JUDICIARY OF
ENGLAND AND WALES

THE RT HON LADY JUSTICE ARDEN DBE
MEMBER OF THE COURT OF APPEAL OF ENGLAND AND WALES

PEACEFUL OR PROBLEMATIC? THE RELATIONSHIP BETWEEN NATIONAL SUPREME COURTS AND SUPRANATIONAL COURTS IN EUROPE

THE HONOURABLE SOCIETY OF LINCOLN'S INN

THE ANNUAL SIR THOMAS MORE LECTURE

10 NOVEMBER 2009

Introduction

1. Ladies and gentlemen, tonight I propose to consider with you the implications for our legal system of the exponential growth in European law and human rights jurisprudence. This jurisprudence is now increasingly populating our domestic law. Accordingly now is a very good time to ask questions such as: why is it important to have a system of supranational courts in Europe? What can be done to improve the way they relate to national courts at the highest level? For reasons which I will explain, a successful working relationship with national supreme courts is in my view one of the most important benchmarks of success for the European supranational courts.
2. To save time, I will refer to the European Court of Justice[1] and its jurisprudence as the Luxembourg court and Luxembourg jurisprudence, and to the European Court of Human Rights and its jurisprudence as the Strasbourg court and Strasbourg jurisprudence respectively.

[1] Shortly to be renamed the Court of Justice of the European Union under the Lisbon treaty.

3. I am not the first person to have noticed the incoming tide of Community law. Lord Denning, a Bencher of Lincoln's Inn, who was often ahead of his time, famously said:

> "... the flowing tide of Community law is coming in fast. It has not stopped at the high water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water."[2]

4. Nor am I the first person to speak about difficulties of implementing the European Convention on Human Rights. Lord Hoffmann was highly critical of some of the jurisprudence of the Strasbourg court in his lecture, *The Universality of Human Rights*, in March of this year.[3] The press and the politicians have their own views on what should happen about human rights, but I come at these questions from a purely legal and judicial perspective and not a political one. This lecture is therefore not concerned with questions such as whether there should be a British Bill of Rights or a repeal of the Human Rights Act 1998[4] or whether there should be restrictions on the powers of our courts in relation to Strasbourg jurisprudence.[5] Whether there should be a British Bill of Rights or any amendment to the Human Rights Act 1998 are matters for the Parliament. What I am concerned with is how we absorb Strasbourg and Luxembourg jurisprudence into our legal system, how we manage the case load to which it gives rise, how we maximise the potential for

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[2] *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408, 1416.

[3] Judicial Studies Board Annual Lecture, 19 March 2009.

[4] However, I would ask anyone who seeks to remove or dilute any Convention right to explain why this is necessary.

[5] See *Governed by Law or by Lawyers? International Treaties and Human Rights*, Malcolm Rifkind, Denning Lecture, October 2009.

working together, how we contribute to the creation of their jurisprudence and how we can have the most influence on their work.

5. My view is that we should in principle support the work of the Strasbourg court. By and large, human rights have made an important contribution to civil society in this country. A major challenge since the commencement of the Human Rights Act 1998 has been the balancing of freedom and security in relation to terrorism issues. Human rights have played a crucial role in the resolution of these issues.[6]
6. Likewise we have greatly benefited from the jurisprudence of the Luxembourg court. It has brought us many benefits, for example, the doctrine of proportionality and the principles of equal treatment, effective protection and so on.
7. However, we tend to react to each case or line of authority on an ad hoc basis instead of thinking in a long term way about the relationship as a whole. Indeed, this may be the first occasion when a judge has raised the question of how the judiciary should react to the case law on a collective basis.
8. There is very good reason for thinking about these issues. However much we value the jurisprudence of the supranational courts, there is always a risk, now that their jurisprudence is becoming ever more pervasive, of European law introducing concepts which do not sit easily with our own domestic law. European law very often has to be superimposed on to a body of domestic law and occasionally it also makes changes to the fabric of English law.
9. An example of this can be taken from the field of arbitration. In *West Tankers*[7] the Luxembourg court held that, notwithstanding that arbitration is outside the Brussels regulation,[8] which regulates jurisdiction over civil matters as regards defendants domiciled within the European Union, the courts of the law of the seat of an arbitration cannot issue an injunction restraining the pursuit of proceedings

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6 See, for example, *A v Secretary of State for the Home Department* [2005] 2 AC 68 (also known as the Belmarsh case).

7 Case C-185/07 *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and others v West Tankers Inc.*

8 Regulation 44/2001/EC art 1.2(d).

in another member state ("an anti-suit injunction"). The law of England and Wales is very commonly the law of the seat of an arbitration. The Luxembourg court held that the anti-suit injunction was contrary to the principle of trust between courts of the member states that underlies the Brussels Regulation. This decision is contrary to the previous practice of the Commercial Court of England and Wales. The effect is that the other party can apply for a stay of those proceedings in that other court and the arbitration can continue. However, there will be a risk of inconsistent findings in the arbitration and in the court of that other member state, and the decision undermines the role given by English arbitration law to the law of the court supervising the arbitration. It is self-evident that it is also likely to cause the parties to incur additional costs.

10. The coherence of our domestic law is liable to be affected whether the basic approach of some area of law is changed or whether some ill-fitting and largely unnecessary principles are superimposed on to it. Change is of course an inevitable consequence of membership of the European Union. However, if we are satisfactorily to meet the challenges which European law presents, we in the domestic courts need to think carefully about how to make the best of the system. I would like to start a debate at the level of national courts about how to achieve the most suitable form of supranational adjudication in Europe. I have no doubt that international courts discuss among themselves how to operate effectively. The supranational courts are not slow to say what they expect of national courts. But I would argue that the question of how to achieve the most suitable form of supranational adjudication must also be considered from the perspective of national systems. It is time to turn the tables and ask what the national courts are entitled to expect of supranational courts. So far as national courts are concerned, it is only natural that, where practical, national supreme courts should be asking this question and taking the lead in making any structural changes in the relationship.

The two European systems

11. Let us reflect for a moment on the major milestones and the major rudiments of the two systems. Those rudiments will be the foundations on which we have to build. There are important differences between the two systems of supranational adjudication.

12. Joining the European Union in 1973 brought about enormous constitutional change for the United Kingdom.[9] Parliament in effect ceded some of its sovereignty to the European Union, or at least transferred some decision-making powers to the institutions of the European Union.

13. The Human Rights Act 1998 is another milestone.[10] The Act gives further protection to the European Convention on Human Rights in domestic law and makes the Convention in effect a shadow constitution for the United Kingdom. The courts are required to take account of the jurisprudence of the Strasbourg court and they are required to interpret legislation compatibly with the Convention, so far as they are able to do so. The domestic courts are not, however, given power to strike down primary legislation. Nonetheless, in respect of at least the qualified Convention rights,[11] the courts have to apply the doctrine of proportionality and balance competing interests and values. Judges when performing this task are *de facto* constitutional judges.

14. By contrast, the courts have the power and duty to displace domestic legislation if that is necessary to comply with European Union law because of the doctrine of primacy enunciated by the Luxembourg court. Community law sometimes simply adds to domestic law. Sometimes Community law and domestic law sit side by side and the litigant can invoke either. This happened in a recent case on equal pay in which I compared domestic law to the foot of Cinderella, on to which the slipper (Community law) had to be fitted. I explained that, unlike Cinderella's slipper, the

[9] See generally Vernon Bogdanor, *The New British Constitution* (Hart Publishing) (2009) page 27 et seq..
[10] See generally Bogdanor, above, n 9, chapter 3.
[11] Arts 8-11.

slipper of Community law is not made of glass but of some altogether technologically more advanced material that can expand and improve, to accommodate developments in Community law. I added that neither the foot nor the slipper can, however, be shrunk in the process of applying the slipper and that, in the context of equal pay, there are times when Cinderella is capable of dancing on her own without any slipper, that is, without any need to invoke Community law.[12]

15. The Luxembourg court was set up to give authoritative rulings on the European Treaty. The treaty contains provisions which mean that the relationship which our courts enjoy with the Luxembourg court is different from that which they enjoy with the Strasbourg court. To take our relationship with the Luxembourg court first, most commonly cases from the United Kingdom which end up in Luxembourg are cases referred to the Luxembourg court by our courts for a ruling on the interpretation of European legislation. This is, in form at least, suggestive of a partnership between our courts and the Luxembourg court. We can ask a question and suggest an answer and the Luxembourg court will rule. The Luxembourg court will provide an answer on the Community law issues raised and will send the case back for the national judge to decide any issues of domestic law which arise and to apply the answer given to the facts of the case (as found by the national court). Of course there are many cases being referred to Luxembourg from other member states as well. The decisions in all those cases form part of the corpus of law which must be enforced by United Kingdom courts. Moreover, domestic courts must provide effective remedies for violations of rights conferred by European law, even where no such remedies are conferred by domestic law.

16. With the Strasbourg court, there is no preliminary ruling procedure. There is, however, the right of individual petition once domestic remedies have been exhausted. The domestic court has no control over which cases become the subject

[12] *Wilson v Health & Safety Executive* [2009] EWCA Civ 1074.

of an application to the Strasbourg court, or over which cases are held to be admissible by the Strasbourg court. Thus it may not be able to conduct a dialogue with the Strasbourg court through its judgments so as to indicate to that court what the domestic court thinks the answer should be.

17. Unlike the Luxembourg court on a reference, the Strasbourg court is expected to apply the human rights law, as enunciated by it, to the facts of the case. It will also be able to order just satisfaction (or compensation) for a violation though it cannot change the domestic law even if it is found to be in violation of the Convention.[13] Not every human rights case has to go to Strasbourg: the Convention requires contracting states to provide effective remedies in their own courts. The Strasbourg court recognises that it is not a fourth level of appeal from the decision of a trial judge. On the contrary, the mechanism for enforcement through the Strasbourg court is said to be subsidiary to that of the member state. The notion of subsidiarity is expressed in the doctrines of subsidiarity and the margin of appreciation, which I will need to discuss further.

18. There is a famous saying, probably apocryphal, attributed to President Jackson of the United States after the Supreme Court of the United States had given judgment on a case about Cherokee rights: "Marshall has given his decision; now let him enforce it". Neither the Luxembourg court nor the Strasbourg court has any machinery of its own for enforcing its judgments.

19. The decisions of the Luxembourg court are enforced through our domestic courts pursuant to the European Communities Act 1972.

20. Since the commencement of the Human Rights Act 1998, effect has also been given to Strasbourg jurisprudence by our domestic courts. I shall consider below the extent to which domestic courts should regard themselves as under an obligation to follow Strasbourg jurisprudence. Strictly the United Kingdom is only bound to

[13] I leave aside the "pilot judgment" procedure: see, for example, *Kudla v Poland* (2000) 35 EHRR 198.

give effect to those decisions which are given in relation to the United Kingdom. It has been suggested that those are the only decisions which should be taken into account by domestic courts.[14] My view is that that suggestion is, with respect, absurd. Since it is likely that the Strasbourg court would apply those decisions to other cases, the courts of England and Wales at least do not draw any such distinction.

21. Decisions of the Strasbourg court are also enforced through the remarkable inter-governmental mechanisms of the Council of Europe, namely through the Committee of Ministers of the Council of Europe.[15] Article 46 of the Convention provides for the Committee of Minsters "to supervise" the execution of judgments of the Strasbourg court. This has proved very effective as a means of enforcement: very few judgments of the Strasbourg court have not been implemented although there have been delays. Enforcement through the Committee of Ministers is not limited to the payment of any amount ordered by the Strasbourg court. The Committee of Ministers expects to be told how the domestic legal system has been altered to prevent recurrence of the violation if this is needed. It is of the essence of the Convention system that it allows a range of methods of implementation: it is not a case of one size fits all.

22. The system of implementation through the Council of Ministers gives contracting states some time to reflect how best to make changes in their law consequent on Strasbourg decisions. In the United Kingdom, this freedom of choice may be taken away from them if the courts have meanwhile applied the Strasbourg jurisprudence in domestic law and decided what domestic law requires.[16] Accordingly the suggestion has recently been made that it should be possible in an appropriate case for an order to be made declaring that a new decision of the Strasbourg court shall

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[14] *The Assault on Liberty*, Dominic Raab, 4th estate, 2009, page 227.

[15] It should be noted that the decisions of the Strasbourg court are generally directed only to the case before it and are declaratory only. They cannot in general require any change to be made to domestic law.

[16] Compare the controversial decision of the House of Lords in *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 73.

have no effect in the United Kingdom for a specified period until Parliament has had the opportunity to decide how to change the law.[17] The 14th Protocol to the Convention is relevant here: it is currently awaiting ratification by the Russian Federation but may come into effect in 2010. Once it comes into effect, the Committee of Ministers will have a new power to go back to the Strasbourg court for clarification of a judgment where the difficulty of interpretation is hindering implementation.[18] The United Kingdom government or Parliament might want a period of non-implementation to enable that step to be taken rather than to have to take an over-cautious approach to what the decision requires. At the margins therefore, and in the context of the implementation of Strasbourg jurisprudence, the protection of Convention rights achieved by the Human Rights Act 1998 may have resulted in a less than perfect solution.

THE CHALLENGE FOR NATIONAL COURTS

23. Sometimes it is difficult to understand what exactly has been decided by the supranational court. This can happen with decisions of either the Luxembourg court or the Strasbourg court. I can give two examples from my own recent experience. In *Wilson v Health & Safety Executive,*[19] the parties were at odds as to whether the Luxembourg court had departed from its ruling in an earlier case known for short as *Danfoss*. This established that an employer did not have to provide special justification for recourse to a length of service criterion in fixing pay scales. In a later case, *Cadman v Health & Service Executive,*[20] the Luxembourg court, after citing *Danfoss,* went on to hold that an employer had to show justification where the worker provided evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service was appropriate.

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17 See *Governed by Law or by Lawyers? International Treaties and Human Rights,* above, n 5.
18 Art 16.
19 Above, n 12.
20 C-17/05.

The Court of Appeal held that the Luxembourg court had departed from its earlier jurisprudence even though in its judgment it appeared to be simply applying the *Danfoss* decision. Occasionally there has to be a second reference to the Luxembourg court to ask it to elucidate its earlier answer to a reference.

24. A similar problem can arise with Strasbourg jurisprudence. For example, in *Faisovas,*[21] the Court of Appeal had to decide whether it was a violation of article 3 of the Convention[22] for prison authorities to handcuff a terminally ill patient while he was receiving treatment at a hospital outside prison. The Court was faced with the difficulty of ambiguous developments in the jurisprudence. Early jurisprudence of the Strasbourg court had held that there was a violation where the prisoner was infirm as a result of his illness. However, in a very recent case,[23] the Strasbourg court held that there was a violation of article 3 when a prisoner, sentenced to 22 years for membership of a terrorist organisation, was subjected to a gynaecological examination while handcuffed, with (male) security officers behind screens and out of earshot. There was no question of the prisoner in that case being infirm and no finding that she was actually distressed. The principle had clearly been modified but it was not clear from the reasoning in the judgment precisely what the new principle was. The later decision seemed to turn on its own facts. The new power in the 14th Protocol is confirmation of the fact that from time to time there are ambiguities in Strasbourg jurisprudence.

25. Many of the decisions of the Luxembourg court can readily be absorbed into the domestic system, but some of them result in profound change to our domestic law. This is particularly so in relation to cases based on the principle in the treaty against discrimination on the grounds of nationality. The Luxembourg court has interpreted the treaty in these cases in a direction which paves the way for integration. An example of this is in the decision of the Luxembourg court in

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[21] *R (Faisovas) v Secretary of State for Justice* [2009] EWCA Civ 373.
[22] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[23] *Uyan v Turkey* (Application no. 7496/03), 8 January 2009.

Bidar,[24] where the Court reversed its previous jurisprudence in the light of treaty changes and held, on the strength of the prohibition on discrimination, that a student who is a national of one member state but lawfully resident in another member state is entitled to a student grant on the same basis as nationals of that state. There have been similar decisions in the field of social security and direct tax. Thus, tax relief given to resident companies cannot be denied to taxpayers resident in other member states.[25] Member states have had to make major alterations to their law and practice in consequence. What appears to be happening is that the Luxembourg court is paving the way for integration by producing rulings which require a member state to give the same benefits that it gives to its own nationals and residents to persons from other member states. As one writer said, the Luxembourg court regards itself as the engine of integration.[26] In some of these cases it appears that the Luxembourg court has departed from its earlier tradition of incrementalism. These decisions can affect the way in which the social security benefits of many kinds are allocated, and the way tax laws in a variety of areas are administered. It can be very burdensome for a member state to have to change its system, and the workload of the courts and tribunals is greatly increased by the need to provide remedies in a wide range of cases. In the United Kingdom, remedies may be claimed for payments made as long ago as 1973.

26. A different problem for national courts arises when the Strasbourg court has sought to develop its jurisprudence in a manner which demonstrates a misunderstanding of the domestic law position. For instance the effect of the decision of the Strasbourg court in *Osman v United Kingdom*[27] was that it was a violation of article 6 on access to court for the court to conclude that it was not fair, just or reasonable to impose a duty of care. Happily a different conclusion was later arrived at in Z *v*

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[24] *R (o/a Bidar) v Ealing LBC* [2005] QB 812.
[25] See, for example, *ICI plc v Colmer* [1999] 1 WLR 2035.
[26] Mitchel Lasser, *Judicial Deliberations* (Oxford) (2004).
[27] (1998) 5 BHRC 293.

United Kingdom.[28] In reality, the Strasbourg court has been very receptive to reasoned criticism. It follows that the higher courts should not be expected as a matter of domestic law to implement the decisions of the Strasbourg court in every situation. There is, however, a small domestic problem here generated by section 2 of the Human Rights Act 1998. This has been interpreted at the highest level as generally requiring domestic courts to follow Strasbourg jurisprudence, no more and no less. I shall need to return to this problem.

27. We are not the only member state to have had this experience of decisions that cause great disruption in the domestic system. For example, in *Princess Caroline's case*, the German Federal Constitutional Court ruled in favour of freedom of expression that the rights of the Princess to protection of her personality under the German constitution had not been violated by intrusive press photography.[29] Princess Caroline was a public figure trying to lead a private life. The Federal Constitutional Court held that she was a figure of contemporary history and that she only enjoyed protection of her private life outside her home if she was in a secluded place out of the public eye. Princess Caroline took her case to Strasbourg where the Third Section of the Strasbourg court reached a different conclusion on the balance to be drawn between press freedom and privacy, and held that the Princess's right to respect for her private life had been violated.[30] This decision caused enormous difficulty for the German Federal Constitutional Court. It found itself in the embarrassing position of having to revise its interpretation of the constitutional right.

28. In the case of Luxembourg court, even though there is the doctrine of primacy, some constitutional courts in some member states have held that the law of the European Union is subject to their own constitution and that it is part of their function to guarantee their national constitutional rights not only as against state

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[28] (2001) 10 EHRR 384.
[29] *Re C* (1999) 10 BHRC 131.
[30] *Von Hannover v Germany* (Application no 59320/00) (2004) 16 BHRC 645.

bodies but also as against the European Union. [31] When the Constitutional Reform Bill was being debated, I floated the idea that the new Supreme Court of the United Kingdom should be given some similar power.[32] However, the intention was that the Supreme Court should, apart from acquiring the powers of the Privy Council in devolution matters, have the same powers as the Appellate Committee of the House of Lords. My idea was not pursued. In any event, it would be difficult, though not impossible; to achieve this position in a country that does not have a wholly written constitution.

29. How many cases go from the UK to Luxembourg or Strasbourg? The number of references to the Luxembourg court from England and Wales is comparatively small: the Court of Appeal sends the most references. The number of references has been going up recently. However the good news is that the United Kingdom is now one of the jurisdictions from which the Strasbourg court receives the fewest applications. But that does not mean we do not have any problems. There is a great deal of jurisprudence being generated by the Strasbourg court and the Luxembourg court from other member states of the Council of Europe or European Union, as the case may be, and this jurisprudence inevitably has a "ripple" effect on our domestic law.

WHY DO WE VALUE THE EUROPEAN SUPRANATIONAL LEGAL SYSTEM AND WHAT ARE THE BENCHMARKS FOR SUCCESS?

30. The above discussion must inevitably lead to the question why we value the European supranational legal system, and what we would regard as a sign of success.
31. I start with the Luxembourg court. The Luxembourg court is an essential part of the European Union. That Union is based on the rule of law and the Luxembourg

[31] See, for example, *Brunner v The European Union Treaty* [1994] 1 CMLR 57, Federal Constitutional Court of Germany.
[32] *Jurisdiction of the New United Supreme Court* (2004) Public Law 699.

court has the function of ensuring that the acts of the member states and the Community institutions are in conformity with the laws of the European Union.[33] We could not do without a European supranational court to regulate the affairs of the European Union.

32. So far as the Strasbourg court is concerned, we need a court with ultimate authority to interpret the Convention. Moreover, as I explained in my *Hailsham* lecture[34] earlier this year, an international system of human rights has considerable advantages for the United Kingdom. It subjects the institutions of the state to outside scrutiny, and that is particularly important when, as in the United Kingdom, there is a strong doctrine of Parliamentary sovereignty, and the doctrine of *Wednesbury* reasonableness. Even under the Human Rights Act 1998, the courts cannot strike down primary legislation that violates the Convention. The existence of supranational courts, establishing human rights principles, also empowers the domestic judiciary and strengthens their independence as against other institutions of their own state. Furthermore, the Convention system gives us a legitimate interest in how other countries in Europe treat their citizens, and this is a more powerful position than could be achieved at the political level alone. The Strasbourg court can bring about remarkable change in the raising of standards throughout Europe. In addition, in my experience, its influence stretches far beyond the shores of Europe. As things stand, we have the opportunity to influence and contribute to its jurisprudence.

33. However, it is still sensible to try to identify what we regard as the benchmarks for success in these European courts. Now what are the benchmarks for success for a supranational court?[35] This is a major question. I am going to take the European

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[33] see, for example, Joined cases C-402/05 P & C-415/05 P *Kadi v Council of the European Union* [2008] 3 CMLR 41 at [281] .

[34] *Human Rights and Civil Wrongs: Tort Law under the Spotlight*, which is due to be published in (2010) Public Law.

[35] See generally, L R Heller and A M Slaughter, *Towards a Theory of Effective Supranational Adjudication* (1997) 107 Yale L J 273.

supranational courts together. I am going to suggest to you that what domestic legal systems value most about these courts are the following qualities:

1. *Their independence*. This goes without saying and I need say no more about it.
2. *Their effectiveness in creating a principled body of law within their jurisdiction*. This too is self-evident. We need a court to take the lead in Community law and human rights. We needed to create substantive law meeting the highest standards.
3. *Quality of reasoning and ability to communicate clearly with their constituents*. This is a matter that I need to enlarge on below.
4. *Respect for the role of national courts*. By this, I mean an awareness of where the boundaries are between its role and that of the national courts, a sensitivity to national traditions and national legal systems and an appreciation that there may be constitutional ramifications for the national institutions flowing from their decisions. This is really a call for judicial restraint by the supranational courts.

34. Once we have understood what makes a good or bad supranational adjudication, we are better able to think about what we could do to make the system work better. I next move to the various suggestions that I want to make. I call this my "toolkit".

MY TOOLKIT FOR MAKING IMPROVEMENTS IN THE EUROPEAN SYSTEM OF SUPRANATIONAL ADJUDICATION

35. My toolkit of suggestions for improving the relationship between the European supranational courts and the national courts and the system of supranational adjudication contains four main tools: (1) more dialogue, meaning dialogue between national judges and judges of the European supranational courts and

(1) More Dialogue

36. Dialogue can take several forms and achieve several objectives. I start with informal dialogue between judges of the national courts on the one hand and judges of the two European supranational courts on the other hand. There is a great value in personal contact. A quiet conversation between judges can head off steps which might prove ill-advised. It can also be an enriching exchange of experiences. The informal discussion can also give the national judges an input into the process of developing jurisprudence at the supranational level. In addition, the national judges can explain where the shoe pinches most and how the new jurisprudence can best be absorbed into their own system.

37. Furthermore, I see judicial dialogue of this kind as of constitutional importance in the European legal order. Any supranational court needs to be subject to checks and balances. In the case of the European supranational courts, dialogue with the national courts is an important means of providing such checks and balances.

38. Another form of judicial dialogue takes place at plenary meetings of judges from different member states, either with or without the judges of the European supranational courts. I would like to see more meetings between judges of national courts with interests in common, such as the judges of the common law jurisdictions within the European Union. This would enable them to forge a common approach. We also need meetings between judges in Europe who do not, on the face of it, have interests in common. This enables us to increase our understanding of our European legal heritage.

39. Another very important means of dialogue is through judgments. It is obviously of great benefit to the United Kingdom in terms of influencing the direction of the jurisprudence in the Strasbourg court that the United Kingdom courts are able to

> "Where...the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law."[36]

40. This authority, which refers to *Z v UK*, means that the Strasbourg court would equally be willing in an appropriate case to reconsider an earlier decision in the light of disagreement by the superior national court. In my view, that is a good reason why in an appropriate case the superior national court should not simply apply the Strasbourg jurisprudence with which it has a serious disagreement, but should state its disagreement and, if it reaches a different conclusion from the Strasbourg court, leave the applicant to his remedy in Strasbourg, where the national government can argue the matter fully. If necessary, it can seek a reference to the Grand Chamber of the Strasbourg court.

41. But, to some extent, our domestic courts are disabled from having an active dialogue. This point derives from the way in which section 2 of the Human Rights Act 1998 has been interpreted. Section 2 of the Human Rights Act 1998 provides that when the court determines a question which has arisen in connection with a Convention right, it must *take into account* any jurisprudence of the Strasbourg court, whenever made or given, so far as in the opinion of the court it is relevant to

[36] *Roche v United Kingdom* (Application no. 32555/96) (2005) 20 BHRC 99 at [120].

the proceedings in which the question has arisen. The obligation in relation to Strasbourg jurisprudence is thus much weaker than the obligation of British courts to give effect to the law of the European Union.[37]

42. However, it is now established in English law that, save in special cases, the duty of national courts is "to keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less." (*per* Lord Bingham in *R (Ullah)* v. *Special Adjudicator).*[38] There are advantages in this approach. It recognises the function of the Strasbourg court as the organ for the authoritative interpretation of the Convention, and at the end of the day domestic courts have to respect its authoritative role. Moreover, from the perspective of minimising the risk of a decision of the national court being the subject of an application to the Strasbourg court, and a finding of violation against the member state in question, this approach makes good sense.

43. However, there are also disadvantages to this approach. It does not, for instance, acknowledge that the Strasbourg court is only laying down minimum guarantees. Article 53 of the Convention itself recognises that citizens of the contracting states may have more far-reaching rights. More fundamentally, it is difficult to have an effective dialogue if the courts start from a position of deference. That deference must colour the national court's approach.

44. Moreover, *Ullah* on the face of it sits uneasily with wording of the duty in section 2 of the Human Rights Act 1998 which imposes an obligation to "take into account" Strasbourg jurisprudence, rather than to follow it. From that it would appear that Parliament intended that the courts should be free in an appropriate case to go further than Strasbourg case law (though this would have to be an exceptional case), or, not as far as Strasbourg case law. Our courts should not in any event be

[37] See section 2 of the European Communities Act 1972.
[38] [2004] 2 AC 323 at [20].

expected to apply jurisprudence from another source without being having investigated its reasoning.

45. It is said that the majority of courts in the other contracting states do not take the view that they are effectively bound by Strasbourg jurisprudence.[39] However, in these jurisdictions there are usually written constitutions so that precedence can be given to the rights contained in the constitution. In Germany, for instance, the obligation is again to take account of Strasbourg case law, which means that the courts attach considerable importance to the Strasbourg jurisprudence and must justify not following it. However they are not bound by it.[40] In Germany, a party may raise an objection based on a violation of the Convention as part of his complaint in proceedings before the German Federal Constitutional Court.

46. The result of the "take into account" point is that domestic courts take a restrictive approach to the question when to depart from Strasbourg jurisprudence. The approach on this issue is in sharp contrast to the expansive view taken of section 3 of the Human Rights Act 1998, containing the interpretative obligation, which also involves substantial policy considerations. It is therefore arguably paradoxical that the courts have not taken a more restrictive approach to section 3 as well.

47. What we need is a *right of rebuttal.* We need to be able to say to the Strasbourg court that it has not made the principle clear, or that it has not applied the principle consistently, or that it has misunderstood national law or the impact of its decisions on the UK legal system. I do not suggest there should be a free for all, or that domestic courts should be free to reinvent the wheel on human rights jurisprudence. However, I would argue in favour of an approach which is more flexible than the *Ullah* approach. Such an approach was adopted (without

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[39] See *The Relations between the Constitutional Courts and the other National Courts including Interference in this Area of the action of the European Courts*, General Report to the XIIth Conference of European Constitutional Courts, May 2002 (2002) 23 HRLJ 304 at 327.

[40] *Görgülü* BVerfGE 111. See further Hans-Jürgen Papier, *Execution and Effects of the Judgments of the European Court of Human Rights from the perspective of German National Courts* [2006] 27 HMLJ 1.

disturbing the status of the *Ullah* ruling) in *Doherty v Birmingham City Council*[41] where the House of Lords declined to apply Strasbourg jurisprudence so long as it failed to provide principles on which the courts could rely for general application.

48. In addition, after the 14th Protocol comes into effect, domestic courts may wish to allow time for a case to be referred back to the Strasbourg court for clarification by the Committee of Ministers before they rule on its effect in domestic law.

49. Before I leave this topic I should refer to the extension of Strasbourg jurisprudence. Some people are concerned by the development by the Strasbourg court of its own jurisprudence. The Strasbourg court adopts what is known as evolutive or dynamic interpretation. The language of the Convention is open-textured, and the Strasbourg court gives it a dynamic interpretation so as to keep the Convention in line with present-day conditions. Strasbourg has for example to keep pace with changes in technology, such as the storage of DNA. Lord Hoffmann, for instance, criticises the liberal way in which the Strasbourg court interprets the Convention. However, if Parliament does not like some development of the jurisprudence by the Strasbourg court, it is always open to it to pass primary legislation preventing our domestic courts from giving effect to that development. It will then be for the government to justify the course in Strasbourg. In appropriate cases, the Strasbourg court should be willing to reconsider its jurisprudence. That still leaves the Strasbourg court in the driving seat, but that position is inevitable, short of an amendment to the Convention.

50. What about dialogue with the Luxembourg court? My view is that this is also very important as a means of achieving the best means of supranational adjudication. The judges of the national courts ought to be able to contribute to a debate on the key developments, but it is difficult to do so unless the judgments are more expansive, a point to which I return below.

(2) More subsidiarity

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[41] [2009] AC 367.

51. Subsidiarity for this purpose is the principle that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level.[42] It inevitably follows from subsidiarity that it is recognised that there can be a diversity of solutions to a particular problem.

52. Subsidiarity is consistent with democracy, and with the right of the individual to self-realisation reflected in art 8 of the Convention. This means that, so far as practical, decisions should be taken by the appropriate authorities in the areas most affected by those decisions. Examining the degree to which the supranational courts implement the principle of subsidiarity is therefore one way of testing my fourth benchmark for the supranational courts: respect for the role of national courts. Strasbourg jurisprudence and Luxembourg jurisprudence both have a principle called subsidiarity but they approach the concept differently and in each there is in my view room for expansion.

53. Although the ultimate rationale for subsidiarity is the same in both Strasbourg jurisprudence and Luxembourg jurisprudence, it has been developed in different ways and therefore it has to be examined separately in relation to the Strasbourg court and the Luxembourg court.

54. In Strasbourg jurisprudence, the doctrine of subsidiarity is well established. The Strasbourg court is not a "fourth instance". Its role is supervisory. In general domestic remedies must be exhausted before any application can be made.

55. An allied doctrine is the doctrine of the margin of appreciation. The expression "margin of appreciation" is used to describe those cases where the Strasbourg court recognises that the domestic authorities are in the best position to decide on measures in a particular area. The Strasbourg court has held that there is a margin of appreciation in cases where the contracting state has asserted a derogation in times of a public emergency, or where there is a question of, for example, morals or

[42] Oxford English Dictionary.

the length of statutes of limitation on which there is no consensus among the member states. The doctrine is often controversial. Some feel that having a doctrine of margin of appreciation effectively compromises the role of the Strasbourg court as the guardian of human rights because it leaves it to the national authorities to provide remedies, and they may fail to do so. After all, the most serious cases about breaches of human rights arise because the rights of some unpopular minority have been infringed.

56. But the margin of appreciation is not solely about the protection of rights. It is also about the competence of national institutions. The margin of appreciation ought not to be just about cases where there is no consensus in the contracting states. It is also about comparative institutional competence.[43] This aspect of the doctrine of the margin of appreciation should be recognised and developed. It is again relevant to my fourth benchmark: respect for the role of national courts.

57. National courts have to use the headroom permitted by the margin of appreciation specifically on a national basis. The self-denying ordinance in *Ullah* has no application when the national court is dealing with a case which falls within its margin of appreciation. As Baroness Hale pointed out in *Re G,*[44] Strasbourg jurisprudence is no help in this situation and our courts have to form their own judgment. If a matter falls within the margin of appreciation, and there is no legislation in place, the courts have to exercise a delicate judgment as to whether the matter should be determined by the courts or by Parliament. The courts do not have power to determine the content of rights in a particular situation simply because a matter falls within the margin of appreciation.

58. My view is that subsidiarity, including margin of appreciation, is a concept which the Strasbourg court should develop in its jurisprudence. It should also build on the idea of subsidiarity in another direction. The Strasbourg court has a daunting

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[43] See, for example, the speech of Lord Hope in *R (Kebilene) v Director of Public Prosecutions* [2000] 2 AC 326 at 380 to 381.
[44] Above, n 16 at [120] and [121].

burden of work. In 2008, the Strasbourg court issued 30,200 decisions but it received 50,000 applications, increasing its backlog of cases to 97,000.[45] Some of these cases may be capable of being dismissed summarily as manifestly ill-founded. However, that would still leave a large residue. The only solution as I see it is to share the load with the national courts: however distasteful it may be to a human rights court, the Strasbourg court should, at least until matters improve, seek to focus on the more important cases and leave the cases which are less important to be dealt with by the national courts without further recourse to the Strasbourg court even if the litigant is dissatisfied with the result. There would have to be a clear definition of which cases were less important to contracting states in general, and the Strasbourg court would have to have a discretion, but the definition ought to exclude cases which raise issues in areas of law where there is already a clear and constant case law, and with which the national courts ought to be able to deal. The Strasbourg court might be able to use its "pilot judgment" procedure for this purpose. Excluding these cases would enable the Strasbourg court to focus on areas of its jurisprudence that most call for its special expertise.

59. For the Luxembourg court, subsidiarity can be seen as a form of proportionality review but it should also be seen as a separate principle since it forms the basis of a specific principle inserted by the Maastricht Treaty, which provides that Community institutions will not take any action which goes beyond what is necessary to achieve the objectives of the European Treaty.[46] But the principle has hardly been explored as yet by the Luxembourg court. The principle is important because it recognises the competence of member states.[47] It helps to create a corridor between what member states do and what Community institutions do. In

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[45] Speech by President Jean-Paul Costa printed in *Dialogue between Judges*, European Court of Human Rights, 2009 at page 84.

[46] Now article 5(3) of the Treaty. This provision has been strengthened by the provisions of the Lisbon Treaty. The Lisbon Treaty enables a percentage of national parliaments to object to the Commission taking new measures in a particular area.

[47] And, where appropriate, the competence of their devolved administrations: see *Horvath v Secretary of State for the Environment, Food and Rural Affairs*, C-428/07.

any given case, however, it may be difficult for the Luxembourg court to decide whether something could be effectively achieved by measures taken at the level of the member states. Even where this is so, the Luxembourg court should insist upon strict review of any measure where the Community view on this is challenged by a member state. This would be a practical way of fulfilling its role as a supranational court in ensuring respect for national institutions.

(3) More temporal limitations

60. I have a particular interest in this subject as I wrote a note on it in the Law Quarterly Review[48], which led to counsel arguing before the House of Lords in *Re Spectrum Plus Ltd (in liquidation)*[49] that English law permitted the courts in an appropriate case to impose temporal limitations, that is, to direct that the effect of the order of the court should not have retrospective effect, but only prospective effect. There are many variants on the form of order that can be made.

61. Constitutional courts in other parts of the world have developed the doctrine. In an appropriate case, they declare that a particular act is unconstitutional, but that, if Parliament enacts legislation within a certain period, the order of the court will not come into effect.

62. The Luxembourg court frequently acts as a constitutional court although it does not always says so. The government affected sometimes asks for a limitation on the effect of the order so that it is not fully retrospective. However, temporal limitations are only rarely imposed. It is generally not enough to show that the decision will have harsh financial consequences, such as having to meet claims going back over a substantial period of time, sometimes back to 1973. Generally, the Luxembourg court takes the view that the interpretation which it gives to a provision of Community law clarifies and defines the meaning and scope of that provision as it

48 *Prospective Overruling* (2004) 120 LQR 7.
49 [2005] 2 AC 680.

should have been understood and applied from the time of its entry into force. For there to be a temporal limitation, it considers that two essential criteria must be fulfilled, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. The former condition may be satisfied by showing that the Commission led the party liable to a wrong belief as to the effect of European law. It can be difficult to satisfy this condition.

63. Some of the rulings of the Luxembourg court have seismic impact on national systems. Temporal limitations should be imposed more frequently where the Luxembourg court makes a substantial change in the law. If the national court wishes to do so, it can make the point that consideration should be given to temporal limitations in its order for reference, explaining its view.

64. The Strasbourg court has from time to time imposed temporal limitations but in the normal course it will be much less easy for it to do so as it will simply be dealing with the instant case and not with its impact on the domestic legal system. Nonetheless, there may be cases where, consistently with justice and subsidiarity, a temporal limitation should be imposed.

(4) Clearer judgments

65. The Luxembourg court is probably very tired of common law courts making this point but it is an important one. The Luxembourg court only issues single judgments. Judgments of the Luxembourg court are often brief and contain little reasoning. Because they are single judgments, they are impersonal: no room for analogies with Cinderella or her slipper here! The Luxembourg court frequently says that something follows when it does not follow and there is in fact a large and unexplained development in the law. Cases are referred to which are clearly not being followed and it is not distinctly said that they are being overruled.[50] What often prevails is some rather general Community law principle, like effectiveness.

[50] See, for example, *Cadman v Health & Safety Executive*, discussed above.

There should be dissenting judgments. When the Luxembourg court fails to issue a judgment that is clear, it is not being transparent, and it does not meet the benchmark, which I have identified above, about the quality of reasoning.

66. But the point I am making goes beyond form: it is also a point about the substance of Luxembourg judgments. We need to encourage the Luxembourg court to have a better debate in their judgments on the key thematic issues in Community law. The Luxembourg court rarely discusses the constitutional ramifications or policy considerations of its decisions. If they did this more often, national courts could engage with these issues and make a contribution to their solution. What is often not appreciated is that, in jurisdictions like our own where there is no form of constitutional review, when the Luxembourg court makes decisions which are effectively constitutional decisions the impression is given that constitutional decisions are being imposed on our jurisdiction without any scope for national debate before our national courts. That is a factor which can lead to hostility towards the institutions of the European Union.

67. For the Strasbourg court, clarity of judgments is also sometimes an issue. We should continue to press the Strasbourg court to maintain high standards in its judgments. Acceptance of its jurisprudence by the contracting states depends on the clarity of its jurisprudence. However, there is a partial remedy in the 14th Protocol in that the Committee of Ministers will be able to refer cases back to the Strasbourg court for clarification.

CONCLUSIONS

68. What I have sought to do in this lecture is to pose some questions about what makes for effective supranational adjudication by our European supranational courts. I have sought also to put forward some criteria for assessing their work on a principled basis. It is in our own self-interest to think more structurally about the relationship of the national supreme courts and the European supranational courts.

69. Building a successful European system of supranational courts will also provide a model for other parts of the world and will help maintain the rule of law internationally.[51]

70. So to conclude. We have obtained substantial benefits from the Luxembourg jurisprudence and Strasbourg jurisprudence. So have other countries within Europe. Accordingly, the relationship has been beneficial and peaceful. However, for the reasons given in this lecture, the relationship is also problematic. I have identified a number of practical issues and suggested solutions for how to manage the relationship to achieve the most effective system.

71. Where do we go from here? How should these ideas be taken forward? We shall have to wait and see. As the title of this lecture suggests, the strategy for a national court may well be one which should be spearheaded by its supreme court. I look forward to seeing whether the new Supreme Court of the United Kingdom rises to the challenge.

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[51] See generally Sir Francis Jacobs, *The Sovereignty of Law*, Cambridge, 2006. I would like to thank Sir Francis Jacobs for our discussion on an early draft of this lecture.