modelled on the preliminary reference system in the EU legal order, this human rights version looks, at first glance, a neat way of clarifying "the respective roles of the Court and national judicial systems" (the UK government's express motivation – para 19(d)) and of engaging highest national courts even more deeply in a human rights dialogue with Strasbourg. However, the mechanism is couched in language which could harm both comity and access to justice. Its terms are currently loose: the mechanism itself would be an opt-in; highest national courts would have (seemingly) unfettered discretion to refer; advisory opinions delivered by Strasbourg would be non-binding; and above all, litigants would "not ordinarily" have recourse to the ECtHR in the same proceedings following a national court's application of an opinion to the facts. This initiative may prove workable (with more robust terms) but would do little to alleviate the Court's docket. Transposing a version of the preliminary reference mechanism to a purely human rights context requires more thought. As such, the ECtHR has indicated that it will issue a 'reflection paper' on the merits of an advisory opinion mechanism in due course.

Taking a sledgehammer to crack admissibility?

The measures which may attract debate in inverse proportion to their likelihood of being accepted are the Draft's proposals on admissibility. The Draft attacks the admissibility problem two-fold. The first suggestion would reduce the deadline for making an application to the ECtHR from six months to either two/three/four months from the date domestic remedies have been exhausted. The sledgehammer approach may not impact litigants in a jurisdiction where they are likely to be promptly advised of the merits or otherwise of making an application to Strasbourg, and where support from NGOs may be forthcoming. Across the High Contracting Parties, this is not the norm. Moreover, simply cutting the deadline to two, three or four months is easier than enquiring into the working practices at the Court in terms of its handling of admissibility (see Ben Jones' assessment and Andrew Tickell on mythbusting admissibility). On this specific point, however, the ECtHR will prove welcoming: its latest observations indicating that it may be possible to reduce the six-month time limit "considerably" having regard to time-limits in place in national jurisdictions.

Perhaps most controversially, the Draft proposes rendering applications stemming from cases considered by national courts inadmissible unless (i) the national court "erred" in interpreting Convention rights; or (ii) the application "raises a serious question" relating to the interpretation or application of the Convention (para 23(c)). This stretches far beyond simply making efficiency changes in Strasbourg, or efforts to transform the relationship between national courts and the European Court of Human Rights. This could change the character of the Strasbourg court, and potentially strikes at the heart of what the court is meant to offer and achieve: access to justice for the adjudication of human rights violations. Reforms adopted must not indirectly dilute the accountability of states. There are possible risks to judicial comity and access to justice in the proposals as currently framed. However, this is a debate the Strasbourg court rightly wants to have – its observations expressly encourage the High Contracting Parties to "identify solutions" relating to admissibility and docket control.

Overall impression

Whilst certain other reform measures (particularly those relating to the appointment of judges, and support for the Council of Europe's work in implementation of the Convention) are logical and may have mileage, the overall impression at this early stage of negotiations is somewhat underwhelming. Opportunities to make recommendations regarding resources, and address remedies (comprehensively) appear to have been missed. Given the enthusiasm for reforming the court—and reaffirming support for the strong ECtHR which citizens need—it is a shame that many of the suggestions, at least in their draft form, either lack rigour or appear misplaced. To that end, the ECtHR's own pre-Brighton observations adopted on 20February also offer some pragmatic suggestions tailored to specific types of cases.

Notwithstanding some shortcomings, this is a varied road-map for reform: its thematic range and hard-line attitude in favour of promoting human rights adjudication in national courts may do no harm in shaking up the debate on the future role and practice of the European Court of Human Rights. It's a debate which, building on agreements at Interlaken and Izmir, may finally be maturing. It will be interesting to see how much of the Draft Declaration survives April's Brighton Conference, and how the current proposals will evolve.

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This post appeared originially in the UK Constitutional Law Group blog and is reposted here with thanks.

SUGGESTED CITATION , : *Reforming the European Court of Human Rights: The Draft Brighton Declaration, VerfBlog,* 2012/3/04, http://verfassungsblog.de/reforming-european-court-human-rights-draft-brighton-declaration/.