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UK courts and EC law

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Concluding Remarks

Obstacles to the enforcement of Community law by UK courts

An examination of the case law involving Community law revealed a wide range of situations. Sometimes, the issue was the incompatibility of a statute with a Community law provision and the UK courts had to solve a conflict of norms. In other cases, where the requirements of Community law had to be established, British judges had to be convinced to either adopt Community methods of interpretation or refer the matter to the ECJ, so that the full extent of the Community requirements could be clarified. Given the delay in obtaining a preliminary ruling an understandable reluctance to refer has started to develop. When judges have been persuaded to seek a preliminary ruling, it has not always been possible to convince the UK courts that they should grant protection in the interim. This, it is suggested, is an area which ought to be looked at as a matter of priority, not least so as to be able to establish whether or not these differences in treatment are objectively justified. In other cases, the substance of a Community law based claim was not disputed; rather the availability of a remedy from the UK court to afford protection of this Community law based claim was at stake. Access to judicial process was threatened, either through a finding of lack of title and interest, or because a limitation period had expired, or the form of process was held incompetent, or a plea of no jurisdiction was sustained, or the decision sought to be challenged did not fall within the category of reviewable acts. Actions have also been brought in the UK courts designed to challenge solely the adequacy of sanctions on a failure to give effect to a substantive Community law based claim. It has been shown that some of these obstacles stem from the Community level. One such difficulty is the fact that, according to the text of Article 249 EC, rights and obligations created in a directive can reach individuals only through the medium of national implementing provisions. Other obstacles exist irrespective of whether the claims arise in a purely domestic context, or with a Community dimension, and for that reason will be labelled as national. Typical of these national obstacles are the rules governing judicial review in England¹, or the limitations on title and interest in Scotland. In England, the leave procedure is of considerable practical importance. It empowers the court to dispose of an application for judicial review without any detailed consideration of the evidence or legal submissions of the body alleged to have acted illegally; the scope of judicial review remains undefined: the question of which activities or which bodies are or should be amenable to judicial review is still unsettled and is a source of continual argument. National obstacles are often exacerbated by the Community dimension.

Obstacles to the enforcement of Community law are not all of the same nature or gravity, and accordingly have been solved with greater or lesser ease. Some obstacles which in other legal systems have become of historical interest are yet to be encountered in the UK².

The UK courts as loyal allies

In the UK there has been a real maturation of the reception of Community law into the national legal system.

"Despite a strong tradition of splendid isolation in legal matters, the British courts have with remarkable alacrity recognised and accepted the obligations and implications of a new and very different legal order".

As has been shown, in spite of some conflicting messages, the current attitude of the UK courts could be characterised as pro-communautaire even if the basis for the rule that Community law prevails is not necessarily that put forward by the ECJ. This is surprising given that the European Communities Act 1972 does not just provide for the recognition of Community law in the UK, but acknowledges the specific character of Community law. Parliament unmistakably required judges to abide by the requirements of the Community legal order as determined by the ECJ. For this reason, certain decisions by UK courts appear puzzling. This was highlighted through an exploration of the on-going difficulties about the definition of "enforceable Community rights". Sometimes British judges are simply not prepared to accept that they have duties in relation to the whole corpus of Community law and not simply in relation to rights which cannot be construed as directly effective. The precise legal status of the General Principles of Law and the legitimacy of their application has been questioned by the UK courts. The fact that the General Principles of Law are forming a new pocket of resistance for UK courts is perhaps less surprising if one considers that on this occasion UK courts – like national courts in other Member States – have signalled that they were not prepared to abandon supervision over the exercise by the Community institutions of their powers. In this respect, it must be remembered that the ECJ itself has, on occasion, exactly like the UK courts, decided that a mere connection with Community issues was not sufficient to bring a situation within the ambit of Community law. And it must be acknowledged that it seems hardly possible that such a fundamental issue as determining the reach of Community law would not be seen as a constitutional fundamental on which both levels of courts would wish to exercise their jurisdiction.

Perhaps the most important aspect of the reception of Community law in the UK is that it has profoundly shaken the constitutional paradigm of parliamentary sovereignty. As has been recently said:

"So long as the UK remains a Member State, Parliament exercises its sovereign powers within the altered framework that continuing membership entails. So long as the UK remains a Member State, the pre-accession model of Parliamentary Sovereignty is of historical, but not actual significance".

The fact that the doctrine of the sovereignty of Parliament is not what it once was is of course not only due to the assaults of Community law. The doctrine is also attacked on many other fronts, including home fronts. Sovereignty is often contested and regarded as a poor yardstick of a modern democracy. Whether or not Community law will benefit or suffer from the considerable re-thinking of orthodox constitutional ideas about the supremacy of Acts of the Westminster Parliament is however not a question to which a straight answer can yet be provided. One thing is certain: membership of the Union has ensured that issues of legal interpretation are now placed at the centre of the political process in the UK.

There is a real trend towards very robust judgments in cases involving Community law issues. So for example, a High Court judge was able to ask the ECJ to extend the protection it has afforded under Directive 76/207/EEC to those of homosexual orientation. In a relatively short period of time, there has been a move away from a national outcry in response to the House of Lords disapplying a provision of primary legislation to public indifference where a judge sitting alone in a Commercial Court did so without making a reference for a preliminary ruling to the European Court of Justice. Community law, like other areas of law in the UK is affected by changes in judicial traditions. Judges in the UK are becoming more and more involved in policy. The judiciary not only is prepared to divine the intention of Parliament, but frequently has had to consider the thinking behind a particular policy and how it has worked out in practice. Effectiveness of judicial review is also compounded by the liberal approach to questions of standing, at least in England. As a result, there is a real potential for review of decisions on the basis of a misdirection in law, even where the applicant has no directly effective or statutory rights. Finally, there is little doubt that the status of Community law in the UK courts will be influenced by the quite radical programme for constitutional reform undertaken in the last couple of years namely devolution and the enactment and entry into force of the Human Rights Act 1998. One such example can be seen in Lord Hope's speech in *R v. Lambert*. In this case Lord Hope highlighted the techniques of interpretation to be applied when using section 3(1) of the Human Rights Act 1998. In doing so, he drew a distinction between interpreting and reading statutes so as to make them compatible, an exercise which can be done by judges, and amendment, which is a legislative act, i.e. an exercise which must be reserved to Parliament. The programme of constitutional reform is likely to reinvigorate the important debate about the respective roles of the different powers, namely that of the relationship between judges and elected representatives. An examination of the dialogue between the ECJ and UK courts weighed up the responsibilities of the ECJ and that of the UK courts in diluting the preliminary ruling procedure and discussed what might be done to restore a more efficient dialogue. A review of the case law concerned with 'giving effect to Community law' led to the conclusion that it should be reconstructed as duties for national courts. In doing so it will be necessary to recognise that expect-

ing national courts to carry out the operation of Community law needs careful consideration of the limits of their judicial function.

Community measures rarely prescribe the procedures or remedies available for breach of the obligations they contain. As a result, when national courts come to enforce these obligations, national rules governing procedures and remedies apply. At the same time, it has become apparent, certainly to the UK courts, that giving full effect to Community law and effective protection of Community rights involves a somewhat radical departure from the classic statement in *Rewe*⁶ that the Treaty was not intended to create new remedies. As the case law evolved, the emphasis shifted from the requirements of non-discrimination and minimum standards of protection to the fleshing out of the notion of effective judicial protection of Community rights and/or effective operation of Community law. This culminated in the establishment of State liability. However, it is suggested that in the present stage of development of European integration, the ECJ ought to take stock of the fact that Community rules are no longer limited to regulating trade. The Community legislature does not simply adopt rules to ensure fair competition or transparency in the operation of the Single Market. Accordingly, national courts should be given clear guidance so that they are in a position to identify those Community rules practical operation of which they must ensure. The ECJ has often told national courts that their task is to apply Community provisions in areas within their jurisdiction and to ensure that provisions of Community law take full effect. Yet it remains unclear whether national courts are expected to confine themselves to ensuring the full effectiveness of rules between competitors, or whether they are also expected to strengthen the practical working of all Community obligations which Member States undertake. On one view, in this stage of integration, national courts should be charged with the task of guaranteeing Union citizens the whole range of benefits which integration is meant to bring about and not just those that flow from opening of the markets. It has been argued that the Court sees the development of the law on remedies as a dialectical process which results from a constant dialogue with the national courts, and that the development of no other area of Community law depends as much on the co-operation of the national courts as the law of remedies⁷. It is certainly true that much is expected of the national courts. Nevertheless, leaving this important task to the necessarily haphazard nature of this relationship has a number of important drawbacks.

The negative consequences and possibly harmful side effects of the piecemeal intrusion into national legal systems have been brought to light. Furthermore a recurrent theme emerged, namely that on occasion the fundamental difficulty for national courts is that fulfilling their duties as Community courts would lead them to step outside the appropriate boundaries of the judicial function. Certainly this concern has to be treated seriously, not least because the ECJ itself has denied litigants particular remedies on the very ground that granting the remedy sought would be outside its jurisdiction. It further held that the changes required by litigants could only be achieved through an

amendment to the Treaty. It may therefore be that the way forward is through a suitably scoped amendment to the Treaty. It is not only the principle of amendment, but the detail of any such amendments which need consideration. One obvious mechanism for achieving this objective would be an express enabling power in the Treaty recognising that national courts are the ordinary courts charged with the primary enforcement role of Community law. Such a provision is conspicuous by its absence, especially when one considers that it has been forty years since *van Gend en Loos* and that there have been so many instances of institutional reforms at Union level. Such a Treaty provision would ensure that the Union institutions when legislating take due account of the difficulties facing the national courts in this primary enforcement role. This might alleviate some of the obstacles which need overcome before 'rules to enforce the rules' can be adopted. All institutions involved in the making of Community legislation need to be reminded that whenever new Community rules are adopted, due regard must be paid to the methods for their enforcement. It is critical that the quality of Community legislation be also measured by reference to this criterion.

Undoubtedly, the decentralised system of enforcement of Community law presents considerable advantages and has undeniable strengths. Only through national courts may aggrieved citizens seek financial redress for a breach of Community law. Only national courts have the power to set aside national provision. Only national courts have the power to take mandatory action. The Community dimension to the jurisdiction of national courts must be recognised in the Grundnorm.

Much is at stake through the enforcement of Community law. As the Commission recently stressed once more, "applying the legislation properly and complying with it are essential to a climate of trust between the Member States, who can be sure that the law will be fairly enforced, and trust by the citizens in the ability of the Union to gain respect".

Endnotes

- ¹ C. Haguenau, *L'Application effective du Droit Communautaire en Droit Interne* (Bruxelles: Bruylant, 1995).
- ² Such as, for some years, the German courts' resistance to the unconditional supremacy of Community law, i.e. refusal to accept the superiority of Community law over German Fundamental rights.
- ³ Bingham LJ in M. Andenas and F. Jacobs (eds) *European Community Law in the English Courts* (Oxford, OUP 1999) at p. 12.
- ⁴ Laws LJ in *S. Thornburn v. Sunderland City Council* [2002] 3 WLR 247 at para. 69.
- ⁵ *R v. Lambert and others* [2001] UKHL 37, per Lord Hope at para. 81 of his speech.
- ⁶ Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805, para. 44.
- ⁷ T. Tridimas, "Enforcing Community rights in national courts: some recent developments" in *The Future of Remedies in Europe*.
- ⁸ As has been shown in Chapter 8, in general the EP as an institution has always been a motor towards better enforcement.