Feature

KEY POINTS

- EU and UK law are fundamentally different in structure, purpose and way of working.
- EU law is designed to regulate relationships between sovereign states united in pursuit of common political, social and economic aims.
- Under the Withdrawal Act, all EU law will be "retained" except for the Treaty provisions that explain their purpose and provide their context.
- Inevitably UK courts will have to "make law" in order to make sense of what they are doing.

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Can EU law be translated holus-bolus into UK domestic law?

In this article, Sir David Edward KCMG PC QC FRSE questions the underlying assumption that EU law can be frozen at a particular moment of time and transposed holus-bolus into UK domestic law.

On Brexit Day, should it arrive, the European Union (Withdrawal) Act 2018 (Withdrawal Act) will come into effect. The aim of the Act is to transpose the corpus of EU law, as it exists on Brexit Day, into UK domestic law, leaving it to the judges to interpret and apply it. In order to do so, it creates a new category of UK domestic law to be known as "retained EU law" with many sub-categories:

- "retained case law";
- "retained domestic case law";
- "retained EU case law"; and
- "retained general principles of EU law"; as well as
- "EU-derived domestic legislation";
- "direct EU legislation";
- "retained direct principal EU legislation"; and
- "retained direct minor EU legislation".

To add a new twist, no sooner was the Act passed than the government produced another White Paper which threatens further legislation. This will amend the Withdrawal Act so that the effect of the European Communities Act 1972 (ECA) is saved for the "time-limited implementation period" that will follow Brexit Day. But "the Bill will take a selective approach to saving the effect of the ECA".[1]

This article does not seek to offer a way through this daunting thicket of statutory and bureaucratic verbiage,[2] but rather to look at the underlying assumption that EU law can be frozen at a particular moment in time and transposed holus-bolus into domestic law. The unavoidable problem is that EU and UK are fundamentally different in structure, purpose and way of working.

UK law is, by its very nature, domestic law. Our judges try to ensure that it is "accessible and so far as possible intelligible, clear and predictable".[3] In a lecture delivered at Harvard in 1898 Dicey spoke about "the elaborate and lengthy process of judicial law-making" – what he called "judicial legislation":

> "Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic and symmetry of the law. The main employment of a Court is the application of well-known legal principles to the solution of given cases, and the deduction from these principles of their fair logical result. Men trained in and for this kind of employment acquire a logical conscience; they come to care greatly – in some cases excessively – for consistency".[4]

In spite of all that has happened to the content and structure of the law since the end of the nineteenth century, it is, I think, still true that judges have a logical conscience, seeking to maintain the logic, symmetry and consistency of the law. This is as true for EU judges as it is for UK judges. They are each working within the structure, and on the basic assumptions, of their own system, but these are different in fundamental respects.

The structure of UK law proceeds on the basic distinction between legislation, primary and secondary, and, on the other hand, the law declared and developed by the courts, broadly based on a recognised system of precedents (that is, "judicial legislation").

As regards international law, the UK has traditionally been severely dualist, so that international law exists on a different plane and enters domestic law only through Parliamentary legislation. Thus, so the theory goes, EU law and the ECHR are binding on the UK courts only by reason of the European Communities Act 1972 and the Human Rights Act 1998. Correspondingly, after Brexit, Parliament will, through the Withdrawal Act, work the magic of converting EU law into domestic law. The task of the judges will no longer be to apply EU law as such, but to apply the new body of domestic law (retained EU law) created by the Act.

EU law differs from UK law in a number of respects. First and foremost, it is designed to regulate relationships between sovereign states united in pursuit of common political, social and economic aims: it is law with an explicit purpose. To say that its interpretation must be "purposive" (or "teleological") is only to recognise the fact that it is the creation of treaties – international contracts between states – which are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[5]

One purpose of the Treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – is "to unite national markets into a single market having the characteristics of a domestic market", so as to prevent the "insulation of national markets" or "artificial partitioning of markets".[6] This is to be achieved through the creation and maintenance of a customs union; free movement of goods, persons, services and capital; rules on competition, state aids and public procurement; and a uniform system of turnover tax (VAT). Interpretation and

application of the rules of the single market cannot be divorced from an understanding of their economic and social purpose, and the way in which they fit together and support each other.

Implementation of the Treaties depends in large part on the legislative, administrative and judicial machinery of the member states. So, while EU Regulations are "directly applicable" in the law of the member states, Directives leave to the member states "the choice of form and methods".[7] As the House of Lords recognised back in 1988, the domestic legislation that implements a Directive has to be read in light of its wording and purpose.[8] And it is the member states, through their own administrative agencies, that collect customs duties and deal with customs formalities, administer the Common Agricultural Policy and pay and account for subsidies.

Unlike most other treaty systems, EU law creates rights and obligations for individuals, companies and firms – notably through the doctrines of direct effect (*Van Gend en Loos*[9]), primacy (*Costa v ENEL*[10]) and damages (*Francovich*[11] and *Brasserie du Pêcheur*[12]) – so that they fully share in realisation of the economic purpose. It is through the courts of the member states that individuals and companies seek redress for failure of the member states to comply with the requirements of EU law, but the national courts are not left to cope on their own. The system of preliminary references, modelled initially on German and Italian constitutional law, enables the national courts, when in doubt, to seek clarification from the Court of Justice.[13] This has made it possible for the court to develop canons of interpretation and application that lend logic, symmetry and consistency to EU law as it has developed.

As to the sources of EU law, the TEU provides that the Court of Justice:

> "shall ensure that in the interpretation and application of the Treaties *the law* is observed."[14]

In this context "the law" (*droit* in the French text, *Recht* in the German[15]) refers, not only to the law created by or under the Treaties, but to the whole body of legal rules and principles that form part of the law of the nations of Europe:

- public international law;
- private international law;
- Roman law;
- the public, constitutional and private law of the member states including the UK; and
- general principles that have been worked out over the centuries by legal scholars, legislators and judges – notably, in recent times, by the judges of the European Court of Justice and the European Court of Human Rights.

Some of these general principles, such as proportionality and legitimate expectation, although previously unknown (as such) in UK law, are now generally accepted as useful principles of administrative law. Others, such as solidarity, subsidiarity, loyal co-operation, mutual trust and mutual recognition, only have meaning in the context of EU law.

For over forty years, there has been a steady "interpenetration" between EU law and UK law. Nevertheless, as Lord Mance said in a lecture on Legal Certainty:

> "The breadth of the interpretive exercise expected of courts in these respects can be a cause of uncertainty. Paradoxically it is uncertainty introduced into domestic legal systems in order to achieve greater consistency with and certainty in the application of European or other fundamental legal principles."[16]

If EU law has presented such problems for UK judges up to now, how much greater will their problems be when the Withdrawal Act leaves them to cope on their own without access to the CJEU?

Consider three basic provisions of the Treaties:

First, as regards free movement of goods, Art 30 EEC, now Art 34 TFEU, provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

Similarly, as regards the right of establishment, Art 52 EEC, now Art 47 TFEU provides:

> "[Within the framework of the provisions set out below] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited."

And Art 85 EEC, now Art 101 TFEU provides that:

> "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market …".

Each of these provisions has been fleshed out by an extensive body of legislation in the form of Regulations and Directives and an encyclopaedic volume of case law. Under the Withdrawal Act, all this law will be "retained", but not the Treaty provisions that explain their purpose and provide their context.[17] Deprived of access to the CJEU for clarification, the UK courts will be expected to apply the "retained law" in a vacuum, as if it were mere letters on a page. Inevitably, in order to make sense of what they are doing, they will have to "make law", so incurring the wrath of those who rail against the activism of unelected judges. But as Lord Reid said many years ago:

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Feature

Biog box

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"There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that, on a judge's appointment, there descends upon him knowledge of the magic words, Open Sesame. Bad decisions are given when the judge muddles the password and the wrong door opens. But we do not believe in fairy tales anymore."[18]

As we know from daily experience, judges will differ in their approach to the same problem of interpretation. How they will respond to the very odd task that is now being asked of them will inevitably lead to different outcomes. Some may take a black letter approach, on the view that their task is to interpret the texts as they stand, frozen in time. Others may be prepared more readily to "have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal".[19] The Supreme Court will no doubt try to achieve some consistency of approach, though it cannot assure uniformity of result. All of this will be complicated by the dispute resolution mechanisms that are yet to be determined. On any view, these will not provide the procedural clarity of the Preliminary Reference procedure.

This confection of ill-conceived legislation is a triumph of hope over experience. If Brexit Day never arrives, the Acts, and the commentaries they excite, will slumber unloved on the upper shelves of law libraries, to be brought back to life, perhaps, by the kiss of a student in search of a suitably arcane topic for a Ph.D. thesis. If not, we may confidently predict that they "will be buffeted on waves of litigation, thrown back and forth between various litigants, sometimes doing good, sometimes doing bad, occasionally being washed up on useless analytical islands where [they] will be stuck for years on end until a rescue by some fresh tidal wave of fresh thinking".[20] ■

1 *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, CM 9574, §60-61.
2 For a guide to some of the problems and pitfalls facing the practitioner, see James Segan The EU (Withdrawal) Act: Ten Key Implications for UK Law and Lawyers at https://www.blackstonechambers.com/news/european-union-withdrawal-act-2018-ten-key-implications-uk-law-and-lawyers/
3 Lord Bingham, *The Rule of Law*, Allen Lane, 2010, p 37.
4 AV Dicey, 'Lecture XI: Judicial Legislation', in *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century*", 2nd edition, Macmillan, London, 1914, pp 363 and 364.
5 Vienna Convention on the Law of Treaties, Article 31.1.
6 Case 270/80 *Polydor v Harlequin Record Shops*, ECLI:EU:C:1982:43, §§16-17.
7 Article 288 TFEU.
8 *Litster v Forth Dry Dock and Engineering Co Ltd* [1988] UKHL10.
9 ECLI:EU:C:1963:1.
10 ECLI:EU:C:1964:66.
11 ECLI:EU:C:1991:428.
12 ECLI:EU:C:1996:79.
13 Article 267 TFEU.
14 Article 19.1 TEU.
15 As opposed to *loi* and *Gesetz*, which refer to legislative and similar acts.
16 Lord Mance, 'Should the law be certain?', The Oxford Shrieval Lecture, 11 October 2011, accessible at www.supremecourt.uk/docs/speech_111011.pdf.
17 Paragraphs 92 ff. of the government's Explanatory Notes to the Withdrawal Act claim that a number of Treaty provisions are converted into UK law by s 4 of the Act. For the absurdity of that proposition, see the article by James Segan cited at footnote 2 above.
18 Lord Reid, The Judge as Law Maker', (1972) 12 JPTL 22.
19 Withdrawal Act, s 6(2).
20 Conor Gearty on the Human Rights Act, in 'Tort Law and the Human Rights Act', in Campbell, Ewing & Tomkins (eds), Sceptical Essays in Human Rights, OUP 2001, p 259 (quoted by Stephen Sedley in Law and the Whirligig of Time, Hart 2018, p 163).

Further Reading:

- The EU (Withdrawal) Bill and the courts: peering through the glass darkly (2017) 10 JIBFL 603.
- The UK courts after Brexit (2016) 9 JIBFL 511.
- LexisPSL: Banking & Finance: The status of EU law in the UK after Brexit.