An English Judge in Europe

by

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Abstract
Judges today have to apply case law from the two European supranational courts in Strasbourg and Luxembourg as well as domestic law. Lord Denning graphically compared the growth of European Union law to "tidal water rushing up our estuaries". The same point can be made about Strasbourg case law. This article makes the neutral assumption that the inundation continues. Criticism of our flood defences has been intense but do we have a clear idea of the new European legal order? We tend to assume that the relationship between domestic and supranational courts is just like that between domestic courts, when it is far more complex – much more like an ill-fitting jigsaw in some respects. When we analyse that relationship, we can deal with the most topical question: what checks and balances exist or could reasonably be put in place in the relationship between national courts and supranational courts in Europe? In this article, I seek to outline some of the steps that could be taken to help ensure a balanced relationship between national and supranational courts.[1]

Introduction

1. Lord Denning famously observed in 1974 of the treaty then constituting the European Union that:

> "But when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the treaty is henceforward to be part of our law. It is equal in force to any statute. The governing provision is s 2(1) of the European Communities Act 1972. The statute …is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of

[1] This article is based on the Neill Lecture given in Oxford at the invitation of All Souls College, Oxford, on 28 February 2014 in celebration of the past Wardenship of Lord Neill of Bladen.

> Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system. The treaty, with the regulations and directives, covers many volumes. The case law is contained in hundreds of reported cases both in the European Court of Justice…We must get down to it."[2]

2. The same sort of point could today be made about human rights law as interpreted by the European Court of Human Rights in Strasbourg. It re-interprets rights guaranteed by the European Convention on Human Rights ("the Convention") and renders decisions which, as critics point out, often go far beyond what was envisaged when the Convention was signed in 1950.

3. Flooding is sadly very topical this winter. It is a graphic image that Lord Denning created. But there was no hint of fear or of being overwhelmed. Simply an injunction that "w*e have to learn a new system"* and that "w*e must get down to it*." I intend to do both those things in this article.

4. More particularly, my aim in this article is to stand back and look at the architecture of the European legal scene as it has developed and stands at the present day. By European legal scene, I mean the principal national courts in Europe and their relationship with the supranational courts in the European Court of Human Rights ("Strasbourg") and the Court of Justice of the European Union ("Luxembourg"). I shall talk mainly about Strasbourg, but I shall refer also to Luxembourg. I call them "supranational" courts as these courts are not merely transnational, that is, courts which transcend a state's boundaries, but

[2] *H P Bulmer Ltd and another v J Bollinger SA and others*- [1974] 2 All ER 1226 at 1232-3. A few years later, however, Lord Denning MR compared the doctrine of direct effect to flooding above the high water mark: he said "All this shows that the flowing tide of Community law is coming in fast. It has not stopped at 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" *(Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456, 462).

they are also in themselves international organisations under which contracting states have agreed to share in the decision-making.

5. I do not propose to argue for or against membership of the European Union or being a contracting party to the Convention: those are political questions. Judges have to give effect to the law as it stands and I will assume that the law will remain as it stands simply because that is what we have to implement. But, in my professional capacity, I have obtained some important insights into the role of the supranational courts which I want to share. Out of court, I fulfil, under the Lord Chief Justice's overall direction, the work of Head of International Judicial Relations for England and Wales. This article, however, represents - for better or worse - my own thoughts based on my own experience, and I do not express any views in an official or representative capacity.

6. I have a few more points to make by way of introduction before I come to my main theme. It is my view – just as it was Lord Denning's - that we have much to learn by looking at some foreign systems of law in any event. By looking abroad we can in my view learn to do a better job at home. The courts used to take it for granted that advocates would where appropriate cite foreign texts. This happened, for example, in *Hadley v Baxendale*[3], which is the leading authority on the measure of damages in contract.

7. In that case, the iron shaft of the plaintiff's flour mill broke and the plaintiffs consigned it to the defendant carrier for delivery to the repairer. The carrier delayed unreasonably so that the plaintiffs lost profits while their mill was shut, but they had not told the carrier that that would happen. It was held that they

[3] (1854) 9 Ex.341.

could not recover damages for these profits. The decision establishes that the damages should be such as may "fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things," from the breach of contract or "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." (per Alderson B, giving the judgment of the court). It is noteworthy that in the course of the argument Parke B. interposed to say that the sensible rule appeared to be that which had been laid down in France and which was indeed the *Code Civil*, which he proceeded to quote in translation. There was a discussion of the American authorities and Counsel submitted that the English courts should follow those decisions. There is nothing to suggest that the use of comparative law in *Hadley v Baxendale* was exceptional. On the contrary it seems a perfectly natural part of the argument in the case. It leads one to believe that in the 19th century and possibly earlier it was commonplace for the English courts to look for inspiration to systems overseas.

8. With the burden of work we may have lost a little of that inquiring mind when it comes to foreign law. We need in my view to find out what we can about other systems in order to strengthen our own law, and we need to be able to promote the value of our common law among others so that it inspires transnational law.

9. Luxembourg's primary responsibility is to give interpretations of the European treaties and European Union legislation. It sits in Luxembourg. EU law has primacy over domestic law in areas of competence conferred by member states on the EU.[4]

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[4] See, for example, *R v Secretary of State for Transport ex parte Factortame Ltd* [1991] 1 AC 603.

10. EU law is made binding in English law by section 2 of the European Communities Act 1972, to which Lord Denning referred. On the face of it, as he said, it is absolute. American lawyers would say it was the equivalent of the supremacy clause in the US constitution which governs the relationship between the states and the federal government.[5]

11. The function of the Strasbourg court is authoritatively to interpret the European Convention on Human Rights. It hears cases mainly on individual petitions from persons within the territory of the contracting states. There are 47 contracting states which are parties to the Council of Europe as opposed to 27 members of the European Union. The protection provided by Strasbourg stretches from the west of Ireland in the west to Vladivostok in the east. Its rulings affect about 800 million people.

12. The Convention is given effect in English law by the Human Rights Act 1998. The principal provision for my purposes is section 2(1):

> "(1) A court … determining a question which has arisen in connection with a Convention right must take into account any—
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> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,…"

13. This obligation is far less "muscular" than section 2 of the European Communities Act 1972. It had to be. One of the reasons why the Human Rights Act refers to "take account" of Strasbourg jurisprudence is that, unlike the European Communities Act, the Human Rights Act does not provide for the

[5] "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." US Constitution, article 6(2).

wholesale incorporation of Strasbourg case law: it merely enables effect to be given to Convention rights when they did not conflict with the clearly expressed will of Parliament or when they did not conflict with primary legislation from Parliament.[6]

14. The Convention has an important place in the world. Since the Convention was signed, many national constitutions have included rights in terms of those set out in the Convention, including constitutions of countries outside Europe. That gives you some idea of the global importance of the Convention.

15. No one can doubt the enormous achievements of Strasbourg in interpreting the Convention rights.[7] The Convention has helped to change the culture in many European countries. For example, in the UK, the Political Parties, Elections and Referendums Act 2000 brought the laws on campaign funding for non-party campaigners up to date after Strasbourg held in *Bowman v UK* [8] that the UK had violated freedom of expression by limiting such funding to £5.

16. A remarkable book of essays has just been published about the first decade of implementation in Russia.[9] You may think this is just propaganda but it is unexpected to find President Valery Zorkin, the President of the Constitutional Court in the Russian Federation describing the steps that have been taken by his

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[6] See, generally, Human Rights Act 1998, sections 3 and 4, and see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The Human Rights Act 1998 preserves Parliamentary sovereignty. In the opinion of the Joint Committee of the House of Lords and the House of Commons on the Draft Voting Eligibility (Prisoners) Bill, Parliamentary sovereignty is not an argument against giving effect to a Strasbourg judgment. Parliament remains sovereign but that sovereignty resides in Parliament's power to withdraw from the Convention (HL paper 103 HC 924 16 December 2013 at pages 64-5).

[7] See, generally, *The Conscience of Europe, 50 years of the European Court of Human Rights,* Strasbourg, 2010, Ch. 13.

[8] (Application 24839/94) (1998) 26 EHRR 1, 4 BHRC 25.

[9] *Russia and the European Court of Human Rights: a Decade of Change, essays in honour of Anatoly Kovler, judge of the European Court of Human Rights in 1999-2012*, Olga Chernishove and Mikhail Lobov eds,.Wolf Legal Publishers (2014), pages 27 to 38.

court to give effect to Strasbourg jurisprudence. He explains, for instance, how "[by] referring, in its [reasons] to the Convention, to its provisions and their interpretation by [Strasbourg], the Constitutional Court implants them directly into the 'tissue' of the Russian legal system." Russia is not known for its participation in dialogue about human rights. Things may be moving even there.

17. I must immediately get one issue out of the way. Strasbourg and Luxembourg, like any other court, do not always get it right. In his recent Essex lecture, Lord Dyson MR powerfully explained how the Strasbourg court had effectively reversed its earlier case law on article 1 of the Convention (which states that the Convention applies to persons within the jurisdiction of the contracting states). In the result, contracting states have increasingly been held responsible for acts which occur outside their own territory but where they have control over others.[10] Shortly before that speech, Strasbourg delivered another decision on the same subject in which it suggested that, in the light of developments in international law, it might in the future have to consider whether sovereign immunity in civil proceedings concerning torture was compatible with the Convention.[11]

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[10] *The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing but is it a Sound One*? 30 January 2014, http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf

[11] *Jones v UK* (App. Nos 3456/06 and 40528/06), where the applicant complained of a violation of article 6 of the Convention because his proceedings for damages for torture in the English court against a foreign state had been struck out on the grounds of sovereign immunity: *Jones v Saudi Arabia* [2007] 1 AC 270. The Grand Chamber held that a state did not violate article 6 of the Convention by granting immunity to officials of a foreign sovereign state alleged to have been involved in acts of torture but that, in view of developments in international law, contracting states needed to keep the matter under review [§215].

18. Some may question whether Strasbourg has taken a wrong turn in relation to extraterritoriality. One of the consequences of this developing case law is that, even where the Geneva Conventions apply to the contracting state's acts, it may be additionally responsible under the Convention for acts outside its own territory. As I said in *Al-Jedda v Secretary of State*,[12] before the latest developments in Strasbourg :

> "If courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states… It is thus not correct to say that the executive had unfettered powers of internment. A decision of the executive in breach of [the Fourth Geneva Convention of 1949] can be remedied in this jurisdiction through the processes of judicial review, and a breach may also constitute a criminal offence over which the United Kingdom courts would have universal jurisdiction under the Geneva Conventions Act 1957."

19. I took the view, therefore, that the Convention jurisprudence on detentions should not bind contracting states in areas already policed by the Geneva Conventions. Peace-keeping troops often are drawn from various countries, many of whom will not be parties to the Convention. Strasbourg jurisprudence may create practical difficulties for joint operations between Convention and non-Convention states in the future, which is not in anyone's interest. If I am right in this, Strasbourg jurisprudence may impede, not promote, international humanitarian law.

20. Let me give you an example of Strasbourg demonstrably taking the wrong path. In *Osman v UK*[13], the Strasbourg court held that the decision of an English court that a public authority did not owe a duty of care to a victim of its negligence

[12] [2011] QB 773.
[13] 87/9997/871/1083, [1998] 5 BHRC 293.

was effectively to give that part of the state an immunity and that was contrary to the right of access to court in article 6 of the Convention. But the duty of care is a fundamental step in the reasoning whereby liability in negligence is imposed under English law. English law is very unlike civil law in this respect. In civil law systems, liability is often imposed on a public authority for its incompetence although the compensation awarded will tend to be lower than in England and Wales. I was appointed an ad hoc judge of the Strasbourg court for a case from England which raised the identical issue: *Z v UK*.[14] The important point for present purposes is that the Strasbourg court took careful note of the criticisms that were made of its decision in *Osman*. It reconsidered its earlier decision and accepted that the determination of the English court that a public authority did not owe a duty of care was simply part of the process whereby substantive national law was applied. This decision demonstrated a very important characteristic of Strasbourg case law – its *plasticity*, its genuine desire to respond to the needs of the contracting states' legal systems, in other words its *receptivity* of the need for change. *Receptivity* is Strasbourg's coping strategy, and we would do well to remember this. The *plasticity* of Strasbourg case law is a cause to celebrate. Strasbourg absorbs ideas from the legal systems of contracting states and it is capable of adapting itself when need arises. *Plasticity* is a point I shall come back to at the end of this article.

21. A unique feature of the Convention system is that the judgments of the Strasbourg court are implemented by a peaceful process. The Universal Declaration of Human Rights, for instance, has no similar process. Decisions of the Strasbourg court are implemented through the Committee of Ministers of the

[14] *Z v UK* (App No 29392/95), [2001] 2 FCR 246.

Council of Europe. That means that, if there is a violation by one contracting state, other countries represented on the Committee of Ministers may expect to receive reports from it as to when the violation will be remedied and it will apply pressure to see that it is done. The process is the same for all the contracting states.

22. What the Convention, therefore, gives is *the collective right to intervene* in the internal affairs of another sovereign state via the Committee of Ministers of the Council of Europe.

23. Ought this intrusive process of implementation to be a matter of concern to a country like the UK? The figures alone would suggest not. In 2013, for instance, out of 1,652 applications against the UK, Strasbourg gave only 8 judgments holding that the UK had violated the Convention, as opposed to 28 against France.[15]

24. Strasbourg's dynamic interpretation of the Convention is known as the "living instrument" theory. Lord Phillips described this in his recent lecture in Oxford.[16] It means that in determining the scope of a right Strasbourg has regard to changing conditions. It laid down the principle in *Tyrer v UK*[17] when it declared that birching was inhuman and degrading treatment contrary to article 3 of the Convention even though that would not have been thought to be the position when the Convention was signed in 1950. In terms of principle, (though probably not the scale), this does not differ from the dynamic way in which our own courts tend to interpret open-textured legislation.

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[15] *The ECHR in Facts and Figures 2013,* issued by the European Court on Human Rights.
[16] *The Elastic Jurisdiction of the European Court of Human Rights*, Oxford, 12 February 2014.
[17] [1978] EHRR 1.

25. But there are concerns about Strasbourg's living instrument theory. What sometimes upsets people is the unpredictability of the dynamic interpretation: Strasbourg has brought within the Convention large areas of activity which would not have been considered to involve human rights in the past, such as night flights at Heathrow, which were held to fall within article 8. Later in this article I shall consider steps which would meet some of the criticisms that have been made of the living instrument theory.

26. On the ground, English judges are now very accustomed to deciding cases with many different systems of law. One can start at the level of devolution and deal with Welsh or Scottish or Northern Irish legislation. Then there is Westminster legislation, then there is legislation at the level of the European Union and the jurisprudence of the Court of Justice of the European Union. In the very same case you may have all these levels of law and in addition an issue as to human rights. The stratification of law reflects that in certain fields there are now many levels of governance today in Europe. I have in another place described this as multi-level judging.

27. With that introduction, I want to turn to look at the architecture of the European legal scene with particular reference to the complications created by the presence of the two European supranational courts.

Architecture of the current European legal order

28. Both Luxembourg and Strasbourg are products of post-Second World War Europe. The Holocaust and the massive violations of human rights in Germany and other European countries that had taken place during the War and the years

preceding it led the political leaders to realise that there had to be some way of intervening in a country's internal affairs when human rights violations occurred. This was the background against which the Council of Europe was set up and its main showpiece, the Convention, was signed.

29. The Council of Europe and the European Union are regional organisations empowered to perform certain tasks that the contracting states which are parties would formerly have made decisions about separately and individually. If we are going to understand the new European legal scene and the relationship between national and supranational courts, we have to recognise that the formation of these regional organisations of states represents a seismic shift away from the conventional notion of the nation state. It may seem obvious but, by grouping together, the states involved have agreed to work together in particular spheres. This necessarily has implications for the legal scene. It has inevitably been a step into a new world and into the unknown.

An interlinked world

30. Another major change in international affairs is that today we live in an interlinked world. If, for instance, Romania were to mistreat its Roma, the Roma people might leave Romania in large numbers and seek to come to (say) France or the United Kingdom.[18] Likewise if there is political unrest in (say) Ukraine, and the authorities react in a way which does not respect the right of democratic protest or the human rights of the protesters, not only the people of Ukraine but investment in Ukraine may suffer and as a result the loss of confidence may spill

[18] There is considerable evidence of discrimination against the Roma throughout Europe. For example, according to figures published by the Financial Times on 25 February 2014 only approximately 1% of the Roma population in Greece receive the educational advantages received by 85% of the rest of the population. According to the same report, there are some 12-13m Roma in Europe, mainly in Romania, Bulgaria and Hungary.

over and affect foreign investment in a number of other related areas of Europe. That would be bad for trade and bad for the economy of the UK and Europe. No doubt many other examples could be given.

31. Some states will recognise that we do now live in an interlinked world, and they will therefore take the view that it is to their advantage to be parties to organisations such as the Council of Europe in order to have some influence over the internal affairs of another state. In the case of the membership of the Council of Europe, that influence is through the European Convention on Human Rights: visionaries like Churchill saw that this was a way of obtaining real and lasting peace in Europe. There is both a gaining and a loss of control: a gaining of power with the other member states to intervene in the internal affairs of another sovereign state and at the same time a loss of control – those other member states may seek to intervene in one's own internal affairs and there is no control over decision-making. So the price of membership of a regional organisation with its own judicial system is a certain inevitable loss of control over the formation of law by the supranational court. Each state is simply one of 47 member states and can only exercise a limited amount of influence.

32. Nation states are bound to respond differently to the major structural changes that have taken place in Europe, including the institution of the supranational courts.

How different courts have reacted to the role of the European supranational courts

33. It is inevitable and to be expected that there are tensions in this situation. There are now many countries which have experienced difficulties with Strasbourg. We are not alone in having the type of episode that occurred in *Z v UK*.

34. As I have said, different states can re-act in different ways to this dilemma. At one end of the scale will be those who either never join or who react by withdrawing from the supranational systems which create additional complexity for the domestic system. By withdrawing from supranational systems, states simply have their own national law again. That would mean the end of the complex multi-level judging which our courts and others do today. That is the decision for the democratic legislature of that member state to take, having weighed up the plusses and minuses and worked out what is in the national interest.

35. At the other end of the scale are those states that have no difficulty in participating. There are probably very few of those.

36. Many of the contracting states to the Convention are, however, positioned at various points along the scale. They have elected to be parties to the Convention, but have sought to accommodate the supranational system more closely to the national paradigm.

37. The best known example is Germany. I start with its approach towards Luxembourg. In its famous *Solange* I ruling[19] in 1974, the German Federal Constitutional Court (FCC) held that it had the right to review the compatibility

[19] BVerfGE 37, 271.

of EU law with the German constitution (known as the Basic Law), as long as the EU does not have a catalogue of fundamental rights equivalent to rights guaranteed by the Basic Law. In its 1986 *Solange II* decision, impressed by the developing Luxembourg case-law, the FCC modified its position.[20] It stated that, in the sphere of competence of the EU, a standard of protection of fundamental rights had arisen that had to be deemed equal in substance to that provided by the Basic Law. The FCC further held that it would no longer review secondary EU law on the basis of the fundamental rights of the Basic Law, as long as the EU generally ensured an efficient protection of fundamental rights against the authorities of the EU deemed equal in substance to the protection of fundamental rights inalienably required by the Basic Law.

38. In a recent case,[21] the FCC considered aspects of the European Stability Mechanism ("ESM") adopted by Eurozone countries in February 2012. It held that it could examine whether the authority of the European Central Bank under the ESM to purchase bonds of member states on the market was within the powers conferred by the EU treaties, and in addition whether the ESM was compatible with the Basic Law. It has announced that it has formed the view that there was more than one possible interpretation and that it proposes to request Luxembourg for a preliminary ruling on that matter. It also made it clear that a finding that the authority was outside the powers conferred by the EU treaties would lead to breaches of the Basic Law. This is a stark position in which Luxembourg and the FCC might find themselves at odds. We shall have to see what Luxembourg decides.

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[20] BVerfGE 73, 339.

[21] See Press Release No.9/2014 issued by the FCC on 7 February 2014.

39. The FCC initially adopted a similar position in relation to Strasbourg jurisprudence. However, in *M v Germany,*[22] a case concerning detention of prisoners after they had served their sentence (preventive detention) on the grounds that they were still a danger to the public, the FCC decided that the detention violated the Basic Law because Strasbourg had held that such detention violated articles 5 and 7 of the Convention and that should be taken into account, even though Convention jurisprudence is of a lower status in German law than the Basic Law. Significantly, the FCC reversed an earlier decision that held that preventive detention was constitutional.

40. Another example is the approach of the Conseil d'Etat in France in relation to Luxembourg's decisions. In *Arcelor*,[23] the question arose whether an EU directive was consistent with the constitutional right of equality in the French constitution. The Conseil d'Etat formed the view that the EU principle of equality provided for equivalent protection but it referred to Luxembourg the question whether the directive in question complied with the EU principle. Luxembourg held that the directive complied with the EU principle of equality.[24] The Conseil d'Etat would not have enforced the EU measure unless it afforded equivalent protection to that available under domestic law.

41. Likewise the Constitutional Tribunal of Poland has held that the Polish constitution has primacy over any other law, including EU measures, though

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[22] BVerfGE 128, 326. This was particularly significant because normally the first decision would have been a bar to any further proceedings regarding the same statutory provisions. In its judgment, the FCC approved the setting up of a new system of detention for dangerous persons and held that this new system was not in violation of the Convention.

[23] Conseil d'Etat: Decision No 287110 of 8 February 2007, *Société Arcelor Atlantique et Lorraine and others.*

[24] Case C-127/07.

both it and Luxembourg would owe reciprocal obligations to avoid any conflict.[25]

42. I could give other examples. In short, a number of countries have laid down a marker that there will be a protected sphere in which the writ of Luxembourg or Strasbourg will not run. This is all a long way from section 2 of the European Communities Act 1972, which as construed by Lord Denning gives EU law absolute effect in the UK. EU law has been developed so that, if domestic law conflicts with EU law, the court must disapply it.[26]

43. The supranational courts may not particularly like the approach taken by courts such as the FCC, but, ironically, they take just the same approach when faced with challenges to their own boundaries, as I will now explain.

44. *Kadi I*[27] concerns the EU's implementation of the sanctions regime established by the UN Security Council. The nub of Luxembourg's decision was that, even though the EU is bound to respect international law and the UN Charter indirectly, given that the member states are subject to those sources of law, EU acts cannot infringe the EU's own fundamental rights. The critical paragraph of the judgment specifies that international obligations:

> "[c]annot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in article 6(1)EU as a foundation of the Union."[28]

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[25] Case SK 45/09 of the Constitutional Tribunal of Poland, 16 November 2011.
[26] See footnote 4, above.
[27] Joined Cases C-402/05 P and C-415/05, *P Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351; [2010] AII ER (EC) 1105.
[28] Paragraph 303.

45. The relevant regulation was found to breach those fundamental rights standards, as it did not provide any means for Mr Kadi to know the basis under which he was placed on the sanctions list. His victory was a pyrrhic one as Luxembourg delayed its annulment order so that a replacement Regulation could be adopted.[29]

46. Strasbourg has also retained a role even where other systems of protection exist. We have seen this in relation to the United Nations, as in *Al-Jedda.* In addition, where an applicant contends that an EU measure violates a Convention right, Strasbourg does not relinquish the field to Luxembourg but applies a rebuttable presumption that EU law provides equivalent protection for Convention rights.[30]

47. Where does the UK stand on this? We are contracting parties to the Convention and a member of the European Union. Have our courts similarly policed the boundaries between their field of operation and that of the supranational courts?

UK approach to the supranational courts: the "mirror" principle

48. UK jurisprudence has taken its own course. After all, unlike, for instance, Germany, we have no higher constitutional law which is to be protected in priority to Convention rights. Indeed, as we have seen, section 2 of the European Communities Act 1972 has the effect that EU law is seamlessly absorbed into our domestic law. The Human Rights Act 1998 is different in its approach to the Convention because it provides that judges will "take into account" Strasbourg jurisprudence. In the light of this, our courts have adopted

[29] *Kadi II* concerned Mr Kadi's challenges to the decision to place him on the sanctions list: Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, [2014] All ER (EC) 123.
[30] *Bosphorus Hava Yollari Turizm v Ireland,* (App No 45036/98); (2006) 42 EHRR 1.

what Baroness Hale has called "the mirror principle", which means that English law will apply and reflect the clear and constant jurisprudence of Strasbourg, save in special cases.[31]

49. I do not propose to allow myself to be drawn into a discussion of whether this reading of the Human Rights Act 1998 is the right one or, as Lord Judge, formerly Lord Chief Justice of England and Wales,[32] recently suggested, the wrong one on the basis that the courts are only bound to "take into account" Strasbourg jurisprudence. Nor do I intend to be drawn into the argument over whether our courts should go further and speak on questions on which the Strasbourg court has not yet spoken. These are questions which I or others may have shortly to decide in our judicial capacity and we must wait to hear the arguments.

50. The effect of the mirror principle is that the courts must follow Strasbourg jurisprudence without exercising their own scrutiny save at a relatively minimal level. The original formulation of this principle came in case known as *Ullah.* [33] It is to be found in a judgment of Lord Bingham, one of the greatest judges of the United Kingdom in the twentieth century. It has been the subject of some refining in the highest court. The most recent statement is in the judgment of Lord Sumption in *R(o/a Chester) v Secretary of State for Justice*[34]:

> "The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do

[31] Baroness Hale, *Argentoratum locutum: is Strasbourg or the Supreme Court supreme?* [2012] HRLR 12.
[32] *Constitutional change: unfinished business* http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture041213/.
[33] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.
[34] [2014] UKSC 63, [2014] 3 WLR 1076 at [121].

> so. In enacting the 1998 Act, Parliament must be taken to have been aware that effect would be given to the Act in accordance with this long-standing principle. A decision of the European Court of Human Rights is more than an opinion about the meaning of the convention. It is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the convention which the convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being reviewed by the Strasbourg court."

51. Thus the adoption of the mirror principle amounts to a decision not to develop the UK's own jurisprudence on human rights. On this basis, it can be said to be ahead of its time. If the *Ullah* principle had been accepted by all the contracting states, it would have led to an integrated legal order in Europe but Europe as presently constituted would not accept that.

52. Some might observe that there is something odd about a supranational system of law in which one country implements Strasbourg case law by having courts which protect the constitutional identity of the nation state while others implement it in way that starts from a position of full compliance from which only a limited number of exceptions are available. But the fact is that the English courts have come to this particular issue only recently with the Human Rights Act 1998. They are slowly working their way towards a solution. The correct view is, as I see it, that the attitude of the English courts to Strasbourg jurisprudence is still developing. In due course it may well come to provide the UK with just as much protection as that available in other contracting states.

53. Some suggest that, if the mirror principle is set aside, English courts will somehow be liberated altogether from Strasbourg jurisprudence, and that England and Wales will be free to develop their own rights jurisprudence. I

would rather doubt that. What tends to happen in practice is that, if a party claims that their human rights have been infringed, they point to some Strasbourg case law. Since the English courts were not able to give effect to Convention rights from the start in 1950, we are still playing “catch-up”. Strasbourg jurisprudence would thus be likely to play an important role even if we did not have the mirror principle.

Metaphors for this new inter-judicial relationship: pyramid or mobile?

54. In a recent speech, Professor Dr Andreas Vosskuhle, the President of the FCC, discussed the question whether the relationship between the supranational and national courts was that of pyramid or a suspended, free-flowing mobile.[35] He concluded that the relationship was more like the latter: that there is no duty on national courts of strict obedience where the constitutional identity of the member state is jeopardised. He points out that the parts of the mobiles are linked together by strings and that those strings must not become entangled. I find this a very compelling metaphor but I would suggest that it must not be taken too far. The analogy with the mobile could suggest that the courts are open to influence and are blown by the winds. The fact is that domestic courts often have an important role to protect the constitutional identity of the domestic system in the supranational sphere. This is particularly so if the margin of appreciation (or, as it is called in EU law, subsidiarity) which they have been allowed by the Luxembourg and Strasbourg courts is exceeded.

[35] http://www.echr.coe.int/Documents/Speech_20140131_Vosskuhle_ENG.pdf.

55. I would also compare the position in some respects to that of an ill-fitting jigsaw. I prefer this metaphor because it conveys the idea of two or pieces jostling to occupy the same space from different directions. The supranational court and the national court are seeking to occupy the same legal space but approach it from very different angles. Thus, for example, Luxembourg may be concerned about the impact of integration on the single market. The national court may be concerned with compatibility of an EU measure with the national constitution.

56. Our national courts are in a pyramid – High Court, Court of Appeal and Supreme Court. The position is similar in Scotland and Northern Ireland. What the analogies with a mobile and jigsaw show is that it is wrong to assume that, just because our national courts exist in a pyramidical system, so do our courts in relation to the supranational courts. The supranational courts have their own spheres of operation. Those spheres are limited: they do not cover the huge range of matters which national judicial systems cover. So on no basis is the relationship between national courts and European courts one that could be described as pyramidical.

Checks and balances, not democratic deficit

57. I am now going to develop some ideas about how the system of supranational courts might be improved. The protection of a state's constitutional identity cannot solely be achieved at the level of the state. It must also be appropriately protected in the supranational court itself.

58. A criticism that people tend to make about Strasbourg is that there is a "democratic deficit": they say that the decisions made by a state's elected legislators, or by its constitution or constitutional court, can in effect be overturned by a court which is an unelected body and whose decisions cannot be appealed to any other body. In a sense, it is a fool's errand to seek a democratic system when assessing a supranational court. In the case of a supranational court, states, which give up a certain measure of control over their own affairs, need to establish something else: they need to establish that there are checks and balances in the system or that there are *accountability mechanisms* which, as far as possible, ensure a proper balance in the relationships.

59. Do these checks and balances exist or can they be created? My answer is yes, it can and is being done in at least three ways: internal working methods, brakes on implementation and constant renewal of the relationship between supranational courts and national courts.

1. Supranational court's own working methods:

60. I shall have space only to deal with Strasbourg: a similar exercise could be conducted for Luxembourg. The following features can be identified:

    (a) *Transparency*: Strasbourg maintains much information on its website and holds hearings in public. It also makes an annual report and holds an open meeting at the start of its legal year.

    (b) *Role of the national judge*: In any case concerning a contracting state, its national judge will always participate in the decision. This is an

important means of helping to ensure that Strasbourg is properly informed about the position in the nation state.

(c) *Implementation*: Decisions are reported to the Committee of Ministers of the Council of Europe, who oversee implementation.

(d) *Precedent*: the Strasbourg court does not regard itself as always bound by precedent. This helps give Strasbourg jurisprudence its plasticity.

(e) *Guarantee of quality of judgments*: one of the ways this is achieved is by a rigorous process of electing judges. Strasbourg judges have to be elected by the Parliamentary Assembly from national lists.[36] There is always room for improvement here. There is a panel to advise the Parliamentary Assembly on the candidates before it. This panel system may not work very well at the moment but it is new. The Parliamentary Assembly of the Council of Europe should give the highest priority to electing as judges the persons who are the best qualified for the role. In addition, contracting states need to be encouraged to ensure that they nominate candidates who are well qualified and suited for election, and that they have systems for selection designed to bring forward a diverse range of the ablest candidates.

(f) *Margin of appreciation:*[37] this is the term used to describe the recognition by Strasbourg that the democratic authorities in any particular contracting state are best able to decide on measures in a

[36] Thus, unusually, Strasbourg judges are not simply appointed by the governments of the contracting states.
[37] In EU law, the equivalent mechanism is subsidiarity.

particular area. It is, therefore, a mechanism which is used to mark out the boundaries between contracting states and Strasbourg. It is one of Strasbourg's coping strategies: if the case involves a sensitive matter on which the views of contracting states tend to differ, Strasbourg allows a "margin of appreciation", which means that it will leave it to the contracting state to make the final decision. The decision to allow a margin of appreciation can be very controversial: if Strasbourg declares that an act is within the margin of appreciation, it may be accused of failing to ensure compliance with the Convention. Conversely, if it fails to declare a margin of appreciation, it may be said to have interfered with national sovereignty. The decision is therefore a tricky one for it.

(g) *Consensus*: Strasbourg may use consensus among European countries to narrow the margin of appreciation allowed to a member state or to enable it to interpret the Convention rights more dynamically. The use of consensus is somewhat like the use of state law by the US Supreme Court – Brandeis J famously referred to the states' laws as "laboratories of democracy". He said "A state may, if it choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of society."[38] They could experiment with new ideas, giving new rights to their citizens, and in due course the Supreme

[38] See *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Court would consider whether those ideas were in fact also reflected in rights in the US Constitution.[39]

(h) *Subsidiarity in implementation*: Both EU law and Strasbourg case law depend on national courts to apply their decisions in future cases. It is very important that the national courts have responsibility for implementation because it is at that stage that the ill-fitting edges of a supranational court's decision and domestic law can be made to work together.

(i) *Right of individual petition:* A key feature of the Convention system is that an individual may petition Strasbourg over violations of Convention rights. This ensures that they have a right of immediate access to Strasbourg and, in an appropriate case, to a remedy under the Convention. I should say a word here about the proposition that human rights are universal in abstraction but national in application. This proposition, which has been very powerfully advanced by Lord Hoffmann[40] in particular, is used as an argument for not permitting the right of individual petition so that Strasbourg would never make a decision in a particular case: that would be left to the contracting state. I do not myself think that this argument is correct. There can be acceptable differences of opinion as to whether something constitutes a violation of human rights: for example, on the extent to which the state may be involved in religion without violating an individual's

[39] The US experience, for instance with abortion rights, has been that if there is no consensus there may be a long rearguard action testing the limits of what has been decided by those who do not agree with the case law.

[40] *The Universality of Human Rights* (2009) LQR 416.

Convention right to manifest his religion. Some states adopt a strict approach of *laïceté*: i.e. no intervention by the state in religious affairs. There are other contracting states, like the UK, where the Head of State is also head of the established Church in one of the constituent parts of the UK. No-one would seriously argue that there cannot be a cultural difference of that kind in the way a state is organised. However, there is also a large measure of agreement on basic rights: the disagreement is more at the level of the proportionality of, and justification for, differences. In that situation, the societal choice of the contracting state should be respected and the restriction is tested against well-established standards of proportionality. This is not inconsistent with the important right of individual petition.

2. ***Brakes on national implementation*:**

61. Having discussed the internal working methods of the supranational court, I now turn to make some observations and proposals about the important subject of how their decisions, which may be very controversial in some states, are to be implemented. A certain amount of leeway in implementation freedom is inherent in the Convention.[41]

62. There can be variations in the speed of implementation. When Strasbourg case law requires to be implemented by the national court, the latter decides how to develop its own law and makes appropriate decisions about law about the period of time over which changes are to be made.

[41] See generally Bratza N, *The Relationship between the UK courts and Strasbourg* [2011] EHRLR 505.

63. Importantly, national courts can disagree with Strasbourg and require it to think again. There are now several instances where the UK courts have done this. The national courts may not succeed in persuading Strasbourg to change its mind, but as in *Z v UK* there have been cases where it has been shown that Strasbourg has unfortunately drawn the wrong conclusions about national law. Parliament may also enter into a dialogue with Strasbourg, as has happened with prisoner voting.

64. We should never reach the stage where there is complete disagreement between Strasbourg and the contracting state but there may be long delays in implementation.

3. *Constant renewal of the relationship between national and European legal orders by formal and informal dialogue:*

65. I have already referred to the formal dialogue that goes on when a national court disagrees with a decision of a supranational court but we also need informal dialogue – a conversation between the leading European courts and the supranational courts.

66. Judges have, therefore, engaged in a considerable amount of dialogue with the Strasbourg court, that is informal meetings in which we each exchange views on general issues. It is a very important form of contact. In a recent speech the former president of the European Court of Human Rights, Nicholas Bratza, said that the United Kingdom was one of the countries which had the most effective dialogue with Strasbourg.[42]

[42] Miriam Rothschild and John Foster Memorial Lecture, London, 2013.

67. But there is another important form of dialogue: the formal dialogue between the Court and the contracting states through the Interlaken, or Brighton, process. The contracting states began a process of formulating reform proposals at a High Level Conference on the future of Strasbourg in Interlaken in 2010. There was particular concern over the size of its backlog, which has now greatly reduced. The process is continuing and has led to a number of administrative changes and to new Protocols. There have been a number of conferences since including one at Brighton in 2012. The process has been very successful. I have some further suggestions to make.

68. Before I do that, there is a word of explanation needed about judicial accountability. A principal badge of judicial accountability in national courts is that judges show restraint in their decision-making and do not venture into those areas which should be left to national Parliaments. For Strasbourg, there is a constant tension between its international obligation to interpret the Convention and national sovereignty. One of the difficulties for Strasbourg is that it is difficult for it to know whether it has gone outside that area of restraint. I think it would help in that regard if there was the ability to use a new form of judgment, which I will call a "provisional judgment". This is not a challenge to Strasbourg's independence but rather an attempt, as its jurisprudence matures and reaches more deeply into the legal systems of contracting states, to link it up more effectively with contracting states.

69. There are various ways in which provisional judgments can be used. Under one version, if the decision would significantly develop its jurisprudence, Strasbourg would not issue a binding decision but only a provisional decision. So, if it

proposed to declare for the first time, say, that there was a right of access to court, it would first issue a provisional judgment. In that provisional judgment it would indicate how, provisionally, it proposed to interpret the Convention but give national courts the opportunity, and a generous period of time, to express their view on the practicality of this development.

70. Another situation is where a provisional judgment will simply indicate that Strasburg's current view, was that unless there was a change in circumstances, it would decide, in an appropriate case, in say three years' time that a new interpretation would be given to a certain right. Contracting states would be able to intervene in the proceedings when the point next arose for final decision and file submissions for Strasbourg's consideration. National courts would be able to express their views in their judgments, so promoting a dialogue between national courts, on the one hand, and Strasbourg on the other. National courts might even consider each other's approach, which could be mutually instructive. Strasbourg might then confirm its provisional judgment or it may decide not to do so or, more likely, to do so with adjustments that meet, so far as appropriate, the points raised by the national courts or contracting states.

71. There are yet other cases in which a provisional judgment might be used. It could save a lot of friction if they were used where Strasbourg was minded to draw conclusions about the legislative procedure or domestic laws in a contracting state. I will give two examples. First, the majority judgment in *Hirst v UK*[43], decided in 2005, on prisoner voting criticised Parliament for having no substantive debate on prisoner voting. That criticism is only valid if it means that Parliament had not considered the matter. The majority judgment refers to

[43] (App no. 74025/01), [2005] 19 BHRC 546.

a working party on electoral reform which considered whether prisoners should have the right to vote. It did not give the date of its report. In fact the report was completed in 1999,[44] not in the Victorian era but just six years before *Hirst.* It was a cross-party working party. The Chair was a minister of state. The majority do not mention that the report was laid before Parliament and the Representation of the People Act 2000 was explicitly drafted to give effect to its recommendations.[45] The point was that the report dealt with prisoner voting and that Parliament had the opportunity to debate the matter had it wished to do so. A provisional judgment would have enabled these details to be flushed out before the judgment was finalised. With a proper explanation, it might have been seen that the criticism did not reflect the reality of how Parliamentary business is conducted.

72. Another example is the recent case of *Vinter v UK*,[46] in which Strasbourg held that it was contrary to article 3 of the Convention[47] for the UK to have a category of prisoners serving whole life-terms (a highly charged subject in national debate) with no prospect of release unless they were suffering from a terminal illness and were near to death. However, as the Court of Appeal presided over by the Lord Chief Justice, recently pointed out, there was a material error in Strasbourg's understanding of our domestic law because it did not appreciate that there was really no doubt but that the Secretary of State would have to review the sentence of even a person with a whole life sentence if

[44] Report of the Working Party on Electoral Procedures, chaired by the Parliamentary Under-Secretary of State for Northern Ireland, Mr George Howarth MP, presented to Parliament on 19 October 1999 (Deb, 1999 WA 435 19.10.99).
[45] See the Explanatory Notes on the Bill, published by Parliament.
[46] (App.No.66069/09), 34 BHRC 605.
[47] This prohibits inhuman or degrading treatment or punishment.

there would otherwise be a breach of article 3 of the Convention.[48] So Strasbourg's reasoning in *Vinter* was thoroughly undermined. The Court of Appeal, therefore, held that it should not take any account of Strasbourg's decision.

73. The provisional judgment would not prevent Strasbourg dealing with the cases already filed, or before it, on a different basis from that set out in the provisional judgment.

74. Is there any prospect of Strasbourg taking this idea on board? I feel sure it would consider it. I have already described the plasticity of Strasbourg jurisprudence and its ability to embrace new ideas. It is a resourceful court. It has already developed new forms of judgment, such as the "pilot" judgment.[49] It has already agreed that in future all cases involving departures from its existing case law should be relinquished to the Grand Chamber.[50] This should both ensure greater consistency but also enable the cases that might be suitable for a provisional judgment procedure to be more easily identified. Strasbourg has also accepted the principle of the non-binding judgment in Protocol 16, which lays down a new procedure for non-binding advisory judgments but has not yet come into force. I am hopeful, therefore, that the idea of provisional judgments can be injected into the Brighton process and that Strasbourg will consider it and

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[48] *Re Attorney General's Reference No 69* of *2013, R v McCloughlin, R v Newell* [2014} EWCA Crim. 188.

[49] Where there are serial cases involving the same violation, Strasbourg selects a "pilot" case and gives a judgment which decides what remedies are called for in the individual case and also how the problem should be dealt with more generally by the country concerned. Pending the outcome of the pilot State's reaction, all the other comparable cases are put on hold: *Broniowski v Poland* (App No 31443/96), (2005) 43 EHRR 1.

[50] *The Interlaken Process and the Court*, 2013, page 11, published by the European Court of Human Rights. The reform process is variously called the Interlaken process and the Brighton process.

experiment with the idea. The provisional judgment would go a long way to meeting some of the most serious criticisms of the Convention.

75. To my mind the idea of a provisional judgment is consistent with the notion that the relationship between national and supranational courts is not as currently assumed a strictly hierarchical one. As we saw earlier, in many respects, it is more like a mobile or an ill-fitting jigsaw. A provisional judgment process would lead to a more balanced relationship between contracting states and Strasbourg because contracting states would have had an opportunity to contribute to the process. The procedure currently gives them a right to intervene in any case but with nearly a 1,000 judgments being issued in a year it is impossible for them to do so in practice without a provisional judgment.

76. There are other ideas that could be injected into the Brighton process. At all events we must keep the process alive.

Relationship with Luxembourg

77. What about Luxembourg?

78. It is an aspect of sovereignty that the state is entitled to reach a view as to the limits of the powers which it has delegated to another international body. The international body may disagree and may have the final word but there is nothing to stop the national court from expressing a view. As I have explained, there are a number of leading courts in Europe which have laid down a marker, and who have not simply treated EU laws as having in all respects immediate and automatic effect, as the UK has done.

79. The FCC and other courts have already developed mechanisms which enable them to uphold their own state's constitution or constitutional identity in the face of challenge from the EU. In 2004, I wrote an article suggesting in effect that, if it was thought right, something similar could be done in the UK.[51] Nothing has yet been done. To my mind it is still an option and would help to put us on a par with countries like Germany. I envisaged that Parliament would give the courts jurisdiction to determine for the purposes of English law whether an EU measure goes beyond the powers which the UK has agreed to confer on the EU. Their decision might be of some weight in the EU. Parliament could also give the courts jurisdiction to determine whether any proposed EU measure threatens the UK's fundamental rights or constitutional principles. It ought not to be an obstacle that we do not have a written constitution. Jurisdiction along these lines might provide some reassurance to the citizens of this country if it is decided that the UK's future is to remain in the EU.

80. The Supreme Court has taken some tentative steps in the same direction in its 2014 decision on *HS2*.[52] It considered the position if a relevant European Union directive had required the courts to consider the adequacy of information placed before Parliament. This might have infringed Article 9 of the Bill of Rights. Lord Reed held that it would be for the UK courts, and not Luxembourg, to determine if there was a conflict between EU law and a constitutional principle of the UK.[53] I respectfully agree with that view. It is consistent with the decisions of the FCC and the Conseil d'Etat.

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[51] *Jurisdiction of the new United Kingdom Supreme Court* [2004] PL 699.
[52] *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324.
[53] At [79].

81. The key question is, however, how such a question should be resolved. On that point, Lord Neuberger and Lord Mance, with whom the other JJSC agreed, considered it arguable that Parliament had not authorised the abrogation of certain fundamental principles laid down by statute or the common law.[54]

82. Some seeds have, therefore, been sown and we shall have to see if they bear fruit. Nothing, however, has been said about determining whether an EU measure, which did not involve a violation of constitutional principle or fundamental right, fell outside the terms of any powers conferred by the UK on the EU or any of its institutions. As I have explained, my article in 2004 extended to encouraging discussion and resolution of this issue too.

Summary: Community of courts or *Bowling Alone*?

83. In this article, I have made the following points:

(1) The question whether the UK should remain a party to the European Convention on Human Rights or a member of the European Union is a question for Parliament. I assume for the purposes of this article that the present legal position continues.

(2) There is a complex and sophisticated European legal order.

(3) Different national courts, for example the German Federal Constitutional Court and the French Conseil d'Etat, have reacted in a range of ways to the new European supranational courts in Luxembourg and Strasbourg.

(4) It would be wrong to assume that, because national courts are hierarchical, that the same is true of the relationship between national courts and supranational courts.

[54] At [204] to [208].

(5) In some respects, the relationship is like that of a suspended, free-flowing mobile, or an ill-fitting jigsaw.

(6) States should look for checks and balances in the relationship, not democratic mechanisms.

(7) I propose that Strasbourg should consider issuing judgments which are provisional only in the first instance when it significantly develops the law so that the national courts and contracting states can contribute to the process. This idea could be considered in the current Brighton reform process.

(8) I also propose that courts be given more powers to determine whether EU law is inconsistent with fundamental rights or constitutional principles of English law or whether EU measures exceed for English law purposes the powers conferred by the UK on EU institutions.

(9) There are other ways to strengthen the relationship with both supranational courts, especially through dialogue.

84. The development on the European legal scene might usefully be compared with the idea in Robert Putnam's book, *Bowling Alone*.[55] In this book, Putnam analysed the fragmentation in American society by analysing the growth in the social phenomenon of people who went to bowling alleys alone to bowl by themselves.

85. That for many years has been how European courts have done their work. However, they are now rapidly becoming a community of courts and working together to produce a new European legal order in which all the domestic legal orders take part. They are no longer *bowling alone* but bowling with each other.

[55] Putnam, R. *Bowling Alone: The Collapse and Revival of American Community* (2000), (Simon & Shuster).

86. The UK can be a 'big player' in the world legal scene because of the quality of its legal system and law schools, but in my view the courts have to be prepared to be more receptive towards other systems of law for this to be done most effectively.

87. The role of judges today can include stepping beyond their national shores and finding out what is happening in the highest courts of their own region in the world and in the supranational courts whose jurisprudence applies to them. Judges need to establish networks with judges in different jurisdictions – to understand those legal systems and take inspiration from them, like Parke B. in *Hadley v Baxendale*.

88. What can we do in the future to help this complex non-hierarchical legal scene evolve into the future? In my view we need to pursue many forms of dialogue. Tensions are inevitable in a complex system with ill-fitting jigsaw pieces. What tends to happen is that there is a tension over some quite minor issue but it is seen as having much wider significance and so becomes a source of great attention and public debate. In the case of Strasbourg, we need to continue the successful Brighton reform process. We need to keep the process going and inject new ideas into it.

89. With the idea of provisional judgments, and the new powers I have suggested for our national courts in relation to EU law, my aim has been to show that there is more we can do to perfect the burgeoning relationship between our domestic courts and the supranational courts in Europe.

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