High-Level Expert Conference

Panel discussions

Wednesday 31 October to Friday 2 November 2018
Kokkedal Castle, Denmark

Panel discussions

The Convention today is incorporated, and to a large extent, embedded into the domestic legal order of the States Parties, and the Court has provided a body of case law interpreting most Convention rights. This enables the States Parties to play their Convention role of ensuring the protection of human rights to the full (Copenhagen Declaration, para. 8).

This affects the role of the Court and its case law (e.g. Copenhagen Declaration, paras. 26-32).

This also affects the role and responsibility on Member States underlining the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention (e.g. Copenhagen Declaration, paras. 12-18).

As mentioned in the Copenhagen Declaration, the most effective means of dealing with human rights violations is at the national level, and encouraging rights-holders and decision-makers at national levels to take the lead in upholding Convention standards will increase ownership of and support for human rights.

The effective implementation of human rights requires a culture of human rights at all levels of government as well as in society in general.

1. Building a Common Human Rights Culture

1a. Political dialogue post Copenhagen – anchoring the development of human rights more solidly in European democracies

The Copenhagen Declaration underlined the need for dialogue at both judicial and political levels, as a means of ensuring a stronger interaction between the national and European levels of the system (para. 36). As stated in the declaration, for the Convention system to be effective, there must be a constructive and continuous dialogue between the Member States and the Court on their respective roles in the implementation and development of the Convention system, including the Court's development of the rights and obligations set out in the Convention. Civil society should be involved in this dialogue. Such interaction may anchor the development of human rights more solidly in European democracies (para. 33).

However, how do we best support and develop such interaction? In particular, how can a political dialogue between the Court, the Member States, civil society and other actors take place without tipping the balance towards undue political pressure on the Court? While few will disagree that the anchoring of the system in the European democracies of the Member States is crucial for the long-term authority of the system, there is less agreement on the ways in which political dialogue can be achieved in a balanced way. This panel focus on identifying ways of improving the dialogue and interaction between the national and Europeans levels of the system. The panel will also touch upon the key role of national parliaments in the realisation of human rights protection within the Convention system.

1b. Judicial dialogue - interaction between the Court and the highest domestic courts

Judicial dialogue and interaction between courts may be a safeguard against the risk of fragmentation of the Convention system and ensuring common understandings of the Convention. But how is such dialogue best supported and what challenges may be identified? How does the European Court of Human Rights use and apply jurisprudence from the highest domestic courts. And to what extent is the jurisprudence of domestic courts applied before the Court? Likewise, as to the domestic courts: How do domestic courts actively receive and apply jurisprudence of the European Court of Human Rights? How do supreme courts reflect disagreement – if any – with jurisprudence of the European Court of Human Rights? The recent entry into force of Protocol No. 16 to the European Convention on Human Rights introduces the option for domestic courts to ask the Court for non-binding advisory opinions. How will the

Protocol best support the judicial dialogue in practice? And is there a need for other new ways of institutional dialogue?

1c. Supporting dialogue through third party Interventions

As underlined in the Copenhagen Declaration (para. 34), a key tool for Member States to engage in a dialogue with the Court is through third-party interventions. Encouraging the Member States, as well as other stakeholders, to participate in relevant proceedings before the Court, stating their views and positions can provide a means for strengthening the authority and effectiveness of the Convention system.

The Copenhagen Declaration also presented new ideas on how to develop and facilitate further third party interventions (paras. 38-40). In this panel, panelists are encouraged to discuss how to implement these ideas in the most efficient way as well as explore issues related to third party interventions. Can the Court improve consistency in its communication and determination of time limits for third party interventions? By what means do Member States identify relevant cases? Moreover, is there any downside to intervene?

A key question will be what Member States and other stakeholders can do to better coordinate their participation in important cases, but also how the Court may contribute to this end.

2. The Caseload Challenge Revisited

A framework for the analysis of a balanced caseload

The caseload of the Court remains the top challenge of the Convention system. Following up on the Copenhagen Declaration para. 54, this panel will explore potential avenues for the forthcoming analysis of the Court's backlog as agreed in the Copenhagen Declaration. Key questions include: What does prompt and effective handling of cases mean in practical terms? What is the realistic capacity of the Court in its current form? Has the Court realistically reached the limit of its output? What kind of cases can and cannot be handled by the Court in its current form taking case handling time and required quality into consideration? What solutions could be envisaged in order to develop a Convention system in balance? What solutions might require profound changes? How can the envisaged analysis be carried out before the end of 2019?

3. European Supervision

Developments in the fourth instance principle and the doctrine of evolutionary interpretation: Finding the proper balance

This panel will examine and elaborate on general developments in the Court's interpretative methods and doctrines. What are the recent developments with regard to the fourth instance principle – if any? Has the Court found a proper balance between authoritative interpretation of the Convention and not acting as a court of fourth instance? Has the Court found appropriate ways of developing the principle of subsidiarity? How is the Member States' margin of appreciation affected by the development of the principle of subsidiarity? Has there been any developments in the Court's application of the doctrine of evolutionary interpretation in recent years and after the Copenhagen Declaration? Furthermore, the panel may address whether the Court has shown restraint. If so, has the restraint gone too far – or not far enough?