

# THE INTERPENETRATION OF NATIONAL AND SUPRANATIONAL LEGAL SYSTEMS

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## VARIETES

In Western Europe the national legal systems have developed in a way which has been described as 'convergence'. The legal systems of the world have been divided into two main groups: the civil law system and the common law system. The civil law system is based on the Roman law and is found in most of the countries of the world. The common law system is based on the English law and is found in the United Kingdom, the United States, and the Commonwealth countries. The two systems have developed in different directions and have become more and more distinct. The civil law system is more centralized and is based on a single code of law. The common law system is more decentralized and is based on a series of precedents. The two systems have been in contact for many centuries and have influenced each other. In the last few decades, however, the two systems have become more and more distinct.

This book is a study of the interpenetration of the national legal systems and the supranational legal systems. The author examines the influence of the national legal systems on the supranational legal systems and vice versa. The book is written in a clear and concise style and is suitable for students of law and for those who are interested in the development of the law.

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## THE INTERPENETRATION OF NATIONAL AND SUPRANATIONAL LEGAL SYSTEMS

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In Western Europe outside the Communist bloc of countries there are two great rival systems of law. One, the Civil Law, or what Professor Rene David calls the Romano-Germanic system, looks back for its origin to the capital of the Eastern Roman Empire now known as Istanbul where under the Emperor Justinian it attained its most sophisticated development at a period when elsewhere in Europe learning and civilisation were in eclipse. The other I shall call the common law system emerging in England at the end of the dark ages and transported to the United States of America and elsewhere throughout the world where the British in the past have exercised their influence as settlers or as conquerors.

That there are some differences in legal concepts applied in the domestic laws of the various States, which follow the Romano-Germanic system cannot be denied. Some conceptual differences have also emerged in the common law as applied by courts in the United States and those in the United Kingdom. But differences between the legal concepts applied and the methods of legal reasoning employed by judges in the courts of various States which have adopted the same general system are minor compared with those that exist between States that have adopted different general systems. The experience of Turkey provides an illustration of this. When, in the aftermath of the First World War, Turkey became a

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secular republican State and decided to discard much of the traditional Islamic legal system of justice which had formerly been applicable, it turned for inspiration to those European countries whose codes were based on the Civil Law; but it turned not to the codes of a single state alone but to all of them; to Switzerland for the Civil Code and Code of Obligations, to Italy for the Criminal Code, but to Germany for the Code of Criminal Procedure; to France for Administrative Law and Procedure. This eclecticism limited as it was to codes belonging to the Romano-Germanic system has worked satisfactorily: but it is unlikely that it would have succeeded so well if it had extended also to the incorporation in Turkish law of English substantive law or procedure for some branch of the law.

Differences between the domestic laws and legal systems of different countries are of little moment so long as courts of justice have to deal with very few transactions that take place across state boundaries. The commonest kinds of transactions which possessed this characteristic in early times were commercial, particularly where transport of goods by sea was involved; and the way in which disputes arising out of such transactions were settled provides the earliest example of the application by what were then the principal trading communities of a supra-national system of law. The separate court of Admiralty in England which, in the sixteenth and early seventeenth century, exercised jurisdiction not only in cases involving ships but in other disputes arising out of transactions between merchants, did not apply the common law of England. In maritime matters it applied what it regarded as the general laws of the sea. The source of these was not law made by the exercise of sovereign power by any individual state, but was the general custom of merchants themselves and the recorded codes of maritime usages such as the laws of Oleron or the *Consolato del Mare*. Because the pioneers in the development of maritime trade at the close of the Middle Ages were the city states of Italy, maritime and commercial law when it came to be developed by the regular courts of justice of the different nations owed much to the revived knowledge of the Roman Law as studied at the University of Bologna. Consistently with this the English Court of Admiralty was not a court of common law. It had its own procedure which differed from

that of the common law courts. The lawyers who practised in it were trained and educated in civil law; and the judges who sat in it were appointed from the foremost of such practitioners.

But growing insularity and nationalist feeling was unfavourable to this development which might have led to the convergence of national laws to form a single general system based on the Civil Law. During the eighteenth and early nineteenth centuries in England the courts of common law succeeded in wresting from the Court of Admiralty all its non-maritime jurisdiction and much of its jurisdiction over disputes involving ships. The judges of those courts to which the jurisdiction passed, whose training and experience was limited to the common law of England, were less willing than the civilians of the Court of Admiralty to accept the notion of an English court applying a supra-national law; and so in the maritime and commercial fields as well the laws of other trading countries and the law of England drifted apart.

The great increase in international trade, transportation and communication which had taken place by the beginning of the twentieth century created among the mercantile communities in the major trading nations a greater awareness of the desirability of obtaining as high a measure of uniformity as possible among the national laws by which the mercantile transactions in which they engaged were liable to be regulated. Pioneer work to achieve this result was undertaken first in the field of shipping law by the International Maritime Committee, a private organisation consisting of national associations representative of the various interests concerned in the carriage of goods by sea. Beginning in 1905 this international committee was responsible for promoting a number of international conventions which have received the ratification of varying numbers of the principal maritime states. I need only mention as best known and the most widely accepted of these which is generally known as the Hague Rules.

International conventions by which sovereign states undertake to incorporate agreed uniform provisions in their domestic laws have now become a common feature of relations between states.

Scarcely a year passes without some convention of this kind being drafted though by no means all attract sufficient ratifications to give them wide effect. Laws adopted pursuant to an obligation imposed by an international convention which has been widely ratified however, can be fairly described as supra-national laws in the sense that amendment or repeal of them would constitute a breach of the State's international obligations, so long as it remains a party to the convention. I do not pause to consider the distinction between those States like France on which the provisions of a treaty upon ratification automatically become part of the law of the State without further enactment and those States, like the United Kingdom, where in order for those provisions to have any effect in its domestic law they must first be enacted by the legislature. In either case the enforcement of the supra-national law laid down in the treaty falls within the jurisdiction of the national court and, more important, so does its interpretation.

It is this that prevents the usual type of international convention on a legal topic from creating within the States that are party to it anything that warrants the description of a supra-national legal system. International conventions of this kind are the creatures of compromise. The language in which they are expressed tends to be imprecise, often deliberately so, for precision is the enemy of compromise; it may bring into the open differences of opinion which might otherwise manage to escape attention. So there is generally considerable scope for clarification of the provisions of the Convention by the national courts of the various states in whose laws it has become incorporated.

The methods of interpretation of written laws that are favoured by the national courts of particular countries may differ widely. The style of draftsmanship of written laws passed by their national legislatures which the courts are used to interpreting may not be the same. To the extent that national courts favour the teleological approach at the expense of the literal or historical, so the interpretations put upon the words of the Convention by those courts are likely to diverge more and more from state to state as time goes on. Developments since the date of the convention in the patterns of trade and economic policies of the individual states are unlikely to

have been all identical; the more they differ the less likely it is that the teleological approach to interpretation will lead to the same result in similar cases brought before different national courts. Such, indeed, has been the experience in cases in which the governing law was to be found in the Hague Rules; although a substantial degree of uniformity of decisions in cases brought in the courts of different countries was to be found in practice as in theory as should always be the case, with the passing of the years it has come about that a case involving the Hague Rules may have opposite results in practice if brought in one country rather than another.

A supra-national legal system that is worthy of the name involves the provision of machinery for securing uniformity of interpretation and application of supra-national laws by courts in all countries in which that law is in force. The kind of supra-national law with which this lecture is concerned is the kind that confers legal rights or imposes legal obligations upon private citizens which are enforceable in the national courts against one another or against governmental and public institutions and authorities. The International Court of Justice at the Hague cannot provide adequate means of ensuring uniformity of interpretation and application of laws which a convention of this kind requires states to adopt. In theory, no doubt, if the national courts of one state consistently misinterpreted the convention to the detriment of the nationals of any other state, the government of the later state could complain to the Hague Court that this was a breach of the convention by the former state; but the International Court of Justice by reason of its composition, its membership, its procedure and, if I dare say so, its record over recent years would be an unsuitable tribunal for the task needed to be done, even in the unlikely event of a government being willing to invoke its jurisdiction for such a purpose. Machinery to provide the private citizen with direct access to a tribunal with jurisdiction to correct misinterpretation or misapplication of the convention by the courts of any state which is party to the convention, particularly his own, is what is needed.

The European Convention on Human Rights of 1951 led the way in making provision for machinery of this kind. In addition to defining the well-known list of human rights and fundamental

freedoms which all states that are parties to the convention undertake to respect, it sets up institutional machinery for dealing with complaints that a state is in breach of its obligations under the convention, that machinery consists of a Commission charged with the function of receiving and examining complaints, of promoting settlement by agreement of those complaints which they consider to be of substance and, if settlement cannot be reached, of referring them for adjudication by the European Court of Human Rights.

All countries of Europe outside the communist bloc are, or will very shortly become, parties to the Convention on human rights. The Convention, however, leaves to states which adhere to it an option whether or not to accept the jurisdiction of the Commission and the Court to deal with complaints brought against them by private individuals, including those who are their own nationals. Some states, including the United Kingdom, have; other states have not. Since human rights and fundamental freedoms are primarily for the protection of the individual from arbitrary or excessive exercise of coercive powers against him by organs of government or administrative authorities, it is only in those states that have accepted the jurisdiction of the Commission and the European Court of Human Rights to entertain complaints by private individuals, that the necessary conditions are fulfilled to create in the field of human rights a supra-national legal system which is integrated in the national legal systems.

Integration into the national legal system is ensured by the requirement that recourse may not be had to the European Court of Human Rights by an individual who claims that any of his human rights have been infringed until he has first exhausted all legal remedies available to him in national courts. So in effect there is an appeal from the highest national court to a supra-national court on questions of interpretation and application of the provisions of the Convention where these have been incorporated either directly or by enactment in the law of the state. Thus, in a case arising in England out of the extent to which freedom to express opinions may be restricted in order to secure the due administration of justice in a pending civil action — what the Americans call the conflict of interest between “Fair Trial and Free Press” — the decision of the

House of Lords as the supreme national court in the United Kingdom forbidding publication of a newspaper article in the interests of fair trial, was reversed by a narrow majority of judges in the European Court of Human Rights in favour of free press.

This case did not in fact raise any question of interpretation of the language of the convention; only a question of its application to the facts of the particular case. The United Kingdom has not in fact incorporated in any written law the actual language used in the convention to define the human rights and fundamental freedoms that it is designed to protect. The view was taken that all those rights and freedoms were already protected under the unwritten common law. The United Kingdom is, however, exceptional in this respect and it is a matter of current debate in parliament whether a written law should now be passed incorporating the actual words of the convention.

I do not belittle this early experiment in creating a supranational court to which private individuals may have access for the protection of their legal rights when national courts have failed to do so; but I must not leave myself too little time to discuss the outstanding example of the interpenetration of national and supranational legal systems that is afforded by the Common Market Countries. I will assume that the constitutional structure of the European Economic Community, for which the Treaties constituting them provide, is broadly familiar to you as lawyers in an Associated State: legislation initiated by the Commission by a proposal to the Council of Ministers in whom the legislative powers of the Community is vested, an Assembly with advisory functions and little effective powers, and, what is most important for present purposes, a Court of Justice. Over the twenty years that have passed since the Common Market was founded and the seven that have elapsed since it was extended from the original six member states to include three more, although the written amendments to the provisions in the Treaties which deal with institutional structures have been relatively minor, practices have grown up and understandings express or tacit have been reached which have affected the balance of power between the Community institutions other than the Court of Justice, and have resulted in some practical redistribution of functions bet-



ween them. In practice the institutions work in a very different way than might be supposed from reading the texts of the Treaties. These, changes, however, are not matters that I am concerned with to-day. What I will be concerned with for the remainder of this lecture is the relationship between Community law and National law particularly in the United Kingdom, and the relationship between the European Court of Justice and the English national courts. My references will be restricted to the principal treaty which deals with the jurisdiction of the European Court - the Treaty of Rome.

The sources of Community law to which effect must be given by member states within their national territory are threefold. First, there are the provisions of the Treaty itself; some of which have been held by the Court of Justice to be directly applicable as law in the member states without any further legislative action by Community Institutions or by the member states themselves. Next come Regulations made by the Council of Ministers; these too have direct effect as law in the member states without further enactment. Then there are Directives; these, according to Article 189 of the Treaty of Rome, are binding upon member states as to the result to be achieved while leaving to national authorities the choice of form and methods.

This would appear clear enough: there are Community laws which are in all relevant respects supra-national. These are provisions of the Treaty that are directly applicable and Regulations made by the Council of the Communities. They become law in all member states without enactment by the national legislature, which also has no power to alter the language in which they are expressed or to repeal them or to pass any law which conflicts with them. Then there is a second category of laws which are supra-national in a more limited sense. These are laws made by the national legislature of a member state for the purpose of achieving the result specified in a Directive. Laws made pursuant to a Directive although designed to achieve the same objective may do so by different methods in different members states; they will not be expressed in identical language. How wide a divergence there may be between national laws made pursuant to the same Directive will

depend upon the degree of particularity with which the Directive defines the result to be achieved. In practice many Directives describe the result to be achieved in so much detail as to amount in effect to a direction as to the language of the provisions that are to be included in the national law so as to produce a uniformity of law in all member states comparable to that attained by a Regulation; but the distinction between a Regulation and a Directive still remains significant when one comes to consider the respective roles of the European Court of Justice and the national courts of member states in the supra-national legal system of the Communities.

There is a complication resulting from the fact that the European Court of Justice has held that in some circumstances provisions of a Directive may become directly applicable like Regulations without the need for the making of any national law by member states; but it is sufficient for present purposes to limit the discussion to Directives that are not directly applicable.

The European Court of Justice, composed of nine judges (in practice one from each of the member states) and four Advocates General, is charged with the duty "to ensure that the law is observed in the interpretation and implementation of the Treaty". It has exclusive jurisdiction in disputes between Member States, the Council and the Commission about the alleged non-compliance by any of them with the provisions of the Treaty; but for present purposes the important jurisdiction of the Court of Justice is that conferred upon it by Article 177 of the Treaty. This is a jurisdiction, at the request of any court or tribunal of a member state to give preliminary rulings on questions that concern the interpretation of the Treaty and the validity and interpretation of measures taken by the institutions of the Community. The most important of such measures are Regulations and Directives. Article 177 itself is a provision of the Treaty that is directly applicable. Any court or tribunal of a Member State, however lowly in rank, in a case where such a question is raised may request a ruling on it from the European Court of Justice if it thinks that a decision on that question is necessary to enable it to give judgment in the case. To request a ruling is optional for lower courts, but the national court of final

appeal is bound to bring the matter before the European Court of Justice if a decision on it is necessary to enable it to give judgment.

Because of natural reluctance of Member States and Community Institutions to resort to legal proceedings against one another in the Court of Justice instead of trying to reach a compromise, most of the constitutional development of the Communities brought about by decisions of the Court of Justice is attributable preliminary rulings made under Article 177 at the request of national courts.

The use of this procedure involves what I have called in the title to this lecture the interpenetration of national and supra-national legal systems. The national court, before which proceedings are brought under civil or criminal or administrative law, alone has jurisdiction to give judgment in the case. The facts found by the court may necessitate its deciding disputable questions of law arising under directly applicable Community Law, (that is, the Treaty or a Regulation) or under national law made pursuant to a Directive or under national law which has nothing to do with the Treaty. If any part of the law applicable to the case is a provision of the Treaty or a Regulation which is susceptible of more than one meaning, and the choice made between the possible meanings will affect the decision of the case, the national court may, and if it is the ultimate court of appeal it must, apply to the European Court of Justice for its ruling as to which is the correct meaning of the Community law; but not for any other purpose. The jurisdiction of the European Court of Justice is interpretative only; the application to the facts of the case of the directly applicable community legislation in the interpretation put upon it by the European Court is a matter for the national court alone. The interpretation of national law does not lie within the jurisdiction of the European Court; that is exclusively a matter for the national court. The division of interpretative functions is rigid. The question may arise in a case before a national court as to whether some provision of a national law conflicts with directly applicable Community law or is inconsistent with a Directive and must give way to it to the extent of the inconsistency. This question is one the national court must decide for itself by placing its own interpretation on its national law and forming its own

opinion as to whether that law is consistent with what the European Court has authoritatively declared to be the true meaning of the Community legislation.

To maintain this division of interpretative functions has called for vigilance on the part of the European Court. In order to identify with enough precision the question of interpretation of community law upon which a ruling is required, the simplest course for a national court, particularly where it is a lower court, is to set out the text of the relevant national law and ask the European Court to say whether it is consistent with the community law with which a party to the case contends that it conflicts. But this involves the European Court in construing the national law as well and, particularly since the expansion of the Community to include member states which do not follow the Romano-Germanic system of law whose usual style of legislative drafting differs from those of other member states and much of whose law is not embodied in written codes. If the European Court were to answer questions put in this form the risk of conflicts of interpretation of national law between the European Court of Justice and national courts would be serious and the harmonious relationship between them which has been achieved over the years would be in jeopardy.

To questions of interpretation of Community law, particularly the provisions of the Treaty itself, the European Court of Justice adopts a strongly teleological approach. It appears to treat the Community as if it were a living and developing organism of which the Treaty provides the skeleton and measures taken by Community institutions to fill in the flesh; but the bones that form the skeleton continue to grow and the functions of the various organs continue to develop. This approach to interpretation is inimical to the doctrine of precedent. What a provision of the Treaty meant in the context of the circumstances as they existed in 1957 may be different in the context of circumstances as they exist to-day and may change again in the circumstances of the 1980's. Nevertheless, the division of interpretative functions between the European Court and national courts would be impracticable if national courts could not treat previous decisions of the European Court upon a particular question of interpretation as binding and so obviating any necessity to refer the same

question to the European Court when it arises in a subsequent case. The doctrine of *stare decisis* is a necessary instrument in providing legal certainty and despite its ostensibly teleological approach to interpretation a perusal of the judgments of the European Court will show it cites and follows its own previous decisions almost as systematically as does an English appellate court. English legislation passed to provide for the accession of the United Kingdom to the Common Market provides specifically that on matters of validity and interpretation of community law, the national courts must follow and are bound by decisions of the European Court.

Attaining the initial objectives of the Common Market, free movement of goods and workers between member states, liberty of establishment, a common agricultural policy and a common policy on competition kept the Community institutions occupied up to the time of the accession of the three new member states in 1973. These were all somewhat specialised fields of law in which the differences in concepts and reasoning between the Civil Law legal systems were of minor significance. So the addition to the original six Civil Law States, of two Common Law States, the United Kingdom and Northern Ireland, and of Denmark which does not fit precisely into either category, did not present any major difficulties. Except as respects competition law the replacement of national law by Community law was in areas which seldom claimed the attention of the national courts.

After a relatively short period of adjustment needed for the absorption of the three new member states, the initial objectives appeared to have been accomplished, with the exception of a generally acceptable common agricultural policy which has so far proved to be politically intractable. So the Community institutions widened their horizons and sought to obtain the extension of the areas in which community law replaced national law. The method adopted for achieving this has been the use of Article 100 of the Treaty which authorises the Council to issue Directives for the approximation (harmonisation) of such provisions of national laws of member states as directly affect the operation of the common market. Under this power many directives have been proposed by the Commission and some adopted by the Council, which would

appear to go far beyond anything that could directly affect the operation of the common market if its objectives are to be treated as confined to those stated in Articles 2 and 3. But as such Directives require the unanimous approval of the Council, which means the approval of the government of every member state, it is unlikely that any member state will subsequently argue that the Directive is invalid, nor is it likely that the European Court with its expansive attitude towards Community objectives and its teleological approach to interpretation would ever hold it to be so.

The area of interpenetration of the supranational law of the Community and the national law of member states is thus likely to expand and the national courts to be more and more concerned with national laws that have been made in response to Directives. By making a Directive the Community pre-empts the legislative field. Each member state must make a national law that will achieve the result specified in the Directive (which, as I have already mentioned, may be specified with the utmost particularity) and must not thereafter make any provision in any national law which would conflict with the Directive. Since although a judgment of the European Court of Justice is decisive on this question of interpretation, whereas national courts other than a national court of ultimate resort have jurisdiction to interpret Community law without referring it to the European Court, only the judgment of the national court of ultimate resort is decisive as to the interpretation of national law. The number and variety of cases in which preliminary references by national courts to the European Court are likely to continue to expand, and the relationship between national courts and the Supra-national Court to grow more intimate.

Interpenetration of national and supra-national legal systems takes place more easily where the national system belongs to the Romano-Germanic family and the supra-national system is based on Romano-Germanic legal concepts and applies Romano-Germanic legal reasoning. Neither national court nor supra-national court is confronted with the problem of learning a new system of law. In the case of the new member states, such as my own, whose courts have hitherto been accustomed only to the common law system the relationship between the national courts and the European Court of

Justice created by references under Article 177 is bound to make judges of the national courts and the European Court more familiar with the legal concepts, legal reasoning, methods of legal draftsmanship and of interpretation used by one another. The European Court provides a focal point where the two great rival systems of law meet. It is, I believe, inevitable that the result of this interpenetration of national and supra-national legal system will be that the basic differences between them will progressively diminish. The process will be a slow one, but convergence is already perceptible in the field of administrative law. I do not expect much to be accomplished in the remainder of my life-time; but although I recognise the great achievements over the centuries of the common law, I believe that the convergence is likely to be more towards the Civil Law than towards the Common Law system. So maybe in the nineteen-twenties Turkey made the right choice between the two.