

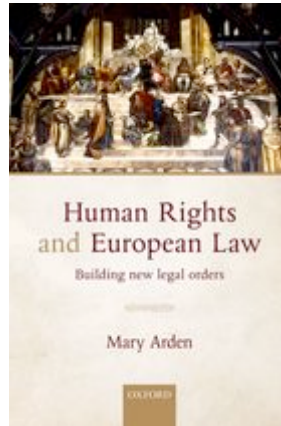
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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Panel Discussion on issues arising from Lady Justice Arden's new book

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Human Rights and European Law: Building New Legal Orders

Dean Spielmann

President of the European Court of Human Rights

Dear Ladies and Gentlemen,

It is my great pleasure to be present today and to take part in the panel discussion around the collection of essays that has been published by Lady Justice Mary Arden.

In this book we who are professionally, and indeed passionately, engaged in European law and human rights, are served a rich array of ideas, reflections, analysis and proposals. In opening this discussion, I think it is for me to take the European perspective. Mary has written very eruditely about both European Courts, with much to say about how both Strasbourg and Luxembourg conduct their business and how the domestic judiciary might engage more deeply with them. Yet this book is, as its title makes clear, mostly about human rights, and it is to that aspect, and from the Strasbourg viewpoint, that I will speak.

But first, allow me to say some words of appreciation for the author.

Mary Arden is a familiar and most welcome figure to us at the European Court of Human Rights. As she explains in the first essay, "Common law in the age of human rights", she had the initiative and the foresight to come to Strasbourg some fifteen years ago and install herself in the *Palais des Droits de l'Homme* as a

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study visitor. There she was able to see for herself the internal workings of the Strasbourg Court, about which she has written perceptively and sympathetically.

As she also recounts in the final part of her book, she was instrumental in bringing about the first meeting between UK judges and Strasbourg judges, in 2006. These meetings have taken place regularly since then, in London and in Strasbourg, and from having participated in them I know their great practical value. Over the course of a day of discussions judges from both sides are able to exchange their views on aspects of human rights law that are their shared task and common concern. Messages are passed, and by the day's end we are all that bit wiser, that bit more informed, that bit more attentive to our interlocutors.

On the UK side, the delegations have been particularly strong, with members of the Supreme Court, the Lord Chief Justice, judges of the Court of Appeal. There have also always been senior figures from Scotland and Northern Ireland to further enrich the dialogue and expand its scope. This is the informal dialogue that Mary Arden refers to in several of her essays, and of which she is a very strong supporter.

Her involvement in judicial dialogue is wider still. She is a stalwart of our annual judicial seminar held each January at the Court, attended by senior judicial figures from all across Europe. It was on one of these visits that she put to me her idea of provisional judgments, set out in the last essay in the book, "An English Judge in Europe". I will come back to this idea in a few moments. She also takes part in a series of high-level judicial seminars bringing together judges from a number of European States as well as from Strasbourg to reflect in depth on common issues, such as the acceptability of judgments.

Her commitment to and investment in international and transnational judicial dialogue is exemplary. For all that she has done these past years to build bridges and open channels of communication and dialogue, let me put on record here my admiration and my gratitude.

As president of the Strasbourg Court, it is natural that I should be particularly attentive to the final essays in the book, dedicated as they are to the relationship between the supranational courts and the domestic judiciary. This is indeed the linchpin of human rights protection in Europe.

Let me use here the term that has become one of the *leitmotifs* of the Convention reform process, and that is *shared responsibility*. Used in the Interlaken conference, it has been reiterated on each occasion since – for example at Brighton in 2012, and at Brussels in 2015. There is no doubt in reading through these pages that in the United Kingdom the responsibility for upholding human rights is indeed shared effectively with the domestic judiciary, operating under

the Human Rights Act. The essays on this landmark piece of legislation make for especially interesting for an external reader, such as myself. Mary Arden leaves the reader in no doubt as to the very great significance – indeed the constitutional significance – of the Human Rights Act for this country. She writes that the Act has changed the nature of the relationship between the Government and the governed, and has changed the way people in the UK think about democracy.

Likewise, the great impact on the common law of human rights law and the principles that underpin it law is explained in the most positive terms. As one who has had a strong interest in English law since my student days in this country, I found Mary's essays on proportionality to be fascinating. Who better than a senior English judge can say that the "logic of the proportionality principle is impeccable, its attraction irresistible"?

Or that it is worth drawing on the case law of the European Courts in order to treat proportionality as a "sophisticated and flexible judicial tool"?

In her comments on proportionality, we get a glimpse into the judicial philosophy of Lady Justice Arden. She is rigorous, without being rigid. Principled, but not without the flexibility that is the mark of a very able legal intellect. I can only agree with her that the introduction of the proportionality principle, with its fine calibrations, in the place of the rather black-and-white *Wednesbury* test has signalled a sea change for the laws of the United Kingdom. As she observes in the sixth essay, "Press, Privacy and Proportionality", the proportionality analysis leads the courts to ask the right question – *was the right balance struck?* And not the rather closed *Wednesbury* question – was it "perverse"? In addition to asking the right question, the proportionality analysis also attracts by the fact, so important in any judicial system including the ECHR, that it is conducive to a consistent and coherent body of case-law.

On a humorous note, it can only be a matter of time before the word "proportionality" is taken as the name of an NGO, as has happened with other legal concepts such as *Justice, Liberty, Amnesty* or *Fair Trials*.

Another aspect of Mary's thought that comes through very clearly in her writings is a strong sense of the separation and balance of powers in the modern State. She is both very clear on the role of the courts, and on the limits of that role in relation to Parliament and the executive. I was very impressed by her remark, in the 8th essay on "The Changing Judicial Role..." that Section 3 of the Human Rights Act has "revolutionised our constitution" and cast the judge as "guardian of constitutional norms, including human rights".

Of course, this very area of UK law has become the subject of political controversy. Like Mary Arden, I will carefully stay out of the political debate in this country about the future of the Human Rights Act.

I come back to the substance of the final part of the book, the relationship with Europe. Here we have a choice of metaphors. We find reference to the mobile, which Andreas Voßkuhle, president of the German Constitutional Court, has used to evoke the inter-relationship between national and supranational courts. And we have Mary's own, intriguing, image of an ill-fitting jigsaw, which I must admit captures some of the jostling for position that has been known to occur between the different judicial domains.

There is no shortage of proposals and ideas addressed to all those who participate in the Convention system in one form or another. For the judges, the prescribed remedy is dialogue, a dialogue that shapes the overall relationship between the European and national levels. As she writes in the 18th essay, "Peaceful or Problematic...?", it is for the national courts to turn the tables and say what it is they want from the supranational level. Then one has a true dialogue, beyond collegial pleasantries and theoretical discussions.

Some of her ideas are maybe rather a bit too radical for my taste, I must confess. For example, the suggestion that there could be a "right of rebuttal", by which national courts could object to a particular ruling of the Strasbourg Court, goes very far. I believe that the practice has shown – and Mary speaks of this too in her essays – that our system today is a self-correcting one. Errors of understanding can be corrected in subsequent rulings – see for example the *Osman* case. To use Mary's own words, the "plasticity" and "receptivity" of the Strasbourg case-law are among its strong features.

I have already mentioned Mary's idea about provisional judgments. I cannot do the idea full justice in the time available, but I have to state maybe some reservations at the thought of diminishing the legal status of a judgment of our Court. Again, one should not overlook the fact that in its current configuration, most of the Court's judgments are provisional in the sense that a Chamber judgment may be referred to the Grand Chamber. Indeed, as you may be aware, last Monday the Grand Chamber Panel accepted an unusually high number of cases for re-hearing, including the post-*Vinter* case of *Hutchinson*. Of course, the very great majority of cases are adjudicated at Chamber level. But let me also point out that the Court has, at times, issued a warning or a reminder to States that there is a need to keep a particular issue under review. The leading example of this is the series of cases involving transsexuals, in which the Court gave ample advance warning to States of an evolution in the case-law, which came with the *Christine Goodwin* case.

More recently, in 2014 the judgment in the case *Jones v. UK* ends with the following words:

"...in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States."

Perhaps we at Strasbourg should have resort to such language more often, in order to signal to States and their superior courts that change may be coming in a particular area of Convention law. This could, and I think Mary would approve, trigger a response from national judges, aiding the European Court in its consideration of the matter.

If I have been rather cautious in relation to two of Mary's ideas, I am more enthusiastic about others. I give the example of Article 46(3) of the Convention. This procedure was introduced by Protocol No. 14. It allows the Committee of Ministers to come back to the Court and ask for interpretation if a judgment turns out to be unclear, making it difficult to execute. Five years after the entry into force of Protocol No. 14, the procedure remains unused. I would like to think this denotes that all of our judgments are crystal clear! But it is as much due to the institutional culture of the Committee of Ministers. Yet as Mary points out, the execution of a judgment may sometimes be within the competence of the domestic courts rather than the executive or the legislature. We know that in some cases the courts have been uncertain as to what exactly was required of them, or how the requirements of one individual case should dovetail with broader principles. Where this arises, would it not be useful for the Committee of Ministers to act as the channel of communication between the domestic level and the Court? It is the only direct channel that exists at present. The advisory opinion procedure of Protocol No. 16, which would not be the same of course, may represent another solution to this difficulty.

Also worthy of further consideration is Mary's idea to create a body composed of senior national judges that could give feedback to the Court, or even intervene as a third party in the proceedings in order to advise the court on the implications of a certain course of action. One can never have too much good advice! And it recognises the distinctive judicial voice, which Governments can never fully convey when they intervene in a case.

I have only skimmed the surface of Mary's thinking on Europe's precious human rights system, and her proposals for strengthening and improving it. They are worthy of the closest examination, coming as they do from such a distinguished source. Her purpose is one that I share, and here I quote the closing words of her essay "An English Judge in Europe": "there is much more we can do to perfect the

burgeoning relationship between our domestic courts and the supranational courts in Europe”.

Strasbourg says: *Hear Hear!*