

The Legitimising Role of Judicial Dialogue between the United Kingdom Courts and the European Court of Human Rights

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Abstract

Since the enactment of the Human Rights Act 1998, discussions have developed concerning a judicial ‘dialogue’ taking place between the UK courts and the European Court of Human Rights (ECtHR) over the interpretation of the European Convention on Human Rights (ECHR) and its application to UK law. This thesis contributes to these debates by offering a judicially-informed account of the dialogue between these courts based on in-depth interviews conducted with eight Justices of the UK Supreme Court and four judges of the European Court of Human Rights. It combines these insights with analysis of case law, extra-judicial commentary and contributions from political and legal theory to explore the role of judicial dialogue in legitimising the judgments of these courts. In this way, the thesis offers a unique methodological approach to a highly topical area of constitutional discourse in the UK.

The thesis argues that dialogue has arisen in response to legitimacy challenges facing these courts based on concerns over the extent of the ECtHR’s influence in the UK. Both at the level of judgments and through informal meetings, dialogue responds to these challenges through the participation of the national courts in the jurisprudential development of ECHR rights, the accountability of the ECtHR to domestic judicial concerns, and the ongoing revision and refinement of the Convention rights at the supranational level to accommodate for legal and constitutional diversity. To this extent, dialogue is part of a wider effort to legitimise the Convention system and the courts charged with upholding it by strengthening the role and identity of the domestic courts in human rights adjudication, as reflected in the reemphasis on subsidiarity and the common law ‘resurgence’.

However, the thesis also observes that a significant part of the dialogue resides in an increased willingness by the UK courts to refuse to apply parts of the ECtHR’s case law, and a tendency by the ECtHR to accommodate that refusal. On this basis, it argues that the process also carries the risk of delegitimising the ECHR system by promoting a disposition to disobey on the part of national authorities across the Council of Europe.

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Chapter 1

Introduction

What is the role of judicial ‘dialogue’ between the United Kingdom courts and the European Court of Human Rights in legitimising their respective judgments?

The European Court of Human Rights takes part in the trans-judicial dialogue by providing inspiration for national courts and in turn being inspired by them. The longer-term vision must secure the viability of the European Court’s role in the system for protecting and promoting human rights across Europe.¹

- András Sajó, Judge of the European Court of Human Rights

1. Overview

Following the enactment of the Human Rights Act (HRA) 1998, the UK courts and the European Court of Human Rights (ECtHR) have sought to engage in a ‘creative’² and ‘constructive dialogue’³ by exchanging views through their judgments and through informal meetings between their senior judges. These ‘valuable’⁴ and ‘laudable’⁵ interactions have been described by the former President of the ECtHR, Dean Spielmann, as ‘a jurisprudential dialogue of the highest standard’,⁶ and have been welcomed by UK and ECtHR judges of past and present.⁷ The

¹ András Sajó, ‘An all-European Conversation: Promoting a Common Understanding of European Human Rights’ in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 183, 191

² Lord Steyn, ‘2000 - 2005: Laying the Foundations of Human Rights Law in the United Kingdom’ [2005] EHRLR 349, 361

³ *Pinnock v Manchester City Council* [2011] 2 AC 104, [48] (Lord Neuberger)

⁴ *R v Horncastle and others* [2010] 2 AC 373 (SC) [11] (Lord Phillips)

⁵ Dean Spielmann, ‘Whither Judicial Dialogue?’ (Sir Thomas More Lecture, London, 12 October 2015) <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016

⁶ Dean Spielmann, ‘Speech by Judge Dean Spielmann’ (UCL Graduation Ceremony, 6 July 2016) <https://www.laws.ucl.ac.uk/wp-content/uploads/2016/07/spielmann_dean_graduationceremony_speech_2016.pdf> accessed 29 November 2016

⁷ Sir Stephen Sedley, ‘Personal Reflections on the Reception and Application of the Court’s Case-law’ in European Court of Human Rights, *Dialogue between Judges* (Council of Europe 2006); Lord Kerr, ‘The Conversation between National Courts and Strasbourg – Dialogue or Dictation?’ (2009) 44 IJ 1, 12; Tom Bingham, ‘The Human Rights Act’ (2010) 6 EHRLR 568, 574; Jean-Paul Costa, ‘On the Legitimacy of the European Court of Human Rights’ Judgments’ (2011) 7(2) EuConst 173; Sir Nicolas Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) 5 EHRLR 505; Robert Walker, ‘The Indefinite Article 8’ (Thomas More Lecture, Lincoln’s Inn, 9 November 2011) <https://www.supremecourt.uk/docs/speech_111109.pdf> accessed 10 December 2016; Lady Hale, ‘Argentoratium Locutum: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12(1) HRLR 65, 78; Lord Carnwath, ‘UK Courts and Strasbourg’ (Rome, 20 September 2013) <<https://www.supremecourt.uk/docs/speech-130920.pdf>> accessed 10 December 2016; Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures, 27 November 2013), 12 <<https://www.judiciary.gov.uk/wp-content/.../laws-lj-speech-hamlyn-lecture-2013.pdf>> accessed 10 December 2016; Lord Mance, ‘Destruction or Metamorphosis of the Legal Order?’ (World Policy Conference, 14 December 2013) <<https://www.supremecourt.uk/docs/speech-131214.pdf>> accessed 10 December 2016; Paul Mahoney, ‘The Relationship between the Strasbourg Court and the National Courts’ (2014) 130 LQR 568; Lord Neuberger, ‘The Role of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK Experience’ (Supreme Court of Victoria Conference, 8 August 2014) <<https://www.supremecourt.uk/docs/speech-140808.pdf>> accessed 10 December 2016

Brighton and Brussels Declarations of 2012 and 2015 on the future of the Strasbourg-based system responsible for the European Convention on Human Rights (ECHR) signalled explicitly the view of the forty-seven member states of the Council of Europe that dialogue between the ECtHR and the national courts is to be ‘welcome[d] and ‘encourage[d]’⁸ and called upon the Strasbourg Court to ‘deepen this dialogue further’.⁹

The concept of ‘dialogue’ has attracted considerable academic discussion as a tool for describing, explaining and justifying different forms of interaction between sites of governance.¹⁰ Since the enactment of the HRA, this has been particularly true in the UK in relation to the ‘dialogic’¹¹ model of judicial review thought to have been put in place by that legislation.¹² There has also been much discussion of the dialogue between the UK courts and the ECtHR. With some notable exceptions,¹³ however, these debates have centred on normative arguments as to the correct interpretation of the duty of UK courts under s.2 HRA to ‘take into account’ the judgments of the Strasbourg Court when interpreting the rights contained under that Act.¹⁴

140808.pdf> accessed 10 December 2016; Mary Arden, *Human Rights and European Law: Building New Legal Orders* (OUP 2015)

⁸ Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights (Brighton 19-20 April 2012) B[12](c)

⁹ Brussels Declaration, High-level Conference on the “Implementation of the European Convention on Human Rights, Our Shared Responsibility” (Brussels 27 March 2015) A[1](b)

¹⁰ Barry Friedman, ‘Dialogue and Judicial Review’ (1993) 91(4) Mich LR 577; Peter W. Hogg and Allison A. Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)’ (1997) 35(1) Osgoode Hall LJ 75; Luc Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures’ (2005) 3(4) IJCL 617; Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, ‘Charter Dialogue Revisited: Or “Much Ado About Metaphors”’ (2007) 45(1) Osgoode Hall LJ 1; Ming-Sung Kuo, ‘In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in its Place’ (2016) 29(1) Ratio Juris 83

¹¹ Po-Jen Yap, ‘Defending Dialogue’ [2012] PL 527

¹² Richard Clayton, ‘Judicial Deference and ‘Democratic Dialogue’: the Legitimacy of Human Rights Intervention under the Human Rights Act 1998’ [2004] PL 33; Tom Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” [2005] PL 306; Roger Masterman, ‘Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities’ [2009] PL 112; Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009); Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010); Sophie Briant, ‘Dialogue, Diplomacy and Defiance: Prisoners’ Voting Rights at Home and in Strasbourg’ (2011) 3 EHRLR 243; Philip Sales and Richard Ekins, ‘Rights-consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217; Alison L Young, ‘Is Dialogue Working under the Human Rights Act 1998?’ [2011] PL 773

¹³ Merris Amos, ‘The Dialogue between United Kingdom Courts and the European Court of Human Rights’ (2012) 61(3) ICLQ 557; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 222-233

¹⁴ Roger Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg? [2004] PL 725; Roger Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54(4) ICLQ 907; Jonathan Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720; Jane Wright, ‘Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights’ [2009] PL 595; Eirik Bjorge, ‘Exceptionalism and Internationalism in the Supreme Court: Horncastle and Cadder’ [2011] PL 475; Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ [2012] PL 237; Philip Sales, ‘Strasbourg jurisprudence and the Human Rights Act: a Response to Lord Irvine’ [2012] PL 253; Richard Clayton, ‘Smoke and Mirrors: the Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639; Roger Masterman, ‘Deconstructing the Mirror Principle’ in Roger Masterman and Ian Leigh (eds.), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative*

This thesis has a different focus. It examines the role of the judicial dialogue between the UK courts and the ECtHR in *legitimising* their respective judgments. For this purpose, it draws upon original, in-depth interviews conducted with eight Justices of the UK Supreme Court and four judges of the ECtHR to develop an understanding of the nature of this dialogue based on the insights of those directly involved. While other interview-based studies conducted with senior UK judges have covered the subject in part,¹⁵ this is the first study to have conducted interviews with these judges exclusively on the subject of the dialogue between their courts. Further, the thesis explores the understanding of dialogue between these courts developed from the interview data and other materials using insights from constitutional and political theory in order to determine how the judges might be using this dialogue to confer legitimacy on their judgments. In this way, the thesis explores a classic jurisprudential question (what is the source of judicial legitimacy?) through a social scientific methodology. It thus offers a unique methodological approach to a highly topical area of constitutional discourse in the UK.

The thesis put forward is that judicial dialogue – in its various manifestations – embodies the mutual participation, mutual accountability and the ongoing revision and refinement of arguments at the domestic and European levels, each of which can perform legitimising functions for both the UK courts and the ECtHR. On this basis, it suggests that the judicial embrace of ‘dialogue’ was unlikely to have been an act of spontaneity but a response to interwoven legitimacy challenges faced by the UK courts and the ECtHR in their decision-making on human rights. This thesis, however, does not engage in debates over the conceptual accuracy of the term ‘dialogue’ to describe the interactions between these courts. In the spirit of the advice given by the authors credited with popularising the concept, it aims instead to ‘deal with the significance of the phenomenon, rather than making "much ado about metaphors"’.¹⁶ Nonetheless, it does not shy away from normative critique. The closing chapter will argue that one manifestation of this ‘dialogue’ – open disagreement by the national courts with judgments of the ECtHR – potentially contributes to the cultivation of a *disposition to disobey* on the part of the various actors subject to the rulings of the ECtHR across the Council of Europe, whether judicial or political. It therefore argues that dialogue between these courts also carries a *delegitimising* potential.

This introductory chapter has four aims. First, it provides context to the research by outlining the emergence of dialogue between the UK courts and the ECtHR (Part 2). It offers a

Perspectives (OUP 2013) 111; Carmen Draghici, ‘The Human Rights Act in the Shadow of the European Convention: are Copyist’s Errors Allowed?’ (2014) 2 EHRLR 154

¹⁵ Paterson, *Final Judgment* (n 13) 222-233; Elaine Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013); Hélène Tyrrell, *UK Human Rights Law and the Influence of Foreign Jurisprudence* (Hart 2017) (forthcoming)

¹⁶ Hogg, Thornton and Wright (n 10) 54

summary of their relationship prior to the HRA, the transformation of that relationship following the enactment of that legislation, and traces the subsequent development by the UK courts from what was generally regarded as a deferential approach towards the ECtHR to an explicitly dialogic relationship. Second, the chapter offers a justification for the first three research questions addressed by this thesis, respectively concerning the *form of dialogue through judgments*, the *functions of dialogue through judgments* and the *role of informal dialogue* (Part 3). Third, the chapter provides a justification for the fourth and central research question on the *legitimising role* of judicial dialogue. It outlines the concept of legitimacy and explains why the dialogic turn in the relationship between these particular courts poses significant questions (Part 4). Finally, the chapter outlines the key arguments of this thesis and the structure of its content (Part 5).

2. The Emergence of ‘Dialogue’ between the UK courts and ECtHR

2.1 Pre-HRA: a period of ‘little or no dialogue’

A ‘dialogue’ is defined as a ‘discussion between two or more people or groups, especially one directed towards exploration of a particular subject or resolution of a problem’.¹⁷ Burgorgue-Larsen explains that it is ‘a word with roots in the Latin term ‘dialogus’ which refers to a philosophical conversation in the manner of Plato’s dialogues’.¹⁸ A dialogue, it is said, is ‘always a sort of collaboration, a way of trying to attain the truth’.¹⁹ However, it is not always cooperative: dialogue can ‘provoke just as much opposition, contradiction, and even discord as agreement’.²⁰

Prior to the enactment of the HRA, the UK courts and the ECtHR are thought to have engaged in little dialogue of any kind. While there was much in the way of contradiction between the respective conclusions of the UK courts and the ECtHR,²¹ it can be said that this consisted of one ‘diktat versus the other court’s diktat’²² or ‘competing monologues’²³ and little in the way of discussion, collaboration or resolution by the judges. Despite the UK having ratified the ECHR

¹⁷ ‘dialogue’, *Oxford Dictionary of English* (3rd edn, OUP 2010)

¹⁸ Laurence Burgorgue-Larsen, ‘A European Perspective’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds) *The Judicial House of Lords: 1876-2009* (OUP 2009) 407 citing *Dictionnaire Historique de la Langue Française* (Editions Le Robert 2006)

¹⁹ Luis Castellví Laukamp, *Publication Review* (2011) 22 EJIL 291

²⁰ Burgorgue-Larsen (n 18) 408

²¹ Brice Dickson, ‘The Record of the House of Lords in Strasbourg’ (2012) 128(3) LQR 354, 355-369

²² Monica Claes and Maartje de Visser, ‘Are You Networked Yet? On Dialogues in European Judicial Networks’ (2012) 8(2) Utrecht L Rev 100, 105 citing Bruno De Witte, ‘The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process’ in Paul Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Bloomsbury 2002) 39, 41

²³ Paterson, *Final Judgment* (n 13) 9

in 1951²⁴ and accepted the jurisdiction of the ECtHR²⁵ and the right of individuals from the UK to petition the Court²⁶ (via the former Commission)²⁷ in 1966,²⁸ it has been observed that during the decades preceding the HRA there was ‘little or no dialogue’²⁹ between the courts. Dickson suggests that ‘before 2000 the Law Lords, applying laws constructed on different foundations from those underlying the Convention, were not speaking the same language as judges in Strasbourg’.³⁰ Instead, the relationship was characterised by their strikingly dissonant roles in protecting rights and a notable lack of engagement by the UK courts with the views of the ECtHR. Three obstacles in particular appeared to hinder the development of a more productive relationship between these courts during this period.

First, there was no document of rights either equivalent or similar to the ECHR within the UK. Its dualist legal system meant that the ECHR rights could not be enforced by the UK courts. Under the UK’s ‘political constitution’,³¹ Hiebert explains that ‘rights were thought of as being protected by Parliament, and not from it’.³² Accordingly, they were not understood as ‘external or independent standards for evaluating legislation ... dependent on judicially-reviewable restraints on political power’.³³ The role of the courts was in protecting the residue of negative liberties under the British constitution to do whatever insofar as it was not explicitly proscribed by law,³⁴ in the application of private law remedies at common law to public officials,³⁵ and through the judicial review of the legality of executive action.

²⁴ Ed Bates, ‘British Sovereignty and the European Court of Human Rights’ (2012) 128 LQR 382, 388

²⁵ ECHR Art.46

²⁶ ECHR Art.34 (formerly Art.25)

²⁷ Protocol 11 to the ECHR abolished the European Commission when it entered into force in 1998. The previously part-time European Court of Human Rights was established as a permanent court with mandatory jurisdiction. Bates, ‘British Sovereignty and the ECtHR’ (n 24) 401

²⁸ Lord Lester, ‘U.K. Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965’ [1998] PL 237

²⁹ Department of Constitutional Affairs, ‘Review of the Implementation of the Human Rights Act’ (38/06, DCA 2006) 11 cited in Merris Amos, ‘The Impact of the Human Rights Act on the United Kingdom’s Performance before the European Court of Human Rights’ [2007] PL 655

³⁰ Dickson (n) 367

³¹ J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1; Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9(1) ICON 86

³² Janet L Hiebert, ‘Governing under the Human Rights Act: the Limitations of Wishful Thinking’ [2012] PL 27, 27

³³ *ibid*

³⁴ ‘The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute.’ *Attorney-General v Observer Ltd* [1990] 1 AC 109, 178 (Sir John Donaldson MR)

³⁵ Klug observes how the common law had long concerned itself with the provision of remedies where the individual’s ‘basic interests’ were concerned. These interests coincided with numerous internationally recognised human rights, particularly those of personal freedom, fair trial, reputation and peaceful enjoyment of property, and were thus able to ensure a similar degree of protection of those rights to that which might be provided by the ECtHR. Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (Penguin 2000) 36

Second, while Acts of the UK Parliament could not be challenged in the UK courts due to the constitutional doctrine of parliamentary sovereignty,³⁶ the same Acts could be subject to challenge before the ECtHR.³⁷ Further, the standard of review applied to government acts differed significantly. The UK courts applied the standard of *Wednesbury*³⁸ unreasonableness or irrationality,³⁹ whereas the ECtHR applies to interferences with the ECHR rights the more exacting standard of proportionality.⁴⁰ While the application of the latter varies depending on the Convention right in question, it generally demands, as Loveland notes, a ‘far more rigorous assessment of the moral merits of a government body’s decision than is allowed under the irrationality principle’.⁴¹ While the UK courts came to accept that executive interferences with human rights called for ‘anxious scrutiny’,⁴² Klug has observed how this fell decidedly short of the requirements of proportionality.⁴³ The view of the UK courts was that they lacked the constitutional authority to examine the compatibility of executive action with the rights contained in the ECHR, in particular the proportionality of interferences with those rights, unless and until Parliament empowered them to do so.⁴⁴ The UK’s constitutional arrangements instead demanded ‘judicial silence’⁴⁵ as to the interpretation and application of Convention rights.

Third, and as a consequence of the previous points, the UK courts generally accorded ‘scant weight’⁴⁶ to the Convention and to the judgments of the ECtHR. While explicit references to the ECHR increased significantly during the 1990s,⁴⁷ by which point the courts had deemed it

³⁶ According to which ‘no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament’. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund Reprint 1982) 3-4

³⁷ The Commonwealth Immigrants Act 1968, for example, was successfully challenged in Strasbourg in the early case of *East African Asians v United Kingdom* (1973) 3 EHRR 76. Lester (n 28) 247-250

³⁸ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

³⁹ In its classic formulation, this requires a decision to be ‘so unreasonable that no reasonable authority could ever have come to it’ before it could be declared unlawful. *ibid* 230 (Lord Greene MR)

⁴⁰ This requires interferences with Convention rights to be prescribed by law, justified in pursuit of a legitimate aim, and ‘proportionate to the legitimate aim pursued’. *Handyside v United Kingdom* (1979-80) 1 EHRR 737 [49]

⁴¹ Ian Loveland, ‘The Holy Grail as an Empty Chalice? Proportionality Review in Possession Proceedings after *Pinnock and Powell*’ (2013) JPEL 622, 623

⁴² *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; *R v Ministry of Defence Ex p. Smith* [1996] Q.B. 517, 554 (Sir Thomas Bingham MR)

⁴³ Klug, *Values for a Godless Age* (n 35) 40-41 citing *Smith and Grady v United Kingdom* (1999) 29 EHRR 493

⁴⁴ Requiring ministerial discretion to be exercised in conformity with the ECHR and the jurisprudence of the ECtHR would involve ‘judicial usurpation of the legislative function’. ‘Unless and until Parliament incorporates the Convention into domestic law ... there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country’ *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696, 726 (Lord Bridge), 763 (Lord Ackner)

⁴⁵ *R v Ministry of Defence Ex p. Smith* [1996] Q.B. 517, 564 (Henry LJ)

⁴⁶ It is estimated that there were just six cases in the 1970s and twelve cases in the 1980s decided by the Appellate Committee of the House of Lords which made explicit reference to the ECHR. Dickson (n 21) 355

⁴⁷ According to research by Starmer and Klug, there were 316 cases between 1975 and 1996 where the Convention was referenced by the UK courts. 187 of these references occurred after February 1991. Keir Starmer and Francesca Klug, ‘Incorporation through the Back Door’ [1997] PL 223, 224

acceptable to refer to the Convention in a number of circumstances,⁴⁸ Starmer and Klug have argued that these references played little role in the actual outcome⁴⁹ of the decisions and thus reflected no more than ‘lip service’⁵⁰ to the Convention. Despite the numerous rulings of the ECtHR in respect of UK cases which amassed before the HRA came into effect,⁵¹ Dickson notes that senior UK judges ‘appear to have spoken or written very little about those views, whether judicially or extra-judicially’.⁵² On this basis, he suggests that the right of individuals in the UK to petition the ECtHR ‘patently failed’⁵³ to create ‘a more transparent dialogue between senior judges in the United Kingdom and Commissioners and judges in Strasbourg ... during this period’.⁵⁴

2.2 The Human Rights Act

Each of these obstacles was removed with the entering into force of the HRA 1998 in England and Wales in 2000. A list of ‘Convention rights’,⁵⁵ taken directly from the ECHR, became enforceable in the UK courts. It became unlawful for any public authority, including a court, to act in a way which is incompatible with those rights.⁵⁶ The UK courts were empowered to review not only government acts but parliamentary statutes for their compatibility with Convention rights.⁵⁷ A new rule of construction was established that UK judges must interpret all domestic legislation in a way which is compatible with the Convention ‘[s]o far as it is possible to do so’.⁵⁸ Where this is not possible, it empowered the courts to make a ‘declaration of incompatibility’⁵⁹ which does not affect the legal validity of the Act but declares to Parliament that the legislation is incompatible with one or several of the Convention rights. Further, the

⁴⁸ It has been observed that the UK courts could refer to the ECHR in any of the following scenarios: to resolve ambiguities in legislation capable of interpretations which were either compliant or non-compliant with ECHR obligations or where the common law was uncertain or underdeveloped; where legislation had been enacted specifically to comply with Convention obligations; in the exercise of judicial discretion; in determining the requirements of public policy; in the interpretation of EU law; in the exercise of the power to exclude evidence under s.78 of the Police and Criminal Evidence Act 1978. *ibid* 224-225; Paul Boateng and Jack Straw, ‘Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law’ [1997] EHRLR 71, 73

⁴⁹ An analysis by Starmer and Klug found that in only 16 of 316 UK cases between 1975 and 1996 referring explicitly to the Convention did the reference appear to influence the decision to the extent that ‘the decision of the court might well have been different if the ECHR had not been taken into account’. Starmer and Klug (n 47) 225

⁵⁰ *ibid* 227

⁵¹ According to Klug, there were 68 UK cases decided by the ECtHR by the end of 1999 which had found one or more violations of ECHR rights by the end of 1999. Klug, *Values for a Godless Age* (n 35) 20

⁵² Dickson (n 21) 355

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ HRA 1998 s.1

⁵⁶ *ibid* s.6

⁵⁷ *ibid* s.3 and s.4

⁵⁸ *ibid* s.3

⁵⁹ *ibid* s.4

courts were quick to accept that interferences with Convention rights must be reviewed by reference to the standard of proportionality rather than reasonableness.⁶⁰ Elliott here notes that the Act had ‘a significant emboldening effect’⁶¹ upon the judges, allowing proportionality to ‘emerge from the shadows’⁶² of domestic judicial review.

Most importantly for this discussion, s.2(1) HRA established that

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... judgment, decision, declaration or advisory opinion of the European Court of Human Rights, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

At the core of this design was a desire to create a more interactive and productive relationship between the UK courts and the ECtHR. The White Paper which preceded the legislation lamented that ‘the fact that [the UK courts] do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed’.⁶³ By enacting the Convention rights and thereby allowing judges in the UK to interpret and rule on their application, the intention was that the ECtHR would be provided ‘with a useful source of information and reasoning for its own decisions’.⁶⁴ During the parliamentary debates on the Human Rights Bill, the intention was made plain that the UK courts should not be ‘hampered unnecessarily by a doctrine of stare decisis which is not required by the [ECHR]’.⁶⁵ Instead of a ‘straitjacket’⁶⁶ they would have ‘flexibility’⁶⁷ to ‘depart from existing Strasbourg decisions’⁶⁸ and freedom ‘to try to give a lead to Europe as well as to be led’.⁶⁹ With the necessary tools thus provided by the HRA, Besson observed that ‘British judges ... [were] positioned to engage in a more serious dialogue of give-and-take with the ECtHR’.⁷⁰

⁶⁰ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 cited in Mark Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 CLP 85, 104

⁶¹ *ibid*

⁶² *ibid*

⁶³ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) para 1.18

⁶⁴ *ibid*

⁶⁵ HL Deb 2 November 1997, vol 583, col 512 (Lord Lester)

⁶⁶ HL Deb 2 November 1997, vol 583, col 515 (Lord Irvine)

⁶⁷ *ibid*

⁶⁸ *ibid* col 514

⁶⁹ *ibid* col 515

⁷⁰ Samantha Besson, ‘The Reception Process in Ireland and the United Kingdom’ in Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 31, 98

2.3 Deference to the ECtHR

Since the enactment of the HRA, it has been observed that the ECHR and Strasbourg case law have been cited by the UK courts ‘with a frequency and diligence hardly matched anywhere else in Europe’.⁷¹ However, the relationship which developed between the two for the first decade of the HRA is perceived as one based on deference toward the ECtHR by the UK courts rather than dialogue, despite the flexibility intended by its architects. According to an analysis by Klug and Wildbore, the ‘most common’⁷² approach to the interpretation of Convention rights for the first decade of the HRA was adherence to what is often termed (and with notable criticism)⁷³ the ‘mirror’⁷⁴ principle. The two early authorities cited frequently in this connection are *Alconbury*⁷⁵ and *Ullah*.⁷⁶ In the former case, Lord Slynn reasoned that UK courts ‘...should follow any *clear and constant* jurisprudence of the European Court of Human Rights’,⁷⁷ short of ‘some special circumstances’.⁷⁸ This was to avert the ‘possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence’.⁷⁹ In *Ullah*, Lord Bingham agreed. Lord Slynn’s reasoning ‘...reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court’.⁸⁰ Thus, in a controversial passage, Lord Bingham stipulated that ‘[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’.⁸¹

The requirements to do ‘no more’ and ‘no less’ than the ECtHR, however, were subsequently applied at times with a striking stringency. In terms of doing no more, concern for the authorities, unable to challenge adverse HRA rulings by the domestic courts before the ECtHR, prompted Lord Brown in *Al-Skeini*⁸² to propose what Lewis terms the ‘heightened mirror principle’.⁸³ On this view, the UK courts should do “no less, but certainly no more”⁸⁴

⁷¹ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 134

⁷² Francesca Klug and Helen Wildbore, ‘Follow or Lead?: the Human Rights Act and the European Court of Human Rights’ (2010) 6 EHRLR 621, 624

⁷³ Masterman, ‘Deconstructing the Mirror Principle’ (n 14) 111-137

⁷⁴ ‘...obligations of public authorities [including the courts] ... mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols’. *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 [34] (Lord Nicholls) cited in Lewis, (n 14) 720

⁷⁵ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295

⁷⁶ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323

⁷⁷ *Alconbury* (n 75) [26]

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ *Ullah* (n 76) [20]

⁸¹ *ibid*

⁸² *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL)

⁸³ Lewis (n 14) 727

than the ECtHR. In terms of doing no less, the case now infamously associated with undue deference to the ECtHR is *AF (No 3)*.⁸⁵ There, Lord Rodger's single-paragraph contribution to the judgment declared: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed'.⁸⁶

In the early years of the HRA, the approach of the UK courts was thus viewed as 'rigid',⁸⁷ with a 'strong loyalty to Strasbourg'.⁸⁸ It was said to be 'based on the idea that the ECtHR is the authoritative exponent of Convention law; and the assumption that all Member States are under a duty to defer to it'.⁸⁹ By adopting this course, however, Gearty argues that the UK courts allowed the 'permissive language of section 2 to harden into an unavoidable obligation'⁹⁰ and the 'myth ... of Strasbourg supremacy'⁹¹ to thrive.

2.4 The Judicial Embrace of 'Dialogue'

Despite the concerns that the UK courts were adopting an unduly restrictive approach to s.2 HRA duty, a report by the Department for Constitutional Affairs in 2006 observed that a dialogue between the courts was already underway:

There is no doubt that the HRA has established a "dialogue" between English judges and the European Court of Human Rights. The close analytical attention paid by the English courts to the European Convention on Human Rights case law is respected by the European Court of Human Rights and is influential on the way that it approaches English cases.⁹²

The same sentiments were echoed by Lord Bingham, who observed in 2009 that a 'constructive dialogue'⁹³ had developed between the courts in the way that 'the British courts have treated [Strasbourg] decisions with respect and analysed and applied them with care',⁹⁴ while '[t]he

⁸⁴ *Al-Skeini* (n 82) [106]

⁸⁵ *Secretary of State for the Home Department v AF and another (no 3)* [2010] 2 AC 269

⁸⁶ *ibid* [98]

⁸⁷ Masterman, 'Binding Domestic Courts to Strasbourg?' (n 14), 734

⁸⁸ Krisch (n 71) 136

⁸⁹ Clayton, 'Smoke and Mirrors' (n 14) 653

⁹⁰ Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 105

⁹¹ Conor Gearty, 'On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights' (2015) 1 EHRLR 1, 5

⁹² DCA (n 29) 7

⁹³ Bingham (n 7) 574

⁹⁴ *ibid*

Strasbourg judges, for their part, have taken notice of what the British courts have said, particularly when they have demurred'.⁹⁵

The concept of dialogue, however, had appeared only occasionally in the reasoning of domestic judicial decisions. In the early HRA case of *R v Lyons*,⁹⁶ Lord Hoffmann observed 'room for dialogue'⁹⁷ between the courts where a decision by the ECtHR had misunderstood a feature of domestic law. His Lordship reasoned that, in such circumstances, a UK court could issue a judgment which 'invites the ECtHR to reconsider'⁹⁸ the earlier judgment, a view which was later reiterated in *Re P*.⁹⁹ There, Lord Hoffmann again observed that 'section 2(1) of the 1998 Act allows for the possibility of a dialogue between Strasbourg and the courts of the United Kingdom over the meaning of an article of the Convention',¹⁰⁰ particularly where the UK courts are of the view that 'the Strasbourg court could be persuaded that it had been wrong'.¹⁰¹

Following the establishment of the UK Supreme Court in 2009, however, the concept of dialogue was fully embraced by the UK courts as the byword for their relationship with the ECtHR, invoked repeatedly in relation to the interpretation of s.2 HRA. In the explicit aim of promoting 'valuable'¹⁰² and 'constructive dialogue'¹⁰³ with the ECtHR, the Supreme Court has undergone what Lord Wilson's dissenting judgment in *Moohan*¹⁰⁴ described as a 'retreat'¹⁰⁵ from the 'no more' and 'no less' stipulations of *Ullah*. While it has been well documented that the UK courts had diverged from those requirements previously,¹⁰⁶ it can be argued that the deployments of the concept of dialogue by the Supreme Court have marked the most decisive shifts away from that approach.

In respect of the 'no less' stipulation, it was unanimously held by the newly-established Supreme Court in the landmark judgment of *Horncastle*¹⁰⁷ that where the UK courts have concerns with a particular strand of the ECtHR jurisprudence, they could refuse to apply it in order to 'give the Strasbourg court the opportunity to reconsider ... so that there takes place what may prove to be a valuable dialogue'.¹⁰⁸ Effectuating Lord Hoffmann's earlier thinking in this

⁹⁵ *ibid*

⁹⁶ *R v Lyons and Others* [2003] 1 AC 976

⁹⁷ *ibid*

⁹⁸ *ibid* [46]

⁹⁹ *In re P (Adoption: Unmarried Couple)* [2009] 1 AC 173

¹⁰⁰ *ibid* [35]

¹⁰¹ *ibid*

¹⁰² *Horncastle* (n 4) [11] (Lord Phillips)

¹⁰³ *Pinnock* (n 3) [48] (Lord Neuberger MR)

¹⁰⁴ *Moohan v Lord Advocate* [2015] 1 AC 901

¹⁰⁵ *ibid* [104]

¹⁰⁶ Klug and Wildbore (n 72), Masterman, 'Deconstructing the Mirror Principle' (n 14)

¹⁰⁷ (n 4)

¹⁰⁸ *ibid* [11]

instance, the Court refused to apply the Strasbourg Chamber decision in *Al-Khawaja v UK*¹⁰⁹ concerning the admissibility of ‘sole or decisive’ hearsay evidence in criminal trials. The Chamber had held that the requirements of a fair trial under Art.6 ECHR would be breached if a defendant was convicted on the ‘sole or decisive’ basis of evidence obtained by witnesses unavailable for cross-examination at the trial.¹¹⁰ On this basis, it held that the admission of such evidence by the UK courts had violated Art.6.¹¹¹ The UK government’s subsequent request for a referral of the decision to the Grand Chamber of the ECtHR was adjourned in order for the ECtHR to consider the conclusions of the Supreme Court in *Horncastle*.¹¹² The Supreme Court criticised the sole or decisive rule for its lack of clarity and argued that the ECtHR had applied the rule both inflexibly and without proper consideration of the existing protections in domestic law and the common law system.¹¹³ It thus held that the admission of hearsay evidence in criminal trials under domestic law would not violate Art.6, and called upon the ECtHR to reconsider its position.¹¹⁴ The resulting Grand Chamber judgment responded directly and even contested a number of the criticisms set out in *Horncastle*.¹¹⁵ However, in agreement with the UK courts, it held that the admission of decisive hearsay evidence would not necessarily violate Art.6.¹¹⁶ In a concurring opinion, the Court’s President, Sir Nicolas Bratza, observed that the Court’s judgment was ‘a good example of the judicial dialogue between national courts and the European Court on the application of the Convention’.¹¹⁷ When the *Horncastle* case subsequently reached the ECtHR, it was held unanimously that no violation of Art.6 had taken place.¹¹⁸ The Court’s press release declared that the decision ‘concludes the judicial dialogue ... which commenced with the delivery of this Court’s Chamber judgment in *Al-Khawaja and Tahery*’.¹¹⁹

This dialogic relationship was reiterated in a number of domestic judgments. In *Pinnock*,¹²⁰ Lord Neuberger MR stated that uncritical adherence to the decisions of the ECtHR

¹⁰⁹ *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 (Chamber)

¹¹⁰ *ibid* [37]-[38]

¹¹¹ *ibid* [41]-[48]

¹¹² *Horncastle* (n 4) [9] (Lord Phillips)

¹¹³ *ibid* [14] (Lord Phillips)

¹¹⁴ ‘... I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case’. *ibid* [108] (Lord Phillips)

¹¹⁵ *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (Grand Chamber) [51]-[62], [129]-[147]

¹¹⁶ *ibid* [147]

¹¹⁷ *ibid* [O-12]

¹¹⁸ *Horncastle v United Kingdom* (2015) 60 EHRR 31

¹¹⁹ Registry of the European Court of Human Rights, ‘Conclusion of Judicial Dialogue between ECHR and UK Courts on Use of Hearsay Evidence’ (16 December 2014)

<<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4966060-6085348&filename=003-4966060-6085348.pdf>> accessed 10 December 2016

¹²⁰ (n 4)

could be ‘impractical’¹²¹ and ‘inappropriate’¹²² because it ‘would destroy the ability of the [Supreme] court to engage in the constructive dialogue with the European court which is of value to the development of Convention law’.¹²³ The UK courts were therefore only required to follow clear and constant jurisprudence of the ECtHR to the extent that it is ‘not inconsistent with some fundamental substantive or procedural aspect of our law, and ... does not appear to overlook or misunderstand some argument or point of principle’.¹²⁴ In the case of *Chester*¹²⁵ an even more comprehensive expression of the dialogic relationship was delivered. There, Lord Mance stated:

The process [of judicial dialogue] enables national courts to express their concerns and, in an appropriate case such as *R v Horncastle*, refuse to follow Strasbourg case-law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a review of the position in Strasbourg.¹²⁶

In Lord Mance’s view, the UK courts might ‘contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level’¹²⁷ where it concerned ‘some truly fundamental principle of our law or some most egregious oversight or misunderstanding’.¹²⁸ In similar terms, Lord Sumption there reasoned that it was open to the UK courts to invite the ECtHR to consider ‘a change of heart’¹²⁹ in such circumstances.

The second dimension to this dialogue is based on a rejection of strict adherence to the ‘no more’ stipulation of *Ullah*. This view is powerfully articulated in the case of *Ambrose*.¹³⁰ There, Lord Kerr used his dissenting judgment to criticise the ‘attitude of agnosticism’¹³¹ which he perceived within the majority’s decision not to accord protection to the applicable Convention rights in the absence of a definitive Strasbourg case to support the finding. Taking issue with what he perceived as ‘*Ullah*-type reticence’,¹³² he argued:

It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. ... If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not

¹²¹ *ibid* [48]

¹²² *ibid*

¹²³ *ibid*

¹²⁴ *ibid*

¹²⁵ *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271

¹²⁶ *ibid* [27]

¹²⁷ *ibid*

¹²⁸ *ibid*

¹²⁹ *ibid* [137]

¹³⁰ *Ambrose v Harris* [2011] 1 WLR 2435

¹³¹ *ibid* [128]

¹³² *ibid* [130]

feel inhibited from saying what we believe Strasbourg ought to find in future. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable.¹³³

Lord Kerr developed this argument further in his Clifford Chance lecture.¹³⁴ There, he suggested that ‘a pre-emptive, properly reasoned opinion by our courts’¹³⁵ on an issue which had not been subject to a Strasbourg ruling could be just as influential as an opinion expressing disagreement with Strasbourg. In his view, ‘[f]or a dialogue to be effective, both speakers should be prepared, when the occasion demands it, to utter the first word’.¹³⁶ Lord Kerr’s dissident thinking in *Ambrose*, however, appeared to be embraced in the case of *Rabone*.¹³⁷ There, Lord Brown remarked that the UK courts should not hesitate to reach a conclusion which ‘flow[s] naturally from existing Strasbourg case law’,¹³⁸ even if it appears to be ‘carrying the case law a step further’.¹³⁹ This would ‘promote each of two frequently expressed aims: engaging in a dialogue with Strasbourg and bringing rights home’.¹⁴⁰

Once more, in *Moohan*,¹⁴¹ the Supreme Court reiterated this dialogic relationship:

The courts of the United Kingdom are not bound by the judgments of the Strasbourg Court in interpreting the ECHR. ... There is room for disagreement and dialogue between the domestic courts and the Strasbourg Court on the application of provisions of the ECHR to circumstances in the UK. ... On occasion our domestic courts may choose to go further in the interpretation and application of the ECHR than Strasbourg has done where they reach a conclusion which flows naturally from Strasbourg’s existing case law...¹⁴²

Thus, a relationship based on dialogue can now be said to reflect the ‘orthodox approach of the UK courts to the jurisprudence of the European court’.¹⁴³

This shift in domestic judicial thinking has been pointedly encouraged by a number of ECtHR judges, particularly the former ECtHR President and UK judge, Sir Nicolas Bratza. In

¹³³ *ibid*

¹³⁴ Lord Kerr, ‘The UK Supreme Court: The Modest Underworker of Strasbourg?’ (Clifford Chance Lecture, 25 January 2012) <https://www.supremecourt.uk/docs/speech_120125.pdf> accessed 18 November 2015

¹³⁵ *ibid*

¹³⁶ *ibid*

¹³⁷ *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72

¹³⁸ *ibid* [112]

¹³⁹ *ibid*

¹⁴⁰ *Rabone* (n 137) [114]

¹⁴¹ *Moohan* (n 104)

¹⁴² *ibid* [13] (Lord Hodge)

¹⁴³ E. Bjorge, *Domestic Application of the ECHR: National Courts as Faithful Trustees* (OUP 2015) 111

2011, he sought to assure UK judges that “‘Strasbourg has spoken, the case is closed’”¹⁴⁴ is not the way in which I or my fellow judges view the respective roles of the two courts’.¹⁴⁵ Observing that Lord Bingham’s reasoning in *Ullah* ‘suggests a position of deference from which it is difficult to have an effective dialogue’,¹⁴⁶ the former President called for ‘increased dialogue’,¹⁴⁷ between the courts. In his view, it is ‘right and healthy that national courts should continue to feel free to criticise Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices’,¹⁴⁸ even refusing to follow them in order to provide the ECtHR the ‘opportunity to reconsider’.¹⁴⁹ Further, he remarked that it was ‘right and positive for the protection of human rights that the national courts, to use the words of Baroness Hale, should sometimes consciously leap ahead of Strasbourg’.¹⁵⁰

2.5 The Rise of Informal Dialogue

There is a further dimension to the relationship between the UK courts and the ECtHR which has emerged since the enactment of the HRA. Alongside the dialogue through judgments is the rise of what the judges regularly describe as ‘informal’¹⁵¹ dialogue between their courts in the form of meetings between senior UK and ECtHR judges. The first Annual Report of the ECtHR in 2001 details bilateral meetings between ECtHR judges and judges from a wide range of national constitutional and supreme courts.¹⁵² Notably, however, the first meeting between UK and ECtHR judges did not take place until 2006.¹⁵³ Since then, bilateral and multilateral meetings between ECtHR and UK judges have been taking place on a near-annual basis.¹⁵⁴ The value of these meetings has been stressed by consecutive Presidents of the ECtHR¹⁵⁵ and a

¹⁴⁴ Bratza (n 7) 512 citing *AF (No 3)* (n 85) [98] (Lord Rodger)

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ *ibid* 511

¹⁴⁸ *ibid* 512

¹⁴⁹ *ibid*

¹⁵⁰ *ibid* citing *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 (HL) [53] (Baroness Hale)

¹⁵¹ Costa (n 7) 182; Bratza, (n 7) 512; Arden (n 7) 286, 315

¹⁵² European Court of Human Rights, *Annual Report 2001* (Registry of the European Court of Human Rights 2002) 33

¹⁵³ Arden (n 7) 274

¹⁵⁴ Detailed records of visits to and from the ECtHR from 2007 are available at the webpage of the court’s President. European Court of Human Rights, ‘Official Visits’

<http://www.echr.coe.int/pages/home.aspx?p=court/president&c=#n1364996188776_pointer> accessed 17 March 2016

¹⁵⁵ Costa (n 7) 182, Bratza (n 7) 512, Spielmann, ‘Whither Judicial Dialogue?’ (n 5)

number of senior UK judges,¹⁵⁶ several of whom have called for them to take place on a more frequent basis.¹⁵⁷

3. The Research Questions

In light of the discussion so far, it would not be unreasonable to argue that the relationship between the UK Supreme Court and the ECtHR is among the most dynamic and interactive of any which the Supreme Court shares with a court outside of its jurisdiction. Building on his seminal interview-based research on the decision-making of the Law Lords in the 1970s,¹⁵⁸ Paterson observes that the relationship between the UK courts and the ECtHR has indeed become ‘dynamic and vibrant’¹⁵⁹ in recent years as a result of the Supreme Court Justices being ‘eager to develop the dialogue with Strasbourg in a way that gave greater room for manoeuvre than the slightly unedifying and sulky response of the House in *AF*’.¹⁶⁰ The President of the Supreme Court, Lord Neuberger, has spoken to similar effect: ‘...while UK judges may well initially have been too readily prepared to follow decisions of the Strasbourg court, we are now more ready to refuse to follow, or to modify or finesse, their decisions, as we become more confident in forming our own views about Convention rights’.¹⁶¹ Pointing to the response of the ECtHR in its *Al-Khawaja* judgment, Paterson also notes that ‘Strasbourg seems as keen to enter into dialogue with the Supreme Court as the Supreme Court is with Strasbourg’.¹⁶² Thus, along with the dialogues between the Justices and legal counsel, between the Justices and their judicial assistants, and among the Justices themselves in their deliberations, Paterson argues that the dialogues with the ECtHR now form a crucial dimension of the ‘social and collective process’¹⁶³ of decision-making in the UK’s most senior court, with ‘far more interaction – oral and written – between the two courts than there is with Luxembourg’¹⁶⁴ and certain judgments ‘written consciously as a form of advocacy’.¹⁶⁵ The same observations are made in Mak’s study of

¹⁵⁶ Lord Kerr, ‘Dialogue or Dictation?’ (n 7) 12; Lord Neuberger MR, ‘The Incoming Tide: The Civil Law, The Common Law, Referees and Advocates’ (The European Circuit of the Bar’s First Annual Lecture, 24 June 2010); Lord Carnwath (n 7); Arden (n 7) 286

¹⁵⁷ Bratza (n 7) 512, Lord Kerr, ‘Dialogue or Dictation?’ (n 7) 12

¹⁵⁸ Alan Paterson, *The Law Lords* (Macmillan Press 1982)

¹⁵⁹ Paterson, *Final Judgment* (n 13) 232

¹⁶⁰ *ibid* 232 citing *AF (no 3)* (n 85)

¹⁶¹ Lord Neuberger, ‘Has the Identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights?’ (Faculty of Law, National University of Singapore, 18 August 2016)

<<https://www.supremecourt.uk/docs/speech-160818-01.pdf>> accessed 10 December 2016

¹⁶² Paterson, *Final Judgment* (n 13) 232

¹⁶³ *ibid* 312

¹⁶⁴ *ibid* 224

¹⁶⁵ *ibid* 226

judicial decision-making in the senior courts of various jurisdictions.¹⁶⁶ It notes the recognition by several Supreme Court Justices interviewed of the influence of the UK courts upon the decision-making of the ECtHR, and their efforts to maximise that influence by ‘writ[ing] in a way which is attractive to the ECtHR’.¹⁶⁷

Confronted with these developments, this thesis seeks to examine four questions. First, what is judicial dialogue in the context of the decision-making of the UK courts and the ECtHR? Second, what are its functions? Third, what is the role of the informal dialogue between these courts? Fourth, what is the role of the dialogue in legitimising the judgments of the UK courts and the ECtHR? The following sections will provide the justification for the first three questions, concerning dialogue, while the fourth question, which addresses the legitimising role of dialogue, is discussed in Part 4.

3.1 What is judicial ‘dialogue’ in the context of the decision-making of the UK courts and the ECtHR?

The need for exploration of this subject arises from what some consider to be the ‘puzzle’¹⁶⁸ of judicial dialogue: its popularity in academic and judicial thinking, on the one hand, and the ‘ambiguities surrounding the very meaning ... and its practical implications’,¹⁶⁹ on the other. Pérez, while embracing the concept as part of her theory of supranational adjudication for the European Court of Justice, acknowledges that its ‘prolific and ambiguous use has worked to mystify the meaning’.¹⁷⁰ Similarly, Zoethout notes that it is ‘appealing and elusive, yet diffuse at the same time’.¹⁷¹ However, because ‘[e]veryone seems to have different associations with the term’,¹⁷² it is susceptible to the cynical charge that it simply ‘means anything its user wants it to mean’.¹⁷³ The present context illustrates the problem. Dialogue between the UK courts and the ECtHR, as seen already in this chapter, has often been praised and further dialogue encouraged by the judges involved. However, it has been used to describe all manner of judgment-based interactions between the courts. Cross-citations,¹⁷⁴ criticism,¹⁷⁵ disagreement,¹⁷⁶ agreement,¹⁷⁷

¹⁶⁶ Mak (n 15)

¹⁶⁷ *ibid* 81-82

¹⁶⁸ Ming-Sung Kuo, ‘Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?’ 26 (2013) CJLJ 341, 344

¹⁶⁹ *ibid*

¹⁷⁰ Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 106

¹⁷¹ Carla Zoethout, ‘On the Different Meanings of “Judicial Dialogue”’ (2014) 10(1) EuConst 175

¹⁷² *ibid*

¹⁷³ *ibid*

¹⁷⁴ The former ECtHR President, Jean-Paul Costa, observes a ‘consensual’ dialogue at work in the way that ‘a large number of constitutional courts cite our case-law, [and] we also cite theirs’. Jean-Paul Costa, ‘Speech by Jean-Paul Costa, President of the European Court of Human Rights’ (Visit to the Constitutional Court of the

influence,¹⁷⁸ in either or both directions, to differing degrees, have all been considered to reflect dialogue between these courts.

Seeking to probe this wide-ranging use and thus decipher further what the UK and ECtHR judges understand by this dialogic relationship is not, to borrow a retort from Carolan, ‘an indulgently academic exercise in linguistic trivialities’.¹⁷⁹ As discussed above, ‘dialogue’ has become a central feature of the domestic case law on how the Strasbourg jurisprudence is approached by the UK courts, invoked across a significant body of case law, consisting of two judgments by the House of Lords¹⁸⁰ and eight judgments of the Supreme Court.¹⁸¹ What is more, it appears to have taken a near permanent place in the narrative of national and ECtHR judges when discussing the relationship between their courts.¹⁸² Thus, it does not seem to be among the kind of judicially-invoked metaphors, observed by Bosmajian, which ‘appear once or twice and are never heard from again’.¹⁸³ Instead, it is among those that have demonstrable ‘staying power, become institutionalized and integral to judicial reasoning and judicial decision making’.¹⁸⁴ Judicial dialogue might well mean ‘whatever its users want it to mean’,¹⁸⁵ but that should not deter scrutiny of what exactly judges mean when it becomes such a recurrent feature of their judgments.

Russian Federation, 10-11 May 2007)

<http://www.echr.coe.int/Documents/Speech_20070511_Costa_Moscow_ENG.pdf> accessed 10 December 2016

¹⁷⁵ Lord Mance has observed that ‘The process [of judicial dialogue] enables national courts to express their concerns...’ *Chester* (n 125) [27] (Lord Mance). The former ECtHR President, Sir Nicolas Bratza, has observed that in the interests of ‘increased dialogue’, it is ‘right and healthy that national courts should continue to feel free to criticise Strasbourg judgments’. Bratza (n 7) 512

¹⁷⁶ *Lyons* (n 96) [46] (Lord Hoffmann); *Horncastle* (n 4) [11] (Lord Phillips); *Pinnock* (n 3) [48] (Lord Neuberger), *Chester* (n 125) [27], [34] (Lord Mance) [137] (Lord Sumption), *Moohan* (n 104) [13] (Lord Hodge)

¹⁷⁷ Costa observes a dialogue where the ECtHR ‘endorses the decision of a constitutional court’. Costa, ‘Speech to Russian Constitutional Court’ (n 174)

¹⁷⁸ Lord Reed has observed: ‘There is ... a dialectical process at work, as the European Court and national courts each influence the work of the other’. Robert Reed, ‘Foreword’ in Bjorge, *Domestic Application of the ECHR* (n 143) vii

¹⁷⁹ Eoin Carolan, ‘Dialogue isn’t Working: the Case for Collaboration as a Model of Legislative–Judicial Relations’ (2016) 36(2) LS 209, 210

¹⁸⁰ *Lyons* (n 96) [46] (Lord Hoffmann); *In re P* (n 99) (Lord Hoffmann) [35]

¹⁸¹ *Horncastle* (n 4) [11] (Lord Phillips); *Pinnock* (n 3) [48] (Lord Neuberger); *Ambrose* (n 130) [130] (Lord Kerr); *Rabone* (n 137) [112] (Lord Brown); *Chester* (n 125) [27] (Lord Mance), [137] (Lord Sumption); *R (Nicklinson) v Ministry of Justice* [2015] AC 657, [117] (Lord Neuberger); *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2015] 1 AC 1344, [18]–[21] (Lord Mance and Lord Hughes); *Moohan* (n 104) [13] (Lord Hodge); *Akerman-Livingstone v Aster Communities Limited* [2015] 1 AC 1399, [20] (Lady Hale)

¹⁸² The Official Opening of the Judicial Year at the ECtHR, with its permanent title ‘Dialogue between Judges’ provides a good example. European Court of Human Rights, *Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?* (Dialogue between Judges, Council of Europe 2014)

¹⁸³ Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Southern Illinois University Press 1992) 3

¹⁸⁴ *ibid*

¹⁸⁵ Zoethout (n 171) 175

The need to further probe the meaning behind this concept also arises from what is, on some accounts at least, a darker side to the judicial use of such concepts. The Justice of the Supreme Court, Lord Sumption, has cautioned:

From time to time, English judges devise catch-phrases devoid of legal meaning in order to describe concepts which they are unwilling or unable to define. ... Now, I am not so austere that I would deny judges the right to use the odd slogan. But there are I think circumstances in which the use of catch-phrases ..., which have little or no legal content, is positively dangerous. This is because they tend to be a substitute for analysis. They mask what the court is really doing and why ... [and] may divert attention from considerations which are legally a great deal more significant.¹⁸⁶

Applied to the present discussion, such remarks beg the question: is ‘dialogue’ to be considered one of those dangerous catch-phrases, devoid of legal meaning, masking what the courts are really doing and why, diverting attention from more significant legal considerations? Given his Lordship’s own willingness to employ the concept of dialogue,¹⁸⁷ this seems unlikely to be his view. In this respect, however, it is notable that Lord Kerr, having previously written favourably of dialogue between the UK courts and the ECtHR,¹⁸⁸ has since become critical of the notion: ‘...as a matter of principle Strasbourg and the national courts cannot be engaged in much of a dialogue, because they are necessarily having different conversations’.¹⁸⁹ The ECtHR, he observes, ‘...must decide each case *despite* what the national courts have said’.¹⁹⁰ Combined with Lord Sumption’s warning of the dangers of judicial slogans, Lord Kerr’s concerns arguably justify a further enquiry into the judicial meaning behind this concept.

An additional reason to discern the form of dialogue between these courts relates to developments in the domestic case law. If it is the case that the UK courts and the ECtHR are engaged in dialogue through their judgments, it would appear that the dynamics of this dialogue are in a state of flux. Several commentators have noted what is frequently labelled the common

¹⁸⁶ Lord Sumption, ‘Anxious Scrutiny’ (Administrative Law Bar Association Annual Lecture, 4 November 2014) <<https://www.supremecourt.uk/docs/speech-141104.pdf>> accessed 10 December 2016

¹⁸⁷ *Chester* (n 125) [137]

¹⁸⁸ Lord Kerr, ‘The Conversation between National Courts and Strasbourg’ (n 5)

¹⁸⁹ Lord Kerr, ‘The Relationship Between the Strasbourg Court and the National Courts – As Seen from the UK Supreme Court’ in Katja S. Ziegler, Elizabeth Wicks & Loveday Hodson (eds), *The UK and Human Rights: A Strained Relationship?* (Hart 2015) 31, 32 (emphasis added)

¹⁹⁰ *ibid*

law ‘resurgence’¹⁹¹ in UK human rights adjudication. The entering into force of the HRA is thought to have marked the beginning of an ‘eclipse of common law by Convention rights’.¹⁹² Developments in the Supreme Court in recent years, however, suggest that the eclipse has now passed. In *Osborn v Parole Board*,¹⁹³ Lord Reed observed: ‘the error ... is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law’.¹⁹⁴ On the correct approach, ‘the starting point [is] our own legal principles rather than the judgments of the international court’.¹⁹⁵ The same thinking has been echoed forcefully in subsequent cases at the Supreme Court,¹⁹⁶ where the Justices have lamented the ‘baleful and unnecessary tendency to overlook the common law’.¹⁹⁷ Masterman and Wheatle thus observe that ‘...after a period of relative dormancy, the common law is being reasserted as an important source of rights protection’.¹⁹⁸ According to Elliott, there are three dimensions to this resurgence consisting of the resilience, primacy and dynamism of the common law.¹⁹⁹ The resilience refers to the ‘modest proposition that common law rights survive the HRA’.²⁰⁰ The primacy reflects the view that the common law ‘should form the focal point when human rights arguments are made’,²⁰¹ and the dynamism refers to the view that ‘the common law has continued not only to exist, but also to evolve’²⁰² since the enactment of the HRA. The question, therefore, is how this development might influence or shape the dialogue between the courts, as the primacy and dynamism of the common law resurgence in particular see the reasoning of the UK courts in human rights adjudication shift focus away from the Convention arguments and the Strasbourg case law.

¹⁹¹ Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ (2015) 1 EHRLR 57; Richard Clayton, ‘The Empire Strikes Back: Common Law Rights and the Human Rights Act’ [2015] PL 3

¹⁹² Elliott (n 60) 91

¹⁹³ *R (Osborne) v Parole Board* [2014] AC 1115; Masterman and Wheatle (n 191) 60;

¹⁹⁴ *Osborn* (n) [63]

¹⁹⁵ *ibid* [62]

¹⁹⁶ *Kennedy v Charity Commission* [2015] 1 AC 455; *A v BBC* [2015] AC 588; *O (A Child) v Rhodes* [2015] UKSC 32; *R (Ingenious Media Holdings plc and another) v Commissioners for Her Majesty’s Revenue and Customs* [2016] UKSC 54

¹⁹⁷ *Kennedy* *ibid* [133] (Lord Toulson)

¹⁹⁸ Masterman and Wheatle (n 191) 58

¹⁹⁹ Elliott (n 60) 92-94

²⁰⁰ *ibid* 92 citing *Osborn* (n 193) [57] (Lord Reed): ‘The HRA ‘does not . . . supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court’.

²⁰¹ *ibid* 93 citing *Kennedy* (n 196) [46] (Lord Mance): ‘[T]he natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene’.

²⁰² *ibid* 93-4 citing *Osborn* (n 193) [57] (Lord Reed): ‘Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate’.

3.2 What are the functions of judicial dialogue in the context of the decision-making of the UK courts and the European Court of Human Rights?

The second research question can be justified by the sheer breadth of functions which have been attributed to the concept of judicial dialogue within the academic literature. It is linked to cross-influence between courts,²⁰³ the enhancement of the quality of judicial reasoning,²⁰⁴ mutual accommodation,²⁰⁵ judicial empowerment,²⁰⁶ the strengthening of human rights protection,²⁰⁷ and, most radically, the development of a new legal order based on transgovernmentalist networks.²⁰⁸ The point need not be laboured. Rather than diminishing the need for research, it can be argued that these various functions underline the importance of understanding the judicial embrace of dialogue within the context of the relationship between the UK courts and the ECtHR. To what extent are the judges using this dialogue to influence one another, to enhance the quality of their reasoning, to accommodate or empower themselves or one another? The timing of the common law resurgence, alongside a number of the cases in which the UK courts have stressed a relationship with the ECtHR based on dialogue, raises a further question of whether, and to what extent, these developments are functionally related.

3.3 What is the role of informal dialogue between the UK courts and the European Court of Human Rights?

The third research question arises from the lack of clarity as to the role of informal dialogue taking place through periodic meetings between senior UK and ECtHR judges. While much praised, the insights offered by the participating judges, with the notable exception of Lady Justice Arden,²⁰⁹ the UK judiciary's Head of International Judicial Relations, have tended to be confined to the improvement of 'mutual understanding',²¹⁰ and the maintenance of the 'high degree of respect'²¹¹ between their courts. Meanwhile, the academic debates on meetings between judges from different jurisdictions have often focused on the extent to which this form

²⁰³ Melissa A. Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 Geo LJ 487, 490

²⁰⁴ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 U Rich L Rev 99, 132

²⁰⁵ Kuo, 'Discovering Sovereignty in Dialogue' (n 168) 367; Krisch (n 71) 127-143

²⁰⁶ Amos, 'The Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 13) 579

²⁰⁷ Slaughter, 'Typology of Transjudicial Communication' (n 204) 134

²⁰⁸ From this perspective, 'the state is not disappearing, it is disaggregating into its separate, functionally distinct parts' and judicial dialogue offers the communicative means through which courts across the world build their functionally distinct networks. Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 Foreign Affairs 183, 185

²⁰⁹ Arden (n 7) 4, 274, 286, 315

²¹⁰ J. Costa, 'On the legitimacy of the European Court of Human Rights' judgements' (2011) 7(2) European Constitutional Law Review 173, 182

²¹¹ Lord Carnwath, 'UK courts and Strasbourg' (Rome, 20 September 2013)

<<https://www.supremecourt.uk/docs/speech-130920.pdf>> accessed 19 September 2015

of dialogue encourages the participants to cite one another's judgments in their decisions.²¹² Given, however, that both the UK courts and the ECtHR routinely cite and examine the other's judgments, it seems unlikely that meetings between their judges serve the function of encouraging further cross-citation.

The need to explore the role of these meetings also arises from the indeterminacy of the relationship between these courts. Krisch argues that European human rights law consists of a pluralistic, 'open architecture'²¹³ in which inter-institutional relationships are increasingly '...governed not by an overarching legal framework but primarily by politics, often judicial politics'.²¹⁴ In his view, the s.2 HRA duty on the UK courts to 'take into account' the judgments of the ECtHR provides a good example of this open architecture. It reflects the kind of 'interface norm'²¹⁵ between legal regimes which 'confers discretion on courts to situate themselves towards other orders as they please'.²¹⁶ In this way, it is 'buffered by a political element – an element that is not fully determined by law but leaves the relationship, to an important extent, open'.²¹⁷ Krisch suggests that this provides the space for 'judicial politics'²¹⁸ in the form of 'discretion and realism'.²¹⁹ On this analysis, and given the importance that has been attached by UK and ECtHR judges to the role of informal dialogue, it would not be unreasonable to infer that these interactions can play an important role within the space for judicial politics provided by s.2 HRA.

4. What is the role of judicial dialogue in legitimising the respective judgments of the UK courts and the ECtHR?

4.1 The Concept of Legitimacy

The fourth and central research question addressed by this thesis examines how the UK courts and the ECtHR have drawn upon the concept of judicial 'dialogue' and the practices underpinning that term in order to legitimise their judgments. Legitimacy is not easily defined. Shany notes that it is a 'fully open-ended'²²⁰ term that 'builds bridges across constituencies, and ... combines ideas about law, morality, and empirical reality'.²²¹ The quality of legitimacy might be ascribed to a legal system, an institution, such as a court, parliament or executive body,

²¹² David S. Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163(4) U Pennsylvania L Rev 927

²¹³ Krisch (n 71) 109

²¹⁴ *ibid* 111

²¹⁵ *ibid* 285

²¹⁶ *ibid* 287

²¹⁷ *ibid* 126

²¹⁸ *ibid*

²¹⁹ *ibid*

²²⁰ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 157

²²¹ *ibid*

a decision, a legal text or a norm.²²² Applied in this way, its meaning goes beyond the ‘general concept’ of legitimacy which treats ‘legitimate’ and ‘illegitimate’ as terms of mere ‘approbation and disapproval’.²²³ Here, legitimacy concerns what is variably termed the ‘validation of power’²²⁴ or the ‘justification and acceptance of political authority’²²⁵ (authority being ‘a relational notion whereby one actor has a claim of obedience upon another’).²²⁶

The concept of legitimacy is distinguished by its legal, normative and descriptive dimensions.²²⁷ First, the ‘legalist notion of legitimacy via legality’,²²⁸ also known as ‘formal’,²²⁹ legitimacy, focuses on whether ‘all requirements of the law are observed in the creation of the institution or system’.²³⁰ Further, it looks at whether actors have the ‘legal authority they claim and whether their decisions accord with the principles of legality’.²³¹ Second, legitimacy as a ‘full-blooded normative term’²³² looks to the ‘conditions or reasons that justify the claim to authoritativeness’.²³³ These reasons provide what Habermas describes as an institution’s ‘worthiness to be recognized’.²³⁴

Descriptive legitimacy, also known as sociological or ‘subjective’²³⁵ legitimacy, looks at ‘whether [an institution’s] authority is accepted by relevant audiences’.²³⁶ According to Weiler, legitimacy from this view connotes ‘a broad, empirically determined, societal acceptance of the system’.²³⁷ Traditionally, this was measured by compliance with the acts or decisions of a site of authority – what Bentham termed the ‘disposition to obey’²³⁸ on the part of the governed. Thus,

²²² Pérez (n 170) 98

²²³ Daniel Bodansky, ‘Legitimacy in International Law and International Relations’ in: Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321, 324

²²⁴ Thomas Franck, ‘Why a Quest for Legitimacy?’ (1987) 21 UC Davis Law Review 535, 544

²²⁵ Bodansky (n 223) 324

²²⁶ Pérez (n 170) 99

²²⁷ Alice Donald and Philip Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 119

²²⁸ Mikael Rask Madsen, ‘Sociological Approaches to International Courts’ in Cesare P.R. Romano, Karen J. Alter and Yuval Shany, *The Oxford Handbook of International Adjudication* (OUP 2014) 388, 392

²²⁹ J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes have an Emperor?” and Other Essays on European Integration* (CUP 1999) 80

²³⁰ *ibid*

²³¹ Donald and Leach (n 227) 120

²³² Leslie Green, ‘Law, Legitimacy and Consent’ (1989) 62 S Cal L Rev 795, 797

²³³ Pérez (n 170) 98

²³⁴ ‘Legitimacy means that there are good arguments for a political order’s claim to be recognized as right and just; a legitimate order deserves recognition. Legitimacy means a political order’s worthiness to be recognized.’ Jürgen Habermas, *Communication and the Evolution of Society* (Beacon Press 1979) 178-9 cited in Franck (n 224) 541

²³⁵ Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein, ‘International Human Rights and the Challenge of Legitimacy’ in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 1, 13

²³⁶ Bodansky (n 223) 327

²³⁷ Weiler (n 229) 80

²³⁸ ‘... the faculty of governing on the one part has for its sole efficient cause, and for its sole efficient measure, the disposition to obey on the other part’. Jeremy Bentham, *The Works of Jeremy Bentham* (William Tait 1843) 219

legitimacy is often treated synonymously with the ‘diffuse support’²³⁹ or the ‘reservoir of goodwill’²⁴⁰ enjoyed by an institution: that ‘which makes people willing to defer even to unpopular decisions and helps sustain the institution through difficult times’.²⁴¹ For Weber, however, legitimacy derives from the *belief* in the rightful rule of governing institutions on the part of the governed.²⁴² Here, ‘what makes a certain practice of power legitimate is the process through which authority justifies its exercise of power and gains social acceptance’.²⁴³ Legitimacy from this perspective, however, retains a normative dimension. Bodansky notes that it is ‘conceptually parasitic on normative legitimacy since beliefs about legitimacy are usually beliefs about whether an institution, as a normative matter, has a right to rule’.²⁴⁴ For this reason, several scholars have turned to Beetham’s understanding of legitimacy which seeks to bridge the two.²⁴⁵ This stresses the link between people’s beliefs in an institution’s legitimacy, on the one hand, and their normative reasons for holding those beliefs, on the other. Here, the focus is ‘the reasons social actors hold for supporting institutions’.²⁴⁶ These are described by Beetham as ‘normative expectations’;²⁴⁷ socially-embedded standards of normative legitimacy.²⁴⁸ From this perspective, a ‘given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs’.²⁴⁹

On this basis, it can be said that courts sustain their legitimacy because they can justify the exercise of their power in terms of the beliefs of those subject to their authority. In line with this approach, this thesis examines how the UK courts and the ECtHR use dialogue and the practices associated with that term in order to justify their authority in terms of the beliefs of those subject to their rulings. Weber argued that ‘Experience shows that ... every such system

²³⁹ Bodansky (n 223) 337

²⁴⁰ *ibid* 337

²⁴¹ *ibid* 327

²⁴² According to Weber, there are three types of legitimate authority based on law (‘resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands’), tradition (‘resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them’) and charisma (‘resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him’). Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 215

²⁴³ Madsen, ‘Sociological Approaches to International Courts’ (n 228) 388, 392

²⁴⁴ Bodansky (n 223) 327

²⁴⁵ David Beetham, *The Legitimation of Power* (Macmillan Press 1991) cited in Başak Çalı, Anne Koch and Nicola Bruch, ‘The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights’ (2013) 35 *Human Rights Quarterly* 955, 961, Donald and Leach (n 227) 120

²⁴⁶ Çalı, Koch and Bruch, *ibid* 961

²⁴⁷ *ibid* 960 citing Beetham (n 245)

²⁴⁸ *ibid*

²⁴⁹ Beetham, *The Legitimation of Power* (n 245) 10 cited in Çalı, Koch and Bruch (n 245) 960. In the second edition of his book, Beetham explains: ‘When we seek to assess the legitimacy of a regime, a political system, or some other power relation, one thing we are doing is assessing how far it can be justified in terms of people’s beliefs, how far it conforms to their values and standards, how far it satisfies the normative expectations they have of it’ David Beetham, *The Legitimation of Power* (Palgrave 2013) 11

attempts to establish and to cultivate the belief in its legitimacy'.²⁵⁰ In a similar vein, Berger and Luckmann observed that '[i]nstitutions ... are legitimated by living individuals'²⁵¹ who seek to 'justif[y] the institutional order by giving a *normative dignity* to its practical imperatives'.²⁵² Judges are no exception. They are not passive actors but central to the legitimacy of the courts in which they operate. Krisch notes that 'legitimacy considerations'²⁵³ are among the key factors which influence judicial decision-making. On the one hand, judges will take opportunities to enhance the legitimacy of their courts as an institution.²⁵⁴ On the other hand, their actions can be tempered by opposing legitimacy considerations, particularly the 'fear of a backlash'.²⁵⁵ In this regard, Baum's research in the United States indicates that judges are acutely conscious of their audiences, who consist not only of their colleagues, the public, the other branches of government, but 'the legal community, including judges on other courts',²⁵⁶ from whom they seek acceptance. Likewise, Poole has argued that the 'politicisation'²⁵⁷ of the UK judiciary following the conferral of their new powers under the HRA may have ushered in an increasingly audience-conscious form of decision-making. He suggests that 'if it is true that individual judges themselves feel as though their judgments are under closer scrutiny, then we might expect them to respond by trying to persuade this newly interested audience that the new powers they are wielding are being used in a proper manner'.²⁵⁸ In Poole's view, this would make more common 'the self-conscious consideration of likely political ramifications in the process of formulating judgments'.²⁵⁹

4.2 Legitimacy Challenges to the UK Courts and the ECtHR

The emergence of dialogue between the UK courts and the ECtHR has an important contextual dimension. The powers of the UK courts under the HRA and the role of the ECtHR in the UK legal system have faced repeated challenges to their legitimacy. Both courts have faced the threat of court 'curbing'²⁶⁰ in the form of proposals by the UK government to repeal the

²⁵⁰ Weber (n 242) 213

²⁵¹ Peter L Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin 1971) 145

²⁵² *ibid* 111

²⁵³ Krisch (n 71) 149

²⁵⁴ *ibid* 148-9

²⁵⁵ *ibid* 149

²⁵⁶ Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006) 24

²⁵⁷ Thomas Poole, 'Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case' (2005) 32(4) *J Law & Soc* 534, 556 citing J.A.G. Griffith, 'The Brave New World of Sir John Laws' (2000) 63 *MLR* 1

²⁵⁸ *ibid* 557

²⁵⁹ *ibid*

²⁶⁰ Lupu describes court curbing as the situation '...when a court decision draws a backlash from governmental actors — resulting in a formal or informal diminution of court power'. Y. Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14(2) *Theoretical Inquiries in Law* 437, 444

HRA,²⁶¹ reduce the legal status of final judgments of the ECtHR against states from binding in international law to ‘advisory’,²⁶² and even withdraw the UK from the ECHR system completely.²⁶³ There have been severe attacks on the legitimacy of the ECtHR in particular, fuelled by its adverse rulings against the UK in respect of the disenfranchisement of prisoners,²⁶⁴ the deportation of terrorist suspects²⁶⁵ and the issuing of whole life prison sentences.²⁶⁶ Bates notes here that ‘...at the core of the strained relationship [between the UK and the ECtHR] are concerns over ... the legitimacy of Strasbourg’s influence’.²⁶⁷ This position ‘questions why and how Strasbourg has the power that it has to (in effect) override what are generally seen to be reasonable British positions’,²⁶⁸ whether legislative or judicial. Further, critics of the ECtHR take particular issue with its evolutive interpretive approach, according to which the ECHR is ‘a living instrument ... which must be interpreted in the light of present day conditions’.²⁶⁹ The former Law Lord, Lord Hoffmann, for example, criticised it as ‘the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by “European public order”’,²⁷⁰ an approach for which it lacked the ‘constitutional legitimacy’.²⁷¹ Likewise, Lord Sumption has criticised the ECtHR as ‘the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying’.²⁷²

The UK courts have also faced challenges. The significant new powers bestowed by the HRA brought with them the dilemmas and uncertainty as to the boundaries of their use. Lord Justice Sales here has noted that the UK courts are now ‘...inevitably political courts in the small “p” sense that in applying Convention rights they enter more fully into ruling on issues of policy

²⁶¹ UK Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (3 October 2014)

<https://www.conservatives.com/~media/files/.../human_rights.pdf> accessed 10 December 2016

²⁶² *ibid* 5

²⁶³ *ibid* 8; Christopher Hope, ‘Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed’ (*The Telegraph* 28 December 2016)

<<http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/>> accessed 10 Jan 2017

²⁶⁴ *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41; *Greens and MT v United Kingdom* [2010] ECHR 1826

²⁶⁵ *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1

²⁶⁶ *Vinter v United Kingdom* (2016) 63 EHRR 1

²⁶⁷ Ed Bates, ‘The UK and Strasbourg: A Strained Relationship – The Long View’ in Ziegler, Wicks and Hodson (eds), (n 189) 39, 41

²⁶⁸ *ibid*

²⁶⁹ *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1 [31]

²⁷⁰ Lord Hoffmann, ‘The Universality of Human Rights’ (Judicial Studies Board Annual Lecture, 19 March 2009) 21 <<https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>> accessed 10 December 2016 citing *Hatton v United Kingdom* (2003) 37 EHRR 611 [O-I5] (Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner)

²⁷¹ *ibid* 23

²⁷² Lord Sumption, ‘The Limits of Law’ (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) <<https://www.supremecourt.uk/docs/speech-131120.pdf>> accessed 16 December 2016

than was the case for the domestic courts before the HRA'.²⁷³ As such, '[t]he legitimacy and coherence of their activities will always be subject to democratic or populist pressures'.²⁷⁴ In the same vein, Masterman has observed that the 'significant margin of discretion'²⁷⁵ bestowed by s.2 HRA raised new questions for the 'legitimacy of the judicial role under the HRA',²⁷⁶ in particular to 'the idea of maintaining legitimacy in judicial decision-making'.²⁷⁷ Further, the concerns over an undue influence being accorded to the ECtHR have fuelled some of the criticisms that the UK courts had taken a needlessly deferential approach to the ECtHR. The former Lord Chancellor, Lord Irvine, argued that it was imperative that the UK courts counter the perception that they are 'merely agents or delegates of the ECHR and CoE ... regard[ing] it as their primary duty to give effect to the policy preferences of the Strasbourg Court'.²⁷⁸ Such deference was 'damaging for our courts' own legitimacy and credibility'²⁷⁹ and 'would gravely undermine, not enhance, respect for domestic and international human rights principles in the United Kingdom'.²⁸⁰

The criticisms against the UK courts and the ECtHR do not mean that either necessarily lacks legitimacy. Føllesdal, Schaffer and Ulfstein point out that '...the fact that some of those addressed by authority protest and critique surely does not necessarily imply that an institution is illegitimate in normative terms'.²⁸¹ The reality, however, is much harsher, particularly for the ECtHR, because 'compliance often requires that subjects believe that an authority is normatively legitimate'.²⁸² A lack of compliance, in turn, can further undermine legitimacy: '...whether a subject is morally obligated and motivated to comply may depend on whether the agent has reason to believe that others will also endorse the norm, for instance because they regard it as legitimate, for whatever reason'.²⁸³

Indeed, the judges have shown themselves to be acutely conscious of the difficulties that they face. The former ECtHR President, Dean Spielmann, has remarked:

We face a constant challenge as regards the acceptability of our decisions. This question is all the more sensitive as our legitimacy is conferred on us by the

²⁷³ Sales (n 14) 266

²⁷⁴ *ibid*

²⁷⁵ Masterman, 'Developing a "Municipal Law of Human Rights" under the Human Rights Act' (n 14) 908

²⁷⁶ *ibid*

²⁷⁷ *ibid* 909

²⁷⁸ Lord Irvine (n 14) 247

²⁷⁹ *ibid*

²⁸⁰ *ibid*

²⁸¹ '...their legitimacy as only indicated by the absence of resistance and criticism could be just as worrying, as such silence could indicate that subjects comply uncritically, or that the institutions are epiphenomenal to power and politically irrelevant, so that nobody cares to dispute their ostensive authority.' Føllesdal, Schaffer and Ulfstein (n 235) 13

²⁸² *ibid* 14

²⁸³ *ibid* 13

States that we find against, and our position is therefore far from easy. We do not follow a particular judicial strategy, but it goes without saying that we do think about how our judgments will be received.²⁸⁴

Likewise, the Court of Appeal judge, Sir John Laws, observing that ‘law’s authority rests upon public belief’,²⁸⁵ has expressed concern that where ‘the law is or seems to be driven by decisions of the Strasbourg court ... the resulting fears and resentments may undermine the confidence which thinking people ought to have’²⁸⁶ in the ability of the domestic courts to use foreign sources of law.

4.3 Harnessing the Legitimising Potential of Dialogue?

Against this background, the judicial invoking of the concept of ‘dialogue’ is significant. The popularity of this concept within the academic literature is partly explained by its legitimising potential. Tremblay notes that ‘the idea that some form of dialogue, discussion, communication, deliberation, or discourse may confer legitimating force on political authority and decision making has been a recurrent theme in contemporary legal, political, and social philosophy’.²⁸⁷

The long-running debates over the ‘counter-majoritarian’ difficulty associated with the judicial review of democratically-enacted legislation are a case in point. Here, the idea of constitutional dialogue has become a common, albeit disputed, retort to the contention that courts lack the legitimacy to interfere with legislation. The crux of constitutional dialogic theory, as explained by Briant, is that ‘the judiciary is not (or should not be) the final arbiter of the content of rights, but rather interacts with the legislature through “constructive dialogue” to determine their content’.²⁸⁸ Instead of one dictating to the other, the two ‘participate in a dialogue regarding the determination of the proper balance between constitutional principles and public policies, and, this being the case, there is good reason to think of judicial review as democratically legitimate’.²⁸⁹

The legitimising force of this idea has not only attracted academic attention, however. The seminal article on ‘dialogue’²⁹⁰ between the Canadian Supreme Court and legislature by

²⁸⁴ Dean Spielmann, ‘Opening Address’ in European Court of Human Rights, *Subsidiarity: a Two-Sided Coin?* (Dialogue between Judges, Council of Europe 2015) 43, 45

²⁸⁵ Lord Justice Laws (n 7)

²⁸⁶ *ibid*

²⁸⁷ Tremblay (n 10) 617

²⁸⁸ Briant (n 12) 250-251

²⁸⁹ Tremblay (n 10) 617

²⁹⁰ Hogg and Bushell, ‘The Charter Dialogue between Courts and Legislatures’ (n 10)

Hogg and Bushell was written, as the authors later put it, ‘to challenge the anti-majoritarian objection to the legitimacy of judicial review’.²⁹¹ Their suggestion was that a judicial decision which strikes down legislation could be considered part of a dialogue if the decision could be ‘reversed, modified, or avoided by the ordinary legislative process’.²⁹² Where this was the case, they argued, ‘any concern about the legitimacy of judicial review is greatly diminished’.²⁹³ Carolan notes that the article was ‘an empirical riposte to allegations of judicial supremacy in the exercise of the courts’ judicial review powers’.²⁹⁴ However, its ‘implicit support ... for the democratic legitimacy of judicial review’²⁹⁵ gave the concept an allure that proved irresistible even to the Canadian courts themselves,²⁹⁶ not merely as a descriptive choice but as a ‘normative template for the legislative–judicial relationship’.²⁹⁷ The Canadian Supreme Court began to declare that ‘the law develops through a dialogue between courts and legislatures’²⁹⁸ and that the judiciary’s was ‘not necessarily the last word on the subject’.²⁹⁹ Further, it was reasoned that the ‘...dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it’.³⁰⁰

Thus, the UK Supreme Court is not the first to have been tempted by this concept. The parallels, however, mean that it can be plausibly asked whether that court, like its Canadian counterpart, invoked the concept of dialogue as a response to the legitimacy challenges which they faced regarding a particular inter-institutional relationship. Their particular challenges, of course, concerned their relationship with another court, but the thinking appears similar: an attempt to rebut allegations of an over-concentration of power in one (judicial) institution at the expense of another, and thereby confer legitimacy.

The question is particularly merited given that both the UK courts and the ECtHR have shown themselves responsive to challenges to their legitimacy. As mentioned earlier, Poole has contended that the conferral of the expanded powers of judicial review under the HRA may well have fostered an increasingly strategic form of decision-making as the public scrutiny of the

²⁹¹ Hogg, Thornton and Wright, ‘Charter Dialogue Revisited’ (n 10) 2

²⁹² Hogg and Bushell, ‘The Charter Dialogue between Courts and Legislatures’ (n 10) 80

²⁹³ *ibid*

²⁹⁴ Carolan (n 179) 210

²⁹⁵ *ibid* 210

²⁹⁶ Writing in 2007, Hogg, Thornton and Wright noted: ‘By 2006, a total of 27 reported decisions (ten Supreme Court of Canada decisions, 9 five provincial appellate decisions, 10 seven decisions by the superior courts of the provinces or territories, 1 one decision of the Federal Court of Appeal, 12 and one of a provincial court) had referred to the concept of Charter dialogue’. Hogg, Thornton and Bushell, ‘Charter Dialogue Revisited’ (n) 5

²⁹⁷ Carolan (n 179) 211

²⁹⁸ *R v Mills* [1999] 3 SC 668, 689 as cited in Hogg, Thornton and Wright (n 10) 21

²⁹⁹ *ibid*

³⁰⁰ *Vriend v Alberta* [1998] 1 SCR 493 paras 138-139 cited in Carolan (n 179) 211

courts intensified.³⁰¹ In this regard, Clayton has observed that s.2 HRA posed ‘immense practical difficulties’³⁰² to the UK courts in the early years of the HRA after the UK government appeared to resile from its support for the HRA in its commitment to the ‘war on terror’, and became particularly critical of judicial decisions under that legislation.³⁰³ With Tomlinson, he argues that the strict approach of the UK courts to the Strasbourg jurisprudence, particularly regarding the duty to do ‘no more’ than the ECtHR, was their way of seeking ‘democratic legitimacy by means of a self-denying ordinance’.³⁰⁴ Amos has written to similar effect: ‘By making it clear that they were merely doing what the ECtHR required, their Lordships effectively absolved themselves from direct responsibility’.³⁰⁵ The ECtHR has also shown itself adept to responding to legitimacy challenges. Madsen has argued that early in the life of the ECtHR it was the sensitivity of its judges to the court’s lack of legitimacy which allowed it to thrive and expand in later years. To this end, it employed a ‘self-constrained legal diplomacy’,³⁰⁶ whereby ‘jurisprudential developments were clearly balanced with diplomatic considerations’.³⁰⁷ Madsen suggests that this was made possible by the ‘legal-political reflexivity of the small legal elite inhabiting the Court during the first 20 years or so, who implicitly understood when to hold back and when to push for European human rights’.³⁰⁸

4. The Thesis and its Structure

The thesis argues that the UK courts and the ECtHR have utilised the judicial ‘dialogue’ between their courts as a means of *legitimising* their respective judgments in response to the direct challenges to their human rights adjudication. It will seek to demonstrate that the manifestations of dialogue, both through judgments and through meetings, embody the mutual participation, mutual accountability and the ongoing revision and refinement of arguments by these courts, each of which can contribute to judicial legitimacy at the domestic and European levels. However, it will also make the case that this legitimising potential is limited, with one particular

³⁰¹ Poole (n 257) 557

³⁰² Richard Clayton, ‘Should the English Courts under the HRA Mirror the Strasbourg Case Law?’ in Ziegler, Wicks and Hodson (eds), (n 189) 95, 113

³⁰³ *ibid* 113

³⁰⁴ Richard Clayton and Hugh Tomlinson, ‘Lord Bingham and the Human Rights Act 1998: The Search for Democratic Legitimacy during the “War on Terror”’ in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 65

³⁰⁵ Amos (n 13) 580

³⁰⁶ Mikael Rask Madsen, ‘The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash’ (2016) 79(1) LCP 141, 152

³⁰⁷ Mikael Rask Madsen, ‘The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights’ in M. Bobek (ed), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 259, 269

³⁰⁸ *ibid* 273

manifestation of dialogue – the open disagreement by national courts with a judgment of the ECtHR – carrying a *delegitimising* potential for the Convention-based system of human rights protection. As outlined above, the thesis develops these arguments by addressing four questions. First, what is judicial ‘dialogue’ in the context of the decision-making of the UK courts and the ECtHR? Second, what are its functions? Third, what is the role of the informal dialogue between these courts? Finally, what is the role of judicial dialogue in legitimising the judgments of the UK courts and the ECtHR?

Chapter 2 sets out the methodology which underpinned the research. It offers an overview of the conceptual difficulties in the existing literature on the concept of judicial dialogue, as well as the different functions which have been ascribed to it. In doing so, it seeks to provide the justification for a qualitative, interview-based study with the judges at the centre of the dialogue between these courts. It sets out the research design and justifies the methodological decisions taken during the course of the research.

Drawing upon the interviews with the judges, the domestic and Strasbourg case law, and extra-judicial literature, Chapters 3 to 6 sequentially explore the four research questions. Chapter 3 attempts to clarify the form of dialogue through judgments, as understood by the judges. While a precise definition proves elusive, it concludes that this form of ‘dialogue’ refers to a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their judgments. This definition does not differ radically from existing understandings of judicial dialogue. However, the data make clear the extent of the strategic thinking on the part of the judges in their efforts to persuade one another.

In Chapter 4, the thesis explores the functions attributed by the judges to the judgment-based dialogue between their courts. It argues that dialogue purports to mitigate the tensions arising from their differing institutional perspectives, prevailing legal traditions and overlapping jurisdictions in the interpretation and application of the Convention rights. Dialogue is used as a way of increasing the procedural flexibility of the Convention system, challenging domestic judicial complacency, improving the quality of the principles applied by the ECtHR and, in the case of the UK courts, bolstering judicial identity.

In Chapter 5, the focus shifts to the dialogue taking place through periodic meetings between the UK and ECtHR judges. As with the discussion of dialogue through judgments, it examines the form of the meetings – the frequency of their occurrence, the participants involved, and the format and tone of the discussions – and their significance. It identifies a number of procedural, substantive and diplomatic functions; each possesses its own value but also appears aimed at furthering the realisation of a relationship of subsidiarity between the courts.

In Chapter 6, the various conclusions on the nature and functions of judgment-based and informal dialogue between these courts are drawn together in order to arrive at the conclusions on its legitimising role. The chapter sets out in greater detail the nature of the legitimacy challenges confronting the UK courts and the ECtHR: the jurisdictional pluralism that defines their relationship, the need for the ECtHR to maintain the consent of the national authorities across the Council of Europe, demonstrate respect for national legal traditions and decision-making, while maintaining the guise of legal as opposed to discretionary decision-making. The UK courts face the charges of undue deference to the ECtHR and the lack of ‘ownership’ ascribed to the rights under the HRA which it is their responsibility to uphold. It argues that three features of discourse, as understood in political theory, permeate the processes of dialogue described by the judges and which manifest through the case law: mutual participation, mutual accountability and the ongoing revision and refinement of arguments, each performing legitimising functions within the context of the relationship between the courts and the particular legitimacy challenges which they face. It places these arguments into a wider context to argue that ‘dialogue’ simply reflects one part of two broader, parallel legitimacy strategies pursued by the courts: the strengthening of subsidiarity by the ECtHR, on the one hand, and the enhancement of domestic judicial autonomy in human rights adjudication, on the other.

Having explored the legitimising potential of dialogue between these courts, the final chapter of the thesis offers a normative critique of the principal form of dialogue through judgments – a sequential process by which the national courts disagree with the ECtHR and the ECtHR, in turn, revises its jurisprudence. It argues that this practice carries the potential to *delegitimise* the ECHR system by promoting a *disposition to disobey* on the part of national courts and indeed other addressees of ECtHR rulings across the Council of Europe. It submits that repeated challenges to the judgments of the ECtHR has placed its reasoning under strain as it has sought to accommodate domestic judicial concerns, and that the apparent salience given to the political climate in the UK at the time of key judgment has fuelled concerns with an abandonment of legal principle, diluting its authority and risking further challenge by other national authorities.

Chapter 2

Methodology

To restrict one's inquiry to the judgements of the courts, the end-products of the decision-making process, rather than scrutinising the dynamics of the process itself, is in some sense no more intellectually satisfying than attributing Christmas presents to Santa Claus, or babies to storks.¹

- Alan Paterson, *The Law Lords*

1. Introduction

The introductory chapter outlined the four research questions addressed by this thesis. First, what is judicial 'dialogue' in the context of the decision-making of the UK courts and the ECtHR? Second, what are its functions? Third, what is the role of the informal dialogue between these courts? Fourth, what is the role of judicial dialogue in legitimising the judgments of the UK courts and the ECtHR?

The task of answering these questions was undertaken using a qualitative research design consisting of in-depth interviews, thematic analysis, case law, and desk-based and library research. The traditional methodology of doctrinal legal research in the use of statutes and case law '...to identify, analyse and synthesise the content of the law'² was deemed to be an inadequate strategy for answering the research questions. As was shown in the opening chapter, both 'dialogue' and 'legitimacy' are disputed concepts which extend beyond law. 'Dialogue' in particular has been attached to interactions between judges which occur both within and outside of the context of their judgments. It was thus felt that the use of case law alone would provide limited insights in reaching an understanding as to the role of these interactions in legitimising the judgments of these courts. Paterson's quip over the limitations of relying solely on case law was made specifically in the context of his seminal study of the decision-making process of the former Judicial Appellate Committee of the House of Lords. Nonetheless, his words underline the importance of seeking to understand judicial interactions, which transcend the narrow confines of written judgments, using a methodology which also looks beyond those judgments.

The aim of this chapter is to justify the methodological decisions which guided the research. Parts 2 and 3 outline the existing research on the two forms of dialogue – judgment-based and face-to-face – discussed in the introductory chapter and its limits. With regards to dialogue through judgments, Part 2 observes divergent understandings within the scholarship as

¹ Alan Paterson, *The Law Lords* (Macmillan Press 1982) 1-2

² Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7, 9

to the form of the interactions, the degree of reciprocity involved in those interactions, and the presence of varied normative positions as to how dialogue through judgments should proceed, based on different views as to the nature of the judicial role under the Human Rights Act (HRA) 1998. In Part 3, the chapter observes the wide-ranging functions which have been ascribed to the idea of judicial dialogue, alluded to in the introductory chapter. In respect of the functions of face-to-face dialogue between judges of the courts, however, it notes an information gap necessitating further research into this area. In Part 4, the chapter offers a justification for the research design and the interpretivist approach to the study of judicial dialogue based on the limitations of the existing research, and the qualitative method which structured the research process. The remaining parts of the chapter justify each aspect of the research design. Part 5 addresses the use of in-depth interviewing and its limitations in this context, while the sampling choices and issues of access are set out in Part 6. An explanation of the choice of interview questions is provided in Part 7, and the method of thematic analysis applied to the interview transcripts is set out in Part 8. The other materials which were relied upon for this research are addressed in Part 9. The research-ethical considerations can be found in the Appendices.

2. Discerning Dialogue in the Judgments of the UK Courts and the ECtHR

2.1 What counts as ‘dialogue’?

Dialogue through the medium of judgments is generally considered to be defined by two features. First, it involves *interaction* between courts in the form the explicit citation by one court of the judgments of courts from outside of its jurisdiction.³ A court might cite the judgment of a national or supranational counterpart for its ‘minor relevance’,⁴ as a point of discussion in the reasoning before ‘distinguishing’⁵ it or because they are “‘following’ ... [the judgment] as some sort of authority’,⁶ and it thus ‘contributes directly to the holding of the case’.⁷ The act of citation, however, is said to allow judges ‘to comment on foreign courts’ interpretations of a

³ Gelter and Siems observe, however, that ‘There can also be dialogue between highest courts that is not reflected in cross-citations ... we do not know how much foreign case law may matter behind the scenes all the while that judges ... do not mention it explicitly in their opinions’. Martin Gelter and Mathias Siems, ‘Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts’ (2012) 8(2) Utrecht L Rev 88, 99

⁴ Christopher McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20(4) OJLS 499, 512

⁵ *ibid*

⁶ *ibid*

⁷ Taavi Annus, ‘Comparative Constitutional Reasoning: The Strategy of Selecting the Right Arguments’ (2004) 14 Duke J Comp. & Int’l L 301, 311

particular norm’⁸ and to thereby signal ‘judicial willingness (and even eagerness) to become part of a broader international discourse’.⁹

Second, what is said to distinguish dialogue from isolated citations is the ‘element of reciprocity’¹⁰ between the courts involved in the form of an ‘exchange of views and experiences’.¹¹ In this respect, dialogue is often distinguished from the ‘one-way transmission’,¹² ‘one-way traffic’,¹³ ‘reception’,¹⁴ or ‘monologues’¹⁵ of ideas between courts, each referring to the situation where ‘a court whose ideas or conclusions are borrowed by foreign courts, whether on the national or supranational level, is not a self-conscious participant in an ongoing conversation’.¹⁶ Dialogue, instead, is said to be characterised by courts ‘mutually reading and discussing each other’s jurisprudence’.¹⁷ According to Pérez, it consists of ‘an ongoing exchange of arguments’¹⁸ albeit one which ‘develop[s] in a fragmented manner since the exchanges ... occur case by case’.¹⁹ De Witte similarly notes that ‘a real dialogue, with mutual exchange of arguments, requires a series of subsequent references in different cases raising similar problems’.²⁰ For this reason, Slaughter, the ‘most visible and influential proponent’²¹ of the concept, suggests that ‘direct dialogue’²² between courts consists of ‘communication between two courts that is effectively initiated by one and responded to by the other’,²³ and underpinned by ‘an awareness on the part of both participants of whom they are talking to and a

⁸ Melissa A Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005) 93 Geo LJ 487, 507

⁹ *ibid*

¹⁰ Tor-Inge Harbo, ‘Legal Integration through Judicial Dialogue’ in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of National and International Courts and the (De-)Fragmentation of International Law* (Hart 2012) 167, 169

¹¹ Allan Rosas, ‘The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue’ (2007) 1(2) EJLS 121, 131

¹² Claire L’Heureux-Dubé, ‘The Importance of Dialogue: Globalization and the Impact of the Rehnquist Court’ (1998) 34(1) Tulsa L Rev 15, 21

¹³ Gelter and Siems (n 3) 88

¹⁴ L’Heureux-Dubé (n 12) 17

¹⁵ Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 U Rich L Rev 99, 113; Antonios Tzanakopoulos, ‘Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument’ in Fauchald and Nollkaemper (n 10) 185, 188

¹⁶ *ibid*

¹⁷ L’Heureux-Dubé (n 12) 21

¹⁸ Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 112

¹⁹ *ibid* 111

²⁰ Bruno De Witte, ‘The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process’ in Paul Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Bloomsbury 2002) 39, 41

²¹ Ronald J. Krotoszynski Jr., ‘“I’d Like to Teach the Word to Sing (in Perfect Harmony)”’: International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue’ (2006) 104(6) Mich L Rev 1321, 1328

²² Slaughter, ‘A Typology of Transjudicial Communication’ (n 15) 112

²³ *ibid* 112

corresponding willingness to take account of the response'.²⁴ Thus, the idea is that the cross-citations between particular courts are 'characterized by such a degree of mutual engagement and substantive debate that it amounts to an ongoing conversation conducted through the medium of judicial opinions'.²⁵

Turning to the context of interest, however, academic accounts vary as to the form of judgment-based dialogue between the UK courts and the ECtHR. There are three issues here. The first two are descriptive. First, while dialogue is generally thought to be characterised by explicit *interactions*, the nature of the interactions to which the term dialogue has been applied is extremely wide. Second, although dialogue through judgments is usually defined by *reciprocity* between the courts involved, there are differences of view as to the directness of that reciprocity. The third issue is normative. There are striking differences of view as to how a dialogue between these courts *should* take place, based on divergent views as to the nature of the domestic judicial role under the HRA.

2.2. A Spectrum of Dialogic Interactions

In the introductory chapter, it was seen that 'dialogue' refers to a 'discussion between two or more people or groups, especially one directed towards exploration of a particular subject or resolution of a problem',²⁶ with connotations of discussion, collaboration, agreement, disagreement and opposition. This malleability has allowed the term to be applied to a wide range of judgment-based interactions between the UK courts and the ECtHR. One way of categorising these interactions is via a spectrum of cooperation and contestation²⁷ or, as the former ECtHR President, Jean-Paul Costa has put it, between '*consensual*'²⁸ dialogue and dialogue based on '*conflict*'.²⁹

There are two broad forms of interaction that might be considered to reflect consensual dialogue. First, it is said that such a dialogue can take place where the *national courts apply the judgments of the ECtHR*. Young suggests that 'dialogue between the two courts can be facilitated when national courts take account of decisions in the Strasbourg court, recognising the way in

²⁴ *ibid*

²⁵ David S. Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Wash L Rev 523, 526

²⁶ 'dialogue', *Oxford Dictionary of English* (3rd edn, OUP 2010)

²⁷ Ming-Sung Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?' (2013) 26(2) CJLJ 341, 361

²⁸ Jean-Paul Costa, 'Speech by Jean-Paul Costa, President of the European Court of Human Rights' (Visit to the Constitutional Court of the Russian Federation, 10-11 May 2007)

<http://www.echr.coe.int/Documents/Speech_20070511_Costa_Moscow_ENG.pdf> accessed 10 December 2016

²⁹ *ibid*

which the court has interpreted Convention rights in the past and predicting future refinements of the definition of Convention rights'.³⁰ Similarly, Costa observes such a dialogue where a national court 'coordinates its decisions with the Strasbourg caselaw, adhering to it and, above all, being guided by it'.³¹ Second, it has been suggested that a consensual dialogue takes place where *the ECtHR agrees with a judgment of national courts*; it 'not only endorses the decision of a constitutional court but uses the reasoning in its own decision'.³² Masterman construes dialogue in this way as the process of 'upward influence of national courts'.³³ Particular emphasis has thus been placed on the potential for consensual dialogue on those occasions where the UK courts develop the Convention principles in areas where there is no 'clear and constant'³⁴ jurisprudence from the ECtHR. In the view of the former Lord Chancellor and leading architect of the HRA, Lord Irvine, such areas in which the ECtHR has not reached a settled view offer the UK courts 'the greatest scope to enter into a productive dialogue with the ECHR, and thus shape its jurisprudence'.³⁵

Dialogue based on contestation, or 'conflictual',³⁶ dialogue, could also be said to encompass two broad forms of interaction. First, such a dialogue is thought to manifest where the *UK courts criticise or disagree with a decision of the ECtHR*.³⁷ This disagreement 'may be based on the different reading of the facts or the law by a national court that in effect reviews the merits of a judgment of an international court'.³⁸ Masterman defines this form of dialogue as 'critical engagement with the Strasbourg jurisprudence in domestic adjudication... lead[ing] to a reconsideration and refinement of the European Court's position'.³⁹ It is this form of interaction

³⁰ Alison L. Young, 'Whose Convention Rights are they anyway?' (UK Const L Blog, 12 Feb 2012) <<http://ukconstitutionallaw.org/2012/02/12/alison-l-young-whose-convention-rights-are-they-anyway/>> accessed 17 November 2015

³¹ Costa (n 28)

³² *ibid*

³³ Roger Masterman, 'Deconstructing the Mirror Principle' in Roger Masterman and Ian Leigh (eds.), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP 2013) 123

³⁴ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 [26] (Lord Slynn of Hadley)

³⁵ Lord Irvine of Lairg, 'A British Interpretation of Convention Rights' [2012] PL 237, 250

³⁶ Alec Stone Sweet, 'From the Point of View of National Judiciaries: The Role of National Courts in the Implementation of the Court's Judgments' in European Court of Human Rights, *Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?* (Dialogue between Judges, Council of Europe 2014) 22-26, 24

³⁷ Bjorge defines this dialogue as the 'cases where the domestic courts have had occasion to take a different view from the one expressed in the Strasbourg jurisprudence'. Eirik Bjorge, *Domestic Application of the ECHR: National Courts as Faithful Trustees* (OUP 2015) 223

³⁸ André Nollkaemper, 'Conversations Among Courts' in Cesare P.R. Romano, Karen J. Alter and Yuval Shany, *The Oxford Handbook of International Adjudication* (OUP 2014) 523, 535

³⁹ Roger Masterman, 'Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights' (The Constitution Unit, October 2015) 24 <<https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf>> accessed 19 January 2017

which is subject to the dialogue label most frequently.⁴⁰ Second, it has also been suggested that a conflictual dialogue arises in those instances where the *ECtHR disagrees with a decision of the national courts*. Sales observes that the role of the ECtHR in dialogue with the UK courts is in ‘correcting’⁴¹ domestic judgments that it considers to have reached a mistaken interpretation of the Convention rights. Thus, it is thought that the ECtHR engages in conflictual dialogue ‘if and to the extent that domestic courts have failed to apply (the substance of) ... [ECHR] law properly’.⁴²

It must be noted that these categories are not easily demarcated. The interactions between the courts over a particular issue can involve both consensus and conflict. A domestic judgment which criticises an ECtHR judgment, for example, might nonetheless apply it, thus reflecting conflict and consensus simultaneously. Further, whether a given interaction is to be considered consensual or conflictual is a matter for interpretation. Indeed, many of the UK cases where the UK courts either contested or considered contesting an ECtHR decision have stressed the cooperative nature of their endeavour: the criticisms are always expressed as ‘constructive’,⁴³ ‘valuable’⁴⁴ and ‘meaningful’.⁴⁵ Equally, those judgments which apply the Strasbourg principles, or further develop the protection which they accord to the Convention rights, have the potential to be considered a form of conflict. Kavanagh, for example, has warned that attempts by national courts ‘to give a more generous interpretation of Convention rights ... would weaken and dilute the authority of the Strasbourg court and undermine the duty of judicial comity which exists between the domestic and Strasbourg Courts’.⁴⁶ Likewise, Young warns that ‘To do so may be interpreted as an assertion of the domestic courts to challenge the role of the Strasbourg court to define rights’.⁴⁷ Nonetheless, while these are not watertight categories, they demonstrate the breadth of judgment-based interactions to which the term ‘dialogue’ has been applied.

⁴⁰ e.g. Lord Irvine (n 35) 247; Philip Sales, ‘Strasbourg jurisprudence and the Human Rights Act: a Response to Lord Irvine’ [2012] PL 253, 264 Richard Clayton, ‘Smoke and Mirrors: the Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639, 633; Merris Amos, ‘The Dialogue between United Kingdom Courts and the European Court of Human Rights’ (2012) 61(3) ICLQ 557, 566; Bjorge, (n 37) 223

⁴¹ Sales (n 40) 263

⁴² Nollkaemper (n 38) 542

⁴³ *Pinnock v Manchester City Council* [2011] 2 AC 104, [48] (Lord Neuberger MR)

⁴⁴ *R v Horncastle and others* [2010] 2 AC 373 [11] (Lord Phillips)

⁴⁵ *R (on the application of Chester) v Secretary of State for Justice* [2014] 1 AC 271 [34] (Lord Mance)

⁴⁶ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 157 cited in Alan Green, ‘Through the Looking Glass? Irish and UK approaches to Strasbourg Jurisprudence’ (2016) Irish Jurist 112, 116

⁴⁷ Young (n 30)

2.3 Reciprocity

The second descriptive issue arising from the way that the term ‘dialogue’ has been applied concerns the directness of the reciprocity required between the courts in order for the dialogue label to be considered appropriate. A difficulty noted by Bjorge is that ‘all cases’⁴⁸ that are subject to adjudication both in the domestic legal system of an ECHR Member State and then the ECtHR, affording both the opportunity to issue their opinion, ‘make up a dialogue’.⁴⁹ In this respect, accounts diverge as to whether dialogue can take place within or between what Bjorge calls a ‘factual complex’.⁵⁰ Dialogue *within* a factual complex occurs where a particular case ‘first comes before the domestic courts and then before the European Court’.⁵¹ Exemplifying the first view is the Court of Appeal judge, Lord Justice Sales. Dialogue, in his view, should allow domestic judicial conclusions on a particular case to be ‘test[ed] ... by argument in Strasbourg’.⁵² He observes that UK cases which, instead, are resolved in the claimant’s favour at the domestic level do not ‘readily give rise to a dialogue with the ECtHR’.⁵³

Dialogue *between* factual complexes, on the other hand, is said to occur where a judgment of a national court is subsequently considered by the ECtHR, however in the context of a different case and set of facts.⁵⁴ Commentators in this second camp have a more flexible view of the reciprocity involved in dialogue. Bjorge, among them, points out that dialogue between the courts takes place between factual complexes as well as within them.⁵⁵ The same view is also evident in Amos’ account of ‘deliberative dialogue’⁵⁶ between the UK courts and the ECtHR. On this view, dialogue involves the courts ‘taking decisions in common; reaching agreement; solving problems or conflicts collectively; determining together which opinion or thesis is true, the most justified or the best’.⁵⁷ Applying this understanding, Amos observes that dialogue ‘is not as widespread as might be thought’⁵⁸ because ‘in practice the majority of HRA claims are determined via the application of the clear and constant jurisprudence of the ECtHR’.⁵⁹ On this basis, ‘[i]t is not in every HRA judgment that every UK court seeks to enter into a dialogue with

⁴⁸ Bjorge (n 37) 223

⁴⁹ *ibid*

⁵⁰ *ibid* 149

⁵¹ *ibid*

⁵² Sales (n 40) 4263

⁵³ *ibid* 265

⁵⁴ *ibid*

⁵⁵ Bjorge (n) 149 citing *Horncastle* (n 44) and *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (Grand Chamber)

⁵⁶ Amos (n 40) 559 citing Luc Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures* (2005) 3(4) *IJCL* 617, 631

⁵⁷ *ibid* 631; Amos (n 40) 559

⁵⁸ *ibid* 566

⁵⁹ *ibid*

the ECtHR'.⁶⁰ For Amos, the key opportunities for deliberative dialogue have arisen where the domestic courts believe the ECtHR has taken the wrong approach,⁶¹ where they have a margin of appreciation in how to decide an issue,⁶² and where the relevant Strasbourg principles lack clarity.⁶³ In these scenarios, she suggests, the UK courts issue their judgments and either expressly or by implication 'seek eventual confirmation from the ECtHR',⁶⁴ leaving it 'open to the ECtHR to give its view on the position adopted either in proceedings brought by an unsuccessful claimant or in *unrelated proceedings*'.⁶⁵ Thus, Amos acknowledges that where the UK courts have adjudicated on a Convention right, the ECtHR might engage with the views of the UK courts not simply if the same case subsequently reaches the ECtHR but also in 'unrelated proceedings'.⁶⁶

A third and wider category which could be added here is dialogue *beyond* factual complexes. On this view, even the mere potential of a domestic judgment to influence the ECtHR in its determination of the European consensus on the minimum level of protection to be accorded to a particular Convention rights can be considered to reflect dialogue. It has thus been argued that domestic judgments which accord protection to the Convention rights, even where the ECtHR is yet to make a similar finding, also form part of a dialogue between the courts, irrespective of whether those judgments have discernibly influenced judgments of ECtHR. In this regard, Lord Irvine cites several such domestic judgments as evidence of dialogue.⁶⁷ Here, what appears to be important is the possibility that the ECtHR might make use of those judgments at some unspecified point in the future or in its determination of where the European consensus lies on particular issues.⁶⁸ It is dialogue beyond factual complexes to the extent that it is seen as immaterial whether the ECtHR has commented on the domestic judicial conclusion, either by considering the same case or in an unrelated case raising the same issue. Notably, however, this

⁶⁰ *ibid* 583

⁶¹ *ibid* 566-567

⁶² *ibid* 567-568

⁶³ *ibid* 568-571

⁶⁴ *ibid* 568

⁶⁵ *ibid* 568 (emphasis added)

⁶⁶ *ibid*

⁶⁷ *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396; *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1198; *In re P (Adoption: Unmarried Couple)* [2009] 1 AC 173 cited in Irvine (n) 251-252

⁶⁸ Wright, for example, argues that 'The process of fleshing out ECHR rights and commensurate obligations on states takes the form of a dialogue between the supervisory bodies and the contracting states in which "the Court must have regard to the changing conditions within ... Contracting States generally and respond ... to any evolving convergence as to the standards to be achieved"'. Jane Wright, 'Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights' [2009] PL 595, 602

is directly disputed as a category of dialogue by Sales on the basis that the ECtHR is not able to subsequently consider and comment on the accuracy of the conclusions.⁶⁹

2.4 Competing Normative Perspectives

The third issue concerning the form of dialogue through judgments arises from the discussions on the duty to ‘take into account’ judgments of the ECtHR under s.2 HRA. Here, there are various suggestions as to how dialogue between the courts *should* take place, in both normative and practical terms, based on particular understandings of the judicial role under the HRA. It is in this respect that the most significant differences of view on dialogue through judgments have emerged, with Fenwick noting a ‘polarisation of opinion’.⁷⁰

On one side of this polarisation are those adhering to what is labelled the ‘incorporationist’⁷¹ view, who argue that the HRA was designed as a ‘conduit’⁷² to give effect only to those rights which could be enforced before the ECtHR. Proponents of this view stress the explicit intention behind the Act to relieve potential ECtHR applicants from having to take the ‘long and hard’⁷³ road to Strasbourg and point to the HRA provisions which refer explicitly to the Convention.⁷⁴ Alternative views of the HRA, however, understand the legislation either as a tool for ‘blend[ing] Convention and common law protections’⁷⁵ or as having ‘created anew a distinctly domestic species of legal rights’.⁷⁶ They point out that the rights contained in the HRA are contained in a domestic statute,⁷⁷ and highlight the ‘purely domestic concepts’⁷⁸ within the HRA, such as the declaration of incompatibility and the ‘hybrid public authorities’⁷⁹ to which

⁶⁹ Sales (n 40) 265

⁷⁰ Helen Fenwick, ‘What’s Wrong with s.2 of the Human Rights Act?’ (UK Const L Blog, 9th October 2012) <<https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/>> accessed 10 October 2016

⁷¹ Masterman, ‘Deconstructing the Mirror Principle’ (n 33) 116

⁷² *ibid* 118. Masterman notes that such a view was exemplified in *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 [55] (Lord Rodger): ‘The House ... is called upon to assess how a claim by the appellant ... would fare before the European Court in Strasbourg’.

⁷³ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) 1.17

⁷⁴ In particular, adherents to this view point to the rights themselves, lifted verbatim from the ECHR (HRA 1998 Sch 1), the fact that a person is to have victim status for the purposes of a claim under the HRA only if they would also have a claim under the Convention, (HRA s.7(7)), the explicit directions to the courts to take into account the judgments of the ECtHR when adjudicating on Convention rights (HRA s.2(1)) and the principles applied by that court in awarding damages (HRA s.8(4)), and the fact that the Act equips ministers with the same power to introduce remedial legislation to address both domestic and ECtHR judgments which find violations of the Convention. Sales (n 40) 258-260

⁷⁵ Masterman, ‘Deconstructing the Mirror Principle’ (n 33) 116

⁷⁶ *ibid*

⁷⁷ Masterman (n) 121-122

⁷⁸ *ibid* 122

⁷⁹ *ibid* citing Human Rights Act 1998 s.6(3)(b)

HRA obligations apply. They also point to the flexibility contemplated by the s.2 duty.⁸⁰ These distinct understandings largely shape their adherents' conceptions of how dialogue between the courts should proceed. In particular, the accounts differ in their level of support for the two stipulations of the *Ullah*⁸¹ principle, encountered in the introductory chapter, that the UK courts should accord 'no more'⁸² and 'no less'⁸³ protection to the Convention rights than the ECtHR.

Some adopting an incorporationist view of the HRA defend the 'no more' dimension of the *Ullah* approach and suggest that for a 'fruitful dialogue'⁸⁴ to take place the UK courts should not outpace the protection that has so far been accorded to Convention rights by the existing ECtHR case law. The most prominent advocate of this view is Lord Justice Sales, who places great weight on the fact that any judgment-based dialogue between the UK courts and the ECtHR has to take place within 'the highly formal procedural limits of litigation in the domestic courts and before the ECtHR'⁸⁵ with 'no scope for a direct exchange of views ... before resolution of a particular case'.⁸⁶ For this reason, he suggests that a dialogue demands from the UK courts a 'relatively cautious approach ... where there is no clear lead given by the ECtHR'.⁸⁷ Echoing Lord Brown's thinking in *Al-Skeini*,⁸⁸ he points out that where the UK courts apply the Convention rights too generously, 'the ECtHR cannot readily correct the error'⁸⁹ and thus the situation does not 'readily give rise to a dialogue with the ECtHR'.⁹⁰

Other authors adhering to an incorporationist view, however, are equally strict that that the UK courts should do 'no less' than the ECtHR. Draghici, for example, criticises the conception of dialogue made apparent in the *Horncastle*⁹¹ line of cases, where the Supreme Court has repeatedly asserted its freedom to pursue dialogue with the ECtHR by refusing to apply judgments which have caused concerns, as 'peculiar'⁹² and 'not the way a dialogue between

⁸⁰ For Klug, for example, the fact that 'British courts can develop their own interpretation of the broad values in the HRA ... is an essential hallmark that distinguishes the HRA from an incorporated treaty typical of monist systems'. It 'places it in the realm of a bill of rights that takes its source from a regional human rights treaty but is interpreted by domestic judges'. Francesca Klug, 'A Bill of Rights: Do we need one or do we already have one?' [2007] PL 701, 707

⁸¹ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20] (Lord Bingham)

⁸² *ibid*

⁸³ *ibid*

⁸⁴ Sales (n 40) 264

⁸⁵ *ibid* 262

⁸⁶ *ibid* 263

⁸⁷ *ibid*

⁸⁸ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL) [106]

⁸⁹ Sales (n 40) 264

⁹⁰ *ibid* 265

⁹¹ *Horncastle* (n 44) [11] (Lord Phillips); *Pinnock* (n 43) [48] (Lord Neuberger); *Chester* (n 45) [27] (Lord Mance)

⁹² Carmen Draghici, 'The Human Rights Act in the Shadow of the European Convention: are Copyist's Errors Allowed?' (2014) 2 EHRLR 154, 165

courts should take place'.⁹³ In her view, dialogue should not be conducted through a domestic court 'frustrating the purpose of the creation of a binding supra-national court'.⁹⁴ Instead, '[t]he input of domestic courts and the constructive dialogue ... should take place at the stage of scrutiny, by the Strasbourg judges, of domestic jurisprudence clarifying the *opinio juris* of the member states on a particular aspect of a right'.⁹⁵

Those who understand the HRA as more than an incorporationist statute, however, argue that dialogue with the ECtHR requires that the UK courts should be willing to go further than the ECtHR. Exemplifying this view, Clayton has argued that '[w]hile, as a matter of judicial comity, it is necessary for the domestic courts to comply with Strasbourg jurisprudence as a minimum requirement, no principle requires the ECtHR to define the ceiling of Convention rights under the HRA'.⁹⁶ By recognising this, he suggests that the national courts can, 'in the absence of pre-existing jurisprudence, stimulat[e] a dialogue with the ECtHR'.⁹⁷ In the same vein, Masterman suggests that where the UK courts accord protection to a Convention right, notwithstanding the absence of a directly applicable ECtHR judgment, they provide 'one of the key indicators of emerging consensus (or otherwise) among Convention signatories'⁹⁸ and thereby facilitate 'the upward influence of national courts in this dialogue'.⁹⁹

At the same time, some commentators viewing the HRA as more than an incorporationist statute maintain that dialogue requires a willingness by the UK courts not only to go further than the ECtHR but to disagree with it in some circumstances. Among these is Lord Irvine, who argues that the UK courts hinder rather than create dialogue with the ECtHR when they treat its judgments as binding precedents: 'A court which subordinates itself to follow another's rulings cannot enter into a dialogue with its superior in any meaningful sense'.¹⁰⁰ Fenwick takes a similar view, arguing that where UK courts 'merely implement a Strasbourg judgment, as in the most obvious example – *AF No3*,¹⁰¹ such a dialogue is not promoted'¹⁰² because it 'tends to mean that the domestic judges remain outside any process of development of a European jurisprudence to which they contribute a fresh voice'.¹⁰³

⁹³ *ibid* 165

⁹⁴ *ibid*

⁹⁵ *ibid*

⁹⁶ Clayton (n 40) 657

⁹⁷ *ibid* 655

⁹⁸ Masterman, 'Deconstructing the Mirror Principle' (n 33) 123

⁹⁹ *ibid*

¹⁰⁰ Lord Irvine (n 35) 247

¹⁰¹ *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269

¹⁰² Fenwick (n 70)

¹⁰³ *ibid*

Thus, the varied normative positions at work within this context have created divergent understandings of the nature of dialogue between these courts and how it should take place, with authors variably defending or disputing the desirability of the UK courts doing ‘no more’ and ‘no less’ than the ECtHR in the protection which they accord to Convention rights.

3. The Functions of Judicial Dialogue

What the chapter has established thus far is the breath of judgment-based interactions between the UK courts and the ECtHR to which the term ‘dialogue’ has been applied in the academic literature, the differences of view as to the directness of the reciprocity required for this label to be considered appropriate, and the divergent normative positions as to how the dialogue should unfold. There are two further dimensions to the literature, however, which merit attention. First, as mentioned in the introductory chapter, a considerable range of functions have been attributed to the idea of judges engaging in dialogue through judgments. Second, there is, by comparison, a lack of information regarding the functions of informal judicial dialogue in this context. The following sections address these points. It will be argued later in the chapter that, combined with the issues explored so far, they justify a research methodology which focuses on the insights of the judges involved.

3.1 Dialogue through Judgments

Five functions commonly attributed to judicial dialogue are cross-influence, the enhancement of the quality of judicial reasoning, mutual accommodation, judicial empowerment and the strengthening of human rights protection. These insights provide a framework against which the judicial understandings of dialogue between the UK courts and the ECtHR can be compared in Chapters 4 and 5.

3.1.1 Cross-influence

First, judicial dialogue is thought to manifest in cross-influence between courts. Waters conceives it as ‘the engine by which domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms’.¹⁰⁴ In the same way, dialogue between the UK courts and the ECtHR is often understood as cross-influence in the development of Convention rights. Young suggests that ‘dialogue is not best understood in terms of a clash of sovereign rights’¹⁰⁵ but rather

¹⁰⁴ Waters (n 8) 490

¹⁰⁵ Young (n 30)

‘as a means of refining the definition of Convention rights’,¹⁰⁶ through the respective judgments of the national courts and the ECtHR. According to Lord Irvine, dialogue purports to ‘influence Strasbourg’s approach to decisions of our Supreme Court’,¹⁰⁷ and ‘influence the approach which the Strasbourg Court ultimately adopts’.¹⁰⁸

3.1.2 Enhancing the quality of judicial reasoning

Second, judicial dialogue is said to enhance the quality of judicial reasoning. Regular interaction between judges is thought to ‘produce a better solution than can be arrived at by any one individual’,¹⁰⁹ ‘enrich[ing] the debate with participants adding arguments not thought of by others’.¹¹⁰ In the present context, Sales suggests that the ECtHR can correct erroneous thinking by the UK courts in their determination of the content of Convention rights.¹¹¹ Equally, he notes that UK courts can, through their interactions with the Strasbourg case law, correct judgments of the ECtHR where the latter has misunderstood domestic law, and also provide ‘detailed reasoning’,¹¹² to assist the Court in the development of its principles at the supranational level.¹¹³

3.1.3 Mutual accommodation

Third, judicial dialogue is linked to the mutual accommodation of overlapping sites of judicial authority in instances of conflict. Kuo explains that ‘Through their decisions, the different judicial and quasi-judicial bodies involved in this interplay are expected to signal to their counterparts on what conditions and to what extent judicial self-restraint will be exercised in order to avoid sitting in judgment on other constitutional orders’.¹¹⁴ On this view, each side seeks to ‘locate a point of convergence between constitutional orders through its own judicial rulings’.¹¹⁵ Here, ‘a successful dialogue begins with contestation and then proceeds in a spirit of cooperation, leading to the resolution of potential conflicts between distinct orders’.¹¹⁶ In the same vein, Feldman suggests that where a UK court ‘consciously limits the application of Strasbourg case law ... to protect domestic legal and constitutional arrangements’,¹¹⁷ this ‘can

¹⁰⁶ *ibid*

¹⁰⁷ Lord Irvine (n 35) 247

¹⁰⁸ *ibid*

¹⁰⁹ Slaughter, ‘Typology of Transjudicial Communication’ (n 15) 132

¹¹⁰ Pérez (n 18) 113

¹¹¹ Sales (n 40) 263

¹¹² *ibid* 265

¹¹³ *ibid* 265

¹¹⁴ Kuo (n 27) 367

¹¹⁵ *ibid*

¹¹⁶ *ibid* 364

¹¹⁷ David Feldman, ‘Human Rights’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds) *The Judicial House of Lords: 1876-2009* (OUP 2009) 541, 554

produce some uncertainty, but it also allows dialogue with the Strasbourg court which can lead to a realignment of the jurisprudence in each jurisdiction to re-establish consistency'.¹¹⁸

3.1.4 Judicial empowerment

Fourth, commentators point to the potential of dialogue to empower the judges involved. Amos argues that dialogue between the courts has the potential for 'a dramatic increase in the power of the judiciary',¹¹⁹ noting that 'UK judges have been enabled by their relationship with the ECtHR to take many decisions that they might not have been prepared to take without it'.¹²⁰ Related to this is the view that dialogue can cultivate a transformation in judicial identity.¹²¹ It is argued that increasing interaction between judges from different systems might encourage a shift from 'a narrow, "nationalist" conception of the judicial role characterized by judicial deference to both domestic public opinion and to executive branch prerogatives in foreign relations',¹²² towards 'a more expansive, "internationalist" conception of the judicial role ... as mediators between international and domestic legal norms, and as protectors of individual rights under international law'.¹²³ Going further, Slaughter has famously argued that through regular interaction, through judgments and face-to-face, judges would come to conceive themselves as part of a 'global community of courts'.¹²⁴ Here, 'the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under the rule of law than by the differences in the law they apply',¹²⁵ characterised by a 'self-awareness',¹²⁶ as 'participants in a common judicial enterprise'.¹²⁷ While the judges do not shed their identities as national or international judges, they become 'increasingly part of a larger transnational system'.¹²⁸

3.1.5 Enhancing the protection of human rights

A further function attributed to judicial dialogue is the enhancement of human rights protections. Mazzone notes that judicial dialogue is 'routinely celebrated for its rights-enhancing

¹¹⁸ *ibid* 555

¹¹⁹ Amos (n 40) 579

¹²⁰ *ibid* 580

¹²¹ Slaughter, 'A Typology of Transjudicial Communication' (n 15) 194-4; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harv Int'l LJ* 191, 194

¹²² Waters (n 8) 523

¹²³ *ibid*

¹²⁴ Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 68

¹²⁵ Slaughter, 'A Global Community of Courts' (n 121) 192

¹²⁶ *ibid*

¹²⁷ *ibid* 193

¹²⁸ *ibid* 194

effects'.¹²⁹ At the forefront of this view is Slaughter, who argues that 'regular and interactive transjudicial communication'¹³⁰ can lead to the 'spread and enhanced protection of human rights'.¹³¹ On this view, the common sense of judicial identity as members of a community of courts charged with upholding individual rights forged by regular judicial interaction leads to a greater judicial willingness to uphold the separation of powers and check abuses of executive power, as 'courts bolstered by communication with other national and supranational courts will be bolstered in their efforts to make their own voices heard'.¹³² Commentators here frequently point to the *Solange*¹³³ exchanges between the German Constitutional Court and the European Court of Justice (ECJ) – described as the 'paradigmatic example'¹³⁴ of judicial dialogue – which are credited with catalysing the latter's development of its fundamental rights jurisprudence.¹³⁵ The constitutional court insisted that it would continue to exercise its constitutional power to review the compatibility of European Community legislation with the fundamental rights contained in the German Constitution 'so long as' equivalent protection of those rights was not available at Community level. The ECJ responded over a series of decisions by 'blending a mixture of national and international human rights guarantees'.¹³⁶ This was to the eventual satisfaction of the German constitutional court. Tzanakopoulos explains that in its *Solange II*¹³⁷ decision, the court held that it would 'refrain from reviewing Community acts for conformity with the German Constitution'¹³⁸ so long as equivalent protection continued to be offered at the Community level.¹³⁹

3.2 Informal Judicial Dialogue

In contrast to dialogue through judgments, the role of informal meetings between ECtHR and national judges has received less attention. At first glance these interactions perhaps raise suspicion, appearing 'at once both glamorous and vaguely conspiratorial',¹⁴⁰ conjuring 'an image of judges trotting the globe to chart the course of constitutional law behind closed doors before

¹²⁹ Jason Mazzone, 'The Rise and Fall of Human Rights: a Sceptical Account of Multilevel Governance' (2014) 3 CJICL 929, 959

¹³⁰ Slaughter, 'A Typology of Transjudicial Communication' (n) 132

¹³¹ *ibid* 134

¹³² *ibid* 135

¹³³ *Solange I* 37 BVerfGE 271 [1974] 2 CMLR 540

¹³⁴ Kuo (n 27) 362

¹³⁵ Tzanakopoulos (n 15) 192

¹³⁶ Slaughter, 'A Typology of Transjudicial Communication' (n 15) 109

¹³⁷ *Solange II* 73 BVerfGE 399 [1987] 3 CMLR 225

¹³⁸ Tzanakopoulos (n 15) 192

¹³⁹ *ibid*

¹⁴⁰ Law and Chang (n 25) 535

returning home to impose this master scheme on their unwitting compatriots'.¹⁴¹ McCrudden, however, advises caution when approaching this aspect of inter-judicial relationships. In his view, informal dialogues between judges from different jurisdictions '[n]o doubt ... result in some influences (such as a country's culture of rights) being inculcated. But such influences, whilst important, are difficult to pin down and prone to over- (or under-) estimation'.¹⁴² Slaughter suggests that such meetings perform several of the same functions as dialogue through judgments. They lead to cross-influence ('educate and ... cross-fertilize'),¹⁴³ enhance judicial reasoning ('broaden the perspectives of the participating judges')¹⁴⁴ and can assist in the transformation of judicial identity ('socialize their members as participants in a common global judicial enterprise').¹⁴⁵ Further, she argues that they provide an important buffer to the interactions through judgments as 'regular relations and knowledge of one another provides assurance that conflict will not escalate and rupture the underlying relationship'.¹⁴⁶

There are few insights available into the role of informal judicial dialogue within the ECHR system, however, and even less analysis of their role between the UK courts and the ECtHR. Paterson's research on the Supreme Court observes that during meetings between members of these courts 'discussions ensue of actual cases and points of debate'.¹⁴⁷ Interestingly, Mak observes different levels of enthusiasm on the part of the Justices for face-to-face engagements with their counterparts from other jurisdictions.¹⁴⁸ Some reportedly described themselves as 'insular',¹⁴⁹ and claim to finding such exchanges 'boring',¹⁵⁰ while viewing some of their colleagues as 'extreme networkers',¹⁵¹ and more 'outward looking'.¹⁵² Echoing Slaughter, some of the judges interviewed for Mak's research reportedly valued the meetings for their potential to 'open one's view'.¹⁵³ Further, Mak observes that a principal motivation of the Supreme Court Justices is 'connected to specific interests, in particular concerning their role in the development of the common law and concerning the application and development of EU law

¹⁴¹ *ibid*

¹⁴² McCrudden (n 4) 511

¹⁴³ Slaughter, *A New World Order* (n 124) 99

¹⁴⁴ *ibid* 99

¹⁴⁵ *ibid* 99

¹⁴⁶ *ibid* 102

¹⁴⁷ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 224

¹⁴⁸ Elaine Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013) 85

¹⁴⁹ *ibid*

¹⁵⁰ *ibid* 84

¹⁵¹ *ibid* 85

¹⁵² *ibid*

¹⁵³ *ibid*

and the ECHR'.¹⁵⁴ Beyond these insights, however, there has been little research to date on the role of these meetings.

4. Research Design

4.1 The Case for a Different Methodological Approach

The discussion in Parts 2 and 3 established a number of points from the academic literature addressing judicial dialogue between the UK courts and the ECtHR. First, the term 'dialogue' has been applied to a wide range of judgment-based interactions. Second, there are differences of view as to the directness of the reciprocal interaction required for the dialogue label to be appropriate, varying from interactions between the courts over the same case and set of facts to the more general process by which the interpretation of Convention rights evolves over time. Third, there are divergent normative positions as to how judgment-based dialogue between the courts should take place. Fourth, a wide range of functions have been ascribed to the idea of dialogue through judgments and, fifth, there is little information or research concerning the functions of informal dialogue between the UK courts and the ECtHR.

These points created certain difficulties. Taking the broad spectrum of judicial interactions to which the term dialogue has been applied, it might be argued that the judgment-based dialogue between the UK courts and the ECtHR is, to misappropriate John Griffith's famous description of the UK constitution, 'no more and no less than what happens'.¹⁵⁵ Since the passing of the HRA, it could be said, everything that happens between the courts is dialogue, and if nothing happens that would be dialogue also.¹⁵⁶ Combined with the differences of view as to the reciprocity required for the 'dialogue' label to be appropriate, and the divergent normative views on how dialogue should take place, what manifests is the puzzle of judicial dialogue, encountered in Chapter 1. The content of the concept becomes opaque; its apparent malleability serving to 'mystify the meaning'.¹⁵⁷

A further difficulty is that the existing research had yet to explore in-depth the *judicial* understanding of the nature of dialogue between the courts or why reliance upon this concept and the practices underpinning it has become central to their relationship. Academic accounts have either sought to explain how a dialogue *can* take place or have made arguments as to how it *should* place. It can be argued that less consideration has been given to why the judges feel that it should take place. The various functions ascribed to the idea of judges engaging in dialogue

¹⁵⁴ *ibid*

¹⁵⁵ J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19

¹⁵⁶ *ibid*

¹⁵⁷ Pérez (n 18)106

through their judgments illuminate some of its potentially far-reaching possibilities. However, what remains to be explored is which of those possibilities the judges of the UK courts and the ECtHR seek to actualise.

It is submitted that these issues justify a different methodological approach to the study of dialogue between the UK courts and the ECtHR, based on the direct insights of the judges themselves. This is not the first piece of research to adopt this view. Two notable studies, mentioned already in this chapter, which have explored the judicial perspectives on the subject of dialogue between the UK courts and the ECtHR are Mak's *Judicial Decision-making in a Globalised World*¹⁵⁸ and Paterson's *Final Judgment*.¹⁵⁹ Mak's study explored the judicial practices in the use of comparative legal materials in the senior courts of the United Kingdom, Canada, the United States, France and the Netherlands.¹⁶⁰ It is based on interviews conducted with thirty-three judges, among them seven UK Supreme Court Justices and a retired Law Lord, which were conducted in November 2009.¹⁶¹ In *Final Judgment*, drawing from interviews conducted with twenty-seven former Law Lords and Justices, Paterson examines the decision-making of the UK Supreme Court through the lens of the various dialogues which take place between the Justices themselves, with legal counsel, judicial assistants, UK domestic courts, academics, Parliament, the government and, most importantly for present purposes, the ECtHR.

As seen in the introductory chapter, both of these studies underlined that the Justices of the Supreme Court conceive of their relationship with the ECtHR as among the most interactive and influential of any which they share with a court outside of the UK, and the Justices seek to write their judgments in a manner which is persuasive to the ECtHR.¹⁶² Further, these works provide a number of useful insights which are drawn upon throughout this thesis. Nonetheless, they have limitations for the present enquiry. Crucially, the concept of judicial dialogue between the UK courts and the ECtHR was not the focus of the interviews conducted for either study. As outlined above, Mak explores the use of foreign law by a number of senior courts across five jurisdictions. Further, the interviews for Mak's study were conducted prior to the UK Supreme Court's landmark decision in *Horncastle*, a point reflected in Mak's observations. She observes that only one of the Justices interviewed at the time felt that it was permissible for the Supreme

¹⁵⁸ Mak (n 148)

¹⁵⁹ Paterson, *Final Judgment* (n 147) 222-233. See also: H. Tyrrell, *UK Human Rights Law and the Influence of Foreign Jurisprudence* (Hart 2017) (forthcoming). Tyrrell's work draws upon interviews conducted with ten UKSC Justices to examine the use of foreign jurisprudence in the human rights adjudication of the UK Supreme Court.

¹⁶⁰ Mak (n 148) 7

¹⁶¹ *ibid* 7

¹⁶² *ibid* 81-82; Paterson, *Final Judgment* (n 147) 232

Court to depart from relevant case-law of the ECtHR.¹⁶³ It would be reasonable to suggest that these views have since changed following the *Horncastle* judgment, which is said to provide ‘the most compelling authority to date for the suggestion that domestic courts will not simply apply even relevant and clear Strasbourg case law as a matter of course’.¹⁶⁴ While Paterson’s study, on the other hand, did explore the subject of dialogue with the ECtHR in his interviews with the Justices, this constituted a small feature of the work.¹⁶⁵ What is more, the interview extracts formed a supplementary feature of his analysis of the relationship between the courts. In total, his work contains only a small collection of direct interview insights from the judges on their views of their relationship with the ECtHR. There was thus much room for further exploration of how the judges view their dialogue with the ECtHR.

4.2 A Qualitative Methodology

This thesis adopted an *interpretivist* approach to its subject matter. Interpretivism derives from Weber’s notion of *verstehen*: ‘the method of understanding people’s meaning’.¹⁶⁶ Interpretivist approaches seek to understand social phenomena ‘from the perspectives of those involved’:¹⁶⁷ ‘...knowledge takes the form of explanations of how others interpret and make sense of their day-to-day life and interactions’.¹⁶⁸ An in-depth exploration of the *judicial* perspective arguably holds the potential to enhance understanding of *judicial* dialogue between particular courts. It not only offers a methodologically unique way of approaching this topic but a useful means of determining how judicial dialogue might be used by the judges as a means of conferring legitimacy on their judgments.

In line with this interpretivist approach, the research was guided by a *qualitative methodology*, focusing on ‘words rather than quantification in the collection and analysis of data’.¹⁶⁹ It followed a flexible, inductive method in seeking to develop an understanding of judicial dialogue between the UK courts and the ECtHR. This process is summarised by Webley:

[Q]ualitative research unfolds – it develops as the researcher learns more; in other words the experiment is not usually set up and then allowed to run along a

¹⁶³ Mak (n 148) 432

¹⁶⁴ Masterman, ‘Deconstructing the Mirror Principle’ (n 33) 114

¹⁶⁵ Paterson, *Final Judgment* (n 147) 222-233

¹⁶⁶ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 931

¹⁶⁷ Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury 2013) 16

¹⁶⁸ *ibid*

¹⁶⁹ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 35

predetermined course. Instead, the research may be redesigned to meet changing conditions, perceptions and findings.¹⁷⁰

In line with this approach, the research for this thesis consisted of a qualitative interview-based study conducted with eight Justices of the UKSC and four judges of the ECtHR, along with ongoing desk-based and library research of UK and ECtHR case law, extra-judicial commentary and academic literature. The flexible, inductive approach was crucial given that the research sought to explore judicial understandings of dialogue rather than test a pre-determined hypothesis on this subject. The remit of the research, originally focused only on dialogue through judgments, was expanded during the process to encompass exploration of informal judicial dialogue. It had become apparent during the interviews with the Justices that this form of dialogue was a significant dimension of their relationship with the ECtHR. Thus, the interviews conducted with the ECtHR judges, along with further desk-based and library research, sought to gain more detailed insights into this aspect of the relationship between the courts.

5. In-depth Interviews

5.1 The Advantages of In-depth Interviewing

The thesis relies on data produced from the use of qualitative, in-depth interviews conducted with eight Justices of the UK Supreme Court and four judges of the ECtHR, respectively carried out in July 2014 and May 2015 at the judges' offices in London and Strasbourg. This method consists of one-to-one, open-ended questioning of participants. It allows the researcher to obtain 'rich and detailed information',¹⁷¹ from participants rather than 'yes-or-no, agree-or-disagree responses'.¹⁷² It seeks to draw out 'examples, experiences ... narratives and stories'.¹⁷³

There are a number of advantages to this approach. In-depth interviews are 'extremely effective at garnering data on individuals' perceptions or views'.¹⁷⁴ They allow for exploration of the '...understandings, experiences and imaginings of research participants',¹⁷⁵ and can enable access to detailed descriptions on 'how social processes, institutions, discourses or relationships work',¹⁷⁶ and the 'significance of the meanings that they generate'.¹⁷⁷ Mak argues in her

¹⁷⁰ Webley (n 166) 932

¹⁷¹ Herbert J Rubin and Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data* (3rd edn, Sage 2012) 29

¹⁷² *ibid*

¹⁷³ *ibid*

¹⁷⁴ Webley (n 166) 937

¹⁷⁵ Edwards and Hollands (n 167) 90 citing Jennifer Mason, *Qualitative Researching* (2nd edn, Sage 2002) 1

¹⁷⁶ *ibid* 91, citing Mason, *ibid*

¹⁷⁷ *ibid*

interview-based study with various judges of senior national courts that this style of interviewing has the advantage of allowing ‘participants to express themselves with more nuance’¹⁷⁸ than is possible under the structured format of quantitative interviewing.

The use of in-depth interviewing was particularly valuable for the present study. Paterson’s early research with the Law Lords notes that ‘Judicial self-concepts and motivations can be derived from semi-structured interviews with judges’.¹⁷⁹ For the present study, they enabled detailed insights into how the judges understand the judicial dialogue between their courts and the practices which they associated with the term, the key examples of such practices, the judicial motivations behind them and their potential disadvantages. Speaking to the judges themselves also had the advantage that it facilitated access to the views of judges that have not written or spoken extra-judicially on the subject of the dialogue between the UK courts and the ECtHR. It also enabled access to information regarding the role of the informal meetings between these judges, for which there is little information available as no minutes are taken. Further, as stated in the introductory chapter, this research sought a better understanding of why the judges have come to place such explicit emphasis on dialogue as a foundation of their relationship. The use of qualitative interviews, by definition ‘retrospective accounts that often explain and justify behaviour’¹⁸⁰ offered a useful means of achieving this.

5.2 The Limitations of Interviewing

The use of qualitative interviewing, however, has its limitations. Certain issues arise in connection with interviewing judges in particular. Flanagan and Ahern suggest that it might be thought ‘pointless’¹⁸¹ to ask judges to express their views on an issue which they have addressed in published judgments. Because their legal reasoning will have already been provided in those judgments, the judges will be either unable or unwilling to provide further insights and thus would be unlikely to reveal them to a researcher. Additionally, Flanagan and Ahern note the concerns which have been expressed over ‘judicial self-reporting’.¹⁸²

People often do not know, or cannot articulate, why they act as they do. In other situations, they refuse to tell, and in still others, they are strategic both in acting and

¹⁷⁸ Mak (n 148) 421

¹⁷⁹ Paterson, *The Law Lords* (n 1) 211

¹⁸⁰ Kathy Charmaz and Antony Bryant, ‘Grounded Theory and Credibility’ in David Silverman (ed), *Qualitative Research* (3rd edn, SAGE 2011) 291-309, 299

¹⁸¹ Brian Flanagan and Sinéad Ahern, ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’ (2011) 60(1) ICLQ 1, 8

¹⁸² *ibid* 7

in answering the scholar's question. This is obvious from the example of asking justices about how they reach decisions . . . ¹⁸³

Taken together, these criticisms encompass three problems. First, the notion that people do not know or cannot articulate why they act as they do connects to the broader methodological argument noted by Silverman that '...[q]ualitative interviews make the problematic assumption that what the interviewees say can be treated as a report on events, actions, social processes and structures, and cognitions'. ¹⁸⁴ Next, the criticisms point to the problem, identified by Paterson, of 'partial disclosure or limited candour due to a lack of trust on the part of the interviewee'. ¹⁸⁵ Finally, the concern with judicial self-reporting also contemplates the potential for social desirability bias: 'saying what the audience wants to hear or the speaker wants them to hear'. ¹⁸⁶ It is useful to consider each of these issues in turn.

The suggestion that judges will be unwilling or unable to provide insights on subjects addressed in their judgments is contentious for a number of reasons. First, it is now commonplace for judges to offer reflections in extra-judicial lectures or academic writings on aspects of the law or their work which would not necessarily feature in their judgments. Thus, if the notion that a judicial decision contains the full extent of a judge's legal thinking or candidness on a particular subject might have been true in the past, it is arguably no longer accurate. Further, 'judicial dialogue' between the UK courts and the ECtHR is said to take place through face-to-face meetings as well as through judgments. It is generally accepted that such meetings have some potential, albeit one which is empirically difficult to ascertain, to influence judicial decisions. ¹⁸⁷ Paterson's work on decision-making at the Supreme Court makes clear that the deliberations between the judges often has a considerable influence over the eventual conclusions reached, often swaying judges from one view to another and determining the outcome of a case. ¹⁸⁸ Nonetheless, the resulting judgments will often not be explicit about those influences. Meetings between UK and ECtHR judges, of course, are of an entirely different nature to the deliberations which precede a decision by the Supreme Court. The point remains, however, that it is unlikely that any influence resulting from those meetings will be explicitly

¹⁸³ *ibid* citing Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 U Chi L Rev 1, 65-66

¹⁸⁴ David Silverman, *Interpreting Qualitative Data* (5th edn, Sage 2014) 199 citing Jonathan Potter and Alexa Hepburn, 'Qualitative Interviews in Psychology: Problems and Possibilities' (2005) 2(4) *Qualitative Research in Psychology* 291-301

¹⁸⁵ Paterson, *Final Judgment* (n 147) 7

¹⁸⁶ *ibid* 8

¹⁸⁷ McCrudden (n 4) 511

¹⁸⁸ Paterson, *Final Judgment* (n 147) 176-207

attributed in the context of the judgments. The use of in-depth interviews thus enabled more insights on these issues to be obtained.

With regard to the view that people do not know and cannot explain what they do, Flanagan and Ahern offer a compelling retort. They note that ‘...there is a distinction in the kinds of questions that may be asked about judicial decision-making’.¹⁸⁹ There are those which address the ‘cognitive processes’¹⁹⁰ underpinning judicial decisions, to which King and Epstein’s critique is directed, and those which seek to gauge ‘what [the judge] thinks is important, how [they] feels toward X, or what would justify something’.¹⁹¹ They argue that obtaining direct answers to the latter ‘advance efforts to explain judicial behaviour merely if judges are more likely to think in accordance with their views and dispositions than not’.¹⁹² The interviews for this study can be justified in the same way. They did not seek to grapple with the cognitive processes of decision-making within the UK or Strasbourg courts but rather their understanding of the dialogue between their courts and their motivations in that dialogue. What is more, each of the participating judges was asked to provide case law examples and much of what they described in their responses could be cross-referenced with the case law. Thus, as both Mak and Paterson found with their research, much of what the judges described could be supported with verifiable, practical examples, thus guarding against the assumption, that Silverman warns of, that qualitative interview data can be treated as a reliable report on events and processes.¹⁹³

As to the issue of partial disclosure, there were few indications during the interviews that the judges were not being transparent in their responses. It must be acknowledged that judges have a duty of independence and that this duty will in some way shape how they respond to questions about their views, particularly on such a topical issue as their relationship with the ECtHR. Occasionally, the discussions turned to points which were deemed by some participating judges to be too politically sensitive either for comment or for citation in this thesis, the main examples being the potential repeal of the HRA 1998, potential modifications to the s.2 HRA duty for UK courts to ‘take into account’ ECtHR judgments, and the optional Protocol 16 ECHR¹⁹⁴ for the provision of advisory opinions on ECHR interpretation, which is yet to be

¹⁸⁹ Flanagan and Ahern (n 181) 7

¹⁹⁰ *ibid*

¹⁹¹ *ibid* 8

¹⁹² *ibid* 8

¹⁹³ Mak notes in her research that ‘sufficiently reliable information could be obtained also through the linking of information from the interviews with case law and other sources which provide information concerning judicial approaches, such as public lectures’. In the same way, Paterson’s research was underpinned by ‘a policy of seeking corroboration for every factual statement of any significance’. Mak (n 148) 7; Paterson, *Final Judgment* (n 147) 7

¹⁹⁴ Protocol 16 to the European Convention on Human Rights and Fundamental Freedoms
<www.echr.coe.int/Documents/Protocol_16_ENG.pdf> accessed 19 January 2017

ratified by the UK government. Generally, however, as Paterson found with his interviews with the Law Lords and Justices, assurances that no section of the interview would be published without the approval of the participants helped to create an open discussion.¹⁹⁵ In terms of the possibility of strategic responses, there was no evidence of group strategy. There was no indication of conferral among Justices or Strasbourg judges as to how they would respond to the questions. One Justice made this particularly clear during an interview:

The views I'm expressing are entirely personal to me. We haven't had discussions among ourselves about how we should respond to your questions. These are my personal views; they don't claim to be representative of anybody else's.¹⁹⁶

With regard to the possibility of social desirability bias, there was again nothing during the interviews to suggest that the judges were not being open in their responses. Indeed, several of the judges did not hesitate to voice their criticisms of the use of the concept of 'dialogue' in this context. In this respect, it must also be borne in mind, as others have noted, that the interviews with the Supreme Court Justices took place in the context of what is widely recognised as the dramatic effort to increase the transparency of the workings of the UK's most senior court and its judges¹⁹⁷ since the Supreme Court came into operation in 2009.¹⁹⁸ Paterson notes that 'The Supreme Court is far more accessible than the House ever was'.¹⁹⁹ What is more, it is worth noting again that it has become increasingly common for senior judges to deliver public lectures, often on contentious issues. It might be argued that these developments point to a growing openness and candour in the voicing of extra-judicial opinions which reduces the possibility of strategic responses in an interview setting. Nonetheless, the possibility of social desirability bias remains. As seen in the Chapter 1, research on judicial decision-making by authors such as Baum in the United States and Paterson in the UK underline the fact that judges often write with particular audiences in mind, including academic audiences.²⁰⁰ Thus, it is possible that the judges who participated in this study gave their responses with a particular academic or judicial audience in mind. This is an important caveat to the findings.

¹⁹⁵ Paterson, *Final Judgment* (n 147) 6

¹⁹⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹⁷ The Supreme Court, 'Biographies of the Justices' <<https://www.supremecourt.uk/about/biographies-of-the-justices.html>> accessed 20 January 2016

¹⁹⁸ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (OUP 2011); Paterson, *Final Judgment* (n 147) 3

¹⁹⁹ *ibid*

²⁰⁰ Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006) 100; Paterson, *Final Judgment* (n 147) 220: 'Most of them also, when asked whom they wrote their judgments for, would mention academics along with other audiences'.

6. Sampling

6.1 Sampling Method

The interview participants were selected using purposive, or non-probability, sampling. This is the selection of participants on the basis that they are ‘relevant to the research questions being posed’.²⁰¹ A purposive sample consists of ‘groups, settings and individuals where ... the processes being studied are most likely to occur’.²⁰² The participants for this study consisted of a total of twelve judges drawn from two purposive samples. The first consisted of eight Justices of the UK Supreme Court and the second consisted of four judges of the ECtHR. In accordance with the guidelines of the UK Judicial Office (JO), an application for the participation of the Justices in the research project was sent to the JO by email on 26th February 2014. Correspondence with Judicial Assistants to the Justices of the UKSC concerning their willingness to participate then commenced on 11th March 2014. In total, eight Justices agreed to take part in interviews. One Justice was unable to commit to the interview but felt that their views on the subject were provided in an extra-judicial lecture on the subject, which was provided by email. Interestingly, another Justice felt unable to participate because the study explored issues which the court might be required to rule on in the near future. The remaining two Justices did not respond to the request.

The second sample consisted of four judges of the ECtHR. The specific participants were determined on the basis of convenience. A convenience sample is one simply ‘available by means of accessibility’.²⁰³ Burton observes that access to judges can be extremely difficult, often requiring ‘a large element of luck’.²⁰⁴ In total, five judges at the ECtHR were contacted with participation requests for this study. Four of these judges were based on a convenience sample of contacts of one of the project supervisors. All four of these judges initially agreed to participate but unfortunately one judge later had to withdraw due to a last-minute schedule conflict. Using the ‘snowball method’²⁰⁵ an interview with an additional judge with experience of UK cases was arranged after one judge kindly agreed to pass details of the study on.

²⁰¹ Bryman (n 169) 418

²⁰² Norman K Denzin and Yvonna S Lincoln, ‘Strategies of Inquiry’ in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (4th edn, SAGE 2011) 245

²⁰³ Edwards and Holland (n 167) 6

²⁰⁴ Mandy Burton, ‘Doing Empirical Research: Exploring the Decision-making of Magistrates and Juries’ in Watkins and Burton (n 2) 55, 60

²⁰⁵ This is defined as ‘...a process in which contact is made with participants appropriate for your research through whatever access route you can find, and through these first participants you are introduced to others of similar/relevant characteristics for your research’. Edwards and Holland (n 167) 6

6.2 The Participants: UK Supreme Court Justices

A potential disadvantage to the use of non-probability sampling methods is that ‘...it can be difficult for the reader to judge the trustworthiness of sampling if full details are not provided’.²⁰⁶ Thus, it is useful to set out why the Justices and the ECtHR judges were deemed the most relevant to answering the research question. The pertinence of the Justices of the UK Supreme Court to a study of judicial dialogue between the UK courts and the ECtHR is obvious. However, there are two particular reasons why the insights of the Justices are particularly crucial. The first is that it is the UK Supreme Court which is the final domestic judicial arbiter of fundamental rights in the UK, whether contained under the HRA or common law. It is thus the Supreme Court which issues the most authoritative domestic judgments in any dialogue with the ECtHR and determines whether, and to what extent, judgments of the ECtHR are to be followed. In this respect, it is worth recalling that the House of Lords held in *Kay*²⁰⁷ that the lower courts remain bound by domestic decisions on questions of ECHR interpretation, notwithstanding any recent judgments of the Strasbourg court which appear to be inconsistent with those earlier rulings.²⁰⁸ It is thus for the UK’s most senior court alone to determine whether previous positions should be departed from in light of the new Strasbourg decisions. In this respect, it is the Supreme Court which has the greatest flexibility in any dialogue with the ECtHR. Second, it will be clear from the outline of the relevant domestic case law in the first chapter that virtually all of the explicit judicial invocations of the term ‘dialogue’ have come from acting or retired Justices of the Supreme Court and former Law Lords. This group of judges is therefore uniquely placed to comment on its inclusion and significance within the case law.

A difficulty with a sample of this kind, however, as noted by Mak, is that the participating judges may have agreed to take part because of a favourable attitude towards the topic of research.²⁰⁹ This relates to the broader issue that non-probability sampling will not produce data which is strictly representative of the views of the group or section of the population of interest. An important limitation to stress, therefore, is that the views of the participating Justices which are analysed in Chapters 3-6 of this thesis are not representative of the whole Supreme Court, nor of the UK judiciary – a point which Lord Justice Moses has emphasised given the rise of extra-judicial lectures by senior UK judges: ‘Each of us has an

²⁰⁶ Satu Elo, Maria Kääriäinen, Outi Kanste, Tarja Pölkki, Kati Utriainen and Helvi Kyngäs, ‘Qualitative Content Analysis: A Focus on Trustworthiness’ (2014) 4(1) Sage Open 1, 4

²⁰⁷ *Kay v Lambeth London Borough Council* [2006] 2 AC 465

²⁰⁸ *ibid* [40]-[45] (Lord Bingham)

²⁰⁹ Mak (n 157) 63

independent view, the others do not speak for us'.²¹⁰ With eight of the twelve Justices having participated, however, they provide a wealth of valuable insights into how judicial dialogue with the ECtHR is perceived at the most senior level of the UK judiciary. Further, while the sample is not representative, this should not diminish entirely the pervasiveness of some of the views expressed during the interviews. Paterson's research with the Law Lords and Justices draws attention to the fact that individual judges on the UK's most senior court can wield considerable influence over its direction and decisions.²¹¹ It could therefore be argued that the views of eight of its judges on the subject of dialogue with the ECtHR are likely to have proven influential in recent years.

6.3 The Participants: ECtHR Judges

Once again, the relevance of the views of ECtHR judges to a study of judicial dialogue between the ECtHR and the UK courts is self-evident. In the interests of transparency, however, it is worth pointing out a number of issues with this particular sample. First, the non-representativeness of the data gathered must be borne in mind. A sample determined by convenience alone is not representative of ECtHR and the findings are thus not generalizable.²¹² What is more, it should be noted that the sample represents only 9% of the total number of sitting judges at the ECtHR in May 2015. A further caveat relates to the division of labour at the ECtHR. The Strasbourg Court is divided into five administrative 'Sections' to which its judges are allocated.²¹³ Sections are allocated the caseloads from specified ECHR signatories. Cases which require full judgments are decided by 'Chambers' of seven judges, drawn from a particular Section.²¹⁴ At the time of the interviews, it was the Fourth Section of the Court which managed petitions against the UK. Thus, those working outside of the Fourth Section at the time generally did not hear UK cases unless they had been allocated to a Grand Chamber hearing of a UK case. An important limitation to the interview insights for this research therefore is that the participating ECtHR judges were drawn from different Sections of the ECtHR. Of the four judges who participated in recorded interviews, two judges were drawn from the Fourth Section, in its composition at that time, while the other two came from different Sections of the court.

²¹⁰ Lord Justice Moses, 'Hitting the Balls out of Court: Are Judges Stepping Over the Line?' (The Creaney Memorial Lecture, 26 February 2014) <<https://www.judiciary.gov.uk/.../moses-lj-speech-creaney-memorial-lecture-2014/>> accessed 10 December 2016

²¹¹ In particular, Paterson points to the influence of Lord Reid in the 1960s and 1970s. Roger Cotterrell, *The Sociology of Law: An Introduction* (OUP 1992) 221 citing Paterson, *The Law Lords* (n 1) Ch 6 and Ch 7

²¹² Bryman (n 169) 201

²¹³ European Court of Human Rights, 'Composition of the Court' <<http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=>> accessed 20 January 2017

²¹⁴ *ibid*

Thus, it was anticipated that the latter might not have had much experience with UK judgments. In the same respect, it was unclear whether those judges would have had any involvement in face-to-face meetings with UK judges.

These are important considerations but they do not diminish the value of the interviews entirely. It is often observed that ‘opportunistic’²¹⁵ samples such as this can be valuable particularly where, as Bryman notes, the sample represents ‘too good an opportunity to miss’.²¹⁶ For a study of judicial dialogue between the UK courts and the ECtHR, the opportunity to interview any judge of the ECtHR was not one which could be overlooked. Regardless of their particular Section, each judge was able to offer valuable insights on the subject of dialogue between national courts and the ECtHR, even if not specifically on dialogue with the UK courts.

7. Interview Designs

7.1 Interview Format

The aims of the research were outlined prior to the commencement of the interviews in order to ensure that the participants had the benefit of sufficient context. The interviews followed a semi-structured format whereby a list of questions was drafted in advance based on the insights from the academic literature, explored above and in the case law, discussed in Chapter 1. The interview guides for both sets of interviews can be found in the Appendices to this thesis. While these guides ensured a general consistency in the topics covered, the questions were executed flexibly and in a variable order in light of the direction of the discussions. Sometimes, the thoroughness of the responses on certain topics rendered certain questions in the interview guide obsolete.²¹⁷ The flexible questioning was integral to the interpretivist and exploratory nature of the research, allowing the discussions to expand into those areas which the judges deemed to be most significant. The clearest example of this arose during the interviews with the Justices. Although the diverse legal traditions of the Member States of the Council of Europe and of the judges sitting on the ECtHR was not initially covered in the interview guide, in the first interview with a Supreme Court Justice it arose several times and in every subsequent interview.

7.2 Interview Guide for the Supreme Court Interviews

There is not scope here to justify each of the questions listed in the interview guide. The following sections will therefore concentrate on the key topics explored with the judges. The

²¹⁵ Burton (n 204) 59

²¹⁶ Bryman (n 169) 201

²¹⁷ This was Paterson’s experience in his early research with the Law Lords. Paterson, *The Law Lords* (n 1) 6

central topics for the interviews with the Justices were: concept, appraisal and future. With regards to *concept*, the interviews sought to explore how the Justices understand and define the term ‘judicial dialogue’ in the context of their relationship with the ECtHR. The following question opened each interview:

The term ‘judicial dialogue’ has been used in a variety of ways within the academic literature, judicial lectures and court decisions, so I’d like to begin by simply asking: what is your understanding of the term?

As the question itself makes explicit, this line of inquiry was based on the differences observed within the academic literature and UK case law in the way the term has been used. In order to further clarify the Justices’ understandings, they were also asked for examples of judicial dialogue.

The *appraisal* section of the interviews engaged the judges critically on the subject of their dialogue with the ECtHR:

Do you think it is important that the UK courts should engage the ECtHR in dialogue? Why?

Are there any potential disadvantages to judicial dialogue between the courts?

Do you agree that there has been a resurgence of the common law in human rights adjudication in the UK? Do you think this will influence in any way the dialogue with the ECtHR?

It will be recalled from the review of the literature earlier in this chapter that numerous functions have been attributed to judicial dialogue. The first two questions thus purported to gain a clearer insight into what functions dialogue serves in the minds of the judges and whether they had any concerns with the practices which they associated with the term. It was seen in the introductory chapter how the common law ‘resurgence’ in UK human rights adjudication²¹⁸ concerns the series of judgments by the UKSC which ‘re-emphasise the utility of the common law, and the rights inherent in it, as tools of constitutional adjudication’.²¹⁹ The third question cited thus sought to explore whether and how the Justices thought this resurgence might affect the dialogue with the ECtHR.

²¹⁸ *R (Osborne) v Parole Board* [2014] AC 1115; *Kennedy v Charity Commission* [2015] 1 AC 455; *A v BBC* [2015] AC 588; *O (A Child) v Rhodes* [2015] UKSC 32; *R (Ingenious Media Holdings plc and another) v Commissioners for Her Majesty’s Revenue and Customs* [2016] UKSC 54

²¹⁹ Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ (2015) 1 EHRLR 57, 58

In terms of *future*, the interviews explored the Justices' views of whether and how dialogue could further develop. The following was the key, concluding question:

In 2009, Lord Bingham remarked that his hope that a 'constructive dialogue' would develop between the courts had been 'part[ly]',²²⁰ realised. Do you think that assessment still applies? If so, how could a dialogue between the courts be fully realised?

7.3 Interview Guide for the ECtHR Interviews

The interview guide for the Strasbourg judges generally mirrored the topics covered in the interviews with the Justices, with some important revisions in order to explore in greater detail certain points raised by the Justices. The key topics covered were: concept, face-to-face meetings, judgments and future.

The first topic, *concept*, again explored how the judges define 'dialogue' in respect of the ECtHR's relationship with national courts:

Could you briefly summarise your understanding of judicial dialogue between this court and the courts of Member States?

In contrast to the interviews with the Justices, however, the second topic focused directly on *face-to-face meetings* between judges of national courts and the ECtHR, particularly the judges' understanding of their structure and purpose:

Which members of this court will usually be present at the meetings? Would a delegation to the UK, for example, typically involve judges from the Fourth Section?

Do you think such meetings have an impact on the decision-making of this court or the domestic courts?

The decision to structure the interviews with a section explicitly on dialogue through face-to-face meetings and judgments was informed both by the data generated from the interviews with the Justices and the lack of literature on the topic, as discussed above. While the face-to-face meetings in particular had not been a major area of interest at the outset of the study, it became apparent during the interviews with the Justices that they were an important aspect of the relationship between the judges and worthy of further exploration. The Strasbourg interviews

²²⁰ 'I had always hoped that a constructive dialogue might develop between the Strasbourg court and the courts in this country. In part at least, that hope has been realised.' Tom Bingham, 'The Human Rights Act' (2010) 6 EHRLR 568, 574

thus presented an opportunity to gain more insight into this aspect of their relationship. While only one of the judges had direct experience of the meetings with UK judges, two of the other judges had been involved in meetings with other national judges at the ECtHR and were able to offer useful comments as to the general role of these meetings.

The third section asked the judges directly about *dialogue through judgments*: what it involves, and the advantages and disadvantages which they perceived in the practices to which they understood the term to apply. The final section again explored the future of dialogue, in particular the potential impact of the common law resurgence from the Strasbourg point of view.

8. Analysis of Interview Transcripts

8.1 Recording and Transcription

The interviews varied in length from roughly thirty-seven to seventy-one minutes. With the written permission of each of the participating judges, the interviews were recorded using a dictaphone and subsequently transcribed for the purposes of analysis. This enabled a detailed examination of the participating judges' responses.

8.2 Thematic Analysis

Qualitative analysis involves '...making choices about what to include, what to discard and how to interpret the participants' words'.²²¹ Rubin and Rubin explain that 'By putting together descriptions from separate interviewees, researchers create portraits of complicated processes'.²²² The interview transcripts in this instance were subject to a thematic analysis. King and Horrocks define themes as 'recurrent and distinctive features of participants' accounts, characterising particular perceptions and/ or experiences, which the researcher sees as relevant to the research question'.²²³ The analysis was conducted using the three-stage process which they propose.²²⁴ This consists of descriptive 'coding',²²⁵ interpretive coding, and the construction of overarching themes.²²⁶ The process was assisted by the use of the CAQDAS (Computer Aided

²²¹ Nigel King and Christine Horrocks, *Interviews in Qualitative Research* (SAGE 2010) 149

²²² Rubin and Rubin (n 171) 3

²²³ King and Horrocks (n 221) 150

²²⁴ *ibid* 149-156

²²⁵ Corbin and Strauss define a code as 'an abstract representation of an object or phenomenon'. See Patricia Bazeley and Kristi Jackson, *Qualitative Data Analysis with NVivo* (SAGE 2013) 70, citing Juliet M Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, SAGE 2008) 66

²²⁶ King and Horrocks (n 221) 149-156

Qualitative Data Analysis) software, NVivo, which provided a useful means of organising and visualising the interview data.²²⁷

It is useful to provide an illustration of the coding process here. The first stage requires the researcher ‘to identify those parts of [the] transcript data that are likely to be helpful in addressing [the] research question’.²²⁸ The focus here is on highlighting the features of interest rather than their interpretation, using descriptive codes which ‘stay relatively close to the data’.²²⁹ Some of the initial descriptive codes employed here were used as indicators to highlight the key areas covered during the interview: ‘concept’, ‘judgments’, ‘examples’, ‘J2J’,²³⁰ ‘purpose’, ‘pre-HRA’, ‘criticism’, ‘advantages’, ‘disadvantages’, ‘lower courts’, ‘common law resurgence’. Additionally, the initial coding relied on in vivo codes, using the language of the data itself, and non in vivo codes. Typical examples of in vivo coding were:

Misunderstanding: ‘... it’s undoubtedly the case that they don’t always understand the nature of a common law system’²³¹

Explanation: ‘It’s a statement that you make which you hope will explain the approach of the national court to the supranational court in Strasbourg’²³²

Non in vivo coding included:

Workload: ‘Given the problematic backlog of cases at Strasbourg...’²³³

Coherence: ‘... there have been occasions where Strasbourg has produced a range of different decisions which are, frankly, difficult to reconcile with one another’²³⁴

The second stage of thematic analysis set out by King and Horrocks moves from description to the interpretation of the initial codes. It involves ‘grouping together descriptive codes that seem to share some common meaning, and creating an interpretive code that captures it’.²³⁵ The researcher during this process will ‘add to, redefine and reapply’²³⁶ interpretive codes as they move between transcripts.²³⁷ The interpretive coding of the interview transcripts with the

²²⁷ Bazeley and Jackson (n 225) 3

²²⁸ *ibid* 152

²²⁹ *ibid* 153

²³⁰ This code is borrowed from Law and Chang’s research, and refers to face-to-face or ‘judge-to-judge’ dialogue. Law and Chang (n 25) 535

²³¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³⁵ King and Horrocks (n 221) 154

²³⁶ *ibid* 156

²³⁷ *ibid*

judges thus consisted of several layers. The descriptive codes ‘coherence’ and ‘misunderstanding’, described above, for example, were respectively placed under the interpretive codes of ‘formal quality’ and ‘substantive quality’ to reflect what they described about the ECtHR jurisprudence. ‘Formal quality’ and ‘substantive quality’ were then subsumed, with others, under the additional and wider interpretive code of ‘issues’, encompassing various difficulties which were identified by the Justices in connection with the ECtHR case law.

The final stage involves the construction of overarching themes which ‘characterise key concepts’²³⁸ within the analysis. These are ‘built upon the interpretive themes, but are at a higher level of abstraction than them’.²³⁹ Staying with the examples used so far, the interpretive code of ‘issues’ was combined with two other interpretive codes. The first of these is ‘sources of tension’ which encompassed numerous interpretive codes relating to points of difference between the UK and the ECtHR courts which were deemed by the judges to give rise to the difficulties coded under ‘issues’. The second interpretive category / code was ‘mitigation’, which included various interpretive and descriptive codes based on the judges accounts of how they seek to address the ‘issues’ raised by the ECtHR case law through dialogue. Combined, these three categories formed the theme of judgment-based dialogue as the *mitigation of tensions*.

This method of analysis allowed for the development and exposition of a ‘rich and detailed ... account of the data’.²⁴⁰ Nonetheless, there are some limitations. A common criticism of this method is that it lacks a systematic approach. Bryman notes that it is ‘a remarkably underdeveloped procedure’,²⁴¹ despite its popularity, with no ‘identifiable heritage’.²⁴² Further, as an exercise in interpretivism, it could of course be argued that the ‘researcher’s own values and biases may lead them to prioritise certain accounts over others – even if unwittingly’.²⁴³ The three-stage process described sought to introduce a degree of systemisation into the analytical process. In the interests of transparency, the thesis relies extensively on direct quotations from the interviews with the judges in order to improve the trustworthiness of the arguments

²³⁸ *ibid*

²³⁹ *ibid*

²⁴⁰ Mojtaba Vaismoradi, Hannele Turunen and Terese Bondas, ‘Content Analysis and Thematic Analysis: Implications for Conducting a Qualitative Descriptive Study’ (2013) 15 *Nursing and Health Sciences* 398, 400 citing Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77

²⁴¹ Bryman (n 169) 580

²⁴² *ibid* 578

²⁴³ Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (Palgrave 1999) 39 cited in Karen Lumsden, ‘“You are what you Research”: Researcher Partisanship and the Sociology of the ‘Underdog’’ (2012) 13(1) *Qualitative Research* 3, 14. Webley, however, explains that ‘[a]n interpretivist researcher would argue that her analysis will always reflect her own frame of reference, because no one is capable of being objective, all meaning being socially constructed’.²⁴³ Webley (n 166) 931

developed from the data. However, due to guarantees of confidentiality, none of the judges are identified by name.²⁴⁴

9. Other Documentary Sources

9.1 Extra-judicial Literature

While the thesis relies extensively on the insights from the interview transcripts, it also draws upon a number of other documentary sources. Among these is the growing body of extra-judicial commentary made by acting or retired judges through published speeches and academic contributions. The topic of the relationship between the UK courts and the ECtHR in particular has been the subject of much extra-judicial commentary and discussion. Bjorge notes that these ‘interventions’²⁴⁵ will often further ‘explicate the way in which they apply the ECHR’.²⁴⁶ They thus provide valuable insights on how they view the dialogue between their courts. During the research process, these were used to supplement and refine the thematic analysis of the interview data.

9.2 Case Law

In addition to the interviews, this thesis relies on the case law of the UK courts, primarily the UK Supreme Court and former Judicial Appellate Committee of the House of Lords, and the ECtHR. The case law was gathered on an ad hoc basis using the Westlaw, BAILII and HUDOC databases. Given the interpretivist emphasis of this research on understanding how the judges understand the dialogue between their courts, many of the examples cited in this thesis were suggested by the judges themselves. Ongoing research of academic literature and extra-judicial lectures using Westlaw, Heinonline, Web of Knowledge, Google Scholar, websites of the UK courts and the ECtHR and library research aided the process of identifying and adding suitable cases to the sample. Additionally, various blogs were used to provide alerts on new cases. In particular, the UK Supreme Court Blog,²⁴⁷ the UK Constitutional Law Blog,²⁴⁸ the UK Human Rights Blog,²⁴⁹ Public Law for Everyone,²⁵⁰ the ECHR blog,²⁵¹ Strasbourg Observers,²⁵² and

²⁴⁴ See Appendices for details.

²⁴⁵ Bjorge (n 37) 5

²⁴⁶ *ibid*

²⁴⁷ <<http://uksclublog.com/>> accessed 21 November 2015

²⁴⁸ <<http://ukconstitutionallaw.org/blog/>> accessed 21 November 2015

²⁴⁹ <<http://ukhumanrightsblog.com/>> accessed 21 November 2015

²⁵⁰ <<http://publiclawforeveryone.com/>> accessed 21 November 2015

²⁵¹ <<http://echrblog.blogspot.co.uk/>> accessed 21 November 2015

²⁵² <<http://strasbourgobservers.com/>> accessed 21 November 2015

European Courts²⁵³ all provided valuable updates on developments in the case law at the domestic and European levels. The purpose of the case law research was to both corroborate and supplement the insights from the interview data. In this regard, the research sought to take heed of the advice given by Neil MacCormick: ‘The judicial self-perception is an important piece of evidence, but not a conclusive one. It remains, therefore, important to look beyond what they say they do to what they do’.²⁵⁴

9.3 Desk-based and Library Research of Academic Literature

Finally, the thesis relies upon a wealth of academic literature gathered through desk-based and library research. The desk-based research was conducted using Westlaw, Heinonline, Web of Knowledge and Google Scholar, with email subscriptions to numerous academic blogs providing valuable updates on new and forthcoming academic scholarship. The library research was relied upon for relevant monographs and edited volumes. Cotterrell argues that ‘...legal theory, as the attempt to understand law as a social phenomenon, *should* require that the limited, partial perspectives of particular kinds of participants in legal processes – for example, lawyers, judges, legislators ... – be confronted with wider theoretical perspectives on law which can incorporate and transcend these more limited viewpoints in order to broaden understanding of the nature of law’.²⁵⁵ Thus, the thesis combines the partial perspectives of the judges on dialogue gleaned from the interviews, extra-judicial commentary and case law with the insights of the academic literature in order to draw conclusions on its role in legitimising their judgments.

10. Conclusion

This chapter has provided a detailed account of the methodological considerations which guided the research for this thesis. By drawing attention to the limitations of the existing research on dialogue between the UK courts and the ECtHR, it has sought to provide the justification for an interpretivist approach to the study of this topic, focusing on the direct perspectives of the judges involved. It has argued that this provides not only a unique methodological way of exploring this contentious area but, through its focus on the judicial perspective, an effective means of understanding how judicial dialogue can perform a legitimising role. Further, the chapter has offered a detailed description and justification for the various features of its research design: its use of in-depth interviews with judges of the UK Supreme Court and ECtHR, the purposive

²⁵³ <<http://europeancourts.blogspot.co.uk/>> accessed 21 November 2015

²⁵⁴ Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 277

²⁵⁵ Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press 1989) 16

sampling which guided the selection process, the avenues of inquiry explored during the interviews, the thematic analysis of interview transcripts and its reliance on case law, extra-judicial commentary and academic literature. With the four research questions and the methodology employed to answer them now established, the thesis turns to begin its exploration of the nature of judicial dialogue between the courts.

Chapter 3

Defining ‘Formal’ Judicial Dialogue

I firmly believe that, in the modern world, openness, transparency, discussion, on a reasonable basis, ought to be regarded as productive. ... I think lawyers, above all, ought to be able to discuss things rationally and to influence each other through openness and dialogue.¹

- Justice of the UK Supreme Court

1. Introduction

The methodology chapter explored the academic perspectives on the concept of ‘judicial dialogue’, observing a variety of views as to its *form* and *functions*. In terms of form, it drew attention to the distinction between judgment-based and face-to-face dialogue and made the case for a closer examination of these within the context of the relationship between the UK courts and the European Court of Human Rights (ECtHR) using a qualitative, interview-based study. This chapter, the first of three examining the interviews conducted with the Supreme Court Justices (“the Justices”) and judges of the ECtHR (“the Strasbourg judges”), the case law and extra-judicial commentary, aims to elucidate the characteristics attributed to the judgment-based (‘formal’) dialogue which has taken root at these institutional levels. Its focus is on the *form* of the interactions, while the next chapter addresses their *functions*.

In doing so, this chapter seeks to answer the first research question set out in Chapter 1: what is judicial ‘dialogue’ in the context of the decision-making of the UK courts and the ECtHR? The answer offered here is that this disputed term refers to a *process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their respective judgments*. The three parts of this chapter deconstruct and examine the various aspects of this definition. Part 2 sets out the characteristics of judgment-based dialogue as a *process* consisting of mutual listening, explanation and influence. It outlines the features of the decision-making of the UK courts and the ECtHR which were felt to facilitate cross-influence between their courts, and the use of judicial diplomacy by the judges to increase the prospect of influence. In Part 3, the chapter draws upon the spectrum of dialogic interactions set out in Chapter 2 and the case law examples cited by the judges interviewed to explore in more detail the nature of the interactions which the judges understood as dialogue. It observes a consensus that dialogue refers to the conflictual interactions whereby national courts criticise or disagree with judgments of the ECtHR. Further, while notable differences regarding other types

¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

of interaction were evident both amongst the Justices and between the Justices and the Strasbourg judges, it observes that the differences of emphasis can be understood as reflective of the judges' desire for their court to influence the judgments of the other: the Justices emphasised dialogue as the influence of the UK courts upon the judgments of the ECtHR, while the ECtHR judges emphasised dialogue as the influence of the ECtHR upon the judgments of the national courts. In Part 4, the chapter explores the practical and normative constraints which were associated with judgment-based dialogue. Practically, the process is indirect and case-dependent. Normatively, the UK's political constitution and the UK courts' adherence to the international rule of law set limits on their judgment-based dialogue with the ECtHR. The chapter concludes in Part 5 with a review of the findings, providing the background against which the *functions* of formal dialogue are explored in Chapter 4.

2. The Process of Formal Dialogue

2.1 A Process

Across the interviews, 'judicial dialogue' was consistently regarded as a *multi-dimensional* concept. As one Justice put it, 'it does all depend on the context ... because judges have conversations with one another in a lot of different contexts'.² It was considered 'a phrase which can mean different things to different people in different contexts'.³ Judgments, however, were frequently described by the judges as the medium of '*formal*'⁴ or '*jurisprudential*'⁵ dialogue. Along with face-to-face meetings, which were described as the medium of '*informal*'⁶ or '*personal*'⁷ dialogue, this was said to constitute one the 'two basic dialogue levels'⁸ between the UK courts and the ECtHR. It is worth noting here that a few of the Justices questioned whether 'dialogue' was an appropriate label for the judgment-based interactions between the courts. It was felt that the term 'doesn't really represent practical reality'⁹ and is 'not "dialogue"

² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014). Throughout the interviews, references were variably made to face-to-face meetings between judges, judgments, judicial conferences and seminars, extra-judicial lectures, Protocol 16 ECHR, and even case-law databases, all as potential mediums of judicial dialogue. Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (not in force at the time of writing). Once in force, it will allow national courts of ratifying countries to request advisory opinions from the ECtHR on the interpretation of Convention rights.

³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁵ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁹ *ibid*

in the sense that somebody in the street would understand dialogue to be'.¹⁰ There was, however, an underlying consensus as to the meaning behind the term.

As indicated by the definition above, formal dialogue was understood as a '*continuing process*'.¹¹ Through their respective judgments on issues concerning the interpretation and application of Convention rights, contained respectively under the Human Rights Act (HRA) 1998 Sch 1 and the ECHR, it was said that the courts can engage in a 'genuine interchange',¹² consisting of 'toing and froing',¹³ and the 'ping pong',¹⁴ of arguments through 'the interplay of judicial decisions'.¹⁵ As one Justice explained: 'We set out in public what we think, they set out in public what they think, then we perhaps return to it at some later case'.¹⁶ Numerous characteristics were attributed to this process. It was said to consist of an *exchange of views*: each court *listens* to the reasoning of the other and, in turn, *explains* its own views through its judgments. In the same vein, the former ECtHR President, Dean Spielmann, has observed that dialogue between the ECtHR and national courts requires 'a continuing openness to listen and willingness to explain',¹⁷ on both sides. During the interviews, these appeared to be both descriptive and normative characteristics, describing actual practice and also reflecting the judges' expectations of how they ought to interact through their decision-making. Further, formal dialogue appears to be defined by both courts *seeking to influence one another* through their exchange of views. To this end, a number of features of the decision-making of the UK courts and the ECtHR were considered by the judges to facilitate a space for cross-influence: their shared language, the Human Rights Act (HRA) 1998, their styles of reasoning and their flexibility in the development of the law in their respective systems. From the judges' accounts, the courts seek to utilise this space through the use of *judicial diplomacy* – framing their judgments with an awareness of how their decision might be received by the other court. The following sections explore each of these in turn.

¹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014) (emphasis added). Lord Mance refers to dialogue as a 'process' in *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271, [27]. Likewise, Lady Hale refers to a 'long process of dialogue' in *Akerman-Livingstone v Aster Communities Limited* [2015] 1 AC 1399, [20]

¹² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷ Dean Spielmann, 'Whither Judicial Dialogue?' (Sir Thomas More Lecture, London, 12 October 2015) <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016

2.2 Mutual Listening

Formal dialogue between these courts was said to be predicated on each listening to the views pronounced in the judgments of the other. The idea behind the term, according to one Justice, is that ‘each court should endeavour to understand what’s led the other to decide the case in the way it has and should pay serious regard to it’.¹⁸ For the Justices, this was considered intrinsic to their s.2 HRA duty to ‘take into account’ the judgments of the ECtHR. However, the requirement to listen went beyond the fulfilment of legal obligations. It was deemed important to not only listen but to be seen listening. One Justice stressed the importance of each court being able to see that the other is considering their views. It was considered to be ‘very important for them [the ECtHR judges] that they see that we are taking them seriously’.¹⁹ Likewise, it was crucial for the UK judges to see that the ECtHR judges are ‘listening to us, taking into account our concerns and interests’.²⁰ Lord Kerr has written pointedly here of ‘the need [for the ECtHR] to attend closely to the articulation by a national court of the difficulties that the propounding of a general rule might have in the domestic setting’.²¹

The same emphasis on listening pervaded the interviews with the Strasbourg judges. One judge, for example, remarked that ‘the natural partner for us is the national judges... You can’t have a partner and not listen to what the partner says’.²² Similarly, another judge remarked that ‘this court – maybe even more than any national court – looks into the national interpretations of national law’.²³ It was said to be ‘crucial for us to know what their legal thinking is based on’.²⁴ A close regard for the decisions of the national courts was deemed integral to the ECtHR’s decision-making: ‘...obviously any decision is likely to be more reliable if you listen to what the person who’s going to be affected by your decision has to say, don’t you think?’.²⁵ Echoing these views, the ECtHR judge, Françoise Tulkens, has argued that ‘the Court can and must enrich its own scrutiny by reflecting on national decisions in which Convention law is analysed. The Court does not have a monopoly on understanding the Convention’.²⁶

¹⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹ Lord Kerr, ‘The Need for Dialogue Between National Courts and the European Court of Human Rights’ in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 104, 108

²² Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

²⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²⁵ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²⁶ Speech of Françoise Tulkens in European Court of Human Rights, *The Convention is Yours* (Dialogue between Judges, Council of Europe 2010) 7, 9

2.3 Mutual Explanation of Views

The second feature of formal dialogue described by the judges is that it takes place through the explanations set out in the respective judgments of the UK courts and the ECtHR. According to the former ECtHR President, Dean Spielmann, ‘the national judge details their analysis of the human rights issues at stake in the case, and their application of the corresponding jurisprudential principles’²⁷ and ‘the European Court assesses, and, as the case may be, rectifies or validates the analysis’.²⁸ The duty to explain a judicial decision was said to be owed principally to ‘the litigants and towards the public’.²⁹ To this extent, the communication between the courts was said to be secondary to the resolution of the particular legal disputes confronting them. However, it was made clear that the courts regard one another as key *audiences* to their respective judgments. This was made particularly apparent during the interviews with the Justices. The task of the UK courts, it was said, is to ‘signal to them [the ECtHR] that we think we’re following them or we’re not following them ... so when it goes to Strasbourg they can see what we’re doing and why’.³⁰ Further, the Justices described the practices of ‘putting in a judgment material which you hope that Strasbourg will have regard to next time round’³¹ and producing ‘a statement ... which you hope will explain the approach of the national court to the supranational court in Strasbourg’.³² Here, Lady Justice Arden has also suggested that ‘[t]he national court can in effect send a message to the Strasbourg court by reflecting its views on the Strasbourg jurisprudence in its judgment either in the case before it goes to Strasbourg or some other case raising the same issue’.³³

It would appear, however, that the twin expectations of being heard and receiving an explanation in reply occasionally collide with reality. One Justice suggested that, in practice, formal dialogue ‘tends to be one way’.³⁴

Strasbourg can indulge in the dialogue but, on the whole, that dialogue tends to be one way, in the sense that we’re making points, rather like a barrister to a judge, if you like, and Strasbourg can ignore them, can answer them, can

²⁷ Spielmann (n 17)

²⁸ *ibid*

²⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

³⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³³ Mary Arden, *Human Rights and European Law: Building New Legal Orders* (OUP 2015) 286

³⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

specifically refer to them, can deal with them in general terms, can half deal with them.³⁵

A notable example of the ECtHR not responding directly to the signals sent by domestic courts arose in one of the most fraught and well-known exchanges between the UK courts and the ECtHR. The courts repeatedly reached differing conclusions as to whether Art.8 ECHR could be invoked by social housing tenants facing eviction to challenge the proportionality of the decision before a court making the order for possession. In the first major domestic judgment on the issue, *Qazi v Harrow LBC*,³⁶ a divided (3:2) decision by the House of Lords concluded that Art.8 could not be invoked to this end.³⁷ Lord Steyn, however, dissenting, argued that the conclusion ‘empties article 8(1) of any or virtually any meaningful content’³⁸ and remarked pointedly that ‘[i]t would be surprising if the views of the majority ... withstood European scrutiny’.³⁹ This ‘putative invitation’,⁴⁰ however, drew no direct response from the ECtHR on the two subsequent occasions that it considered UK cases on this matter, prompting some consternation when the issue next returned to the Law Lords:

The question is not made easier by the fact that when *Qazi*'s case reached the Strasbourg court it was dismissed as inadmissible without any reasons having been given, and by the absence of any mention of the House's decision in *Qazi* in the court's judgment in the *Connors*⁴¹ case. Lord Steyn's declaration in *Qazi* ... that it would be surprising if the views of the majority ... withstood scrutiny cannot have escaped attention in Strasbourg.⁴²

The lack of explicit engagement by the ECtHR with the divided views of the Law Lords appeared to prolong domestic judicial difficulties in that area, as the judges were left to debate which arguments the ECtHR had implicitly accepted or rejected.⁴³ There was, however, a view

³⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³⁶ *London Borough of Harrow v Qazi* [2003] UKHL 43 [2004] 1 AC 983

³⁷ *ibid* [139] (Lord Scott)

³⁸ For Lord Steyn, the majority's approach was ‘...contrary to a purposive interpretation of article 8 read against the structure of the Convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the Commission. ... [I]t empties article 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1). The decision of today does not fit into the new landscape created by the Human Rights Act 1998’. *ibid* [27]

³⁹ *ibid*

⁴⁰ Jonathan Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720, 744

⁴¹ *Connors v United Kingdom* (2005) 40 EHRR 9

⁴² *Kay v Lambeth London Borough Council* [2006] 2 AC 465 [88] (Lord Hope)

⁴³ Lord Hope and the majority attached weight to the fact that the *Qazi* case had been dismissed in Strasbourg. In contrast, Lord Bingham was sceptical of such an inference, reminding the majority that ‘the House itself has been at pains over the years to make plain that the refusal of leave does not necessarily import approval of the reasoning of

among the Justices that the ECtHR had become more receptive in recent years: ‘...in relation to the Strasbourg court, there is a real sense of increasing dialogue. They are listening to what is said about their decisions’.⁴⁴

2.4 The Space for Cross-Influence

The next feature of formal dialogue described by the judges is that it involves the courts actively seeking to influence one another. In this respect, it is predicated on a space for cross-influence between the courts. The ongoing presence of such influences in the decision-making of the UK courts and the ECtHR is well-recognised in the extra-judicial commentary. Lord Reed observes ‘a dialectical process at work, as the European Court and national courts each influence the work of the other’.⁴⁵ Likewise, Paul Mahoney, the former UK judge at the ECtHR, notes a ‘two-way adjudicatory traffic’⁴⁶ by which the courts have engaged in ‘a continuing exchange on the subject of a specific human rights problem in the country, with the position on each side progressively evolving in the light of the other’s judgments’.⁴⁷

During the interviews, several features of the decision-making of the UK courts and the ECtHR were identified as facilitating the potential for mutual influence. One such feature was the *shared language* of the courts. A Strasbourg judge felt that this placed the UK courts in a considerably stronger position to engage with the Strasbourg case law than many of their European counterparts whose first language is neither English nor French.⁴⁸ They face no ‘linguistic hurdle’⁴⁹ in their efforts to apply the Convention rights. A second and much more significant feature, however, was the *Human Rights Act (HRA) 1998*. The legislation was deemed

the judgment which it is sought to challenge’. *Kay* (n 42) Lord Hope [106]-[107]; Lord Scott [154] [167]; Lord Bingham [23]. Lewis argued that the ECtHR’s failure to either acknowledge or respond to Lord Steyn’s invitation amounted to ‘...a clear failure in the supposedly dialogic relationship between the two courts’. Lewis (n 40) 745

⁴⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁴⁵ Robert Reed, ‘Foreword’ in Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) vii

⁴⁶ Paul Mahoney, ‘The Relationship between the Strasbourg Court and the National Courts’ (2014) 130 LQR 568, 572

⁴⁷ *ibid* 57. Likewise, Lady Justice Arden observes that ‘by the end both national case-law and Strasbourg jurisprudence will end up in a different place from where it started’. Speech by Lady Justice Arden in ECtHR, *The Convention is Yours* (n 26) 26

⁴⁸ English and French are the official languages of the ECtHR. The importance of language for cross-citation and analysis between courts of different jurisdictions is underlined in Martin Gelter and Mathias M. Siems, ‘Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe’ (2014) 21(1) *Sup Ct Econ Rev* 215. The advantage to the UK courts and the ECtHR provided by their shared language, however, may reduce in significance as a result of the ECtHR’s case law translation programme, launched in 2012, aimed at enhancing the accessibility of its judgments to the contracting states whose first language is neither English nor French. European Court of Human Rights, *Annual Report* (Council of Europe 2015) 70-71

⁴⁹ Jean-Paul Costa, ‘Speech given on the occasion of the opening of the judicial year’ in European Court of Human Rights, *Fifty Years of the European Court of Human Rights Viewed by its Fellow International Courts* (Dialogue between Judges, Council of Europe 2009) 64

by several Justices to have directly facilitated formal dialogue with the ECtHR by granting the UK courts the ability to interpret the ‘Convention rights’⁵⁰ and engage extensively with the ECtHR’s case law. Prior to the Act, it was said that the situation was ‘unsatisfactory on all sorts of levels, not least because it meant that Strasbourg considered a case without the benefit of the thinking of the national court’.⁵¹ Another Justice explained:

[Dialogue] certainly didn’t exist in the way that it does now because the UK courts weren’t able to apply the Convention rights directly, so human rights tended to be very much a policy argument in support of a statutory or common law argument. ... That’s much less of a dialogue because we weren’t able to engage with Strasbourg on Strasbourg’s terms, and now we can.⁵²

Lord Reed similarly notes here that ‘for good or ill, [the HRA] compels our courts to analyse the Strasbourg jurisprudence to a greater extent than the courts of other contracting parties’.⁵³ The same sentiments have been voiced by several former ECtHR Presidents. Sir Nicolas Bratza has observed that ‘...the Strasbourg Court has, in my perception, been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication’.⁵⁴ Similarly, Spielmann has remarked that ‘...the distinctive English approach to human rights, which rest on that great landmark that is the Human Rights Act, has never ceased to command my attention’.⁵⁵

A third feature which was deemed to facilitate the potential for cross-influence is the particular *styles of reasoning* which characterise the judgments of the UK courts and ECtHR. According to the Justices, the ability to interpret Convention rights and reason with the Strasbourg case law combines with the ‘narrative and argumentative form’⁵⁶ and ‘profoundly explanatory’⁵⁷ method of analogical reasoning in common law judgments to enable the UK courts to explain their analysis of the applicable Convention rights and the Strasbourg jurisprudence in considerable detail to the ECtHR. For this reason, one Justice suggested that ‘our own relationship with Strasbourg is different from any other country’.⁵⁸ The ECtHR

⁵⁰ Human Rights Act 1998 Sch 1

⁵¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁵² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁵³ Lord Reed (n 45) vii

⁵⁴ Nicolas Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) 5 EHRLR 505, 507

⁵⁵ Spielmann (n 17)

⁵⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁵⁷ *ibid*

⁵⁸ *ibid*

judgments were deemed to broadly share this explanatory style. One Justice observed that ‘[t]hey reason in quite a common law way ... they’re fairly explicit, they try and reason things out’.⁵⁹ Likewise, the Strasbourg judges observed that the ‘the whole machinery [at the ECtHR] is an imitation of the common law system’,⁶⁰ mirroring ‘the very pattern of law-making through judicial law-making’.⁶¹ There was a clear view among the Justices that this provides the UK courts with an advantage in their relationship with the ECtHR over the courts in jurisdictions which either provide shorter, formalistic reasoning for their decisions or do not explicitly analyse the Strasbourg jurisprudence, which placed them in ‘a strong position to influence Strasbourg’.⁶² Several Strasbourg judges here testified to the influence of the reasoning of the UK courts. One judge remarked:

... in every British case that I was part of there were long citations from British judgments that everybody has read with great interest, precisely because Britain and, of course, Cyprus, Ireland, are the common law countries that are well versed in the applications of the case law.⁶³

Another judge referred to the ‘very influential’⁶⁴ and ‘excellent reasoning of the UK judges’⁶⁵ and described it as a ‘very rewarding learning exercise ... to see how our case law was interpreted in the British cases’.⁶⁶

A fourth feature of the decision-making of the UK courts and the ECtHR which was deemed to facilitate cross-influence is their *mutual flexibility*. There was a shared view that because both courts develop their legal principles on a case-by-case basis, they are afforded a degree of flexibility with which to mutually adapt in response to their respective positions. The UK courts, on the one hand, enjoy what Lord Justice Laws has described as the common law’s ‘power of continuous self-correction’⁶⁷ and its ‘catholicity’:⁶⁸ its ‘...capacity to draw inspiration from many different sources’.⁶⁹ To this end, the UK courts were deemed well-equipped to adjust to changes in the thinking of the ECtHR. One Justice observed that ‘the idea of developing

⁵⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

⁶⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁶¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

⁶² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁶³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁶⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures 2013)

<<https://www.judiciary.gov.uk/wp-content/.../laws-lj-speech-hamlyn-lecture-2013.pdf>> accessed on 10 October 2016

⁶⁸ *ibid*

⁶⁹ *ibid*

thinking and principles through case law and the interaction of decisions on particular facts is one that we all like and are comfortable with'.⁷⁰ Again, there was a view that this places the UK courts at an advantage. One Strasbourg judge, for example, observed 'a big difference between the common law countries that are used to assimilating the precedents and, in a sense, integrating them into their own judicial system, and ... other countries that are not able to assimilate those judgments'.⁷¹ In the same vein, it was noted by several of the Strasbourg judges that the ability of the ECtHR to develop its jurisprudence case-by-case enables it to modify its position where necessary in the light of arguments made by national courts. Lady Justice Arden has referred to this as the ECtHR's 'plasticity':⁷² '...its genuine desire to respond to the needs of the contracting states' legal systems, in other words its receptivity of the need for change ... [its] coping strategy ... adapting itself when need arises'.⁷³ Each of these features was deemed to facilitate the potential for cross-influence between the courts.

2.5 Seeking Influence through Judgments

It was described earlier how the judges regard one another as key audiences to their respective judgments. For this reason, a number of the judges stressed the need for what can be termed *judicial diplomacy*:⁷⁴ sensitivity to how the language and framing of their judgments is likely to be received by the judges of the other court. One Justice described how the manner in which views are presented in Supreme Court judgments is influenced by 'political considerations':⁷⁵ their sense of 'how will this go down in Strasbourg'.⁷⁶ In this regard, it was said that the expression of views tends to be more 'guarded'⁷⁷ in judgments compared to the 'frank',⁷⁸ exchanges between the judges which reportedly take place during their bilateral meetings, where the contents of discussions are not published. Another Justice explained this in similar terms:

⁷⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁷² Arden, *Building New Legal Orders* (n 33) 304

⁷³ *ibid.* Sir Stephen Sedley has made the same point, where he argued at the 2006 official opening of the judicial year at the ECtHR that 'There is nothing which prevents this Court from modifying its own jurisprudence in response to the considered judgments of national courts'. Stephen Sedley, 'Personal Reflections on the Reception and Application of the Court's Case-law' in European Court of Human Rights, *Dialogue between Judges* (Council of Europe 2006)

⁷⁴ David S. Law notes three ways that the concept of judicial diplomacy has been used: the instrumental use of courts by diplomats, the judicial use of diplomatic methods, such as negotiation and agreement, tact and secrecy, and the judicial pursuit of foreign policy objectives. David S. Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163(4) *U Pennsylvania L Rev* 927, 1003-1004. The use of the term in this chapter falls into the second category to refer to the need for tactfulness described by the interviewed judges.

⁷⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁷⁶ *ibid.*

⁷⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁷⁸ *ibid.*

Obviously we have to have respect for them and they have to have respect for us, and so it would be quite inappropriate for us to write a sort of polemical judgment in which we set out a Strasbourg judgment, then analysed it in order to show in harsh terms that it was a lot of rubbish – that would be quite inappropriate.⁷⁹

It was not only the Justices, however, who observed this need for judicial diplomacy. A Strasbourg judge interviewed stressed the importance of ‘having a certain awareness as to what the impact of judgments is going to be and what the people who are affected by the judgments actually think about them’,⁸⁰ including the national judges. This echoes the remarks of Spielmann, quoted in the Chapter 1, that ‘it goes without saying that we do think about how our judgments will be received’.⁸¹

It appears that this diplomacy is intended as a way of *increasing influence*. This is fairly explicit in the remarks of the former ECtHR President, Jean-Paul Costa:

We need to be pragmatic. There is no point in chanting the maxim “*pacta sunt servanda*” on which Grotius based international law. The Court could only have been influential and it can only avoid the danger of being misunderstood, or even rejected, so long as it observes a degree of restraint and explains again and again to judges and other national authorities the basis for its decisions.⁸²

Likewise, the use of diplomacy to achieve influence was evident in the Supreme Court’s decision in *Nicklinson*,⁸³ where Lord Neuberger remarked that ‘Dialogue or collaboration ... can be carried on with varying degrees of emphasis or firmness, and there are times when an indication, rather than firm words are more appropriate and can reasonably be expected to carry more credibility’.⁸⁴ At a more general level, Lord Reed has remarked that ‘national courts can and do seek, through their judgments, to encourage or persuade the European Court to develop its jurisprudence in particular ways’.⁸⁵ To this end, one Justice suggested that ‘you influence people much better by reasoning with them calmly and in a constructive way than by either remaining silent or by hectoring’.⁸⁶ Likewise, another Justice made the point that ‘sometimes you will get a more favourable response if you tread gently than if you wave a big stick’.⁸⁷

⁷⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁸⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁸¹ Spielmann (n 17)

⁸² Costa, ‘Speech given on the occasion of the opening of the judicial year’ (n 49) 64

⁸³ *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200

⁸⁴ *ibid* [117] (Lord Neuberger)

⁸⁵ Reed (n 45) vii

⁸⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

⁸⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

Two examples provided by the Justices were said to illustrate the different manifestations of this diplomacy. On the one hand, the ‘big stick’ approach was evidenced by the Supreme Court’s judgment in *Horncastle*.⁸⁸ As discussed in Chapter 1, the question there was whether a criminal conviction would be compatible with the fair trial requirements of Art.6 ECHR where hearsay evidence constituted ‘sole or decisive’ evidence against the accused. The ECtHR Chamber judgment in *Al-Khawaja v UK*,⁸⁹ finding against the UK, had ruled that such a conviction would not be compatible with Art.6. The government subsequently requested a referral of the judgment to the ECtHR Grand Chamber, however the Court postponed its consideration of the request until after the Supreme Court had issued its *Horncastle* judgment which addressed the same issue. The Supreme Court held that the admission of hearsay evidence under domestic law would be compatible with Art.6. It refused to apply the judgment in *Al-Khawaja*, and criticised the decision at length for its inflexible application of the sole or decisive rule, for the lack of clarity in the rule itself, and for having misunderstood the existing fair trial protections in domestic law. One Justice interviewed explained here that ‘the whole point of *Horncastle* was to persuade the Grand Chamber to take *Al-Khawaja*⁹⁰ on and then to persuade the Grand Chamber that they need to modify the Chamber’s⁹¹ approach’.⁹² The effort was largely successful. *Al-Khawaja* was relinquished to the Grand Chamber and the eventual judgment,⁹³ which reversed the decision of the Chamber in part,⁹⁴ ruled that a conviction based decisively on hearsay evidence could still be compatible with Art.6 provided there were sufficient counterbalancing measures to offset the disadvantage to the defendant and the ‘overall fairness’ of the proceedings was not undermined.⁹⁵

By contrast, an example cited by one Justice of the UK courts ‘treading gently’, by sending subtler signals to the ECtHR, was the decision of the Supreme Court in *Whiston*.⁹⁶ One of the issues there was whether the right to have a detention reviewed under Art.5(4) ECHR renews when a person, serving a determinate custodial sentence, is granted discretionary early release but subsequently recalled to prison. Holding that it did not renew, the majority reasoned that the result ‘clearly appears to be the conclusion which the Strasbourg court would reach’.⁹⁷

⁸⁸ *R v Horncastle and others* [2010] 2 AC 373

⁸⁹ *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 (Chamber)

⁹⁰ *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (Grand Chamber)

⁹¹ *Al-Khawaja* (n 89) (Chamber)

⁹² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁹³ *Al-Khawaja* (n 90) (Grand Chamber)

⁹⁴ The Grand Chamber found a violation in one of the two cases.

⁹⁵ *Al-Khawaja* (Grand Chamber) (n 90) [147]

⁹⁶ *R (Whiston) v Secretary of State for Justice* [2015] 1 AC 176

⁹⁷ *ibid* [44] (Lord Neuberger)

Lady Hale, however, while agreeing with the *ratio*, was unconvinced by the majority's reasoning.⁹⁸ In light of this difference of view, the ECtHR was invited to clarify the position at the next opportunity: '...it may be that the Strasbourg court would want to reconsider their jurisprudence'.⁹⁹

On the basis of these insights, judgment-based dialogue appears to be actively shaped by the judges' awareness of one another as audiences to their respective judgments, with the UK courts in particular having tailored their reasoning in specific instances in order to increase the prospect of influence.

3. Categories of Interaction

3.1 Conflict and Consensus

The chapter has so far explored the general characteristics ascribed by the Justices and ECtHR judges to the formal dialogue between their courts. These characteristics – mutual listening, mutual explanation and the reciprocal effort to influence – were fairly uncontroversial. It will be recalled from the methodology chapter, however, that a variety of judgment-based interactions between these courts have been labelled 'dialogue'. Drawing upon the case law cited by the judges interviewed, this next part of the chapter uses these categories of interaction to further scrutinise the nature of the judgment-based interactions which the judges understand as dialogue. If formal dialogue is a process by which the courts mutually listen and explain their views, seeking to influence one another through the medium of their judgments, does it encompass *all* judgments made respectively by the courts on matters concerning the Convention rights, or does it involve *specific* types of decision only?

Here, there were different views both amongst the Justices and between the Justices and the ECtHR judges. Drawing upon the concepts introduced in the previous chapter, it can be said that two broad categories emerged from the interviews, which can be supported with additional extra-judicial insights: first, what has been labelled '*conflictual*'¹⁰⁰ dialogue, based on disagreement or 'differences of opinion'¹⁰¹ between the courts; second, '*consensual*'¹⁰² dialogue,

⁹⁸ *ibid* [59]

⁹⁹ *ibid* [49]

¹⁰⁰ Alec Stone Sweet, 'From the Point of View of National Judiciaries: The Role of National Courts in the Implementation of the Court's Judgments' in European Court of Human Rights, *Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?* (Dialogue between Judges, Council of Europe 2014) 22-26, 24

¹⁰¹ Jean-Paul Costa, 'Speech by Jean-Paul Costa, President of the European Court of Human Rights' (Visit to the Constitutional Court of the Russian Federation, 10-11 May 2007) <http://www.echr.coe.int/Documents/Speech_20070511_Costa_Moscow_ENG.pdf> accessed 10 December 2016

based on influences at work between the courts in the absence of disagreement. As seen in the Chapter 2, conflictual dialogue can be divided into two subcategories: disagreement by the UK courts with a judgment of the ECtHR, and disagreement by the ECtHR with a judgment of the UK courts. Consensual dialogue can also be divided into two subcategories: judgments by the UK courts with which the ECtHR agrees, or could potentially agree with in future (influence or the prospect of influence by the UK courts) and the application of ECtHR judgments by the UK courts (influence by the ECtHR). It should be recalled, however, that these are neither strict nor mutually exclusive categories. Conflictual dialogue, for example, also has the potential for subsequent agreement and influence.¹⁰³ Nonetheless, these categories help to illuminate the differences of emphasis in the judicial understandings of dialogue between these courts which were encountered during the interviews and which have manifested in the extra-judicial commentary. The following sections consider each of the categories in turn and the level of consensus surrounding them.

3.2 Conflictual Interaction

3.2.1 *Disagreement by the UK courts*

This first category of conflictual dialogue was the subject of the only clear consensus across the interviews. There was a common understanding among the judges interviewed that formal dialogue involves a decision by a national court which *signals concerns* regarding, or even *disagrees* with, a particular aspect of the Strasbourg jurisprudence. One Justice defined dialogue as

... a polite way of saying that a national court can express disagreement with a decision by a Strasbourg section or even the Grand Chamber when it feels that there's been a failure to understand the domestic law sufficiently or where they feel the decision hasn't been adequately reasoned.¹⁰⁴

Another Justice similarly explained: 'We are saying to Strasbourg "Think again" or "What about this problem?" or "We don't think you've really dealt with this"'.¹⁰⁵ These views echo similar

¹⁰² *ibid*

¹⁰³ As seen in Chapter 2, Kuo points out that dialogic interactions can typically involve elements of both cooperation and contestation: 'a successful dialogue begins with contestation and then proceeds in a spirit of cooperation, leading to the resolution of potential conflicts between distinct orders'. Ming-Sung Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?' (2013) 26(2) *CJLS* 341, 364

¹⁰⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁰⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

statements made by senior UK judges in extra-judicial lectures¹⁰⁶ and reflects the dominant conception of dialogue apparent within the UK case law, neatly encapsulated in the judgment of Lord Mance in *Chester*¹⁰⁷ as the process by which the national courts ‘express their concerns and, in an appropriate case ... refuse to follow Strasbourg case-law’.¹⁰⁸

In such instances, there is a clear expectation that the ECtHR will undertake a review of its own position. Lady Justice Arden has argued that the ECtHR must be ‘willing in an appropriate case to reconsider an earlier decision in the light of disagreement by the superior national court.’¹⁰⁹ This expectation has been made clear in the case law on a number of occasions. In *Horncastle*, Lord Phillips concluded his judgment: ‘I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case’.¹¹⁰ Likewise, in *Chester*, Lord Mance reasoned that where a national court disagrees with a judgment of the ECtHR, it could do so ‘in the confidence that the reasoned expression of a diverging national viewpoint will lead to a review of the position in Strasbourg’.¹¹¹

A number of the Strasbourg judges shared with the Supreme Court Justices the view that formal dialogue can involve this type of conflictual exchange. One judge, for example, observed: ‘I think that it is quite right that national superior courts should have a second bite at the cherry, should at least be allowed to react to a judgment by the ECtHR concerning their country and to say to the ECtHR, in polite terms and explaining why, “Sorry, but we think that you have got it wrong.” This is so particularly where the disagreement goes to assessment of domestic law’.¹¹²

¹⁰⁶ The former Court of Appeal judge, Sir Stephen Sedley, has argued that disagreements by national courts with an ECtHR decision are ‘...not acts of indiscipline or insubordination’ but ‘...part of the opportunity which a dualist system affords for a constructive dialogue between national and supranational courts’. The UK courts, he argued at the opening of ECtHR judicial year, ‘reserve the right to question your jurisprudence’. Sedley (n 73)

In the same way, a Justice interviewed in Alan Paterson’s study referred to dialogue as ‘judgments ... which contain a well reasoned critique of Strasbourg case law’. Alan Paterson *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 233. The Supreme Court’s Deputy President, Lady Hale, has similarly written of seeking a meaningful dialogue with the ECtHR through judgments ‘... if we think that they have gone too far’. Lady Hale, ‘What’s the Point of Human Rights?’ (Warwick Law Lecture, 28 November 2013) <<https://www.supremecourt.uk/docs/speech-131128.pdf>> accessed 9 December 2016. The President of the Supreme Court, Lord Neuberger, has described dialogue as ‘giving a detailed judgment not following the Strasbourg jurisprudence, and explaining why’. Lord Neuberger, ‘The Role of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK Experience’ (Supreme Court of Victoria Conference, 8 August 2014) <<https://www.supremecourt.uk/docs/speech-140808.pdf>> accessed 9 December 2016.

¹⁰⁷ *Chester* (n 11)

¹⁰⁸ *ibid* [27]

¹⁰⁹ Arden, *Building New Legal Orders* (n 33) 286

¹¹⁰ *Horncastle* (n 88) [108]

¹¹¹ *Chester* (n 11) [27]. Lord Sumption in the same case remarked that where a national court disputes the ECtHR’s interpretation of domestic law, this ‘may, when properly explained, lead to the decision being reviewed by the Strasbourg Court’. *ibid* [121]

¹¹² Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

Further, as seen in Chapter 1, in calling for ‘increased dialogue’¹¹³ between the courts, the former ECtHR President, Sir Nicolas Bratza, has similarly remarked that it is ‘right and healthy that national courts should continue to feel free to criticise Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices’,¹¹⁴ even refusing to follow them in order to provide the ECtHR the ‘opportunity to reconsider the decision in issue’.¹¹⁵

By far the most frequently cited example of formal dialogue during the interviews with the Justices was the *Horncastle / Al-Khawaja* exchange concerning the admissibility of hearsay evidence and the right to a fair trial under Art.6 ECHR. This appears to be widely considered the paradigmatic example of dialogue between these courts. As seen in the introductory chapter, Sir Nicolas Bratza used his concurring judgment to applaud the decision as ‘a good example of the judicial dialogue between national courts and the European Court on the application of the Convention’.¹¹⁶ Likewise, another former ECtHR President, Dean Spielmann, has hailed this exchange as the ‘example *par excellence* of judicial dialogue’.¹¹⁷

Another example frequently cited by the Justices has been encountered already in this chapter: the repeated conflict between the UK courts and the ECtHR as to whether a person’s right to respect for their home under Art.8 ECHR required the courts to be able to determine the proportionality of an eviction from social housing or local authority sites before issuing a possession order. Contrary to Strasbourg’s view, the House of Lords repeatedly held that Art.8 made no such requirement,¹¹⁸ maintaining instead that the availability of judicial review (and, later, expanded grounds of judicial review to allow for greater factual sensitivity,¹¹⁹ developed in response to the adverse ECtHR case law) provided an adequate safeguard against the risk of evictions which would violate a person’s right to respect for their home. The ECtHR, however, repeatedly disagreed with that assessment.¹²⁰ In its view, the loss of a home resulting from a possession order required the courts to be able to determine whether it was a proportionate interference with Art.8.¹²¹ Judicial review, it reasoned, did not provide the opportunity for the

¹¹³ Bratza (n 54) 511

¹¹⁴ *ibid* 512

¹¹⁵ *ibid*. The former UK judge at the ECtHR, Paul Mahoney, has written to similar effect: ‘... national superior courts remain free to open a judicial dialogue with the Strasbourg Court by—exceptionally—declining to follow the Strasbourg precedent and by explaining in the reasoning of their judgment why they believe that in the particular instance the Strasbourg Court has got it wrong’. Mahoney (n 46) 581

¹¹⁶ *ibid* [O-I2 2]

¹¹⁷ Spielmann (n 17)

¹¹⁸ *Qazi* (n 36)

¹¹⁹ *Kay* (n 42) [110] (Lord Hope); *Doherty v Birmingham City Council* [2009] 1 AC 367 [55] (Lord Hope)

¹²⁰ *Connors* (n 41); *McCann v United Kingdom* (2008) 47 EHRR 40; *Kay v United Kingdom* (2012) 54 EHRR 30

¹²¹ *McCann* (n 120) [50]

courts responsible for making possession orders to make that assessment.¹²² At the culmination of a resistance by majorities in the House of Lords spanning three separate decisions,¹²³ however, a situation which Paterson describes as ‘reminiscent of trench warfare’,¹²⁴ the Supreme Court unanimously decided to accept the Strasbourg view that an applicant facing eviction from social housing must be able to challenge the proportionality of that decision.¹²⁵ One Justice described the saga: ‘It certainly was a dialogue. They decided something, we decided something, they decided something, we decided something, and it was definitely a catch-up going on’.¹²⁶

3.2.2 Disagreement by the ECtHR

The second, and more controversial, category of conflictual dialogue which emerged from the interviews is the decisions by the ECtHR which disagree with judgments of the domestic courts. During the interviews with the Justices, two examples of such interaction were cited. The first example was the disagreement stemming from the UK’s former policy of retaining the biometric data of individuals previously suspected, though not convicted, of criminal offences.¹²⁷ In *S and Marper*,¹²⁸ the House of Lords unanimously held that the policy was not a disproportionate restriction on the Art.8 rights of the appellants.¹²⁹ However, when the case was taken to Strasbourg,¹³⁰ the Grand Chamber unanimously disagreed. It found that the data retention was an indiscriminate and thus disproportionate restriction on the right to a private life. Dickson observes that this was particularly striking given that all ten UK judges who heard the case at the domestic level found no violation of Art.8 and had declined to make a declaration of incompatibility, whereas all seventeen ECtHR judges found a violation.¹³¹ When the Supreme Court was next confronted with the matter, faced with the unequivocal view from the ECtHR and an ‘irreconcilable conflict’¹³² between the UK and Strasbourg positions, it accepted and applied the reasoning of the Grand Chamber.¹³³

¹²² *ibid* [53]. In *Kay* however, the Court welcomed ‘the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8’. *Kay* (n) (HL) [73]

¹²³ *Qazi* (n 36); *Kay* (n 42); *Doherty* (n 119)

¹²⁴ Paterson (n 106) 227

¹²⁵ *Pinnock v Manchester City Council* [2011] 2 AC 104

¹²⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹²⁷ Previously contained under the Police and Criminal Evidence Act 1984, s.64

¹²⁸ *R (S and Marper) v Chief Constable of South Yorkshire*; [2004] 1 WLR 2196

¹²⁹ Baroness Hale, however, held that Art.8 ECHR was engaged: ‘... there can be little, if anything, more private to the individual than the knowledge of his genetic make-up’. *ibid* [71]

¹³⁰ *S and Marper v United Kingdom* (2009) 48 EHRR 50 (Grand Chamber)

¹³¹ Brice Dickson, *Human Rights and the UK Supreme Court* (OUP 2013) 82

¹³² *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230 [12] (Lord Dyson)

¹³³ ‘It is common ground that, in the light of *Marper ECtHR*, the indefinite retention of the appellants’ data is an interference with their rights to respect for private life protected by article 8 of the ECHR which, for the reasons given by the ECtHR, is not justified under article 8(2). It is agreed that *Marper UK* cannot stand’. *ibid* [15]

The second example cited turned on the meaning of ‘jurisdiction’ under Art.1 ECHR and the extent to which it gave the Convention rights extra-territorial effect. In the case of *Al-Skeini*,¹³⁴ the House of Lords held that questions relating to the interpretation of Art.1 ECHR and thus the entire reach of the Convention were for the Strasbourg court alone.¹³⁵ However, it concluded from the Strasbourg jurisprudence that generally a state could only be said to have extra-territorial jurisdiction within the meaning of Art.1 where it had ‘such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in section 1 of the Convention’.¹³⁶ Later, in *Smith (no.1)*,¹³⁷ a (6:3) majority at the Supreme Court held that the armed forces of a contracting state operating outside of its territory are not within its jurisdiction within the meaning of Art.1. When the Grand Chamber delivered its *Al-Skeini* decision,¹³⁸ however, it disagreed with that assessment. While a state’s jurisdiction under Art.1 was to be considered ‘primarily territorial’,¹³⁹ it could also arise by reason of acts which are performed or produce effects outside of its territory,¹⁴⁰ where a state exercises effective control over an area outside of its territory as a result of its military action,¹⁴¹ but also from a state’s use of force outside of its territory which brings individuals under the control of the state’s authorities. Where a state’s agents exercise control over an individual through force, there was an obligation to secure only the Convention rights which are ‘relevant to the situation of that individual’.¹⁴² In *Smith (no 2)*,¹⁴³ the Supreme Court was unanimous in the view that a state’s armed forces abroad fell within its jurisdiction for the purposes of Art.1 and that the appropriate course was to depart from *Smith (no 1)*.¹⁴⁴

As with domestic judgments which disagree with a position taken by the ECtHR, there is a shared understanding that the national courts must undertake a review of their position in the face of an adverse ECtHR judgment.¹⁴⁵ It should be stressed, however, that there are differences

¹³⁴ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL)

¹³⁵ *ibid* [28] (Lord Bingham), [65] (Lord Rodger), [105] Lord Brown

¹³⁶ *ibid* [79] Lord Rodger

¹³⁷ *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1

¹³⁸ *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber)

¹³⁹ *ibid* [131]

¹⁴⁰ *ibid* [131]

¹⁴¹ *ibid* [127]

¹⁴² *Al-Skeini (n)* (Grand Chamber) [137]

¹⁴³ *Smith and others v Ministry of Defence (no 2)* [2014] AC 52

¹⁴⁴ *ibid* [55] Lord Hope

¹⁴⁵ ‘...it is obvious that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights’. *R (Purdy) v DPP* [2010] 1 AC 345, [34] (Lord Hope). Likewise, in *McCaughey and Another* [2012] 1 AC 725, 757 Lady Hale stated: ‘If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before’. Cited in Bjorge (n 45) 21

of judicial view as to whether this type of interaction reflects dialogue. On the one hand, for example, Lady Justice Arden has suggested that it does. In her view, dialogue between the courts purports to ‘give both the national and supranational court the chance to think again’.¹⁴⁶ In the same vein, the former ECtHR President, Jean-Paul Costa, has written of dialogue as ‘divergences’¹⁴⁷ by the ECtHR with the judgments of national courts: ‘We have the utmost respect for constitutional courts, but if we always agreed with them, what would be the point of our Court?’.¹⁴⁸ During the interviews, however, very few Justices cited such instances as dialogue. Additionally, the former UK judge at the ECtHR, Paul Mahoney, has suggested that these examples do not reflect ‘dialogue’ but ‘instances of the Strasbourg Court in effect reversing the national ruling on a human rights issue’.¹⁴⁹

3.3 Consensual Interactions

3.3.1 National courts influencing the ECtHR

Turning to the consensual interactions, several Justices and ECtHR judges identified dialogue as the domestic judgments which have either influenced, or are considered to have the prospect of influencing, the judgments of the ECtHR, in the absence of disagreement. For the Justices, this category was associated particularly with UK judgments which make novel contributions to the development of Convention rights, either in areas upon which the ECtHR has yet to make a ruling or where there is no settled approach to the issue within the case law. Here, a number of the Justices cited the case of *Rabone*.¹⁵⁰ The question there was whether an operational duty exists on states under Art.2 ECHR to protect informal psychiatric patients against the risk of suicide. In deciding that there was such a duty, the Supreme Court acknowledged that its conclusion was effectively going further than the existing Strasbourg jurisprudence but was, nonetheless, one which flowed from it.¹⁵¹ In *Reynolds v UK*,¹⁵² a subsequent Strasbourg case concerning the same issue but arising from facts which occurred prior to the *Rabone* judgment, the ECtHR endorsed the Supreme Court’s approach. Noting that the Court of Appeal in 2010 had held that the operational duty did not apply to informal

¹⁴⁶ Speech by Lady Justice Arden in ECtHR, *The Convention is Yours* (n 26) 26

¹⁴⁷ Costa, ‘Speech to the Constitutional Court of the Russian Federation’ (n 101)

¹⁴⁸ Costa suggests that if the ECtHR were to simply agree with the views of national courts, it would ‘give rise to a form of judicial immunity without any rational basis’. *ibid*

¹⁴⁹ Mahoney (n 46) 571

¹⁵⁰ *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 (SC)

¹⁵¹ *ibid* [112] (Lord Brown)

¹⁵² *Reynolds v United Kingdom* (2012) 55 EHRR 35

patients,¹⁵³ it welcomed the fact that the ‘underlying reasoning [of the domestic courts] ... changed over the years’.¹⁵⁴ Lady Hale subsequently inferred from this decision that the ECtHR ‘clearly thought that we were right’.¹⁵⁵ Several Justices considered such cases to reflect a form of dialogue because they enable the UK courts to ‘help [Strasbourg] to develop the law’¹⁵⁶ and thus offer ‘opportunities for influence’¹⁵⁷ at the European level.

A number of ECtHR judges have also identified dialogue in such terms. A manifestation of the consensual dialogue suggested by the former ECtHR President Jean-Paul Costa, for example, is where the Strasbourg Court ‘not only endorses the decision of a constitutional court but uses the reasoning in its own decision’.¹⁵⁸ The former UK judge at the ECtHR, Paul Mahoney, points to the exchange between the courts concerning the question of whether any of the Convention rights affords a ‘right to die’. In *Pretty*,¹⁵⁹ the House of Lords concluded on the basis of the available Strasbourg jurisprudence that none of the Convention rights¹⁶⁰ could be interpreted in such a way, even in the extreme case of a person suffering from a degenerative illness (though Lord Hope considered that the right to a private life under Art.8 was at least engaged).¹⁶¹ When the case was subsequently considered in Strasbourg,¹⁶² the reasoning of the Law Lords was emphatically endorsed, with the court citing no fewer than forty paragraphs from Lord Bingham’s judgment alone.¹⁶³ However, it also pointedly endorsed Lord Hope’s view that Art.8 was engaged.¹⁶⁴ Mahoney argues that the ‘Careful analysis of the relevant human rights case-law by the domestic, British courts in *Pretty* clearly helped the Strasbourg Court to develop its own interpretation when the case subsequently came to Strasbourg’.¹⁶⁵

Interestingly, however, it was only *a minority* of the Justices interviewed who considered such cases to reflect a form of dialogue, with several others contesting the view. One Justice, for

¹⁵³ *Rabone v Pennine Care NHS Foundation Trust* [2011] QB 1019 (CA)

¹⁵⁴ *Reynolds* (n 152) [63]

¹⁵⁵ Lady Hale, ‘What’s the Point of Human Rights?’ (n 106)

¹⁵⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹⁵⁷ *ibid*

¹⁵⁸ Costa, ‘Speech to the Constitutional Court of the Russian Federation’ (n 101)

¹⁵⁹ *R (Pretty) v DPP* [2002] 1 AC 800

¹⁶⁰ Arguments were advanced on the basis of Articles 2, 3, 8, 9 and 14 of the Convention rights.

¹⁶¹ ‘The way [Mrs Pretty] chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected’ *Pretty* (n 159) [100]

¹⁶² *Pretty v United Kingdom* (2002) 35 EHRR 1

¹⁶³ *ibid* [14]

¹⁶⁴ The Court declared that ‘[t]he applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life’. *ibid* [67]

¹⁶⁵ Mahoney (n 46) 572. The former Supreme Court Justice, Lord Walker, hailed the ECtHR judgment as ‘an example of a real dialogue between our final appeal tribunal and the Strasbourg Court’. Robert Walker, ‘The Indefinite Article 8’ (Sir Thomas More Lecture, Lincoln’s Inn, 9 November 2011) <https://www.supremecourt.uk/docs/speech_111109.pdf> accessed 15 January 2017

example, remarked that ‘if you regard those as dialogue, then every case in which we look at Strasbourg jurisprudence and seek to apply it is an example of dialogue’.¹⁶⁶ It was clear that, for a number of the Justices, disagreement is intrinsic to the dialogue metaphor in this context. Referring to the *Rabone*-type case, three Justices remarked:

There was no question of a disagreement with Strasbourg so I would not see that as a dialogue case.¹⁶⁷

I don’t think that’s what’s normally being meant by it. What’s normally being meant by it is a genuine interchange where Strasbourg says something, we say something slightly different.¹⁶⁸

I think it really would be a misrepresentation to suggest that this was the outcome of some form of dialogue. It was simply a question of our looking at the relevant jurisprudence, considering it, having regard to it and coming up with our own conception of what the Convention right meant in the particular circumstances of the case.¹⁶⁹

Such remarks point to a specific conception of dialogue centred strictly upon disagreement by the domestic courts with a decision of the ECtHR. Relating these observations back to the question posed at the outset of this part of the chapter suggests that, for a number of the Supreme Court Justices, ‘dialogue’ does not connote the communication of all views by the domestic courts to the ECtHR but rather those which either disagree with a particular aspect of the Strasbourg jurisprudence or, on the most generous view, develop it in areas upon which the ECtHR has yet to make a direct ruling. The difference is consistent with the understandings of dialogue which have manifested in the case law, explored in Chapter 1. On the one hand, the dominant conception is centred on disagreement by the UK courts with a decision of the ECtHR.¹⁷⁰ Alongside this, however, is a conception of dialogue visible in *Rabone* and *Ambrose*¹⁷¹ which stresses the ability of the UK courts to contribute proactively to the development of ECHR principles where there is no ECtHR case law dealing directly with the point in issue.

¹⁶⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁶⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁶⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁶⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷⁰ *R v Lyons and Others* [2003] 1 AC 976 [46] (Lord Hoffmann); *In re P (Adoption: Unmarried Couple)* [2009] 1 AC 173, [35] (Lord Hoffmann); *Horncastle* (n 88) [11] (Lord Phillips); *Pinnock* (n 125) [48] (Lord Neuberger), *Chester* (n 11) [27], [34] (Lord Mance), [137] (Lord Sumption); *Moohan v Lord Advocate* [2015] 1 AC 901 [13] (Lord Hodge); *Akerman-Livingstone* (n 11) [20] (Lady Hale)

¹⁷¹ *Ambrose v Harris* [2011] 1 WLR 2435

3.3.2 *The ECtHR influencing national courts*

The fourth and widest category of interaction, one which emerged only from the interviews with the Strasbourg judges, is the decisions by domestic courts which implement ECtHR jurisprudence into the domestic legal system. There was a strong consensus amongst the ECtHR judges interviewed that dialogue refers to the process by which national judges ‘translate’,¹⁷² ‘integrate’,¹⁷³ or ‘assimilate’¹⁷⁴ through their decision-making the judgments of the ECtHR into domestic law. One Strasbourg judge interviewed explained that it represents ‘a different kind of dialogue’:¹⁷⁵

In this context it is not a question of the national courts saying to the ECtHR, “We are asking you to reconsider this point because we think that you have got it wrong.” Rather, it is a dialogue in the sense of: “We take notice of the ECtHR’s finding that this or that aspect of our domestic law has given rise to a violation of the Convention. What can we, the national courts, do to execute the ECtHR judgment, to translate it into practice in our legal system?” This participation by the national courts in facilitating an effective execution of the ECtHR judgment within their legal system, quite apart from any measures of execution by the national parliament or government, represents another form of dialogue.¹⁷⁶

These insights are reinforced by other extra-judicial comments from former ECtHR judges. For Costa, for example, the most welcome form of dialogue is where the national court ‘coordinates its decisions with the Strasbourg caselaw, adhering to it and, above all, being guided by it’.¹⁷⁷ This is echoed by Spielmann, who argues that the dialogue ‘at the heart of vindicating Convention rights’¹⁷⁸ is where the national courts ‘...appropriate the principles and methodology of the European case-law, notably proportionality, in the determination of the cases that present before them’.¹⁷⁹ According to one Strasbourg judge interviewed, this form of interaction is ‘dialogue at its best’.¹⁸⁰

¹⁷² Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁷³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁷⁴ *ibid*

¹⁷⁵ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁷⁶ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁷⁷ Costa, Speech to the Constitutional Court of the Russian Federation’ (n 101)

¹⁷⁸ Spielmann (n 17)

¹⁷⁹ *ibid*

¹⁸⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

3.4 Judicial Understandings of ‘Dialogue’: Reconciling the Divergences

In light of the preceding sections, it is reasonable to qualify the understanding of formal dialogue developed so far. In total, it has been described how four categories of interaction emerged: conflictual dialogue, either in the form of UK judgments which disagree with ECtHR judgments or ECtHR judgments which disagree with UK judgments; and consensual dialogue, either in the form of UK judgments which influence ECtHR judgments in the absence of disagreement, or ECtHR judgments which influence UK judgments. Among these categories, there were areas of consensus and points of difference between the judges. There was a strong consensus that this type of ‘dialogue’ refers to the situation where *a national court expresses disagreement with a decision of the ECtHR*. However, there was an explicit difference of view between the Justices as to whether the decisions of the UK courts which further develop ECHR principles in the absence of direct ECtHR case law could be considered a form of dialogue. Further, it was only the ECtHR judges who considered the general effectuation of ECHR principles into national law by domestic courts as a form of dialogue. None of the Justices interviewed conceived of the term in such a broad way. Thus, it would appear that there are diffuse judicial understandings at work as to the precise nature of the dialogue between these courts.

The differences in emphasis, however, are not irreconcilable. What was consistently stressed by all of the interviewed Justices was the capacity of the UK courts to *express their own views* on questions related to the interpretation of Convention rights, whether by criticising or departing from a particular strand of ECtHR jurisprudence, or by developing the Convention principles in areas which have not been directly ruled upon by the ECtHR, and thereby create the prospect of influencing that court.

In terms of the differences between the Justices and the ECtHR judges, the categories of dialogue emphasised by the respective judges simply reflected influence of their courts upon the judgments of the other. Thus, what the Justices emphasised were the domestic judgments which either influence or have the prospect of influencing the ECtHR. Dialogue is understood principally by the Justices as the ‘upward influence of national courts’,¹⁸¹ to borrow a phrase from Masterman. What the Strasbourg judges emphasised as dialogue, in contrast, was the downward influence of their court upon the domestic courts. The different understandings are

¹⁸¹ Roger Masterman, ‘Deconstructing the Mirror Principle’ in Roger Masterman and Ian Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP 2013) 111, 123

thus consistent with the notion of dialogue based on ‘reciprocal influences’¹⁸² which, as discussed in previous chapters, is at the core of the concept.

4. The Practical and Normative Constraints

4.1 The Practical Constraints

The chapter has established that formal dialogue is understood by the judges as a process by which the courts exchange views and seek to influence one another through their respective judgments. Further, while there is some variation as to the nature of the interactions which are considered to reflect dialogue, the judges tended to emphasise the type of judgment-based interaction in which the court to which they belong exerts influences upon the other. As indicated by the definition provided at the outset of this chapter, however, both practical and normative constraints were identified. At the practical level, this form of dialogue was considered an ‘indirect’¹⁸³ exchange of views, taking place via the ordinary process of litigation in the respective courts.¹⁸⁴ As such, it was viewed as a case-dependent process. One Justice remarked: ‘[t]he trouble is that – certainly this kind of dialogue – depends upon the cases which happen to come to us ... We don’t go out looking for cases’.¹⁸⁵ Likewise, another Justice observed: ‘...we’re a second or third-tier appellate court dealing with things sometime after they’ve become urgent down below or notorious down below, and we deal with cases as they come to us’.¹⁸⁶ In addition to having little control over the issues that become the subject of adjudication, Lady Justice Arden has pointed out that the UK courts have little say over the issues which merit the attention of the ECtHR:

The domestic court has no control over which cases become the subject 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.¹⁸⁷

Thus, formal dialogue is not a fluid discussion but one confined to the particular issues arising from a given case, taking place on what one Strasbourg judge described as an ‘ad hoc, case-by-

¹⁸² Costa, Speech to the Constitutional Court of the Russian Federation’ (n 101)

¹⁸³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁸⁴ This point is also made in Philip Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine’ [2012] PL 253, 262-3

¹⁸⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁸⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁸⁷ Arden, *Building New Legal Orders* (n 33) 279

case basis’,¹⁸⁸ as and when particular issues happen to arrive consecutively at the UK courts or the ECtHR for consideration.

4.2 Normative Constraints

Aside from the practicalities of formal dialogue, two *normative* constraints were identified. These arise from two institutional relationships: the relationship between the UK courts and Parliament, on the one hand, and the relationship between the UK courts and the ECtHR, on the other.

4.2.1 The UK courts and Parliament

The first constraint stems from the constitutional relationship between the judicial and legislative branches of government under the separation of powers in the United Kingdom. As seen in the introductory chapter, the UK’s particular tradition of constitutionalism is considered to be political rather than judicial in character. For the Justices, formal dialogue with the ECtHR was therefore seen within the context of their relationship with Parliament: in particular, the need to respect the doctrine of Parliamentary sovereignty. While one Justice alluded to the ‘the most extreme margins’,¹⁸⁹ whereby the UK courts might consider not following an Act of Parliament, it was said that the UK courts are bound by the decisions of the legislative branch. One Justice explained: ‘whatever Parliament decides, the UK courts will follow and they will have no problem in doing that – it’s something which we’ve always done’.¹⁹⁰ To this extent, the formal dialogue with the ECtHR was conceived as effectively subject to parliamentary oversight; the outcomes contingent upon Parliament not subsequently legislating to the contrary. For this reason, one Justice observed: “‘dialogue’ suggests just a two-way process but, actually, it’s a multi-way process ... It’s often a tripartite thing: court here, court there, Parliament. It goes on’.¹⁹¹ Parliamentary sovereignty also appeared to play a role to the extent that a number of the Justices expressed awareness that the HRA 1998 did not bestow legislative authorisation upon them to take the protections of the Convention rights under the HRA significantly beyond those laid down in the jurisprudence of the ECtHR.¹⁹²

¹⁸⁸ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

¹⁸⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014); *Jackson and others v Attorney General* [2005] 1 AC 262 [102] (Lord Steyn)

¹⁹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹² To this extent, the interviews echoed the thinking of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20]: ‘It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts...’. See also Baroness Hale in *R (Animal Defenders International) v Secretary of State For Culture, Media*

4.2.2 *The international rule of law*

The second normative constraint upon formal dialogue, this time upon the relationship between the UK courts and the ECtHR, is the *international rule of law*.¹⁹³ Two principles were cited by the Justices in this connection. First, that it is their presumptive duty to adhere to a ‘clear and constant line’¹⁹⁴ of Strasbourg jurisprudence, particularly when this line has been confirmed by a decision of the Grand Chamber.¹⁹⁵ Second, and connected to the first, is the long-standing principle of the common law that UK courts will attempt to interpret and apply domestic law in a way that does not place the UK in breach of its international obligations.¹⁹⁶ One Justice explained the combined effect of these principles on the way that they interpret the HRA: ‘Unless we pull out of the Council of Europe, the legislation would be there to reflect our international obligations, and there is a principle of interpretation that Parliament intended to act consistently with our international obligations’.¹⁹⁷ With this in mind, it was considered to be ‘futile ... to refuse to follow a Grand Chamber decision which reflects a clear and constant approach, because we’ll only be putting the UK in breach of its international obligations for no good purpose’.¹⁹⁸

On the one hand, a number of the Justices interviewed described a shift away from the first of the two principles. One Justice, for example, observed that ‘the past fourteen years have seen a development of our approach. I think that we are somewhat moving away from *Ullah*’.¹⁹⁹ Similarly, another Justice noted: ‘The possibility exists that you may get courts taking different views. I sense that among our courts there is a greater readiness to recognise that that may happen from time to time’.²⁰⁰ The case law on s.2 HRA, discussed in Chapter 1, certainly reflects

and Sport [2008] 1 AC 1312 [53]: ‘I do not believe that, when Parliament gave us those novel and important powers, it was giving us the power to leap ahead of Strasbourg in our interpretation of the Convention rights’.

¹⁹³ Kumm offers the following definition of the international rule of law: ‘... nations, in their relationships to one another, are to be ruled by law. The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions’. Mattias Kumm, ‘International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model’ (2002) 44(1) *Virginia J Intl L* 19, 22

¹⁹⁴ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions*; [2001] UKHL 23 [26] (Lord Slynn)

¹⁹⁵ *Chester* (n 11) [27] (Lord Mance)

¹⁹⁶ *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771: ‘[I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.’ In *Chester* (n 11) [121], Lord Sumption suggested that ‘In enacting the Human Rights Act 1998, Parliament must be taken to have been aware that effect would be given to the Act in accordance with this long-standing principle’.

¹⁹⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹⁸ *ibid*

¹⁹⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁰⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014). Since the interviews were conducted, these views have also manifested within the Supreme Court’s case law.

this view.²⁰¹ Further, each of the eight Justices interviewed felt that it was technically open to the UK courts to refuse to follow a decision of the ECtHR, with several indicating explicitly that this remains the case even where a decision has been issued by the Grand Chamber of the ECtHR. While the UK courts have yet to openly depart from a Grand Chamber ruling, there were indications by some of the Justices that the option is technically open. One Justice remarked that ‘even if we had three absolutely clear, consistent decisions of the Grand Chamber, it would still be open to us, as a matter of principle, to say “We’re not following it”’.²⁰² The Strasbourg judges interviewed were comfortable with the notion that domestic courts can disagree with ECtHR decisions. Indeed, it was described earlier how one judge felt it was the prerogative of national courts to take ‘a second bite at the cherry’²⁰³ where they have concerns with a particular decision of the ECtHR. Further, as seen in Chapter 1, Sir Nicolas Bratza has stressed that “‘Strasbourg has spoken, the case is closed’²⁰⁴ is not the way in which I or my fellow judges view the respective roles of the two courts’”.²⁰⁵

Nonetheless, there appears to be a consensus that there are limits to the extent to which national courts can disagree with the ECtHR. Despite the emphasis of a shift away from *Ullah*, several Justices expressed a strong inclination to avoid disagreements with the ECtHR, based on considerations of ‘the value of the rule of law internationally’.²⁰⁶ the view, to quote another Justice, that ‘the whole point of the Convention is that there should be a general standard across the whole of Europe’²⁰⁷ and that ‘it’s desirable to have a European court basically laying down the principles’.²⁰⁸ References were made to the ‘benefits of having shared norms across a continent, the benefits that that can bring to this country in terms of the stability and the creation of shared values’.²⁰⁹ Similarly, another Justice expressed the view that the uniformity harnessed by the Convention is ‘one of the things which has maintained peace, if you like, for many years’.²¹⁰ Further, several showed consideration for the goals of the Strasbourg court itself. It was felt that the UK courts should be mindful of the ‘imperatives that the European court is facing’,²¹¹ just as the Strasbourg court should take heed of the concerns expressed by the national

²⁰¹ Lord Wilson has set out a timeline of UK cases indicative of what he perceives as the ‘retreat from the *Ullah* principle’. *Moohan* (n 170) [104]

²⁰² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁰³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²⁰⁴ *Secretary of State for the Home Department v AF and another (no 3)* [2010] 2 AC 269, [98] (Lord Rodger)

²⁰⁵ Bratza (n 54) 512

²⁰⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²⁰⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁰⁸ *ibid*

²⁰⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²¹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

courts: ‘they have to address other socio-political circumstances than those which are current in our society so, in a sense, you have to tolerate what are essentially minor interventions for the greater good’.²¹² Another of the Justices similarly remarked: ‘I think we should certainly not think that it’s only us they’re dealing with – there’s a slight feeling of that in the United Kingdom’.²¹³

This commitment to the international rule of law appears to act as a constraint in two ways. First, it appears to demand that national courts depart from ECtHR rulings only ‘exceptionally’.²¹⁴ Regular divergences from the standards set in the caselaw of the ECtHR were felt to pose damaging implications from an international rule of law perspective. As one Justice explained:

If you take too much advantage and you regularly disregard Strasbourg decisions, then the thing does start to fall apart because, well, it’s contrary to the rule of law. Nobody knows where they are, the general hierarchy is not being observed and the consistency across the Council of Europe countries goes.²¹⁵

Equally, there is a consensus that that disagreements between the courts ‘can’t go on indefinitely’²¹⁶ – that ‘[d]ialogue cannot go on for ever’.²¹⁷ To this extent, there appears to be a mutual understanding among judges that a Grand Chamber judgment should mark the end of any dialogue between the courts. This perhaps explains why few of the judges considered final ECtHR judgments, particularly from the Grand Chamber, which directly contradict domestic judgments, to reflect dialogue. In *Chester*, Lord Mance was explicit that dialogue as disagreement by the national courts is subject to ‘limits’²¹⁸ where a Grand Chamber decision had been delivered, requiring ‘some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level’.²¹⁹ Endorsing Lord Mance’s views in *Chester*, Spielmann has argued:

... one must sincerely hope never to find a situation in which a domestic court is placed in such a dilemma as to have no option but to defy the authority of the

²¹² *ibid*

²¹³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹⁴ Mahoney (n 46) 581

²¹⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹⁶ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²¹⁷ Speech by Lady Justice Arden in ECtHR, *The Convention is Yours* (n 26) 26

²¹⁸ *ibid* [27]

²¹⁹ *ibid*

European Court. It would signal the clear failure of dialogue, which can only be detrimental to the full observance of the Convention'.²²⁰

Thus, formal dialogue does not reflect a free-flowing exchange of views and unhindered opportunities for influence between the courts. The practicalities of decision-making mean that it is necessarily an opportunistic process, while the normative constraints guide and limit the ways in which the UK courts are able to engage with the ECtHR case law, steering them away from outright conflict with final judgments of the ECtHR and confining disagreements to exceptional circumstances.

5. Conclusion

This chapter, the first of three drawing upon the interviews with the Justices and Strasbourg judges, has addressed the first research question: what is judgment-based ('formal') dialogue in the context of the relationship between the UK courts and the ECtHR? The answer proposed is that while the disputed notion of formal 'dialogue' – described as one of the 'two basic dialogue levels' between the UK courts and the ECtHR – eludes any precise definition, it can be said to refer to a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their respective judgments. By exploring the different aspects of this definition, this chapter has produced three sets of conclusions as to how the judges understand the *form* of this judgment-based dialogue.

First, it has shown that the process of formal dialogue is considered, in both descriptive and normative terms, to involve mutual listening on the part of both courts and mutual explanation for the respective positions which they adopt on particular issues. To this end, their shared language, the HRA 1998, the detailed, explanatory methods of reasoning and the flexibility of each court in the development of the law in their respective systems are regarded by the judges as enabling cross-influence. It is clear from the judges' accounts, however, that this dialogue does not consist of one 'diktat versus the other court's diktat'²²¹ or 'competing

²²⁰ *ibid.* The Vice-President of the French Conseil d'Etat, Jean-Marc Sauvé, has echoed this view, arguing that 'once the Court has ruled in a Grand Chamber judgment, the debate must then be closed'. In his view, 'Nothing would be more damaging to the protection of rights and to their legal certainty than exacerbated, drawn-out and fundamental disagreement between the national courts and the European Court of Human Rights'. Jean-Marc Sauvé, 'The Role of National Authorities' (Subsidiarity: a Two-Sided Coin? Strasbourg, Friday 30 January 2015) <www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauvé_ENG.pdf> accessed 10 December 2016

²²¹ Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8(2) *Utrecht L Rev* 100, 105 citing Bruno De Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' in Paul Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Bloomsbury 2002) 39, 41

monologues’.²²² Indeed, despite that some of the judges question whether ‘dialogue’ is the most appropriate description, what they essentially describe is ‘direct dialogue’²²³ as conceived by Slaughter: ‘communication between two courts that is effectively initiated by one and responded to by the other’,²²⁴ underpinned by ‘an awareness on the part of both participants of whom they are talking to and a corresponding willingness to take account of the response’.²²⁵ Each court is certainly conscious of the other as an addressee to their judgments and engages in judicial diplomacy – tailoring their reasoning in consideration of how their judgments will be received by the other court – in order to enhance the prospect of influence. The observations in this way reinforce previous interview-based research noting the eagerness at the UK Supreme Court to influence the ECtHR through the reasoning of its judgments.²²⁶

Second, by drawing upon the categories of interaction set out in Chapter 2 and the case law cited by the interviewed judges, the chapter has illuminated varied judicial understandings at work as to the specific forms of judgment-based interaction thought to reflect dialogue between these courts, and has sought to reconcile these differences. To varied degrees, both conflictual and consensual forms of interaction are associated with the term, with differences of view both among the Justices and between the Justices and the ECtHR judges. To this extent, the differences of view among the judges could be said to amplify those differences within the academic literature, explored in Chapter 2. However, there was also much commonality in what the judges described. Reinforcing academic opinion to this effect,²²⁷ there is a clear consensus that ‘dialogue’ between the UK courts and the ECtHR refers to a conflictual interaction whereby the national courts either criticise or disagree with a judgment of the ECtHR. Further, underlying the interactions identified by the Justices – domestic judgments which criticise or disagree with judgments of the ECtHR and domestic judgments which exert influence upon the ECtHR in the absence of disagreement – is an emphasis on the ability of the UK courts to offer a distinct contribution to the interpretation of Convention rights. On this basis, Amos is right to observe that ‘[i]t is not in every HRA judgment that every UK court seeks to enter into a dialogue with

²²² Paterson (n 106) 9

²²³ Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 U Rich L Rev 99, 112

²²⁴ *ibid* 112

²²⁵ *ibid*

²²⁶ As seen in Chapter 1, Mak’s study noted the judicial admission that ‘British judges try to write in a way that is attractive to the ECtHR’. Likewise, Paterson’s research observed that certain UK Supreme Court judgments are ‘written consciously as a form of advocacy’ for the ECtHR. Elaine Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013) 82; Paterson (n 106) 226

²²⁷ Merris Amos, ‘The Dialogue between United Kingdom Courts and the European Court of Human Rights’ (2012) 61(3) ICLQ 557, 566; Richard Clayton, ‘Smoke and Mirrors: the Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639, 633; Lord Irvine, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 247; Sales (n 183) 264; Borge (n 45) 223

the ECtHR'.²²⁸ Further, unifying the different emphases by the Justices and the Strasbourg judges is the desire for the court to which they belong to influence the other. The emphasis in the Justices' accounts was in the domestic judgments which have the prospect of influencing the ECtHR – a process of 'upward influence of the national courts'²²⁹ – while the interaction stressed by the Strasbourg judges – the effectuation of Strasbourg jurisprudence at the national level by domestic courts – stressed the downward influence of the ECtHR on domestic judicial decisions. Rather than reflecting any substantive differences, therefore, the different judicial understandings underlined the judges' desire for their court to influence the other: to influence rather than be subject to influence.

Third, the chapter has observed practical and normative constraints on the formal dialogue between these courts. Practically, the process occurs indirectly through judgments and is thus dependent on cases which the courts cannot hand-pick for the purposes of engaging in dialogue. Normatively, parliamentary sovereignty and the international rule of law combine to limit the ways in which the Justices engage with the Strasbourg case law. In one respect, the observations made in this chapter underline the eagerness of the Justices to move away from a role of simply applying the existing ECtHR jurisprudence. However, this eagerness appears to be tempered by a shared regard for the international rule of law and the potential implications for the stability of the Convention system, manifesting in a mutual understanding that a Grand Chamber decision should ordinarily mark the end of any conflictual dialogue between the courts. Indeed, the reticence described by the Justices in interview to depart frequently from the standards set by the ECtHR also lends support to Bjorge's argument that the UK courts perform their role within the ECHR system as 'faithful trustees of the Convention rights, ... applying the Convention rights loyally, with a focus on the principles underlying those rights and the Strasbourg jurisprudence which sets them out'.²³⁰ As faithful trustees, the courts adhere to the rule of '*pacta sunt servanda*, according to which states must comply with their obligations in good faith'.²³¹ Observing that the UK courts have set clear limits on the scope for permissible disagreement with the ECtHR, particularly where the Grand Chamber has issued a judgment, Bjorge argues that 'The principle *pacta sunt servanda*, and the attendant standard of faith, could be taken to explain the approach taken by the national courts to dialogue with the European Court'.²³²

²²⁸ Amos, *ibid* 583

²²⁹ Roger Masterman, 'Deconstructing the Mirror Principle' (n 181) 111, 123

²³⁰ Bjorge (n 45) 245

²³¹ *ibid* 42

²³² *ibid* 47

The analysis here, however, presents only a partial picture of the dialogue between these courts. In order to understand whether it can perform a legitimising role, what remain to be addressed are the *functions* which were attributed to the process of formal dialogue by the Justices and ECtHR judges and the role of the *informal dialogue* between their courts.

Chapter 4

The Functions of Formal Judicial Dialogue

Perhaps the most potent source of tension and the greatest inhibition to dialogue between Strasbourg and national courts is the circumstance that Strasbourg is a supranational court and the influences that come to bear on its decisions are inevitably disparate. ... [I]neluctably, the decisions that it reaches present challenges as to their workability in the domestic setting.¹

- Lord Kerr of Tonaghmore

1. Introduction

The previous chapter constructed a definition of judgment-based ('formal') judicial dialogue within the context of the relationship between the UK courts and the European Court of Human Rights (ECtHR) based on insights provided by the UK Supreme Court Justices and the ECtHR judges interviewed for this study. It was defined as a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence each other through their respective judgments. Having thus defined the *form* of this type of dialogue, the present chapter aims to answer the second research question outlined in Chapter 1: what are the *functions* of judicial dialogue in the context of the decision-making of the UK courts and the European Court of Human Rights? Drawing from the interview insights, it submits that the principal function of formal dialogue is *the mitigation of tensions arising from the overlapping, multi-layered systems for the judicial protection of human rights in Europe*. The chapter develops this argument in five parts. Part 2 sets out the reasons why the judges seek to influence one another through their judgments. In doing so, this section provides key insights as to the motivations of the judges in their interactions with one another which are drawn upon throughout the rest of the chapter. In Part 3, the chapter sets out the multiple sources of tension within the relationship between the UK courts and the ECtHR which were described by the judges, along with the issues which were perceived to arise from those tensions. This provides the necessary context for Part 4 which explains the tension-mitigating functions of formal dialogue. Here, the chapter explores how the judgment-based interactions which the judges associated with the term 'dialogue' are used to perform this alleviating role. In Part 5, the analysis turns to another development: the 'resurgent' common law. It examines how this development in the UK case law appears, in the light of the interview insights, to coincide with and compliment the mitigating functions of the dialogic interactions identified in Chapter 3. The concluding remarks are offered in Part 6.

¹ Lord Kerr, 'The Conversation between National Courts and Strasbourg – Dialogue or Dictation?' (2009) 44 Irish Jurist 1, 3

2. Motivations for Influence

In Chapter 3, formal dialogue was defined as a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their respective judgments. Four categories of interaction were, with varied degrees of consensus, identified as dialogue: conflictual interactions, manifesting in disagreement by either the UK courts or the ECtHR with a judgment of the other, and consensual interactions, manifesting in agreement and influence in either direction. Underlying each of these categories, however, was the shared desire on the part of the Justices and the Strasbourg judges for the UK courts and the ECtHR to *mutually influence* their respective decision-making.

The ECtHR judges seek to influence the judgments of the domestic courts as a means of *making the Convention rights effective* at the national level, ensuring that those rights are not ‘theoretical or illusory but ... practical and effective’.² As one Strasbourg judge put it, once the ECtHR has ‘stated the principle’,³ there is ‘nothing much more the Court can do’.⁴ In order for the principle to become effective in the domestic context, action is required on the part of the national authorities. A sufficient influence upon the judgments of the domestic courts was thus said to facilitate ‘direct execution’⁵ of the principles. This is reflected in the type of judgment-based interaction which the Strasbourg judges associated with the term ‘dialogue’: the appropriation and effectuation of Convention law by the national courts, seen in Chapter 3. The former ECtHR President, Dean Spielmann, expresses this view where he notes that the application of the Court’s jurisprudential principles by the domestic courts is the ‘form of dialogue that is at the heart of vindicating Convention rights’⁶ – a ‘necessity’⁷ to the success of the Convention.

The Justices, on the other hand, valued the prospect of influencing the development of the Strasbourg jurisprudence. Several shared a perception that the development of human rights norms in Europe is a ‘cooperative venture’⁸ to which the UK courts have a valuable contribution to make. Since the enactment of the HRA, it was pointed out, the UK courts are ‘working on the same material [as the ECtHR] and sometimes we have insights and thoughts ... [and]

² *Airey v Ireland* (1979) 2 EHRR 305 [24]

³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁴ *ibid*

⁵ *ibid*

⁶ Dean Spielmann, ‘Whither Judicial Dialogue?’ (Sir Thomas More Lecture, London, 12 October 2015) <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016

⁷ *ibid* 12

⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

developments which are ahead of theirs'.⁹ They thus attached value to the notion that they are, through their decision-making, able to have, in one Justice's words, 'an input into the way in which Strasbourg thinks'.¹⁰ There was a desire for the Supreme Court to have a role as 'one of the opinion-formers at the international level'.¹¹ In this way, their judgments were valued for providing them with a voice reaching beyond their jurisdiction. More importantly, however, the desire to influence the development of the European human rights jurisprudence stemmed from a shared self-perception amongst some of the Justices as *representatives of the common law tradition* in a European human rights system largely dominated by variations of the civil law tradition. This crucial point is returned to in the next part of the chapter.

A motivation for cross-influence which was common to both the Justices and the ECtHR judges was a desire for mutually compatible standards of human rights protection. As one Justice put it, 'it's simply each learning from the other and trying to make sure that, on the whole, both courts are singing from, broadly speaking, the same hymn-sheet'.¹² In the absence of such cross-influence, it was felt that the respective courts would effectively retreat into judicial 'isolation'¹³ to the detriment of the development of common European standards. To this extent, the influence which the judges desired their courts to exert upon one another was motivated by the need for a broad *convergence* of standards. To this extent, *mutual accommodation* was deemed necessary in instances of disagreement between the courts. One Justice was explicit that where the UK courts disagree with the ECtHR, it was desirable for there to be 'a modification of Strasbourg's view with which ... we can live'¹⁴ and a 'satisfactory compromise'.¹⁵ Equally, it is expected of the national courts that where they find occasion to disagree with the ECtHR, to quote one Strasbourg judge, they 'must aim to find a solution ... otherwise it's monologue'.¹⁶ They cannot simply appeal to some 'special position and say "No, we are different, we are unique"'.¹⁷

3. The Sources of Tension between the UK courts and the ECtHR

What the chapter has thus far established from the interviews is three motivations underpinning the judges' respective desires for influence between their courts: for the Strasbourg judges, the need to make Convention rights effective at the national level; for the Justices, the need to have a

⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

¹⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁵ *ibid*

¹⁶ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

¹⁷ *ibid*

voice in the development of European human rights law, in particular to represent the common law tradition; and, for both the Justices and the ECtHR judges, the need to have a broad convergence of standards of human rights protection. In Chapter 3, it was seen how the Strasbourg judges have emphasised an understanding of dialogue based on the effectuation of the Strasbourg jurisprudence into domestic law by national courts. This form of interaction allows the first of the three motivations to be achieved.

The application of the ECtHR case law, however, is not a straightforward task. The effectuation of the Strasbourg jurisprudence by the domestic courts is not always possible, or at least to the satisfaction of the national judges, and neither, therefore, is a convergence of standards. In this way, the relationship between the courts was said to be complicated by certain ‘tensions’.¹⁸ These are key points of difference between the courts in their institutional perspective, modes of operating and the legal traditions of their judges which were perceived by the judges to have implications for the ability of the UK courts to apply the Strasbourg judgments in the domestic context. It is these tensions which bring to the fore the Justices’ desire to influence the development of the Strasbourg jurisprudence in order to mitigate either existing or potential difficulties. The following sections set out the sources of those tensions and their manifestations which were described during the interviews. As will be shown later, the dialogue judgments proposed during the interviews with the Supreme Court Justices (signalling disagreement or the development of Convention law in the absence of pre-existing Strasbourg jurisprudence) purport to counter these tensions in numerous ways.

3.1 National Courts and a Supranational Human Rights Court

The first source of tension described between the UK courts and the ECtHR stems from their respective roles as *national* and *supranational human rights courts*.¹⁹ This was considered by the judges to be a tension inherent to the relationship between all national courts within the Council of Europe and the ECtHR. As one Justice observed, ‘there is an element of tension between national courts and Strasbourg ... and that’s inevitable and it’s healthy tension’.²⁰

First, the difference in the perspectives of the courts was noted. The UK Supreme Court is

¹⁸ The term was used by multiple Supreme Court Justices during the interviews.

¹⁹ Lord Kerr here has pointed out that ‘difficulties and tensions ... can arise where the supranational court in Strasbourg is called on to pronounce on constitutional issues which are traditionally the province of domestic constitutional courts’. Lord Kerr, ‘The Conversation between National Courts and Strasbourg – Dialogue or Dictation?’ (n 1) 2

²⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

the final court of appeal for cases within the particular constitutional setting of the UK.²¹ In contrast, it was observed that the ECtHR provides a system of individual justice for allegations of human rights violations emanating from forty-seven countries, developing the ECHR principles for application across those countries. To this extent, while the UK courts and the ECtHR are both engaged in the interpretation and application of Convention rights, the perspectives from which they approach those questions were seen as institutionally distinct, with ‘legitimate interests on both sides’.²² The former ECtHR President, Dean Spielmann, observes that the perspective of the national courts is the embodiment of the rule of law and ‘guardian of the constitutional order’.²³ The perspective of the ECtHR, in contrast, is one of external review.²⁴ According to Lord Kerr, quoted at the beginning of this chapter, this difference reflects ‘the most potent source of tension’,²⁵ as ‘the influences that come to bear on [ECtHR] decisions are inevitably disparate’²⁶ and thus ‘present challenges as to their workability in the domestic setting’.²⁷

In addition to their distinct institutional perspectives, differences in their respective *modes of operation* were also highlighted. It was observed that the Supreme Court addresses roughly eighty cases per year²⁸ via a single court, whereas the ECtHR has a significantly larger caseload divided amongst the Sections responsible for its Chamber decisions.²⁹ A common observation amongst the Justices and Strasbourg judges here was that the Supreme Court thus has the benefit of more time for deliberation over its cases,³⁰ whereas the examination of cases at the ECtHR, according to one Strasbourg judge, is by comparison ‘less intense’.³¹ A further, related difference which was noted in this regard was in the procedural mechanisms for reviewing areas of problematic case law.³² A number of the Justices felt that while domestic legal systems provide a

²¹ The Annual Reports of the UK Supreme Court define it as ‘the UK’s highest court of appeal ... [which] hears appeals on arguable points of law of general public importance, concentrating on cases of the greatest significance’. UK Supreme Court, *The Supreme Court Annual Report and Accounts* (2014-2015, HC 50) 26

²² Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

²³ Spielmann (n 6) 3

²⁴ *ibid* 4

²⁵ Lord Kerr, ‘The Conversation between National Courts and Strasbourg – Dialogue or Dictation?’ (n 1) 1, 3

²⁶ *ibid*

²⁷ *ibid*

²⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014). In the 2014-15 year, the Supreme Court delivered 81 judgments. UK Supreme Court, *Annual Report* (n 21) 31

²⁹ In 2015, the ECtHR decided 45,576 cases. European Court of Human Rights, *Annual Report* (Council of Europe 2015) 189. At the time of writing, the European Court of Human Rights consists of five Sections.

³⁰ As one Justice explained, ‘...our decisions here often involve a good deal of exchanges of drafts, changes of mind, case conferences – it’s a highly deliberative process’. Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

³² Bradley notes the ‘structural problem’ in the ECHR system, which provides no comparable equivalent to domestic legislation or constitutional amendment to address judgments which are considered to be wrong, ‘except by the

structure of appellate courts through which to address problems within the case law, there is a comparatively more limited appeal system for raising and resolving problems within the Strasbourg jurisprudence. In a similar vein, one Strasbourg judge observed that the Convention system lacks the inter-institutional balance provided to national courts by national parliaments:

In most national systems, parliament does have the opportunity to come back if it disagrees with the courts. The elected representatives of the people can change the law as interpreted by the courts; they can even change the constitution. That kind of on-going, working relationship between the legislature and the courts (the existence of such ‘checks and balances’) is not really found in the Convention system. In practice there is little or no scope for the Contracting States to reverse unwanted interpretation of Convention rights by the ECtHR through exercise of their legislative power, that is by amending the text of the Convention – so that in that sense the ECtHR, and likewise the EU Court of Justice in Luxembourg, have more power than the national superior courts.³³

3.2 Common Law v Civil Law Traditions

The second source of tension which was perceived between the courts lay in the two broad legal traditions of the states within the Council of Europe: namely, the *common law* and *civil law traditions*. To this extent, it extends from the tension explored in the previous section, arising from differences between a domestic court comprised of judges of the same legal tradition, on the one hand, and, a supranational court consisting of judges of multiple and various legal traditions, on the other. Gelter and Siems note a growing scepticism from comparative law scholars towards this classification: ‘Since law is becoming international, transnational, or even global, looking at legal families is seen as less important’.³⁴ Nonetheless, the influence of civil law systems, traditionally understood, interwoven into the Strasbourg jurisprudence and the decision-making of the ECtHR, were deemed by a number of the Justices and Strasbourg judges to be an acute feature of the relationship between the UK courts and the ECtHR and even between the different judges sitting at the ECtHR. Indeed, it has been a recurring feature of

laborious negotiation of an amendment to the Convention endorsed by all of the member States’. Anthony Bradley, ‘Introduction: The need for both international and national protection of human rights – the European challenge’ in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 1, 8

³³ *ibid*

³⁴ Martin Gelter and Mathias M. Siems, ‘Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe’ (2014) 21(1) *Sup Ct Econ Rev* 215, 250

lectures by senior UK judges.³⁵ A number of the Justices interviewed shared a perception that the Convention system is dominated by civil law legal systems from which the ECtHR also draws most of its judges. As one Justice remarked, ‘they’re primarily dealing with civil law legal systems and they mostly come from civil law legal systems’.³⁶ It was thus felt that the UK’s common law system is a ‘minority interest in Europe’³⁷ and that ‘the mind-set of the Strasbourg court is very much on the civilian law system’.³⁸ With regard to the same tension amongst the ECtHR judges, one interviewed Strasbourg judge described at the ECtHR ‘a built-in cultural conflict between common law mentality, on the one hand, and the continental mentality: between reasoning by analogy, in very reductive terms, and legal formalism on the other’.³⁹

3.3 Jurisdictional Pluralism

What was said to make the differences in institutional perspective, modes of operation, and legal tradition more acute, is the *overlapping jurisdictions* of the courts, with the UK being a signatory to the ECHR and with both courts adjudicating on an identical set of rights in respect of the UK. As one Justice observed, both the Supreme Court and the ECtHR occupy the position of a ‘final court in area where there is another final court with its own jurisdiction’.⁴⁰ With the UK courts required by s.2 Human Rights Act (HRA) 1998 to ‘take into account’ the decisions of the ECtHR when deciding upon the meaning of Convention rights, the overlapping jurisdictions confront them with the question of the extent to which the ECtHR decisions should determine the content of their own judgments. Lady Justice Arden here describes the relationship between domestic and European courts as resembling ‘an ill-fitting jigsaw’⁴¹ where there are ‘pieces jostling to occupy the same space from different directions’.⁴²

³⁵ E.g. Master Reed, ‘The Common Law and the ECHR’ (Inner Temple, 11 November 2013) <https://www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf> accessed 16 January 2017); Lord Toulson, ‘International Influence on the Common Law’ (London Common Law and Commercial Bar Association, 11 November 2014) <<https://www.supremecourt.uk/docs/speech-141111.pdf>> accessed 15 January 2017; Lord Neuberger, ‘Has the Identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights?’ (Faculty of Law, National University of Singapore, 18 August 2016) <<https://www.supremecourt.uk/docs/speech-160818-01.pdf>> accessed 10 December 2016

³⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

³⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³⁹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁴⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁴¹ Lady Justice Arden, ‘An English Judge in Europe’ (Neill Lecture, Oxford, 28 February 2014) <<https://www.judiciary.gov.uk/announcements/speech-by-arden-lj-english-judge-in-europe/>> accessed 17 March 2016

⁴² *ibid*

4. Issues arising from the Tensions

The tensions between the UK courts and the ECtHR were perceived to manifest in three issues. The first and second issues concern, respectively, the *formal* and *substantive* quality of the Strasbourg jurisprudence, while the third issue concerns the *judicial identity* of the UK courts, in particular the UK Supreme Court.

4.1 The Formal Quality of the Strasbourg Jurisprudence

The differences in institutional perspective and modes of operating between the UK courts and the ECtHR were said to occasionally manifest with ECtHR decisions which lack the required clarity and coherence for immediate application at the domestic judicial level. One Justice explained: ‘there have been occasions where Strasbourg has produced a range of different decisions which are, frankly, difficult to reconcile with one another’.⁴³ In this regard, one Strasbourg judge acknowledged the potential for inconsistencies due to the workload of the court: ‘because of the pressure under which we work, the speed with which we have to deal with cases, I think the risk of making mistakes is higher’.⁴⁴

Adding to this problem was felt to be the verbatim declaration of legal statements across cases: ‘part of Strasbourg jurisprudence tends to involve certain passages in judgments being repeated consecutively in other judgments and so you can find yourself reading exactly the same thought in ten different authorities’.⁴⁵ It was explained that this has created particular difficulties for UK judges who, under the common law doctrine of *stare decisis*, are accustomed to explicitly reasoning with and reconciling bodies of cases on the basis of their discernible legal principles. The problem was said to be particularly acute in areas where there are a large number of Strasbourg cases, which were said by the Justices to add to the challenge of coherent application at the domestic level.⁴⁶ It was pointed out that such difficulties manifested in the Supreme Court’s decision in *Kennedy*,⁴⁷ which concerned an Art.10 challenge to an exemption on journalistic access to information under the Freedom of Information Act 2000 s.32(2). There, Lord Mance, with whom Lord Neuberger and Lord Clarke agreed, remarked:

⁴³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014). On this point, Wright highlights that the ECtHR case law ‘reflects the strongly civilian tradition of the contracting states which generally deny the doctrine of precedent as understood by an English lawyer’. Jane Wright, ‘Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights’ [2009] PL 595, 596

⁴⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁴⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁴⁶ Lord Toulson has articulated this concern extra-judicially: ‘...it is not unusual to find a cluster of decisions, sometimes by different chambers, which employ the same phrases but which differ in outcome without the kind of analysis to which we are accustomed when reading judgments, particularly appellate judgments, in this country and other common law jurisdictions’. Lord Toulson (n 35)

⁴⁷ *Kennedy v Charity Commission* [2015] 1 AC 455

The Strasbourg jurisprudence is neither clear nor easy to reconcile. In ... *AF (No 3)* ... Lord Rodger said famously: “*Argentoratum locutum: iudicium finitum* – Strasbourg has spoken, the case is closed”. In the present case, Strasbourg has spoken on a number of occasions to apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that at least some members of the Court disagree with and wish to move on from the Grand Chamber statements of principle. ... It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation.⁴⁸

Another case which was repeatedly cited in this regard was *Sturnham*.⁴⁹ This case concerned how damages are to be assessed in respect of breaches of Art.5(4) ECHR for individuals whose continued detention was not subject to a prompt review following their tariff expiry. Under s.8(4) of the HRA, courts have a duty ‘to take into account the principles applied by the [ECtHR] in relation to the award of compensation under article 41 of the Convention’. However, the Supreme Court observed a number of difficulties within the Strasbourg jurisprudence which complicated this task. Giving the lead judgment of the court, Lord Reed observed that ‘...the European court does not often articulate clear principles explaining when damages should be awarded or how they should be measured’.⁵⁰ Several Justices indicated that this difficulty was exacerbated by the huge volume of Strasbourg cases which had been considered by the court on that occasion. The judgment gives voice to the court’s frustration with the ‘time-consuming process’⁵¹ required to survey ‘around 75 Strasbourg authorities’,⁵² prompting the Supreme Court to issue guidance to counsel as to the future presentation of large volumes of Strasbourg case law.⁵³

It was, however, stressed that these were not intended as general criticisms of the ECtHR. It was observed that areas of the common law suffer problems of coherence and that it would be

⁴⁸ *ibid* [59] (Lord Mance) citing *Secretary of State for the Home Department v AF and another (no 3)* [2010] 2 AC 269 [98]

⁴⁹ *R (Sturnham) v Parole Board for England and Wales* [2013] 2 AC 254

⁵⁰ *ibid* [34] Clayton observes that ‘[t]he Strasbourg court does not amplify its principles and reasoning in the discursive analytical style of the common law tradition; and principles are often extended—even if the reasoning for doing so is, sometimes, exiguous’. Richard Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639, 656

⁵¹ *Sturnham* (n 49) [99] (Lord Reed)

⁵² *ibid*

⁵³ *ibid* [100]-[103] (Lord Reed)

unfair to criticise occasional problems at the ECtHR in the light of its workload. Nonetheless, the issues faced by the Supreme Court in *Sturnham* were perceived by several Justices as a product of the legal-cultural differences described above. They recognised their own common law habits contributing to the difficulties: ‘I think probably we may be a bit too concerned to try and reconcile every single Strasbourg authority’.⁵⁴ Likewise, another Justice saw *Sturnham* as ‘an example of the common law system and the civilian law system uncomfortably trying to work together’.⁵⁵

4.2 The Substantive Quality of the Strasbourg Jurisprudence

The tensions within the relationship between the courts were also said to occasionally give rise to issues concerning the substantive quality of the reasoning in Strasbourg judgments, in particular the understanding of UK law. There was a consensus amongst the Justices and the Strasbourg judges that occasional misunderstandings arise because the judges of the ECtHR, drawn largely from countries with civil law traditions and primarily addressing cases from those countries, are likely to have had little direct experience of the common law system.⁵⁶ Here, one Strasbourg judge explained that, to many judges at the ECtHR, the common law system is ‘alien’.⁵⁷ In particular, a number of the Strasbourg judges pointed out that the content of judicial precedents will not always appear ‘clear as daylight’⁵⁸ to judges from civil law traditions. A number of the Strasbourg judges also highlighted that because of the organisation of the ECtHR into Sections which deal with particular countries, the many judges outside of the particular Section dealing with UK cases will not be exposed to those cases unless they sit on a UK case at the Grand Chamber. Even then, however, it was said that the possibility exists of ECtHR judges not hearing UK cases. One interviewed judge, for example, confirmed that they were yet to decide a UK case despite having been a judge at the ECtHR for several years.

4.3 Questions of Domestic Judicial Identity

The third issue arising from the tensions appeared to be one of *judicial identity*: ‘the characteristics determining who or what’⁵⁹ the Supreme Court and its judges are, or what Gearty

⁵⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁵⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁵⁶ In this regard, Lord Lester has voiced the ‘British concern that the Strasbourg Court, dominated by judges from civil law systems, may not give full faith and credit to our common law system’. Anthony Lester, ‘The European Court of Human Rights and the Human Rights Act: British Concerns’ (Public Law Project Annual Conference, 13 October 2011)

⁵⁷ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁵⁸ *ibid*

⁵⁹ ‘identity’, *Oxford Dictionary of English* (3rd edn, OUP 2010) 869

calls ‘judicial culture ... the sort of body the judiciary has become’.⁶⁰ The question for domestic judicial identity in the face of the ECtHR jurisprudence has been eloquently stated by Lord Mance:

No one has a single identity. We have mixed characteristics, inter-relating with those possessed by others in a confusion of overlapping circles. ... Unfortunately, however, identities are, in public discourse, often over-simplified, and often presented in unitary and conflictual terms. When changes to domestic law are impelled from outside, fears can in this way be raised about loss of identity. The European project raises questions about identity - for societies and individuals and how they view themselves.⁶¹

The courts, too, are ‘...confronted with novel issues and tensions. ... How far is their system part of a larger system? How far is their system subsumed, consumed, superseded, by another?’.⁶² For Lord Mance, the answer is clear: ‘While there are some unresolved issues and tensions at a European level, ...I have no sense at all that the United Kingdom’s legal system or we, its common lawyers, judges and courts, are about to be over-whelmed or lose our identity’.⁶³ The same questions explored by Lord Mance’s lecture, however, were pervasive during the interviews with the Justices. Since the enactment of the HRA, the UK courts have been confronted with the related questions of the extent to which they should follow the decisions of the ECtHR and how they should make use of the common law when considering questions of human rights. These concerns are not new. Lord Goff expressed his concern in 1997: ‘There is a whole new area of jurisprudence in which we find ourselves *acting more like civil lawyers than common lawyers*. I speak of the enforcement of fundamental human rights which are recognised under the constitutions of many common law countries’.⁶⁴

A view amongst a number of the Justices interviewed was that the approach of the UK courts under the HRA had at times been *excessively deferential* to the views of the ECtHR. There was a sense that the UK courts had lacked assertiveness or had, as one Justice put it, ‘been too

⁶⁰ Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 44

⁶¹ Lord Mance, ‘Destruction or Metamorphosis of the Legal Order?’ (World Policy Conference, 14 December 2013) <<https://www.supremecourt.uk/docs/speech-131214.pdf>>

⁶² *ibid*

⁶³ *ibid*

⁶⁴ The Law Lord expressed feeling ‘uneasy’ in the application of such rights in his judicial capacity on the Privy Council: ‘I prefer the traditional common law approach to which I am accustomed. I feel happier as I gradually develop the law from one factual situation to another, and see the principles develop as we go along’. Lord Goff, ‘The Future of the Common Law’ (1997) 46(4) ICLQ 745, 753-754 (emphasis added)

slavishly following Strasbourg'.⁶⁵ To this extent, one Justice expressed the view that the UK courts had been 'rightly criticised'⁶⁶ where they have treated the Strasbourg court 'as a higher level in a human rights hierarchy i.e. a supra-supreme court, as it were, when that isn't what its role is and it's not, I think, the role it would claim'.⁶⁷ Interestingly, there were suggestions by the Justices that the UK courts had been too deferential both to views which they disagreed with and also to the Strasbourg jurisprudence which is yet to address certain types of rights claim.⁶⁸

Of greater concern to a number of the Justices, however, was that the UK courts had adopted an approach which is *over-reliant* upon the Strasbourg jurisprudence as the primary source of law for decisions on fundamental rights, at the expense of the common law. It was observed that an 'imbalance'⁶⁹ had emerged, which had in turn created a Strasbourg-focused culture of advocacy before the courts:

... [W]e're sometimes presented with a pantechicon of Strasbourg cases with comparatively little analysis of what is the principle for which they actually stand. Conversely, we've had, sometimes, a neglect of what is to be found within the common law.⁷⁰

Between the Justices, there was a clear difference in the degree to which this was a cause for concern. According to one Justice, this disparity mirrored the views of UK judges generally since the passing of the HRA: 'I think that some judges are more inclined to hark back to the common law, others simply say, "Why do you need to do that? You've got the Convention, it's part of English law, we'll just decide what the Convention says and be done with it"'.⁷¹ Nonetheless, for a number of the Justices the lack of attention which they perceived to have been paid to the development of the common law since the HRA came into force was a clear source of regret. The common law, it was said, had played a crucial historical role in protecting certain fundamental rights, with 'a very strong and very long standing libertarian tradition',⁷² and had formed the basis for many of the ECHR rights. For these Justices, it was a proud source of constitutional heritage, closely linked to their sense of judicial identity. One Justice, for example, suggested

⁶⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁶⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁶⁷ *ibid*

⁶⁸ One Justice expressed frustration with the view that 'the proper course for a national court is to refrain from recognising a Convention right until Strasbourg has spoken. ... [W]e don't have any alternative but to decide whether the claimed Convention right is valid or not'. Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁶⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁷² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

that ‘human rights, in various ways, permeate the common law and have done for centuries’.⁷³ Similarly, another Justice explained:

...our domestic system hasn't gone to sleep. It's had a long history of protection of certain types of rights and just because now we have a Convention or Convention rights which are part of our domestic law doesn't mean to say that we forget that the common law itself has certain principles.⁷⁴

In respect of the right to a fair trial and press freedom, it was argued that the UK courts have ‘longer experience of dealing with these issues than any other court in Europe’.⁷⁵ What is more, it was suggested that scepticism over the common law’s historical capacity to protect human rights is the result of viewing the UK’s legal history through ‘twentieth century spectacles’:⁷⁶

...[T]he twentieth century, largely as a result of the development of government powers in two world wars, was a period of relative judicial subservience at a time of very significant developments in the powers of government. But looking at it over a longer period, it seems to me that English law has an approach which is, although over a narrower range of subjects, at least as liberal as many parts of the Convention.⁷⁷

The link between the common law as a source of constitutional heritage and some of the Justices’ sense of judicial identity was made further apparent by their choice of language when referring to the common law, with several identifying with it in terms of direct ownership. Frequent references were made to ‘our common law’,⁷⁸ ‘our common law approach’,⁷⁹ and ‘our public law ... fashioned on the anvil of decided cases’.⁸⁰ In contrast, only one Justice referred to the Convention in such terms, describing those rights included in HRA Sch.1 as ‘emphatically British law’.⁸¹ This hints at a much stronger link among some of the Justices between their sense of judicial identity and the common law than the Convention rights under the HRA.

In view of these insights, it is apparent that the tensions within the relationship between the UK courts and the ECtHR have for a number of the Justices too often resulted in deference to, and overreliance upon, the Strasbourg jurisprudence. There was an evident dissatisfaction

⁷³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁷⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

⁷⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷⁷ *ibid*

⁷⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁷⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁸¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

amongst these Justices that the views and approaches of the UK courts in respect of the protection of human rights had, at times, been too closely defined by an uncritical application of the views and activities of another court. These issues of judicial identity generated by the relationship between the UK courts, the Strasbourg jurisprudence and the common law, however, were more than a matter of professional pride for the individual Justices. It was also one which was perceived to affect the *legitimacy* of the domestic system of human rights protection. One Justice observed: ‘we face quite an interesting issue in the UK that there are elements of the media that portray human rights as a *foreign-imposed legal system*’.⁸² They continued: ‘...we need to address the narrative that human rights are a foreign imposition because, in the longer term that could, at least at the margin, discredit the rule of law’.⁸³ Thus, there was a clear awareness on the part of the Justices that the extent to which they are perceived to apply Strasbourg judgments, as opposed to common law principles, has implications for the acceptance of the system of legal human rights protection amongst domestic audiences.

5. Mitigating Tensions through Formal Dialogue

As the preceding sections have shown, the various tensions said to characterise the relationship between these institutions – between the UK courts as national courts and the ECtHR as a supranational human rights court, and in the duality of the common law and civil law traditions within the Council of Europe – have manifested in concerns with the formal and substantive quality of the reasoning in the Strasbourg jurisprudence, as applied in the domestic judicial context, and in issues of domestic judicial identity. There was thus a shared view amongst both the Justices and the Strasbourg judges that the courts sometimes need to ‘modify or finesse’,⁸⁴ to quote Lord Neuberger, or further develop the jurisprudence before it can be effectuated at the domestic level. The purpose of formal dialogue can thus be regarded as *the mitigation of tensions arising from the overlapping, multi-layered systems for the judicial protection of human rights in Europe*. In using the term, ‘mitigation’, it is useful to recall that the Justices and Strasbourg judges described the tensions which exist within the relationship between their courts as something ‘inevitable’ – a persisting feature of the relationship, incapable of being definitively addressed or resolved. ‘Mitigation’, by definition the ‘action of reducing the severity, seriousness, or painfulness of something’⁸⁵ captures the decision-based means used by the judges

⁸² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸³ *ibid*

⁸⁴ Lord Neuberger, ‘Has the Identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights?’ (n 35)

⁸⁵ ‘mitigation’ (n 59) *OED* 1134

as an ongoing response to those inevitable tensions. The following sections explore how it is that formal dialogue was understood by the judges to achieve this mitigation.

First, disagreements between the courts were deemed to perform a '*check*' function on the decision-making of each. This was seen to provide procedural flexibility to the Convention system. Second, formal dialogue was deemed to *benefit the clarity and coherence of the Strasbourg jurisprudence*, either by the UK courts drawing the attention of the Strasbourg court to areas where clarity and coherence appear to be lacking or by offering solutions to the areas of difficulty through their decisions. Third, it was seen to enhance the *substantive quality of the Strasbourg jurisprudence* by ensuring that that UK law, and particularly the UK's common law system, is fully understood and taken into account in Strasbourg, thereby enabling the Justices to fulfil their role as representatives of the common law tradition on the international plane. Finally, the judgments which the Justices understood as dialogue appear to contribute to a *strengthening judicial identity* for the UK courts and particularly the UK Supreme Court.

5.1 A Mutual Check on Decision-Making

This first function relates to conflictual interactions whereby the courts disagree with one another. These interactions were considered to provide each court with 'a small, sensible check'⁸⁶ on the decision-making of the other. One interviewed Justice described the process by way of an analogy with dissenting judgments:

There's a sense in which a judgment given by one final court, in an area where there is another final court with its own jurisdiction, serves a similar purpose. When the one is disagreeing with the other it is, among other things, an invitation to the other court to reconsider, and that's no bad thing.⁸⁷

It was felt that a disagreement, like a dissenting judgment, 'provides a launch pad on which another court looking at the matter in some time to come may take a different view'.⁸⁸

For a number of the Justices, this check *guards against domestic judicial complacency*. One Justice observed the judicial complacency that existed prior the HRA:

I don't want to be too generalist about it but there was a big tendency to say "Oh, our law complies with Strasbourg anyway" without subjecting it to the intense analysis

⁸⁶ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁸⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸⁸ *ibid*

that we now do ... and then to be perhaps slightly surprised when Strasbourg says, “No, you’re wrong.”⁸⁹

Since the passing of the HRA, however, the ECtHR judgments were said to serve as a valuable ‘mirror’⁹⁰ for critical reflection on domestic practice and preventing such complacency:

There’s a great danger that if you’re used to a legal system and you’re used to the rules and you think they’re broadly fair, you don’t analyse them critically ... I think once it’s pointed out to you that [the traditional approach] might be unacceptable ... then I think it’s quite easy to see, well, perhaps what we were doing was unfair, so it’s quite useful to have a mirror shone on your practices and the common law will be, I suspect, as prone to that as many other legal systems. There’ll be things that we take for granted, we assume are fair, but if you see it through another person’s eyes, you might look at it differently.⁹¹

In this regard, Lady Justice Arden has cited the disagreement between the courts concerning police stop and search powers. In *Gillan*,⁹² the House of Lords unanimously found that a power⁹³ of police to stop and search individuals in the absence of reasonable suspicion was compatible with Arts. 5, 8, 10 and 11 ECHR. When the case went to Strasbourg,⁹⁴ the ECtHR held, and contrary to the view of the Law Lords, that the stop and search process involved a ‘clear interference’⁹⁵ with the right to private life. Further, it found a violation of Art.8 on the basis that the various safeguards in place had not been shown ‘to constitute a real curb on the wide powers afforded’,⁹⁶ given the statistical evidence of their extensive use in practice, with the consequence that the legislative regime failed to meet the requisite legality for the interference under Art.8(2). While the House of Lords had largely focused on the provisions themselves in *Gillan*, the ECtHR attached considerable weight to the available evidence of their use in practice in finding the breach of Art.8. Thus, when the Supreme Court subsequently considered *Gillan* in *Beghal v DPP*,⁹⁷ this time concerning a different set of stop and search powers,⁹⁸ though the majority of the court was able to distinguish the powers in issue from those in *Gillan* and thus reject the

⁸⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307

⁹³ Formerly ss 44-47 of the Terrorism Act 2000

⁹⁴ *Gillan v United Kingdom* (2010) 50 EHRR 45 (Chamber)

⁹⁵ *ibid* [63]

⁹⁶ *ibid* [79]

⁹⁷ *Beghal v DPP* [2015] UKSC 49

⁹⁸ Terrorism Act 2000 Sch 7

Arts.5 and 8 challenges, it accepted the need for a more holistic assessment of their legality. It acknowledged the need to ‘look not only at the provisions of the statute or other relevant instrument ... but also at how that system actually works in practice’.⁹⁹ Lady Justice Arden has observed of the exchange: ‘...The benefit of decisions of the Strasbourg Court is that they encourage domestic courts vigorously to enforce fundamental rights, and correct our decisions if we forget the importance of those rights’.¹⁰⁰

The check provided by UK judgments which disagree with decisions of the ECtHR, on the other hand, was perceived to directly mitigate the tensions within the relationship between the courts by providing an additional *source of procedural flexibility* to the ECHR system. Where there are serious concerns with the Strasbourg jurisprudence, the ability to disagree was thought to serve as a necessary ‘safety valve’.¹⁰¹ This was valued by both the Justices and the ECtHR judges in light of what was perceived as the procedural limitations for the resolution of problems within the Strasbourg case law, described earlier. Dialogue by disagreement, in this respect, was seen as an alternative means with which to query the decisions of the ECtHR and ensure that the system has flexibility.

This procedural flexibility was said to be crucial to the relationship of *subsidiarity* between the courts and to the *legitimacy* of the Convention system. According to the ‘fundamental principle’¹⁰² of subsidiarity,¹⁰³ the ‘primary responsibility’¹⁰⁴ for the protection of Convention rights is with the national authorities while ‘the Convention system is subsidiary to the safeguarding of human rights at national level’.¹⁰⁵ To this extent, the Convention rights are considered the ‘shared responsibility’¹⁰⁶ of the ECtHR and national courts. One Strasbourg judge remarked that “[i]f the ECtHR is to collaborate with the national courts so as to achieve the famous notion of “shared responsibility”, there must be some discussion as to how the sharing is to be done’.¹⁰⁷ For this judge, such a discussion of responsibility-sharing is only possible where the domestic courts have the flexibility with which to challenge the ECtHR where they have

⁹⁹ *Benghal* (n 97) [86] (Lord Neuberger and Lord Dyson)

¹⁰⁰ Speech by Lady Justice Arden in European Court of Human Rights, *The Convention is Yours (Dialogue Between Judges*, Council of Europe 2010) 22

¹⁰¹ This term was used by both Justices and a Strasbourg judge in interview.

¹⁰² Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights (Brighton 19-20 April 2012) ; Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 1. Following the Brighton Declaration, Protocol 15 ECHR will, once ratified, amend the Convention preamble so as to expressly include a reference to the subsidiarity principle.

¹⁰³ The ECtHR’s 2015 Annual Report directly states that informal dialogue ‘is of great significance, as a means to enhance subsidiarity’. ECtHR Annual Report 2015 (n 29) 12

¹⁰⁴ Brighton Declaration (n 102) [9](a)

¹⁰⁵ *ibid* [11]

¹⁰⁶ *ibid* [12](c)

¹⁰⁷ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

genuine concerns over particular judgments. It was thus felt ‘to ensure proper balance’,¹⁰⁸ particularly in the light of what was considered to be an absence of the kind of inter-institutional balance provided to domestic courts by national legislatures, and allow ‘both sides ... to come to the civilised sharing of responsibility’.¹⁰⁹

With regard to the legitimacy of the Convention system, one Justice suggested that the procedural flexibility provided by the ability of domestic courts to depart from problematic Strasbourg decisions was integral:

The fact that you’re given a bit of wriggle room, not merely through the margin of appreciation, but actually downright ability to refuse to follow decisions of the Strasbourg court, means that the system is not too rigid, and if the system isn’t too rigid, it’s less likely to break if you act within the bounds of what’s permitted and act reasonably ... it gives it flexibility, and with flexibility comes greater likelihood of acceptability.¹¹⁰

The implication here was that, in the absence of the ability of UK courts to challenge what they perceive to be problematic Strasbourg case law, the tensions within the relationship between the UK courts and the ECtHR could become more acute, leading to a greater strain on their relationship and posing the risk of a gradual erosion in acceptance of the Convention system and its court among domestic audiences. In facilitating that flexibility, however, dialogue by disagreement was felt to prevent those developments and thus help to preserve the legitimacy of the ECtHR and the Convention system.

5.2 Enhancing the Formal Quality of Strasbourg Jurisprudence

Moving from the procedural advantages of the check function attributed to dialogue to the implications for the quality of the Strasbourg jurisprudence, both conflictual and consensual interactions were said to assist in resolving *formal* problems of clarity and coherence. As explained earlier, the large number of decisions which the ECtHR delivers via different Sections, combined with what was felt to be the somewhat formalistic style of reasoning within certain decisions, were felt by the Justices to create occasional problems of clarity and coherence within the Strasbourg jurisprudence which render its application difficult. Through their judgments, the Justices felt that they are able to take steps to alleviate this issue.

¹⁰⁸ *ibid*

¹⁰⁹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹¹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

As explored earlier, problems of this kind within the Strasbourg jurisprudence were said to have come to the fore in *Kennedy* on the question of the compatibility of statutory exemptions to freedom of information with the right ‘to receive and impart information and ideas without interference by public authority’ under Art.10(1) ECHR. Here, one Justice described how the Supreme Court, confronted with conflicting Strasbourg authorities on the matter, had felt obliged to ‘deal with [the Strasbourg case law] at some length and to explain why we didn't think it provided an answer’.¹¹¹ In support of the Supreme Court’s conclusion in the earlier case of *BBC v Sugar*,¹¹² the Court in *Kennedy* reasoned that Art.10 did not confer a positive right to access information or an obligation on states to disclose information. As Lord Mance put it, Art.10 did not provide a ‘European-wide Freedom of Information law’.¹¹³ In reaching this conclusion the court relied on the earlier judgments of the ECtHR to this effect,¹¹⁴ including Grand Chamber judgments, and not the more recent Chamber decisions which appeared to support the existence of a right of access to information held by public authorities.¹¹⁵

Several Justices in interview pointed out that there is a benefit in being able to use judgments in this way to indicate difficulties to the ECtHR and thereby encourage the Grand Chamber of the ECtHR to address the source of difficulty at the next opportunity.¹¹⁶ Indeed, Lord Mance was explicit to this end in *Kennedy*, declaring it ‘unfortunate that the relevant sections did not prefer to release the matter before them to a Grand Chamber’.¹¹⁷ Since the interviews were conducted, however, the judges’ prayers have been answered, though perhaps not in the manner desired. Declaring that ‘the time has come to clarify the classic principles’,¹¹⁸ the Grand Chamber in *MHB v Hungary*¹¹⁹ held, and contrary to the conclusion of the Supreme Court in *Kennedy*, that Art.10(1) does confer a right to access information under certain circumstances. The Court rejected that its later cases were inconsistent with the earlier authorities, reasoning

¹¹¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹¹² *Sugar v British Broadcasting Corporation* [2012] 1 WLR 439

¹¹³ *Kennedy* (n 47) [94]

¹¹⁴ *ibid* [63]-[70] (Lord Mance) citing *Leander v Sweden* (1987) 9 EHRR 433; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599

¹¹⁵ *ibid* [71]-[86] citing *Matky v Czech Republic* (Application No 19101/03) (unreported), *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130, *Kenedi v Hungary* (2009) 27 BHRC 335, *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) (31 July 2012), *Youth Initiative for Human Rights v Serbia* (Application No 48135/06) (unreported) (25 June 2013), *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* (Application No 39534/07) (unreported) (28 November 2013)

¹¹⁶ Lady Justice Arden on this point has argued that ‘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.’ Lady Justice Arden, ‘Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe’ (2010) 29 (1) YEL 3, 19

¹¹⁷ *Kennedy* (n 47) [59]

¹¹⁸ *ibid* [156]

¹¹⁹ *Magyar Helsinki Bizottság v Hungary* App. no. 18030/11 (8 November 2016) (Grand Chamber)

instead that they simply demonstrated the circumstances where the court had been prepared to accept the existence of a right to access information under certain conditions.¹²⁰ The influence of the Supreme Court judgment in persuading the ECtHR to address the issue at Grand Chamber level has been noted by several commentators.¹²¹

UK judgments offering novel contributions to the interpretation of Convention rights were also considered to mitigate such tensions through their attempts to establish clear and coherent principles that might otherwise be lacking in areas of the Strasbourg jurisprudence and, in effect, offering a suggestion to the ECtHR as to how it might resolve the difficulties at the European level. It was described earlier how problems of coherence were said to have manifested in the case of *Sturnham* on the issue of assessments for damages in respect of violations of the right to a speedy review of a detention under Art.5(4) ECHR. There, the Supreme Court was invited to consider around seventy-five different Strasbourg cases which were deemed by the court to lack clear, general principles for application. Drawing from the large volume of decisions, however, the court devised a number of its own general principles to the assessment of damages for breaches of Art.5(4).¹²² It was pointed out that such cases also provide the UK courts with the opportunity to address problems in the formal quality of the Strasbourg jurisprudence by allowing them to ‘introduce a degree of rationalisation’¹²³ where it might otherwise be lacking and thereby ‘help [Strasbourg] to develop the law’.¹²⁴

5.3 Enhancing the Substantive Quality of Strasbourg Jurisprudence

The third way in which the judges seek to mitigate tensions is through the enhancement of the substantive quality of the Strasbourg jurisprudence. This function appears to be at the core of formal dialogue. It was discussed earlier how the tension arising from the different legal traditions comprising the Council of Europe was deemed to manifest in the potential for misunderstanding the UK’s legal system. Domestic judgments were felt to mitigate this

¹²⁰ *ibid* [133]

¹²¹ Clayton observes that the ECtHR specifically stayed the proceedings of the unsuccessful litigants to the Supreme Court’s decision in *Kennedy* because *MHB* had been referred to the Grand Chamber. Richard Clayton, ‘New Directions for Article 10: Strasbourg Reverses the Supreme Court in Kennedy’ (UK Const L Blog, 13th Dec 2016) <<https://ukconstitutionallaw.org/2016/12/13/richard-clayton-qc-new-directions-for-article-10-strasbourg-reverses-the-supreme-court-in-kennedy/>> accessed 11 December 2016. Additionally, Uitz notes the judgment for its ‘great political significance in the ongoing judicial dialogue between national courts and the European Court of Human Rights’. ‘...the UK Supreme Court’s call for action in this respect might well have served as a source of inspiration to take up a relevant case from another member state at the right time’. Renata Uitz, ‘Protecting Access to Information Under Article 10: A Small Step With Major Implications’ (ECHR Blog 24 November 2016) <<http://echrblog.blogspot.co.uk/2016/11/mhv-v-hungary-judgment-on-access-to.html>> accessed 10 December 2016

¹²² *Sturnham* (n 49) [76]

¹²³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹²⁴ *ibid*

possibility in two ways. On the one hand, it was noted that consensual interactions, whereby the UK courts further develop the Convention principles in the absence of a clear decision on an issue from the ECtHR, can serve to mitigate tensions by encouraging the formulation of human rights norms by the ECtHR which are appropriate to the common law as well as civil law systems. One Justice explained:

... if a court in the United Kingdom is presented for the first time with a particular species of Convention right and pronounces upon it, then obviously that matter comes before Strasbourg, there is the opportunity for the national court's decision to be considered by Strasbourg and therefore there is some opportunity for influence.¹²⁵

It was opined that the UK courts, in this way, 'may bring about a result which is more suitable to the domestic setting than might otherwise be the case at Strasbourg considering the matter before it had gone through the filter of judicial interpretation here'.¹²⁶ Lady Justice Arden makes a similar point: '...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'.¹²⁷

On the other hand, the check function provided by conflictual interactions between the courts was felt to help the UK courts ensure that the ECtHR judges have a sound understanding of UK law. It was pointed out that the UK courts will challenge the ECtHR where there are 'heel-digging points'¹²⁸ at issue: the circumstances described by Lord Neuberger MR in *Pinnock*¹²⁹ in which the ECtHR case law 'appear[s] to overlook or misunderstand some argument or point of principle' or has an effect which is 'inconsistent with some fundamental substantive or procedural aspect of [UK] law'.¹³⁰ By raising concerns with or diverging from decisions which reveal misunderstanding of domestic law, the Justices felt that they are able to give the Strasbourg judges, at the very least, 'an informed basis for reconsidering'¹³¹ and the opportunity 'to decide whether they have misunderstood'.¹³² There were three ways in which the judges described using their judgments to improve the substantive quality of the Strasbourg jurisprudence: by rectifying misunderstandings of domestic law, by safeguarding domestic fundamentals and by working to ensure the compatibility of the Strasbourg jurisprudence with the UK's tradition of constitutionalism.

¹²⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹²⁶ *ibid*

¹²⁷ Arden, 'An English Judge in Europe' (n 41)

¹²⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹²⁹ *Pinnock v Manchester City Council* [2011] 2 AC 104

¹³⁰ *ibid* [48]

¹³¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹³² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

i. Rectifying misunderstanding

First, the judges described using their judgments to challenge flawed interpretations of domestic law by the ECtHR. This reflects dialogue as it was originally conceived in the UK case law.¹³³ Cited by one Justice as the ‘classic example’,¹³⁴ of a misunderstanding in this regard was a set of decisions concerning the compatibility of striking out negligence claims against the police with the right to access a court under Art.6 ECHR. In *Osman v UK*,¹³⁵ the ECtHR concluded that a strike-out rule¹³⁶ for negligence claims against the police breached the right to access a court under Art.6, based on an understanding that the domestic courts had discretion in each case as to whether or not to apply it.¹³⁷ When the House of Lords subsequently came to consider the implications of this decision in *Barrett v Enfield*,¹³⁸ Lord Browne-Wilkinson found the reasoning ‘extremely difficult to understand’.¹³⁹ He drew attention to the ‘many and various’¹⁴⁰ flaws in the ECtHR’s thinking, in particular its apparent ignorance of the fact that the existence of liability in negligence under English law was not imposed as a matter of discretion in each case.¹⁴¹ The major concern was that *Osman* appeared to stipulate that Art.6 required access to court even where there is no substantive legal basis for a claim. When the matter subsequently came before the Grand Chamber in *Z v UK*,¹⁴² the Court observed that the jurisprudence in *Osman* had to be ‘reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords’¹⁴³ and this time found no violation of Art.6. In doing so, it openly conceded that the insistence on a right of access to court in the absence of a substantive legal basis for a claim ‘would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion’.¹⁴⁴

The UK courts, however, have not always enjoyed success in this regard. Mentioned in Chapter 3 were the repeated disagreements between the courts as to whether a person’s right to respect for their home under Art.8 ECHR could be invoked to challenge the proportionality of an

¹³³ As seen in Chapter 1, Lord Hoffmann declared in an early HRA case that there is ‘room for dialogue’¹³³ between the courts. A UK court, he reasoned, could issue a judgment which ‘invites the ECtHR to reconsider’¹³³ a decision which had misunderstood a feature of English law. *R v Lyons and Others* [2003] 1 AC 976 [46]

¹³⁴ *ibid*

¹³⁵ *Osman v United Kingdom* (2000) 29 EHRR 245

¹³⁶ *Hill v Chief Constable of West Yorkshire* [1989] AC 53

¹³⁷ *Osman* (n 135) [138]

¹³⁸ *Barrett v Enfield* [2001] 2 AC 550

¹³⁹ *ibid* 559

¹⁴⁰ *ibid*

¹⁴¹ *ibid* 559-560

¹⁴² *Z v United Kingdom* (2002) 34 EHRR 3

¹⁴³ *ibid* [100]

¹⁴⁴ *ibid* [97]

eviction from social housing. In *Doherty*,¹⁴⁵ the final of three instances in which a majority of the House of Lords refused to accept the ECtHR's view that Art.8 did make this requirement,¹⁴⁶ strong criticisms were levelled at the ECtHR's understanding of domestic legal procedures. Lord Hope was of the view that the Strasbourg court had not 'fully appreciated the very real problems that are likely to be caused',¹⁴⁷ for local authorities and county courts by its insistence on such a defence. Likewise, Lord Scott felt 'unable to place any weight',¹⁴⁸ on the Strasbourg view because it was 'based on a mistaken understanding of the procedure in this country',¹⁴⁹ and 'of the various factors that would have been taken into account by the domestic court'.¹⁵⁰ These criticisms, however, were met with silence by the ECtHR in *Kay*,¹⁵¹ as it reiterated the need for a proportionality defence under Art.8. A common explanation for this is that the ECtHR was simply not mistaken in its view of UK law.¹⁵² When the issue subsequently came before the Supreme Court in *Pinnock*, the nine-judge panel abandoned the criticisms in *Doherty*: '...there is no question of the jurisprudence of the European court failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way'.¹⁵³

Nonetheless, it was suggested by the Justices that querying the ECtHR through their judgments in this way helps to 'ensure that the decisions that they make about the application of the Convention to questions of English law are made with a proper appreciation of what English law is'.¹⁵⁴ The explicit rationale here was that it will 'strengthen the quality of the European norm if its formulation is better informed'.¹⁵⁵

ii. Safeguarding domestic fundamentals

Second, a number of the Justices described using dialogue to safeguard fundamental aspects of the domestic legal system. Lord Neuberger here has said that 'we judges should ensure that, in applying or adopting any principles from the Strasbourg court, we do not undermine the essential characteristics of our constitutional system, based on the common law and

¹⁴⁵ *Doherty v Birmingham City Council* [2009] 1 AC 367 (HL)

¹⁴⁶ *London Borough of Harrow v Qazi* [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] 2 AC 465

¹⁴⁷ *Doherty* (n 145) [20]

¹⁴⁸ *ibid* [88]

¹⁴⁹ *ibid* [82]

¹⁵⁰ *ibid*

¹⁵¹ *Kay v United Kingdom* (2012) 54 EHRR 30

¹⁵² Loveland, for example, argues that '[a]s well as being unhappily intemperate, that particular criticism was substantively misplaced'; the ECtHR's view of domestic law was 'entirely correct'. Ian Loveland, 'The Shifting Sands of Article 8 Jurisprudence in English Housing Law' (2011) EHRLR 151, 152

¹⁵³ *Pinnock* (n 129) [49] (Lord Neuberger MR)

¹⁵⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁵⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

parliamentary sovereignty'.¹⁵⁶ During the interviews, it was suggested that the ability to disagree with the ECtHR ensures that the common law itself is preserved in the very unlikely event that a Strasbourg norm encroached upon it in some fundamental way. One Justice explained:

I certainly don't think there's any sort of conspiracy to stop the common law but I think there is a danger that, rather than being enriched and developed by the influence of civilian laws through Strasbourg, which is what's happened so far, it could actually be destroyed. I think we have to watch out for that and that's one of our duties, and therefore it certainly impinges on the dialogue quite strongly.¹⁵⁷

A specific example cited here was the Chamber judgment of the ECtHR in *Taxquet v Belgium*¹⁵⁸ which found the use of jury trial in Belgian criminal procedure to be in violation of the right to a fair trial under Art.6(1) ECHR. One Justice in interview indicated that this case might have become the source for concern had the decision been framed as a general indictment of jury process. However, as has been pointed out elsewhere,¹⁵⁹ when the case went to the Grand Chamber the Strasbourg Court took care to allay the fears of the intervening UK government, highlighting the particular features of the Belgian model in issue and stressing the 'considerable freedom [of Contracting States] in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6'.¹⁶⁰ Nonetheless, the possibility of providing a check on the ECtHR decisions through their judgments was felt to safeguard against the tension which such decisions pose to the UK common law system.

iii. Highlighting overlooked arguments

Third, the Justices described using their judgments to draw the attention of the ECtHR to considerations which may be absent from its jurisprudence. Perhaps the strongest example of this in practice concerned the question of whether the UK's ban on political advertising¹⁶¹ could be deemed 'necessary in a democratic society' for the purposes of Art.10(2) ECHR. In *Animal Defenders International (ADI)*,¹⁶² the question for the House of Lords was whether the application of the UK's ban on televised political advertising to a group of animal rights activists

¹⁵⁶ Lord Neuberger, 'Has the Identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights?' (n 35)

¹⁵⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁵⁸ *Taxquet v Belgium* (2012) 54 EHRR 26 (GC)

¹⁵⁹ Paul Roberts, 'Does Article 6 of the European Convention on Human Rights require reasoned verdicts in criminal trials?' (2011) 11(2) HRLR 213

¹⁶⁰ *Taxquet* (n 158) [84]

¹⁶¹ Communications Act 2003 s.231(2)

¹⁶² *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*; [2008] 1 AC 1312

violated the group's right to freedom of expression under Art.10. In a similar case against Switzerland,¹⁶³ the ECtHR had found a violation. However, the House nonetheless concluded that there had been no violation of Art.10. Its contention was that the 'full strength'¹⁶⁴ of the democratic arguments underpinning the ban had not been fully explored in Strasbourg.¹⁶⁵ It might be said, however, that a further overlooked argument which the judges were implicitly drawing the ECtHR's attention to was the UK's tradition of political constitutionalism. In reaching their conclusion, the judges attached much weight to the fact that the relevant legislation had been passed after the ECtHR's judgment in the case against Switzerland, and that Parliament had 'paid close attention to the important decision'¹⁶⁶ before proceeding to enact the ban. Lord Bingham noted that 'democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy'¹⁶⁷ and, therefore, '[t]he judgment of Parliament on such an issue should not be lightly overridden.'¹⁶⁸ Baroness Hale echoed the significance of this consideration: 'The solution chosen has all-party support. Parliamentarians of all political persuasions take the view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this'.¹⁶⁹ Lord Scott acknowledged the prospect of the Strasbourg Court adopting a different view, albeit 'no more than the possibility of a divergence'.¹⁷⁰ The possibility subsequently intensified as the Strasbourg Court found further violations of Art.10 on similar facts.¹⁷¹ However, when *ADI* reached the Grand Chamber,¹⁷² a (9:8) majority was persuaded by the reasoning of the House of Lords and no violation of Art.10 was found.

Thus, in these various ways, the Justices felt that they are able to enhance the quality of the Strasbourg jurisprudence, and thereby mitigate tensions arising from the relationship between the UK courts and the ECtHR. As seen in Chapter 3, the Strasbourg judges, for their part, place great import on the insights of the UK courts. The former ECtHR President, Sir Nicolas Bratza, has been explicit to this effect: 'Even if it is not bound to accept the view of the national courts ... it is of untold benefit for the Strasbourg Court that we should have those views'.¹⁷³

¹⁶³ *VgT v Switzerland* (2002) 34 EHRR 4

¹⁶⁴ *ADI* (n 162) [29] (Lord Bingham)

¹⁶⁵ *ibid* (Lord Bingham) [28]-[29], (Lady Hale) [48]

¹⁶⁶ *ADI* (n 162) [7], (Lord Bingham)

¹⁶⁷ *ibid* [33]

¹⁶⁸ *ibid*

¹⁶⁹ *ibid* [52]

¹⁷⁰ *ibid* [44]

¹⁷¹ *TV Vest AS v Norway* (2009) 48 EHRR 51

¹⁷² *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (Grand Chamber)

¹⁷³ Nicolas Bratza, 'The Relationship between the UK Courts and Strasbourg' (2011) 5 EHRLR 505, 511

5.4 Strengthening Domestic Judicial Identity

A final function which was implicit in the Justices' accounts of dialogue is the strengthening of domestic judicial identity. It was explored earlier how the passing of the HRA was perceived by a number of the Justices to have been followed with a period of excessive deference to, and reliance upon, the Strasbourg jurisprudence in domestic human rights adjudication. This appeared to be linked to issues of judicial identity as the judges conceived of their decisions as having been too closely defined by the views and activities of the ECtHR. Whether through disagreement with judgments of the ECtHR, or by offering distinct contributions to the development of the jurisprudence where the ECtHR has not pronounced on an issue, formal dialogue was valued by the Justices for bolstering the identity of the Supreme Court through the display of a more distinct and confident approach to the Convention rights.

A strong sense of *judicial integrity* pervaded their accounts of dialogue with ECtHR. With regard to disagreement, one Justice made the observation that the UK courts are 'start[ing] to get more confident and more prepared to stand up for what we think is right, rather than necessarily following what we think is Strasbourg's approach always'.¹⁷⁴ Likewise, as shown in Chapter 3, another Justice noted how '[t]he possibility exists that you may get courts taking different views. I sense that among our courts there is a greater readiness to recognise that that may happen from time to time'.¹⁷⁵ A number of the Justices stressed a sense of duty when engaging with the ECtHR case law 'to do what we think is right',¹⁷⁶ 'to stand at a certain point for principles which [we] absolutely believe in',¹⁷⁷ and, where appropriate, to make it clear to the Strasbourg Court that is 'not merely there to tell us what to do'.¹⁷⁸ On the one hand, as shown in the last chapter, this desire for greater assertiveness on the part of the UK courts was felt to be constrained by the demands of the international rule of law and European uniformity in the minimum standards of human rights protection. On the other hand, it was stressed that the need for common standards should not prevent the UK courts from disagreeing with views which they consider to be flawed: 'If the court really thinks that the Strasbourg approach is wrong, then I think it's important it articulates that rather than knuckles under and says "Well, for the sake of legal certainty, we'll go along with it"'.¹⁷⁹ Likewise, another Justice explained: 'if, having given

¹⁷⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹⁷⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁷⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

due consideration to the Strasbourg court's view, our courts believe it to be wrong, it is their *constitutional duty* to say so'.¹⁸⁰

At the same time, it appeared that the UK cases which make distinct contributions to the development of ECHR norms were also valued by the Justices for bolstering domestic judicial identity. In Part 2 of this chapter it was shown that a key motivation for the Justices in their interactions with the ECtHR was the desire to have a role in the development of the Strasbourg jurisprudence. Cases addressing issues which have yet to be considered by the ECtHR, it was noted, were said to present 'opportunities for influence'¹⁸¹ and thus appeared to play a role in fulfilling this aspect of their judicial identity: 'if you don't take opportunities to influence people, then your voice is lost'.¹⁸²

It was seen in Chapter 3 that underlying the judgment-based interactions which were cited by the Justices as reflecting dialogue was their ability to make a distinct contribution to the development of the ECHR through the expression of their own views, as opposed to simply applying existing ECtHR case law. Indeed, indications of the link between this assertiveness in respect of the Strasbourg case law and the Justices' sense of judicial identity were evident in the language which some of the Justices used to describe those judgments. They were seen as the UK courts 'getting a mind of our own',¹⁸³ 'going more independent',¹⁸⁴ 'branching out on our own',¹⁸⁵ and having 'our own output'.¹⁸⁶ In this way, it appeared that the dialogue judgments were conceived by a number of the Justices to reflect a more distinct sense of ownership of decision-making on human rights, affirming an identity for the UK courts which is more 'independent' from the ECtHR. The ability of the UK courts to take their own view as to the interpretation of Convention rights has been a recurring theme of a number of extra-judicial lectures by senior UK judges, where the Latinised words¹⁸⁷ of Lord Rodger which have come to symbolise undue deference to the ECtHR have been subject to proposed reformulations. Lady Hale, for example, has suggested, '*Argentoratum locutum: iudicium non finitum*':¹⁸⁸ Strasbourg

¹⁸⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁸¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹⁸² *ibid*

¹⁸³ *ibid*

¹⁸⁴ *ibid*

¹⁸⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁸⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

¹⁸⁷ *AF (No 3)* (n 48) [98]: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed'.

¹⁸⁸ Lady Hale, '*Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*' (2012) 12(1) HRLR 65, 77

has spoken, the case is not closed; Lord Kerr, even more robustly, *Argentoratum locutum, nunc est nobis loquendum*’ – Strasbourg has spoken, now it is our time to speak’.¹⁸⁹

6. The Mitigating Role of the ‘Resurging’ Common Law

Placing these insights into the wider context of domestic judicial developments in the UK, it would appear that the practices of dialogue identified by the Justices and the utilities which they attached to them are perhaps reflective of a broader trend. In view of the interview data, it would seem that this trend also encompasses the ‘resurgence’¹⁹⁰ of the common law in UK human rights adjudication. As seen in Chapter 1, this refers to the series of Supreme Court decisions which ‘re-emphasise the utility of the common law, and the rights inherent in it, as tools of constitutional adjudication’.¹⁹¹ These developments appear to be functionally related to the extent that both appear to be motivated by the desire to mitigate some of the tensions within the relationship between the UK courts and the ECtHR, explored above.

6.1 The Resurgence

As discussed in the introductory chapter, the Supreme Court has over a series of judgments repeatedly stressed that in matters of fundamental rights, ‘the starting point ... [is] our own legal principles rather than the judgments of the international court’.¹⁹² As Masterman and Wheatle observe, ‘...after a period of relative dormancy, the common law is being reasserted as an important source of rights protection’.¹⁹³ During the interviews, one Justice observed how these developments had already prompted a shift in culture on the part of legal counsel:

There is already a noticeable change. In this court I’ve seen it. There’ve been recent cases where counsel has said “I’m conscious we need to start by looking at the common law and this is how I lay out my argument and I’m going to put the Strasbourg argument second”.¹⁹⁴

As described earlier, however, the Justices appeared to express varying degrees of support for the resurgence. While none voiced any opposition to the notion of a resurgent common law, different levels of enthusiasm were certainly evident. One Justice, for example, expressed ‘profound

¹⁸⁹ Lord Kerr, ‘The UK Supreme Court: The Modest Underworker of Strasbourg?’ (Clifford Chance Lecture, 25 January 2012) 14 available at <https://www.supremecourt.uk/docs/speech_120125.pdf> accessed 18 November 2015

¹⁹⁰ Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ (2015) 1 EHRLR 57

¹⁹¹ *ibid* 58

¹⁹² *R (Osborne) v Parole Board* [2014] AC 1115 [62]

¹⁹³ Masterman and Wheatle (n 190) 58

¹⁹⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

hope¹⁹⁵ that the resurgence continues, whereas another Justice passively observed that a ‘reemphasis’¹⁹⁶ of the common law as a source of human rights was taking place. Another Justice felt that there was simply ‘a debate to be had’¹⁹⁷ about the accuracy of claims to a ‘resurgence’. As discussed earlier, one Justice observed this varying enthusiasm throughout the UK judiciary, noting some judges being content to apply the Convention rights under the HRA and others preferring to ‘hark back’¹⁹⁸ to the common law. One Justice stressed that the desire for greater use of the common law stemmed not from an ‘anti-Strasbourg’¹⁹⁹ sentiment within the UK judiciary but a desire to rectify the ‘imbalance’²⁰⁰ caused by overreliance on Strasbourg case law.

The Strasbourg judges, for their part, were sympathetic to this development. On the one hand, one judge noted that direct and explicit application of the ECtHR case law – ‘looking of the fact complained of through Convention spectacles’²⁰¹ – was, from the perspective of the ECtHR, the most reliable means of ensuring compliance with the ECHR, just as incorporation of the ECHR into domestic law has been said by the Strasbourg court to be ‘a particularly faithful reflection’²⁰² of the commitment to securing Convention rights at the national level. On the other hand, it was accepted that the common law, as ‘authentic national law ... is something which cannot simply be put aside’.²⁰³ Thus, the common law resurgence was seen not as ‘a unique British phenomenon’²⁰⁴ but as part of the judicial process by which many national courts ‘discover’²⁰⁵ and ‘rediscover’²⁰⁶ new potential in national law over time. While welcoming the process, however, it was stressed that the ‘contents’²⁰⁷ must still be subject to scrutiny for compliance with ECHR rights.

6.2 The Tension-Mitigating Role of the Resurgence

Earlier in this chapter it was shown how both disagreement and the proactive development of the Convention rights by the UK courts were considered to have the potential to benefit the formal and substantive quality of the Strasbourg jurisprudence and strengthen the Justices’ sense of judicial identity, thereby helping to mitigate the tensions within the relationship

¹⁹⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁹⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁹⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁹⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²⁰⁰ *ibid*

²⁰¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²⁰² *Ireland v United Kingdom* (1978) 2 EHRR 25

²⁰³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

²⁰⁴ *ibid*

²⁰⁵ *ibid*

²⁰⁶ *ibid*

²⁰⁷ *ibid*

between the courts. On the basis of the interview insights provided by the Justices and Strasbourg judges, it appears that a resurgent common law can also play a role in these respects.

With regard to the formal quality of the Strasbourg jurisprudence, it was explained by the Justices that the resurgence has taken place partly because the common law authorities can, in some areas, provide a more coherent body of general principles than the Strasbourg case law with which to address issues falling within the ambit of Convention rights. Here, a number of Justices referred to the *Kennedy* case. It was seen earlier how this was cited by the Justices as an example of their use of judgments to draw the attention of the ECtHR to inconsistencies in its jurisprudence. However, the judgment itself also gives recognition to the tension-mitigating capacity of the common law:

Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.²⁰⁸

Also cited in this regard was *Guardian Newspapers v Westminster Magistrates Court*.²⁰⁹ The question there was whether the principle of open justice empowered the courts to allow journalistic and public access to court documents. In concluding that it did, the Court of Appeal was ‘fortified by the common theme of the judgments in other common law countries ... Collectively they are strong persuasive authority’.²¹⁰ In contrast, ‘[t]he Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut’.²¹¹ The court was therefore clear that the outcome was based on ‘the common law and not on article 10’.²¹²

With regard to the substantive quality of the Strasbourg jurisprudence, it was said that there was much within the common law ‘which is highly relevant to human rights law’,²¹³ developed over centuries of tradition, thus offering a rich source of law with which to resolve human rights claims.²¹⁴ Thus, it was suggested by a number of the Justices interviewed that a

²⁰⁸ *Kennedy* (n 47) [46] (Lord Mance)

²⁰⁹ *Guardian Newspapers v Westminster Magistrates Court* [2012] 3 WLR 1343

²¹⁰ *ibid* [88] (Toulson LJ)

²¹¹ *ibid* [89]

²¹² *ibid*

²¹³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²¹⁴ Lord Reed here has observed: ‘...the independence of the judiciary has been protected by statute since the end of the seventeenth century and the beginning of the eighteenth. Habeas corpus in England is of course much older. Much of our law of criminal evidence and procedure has its roots far in the past, and has been designed to ensure a fair trial. Our law of tort is designed to protect people’s bodily integrity, their reputation, and their freedom to live free of unlawful interference of all kinds. Our law of property protects their possessions. Freedom from illegal

greater use of the common law to address problems raised by Convention claims could, in turn, ‘have an influence on decisions in Strasbourg’²¹⁵ and thus enrich the contribution of the UK courts to the development of the jurisprudence.

Most importantly, however, it was clear from the Justices’ accounts that the common law resurgence shared with the practices of formal judicial dialogue the potential to bolster the identity of the UK courts. As explored earlier, the common law for a number of the Justices was a proud but too often neglected source of constitutional heritage since the passing of the HRA. The excessive reliance which several consider to have been placed on Strasbourg judgments as the guiding source of domestic decision-making on human rights was also felt to be contributing to a perception of human rights as part of a foreign-imposed legal system. The reassertion of the common law as a source of human rights was thus felt to be a welcome return by the UK courts to the practice of drawing upon and developing their constitutional heritage. Lord Reed has argued here that a greater reliance on the common law allows the UK courts to ‘actively engage with the judgments of the highest courts in other common law jurisdictions’²¹⁶ and thereby bolster ‘the reputation of the common law’,²¹⁷ and ensure the ‘influence of the judgments of our highest courts, in particular the Supreme Court, in other common law jurisdictions around the world’.²¹⁸

Further, by stressing domestic judicial ownership of human rights via the common law, several Justices suggested that they are able to counter the perception that those rights are a European imposition. As one Justice noted, ‘by recognising and explaining common law principles we actually, firstly, give concepts a domestic root, and I think that is probably something that’s quite useful and is understood in Strasbourg’.²¹⁹ On this point, another Justice was even more explicit on the potential of the common law. Referring to the Supreme Court’s approach in *Osborne*, they remarked:

[T]hat is one way of creating a narrative which says these human rights aren’t a foreign imposition, they are part of our long-term tradition which, of course, they are because the human rights convention, when initially formulated, drew on many British traditions and ... had a huge British input.²²⁰

searches of premises or correspondence has been protected under the common law since the 18th century ... Slavery was held to be unlawful at common law at about the same time’. Master Reed (n 35)

²¹⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹⁶ Master Reed (n 35)

²¹⁷ *ibid*

²¹⁸ *ibid*

²¹⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

²²⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

In common with the Justices, several of the Strasbourg judges noted the problematic perception that human rights are an alien imposition in the UK. This view was felt to be part of a wider trend whereby ‘people want more power for themselves at local level, rather than being ruled by what they consider to be an elite miles away’.²²¹ Where this has ‘repercussions for the protection of human rights’,²²² however, it was felt to be understandable for domestic judges to seek ‘means of minimising’²²³ those repercussions. A greater use of the common law in human rights adjudication was thus seen as one way of achieving this, taking ‘the route of national law rather than the route of international law’²²⁴ and replacing ‘the foreign with the home-grown’.²²⁵ For the ECtHR judges, what was important at the national level was not the source of law with which rights are protected but the existence of the protections themselves. As one judge explained, ‘what this Convention is concerned about is *results*, ensuring that in practice what the Convention guarantees by way of rights, that is the level of protection as embodied in the Convention Article concerned, is actually enjoyed as far as possible [emphasis added]’.²²⁶ As with formal dialogue, the position of the Strasbourg judges was thus one of accommodation, recognising the benefits of the mitigation strategies adopted by the UK courts for the viability of the European system of human rights protection.

7. Conclusion

This chapter has examined the functions of formal judicial dialogue between the UK courts and the ECtHR. Its conclusion is that the principal judicial intention behind this process, by which the courts exchange views and seek to influence one another through their judgments, is to mitigate the tensions arising from the overlapping and multi-layered systems for the judicial protection of human rights of which these courts are a part.

The chapter began by observing three judicial motivations at work in this dialogue: for the ECtHR judges, the desire to make the Convention rights effective at the national level; for the Justices, the eagerness to have a voice in the development of the Strasbourg jurisprudence; and, for both sets of judges, the desire for mutually compatible standards of human rights protection. Formal dialogue – broadly defined in Chapter 3 as the process by which the courts exchange views and seek to influence one another through their judgments – works to achieve these in a

²²¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²²² *ibid*

²²³ *ibid*

²²⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

²²⁵ *ibid*

²²⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

number of ways. A sufficient influence of the ECtHR upon domestic judicial decision-making – the form of dialogue emphasised by the ECtHR judges – achieves the first of these. On the basis of the interview insights, however, formal dialogue is directed principally at the second and third motivations due to the presence of multiple tensions within the relationship between the courts which are felt to render the application of the ECtHR case law at the domestic level problematic. These tensions are rooted in the differences of institutional perspective, as a national and supranational human rights court, respectively, and from the diverging legal traditions of their respective judges. The differences are brought to the fore by the jurisdictional pluralism which defines the relationship between these courts. They manifest in difficulties concerning the clarity and coherence of ECtHR judgments, their substantive grasp of the UK domestic law, in particular the operation of its common law system, and raise questions for domestic judicial identity. Through their exchange of views and efforts to influence one another through their respective judgments, however, the judges feel that they are able to take mitigate these issues.

First, the ability of the courts to disagree was felt to provide a mutual check on decision-making. The ability of the ECtHR to check domestic judgments is valued by a number of UK judges for its role in challenging judicial complacency regarding the protection of rights in domestic law. Further, the ability of the UK courts to criticise and disagree with ECtHR judgments was deemed to provide an additional source of procedural flexibility to the ECHR system akin to a ‘safety valve’. This was considered by a number of the judges to accord with the primary role of the domestic courts in the protection of Convention rights under the subsidiarity principle. Additionally, the ability of the UK courts to check judgments of the ECtHR is thought to prevent areas of particularly problematic jurisprudence from causing excessive strain on the relationship between the courts, thereby averting the risk of erosion in the legitimacy of the ECtHR among domestic audiences.

Second, the views expressed in the domestic judgments were considered to carry the potential of improving the formal quality of the Strasbourg jurisprudence. The raising of concerns or disagreements, on the one hand, was felt to draw the attention of the ECtHR to problem areas, while their contributions in areas of unclear jurisprudence, on the other hand, in addition to providing resolution at the domestic level, are felt to offer potential insights for the ECtHR for addressing those areas when it next considers the same issue.

Third, with regard to the substantive quality of the Strasbourg jurisprudence, the contributions of the UK courts, through their critiques and through their analysis in areas where the ECtHR has yet to make a direct ruling, were again felt to alert the latter to misunderstandings

of domestic law and offer useful insights with which the ECtHR can formulate European norms which are workable within the UK context.

Fourth, the chapter has observed that the judgments which the Justices associate with dialogue play a mitigating role in the issues of judicial identity arising from the tensions within the relationship between the courts. The increasingly assertive role with which the Justices associate their dialogue, manifesting in a willingness to both challenge the ECtHR where they disagree with its judgments and offer their own conclusions where the ECtHR has not yet spoken, appear to contribute a more distinct identity for the UK courts.

Finally, the chapter has observed a functional connection between the emergence of dialogue and the resurgence of the common law in domestic judicial thinking on human rights adjudication. On the basis of the judges' insights, it appears that the resurgent common law plays a complimentary role to dialogue, performing the same tension-mitigating functions. It is considered to offer a comprehensive source of law in certain areas where the requirements of the ECtHR jurisprudence are unclear, and have much to contribute to the substantive development of European human rights law. Further, it appears to provide certain Justices with a more distinct sense of ownership over their adjudication on human rights. There is a further, strategic element underpinning both developments: the desire to challenge perceptions that human rights are a foreign imposition in the UK.

The observations of a functional link between the emergence of dialogue and the resurgence of the common law support the analysis of Masterman and Wheatle, who argue that '[t]he [Supreme] [C]ourt's reassertion of domestic law in rights protection speaks not only to a domestic audience wary of Strasbourg overreach, but also a second audience: the European Court of Human Rights itself'.²²⁷ The common law resurgence, they note, follows on from the 'pivotal moment in the interaction between Strasbourg and domestic courts'²²⁸ during the *Horncastle / Al-Khawaja* exchange, which demonstrated 'the fallibility of Strasbourg and the potential for assertiveness on the part of national courts'²²⁹ and that '[t]he armour of Strasbourg has been pierced'.²³⁰ What is more, 'the reiteration of the common law's vitality in the face of the Convention rights amounts to a partial rejoinder to calls for a UK Bill of Rights'.²³¹ Along with those developed in Chapter 3, these observations are instructive to the legitimising role of judicial dialogue between these courts. Before turning to that part of the discussion, however, it

²²⁷ Masterman and Wheatle (n 190) 63

²²⁸ *ibid*

²²⁹ *ibid*

²³⁰ *ibid*

²³¹ *ibid* 65

is necessary to explore the third – and largely unexplored – dimension of the dialogue between the courts: informal dialogue in the form of face-to-face meetings.

Chapter 5

‘Informal’ Judicial Dialogue

I think that developing relations with the Strasbourg Court and actually meeting them and seeing the judges is very, very important. Partly because of the present political stance, we are generally seen as being antagonistic as a country to Europe for reasons which, although I don’t happen to agree with, I understand.¹

- Justice of the UK Supreme Court

1. Introduction

The thesis has so far established from the interview data the nature and functions of judgment-based or ‘formal’ dialogue between the UK courts and the European Court of Human Rights (ECtHR). Chapter 3 developed a definition of this type of interaction as a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence each other through their respective judgments. In Chapter 4, it was shown how this process appears to have the overarching aim of mitigating the tensions within the relationship between the UK courts and the ECtHR inherent in their overlapping jurisdictions, institutional differences of perspective and diversity in legal tradition. It was argued that ‘dialogue’, to this extent, connects with another significant development in the UK courts, the common law resurgence, as part of a broader trend in domestic judicial thinking aimed at increasing the distinctness of their role and identity in human rights adjudication.

The focus of this particular chapter, the last exploring how the judges understand the dialogue between their courts, is on the face-to-face or *informal* dialogue which takes place in the form of periodic meetings. In Chapters 1 and 2, it was noted that there has been little sustained analysis of the role of this particular form of interaction between these courts. At the same time, a number of senior UK and ECtHR judges have spoken of its importance. This chapter therefore aims to provide an account of informal dialogue between these courts based upon the insights from the interviews and extra-judicial materials. In doing so, it seeks to answer the third research question posed in Chapter 1: what is the role of informal dialogue between the UK courts and the European Court of Human Rights? The chapter consists of five parts. In Part 2, informal judicial dialogue is situated within the context of the European and domestic rules which appear to have both encouraged and facilitated its development. Next, in Part 3, the chapter considers the nature of informal dialogue: the frequency of the meetings, the participants and the format and tone of the discussions. The third and central part of this chapter explores the procedural, substantive and

¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

diplomatic functions of informal dialogue which supplement the tension-mitigating functions of formal judicial dialogue. While each of these functions has its own intrinsic value, it will be shown how they are also aimed at enhancing subsidiarity between the courts. Part 4 considers the implications of these functions by reference to the varied relations which exist between the ECtHR and the respective national judiciaries across the ECHR Member States, followed by the conclusion in Part 5.

2. The Diplomatic Roles of the UK and Strasbourg Judiciaries

There is no legislation which specifically regulates face-to-face meetings between the UK and Strasbourg judges. Nonetheless, informal dialogue has been made possible by rules and policies at the domestic and European levels which have permitted and encouraged diplomatic relations between their institutions. The following sections address these facilitators from the Strasbourg and UK judicial perspectives.

2.1 The Strasbourg Judiciary

In Chapter 1, it was seen that the building and maintenance of relations with national authorities, including national judiciaries, has long been part of the Strasbourg Court's activities. The Court's President from 1985-1998, Rolv Ryssdal, championed a policy of hosting delegations from the highest national courts 'for informal exchanges on the Convention case-law and procedure',² viewing a constructive relationship between the national courts across the Council of Europe and the ECtHR as a necessity to the success of the Convention system.³ The Annual Reports of the ECtHR demonstrate that this policy has retained its place in the Court's activities. The first such report, published in 2002, details meetings with a wide range of national constitutional and supreme courts.⁴

There are a number of provisions in place in the ECHR and the ECtHR's Rules of Court which facilitate these activities. First, under the Rules of Court, the President of the ECtHR holds a responsibility for relations with national judiciaries.⁵ Second, under Art.51 ECHR,⁶ all judges

² Paul Mahoney and Søren Prebensen, 'What Does it Take to Be a Good President? Rolv Ryssdal as a Case-Study' in Jonathan Sharpe (ed), *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Council of Europe, Third Millennium Publishing 2010) 117

³ *ibid*

⁴ European Court of Human Rights, *Annual Report 2001* (Registry of the European Court of Human Rights 2002) 33

⁵ 'The President shall represent the Court and, in particular, be responsible for its relations with the authorities of the Council of Europe'. Rule 9.1 of the Rules of Court; David Harris, Michael O'Boyle, Edward Bates and Carla Buckley (eds), *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 106

⁶ European Convention on Human Rights and Fundamental Freedoms Article 51

of the ECtHR are afforded the same ‘privileges and immunities, exemptions and facilities’⁷ which are conferred upon diplomats under international law. They are thus ‘immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity and within the limit of their authority’.⁸ Third, the Council of Europe’s 2012 Brighton Declaration ‘[w]elcomes and encourages open dialogues’⁹ between the ECtHR and the highest courts of the State Parties.¹⁰ The former UK judge at the ECtHR, Paul Mahoney, and the Court’s former President, Dean Spielmann, take the view that this Declaration represents a blessing by those governments at the Brighton Conference of the continuation of direct relations between the judges of the national judiciaries within the Council of Europe and the judges of the ECtHR.¹¹

2.2 The UK Judiciary

In contrast to the ECtHR judges, the ability of the UK judges to engage in diplomatic relations with the ECtHR was historically hampered by two facts. First, as seen in the introductory chapter, the UK courts played little role in the interpretation of ECHR rights.¹² Second, the UK judiciary previously lacked the institutional autonomy to conduct international relations with its counterparts abroad. The two key pieces of legislation which dramatically altered this situation, paving the way for diplomatic relations between the ECtHR and the UK courts, are the Human Rights Act (HRA) 1998 and, perhaps more importantly, the Constitutional Reform Act (CRA) 2005.

2.2.1 *The Human Rights Act 1998*

Prior to 2000, there was arguably little reason for the UK judges to engage in face-to-face relations with the ECtHR judges. Under the UK’s dualist legal system, ECHR rights could not be enforced at the domestic level and thus the UK courts played little role in their interpretation. As was noted in Chapter 1, however, the passing into UK law of the list of rights, drawn directly from the ECHR, within Schedule 1 of the HRA 1998, and the constitutional bestowing of powers on the UK courts to adjudicate upon them, fundamentally changed their relationship with the

⁷ Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe 1996, Article 1

⁸ General Agreement on Privileges and Immunities of the Council of Europe 1949, Article 18

⁹ Brighton Declaration on the Future of the European Court of Human Rights (Brighton, 19-20 April 2012) [12](c)

¹⁰ *ibid* [12](c)(i)

¹¹ Dean Spielmann, ‘Whither Judicial Dialogue?’ (Sir Thomas More Lecture, London, 12 October 2015) <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016; Paul Mahoney, ‘The Relationship between the Strasbourg Court and the National Courts – as seen from Strasbourg’ in Katja S. Ziegler, Elizabeth Wicks & Loveday Hodson (eds), *The UK and Human Rights: A Strained Relationship?* (Hart 2015) 21, 27

¹² Keir Starmer and Francesca Klug, ‘Incorporation through the Back Door’ [1997] PL 223

ECtHR. It did so by placing upon the UK judges the task of interpreting an identical set of rights to the Strasbourg judges. While the Act left open whether and how the judges should conduct any relations with the ECtHR judges, it could be argued that this provided an incentive for informal dialogue between them by establishing a common point of reference for discussions. What is more significant in this respect, however, is s.2 of the Act, requiring the UK courts to ‘take into account’ judgments and decisions of the ECtHR when adjudicating on Convention rights. It would be reasonable to assume that this duty further incentivised informal dialogue between the UK and Strasbourg judges to the extent that both were engaged in interpreting and applying not only an identical set of rights but also the jurisprudence of the ECtHR.

2.2.2 The Constitutional Reform Act 2005

Despite these developments, a cursory glance through the records of visits to and from the ECtHR reveals the conspicuous absence of any bilateral exchanges with UK judges during the HRA’s infancy.¹³ In fact, the first such meeting did not take place until 2006.¹⁴ In this respect, as one Strasbourg judge remarked, ‘the UK was later than other countries’.¹⁵ The explanation for the apparent absence of exchanges between the UK and Strasbourg judiciaries during the first five years of the HRA appears to reside in the passing of the CRA 2005. As is well known, this ‘constitutional instrument’¹⁶ drastically increased the independence of the UK judiciary from the legislative and executive branches of government, replacing the judicial committee of the House of Lords with a Supreme Court¹⁷ and transferring the powers of the Lord Chancellor as head of the judiciary to the Lord Chief Justice.¹⁸ Most significantly for present purposes, however, the Act did not specify how the powers transferred to the Lord Chief Justice were to be used. As the Lord Chief Justice, Lord Thomas, has explained:

The Constitutional Reform Act by and large vested in the Lord Chief Justice most of the old powers that had been exercised by the Lord Chancellor as head of the judiciary in relation to England and Wales and most of the new powers to be conferred on the judiciary in relation to the delivery of justice in England and Wales.

¹³ European Court of Human Rights, *Annual Reports* (Council of Europe 2001-2015) <<http://www.echr.coe.int/Pages/home.aspx?p=echrpublications>> accessed 17 March 2016; Detailed records of visits to and from the ECtHR from 2007 are available at the webpage of the court’s President: <<http://www.echr.coe.int/Pages/home.aspx?p=court/president>> accessed 17 March 2016

¹⁴ Mary Arden, *Human Rights and European Law: Building New Legal Orders* (OUP 2015) 274

¹⁵ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 28 May 2015)

¹⁶ *R (HS2) v Secretary of State for Transport and another* [2014] 1 WLR 324 [207] (Lord Neuberger and Lord Mance)

¹⁷ Constitutional Reform Act 2005 Part III

¹⁸ *ibid* s.7

The Act was essentially silent on the exercise of these powers by the Lord Chief Justice and on the governance of the judiciary. *This has enabled the judiciary to develop its own leadership and governance.*¹⁹

A by-product of this judicial self-governance was an expansion in what could be called the diplomatic autonomy of the UK judiciary in its relations with foreign counterparts. Utilising this autonomy, it has since the Act's passing set itself a number of objectives for its international judicial relations.²⁰ They include building links with judiciaries within the EU and Council of Europe, 'facilitating co-operation and understanding on matters of mutual interest',²¹ holding bilateral meetings with counterparts 'with whom the UK judiciary has or wishes to have close links'²² and participation in 'projects for the promotion of English law'.²³

This growth in diplomatic autonomy has also prompted a number of other developments within the UK judiciary. The Justices of the UK Supreme Court, according to the court's statement of professional values, have an explicit role as 'ambassadors for the court'²⁴ and, as Paterson notes, a strategic objective to develop relations with the ECtHR.²⁵ This helps to explain why, as seen in Chapter 4, a number of the Justices interviewed conceived of themselves as having a role as representatives of the common law tradition on the international plane. Most interestingly, however, the diplomatic autonomy brought about by the CRA 2005 necessitated a leading strategist to monitor its exercise. Lady Justice Arden has explained that the 2005 Act in this way prompted the creation of her current role as 'Head of International Judicial Relations':²⁶

As a separate institution, the judiciary had to conduct its own foreign policy and I became, so to speak, its foreign secretary. My responsibility was, where appropriate, to facilitate relations with other judiciaries and to receive visits from them in London.²⁷

¹⁹ Lord Thomas, 'Judicial Leadership' (Conference on the Paradox of Judicial Independence, UCL Constitution Unit, 22 June 2015) 7 (emphasis added) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf>> accessed 17 March 2016

²⁰ Courts and Tribunals Judiciary, 'International Judicial Relations' <<https://www.judiciary.gov.uk/about-the-judiciary/international/international-judicial-relations/>> accessed 17 March 2016

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ UK Supreme Court, *The Supreme Court Annual Report and Accounts* (2014-2015, HC 50) 12

²⁵ *ibid* 11; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 221

²⁶ Courts and Tribunals Judiciary, 'Head of International Judicial Relations' <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/biographies/biography-ardenlj/>> accessed 18 March 2016

²⁷ Arden, *Building New Legal Orders* (n 14) 4, 274: 'Surprisingly there were no meetings between the UK judiciary and the Strasbourg or Luxembourg judiciary until about 2006, when I suggested such a meeting, and these have been held at regular intervals since.'

As the UK's foremost judicial diplomat, Lady Justice Arden carries a responsibility to 'take stock of the work already being done and to identify the work that needs to be done'.²⁸ The latter point is particularly interesting. It indicates that this judicial-diplomatic role is partly conducted on a needs basis, where relations with certain counterparts are not what they should be. In this capacity, it was Lady Justice Arden who, in 2006, brokered the very first bilateral meeting between UK and ECtHR judges and has since played the leading role in maintaining judicial relations between their institutions.²⁹

2.2.3 Judges as diplomats

Through these various frameworks at the domestic and European levels, it is apparent that the UK and Strasbourg judges have come to possess certain diplomatic roles. In performing these roles, it is important to bear in mind the nature of the bodies which the respective judges represent. As Hutchings and Suri note, '[o]ne cannot understand the role played by diplomats without reference to their larger organizational context. Diplomats represent the characteristics of their government, as well as its official positions'.³⁰ The UK judges in their relations with their counterparts, however, do not represent the characteristics and positions of the government but those of the UK judiciary. Equally, the President of the ECtHR is tasked not with representing the Council of Europe but the ECtHR.

The characteristics and positions of these judicial bodies differ in major respects, as the interviewed judges were quick to point out. The UK judges represent a senior appellate court operating within the common law tradition of the UK, a role which, as seen in Chapter 4, for a number of the Justices carries particular import. Their official positions are those established in the domestic case law on the interpretation of fundamental rights. The ECtHR judges, in turn, represent a supranational body responsible for supervising the protection of human rights across forty-seven countries. Its official positions, in turn, are those established within its jurisprudence in respect of those countries. The last chapter made clear that the judges rely on the exchanges of view and cross-influence through their judgments as a means of mitigating the tensions arising from their relationship. What will become clear by the end of this chapter is that informal judicial dialogue performs a similar role, only through direct, face-to-face means.

²⁸ Courts and Tribunal Judiciary, 'Head of International Judicial Relations' (n 26)

²⁹ Arden, *Building New Legal Orders* (n 14) 26; Spielmann (n 11) 3

³⁰ Robert Hutchings and Jeremi Suri (eds), *Foreign Policy Breakthroughs: Cases in Successful Diplomacy* (OUP 2015) 16

3. The Nature of Bilateral Meetings

Having thus set out the frameworks which have prompted and facilitated diplomatic relations between the UK and ECtHR judges, the chapter turns now to the nature of the bilateral meetings at the centre of those relations. This section examines the frequency of the meetings, the participants and the format and the tone of the discussions.

3.1 Frequency

Bilateral meetings between ECtHR and UK judges have been taking place on a fairly regular basis since they began. As a rough estimate from the available details, eight bilateral meetings took place between 2006 and 2015, providing the judges with a regular, if slightly staggered, channel of communication. The first took place in 2006. Then, in October 2007,³¹ the ECtHR President, Jean-Paul Costa, along with ‘Section Presidents and members of the Registry’³² made a two-day visit to the UK where they met with Lord Phillips, the Lord Chief Justice, and participated in ‘workshops on the case-law of the Court’.³³ A third meeting took place in June 2010.³⁴ The Lord Chief Justice, then Lord Judge, and Lord Phillips, the President of the Supreme Court, led ‘a high level delegation of United Kingdom judges’³⁵ to the ECtHR ‘for a working meeting with Judges and members of the Registry’³⁶ as ‘part of the continuing dialogue between senior national courts and Strasbourg’.³⁷ In February 2012, a further meeting took place in London where the ECtHR President, Sir Nicolas Bratza, ‘accompanied by [ECtHR] Judges and members of the Registry’,³⁸ was received by Lord Judge and Lord Phillips, again in their respective capacities as Lord Chief Justice and Supreme Court President. Additionally, senior members of the Scottish judiciary, including the Lord President and Lord Justice General of Scotland, Lord Hamilton, and the Lord Chief Justice of Northern Ireland, Sir Declan Morgan, were also present.³⁹ Later, in March 2014, the ECtHR President, Dean Spielmann, accompanied by the Court’s Vice-Presidents, Josep Casadevall and Guido Raimondi (the Court’s current President, at the time of writing), and the Deputy Registrar, Michael O’Boyle, visited the UK where they had two meetings with UK judges.⁴⁰ First, they met with the Lord Chief Justice, Lord

³¹ ECtHR Official Visits (n 13)

³² *ibid*

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid*

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *ibid*

Thomas, the President of the Queen's Bench Division, Sir Brian Leveson, and the Head of International Judicial Relations, Lady Justice Arden.⁴¹ They later met with the President of the Supreme Court, Lord Neuberger, and eight Justices of the Supreme Court.⁴² Later that year, in July, the Lord Chief Justice, Lord Thomas, led another group of UK judges, including two Justices of the Supreme Court,⁴³ to the ECtHR where they 'took part in a day-long programme of discussions with Judges of the Court and members of the Registry.'⁴⁴ In October 2015, a further meeting took place between 'senior judges of the different jurisdictions of the United Kingdom'⁴⁵ and 'representatives of the [Strasbourg] Court'.⁴⁶

The relative frequency of the meetings appears to be aimed deliberately at reducing the effects of regular changes in judicial office-holders. According to the former ECtHR President, Dean Spielmann, regular meetings between ECtHR and national judges are particularly important given the 'single-mandate'⁴⁷ rule of non-renewable nine year tenures for the Strasbourg judges.⁴⁸ One Strasbourg judge in interview stated the issue here in even blunter terms: 'This court is like a hotel – people check in and they check out'.⁴⁹ The frequency of the changes at both the ECtHR and within the UK judiciary is apparent from the visits outlined above. Since the first exchange with UK judges took place in 2006, the ECtHR Presidency has changed four times.⁵⁰ The House of Lords has been replaced by the Supreme Court as the highest appellate court in the UK, and the offices of the Lord Chief Justice and the Presidency of the Supreme Court has changed hands twice if the change in Senior Law Lord at the judicial House of Lords is also considered.⁵¹

Thus, it appears that the perceived value of informal dialogue is contingent upon its regularity. Lady Justice Arden has referred to this as the need for 'constant renewal'⁵² of the relationship between the UK and Strasbourg courts. The more regular the informal dialogue, it

⁴¹ *ibid*

⁴² *ibid*

⁴³ During the interviews with the Supreme Court Justices, Lord Mance and Lord Reed were said to have been part of this particular delegation.

⁴⁴ ECtHR Official Visits (n 13)

⁴⁵ European Court of Human Rights, *Annual Report* (Council of Europe 2015) 11

⁴⁶ *ibid*

⁴⁷ Spielmann (n 11)

⁴⁸ Convention for the Protection of Human Rights and Fundamental Freedoms Article 23(1)

⁴⁹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁵⁰ Luzius Wildhaber (1 November 1998 to 18 January 2007), Jean-Paul Costa (9 January 2007 to 3 November 2011) Sir Nicolas Bratza (4 November 2011 to 31 October 2012), Dean Spielmann 1 November 2012 to 31 October 2015) and Guido Raimondi (1 November 2015-Present)

<<http://www.echr.coe.int/Pages/home.aspx?p=court/formerpresidents&c=>> accessed 10 December 2016

⁵¹ Lord Judge succeeded Lord Phillips as Lord Chief Justice in 2008, who was succeeded by Lord Thomas in 2013. Lord Phillips succeeded Lord Bingham in 2008 as Senior Law Lord, becoming the inaugural President of the UK Supreme Court in 2009 and then succeeded by Lord Neuberger in 2012.

⁵² Arden, *Building New Legal Orders* (n 14) 315

seems, the greater the value of the interactions. The less regular the informal dialogue, in contrast, particularly when there has been changes in key judicial office-holders, the weaker the value of the interactions. The implication here is that those tensions between the courts which were explored through the interview data in the last chapter, between the UK courts as national courts and the ECtHR as a supranational human rights court, and between the common and civil law traditions of the Council of Europe, and the issues which these were perceived by the interviewed judges to generate – difficulties in the application of ECtHR case law for the domestic courts and misunderstandings of the UK common law system – have the potential to increase should their meetings become too infrequent. This point will be returned to later in the chapter.

3.2 Participants

It will be clear from the last section that there have been a range of participants to the meetings from both the ECtHR and the UK judiciary, with the participants also varying slightly with each meeting. From the UK, the meetings have included a ‘pick-and-mix’ of the Lord Chief Justice, the President of the Supreme Court, the Head of International Judicial Relations and senior judges from the High Court and the Scottish and Northern Irish legal jurisdictions. Generally, however, they have consistently tended to include the Lord Chief Justice, the President of the UK Supreme Court and, on the basis of Lady Justice Arden’s insights on the topic, the Head of International Judicial Relations. Thus, if it is the case that the UK judiciary has, since the CRA 2005, increased its diplomatic autonomy, it would appear that this is exercised only at the most senior levels. From the ECtHR, the President has been the constant representative, consistently with their role under the ECtHR’s Rules of Court,⁵³ along with the national judge for the country concerned⁵⁴ and senior members of the Registry. The frequent presence of these various high judicial office holders, however, appears to provide not only consistency but *symbolic* and *strategic* value.

Symbolically, the presence of the Lord Chief Justice, the President of the Supreme Court and the ECtHR President are perhaps the most significant. As Head of the Judiciary in the UK, the Lord Chief Justice speaks on behalf and with the full weight of UK judges. Similarly, the President of the Supreme Court speaks on behalf of the most senior court in the UK and the most authoritative on the interpretation of Convention rights in the domestic context. The ECtHR President’s role is also symbolically significant, showing the ECtHR to be taking seriously its

⁵³ Rule 9.1 of the Rules of Court (n 5)

⁵⁴ The presence of the national judge in the meetings was confirmed during the interviews with the ECtHR judges.

relations with the UK judiciary. It is not difficult to imagine that exchanges which never included the President could be interpreted unfavourably by the UK judges. What is more, by including these senior representatives from both courts, the meetings, to those who are aware of them, serve to convey an impression of equality between the participants. They suggest a relationship of genuine ‘dialogue’ rather than ‘dictation’.⁵⁵

Strategically, the regular participation of the judges identified above has practical advantages. The frequent participation of the Lord Chief Justice would appear to provide a direct feedback link between the meetings with the ECtHR judges and the Judicial Executive Board, responsible for the governance of the judiciary, and the Judges’ Council, the body which represents all levels of the UK judiciary.⁵⁶ Thus, the Lord Chief Justice is able to communicate issues or concerns which have arisen at any level of the UK judiciary as a result of ECtHR jurisprudence to the Strasbourg judges and deliver any guidance or conclusions which are reached during the ensuing discussions. Equally, the participation of either the President or Justices of the Supreme Court provides a feedback link between the ECtHR judges and the UK court which makes the most authoritative pronouncements on the interpretation of Convention rights at the domestic level. Indeed, the interview insights supporting this point are considered below.

From the perspective of the ECtHR, the central role of the President is also strategically valuable. As with the Lord Chief Justice in the UK, it provides a feedback link to other ECtHR judges. The central place of the President in the court’s operations allows any lessons learned during the discussions with UK judges to be communicated where appropriate through plenary meetings, Grand Chamber meetings and panel meetings for Grand Chamber referral requests.⁵⁷ The participation of the national judge for the UK at the ECtHR in the meetings is perhaps even more important in this respect. They can provide the feedback link from the discussions with the UK judges to the ECtHR judges at the Section of the court who routinely deal with UK cases. Additionally, the presence of senior members of the Registry also seems crucial, given its wide-ranging functions in respect of the ECtHR’s work. It is responsible for ‘preparing files and analytical notes for the judge rapporteurs’,⁵⁸ ‘drafting decisions and judgments’⁵⁹ and

⁵⁵ Lord Kerr, ‘The Conversation between National Courts and Strasbourg – Dialogue or Dictation?’ (2009) 44 *Irish Jurist* 1

⁵⁶ Courts and Tribunals Judiciary, ‘Judges’ Council’

<<https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judges-council/>> accessed 17 March 2016

⁵⁷ Harris et al (n 5) 106-107

⁵⁸ *ibid* 112

⁵⁹ *ibid*

‘responding to inquiries and investigating issues of national or international law relevant to the Court’s work’.⁶⁰ They thus play a crucial role in informing the ECtHR judges in their decision-making. Thus, if any of the discussions relate to issues of UK law, it seems that the senior members of the Registry will be better informed in those tasks.

For all of the strategic value offered through the consistent participation of these office-holders, however, the regular changes in personnel cannot be overlooked. In this regard, it would seem that the presence of the Head of International Judicial Relations since the first meeting took place in 2006 has provided valuable continuity. Dean Spielmann has described Lady Justice Arden as the ‘moving force behind the strong relations that exist’⁶¹ between the UK courts and the ECtHR. This is unsurprising and yet all the more interesting given her role as the UK’s Head of International Judicial Relations. It is an indicator of the prominence which this role has quickly gained in the management of the relations between the UK and Strasbourg judges.

3.3 Format and Tone

Turning to the format of the meetings, there are a number of features worth drawing attention to. First, it is important to first note their frequently *bilateral* nature: they often involve representatives from the UK judiciary and the ECtHR alone. Second, it was described by the Strasbourg judges in interview that the meetings typically have *a written agenda*. Third, it was also said in those interviews that while the meetings will usually have an agenda, the judges are generally free to articulate their questions, thoughts, concerns or ideas. In this respect, the meetings were said by one Justice to be characterised by ‘give and take and *open discussion*’.⁶² Fourth, it is clear that the meetings consist of more than just brief exchanges. The visits generally take place over the period of one to two days and are made up of what are variably described as ‘workshops on the [ECtHR] case law’,⁶³ ‘working meeting[s]’,⁶⁴ ‘working sessions’⁶⁵ and ‘day-long programme[s] of discussions’.⁶⁶ Finally, and perhaps most significantly, *no minutes are recorded* at the meetings in order to preserve judicial discretion.⁶⁷

These features appear to have a number of implications. While the written agenda will obviously play some role in steering the discussions, the open flow of the verbal exchanges described by the judges indicates a discursive flexibility which they simply do not have in their

⁶⁰ *ibid*

⁶¹ Spielmann (n 11)

⁶² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁶³ ECtHR Official Visits (n 13)

⁶⁴ *ibid*

⁶⁵ This term was used by a Justice of the Supreme Court in interview.

⁶⁶ ECtHR Official Visits (n 13)

⁶⁷ Spielmann (n 11)

judgments i.e. the domain of ‘formal’ dialogue. As Lady Justice Arden describes it, there is ‘a more free-flowing debate’.⁶⁸ The judges are not constrained by the facts or legal issues of particular cases or the duties of decision-making but are free to discuss whatever issues they have. Additionally, unlike the communication through judgments, the meetings involve *direct* communication, reducing the likelihood of the concerns and insights voiced by the national judges being missed – something which was deemed to be an occasional problem, as seen in Chapter 3. The bilateral structure of the meetings also appears to be particularly important. It would appear to focus the discussions on issues which have particular relevance to the UK judges and even allow the UK judges to steer the direction of those discussions.

The length of the meetings, evident in the descriptions of working sessions and programmes of discussions, would appear to complement the openness of the discussions, enabling substantive debate rather than polite judicial chitchat. Relatedly, the fact that no minutes are recorded appears to encourage a directness of tone on the part of the judges which is not feasible in their judgments. The common distinction between ‘formal’ and ‘informal’ dialogue, evident in the interviews and in extra-judicial writings, itself points to a marked difference in the way that the two are conducted. Indeed, it was seen in Chapter 3 that a sense of judicial diplomacy constrains and informs the language employed by the judges towards one another in their respective judgments. This is not to suggest that during the meetings, the judges, hidden from public view, seize upon the opportunity to hurl abuse at one another. However, throughout the interviews the point was repeatedly made that the face-to-face discussions are distinctly ‘full and frank’⁶⁹ rather than ‘a polite series of formalities’.⁷⁰ On this point, the former UK judge at the ECtHR, Paul Mahoney, has been explicit that these meetings do not consist of a ‘purely diplomatic exchange of niceties’.⁷¹ As one Strasbourg judge recounts, ‘there is no press in attendance, the meeting is behind closed doors, the atmosphere is friendly, but the exchange of views is frank - so the participants do not pull their punches’.⁷² The privacy of the meetings in this respect was widely valued by the interviewed judges. It was felt to facilitate a space where the judges are not subject to the reservation required when delivering judgments and public lectures. Importantly, however, the meetings were still deemed to carry the formality of official meetings between *judges*. A Strasbourg judge, for example, distinguished the meetings from the

⁶⁸ Arden, *Building New Legal Orders* (n 14) 240

⁶⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁷⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

⁷¹ Mahoney, ‘The Relationship Between the Strasbourg Court and the National Courts – As Seen From Strasbourg’ (n 11) 27

⁷² Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

informal socialising which can take place after such meetings. In these respects, the meetings appear to provide a relative informality as compared to the communication through judgments.

3.4 The Constraints of Judicial Independence

Finally, before progressing to consider the functions of informal dialogue, it is necessary to consider the constraints which are imposed by the duty of independence and impartiality to which all of the judges are subject. It was shown in Part 2 of this chapter how the ECtHR and UK judges are tasked with distinctly diplomatic responsibilities. The ECtHR President, on the one hand, has a responsibility to ‘represent’⁷³ the Court to national judiciaries, while the UK judges, on the other hand, are to act as ‘ambassadors’⁷⁴ for the UK judiciary. Both sets of judges, nonetheless, remain subject to their duty of independence as judges. Under Art.21(3) ECHR,⁷⁵ the ECtHR judges are prohibited from acts which would compromise their independence. Additionally, Rule 4(1) of the Rules of Court explicitly prohibits their engagement ‘in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality’.⁷⁶ Likewise, the independence of the UK judges is enshrined in both the common law and the CRA 2005,⁷⁷ and is set out in detail in their Guide to Judicial Conduct.⁷⁸

It can be argued that this presents a slight tension. Both sets of judges are charged with representing their respective courts, each with distinct interests, traditions and working methods, and yet both must, at the same time, remain impartial. At this intersection between different judicial interests, it seems that the independence of judges representing those interests has the potential to come under strain. It seems that the judges must traverse the line between acting as representatives of their courts and their legal traditions while avoiding active lobbying of the other. For the Supreme Court Justices interviewed, however, there was a bright line between the two. One Justice stated:

If judges of one court were to set about lobbying behind closed doors to persuade the other court to take a different view that would be quite obviously inappropriate, and

⁷³ Rule 9.1 of the Rules of Court (n 5)

⁷⁴ UK Supreme Court, *Annual Report 2014* (n 24) 12

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 21(3)

⁷⁶ Rule 4.1 of the Rules of Court)

⁷⁷ Constitutional Reform Act 2005 s.3

⁷⁸ Judiciary of England and Wales, *Guide to Judicial Conduct* (2013, amended in 2016)

<<https://www.judiciary.gov.uk/publications/guide-to-judicial-conduct/>> accessed 10 December 2016

I've no awareness that any such a thing has ever happened and I don't believe that it would.⁷⁹

Likewise, another Justice indicated that 'frequent cabals between judges who were cooking up arrangements between themselves'⁸⁰ is a 'farfetched idea':⁸¹ 'We don't sit down and try to persuade them to change *Hirst*⁸² to something different, it's not the way it works'.⁸³ On this point, one Justice provided a particularly interesting insight into their professional approach to the face-to-face meetings:

I always used to think as a barrister, if I was concerned as to whether some particular piece of conduct would be professionally embarrassing, a very good test would be to ask oneself: "Would I feel embarrassed and have something to defend if my opponent or somebody other else knew what I was doing?" And I think if one asks oneself that question, you normally have an intuitive sense of what are the proper boundaries.⁸⁴

It would appear, therefore, that while the format of the meetings encourages open, substantive and frank discussion in a relatively informal setting, judicial independence and professional integrity combine to constrain the judges from openly pressuring one another for change. Instead, as the Justices recounted in interview, their role is confined to 'exploring',⁸⁵ 'discussing'⁸⁶ and 'explaining'⁸⁷ issues with the ECtHR judges.

4. The Functions of Informal Judicial Dialogue

Thus far it has been shown that informal judicial dialogue between the UK and Strasbourg judges has been both facilitated and prompted by rules at the domestic and European levels which have given the judges distinctly diplomatic roles. The central question here, however, is the value of this informal dialogue.

The answer appears to reside in the *procedural*, *substantive* and *diplomatic* functions which it performs. The first two terms embody, respectively, the ways that the bilateral meetings facilitate certain processes and achieve certain outcomes which are considered valuable to the

⁷⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁸⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸¹ *ibid*

⁸² *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41

⁸³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

⁸⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

⁸⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

relationship between the UK courts and the ECtHR. Procedurally, informal dialogue facilitates the participation of the national courts in the development of ECHR principles and provides an accountability mechanism where its decisions have caused concerns. Substantively, it promotes mutual understanding between the courts. These processes and outcomes appear to have their own intrinsic value. However, throughout the following section it will be shown that each contributes to the realisation of the ‘fundamental principle’⁸⁸ of subsidiarity,⁸⁹ according to which the ‘primary responsibility’⁹⁰ for the protection of Convention rights is with the national authorities while ‘the Convention system is subsidiary to the safeguarding of human rights at national level’.⁹¹ Diplomatically, the meetings are valued for smoothing relations between the courts and rectifying damaging perceptions that may arise between them, either as a result of hostile domestic politics or critical judgments. In these various ways, informal judicial dialogue between the courts appears to both complement and buffer the formal dialogue taking place through judgments.

4.1 Procedural Functions

4.1.1 Participation

The first procedural function of informal dialogue is the *participation* of national judges in the construction of norms. According to Lady Justice Arden, the meetings ‘give the national judges an input into the process of developing jurisprudence at the supranational level’.⁹² In particular, the national judges can assist the ECtHR judges in determining whether a particular course of action would tip the balance ‘between [their] international obligation to interpret the Convention and national sovereignty’⁹³ too far in favour of the former. In this way, Lady Justice Arden remarks that ‘a conversation between judges can head off steps which might prove ill-advised’.⁹⁴

Additionally, Lady Justice Arden explains that the meetings provide a key opportunity for the national judges to ‘explain where the shoe pinches most and how the new jurisprudence can best be absorbed into their own system’.⁹⁵ To this extent, it seems that they also enable the UK

⁸⁸ Brighton Declaration (n 9) [3]; Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 1

⁸⁹ The ECtHR’s 2015 Annual Report states directly that informal dialogue ‘is of great significance, as a means to enhance subsidiarity’. ECtHR Annual Report 2015 (n 45) 12

⁹⁰ Brighton Declaration (n 9) [9](a)

⁹¹ *ibid* [11]

⁹² Arden, *Building New Legal Orders* (n 14) 286

⁹³ *ibid* 315

⁹⁴ *ibid* 286

⁹⁵ *ibid*

judges to perform their diplomatic role as ‘ambassadors’ for the UK common law tradition. As shown in Chapter 4, during the interviews the participation of UK judges in the development of European norms was deemed particularly important by some of the Justices due to a shared perception that the common law tradition is a minority legal tradition within Europe. Lord Neuberger has offered a colourful account of this view:

...the ant is the common lawyer, collecting and using forms of action, seeing what works and what doesn’t, developing the law on an incremental, case by case, basis. The spider is the civil lawyer, propagating intricate, principle-based codes, which can be logically and rigidly applied to all disputes and circumstances. In Europe, the common law ants are heavily outnumbered by the civilian law spiders.⁹⁶

Through their participation in informal dialogue with the ECtHR judges, it appears that the UK judges are able to fulfil their ambassadorial roles and articulate any specific common law concerns, ensuring that the voices of the few ‘ants’ are not muffled or overlooked amongst the many ‘spiders’. Indeed, as the previous chapter demonstrated, several of the interviewed Justices saw it as their duty to make sure that the UK’s common law system is properly comprehended and taken into consideration by the ECtHR judges in their decision-making. As seen in Chapter 3, it was said to be important for the UK judges to see that the ECtHR judges are ‘listening to us, taking into account our concerns and interests’.⁹⁷ To this extent, informal dialogue also appears to enhance the realisation of the principle of subsidiarity by giving the UK judges the opportunity to participate, as representatives of their common law tradition, in the construction of norms which, according to the subsidiarity principle, it is their primary responsibility to uphold.

4.1.2 Accountability

The second procedural function of informal dialogue is *accountability*. It was described earlier how the bilateral meetings are said to be characterised by open, frank discussion, whereby the national judges are free to articulate their questions and concerns to the ECtHR judges. This appears to provide the national judges with a means of holding the ECtHR to account where its decisions have caused consternation among the domestic judiciary. In this way, informal dialogue mirrors the check function of judgment-based dialogue. Indeed, Lady Justice Arden suggests that informal dialogue provides an important check and balance on the power of the

⁹⁶ Lord Neuberger, ‘The British and Europe’ (Cambridge Freshfields Annual Law Lecture 2014, February 2014) para 35 <<https://www.supremecourt.uk/docs/speech-140212.pdf>> accessed 17 March 2016

⁹⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

ECtHR within the European legal order.⁹⁸ As discussed in Chapter 4, she likens the relationship between domestic and European courts to ‘an ill-fitting jigsaw’⁹⁹ where there are ‘pieces jostling to occupy the same space from different directions’.¹⁰⁰ Within this space, domestic courts are instrumental to the protection of ‘the constitutional identity of the domestic system in the supranational sphere’.¹⁰¹ In her view, however, the protection of this identity is also incumbent on the ECtHR.¹⁰² The meetings can therefore function as an accountability mechanism that enables the domestic courts to communicate their concerns to the ECtHR where they feel it is in tension with the constitutional identity of the domestic system.

It would appear that this also carries the potential to promote subsidiarity between the courts. Several Justices interviewed echoed the general concern amongst UK judges that the Strasbourg Court had at times been prone to contradicting the findings of fact made by domestic courts and thus not adhering to the subsidiary nature of its role. Concerns of this kind, in particular over the related doctrine of the margin of appreciation by which the ECtHR delineates whether a matter falls within the exclusive decision-making competence of the national authorities, have been voiced publicly by UK judges on a number of occasions. In 2011, for example, Lady Hale argued at the official opening of the judicial year at the ECtHR that ‘it would be idle to pretend that we have not sometimes been deeply troubled by an apparent narrowing of the margin’.¹⁰³ Interestingly, it was pointed out during the interviews with the Justices that a concern that the ECtHR had not always not sufficiently respected the principle of subsidiarity was shared by judges of the Federal Constitutional Court of Germany and that, to this extent, their horizontal relations with national counterparts in Europe were of strategic value in their relationship with the ECtHR. One Justice explained: ‘If they’re getting the same message from the German supreme court and the supreme court here, I think that helps. It isn’t ganging up exactly, I would call it coordinating’.¹⁰⁴ A number of the Justices felt that coordinating their concerns over the subsidiarity principle with the judges of the German court may have played a role in two, related ways. It was felt that it may have contributed, alongside the Brighton Declaration, to the reemphasis of the principle of subsidiarity and the margin of appreciation in

⁹⁸ Lady Justice Arden, ‘Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe’ (2010) 29 (1) YEL 3, 13

⁹⁹ Lady Justice Arden, ‘An English Judge in Europe’ (Neill Lecture, Oxford, 28 February 2014) para 55 <<https://www.judiciary.gov.uk/announcements/speech-by-arden-lj-english-judge-in-europe/>> accessed 17 March 2016

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ Speech by Baroness Hale in European Court of Human Rights, *What are the Limits to the Evolutive Interpretation of the Convention?* (Dialogue between Judges, Council of Europe 2011) 11, 18

¹⁰⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

the Strasbourg case-law in recent years.¹⁰⁵ Relatedly, it was suggested that it may have prompted the Strasbourg court to show greater deference to the findings of fact made by national courts.

Thus, by giving the UK judges a forum through which to voice their concerns, it appears that informal dialogue is valued for providing a useful check upon the ECtHR, ensuring that it is accountable for any decisions which appear to show a lack of regard for the constitutional identity of the UK or for the principle of subsidiarity. In these ways, it is evident that informal dialogue broadly mirrors the formal judicial dialogue. As was shown in Chapter 4, participation in the development of the European human rights norms and holding the ECtHR to account where its decisions cause concerns were central to many of the judges' understandings of how the dialogue between their courts functions.

4.2 Substantive Functions

The value attributed to informal dialogue has been explored thus far by reference to the participation and accountability which it appears to facilitate. It has been shown that these procedural functions possess their own intrinsic value and also contribute to observance of the subsidiarity principle. Additionally, however, participation and accountability also appear to perform a substantive function: enhancing *mutual understanding* between the courts. Lord Kerr here has argued that through informal dialogue '[a] greater appreciation of the problems that we create for each other might be, if not eliminated, at least better understood'.¹⁰⁶ This arguably represents the central aim of informal dialogue and that which is most crucial to subsidiarity. It is noteworthy that the Brighton Declaration, which affirmed subsidiarity as a fundamental principle within the Convention system, also called for further interactions between the national courts and the ECtHR 'as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention'.¹⁰⁷ According to the former ECtHR President, Dean Spielmann, informal dialogues 'make for a sounder grasp of the other's perspective'.¹⁰⁸ There are a number of levels on which the participatory and accountability functions of informal dialogue appear to assist the judges in enhancing their understanding of not only those perspectives but also their own: in respect of Convention law and its practical application, the UK's legal system, appropriate methods of judgment-writing and shared legal resource needs. Each of these is considered below.

¹⁰⁵ Helen Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg Against the UK?' in Ziegler, Wicks and Hodson (eds) (n 11) 193

¹⁰⁶ Lord Kerr, 'Dialogue or Dictation?' (n 55) 12

¹⁰⁷ Brighton Declaration (n 9) [12](c)

¹⁰⁸ Spielmann (n 11)

4.2.1 ECHR principles and their application

First, the meetings appear to facilitate mutual understanding between the judges through discussion of ECHR principles and their practical application. As described by the Supreme Court Justices, they allow the judges to share and explain to one another their ‘perceptions of how one should deal with particular points’,¹⁰⁹ and to explore ‘some of the principles which have been thrown up by previous cases’,¹¹⁰ a process which can help to inform their respective practices. Here, the judges of both courts appear to carry crucial *feedback roles*.

The UK judges explain how they have, in one Strasbourg judge’s words, ‘tried to translate the implications [of ECtHR judgments] into domestic law through their judicial activity’.¹¹¹ The ECtHR judges, in turn, are able to provide feedback on that activity, which was said to be typically very positive. Numerous Justices described how the Strasbourg judges in the informal discussions have shown particular appreciation for the detail and rigour with which the UK courts engage with Strasbourg case law:

[T]he judges of the Strasbourg court regularly say that they find the jurisprudence of the British courts to be very useful in their examination of Convention rights, even when they’re not considering British cases.¹¹²

Additionally, informal dialogue allows the judges to address any perceived problems of *clarity* and *coherence* arising from the Strasbourg jurisprudence. In this way, the accountability function of informal dialogue described earlier also serves to improve the Strasbourg judges’ understanding of any problems which their case law has created at the domestic level. In terms of clarity, the meetings provide an opportunity for the ECtHR judges to explain principles expounded in judgments where their meaning is unclear to the national judges. One Strasbourg judge explained that ‘saying it in other words’¹¹³ can help to clarify the ‘basic idea’¹¹⁴ underpinning particular judgments. This suggestion was qualified, however, by the observation that this function is perhaps less useful for UK judges because the ECtHR judgments are issued in English. Unlike their counterparts whose first language is not English or French, the two official languages of the ECtHR, the UK judges do not face a language barrier in discerning the meaning of ECtHR judgments.

¹⁰⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹¹⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹¹¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹¹² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹¹³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹¹⁴ *ibid*

In terms of coherence, it was suggested by the Supreme Court Justices that informal dialogue has enabled them to communicate the problem presented by voluminous bodies of Strasbourg cases lacking statements of legal principle. The concern is neatly summarised in a lecture by Lord Reed: ‘...the discussion of the law in Strasbourg judgments is in most cases comparatively short, with a tendency to repeat well-worn formulae, and it is unusual to find authoritative statements of general principle other than in judgments of the Grand Chamber’.¹¹⁵ As explored in Chapter 4, such cases were felt to present particular difficulties for common law judges accustomed to reconciling decisions under a system of precedent. Communicating these difficulties directly to the ECtHR judges during the meetings was therefore valued for the insights which the ECtHR judges can offer in reply. One Justice explained: ‘the conversations that we have informally with Strasbourg judges are quite valuable on this, because they can give us a bit of assistance as to how they think we should be approaching it’.¹¹⁶ The particular guidance issued by the Strasbourg judges on this issue was for the UK courts to focus primarily on the Grand Chamber decisions:

One got the impression that, as far as Strasbourg is concerned, a single Chamber decision does not reflect a clear and constant Strasbourg line, and it’s only when you get to the Grand Chamber that you can say that Strasbourg has taken a particular, strong position, and that we possibly shouldn’t worry as much as we do about the Chamber decisions.¹¹⁷

These insights perhaps give context to other developments in UK case law. In December 2014, sometime after this advice had been imparted, the Supreme Court handed down its judgment in *Haney*,¹¹⁸ where it has been observed that a directly relevant ECtHR Chamber decision against the UK was ‘almost casually swatted aside’.¹¹⁹ In *James v UK*,¹²⁰ the ECtHR had reasoned, and contrary to the conclusion of the House of Lords,¹²¹ that in the context of Art.5(1) ECHR an opportunity for rehabilitation was a necessary part of the justification required for an indeterminate prison sentence for the purpose of public protection.¹²² Accordingly, it found a violation of Art.5(1) on the basis that the continued detention of individuals beyond the expiry of

¹¹⁵ Master Reed, ‘The Common Law and the ECHR’ (Inner Temple Lecture, 13 November 2013) <https://www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf> accessed 17 March 2016

¹¹⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹¹⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹¹⁸ *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2015] 1 AC 1344

¹¹⁹ Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 109

¹²⁰ *James and others v United Kingdom* (2013) 56 EHRR 12

¹²¹ *R (James) v Secretary of State for Justice* [2010] 1 AC 553

¹²² *James v UK* (n 120) [209]

their tariff was, in the absence of the provision of rehabilitative assistance and an opportunity to demonstrate rehabilitation, arbitrary and thus unlawful.¹²³ The Supreme Court in *Haney*, however, declined to give full effect to the decision. Citing concerns with the distinctions implied in *James* between lawful and unlawful deprivations of liberty on the basis of when rehabilitative assistance is provided,¹²⁴ as well as concern that the ECtHR view appeared to necessitate the release of individuals whose safety was not established,¹²⁵ it accepted an implicit duty on the state to provide rehabilitative assistance and opportunities to demonstrate rehabilitation, but opted to address the issue not through Art.5(1) but via an ‘an ancillary duty - a duty not affecting the lawfulness of the detention, but sounding in damages if breached ... implied as part of the overall scheme of article 5, read as a whole’.¹²⁶

It would not be unreasonable to suggest that the advice given informally by the ECtHR judges in respect of its case law may have played a role in shaping the confidence with which the Supreme Court was able to approach the Strasbourg jurisprudence in this instance. Indeed, at a wider level of informal interactions, there are other indications that extra-judicial assurances by ECtHR judges have been influential on domestic judicial thinking. The public assurance made in 2011 by the former ECtHR President, Sir Nicolas Bratza, for example, that the judgments of the ECtHR need not always indicate the final word¹²⁷ appears to have struck a chord. Lady Hale’s response, for example, was that ‘I am intrigued and encouraged indeed to know that *Argentoratum locutum, iudicium finitum*¹²⁸ is not in fact how the President and his fellow judges view the respective roles of our two courts. ...We may look forward to an even more lively dialogue with Strasbourg in future’.¹²⁹ In the same vein, Lord Mance remarked that the former ECtHR President’s assurance ‘sets a sound basis for cooperation, which is likely in future to prove very influential in domestic courts’.¹³⁰

This aspect of informal dialogue again appears to be aimed at further a relationship of subsidiarity. By facilitating the assistance of the UK judges in their understanding of how to apply the ECtHR case law, it appears to assist the domestic judges in their fulfilment of their ‘primary responsibility’ of safeguarding Convention rights at the domestic level.

¹²³ *ibid* [221]

¹²⁴ *Haney* (n 118) [33] (Lord Mance and Lord Hughes)

¹²⁵ *ibid* [30]

¹²⁶ *ibid* [38]

¹²⁷ Nicolas Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) 5 EHRLR 505,

¹²⁸ *Secretary of State for the Home Department v AF and another (no 3)* [2010] 2 AC 269, [98] (Lord Rodger)

¹²⁹ Lady Hale, ‘*Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*’ (2012) 12(1) HRLR 65

¹³⁰ Lord Mance, ‘Foreign Laws and Languages’ in Andrew Burrows, David Johnston and Reinhard Zimmermann, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013) 85, 96

4.2.2 The UK's common law system

Aside from ECHR principles, it seems that informal dialogue is also used to enhance the ECtHR judges' understanding of the UK's legal system, further mitigating the sources of tension identified in Chapter 4. The point has been made here and in that chapter that the UK judges perform a certain diplomatic function as ambassadors of the common law tradition both within and outside of the context of their decision-making. In their participation in bilateral meetings, this particular function appears to entail explanation of what one Justice described as 'the mental processes of the common law',¹³¹ to the Strasbourg judges. It was felt that informal dialogue provides the opportunity to 'clear away',¹³² any misunderstandings and thereby reduce the potential for them to manifest in the ECtHR's judgments and cause conflict. As with formal dialogue, the ECtHR judges also considered this informative role to be valuable in informal dialogue. One Strasbourg judge explained that it is

... the role of the British judges at these meetings, and sometimes the Irish, Cypriot and Maltese judges on the ECtHR, who are often invited to attend, ... to explain to the others why it is that most legal systems in Europe, when regulating some issue in law, do it in one way, whereas the common law does it in some wholly peculiar other way.¹³³

To the extent that informal dialogue thus improves the understanding of the Strasbourg judges of the UK common law system and its traditions, it seems that subsidiarity is again strengthened as the performance of the domestic courts in their primary responsibility for protecting human rights is less likely to be challenged by the ECtHR in its supervisory capacity on the basis of a misunderstanding of domestic law.

4.2.3 Judgment-writing

A third way that informal dialogue appears to enhance mutual understanding relates to the way that judgments are written. During one interview, it was described how the meetings enable the judges to discuss ways of writing judgments which are mutually intelligible. This was deemed particularly important given the resurgence of the common law on human rights issues.¹³⁴ It was suggested that if the UK courts were to decide human rights cases using only the

¹³¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹³² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹³³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹³⁴ *R (Osborne) v Parole Board* [2014] AC 1115; *Kennedy v Charity Commission* [2015] 1 AC 455; *A v BBC* [2015] AC 588; *O (A Child) v Rhodes* [2015] UKSC 32; *R (Ingenious Media Holdings plc and another) v Commissioners*

common law and some of the cases were to then be challenged at Strasbourg, ‘the Strasbourg court might find itself puzzled about how we see our common law linking in with Convention law’.¹³⁵ With this in mind, it was suggested that the meetings would enable the Strasbourg judges, if necessary, to explain that concern to the UK judges and to request them to provide some explanation in their judgments of how that common law analysis fits in with the Convention. Likewise, it was suggested that it would be reasonable for the UK judges to use the meetings to request the Strasbourg judges to offer some explanation when deciding cases involving the UK as to how their analysis of Convention principles fits in with the common law. It was felt that this would enable the courts to avoid disagreements resulting from ‘a lack of expression of one court’s reasoning in terms that are enlightening to the other court’.¹³⁶ This would appear to further enhance subsidiarity as the judges have a greater awareness of what they should include in their respective judgments to assist the other court in the performance of its tasks.

4.2.4 Legal resource needs

Finally, informal dialogue appears to enhance mutual understanding between the courts by allowing them to explore and identify any shared legal resource needs. Dean Spielmann has described how one particular meeting at Strasbourg with the President of the French Cour de Cassation led to plans being put into place for the development of a ‘network for sharing case-law’¹³⁷ between their courts, ‘which in the long term could cover all Supreme Courts’.¹³⁸ This plan was subsequently developed to facilitate not only the sharing of case law but other legal resources between the ECtHR and domestic courts.¹³⁹ These plans have now materialised with the ‘Superior Courts Network’¹⁴⁰ having been launched on a trial basis on 5 October 2015.¹⁴¹

Such developments enhance subsidiarity by equipping both courts with the resources to better understand the work which they respectively perform in the protection of Convention rights. With increased access to domestic legal resources, the ECtHR is better able to grasp how those rights are being protected at the national level. Likewise, with better access to ECHR

for Her Majesty’s Revenue and Customs [2016] UKSC 54; *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2013] QB 618, [88]

¹³⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹³⁶ *ibid*

¹³⁷ European Court of Human Rights, *Annual Report* (Council of Europe 2014) 6

¹³⁸ *ibid*

¹³⁹ ECtHR Annual Report 2015 (n 45) 11

¹⁴⁰ At the time of writing, this network had been ‘launched on a trial basis with two participating courts, the *Conseil d’État* and the Court of Cassation of France’. European Court of Human Rights, ‘Superior Courts Network’ <<http://www.echr.coe.int/Pages/home.aspx?p=court/network&c=>> accessed 17 March 2016

¹⁴¹ *ibid*

materials, domestic courts are better able to understand the particular requirements of the Convention and thus better placed to fulfil their primary responsibility of securing the rights at the national level. As the former ECtHR Vice-President, François Tulkens has argued, ‘if the national courts are to play the role assigned to them by the Convention system, in other words, to apply the Convention directly in the light of the Court’s case-law, then they must have access to that case-law’.¹⁴²

4.3 Diplomatic Functions

The next function which the meetings appear to perform is, by comparison, of a more diplomatic nature: the enhancement of mutual receptivity between the judges and thereby the scope for mutual influence. Here, the analysis turns to the more interpersonal aspect of the relationship between the judges of these courts. This section considers how informal dialogue is able to improve this dimension of their relationship and why the resulting enhancement in the potential for mutual influence is perceived by the judges to be significant.

4.3.1 *Maintaining mutual respect*

In Chapters 3 and 4, it was seen how the judges actively seek to influence one another through their judgments, whether for the effectuation of the Strasbourg jurisprudence, or the improvement of the formal and substantive quality of the applicable principles. The ability of each court to influence the other appears to depend, however, on a certain level of mutual respect between the judges. On this point, Lord Carnwath has specifically praised informal dialogue between the UK and Strasbourg for maintaining a ‘high degree of respect from both sides’.¹⁴³ It is reasonable to assume that the extent to which the UK courts and ECtHR mutually understand one another will have some impact on the level of mutual respect between their judges. Flagrant misunderstandings between the institutions are unlikely to foster mutual respect. It appears, however, that it is not simply the educational value of the meetings which harnesses mutual respect but also their implicit *psychological* value in alleviating tensions and rectifying negative perceptions.

As to the former, the frank discussions between the judges were described by one of the Justices as a way of managing the ‘inevitable and healthy tension’¹⁴⁴ arising from the different

¹⁴² European Court of Human Rights, *How Can We Ensure Greater Involvement of National Courts in the Convention System?* (Dialogue between Judges, Council of Europe 2012)

¹⁴³ Lord Carnwath, ‘UK courts and Strasbourg’ (Rome, 20 September 2013)

<<https://www.supremecourt.uk/docs/speech-130920.pdf>> accessed 19 September 2015

¹⁴⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

institutional perspectives of the UK courts and the ECtHR, explored in Chapter 4. The ability to raise concerns over subsidiarity, explored earlier, is one example of this. Further, it would appear that these meetings can help to diffuse any tensions arising from conflictual dialogues between the courts. Recounting the prolonged disagreement between the courts over the role of Art.8 ECHR in possession order cases, discussed in Chapters 3 and 4, Lord Walker confessed in his Thomas More lecture that he found it ‘painful to dwell on this episode. ... I am reluctant “infandum ... renovare dolorem”’¹⁴⁵ (to renew an unspeakable grief). In this vein, some of the Justices described how the meetings can play a role in defusing tensions when concerns over the relationship between the courts have been voiced in extra-judicial lectures. One Justice expressed the view that the increased regularity of meetings during 2014 was partly prompted by a string of lectures delivered respectively by Lord Justice Laws, Lord Judge and Lord Sumption in late 2013 which had criticised either the Strasbourg Court or deference to it by the UK courts.¹⁴⁶ Here, however, the general feeling among the interviewed judges of both courts was that there are no personal tensions to dispel. Indeed, several stressed the difference between the reality of the relationship between their courts and the way that is depicted in the popular press. One Justice stated: ‘I think there’s a lot of nonsense talked in the press about tensions but there are very few tensions between this court and those who actually operate the court in Strasbourg’.¹⁴⁷ Nonetheless, by engaging in face-to-face discussions and thereby building mutual understanding, it was said that informal dialogue facilitates a sense of cooperation between the judges. As one Justice neatly put it, it ‘makes it less of an “us and them” situation’.¹⁴⁸

Informal dialogue was also valued by interviewed judges of both courts for allowing them to challenge any negative perceptions which might exist between them. As one Justice explained:

Particularly at a time when one group of judges may have perceptions about the sort of people deciding cases, and the way in which they decide them, which may be entirely inaccurate, meetings which just improve one judge’s understanding of what makes another judge tick are, I think, perfectly innocuous.¹⁴⁹

¹⁴⁵ Robert Walker, ‘The Indefinite Article 8’ (Sir Thomas More Lecture. Lincoln’s Inn, 9 November 2011) <https://www.supremecourt.uk/docs/speech_111109.pdf> accessed 15 January 2017

¹⁴⁶ Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures, 27 November 2013) <<https://www.judiciary.gov.uk/wp-content/.../laws-lj-speech-hamlyn-lecture-2013.pdf>> accessed on 10 October 2016; Lord Sumption, ‘The Limits of Law’ (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) <<https://www.supremecourt.uk/docs/speech-131120.pdf>> accessed 16 December 2016; Lord Judge, ‘Constitutional Change: Unfinished Business’ (UCL, 4 December 2013) <https://www.nottingham.ac.uk/hrlc/documents/specialevents/lordjudgelecture041213.pdf>.

¹⁴⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁴⁸ *ibid*

¹⁴⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

Likewise, one Strasbourg judge stressed the value of allowing national judges ‘to see the faces behind the name of the institution’.¹⁵⁰ The former ECtHR President, Jean-Paul Costa, in this regard has similarly suggested that while dialogues through judgments can be productive ‘... there is no substitute for human contact’.¹⁵¹

More specifically, it appears that informal dialogue benefits the UK judges by enabling them to distance themselves from political or populist currents in the UK which might otherwise have a damaging impact on their relations with the ECtHR. One Justice suggested that the UK might presently suffer from a view that it is ‘antagonistic’¹⁵² as a country due to the ‘present political stance’.¹⁵³ This appears to be an accurate view of the situation in the light of remarks made by the former ECtHR President, Sir Nicolas Bratza, writing in 2011:

The vitriolic--and I am afraid to say, xenophobic--fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years. ... [T]he scale and tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government has created *understandable dismay and resentment among the judges in Strasbourg*.¹⁵⁴

Clearly, there was a perception amongst the Justices that the ‘dismay and resentment’ among the Strasbourg judges had the potential to spill over into similar feelings toward the UK judiciary. It was therefore indicated that by meeting the Strasbourg judges, the Justices are able to rectify that perception and make clear that the UK courts are ‘friendly, trying to – as we ought to as judges – ensure that the law is clear and coherent’.¹⁵⁵ The implication here was that by allowing the UK judges to present themselves as both cooperative and non-political, motivated by a desire for clarity and coherence, informal dialogue can secure the necessary respect on the part of the ECtHR judges. Thus, as Slaughter observed, it would appear that ‘regular relations and

¹⁵⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁵¹ Jean-Paul Costa, ‘Speech by Jean-Paul Costa, President of the European Court of Human Rights’ (Visit to the Constitutional Court of the Russian Federation, 10-11 May 2007) <http://www.echr.coe.int/Documents/Speech_20070511_Costa_Moscow_ENG.pdf> accessed 10 December 2016

¹⁵² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁵³ *ibid*

¹⁵⁴ Bratza (n) 505 [emphasis added]

¹⁵⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

knowledge of one another provides assurance that conflict will not escalate or rupture the underlying relationship'.¹⁵⁶

4.3.2 Ensuring mutual receptivity

It is clear from the judges' accounts quoted in the previous section that the level of respect between the UK and ECtHR judges is deemed to have real significance for the overall relationship between their courts. This is because mutual respect is deemed by the judges to facilitate mutual receptivity between the courts to the views that each expresses, ensuring a greater potential for each to influence the other. Informal dialogue was thus valued as a means of cultivating through judicial diplomacy an atmosphere between the judges in which future dialogues, both informally through meetings and formally through judgments, can thrive.

For the Supreme Court Justices, it was said that receptivity on the part of the ECtHR judges is important to ensure that they give weight to the ideas and concerns of the UK judiciary. One Justice explained: 'I think that if they see that we are basically friendly ... hopefully they'll listen more to us'.¹⁵⁷ This was particularly valued by some of the Justices given their desire to represent the common law tradition in a European human rights system which they consider to be dominated by civil law traditions. There have been clear indications from ECtHR judges that informal dialogue is indeed conducive to receptivity on the part of the ECtHR. The former ECtHR judge, Paul Mahoney, has written that 'As far as the United Kingdom judiciary is concerned, it is knocking on an open door to suggest that the more regular the informal meetings between Strasbourg judges and senior national judges, the more productive actual judicial cooperation through judgments delivered is likely to be'.¹⁵⁸

For the Strasbourg judges, however, the meetings play an even more important role. Securing receptivity on the part of UK judges through informal dialogue is partly intended as a *legitimation strategy* for the ECtHR amongst the UK courts. The introductory chapter drew attention to the basic distinction between normative and descriptive legitimacy, which concern, respectively, the justification and *acceptance* of authority.¹⁵⁹ During the interviews, there were a number of indications that informal dialogue can enhance the acceptance of the ECtHR and its decisions by the UK judiciary. One Strasbourg judge explained: 'It's always easier to accept and

¹⁵⁶ Anne-Marie Slaughter, *A New World Order* (Princeton University Press) 102

¹⁵⁷ *ibid*

¹⁵⁸ Mahoney, 'The Relationship between the Strasbourg Court and the National Courts – as seen from Strasbourg' (n 11) 27

¹⁵⁹ Daniel Bodansky, 'Legitimacy in International Law and International Relations' in: Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321, 324

understand [a judgment] if you know the person who has written it. You feel more at ease with it'.¹⁶⁰ In particular, there was a perception amongst the judges interviewed of a clear link between the procedural functions of participation and accountability, earlier explored, and the wider acceptance of the ECtHR and its decisions by the UK judiciary. As one Strasbourg judge explained:

It always helps understanding and acceptance when you can really see who the people are behind these judgments and you can really share your opinions and your worries and put your questions.¹⁶¹

According to one Justice, this process could legitimise the ECtHR not only in the eyes of the UK judiciary but other key groups at the domestic level:

It's essential that there is the dialogue because if the judges here don't have confidence in and respect for the Strasbourg court, then nobody else is going to. If we do feel that they are doing their best, listening to us, taking into account our concerns and interests and developing the law in a sensible way, then that will probably affect lawyers, it'll affect politicians and generally people are more likely to accept that which is obviously good for the rule of law.¹⁶²

Thus, for a number of the Justices and Strasbourg judges there was a link between the procedural functions of informal dialogue, the level of respect between the judges at a personal level and the extent to which the ECtHR and its judgments are accepted by UK courts and other domestic audiences.

What is particularly notable is the degree of strategic thinking evident here. Earlier in this chapter, attention was drawn to the diplomatic roles of the UK and ECtHR judges in representing their respective bodies. The importance which was attached to building respect and receptivity and thereby a greater scope for influence points to the remarkable extent of the judges' diplomatic functioning. Consistently with the remit conferred upon them by the CRA 2005, the UK judges are not only acting as representatives of the UK judiciary and its legal tradition but engaging in international relations with the ECtHR which are institutionally distinct from those of the UK government. The Justice quoted in the heading to this chapter and in the previous section spoke of the potential problem for relations between the UK and ECtHR judges presented by the hostility of the UK government and politicians towards the ECtHR, along with a

¹⁶⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁶¹ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁶² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

consequent need to create distance between those attitudes and those of the UK judiciary in order to maintain the respect and receptivity amongst the Strasbourg judges to UK judicial influence. The ECtHR judges, for their part, also displayed a degree of strategic thinking, perceiving informal dialogue as a means of enhancing acceptance of the ECtHR and its decisions amongst domestic judiciaries which, as one of the Justices noted, can play a role in promoting the acceptance of the ECtHR amongst other domestic audiences.

5. The Asymmetry of Judicial Relations

Finally, it is worth noting the importance of the UK judiciary within the ECHR system. Between the ECtHR and the many national judiciaries across the Council of Europe, there is a variation in the frequency of informal dialogues taking place. Dean Spielmann has referred to this as the ‘variable geometry’¹⁶³ which exists in the relations between the ECtHR and particular national judiciaries. Speaking in 2015, the former ECtHR President noted that those with the strongest links to the ECtHR are the UK judiciary, the senior French courts ‘(the Cour de Cassation, the Conseil d’Etat and also the Conseil Constitutionnel)’,¹⁶⁴ and the Federal Constitutional Court of Germany.¹⁶⁵ A review of the most recent ECtHR Annual Reports at the time of writing, from 2013 to 2015, appears to support this. During this period, the UK, French and German judiciaries enjoyed the most frequent exchanges with the ECtHR, with between three and five bilateral exchanges each.¹⁶⁶ This makes for an interesting contrast with some of the other national judiciaries within the Council of Europe. During one Strasbourg interview, it was described anecdotally how Georg Ress, the former judge at the ECtHR, had informally referred to the Slovenian constitutional court as ‘der vergessene Gericht’:¹⁶⁷ ‘the forgotten court’.¹⁶⁸ Again, the most recent ECtHR Annual Reports paint a similar picture, with the Slovenian Constitutional Court listed as a participant in just one, multilateral visit to the ECtHR with various other presidents of national superior courts in 2013.¹⁶⁹ One reason for the variable geometry, according to Spielmann, is *resource limits*. The ECtHR, he suggests, ‘would be stretched rather thin if we were to engage with such intensity with the judiciary in every one of the 47 States in the system’.¹⁷⁰ This appears to work both ways, with resource constraints upon the domestic judiciaries also having some influence on the intensity of informal dialogues with the ECtHR.

¹⁶³ Spielmann (n 11) 4

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ ECtHR Annual Reports 2013-2015 (n 13)

¹⁶⁷ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁶⁸ *ibid*

¹⁶⁹ ECtHR Annual Report 2013 (n 13) 51

¹⁷⁰ Spielmann (n 11)

Additionally, Spielmann suggests that national judiciaries vary in their *receptivity* to conducting relations with the ECtHR.¹⁷¹

The considerations of resources and receptivity go some way to explaining the position of the UK judiciary as currently among those with the strongest relations with the ECtHR. Notwithstanding a limited budget,¹⁷² the UK judges have clearly had the financial capacity to conduct numerous exchanges with ECtHR judges in recent years. Likewise, as described earlier, the meetings have been applauded and further meetings welcomed both by the participants and the UK government. There is thus no question of the receptivity on the part of the UK judiciary to informal dialogue with the ECtHR judges.

The asymmetry which is apparent in the relationships between the ECtHR and the various national courts within the Council of Europe is not insignificant. Mak observes that ‘Under the effects of globalisation, the authority of highest national courts concerns not only their formal legal status as the final interpreter of a specific set of rules, but also the prestige accorded to these courts by other courts and society at large’.¹⁷³ As such regular meetings between particular courts can cause ‘a shift in the position of authority and autonomy’¹⁷⁴ which they enjoy. On this basis, the strong relations between the UK judiciary and the ECtHR judges have the potential to increase the former’s authority on the domestic and international plane. This raises a number of questions regarding the nature of the influences, power and judicial politics at work on this level. Such questions are beyond the scope of this thesis. For present purposes, however, the fact that the engagement between these courts is among the strongest at work arguably underlines the seriousness with which the ECtHR approaches this particular audience of judges. It is perhaps no coincidence that the UK, along with France and Germany, is regarded as one of the most important Member States in the ECHR system.¹⁷⁵

6. Conclusion

This chapter has examined in detail the third research question posed at the outset of this thesis concerning the ‘informal’ or ‘personal’ dialogue’ in the form of bilateral, face-to-face meetings taking place between the UK courts and the ECtHR. It has produced three sets of conclusions. First, the chapter has observed the rules and policies at the domestic and European levels which have enabled the informal dialogue between these courts to develop. While rules have long been

¹⁷¹ *ibid*

¹⁷² The website of the UK judiciary cites the ‘very small’ resources available. Courts and Tribunals Judiciary (n 26)

¹⁷³ Elaine Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013) 79

¹⁷⁴ *ibid*

¹⁷⁵ Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) 7

in place for the ECtHR to build relations with national judiciaries, such relations have only been able to fully develop with the UK judiciary with the combined effects of the enactment of the Human Rights Act and the Constitutional Reform Act. Together, these have placed the UK judges in the joint task of interpreting and applying the ECHR rights and surrounding jurisprudence with the ECtHR, and conferred upon the UK judiciary the autonomy to conduct its own international judicial relations.

Second, the chapter has explored the nature of the informal dialogue which is taking place between these courts its frequency, the participants, and the format and tone of the discussions – and the significance of those features. It has shown that bilateral exchanges between the UK courts and the ECtHR have been taking place frequently since the first in 2006, and that this regularity is considered crucial by the participating judges to maximising the value of the interactions, particularly in the light of the regular personnel changes in judicial office at the senior levels of both the UK and ECtHR judiciaries. In terms of the participants to this form of dialogue, the chapter has observed that the judges which frequently take part in the meetings – the ECtHR President, the UK judge at the ECtHR, members of the ECtHR Registry, the Lord Chief Justice, the President of the Supreme Court and the Head of International Judicial Relations – each occupy a position within the respective judicial institutions which are of strategic and symbolic value. Strategically, they facilitate the passing of the information exchanged between the judges during the meetings to and from the levels of the respective domestic and Strasbourg judiciaries where it will be influential. Symbolically, they demonstrate the seriousness with which the courts engage with one another. Additionally, the chapter has discussed how the particular formatting of the meetings encourages open, frank and substantive exchanges between the judges, whereby the judges are free of the practical constraints of formal dialogue, on the one hand, but nonetheless constrained by the requirements of judicial independence, veering them away from judicial lobbying.

Third, the chapter has concluded that the value of informal dialogue stems from the procedural, substantive and diplomatic functions which it performs, each of which can contribute to the realisation of the now fundamental principle of subsidiarity. Procedurally, it allows the UK judges to participate in the discussion of jurisprudence which, under the subsidiarity principle, they have the principal responsibility of applying, and to hold the ECtHR judges to account where they feel it is not respecting the boundaries of its subsidiary role. In terms of the substantive functions of informal dialogue, the chapter has drawn attention to the capacity of bilateral meetings for building mutual understanding as to the content of Convention law and its practical application, the UK legal system, methods of judgment-writing which make decisions

mutually intelligible and shared legal resource needs, each of which can contribute to the judges' respective understandings of their role in the shared responsibility for upholding the Convention rights. In terms of the diplomatic functions, informal dialogue is used to maintain respect between the judges, relieving tensions and challenging damaging perceptions resulting from domestic politics or conflictual judgment-based interactions. Such respect is particularly valued for fostering mutual receptivity between their courts, thereby cultivating the conditions for productive informal dialogues in future meetings and formal dialogues through decision-making, whereby the ECtHR is alive to the concerns and ideas of the UK courts, on the one hand, and the UK courts, on the other hand, are accepting of the judgments of the ECtHR.

It is submitted that these three sets of conclusions shed light on why it is that several senior UK and ECtHR judges of past and present have attributed such value to the informal dialogue between their courts and repeatedly called for its continuation. The deeper value of these dialogic interactions, however, along with those taking place through judgments, resides in their legitimising potential. It is that potential to which the thesis now turns.

Chapter 6

The Legitimising Role of Judicial Dialogue

... [T]he sole source of a court's legitimacy stems from the reasoning of its decisions. To explain rationally the reasoning followed is an instrument of dialogue. Reasoning is indispensable for mutual trust.¹

- Jean-Paul Jacqué

1. Introduction

Over the course of the previous three chapters, the nature and functions of both judgment-based ('formal') and face-to-face ('informal') judicial dialogue between the UK courts and the European Court of Human Rights (ECtHR) have been examined in depth using the insights of the interviewed judges, case law and extra-judicial literature. In Chapter 3, it was observed that judgment-based dialogue is understood as a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their respective judgments. In Chapter 4, the thesis concluded that the principal function of this process is the mitigation of tensions arising from the overlapping, multi-layered systems for the protection of human rights of which the courts are a part. Informal dialogue, explored in Chapter 5, taking place in the form of bilateral meetings between the judges, was shown to supplement this process of tension-mitigation by performing procedural, substantive and diplomatic functions in the relationship between the courts.

With this understanding of the central forms of dialogue between these courts established, the thesis turns to the fourth and central question posed at the outset of the thesis: what is the role of judicial 'dialogue' between the UK courts and the ECtHR in legitimising their respective judgments? More specifically, how are the judges using these processes as a means of legitimising their particular courts and their decision-making? This chapter proceeds in nine parts. Part 2 recaps the concept of legitimacy explained in the introductory chapter and sets out its significance in the context of jurisdictional pluralism in which the processes of dialogue studied here unfold. From here, the two subsequent parts of the chapter detail the recent legitimacy challenges confronting the ECtHR and the UK courts. In Part 3, it is observed that the Strasbourg Court faces the task of maintaining the consent of national authorities, the concomitant need to demonstrate respect towards their autonomy and legal traditions, and at the

¹ Jean-Paul Jacqué, 'Preliminary References to the European Court of Human Rights' in European Court of Human Rights, *How Can We Ensure Greater Involvement of National Courts in the Convention System?* (Dialogue between Judges, Council of Europe 2012) 17, 22

same time avoid the charge of appearing to act on discretion rather than law. In Part 4 it is noted that the UK courts, on the other hand, have been confronted by the related contentions of their undue deference to the ECtHR and the perceived lack of ‘ownership’ of human rights in the UK resulting from the Human Rights Act (HRA) 1998 and its connection with the ECtHR jurisprudence.

From here, the chapter in Part 5 goes on to outline the central thesis: that the courts respond to these various challenges through judicial dialogue by utilising the reasoning of their judgments and their face-to-face discussions to employ three features of discourse: *mutual participation*, *mutual accountability* and the *ongoing revision and refinement of arguments*. The legitimising roles of each of these discursive features are then elaborated in Parts 6-8. Having then explored the legitimising roles of judicial dialogue, the chapter situates them in Part 9 within the context of what are arguably the wider, parallel legitimacy strategies currently pursued by the ECtHR and UK courts based respectively on enhancing subsidiarity within the Convention system and strengthening domestic judicial autonomy and identity in human rights adjudication. Part 10 offers the concluding remarks.

2. Legitimacy and the Challenges of Pluralism

2.1 Legitimacy Recapped

As outlined in Chapter 1, ‘legitimacy’ concerns the ‘validation of power’² or the *justification* and *acceptance* of authority³ (‘authority’ being a relational claim of obedience by one actor upon another).⁴ The former, normative dimension concerns the reasons which justify an institution’s ‘worthiness to be recognised’,⁵ while the latter, descriptive dimension is typically concerned with the extent to which a particular institution commands popular acceptance as legitimate. Descriptive legitimacy is traditionally measured in actual compliance with authority – Bentham’s ‘disposition to obey’⁶ – and, following Weber, whether there is belief in the legitimacy of governing institutions on the part of the governed.⁷ This chapter is concerned with elements of both the normative and descriptive dimensions of legitimacy: specifically, the way

² Thomas Franck, ‘Why a Quest for Legitimacy?’ (1987) 21 UC Davis Law Review 535, 544

³ Daniel Bodansky, ‘Legitimacy in International Law and International Relations’ in: Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321, 324

⁴ Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 99

⁵ Jürgen Habermas, *Communication and the Evolution of Society* (Beacon Press 1979) 178

⁶ ‘...the faculty of governing on the one part has for its sole efficient cause, and for its sole efficient measure, the disposition to obey on the other part’. Jeremy Bentham, *The Works of Jeremy Bentham* (William Tait 1843) 219

⁷ Max Weber, *Economy and Society* (University of California Press 1978) 215

that the judges appear to be using judicial dialogue between their courts to normatively justify the exercise of their power in terms of the beliefs of their audiences.⁸

The potential audiences from whom judges seek legitimacy are many and various. Courts make their decisions under the ‘critical gaze of a robust legal public sphere’,⁹ seeking acceptance from ‘their own community of the legally informed’.¹⁰ Thus, it has been observed that in order to be considered legitimate ‘[a] judicial decision should aim to convince as many potential members of the audience: the State officials, legal professionals in general’.¹¹ Both national courts and international courts seek acceptance of their judgments from the elected arms of government(s) and from the general public ‘out there in the streets’¹² from whom they and the elected officials draw power.¹³ What is more, it is worth recalling from Chapter 3 that both sets of courts seek acceptance of their views from one another, each considering the other among the key audiences to their judgments. Clearly, the quality of legitimacy does not require agreement among these various audiences with the substantive content of every decision by the courts. The ability of the ECtHR to find against the UK, for example, and thereby contradict the views of the UK courts, is intrinsic to its institutional function in providing external review. Dzehtsiarou thus argues that the ‘legitimacy of the judgments cannot be evaluated on the basis of whether they achieved the result preferred by the addressee of the ruling’.¹⁴ Tremblay makes the same point: ‘judges do not have to justify their decisions on the basis of reasons that legislatures would necessarily accept’.¹⁵

Nonetheless, as seen in Chapter 1, it has been observed that ‘legitimacy considerations’¹⁶ are among the key factors which influence judicial decision-making. On the one hand, judges

⁸ ‘When we seek to assess the legitimacy of a regime, a political system, or some other power relation, one thing we are doing is assessing how far it can be justified in terms of people’s beliefs, how far it conforms to their values and standards, how far it satisfies the normative expectations they have of it’. David Beetham, *The Legitimation of Power* (Palgrave 2013) 11

⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 2015) 280. Habermas defines the public sphere as ‘...a network for communicating information and points of view (i.e., opinions expressing affirmative or negative attitudes); the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions’. 360

¹⁰ Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 72

¹¹ Kanstantsin Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ [2011] PL 534, 536

¹² ‘One may ask, what makes a judgment from the European Court legitimate? Legitimate for whom? Parliament, the government, people at large? Obviously, it must be legitimate for Parliament and the government. But in a modern, open democratic society, the judgment must be legitimate also for the public out there in the streets.’ The speech of Jan Erik Helgesen in European Court of Human Rights, *What are the Limits to the Evolutive Interpretation of the Convention?* (Dialogue between Judges, Council of Europe 2011) 22

¹³ ‘The original power of the judicature, by the fundamental principles of society, is lodged in the society at large’. Alain A. Levasseur, ‘Legitimacy of Judges’ (2002) 50 Am.J.C.L 43, 46 citing W. Morrison (ed), *Blackstone’s Commentaries on the Laws of England* (2001) 203

¹⁴ Dzehtsiarou, ‘Does Consensus Matter?’ (n 11) 538

¹⁵ Luc Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures’ (2005) 3(4) IJCL 617, 635

¹⁶ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 149

will take opportunities to ‘strengthen[...] ... the position, authority, and legitimacy of the court as an institution’.¹⁷ On the other hand, their actions can be tempered by opposing legitimacy considerations, particularly the ‘fear of a backlash’.¹⁸ Thus, judges can be strategic in the way that they go about the business of legal interpretation; ‘their calculations can be judicious as well as judicial’.¹⁹

2.2 No ‘Ultimate’ Judicial Authority

In making their legitimacy calculations, judges have to respond to a range of possible challenges. One challenge common to both the UK courts and the ECtHR is the fact that neither enjoys complete authority over the other. Theirs cannot be described neatly as a relationship between the governing and the governed or ultimate authority and its subjects. As seen in Chapter 4, it was described during the interviews as having an ‘inevitable ... and healthy tension’²⁰ with both the UKSC and the ECtHR occupying the position of a ‘final court with its own jurisdiction in an area where there is another final court with its own jurisdiction’.²¹ Such remarks reflect the plurality of authority between these courts which, according to Somek, is the ‘consequence of mutual recognition of final authority’.²² The UK courts, on the one hand, accept that the ECtHR has final authority on the interpretation of the ECHR,²³ while the ECtHR accepts the authority of national courts in their interpretation of domestic law.²⁴ Their relationship can thus be considered ‘interactive rather than hierarchical’.²⁵ As Stone Sweet observes, ‘[t]he system is pluralistic: neither a national court nor the Strasbourg Court has formal powers to impose its interpretation of rights on the other’.²⁶

¹⁷ *ibid* 148-9

¹⁸ *ibid* 149

¹⁹ Gearty, *On Fantasy Island* (n 10) 188

²⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²² Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014) 19

²³ ‘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...’. *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271, [121] (Lord Sumption)

²⁴ ‘...where, following the Grand Chamber’s judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court’s interpretation of domestic law’ *Hutchinson v United Kingdom* (2015) 61 EHRR 13 (Chamber), [25]

²⁵ Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 118

²⁶ Alec Stone Sweet, ‘From the Point of View of National Judiciaries: The Role of National Courts in the Implementation of the Court’s Judgments’ in European Court of Human Rights, *Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?* (Dialogue between Judges, Council of Europe 2014) 22, 25

A further challenge arising from this pluralism is the risk of conflict. As seen in previous chapters, the authority of the courts overlap as a result of the UK being signatory to the ECHR and, since the HRA was enacted, the courts adjudicating on the meaning of identical sets of rights. The way that the UK courts interpret Convention rights under the HRA can contradict the interpretations of the ECtHR and vice versa, and the ECtHR can interpret the Convention rights in a way which potentially conflicts with the constitutional and legal traditions of the UK legal system and the role of the UK courts in maintaining it. The concern generated by jurisdictional pluralism in this regard is that it ‘generates unpredictability, unevenness, incoherence, and inconsistency, which leaves subjects unable to plan as autonomous and rational agents should be entitled to do’,²⁷ rendering compliance difficult. MacCormick observed that such a situation is not ‘logically embarrassing’²⁸ but ‘practically embarrassing to the extent that the same human beings ... are said to have and not have a certain right. ...To which system are they to give their fidelity in action?’.²⁹ The same concern was raised in respect of the s.2 HRA duty on UK courts to simply ‘take into account’ ECtHR rulings. As Gearty notes, it was felt that such flexibility ‘gave rise to a real risk of conflict between the two legal regimes, the courts here saying one thing, Strasbourg another with the government embarrassed by having to enforce both’.³⁰ It is worth recalling from Chapter 3 how the Justices described international rule of law considerations in this way acting as a constraint on the UK courts in their interactions with the ECtHR jurisprudence, steering them away from either regular or outright disagreements with final judgments of the Strasbourg Court. The concern was that regular divergences from the ECtHR would create a situation where ‘nobody knows where they are’³¹ and thus undermine the coherence and legitimacy of the Convention system.

Thus, pluralism presents two challenges for the courts. In the absence of either court holding ‘ultimate decision-making capacity’,³² it can be argued that they must seek to find ways of enhancing the legitimacy of their decisions in order to secure the compliance of the other. Additionally, given the risk of conflict, the courts need to find ways of accommodating one another in order to ensure a degree of coherence between their positions so that both might enjoy the disposition to obedience from their overlapping audiences.

²⁷ Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013) 147 citing Pavlos Eleftheriadis, ‘Pluralism and Integrity’ (2010) *Ratio Juris* 365

²⁸ MacCormick, *Questioning Sovereignty* (n 25) 119

²⁹ *ibid*

³⁰ Gearty, *On Fantasy Island* (n 10) 105

³¹ Interview with Justice of the UK Supreme Court (London, 11 July 2014)

³² Krisch (n 16) 88

3. Legitimacy Challenges for the ECtHR

Aside from the challenges posed by jurisdictional pluralism, each of the courts faces their own, distinct legitimacy challenges. For the ECtHR, three challenges are the need to maintain the consent of the national authorities across the Council of Europe, the related need to accord respect to the decision-making of those institutions and, at the same time, demonstrate that its decisions are reached on the basis of law and not discretion.

3.1 The Need for Consent

The ECtHR faces a ‘structural handicap’:³³ it operates within a system which lacks the coercive power to ensure compliance with its judgments. In this regard, Bodansky notes that ‘an institution’s lack of coercive power means that it must rely more on perceived legitimacy as a basis of influence’.³⁴ Indeed, Harlow observes that ‘[i]n its initial phases, the ECtHR relied to a great extent on consensus and the consent of the member states of the Council of Europe to establish its legitimacy – as indeed it still to a certain extent does’.³⁵ In the same vein, Dzhetsiarou observes that the consent established at the signing of the ECHR ‘does not suggest that the Contracting Parties initially subscribed to any ruling produced by the court ... [or] extend to the interpretive methods deployed by the court’.³⁶ What is more, the fact that the ECtHR is an international court is said to aggravate the concern with the ‘counter-majoritarian difficulty’ that judges should not readily interfere with the decisions of the directly elected branches of government.³⁷ To this extent, it has been argued that the ECHR is ‘inevitably trapped in a permanent “crisis of political legitimacy” between its purpose of extending human rights protection and the raw reality that its effectiveness and ultimate survival depends on the consent

³³ Dzehtsiariou, ‘Does Consensus Matter?’ (n 11) 534

³⁴ Bodansky, ‘Legitimacy in International Law’ (n 3) 325

³⁵ Carol Harlow, ‘The Concepts and Methods of Reasoning of the New Public Law: Legitimacy’ LSE Law, Society and Economy Working Papers 19/2010. <https://www.lse.ac.uk/collections/law/wps/WPS2010-19_Harlow.pdf> accessed 27 January 2017. Gearty also notes here that the dependency of the ECtHR on the consent of national authorities meant that they could have chosen to derail the ECHR project - ‘dragged their heels so much that the place became a noisy irrelevance, its grand pronouncements signifying nothing’. Gearty, *On Fantasy Island* (n 10) 99

³⁶ Dzehtsiariou, ‘Does Consensus Matter?’ (n 11) 537

³⁷ *ibid* 536

of states'.³⁸ The observation that courts act strategically in order to increase their legitimacy is thus particularly relevant to international courts such as the ECtHR.³⁹

Maintaining the consent of national authorities presents a significant challenge for the ECtHR in what is a politically hostile climate in the UK towards European institutions. Elliott has described the political debates surrounding the HRA and the role of the ECtHR as:

....a particular manifestation of a specific, and influential, strand within politico-legal discourse in the United Kingdom. It is characterised by a deep antipathy towards legal control of political—including, and especially, legislative—authority in general, and external—"European"—legal control in particular: mindsets which, in turn, arguably betray attitudes of entrenched isolationism and a deep-seated commitment to the notion of the political constitution.⁴⁰

Within this climate, the UK courts are an essential ally – a point recognised by a number of the judges in interview – as national courts can play a key role in legitimising international law. In another context, Maduro argues that 'co-operation and discourse with national courts'⁴¹ was key for 'securing the legitimacy and authority of both the European Court of Justice and EC law'.⁴² Their application of the case law served to equip them with the 'same authority of national court decisions',⁴³ providing the 'added values of both neutrality and of legitimacy'.⁴⁴ In the same way, it can be argued that the UK courts help to anchor the legitimacy of the ECtHR, particularly in light of the view that they have cited the Convention rights and the Strasbourg case law 'with a frequency and diligence hardly matched anywhere else in Europe'.⁴⁵ The UK courts are seen to be giving recognition to the normative force of the ECtHR's conclusions, encouraging other actors subject to its rulings to do the same.

³⁸ Colm O'Cinneide, 'Human Rights Within Multi-Layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Particularism in Tension' in Jean Allain and Siobhán Mullally (eds), *Irish Yearbook of International Law, Vol 3* (Hart 2008) 41 citing Başak Çalı, 'The Limits of International Justice at the European Court of Human Rights: Between Legal Cosmopolitanism and 'A Society of States'', in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (CUP 2007)

³⁹ 'International courts try to enhance their legitimacy and behave strategically to pursue this goal. They seek legitimacy both for its own sake and as a way to fulfill other goals, such as improving compliance with their judgments'. Shai Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 *Theoretical Inquiries in Law* 455, 456

⁴⁰ Mark Elliott, 'After Brighton: Between a Rock and a Hard Place' [2012] PL 619, 626-627

⁴¹ Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998) 27

⁴² *ibid* 9

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ Krisch (n 16) 134

3.2 Respecting Domestic Legal Traditions and Autonomy

In order to maintain the consent of national authorities, it is often observed that supranational courts should accord respect to the former's constitutional traditions and the autonomy of their decision-making. With regard to traditions, Maduro argues that '[t]he bottom up construction and legitimacy of EU law requires the Court to pay due respect to the common national legal traditions and not simply to search for its preferred legal solution among a variety of national legal regimes'.⁴⁶ Likewise, Ostrovsky argues that in the face of legal and cultural diversity, human rights courts 'ignore the different institutional contexts in which interpretation takes place, the different cultural contexts, and the different power relations in these jurisdictions at their peril'.⁴⁷ It was seen in Chapter 4 that these views were shared by the Justices interviewed, who placed much emphasis on the need for the ECtHR judges to understand the nature of the common law system, its tradition of constitutionalism, and the implications of their judgments on their operation.

Equally, with regard to the need for supranational courts to respect the decision-making of national authorities, Helfer and Slaughter warn that '[b]old demonstrations of judicial autonomy by judgments against state interests ... must be tempered by incrementalism and awareness of political boundaries'.⁴⁸ This point is sharply underlined in Çali, Koch and Bruch's empirical study of how the legitimacy of the ECtHR is understood by elite judicial, legal and political actors across Europe.⁴⁹ They conclude that the legitimacy accorded to the ECtHR fluctuates on the logic of 'a fair compromise between the purposes and the performance of human rights courts and the purposes and performance of domestic institutions'.⁵⁰ Of particular note here is that 'the legitimacy of the human rights court is a matter of comparative judgment'⁵¹ between its purpose and performance 'with those of domestic institutions'.⁵² Crucially, they found that '[t]he more actors perceive *competition rather than cooperation* between domestic and international institutions, the more onerous it becomes to maintain the legitimacy of

⁴⁶ Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 EJLS 137, 141

⁴⁷ Aaron A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' [2005] Hanse LR 47, 59

⁴⁸ Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 YLJ 273, 314

⁴⁹ Başak Çali, Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35 Human Rights Quarterly 955

⁵⁰ *ibid*, 974

⁵¹ *ibid* 975

⁵² *ibid* 958

international institutions in domestic contexts'.⁵³ The ECtHR thus relies on 'a presumption of *complementarity* with domestic institutions'.⁵⁴

On the one hand, it has been observed that the ECtHR enjoys legitimacy among senior UK judges. In an analysis of a range of extra-judicial speeches, Bates has observed that 'taken overall, the views were supportive, if not very supportive of the [Strasbourg] Court, with references being made to its recent practices and interaction with UK courts'.⁵⁵ Such support, however, as made clear during the interviews, is not unconditional. Indeed, in the breakdown of legitimacy constructions by profession, Çali, Koch and Bruch's study observed that the UK judges attributed legitimacy to the ECtHR subject to its non-intrusion in domestic processes and flexibility in areas of reasonable disagreement.⁵⁶ Again, this was echoed by a number of the interviewed Justices, who were concerned that the ECtHR in the past had not always abided by the subsidiarity nature of its role, particularly in the determination of facts, in breach of its 'fourth instance'⁵⁷ doctrine, and valued the freedom to occasionally disagree with the Court's rulings.

The ECtHR has been responsive to these challenges. It has recognised the need to observe the various legal traditions of the ECHR signatories, stating over the years that it should not 'strike at the very roots of the State's legal system',⁵⁸ 'ignore entirely the specificities of the particular legal system'⁵⁹ or overlook 'a well-entrenched and necessary part of legal tradition'.⁶⁰ What is more, it has developed a number of 'restraining principles'⁶¹ to assist it in navigating these legitimacy challenges, notably the margin of appreciation accorded to states in areas where a clear 'European consensus' is lacking, and the principle of subsidiarity which emphasises the subsidiarity or complementary role of the ECtHR to domestic decision-makers as the primary guarantors of Convention rights. Nonetheless, the challenges remain. It has been observed that an acute difficulty faced by supranational courts is that they 'have larger audiences than national

⁵³ *ibid* 958

⁵⁴ *ibid* 974

⁵⁵ Ed Bates, 'The Senior Judiciary on 'Strasbourg' – More Supportive Than Some Would Have You Believe' (UK Const L Blog, 28 May 2015) <<https://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/>> accessed 17 January 2017

⁵⁶ Çali, Koch and Bruch (n 49) 980

⁵⁷ *Kemmache v France (No.3)* (1995) 19 EHRR 349 at [44]: 'In principle, and without prejudice to its power to examine the compatibility of national decisions with the Convention, it is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action' cited in Carmen Draghici, 'The Human Rights Act in the Shadow of the European Convention: are Copyist's Errors Allowed?' (2014) 2 EHRLR 154, 166-7

⁵⁸ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [47]

⁵⁹ *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (GC) [146]

⁶⁰ *Hutchinson* (n 24) (Chamber) [24]

⁶¹ Gearty, *On Fantasy Island* (n 10) 98

courts, hearing cases from multiple, often very different countries',⁶² manifesting 'sharply divided preferences with respect to the interpretation and promulgation of international law'.⁶³ Indeed, as others have noted, the jurisdiction of the ECtHR spans from 'Ireland in the west to Vladivostok in the east'⁶⁴ and from 'Iceland to Istanbul',⁶⁵ covering over 800 million people. Thus, developing its jurisprudence in a way which is consistent with the diverse legal traditions and respectful of the autonomy of decision-makers across this vast space remains a persistent challenge, as the former ECtHR President, Dean Spielmann has recognised.⁶⁶ It is in light of these difficulties that Çali, Koch and Bruch advise that the ECtHR 'must be sensitive to—at times strongly conflicting—demands of those it asks to abide by its decisions'.⁶⁷

3.3 Law not Discretion

A third legitimacy challenge facing the ECtHR is that, to the extent possible, it has to avoid the charge that its decisions are informed by discretion rather than law. MacCormick notes that 'the opinion that power is being exercised under law is a notable inducement to accept as legitimately in authority those who do in fact exercise effective political power'.⁶⁸ Faced with the ongoing need to maintain the consent of national authorities, however, Helfer and Slaughter observe the risk that judges on international courts such as the ECtHR 'may feel that their authority and legitimacy depends on not antagonizing those governments on which their power ultimately depends, and on proceeding diplomatically'.⁶⁹ Here, 'neutrality can come to mean "avoiding political confrontation," a euphemism for choosing not to remind governments of their legal obligations'.⁷⁰ They 'must be willing to brave political displeasure, searching always for generalizable principles, even as they search for formulations ... to render the principles more palatable to the states concerned'.⁷¹ In the same vein, Alter argues that such courts should avoid

⁶² Yonatan Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14(2) *Theoretical Inquiries in Law* 437, 452

⁶³ *ibid*

⁶⁴ Mary Arden, *Human Rights and European Law: Building New Legal Orders* (OUP 2015) 301

⁶⁵ Gearty, *On Fantasy Island* (n 10)

⁶⁶ As quoted in the introductory chapter: 'We face a constant challenge as regards the acceptability of our decisions. This question is all the more sensitive as our legitimacy is conferred on us by the States that we find against, and our position is therefore far from easy'. Dean Spielmann, 'Whither Judicial Dialogue?' (Sir Thomas More Lecture, London, 12 October 2015)

<http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016

⁶⁷ Çali, Koch and Bruch (n 49) 982

⁶⁸ Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 59

⁶⁹ Helfer and Slaughter (n 48) 314

⁷⁰ *ibid*

⁷¹ *ibid*

‘transparently political decision[s]’⁷² if they are to avert the risk of ‘los[ing] their legitimacy as legal actors’.⁷³ Here, the legitimacy study discussed above offers further insights. Among the factors which emerged as affecting the legitimacy of the ECtHR among judicial, political and legal actors was ‘[o]bjectivity ... the respondents’ judgments about whether the Court achieves a balance between law and politics when deciding on the facts of cases before it’.⁷⁴ Çali et al observed that the perception of objectivity depletes ‘when the Court is perceived as displacing or overriding a decision of domestic authorities based on political considerations’.⁷⁵ Further, they note that ‘the lack of objectivity or concern for double standards was more a legitimacy concern in Turkey and Bulgaria than the other three states [the UK, Ireland and Germany]’.⁷⁶ They thus caution that ‘by aiming to increase its legitimacy in states with good human rights records, the Court may lose it in states with bad records’.⁷⁷

4. Legitimacy Challenges for the UK Courts

The UK courts face their own, albeit less severe, legitimacy challenges. They enjoy the benefits of having been ‘traditionally legitimated’⁷⁸ and having domestic enforcement mechanisms at their disposal. Indeed, O’Cinneide notes that ‘far from being dependant on state approval, they constitute part of the integral framework of the state, both as a matter of law and popular perception’.⁷⁹ Unlike the ECtHR, they enjoy enforceable review powers over the executive for their compliance with Convention rights and ‘weak review’ powers over primary legislation. However, they face the same challenge, articulated by Elliott: the ‘deep antipathy towards legal control of political—including, and especially, legislative—authority in general, and external—“European”—legal control in particular’.⁸⁰ Situated, as they are, within the framework of the domestic constitutional setting, however, they are perhaps better placed than the ECtHR in confronting this issue. They are not existentially threatened in the way that the ECtHR has been. However, as Kumm notes, ‘[i]nstitutionally, national courts—including constitutional courts—are

⁷² Karen J. Alter, ‘Delegating to International Courts: Self-binding vs. Other-binding Delegation’ (2008)

71(1) LCP 37, 73

⁷³ *ibid.* Similarly, it has been argued elsewhere that inter-court ‘wooing’ can offer legitimacy to international courts as *institutions* but at the expense of the legitimacy of their *judicial capacity* where such wooing takes precedence over the parties to a case and the law. Cesare P.R. Romano, ‘Deciphering the Grammar of the International Jurisprudential Dialogue’ (2008) 41 NYU J. Int’l L. & Pol. 755 cited in Merris Amos, ‘The Dialogue between the United Kingdom Courts and the European Court of Human Rights’ (2012) 61(3) ICLQ 557, 576

⁷⁴ Çali, Koch and Bruch (n 49) 966

⁷⁵ *ibid* 966

⁷⁶ *ibid* 982

⁷⁷ *ibid*

⁷⁸ Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) MLR 317, 358

⁷⁹ O’Cinneide (n 38) 41

⁸⁰ Elliott (n 40) 626-7

far too weak to withstand persistent majoritarian pressures for long'.⁸¹ While their institutional legitimacy is less disputed, the legitimacy of their current powers and place within the constitutional order of the UK under the HRA – an arrangement of which many senior judges are openly supportive – is less secure.

4.1 The 'Modest Underworker of Strasbourg'⁸²

The introduction of the HRA presented new legitimacy challenges for the UK courts. As Krisch notes, 'they had been turned into a quasi-constitutional court with broad review powers over executive and legislative action, and this was in strong tension with previous assumptions about the role of courts under the British constitution'.⁸³ Indeed, O'Cinneide points out that the UK's traditionally political constitution had been characterised by 'judicial deference to the decisions of elected decision-makers and the prerogative-wielding executive'.⁸⁴ Against this background of tradition, Krisch notes that deviations from the jurisprudence of the ECtHR 'might have appeared too openly "creative": as a legislative rather than judicial function and therefore subject to greater challenge'.⁸⁵ The close adherence to the ECtHR case law thus helped to 'maintain a more clearly judicial role, one of 'applying' the law'.⁸⁶ In this regard, 'tying its hand and limiting (or denying) its discretion by reference to Strasbourg might have seemed to the House of Lords the safest option in the new – tempting but slightly uncomfortable – position in which the HRA placed it'.⁸⁷

As seen in the introductory chapter, however, this approach brought its own legitimacy challenges. A widespread view developed that the UK courts had become excessively deferential to the ECtHR by allowing the 'permissive language of section 2 to harden into an unavoidable obligation'.⁸⁸ The case which infamously came to typify this was *AF (No 3)*.⁸⁹ There, the House of Lords accepted, contrary to their previous conclusion,⁹⁰ that the right to a fair trial would be violated where a person suspected of terrorist offences was subject to control orders on the 'sole or decisive' basis of evidence obtained through closed material procedures. This was despite the

⁸¹ Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2002) 44(1) *Virginia J Intl L* 19, 24

⁸² This term is borrowed from Lord Kerr, 'The Supreme Court: The Modest Underworker of Strasbourg?' (Clifford Chance Lecture, 25 January 2012) <https://www.supremecourt.uk/docs/speech_120125.pdf> accessed 18 November 2015

⁸³ Krisch (n 16) 138

⁸⁴ O'Cinneide (n 38) 23

⁸⁵ Krisch (n 16) 138

⁸⁶ *ibid* 138

⁸⁷ *ibid* 139

⁸⁸ Gearty, *On Fantasy Island* (n 10) 105

⁸⁹ *Secretary of State for the Home Department v AF and another (No 3)* [2010] 2 AC 269

⁹⁰ *Secretary of State for the Home Department v MB and AF* [2008] 1 AC 440

fact that the Lords expressed serious concerns over the ‘sole or decisive’ test. Lord Hoffmann criticised it as the imposition by the ECtHR of a ‘rigid rule’⁹¹ in a context where the demands of a fair procedure simply ‘cannot ... be stated in rigid rules’.⁹² Nonetheless, the Law Lords considered themselves ‘obliged’⁹³ by the applicable ECtHR judgment,⁹⁴ having ‘no option but to accept and apply it’.⁹⁵ This was best encapsulated in the now-famous words of Lord Rodger’s single-paragraph contribution to the judgment: ‘Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed’.⁹⁶

As discussed in Chapter 1, in the view of one of the primary architects of the HRA, this posed a threat to the legitimacy of the UK courts and human rights law itself at the domestic and international levels. In a plea to the judges to take a less deferential approach, the former Lord Chancellor, Lord Irvine, argued that it was imperative that the UK courts counter the perception that they are ‘merely agents or delegates of the ECHR and CoE ... regard[ing] it as their primary duty to give effect to the policy preferences of the Strasbourg Court’.⁹⁷ Undue deference was ‘damaging for our courts’ own legitimacy and credibility’⁹⁸ and ‘would gravely undermine, not enhance, respect for domestic and international human rights principles in the United Kingdom’.⁹⁹ Likewise, the Court of Appeal judge, Lord Justice Laws, has written of the threat of such deference to the common law’s virtues of ‘catholicity’¹⁰⁰ – its ‘capacity to draw inspiration from many different sources’¹⁰¹ and its ‘restraint’.¹⁰² Any principle of foreign ancestry, he suggests, ‘like any other principle of the common law, can only truly take their place and play their part if the law’s users, its practitioners and its commentators, believe in their benign effects’.¹⁰³ In this way, ‘law’s authority rests upon public belief’.¹⁰⁴ Where, however, ‘the law is or seems to be driven by decisions of the Strasbourg court ... the resulting fears and resentments

⁹¹ *AF (No 3)* (n 89) [71]

⁹² *ibid* [72]. Lord Brown was concerned that fulfilling the requirement that those suspected of terrorist offences should not be subject to control orders on the sole or decisive basis of evidence which they have been unable to assess would be sometimes ‘impossible’ and would put national security in jeopardy. [116]

⁹³ *ibid* [74] (Lord Hoffmann)

⁹⁴ *A v United Kingdom* (2009) 49 EHRR 29

⁹⁵ *AF (No 3)* [108] (Lord Carswell)

⁹⁶ *ibid* [98]

⁹⁷ Lord Irvine, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 247

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ Lord Justice Laws, ‘The Common Law and Europe’ (Hamlyn Lectures 2013)

<<https://www.judiciary.gov.uk/wp-content/.../laws-lj-speech-hamlyn-lecture-2013.pdf>> accessed on 10 October 2016

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *ibid*

may undermine the confidence which thinking people ought to have in the common law's catholicity'.¹⁰⁵ In the same vein, Amos has written of the 'ongoing legitimacy problem flowing from the link between UK courts and the ECtHR'.¹⁰⁶ Where the UK courts 'simply accept and apply the jurisprudence of the ECtHR, this may contradict shared national values leading to HRA judgments and the HRA itself losing legitimacy'.¹⁰⁷

4.2 The Lack of Rights 'Ownership'

Related to the concern that the UK courts had accorded to the ECtHR too much influence is the alleged lack of national 'ownership' of the rights contained under the HRA. A majority on the Commission on a UK Bill of Rights, set up by the former coalition government to consider how the HRA might be replaced, concluded that 'many people feel alienated from a system that they regard as 'European' rather than British',¹⁰⁸ with the consequence of a lack of 'widespread public acceptance of the legitimacy of our current human rights structures, including of the roles of the Convention and the European Court of Human Rights'.¹⁰⁹ This is echoed by Amos, who notes that '[t]he human rights protected and the procedures adopted are perceived as European and not sufficiently British',¹¹⁰ with 'a distrust of international and European institutions by contrast to the trust placed in national courts and other institutions'.¹¹¹ Thus, for a majority of the Commission, this provided one of the strongest reasons for a 'new constitutional instrument'¹¹² to replace the HRA, there being 'a strong case at least in principle for drafting it in language reflecting our own heritage and tradition'.¹¹³ It should be noted that the contentions on 'ownership' have been roundly rejected by Klug and Williams.¹¹⁴ Nonetheless, as seen in Chapter 4, the judges are conscious of a problem: 'we need to address the narrative that human rights are a foreign imposition because, in the longer term that could, at least at the margin, discredit the rule of law'.¹¹⁵

¹⁰⁵ *ibid*

¹⁰⁶ Merris Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35(2) *Human Rights Quarterly* 386, 406

¹⁰⁷ Amos, 'Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 73) 577

¹⁰⁸ Commission on a UK Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1, December 2012) 28-9

¹⁰⁹ *ibid* 176

¹¹⁰ Amos, 'Transplanting Human Rights Norms' (n 106) 400

¹¹¹ Commission on a UK Bill of rights, *The Choice Before Us* (n 108) 176

¹¹² *ibid*

¹¹³ *ibid* 147

¹¹⁴ Francesca Klug and Amy Williams, 'The Choice before Us? The Report of the Commission on a Bill of Rights' [2013] PL 460, 462-464

¹¹⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

In these respects, it can be said that the UK courts and the ECtHR face interwoven legitimacy challenges. Both face the challenges of pluralism to achieving effective compliance with their judgments, and both face the task of navigating a political climate hostile to European institutions and legal interventions on human rights grounds. The difficulties presented for the ECtHR are perhaps more acute and, as will become clear throughout this chapter, it is thus the ECtHR which stands to benefit the most from the legitimising role of judicial dialogue with the UK courts.

5. Judicial Dialogue: Drawing Lessons from Discourse

Having considered the interwoven legitimacy challenges facing the UK courts and the ECtHR in their decision-making on Convention rights, the question to which the chapter now turns is how the judges appear to use the processes of judicial dialogue as a way of navigating these challenges. How might the courts be using their dialogue to legitimise their decisions to each other, to their ‘own community of the legally-informed’¹¹⁶ or the ‘legal public sphere’?¹¹⁷ The principal tool which the courts have in this regard is the *reasoning of their judgments*.¹¹⁸ Jacqué, quoted in the heading to this chapter, argues that ‘the sole source of a court’s legitimacy stems from the reasoning of its decisions. To explain rationally the reasoning followed is an instrument of dialogue. Reasoning is indispensable for mutual trust’.¹¹⁹ Likewise, Weiler argues that ‘the legitimacy and persuasiveness of ... decisions resides both in their quality and communicative power’.¹²⁰ Judicial reasoning, as seen in Chapters 3 and 4, is the medium of ‘formal’ dialogue between the courts through which they mutually engage with one another and seek to explain their conclusions. However, as seen from Chapter 5, informal dialogue complements this engagement by providing an additional opportunity for both sides to further explain their views and positions to one another. To that extent, their judgments are not the sole source of their legitimacy.

Drawing upon the insights of Chapters 3-5, it can be argued that both the reasoning of their judgments and their face-to-face meetings enable the courts to seek legitimacy for their decision-making by drawing upon three particular features of *discourse*, as understood in political theory: *participation*, *accountability* and *ongoing revision and refinement of arguments*.

¹¹⁶ Gearty, *On Fantasy Island* (n 10)

¹¹⁷ Habermas, *BFN* (n 9)

¹¹⁸ Çalı, Koch and Bruch (n 49) 982. Dzehtsiarou also points out that the original consent which provided the foundations of the ECtHR’s legitimacy is not enough: ‘the reasoning of the court must attempt to independently justify its jurisprudence’. Dzehtsiarou, ‘Does Consensus Matter?’ (n 11) 537

¹¹⁹ Jacqué (n 1) 22

¹²⁰ J.H.H. Weiler, ‘Lautsi: Crucifix in the Classroom Redux’ (2010) 21(1) EJIL 1

These provide the courts with the means to enhance the ‘procedural quality of the jurisgenerative process’¹²¹ through which they develop their interpretations of Convention rights. The following sections explain how these discursive features are reflected in judicial dialogue, before the chapter turns to examine how each feature performs distinct legitimising roles.

5.1 Discourse and Judicial Dialogue Compared

Following the example of other authors exploring the legitimising role of judicial dialogue,¹²² a useful starting point here is the proceduralist understanding of law and democracy developed by Habermas. According to Habermas’ discourse principle, ‘[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’.¹²³ For Habermas, these rational discourses ‘...include any attempt to reach an understanding over problematic validity claims’,¹²⁴ conducted ‘under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations’.¹²⁵ Here, ‘...the only thing that counts is the compelling force of the better argument based on the relevant information’.¹²⁶

Neither formal nor informal dialogue between the UK courts and the ECtHR neatly match these ideal conditions. In formal dialogue between the courts, as seen in Chapter 3, the free processing of topics and contributions is subject to certain practical constraints. It is as an indirect, case-dependent process taking place on an ad hoc basis, with the judges confined to addressing the issues raised by the particular cases as and when they come before them.¹²⁷ Similarly, informal dialogue, though taking place directly on a face-to-face basis, was shown to occur somewhat sporadically. Various normative constraints are also present. Respect for parliamentary sovereignty and the international rule of law in particular were identified by the judges as constraining and influencing the interactions between their courts, both conflictual and consensual, from different directions, as does the duty of judicial independence during the course of their informal discussions. What is more, it is clear that dialogue between the courts is not simply an effort to reach mutual understanding as to the stronger argument. It does not take place

¹²¹ Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15(5) *EJIL* 907, 926

¹²² In particular, Pérez (n 4) 103-106

¹²³ Habermas, *Between Facts and Norms* (n 9) 107

¹²⁴ *ibid* 107

¹²⁵ *ibid* 107-8

¹²⁶ *ibid* 103

¹²⁷ The same point is made by Pérez in the context of the fundamental rights adjudication of the CJEU. She concedes that supranational courts ‘cannot enter into simultaneous dialogue, at the same time and in the same place, with all member state courts for an unlimited period of time until a consensus is reached’.¹²⁷ Instead, it inevitably takes place in a ‘fragmented manner ... case by case’. Pérez (n)

between freely associating individuals engaged in communication but individuals performing distinct, institutionalised roles in the form of the judicial functions of their particular courts, each with their own traditions, working methods and judicial philosophies in play. Chapter 3 saw how the judges' understandings of the very notion of 'dialogue' appeared to be conditioned in part by the particular interests of their respective courts.

Despite these deviations from ideal discourse, the following sections will show that the reasoning of their judgments and the communicative flexibility of the face-to-face situation enable the courts to employ numerous features of discourse along with their legitimising potential.

5.2 Participation

First, judicial dialogue harnesses the *participation* of both courts in the development of the jurisprudence on Convention rights at both the domestic and European levels. The participant, as Waldron notes, takes 'a part or share in the activity in question'¹²⁸ and 'demands that [their] voice be heard and that it count in public decision-making'.¹²⁹ Direct participation in discourse, according to Habermas, depends on 'communicative freedom':¹³⁰ 'the possibility – mutually presupposed by participants engaged in the effort to reach an understanding – of responding to the utterances of one's counterpart and to the concomitantly raised validity claims'.¹³¹

Through both formal and informal dialogue, the courts take part in the development of Convention rights and exercise communicative freedom in respect of one another. In Chapter 3, it was established that formal dialogue is considered a process by which each court listens to the views of the other and seeks to explain their own position in turn if and when the opportunities arise. The UK courts, as is required under s.2 HRA, take into account the judgments of the ECtHR – 'engage with Strasbourg on Strasbourg's terms'¹³² – and explain their own conclusions – 'fashion our response'¹³³ – in reply, thereby contributing to the development of the jurisprudence on Convention rights. The ECtHR, for its part, takes into account the arguments advanced by the UK courts – 'listen[s] to what the partner says'¹³⁴ – and 'assesses, and, as the

¹²⁸ Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 Proceedings of the Aristotelian Society. 307, 311

¹²⁹ Habermas, *Between Facts and Norms* (n 9) 312

¹³⁰ *ibid* 119

¹³¹ *ibid*

¹³² Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹³³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹³⁴ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

case may be, rectifies or validates the analysis'.¹³⁵ Through informal dialogue, the judges participate directly in open, 'give and take'¹³⁶ discussion, exploring whatever issues, concerns, feedback and ideas either set of judges might have concerning the Convention rights or their practical application. In this way, both sides take a part in the activity and have 'a voice and a role in norm creation'.¹³⁷ Further, through their reasoning and through their face-to-face meetings, both sides enjoy 'the opportunity ... of responding to the utterances of [their] counterpart'¹³⁸ and thus exercise a degree of communicative freedom as participants.

5.3 Accountability

Second, formal and informal judicial dialogue involve *mutual accountability*, one of the central 'illocutionary obligations'¹³⁹ which underpin discourse. According to Habermas, '...interacting participants must consider themselves mutually accountable'.¹⁴⁰ Each statement made by participants in discourse '...involves the raising of criticizable validity claims'¹⁴¹ and 'the speaker, by raising a validity claim, concomitantly takes on a sufficiently credible guarantee to vindicate the claim with the right kind of reasons, should this be necessary'.¹⁴² A similar stipulation of accountability is visible in Tremblay's model of deliberative dialogue, according to which '...each participant must be willing to expose their views to the critical analysis of the others'.¹⁴³

This accountability is evident in the way the UK courts and ECtHR interact. With regard to the ECtHR, it was seen in Chapter 3 how the dominant category of formal dialogue which emerged from the interviews with the judges was the domestic judgments which signal concerns or disagree with an aspect of the Strasbourg jurisprudence. These concerns, as seen in Chapter 4, have primarily concerned the clarity and coherence of the Strasbourg jurisprudence and its substantive appreciation of UK domestic law. As will be explored below, when confronted with such criticism, the ECtHR has often shown its willingness to engage through both judgments and meetings. What is more, the ECtHR holds itself accountable with reasons for any divergence with the views of national judgments. As Amos points out, in light of the margin of appreciation

¹³⁵ Spielmann, 'Whither Judicial Dialogue?' (n 66)

¹³⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹³⁷ Amos, 'The Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 73) 572

¹³⁸ Habermas, *Between Facts and Norms* (n 9) 119

¹³⁹ *ibid* 108

¹⁴⁰ *ibid* 20

¹⁴¹ *ibid* 18

¹⁴² *ibid*. Reasons, however, are not merely 'dispositions to have opinions' but 'the currency used in a discursive exchange that redeems criticizable validity claims'.

¹⁴³ Tremblay (n 15) 632 cited in Amos, 'The Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 73) 559

doctrine the ECtHR has declared that when considering a case which has already been the subject of domestic adjudication it requires ‘strong reasons to substitute its view for that of the final decision of the [domestic court]’.¹⁴⁴

With regard to the UK courts, their accountability to the ECtHR, as courts of an ECHR member state, is intrinsic to the Convention system of human rights protection.¹⁴⁵ In line with their s.2 HRA duty to ‘take into account’ ECtHR rulings and their interpretive presumption at common law that Parliament intends to act in accordance with the UK’s international obligations, the UK courts will follow a ‘clear and constant’¹⁴⁶ view of the ECtHR which does not contravene ‘some fundamental substantive or procedural aspect of [UK] law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle’.¹⁴⁷ This presumption helps to ensure a degree of coherence between the domestic and Strasbourg case law, thereby easing the potential rule of law difficulties arising from disparate approaches. For this reason, the UK courts hold themselves accountable to the ECtHR for any conscientious divergence between their own judgments and those of the ECtHR. The Supreme Court has stated that while it is ‘open to this court to decline to follow [a] Strasbourg decision’,¹⁴⁸ if choosing to do so it must ‘giv[e] reasons for adopting this course’.¹⁴⁹ As one Justice in interview put it, such reasons provide the ECtHR with ‘an informed basis for reconsidering’.¹⁵⁰ Further, as seen in the previous chapters, the UK courts have revisited their previous decisions on numerous occasions where those decisions, based on predicative assessments of how the ECtHR would interpret the Convention rights, transpired to be at odds with the subsequent conclusions of the ECtHR. However, while the UK courts consider the judgments of the ECtHR partly ‘because they have been directed by Parliament to do so’,¹⁵¹ it should be recalled from Chapters 3 and 4 that a number of the interviewed judges considered ECtHR judgments which disagree with UK judgments to be an important form of dialogue. Despite Lord Wilson’s remark in *Moohan*¹⁵² that ‘the notion that the ECtHR has power to “correct” a decision of this court is a constitutional aberration’,¹⁵³ it was

¹⁴⁴ *MGN v United Kingdom* (2011) 53 EHRR 5, [150]

¹⁴⁵ Within the ECHR framework, ‘[t]he ECtHR holds de jure authority to hold states to account with respect to their human rights practices, understood as encompassing legislation, *judicial decisions* and executive action’ [emphasis added]. Başak Çalı, ‘The Purposes of the European Human Rights System: One or Many?’ (2008) 3 EHRLR 299, 301

¹⁴⁶ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [26] (Lord Slynn)

¹⁴⁷ *Pinnock v Manchester City Council* [2011] 2 AC 104, [48] (Lord Neuberger)

¹⁴⁸ *R v Horncastle and others* [2010] 2 AC 373 (SC) [11] (Lord Phillips)

¹⁴⁹ *ibid*

¹⁵⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁵¹ Brice Dickson, *Human Rights and the UK Supreme Court* (OUP 2013) 34

¹⁵² *Moohan v Lord Advocate* [2015] 1 AC 901

¹⁵³ *ibid* [104]

clear from the interviews that a number of the Justices considered the ability of the ECtHR to challenge their decisions to be valuable. It was considered to be ‘an invitation ... to reconsider, and that’s no bad thing’¹⁵⁴ and a means of challenging judicial complacency about domestic human rights standards.

Thus, through their interactions the courts are felt to act as an important ‘check’ on their respective decision-making, challenging their respective reasoning and the assumptions underlying them. Likewise, informal dialogue was shown in Chapter 5 to serve the same purpose, providing a forum for the judges to raise concerns with one another, though this was thought to be valuable primarily from the perspective of the national judges, raising concerns with the ECtHR. In these numerous respects, as in discourse, both sets of courts demonstrate accountability in reason to one another.

5.4 Revision

The third discursive feature of judicial dialogue, both formal and informal, which appears to be aimed at legitimising decision-making is the ongoing revision and refinement of judicial opinions in light of the new arguments which each court advances. For participants engaged in discourse, Habermas suggests that the respective views held by each are only ‘provisionally justified’¹⁵⁵ because there is ‘no criterion independent of the argumentative process’.¹⁵⁶ This warrants from each participant ‘an openness to the possibility that ... views might have to be revised in the light of new information and arguments’.¹⁵⁷ Similarly, Rawls observes that ‘[w]hen citizens deliberate, they ... suppose that their political opinions may be revised by discussion ... and therefore these opinions are not simply a fixed outcome of their existing private or nonpolitical interests’.¹⁵⁸

Ongoing revision is, of course, intrinsic to legal development. It is ‘an ever changing process ... [that] morphs, adapts and develops in response to previously unencountered arguments and unanticipated circumstances’.¹⁵⁹ Understood discursively, Habermas suggests that judicial decisions reflect ‘...a caesura in an *ongoing discussion*; ...the interim result of a discursive opinion-forming process’¹⁶⁰ and one which ‘is in principle resumable’.¹⁶¹ This ‘resumability’ is

¹⁵⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁵⁵ Habermas, *Between Facts and Norms* (n 9) 178

¹⁵⁶ *ibid*

¹⁵⁷ *ibid*

¹⁵⁸ John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64(3) U Chi L Rev 765, 772

¹⁵⁹ Lord Kerr, ‘Dissenting Judgments: Self-indulgence or Self-sacrifice? (The Birkenhead Lecture, 8 October 2012) <<https://www.supremecourt.uk/docs/speech-121008.pdf>> accessed 10 October 2016

¹⁶⁰ Habermas, *Between Facts and Norms* (n 9) 179

¹⁶¹ *ibid*.

plain in the decision-making by the UK courts and the ECtHR, both of which enjoy the capacity to explicitly revise their views over time.¹⁶² For the UK courts, revision is central to the case-by-case development of the common law, with its ‘power of continuous self-correction’¹⁶³ and ‘catholicity’.¹⁶⁴ its ‘...capacity to draw inspiration from many different sources’.¹⁶⁵ In relation to the ECtHR, this self-correcting capacity is enhanced by the s.3 HRA power to interpret legislation ‘so far as it is possible’ in a manner which is compatible with Convention rights. This provision, as Dickson notes, is an instrument of ‘adaptability’¹⁶⁶ which allows the UK courts to revise their positions as the case law of the ECtHR develops. For both the ECtHR and UK courts, the Convention is interpreted as ‘a living instrument which ... must be interpreted in the light of present day conditions’,¹⁶⁷ allowing the judges to ‘breathe life into the words of the instrument so as to make it relevant to contemporary European society’.¹⁶⁸ What is more, the ECtHR has shown its willingness to revise its jurisprudence ‘in the light of the clarifications subsequently made by the domestic courts’.¹⁶⁹ It has ‘plasticity’¹⁷⁰ in this regard.

Formal and informal judicial dialogue harness these capacities as each court is encouraged to review and potentially revise their positions in light of the views presented by the other through judgments and meetings. The understanding of formal dialogue developed in Chapters 3 and 4 is that of a process by which each court considers the views of the other, explains its own position and expects that explanation, in turn, to be considered by the other court. The capacities of each court for revision are utilised in a process of tension-mitigation through which the courts, primarily the UK courts, employ their judgments as a means of signalling concerns or disagreement to the ECtHR and also offering contributions to areas lacking Strasbourg case law with the aim of influencing the ECtHR in a way that minimises either existing or potential difficulties arising from their differing institutional perspectives, modes of operating and the prevailing legal traditions of their judges. Further, formal dialogue

¹⁶² The idea of judgments as ‘resumable’ discussions strongly resonates in a set of post-scripted comments to a judgment by Lord Brown: ‘I prefer to leave over for another day my final conclusion on the point. I just wish to indicate that I may change my mind’. *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332

¹⁶³ Lord Justice Laws (n 100)

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ Dickson (n 151) 374

¹⁶⁷ *Tyrer v United Kingdom* (1979-1980) 2 EHRR 1 [31]; *Brown v Stott* [2003] 1 AC 681, 727 (Lord Clyde) cited in Roger Masterman, ‘Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights’ (The Constitution Unit, 2015) 23

¹⁶⁸ Nicolas Bratza, ‘Living Instrument or Dead Letter – The Future of the European Convention on Human Rights’ [2014] EHRLR 116, 118 cited in Masterman, *ibid* 23

¹⁶⁹ *Z and others v United Kingdom* (2002) 34 EHRR 3, [100]

¹⁷⁰ ‘...its genuine desire to respond to the needs of the contracting states’ legal systems, in other words its *receptivity* of the need for change ... [its] coping strategy ... adapting itself when need arises’. Arden, *Building New Legal Orders* (n 64) 304

was predicated, albeit with somewhat less enthusiasm from some of the Justices, on the UK courts modifying their own views in the wake of new judgments of the ECtHR which appear to warrant a review of the domestic judicial position. Thus, the tension-mitigating function rests on the capacity of both courts to revise their previous conclusions. Informal dialogue is also predicated on the possibility of views and approaches being revised through the face-to-face discussions which take place between the judges. It was seen in Chapter 5 how UK judges feel that they can use these encounters to give their views to the Strasbourg judges on developments which might prove ‘ill-advised’¹⁷¹ and seek guidance as to how they could revise their approach to the application of ECtHR case law domestically.

6. The Legitimising Role of Participation

The discussion turns now to how each of the discursive features of judicial dialogue can contribute to the legitimacy of their decision-making. The first feature is the mutual participation of the courts in the development of the jurisprudence on Convention rights. This participation appears to contribute to the legitimacy of the courts’ decisions both in respect of one another and on the part of their other audiences. Through their mutual participation, they demonstrate *institutional awareness* towards one another; build mutual understanding in order to *avoid conflict*; and attempt to reach jurisprudential *outcomes to which both have contributed*.

6.1 Institutional Awareness

For a start, with each court according weight to the views of the other court before pronouncing their own, they show mutual recognition for their respective authority and roles in the ‘shared responsibility’¹⁷² for enforcing the Convention rights. Helfer and Slaughter suggest that such recognition ‘...dignifies the opposing arguments, signalling the proponents of these arguments that they have been heard and recognized as important participants in a debate, participants whose arguments must be answered’.¹⁷³ The importance of mutual participation for the legitimacy of decision-makers within contexts of jurisdictional pluralism is well-noted. Maduro points out that such conditions generate a need for ‘institutional awareness’:¹⁷⁴ ‘[c]ourts must increasingly be aware that they don’t have a monopoly over rules and that they often

¹⁷¹ *ibid*

¹⁷² Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights (Brighton 19-20 April 2012) B[12](c)

¹⁷³ Helfer and Slaughter (n 48) 321 cited in Pérez (n 4) 114

¹⁷⁴ Maduro, ‘Interpreting European Law’ (n 46) 149

compete with other institutions in their interpretation'.¹⁷⁵ Likewise, Kumm argues that when national and supranational courts within Europe interpret legal provisions in such contexts, '[t]he views of the other courts have to be given appropriate weight and their concerns, so far as reasonable, accommodated'.¹⁷⁶ Even where they disagree, 'evidence of having listened is an important legitimating force'.¹⁷⁷ To borrow a phrase from Weiler, the courts thus need 'to listen, not only preach, and to be seen to be listening'.¹⁷⁸ A number of the interviewed judges spoke in similar terms. As seen in Chapter 3, one Justice explained that 'it's very important for them that they see that we are taking them seriously'.¹⁷⁹ Likewise, a Strasbourg judge remarked that 'any decision is more reliable if you listen to what the person who's going to be affected by your decision has to say'.¹⁸⁰ To this extent, the judges display to one another a kind of judicial civility – 'a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made'.¹⁸¹ This could be particularly crucial for the ECtHR which, as discussed earlier, depends for its legitimacy on the continued consent of the national authorities. If it is the case that the legitimacy of the ECtHR becomes more vulnerable the more the domestic actors perceive 'competition rather than cooperation',¹⁸² by showing recognition of the views of the UK judges in its judgments, the ECtHR reduces the risk of damaging its legitimacy in this regard.

6.2 Conflict Avoidance

Next, their mutual participation can contribute to the legitimacy of the courts' decision-making by enabling them to minimise the risk of conflict. Under the kind of pluralist conditions which define their relationship, Somek observes that 'there is no final legal resolution to jurisdictional conflicts ... No meta-law governs their interaction'.¹⁸³ However, it was seen earlier how the courts arguably require a degree of coherence between their conclusions if both are to

¹⁷⁵ *ibid*

¹⁷⁶ Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *ELJ* 262, 302. In the same vein, McCormick has argued that a supranational court 'ought not to reach its interpretive judgments without regard to their potential impact on national constitutions', while Pérez notes that the CJEU 'ought to be responsive' to the arguments advanced by national courts. McCormick, *Questioning Sovereignty* (n) 74; Pérez (n) 114

¹⁷⁷ Amos, 'The Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 73) 575

¹⁷⁸ Weiler (n 120) 1

¹⁷⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁸⁰ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

¹⁸¹ This is just one particular aspect of John Rawls' 'duty of civility' – 'a moral, not a legal, duty ... to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason'. John Rawls, *Political Liberalism* (Columbia University Press 1996) 217

¹⁸² Çalı, Koch and Bruch (n 49) 958

¹⁸³ Somek (n 22) 20

enjoy the disposition to obedience on the part of their shared audiences, who would otherwise have to grapple with conflicting rulings.¹⁸⁴ Thus, MacCormick argues that such a situation necessitates ‘careful management at all levels to avoid deadlock or damaging conflict among rival authorities’.¹⁸⁵

With each court taking into consideration the views of the other through formal and informal exchanges of argument, however, exercising communicative freedom in turn, their participation in dialogue can improve understanding. Pérez notes that it ‘brings to the fore information about the views and concerns of the participants’,¹⁸⁶ which in turn ‘promotes knowledge and sustains better understanding of competing interests and values at the different levels of governance’.¹⁸⁷ This enables them to reach ‘common understanding of the scope and limits’¹⁸⁸ of their respective authority and to ensure a degree of coherence between their approaches.¹⁸⁹ Constantinides notes here that while ‘judge-made rules face legitimacy concerns’,¹⁹⁰ ‘[c]oherence through dialogue can provide such legitimacy’.¹⁹¹ As seen in previous chapters, through their dialogue the courts seek through cross-influence to prevent as well as rectify disagreements. Their participation in dialogue involves ‘each learning from the other and trying to ensure that, on the whole, we’re singing from the same hymn-sheet’¹⁹² and ‘both sides trying to come to the civilised sharing of responsibility’.¹⁹³

What is more, their mutual participation helps to avoid conflicts where possible between the UK generally and ECtHR by ensuring that the Strasbourg judges benefit from the insights of the UK judges. National judges, as the ECtHR acknowledges with its margin of appreciation

¹⁸⁴ The legitimacy risks associated with disparate approaches between the courts are vividly articulated by Sales: ‘Confusion would result. The costs of litigation would increase, since in very many cases there would be much greater scope for argument ... about both sets of case law and how they bear upon the dispute in question. The basic rule of law values inherent in the ECHR and the Convention rights would not be promoted as they should be.... if the domestic courts are perceived to be giving different meanings to Convention rights than the ECtHR gives them, there is a serious risk that public confidence in the courts and respect for human rights would be adversely affected ... The Supreme Court would particularly be at risk of being diminished in the eyes of European States and institutions ; and the general authority of the ECHR system and Convention rights would be at greater risk of being diminished in the eyes of the British public.’ Philip Sales, ‘Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine’ [2012] PL 253, 261

¹⁸⁵ MacCormick, *Questioning Sovereignty* (n 25) 74

¹⁸⁶ Pérez (n 4) 113

¹⁸⁷ *ibid*

¹⁸⁸ MacCormick, *Questioning Sovereignty* (n 25) 74

¹⁸⁹ Kumm suggests that ‘mutual deliberative engagement’ between courts ‘[i]n the absence of conclusive hierarchical rules ... is an important mechanism to reduce conflict and increase coherence of legal practice in Europe’. Kumm, ‘Jurisprudence of Constitutional Conflict’ (n 176) 302

¹⁹⁰ Aristoteles Constantinides, ‘Transjudicial Dialogue and Consistency in Human Rights Jurisprudence: A Case Study on Diplomatic Assurances Against Torture’ in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of National and International Courts and the (De-)Fragmentation of International Law* (Hart 2012) 267, 275

¹⁹¹ *ibid*

¹⁹² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁹³ Interview with Judge of the European Court of Human Rights (Strasbourg, France, 29 May 2015)

doctrine, [b]y reason of their direct and continuous contact with the vital forces of their countries, ... are in principle in a better position than the international judge,¹⁹⁴ to determine the proportionality of interferences with Convention in their particular countries. Lupu notes that ‘international courts have less information than national courts about their audience’s preferences’,¹⁹⁵ the latter ‘having more experience with their home country and more direct access to information about public opinion’.¹⁹⁶ The ECtHR’s vast audience means that ‘it is often difficult ... to discern the preferences of the public and of the political actors in the applicable states’.¹⁹⁷ In the same vein, Bellamy notes that ‘the ‘outsider’s’ view may overlook how the specification of a particular right within a given legal system forms part of a more general approach to rights, that balances different rights considerations and which taken overall is reasonable and reflects local circumstances and concerns’.¹⁹⁸ Thus, judicial dialogue allows UK judges to nudge the ECtHR judges away from potential approaches which would cause unnecessary difficulties at the domestic level.

6.3 Shared Interpretive Outcomes

Third, the mutual participation of the courts in judicial dialogue allows the European human rights jurisprudence to be ‘constructed as much bottom up as it is constructed top down’,¹⁹⁹ thereby reflecting a ‘shared result’²⁰⁰ of input from the ECtHR and UK courts. This offers a legitimising potential for the judgments of the ECtHR which can be explained by democratic insights on public participation. In liberal democracies, the participation of the governed in the governance of their society, as free and equal individuals, is considered a staple requirement for the legitimacy of authoritative decision-makers. As discussed earlier, Habermas’ discourse principle stipulates that a norm’s validity depends on whether all those possibly affected by it could agree to it as participants in discourse. Applying this understanding to law and democracy, he proposes that the legitimacy of legal norms requires that those subject to them

¹⁹⁴ *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [48]

¹⁹⁵ Lupu (n 62) 453

¹⁹⁶ *ibid*

¹⁹⁷ *ibid*

¹⁹⁸ Richard Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case’ in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 243, 257 citing Kristen Hessler ‘Resolving Interpretive Conflicts in International Human Rights Law’ (2005) 13(1) *Journal of Political Philosophy* 29, 43-4

¹⁹⁹ Kumm, ‘The Jurisprudence of Constitutional Conflict’ (n 176) 302 citing Miguel Poiars Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 449

²⁰⁰ Pérez (n 4) 114

‘understand themselves, taken as a whole, as the rational authors of those norms’.²⁰¹ In a similar vein, Young writes that ‘...a democratic decision is normatively legitimate only if all those affected by it are included in the process of discussion and decision-making’.²⁰² Participation in this way can enhance legitimacy by ‘giving stakeholders a sense of ownership in the process’²⁰³ while ‘restricted participation can provoke dissatisfaction on the part of those excluded’.²⁰⁴

These democratic arguments are resonant in the thinking of the judges in their dialogue. As seen in Chapter 3, the Justices stressed the importance of the ECtHR ‘listening to us, taking into account our concerns and interests’²⁰⁵ and valued the opportunities through both their judgments and meetings to have ‘an input into the way in which Strasbourg thinks’.²⁰⁶ In Chapters 4 and 5, their participation was deemed to be particularly important by a number of the Justices who conceived of themselves as both representatives and guardians of the UK’s common law tradition within a European human rights system consisting largely of civil law traditions. Two opposing examples from the case law further demonstrate the importance which is attached to their participation. In Chapter 3, it was seen how the failure of the ECtHR to acknowledge the divided views of the Law Lords in *Qazi*²⁰⁷ on the question of whether Art.8 ECHR required a court making a possession order to determine its proportionality had not only given rise to consternation in the UK’s highest court²⁰⁸ but had arguably prolonged domestic judicial difficulties in that area as the judges were left decipher whether the majority or minority view had been implicitly endorsed. A contrasting example, also seen in Chapter 3, concerned the question of whether any of the Convention rights affords a ‘right to die’. The conclusions of the House of Lords on this question in *Pretty*²⁰⁹ were cited extensively in Strasbourg,²¹⁰ with the Court citing forty paragraphs from Lord Bingham’s judgment alone. This particular interaction

²⁰¹ Habermas, *Between Facts and Norms* (n 9) 33

²⁰² Iris Marion Young, *Inclusion and Democracy* (OUP 2000) 23

²⁰³ Daniel Bodansky, ‘The Legitimacy of International Governance: a Coming Challenge for Environmental Law?’ (1999) 93(3) AJIL 596, 617

²⁰⁴ *ibid*

²⁰⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁰⁶ Interview with Justice of the UK Supreme Court (8 July 2014)

²⁰⁷ *London Borough of Harrow v Qazi* [2004] 1 AC 983

²⁰⁸ ‘The question is not made easier by the fact that when Qazi’s case reached the Strasbourg court it was dismissed as inadmissible without any reasons having been given, and by the absence of any mention of the House’s decision in Qazi in the court’s judgment in the Connors case. Lord Steyn’s declaration in Qazi ... that it would be surprising if the views of the majority ... withstood scrutiny cannot have escaped attention in Strasbourg’. *Kay v Lambeth London Borough Council* [2006] 2 AC 465 [88]

²⁰⁹ *R (Pretty) v DPP* [2002] 1 AC 800

²¹⁰ *Pretty v United Kingdom* (2002) 35 EHRR 1

has been hailed by the former Supreme Court Justice, Lord Walker, ‘an example of a real dialogue between our final appeal tribunal and the Strasbourg Court’.²¹¹

The difference between the two exchanges is plain: the UK judges appreciated having their contributions heard by the ECtHR, particularly where it resulted in influence; they were less keen on being ignored, particularly having faced stark interpretive disagreements at the domestic level. It seems clear that they thus value the opportunity to ‘voice their claims and see if their arguments are answered in convincing terms’.²¹² On this basis, as Pérez argues elsewhere, ‘the participatory nature of the process of interpretation ... may well enhance compliance’.²¹³ Through their direct involvement in interpreting Convention rights, the UK courts ‘might be inclined to support the interpretive results as fair’.²¹⁴ As with democratic participation, the participation of the judges appears to give them a sense of ownership in the process, offering the potential to legitimise the ECtHR judgments, whereas a lack of regard for their views promotes dissatisfaction. Again, this is particularly important given that the ECtHR depends on the consent of domestic actors, including domestic courts, for the acceptance of its jurisprudence and for its legitimacy. By developing jurisprudence to which the UK judges can feel that they have contributed, they are more likely to perceive cooperation rather than competition, viewing themselves as co-authors of the jurisprudence.

7. The Legitimising Role of Accountability

The second discursive feature of dialogue between the UK courts and the ECtHR identified above is the mutual accountability which the courts display to one another. This accountability is perhaps an inevitable feature of the jurisdictional pluralism which defines their relationship. MacCormick pointed out that under such conditions ‘[t]hose who hold power at particular levels or for particular purposes would be likely to find themselves subject to checks and controls on their action that emanate from different authorities’.²¹⁵ Nonetheless, the courts appear to be harnessing aspects of this accountability as a means of bolstering the legitimacy of their decisions, in numerous ways. First, it seems that they seek to *enhance trust* both between their courts and toward them on the part of other actors by showing a willingness to engage with criticism. Second, and relatedly, in holding the ECtHR to account where its jurisprudence gives

²¹¹ Robert Walker, ‘The Indefinite Article 8’ Thomas More Lecture (Lincoln’s Inn, 9 November 2011) <https://www.supremecourt.uk/docs/speech_111109.pdf> accessed 15 January 2017

²¹² Pérez (n 4) 115

²¹³ *ibid* 116

²¹⁴ *ibid* 115

²¹⁵ MacCormick, *Questioning Sovereignty* (n 25) 74. Likewise, Krisch explains that under pluralist conditions ‘no single site enjoys ultimate decision-making powers but has to face checks by others that, in some respects, may have equally strong claims to authority’. Krisch (n 16) 89

rise to domestic judicial concerns, the UK courts show themselves to be actively *guarding the domestic legal order*. Third, through its exchanges with the UK courts, the ECtHR demonstrates its *sensitivity to domestic concerns*.

7.1 Enhancing Trust

As with the participation of those affected in the decision-making process, accountability is often considered central to the legitimacy of institutions with decision-making power, guarding against error and abuse and thereby building trust in decision-makers. Trust is linked to legitimacy to the extent that the belief that an institution's authority is justified will often be based in part on the view that 'officials can be trusted to wield their power judiciously'.²¹⁶ The need for trust in judges, in particular, is often summarised with the ancient question, 'Quis custodiet ipsos custodes - who will guard the guards themselves?'.²¹⁷ For reasons of accountability and legitimacy, both the UK courts and the ECtHR publish their decisions and provide full reasons.²¹⁸ Reasoning, as seen earlier, is integral to maintaining trust in decision-makers. Offering reasons for judicial decisions reflects what Le Sueur defines as 'content accountability':²¹⁹ a specific form of judicial accountability for 'what the law is and what legal and constitutional values a court ought to promote in its judgments'.²²⁰ It subjects judicial decisions to 'a normative, and not political, scrutiny with regard to the normative preferences [courts] attribute to their legal order'.²²¹ Through judicial dialogue, however, the UK courts and the ECtHR appear to have extended their respective content accountability, treating themselves and one another as accountable in certain respects for the conclusions that they make in their judgments.²²²

This extension of accountability through openness to mutual challenge appears to be aimed at generating trust both between their institutions and towards them on the part of other actors with whom they have a relationship. In terms of building trust and legitimacy with each other, by treating themselves and one another as accountable for their conclusions in a manner

²¹⁶ Jonathan Jackson and Jacinta M. Gau, 'Carving up Concepts? Differentiating between Trust and Legitimacy in Public Attitudes towards Legal Authority' in Ellie Shockley, Tess M.S. Neal, Lisa M. PytlíkZillig, Brian H. Bornstein (eds.) *Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration* (Springer 2015) 49, 50

²¹⁷ *Guardian Newspapers v Westminster Magistrates Court* [2012] 3 WLR 1343 [1] (Toulson LJ)

²¹⁸ Dzehtsiariou, 'Does Consensus Matter?' (n 11) 538

²¹⁹ Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1) LS 73, 86

²²⁰ *ibid* 86-7

²²¹ Maduro, 'Interpreting European Law' (n 46) 139

²²² Though mentioned only in passing, Le Sueur contemplates the additional content accountability provided to national courts in Europe through judicial dialogue with supranational courts, specifically in 'responding to judgments of the ECJ and ECtHR'. Le Sueur (n 219) 79, 87

similar to participants in discourse, the courts further demonstrate institutional awareness, ‘reciprocally attributing communicative freedom to each other’²²³ rather than insisting on monopolistic authority in their respective interpretive tasks. Further, as seen in Chapter 5, the accountability of the ECtHR to domestic judicial concerns, according to one Justice, helps to sustain ‘confidence in and respect for the Strasbourg court’²²⁴ on the part of the UK judiciary, which in turn was deemed integral to the wider legitimacy of the ECtHR within the UK. Likewise, a Strasbourg judge suggested that a key rationale for informal dialogue with national judges is that it ‘helps understanding and acceptance when you can really see who the people are behind these judgments and you can really share your opinions and your worries and put your questions’.²²⁵ Equally, the need for the UK courts to maintain the trust of the ECtHR is apparent in their presumption that they should interpret Convention rights consistently with its rulings. This was not simply a matter of respecting the UK’s international obligations. The reemphasis by the UK courts on the common law as the first source of domestic rights protection was said to generate a need to ‘make[...] clear to Strasbourg we’re doing it in a way that is coherent and consistent with the human rights convention’,²²⁶ to show that they are not ‘antagonistic’²²⁷ but ‘friendly’,²²⁸ ‘interested in the Convention and ... want[ing] it to be successful’.²²⁹

Likewise, the critique which each court offers the other, along with their mutual willingness to respond to those critiques, appear to deliberately further the potential to build wider trust and legitimacy in these institutions. Habermas describes a judicial decision as a ‘rationally motivated yet *fallible* result of a process of argumentation that has been interrupted in view of institutional pressures to decide’.²³⁰ Judges of both courts recognised the potential fallibility of their own decision-making during the interviews. For some of the Justices, this fallibility was felt to be manifested in occasional complacency about domestic human rights standards. For the ECtHR judges, the institutional pressures resulting from its caseload were felt to increase the risk of mistakes and inconsistencies in its decision-making. In view of this fallibility, both courts thus appear to embrace through dialogue a willingness to both challenge

²²³ Habermas, *Between Facts and Norms* (n 9) 361

²²⁴ ‘If we do feel that they are doing their best, listening to us, taking into account our concerns and interests and developing the law in a sensible way, then that will probably affect lawyers, it’ll affect politicians and generally people are more likely to accept that which is obviously good for the rule of law’. Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²²⁵ Interview with Judge of the European Court of Human Rights (European Court of Human Rights, Strasbourg, 29 May 2015)

²²⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²²⁷ *ibid*

²²⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²²⁹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³⁰ Habermas, *Between Facts and Norms* (n 9) 179

and be challenged, thereby facilitating the detection of ‘mistakes or misunderstandings about factual or normative claims’.²³¹

There is however a more significant dimension to this accountability. Poole observes that ‘...the opening-up of public decision-making to a kind of ‘legal audit’ reflects and responds to the deep-seated mistrust that characterizes the attitude of (modern) citizens to the government and fits the concomitant demand that exercises of power must always be open to challenge and justification’.²³² To this extent, through their dialogue the judges appear to have embraced the view that ‘...in political systems where the legitimacy of public power is increasingly measured according to the nature and extent to which a public authority is accountable, courts themselves have much to gain from engaging in modern accountability practices’.²³³ Paterson makes a similar point where he observes that the various dialogues involved in the decision-making at the Supreme Court, including with the ECtHR, contribute to its accountability: ‘both because of the transparency which they bring, but also because of the link which they provide to the expectations of the wider legal community’.²³⁴

7.2 Guarding the Domestic Legal Order

The willingness of the UK courts to take on board the conclusions of the ECtHR demonstrates their openness to having, as one Justice put it, ‘a mirror shone on [their] practices’.²³⁵ It suggests a willingness to have challenged any domestic judicial views which, as O’Cinneide puts it, might be ‘stagnant, unresponsive or excessively accommodating of entrenched assumptions’.²³⁶ It can thus counterbalance what some have considered a ‘tendency to support the authorities’²³⁷ and a ‘restrained and tentative’²³⁸ approach to the protection of rights by the UK courts, thereby providing domestic rights adjudication with ‘good conscience, ensuring that it remains alive, aware and committed to self-improvement’.²³⁹

While this should play an important role in establishing trust in both the UK courts and the ECtHR, the legitimacy of the decision-making by UK courts on human rights issues also appears to depend on their safeguarding the domestic legal order from unnecessary disruption. In this way, trust in the UK courts can be said to turn on their willingness to challenge decisions of

²³¹ Pérez (n 4) 113

²³² Thomas Poole, ‘Legitimacy, Rights and Judicial Review’ (2005) 25(4) OJLS 697, 720

²³³ Le Sueur (n 219) 75

²³⁴ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 308

²³⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²³⁶ O’Cinneide (n 38) 20

²³⁷ Gearty, *On Fantasy Island* (n 10) 121

²³⁸ Dickson (n 151) 98

²³⁹ O’Cinneide (n 38) 43

the ECtHR which fail to appreciate the specifics of the domestic legal system. Indeed, as seen in Chapters 3 and 4, a recurrent point from the interviews was the need for the UK courts to challenge ECtHR decisions which have ‘not been adequately reasoned’.²⁴⁰ Their freedom to disagree with such decisions was itself deemed integral to the legitimacy of the Convention system: ‘...it gives it flexibility and with flexibility comes greater likelihood of acceptability’.²⁴¹ To this extent, it appears that the UK courts seek legitimacy from the act of *holding the ECtHR to account* as guardians of the domestic legal order.

As seen in Chapters 4 and 5, the judges do so by raising concerns with the formal and substantive quality of the Strasbourg jurisprudence through their judgments and meetings. With regard to the formal quality of the jurisprudence, the UK courts have used their judgments to raise concerns with regards to a range of issues. In Chapter 4, it was seen how they have done so in relation to the application of Art.10 ECHR to freedom of information.²⁴² Additionally, concerns over the clarity and coherence of the Strasbourg jurisprudence have been raised by the UK courts in relation to a number of other areas of the Convention: the rule against self-incrimination (Art.6),²⁴³ the rule against hearsay evidence (Art.6),²⁴⁴ the temporal application of Convention rights (arising in respect of the procedural obligation to investigate killings (Art.2),²⁴⁵ and the extra-territorial application of Convention rights (Art.1),²⁴⁶ and the application of the right to a review where a detention has taken place following early release (Art.5).²⁴⁷ With regard to the substantive quality of the Strasbourg jurisprudence, the UK courts have also voiced criticism in number of areas, wherever they have deemed the ECtHR to have misunderstood domestic law or underappreciated certain arguments, often in the same cases where the perceived lack of clarity or coherence in the case law has caused difficulty. In Chapter 4, it was discussed how they have done so in respect of the operation of negligence claims under English law (Art.6),²⁴⁸ the ability of county courts to undertake proportionality analysis in respect of possession orders (Art.8),²⁴⁹ and the democratic justifications for a domestic ban on televised

²⁴⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

²⁴¹ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁴² *Kennedy v Charity Commission* [2015] 1 AC 455, [59]-[60] (Lord Mance)

²⁴³ *Brown v Stott* [2001] 1 AC 681 where the Privy Council criticised the ECtHR judgment in *Saunders v United Kingdom* (1997) 23 EHRR 313; 711-712 (Lord Steyn), 720-721 (Lord Hope)

²⁴⁴ *Horncastle* (n 148) [14], [73], [86] (Lord Phillips)

²⁴⁵ *In re McCaughey and another* [2012] 1 AC 725 (SC), [49] (Lord Phillips), [73] (Lord Hope), [81], [89] (Baroness Hale), [100] (Lord Browne-Wilkinson), [130] (Lord Dyson), [151] (Lord Rodger)

²⁴⁶ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL) [67]-[80] (Lord Rodger)

²⁴⁷ *R (Whiston) v Secretary of State for Justice* [2015] AC 176 [49] (Lord Neuberger)

²⁴⁸ *Barrett v London Borough of Enfield* [2001] 2 AC 550 (HL) 559-560 (Lord Browne-Wilkinson)

²⁴⁹ *Doherty v Birmingham City Council* [2009] 1 AC 367 (HL) [20] (Lord Hope), [80]-[88] (Lord Scott) cf [163] (Lord Mance)

political advertising (Art.10).²⁵⁰ Again, further examples can be added. The UK courts challenged the ECtHR's understanding of courts martial systems in the armed services,²⁵¹ the domestic fair trial safeguards in place for the use of hearsay evidence (Art.6),²⁵² the clarity of the domestic law on whole life tariffs (Art.3)²⁵³ and the procedures in place for imprisonment for public protection (Art.5).²⁵⁴ What is more, as seen in Chapter 5, it is clear that the Justices have used their informal dialogue with ECtHR judges to raise concerns directly over certain areas of its jurisprudence.

It must be recalled that a distinct legitimacy challenge allegedly facing the UK courts was the perception of undue deference to the views of the ECtHR, an argument made by senior politicians and even the judges themselves. In response, the judges appear to have taken on board Lord Irvine's call for an 'appropriately critical'²⁵⁵ approach to their interactions with the ECtHR in order to 'enhance our courts' own institutional prestige and credibility domestically, both with the man in the street and Parliament'.²⁵⁶ By participating in formal and informal judicial dialogue, raising concerns with the ECtHR, the UK courts show themselves to be actively guarding the domestic constitutional and legal order. Amos suggests that this can enhance the legitimacy of their judgments, particularly where their critiques result in a change of approach by the ECtHR.²⁵⁷

7.3 Allaying Domestic Judicial Concerns

The ECtHR, on the other hand, appears to seek to enhance its legitimacy through dialogue with the UK courts by showing its willingness to account for its jurisprudence in the face of those domestic judicial concerns. Taking some of the examples mentioned in the previous section, the ECtHR directly responded to the criticisms from the UK judiciary concerning a lack of clarity or coherence in respect of the jurisprudence on self-incrimination (Art.6),²⁵⁸ hearsay evidence (Art.6)²⁵⁹ and the extra-territorial (Art.1)²⁶⁰ and temporal²⁶¹ application of Convention

²⁵⁰ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 (HL) [29] (Lord Bingham)

²⁵¹ *R v Spear* [2003] 1 AC 734 (HL) [12]-[13] (Lord Bingham), [66]-[97] (Lord Rodger)

²⁵² *Horncastle* (n 148) [14], [107]

²⁵³ *R v McLoughlin and Newell* [2014] 1 WLR 3964 (CA) [29]-[36] (Lord Thomas LCJ)

²⁵⁴ *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2015] 1 AC 1344 [33]-[36] (Lord Mance and Lord Hughes)

²⁵⁵ Lord Irvine (n 97) 247

²⁵⁶ *ibid*

²⁵⁷ Amos, 'The Dialogue between the United Kingdom Courts and the European Court of Human Rights' (n 73) 577

²⁵⁸ *O'Halloran and Francis v United Kingdom* (2008) 46 EHRR 21

²⁵⁹ *Al-Khawaja* (n 59) (Grand Chamber)

²⁶⁰ *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber)

rights, often to the satisfaction of the UK courts.²⁶² Likewise, it has shown its willingness to respond to allegations of misconstruing domestic law or underappreciating arguments, in respect of English negligence,²⁶³ court martial systems,²⁶⁴ safeguards against unfair admissions of hearsay evidence in criminal trials,²⁶⁵ the democratic justifications for the UK's ban on televised political advertising²⁶⁶ and the possibilities for review and release of prisoners serving whole life tariffs,²⁶⁷ again to the satisfaction of the UK courts, while sometimes rejecting their criticisms.²⁶⁸

Once again, recalling that the ECtHR can be said to depend for its legitimacy on the consent of the national authorities, displaying such accountability to the national courts is likely to be beneficial. What is more, given the need for the ECtHR to accord respect to the legal traditions of the courts and for the autonomy of their decision-making, the ECtHR judges are clearly seeking to demonstrate their willingness to engage with critical arguments raised by the UK courts. It could be argued that this additional accountability is particularly important given the lack of a separated powers model within the Convention system. Bellamy argues that domestic courts are at least 'indirectly',²⁶⁹ democratically accountable for their decisions 'be it through the selection process of the judges, the influence of public opinion, which can exert rather greater sway in the domestic than in the international arena, or – in some jurisdictions – because of democratic procedures, such as referenda or a parliamentary vote, that allow court decisions to be overridden'.²⁷⁰ Within the Council of Europe machinery, in contrast, Nollkaemper observes within the Convention system a 'lack of a proper political context ...given the rather limited role of the Committee of Ministers'.²⁷¹ In the same vein, Helgesen observes the concern that 'there is no political body which may correct and control the court'.²⁷² It was seen in Chapter 4 how this view was shared by a number of the interviewed judges, who considered the

²⁶¹ *Janowiec and others v Russia* (2014) 58 EHRR 30 (Grand Chamber)

²⁶² The UK courts approved of the clarifications made by the ECtHR on these issues in *R v Ibrahim* [2012] EWCA Crim 837 (on hearsay evidence and Art.6 ECHR), *Smith and others v Ministry of Defence (no 2)* [2014] AC 52 (on the extra-territorial application of the Convention rights under Art.1 ECHR), and *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69

²⁶³ *Z and others* (n 169)

²⁶⁴ *Cooper v United Kingdom* (2004) 39 EHRR 8

²⁶⁵ *Al-Khawaja* (n 59) (Grand Chamber)

²⁶⁶ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (Grand Chamber)

²⁶⁷ *Hutchinson* (n 24) (Chamber)

²⁶⁸ As discussed in Chapter 4, the contention in *Doherty* (n 249) that the ECtHR had failed to consider the burden that would be placed on county courts by the Art.8 requirement that those facing eviction from social housing should be able to challenge its proportionality made no impression on the ECtHR in *Kay v United Kingdom* (2012) 54 EHRR 30

²⁶⁹ Bellamy (n 198) 247

²⁷⁰ *ibid*

²⁷¹ André Nollkaemper, 'Conversations Among Courts' in Cesare P.R. Romano, Karen J. Alter and Yuval Shany, *The Oxford Handbook of International Adjudication* (OUP 2014) 523, 537

²⁷² Helgesen (n 12) 22

ability of the national courts to challenge ECtHR decisions valuable given the lack of an equivalent to a domestic legislature within the Convention system. To this extent, the ECtHR appears to use its dialogue with national courts to plug this accountability gap and thereby compensate for any perceived legitimacy deficits arising from it.²⁷³

8. The Legitimising Role of Revision

The third discursive feature of judicial dialogue which appears to be geared towards legitimising the respective decision-making of the courts is the ongoing revision and refinement of arguments. Revision, of course, would not of itself perform a legitimising role. Rather, it appears that the judges seek to enhance legitimacy by harnessing their capacities for revision in two ways. First, they strive for *mutual accommodation*, thereby ensuring legitimacy with one another. Second, and relatedly, they attempt to *improve the quality of the reasoning* in their judgments, thereby building greater legitimacy both with one another and with their other audiences.

8.1 Mutual Accommodation

It was seen in Chapter 4 that the tension-mitigating function of judicial dialogue elucidated from the interviews and case law rests on the willingness of the courts to mutually accommodate their respective concerns. If, as discussed earlier, the participation of the courts in dialogue enables them to avoid conflict and the legitimacy challenges that go with it, as they reach mutual understanding as to the limits of their respective authority, the revision of judicial opinions which takes place through dialogue enables them to rectify conflict where it has materialised. Judicial dialogue, as seen in Chapters 4 and 5, is aimed at both preventing and rectifying conflicts between the courts. Such accommodation can contribute to the legitimacy of their decision-making in numerous respects.

First, it does so in conjunction with the other legitimising functions of participation and accountability explored so far in this chapter. With regards to participation, where one court revises its views in order to accommodate the concerns of the other, it gives recognition to their authority and to the value of their contribution. Once again, this demonstrates the kind of institutional awareness which, according to Maduro, is required of courts under conditions of jurisdictional pluralism.²⁷⁴ It could be said that when a court revises its own position in light of

²⁷³ Nollkaemper makes the same point where he notes that the lack of a strong political body providing a rigorous check on the ECtHR within the Convention system is ‘supplemented and corrected by decisions of national organs, including courts’. Nollkaemper (n 271) 537

²⁷⁴ Maduro, ‘Interpreting European Law’ (n 46) 149

the critique of another court, it ‘dignifies the opposing arguments’²⁷⁵ even more so than when it simply considers them. The revision of positions in this way can give the other court an enhanced sense of participation in the interpretive process, potentially strengthening its tendency to accept the authority of the other court as legitimate. Again, this is likely to be useful for both courts but particularly the ECtHR which depends on the UK courts to a degree for the application of its jurisprudence domestically.

In terms of accountability, where a court revises its previous conclusions on an issue in the face of the critique or insights of the other court, it shows accountability in reason to the force of its argument or the relevance of the information which it presents. Recalling Oliver’s definition, accountability is not simply a question of whether those with decision-making power provide reasons for their actions but also whether they ‘undertake to put matters right if it should appear that errors have been made’.²⁷⁶ In this way, as discussed earlier, the willingness of the UK courts and the ECtHR to revise their opinions in light of one another’s conclusions has the potential to generate trust both between the courts and towards them among other actors. As ‘both sides work their way toward a mutually satisfactory position on legal issues of common concern and impact’,²⁷⁷ they strengthen their relationship and build legitimacy with one another. Taking the exchange over access to court and negligence claims against public authorities as an example, it was seen in Chapter 4 how the ECtHR in *Z and others*²⁷⁸ adjusted its previous conclusion in *Osman*²⁷⁹ in order to accommodate the concerns voiced by the UK courts in *Barrett*²⁸⁰ that it had misunderstood the English law on negligence. However, in *Barrett* the House of Lords also departed from its own previous position by accepting the thrust of the ECtHR’s view in *Osman*, albeit inexplicitly,²⁸¹ that public bodies should not be able to avoid liability in negligence. Recalling that the legitimacy of the ECtHR rests on the consent of national authorities, which in turn depends on its demonstration of respect for the decision-making and legal traditions of the national authorities who have the ‘primary responsibility’ for the Convention, its accommodation to domestic concerns can be crucial for its legitimacy. For

²⁷⁵ Helfer and Slaughter (n 48) 321 cited in Pérez (n 4) 114

²⁷⁶ Dawn Oliver, *Government in the United Kingdom* (Open University Press 1991) 2 cited in Anthony Arnall, ‘Introduction: The European Union’s Accountability and Legitimacy Deficit’ in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 2

²⁷⁷ Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 U Rich L Rev 99, 133
²⁷⁸ (n 169)

²⁷⁹ *Osman v United Kingdom* (2000) 29 EHRR 245

²⁸⁰ *Barrett* (n 248) 559-560 (Lord Browne-Wilkinson)

²⁸¹ Gearty observes from the decision in *Barrett* that ‘[t]heir Lordships were not explicitly ‘following’ *Osman*, but the spectre of the case hung over their various opinions’. Conor A. Gearty, ‘Unravelling *Osman*’ (2001) 64(2) MLR 159, 185

example, had the Grand Chamber of the ECtHR in *Al-Khawaja*²⁸² chosen to ignore the trenchant criticisms of the Supreme Court in *Horncastle*,²⁸³ it has been observed that the Court would have effectively ‘precipitate[d] a crisis of authority between itself and the UK Supreme Court’.²⁸⁴ By accommodating their concerns, however, it avoided the potentially damaging ‘constitutional experiment ... [of] seeing whether the English courts would continue to defy’.²⁸⁵ On the contrary, Bjorge suggests that ‘...in the longer run the acceptance, sometimes with alacrity, by the European Court of such rulings from the national courts is just what is needed to create a sense of solidarity between the European and the national courts’.²⁸⁶

Finally, by revising and accommodating their respective concerns and approaches, the courts work to ensure a degree of coherence between their regimes, enabling them to reduce the legitimacy challenges arising from contradictory approaches. Judicial dialogue, as seen in previous chapters, involves mutual judicial learning in order that both courts are ‘singing from the same hymn-sheet’.²⁸⁷ Like Sunstein’s ‘incompletely theorized agreements’,²⁸⁸ whereby judges seek agreement at a low level of abstraction to avoid the inevitable conflict which comes with appeal to grander theories, ‘[t]he result is a degree of stability and predictability that are important virtues for law’.²⁸⁹ The damaging consequences of the courts failing to accommodate and the ensuing instability were clear in the exchange over the role of Art.8 ECHR and proportionality in dispossession proceedings for social housing. The reticence of the majorities in the House of Lords in *Qazi*,²⁹⁰ *Kay*²⁹¹ and *Doherty*²⁹² to accept the view of the ECtHR that a person facing eviction should be able to challenge its proportionality in court created notable difficulties at the domestic level, further exacerbated by the sheer volume and variety of judicial opinions which were delivered.²⁹³ The Equality and Human Rights Commission intervened in

²⁸² (n 59)

²⁸³ (n 148)

²⁸⁴ Conor Gearty, ‘*Al-Khawaja and Tahery v United Kingdom*’ (UK Const L Blog 9th Jan 2012) <<http://ukconstitutionallaw.org/2012/01/09/conor-gearty-al-khawaja-and-tahery-v-united-kingdom/>> accessed 1 August 2015

²⁸⁵ Mike Redmayne, ‘Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber’ (2012) 75(5) MLR 865, 878

²⁸⁶ Eirik Bjorge, *Domestic Application of the ECHR: National Courts as Faithful Trustees* (OUP 2015) 244

²⁸⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

²⁸⁸ Cass R. Sunstein, ‘Incompletely Theorized Agreements’ (1994-5) 108 Harv L Rev 1733

²⁸⁹ *ibid* 1750

²⁹⁰ (n 207)

²⁹¹ (n 208)

²⁹² (n 249)

²⁹³ As Loveland notes, there was much frustration among the lower domestic courts with the lack of clarity in this area. One judge referred to the state of the law as ‘frankly something of a mess’.

Defence Estates v JL [2009] EWHC 1049 (Admin). Collins J [78] cited in Ian Loveland, ‘The Shifting Sands of Article 8 Jurisprudence in English Housing Law’ (2011) EHRLR 151, 152. Writing extra-judicially, Lord Bingham articulated the same concern: ‘In the House alone, the question has been addressed in fifteen separate reasoned judgments running to more than 500 paragraphs and more than 180 pages of printed law report. Even after this

one of the Strasbourg cases²⁹⁴ to complain of the ambiguity at the domestic level, protesting that ‘certainty of the law [is] required if justice [is] to be secured’.²⁹⁵ It was only when the Supreme Court in *Pinnock* finally accepted that persons facing eviction from social housing should be able to challenge its proportionality that these difficulties began to alleviate, albeit with some persisting issues of clarity in this area. Where, however, the courts have readily accommodated one another, ensuring a degree of coherence between their approaches, it can be argued that they have avoided such difficulties.

8.2 Enhancing Judicial Reasoning at the Domestic and European Levels

The second legitimising role of revision is the enhancement of judicial reasoning. The reasoning of judgments, as discussed earlier, is central to their legitimacy. Fredman notes that the ‘legitimacy and accountability of court decisions depends on the ability of judges to adduce reasons for their conclusions which are thorough and persuasive’.²⁹⁶ Both the UK courts and the ECtHR enjoy significant flexibility with which to revise their previous conclusions, which they harness through their interactions with one another to strengthen the reasoning of their decisions. In order to be accepted as legitimate, it is perhaps a given that the reasoning of judicial decisions needs to be fully informed of the relevant law and affected interests. For Habermas, a legitimate, ‘rationally acceptable’²⁹⁷ decision is thus one in which ‘all relevant questions, issues, and contributions are brought up and processed ... on the basis of the best available information and arguments’.²⁹⁸ It is one ‘taken by a well-informed decision maker, having consulted available binding and persuasive sources’.²⁹⁹ In this respect, Krisch observes how the flexibility to revise opinions affords ‘a greater capacity for learning’³⁰⁰ as decision-makers ‘are better able to respond to changes in both circumstances and knowledge’,³⁰¹ whereas a lack of flexibility can risk rendering past decisions static, ‘obsolete or even positively harmful’.³⁰²

immense outpouring of effort it may be doubted whether the relevant law is entirely clear, or for that matter finally settled’. Tom Bingham, *The Rule of Law* (Penguin 2010) 44

²⁹⁴ *Kay v UK* (n 268) (Chamber)

²⁹⁵ *ibid* [63]

²⁹⁶ Sandra Fredman, ‘Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law’ (2015) 64(3) ICLQ 631, 659

²⁹⁷ Habermas (n 9) 33

²⁹⁸ Habermas explains that ‘[d]eliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable *quality*’ [emphasis added]. *ibid* 304

²⁹⁹ Dzehtsiarou, ‘Does Consensus Matter?’ (n 11) 539

³⁰⁰ Krisch (n 16) 80

³⁰¹ *ibid*

³⁰² *ibid*

As seen in Chapter 2, the potential of interactions between judges to enhance judicial reasoning in these respects has been observed by a number of authors. Slaughter suggests that ‘courts sharing their insights with their counterparts ... will be forced to examine their own legal systems in comparative perspective, a perspective that often casts features we take for granted into sharp relief’.³⁰³ Likewise, Pérez argues that ‘courts contrasting their claims with those of other courts enhance self-understanding of their respective interpretations, thus permitting them to revise these interpretations with added insights’.³⁰⁴

The judges appear to harness this potential in at least three respects. First, the possibility, and actual instances, of conflict have at times encouraged the courts to revise and *strengthen the justifications* for their positions. Second, the shared insights offered by each court have often provided the other with *a source of reasoning and authority* with which to enhance its own conclusions. Third, the UK courts appear to assist the ECtHR in the development of a *rationality acceptable jurisprudence* which is workable across the various legal traditions of the Convention system.

8.2.1 Enhancing justification through mutual challenge

MacCormick once observed that dissenting judgments can point out ‘in a strong form the very reasons which need to be countered for the justification of the majority to stand up’.³⁰⁵ Likewise, Lord Kerr has argued that a judicial opinion, ‘in confronting and disposing of an opposite view, if it has been done convincingly, will be all the more commanding of acceptance as a result’.³⁰⁶ Several Justices in interview considered disagreements between the UK courts and the ECtHR to play an analogous role at the inter-institutional level. Indeed, there are examples from the case law to suggest that either disagreement or its potential between the courts has led them to strengthen the justifications for their decisions.

In all of the areas mentioned in which the ECtHR has sought to respond to the criticisms of the UK courts, it also revised its jurisprudence in order to achieve greater clarity or demonstrate an improved understanding of the specifics of domestic law. The exchange between the courts over hearsay evidence, however, provides the best demonstration of dialogue’s role in enhancing justification. The critique offered by the Supreme Court in *Horncastle* showed a determination and intensity which has since yet to be surpassed in the UK case law. As seen in

³⁰³ Slaughter, ‘A Typology of Transjudicial Communication’ (n 277) 133

³⁰⁴ Pérez (n 4) 113

³⁰⁵ Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 10

³⁰⁶ Lord Kerr, ‘Dissenting Judgments: Self-indulgence or Self-sacrifice?’ (n 159)

Chapter 3, one of the Justices explained that the ‘whole point’³⁰⁷ of the case was to convince the ECtHR that the Grand Chamber needed to reconsider *Al-Khawaja* and that it needed to revise the Chamber’s conclusions. As Paterson notes, it is clear that the case was ‘written consciously as a form of advocacy’.³⁰⁸ In summary, the court criticised the ECtHR for a lack of clarity and consistency in its jurisprudence,³⁰⁹ for having misunderstood or overlooked numerous historical³¹⁰ and current features of domestic law,³¹¹ for having insufficiently explained the underlying premise of its applicable principles³¹² and for failing to consider their practical implications.³¹³ In support of these conclusions, the Court provided multiple annexes to its judgment, including a history of the development of the Strasbourg principles in dispute,³¹⁴ a table of comparisons based on Strasbourg decisions to demonstrate parity of outcome between the application of domestic law and the relevant Strasbourg case law³¹⁵ in order to strengthen its argument that the latter added nothing to the existing domestic protections, and a wealth of case law from commonwealth jurisdictions to support its view that it was the ECtHR, and not the UK, which was out of step by insisting on an absolute rule against the ‘decisive’ reliance on hearsay evidence in criminal trials.³¹⁶ In response, the ECtHR in *Al-Khawaja* dedicated thirty-one paragraphs of its judgment to setting out and directly responding to the domestic judicial criticisms.³¹⁷ It clarified the jurisprudence in dispute, the rationale underpinning it³¹⁸ and sought to rebut a number of the Supreme Court’s contentions. What is more, the court used twenty-five

³⁰⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

³⁰⁸ Paterson, *Final Judgment* (n 234) 226

³⁰⁹ The Court was critical that the ECtHR had recognised exceptions to the sole or decisive rule but had done so in a manner which ‘resulted in a jurisprudence that lacks clarity’. Rather than being explicit, it argued, ‘the Court has used language that has tended to obscure the fact that it is ... countenancing a failure to comply with the requirements of paragraph (3)(d)’. It had not explained why partial reliance on hearsay evidence was acceptable but ‘decisive’ reliance was not. *Horncastle* (n 148) (SC) [14], [73], [86] (Lord Phillips)

³¹⁰ ‘Long before 1953 when the Convention came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure’. The ECtHR case law ‘... appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure’. *ibid* [14], [107] (Lord Phillips)

³¹¹ ‘The regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary’. The ECtHR appeared not to have given a ‘detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration by the Law Commission, intended to ensure that English law complies with the requirements of article 6(1) and (3)(d)’. [14], [107] (Lord Phillips)

³¹² The Supreme Court lamented that the ECtHR had not discussed whether the sole or decisive rule should be ‘equally applicable to continental and common law jurisdictions’ and that ‘[n]o explanation was given ... in respect of the principle underlying [it]’. *ibid* [14], [86]

³¹³ The Court was concerned that ‘a direction to the jury that they can have regard to a witness statement as supporting evidence but not as decisive evidence would involve them in mental gymnastics that few would be equipped to perform’. *ibid* [90] (Lord Phillips)

³¹⁴ *ibid* Annexe 2

³¹⁵ *ibid* Annexe 4 (Lord Judge)

³¹⁶ *ibid* Annexe 1 (Lord Mance)

³¹⁷ *Al-Khawaja* (n 59) (Grand Chamber) [51]-[62]; [129]-[147]

³¹⁸ *ibid* [131]

paragraphs of its judgment to provide its own review of the use of hearsay evidence in common law jurisdictions,³¹⁹ which for one commentator ‘does a more careful job than the Supreme Court did in its own survey’.³²⁰ It thus seems reasonable to conclude, as Redmayne does, that ‘*Horncastle* was provocative, and it produced a judgment that is generally more thorough and better reasoned than many ECtHR decisions – even Grand Chamber decisions’.³²¹

8.2.2 *Shared insights*

It is not simply the mutual challenge, however, which appears to encourage the courts to revise and strengthen the justification for their views but the jurisprudential insights which each is able to offer the other for its own reasoning. The judges, to varying degrees, appear to rely on these insights to both develop the content of their own reasoning and support that development as a matter of persuasive authority.

With regard to the content of their reasoning, a number of the Justices valued the shift in the ‘whole way of thinking’³²² brought about by their access to the ‘very rich vein’³²³ of ECtHR jurisprudence and the complacency which it helps the judges to avoid, as seen in Chapter 4. Additionally, it was seen in Chapter 5 how informal dialogue allows the judges to discuss the content of Convention principles and their practical application, and how the Justices, conscious of their common law tendency to ‘try and reconcile every single Strasbourg authority’,³²⁴ have used the insights from the ECtHR judges in informal dialogue to revise the way that they approach the application of ECtHR case law and simplify the task of analysing the jurisprudence. Likewise, it was seen in previous chapters how the ECtHR judges emphatically valued the contributions of the UK courts. Specifically, the UK courts assist the ECtHR in the way that it interprets the Convention as a ‘living instrument’,³²⁵ a particularly controversial aspect of its interpretive approach. Masterman notes that ‘decisions of State’s national courts form a large part of the evidence on which the Strasbourg court gauges the ‘present day conditions’ in the light of which the Convention is to be interpreted’.³²⁶ In this way, domestic courts can provide it with support for its development of Convention rights,³²⁷ adding ‘one more voice in the choir of

³¹⁹ *ibid* [63]-[87]

³²⁰ Redmayne (n 285) 869

³²¹ *ibid*

³²² Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³²³ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³²⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³²⁵ *Tyrer* (n 167) 23

³²⁶ Roger Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” under the Human Rights Act’ (2005) 54 ICLQ 907, 925

³²⁷ *ibid*

political and legal actors that give meaning and spell out the implications of what the project is all about'.³²⁸ Thus, the UK courts provided the ECtHR with support for its development of its jurisprudence on the application of Convention rights to the removal of foreign nationals,³²⁹ the burden of proof for deprivations of liberty on mental health grounds,³³⁰ and the operational duty on mental health authorities, arising from the right to life, to guard against the risk of suicide by voluntary patients,³³¹ among a range of possible examples.³³² In this way, the judges recognise that they may mutually 'profit'³³³ from one another's views.

As a matter of authority, the insights which the courts provide for one another allow them to reinforce and legitimise their respective views, performing a classic function of comparative practice in judicial decision-making.³³⁴ In such instances, the judicial authority, both legal and epistemic, of both courts is harnessed – 'two courts have given their views on the issue, not just one'.³³⁵ Helfer and Slaughter suggest that 'Evidence that a number of judges could reach the same conclusion ...could well enhance persuasive power'.³³⁶ It provides 'a simple demonstration that others have trodden a similar path',³³⁷ thereby 'avoid[ing] the appearance of a checkerboard of legal principle across jurisdictions'.³³⁸ Dothan makes the point that '[n]ational courts can increase support for the judgments of an international court by issuing judgments that the international court can rely on'.³³⁹ Thus, in each of those instances explored in the previous section, the judgments of the UK courts provided the ECtHR with an additional means of legitimising the development of its jurisprudence, reinforcing it with parallel developments by the UK judiciary in their interpretation of Convention rights. Likewise, the judgments of the

³²⁸ Kumm, 'Jurisprudence of Constitutional Conflict' (n 176) 289

³²⁹ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323; *Z and T v United Kingdom* [2006] ECHR 1177

³³⁰ *R (H) v. the Mental Health Review Tribunal North and East London Region* [2001] 3 WLR 512; *Hutchinson Reid v United Kingdom* (2003) 37 EHRR 9

³³¹ *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72; *Reynolds v United Kingdom* (2012) 55 EHRR 35 (Chamber)

³³² e.g. *Pretty v UK* (n 210) relying on *Pretty* (n 209) (HL) on the 'right to die'; *Jones v United Kingdom* (2014) 59 EHRR 1 relying on *Jones v Saudi Arabia* [2007] 1 AC 270 in respect of state immunity and access to court (Art.6); *Austin v United Kingdom* (2012) 55 EHRR 14 relying on *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564 in respect of police 'kettling' and deprivations of liberty (Art.5)

³³³ Kumm, 'Jurisprudence of Constitutional Conflict' (n 176) 303

³³⁴ Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 519

³³⁵ Amos, 'The Dialogue Between the United Kingdom Courts and the European Court of Human Rights' (n 73) 576

³³⁶ Helfer and Slaughter (n 48) 328

³³⁷ Slaughter, 'Typology of Transjudicial Communication' (n 277) 119

³³⁸ 'The same values of settling expectations and of treating like cases alike are as much at play between courts as they are within the same courts. ... There is no a priori reason why this interest in predictability and stability should stop at jurisdictional borders'. Chad Flanders, 'Toward a Theory of Persuasive Authority' (2009) 62 Oklahoma L Rev 55, 84

³³⁹ Dothan (n 39) 463; Slaughter also suggests that '...historical and cultural traditions may endow the decisions of particular foreign courts with particular authority or legitimacy'. Slaughter, 'A Typology of Transjudicial Communication' (n 277) 119

ECtHR can provide what one Justice termed ‘Strasbourg’s blessing’.³⁴⁰ However, as shall be explored later, in the current climate of political animosity towards the ECtHR, it appears that the UK courts are moving away from reliance on ECtHR judgments as a source of authority with which to legitimise their conclusions towards greater reliance on the common law.

8.2.3 A rationally acceptable European human rights jurisprudence

Finally, the shared insights and authority which the courts provide for one another connects to the third and broader way in which the judges seek to revise and enhance the Strasbourg jurisprudence. As discussed earlier, the legitimising force of discourse, according to Habermas, depends on the reaching of outcomes which would be rationally acceptable to those affected. Applying this thinking to the fundamental rights jurisprudence of the CJEU, Pérez argues that dialogue with the national courts enables that court to ‘fashion an interpretation [of fundamental rights] that all could rationally agree upon’.³⁴¹

The same applies in this context. The insights of the UK courts can assist the ECtHR in developing an approach which is ‘woven into the fabrics of established communities’³⁴² and thus commanding of acceptance within the UK. Maduro notes that the ‘[t]he legitimacy of a court comes from a particular political community and it is based on the values of that polity’.³⁴³ Thus, for this reason, Weiler argues that the legitimacy of the ECtHR requires it to be ‘simultaneously reflective and constitutive of the European constitutional practices and norms’.³⁴⁴ In this vein, Amos notes that ‘[t]he general public and their representatives in governments and legislatures are far more likely to consider a judgment of the ECtHR legitimate and acceptable if it is reflective of their values. And a judgment of the ECtHR is much more likely to meet this criterion if it is the result of dialogue with a national court’.³⁴⁵ This thinking appears to be shared by the judges. A key motivation for the Justices in their dialogue with the ECtHR is to ensure that the latter’s jurisprudence is formulated with sufficient coherence - ‘trying, as we ought to as judges, to ensure that the law is clear and coherent’³⁴⁶ – and a full appreciation of the specifics of UK law in order for it to be workable within the common law as well as civil law systems which make up the ECHR Member States, thereby ‘strengthen[ing] the quality of the European

³⁴⁰ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

³⁴¹ Pérez (n 4) 110

³⁴² *ibid* 112

³⁴³ Maduro, ‘Interpreting European Law’ (n 46) 151

³⁴⁴ Weiler (n 120) 1

³⁴⁵ Amos, ‘The Dialogue Between the United Kingdom Courts and the European Court of Human Rights’ (n 73) 575

³⁴⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

norm'.³⁴⁷ To this extent, the judges appear to be utilising judicial dialogue as 'a means to reach better-reasoned outcomes for the community as a whole',³⁴⁸ their interactions providing 'opportunities for the development of a richer, more integrative common European Constitutional tradition that embraces constitutional diversity'.³⁴⁹

9. The Wider Legitimacy Strategies

The chapter has examined the three discursive features of judicial dialogue between the UK courts and the ECtHR which appear to be strategically driven towards enhancing the legitimacy of their respective decision-making. Viewing their dialogue across a wider canvass, its role appears to connect to two general legitimacy strategies currently pursued by the UK courts and the ECtHR. These two strategies, running parallel to one another, are the *enhancement of subsidiarity*, adopted by the ECtHR, and the *enhancement of domestic judicial autonomy in rights adjudication*, adopted by the UK courts, both of which can be explained by the legitimacy challenges outlined in the early part of this chapter.

9.1 The ECtHR and the 'Fundamental Principle' of Subsidiarity

The emergence of dialogue between the UK courts and the ECtHR has taken place against the backdrop of significant reforms at the ECtHR. These have aimed to reduce the backlog of cases at the ECtHR and have repeatedly emphasised the strengthening the principle of subsidiarity and the margin of appreciation in the Convention system as means of achieving this. The 'fundamental principle'³⁵⁰ of subsidiarity was encountered in Chapter 5 where it was shown that its enhancement was a central part of informal dialogue between the ECtHR and national courts. The principle states that the 'primary responsibility'³⁵¹ for the protection of Convention rights is with the national authorities while 'the Convention system is subsidiary to the safeguarding of human rights at national level'.³⁵² This reflects the long-standing view of the ECtHR that 'national authorities are in principle better placed than an international court to evaluate local needs and conditions'³⁵³ in the determination of Convention rights. The related doctrine of the margin of appreciation can be considered a 'doctrine of judicial deference'.³⁵⁴

³⁴⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

³⁴⁸ Pérez (n 4) 112

³⁴⁹ Kumm, 'Jurisprudence of Constitutional Conflict' (n 176) 304

³⁵⁰ Brighton Declaration (n 172) [3]

³⁵¹ *ibid* [9]

³⁵² *ibid* [11]

³⁵³ *ibid* *Handyside* (n 194) [48]

³⁵⁴ Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 15

which the ECtHR will apply to the decisions of national authorities in areas lacking a clear European consensus as to the requirements or balancing of certain rights. It is used in recognition of the view that where ‘it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals’,³⁵⁵ the national authorities are better-placed to determine the content of those requirements [b]y reason of their direct and continuous contact with the vital forces of their countries’.³⁵⁶ In this respect, Elliott observes that ‘the margin of appreciation doctrine may predispose Strasbourg to accept a domestic court’s view, particularly if the matter is one that is not straightforwardly covered by existing jurisprudence’.³⁵⁷

The respective Interlaken and Izmir Conferences of 2010 and 2011, the UK-led Brighton Conference 2012 and the Brussels Conference 2016 on the future of the ECHR system repeatedly stressed that the role of the ECtHR within the system was subsidiary to national authorities, in particular the national courts.³⁵⁸ The Brighton Conference in particular [w]elcome[d] the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourage[d] the Court to give great prominence to and apply consistently these principles in its judgments’.³⁵⁹ The Brighton Conference recommended ‘for reasons of transparency and accessibility’³⁶⁰ a formal elevation of subsidiarity and the margin of appreciation into the preamble of the ECHR itself. Protocol 15 to the Convention, drafted in the follow-up, inserts both concepts into the preamble.³⁶¹ This was considered a means of reducing the backlog. Additionally, it was a response to the concerns that the court had intervened too readily in domestic decision-making, a key legitimacy challenge discussed at the outset of this chapter.

³⁵⁵ *Handyside* (n 194) [48]

³⁵⁶ *ibid*

³⁵⁷ Elliott (n 40) 626

³⁵⁸ The Interlaken Conference called for ‘a strengthening of the principle of subsidiarity’ and called upon the ECtHR to ‘take fully into account its subsidiary role in the interpretation and application of the Convention’. This was echoed at the Izmir Conference, where it was stated that ‘the subsidiary character of the Convention mechanism constitutes a fundamental and transversal principle which both the Court and the States Parties must take into account’. The Brussels Declaration ‘...reaffirms that the national authorities and, in particular, the courts are the first guardians of human rights ensuring the full, effective and direct application of the Convention – in the light of the Court’s case law – in their national legal system, in accordance with the principle of subsidiarity’. Interlaken Declaration, High Level on the Future of the European Court of Human Rights (Interlaken 19 February 2010) [9] Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights (Izmir 26-27 April 2011) [5], Brussels Declaration, High-level Conference on the “Implementation of the European Convention on Human Rights, Our Shared Responsibility” (Brussels 27 March 2015) [B]

³⁵⁹ Brighton Declaration (n 172) [12]

³⁶⁰ *ibid*

³⁶¹ The amendment introduced by Protocol 15, Article 1, reads: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,’

As a wider legitimacy strategy, it has been said that strengthening the observance of these principles by the ECtHR ‘lends more legitimacy to the Convention because it allows for an expanding, living document but does so in a way that ensures that the primary moves are made by the domestic elements of Member States and not a transnational juridical body’.³⁶² To this extent, judicial dialogue reflects a wider effort to legitimise the ECtHR through a significantly strengthened role for national courts within the Convention system. Masterman notes that it ‘demonstrates the principle of subsidiarity operating in practice and illustrates that national authorities can – and do – play a decisive role in shaping the content of the Convention case law’.³⁶³ This is perhaps another reason why Bjorge argues that the national courts must play their part as the ‘faithful trustees of the Convention rights’,³⁶⁴ acting as ‘the prime movers, willing to take a lead both in the development and the further realization of the Convention rights’.³⁶⁵ In his view, ‘only if that domestic application is faithfully loyal to the hilt can the European Court play the subsidiary role which it was always intended to play, one in which the European Court no more than completes the system that is the larger construction of fundamental rights protection’.³⁶⁶

9.2 Domestic Judicial Autonomy in Rights Adjudication

For the UK courts, dialogue with the ECtHR can be considered one aspect of a broader, parallel legitimising strategy based on the assertion of domestic judicial autonomy in human rights adjudication. This would appear to be a direct response to the two particular legitimacy challenges confronting the UK courts: the perceived deference to the ECtHR and the alleged lack of rights ‘ownership’ of the rights under the HRA. Like the efforts to enhance subsidiarity within the Convention system, it is a strategy predicated on strengthening the role of national courts. This strategy is reflected in two distinct developments: the ability of the UK courts to disagree with the ECtHR, and the ‘resurgent’ common law, as discussed in Chapter 4.

With regard to the ability of the UK courts to disagree with the ECtHR, *Horncastle* once again merits closer attention. It must be recalled that the refusal of the Supreme Court in that case to apply the ECtHR’s *Al-Khawaja* judgment was not the first time that the UK courts had expressed concerns with the ‘sole or decisive’ test. As discussed earlier, the House of Lords in *AF (No 3)*, despite having a variety of concerns over the principle, accepted out of a sense of

³⁶² Ostrovsky (n 47) 60

³⁶³ Roger Masterman, ‘Supreme, Submissive or Symbiotic?’ (n 167) 24

³⁶⁴ Bjorge, *National Courts as Faithful Trustees* (n 286) 245

³⁶⁵ *ibid* 248

³⁶⁶ *ibid* 248

obligation that the right to a fair trial would be violated where a person suspected of terrorist offences was subject to control orders on the ‘sole or decisive’ basis of evidence obtained through closed material procedures. To this extent, it is arguable that the ‘sole or decisive’ test had become totemic of the deference of the UK courts to the judgments of the ECtHR for which the UK courts endured much criticism. Viewed in this way, the refusal by the UKSC to apply the same test in a different area of Art.6 jurisprudence amounted to a highly symbolic reassertion of domestic judicial autonomy over human rights questions. Indeed, Murphy observes that ‘the resistance to *Al-Khawaja* was not solely the result of normative objections’³⁶⁷ but served ‘a strategic function ...to assert the autonomy of domestic law and the authority of the Supreme Court in interpreting it’.³⁶⁸ Likewise, Gearty notes that *Horncastle*, only the fourteenth case to be handed down by the newly-established Supreme Court, presented an ‘opportunity ...to redefine the relationship with Strasbourg along the lines originally intended’.³⁶⁹ The resulting judgment, unanimous among its seven-strong bench and delivered with ‘one voice’³⁷⁰ through the Court’s President, Lord Phillips, served to shatter the image of the UK judges as ‘servants of a higher judicial power’³⁷¹ and effectively declared ‘a new, more equal partnership’³⁷² with the ECtHR.

Two significant decisions subsequent to *Horncastle* have continued this trend. The Court of Appeal in *McLoughlin*³⁷³ and Supreme Court in *Haney*³⁷⁴ respectively reached conclusions which directly contradicted key aspects of Strasbourg case law. The former judgment rejected the view of the Grand Chamber in *Vinter*³⁷⁵ that English law failed to provide sufficiently clear possibilities for the review and release of prisoners serving whole life tariffs to ensure that the right not to suffer inhuman or degrading treatment under Art.3 ECHR would not be breached. The latter judgment rejected the conclusion of the ECtHR in *James*³⁷⁶ that the detention of prisoners for public protection will be arbitrary and contrary to Art.5(1) ECHR following the expiry of their tariff if they have not been provided with rehabilitative assistance and the opportunity to demonstrate their eligibility for release. Thus, as the Justices observed in interview, *Horncastle* marked a distinct shift in the way that the UK courts approach the

³⁶⁷ Cian C Murphy, ‘Human Rights Law and the Challenges of Explicit Judicial Dialogue’ (2012) 12(10) Jean Monnet Working Paper series 1, 24

³⁶⁸ *ibid*

³⁶⁹ Gearty, *On Fantasy Island* (n 10) 106

³⁷⁰ *ibid* 107

³⁷¹ *ibid* 106

³⁷² *ibid* 108

³⁷³ *McLoughlin* (n 253)

³⁷⁴ *Haney* (n 254)

³⁷⁵ *Vinter and others v United Kingdom* (2016) 63 EHRR 1 (Grand Chamber)

³⁷⁶ *James and others v United Kingdom* (2013) 56 EHRR 12

Strasbourg jurisprudence, characterised by ‘more confidence’³⁷⁷ and a ‘greater willingness’³⁷⁸ to accept that they may take different views to the ECtHR. Clearly, the ‘*Horncastle* turn’³⁷⁹ reflects ‘a new mood of ...calm co-responsibility’³⁸⁰ among the UK courts in their relationship with the ECtHR. In this respect, to paraphrase Lord Irvine, they appear to be concertedly acting as autonomous institutions.³⁸¹ They have taken steps to counter the perception that ‘the law is ...driven by decisions of the Strasbourg court’³⁸² and thereby sought to allay the ‘fears and resentments’³⁸³ which Lord Justice Laws was concerned would arise from the view that the UK courts are merely giving effect to the views of the ECtHR. No longer are they ‘merely agents or delegates of the ECHR’,³⁸⁴ ‘Strasbourg surrogate[s]’,³⁸⁵ or even the ‘Strasbourggeoisie’.³⁸⁶

If the ‘*Horncastle* turn’ has served to demonstrate the autonomy of the UK courts in the way that they approach Convention rights, the ‘resurgent’ common law has served to further distinguish their decision-making from the ECtHR. Masterman and Wheatle observe that the reassertion of the common law as the first source of law in domestic human rights adjudication is ‘analogous to a domestically developed presumption in favour of subsidiarity, which allocates decision-making first to the local level and only moves to more centralised decision-making as a secondary step’.³⁸⁷ Here, however, ‘it is the substantive law, rather than the institution that takes centre stage’,³⁸⁸ as the turn to the common law ‘evinces preference for domestic mechanisms and domestic legal sources over law with a more European heritage’.³⁸⁹

As well as reflecting a domestic presumption of subsidiarity, this turn to the common law arguably reflects a renewed effort by the UK courts at *traditional legitimisation* in response to the attacks on the legitimacy of the ECtHR whose decisions have been so central to their own decision-making under the HRA. Weber argued that legitimacy based on tradition derives from ‘established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them’³⁹⁰ or ‘acceptance of authority merely because it is regarded as long

³⁷⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

³⁷⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

³⁷⁹ Gearty (n 10)

³⁸⁰ *ibid* 109

³⁸¹ Lord Irvine (n 97) 247

³⁸² *ibid*

³⁸³ *ibid*

³⁸⁴ *ibid*

³⁸⁵ *Prolife Alliance v BBC* [2002] 2 All ER 756, [33] (Laws LJ)

³⁸⁶ Lord Justice Elias, ‘The Rise of the Strasbourggeoisie: Judicial Activism and the ECHR’ (Annual Lord Renton Lecture, Institute for Advanced Legal Studies, 24 November 2009)

³⁸⁷ Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ (2015) 1 EHRLR 57, 62

³⁸⁸ *ibid*

³⁸⁹ *ibid*

³⁹⁰ Weber (n 7) 215

established'.³⁹¹ The turn to the common law in this way has the potential to harness a number of legitimacy benefits, observed by O'Cinneide. Because it 'prioritise[s] the value of articulating rights in "home-grown" constitutional language',³⁹² it has the advantage of being 'rooted in the organic legal and constitutional culture',³⁹³ allowing the rights articulated to 'become more deeply rooted in legal culture and popular esteem'.³⁹⁴ This can increase the likelihood of 'a more welcoming response by politicians, the national media, the judiciary and the public at large than the application of disconnected and apparently abstract cosmopolitan standards'.³⁹⁵ Indeed, it was seen in Chapter 4 how the resurgent common law was considered by a number of Justices as a useful tool of combating the view that human rights lack legitimacy as a 'foreign-imposed legal system'³⁹⁶ by giving the principles a 'domestic law root'.³⁹⁷ This is echoed by Lord Justice Laws, who has stressed the importance of both judicial autonomy and ownership of human rights in the UK to their legitimacy: 'if we can make the law of human rights truly our own, perceived and rightly perceived as a construct of English law, we shall quell these fears of the incoming tide ... and at the same time keep control of the proper place of human rights'.³⁹⁸

In these ways, the UK courts have offered a response to the legitimacy challenges arising from the perceived deference to the ECtHR and the perceived lack of 'ownership' of human rights in the UK under the HRA. Linked as these challenges are to the HRA itself, the courts have gone some way to appeasing the clamour for that Act to be replaced, offering a 'partial rejoinder to calls for a UK Bill of Rights'³⁹⁹ and conveying the impression that 'the Act has been dispensed with before it has been repealed'.⁴⁰⁰ Poole's observation in 2005 may have therefore proven well-founded: 'It may also be the case ... that judges are now beginning to feel more keenly on the back of their necks, as it were, the clammy breath of a critical public. If so, they may well begin to appeal in their judgments more openly and directly to an audience of sceptics (real or imagined)'.⁴⁰¹

³⁹¹ Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, OUP 1992) 155

³⁹² O'Cinneide (n 38) 40

³⁹³ *ibid*

³⁹⁴ *ibid*

³⁹⁵ *ibid*. Here, McCrudden has observed: 'If the primary audience is domestic popular opinion, then whether or not to cite foreign courts in general, or this foreign court in particular, may depend on whether such citation is likely to strengthen, or weaken, its legitimacy with that audience. Where the view among public opinion is current that human rights are not subject to international debate ... then reference to other foreign courts' decisions are much less likely.' McCrudden (n 3334) 519

³⁹⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

³⁹⁷ Interview with Justice of the UK Supreme Court (London, United Kingdom, 24 July 2014)

³⁹⁸ Lord Justice Laws (n 100)

³⁹⁹ Masterman and Wheatle (n 386) 65

⁴⁰⁰ Gearty, *On Fantasy Island* (n 10)

⁴⁰¹ Thomas Poole, 'Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case' (2005) 32(4) J Law and Soc 534, 561

10. Conclusion

Both the UK courts and the ECtHR face challenges to the legitimacy of their adjudication on human rights. This chapter has examined how the judicial dialogue which has arisen between them responds to those challenges. In response to the common legitimacy challenges presented by the jurisdictional pluralism which defines their relationship, the rule of law difficulties associated with that pluralism, along with the distinct challenges faced by the respective courts, it has argued that judicial dialogue embodies three features of discourse with the potential to enhance legitimacy: the mutual participation of the courts in the jurisprudential development of the Convention rights, mutual accountability in reason, and the ongoing revision of refinement of arguments, each playing distinct and yet overlapping legitimising functions.

The participatory aspect of dialogue, by which each court is able to give its views on an issue both formally through judgments and informally through meetings, and have those views considered by the other court in turn, has a number of implications. The courts demonstrate institutional awareness or judicial civility towards one another, showing appreciation for the authority and role of each and a degree of caution and consideration in their shared interpretive space, thereby ensuring legitimacy with one another. Further, through their mutual consideration the courts prevent conflict through reaching an understanding of the limits of their respective roles, allowing them to avoid the legitimacy challenges arising from conflicting approaches. Their joint participation allows them to reach shared interpretive outcomes which are acceptable to both.

The accountability function of judicial dialogue between these courts, by which each court considers itself and the other as accountable in certain respects for the claims which they make, complements participation and also provides distinct sources of additional legitimacy. It can enhance trust both between the institutions – again through showing institutional awareness and judicial civility – and on the part of other key constituents with whom the courts have a relationship. More importantly, the accountability expected of the ECtHR to the UK courts in their dialogue appears to have a parallel legitimising role. On the one hand, the UK courts are seen to be holding the ECtHR to account for the quality of its reasoning, particularly where it is felt to have misunderstood domestic law. Considering that a legitimacy challenge facing the UK courts was the perception of an uncritical deference to the views of the ECtHR, this is likely to enhance greater trust and thus legitimacy in the UK courts on the part of domestic audiences as they fulfil their role as guardians of the domestic constitutional order. At the same time, where

the ECtHR responds explicitly to such concerns, it demonstrates its commitment to taking on board national judicial concerns, showing respect to the views of national decision-makers and acknowledging the limits of its role.

The ongoing revision and refinement of arguments, whereby each court revises its views in response to the new arguments and information presented by the other, appears to again both reinforce and add further, distinct sources of legitimacy. Through such revision, the courts have been able mutually accommodate one another. This accommodation works in conjunction with participation and accountability, as each court shows institutional awareness and also seeks to rectify conflict where it has manifested through judgments. What is more, through their accommodation the courts try to ensure a degree of coherence between their respective approaches, again avoiding the compliance difficulties created by conflicting views. Aside from mutual accommodation, the possibilities for mutual challenge have at times prompted the courts to strengthen the justifications for their decisions, further contributing to the legitimacy of the courts in respect of one another and other key constituents to their decisions. Their shared insights have mutually assisted the development of their respective positions in terms of reasoning and authority, their agreements reinforcing their conclusions and harnessing greater legitimacy for both. This range of legitimising functions perhaps further explains why judicial dialogue between the courts is considered part of the broader, long-term effort to ‘secure the viability of the European Court’s role in the system for protecting and promoting human rights across Europe’.⁴⁰²

Viewed in their wider context, the legitimising roles of judicial dialogue are emblematic of two broader and adjacent legitimisation strategies adopted by the courts in recent years: the move to enhance subsidiarity within the Convention system and the effort to strengthen domestic judicial autonomy and identity in domestic rights adjudication. The former strategy can be considered an attempt to instil greater democratic legitimacy into the Convention system in response to the concerns that the ECtHR has intervened too readily into the decision-making of national authorities, both political and judicial. The latter arguably reflects the broader response of the UK courts to the concerns that they had shown undue deference to the views of the ECtHR at the expense of their own opinions and the development of the common law. Both strategies, however, appear to serve the same broad end: legitimising the Convention system through enhancing the role of national courts. Thus, it would appear that the courts harness the discursive

⁴⁰² András Sajó, ‘An all-European Conversation: Promoting a Common Understanding of European Human Rights’ in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 183, 191

features of dialogue as a source of legitimacy not in isolation but in the soil of these wider attempts to legitimise their decision-making on Convention rights.

Chapter 7

Legitimacy and its Limits

The protection of human rights is our common cause in Europe, and, for judges particularly, our common task. In performing it, the dialogue between us is a necessity, a corrective and an incentive. With the existing means for that dialogue, along with those anticipated though yet to materialize, the conditions are surely right to improve further the observance of the Convention. For me, judicial dialogue is the key – indeed, the golden key – to that desirable future for the protection of human rights in Europe.¹

- Dean Spielmann, former President of the European Court of Human Rights

1. Overview

This thesis has explored the judicial ‘dialogue’ that has become a central feature of the relationship between the UK courts and the European Court of Human Rights (ECtHR). The conclusion offered is that this concept and its associated practices have not arisen in a vacuum but in response to direct challenges to the legitimacy of judicial decision-making on human rights at both the domestic and European levels.

This final chapter has four parts. First, it offers a summary of the conclusions drawn throughout the thesis. Second, the chapter offers a normative critique of judicial dialogue between these courts. While the thesis has argued that dialogue between these courts has a *legitimising* role, this chapter qualifies that view with a cautionary note about the potential of a particular manifestation of formal judicial dialogue – open disagreement by national courts with judgments of the ECtHR – to *delegitimise* the Convention system by cultivating a *disposition to disobey* on the part of national courts across the Council of Europe. The third part of the chapter looks to the future of the relationship between the UK courts and the ECtHR in light of recent developments, and the fourth part offers the final thoughts on the conclusions.

2. A Summary of the Conclusions

The thesis began by noting the rise to prominence of the concept of ‘dialogue’ within the case law of the UK courts against the historical background of their relationship with the ECtHR. Prior to 1997, it was noted, the UK courts had little to say to the ECtHR, either through their judgments or directly. The Human Rights Act (HRA) 1998, however, transformed their

¹ Dean Spielmann, ‘Whither Judicial Dialogue?’ (Sir Thomas More Lecture, London, 12 October 2015) <http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf> accessed 17 March 2016

relationship: its enactment marked the end of a domestic ‘judicial silence’² on the interpretation of Convention rights and the beginning of a dynamic and interactive relationship based on ‘dialogue’. Through their respective judgments, and, since 2006, through informal meetings, the judges of these courts have been exchanging views on the interpretation of Convention rights and their application to UK law. This ‘dialogue’ was not merely an academic label, however: the UK courts explicitly invoked the concept as part of their judgments. Following the establishment of the UK Supreme Court, it became the byword for the relationship between the courts, drawn upon and developed across a significant number of Supreme Court decisions and praised by senior UK and ECtHR judges of past and present alike.

The introductory chapter noted, however, the puzzle of judicial ‘dialogue’: how its popularity as a concept within the academic and judicial commentary was coupled by differences of view as to its form and functions. UK and ECtHR judges used the term to connote different types of interaction between their courts: citation, agreement, disagreement, and influence in either or both directions. It was noted that the invoking of the concept of dialogue in the case law of the UK Supreme Court, however, appeared to have a contextual significance. Both the UK courts and the ECtHR had been confronted with challenges to the legitimacy of their decision-making on human rights. The ECtHR was criticised for an allegedly excessive and undemocratic influence in the UK, facilitated by the UK courts which accorded undue deference to its views. Against this background, it was striking that ‘dialogue’ had been frequently drawn upon as a means of legitimising particular inter-institutional relationships, particularly as a retort to the long-standing counter-majoritarian critique of judicial review of democratically enacted legislation. The UK courts, it was noted, are not the first to have been allured by this concept: it has featured prominently in the case law of the Canadian courts as a way of justifying their relationship with the legislature. The UK Supreme Court’s seduction, of course, was not in relation to Parliament but in its relationship to the ECtHR. The phenomenon, however, appeared similar: judges drawing explicitly upon the idea of ‘dialogue’ as a riposte to contentions of an over-concentration of judicial power.

Thus, the thesis sought to explore whether and, to what extent, the judges may have used this concept and the practices associated with it as a means of legitimising their judgments. It set about this task by asking four questions. First, what is judicial dialogue in the context of the decision-making of the UK courts and the ECtHR? Second, what are its functions? Third, what is the role of the informal dialogue between these courts? Fourth, what is the role of the dialogue in

² *R v Ministry of Defence Ex p. Smith* [1996] QB 517, 564 (Henry LJ)

legitimising the judgments of the UK courts and the ECtHR? In order to answer these questions, this thesis took a novel approach to the study of this topic. It focused on how the judges involved understand the nature of the ‘dialogue’ between their courts and the functions which they attribute to it. In Chapter 2, it was noted that the debates had focused primarily on how the UK courts *should* approach their duty under s.2 HRA to ‘take into account’ the judgments of the ECtHR. Less attention had been paid to the judicial meaning and intention behind the turn to dialogue. It thus made the case for a qualitative interview-based study with the judges. Several previous studies had applied the same logic; none, however, have focused exclusively on the dialogue between these courts.

Each of the research questions was explored in the four subsequent chapters. The first question was addressed in Chapter 3. There, it was seen how judicial dialogue between the UK courts and the ECtHR is considered by the judges to take place through two mediums: the judgments of the courts (‘formal’ judicial dialogue) and face-to-face meetings (‘informal’ judicial dialogue). It concluded that while formal dialogue eludes precise definition, it could be understood as a process by which the courts, subject to practical and normative constraints, exchange views and seek to influence one another through their respective judgments, relying on judicial diplomacy to this end. Further, there was a consensus among the interviewed judges that this form of ‘dialogue’ refers to the situation where a national court uses its judgments to express concern or disagreement with a judgment of the ECtHR. However, to varying degrees the judges also perceived dialogue as the reciprocal influences at work in their relationship: each side being influenced by and, in turn, influencing the other. It was seen how the term also embodies certain shared expectations which the courts have of one another. Each is expected to listen attentively to the conclusions of the other and to explain its reasoning in reply, particularly where it disagrees. Critiques by either side are expected to prompt review and possible revision by the other court at the next opportunity. Further, there is a shared view that a Grand Chamber judgment should ordinarily mark the end of a conflictual dialogue. To this extent, ‘dialogue’ does not appear to be one of Lord Sumption’s ‘meaningless slogans’,³ discussed in the introductory chapter, but a term which captures the shared normative expectations of the judges involved.

Chapter 4 explored the second question, concerning the functions which the judges attribute to the dialogue taking place between their courts through their judgments. At the broadest level, dialogue appears to encompass the shared role of the courts in applying and

³ Lord Sumption, ‘Anxious Scrutiny’ (Administrative Law Bar Association Annual Lecture, 4 November 2014) <<https://www.supremecourt.uk/docs/speech-141104.pdf>> accessed 10 December 2016

upholding fundamental rights in coordination with one another. A more specific purpose that emerged from the interviews, however, is the mitigation of tensions between the courts arising from their overlapping jurisdictions, differences of institutional perspective and legal tradition. For the Justices, these tensions manifest in three ways: in the clarity and coherence of the ECtHR case law, its substantive understanding of UK law and the common law system, and issues of judicial identity. By exchanging views and seeking to influence the ECtHR through their judgments, however, it was felt that the courts can address these tensions in various ways. First, the ability of each side to disagree with the other was deemed to be an important check in their relationship. The ECtHR, on the one hand, was valued by some of the Justices as a guard against domestic judicial complacency in human rights standards. The ability of the UK courts to disagree with ECtHR, on the other hand, was felt to provide an additional source of flexibility to the Convention system. Second, it was felt that it can lead to improved clarity and coherence in the relevant principles and, third, enhance the substantive quality of those principles. The judgments of the UK courts were felt to allow the judges to signal concerns and disagreement to the ECtHR, or offer contributions in areas lacking Strasbourg case law, in order to encourage it to develop its jurisprudence in ways that mitigate either existing or potential sources of difficulty. Fourth, the types of judgments which the Justices associated with their dialogue with the ECtHR appeared to have a bolstering effect upon their sense of judicial identity as they assert their willingness to reach their own conclusions on the interpretation of Convention rights. Placing these insights into their wider context, formal dialogue connected with another development in the domestic judicial context: the resurgent common law. Greater reliance on the common law was felt to mitigate against the difficulties brought about by unclear or incoherent Strasbourg jurisprudence by providing an alternative source of law with which to resolve human rights claims. Likewise, it was felt to contain valuable substantive insights which might further contribute to the development of the Convention rights by the ECtHR, and clearly gave renewed vigour to some of the Justices' sense of judicial identity. Even more interestingly, both dialogue and the turn to the common law as a source of fundamental rights protection appeared to be inspired by strategic thinking on the part of the judges. Both were considered means of combating the view that human rights are a foreign imposition in the UK.

Chapter 5 addressed the third question, concerning the role of informal dialogue between the courts. It concluded that the value of this interaction – often praised by the participating judges but rarely discussed in any depth – plays an important, albeit subtle role in the relationship between these courts. It performs procedural, substantive and diplomatic functions, each of which can contribute to enhancing a relationship of subsidiarity between the courts. Procedurally,

the meetings allow the national judges to participate in the ongoing process of developing the Convention rights at the supranational level. Further, they provide an accountability forum where the ECtHR jurisprudence gives rise to domestic judicial concern. Substantively, they are valued for improving the judges' respective understandings of Convention law and its practical application, the UK legal system, judgment-writing and even shared legal resource needs. Perhaps the most significant, however, are the diplomatic functions of preserving mutual respect and receptivity between the courts. It was seen how the judges value these opportunities to clear any false perceptions between them. In particular, some of the UK judges in particular valued the chance to distance themselves from political currents which could otherwise prove damaging to the relationship between the courts. Judges of both courts are eager to ensure receptivity on the part of the other to their views. For the ECtHR judges, the meetings performed an important legitimising function: by allowing national judges to raise their questions and concerns, the interactions were deemed to promote compliance with ECtHR judgments.

In Chapter 6, the thesis explored the fourth research question, concerning the legitimising role of dialogue between these courts. Synthesising the findings from the previous chapters with insights from legal and political theory, it concluded that both forms of dialogue embody three features of discourse – mutual participation, mutual accountability and the ongoing revision and refinement of arguments – each performing legitimising functions in response to the particular challenges facing the courts. The participatory aspect of their interactions, by which each court is able to state its views and have those views considered by the other, serves to demonstrate institutional awareness, aid conflict avoidance and contribute to the production of co-created interpretive solutions. The accountability dimension can enhance trust both between the courts and towards them on the part of domestic audiences, as each shows its openness to judicial critique, the UK courts fulfil their role as guardians of the domestic legal order and the ECtHR demonstrates its receptivity to domestic concerns.

Finally, through their ongoing revision of arguments the two courts mutually accommodate, showing institutional awareness and accountability towards one another and reducing incoherence between their positions and the legitimacy challenges that come with it. The revision of their respective positions through dialogue also encourages mutual enhancement of judicial reasoning, as conflict or its prospect prompts each to strengthen the justification for its decisions, the shared insights provide an additional source of insight and authority with which each can enhance its decisions, and the UK courts assist the ECtHR in building a jurisprudence with the quality of rational acceptability, logically justifiable within the framework of Europe's diverse national legal systems. Viewed in the wider context, the role of dialogue between these

courts is an elemental part of two wider legitimacy strategies pursued by the respective courts: for the UK courts, the strengthening of domestic judicial autonomy and identity in fundamental rights adjudication; for the ECtHR, the enhancement of subsidiarity.

3. New Legitimacy Challenges: Risking a Disposition to Disobey

3.1 Delegitimising through Dialogue

The focus of this thesis has been the legitimising role of dialogue between the UK courts and the ECtHR. To that end, it has argued that judicial dialogue has a legitimising role to play, in all of the ways explored in Chapter 6. Legitimacy, however, is always ‘relative’⁴ or ‘particularistic’⁵ – ascribed ‘only from some particular perspective’.⁶ Thus, a court might be ‘regarded as legitimate in the eyes of some constituencies and illegitimate in the eyes of others’.⁷ Moran observes:

The multiple audiences that the performance of judicial authority may engage will bring a variety of expectations and assumptions to the performance and evaluate it accordingly. So the same performance of judicial authority may generate different reactions from different audiences. These may range from respect, recognition, awe and compliance to incomprehension, confusion, derision, alienation, to name but a few.⁸

Thus, judicial dialogue between the UK courts and the ECtHR might well carry the potential to legitimise the respective judgments of these courts. Nonetheless, as implied by Moran’s observation, what builds legitimacy among one audience may deplete it with another.

It is particularly necessary to ask whether judicial dialogue carries a *delegitimising* potential for the Convention system through the cultivation of a ‘disposition to disobedience’ on the part of national authorities within Europe. This concern relates to those cases where the UK courts have not only criticised an ECtHR judgment but refused to apply key aspects of the reasoning. Recalling that legitimacy is partly reflected in compliance with authority – the

⁴ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 139

⁵ Lynn Dobson, ‘Legitimacy, Institutional Power, and International Human Rights Institutions: A Conceptual Enquiry’ in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 190, 200

⁶ *ibid*

⁷ Shany (n 4) 139

⁸ Leslie J. Moran, ‘In Conversation with Lord Justice Etherton: Judicial legitimacy, Diversity and the Representation of Judicial Authority’ [2010] PL 662, 666

‘disposition to obey’⁹ on the part of the governed – and that such compliance, as a measure of a court’s effectiveness, is in turn likely to influence belief in a court’s legitimacy, there is a growing anxiousness that the willingness of the UK courts to refuse to follow decisions of the ECtHR in the interests of stimulating a dialogue will encourage others to do the same, generating a loss of legitimacy. Føllesdal et al note that ‘whether a subject is morally obligated and motivated to comply may depend on whether the agent has reason to believe that others will also endorse the norm, for instance because they regard it as legitimate, for whatever reason’.¹⁰ For this reason, it has been observed of the ECtHR that, ‘[u]ndoubtedly, non-compliance with its judgments is a blow for the Court’s legitimacy’.¹¹ The concern that this type of dialogue could cultivate a disposition to disobey is summarised by Bjorge: ‘...the Supreme Court represents one of nearly 50 Member States. If the other courts of Europe were to take a leaf out of the Supreme Court’s book, the result could be a very chaotic situation indeed’.¹² The same is articulated by Draghici:

From a systemic perspective, if each domestic judiciary asserted its competence to challenge the interpretation of the European Court of Human Rights on the basis of its alleged inconsistency with national practices, the authority of the Strasbourg Court would be undermined...¹³

The concern is felt to be heightened due to the UK’s high standing within the ECHR system and the loyalty which has been displayed by its courts in applying the Strasbourg jurisprudence. It is thought that other courts across the Council of Europe may ask themselves, ‘If so august a body as the UK Supreme Court can dispense at will with Strasbourg decisions then why should we not do the same?’.¹⁴ Indeed, it has been observed that the Russian Constitutional Court has protested that cases involving ECtHR case law can be resolved only through ‘dialogue’ rather than

⁹ ‘...the faculty of governing on the one part has for its sole efficient cause, and for its sole efficient measure, the disposition to obey on the other part’. Jeremy Bentham, *The Works of Jeremy Bentham* (William Tait 1843) 219

¹⁰ Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein, ‘International Human Rights and the Challenge of Legitimacy’ in Føllesdal, Schaffer and Ulfstein (n 5) 13

¹¹ Julie Fraser, ‘Conclusion: The European Convention on Human Rights as a Common Endeavour’ in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 192, 200

¹² Eirik Bjorge, ‘Exceptionalism and Internationalism in the Supreme Court: Horncastle and Cadder’ [2011] PL 475, 479

¹³ Carmen Draghici, ‘The Human Rights Act in the Shadow of the European Convention: Are Copyist’s Errors Allowed?’ (2014) 2 EHRLR 154, 165

¹⁴ Conor Gearty, *On Fantasy Island* (OUP 2016) 110-111. In the same vein, Clayton has argued: ‘...we in the United Kingdom must be alert to the message we are sending to other signatories to the ECtHR. The UK Government is not alone in taking the view that some Strasbourg decisions do not stand up to scrutiny; it is a perspective shared by governments in Russia, the Ukraine and elsewhere’. Richard Clayton, ‘Smoke and Mirrors: the Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639, 644

‘subordination’, and that such dialogue derives from ‘the ECtHR’s respect towards national constitutional identity’.¹⁵ However, Dzehtsiarou et al warn that ‘[o]ne should not be misled ... The truth behind this word play is plain: no dialogue, no trade-offs, and no respect to international obligations’.¹⁶

Compounding this is the concern that the disposition to obey the ECtHR might be weakened by the degree to which the Court appears to revise its jurisprudence in order to accommodate UK judicial concerns. It was observed in the previous chapter how a legitimacy challenge facing the ECtHR is the need to convey the impression that it is acting on the basis of law and not discretion while at the same time showing respect to national decision-makers in the execution of their primary responsibility for the Convention rights. The concern is that, to the extent that the ECtHR appears to change its approach on the basis of discretion, the less inclined those subject to its judgments might be to accept them as legitimate exercises of legal interpretation. This pull from different directions has at times placed the reasoning of ECtHR judgments under strain. Two features of judicial dialogue (in the form of disagreement by the national courts) in particular appear to undermine this effort to maintain the guise of law over discretion: the reasoning of the court where it has revised its approach and the salience seemingly given to the political animosity towards the ECtHR in the UK at the time of key decisions. Three ECtHR judgments are particularly instructive here: *Al-Khawaja*¹⁷ on hearsay evidence and fair trials (Art.6 ECHR), *Animal Defenders International (ADI)*¹⁸ on political advertising and freedom of expression (Art.10 ECHR), and *Hutchinson*¹⁹ on whole life tariffs and the right not to suffer inhuman or degrading treatment (Art.3 ECHR).

3.2 Reasoning under Strain

It was discussed in Chapter 6 how dialogue sees the courts revising their positions in order to mutually accommodate one another and enhance the quality of their reasoning. The revisions made by the ECtHR, however, have at times manifested in jarring shifts either within the reasoning of particular judgments or against the grain of its well-established case law. On hearsay evidence, for example, despite the thoroughness of the judgment itself, several

¹⁵ Kanstantsin Dzehtsiarou, Sergey Golubok and Maxim Timofeev, ‘Imaginary Dialogue and Fictitious Collaboration: Russian Response to the Prisoner Voting Judgment’ (ECHR Blog, 29 April 2016) <[http://echrblog.blogspot.co.uk/2016/04/the-russian-response-to-prisoner-voting.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+blogspot/KCGaBs+\(ECHR+BLOG\)](http://echrblog.blogspot.co.uk/2016/04/the-russian-response-to-prisoner-voting.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+blogspot/KCGaBs+(ECHR+BLOG))> 11 October 2016

¹⁶ *ibid*

¹⁷ *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 (Grand Chamber)

¹⁸ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (Grand Chamber)

¹⁹ *Hutchinson v United Kingdom* (2015) 61 EHRR 13 (Chamber)

commentators have noted a peculiar shift within the reasoning of the Grand Chamber in its *Al-Khawaja* decision in response to the Supreme Court's *Horncastle*²⁰ critique, varying from a thorough rebuttal of the criticisms of its jurisprudence to a concession that said jurisprudence should be modified. Hoyano argues that the Grand Chamber's judgment initially suggests a refusal 'to remove its tanks from the UK Supreme Court's lawn'²¹ only to reach a conclusion which reveals said tanks 'to be constructed from papier mâché'.²² Likewise, Redmayne observes 'an abrupt gear change in the judgment, as the Court switches from a seemingly unbending response to *Horncastle* to an acknowledgment that the sole or decisive rule is not absolute'.²³

Further, in order to accommodate domestic judicial and political concerns, the court has at times had to produce jurisprudentially novel reasoning which appears to contradict established trends within the case law already accepted by other ECHR member states, placing a strain on the rule of law requirement of equality before the law. In respect of the jurisprudence on Art.6 and hearsay evidence, Judge Sajó and Judge Karakaş in their dissenting opinion to *Al-Khawaja* expressed concern over the novelty of the term 'overall examination'²⁴ which the majority had introduced in the context of Art.6. In their view, the sole or decisive principle consistently applied by the court as a 'bright line'²⁵ was 'abandoned in the name of an overall examination of fairness'.²⁶ While emphasising the importance of 'bona fide dialogue'²⁷ with national courts, the two judges felt that the Court, 'in the absence of a specific new and compelling reason, has diminished the level of protection... a matter of gravest concern for the future of the judicial protection of human rights in Europe'.²⁸

This concern is shared by Hoyano, who argues that the insistence by the ECtHR that it had 'always'²⁹ approached Art.6 as a question of overall fairness was inaccurate.³⁰ The shift was even more puzzling to many given the prior acceptance of the jurisprudence in this area both

²⁰ *R v Horncastle and others* [2010] 2 AC 373 (SC) [11] (Lord Phillips)

²¹ Laura Hoyano, 'What is balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' (2014) (1) Crim LR 4, 20

²² *ibid* 20

²³ Mike Redmayne, 'Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber' (2012) 75(5) MLR 865, 877-878

²⁴ '...the Court has consistently assessed the impact that the defendant's inability to examine a witness has had on the overall fairness of his trial'. *Al-Khawaja* (n 17) (Grand Chamber) [143]

²⁵ *ibid* [O-II5]

²⁶ *ibid*

²⁷ *ibid* [O-II1]

²⁸ *ibid* [O-II28]

²⁹ *Al-Khawaja* (n 17) [143]

³⁰ '... antithetical balancing of the defendant's rights against the public interest is not how the Grand Chamber had previously approached art.6'. Hoyano (n 21) 21. Gearty has also described the judgment as a 'large-scale watering down of Article 6'. Conor Gearty, '*Al-Khawaja and Tahery v United Kingdom*' (UK Const L Blog 9th Jan 2012) <<http://ukconstitutionallaw.org/2012/01/09/conor-gearty-al-khawaja-and-tahery-v-united-kingdom/>> 1 August 2015

within the UK and across Europe. The ECtHR position was accepted without question in a unanimous decision of the House of Lords in respect of the admissibility of anonymous witness evidence in *R v Davis*,³¹ with Lord Bingham stating that the same sole or decisive test – which later came under such heavy judicial fire in *Horncastle* – reflected ‘the view traditionally taken by the common law of England’.³² What is more, it has been noted that prior to *Horncastle* no other government in the Council of Europe had ever complained of the jurisprudence in this area.³³ All the same, ‘judicial dialogue ...in this instance helped ratchet down the right of confrontation under both domestic and European law’.³⁴

The dialogue over the compatibility of a ban on political advertising and the right to freedom of expression is observed to have generated similar contradictions. The ECtHR’s conclusion in *ADI* that the UK’s ban did not breach Art.10, reached on the basis of the ‘exacting and pertinent’³⁵ analysis of the issues raised for the Convention rights conducted by both the UK Parliament and courts,³⁶ was made possible by categorising the ban in the UK as a ‘general measure’³⁷ – a term described by one commentator, echoing the views of the dissenting judges in *ADI*,³⁸ as having a ‘distinctly dubious doctrinal provenance’,³⁹ having never before been cited in the court’s Art.10 jurisprudence or in the recent ECtHR decisions on restrictions to political advertising and free expression. For all eight dissenting judges to the decision, the conclusion was particularly alarming because the UK’s ban was viewed to be even wider than that which was held to violate Art.10 in a case against Switzerland,⁴⁰ again resulting in concerns over equality before the law.⁴¹ Five of the dissenters perceived ‘the almost inescapable conclusion ...that an essentially identical “general prohibition” on “political advertising” ...is not necessary in Swiss democratic society, but is proportionate and *a fortiori* necessary in the democratic society of the United Kingdom’.⁴² This conclusion amounted to a ‘double standard

³¹ *R v Davis and others* [2008] 1 AC 1128

³² *ibid* [25] cited in Bjorge (n 12) 478

³³ Hoyano (n 21) 19

³⁴ Jason Mazzone, ‘The Rise and Fall of Human Rights: a Sceptical Account of Multilevel Governance’ (2014) 3 *CJICL* 929, 959

³⁵ *ADI* (n 18) (Grand Chamber) [116]

³⁶ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 (HL)

³⁷ *ADI* (n 18) (Grand Chamber) [83]

³⁸ *ibid* [O-II5]-[8] (Joint Dissenting Opinion of Judges Ziemeles, Sajó, Kalaydjieva, Vučinić and De Gaetano)

³⁹ Tom Lewis, ‘*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?’ (2014) 77(3) *MLR* 460, 471

⁴⁰ *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No.2)* (2011) 52 *EHRR* 8

⁴¹ *ADI* (n 18) (Grand Chamber) [OII-2] (Joint Dissenting Opinion of Judges Ziemeles, Sajó, Kalaydjieva, Vučinić and De Gaetano) ‘In this sense the prohibition is wider than that which was considered excessive in *VgT*, so that the present judgment is, in my opinion, incompatible with that previous case-law’. [OIII-12] (Dissenting Opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque)

⁴² *ibid* [OII-1] (Joint Dissenting Opinion of Judges Ziemeles, Sajó, Kalaydjieva, Vučinić and De Gaetano)

within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it'.⁴³ Commentators have raised the same concerns. English takes the view that 'there are no convincing reasons given in this whole ruling why the UK challenge received such different treatment',⁴⁴ while Lewis points out that 'states like Switzerland, Norway and Denmark, all of which reformed their systems in order to comply with the earlier Strasbourg rulings, might feel aggrieved at the Grand Chamber's apparent U-turn'.⁴⁵

In relation to whole life tariffs, similar concerns have been voiced over the shift by ECtHR between its *Vinter*⁴⁶ and *Hutchinson* judgments, to the effect that UK law was held – and then not held – to violate Art.3 following the protestations of the Court of Appeal. In *Vinter*, the Grand Chamber had ruled that '...for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review'.⁴⁷ Thus, it reasoned that persons subject to whole life terms should be entitled to know the conditions for release and the time when a review can be sought.⁴⁸ Applying this reasoning to the whole life tariffs regime in England and Wales, the Grand Chamber was critical of the 'lack of clarity',⁴⁹ in the relevant law. It accepted that a ministerial power to release whole life prisoners on compassionate grounds⁵⁰ was itself subject to Art.3 principles under s.6 HRA,⁵¹ requiring all public authorities to act compatibly with Convention rights. However, it noted that the policy document containing the criteria⁵² for such release made no statement to this effect. Consequently, those subject to whole life tariffs had 'only a partial picture'⁵³ of the conditions which would prompt the exercise of the power to release on compassionate grounds. On this basis, the Court found a violation of Art.3. However, in the subsequent Court of Appeal case of *R v McLoughlin*,⁵⁴ a specially convened five-judge panel, led by the Lord Chief Justice, openly declared: 'We disagree. In our view, the

⁴³ *ibid*

⁴⁴ Rosalind English, 'Strasbourg Ties itself in Knots over Advertising Ban' (UK Human Rights Blog 23 April 2013) <<http://ukhumanrightsblog.com/2013/04/23/strasbourg-ties-itself-in-knots-over-advertising-ban/>> accessed 3 July 2015

⁴⁵ Lewis (n 39) 472. Further, Lewis suggests that the significance of the extensive parliamentary debate over the issues to the finding that the ban was proportionate blurs the requirements of Art.10 proportionality in this context: '...if Switzerland, Norway or Denmark decided to reintroduce their own bans, and their legislative organs conducted searching debates on the issue, would they now, in the wake of *ADI*, be entitled to do so? Far from clarifying the position the Grand Chamber's judgment tends to muddy these waters'. 473

⁴⁶ *Vinter and others v United Kingdom* (2016) 63 EHRR 1

⁴⁷ *ibid* [110]

⁴⁸ *ibid* [122]

⁴⁹ *ibid* [125]

⁵⁰ Crime (Sentences) Act 1997 s.30

⁵¹ A point established by the Court of Appeal in *R v Bieber* [2009] 1 WLR 223

⁵² Prison Service Order 4700, Lifer Manual

⁵³ *Vinter* (n 46) [128]

⁵⁴ *R v McLoughlin and Newell* [2014] 3 All ER 73

domestic law ... is clear'.⁵⁵ English law, properly explained, did in fact provide for the possibility of release. The absence of the Art.3 avenue for review from the guidance for releasing prisoners on compassionate grounds, while of 'real consequence',⁵⁶ to the Grand Chamber's decision, it was 'as a matter of law, ...of no consequence'.⁵⁷ Nonetheless, the Court of Appeal sought to make the law regarding the potential release of whole life prisoners clear.⁵⁸ It reiterated that the power to release prisoners on compassionate grounds was itself subject to Art.3, and that the 'exceptional circumstances' in which it would be exercised could be clarified by the domestic courts, case-by-case. When the issue subsequently returned to the ECtHR in *Hutchinson*, a majority at the Chamber level observed that the Court of Appeal had 'expressly responded to the concerns detailed in *Vinter*',⁵⁹ and found no violation of Art.3. When the case was relinquished to the Grand Chamber, this was affirmed 14:3. Observing that 'the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities',⁶⁰ it was held that 'the Court of Appeal responded explicitly to the *Vinter* critique',⁶¹ and 'brought clarity as to the content of the relevant domestic law, resolving the discrepancy identified in the *Vinter* judgment'.⁶² Again, however, this drew sharp dissenting judgments. Judge Pinto de Albuquerque expressed severe doubts as to whether anything had been clarified by the Court of Appeal's judgment.⁶³ In his view, the majority was 'pretend[ing] that a future clarification of the law is capable of remedying its present lack of clarity and certainty and thus the violation that exists today'.⁶⁴ Consequently, there was a risk that 'the dialogue between courts risks becoming two parallel monologues until one of them gives up'.⁶⁵

A further case of note, discussed in Chapters 5 and 6, was the Supreme Court case of *Haney*.⁶⁶ In this post-*Horncastle* case, the court rejected the conclusion of the ECtHR in *James*⁶⁷

⁵⁵ *ibid* [29] (Lord Thomas LCJ)

⁵⁶ *ibid* [30]

⁵⁷ *ibid* [30]

⁵⁸ In particular, it stressed that the criteria were not prescriptive, that the exercise of the power was itself subject to Art.3 principles, and that the meaning of that term could be further elucidated, case-by-case, by the courts and that the exercise of the power was subject to judicial review. *ibid* [30]-[35]

⁵⁹ *Hutchinson* (n 19) [25]

⁶⁰ *Hutchinson v United Kingdom* App. no. 57592/08 (17 January 2017) (Grand Chamber) [71]

⁶¹ *ibid* [39]

⁶² *ibid* [40]

⁶³ 'The Court of Appeal provided no guidance as to the criteria, respective weight and procedure for assessing the penological needs of further detention of the whole-life prisoner. The Court of Appeal stated that the section 30 power should and would be read in compliance with the Convention and the Court's case-law. Yet the Court of Appeal did not say what exactly that reading would be. In fact, the Court of Appeal gave a *chèque en blanc* to the Secretary of State, and the Court has nothing to say on this matter in the present judgment'. *ibid* (Dissenting Opinion of Judge Pinto De Albuquerque) [31]

⁶⁴ *ibid* [34]

⁶⁵ *ibid* [17]

⁶⁶ *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2015] 1 AC 1344

that the continued detention of prisoners subject to indeterminate sentences for public protection beyond the original tariff would be unlawful and contrary to Art.5(1) where rehabilitative assistance and an opportunity to demonstrate rehabilitation had not been provided. The Supreme Court felt that a more sensible angle in such instances would be to provide a remedy in damages, implicit within Art.5 as a whole, so as to avoid the danger of having to release persons whose safety to the public had not been established.⁶⁸ When the case reached the ECtHR, in the admissibility decision of *Kaiyam v United Kingdom*,⁶⁹ it considered in detail the critique by the Supreme Court.⁷⁰ On the one hand, the Court explicitly refused to modify or discredit its own approach, instead passing the buck to the Committee of Ministers to ‘determine ...whether the UK has properly implemented the judgment in *James* within its domestic legal order’.⁷¹ The Court simply applied its own approach, as established in *James*, based on Art.5(1) and not the Supreme Court’s approach, confining itself to the remark that ‘...the test applied by this Court ... might be said to be more stringent than the approach applied by the Supreme Court’.⁷²

3.3 The Influence of the Political Climate

The concern with the fluctuations across the cases discussed is that they convey the impression of the ECtHR playing judicial politics, acting upon discretion rather than legal principle and prioritising its relationship with certain states over others. This impression has arguably been exacerbated by the apparent salience given to the political climate towards the ECtHR within the UK when those dialogues have taken place, during a time of heightened discussion of the legitimacy of the ECtHR’s influence within the UK.

Redmayne therefore ponders whether the Grand Chamber’s conclusion in *Al-Khawaja*, decided in 2012, was the product of a political compromise, in particular whether ‘a hard line reiteration of the sole or decisive rule was watered down to avoid antagonising the UK at a time when there is much talk of the problems of the Human Rights Act’.⁷³ In even graver terms, Hoyano asks whether, in this instance, ‘...the Grand Chamber sacrificed principle to juridical, and possibly political, expediency, under the guise of judicial comity’.⁷⁴ Likewise, noting that the slim 9:8 majority which carried the decision in *ADI* was decided in 2012, Lewis suggests that the majority

⁶⁷ *James and others v United Kingdom* (2013) 56 EHRR 12

⁶⁸ *Haney and others* (n 66) [33]-[35], [38]-[39] (Lord Mance and Lord Hughes)

⁶⁹ *Kaiyam, Massey and Robinson v United Kingdom* (2016) 62 EHRR SE13

⁷⁰ *ibid* [52]-[62]

⁷¹ *ibid* [72]

⁷² *ibid*

⁷³ Redmayne (n 23) 878

⁷⁴ Hoyano (n 21) 28-29

may have been ‘desperate’⁷⁵ to reach its decision in light of the ‘famously hostile reaction amongst the British political classes and media to the ECtHR’s judgment in *Hirst*’.⁷⁶ Again, numerous commentators have expressed similar unease at the ECtHR’s decision in *Hutchinson* on whole life tariffs. Holcroft-Emmess notes that the decision arrived at a time when the Strasbourg court was ‘particularly vulnerable’,⁷⁷ with the dialogue between the courts having ‘played out in the shadow of political contentions to renegotiate the UK’s relationship with the ECtHR’.⁷⁸ In equally strong terms, Pettigrew argues that *Hutchinson* ‘appears to be more of a response to hard line domestic politics than a continuation of holistic legal principle which the ECtHR has outwardly supported in the past’.⁷⁹

Such revisions by the ECtHR in the name of judicial dialogue and accommodation have raised concerns of Strasbourg ‘losing its nerve’⁸⁰ and capitulating under sustained criticism. Madsen observes that an ‘...unsolved balance between national and European human rights law’⁸¹ is creating ‘a new uncertainty in the system where the Court seems to be seeking the approval of the constituencies’.⁸² There is, he notes, a ‘new fragility’⁸³ in the ECHR system to which the ECtHR is responding: ‘...the rights-oriented jurisprudence that became the Court’s trademark in the late 1970s is being supplemented, or replaced, by new forms of strategic judging reminiscent of the legal diplomacy of the early ECtHR’.⁸⁴

In slightly different terms, Fenwick has plausibly asked whether the court has adopted an ‘appeasement approach’⁸⁵ towards certain states, retracting previous decisions with the aim of allaying criticisms of interventionism, ‘...revisiting the ‘true’ scope of the ECHR in a more

⁷⁵ Lewis (n 39) 474 citing *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41

⁷⁶ *ibid*

⁷⁷ Natasha Holcroft-Emmess, ‘Whole Life Sentences in *Hutchinson v UK* – Compromise or Concession?’ (OxHRH Blog, 5 February 2015), <<http://ohrh.law.ox.ac.uk/whole-life-sentences-in-hutchinson-v-uk-compromise-or-concession/>> accessed 6 July 2015

⁷⁸ *ibid*

⁷⁹ Mark Pettigrew, ‘A Tale of Two Cities: Whole of Life Prison Sentences in Strasbourg and Westminster’ (2015) 23(3) *Eur J Crime Cr.L.Cr.J* 281, 281

⁸⁰ Lewis (n 39) 474

⁸¹ Mikael Rask Madsen, ‘The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash’ (2016) 79(1) *LCP* 141, 175

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid* 171

⁸⁵ Helen Fenwick, ‘Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg Against the UK?’ in Katja S. Ziegler, Elizabeth Wicks & Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 193

deferential spirit'.⁸⁶ The same concerns are voiced by Dzehtsiarou, who questions whether there is a growing propensity of the ECtHR to engage in a 'game of courts':⁸⁷

Is the European Court of Human Rights a strategic actor that can sacrifice certain achievements in certain areas of human rights protection in order to save the "Strasbourg project"? ... [O]ne can wonder what price the Court should and is prepared to pay to have the UK on board.⁸⁸

On the basis of these concerns, it may be that in its efforts to legitimise its decisions in the UK through dialogue with the national courts, the ECtHR risks facing a disposition to disobey from other national authorities across the Council of Europe. As discussed in Chapter 6, concern over double standards and preferential treatment was explicitly identified in Çalı, Koch and Bruch's interview-based study as affecting the legitimacy of the ECtHR among elite political, legal and judicial actors in countries such as Turkey which make up a significantly larger proportion of the ECtHR case load.⁸⁹

Along with the criticism from politicians and the media, what presents is 'a double assault on the integrity of the Strasbourg-based system of human rights'.⁹⁰ Dzehtsiarou et al argue that '[t]he constant questioning of the Court's judgments undermines its authority. Erosion of the legitimacy of the ECtHR may become unstoppable. This process takes time, but it is hard to reverse and its ultimate result can be damning: rendering the Council of Europe obsolete'.⁹¹ These very themes have recently surfaced in the dissenting opinion of Judge Pinto de Albuquerque in the Grand Chamber decision in *Hutchinson*, with which Judge Sajó, acting as ECtHR President on this occasion, agreed. In no uncertain terms, he argued that the ECtHR is facing an 'existential crisis'⁹² in view its 'retreat',⁹³ 'regression'⁹⁴ and 'reversal'⁹⁵ of positions in numerous cases involving the UK, and the fact that it was 'still suffering from the ongoing *Hirst*

⁸⁶ *ibid* 195

⁸⁷ Kanstantsin Dzehtsiarou, 'Hutchinson v UK: The Right to Hope (Revisited)...' (ECHR Blog, 10 February 2015) <<http://echrblog.blogspot.co.uk/2015/02/hutchinson-v-uk-right-to-hope-revisited.html>> 10 October 2015

⁸⁸ *ibid*

⁸⁹ They note that 'the lack of objectivity or concern for double standards was more a legitimacy concern in Turkey and Bulgaria than the other three states [the UK, Ireland and Germany]'. They thus caution that 'by aiming to increase its legitimacy in states with good human rights records, the Court may lose it in states with bad records'. Başak Çalı, Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 955, 982. According to its 2015 analysis, Turkey made up 13.0% of the ECtHR's pending applications. European Court of Human Rights, *Analysis of Statistics 2015* (Council of Europe, January 2016)

⁹⁰ Gearty, *On Fantasy Island* (n 14) 111

⁹¹ Dzehtsiarou, Golubok and Timofeev, 'Imaginary Dialogue and Fictitious Collaboration' (n 15)

⁹² *Hutchinson* (n 60) (Grand Chamber) [35] (Dissenting Opinion of Judge Pinto de Albuquerque)

⁹³ *ibid*

⁹⁴ *ibid*

⁹⁵ *ibid*

saga on the voting rights of prisoners’,⁹⁶ which had manifested in an ‘unfortunate spill over effect ... on the Russian courts’.⁹⁷ The ruling by the majority that whole life tariffs under UK law were compatible with Art.3, in his view, had ‘seismic consequences ... for Europe’.⁹⁸ It was ‘a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards’,⁹⁹ raising the ‘probability of deleterious consequences for the entire European system of human-rights protection ... heightened by the current political environment, which shows an increasing hostility to the Court’.¹⁰⁰ Judge Pinto de Albuquerque was explicit in his concern about the potential for a growing disposition to disobey. In light of way that the ECtHR had responded to domestic judicial criticism from the UK, he considered that ‘Domestic authorities in all member States will be tempted to pick and choose their own “rare occasions”¹⁰¹ when they are not pleased with a certain judgment or decision of the Court in order to evade their international obligation to implement it’.¹⁰² In his view, this had significant ramifications for the legitimacy of the ECtHR as a legal body:

If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does not deliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on “what it would be desirable” for domestic authorities to do, acting in an mere auxiliary capacity, in order to “aid” them in fulfilling their statutory and international obligations...¹⁰³

3. The Future

In light of the above critique, it is useful to consider the possible directions that the dialogue between the UK courts and the ECtHR might take in future. During the interviews with the Justices, there was a general feeling that it has developed as far as it will – in short, peak dialogue has been reached. One Justice opined: ‘I think that the dialogue has progressed probably as far as it can do and I would be hard-pressed to think of any way in which we could enhance it’.¹⁰⁴

⁹⁶ *ibid*

⁹⁷ *ibid*, citing the refusal of the Russian Constitutional Court to give effect to the reasoning of the ECtHR in *Anchugov and Gladkov v Russia* App nos. 11157/04 and 15162/05 (4 July 2013)

⁹⁸ *ibid*

⁹⁹ *ibid* [38]

¹⁰⁰ *ibid*

¹⁰¹ Citing *Horncastle* (n 20) [11] (Lord Phillips)

¹⁰² *ibid* [36]

¹⁰³ *ibid* [38]

¹⁰⁴ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

Similarly, another Justice commented: ‘I don’t think that there’s anything we can do by way of changing our methods to produce greater harmony with Strasbourg’.¹⁰⁵ It is reasonable to suggest, however, that the future of the relationship between these courts is deeply uncertain. Three possible developments are worth considering: the now resurgent common law, Protocol 16 ECHR and the prospect of the HRA being repealed.

3.1 The Common Law Resurgence

On the subject of the resurgent common law, several Justices stressed that their aim was not for common law analysis to completely supplant analysis of the Strasbourg jurisprudence but, consistently with the reasoning in *Osborn*, a ‘fusion’¹⁰⁶ of the common law and Convention rights in domestic human rights adjudication.¹⁰⁷ One Justice, however, indicated a slight feeling of unease as to the future direction of travel:

... we’ve got to be careful not to detach ourselves too much from Strasbourg. Life seems to be full of pendulums. We’ve probably been too slavishly following Strasbourg. What I’m worried about is that the reaction will end up with us being too independent, and I would like to stop at some midpoint if we could.¹⁰⁸

These words proved prophetic, with said pendulum swinging significantly in the direction of the common law. Two examples merit attention here. The first is noted by Gearty.¹⁰⁹ The case of *O (A Child) v Rhodes*¹¹⁰ concerned a challenge to prevent the publication of a book by a famous pianist. Despite the relevance of Art.10 ECHR, the issue was dealt with almost exclusively at common law, and neither the HRA nor a single Strasbourg decision is mentioned in the judgment.¹¹¹ A second example is the case of *R (Ingenious Media Holdings) v HMRC*.¹¹² This raised the question of whether HMRC officials had acted unlawfully by disclosing tax information concerning a media company to a journalistic investigation into tax avoidance. Both the High Court and the Court of Appeal deemed it necessary to consider whether the disclosures

¹⁰⁵ Interview with Justice of the UK Supreme Court (London, United Kingdom, 8 July 2014)

¹⁰⁶ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁰⁷ In *R (Osborne) v Parole Board* [2014] AC 1115 [57], Lord Reed reasoned that ‘The importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.’

¹⁰⁸ Interview with Justice of the UK Supreme Court (London, United Kingdom, 11 July 2014)

¹⁰⁹ Gearty, *On Fantasy Island* (n 14) 197-8

¹¹⁰ *O (A Child) v Rhodes* [2015] UKSC 32

¹¹¹ Gearty, *On Fantasy Island* (n 14) 197-8

¹¹² *R (Ingenious Media Holdings plc and another) v Commissioners for Her Majesty’s Revenue and Customs* [2016] UKSC 54

breached the right to privacy under Art.8 and the right to peaceful enjoyment of property under A1P1 ECHR. In both instances, the actions were deemed to be proportionate interferences with both rights. When the case reached the Supreme Court, however, it was lamented that ‘the courts below were not referred (or were only scarcely referred) to the common law of confidentiality’.¹¹³ By unanimous judgment the court held that the disclosures by HMRC had breached the common law requirements of confidentiality, which applied equally to public officials as to private actors.¹¹⁴ Here, neither Strasbourg nor domestic case law concerning Convention rights, or indeed the rights themselves, was mentioned.

One possible consequence of this shift is a loss of influence by the UK courts on the judgments of the ECtHR. If it is the case that the explicit engagement and analysis by the UK courts of the Strasbourg case law has been instrumental in their influence upon the reasoning of the ECtHR, as the interviews with the Strasbourg judges seemed to suggest, it might be that this trend will diminish their influence somewhat. *Rhodes* in particular saw the Supreme Court preferring a nineteenth century case to the Strasbourg case law.¹¹⁵ Lord Justice Sales has argued that where the UK courts make it apparent to the ECtHR that they are adopting their own, distinct interpretation of Convention rights, rather than finding the same meaning as the ECtHR, ‘...it would be only too easy for [the ECtHR] to avoid confronting the domestic case law when making its own rulings under the ECHR’.¹¹⁶ Given that the UK courts in the above instances are largely prioritising consideration of the common law, on Sales’ view it might be even easier for the ECtHR to avoid confronting their arguments. More fundamentally, the extent to which this development can successfully offer the means to confer legitimacy on the judicial protection of fundamental rights at the domestic level, in the absence of the kind of mandate provided by the HRA, remains to be seen.¹¹⁷

¹¹³ *ibid* [18] (Lord Toulson)

¹¹⁴ ‘It is a cardinal error to suppose that the public law remedies and principles associated with judicial review of the exercise of administrative power, developed by the common law from the ancient prerogative writs, occupy the entire field whenever the party whose conduct is under challenge holds a public position. It is important to emphasise that public bodies are not immune from the ordinary application of the common law, including in this case the law of confidentiality. The common law is multi-faceted and remains the bedrock of the English legal system.’ *ibid* [28] (Lord Toulson)

¹¹⁵ *Wilkinson v Downton* [1897] 2 QB 57

¹¹⁶ Philip Sales, ‘Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine’ [2012] PL 253, 266

¹¹⁷ On this point, Bowen has expressed doubts: ‘Even if common law rights continue to be developed, the principle of Parliamentary sovereignty, the unwritten nature of common law rights and their lack of democratic legitimacy compared with a written constitutional instrument is a severe constraint on that development’. Paul Bowen, ‘Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?’ (2016) 4 EHRLR 361, 376

3.2 Protocol 16 – The ‘Protocol of Dialogue’¹¹⁸

A second consideration for the future of the relationship between these courts is Protocol 16 ECHR. Drafted in the follow-up from the Brighton Conference and its accompanying Declaration, in which further dialogue between national courts and the ECtHR was explicitly welcomed and encouraged,¹¹⁹ this optional measure offers a formalised procedure, similar to the preliminary reference under Art.267 TFEU, by which a national court can request directly a non-binding,¹²⁰ ‘advisory opinion’ from the ECtHR ‘on questions of principle relating to the interpretation or application’¹²¹ of ECHR rights. The courts involved in this procedure are required to give reasons at every stage: the national courts, when requesting an opinion;¹²² the ECtHR, when issuing its advisory opinion¹²³ or, conversely, when refusing a request.¹²⁴ Concerns, however, have been expressed over its workability and the extent to which it would exacerbate, rather than alleviate, difficulties arising from the ECtHR’s backlog of cases.¹²⁵ The UK Coalition Government in 2013 made clear its desire to observe how the procedure operates in those states that have ratified it.¹²⁶ However, given that the measure has not obtained the required ten signatures required to enter into force, the present government seems unlikely to ratify the protocol in the near future.

3.3 Repeal of the Human Rights Act 1998

The final consideration is the future of the HRA 1998. The commitment of the UK Conservative Party to repeal and substitute this legislation with a ‘British Bill of Rights’ is long-standing.¹²⁷ It has been observed that the result of the UK’s referendum on its membership of the European Union may well give fresh impetus for the UK government to push ahead with this

¹¹⁸ Dean Spielmann, ‘Opening Speech’ in European Court of Human Rights, *Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?* (Dialogue between Judges, Council of Europe 2014) 31

¹¹⁹ High Level Conference on the Future of the European Court of Human Rights Brighton Declaration (19/20 April 2012), 12c

¹²⁰ Protocol 16 to the European Convention on Human Rights and Fundamental Freedoms, Article 5

¹²¹ *ibid*, Article 1(1)

¹²² *ibid*, Article 1(3)

¹²³ *ibid*, Article 4(1)

¹²⁴ *ibid*, Article 2(1)

¹²⁵ Kanstantsin Dzehtsiarou and Noreen O’Meara, ‘Advisory Jurisdiction and the European Court of Human Rights: a Magic Bullet for Dialogue and Docket-Control?’ (2014) 34(3) LS 444

¹²⁶ A Ministry of Justice Report in 2013 noted: ‘The UK did not sign or ratify Protocol 16 at this time, but will wait to evaluate the system of advisory opinions as it operates in practice’. Ministry of Justice, *Responding to Human Rights Judgments* (Cm 8727, October 2013) 8

¹²⁷ Helen Fenwick, ‘Conservative Anti-HRA Rhetoric, the Bill of Rights ‘Solution’ and the Role of the Bill of Rights Commission in in Roger Masterman and Ian Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP 2013) 309

plan.¹²⁸ Recent government statements indicate this to be the case.¹²⁹ While the contents of such a Bill have not been made clear, what is apparent is that the s.2 HRA duty on UK courts to ‘take into account’ judgments of the ECtHR will be repealed either entirely or replaced by an alternative,¹³⁰ given the criticism specifically directed at that provision. It is difficult to say how this change will be interpreted by the courts. It is clear from the domestic case law that it is not simply the s.2 duty that compels the UK courts to adhere closely to the standards set by the case law of the ECtHR. As seen in Chapter 3, they place considerable weight on the presumption that Parliament is intended to act compatibly with its international obligations. Thus, any modification or replacement will be construed on that basis for as long as the UK remains an ECHR member state. A further point to consider is how this would impact on informal dialogue between the courts. As seen in Chapter 5, the UK judges insist on an autonomous relationship with the judges of the ECtHR. It therefore seems unlikely that they would accept such a provision as an indication that Strasbourg judges are to be kept at arms-length and that their face-to-face exchanges should become less frequent.

4. Final Thoughts

Quoted in the heading to this chapter are the words of the former ECtHR President, Dean Spielmann, who describes dialogue between the national courts and the ECtHR as ‘a necessity, a corrective and an incentive’¹³¹ in the performance of their ‘common task’¹³² of protecting human rights in Europe – the ‘golden key’¹³³ to its future. Another ECtHR judge, Julia Laffranque, however, has added: ‘a key is not enough; one also needs to know how to use this key’.¹³⁴

¹²⁸ Gearty, *On Fantasy Island* (n 14) xiii

¹²⁹ Danny Shaw, ‘Justice Secretary Liz Truss casts doubt on prison reforms’ (BBC News, 7 September 2016) <<http://www.bbc.co.uk/news/uk-37298415>> accessed 10 December 2016; Christopher Hope, ‘Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed’ (*The Telegraph* 28 December 2016) <<http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/>> accessed 10 Jan 2017

¹³⁰ One suggestion for such an alternative reads as follows:

‘A court or tribunal which is concerned with the interpretation and application of the constitutional rights may, in so far as it considers it relevant, take into account as persuasive authority decisions on provisions in treaties affecting the United Kingdom of,

(a) the European Court of Human Rights;

(b) the European Court of Justice;

(c) other international courts;

but in each such case shall be at liberty to express disagreement with the decisions of such courts.’ Anthony Speaight, ‘Mechanisms of a UK Bill of Rights’ in Commission on a UK Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1, December 2012) 267

¹³¹ Spielmann (n 1)

¹³² *ibid*

¹³³ *ibid*

¹³⁴ Speech by Judge Julia Laffranque in European Court of Human Rights, International and National Courts Confronting Large-scale Violations of Human Rights (Dialogue between Judges, Council of Europe 2016) 7

This thesis has offered a qualitative, interview-based study of how judges in the UK and at the ECtHR understand the dialogue between their courts. It has developed a judicially-informed account of this dialogue using the perspectives of those at its centre. Combining these direct insights with analysis of case law and contributions from political and legal theory, the thesis has explored the ways in which the UK courts and the ECtHR use the ‘golden key’ of dialogue as a means of conferring legitimacy on their respective judgments at a time of considerable challenge. It has observed that its various manifestations – judgment-based interactions, of a conflictual and consensual nature, and informal meetings between the judges – embody mutual participation, mutual accountability and the ongoing revision and refinement of judicial reasoning, each of which can confer legitimacy on the judgments of the courts, both in respect of one another and on the part of their UK audiences. The participatory dimension allows for the application and development of co-constructed norms, driven in part from the national level, as opposed to external impositions. Through accountability, there are meaningful checks in place rather than a supreme judicial power. Through revision, there is a demonstrable willingness at the supranational level to adapt, accommodate and strengthen the applicable principles in a way which is more accommodating of different legal and constitutional traditions. Dialogue is part of a wider effort to legitimise the Convention system and the courts enforcing it through a strengthening domestic judicial role, increasing the subsidiary nature of the relationship between the national and the supranational, on the one hand, and stressing the distinctness of the autonomy and identity of the domestic courts, on the other. In these ways, there has been a considerable effort to challenge and dilute the notion that the application of rights domestically is an imposition from afar. On the basis of these arguments, the ‘golden key’ to the future protection of human rights in Europe has a clear, legitimising role to play.

This chapter, however, has shown its limits. It has examined the growing concerns with the cumulative effects of judicial dialogue in the form of disagreement by national courts with the judgments of the ECtHR for the legitimacy of the Convention system. There is clearly a greater willingness on the part of the UK courts to depart from aspects of the Strasbourg jurisprudence in the interests of dialogue. At the same time, there is a discernible effort to accommodate those positions at the ECtHR, even going against the tide of its recent jurisprudence to do so, and occasionally manifesting in what are considered to be transparent attempts to maintain the consent of the national authorities. There is a growing anxiousness that this diplomacy risks promoting a disposition to disobedience towards the ECtHR on the part of other national authorities across the Council of Europe. Both the domestic and supranational judicial tendencies described are thought to convey the application of Convention principles at

both levels to be a matter of discretion and not law, weakening their prescriptive power, encouraging others to follow suit and risking their resentment where the ECtHR declines to make similar concessions. It is clear that some ECHR Member States (and their courts) are in a powerful enough position (and the ECtHR in a vulnerable enough position) to effectively negotiate the terms of their compliance. If negotiated compliance becomes widespread, however, it seems that the risk of passing a tipping point into a full-blown legitimisation crisis would be brought closer. This perhaps underlines the fragility which has been noted in the international human rights landscape, from which dialogue has arisen and to which it can only be a partial, and carefully circumscribed, response. It unfolds in a space in which the line between legitimisation and de-legitimisation is a fine one. While the processes appear to offer a useful legitimising tool for both courts, the potential legitimacy challenges which their use creates should not be ignored if the judges do not wish to imperil the common cause of which the former President of the ECtHR spoke.

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Appendix 1

Ethical Considerations

Ethical Approval

Ethical approval for this study, including a proposal to interview Supreme Court Justices, was granted by the Research Ethics Committee of Cardiff University's School of Law and Politics in February 2014. Following the decision to expand the remit of the research to include interviews with ECtHR judges, additional approval was sought from the Committee and granted in May 2015 on the basis of a fresh research ethics application. There are no ethical issues in this project arising from the use of published materials, such as academic publications, statutes and case law. The main ethical considerations arise from the interviews conducted with the judges of the two courts.

Judicial Independence

A principal issue for this study was the need to protect the participating judges' independence, particularly given the highly topical nature of the UK's relationship with the ECHR and the European Court of Human Rights. This was addressed in a number of ways. First, in order to secure the participation of the UK Supreme Court Justices, it was necessary to make a formal application to the Judicial Office (JO). As required by the JO, the application had to state why the project was in the public interest, why judicial participation was essential, how judicial independence would be preserved, the extent of the burden which would be placed on the judges by their engagement with the research, and the extent to which confidentiality would be maintained. This application process is subject to a two-tier approval: permission is required from both the JO and the head of the judicial branch from which judges are sought for research purposes. The stringency of this process helped to ensure that the participation of the Justices would not undermine their independence. In accordance with the JO's guidelines, the judges were not asked about the merits of pending cases or to comment on more overtly political issues such as the UK's membership of the ECHR. The application and participant information sheets made plain to the judges that they would be identified only by their professional affiliation in the write-up of the research, that they would be free to withdraw from the study at any time, without giving a reason, and that any direct quotes from the interviews would be used in any subsequent publications only with their express permission. **This thesis is therefore subject to a temporary bar on access until the participating judges have signalled their consent to the quotations used.**

In contrast to the UK Supreme Court, the ECtHR does not have a formal gatekeeper for researchers seeking to interview its judges. Prospective participants were thus informally approached by one of the project supervisors. After the prospective participants had expressed their willingness to discuss the research project, they were sent a formal invitation to participate, including detailed information about the research, interview questions and consent forms. While a formal gatekeeper was absent, the conditions detailed in the previous paragraph were replicated to ensure that judicial independence was maintained.

Inevitably, given the nature of the topic, there were points during some interviews where the judges felt that they might be straying too far into political territory and provided a clear

indication to that effect. Those sections of the interviews therefore do not appear in this thesis, nor have they been relied on in any way.

Confidentiality

Each of the judges interviewed and quoted in this thesis is anonymised with the exception of their professional affiliation as judges of either the UKSC or ECtHR.

Data Protection Issues and Consent

In accordance with Cardiff University's Data Protection Advice for Researchers and the Data Protection Act 1998, electronic copies of the interview data were stored on the encrypted university servers and a password-locked memory stick. Hard copies were stored in a locked draw on university premises. An information sheet and consent form was issued to the participants prior to the interviews taking place detailing information to this effect. Informed and written consent was then obtained from each of the participants before the interviews were conducted, as required by the DPA 1998, the SLSA's (Socio-Legal Studies Association) Principles of Ethical Research Practice and Cardiff University's Research Integrity and Code of Practice.

Appendix 2

Consent Form (UKSC Interviews)

Judicial Dialogue between the UK and Strasbourg: Perspectives from the UK Supreme Court

Interview Consent Form

	Initials
1. I confirm that I have read and understood the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.	
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason.	
3. I agree to take part in this study and for the interview to be recorded and transcribed.	

Name of participant:

Signature of participant:

Date:

Name of researcher:

Signature of researcher:

Appendix 3

Consent Forms (ECtHR Interviews)

Judicial ‘Dialogue’ between the UK and Strasbourg: An Examination of the Legitimising Potential

Participant Consent Form

	Initials
1. I confirm that I have read and understood the participant information sheet for the above study. I have had the opportunity to consider the information, ask questions and have these questions answered satisfactorily.	
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason.	
3. I agree to take part in this study and for the interview to be recorded and transcribed.	
4. I consent to the opinions and views which I express being used in the research, subject to the conditions outlined above.	

Name of participant (please print): _____

Signature of participant: _____

Date: _____

Name of researcher: _____

Signature of researcher: _____

Appendix 4

Interview Guide (UKSC Interviews)

1. Concept

- a. The term ‘judicial dialogue’ has been used in a variety of ways within the academic literature, judicial lectures and court decisions, so I’d like to begin by simply asking: what is your understanding of the term?
- b. Do you have any examples of judicial dialogue between the UK and Strasbourg courts?
- c. In a lecture last November, Lady Hale commented that the only two ‘really good’ examples of judicial dialogue between the UK courts and the ECtHR stemmed from the respective decisions of the House of Lords and Supreme Court in *Animal Defenders* and *Horncastle*. Do you share that assessment?
- d. Do you think the decision in the *Cheshire West* case is a good example of judicial dialogue between the courts?
- e. Do you think that dialogue between the courts existed before the Human Rights Act 1998? (Yes – can you think of any examples?)

2. Appraisal

- a. Which courts from the UK do you think should engage in the dialogue?
- b. In what ways can the UK courts and ECtHR create a dialogue with one another?
- c. Do you think the courts could reach a *modus vivendi* over a particular issue?
- d. What factors would influence it?
- e. Which do you think is the most effective?
- f. Are there any potential disadvantages to judicial dialogue between the courts?
- g. Do you think that the margin of appreciation in a given area affects the scope for dialogue between the courts? If so, how?
- h. Thinking of the controversy surrounding the ECtHR’s decisions in such decisions as *Hirst and Vinter*, do you think that there is now an expectation that a thorough judicial dialogue takes place between the UK courts and the ECtHR before a wider constitutional dialogue takes place, either between the UK courts and Parliament or Strasbourg and Parliament?

3. Future

- a. Do you agree that there has been a resurgence of the common law in human rights adjudication in the UK? Do you think this will influence in any way the dialogue with the ECtHR?
- b. Do you think that the legislative repeal of the duty on UK courts to ‘take into account’ judgments of the Strasbourg court would have an impact on the scope for dialogue between the courts? (If so, how? / If not, why?)
- c. What are your views regarding Protocol 16 to the European Convention on Human Rights? (Would it enhance the interactions between the courts in any way?)
- d. In 2010, Lord Bingham remarked that his hope that a ‘constructive dialogue’ would develop between the courts had been ‘partly’ realised. Do you think that assessment still applies? If so, how could a dialogue between the courts be fully realised?

Appendix 5

Interview Guide (ECtHR Interviews)

1. Concept

Could you summarise your understanding of judicial dialogue between this court and the courts of Member States?

2. Face-to-face meetings between ECtHR judges and judges of Member State courts

History

The Annual Reports of this court show that bilateral meetings between judges of this court and judges of Member State courts have been taking place for many years. Do you know when such meetings first began taking place?

What do you believe was the impetus behind the earlier meetings?

The Annual Reports of this court and the UK Supreme Court suggest that bilateral meetings between their respective judges only started taking place relatively recently. Do you have any thoughts on why these meetings began much later than meetings with other Member State courts?

Procedure

Have you ever been part of a delegation to visit the judges of a particular Member State, or been involved in the reception of such judges visiting the Strasbourg court?

How are the meetings arranged?

Which members of this court will usually be present at the meetings? Would a delegation to the UK, for example, typically involve judges from the Fourth Section?

Do the meetings have a chair?

Do the meetings have a set agenda? If so, who is responsible for setting it?

Are minutes taken at the meetings?

Are the meetings ever concluded with agreed actions? Are there any follow-ups to the meetings?

Substantive

What issues are typically discussed during these meetings?

When I interviewed the UK Supreme Court Justices, several of them remarked that their meetings with judges of this court tend to be characterised by very open and frank discussions. Would you agree with that assessment? Have you experienced, or are you aware of, any examples of particularly frank exchanges with judges of national courts?

Do you think such meetings have an impact on the decision-making of this court or the domestic courts?

The President of this Court, Dean Spielmann, has spoken about how a recent bilateral meeting between this court and judges of the French Court of Cassation led to an agreement to establish a network of shared case-law. Any you aware of any other practical developments that have emerged from such meetings?

3. Dialogue through judgments

Do you think ‘dialogue’ is a suitable metaphor to describe the way in which this court and the courts of Member States interact through their judgments?

What do you feel are the key advantages in this court and the courts of Member States exchanging opinions through their judgments?

The *Horncastle / Al-Khawaja* exchange concerning the admissibility of hearsay evidence in criminal trials between the UK Supreme Court and this court is often cited as the cardinal example of judicial dialogue. What do you think is the best example of an exchange between this court and the courts of a Member State?

In their partly dissenting opinion to the Grand Chamber decision of *Al-Khawaja*, Judge Sajó and Judge Karakaş expressed concern that the approach of the majority was ‘... a matter of gravest concern for the future of the judicial protection of human rights in Europe’. Are there any examples of dialogue with national courts which give you similar concerns?

In what circumstances do you believe it is right for this court to modify its approach in the face of domestic judicial criticism?

Would you agree that the judgments of courts in certain Member States are more influential on this court than others? If so, do you think this is in any way a problem?

Do you think it is desirable that national courts explicitly analyse the case-law of this court when adjudicating on human rights?

In a number of cases against the United Kingdom, this court has drawn support for its conclusions from minority / dissenting judgments at the domestic level. Do you think dissenting judicial views at the domestic level are generally helpful to this court in reaching its view as to the proper interpretation of a Convention right?

4. The future of judicial dialogue within the ECHR system

Are you aware of the so-called common law ‘resurgence’ taking place within human rights adjudication in the UK? Do you have any thoughts on it?

Critics of this court often call its legitimacy into question. Do you think dialogue with national courts, whether through meetings or judgments, enhances the legitimacy of this court’s decisions?

Do you think Protocol 16 – the ‘Protocol of dialogue’ – could further improve the legitimacy of this court’s decisions?