National Courts—the Powerhouse of Community Law

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I. INTRODUCTION

IT IS ALWAYS an honour to be invited to give a named lecture and especially to be invited to do so in this University. But it is an added privilege and also a pleasure to be invited to do so when one has known the person in whose honour the lecture has been named. It is particularly delightful to be able to do so with Lady Mackenzie-Stuart among us.

My recollections of Lord Mackenzie-Stuart go back to 1959 and my earliest days as a law student in Edinburgh. In those days we studied for the law degree, with lectures in the morning and evening, while acting as a solicitor’s apprentice during the day. We went to court and in the Scottish custom sat behind counsel. The solicitors for whom I worked acted for the National Union of Mineworkers while Jack Mackenzie-Stuart acted for the National Coal Board. So, as an opponent, I saw this rather debonair and dashing young man who had been in the army during the War and was now a leading junior. Not only did he act for the Coal Board, he was also Standing Junior Counsel to the Inland Revenue. Moreover, following in his father’s footsteps, he knew all about trusts which, in the very early days of variation of trusts, was where serious money was to be earned. Later, as a junior advocate, I learned my trade from him, amongst others, as my leader.

There was a particular delight in being junior to Jack Mackenzie-Stuart. In those days Scottish advocates held their consultations in their houses, and Jack’s house in Doune Terrace was one of the great welcoming houses of Edinburgh. After a consultation with Jack, learned senior would say to learned junior, and sometimes to the solicitor, ‘There’s a small matter I’d

*The Mackenzie-Stuart Lecture, 18 October 2002. The lecture owed much to brain-storming with my Legal Secretaries at the Court of Justice, Dieter Kraus, Joxe Bengoetxea and Anneli Howard. Fiona Young did sterling work in preparing the lecture for publication. They bear no responsibility for errors, omissions or improprieties.
like to discuss with you. Perhaps, when you have shown our client out, you
could stay behind for a few minutes'. The 'small matter' was to sit down by
the fire with a gin and tonic and talk about anything but law. It was a great
family house and I'll always remember it in that way. Jack, of course, had
wide interests outside the law, being particularly versed in old master draw­
ings, of which he had a great collection. He also wrote a delightful little book
called *A French King at Holyrood* about the Comte d'Artois (brother of
Louis XVI and later King Charles X) who on more than one occasion was
accommodated in the debtors' sanctuary at Holyrood Palace in Edinburgh.

The topic suggested to me by John Bell for tonight is one to which Jack
Mackenzie-Stuart attached great importance—the nature of the relation­
ship between the Court of Justice and national courts. I remember him
reacting very strongly at a conference when someone suggested that there
should be a right of appeal from national supreme courts to the Court of
Justice. He insisted that the relationship should not be hierarchical or verti­
cal but should remain horizontal—a relationship of judicial cooperation.

In this context 'judicial cooperation' is more than a euphemism. I admit
that the media, and even some national judges, talk about 'appealing to
Luxembourg', and I suppose the Court of Justice might be accused of
encouraging that point of view from time to time. But I do believe that
underlying the success of Community law as a system is the willing accept­
ance of the Court's judgments by all (or perhaps virtually all) national
judges in all (or perhaps virtually all) member states—the willing accept­
ance that the judgments of the Court provide appropriate legal criteria in
the light of which to judge the case before them.

At its best, the relationship is one of mutual trust, respect and coopera­
tion. But I think it is more, and that is why the word 'powerhouse' appears
in the title of this lecture.

**II. WHY 'THE POWERHOUSE'?**

It may seem paradoxical to say that the national courts are the powerhouse
of Community law. Surely it is the Court of Justice that is the powerhouse.
But there is a good reason why it is truly the national courts that generate
the electricity.

A judge may be very enthusiastic about making law but cannot actually
do so until there is a case to make it in, and judges cannot normally decide
what cases they get. Occasionally, when they are Presidents of Divisions in
the courts in the Strand, they may be entitled to select. (It is often said that
Lord Denning chose the cases he liked best). But if you are a judge in
Germany, you cannot choose. The principle of the gesetzlicher Richter ('the
legal judge') means that you can do only those cases that are assigned to
you. The corollary is that you must hear and decide those cases.
This is illustrated in a very recent judgment of the European Court of Human Rights, where the Court was considering the status of the commissaire du gouvernement in the French Conseil d'État—the model, it is said, for the Advocate General in the Court of Justice. The question was whether the commissaire du gouvernement is a 'judge' and the argument turned in particular on whether he can vote. The Court of Human Rights said:

The Court considers that by forbidding him to vote, on the ground that the secrecy of the deliberations must be preserved, domestic law considerably weakens the Government's argument that the commissaire du gouvernement is truly a judge, as a judge cannot abstain from voting unless he stands down.\(^1\)

If the case comes, the judge must judge, however unattractive or unpopular the result. Having given judgment, he (or she) cannot withdraw, apologise or explain. On the other hand, however keen he may be to make new law, he is powerless if no suitable case comes before him. That is the essential point of difference between the legislator or administrator on the one hand and the judge on the other. The suggestion that judges lack legitimacy because they are unelected and unaccountable rests on a false premise. In a sense, the essence of the judge's position is not to be 'accountable' to anyone other than the appeal court (if any).

So, although the Court of Justice has been accused of being 'activist' in the development of Community law, it has been able to be so only because national courts have provided it with the material for activism. I can illustrate the point by reference to two famously (or notoriously) 'activist' judgments—Van Gend en Loos and Van Duyn.\(^2\)

In Van Gend en Loos the Court held that certain Treaty provisions have direct effect and create rights that national courts must protect. The Court did not produce this idea like a rabbit out of a hat. The direct effect of Treaty obligations had been an issue in the Netherlands for more than 50 years.\(^3\) In 1953, in the slightly euphoric post-war period, the Dutch amended Article 66 of their Constitution to provide that '[International] agreements shall be binding on anyone insofar as they will have been published'. At the same time, Article 65 was amended to read:

Legal provisions in force within the Kingdom shall not apply if the application would be incompatible with agreements which have been published in accordance with Article 66 either before or after the enactment of the provisions.

\(^1\) Kress v France (application n° 39594/98), judgment of 7 June 2001, para 79 (emphasis added).
\(^2\) Case 26/62 Van Gend en Loos v Netherlands Inland Revenue Administration [1963] ECR 1; Case 41/74 Van Duyn v Home Office [1974] ECR 1337.
Three years later Article 65 was again amended to read ‘Provisions of agreements which, according to their terms, can be binding on anyone shall have binding force after having been published’, thus bringing in the idea of a provision which creates an individual right or an individual obligation.

So, when the Dutch Court asked the Court of Justice whether Article 12 of the EEC Treaty had direct effect, it was raising a live problem which had been discussed in Dutch legal writing for more than 50 years and had already been the subject of two constitutional amendments.

Van Duyn, which first decided that directives could have direct effect, arose in a different way. It was heard in the Chancery Division by the Vice Chancellor, Sir John Pennycuick. He approached the case in a strictly common law fashion as a pure question of interpretation.4 ‘The pleadings’, he said:

raise two broad issues, namely (i) was the refusal of entry based on Miss Van Duyn’s personal conduct within the meaning of Article 48 and the 1964 Directive, and (ii) does Article 48 confer on Miss Van Duyn a right of action enforceable in the courts in this country?

Rather charmingly, he went on,

I will not attempt any introductory statements as to the Treaty of Rome or the European Court of Justice. For a convenient general review of these matters, see Parry and Hardy’s EEC Law.

He then went straight to the terms of the provisions at issue, citing Article 48, Article 177 and, in particular, Article 189 for the definition of a Directive as a measure which ‘shall be binding, as to the result to be achieved, ... but shall leave to the national authorities the choice of form and methods’. Then he cited the 1964 Directive, Article 3 of which provides that ‘Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.’

Against that background, he came at once to his conclusion:

Article 3, paragraphs 1 and 2 in that directive clearly I think go to the ‘result to be achieved’ within the meaning of Article 189 of the Treaty of Rome, and not to the ‘form and methods’, which are left to the national authorities.

On the basis of that classically common law approach to interpretation he concluded that Article 3 of the Directive probably had direct effect. But he felt that he should nevertheless refer the case to Luxembourg to make sure,

4 For a report of the proceedings in the Chancery Division, see Van Duyn v Home Office [1974] 1 CMLR 347.
so illustrating my point that the national courts are the powerhouse where the electricity of Community law is generated.

A. How References have Evolved

*Van Gend en Loos* was referred in 1962. At that stage there had been only six references and there were six more in 1963. By the time Jack Mackenzie-Stuart became a judge in 1973, there had been a total of 184 references, 40 of them in 1972. *European Court Reports* for 1972 ran to 1,400 pages. In his judgment in *Van Duyn*, the Vice Chancellor narrates the submissions of Mr Peter Gibson QC, now Gibson LJ, in which he tried to persuade the Vice Chancellor not to make a reference because, as he said, ‘national courts should not overburden the already overburdened European Court with a deluge of references’.

Well, the deluge happened and, by the time Lord Mackenzie-Stuart retired in 1988, the average number of references per annum had risen from about 40 to 140. *European Court Reports* for 1988 ran to 6,500 pages. We are now getting up towards 250 references a year and *European Court Reports* for 2001 was 14,000 pages—10,000 for the Court of Justice and 4,000 for the Court of First Instance.

That is against the background of ‘self-restraint’ on the part of national courts. It is said that if the Supreme Finance Court in Germany (the Bundesfinanzhof) referred all the cases that, on a strict reading of Article 234, it ought to refer, we would be doing nothing but German tax cases. When I mentioned that to a member of the German Supreme Civil Court (the Bundesgerichts hobf), he said that, if we had all of his cases, then we couldn’t do any of the tax cases.

References now account numerically for about 50 per cent of the case load of the Court of Justice and far more in terms of the work load. This is partly because of the novelty, variety and technical complexity of the legislation enacted to fulfil the 1992 programme. In 1997, environment and consumer affairs accounted for only eight cases, but 53 new cases on these topics have already been introduced in the nine months to September of this year. In 1997, free movement of goods, once the staple diet of the Court, accounted for 20 cases, but up to September of this year for only nine. Services and establishment have produced 30 cases this year and taxation nearly 25.

It is inevitable that, in the 40 years since *Van Gend en Loos*, and the 30 years since Lord Mackenzie-Stuart became a member of the Court, the pattern of the relationship between the Court of Justice and the national courts should itself have become both more complicated and more varied. Lest your professors ask you to say what is the model of the relationship, let me give you some examples to show why it is not a simple model.
B. The Approach of National Courts

Much depends on the status and attitudes of national judges, the extent to which the courts of the country concerned rely on arguments presented by counsel for the parties and the extent to which the judge has to limit consideration of a case to the arguments presented. So in some cases, such as Telemarsicabruzzo, you will find national judges raising questions which neither party before them appears to have suggested might be raised. A current example is Altmark, where, of its own motion, the German Federal Administrative Court (Bundesverwaltungsgericht) raised the question whether a subsidy to a bus company constituted a state aid, although neither the bus company nor its competitor seems to have wanted to be involved in litigation before the Court of Justice.

By contrast, some judges appear simply to rubber-stamp orders for reference drawn up by counsel for the parties. Because each party wants to introduce a question that might produce an answer in their favour, the result is an examination paper. Question 1 is a general question. Question 2 then begins ‘If the answer to Question 1 is Yes...’, and it is not until Question 6 that we reach ‘If the answer to Question 1 is No...’. That is not very helpful particularly if Question 1 is based on a false premise.

Some courts make references early, particularly nowadays tribunals like the British Employment and VAT Tribunals, who are sufficiently versed in Community law to spot the point from the beginning. But some references that could usefully have been made earlier are not made until the case has reached the highest court. Seymour-Smith took five years before it was referred on a point which one might have thought was pretty obvious from the start. By the time it reached Luxembourg, there were said to be 10,000 pending cases awaiting the result.

Some judges make long references—for example, 80 pages on a question of company accounting. Some are very short—two pages without the slightest indication why the reference is being made. Some are handwritten and some are almost unintelligible.

Sometimes the judge in a lower court uses the reference procedure to challenge the jurisprudence of a higher court. The Simmenthal case, on the question whether national judges are required to set aside national provisions...
in favour of Community law, arose precisely because the local judge wanted to challenge the jurisprudence of the Italian Constitutional Court.

In a very recent example, Arduino, the Italian Corte di Cassazione quashed a decision of a lower court which had refused to apply the Italian tariff for lawyer's fees. The judge in the lower court then referred the case to the Court of Justice suggesting that the tariff as such might be illegal under the competition rules of the Treaty. In fact the Court held that the tariff did not contravene the competition rules, but the case illustrates the willingness of lower courts to use the reference system to challenge decisions of the higher courts that they do not like. Sometimes, as in Simmenthal, it works.

Then, of course, there are cases of refusal to refer—witness the long saga of the refusal of the French Conseil d'État to accept the direct effect of directives while the Cour de Cassation accepted it. Eventually the Conseil d'État gave in without referring.

Sometimes higher courts apply the doctrine of acte clair as a reason for not making a reference. It has even been known for judges to differ on the question of whether (or sometimes why) there is acte clair but it is held nevertheless that there is acte clair and no reference is made. Occasionally, one is tempted to wonder whether some of the courts that have refused to refer knew the answer they would get and didn't want to hear it. It was partly to counteract such deliberate deafness that the Court of Justice produced the much criticised decision in CILFIT.

CILFIT, so it seems to me, is no more than a counsel of common sense. The Treaty, after all, is unambiguous: a court of last resort must refer if the question of Community law is necessary to enable it to give judgment. But it would be absurd to do so if the answer to the point is already clear. On the other hand, in deciding whether the point is clear, the court has to take account of the fact that Community law is different in character from national law. That, in essence, is all that CILFIT says, and it does seem very odd to suggest that the Court should 'relax' CILFIT when that judgment already represents a substantial (even 'activist') relaxation of what the Treaty requires.

'Relaxation' of CILFIT is, in any case, unnecessary now. Article 104 of the Court's Rules of Procedure have been amended to allow the Court to decide a case by Order:

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

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13 Case 283/81 CILFIT (Srl) & Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415.
question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt.

A national court which is in doubt whether there is *acte clair* can make a reference indicating the answer it would give and suggesting that, if the Court agrees, it would be appropriate to decide by Order. Honour will be satisfied, time saved and the requirements of the Treaty respected *unless*, of course, the Court disagrees which will show that the reference was necessary after all.

Parallel to cases of refusal to refer, there is the phenomenon of constitutional courts questioning the primacy of Community law by reference to their own constitution, particularly on the basis of the protection of fundamental rights.14 I may be naïve, but I suspect that, for the practical lawyer, this particular dispute is about as real as the dispute about sovereignty—"that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples".15

There are also examples, fortunately very rare, of courts refusing to accept the answer given by the Court of Justice, or where, a reference having been made and an answer received, another route is found to bypass the decision of the Court of Justice.16 This problem and its possible consequences (state liability for court decisions) are raised acutely in a recent reference from Austria.17

C. The Approach of the Court of Justice

Just as there is a wide range of approaches from the national courts, there is a wide range of responses from the Court of Justice and I would have to admit that they are not always consistent. Sometimes the Court will give very abstract replies, simply saying how the provision in question is to be interpreted, and sometimes very specific replies which leave very little discretion to the national judge. The latter type of reply has been criticised as going beyond the Court’s competence, but it should be remembered that Article 220 requires the Court to ‘ensure that, in the interpretation and application of this Treaty, the law is observed’.

Sometimes the Court answers all the questions as put, sometimes they are reformulated and some of the questions may not be answered at all. In about one per cent of cases the reference is rejected as inadmissible, and in

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17 Case C-224/01 *Köbler v Republic of Austria*, judgment delivered 30 September 2003, not yet reported.
other cases, in spite of the urging of Advocates General,¹⁸ the Court refuses to reject references.

I plead guilty to occasional inconsistency and it is not surprising that, with 250 judgments a year, more than half of which are decided by Chambers of three or five judges, there should not be total consistency. But I would not plead guilty to any failure on the part of the Court genuinely to cooperate with the national courts. What is surprising is not how badly the system works, or how difficult it is to make it work, but how well it works.

D. Enlargement

With enlargement there will be a new dimension. The number of cases coming to the Court will inevitably increase (for other reasons as well) and the Court will be dealing with countries with very little experience of the system. What are the conditions for future success?

First, as far as the national courts are concerned, it will be important to remember that a reference should be made only when a decision on the point is necessary to enable the national court to give judgment. That leads to the second point that, from the point of view of the Court of Justice, the national court should explain why the reference is necessary. Quantity inevitably affects quality and national judges must do more than rubber-stamp what the parties produce. If the Court of Justice has to process cases that are unnecessary, or the point of which is difficult to understand, quality will inevitably be affected.

Third, the Court must continue to make every effort to ensure that cases are processed in a reasonable time, although the importance of speed is sometimes exaggerated. Speed is essential if the system is to work, but a quick answer is not necessarily a good answer or an answer that will last. It may be worth waiting another three, four or five months to get a good answer. In that connection it is worth remembering that the language regime adds seven to nine months to the time taken to process a case.

It is sometimes suggested that the Court should operate only in one, two or three main languages. But judgments that are to be followed must be understandable in all languages, workable in all legal systems, and consumable and acceptable in all countries by judges, lawyers and litigants. The experience of the EFTA countries (Norway, Iceland and Liechtenstein) is instructive. The EFTA Court operates only in English and the judgments of

the Court of Justice (many of which apply in the EEA) are not available in Norwegian or Icelandic. There is said to be a reluctance to apply this jurisprudence because ‘it’s not in my language’. If Community law is to be applied uniformly by national judges, they must have access to the law in their own language, otherwise it will be ‘foreign law’, to be resisted, mistrusted and eventually not applied.

Fourth, confidence in the system requires adequate resources and a rational allocation of resources—financial and human. The Court cannot operate to maximum efficiency in a procedural and financial straitjacket imposed by the Member States and the political institutions. At present, the simplest amendment to the Rules of Procedure takes about a year to achieve, and the budget of the Court, amounting to 0.15 per cent of the total expenditure of the European Union, is examined line by line by the Commission, the Council and the Parliament as well as being audited by the Court of Auditors. That is neither rational nor a recipe for efficiency.

E. The Effect on the Development of Law

Up to now I have been talking about the working of the relationship between the Court of Justice and the national courts. But it seems to me that the process of interaction between the Community Courts and the national courts is of much wider interest for the development of the law in general.

In one of the very earliest cases under the Coal and Steel Treaty, Advocate General Lagrange was discussing the sources of law of Community law. He said:

Although the Treaty which the Court has the task of applying was concluded in the form 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 different Member States. Have the applicants themselves not followed that latter path in the present action with regard, for example, to the concept of misuse of powers, of which it has become apparent that the national laws constitute an infinitely richer source than the really rather summary theory of ‘abuse of power’ 19

Thus, it was recognised at the very beginning that national law would be an important and indeed fundamental source of Community law. The idea of direct effect begins with Dutch law but it now goes beyond the issue that was foremost in Van Gend en Loos and Van Duyn—the issue of individual rights. As two Dutch authors have said, ‘the rights issue obscures the direct effect issue, and this may, in the beginning, have been a direct consequence of the Dutch legal thinking on the subject’. In cases beginning with Grosskrotzenburg, Kraaijeveld and Inter-Environnement Wallonie and, more recently, Dior and Schieving-Nijstad, we see the discussion of direct effect moving from the question of individual rights into a much more general question about the nature of Treaty obligations and the obligation of the organs of the state (whichever organ is responsible) to comply with the international obligations of the state. The jurisprudence of the Court has emphasised that, lying behind all this, there is a general theory of obligations which clearly comes from national and ultimately from Roman law. (As a Scots lawyer, I am comforted to see that ‘obligations’ seem to have entered the vocabulary of English law.)

Another example of the interaction is the evolution of remedies in national law—compensating for failure of the legal system (Francovich), extending the boundaries of judicial control (Factortame), extending the range of national remedies (Francovich, Factortame and, very recently, Muñoz, a case about a rather banal regulation on the nomenclature of seedless grapes).

Again, the system has been used to kill some sacred cows—Crown immunity (Factortame) and, again very recently, the rule that excluded an action of damages between parties to an illegal contract (Courage v Crehan). The attitude of two divisions of the Court of Appeal, one of which did not refer and the other did refer, shows that there was a truly doctrinal issue that Community law was being used to break open.

In one reference from Germany, Dr Meilicke used, or tried to use, Community law to find out whether a particular provision of German tax law was compatible with the second Company Law Directive. The Court
detected that his real purpose was not to answer a question of Community law, but to prove a point about German company law. We now have a very real doctrinal dispute in Germany between the Sitztheorie and the Gründungstheorie in company law. Is a company’s personality to be judged by reference to the place where it is incorporated or the place where it has its Sitz or seat (Überseering)?

Then there are cases that test the economic consequences of the law. In Davidoff and Levi, following Silhouette, the real underlying issue was whether protection of intellectual property rights worked ultimately to the disadvantage of consumers—a major issue of law, economics and social policy which in truth is a matter for the legislator to solve rather than the judge.

Finally, there are references designed to put clothes on skeletons—to give substantive legal content to the words of the Treaties which are, after all, only ‘framework treaties’.

In a sense, that is the essence of the history of Community law, beginning with Van Gend en Loos. Community citizenship is the most recent example. According to the submissions of the Member States appearing in Martínez Sala and Wijzenbeek, the provisions on citizenship included in the Maastricht Treaty were intended to be no more than a general declaration of existing but limited rights with no autonomous legal significance. In legal terms it was no more than a skeleton without practical effect. The Court has been prepared to put legal skin and clothes on the political skeleton.

This rather complex interpenetration of the legal systems seems to me to produce a new dimension of legal thought. Some of you may regret the loss of purity of national legal systems that goes with it. I comfort myself with an experience long ago, before I even started in the law, when I was invited to meet Mr Justice Finlemore, who said to me ‘Humph, you come from Scotland. The Scots ruined the English law of tort with Donoghue v Stevenson’. You must make your choice whether you want to stay in that mode or move on. For my part, I believe that the law is more exciting now than it used to be, though it is also more complex. Lawyers have to get used to raising their eyes above the immediate horizon and, as the development of CELS shows, that is not too difficult, even in the Fen Country.

The development of Community law and, with it, of national law is a process in which all lawyers have a part to play—judges, certainly, but also barristers, solicitors and in-house counsel, not forgetting students who help in advice centres. If national courts are the powerhouse of Community law, because it is there that Community law really happens for the individual, they are also where it doesn’t happen when those who should have done so have failed to spot the point or failed to raise it. Most crucially—and this is a new development in Britain since the days when I was watching Jack Mackenzie-Stuart as a very raw solicitor’s apprentice—we need the help of academic lawyers as teachers, as writers and as critics.

Let me close with a quotation from an academic lawyer who profoundly influenced both Jack Mackenzie-Stuart and myself—Professor JDB Mitchell, my predecessor in the Chair of European Institutions at Edinburgh:

Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other and, in the evolution of government, it is important that within acceptable limits individuals should be able to participate through the neutral mechanism of courts, not merely in maintaining the framework of rules, but also in advancing its construction. I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organised, it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security.37