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RESEARCH ARTICLE

The rise of judicial diplomacy in the UK: aims and challenges

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Abstract

This paper examines the aims and challenges of 'judicial diplomacy' in the form of bilateral meetings between UK and supranational judges. Drawing from in-depth interviews, extra-judicial writings and other documentary sources, it argues that judicial diplomacy has become an important feature of the work of senior judges in the UK, allowing them to pursue jurisprudential and strategic aims. In jurisprudential terms, the judges have sought to improve the quality of judicial decision-making at the domestic and supranational levels. Strategically, they have striven to maintain robust inter-institutional relations and maximise their influence at the supranational level. The pursuit of these aims has taken on renewed significance in the context of Brexit but may raise questions for the protection of judicial independence and impartiality. The judiciaries should therefore consider steps to improve the visibility of these interactions and their value.

Keywords: public law; Constitutional Reform Act 2005; judicial diplomacy; Brexit; judicial independence

Introduction

Since the enactment of the Constitutional Reform Act (CRA) 2005, a quiet revolution has unfolded within the judiciary of England and Wales.[1] The Act transferred the leadership and responsibility for much of the governance of the judiciary from the Lord Chancellor to the Lord Chief Justice, resulting in a 'considerable growth of the institutional power of the judiciary'.[2] This has enabled judges to develop a distinctive and wide-ranging programme of activities on the international plane. This programme is described by the current Lead Judge for International Relations, Lord Justice Gross, as 'independent of the executive but not free-lancing'.[3] It is multi-faceted, covering the judiciary's membership in international judicial associations, participation in bilateral and multilateral meetings with other judiciaries, engagement in law reform

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[1] Lord Judge, Judicial Studies Board lecture (March 2010).

[2] Gee et al distinguish between 'jurisdictional and 'institutional' judicial power. Whereas jurisdictional power concerns the substantive decision-making powers of the courts in legal disputes, institutional power refers to '… the ability of the judiciary to alter its own internal arrangements, to set the agenda, to initiate and make policy on issues relating to the judiciary and courts, and the ability to shape the thinking of the other branches of government and to influence public debate'. See G Gee et al *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015) p 25.

[3] P Gross 'Judicial leadership and reform' speech to the Supreme Judicial Council, Bahrain (February 2017).

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projects and the provision of support to judiciaries in developing countries, all prioritised on a strategic basis.[4]

This development reflects a broader trend in 'judicial diplomacy'[5] worldwide. Technological advancements and the interweaving of domestic and international legal orders have incentivised official, 'off the bench'[6] meetings between different groups of judges in various forums. As a result, many senior judges have developed roles as 'judicial statesperson[s]'[7] or 'ambassadors'[8] with responsibility for representing their court and its jurisprudence abroad. The US Supreme Court Justice, Stephen Breyer, argues that international engagements are now 'part of today's judicial experience' – the judicial role has become 'more diplomatic'.[9]

The rise of judicial diplomacy in the UK has significant ramifications. Regular interaction between judges has the potential to influence judicial reasoning and institutional practices, as the participating judges learn from the insights of other courts.[10] It can also enable courts to develop prestige and influence beyond their legal systems, thereby bolstering their position domestically and internationally.[11] The emergence of judicial diplomacy has particular importance in the context of Brexit. Senior judges are adamant that their engagements with judges abroad should continue, and no less within Europe. The Justice of the UK Supreme Court, Lady Arden, who served as the lead judge in international relations for England and Wales for 12 years, argues that Brexit requires the UK's judiciaries to strengthen, not weaken, their relations with their national and supranational counterparts, a view shared by the President of the Supreme Court, Lady Hale.[12] The political importance attached to these interactions is further underlined by the agreement on the UK's withdrawal from the EU, which indicates a shared view that meetings between UK judges and judges of the Court of Justice of the European Union (CJEU) should continue to take place beyond the UK's exit.[13] However, the engagement of judges in this area is not without its critics, and Brexit has renewed questions around the appropriate limits of judicial activity.[14]

The diplomatic work of senior judges in the UK is therefore an important dimension to their role in the changing constitution. In view of its salience, this paper offers an account of the aims and challenges of one prominent form of this diplomacy: bilateral meetings with supranational courts. It does so using a case study of the meetings which have taken place periodically between UK judges and the judges and officials of the European Court of Human Rights (ECtHR). For this purpose, it draws upon in-depth interviews conducted with eight Justices of the UK Supreme Court and four judges of the

[4]See https://www.judiciary.uk/about-the-judiciary/international/international-judicial-relations/ (last accessed 27 August 2019).

[5]D Law 'Judicial comparativism and judicial diplomacy' (2015) 163(4) U Pennsylvania L Rev 927.

[6]A Tatham '"Off the bench but not off duty": the judicial diplomacy of the Court of Justice' (2017) 22(3) EFA Rev 303 at 305.

[7]R Cornes 'Gains (and dangers of losses) in translation – the leadership function in the United Kingdom's Supreme Court, parameters and prospects' [2011] PL 509 at 512.

[8]Tatham, above n 6, at 304.

[9]S Breyer 'The court in the world' in S Breyer et al (eds) *The Justice Stephen Breyer Lecture Series on International Law 2014–2016* (Washington: Brookings Institution, 2017) p 22.

[10]A Slaughter *A New World Order* (Princeton: Princeton University Press, 2004) p 101.

[11]M Claes and M de Visser 'Are you networked yet? On dialogues in European judicial networks' (2012) 8(2) Utrecht Law Review 100 at 111–112.

[12]Lady Justice Arden 'International judicial work: the continuing need for international judicial dialogue as the UK's relationship with Europe changes' Speech to the Faculty of Advocates (26 October 2017); House of Lords Select Committee on the Constitution 'Uncorrected oral evidence: President and Deputy President of the Supreme Court' (21 March 2018). Lady Hale has been the President of the UK Supreme Court since September 2017.

[13]'… [T]he Court of Justice of the European Union and the United Kingdom's highest courts shall engage in regular dialogue, analogous to the dialogue in which the Court of Justice of the European Union engages with the highest courts of the Member States': Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018.

[14]R Ekins and G Gee 'Putting judicial power in its place' (2017) 36 UQLJ 375.

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ECtHR over 2014–15, along with extra-judicial commentary and other documentary sources. The bilateral meetings which have been held between these judges constitute an exemplary form of this type of judicial interaction within a supranational legal system. Judges on both sides have spoken of the value of these meetings and called for them to take place on a more frequent basis.[15] Despite having a longer constitutional history, dating back to the European Communities Act 1972, Paterson suggests that there has been far less direct interaction between UK judges and judges of the CJEU.[16] UK judges have suggested that the binding nature of Luxembourg judgments has limited the scope for constructive differences of view, and that it is less apparent from the reasoning that domestic judicial concerns have been heard.[17] Nonetheless, the meetings with the two supranational courts have been underpinned by broadly the same aims.[18] Studying these aims therefore offers valuable insights into the approach of UK judges in both contexts.

The analysis here suggests that judicial diplomacy has become an important feature of the work of senior judges in the UK. It has enabled them to pursue a combination of jurisprudential and strategic aims. At the jurisprudential level, UK judges have sought to promote well-reasoned decision-making at home and at the supranational level. Strategically, their aims have been twofold. They have attempted to preserve robust inter-institutional relations with the supranational courts during politically challenging periods, and have also sought to maximise their influence over the development of the supranational jurisprudence. However, this new area of judicial work poses challenges. The meetings with the supranational judges generally occur behind closed doors under conditions of confidentiality, raising questions for the maintenance of judicial independence and impartiality in this context. The judiciaries should therefore consider taking steps to improve the visibility of these encounters and their aims.

The paper consists of five parts. Part 1 sets out the theoretical and methodological framework for the research. Part 2 provides an account of UK-Strasbourg judicial relations, covering the historical emergence of the meetings, their frequency, the participants and the format of the discussions. In Part 3, the aims which have been attributed to the meetings by the judges are explored. These aims and their challenges in the wake of Brexit are then examined in Part 4. Finally, there are some concluding remarks on the future direction of the UK judges' bilateral engagements with supranational judges.

1. Theoretical and methodological framework

(a) Judicial diplomacy: incentives and limits

Judicial diplomacy occurs through a range of forums: bilateral and multilateral meetings, seminars, conferences, and official networks and associations.[19] However, participation in these engagements is to some extent determined by the characteristics of the court or judge in question. Generally,

[15]Lord Neuberger '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 Kerr 'The conversation between national courts and Strasbourg – dialogue or dictation?' (2009) 44 IJ 1 at 12; N Bratza 'The relationship between the UK courts and Strasbourg' (2011) 5 EHRLR 505 at 512; P Mahoney 'The relationship between the Strasbourg court and the national courts – as seen from Strasbourg' in K Ziegler et al (eds) *The UK and Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015) p 21; M Arden *Human Rights and European Law: Building New Legal Orders* (Oxford: Oxford University Press, 2015) p 286.

[16]A Paterson *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013) p 224.

[17]House of Lords Select Committee on the Constitution 'Evidence session with the President and Deputy President of the Supreme Court' (8 July 2015), Q4 (Lord Neuberger).

[18]The aims of judicial diplomacy which have been outlined by Lady Arden, for example, arguably the most influential English judge on this topic, apply explicitly to the relationships with both of the European supranational courts. Lady Justice Arden 'Peaceful or problematic? The relationship between national supreme courts and supranational courts in Europe' (2010) 29(1) YEL 3 at 12–13.

[19]Many such formal networks and associations now exist, such as the Network of the Presidents of the Supreme Judicial Courts of the Member States of the European Union, the Superior Courts Network (ECHR), and the Standing International Forum of Commercial Courts.

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such activities tend to be centred on the common adjudicative responsibilities and expertise of the participants, for example in the fields of constitutional law, human rights or commercial law, or their common membership within international legal regimes. The seniority of individual judges and the position of their court within their respective legal systems are also important, with appellate courts and more senior judges tending to participate most frequently.[20] Personalities are also a factor, since enthusiasm among judges for international engagements varies considerably. Some judges believe firmly in the value of these interactions, while others prefer 'to get on with the business of judging'.[21] There are 'insular' judges and there are 'extreme networkers'.[22] UK judges are no exception in this regard.[23] Shared legal traditions and pre-existing relationships between judges are also relevant to the level of diplomatic activity between courts.[24]

Beyond these characteristics, commentators have pointed to a range of 'incentives'[25] to participation in judicial diplomacy. These incentives can be categorised along *jurisprudential* and *strategic* lines. The jurisprudential incentives relate to the decision-making of the courts and their development of legal principles.[26] The strategic incentives, by contrast, concern the institutional interests of their courts, in particular their authority, legitimacy and influence with their different audiences.[27]

At the jurisprudential level, meetings between judges may help to improve the quality of legal reasoning, in a variety of ways. They offer an occasion to discuss and clarify case law, and exchange views in areas of common concern and interest.[28] Tyrrell argues that they have particular relevance for national judges working within supranational legal orders, providing opportunities to obtain guidance on the jurisprudence of the supranational courts.[29] More broadly, these encounters offer the judicial participants the potential for mutual enlightenment and influence as they exchange views and promote ideas from their respective legal systems.[30] Indeed, Claes and de Visser suggest that face-to-face meetings between judges can even facilitate 'a more political dialogue' in which judges advocate particular approaches to legal issues.[31]

In strategic terms, the various forms of judicial diplomacy constitute a form of 'outreach work'[32] which can help courts to enhance their standing among different judicial audiences. Such standing is important, and not only because judges generally value the esteem of their peers.[33] Mak argues that judicial authority in a globalised context is shaped in part by the prestige which different courts attribute to one another.[34] On that basis, judicial diplomacy can offer a number of potential advantages. It enables judges to demonstrate their intellectual quality on the international stage.[35] Further, Slaughter suggests that it allows courts to promote knowledge and understanding of their

[20] M de Visser and M Claes 'Courts united? On European judicial networks' in A Vauchez and B de Witte *Lawyering Europe: European Law as a Transnational Social Field* (Oxford: Hart Publishing, 2013) p 99.

[21] Interview with The Rt Hon Lord Clarke, Justice of the UK Supreme Court (UK Supreme Court, London, 9 May 2012) in H Tyrrell *UK Human Rights Law and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018) p 95.

[22] E Mak *Judicial Decision-Making in a Globalised World* (Oxford: Hart Publishing, 2013) p 85.

[23] R Hunter and E Rackley 'Judicial leadership on the UK Supreme Court' (2018) 38 LS 191 at 215–216.

[24] For example, Tyrrell notes that the UK Supreme Court tends to meet with common law courts, such as the Canadian Supreme Court and Constitutional Court of South Africa, more frequently: Tyrrell, above n 21, pp 93–94, 206.

[25] Claes and de Visser, above n 11, at 111.

[26] Hunter and Rackley, above n 23, at 193.

[27] N Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) pp 148–149.

[28] Claes and de Visser, above n 11, at 105.

[29] Tyrrell, above n 21, p 93.

[30] Mak, above n 22, pp 83–95; S Breyer *The Court and the World: American Law and the New Global Realities* (New York: Vintage Books, 2015) pp 249–270.

[31] Claes and de Visser, above n 11, at 112.

[32] Hunter and Rackley, above n 23, at 195.

[33] L Baum *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006) p 104.

[34] Mak, above n 22, p 78.

[35] Claes and de Visser, above n 11, at 111–112.

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case law, which in turn can encourage the citation of their decisions by other courts outside of their jurisdictions. Direct interactions, she suggests, can also help to shore up institutional relations, building mutual respect between courts and providing an important buffer to the underlying relationship in the event of future conflicts.[36] Building their authority internationally in these ways may in turn allow courts to strengthen their domestic position vis-à-vis the other branches of government.[37] Law thus contends that judicial diplomacy goes well beyond 'collective learning or intellectual debate' – it is also 'an exercise in power politics'.[38]

In view of these incentives, the involvement of judges in this sphere has prompted questions regarding the constitutional limits of the judicial role. Some have argued that meetings between judges from different courts and jurisdictions have the potential to undermine judicial impartiality and independence. These are closely related concepts, but they refer to distinctive, internal and external features of the judicial institution. According to O'Brien, impartiality concerns the judicial mind-set: the need for judges to have a 'personal psychological commitment' to deciding cases on the basis of the facts and law alone. Judicial independence, on the other hand, relates to the 'rules, conventions and cultural practices' erected to preserve that mind-set, thereby allowing judges to decide cases free from undue pressure or influence. These rules and practices also serve to symbolise judicial impartiality, which is 'otherwise almost intangible'.[39]

The traditional understanding of the judicial role is that judges should speak only through their formal pronouncements on the law. By this standard, participation in meetings with judges from other jurisdictions has the potential to compromise independence and impartiality.[40] This view has been forcefully articulated by Young, who argues that '[i]n no account of the British Constitution … does the role of the judge include acting as a branch of Foreign and Commonwealth Office'.[41] In his view, the involvement of judges in international engagements – what he terms a form of 'judicial executivism' – risks encouraging judges to step beyond their constitutional role and undermines their duty to decide cases 'on the basis of the evidence and arguments presented "after the laws and usages of this realm"', as per their judicial oath.[42] For national judges actively engaged in judicial diplomacy, de Visser and Claes suggest there is further risk of being perceived as prioritising international over domestic legal concerns.[43]

These concerns have particular salience in the context of Brexit, which has prompted renewed discussion regarding the appropriate limits of the judicial role. The judicial rulings that an Act of Parliament was required before the UK government could initiate the UK's withdrawal from the EU prompted fierce attacks on the judges' impartiality from sections of the press.[44] Some academic commentators have also expressed hope that Brexit will inspire judges to adopt a narrower understanding of their constitutional role. Ekins and Gee argue that a cumulative erosion of the limits of the judicial role over recent decades has left it 'overinflated', with judges having taken on responsibilities 'not fitting for their office'.[45] They therefore call for a return to a more limited judicial role confined to the impartial resolution of disputes based on the existing law.[46]

[36]Slaughter, above n 10, pp 101–102.

[37]Claes and de Visser, above n 11, at 111–112.

[38]Law, above n 5, at 1023.

[39]P O'Brien '"Enemies of the people": judges, the media, and the mythic Lord Chancellor' [2017] PL 135 at 141–142.

[40]de Visser and Claes argue that face-to-face meetings between judges from different jurisdictions were historically eschewed for this reason: de Visser and Claes, above n 20, p 98.

[41]J Young 'The constitutional limits of judicial activism: judicial conduct of international relations and child abduction' (2003) 66(6) MLR 823 at 835.

[42]Ibid, at 836.

[43]de Visser and Claes, above n 20, p 99.

[44]*R (on the application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] 1 All ER 158; *R (on the application of Miller and Another) v Secretary of State for Exiting the European Union* [2018] AC 61; 'Enemies of the people' (*Daily Mail*, 4 November 2016).

[45]Ekins and Gee, above n 14, at 384–385.

[46]Ibid, at 375, 398.

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In summary, the scholarship points to a range of reasons as to why judges might engage in diplomacy with other courts, but the pursuit of these incentives poses acute questions for the nature of the judicial role and its limits in the contemporary constitution, particularly in the wake of Brexit. It is therefore important to understand how UK judges have approached this dimension of their work.

(b) Methodology: in-depth interviewing and documentary analysis

Studying judicial diplomacy presents a number of methodological challenges. The content of discussions between different groups of judges is rarely published. Moreover, judicial decisions provide little, if any, insight into this topic, while the official reporting by the judiciaries in the UK on their international engagements lacks comprehensiveness and detail. This paper therefore adopts a methodology centred on the direct, extra-judicial accounts of judges with first-hand experience of these meetings. It relies on data obtained from 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.[47] It also draws from the lectures, statements and other extra-judicial work of senior UK judges which address this topic. Particular attention is given to the writings of Lady Arden. From 2004 to 2017, Lady Arden acted as the lead judge for international relations for the judiciary of England and Wales, and in October 2018 she was appointed as Justice of the Supreme Court. Her views therefore have particular relevance in this area.

The principal advantage to this approach is that extra-judicial comments can reveal judicial motivations which are not apparent from court judgments.[48] However, the usual limitations of reliance on judicial self-reporting, such as the potential for a lack of total candidness on the part of the interviewees, or the possibility of strategic responses, cannot be discounted entirely and are therefore an important caveat to the findings.[49]

2. UK-Strasbourg bilateral relations 2006–17

(a) The diplomatic capacity of the UK's judiciaries

The emergence of bilateral meetings between UK and ECtHR judges has been facilitated by major constitutional reforms over the last two decades which have given the UK's judiciaries the capacity to conduct relations with courts abroad. The Human Rights Act (HRA) 1998 provided a powerful incentive for bilateral relations with the judges in Strasbourg. It empowered the UK courts to adjudicate on rights under the European Convention on Human Rights (ECHR) and instructed them to 'take into account'[50] the judgments of the ECtHR in performing this task, thereby furnishing the courts with common purpose. While the Act left open whether UK judges should conduct any relations with the ECtHR judges, the new domestic legal status of the Convention rights and the judgments of the Strasbourg court undoubtedly provided the principal motivation for future bilateral discussions.

In constitutional terms, however, the HRA 1998 did not alter the judiciary's lack of autonomy in this field. This is underlined by the fact that the first bilateral meeting between UK and ECtHR judges did not take place until 2006, more than five years after the HRA 1998 entered into force.[51] As Lady Arden explains, until 2005, the international engagements of judges in England and Wales were the responsibility of the Lord Chancellor's department. The judges themselves had 'no control'[52] over these activities.

[47]These interviews were conducted as part of a wider examination of the ongoing exchange of views, or 'dialogue', between the UK courts and the ECtHR: G Davies *The Legitimising Role of Judicial Dialogue between the United Kingdom Courts and the European Court of Human Rights* (PhD thesis, Cardiff University 2017).

[48]A Paterson *The Law Lords* (London: Macmillan Press, 1982) p 211.

[49]B Flanagan and S Ahern 'Judicial decision-making and transnational law: a survey of common law supreme court judges' (2011) 60(1) ICLQ 1 at 8, citing L Epstein and G King 'The rules of inference' (2002) 69(1) U Chi L Rev 1 at 65–66.

[50]HRA 1998, s 2.

[51]Arden, above n 15, p 274.

[52]Arden, above n 12.

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The CRA 2005 radically altered this arrangement. It transferred the leadership of the judiciary of England and Wales from the Lord Chancellor to the Lord Chief Justice and with it numerous powers over its governance.[53] This included the responsibility and a small budget for international judicial relations, prompting a number of initiatives. The judiciary established a set of objectives for its international work, which included building links with judiciaries across Europe, and a new post of lead judge for international judicial relations was created.[54] The first judge appointed to this position was Lady Justice Arden (as she was then), as she recounts:

> 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.[55]

In this capacity, Lady Justice Arden organised the first meeting between UK and ECtHR judges in 2006.[56]

Since that first meeting, ongoing institutional reforms brought about by the 2005 Act have further enhanced the ability of UK judges to develop their relations with courts abroad. The judicial appellate committee of the House of Lords was replaced with the Supreme Court.[57] With considerably greater administrative and financial independence than its predecessor, the Court made the development of relations with the European courts one of its strategic objectives.[58] The 2005 Act also led to the establishment of the Judicial Office to provide support to the judges of England and Wales with their new responsibilities.[59] This further enhanced the judiciary's diplomatic capacity, with an international team providing logistical support for both incoming and outgoing judicial visits.[60]

For the judiciaries in Scotland and Northern Ireland, operating in distinct legal jurisdictions under separate structures of judicial governance, the 2005 Act had limited constitutional significance.[61] However, as a result of the reforms described above, the judiciary of England and Wales has adopted an important coordinating role in judicial diplomacy, liaising with the judges in Northern Ireland, Scotland and at the Supreme Court in the organisation of UK-wide bilateral engagements with the supranational courts.[62] To this extent, the 2005 Act has been important for the international work of judges across the UK, albeit indirectly for those in the Scottish and Northern Irish jurisdictions.

(b) A timeline of UK-Strasbourg judicial relations

Since 2006, bilateral meetings between UK and ECtHR judges have continued to take place. From the available details, eight meetings were held from 2006–2017.

As Table 1 shows, the meetings have generally taken place every 1–2 years. Their continuation since 2006 has been underpinned by a shared belief among the participants that the value of the encounters depends on their frequency.[64] Personalities have also been significant. Lady Arden has long emphasised the importance of relations with the European supranational courts, and has been described by the former ECtHR President, Dean Spielmann, as the 'moving force behind the strong relations that exist'[65] between UK and Strasbourg judges. Spielmann has also been an important personality,

[53] Constitutional Reform Act 2005, s 7.
[54] Arden, above n 12.
[55] Arden, above n 15, p 4.
[56] Ibid, p 274.
[57] Constitutional Reform Act 2005, Part III.
[58] UK Supreme Court *The Supreme Court Annual Report and Accounts* (2009-10, HC 64) p 15. On the increased administrative and financial independence of the UK Supreme Court, see Gee et al, above n 2, ch 8.
[59] Gee et al, above n 2, p 143.
[60] Judicial Office *The Judicial System of England and Wales: a Visitor's Guide* (Judicial Office, 2016) p 52.
[61] See Gee et al, above n 2, ch 9.
[62] Arden, above n 12.
[64] Arden, above n 15, p 315; Mahoney, above n 15, p 27.
[65] D Spielmann 'Whither judicial dialogue?' Sir Thomas More Lecture (12 October 2015).

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Table 1. Bilateral exchanges between UK and ECtHR judges[63]

Meeting number	Date	Location	Number of UK participants	Number of ECtHR participants
1	Mar 2006	Strasbourg	13	–
2	25–26 Oct 2007	London	12	8
3	18 Jun 2010	Strasbourg	12	9
4	16–17 Feb 2012	London	14	8
5	20 Mar 2014	London	–	–
6	3 Jul 2014	Strasbourg	8	10
7	23 Oct 2015	London	11	5
8	9 Jun 2017	Strasbourg	7	10

having been a major advocate of bilateral exchanges between the domestic judiciaries of states who are parties to the ECHR and the ECtHR.[66] It is noteworthy that there were more bilateral meetings between the UK and Strasbourg judges during his presidency from 2012 to 2015 than under any other ECtHR President. Nonetheless, limited resources on both sides, as well as the demands of adjudication, have prevented these meetings from taking place more regularly.[67] Despite the increased capacity of the judiciaries for international work, Lady Arden suggests that individual judges are often required to spend their annual leave in order to participate.[68]

(c) Setting the scene: the participants, format and tone of the meetings

Exchanges between the UK and Strasbourg judges usually involve 15–25 participants, as Figure 1 indicates. This usually comprises a 'pick-and-mix' of participants from each side. From the UK, the meetings have tended to include the Lord Chief Justice of England and Wales, the lead judge for international relations, the President and/or Justices of the UK Supreme Court, and senior judges from the Court of Appeal, the High Court and the Scottish and Northern Irish jurisdictions. In this respect, the meetings are consistent with broader trends in judicial diplomacy, where senior judges from domestic legal systems have tended to be the most common participants.[69] From Strasbourg, the meetings have usually included the Court's President, the UK judge at the Court, senior members of the Registry and, other judges.

In terms of format, the exchanges generally take place over the period of one to two days, consisting of what are variably described as 'roundtable discussions' or 'working sessions'.[70] UK delegations to Strasbourg tend to participate in one meeting together, whereas Strasbourg delegations to the UK have often attended separate meetings with the Lord Chief Justice and the Supreme Court. The meetings typically have a written agenda, which is agreed by the judges in advance.[71] Crucially, no minutes are recorded or published. During the meetings, the judges are free to articulate their questions, concerns and ideas. As one interviewed Justice described it, there is 'give and take and open discussion'.[72]

The judges consider this format to enable them to express themselves with greater nuance and without the reservation required when delivering judgments or public lectures. As one interviewed Strasbourg judge recounted, 'there is no press in attendance, the meeting is behind closed doors,

[66]D Spielmann, Speech at University College London Graduation Ceremony (6 July 2016).
[67]Spielmann, above n 65; Arden, above n 12.
[68]Arden, above n 12.
[69]de Visser and Claes, above n 20, p 99.
[70]See the records of visits to the ECtHR, above n 63.
[71]HL Constitution Committee, above n 17.
[72]Interview with Justice 7 of the UK Supreme Court (London, UK, 11 July 2014).

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the atmosphere is friendly, but the exchange of views is frank – so the participants do not pull their punches'.[73] They are therefore seen an important complement to the courts' respective judgments, which Lady Arden suggests are 'not always … the best way to make a point'.[74]

3. The aims of UK judges in bilateral exchanges

The findings from the analysis of the interviews and others documentary sources are consistent with much of what has been proposed in the scholarship. As a preliminary point, not all of the judges interviewed shared an enthusiasm for this area of work. Just as others have found, while some of the Justices (all but one, in this instance) saw value in these engagements, others were less convinced of the need for them.[75]

For the UK judges who see advantages in meeting with their supranational counterparts, there are three overarching aims: improving the quality of decision-making; maintaining good inter-institutional relations; and maximising influence at the supranational level. The first of these is *jurisprudential*, relating to the legal reasoning of the courts. The others are *strategic*, concerning their wider, institutional interests.

(a) The jurisprudential aim: improving the quality of decision-making

UK judges have engaged in bilateral meetings with the judges of the Strasbourg Court in order to enhance their understanding (and that of the Strasbourg judges) of considerations which are relevant to their decision-making. The encounters offer the judges the opportunity to receive guidance on the application of ECHR principles from the supranational judges, but also to contribute their views to the development of those principles. This reflects what Lady Arden suggests are the 'principal purposes' of international judicial diplomacy: to 'learn from judges overseas and, where appropriate, to influence their thinking'. The promise of this two-way process, she suggests, is a higher quality of domestic and supranational jurisprudence.[76]

(i) Guidance on case law

Bilateral meetings provide an occasion for the judges to discuss recent developments in their respective case law. The UK judges can 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',[77] and the ECtHR judges are able to provide feedback on that activity. According to the Justices interviewed, this feedback tends to be very positive, with the Strasbourg judges having repeatedly expressed their appreciation for the detail and rigour with which UK judges have applied the ECtHR case law. This was clearly the source of some pride for the Justices:

> [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.[78]

Additionally, the meetings were said to allow the judges to share their views on the application of common legal principles, such as proportionality and the margin of appreciation. Consistently with other

[73]Interview with Judge 4 of the European Court of Human Rights (Strasbourg, France, 29 May 2015).
[74]Arden, above n 12.
[75]Mak, above n 22, p 85; Tyrrell, above n 21, p 95.
[76]'Case law can be much richer and, as a consequence, more useful to practitioners and members of the public, when it has been the subject of prior discussion between judges from different jurisdictions'. Arden, above n 12.
[77]Interview with ECtHR Judge 4, above n 73.
[78]Interview with Justice 5 of the UK Supreme Court (London, UK, 11 July 2014).

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research in this area, some of the Justices interviewed claimed to find these discussions useful but were unable to link previous discussions to direct changes in reasoning.[79] As one Justice explained,

> It's difficult to say that there is any obvious, clearly identifiable practical consequence but at the same time it's been very important for us and, I hope, for them, … to have different perceptions of how one should deal with particular points articulated. I think it's very helpful.[80]

An area where the meetings were considered to be particularly valuable, however, is in the discussion of problems which have arisen in practice. A notable example given by the Justices concerned the domestic application of Strasbourg case law. For the first decade of the HRA 1998, UK judges wrestled with the question of how to apply the decisions of a court that did not adhere to the same system of judicial precedent, nor explicate its reasoning 'in the discursive analytical style of the common law tradition'.[81] One Justice suggested that the tendency of UK judges was 'to try and reconcile every single Strasbourg authority',[82] often with great difficulty. For several of the Justices interviewed, this issue had been vividly demonstrated in the case of *Sturnham*,[83] a case concerning the award of damages for violations of the right to a speedy review of a detention under the ECHR, Article 5(4). The judgment gives voice to the frustration among the Justices with the 'time-consuming process'[84] required to survey over 70 Strasbourg decisions which had been presented to the Court.

In light of these difficulties, meetings between the judges were considered a valuable aid. According to one Justice, ECtHR judges can '… give us a bit of assistance as to how they think we should be approaching it'.[85] 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.[86]

Some Justices questioned the feasibility of this approach, given that there are comparatively fewer Grand Chamber judgments. Nonetheless, having the benefit of these suggestions was valued by several of the Justices in helping to inform and develop their approach to Strasbourg cases.

(ii) Influencing the supranational jurisprudence

Equally, the judges value the meetings as an opportunity to contribute to the development of judicial thinking at the supranational level. In particular, the meetings offer an occasion to enhance knowledge and understanding of domestic law and practice in Strasbourg. Several of the Justices interviewed shared a view that the ECHR system is dominated by states with civil law legal traditions, from which the ECtHR also draws most of its judges. It was therefore felt that the approach of the ECtHR to the development of its jurisprudence is shaped predominantly by those traditions. This was felt to give rise to occasional misunderstandings of the common law system in the UK – a criticism which has been articulated in a number of judgments since the enactment of the HRA 1998.[87]

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[79] Tyrrell, above n 21, p 94.

[80] Interview with Justice 5, above n 78.

[81] R Clayton 'Smoke and mirrors: the Human Rights Act and the impact of Strasbourg case law' [2012] PL 639 at 656.

[82] Interview with Justice 2 of the UK Supreme Court (London, UK, 8 July 2014).

[83] *R (Sturnham) v Parole Board for England and Wales* [2013] 2 AC 254.

[84] Ibid, at [99] (Lord Reed).

[85] Interview with Justice 7, above n 72.

[86] Interview with Justice 2, above n 82.

[87] *Barrett v London Borough of Enfield* [2001] 2 AC 550 (HL) at 559–560 per Lord Browne-Wilkinson; *R v Spear* [2003] 1 AC 734 (HL) at [12]–[13] per Lord Bingham, [66]–[97] per Lord Rodger; *Doherty v Birmingham City Council* [2009] 1 AC

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In that context, the meetings were said to provide an opportunity for UK judges to explain features of domestic law and procedure. As one Justice explained, they are able to set out 'the mental processes of the common law' and thereby 'clear away misunderstandings'.[88] This was viewed as a useful means of minimising the potential for misunderstandings to arise in the ECtHR's judgments. Additionally, the judges are able to make suggestions as to how the supranational jurisprudence can be integrated at the domestic level with minimal disruption to the domestic legal order. As Lady Arden puts it, 'a quiet conversation between judges can head off steps which might prove ill-advised'.[89] Several of the ECtHR judges interviewed agreed that the meetings are valuable in this respect. One judge suggested that it is

> … the role of the British judges at these meetings … 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.[90]

Another Strasbourg judge observed that the result of such discussions is that 'we better understand the consequences of the [ECtHR's] judgments and what we should take into account'.[91]

Additionally, UK judges use the meetings to communicate their concerns directly where they feel the supranational jurisprudence is in tension with the constitutional identity of the domestic legal system.[92] The UK courts operate within a domestic common law system (with the exception of Scotland) and a constitutional tradition centred on the doctrine of parliamentary sovereignty. The ECtHR, on the other hand, is a supranational court with a jurisprudence developed from a wide range of legal and constitutional traditions and political circumstances. According to Lord Kerr, this difference reflects 'the most potent source of tension'[93] between the two sides, since the disparate influences on ECtHR judgments inevitably create challenges for their domestic application.

In that context, the judges regard it as their responsibility to protect the domestic legal and constitutional order at the supranational level. To this end, the meetings are viewed as an important check on the power of the supranational courts, which helps to ensure accountability to domestic judicial concerns.[94] For some of the Justices interviewed, this was particularly important given the status of the common law as a minority legal tradition in Europe. On the international stage, they regard themselves as ambassadors and defenders of this tradition. Thus, the former President of the Supreme Court, Lord Neuberger, suggests that the meetings have given UK judges the opportunity to indicate '… where we are concerned that the common-law voice or concerns in this country are not being taken in the way that we think they should be taken'.[95] Additionally, the judges have used the meetings to raise concerns over the ECtHR's approach to subsidiarity, the principle that the national authorities are the primary guarantors of the ECHR rights.[96] Several judges have previously suggested that the ECtHR had undermined this principle by contradicting the fact-finding of domestic courts and narrowing the margin of appreciation by which it defers to the

367 (HL) at [20] per Lord Hope, at [80]–[88] per Lord Scott; *R v Horncastle and Others* [2010] 2 AC 373 at [14] per Lord Phillips, at [107]; *R v McLoughlin and Newell* [2014] 1 WLR 3964 at [29]–[36] per Lord Thomas; *R (Haney, Kaiyam and Massey) v Secretary of State for Justice* [2015] 1 AC 1344 at [33]–[36] per Lord Mance and Lord Hughes.

[88] Interview with Justice 1 of the UK Supreme Court (London, UK, 8 July 2014).

[89] Arden, above n 15, p 286.

[90] Interview with ECtHR Judge 4, above n 73.

[91] Interview with ECtHR Judge 3 of the European Court of Human Rights (Strasbourg, France, 29 May 2015).

[92] 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/ (last accessed 27 August 2019).

[93] Lord Kerr, above n 15, at 3.

[94] Lady Justice Arden, above n 18, at 13.

[95] HL Constitution Committee, above n 17.

[96] Brighton Declaration 2012, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (last accessed 27 August 2019).

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decision-making of national authorities.[97] The meetings were therefore said to have provided national judges with a forum in which to voice these concerns directly, and one Justice expressed the view that the ECtHR had clearly responded to those concerns with its development of the subsidiarity principle in its case law.[98]

UK judges are therefore using their bilateral engagements not only to improve understanding at the level of decision-making but also as a means of advancing domestic constitutional interests in the development of supranational law. Moreover, there was a clear sense among several of the Justices interviewed that the ECtHR has been actively taking their views into consideration. Taken together, these insights may help to explain the growth in confidence which the UK judges have displayed in their approach to the ECtHR case law in recent years.[99] Bates notes that the judges have entered a 'new phase', in which they have become '… become more circumspect about the ECtHR, and far more willing to question its case law in the context of the domestic protection of human rights'.[100] There has also been a renewed emphasis on the common law as a source of rights protection in the case law of the UK courts.[101] Clearly, bilateral meetings have not been the only factor in these developments. As Fenwick and Masterman observe, anti-European political narratives appear to have played a significant role in encouraging UK judges to 'emphasise the existing, and distinctly national, capacity of the courts to uphold individual rights'.[102] However, it is notable that Lady Arden considers the informal exchanges between the courts to have been 'instrumental'[103] in developing the confidence of senior UK judges. Individual meetings may have not led to immediate changes in reasoning, but by giving the judges an additional forum in which to engage with the views of the supranational judges, voice concerns and participate in the development of the supranational jurisprudence, they may have engendered a more subtle influence in domestic judicial decision-making over time.

(b) Strategic aims

The considerations discussed so far have related primarily to the quality of the courts' decision-making. In short, UK judges have engaged with their Strasbourg counterparts *outside* of court in order to enhance their appreciation of what they do respectively *inside* court. However, the interviews and extra-judicial insights indicate that this is not the whole picture: UK judges also pursue strategic aims through these engagements in order to maintain and strengthen their position in the supranational sphere.

(i) Maintaining good inter-institutional relations

One such aim is the maintenance of robust inter-institutional relations between the courts. Over the years, such relations have been threatened by a range of legal and political developments. The courts have often disagreed in their interpretation of the Convention rights, and several senior UK judges

[97] Speech by Baroness Hale in European Court of Human Rights *What are the limits to the evolutive interpretation of the Convention?* (Strasbourg: Council of Europe, 2011) p 18. Lord Phillips 'European human rights – a force for good or a threat to democracy?' Centre of European Law Lecture (King's College London, 17 June 2014).

[98] For a review of the Court's development of the subsidiarity principle, see R Spano 'The future of the European Court of Human Rights – subsidiarity, process-based review and the rule of law (2018) 18(3) Human Rights Law Review 473.

[99] For two recent examples see *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] AC 624 at [36]–[37].

[100] E Bates 'The UK and Strasbourg: a strained relationship – the long view' in Ziegler et al, above n 15, p 67.

[101] *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* [2016] AC 219; *R (Ingenious Media Holdings plc and another) v Commissioners for Her Majesty's Revenue and Customs* [2017] 1 All ER 95; C Lienen 'Common law constitutional rights: public law at a crossroads?' (2018) PL 649.

[102] H Fenwick and R Masterman 'The Conservative project to "break the link between British courts and Strasbourg": rhetoric or reality?' (2017) 80(6) MLR 1111 at 1133.

[103] Arden, above n 12.

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have publicly aired concerns about the interpretive methods adopted by the ECtHR,[104] and, occasionally, even the quality of its judges.[105] The UK Conservative Party has frequently championed a replacement of the HRA 1998 which would weaken the protection for particular Convention rights, and has repeatedly pledged to withdraw the UK from the ECHR.[106] In 2011, anti-Strasbourg sentiment reached such a severe level that the President of the ECtHR used a public lecture to express the 'dismay and resentment' felt among the Court's judges at the 'vitriolic … xenophobic fury' from politicians and sections of the media.[107]

In the face of these legal and political currents, frank, face-to-face discussions between the judges were felt to perform a valuable, psychological role. One Justice explained how they allow inter-institutional prejudices and assumptions to be challenged:

> 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.[108]

Similarly, another Justice suggested that the meetings help to reinforce a sense of cooperation and common purpose among the judges. This was considered a valuable way of managing the inevitable, constitutional tensions which arise between national and supranational courts.

More specifically, the meetings were said to allow the judges to distance themselves from the political context. One Justice observed that the UK might suffer from a view that it is 'antagonistic' as a country due to the 'political stance' toward the Strasbourg Court.[109] Moreover, there was clear awareness among the Justices that the 'dismay and resentment' felt by judges at the ECtHR had the potential to spill over into similar feelings toward UK judges, damaging their relations. It was therefore considered that '… developing relations with the Strasbourg Court and actually meeting them and seeing the judges is very, very important'.[110] It was said to allow UK judges to emphasise that the purpose of the criticisms expressed in their judgments is not to politically undermine the ECtHR but to strengthen the quality of the supranational jurisprudence.

In these ways, judicial diplomacy between the UK and the ECtHR is consistent with what has been suggested in the scholarship. UK judges use these meetings to renew inter-institutional trust and goodwill and thereby reinforce the underlying relationship.[111] The importance which some of the judges place on the need to distance themselves from the political context also underlines the autonomy with which the judges now view their relations with courts abroad since the changes ushered in by the 2005 Act.

(ii) Maximising influence

Maintaining good relations between the courts is connected to a further strategic aim: maximising influence. It was discussed earlier how the UK judges regard themselves as integral to the protection of the domestic constitution and the common law tradition. In this vein, one Justice suggested that it is incumbent upon them to ensure that the supranational courts are 'listening to us, taking into account our concerns and interests'.[112]

[104]Lord Justice Laws 'The common law and Europe' Hamlyn Lectures (27 November 2013); Lord Sumption 'The limits of law' 27th Sultan Azlan Shah Lecture (Kuala Lumpur, 20 November 2013); Lord Judge 'Constitutional change: unfinished business' (4 December 2013).

[105]Lord Hoffmann 'The universality of human rights' Judicial Studies Board Annual Lecture (19 March 2009).

[106]Fenwick and Masterman, above n 102.

[107]Bratza, above n 15.

[108]Interview with Justice 3 of the UK Supreme Court (London, UK, 8 July 2014).

[109]Interview with Justice 7, above at n 72.

[110]Ibid.

[111]Slaughter, above n 10, pp 101–102.

[112]Interview with Justice 7, above n 72.

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There was a shared view among some of the Justices interviewed that maintaining good relations with the Strasbourg judges can help to bolster their influence in this regard. One Justice argued that 'if they see that we are basically friendly … hopefully they'll listen more to us'.[113] There have been clear indications from ECtHR judges that meetings are indeed conducive to greater receptivity to domestic judicial concerns. The former ECtHR judge, Paul Mahoney, has written that '[a]s 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'.[114]

Good relations with other European domestic judiciaries are also considered to be strategically valuable for bolstering influence. For example, the Supreme Court holds regular exchanges with the French Conseil d'État and the German Constitutional Court.[115] One Justice explained that these allow the domestic judiciaries to identify shared interests and concerns, which can then be communicated at the supranational level: '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'.[116]

UK judges are therefore using bilateral engagements not only to improve the quality of decision-making at home and at the supranational level. The insights here suggest that they use these encounters as strategic opportunities to reinforce their relationships with the supranational courts and maximise their influence. Moreover, it is clear that the judges can be tactically-minded in how they seek to exercise influence. Law's observation that judicial diplomacy is as much about 'power politics' as 'intellectual debate' therefore seems to have resonance in this context, even if the power politics here play out discreetly via discussions on the application of legal principles.[117]

Seeking to exercise influence in this way has arguably become more important in recent years in view of the fact that UK judges currently sit outside of two additional channels of influence which have been introduced into the ECHR system. The UK Government has shown no appetite for ratifying Protocol 16 ECHR, which enables national courts to request advisory judgments from the ECtHR on the interpretation of Convention rights.[118] Additionally, while several have expressed an interest in joining, none of the UK courts are currently members of the Superior Courts Network, the ECtHR's new online platform for case law, research and other information exchange with the national judiciaries of states who are parties to the ECHR.[119] Thus, their direct meetings will continue to be an important means of engaging with the judges of the ECtHR.

4. Judicial diplomacy and constitutional propriety

(a) Relations with the CJEU in the Brexit era

Judicial diplomacy and its constitutional propriety take on new significance in the wake of Brexit. Senior judges in the UK have insisted that they will continue to meet with judges of the Luxembourg court for as long as EU law remains relevant to their decision-making.[120] Since the European Union (Withdrawal) Act (EUWA) 2018 will retain a substantial body of EU law at

[113] Ibid.

[114] Mahoney, above n 15, p 27.

[115] UK Supreme Court *The Supreme Court Annual Report and Accounts* (2017–18, HC10 32) p 57.

[116] Interview with Justice 7, above n 72.

[117] Law, above n 5, at 1023.

[118] 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.

[119] Protocol 16 to the European Convention on Human Rights and Fundamental Freedoms. The UK Supreme Court, the Court of Appeal of England and Wales, the Court of Session, the High Court of Justiciary and the Northern Ireland Court of Appeal have expressed an interest in joining the SCN. See https://www.echr.coe.int/pages/home.aspx?p=court/network&c= (last accessed 27 August 2019).

[120] HL Constitution Committee, above n 12.

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the domestic level as it appears at the time of the UK's official exit, this may be for some years to come.[121] Moreover, while the Withdrawal Agreement between the UK and the EU remains unratified at the time of writing, it is worth noting that Article 163 of the agreement envisions a continuing relationship between UK and Luxembourg judges based on 'regular dialogue and information exchange'.[122]

In the short to medium term, the evidence suggests that the judges will continue to pursue similar aims in their diplomacy with the CJEU. For example, the judges have drawn attention to the continuing need for bilateral meetings over the coming years to ensure well-informed decision-making at home and in Luxembourg. Lord Neuberger argues that this follows logically from the structure of the EUWA:

> If we have issues of EU law that will now become UK law, they will make decisions on legislation in the European Court of Justice for EU purposes, and we will make decisions in our courts on identically worded legislation in the UK. It seems sensible to maintain contact with them to discuss matters of mutual interest for the benefit of the people of this country and the people of the EU.[123]

In this respect, it is notable that the continuing dialogue and information exchange envisioned in the Withdrawal Agreement is also aimed explicitly at promoting consistent judicial interpretation of its provisions. Moreover, UK judges have emphasised the strategic importance of maintaining 'friendly relations' with the judges in Luxembourg for as long as EU law and CJEU decisions remain relevant to their work.[124] It seems likely that the judges will use their ongoing exchanges to contribute to the development of the supranational jurisprudence in those areas where it remains relevant to the UK after Brexit, so as to maintain workability with domestic constitutional and legal arrangements wherever possible. It is also clear that the judges now view their international engagements more generally as a means of clarifying the UK's legal situation to global audiences.[125]

Thus, if realised, the UK's departure from the EU appears set to give renewed significance to judicial diplomacy between the UK and Luxembourg. However, the highly politicised context of the process also increases the salience of concerns around judicial independence and impartiality arising from this work. Those concerns therefore merit careful consideration.

(b) A threat to judicial independence?

The *Guide to Judicial Conduct* for judges in England and Wales states that '… judicial independence extends well beyond the traditional separation of powers and requires that a judge be, and *be seen to be*, independent of all sources of power or influence'.[126] Of course, judicial independence does not require the 'complete absence of any dependence on others'.[127] Indeed, under the HRA 1998 and European Communities Act 1972, UK judges have been dependent on the judgments of the supranational courts for their interpretation of the treaties. The question is whether existing practices in judicial diplomacy are sufficient to ensure judicial independence, and the perception of judicial independence.

When meeting with judges from other courts, UK judges remain subject to their duty of independence. In the context of these meetings, however, which generally take place under conditions of

[121] European Union (Withdrawal) Act (EUWA) 2018, ss 2–4.

[122] Withdrawal Agreement, above n 13.

[123] House of Lords Select Committee on the Constitution, 'Evidence session with the President and Deputy President of the Supreme Court' (29 March 2017).

[124] HL Constitution Committee, above n 12, Q1 (Baroness Hale).

[125] Arden, above n 12; Sir Geoffrey Vos 'The future for the UK's jurisdiction and English law after Brexit' Legal Business Seminar (Frankfurt, 28 November 2017); Lord Justice Hamblen 'Myths of Brexit' Brexit conference (Hong Kong, 2 December 2017).

[126] Courts and Tribunals Judiciary *Guide to Judicial Conduct* (2018) p 7 (emphasis added).

[127] Gee et al, above n 2, p 15.

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confidentiality, fulfilment of that duty relies on self-policing by the judges. According to one Justice, the participating judges therefore require 'an intuitive sense of what are the proper boundaries'.[128] Their approach to the meetings should be the same as in any other context:

> I don't think there's anything wrong with having informal meetings … provided that in discussions of that kind you say nothing that you might feel embarrassed to be recorded as having been said by you if some outside party were sitting in a room listening to the conversation.[129]

In self-policing their independence, it seems that the judges distinguish between raising concerns with supranational judges – for example, over the clarity or coherence of the jurisprudence – and openly advocating a particular, substantive change in the existing jurisprudence. The former is considered a legitimate concern for judges to express, whereas the latter represents an unacceptable foray into political territory. A similar distinction has been expressed by the former Lord Chief Justice, Lord Thomas, on the matter of judicial meetings with government ministers and parliamentarians. He argues that while policy is the preserve of the elected branches, judges can legitimately provide 'technical advice' as it relates to the administration of justice, drawing from their 'wealth of experience regarding both the operation of substantive and procedural law':

> It can properly encompass the practical consequences of proposals. It can outline how they would interact with existing procedure. Such interaction may produce otherwise unforeseen consequences in seemingly unrelated areas.… The aim is not to pass judgement on the merit of the proposal. It is to ensure that if it goes ahead it will work as well as it possibly can.[130]

For several of the Justices interviewed, there is a bright line distinction between such advice and any attempt to press for substantive change in policy at the supranational level. One Justice stated this plainly:

> 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 I've no awareness that any such a thing has ever happened and I don't believe that it would.[131]

Nevertheless, it is important to consider whether self-policing alone is sufficient to ensure judicial independence and the perception of judicial independence. The principal challenge is that the content of the discussions between the judges is not publically disclosed. As a matter of perception, this secrecy has the potential to create the impression of 'glamorous and vaguely conspiratorial' activities 'behind closed doors'.[132] More importantly, it makes it difficult to know just how far the judges seek to advocate particular views or concerns, and whether these efforts cross boundaries.

The notion of domestic judges seeking to influence the direction of jurisprudence at the international level is not generally regarded as controversial. On the contrary, it is viewed by many judges as necessary for the cohesiveness and longevity of supranational legal regimes. 'Dialogue' at the level of judicial decision-making, for example, has effectively involved the UK courts advocating through their judgments a set of arguments engineered to convince the ECtHR to reconsider its position on an issue; ideally, to have 'a change of heart'.[133] In several instances, the UK courts have enjoyed high-profile

[128]Interview with Justice 3, above n 108.

[129]Ibid.

[130]Lord Thomas 'Reflections of a serving Lord Chief Justice' in J Cooper (ed) *Being a Judge in the Modern World* (Oxford University Press, 2017) pp 25, 27–28.

[131]Interview with Justice 3, above n 108.

[132]D Law and W Chang 'The limits of global judicial dialogue' (2011) 86 Wash L Rev 523 at 535.

[133]*R (Chester) v Secretary of State for Justice* [2014] 1 AC 271 at [137] (Lord Sumption).

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success with these efforts.[134] What is more, UK judges have, on multiple occasions, aired substantive criticism of the jurisprudence of the ECtHR in public lectures. Some commentators suggest that judges have ventured into political territory through such extra-judicial pronouncements.[135]

However, unlike the discussions through meetings, these interactions are a matter of public record. The criticisms and compromises signalled through lectures and judgments are there for all to see, and the constitutional propriety of these actions can be examined and debated. It may be that the judges have always stayed well within the boundaries of judicial independence during these encounters. Indeed, in recent years, UK judges have shown themselves adept at self-policing in their official, extra-judicial activities.[136] As in other contexts, however, the meetings may nonetheless give rise to concern for judicial independence 'simply because such talks are held in secret and no one outside knows what was said'.[137] Even if the judges adhere strictly to their duty of impartiality, the risk is that the perception of their independence could be harmed. This risk is particularly acute in the context of Brexit, where senior UK judges have been accused by sections of the press of having ideological predilections to European legal institutions.[138]

(c) Striking a balance between independence and accountability

Whatever the actual or perceived threat to judicial independence, there are risks in attempting to pry open the closed doors. An obvious change to current practice would be to have every meeting recorded, transcribed and published, but this would be a fraught step. Some judges appear to regard the current discretion afforded to meetings between courts as part of the confidentiality which applies to the deliberations which precede a judicial decision.[139] In that light, there may be a risk that opening the door of public scrutiny to these meetings could create an expectation that all manner of judicial deliberations should be made publically available. Indeed, one Justice interviewed suggested that it could lead to a loss of the frankness which the judges deem critical to the success of the exchanges. Moreover, publishing the details of every meeting would also present practical challenges.

As with other measures of judicial accountability, there is also the risk that such a step could actually undermine, rather than strengthen, the perception of judicial independence. The information released about the meetings could be misinterpreted, while the implicit expectation which it would place on the judges to explain and justify the meetings 'might encourage suspicion that they have committed some wrong'.[140] The tension which confidential meetings between UK and other judges pose for their perceived impartiality therefore needs to be weighed carefully against the countervailing risks of greater openness.

One option to strike an appropriate balance is the use of softer accountability measures, such as additional judicial reporting.[141] Either through press releases or annual reports, individually or in combination, information about key bilateral exchanges with other judiciaries could be published by the judiciary of England and Wales, the Supreme Court, and other participating judiciaries, where feasible. This could include the topics, key points of discussion and agreed points of consensus or action points, without attributions to individual participants. This would not be a radical step, since

[134] *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23; *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21; *Hutchinson v United Kingdom* App no 57592/08 (17 January 2017).

[135] C Gearty 'On fantasy island: British politics, English judges and the European Convention on Human Rights' (2015) 1 EHRLR 1 at 6.

[136] R Hazell and P O'Brien 'Meaningful dialogue: judicial engagement with Parliamentary committees at Westminster' (2016) PL 54 at 72; R Hazell and J Wells 'Judicial input into parliamentary legislation' (2018) PL 106 at 127.

[137] Hazell and O'Brien, ibid, at 72.

[138] Daily Mail, above n 44.

[139] The former ECtHR President, Dean Spielmann, spoke of the need for confidentiality as self-evident: 'By the very nature of the exercise, the content of our exchanges is not placed on any public record': Spielmann, above n 65.

[140] Gee et al, above n 2, p 20.

[141] A Sengupta 'Judicial accountability: a taxonomy' (2014) PL 245 at 263, citing K Malleson *The New Judiciary: The Effects of Expansion and Activism* (Oxford: Routledge, 1999).

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information about these meetings is already shared on an ad hoc basis through judicial speeches, appearances before parliamentary select committees and extra-judicial writings. Moreover, the templates for additional reporting are already in place. The reports of the UK Supreme Court and the Lord Chief Justice of England and Wales already contain sections on the international work of the judges, albeit with limited detail. The courts have also released occasional press releases for meetings with visiting courts, detailing the participants and areas for discussion.[142] Openness in this area of judicial work could therefore be enhanced, and judicial independence strengthened, by rendering existing practices more consistent and more comprehensive.

Providing further clarity as to the purpose and content of the discussions could provide assurance that the judges are not stepping beyond their constitutional roles. Moreover, the improved accountability could encourage the judges involved in this work '… to reflect on their performance, to obtain feedback from stakeholders and to ensure that they are focused on achieving desirable societal outcomes'.[143] It could also promote wider understanding and support for this aspect of judicial work, and reflect its growing significance for senior judges in the UK. These changes would also be in step with the growing expectation that all those who exercise public power, including judges, should be accountable in some way for how that power is exercised.[144]

Conclusion

A significant consequence of the Constitutional Reform Act 2005 has been the rise of judicial diplomacy in the UK. Bilateral meetings between UK and European supranational judges are a key part of this new activity. The domestic judicial aims which have underpinned these exchanges are consistent with much of the existing scholarship on judicial diplomacy. At one level, the judges' aims are jurisprudential. They look to improve the quality of decision-making at home and at the supranational level by discussing recent case law developments, exchanging views on the application of legal principles, explaining features of domestic law and thereby protecting domestic constitutional interests. However, these are also tied to strategic aims: maintaining good inter-institutional relations with supranational judges and maximising their influence at the supranational level.

The determination to continue with these engagements in the context of Brexit underlines the significance which they have acquired in the minds of senior judges. It is also a powerful signal of the lasting sense of institutional autonomy which has resulted from the quiet revolution ignited by the Constitutional Reform Act. Nonetheless, there are challenges arising from this work. The conditions of confidentiality under which the meetings take place may threaten the perceived impartiality of the participating judges. The use of more consistent and comprehensive reporting on these activities by the judiciaries could help to alleviate this difficulty without compromising their effectiveness. Providing detail and clarity about the purpose of these encounters will also be particularly crucial in the context of Brexit in order to prevent misunderstandings or deliberate misrepresentations of the nature of the relationships between UK and supranational judges. In doing so, it may also help to secure a stable place for judicial diplomacy in the UK's changing constitution.

[142]Eg UK Supreme Court 'Chief Justice of India to visit United Kingdom judges' (18 June 2012), available at https://www.supremecourt.uk/news/chief-justice-of-india-to-visit-united-kingdom-judges.html (last accessed 27 August 2019).

[143]Gee et al, above n 2, p 18.

[144]A Le Sueur 'Developing mechanisms for judicial accountability in the UK' (2004) 24(1) LS 73 at 75.

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