

Richterrecht in community law

by

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I. Introduction

A. V. DICEY, the great English constitutional lawyer, said that

“A large part and, as many would add, the best part of the law of England is judge-made law.¹ ... [It] aims, to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic and symmetry of the law”.²

The same claim can be made for *Richterrecht* in the evolution of European Community law. It is through *Richterrecht* that Community law has become a legal system in its own right.

The role of judge-made law was recognised in the recent amendments to the Rules of Procedure of the Court of Justice. Article 104, paragraph 3, as amended in 2000, provides:

“Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case law or where the answer to the question admits of no reasonable doubt, the Court may ... give its decision by reasoned order in which, if appropriate, reference is made to its previous judgment or to the relevant case law.”

This makes explicit what was already true before accession to the Community of the two common law countries (the United Kingdom and Ireland) in 1953 – namely, that the jurisprudence of the Court of Justice is itself a source of law. It is true that until the mid-1970s the judgments of the Court did not refer to previous cases.³ But the Opinions of the Advocates General frequently referred to the Court’s jurisprudence as a source of law and the Court ‘followed’ previous cases by repeating the formulae used in them without referring to their source.

This is not surprising. For reasons of common sense and justice, courts in the civil law as well as the common law world will try to decide similar cases in a similar way. The principle of equality of treatment (or non-discrimination) re-

¹ Dicey, A. V., *Law and Public Opinion in England*, London 1914, p. 361.

² Dicey (note 1), p. 364.

³ The earliest example I have found is in 1977 – Case 77/76, *Cucchi v. Avez*, (1977) ECR, 987, point 30.

quires that similar situations should not be treated differently. The distinguishing feature of the common law system is the doctrine of binding precedent (*stare decisis*) according to which courts not only *should* but *must* decide similar cases in the same way. The Court of Justice does not follow that doctrine and has departed from previous case law more than once.⁴ But the Court is reluctant to do so. In any event, the rigidity of *stare decisis* in the common law world has been considerably relaxed in recent years.

II. The development of *Richterrecht* in Community law

It is possible to trace three phases in the evolution of *Richterrecht* in Community law – first, from the foundation of the Court in 1952 until the mid-1960s; second, from the mid-1960s to the mid-1980s; third, from the mid-1980s to the present. These phases shade into one another and a fourth has already started.

1. The first phase

In the first phase (1952 to the mid-1960s) the main task of the Court was to establish the essential characteristics of the Community legal order. The founding treaties were *traités cadre* (framework treaties). They provided that:

*“The Court shall ensure that in the interpretation and application of this Treaty, the law is observed”.*⁵

The Treaty makers left it to the Court to determine the nature and sources of “the law” to which they referred. In particular, it was left to the Court to determine the place of European Community law on the frontier (or perhaps more appropriately the *Mark*) between national law and classical international law. Of the original six Member States, two (Germany and Italy) were dualist,⁶ treating national law and international law as distinct and separate. Two (Belgium and Luxembourg) were monist, treating national and international law as part of a single, seamless legal web. The other two (France and the Netherlands) fell somewhere in between these two positions.

The Court’s basic approach to the problem was proposed by Advocate General Lagrange in 1956:

“Our Court is not an international court but the court of a Community created by six States on a model which is more closely related to a federal than to an international organisation and although the Treaty which the Court has the task of applying was concluded in the form

⁴ See, for example, Case C-10/89, *SA-CNL Sucal NV v. Hag GVAG* (“Hag II”), (1990) ECR I, 3711.

⁵ Article 31 ECSC, Article 164 EEC (now Article 220 EC) and Article 136 Euratom.

⁶ Though probably less extremely dualist than the United Kingdom was at that time.

of an international treaty and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community. As regards the sources of that law, there is obviously nothing to prevent them being sought, where appropriate, in international law, but normally and in most cases they will be found rather in the internal law of the various Member States."⁷

In that light and through systematic interpretation of the Treaties the Court established the principles of direct effect (*Van Gend en Loos* 1963)⁸ and primacy (*Costa* 1964)⁹. Although the principle of state liability for breach of Community law was developed much later (*Francoovich*¹⁰ and *Brasserie du Pêcheur & Factortame*¹¹), the Court had already asserted it in a judgment of 1960 (*Humblet*¹²).

These fundamental developments of Community law through case-law were the work of continental jurists long before the accession of the common law countries. In essence, the Court's reasoning was based on the general principle of obligations, a concept more familiar to civil lawyers than to common lawyers. The Court stressed the reciprocal obligations undertaken by the Member States towards each other, the obligations undertaken by the Member States towards their respective citizens, and the obligations imposed by them on the institutions they created.¹³

2. The second phase

The second phase (from the mid-1960s to the mid-1980s) was characterised by the failure of the Community legislator (the Council of Ministers representing the governments of the Member States) to pass the legislation for completion of the common market which had been called for by the Treaties. All the necessary legislation should have been in place by the end of the transitional period (31st December 1969).¹⁴ That was not achieved, partly because the so-called Luxembourg compromise of 1966 ruled out majority voting for all important legislative decisions and partly because the necessary legislation presented unforeseen technical difficulties. Those who were adversely affected by the resulting "non-Europe" turned to the Court to compensate for the failure to legislate.

⁷ Case 8/55, *Fédération Charbonnière Belgique v. High Authority*, (1954–56) ECR, 245, 277.

⁸ Case 26/62, *Van Gend en Loos v. Nederlandse Tariefcommissie*, (1963) ECR, 1.

⁹ Case 6/64, *Costa v. ENEL*, (1964) ECR, 585.

¹⁰ Cases C-6/90, *Francoovich & Bonifaci v. Italy*, (1991) ECR I, 5357.

¹¹ Cases C-46,48/93, *Brasserie du Pêcheur & Factortame (n°3)*, (1996) ECR I, 1029.

¹² Case 6/60, *Humblet v. Belgian State*, (1960) ECR, 559.

¹³ See: *Edward, David*, Direct Effect – Myth, Mess or Mystery, in: *Prinssen, J. M./Schrauwen, A.* (eds.), *Direct effect – rethinking a classic of EC legal doctrine*, Groningen, 2002.

¹⁴ Article 8 (later Article 7) of the EEC Treaty.

In 1974 the Court's judgments in *Reyners*¹⁵ and *Van Binsbergen*¹⁶ held that, where the Treaty prescribed a precise result to be achieved by the end of the transitional period (removal of restrictions on grounds of nationality), expiry of the transitional period made further legislation superfluous. The effect of these judgments was to unblock progress towards the realisation of freedom of establishment and freedom to provide services.

In *Van Duyn*¹⁷ (also in 1974) the Court stressed that legislative inactivity on the part of the Member States cannot deprive individuals of the protection of precise and unconditional obligations imposed by directives. In 1976 the judgment in *Defrenne*¹⁸ held that, although Article 119 called for action on the part of the Member States to achieve equal pay for men and women, it nevertheless imposed obligations directly on employers in the labour market. This set the pattern for a long series of cases establishing the principles of the law on gender discrimination.

In 1979 the *Cassis de Dijon* judgment¹⁹ established two principles which became the foundation of the Single European Act of 1986 and the subsequent "1992 programme" of legislation to complete the internal market. These were the principles of mutual trust and recognition of overriding public-interest objectives. The first principle requires Member States to accept the standards set by other Member States relating, for example, to the quality and safety of goods or professional qualifications. The second accepts that Member States may restrict access to their market where the restriction is objectively justified by considerations of public interest. But the restrictions must be proportionate to the objective to be achieved. (The test of proportionality is probably the most important contribution of German law to Community law.)

3. The third phase

In the third phase (beginning in 1986) the 1992 programme led to a flood of legislation for completion of the internal market. Much of this legislation is extremely technical and covers a wide range of subject matters. Interpretation of legislation is a normal part of the work of the Court but in many cases it has been left to the Court, not simply to interpret the legislation, but to fill gaps or resolve uncertainties that appear to have been deliberately left open by the legislator.²⁰

¹⁵ Case 2/74, *Reyners v. Belgium*, (1974) ECR, 631.

¹⁶ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, (1974) ECR, 1299.

¹⁷ Case 41/74, *Van Duyn v. Home Office*, (1974) ECR, 1337.

¹⁸ Case 43/75, *Defrenne v. Sabena*, (1976) ECR, 455.

¹⁹ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, (1979) ECR, 649.

²⁰ For example, in the field of company accounts, Cases C-234/94, *Tomberger* (1996) ECR I, 3133, and C-275/97, *DE & ES Bauunternehmung*, (1999) ECR I, 5331; and in the field of trade

During the same period the Court consolidated the case law on state liability referred to above.

4. The fourth phase

In addition – and probably marking the beginning of a fourth phase – the Maastricht Treaty opened up a new dimension of constitutional cases, notably in relation to human rights, European citizenship²¹ and the protection of family life²². In the Opinion on Community accession to the European Convention on Human Rights, the Court stressed that accession to the Convention (apart from the technical difficulties) was too important a step to be taken on the basis of implied powers.²³

Looking ahead, new constitutional questions will be raised by incorporation of the third pillar (justice and home affairs) with the first pillar (the Community treaties) and perhaps in due course by adoption of a Constitution for the European Union including the Charter of Fundamental Rights as a legally binding text. If, as expected, the Constitution contains a new text on subsidiarity, this will provoke a further range of “federal questions” requiring the Court to balance the claims of subsidiarity against those of the internal market and the pressures of competition in a global market. These questions are likely to become particularly acute with enlargement of the Union to 25 Member States.

III. Conclusions

Richterrecht has played and will continue to play a role of fundamental importance in the evolution of European Community law. In the words of DICEY, it has created and maintained the logic and symmetry of Community law.

Three points should however be remembered when reading the case-law of the Court.

First, it is important to note whether the judgment was delivered by the plenary Court or by a Chamber. At the end of the written procedure, the Court determines whether the case should be decided by the Court in plenary session or assigned to a Chamber of three or five judges. A case will be maintained before the full Plenary (currently 15 judges) if it clearly raises a new and important question

marks, Cases C-355/96, *Silhouette v. Hartlauer*, (1998) ECR I, 4799 and Joined Cases C-414 to 416/99, *Davidoff v. A & G Imports and Levi Strauss v. Costco*, (2001) ECR I, 8691.

²¹ Cases C-85/96, *Martinez Sala v. Freistaat Bayern*, (1998) ECR I-2691, and C-184/99, *Grzelczyk*, (2001) ECR I, 6193.

²² Cases C-348/96, *Calfa*, (1999) ECR I, 11, and C-60/00, *Carpenter*, (2002) ECR I, 6279, and C-413/99, *Baumbast*, (2002) ECR I, 7091.

²³ Opinion 2/94, (1996) ECR I, 1759.

of principle. At the other end of the scale, it will be allocated to a Chamber of three judges if it raises a straightforward problem involving no new point of principle at all. If the case raises a significant point but one that can be decided within the scope of existing jurisprudence, it will be assigned to a Chamber of five judges. In doubt, it will be referred to a "small plenary" of 11 judges (two more than the quorum of nine).

It follows that a judgment of a Chamber of three judges should not be treated in the same way as a judgment of the plenary Court or even of a Chamber of five judges. The case would never have been assigned to a Chamber of three judges if it had been thought likely to raise a new point of legal principle. Correspondingly, a judgment of the full plenary of 15 judges is intended to be an authoritative statement of principle.

Second, the Court uses a single internal working language which currently, for historical reasons, is French. Judgments are written in French and then translated into the other official languages. The Court's translators are highly skilled lawyers but it is sometimes impossible to convey all the nuances of the original French in other languages. So it is important not to attach excessive significance to the precise wording of the text and, if in doubt, it may be useful to refer to the French version.

Third, the Court's judgments must be read in the context of the facts of the case and of the legal issues raised in argument, especially in preliminary references under Article 234 EC (formerly Article 177) or the Brussels Convention. Of course, the judgments of the Court seek to state the law as it should be applied in all the Member States. But the factual and legal context of the questions referred has been set by the national judge in a national context and consequently condition the tenor and scope of the Court's reply.

In short, the case-law of the Court of Justice is the work of judges working in a unique multinational and multilingual environment. European *Richterrecht* is not legislation, it is not intended to be legislation and it should not be interpreted as if it were.