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"The Influence of European and International law on the English Common Law, 1980 to date."

Some observers have watched with growing dismay as European and international law has encroached into areas traditionally considered the preserve of the common law. In their eyes, the new rules will render the old law gradually redundant, the victim of a slow but relentless codification. Others, however, remain optimistic. To them, by adapting to European and international law, the common law has demonstrated that it can be renewed and reinvigorated in the face of challenges posed by growing influences from overseas. With the this debate in mind, this essay outlines five broad ways in which European and international law have influenced the common law.

1. Replacement

It is unarguable that, in some areas of law, international and European law have begun to overshadow – and even to replace – the common law. At present, this process is clearest within certain niche practice areas. For example, whereas employment law was at one time governed exclusively by common law principles, almost every employment case now raises legislative provisions. And, from discrimination to collective redundancies, that legislation increasingly traces its roots to Europe.

Furthermore, the onslaught is not confined to niche corners of law. Take, for example, the Defective Products Directive, the Unfair Contract Terms Directive, and the Consumer Goods Directive: all reach deep into territory previously considered to be the realm of the common law. Indeed, on one view, this encroachment is simply the first stage of a bigger project to develop a harmonised system of European private law. Plans for a European Civil Code, although currently unfashionable, could be

easily resurrected. A unified code of administrative law, whilst undoubtedly a more distant prospect, may then not be far behind.

2. Incorporating rights

Common lawyers, however, should not despair. The second main way in which European and international law has influenced the common law is by prompting the development of certain common law rights so as to properly guarantee the rights provided by treaties which have been incorporated into domestic law. The most well-known example of this is in relation to actions for breach of confidence, which, to quote Lord Hope in *Campbell v MGN Ltd*, has been given a new "breadth and strength" by articles 8 and 10 of the European Convention.[1] Far from eroding or weakening the common law, European law has here breathed new life into an existing cause of action.

So far, the development of substantive common law rights to conform with international treaties has been largely confined to human rights cases. The courts are, after all, obliged by the Human Rights Act 1998 to act compatibly with Convention rights, and to have regard to the judgments of the Strasbourg court. Furthermore, Community law is generally implemented through the use of legislation, and as such there is relatively little opportunity to argue that the common law is in some way incompatible with Community law. However, it surely cannot be long before such incompatibility arises. Following the German ECJ case of *Pfeiffer,*[2] it is now clear that the duty on domestic courts to interpret national law consistently with Community law is a duty which applies not only to legislation, but also to domestic case-law – and, therefore, to the common law. This second category of cases is therefore likely to grow sharply in significance over the coming years.

3. The presumption of compatibility

The third area of influence is in cases where, in developing the common law, the courts have had regard to international and European law even though the relevant

[1] [2004] UKHL 22 [2004] 2 WLR 1232, [86]
[2] Cases C-397-403/01 [2004] ECR I-8835

treaties are not incorporated into domestic law. The principal mechanism has been through the use of a presumption that, in the words of Lord Hoffmann in *R v Lyons*, the English common law should be interpreted, "in a way which does not place the United Kingdom in breach of an international obligation."[3] As in *Lyons* itself, this principle was developed most strongly in the context of human rights cases prior to the 1998 Act which incorporated the European Convention. However, the same logic should apply, by analogy, to other types of international treaty. For example, *Westland Helicopters Ltd v AOI*[4] raised a question regarding the common law rules governing the conflict of laws, and in particular the question of which law should govern an international organisation. In deciding the issue, the court looked to what was said by the international treaty which established the organisation, and the presumption that the common law should be compatible with international public law.

It is also worth contemplating further this compatibility presumption itself. The presumption is most commonly used when construing legislation, when it is said that Parliament does not intend to legislate contrary to its international treaty obligations. But the intent of Parliament is far less relevant to the interpretation of the common law than it is to the interpretation of statutes, and the application of the compatibility presumption in this context can be justified only on the basis of a general legal policy that compatibility is better than conflict. This legal policy, itself judge-made, is therefore a further development of the common law made under the influence of international law. Further, whereas the compatibility principle may only be applied to legislation if its meaning is ambiguous or obscure, it has been suggested that it could be applied to the common law even if there is no ambiguity.[5] This follows from the fact that the courts are not bound by the common law in the same way as they are bound by clear legislative words. Paradoxically, this may mean that there is a stronger presumption that the common law should be compatible with international law than that legislation should be so.

4. Social and political norms

[3] [2002] UKHL 44 [2003] 1 AC 976, at [27]
[4] [1995] QB 282
[5] Balcombe LJ in *Derbyshire CC v Times Newspapers* [1992] QB 770, 812E

The fourth way in which the development of the common law has been influenced by European and international law is through the more general impact which those areas of law have had on English social and political norms. This category of cases is more difficult to pin down than the three outlined above, but it is nevertheless of equal importance. Indeed, in some respects this is the most significant influence of all.

This more general influence of international law is clearest when the courts make explicit reference to it. For example, in *R v G*[6] the House of Lords revised the common law on recklessness. Two boys, aged 11 and 12, had lit a fire which got out of control and caused serious damage. They had not realised the risk that the fire would spread as it did, but were nonetheless convicted of reckless arson. In overturning their conviction, the House of Lords took account of the United Nations Convention on the Rights of the Child. In the words of Lord Bingham (at [53]), "the House cannot ignore the norm created by the UN convention," which showed that, "ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society." Whilst this was only one consideration among many, it is clear that the court was alive to the general trends in international law.

Where the courts do not make explicit reference to international principles, one must look harder to see their influence. Take, for instance, the growing willingness of the courts to interfere in executive decisions, which has arguably been spurred on by the more interventionist attitude of the European courts. For example, it is notable that the English courts have recently reemphasised the importance of certain human rights which exist at common law, and are now articulating a constitutional principle that Parliament could only override those rights could by express statutory language. For Lord Hoffmann to talk of "fundamental principles of human rights"[7] without prompting widespread dissent is surely an indication of quite how far the common law has come. Looking ahead, if the House of Lords ever takes the bold step which many have urged of declaring proportionality to be a head of review in English, and not just European, administrative law, it will be a clear example of the English common law being very strongly influenced by its European partners.

[6] [2003] UKHL 50 [2004] 1 AC 1034
[7] *R v Home Secretary ex parte Simms* [2002] 2 AC 115, 131.

5. Constitutional

Finally, this essay would be incomplete without mention of the impact which European law has had on English constitutional law, and in particular on the principle of Parliamentary sovereignty. It may surprise some that this fundamental constitutional principle should be categorised as 'common law'. But as Lord Steyn commented in the recent Parliament Act case of *R (Jackson) v Attorney General*,[8] the legal doctrine of the supremacy of Parliament was created by judges and is, in this important sense, a construct of the common law.

The conflict between the principle of Parliamentary sovereignty and the European law doctrine of supremacy is well known to English lawyers. The scene was set by the European Communities Act 1972, which made all directly effective Community law immediately enforceable in domestic courts, and left any question regarding the meaning or validity of any Community instrument to the European Court. The key question was, what would happen when a later United Kingdom statute came into conflict with directly effective European law?

The collision came, finally, in the course of the famous *Factortame* litigation. Under the Merchant Shipping Act 1988, 75 percent of the directors of any company owning a British fishing vessel had to possess British nationality. Factortame, whose directors were mainly Spanish, argued that this requirement was incompatible with Community law. The question arose of whether the courts could grant an interim injunction to disapply the 1988 Act so as to protect Factortame's interests pending final determination of the claim. The House of Lords held that, under the common law, it could not.[9] This was in accordance with a strict view of Parliamentary sovereignty, which insists that no Act of Parliament can be impugned by an earlier Act (i.e., in this instance, the 1972 Act). The European Court, however, held that the absence of such interim relief was itself a breach of Community law.[10] This European principle was

[8] [2005] UKHL 56 [2006] 1 AC 262
[9] [1990] 2 AC 85
[10] Case C-213/89 [1990] ECR I-2433

then accepted by the House of Lords, and in June 1990 their Lordships 'disapplied' the 1988 Act.[11]

Academic debate still rages over the significance of *Factortame*, and whether it amounts (at one extreme) to a revolution, or (at the other) merely to the application of a new interpretive method. The crucial point for the purposes of this essay is that the court neither abandoned the common law principle of Parliamentary sovereignty, but nor did it stick slavishly to that principle as previously understood so as to simply reject European law. Rather, it steered a new course, retaining the underlying principle – Parliament could still reject European law if it chose to – whilst acting on a new presumption that, unless it states otherwise, Parliament has an ongoing intention that the courts should apply the 1972 Act. This development is a compelling demonstration of the flexibility of the common law, even in an area as fundamental as the constitution.

Conclusion

European and International law have brought mixed blessings to the English common law. There is no avoiding the fact that, in some areas, European law has and will continue to replace and overshadow the common law. But in other areas of law, the common law has adapted to new challenges; and in still others, it has positively thrived. It is precisely because of this flexibility that the common law will continue to survive alongside its international and European peers. This will not be because the English method is superior to all others, and it will not be because England jealously guards the boundaries of its common law. Rather, it will be because the common law has proved that it possesses that most crucial key to survival – adaptability.

[11] [1991] 1 AC 603