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*Outside the Picture Frame?
The Case of the United Kingdom*

There is much about the relationship between the UK and the EU that makes the UK appear like the odd man out. However as with many things the reality is much more nuanced. UK lawyers and judges have perhaps for centuries acted like curious yet discerning jackdaws; selecting enticing and appropriate bits of law from many international sources and weaving them into their own work and the national legal heritage.

To strike an optimistic note it is therefore perhaps unlikely that Brexit, if and when it eventually happens will in any way curtail this internationalist judicial mind-set, indeed perhaps rather to the contrary it might be extended over wider international horizons. So if Brexit proceeds one might arguable say that the UK will be outside of the constraints of the EU picture frame but that will not mean at all that she will not be dipping in more than occasionally.

The starting point of this paper is to look back at a report produced by the author in the European Parliament in June 2008, now just over a decade ago, «On the Role of the National Judge in the European Judicial Order»¹. The report was produced, by the Legal Affairs Committee of the European Parliament, as a so-called “own initiative” report. The background to the Committee’s desire to investigate this area flowed from its annual task to produce the official Parliament report on the Monitoring of Community Law. Each year there was a growing sense that European law was not being employed at a national level as much as it should, sometimes doubtless due to lack of knowledge. There was a general sense that having put our national judges on the front line of European law as the ‘first judge’ we should make sure they were adequately supported in this task. To identify the necessary support it was of course first necessary to look at the experience of judges in the national context.

The report was quite a unique venture for the Parliament in that it

¹ European Parliament, *Report on the Role of the National Judge in the European Judicial System*, June 4 2008, accessed July 19, 2019, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0224&language=EN>.

included an attempt to gather first hand data from national judges.

To this end a detailed survey was sent to all Member States during the second half of 2007 in order to hear from as many national judges as possible. More than 2300 judges responded to the survey and the results were published as an annex to the Parliament's report. The original questionnaire and some analysis of the results are attached to the report and warrant closer study. For simplicity it is perhaps worth setting out here the main findings highlighted at the beginning of the report which arose from the answers to the survey:

«—significant disparities in national judges' knowledge of Community law² across the European Union, with awareness of it being sometimes very limited,
— the urgent need to enhance the overall foreign language skills of national judges,
— the difficulties experienced by national judges in accessing specific and up-to-date information on Community law,
— the need to improve and intensify the initial and life-long training of national judges in Community law,
— the judges' relative lack of familiarity with the preliminary ruling procedure, and the need to reinforce the dialogue between national judges and the Court of Justice,
— the fact that Community law is perceived by many judges as excessively complex and opaque,
— the need to ensure that Community law lends itself better to application by national judges»³.

In the main the report was much used to argue for greater judicial training and co-operation across the Union and there can be little doubt that these aspects have improved during the intervening years. However to give a flavour of the sentiment of national judges which perhaps may not have evolved so much it is perhaps instructive to repeat the synopsis of the judges view on the role in respect of EU law.

«Thus, if we were to present a profile of a typical first instance judge, based on the answers to this question, it could be summarised in this way:

² For the purposes of this resolution, references to Community law should be understood as also including Union law.

³ Ibid.

*“I see myself primarily as a national judge. I take Community law seriously, although it is a big responsibility to deal with such a complex body of law. Also, I rarely come across it in my daily work because the parties hardly ever raise it”*⁴.

As we are dealing here specifically with UK attitudes it might also be appropriate to relate one response received from that jurisdiction almost certainly from London, bearing in mind that London falls within the specific jurisdiction of England and Wales. Written in neat fountain pen the respondent sought to address the question concerning his role as the ‘first judge of European law’ answering carefully that he sadly ‘did not understand the question’...

Of course the UK and specifically the jurisdiction of England and Wales has a very special way of dealing with what it terms “foreign” law. Whilst the UK remains a Member State EU law itself would never have this status but rather should be seen as an integral part of national law, but where judges are used to parties having to plead a foreign law there is always the chance that anything that appears extraneous will be overlooked and the court will revert to English law⁵.

Indeed this had always been a worry in respect of the Rome I⁶ and Rome II⁷ Regulations that despite the need to respect these EU instruments without parties specifically pleading a “foreign” law as applicable to their case the intention of the Regulations might be undermined. In a sense Brexit has potentially brought more clarity to this issue. As the European Union (Withdrawal) Act 2018, also dubbed by those supporting Brexit, the ‘Great Repeal Act’ rather conversely has the effect, not of repealing EU law but directly writing it into UK law thus giving the two above Regulations (which are included) and much else besides a potentially more sound footing before the UK courts and judiciary⁸.

Whilst English procedural law might as stated above appear to adopt a rather churlish attitude to ‘foreign’ law, this has never stopped our judges

⁴ Ibid.

⁵ Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA [2018] EWHC 2759.

⁶ Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁷ Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁸ European Union (Withdrawal) Act 2018; 3, 2, (a) Incorporation of direct EU legislation, specifically any EU Regulation. Accessed 19 July 2019, <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>.

from looking further afield for solutions and adopting what can only be termed an internationalist approach. The first and most historically eminent of these being Lord Mansfield⁹.

Thereafter and in more recent times the English judiciary and legal professions have received several waves of incoming diversity which have helped in the further “Europeanisation” of English law and practice. The first and most excellently documented in relation to some key figures (but not all) being the influx of German Jewish emigres during the World War II¹⁰. There can be little doubt that the civilian training and comparativist outlook of this generation fed into the stream of legal and judicial thinking both contemporaneously and by way of a subtle on-going influence. This was further added to by an influx of South African lawyers during the apartheid era, likewise contributing to further diversity of thought and influence.

There then comes what could be termed the “European” and “Erasmus” generations, the full effect of the latter and free movement of lawyers perhaps has yet to be captured. This started with the UK joining the EEC in 1973 and has continued to develop in different and deeper ways ever since. The mere passing of an Act of Parliament, nor the carrying through of a political decision cannot and will not overnight destroy decades of legal practice and judicial thinking let alone so many personal and professional legal connections across the continent. The influence will remain despite any legislative black letter change.

In line with this sentiment it is perhaps instructive to look at the thoughts expressed by a member of the judiciary from one of the UK’s other jurisdictions; Scotland. Perhaps more in tune with civil law and European, but nonetheless important in representing the full outlook of the UK. Ian Forrester QC, UK Judge at the General Court of the CJEU, drew an intriguing parallel between the effects of Brexit and that of the Reformation in Scotland bringing an end to papal jurisdiction over many aspects of life and law via the Papal Jurisdiction Act of 1560¹¹. Coming to the endearing but reasoned conclusion that despite the apparent huge legislative change perhaps in typically “British” fashion everyone “muddled through” as perhaps we shall with Brexit itself. Based on the parallel he draws some very pertinent conclusions which perhaps echo those hinted at above as follows:

⁹ J. OLDHAM, *English Common Law in the Age of Mansfield*, The University of North Carolina Press, Chapel Hill, 2004, p. 367.

¹⁰ J. BEATSON, R. ZIMMERMANN, *Jurists Uprooted*, Oxford, 2004.

¹¹ *MacFadyen Lecture*, Edinburgh March 8, 2018, Royal Society of Edinburgh, I. FORRESTER QC, LLD1. Accessed July 19 2019; http://www.advocates.org.uk/media/2724/forrester_macfadyen_lecture.pdf.

«-For as long as provisions of EU law are to be applied in the UK, for so long will it be necessary to think through how EU law problems will be litigated.

-It is not by “nationalising” EU regulations that the country will free itself of EU law. Nor will disputes as to the interpretation of doubtful texts disappear.

-The current criteria for examining the legality of European law, post Brexit, appear extremely complex.

-Political leaders will need to address the necessity of giving guidance to the judiciary about what priorities will apply in interpretation.

-The UK judge should not be blamed for a lack of patriotism if he or she chooses to follow a “European” interpretation of the text”¹².

If we then pass to the comments of the current Chancellor, Sir Geoffrey Vos speaking as the UK’s most senior commercial judge on the future of dispute resolution post Brexit we see a very similar train of thought. He echoes the internationalist and pragmatic approach which makes the English courts so attractive. The «EU law tapestry» is seen as remaining part of «the backdrop to the business environment in which the common law operates to resolve disputes governed by it»¹³.

The UK judiciary and legal professions will need such a pragmatic approach to survive Brexit as their independence remains open to challenge in such a highly charged political context. The headlines which greeted the outcome of the Miller case on the triggering of Article 50 where evidence of this if any were needed. With judges being labelled as “enemies of the people” the rule of law begins to look shaky and the likelihood is there will still be further political / legal challenges before Brexit is done.

Of course many will feel faced with such a highly charged atmosphere that recourse to an ‘outside’ arbiter in the sense of the CJEU would be useful but of course where some would read “outside” others would read “partial”. This is perhaps why at this point it is useful to view things from the other side, from the European side. To consider how this co-operation between courts should ideally function, in that sense it is useful to consider the thoughts of the president of the CJEU Koen Lenaerts: «In multilayered systems of governance, the notion of “comity” – understood as a means guaranteeing a constructive judicial dialogue among different

¹² Ibid.

¹³ Presentation to a Legal Business Seminar in Frankfurt, *The Future for the UK’s jurisdiction and English law after Brexit*, 28th November 2017, Sir G. Vos, Chancellor of the High Court, Accessed July 19 2019; <https://www.judiciary.uk/wp-content/uploads/2017/11/chc-frankfurt-presentation-nov2017.pdf>.

courts – becomes of paramount importance to determine whether a given court enjoys legitimacy»¹⁴. This would seem to be an equally nuanced representation of both soft yet constructive co-operation, indeed this form of approach is surely echoed in the dispute resolution system included in the to date ill fated Withdrawal Agreement between the EU and UK. Yet even the light background presence of the CJEU is too much for some.

Perhaps the fear is or indeed the hope amongst some that European law viewed against current political discourse becomes seen as the interloper, the intruder that has to be expunged. It is too easy to fall into the trap of such language when that may not be the result that was intended. Take for example Lord Dyson, former Master of the Rolls, maybe making a statement of fact but it can be imagined how this might be seen by some: «EU law now regulates large swathes of our national life. A development most of our judges from the first half of twentieth century would have found seriously objectionable»¹⁵.

It is to be hoped that by majority the UK judicial and legal professions continue to feel that EU law has a continuing contribution to make to the legal life and disputes resolutions systems within the different jurisdiction of the British Isles. Also likewise that those same professionals continue, in these uncertain times to nurture their links and connections across the continent. Perhaps in these times there is merit in some continuing consistency.

«Uncertainty is the only certainty there is, and knowing how to live with insecurity is the only security there is».

John Allen Paulos

¹⁴ K. LENAERTS, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice* in Adams et al (eds.), *Judging Europe's Judges*, Hart Publishing, 2013.

¹⁵ Lord Dyson, *Justice Continuity and Change*, Hart Publishing, 2018.