Foreword

EUROPE FAREWELL?

The Rt Hon Lord Mance PC[*]

Lord Neuberger gave a "rear-view perspective" in the last volume of the Yearbook covering most of the span of my own judicial career.[1] But there is one area where it could be fruitful to add something. That is the relations between the judiciary and Europe. These have flourished over recent years. The common law has had, and been accepted as, a positive influence on the European legal scene. Now - despite the increasingly evident pregnancy of the question-mark in my title – the UK remains due to leave the European Union ("EU") at some relatively early date. But judicial relations with Europe will continue to be important. We shall remain party to the ECHR and a significant interlocutor of the European Court of Human Rights ("ECtHR"). Much of EU law will transmute into domestic law, with consequential questions about continuing alignment. The reflexive effect of EU law is also likely to be significant in shaping UK standards, behaviour and law. However, our absence from EU institutions and meetings will make it less easy than hitherto to maintain contacts, inter-action and influence. Against that background, I will therefore, in this foreword, look at relationships – past, present and future – between the common law, other European legal systems and the two European courts, the ECtHR and the Court of Justice of the European Union ('CJEU').

From 2005, I enjoyed, in a non-political way, four years' experience of the Upper House, and had the privilege of being the last of the Law Lords who, by convention, chaired the sub-committee of the EU Select Committee responsible for European Law and Institutions. During this period we took evidence, both at home and as a "first" in Brussels, where we saw in operation well-respected and influential British diplomacy in the form of UKRep,[2] the importance of whose head, the UK Representative to the EU, was symbolized by the fact that he had taken over the UK Ambassador to

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[1] Lord Neuberger, 'A Glance in the Judicial Rear-View Mirror' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8 -2016-2017 Legal Year* (Appellate Press 2018).

[2] For more information, see Foreign and Commonwealth Office, 'UK Representation to the EU Brussels' <https://www.gov.uk/world/organisations/uk-representation-to-the-eu> accessed 27 December 2018.

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Belgium's elegant Residence. We prepared or contributed to reports on various issues, which (as I write in the middle of the Brexit debate) may or may not prove to have been of enduring interest. With the aid of the House of Lords' excellent legal advisers, these included the House's report on the Treaty of Lisbon.[3] The report was widely read and quoted across Europe, whose common legal language is now English.

Article 255 of the Treaty of Lisbon, introduced with considerable impetus from the UK, provided for a seven-person committee to be nominated by the Council of Ministers and to be responsible for reporting on the suitability for appointment of candidates nominated by Governments of the EU to serve as Judges or Advocates General at the CJEU. I served on that committee for the maximum of two terms from 2012 to 2018. Throughout that period its masterly chair was the Vice-President of the Conseil d'État, M. Jean Marc-Sauvé. We evaluated and interviewed 73 first-time candidates for six-year terms and rejected 14(i.e. 19% of the candidates). More precisely, we rejected 7 out of 32 in the first four years (i.e. 22%), reducing to 7 out of 41 in the second four-year period (i.e. 17%). The work and reports of this committee have had an influence on the selection practices and standards of individual EU Member States. But it cannot not choose the candidates which it evaluates, or therefore contribute to any balance of backgrounds, qualifications or skills on the court. It is a sad comment on European solidarity that the smaller countries of the Union vetoed a suggestion that some of the members of an expanded General Court should be chosen by competition across Europe.

By the time I became a Law Lord, there was a well-established tradition of meetings of UK judges from all levels with the highest courts of various foreign judiciaries. These included the Supreme Courts of the USA, Canada and India, the Cour de Cassation and Conseil d'État and the *Bundesgerichtshof* (the German Supreme Court or '*BGH*') as well, of course, as the two European Courts. Lord Goff, with his friendship with Professor Dr Christian von Bar, was particularly active in relation to the German exchanges, as was Lord Hope in relation to the Conseil d'État. With the domestication of the European Convention on Human Rights ('ECHR') and an increasing focus in the workload of the Law Lords on public law, we decided that the *Bundesverfassungsgericht* (the German Constitutional Court or '*BVerfG*') would also be a natural partner in discussions. We suggested to the President of that Court that it would be excellent if one or more members of the *BVerfG* could attend an exchange with the *BGH*. Professor Dr Gertrude Lübbe-Wolf came, and so started a series of meetings with the *BVerfG* which continues to this day and has revealed much common ground

[3] EU Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007–08, 62-I).

on European issues.

In recent times, the regular judicial assistants of the UK Supreme Court have also been joined for short periods by German comparativists in their late 20s about to complete their law studies. These came on the recommendation of, for example, the Max-Planck Institute for Comparative and International Private Law in Hamburg. Their input proved invariably stimulating, and it is a pity that at present the UK Supreme Court does not have the full-time comparative research capability by which some other apex European courts benefit.

Both the ECtHR and the CJEU are remarkable supranational institutions, embedded in and highly influential for national legal cultures across Europe. Not surprisingly, the relationship with them remains one of the central issues which any domestic system in Europe must address. Both courts are the product of international treaties, of which, at least in legal theory, the Contracting States remain the 'masters'. In practice, however, there is little prospect of the Contracting States agreeing by unanimity or otherwise to reverse or vary any particular decision of either court. This is one striking difference between the international system under which these courts operate and the domestic system in the UK, where Parliament can legislate to reverse or affect a domestic court decision for the future.

The relationship is commonly described in terms of dialogue, but this vague term cannot conceal some fundamental differences. First, the Convention rights are understood, at least at the international level, as involving minimum standards and as giving national legal systems in important areas a 'margin of appreciation'; and, second, under s 2(1) of the Human Rights Act 1998 (UK), the UK judiciary is only required to 'take into account' the caselaw of the ECtHR. In contrast, the European Treaties and the caselaw of the CJEU constitute, at both the international and the domestic level, a mandatory system, from which the UK judiciary has no power to depart.[4]

The President of the CJEU, M. Koen Lenaerts, stressed these differences in a speech at the opening of the ECtHR's legal year on 26 January 2018, when he said that 'the Convention operates as an *external* check on the obligations imposed by that international agreement on the Contracting Parties', whereas 'the EU system of fundamental rights protection is an *internal* component of the rule of law within the EU' with a logic 'closer to that of an EU Member State than to that provided for by the Convention' and that 'the CJEU ensures the uniform application of EU law throughout the territory of the EU Member States'.[5]

[4] See eg European Communities Act 1972 (UK), ss 1(2)-(4), 2(1), 3(1).

[5] Koen Lenaerts, 'The ECHR and the CJEU: Creating Synergies in the Field of Fun-

The Contracting States have also been able to have some influence over the workload and development of the caselaw of the ECtHR, in a way which has not, at least yet, been the case with the CJEU. This is for practical reasons related to the funding and workload of the ECtHR. This is far less well-funded and much more prone to overload than the CJEU. For this and other reasons, Council of Europe states, with the UK foremost among them, started in about 2010 the 'Interlaken process' leading to the Brighton Declaration of April 2012. This underlined the principles of subsidiarity and margin of appreciation and encouraged the ECtHR in the development of focused procedures addressing manifestly ill-founded and repetitive, as well as priority, cases. There followed in 2013 Protocol No 15, formally enshrining such principles into the Preamble to the ECHR. The process has continued with the Copenhagen Declaration of April 2018, referring to the 'shared responsibility' of States and the ECtHR to achieve 'a balance between the national and European levels of the Convention system',[6] and with a further meeting in Autumn 2018 in Kokkedal, Denmark.

The features of the relationship with the ECtHR mentioned in the preceding mean that UK courts could develop with the ECtHR a real dialogue, in the sense of exchanges of views which may influence each other. This sort of dialogue keeps the Convention system in touch with the realities and problems of domestic jurisdictions and promotes the quality and usability of Convention jurisprudence at both the Strasbourg and domestic levels. Domestic courts not only apply Strasbourg case law, they interpret and analyse it in a way which influences future Strasbourg thinking. The ECtHR also looks at domestic caselaw and reasoning. Thus, the ECtHR is, rightly and to its credit, prepared in an appropriate case to change or modify its direction in the light of further insights gained from domestic sources. Many examples can be given. Compare:

(a) *Osman v United Kingdom*[7] with *Z v United Kingdom*;[8]

(b) *R v Horncastle*[9] with *Al-Khawaja v United Kingdom*;[10] or

damental Rights Protection' (European Court of Human Rights, 26 January 2018) < https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf> accessed 27 December 2018, 2 (emphasis in original).

6 Committee of Ministers of the Council of Europe, *Copenhagen Declaration* (High Level Conference, 12-13 April 2018) < https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 27 December 2018, paras 6, 9, 16 and 33.

7 [1998] ECRR 101.

8 App no 29392/95 (ECtHR, 10 May 2001).

9 [2009] UKSC 14, [2010] 2 AC 373.

10 [2011] ECHR 2127

(c) *Ostendorf v Germany*[11] with *S, V and A v Denmark*[12] in which the ECtHR cited extensively from the UK case of *R (Hicks) v Comr of Police for the Metropolis.*[13]

In contrast, the relationship with the CJEU feels (and is) more one-sided. The CJEU's caselaw is, as indicated, imperative. But it is also expressed without nuance or acknowledgement of counter-arguments. The CJEU (in contrast to its Advocates General in their opinions) generally refrains from overt engagement with national jurisprudence. When it endorses the Advocate General's opinion, this is less of a problem than when it departs from or does not fully follow that opinion or reproduce its reasoning. Further, the CJEU does not allow overt signs of disagreement or difference of opinion within the court. It sometimes reduces its reasoning in important cases to the lowest common denominator of consensus reached in the secret deliberations (*deliberés*) between the members of the relevant constitution of the court. However fruitful the court's internal discussions may be, its approach, decision-making and reasoning are all tied to a tradition which dictates, rather than debates, and lacks in transparency.. More fundamentally, the adoption of French as the language of the court, and in particular as the only permissible language of the deliberations, has important effects up-stream in limiting the candidates across Europe who can be or are, in practice, chosen by national governments for appointment to the CJEU. The pool of candidates is, realistically, probably only a fraction of the otherwise eligible legal community, most of whom in today's world are far more likely to master passable English.[14]

The CJEU has also been disinclined to identify firm principles of interpretation, save for an avowedly teleological approach which enables it to justify most of the ends which it perceives as appropriate in the interests of the development of the EU, irrespective of the actual wording of the intentions of the drafters or *travaux préparatoires* and of any ordinary purposive understanding.[15] The court has repeatedly stressed the European legal order as 'autonomous', and, presumably on this basis, has not endorsed the principles of interpretation set out in the Vienna Convention on the Law of Treaties as having relevance.

[11] App no 15598/08 (ECtHR, 7 March 2013).

[12] App nos. 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018).

[13] [2017] UKSC 9, [2017] 1 AC 256.

[14] For a forceful critique of the Francophone tradition in the CJEU and its effects, see Anthony Arnull, 'The Working Language of the CJEU: time for a change?' [2018] ELR 904. The inability of judges to express differing views and a somewhat hierarchical internal organization of the court may also contribute to limiting the pool of potential candidates.

[15] See generally Gunnar Beck, 'Judicial Activism in the Court of Justice of the EU' (2017) 36 U of Queensland LJ 333.

The bulk of the CJEU's decisions give rise to no controversy, and the court is, as I have said, a remarkable institution, which fulfils a unique function in adjudicating across national borders and may serve as a model for other groupings of states in the future. The sometimes vituperative targeting of the CJEU in the context of Brexit is difficult to follow. Such points that may be made in relation to it, and probably almost any institution, appear to me to have been exaggerated out of proportion. But there are points that can be made. For a start, if the court is to enjoy the fullest sympathy and support of national legal systems, its approach could be a little more modest. This is not the place to go into problematic issues in detail. But take judgments such as those in Case C-281/02 *Owusu v Jackson*,[16] C-144/04 *Mangold v Helm*,[17] Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor Flugdienst GmBH* and *Böck v Air France SA*,[18] Case C-533/08 *TNT Express Nederland BV v Axa Versicherung AG*,[19] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres*[20] and Case C-284/16 *Slowakische Republik v Achmea BV*,[21] as well as Opinion No 1/09 of 8 March 2011 on a unified patent court, and Opinion No 2/13 of 18 December 2014 on accession of the EU to the ECHR. They evidence a degree of activism and assert an autonomy of the Union's legal order and an imperative for mutual trust in its institutions going well beyond the limpid statement of the direct effect and supremacy of Community/Union law to be found in *NV Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*.[22] They raise at least a legitimate question as to whether the CJEU has yet achieved the right balance between perceived interests of the European legal order and other interests, including those of the European legislators, Member States, third states and general international law.

The UK Supreme Court expressed concerns of this nature in the two cases of *R (HS2 Action Alliance Ltd) v The Secretary of State for Transport*

[16] [2005] ECR I-1383.
[17] [2005] ECR I-9981.
[18] [2009] ECR I-10923.
[19] [2010] ECR I-4107.
[20] [2011] ECR I-773.
[21] (GC, 6 March 2018).
[22] [1963] ECR 1, 12 ('the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law, therefore, apart from legislation by the member-States, not only imposes obligations on individuals but also confers on them legal rights[...]').

('HS2')[23] and *Pham v Secretary of State for the Home Dept ('Pham')*.[24] Similar concerns have been expressed in other European countries, by academic commentators as distinguished and as generally well-inclined towards the Union as M. Bobek,[25] and Professors JHH Weiler,[26] Catherine Barnard[27] and Paul Beaumont.[28] In *HS2*, we quoted directly from one of the *BVerfG's* judgments to illustrate the sensitivity which was, we believed, necessary in an appropriately balanced relationship between national courts and the CJEU, pointing out that the *BVerfG* had:

> noted in its judgment of 24 April 2013 – 1 BvR 1215/07, (para 91) – that decisions of the European Court of Justice must be understood in the context of the cooperative relationship ("Im Sinne eines kooperativen Miteinanders") which exists between that Court and a national constitutional court such

[23] [2014] UKSC 3, [2014] WLR 324, [171] (Lord Neuberger and Lord Mance (with whom Lady Hale, Lord Kerr, Lord Sumption, Lord Reed and Lord Carnwath agreed)) ('When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree. Limitations on the scope or application of a legislative measure may have been necessary to achieve agreement. There may also have been good reasons for limitations, of which courts are unaware or are not the best to judge. Where the legislature has agreed a clearly expressed measure, reflecting the legislator's choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or "improve" it respects which the legislator clearly did not intend.').

[24] [2015] UKSC 19, [2015] WLR 1591.

[25] M Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in M Adams, H de Waele, J Meeusen and G Straetmans (eds) *Judging Europe's Judges* (Hart 2013) 197.

[26] JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in M Adams, H de Waele, J Meeusen and G Straetmans (eds) *Judging Europe's Judges* (Hart 2013) 235; J Weiler, 'Epilogue: The Judicial Après Nice' in G de Búrca and J Weiler (eds), *The European Court of Justice* (OUP 2001) 215, 219 ('The style of [the Court's] judicial decisions is outmoded, does not reflect the dialogical nature of European constitutionalism, and is not a basis for confidence-building European relations between the European Court and its national constitutional counterparts.').

[27] Catherine Barnard, 'Van Gend en Loos to(t) the future' in A Tizzano, J Kokott and S Prechal (eds), 50th Anniversary of the Judgment in *Van Gend en Loos* (Court of Justice of the EU 2013) 117, 122 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf> accessed 27 December 2018 (where she suggests that the Court of Justice reposition itself 'from standard bearer of EU integration to ensuring that the EU is able to function in its new, more fragmented reality […] to develop a new kind of doctrine of effectiveness, one that might mean endorsing the devolution of more decision-making power to the Member States or other actors.').

[28] Paul Beaumont, 'A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13' <https://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf> accessed 27 December 2018.

> as the Bundesverfassungsgericht or a supreme court like this Court.[29]

In both *HS2* and *Pham*, the Supreme Court identified the possibility that, despite all the width of the European Communities Act 1972, there may be quasi-constitutional instruments or foundational principles in the United Kingdom which lay outside the scope of the powers conferred on the EU and the jurisdiction of the CJEU. The *BVerfG* is well-known for having asserted its powers to undertake an examination of the vires, and consistency with the 'identity' of the Federal Republic as established by its Constitution of Union institutions and CJEU.

Achieving an appropriate balance between centralising and national tendencies was and is always bound to be an ongoing process. The government's review, prior to the referendum, of the balance of competences at a European and national level did not suggest any fundamental imbalance. In such a situation, rather than simply condemn the whole system of adjudication by the CJEU, one might have expected that any particular issues could be resolved by collaboration. On the basis that the UK remained within the EU, it was possible to envisage that it might have fulfilled a leadership role in relation to the CJEU similar to that which the UK fulfilled in the Interlaken process leading to the Brighton Declaration. The UK Supreme Court might with other apex courts have also been able to contribute, through views expressed in judgments as well as in informal meetings, to developments which would encourage real dialogue and cooperation and a healthier balance between the interests of national legal systems and EU law as determined by the CJEU.

With Brexit, the prospect of any significant influence being exercised by either the UK or by its Supreme Court in such matters would become sadly negligible. But that is certainly no reason for ceasing judicial contacts with our regular interlocutors in other national courts and in both the European courts. On a personal level, relations with judges in all these courts are extremely cordial and instructive. Assuming Brexit goes ahead, common lawyers will no longer sit automatically on EU committees to work through problems of common interest. The President of the CJEU has shown sensitivity in appointing the Chief Justice Frank Clarke of Ireland to the art 255 committee. So, the common law retains involvement in that limited area. But it will need to cultivate alternative means of contact and

[29] *HS2* (n 23) [202] (Lord Neuberger and Lord Mance (with whom Lady Hale, Lord Kerr, Lord Sumption, Lord Reed and Lord Carnwath agreed)); see also [111] (Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Sumption and Lord Carnwath agreed)).

collaboration, to avoid isolation if the interests of the common law are to be more generally preserved. That is, in my view, an important future task for the judiciary both of the Supreme Court and of all jurisdictions in the UK.