



How to Deal with the Criticism of the European Court of Human Rights

Organised by the European Public Law Organisation and the Netherlands School of Human Rights Research

With financial support from the Dutch Ministries of Security & Justice and Foreign Affairs

For more than five decades since it opened for business in 1953, the European Court of Human Rights (the Court) has been gradually enhancing its reputation and credibility. Like any other institution operating within a democratic environment, it has been subject to criticism. It is not surprising that States Parties and individual applicants who were on the losing end, have often been vocal in stating their objections. Time and again, NGOs have claimed that the Court has not been forceful enough in providing protection, while academics have been eager to point to flaws and inconsistencies. These criticisms have assisted the Court in becoming the robust institution it is today, presiding over the most advanced and successful regional human rights regime in the world.

However, lately the criticism has turned into defiance and resistance. For example, the Italian government, backed by almost all parties in Parliament as well as church circles and religious communities across Europe, refused to accept the chamber judgment in *Lautsi* on crucifixes in Italian class rooms. The Grand Chamber has since reversed the decision. Another example is the case of *Kononov v. Latvia*, in which the Grand Chamber upheld the conviction by a Latvian court of the applicant for war crimes committed during World War II. Since he had been decorated for them during the Soviet era, this decision was badly received in Russia. In February of this year, the British House of Commons openly defied the judgment of the Court in *Hirst v. United Kingdom (no. 2)* by refusing to accord voting rights to prisoners. In Germany, the decision of the Court in *H. v. Germany* to invalidate the so-called security detention for sexual offenders got a frosty reception. The Court's case law regarding asylum seekers and the way in which it handles so-called 'rule 39' requests has led to negative comments not only from government ministers, but also from national parliaments and academics.

Some commentators believe that the Court has grown out-of-touch and that its legitimacy may suffer accordingly. They also feel that the Court has become result-oriented in its approach towards the Convention and rather loose in the application of its standards and procedures. Consequently, in their view, the Court is encroaching on the prerogatives of the democratically elected political bodies within the Council of Europe and at the domestic level. These critics do not limit themselves to challenging isolated products, but they question the Court's production



process as a whole. In this view, the way in which the Court operates, rather than the criticism it evokes, is a cause for concern.

Others have downplayed the validity of these challenges. They see the criticism as a campaign orchestrated by politicians who are tired of being boxed-in by the Court's case law. To restore their room to manoeuvre, these politicians would like to see the wings of the Court clipped. To justify such an action, they cloak themselves in public sentiments about the Court which are fuelled by nationalism, parochialism, populism and ignorance. These commentators argue that the Court is performing well, especially with regard to Central and Eastern Europe, while operating within the four corners of the European Convention. Commentators belonging to this school of thought believe that the continued criticism will play into the hands of those States Parties which are already underperforming in the area of implementation. In the eyes of these commentators, therefore, the criticism itself is a cause for concern.

The aim of the conference, which will have an adversarial nature, is to bring together for the first time representatives of both schools of thought to clarify positions, remove misunderstandings and, if necessary, come up with solutions.



Provisional Program

How to Deal with the Criticism of the European Court of Human Rights

Day 1

Chair: Professor Spyridon Flogaitis

Opening and Welcoming Statements

14h00

Welcome: Representative of the Dutch Government

Opening: **Rt. Hon. David Davis MP**, *Why the House of Commons Took Issue with the Court in Hirst*

Key note address: **President Valery Zorkin**, *The Cooperation Between the Court and National Courts from the Perspective of the Constitutional Court of the Russian Federation*

Key note address: **President Jean-Paul Costa**, *The Challenges Faced by the European Court of Human Rights and How to Deal with Them*

Panel I: Crisis, what Crisis?

15h30

Judge Egbert Myjer, *Why the Court Is Doing Fine*

Marc Bossuyt, *Why the Court Is on a Slippery Slope*

Ernst Hirsch Ballin, *The New Democrats*

Discussion



Panel II: The Need for Attitude Changes Within the Council of Europe

17h30

Tom Zwart, *How the Court Can Increase its Legitimacy*

Marie-Louise Bemelmans-Videc, *The Role that Can be Played by the Other Organs of the Council of Europe*

Discussion

Discussant: Marie Schirrmeyer

20h00

Dinner

Day 2

Chair: Professor Henk Kummeling

Panel III: More or Less Supervision by the Court?

9h30

Wilhelmina Thomassen, *The Need to Strengthen the Supervisory Role of the Court*

Lord Kerr, *The Need for Dialogue Between National Courts and Strasbourg*

Discussion

Discussant: Antoin Burkov



Closing session

11.30

Response: **Judge Andres Sajo:** *The Road Ahead for the European Court of Human Rights*

Closing remarks by the UK Presidency of the Council of Europe

13h00

Lunch