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SEVERAL STATES, ONE UNITY, ONE LAW?

by

NICOLA PRESTON*

INTRODUCTION

The European Economic Community (EEC) was created by the Treaty of Rome in 1957. Since then many more states have joined the EEC, including the United Kingdom. One of the objectives of the EEC was to create a new legal order to which all member states would be subject. This article discusses the nature and operation of community law and highlights some of the difficulties experienced by its application to the English legal system.

The latter part of the article compares the operation of community law with that of the federal system in the United States of America. In many respects the aims of both systems are the same. There are some matters in which it is considered essential that the law should be common or uniform throughout all the states, for example, commerce. In the United States, commerce is largely a federal matter so that goods can flow freely between the states.1 Similarly in Europe, freedom of trade is one of the major objectives of the EEC.2 Other matters are left to the discretion of the various states. These tend to be matters which are of domestic concern only, that is, those which do not affect other states, either of the United States or of the EEC.

It is inevitable that there are some differences between the two systems. The federal system in the United States has been in place for over two centuries, whereas the system in Europe is much more recent. One consequence of this is the desire in Europe to achieve uniformity in many areas of law which in the United States would be commonly within the realm of the state.3

The EEC did not specifically use the United States as a role model for its legal system, but nonetheless much can be learned from the federal system in respect to

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1 U.S. CONST. art. I, § 8 of the United States Constitution provides that trade between the states is a federal matter, although trade within a state is under state control alone, provided that it does not impinge on inter state commerce.
3 For example, the EEC has a Common Agricultural Policy which is uniform in each member state; the EEC aims at uniformity in Value Added Tax whereas in the US sales tax is different in each state. Also, the driving licences issued to individuals of member states of the EEC are now “EEC licences” and are valid in each member state.
the interests of justice and the practicable application of the law. The problems experienced by the EEC are wider than those of the United States in that in Europe the aim is for a uniform law which will operate to produce the same results in a variety of very different legal systems. At least in the United States the basis of the legal systems of the states were common.4

**European Economic Community**

The European Economic Community was created by the Treaty of Rome in 1957. The United Kingdom joined the EEC on 1 January 1973 after signing the Treaty of Accession on 22 January 1972. The effect of the latter Treaty was to put the UK in the same position, as from 1 January 1973, as if it had been a signatory to the Treaty of Rome in 1957.5

The EEC had many aims; the economic advantages being the most obvious. It was also the aim of the Community to create a new legal order to which all member states would be subject, but which would remain separate from the national legal orders. The concept was not that the two legal orders would compete with each other but rather that they would complete each other. The objective was to achieve uniformity throughout the Community. If this objective was to be realized, it was essential, therefore, that community law be superior to the national laws of the member states.

The legal order of the Community is an independent legal order. This means that the methods of interpretation applicable to Public International Law are not relevant. The laws are applied by member states as part of their own law, although it is not national law. This has the advantage of ensuring that community law is common to all member states in that it must be interpreted and applied in the same way throughout the Community. The difficulties that could flow from this are evident but the Community has provided, in Article 177 Treaty of Rome, that member states may refer questions of the interpretation of community law to the European Court of Justice, which can make the final determination as to its meaning.

Community law has many sources. The first is the Articles of the Treaty of Rome itself. These set out the major objectives of the EEC in the form of general principles, for example, Article 12 expounds the principle of freedom of trade; Article 48 the principle of the freedom of movement of workers and Article 119 the principle of equal pay for equal work.

4 Except for Louisiana, which legal system is modelled on the French.
5 France was the driving force behind the concept of a European Economic Community and so it is not surprising, therefore, that the community legal system was modelled on the French. In France much of the domestic law is codified in the form of general principles, as is the Treaty of Rome. These principles are largely interpreted according to the philosophy of "the spirit of the law". The rules of statutory interpretation that are used in the United Kingdom and United States, especially the literal rule, have little or no part to play in the determination of the meaning of such codes.
Secondary legislation is provided by Article 189 which states:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states.

A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

The purpose of such secondary legislation is to provide a more detailed exposition of the principles embodied in the Articles so that the member states have a more detailed guide as to the scope and extent of community law.6

A further source of community law is the general legal principles which form part of the common heritage of the member states.7 This can be illustrated by reference to Article 1648 which provides, inter alia, “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.” The reference contained therein to “the law” indicates that the authors of the Treaty had an existing body of legal principles in mind. Thus, the Treaty is not to be approached as if it were in a legal vacuum.

The exact scope of these general principles has not been defined and, indeed, is probably incapable of definition. It is also questionable as to whether such general principles can be accurately described as a source of law. It is submitted, however, that they are at least a useful reminder that community law does not exist in a vacuum. Finally, there are the decisions of the European Court of Justice. It will be seen later that the function of this court is to declare the meaning of community law. The ambit of the various provisions is contained in the judgments of the Court. These judgments provide an invaluable insight into the scope and nature of the provisions, even though technically they are not a true source of law as they are merely declaratory.

6 For example, Treaty of Rome Article 119 enunciates the principle of equal pay for equal work. This has been supplemented by Directive 75/117 (equal pay); and Directive 76/207 (equal treatment); and Directive 79/7 (pensions).
8 Treaty of Rome, Article 164 defines the function of the European Court of Justice, infra.
One significant feature of community law is that of direct enforceability. This means that certain (but not all) provisions of community law automatically become part of the national law of member states, without the need for any further action on their part. Such provisions may be relied upon by individuals before their national courts. In this respect, community law is noticeably different from international law. Under the latter, if a country, which is party to a treaty does not abide by its provisions, then, whilst it might be accountable at an international level, at a local level it is the national law that is to be applied. This is not so with community law, as those provisions which are directly enforceable may be relied upon automatically before the national courts.

Direct enforceability arises because a provision is either directly applicable or directly effective. Some academics consider that there is little practical difference between these two terms but the majority view is that there is a valid distinction between them. If a provision is directly applicable then individuals may rely on it directly before their national courts, even in the absence of domestic legislation. Some Articles of the Treaty of Rome have been held to be directly applicable, for example, Article 119. If an Article is clear and unambiguous then it will be directly applicable. In cases of doubt, the matter will be resolved by the European Court of Justice, but that forum has stated that if an Article is so worded that there can be no doubt as to its meaning, then it will be directly applicable.

Regulations are also directly applicable since Article 189 expressly so provides. Directives, however, can never be directly applicable because Article 189 provides that they are to be addressed to member states and are binding only as to the result to be achieved. In other words, some action has to be taken on the part of the member state before a directive can form part of the national law. But this does not mean that directives are robbed of all direct effect. The result of a provision being directly effective is similar to where one is directly applicable, in that a citizen can rely on it before the national courts. But in order for a provision to be held to be directly effective, its terms must be appropriate to judicial application: a require-

11 Defrenne v SABENA, case 43/75 ECR 455 (1976).
12 See infra the judgment of the European Court of Justice in Van Gend en Loos v Nederlandse Administratie de Belastingen, case 26/62 ECR 1, (1963).
13 Id.
14 See supra note 6.
15 See supra note 7; see also, Advocate-General Reischl in Pubblico Ministero v. Tullio Ratti, case 148/78 CMLR 96 (1979).
ment not present when considering whether a provision is directly applicable.

An early case on this point was *Van Gend en Loos v. Nederlandse Administratie de Belastingen*. In that case the European Court of Justice approached the issue of direct effect somewhat cautiously but now the principle of direct effect is widely accepted. The test is one of feasibility, so that a provision which is not directly applicable can be directly effective if it is clear, unambiguous, and lends itself to judicial application.

A decision of the European Court is not necessary for a provision to be directly applicable or directly effective. Such effect is inherent in the nature of the provision itself. Nonetheless, the European Court frequently hears such cases, usually because an individual is wishing to rely directly on a provision of community law and the member state is opposing such reliance. In these cases the European Court does not decide the effect of the provision but merely declares its effect. This distinction, albeit subtle, is crucial to the operation of community law.

From the foregoing it can be seen that a directive can never be directly applicable since it does not automatically form part of the national law. It is simply addressed to member states and the choice of form and method of introduction is theirs. Something further has to be done before its objective can be achieved. It is because of this fact that it was once suggested that directives could not be directly effective either because, as their implementation was left to member states, they did not lend themselves to judicial application. This view was short lived because the European Court has reached the opposite conclusion on several occasions. The first British case was *Van Duyn v. Home Office*, which concerned Directive 64/221 on the freedom of movement of workers. The United Kingdom had taken no action to implement the directive and, allegedly in contravention of it, were refusing the admission of Miss Van Duyn, a Dutch Christian Scientist, into the United Kingdom. She sought to rely on the directive directly. On the particular facts of the case she was unsuccessful, but the European Court did say that Directive 64/221 was directly effective because it was clear, unambiguous and capable of judicial application.

This decision is an important one and indeed was the only one that the European Court could have reached. A contrary conclusion would have meant that the United Kingdom would have been able to plead its own wrong. In other words, a potential applicant would be unsuccessful because the United Kingdom had

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16 *Supra* note 12. This case concerned Treaty of Rome, Article 12. The action was brought by a Dutch company which sought the repayment of tax that it claimed had been paid in contravention of Article 12. The facts indicated that there had been an infringement of Article 12. The question, therefore, was whether the company could bring the action. The European Court answered in the affirmative because Article 12 was directly applicable.


18 On the issue of equal pay, see Defrenne v. SABENA, case 43/75 ECR 455 (1976).


20 1 Ch 358 (1975), case 41/74 ECR 1337 (1974).
(wrongly) failed to implement the Directive. Initially, the decision in Van Duyn was much criticized and it was argued that it extended the meaning of Article 189 beyond its reasonable construction. That Article provides that Regulations are directly applicable but that Directives are not. The choice of form and methods of introduction is left to the member states. The decision of the European Court, however, is not incompatible with that because many directives (including 64/221) are so precise in detail that very little discretion is left to the member states.

There is one further issue that must be mentioned and that is the distinction between vertical and horizontal direct effect. Vertical direct effect means that the provision in question operates downwards only, that is, by applying to member states. Horizontal direct effect means that the provision applies to citizens of the member states also, in the sense that it can impose obligations on them. This distinction is especially relevant in the case of Directives. Since they are addressed to member states, they can only be held to be directly effective vis-à-vis the member state. They may only grant individual rights but may not impose obligations upon individuals. Thus, Directives can have only vertical direct effect. Miss Van Duyn’s argument was viable only because her claim was against the government of the United Kingdom. This would not have been so had the issue involved the enforceability of her right against another private individual since that would have meant that the other individual would be under an obligation to give effect to community law.

To some extent, therefore, the distinction between Regulations and Directives has been blurred since they both may be directly enforceable. But a valid distinction does still remain as all Regulations are directly applicable, both vertically and horizontally, whereas only some Directives have vertical direct effect.

**European Court of Justice**

The European Court of Justice is a creature of the EEC treaty. Its main function is contained in Article 164 which provides that it is to ensure that, in the interpretation and implementation of the Treaty Provisions, the law is observed. The Bench of the Court consists of one judge from each member state. The Court is assisted by Advocates-General, a body of professional lawyers. The procedure was drawn up by the court itself, although, in accordance with Article 188, it has received the approval of the Council.

As the Court was established by the Treaty, it has no inherent jurisdiction. It has only that conferred on it by the Treaty. It is a court of first and only instance and

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21 Treaty of Rome, art. 189.
22 Warner, supra note 7, at 359.
23 For a list of writers for and against this view, see Easson, Can Directives Impose Obligations on Individuals? 4 EUR. L. REV. 67, 70 n.24 (1979).
24 The United Kingdom judge is Lord MacKenzie Stuart, formerly of the Scottish Court of Session.
its judgments are not the subject of appeal. Member states are able to refer matters of community law to the European Court under Article 177. The essence of such a reference is to ask the European Court for a preliminary ruling. The Court makes an abstract judgment on the point of community law involved and does not make any attempt to resolve the actual case before it. After delivering its single judgment, the European Court then refers the case back to the national court to apply the law as expounded by the European Court to the instant case. The reference consists of questions put by the national court for the European court to answer. The sole function of the European Court in this respect is to declare the meaning of community law. This system of reference by the domestic courts of the member states has been described as embodying "une règle de bons sens et de sagesse."

As the structure of the European Court is largely based upon the French system, it has, in theory, no legislative function. There have been some cases, however, where the consequences of a decision of the European Court have been tantamount to legislation, for example, Defrenne v. SABENA. Such cases, however, are the exception rather than the rule and consequently are rare.

The hearings before the European Court are both lengthy and expensive. The Court firstly hears argument from both sides involved in the case at issue. Then it will hear argument from other interested parties, for example, one or more member states may have views on the meaning of a particular provision of community law. Next, the Advocate-General will deliver his opinion on the questions asked. This opinion is written in the form of a judgment and is very persuasive, although the European court is not bound to follow it. Finally, the Court will deliver its own

21 A judgment may be revised, however, if new facts are brought to light which are likely to be significant to the decision. The new information must relate to the ratio decidendi of the case and not to the obiter dictum.
26 A member state is not bound to refer issues under Treaty of Rome, Article 177. If a domestic court is able to interpret a community law provision, for example, where its meaning is well-established and/or obvious, then the domestic court may directly apply the relevant provision. See Costa v. ENEL, case 6/64 ECR 585 (1964); Pickstone v. Freemans, plc 1 AC 66 (1988).
27 See for example, Macarthys v. Smith, IRLR 209 (1980).
30 "There is an obstinate belief upon the continent of Europe that a court does not have a legislative function." Court of Justice of the European Communities Judicial and Academic Conference 27-28 September 1976, Professor Hamson, Methods of Interpretation - A Critical Assessment of the Results at II - 15.
31 See note 11. In this case the European Court held that Article 119 on equal pay was directly applicable and could be relied upon directly by a Belgian air hostess before her national courts, even in the absence of any domestic legislation on the issue.
32 For example, this has occurred on several occasions in equal pay cases. See Defrenne v. SABENA, supra note 11. Worringham and Humphries v. Lloyds Bank Ltd., IRLR 178 (1981). On the issue of freedom of movement of corporations see R v. HM Treasury and Inland Revenue Commissioners, ex parte Daily mail and General Trust plc, case 81/87 1 All ER 328 (1989).
33 For example, in Macarthys v. Smith, IRLR 209 (1980), the Advocate-General was of the opinion that Article 119 was so broad that it embraced a comparison with a hypothetical male. This aspect of his opinion was not followed by the European Court.
judgment, after taking time to consider the matter. The European Court delivers only one judgment and concurring or dissenting judgments are not permitted. The reason for this is to protect the judges so that they cannot be accused of favoring national interests etc. All of the judges are involved in the drafting of the judgment, so that each sentence can be the subject of lengthy discussion. Further, the single judgment can mean that two lines of reasoning are followed, each leading to the same conclusion. This indicates a division of opinion in the European Court, but as no preference is indicated for one or the other, it hinders the extraction of the ratio decidendi of the case. Alternatively, the court may delete certain parts of the judgment which may be contrary to the opinion of one group of judges. The effect of this can be that there are few, if any, reasons of substance given for the decision and this again is unhelpful from a practical point of view. 34

The sole function of the European Court is to declare the meaning of community law by answering the questions referred to it. This can cause difficulties as the European Court makes no attempt to direct its answers to the actual case in question, and so it is important that the questions are suitably phrased. The Court is usually reluctant to alter the questions, although it has been known to do so. 35 Further, the European Court will not answer allied questions even though they may be relevant either in the context of the case or in the complete understanding of the area of law involved. 36

A further difficulty is the problem of translation since the working language of the European Court, and the EEC as a whole, is French. This can be illustrated by reference to Article 119. The English text reads “equal pay for equal work” whereas the French text reads “pour un même travail”. In English the concept of ‘equal work’ is wider than the ‘same work’, and yet that is the literal translation of the French. The European Court has to be wary of such pitfalls if community law is to be applied uniformly throughout all member states.

The European Court knows no system of stare decisis although, usually, it does follow its previous decisions even though it infrequently cites earlier cases or indicates that the current decision is in accord with them. 37 When the court declines

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34 Hamson, supra note 30, at II - 20.
36 Several United Kingdom cases on the issue of equal pay have been referred to the European Court. In each of them the domestic court asked, inter alia, whether Directive 75/117 was directly effective. On each occasion the European Court held that the issue could be resolved under Treaty of Rome Article 119 alone and so declined to answer the subsidiary question. See Macarthys v. Smith, IRLR 209 (1980); Worringham and Humphries v. Lloyds Bank Ltd., IRLR 178 (1981); Jenkins v. Kingsgate (Clothing Productions) Ltd. IRLR 228 (1981).
37 Hartley at 157. In the early cases on equal pay, for example, Defrenne v. SABENA, supra note 11. Macarthys v. Smith, supra note 36, the European Court emphasized and reiterated that Article 119 covered only overt or direct discrimination. In Jenkins v. Kingsgate (Clothing Productions) Ltd., IRLR 228 (1981) however, the European Court held that Article 119 also covered intentional covert or disguised discrimination. It should be noted that this is a decision which is within the spirit of the law.
to follow an earlier decision, it simply ignores it. It makes no attempt to distinguish
it or overrule it, but again such cases are rare.

In the interpretation of community law, the European Court adheres less
rigidly than the English Courts to the literal rule. Its main considerations are those
of policy and the changing needs of the Community. In this way the Court is able
to develop both the law and the Community itself. This again can present difficulties
when either predicting or explaining a decision. The policy considerations and the
needs of the Community fluctuate, and the decisions of the European Court oscillate
along with them, even to the extent of ignoring the actual words of the Treaty on
occasions.38

Nonetheless, despite all of the above difficulties, the European Court does
perform a valuable function. The meaning of Articles of the Treaty and of secondary
legislation become clearer and more definite as a result of its decisions. The Court
does acknowledge some of the difficulties of member states when trying to adhere
to community law,39 but the Court itself is one of the institutions of the EEC and must
necessarily look to the continued harmony of the EEC as a whole. This, of course,
may mean that one member state feels itself to be disadvantaged on occasions.
Nonetheless, from the community law point of view the European Court is regarded
as being effective in that it upholds and promotes the development of community
law.

Sanctions

One final point to consider when examining community law is what, if any,
are the sanctions available if a member state fails to comply with its treaty
obligations.40 The matter is firstly investigated by the Commission of the European
Communities under a power contained in Article 219. Discussions then take place
between the Commission and the member state concerned to see if it is possible to
resolve the matter. If it is not possible to do so, for example, because the member
state refuses to acknowledge that it is in breach of its obligations, the Commission
may bring the case before the European Court under Article 169. Only the
Commission has the power to do this, not other member states. The European Court

38 See Rutili v. Ministère de L’Intérieur, case 36/75 ECR 1219 (1975), (on Treaty of Rome Article 48, the
freedom of movement of workers).
39 In Defrenne v. SABENA, supra note 11, the European Court imposed a temporal restriction on its
judgment, so that it could not be relied upon in respect of events prior to that date. This was in response to
a request by the Belgian Government, who feared a proliferation of equal pay claims. A similar request by
the United Kingdom Government in Worringham and Humphries v. Lloyds Bank Ltd., IRLR 178 (1981) was
refused.
40 Note that Treaty of Rome Article 5 provides that all member states shall abstain from any measures which
could jeopardize the attainment of the objectives of the Treaty, and that they shall take all appropriate
measures to ensure the fulfillment of the obligations arising out of the Treaty, or resulting from an action taken
by the institutions of the Community.
will then adjudicate as to whether or not a breach has been committed. When hearing such a case, the European Court refers only to the Treaty obligations and takes no account whatsoever of wider issues, for example, national political crises. This approach is essential if community law is to remain supreme. The European Court believes that practical or political difficulties at a national level do not excuse a member state from unilaterally failing to fulfill its Treaty obligations.

Should a member state be found to be in breach and fail to execute the judgment of the European Court, then it may be sued again for breach of Article 171. There is, however, no provision for sanctions if a member state persistently refuses to comply with its obligations. This has been described as the last vestige of sovereignty. But the recalcitrant member state may be put under much political and economic pressure from its co-member states to comply. Frequently it is only this, or a compromise, that will bring the violation to an end. Nonetheless, Article 169 is effective. Its operation is lengthy and this provides the member state with ample time in which to amend its national law so that it complies with the Treaty. Also, all of the member states realize that the continued existence and smooth working of the Community can only be ensured by co-operation and the eventual fulfillment by all of the Treaty obligations. Thus the procedure is effective because there is no reason to believe that a member state would wantonly act contrary to its Treaty obligations.

Relationship between the law of the United Kingdom and Community law

It has already been shown that if community law is to be effective, it must be superior to the national law of the member states. As far as the United Kingdom was concerned, this involved a basic dichotomy as Parliamentary sovereignty sat somewhat uneasily alongside the new community legal order. A compromise was effected through the European Communities Act 1972. The position achieved was that community law took priority because Parliament had so decided. The Community view is simply that it is community law which is supreme.

41 See EC Commission v. United Kingdom, case 61/81 ECR 2601 (1982), on equal pay, where the European Court held that the United Kingdom domestic law on equal pay (Equal Pay Act 1970) was insufficient to fulfill the United Kingdom’s Treaty obligations under Treaty of Rome Article 119. Following this case, the Equal Pay Act 1970 was amended by the Equal Pay (Amendment) Regulations 1983 SI 1983/1794 which came into force on 1 January 1984.


44 For example, the notorious “sheepmeat” case, when France refused to accept consignments of English lamb - EC Commission v France, case 232/78 ECR 2729 (1979).


46 See supra text accompanying notes 42-45.

47 Note that the European Communities Act 1972 does not expressly confer any additional jurisdiction on the courts or tribunals of the United Kingdom. Nonetheless, all courts, and even tribunals, which only have the jurisdiction given them by statute (and no inherent jurisdiction), apply and refer to community law where appropriate.
The purpose of the European Communities Act 1972 was to avoid conflict between United Kingdom and community law. The European Court of Justice had stated that the law stemming from the Treaty of Rome is an independent source of law which cannot be overridden by domestic provisions.48 The 1972 Act attempted to give force to this by providing:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable community right’ and similar expressions shall be read as referring to one to which this section applies.49

It can be seen that the Act provides that it is community law which may determine whether or not a provision is directly enforceable. Whilst Parliament clearly subordinated legislation existing in 1972 to community law, the references in sections 2(4) and 3(1) to “enactments . . . to be passed” raises the constitutional difficulty: can Parliament bind itself as to the future? The doctrine of sovereignty of Parliament is one that is fundamental to the British constitution, that is, Parliament cannot limit its powers as to the future. Section 2(4) sought to obviate the problem by declaring that, as a matter of statutory interpretation, statutes are subject to community law unless the contrary appears. Furthermore, the House of Lords has held that, as far as possible, statutes should be construed to give effect to treaties.50

It is, of course, possible for Parliament to provide expressly that any Act is not subject to community law. This has not occurred and, indeed, it would be most surprising if it did because such action would demonstrate an overt lack of commitment to the EEC on the part of the British Government. What may be more likely is that Parliament might pass a law which, by oversight, conflicted with community law. In such circumstances the European Communities Act 1972 would be ignored.51 Fortunately, from the point of view of harmony, this has not occurred. If it did, it would create considerable conflict because the United Kingdom view would be that Parliament is supreme whereas the Community view is that commu-

48 Costa v. ENEL, ECR 585 (1964).
49 Section 2(1). It has been queried as to why the statute did not use the phrases “directly applicable” or “directly effective” since their meaning was well known even in 1972. See John Usher “European Community Law and National Law, The Irreversible Transfer?” University Association for Contemporary European Studies, George Allen and Unwin 29 (1981).
51 For example, see the judgment of Lord Denning MR in Macarthys v. Smith, IRLR 316 (1979). Also, the House of Lords in Garland v. BREL, ICR 420 (1982).
nity law is supreme.\textsuperscript{52}

In the absence of such conflicts, the United Kingdom courts must give effect to community law when they are interpreting domestic statutes. From the United Kingdom standpoint, difficulties could occur where community law is wider than the domestic law.\textsuperscript{53} Again a solution is supplied by the European Communities Act 1972, which also provides that domestic law may be amended or extended so that it accords with community law, by means of Regulations which must be laid before Parliament.\textsuperscript{54} This legislative process is more expeditious than the enactment of a new statute to remedy a situation. The single restriction of this procedure is that the Regulations may extend only as far as community law. If the Government wished to go further, for example, by conferring greater rights, then an Act of Parliament must be used.

\textit{Comparison with the Federal System of the United States}

The operation of the federal system is quite different from that of community law. Federal law covers those matters declared by Congress to be within its province and, generally, is distinct and separate from state law. It is interstitial in nature. In the United States, the two systems of federal and state law work alongside each other whereas in the EEC, community law is a gloss on the domestic laws of the member states. This is simplistically expressed and it does not mean that there is no overlap between federal and state law or that the two systems never come into conflict. Essentially, however, the federal system of law is separate from the state laws and is uniform and supreme in each of the states. Although there is a separate federal court structure, state courts also need to be aware of and apply federal law in appropriate cases because of its supremacy.\textsuperscript{55}

Community law is also both uniform and supreme throughout the EEC but it operates via the domestic laws of the member states, by direct applicability or direct effect, rather than through a separate legal structure. This is necessary in Europe where the member states of the EEC have very different domestic legal systems. The diversity of state legal systems in the United States is not nearly so great and, furthermore, the operation of federal law is based upon the same common system.\textsuperscript{56} It has already been demonstrated that this is not the case in Europe.\textsuperscript{57} One common

\textsuperscript{52} But see minority view of Graham J., supra note 50.
\textsuperscript{53} The domestic courts can, of course, give effect to community law when they can ascertain the community law involved (and accept that it is wider than the domestic provision). See the House of Lords in Pickstone v. Freemans, plc 1 AC 66 (1988).
\textsuperscript{54} European Communities Act 1972 § 2(2)(a) and schedule 2. An example of these regulations is Equal Pay (Amendment) Regulations 1983 SI 1983/1794.
\textsuperscript{55} For example, where the case involves a federal question but the amount involved or in controversy is less than $50,000: 28 USC § 1332(a) (1988 & Supp. 1990).
\textsuperscript{56} Except Louisiana.
\textsuperscript{57} See supra text accompanying notes 3 and 4.
feature, however, is that both systems have an element of common law.\textsuperscript{58} This is essential to a dual system where one set of laws is supreme and must operate and be enforced in the other.

A comparison of the operation of federal law with that of community law can best be effected by considering, firstly, the interaction of state and federal law. In this section, emphasis will be placed on federal occupation of the field since no similar concept is known to community law. Secondly, the operation and jurisdiction of the Supreme Court will be compared with the European Court of Justice.

\textit{Interaction of State and Federal Law}

The states exercise concurrent jurisdiction with federal courts, except where Congress, either expressly or by implication, has made the federal jurisdiction exclusive.\textsuperscript{59} In most cases it is provided by statute that the state courts must enforce federal law but it is not essential that this is decreed by legislation. The state courts must also enforce the increasing volume of federal common law. This federal common law involves matters in which the federal interest is so strong that the federal courts are free to develop substantive rules to protect that interest. In such cases the state courts are obliged to follow the substantive rules expounded by the federal courts.\textsuperscript{60}

In some instances Congress may expressly oust state power. In these cases the position is clear. The state courts must apply federal common law and the state cannot legislate on the matter. Problems can develop, however, when a vacuum is created, albeit not expressly, by the federal legislation. Where this occurs, any state action is held to be invalid even if it is consistent in detail with the federal statutes. Thus, state action is pre-empted where a Congressional purpose to "occupy the field" is divined.\textsuperscript{61} Such purpose can be either substantive or jurisdictional. State action, therefore, may be an invalid interference with a federal design either because it is in conflict with the operation of a federal program or, whatever the substantive impact, it intrudes into a field that Congress has validly reserved to the federal sphere.\textsuperscript{62} In such circumstances, even nascent federal occupation of the field is sufficient to oust state law.

\textsuperscript{58} In the EEC see \textit{supra} note 6. In the US see Erie Railroad v. Tompkins, 304 U.S. 64 (1938) (where it was provided that there is no federal common law in diversity cases but this decision does not extend to other matters).


As federal law is supreme, if state law is in conflict with it, federal law must prevail. But occupation of the field is more subtle than that because it means that federal law can supersede state law even when there is no prima facie contradiction. This could occur, for example, where the effect of state law is to encourage conduct which the federal law discourages, or where state law encourages conduct, the absence of which would assist in the effectuation of a federal scheme as interpreted and applied.

It was once thought that if there was federal law on an issue then all state law on the same issue was ineffective, even if the state law merely replicated the federal law. This is not true today. Indeed, federal occupation of the field is not now lightly inferred:

The principle to be derived from [the Supreme Court's] decisions is that federal regulation of a field should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons - either that the native of the regulated subject matter permits no other conclusion, or that Congress has mistakenly so ordained.

The reluctance to find complete federal pre-emption comports with the basic conception of federal law as interstitial in nature. Furthermore, problems can occur where federal occupation of the field is found when the federal legislation is not comprehensive because of the consequent legal vacuum. In such a case today it is less likely that state law would be found to be pre-empted. But where there is a multiplicity of federal regulations, it is more likely that a conclusion of federal occupation of the field can be supported.

It has thus been demonstrated that the supremacy of federal law is effected in a variety of ways, including occupation of the field. This latter method is very different from the position of the supremacy of community law. In the EEC there is no concept of occupation of the field. Indeed, it would be an anathema to the philosophy behind the operation of community law since the law can operate only

through the legal systems of the member states. This does not mean, however, that community law cannot control or dominate a field. It may be that much (or all) domestic legislation on an issue may exist only because of EEC obligations. The member states must give effect to community law and if the EEC creates obligations in an area where no domestic law or regulation exists, that member state must rectify the situation. It would do this by passing legislation in accordance with the aims and provisions of community law.

The Supreme Court and the European Court of Justice

1. Constitution

The Supreme Court consists of nine judges. In this respect it is smaller than the European Court of Justice (ECJ). This difference, however, is not of major significance. The main distinguishing factor is that the judges of the Supreme Court are all political appointments made by the President of the United States when vacancies occur. It has been seen over the years how a President is able to control the political thinking of the Supreme Court in this way.

In Europe the position is quite different. Article 167 of the Treaty of Rome provides that the judges of the ECJ must be chosen:

... from persons whose independence can be fully relied upon and who fulfill the conditions required for the exercise of the highest judicial office in their respective countries or are legal experts of universally recognized ability.

Thus, there is no minimal requirement that a judge of the ECJ is a "judge" in his member state, although he commonly is. Further, although the member states could influence the political bias of the ECJ by their appointments, their ability to do so is restricted by their own mechanism for appointing judges. None of the major member states entertain the political appointment of individuals to judicial office. In England, for example, High Court judges are chosen from senior barristers of at least ten years standing. Regard is had to their integrity and impartiality. Any demonstration of political affinity on their part would be viewed with disfavor and as an impediment to the holding of judicial office.

In addition, Article 167 states that the individual must be qualified to hold the

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70 See E.C. Commission v. United Kingdom, case 128/78 ECR 419 (1979), where the British Government unsuccessfully contended that it was free to enact a permissive measure when Council regulation 1463/70 provided that the installation of tachographs in certain vehicles was compulsory. Prior to regulation 1463/70 the United Kingdom had no domestic law on tachographs ("the spy in the cab").
71 President F.D. Roosevelt appointed nine members to the Supreme Court during his term of office. President R. Reagan appointed only three but he did so at a time that his appointees affected the balance of political opinion of the court.
72 Supreme Court Act 1981, § 10(3).
73 This reflects adherence to the doctrine of separation of powers in this context.
"highest judicial office." In England, to become a judge in the Court of Appeal one needs to be either a High Court judge or a barrister of at least fifteen years standing. To be eligible for appointment as a Law Lord, one must first have served for at least two years in another judicial office or be a barrister of at least fifteen years standing.

Finally, each member state has control over the appointment of its member of the ECJ. Thus, even if a member state's appointment of domestic judges is less rigorous than in England and that member state made a political appointment to the ECJ, it still could not control the political bias of the whole court. In this way the ECJ is, if not apolitical, at least politically neutral.

2. Jurisdiction

There are many differences between the jurisdiction of the Supreme Court and that of the ECJ. Firstly, the Supreme Court is the highest appellate court in the United States, whereas the ECJ is a court of first and only instance. The ECJ is not even the "highest" court as cases may be referred to it at any stage of the domestic proceedings. The Supreme Court has both original and appellate jurisdiction. In practice, the Supreme Court hears largely those cases referred to it by way of certiorari, although the Court of Appeals can certify certain matters to the Supreme Court. Further, the Supreme Court itself has control over deciding which cases it will hear. In this respect again the ECJ is different. It sees itself as having a duty to accept the reference without questioning the reasons for it or criticizing the referring court. In this context, a reference to the ECJ is a judicial one which implies uncertainty of the law in the opinion of the referring court. Thus, the Supreme Court is able to control its workload whereas the ECJ cannot. Further in neither case do the parties have control, that is, the parties have no automatic right to have their case heard in the Supreme Court or in the ECJ. In the United States the case must be accepted by the Supreme Court, and in the EEC, a domestic court of a member state must refer the case. Also, in both courts a case will be rejected if it is academic or moot.

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74 Supreme Court Act 1981, § 10(3).
75 Appellate Jurisdiction Act 1876, § 6.
77 See supra note 24.
78 That is, there is no need for the case to go through the domestic appellate system first. The authority for this referral in England is found in RSC Ord 114 r2(1).
80 U.S. CONST. art. III, § 2.
81 See supra note 76.
Secondly, the Supreme Court has the jurisdiction to hear three types of cases: federal, constitutional, and diversity. The ECJ hears only cases involving issues of community law. The EEC does not have a written constitution as does the United States. The Treaty of Rome, however, does embody general principles but these are not of the same type as those in the United States Constitution. Further, questions relating to the scope and/or application of the articles of Treaty of Rome are matters of community law. Indeed, the resolution of such issues is the most significant feature of the ECJ. In a sense, the Supreme Court’s jurisdiction here is similar. Technically, constitutional issues are not matters of federal law, but neither are they matters of state law. They do relate to all citizens of the United States and therefore, are clearly outside the realm of state control. In this respect, therefore, constitutional issues are similar to federal issues because it is crucial that the interpretation of the Constitution is uniform throughout each of the states.

Diversity cases also fall within the jurisdiction of the Supreme Court. Although the Supreme Court hears these appeals, it is state law that is applied to them and not federal law. The Supreme Court’s major function in this respect is to determine which state law is applicable. That the ECJ has no similar function is not surprising. When the citizens of member states of the EEC are in dispute with each other about a non-community law matter, the issue is resolved by the regular court structure of the nations concerned. It is a matter of private international law. The ECJ will only have a part to play when community law is involved, and only then if a provision of community law requires interpretation which the domestic courts involved feel unable to supply.

This difference in jurisdiction, therefore, is expected. In the US, the citizens involved in the dispute are all citizens of the same country. The function of the Supreme Court is to decide which parts of the law of the United States are applicable. In Europe, a similar dispute may involve no aspect of community law, in which case the matter clearly is outside the ambit of the jurisdiction of the ECJ. As community law expands and covers more aspects of the lives of the citizens of member states, the rôle of the ECJ may correspondingly expand, but this will be because the scope of the law is wider, and not because the ECJ has had any additional jurisdiction conferred upon it.

There is one final aspect of jurisdiction that merits further consideration and that is the review of state court decisions. In the United States, the Constitution does not expressly authorize the review of state court decisions, but the Supremacy Clause

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85 See supra notes 23-39 and accompanying text.
86 This is not to say that state courts can never adjudicate on these matters.
87 Erie Railroad v. Tompkins, 304 U.S. 64 (1938).
88 "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Per Judge Friendly in Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).
gives the Supreme Court such jurisdiction in certain classes of cases. The review is limited to the "final judgments or decrees" of the state court. However, even where the judgment of the state court is final, the Supreme Court does not have the power of review if the judgment can adequately be supported on independent state grounds, unless the state ground is unconstitutional. In the context of federal law, it is sometimes difficult to ascertain whether or not there is an adequate state ground for the decision. What is clear, however, is that a state cannot "invent" a new rule for the occasion. The reason for this limited review of the Supreme Court is that it is not within the function of that court to render advisory opinions.

The ECJ on the other hand does not have the power to review decisions of the domestic courts of member states. It can only hear those cases that are referred to it by the domestic courts which involve the interpretation of provisions of community law. It is important to note also that domestic courts are only obliged to refer cases when they are unable to interpret the provisions of community law involved. Thus, the domestic courts are free to place their own interpretations on community law, and the litigants do not have the right to have that interpretation challenged in the ECJ. At first sight, therefore, it would appear that there are no checks in this system and that a member state would be free to "misinterpret" community law at its own whim. But this view ignores the underlying philosophy of the EEC as well as the independence of the judiciary. The aims of the EEC are harmony and the uniform applicability of community law. Each member state voluntarily joined the Community, and therefore, would not wish to be seen as disregarding its basic objectives by overtly interpreting community for itself in a way obviously contrary to that which would be employed by the ECJ. Thus, the tendency has been for member states to interpret provisions for themselves only when their meaning (from a community law point of view) was clear. If there was any ambiguity, the matter normally would be referred to the ECJ. Further, although the ECJ itself has no power to review state court decisions, the Commission is the watchdog of the Community. It has the power, under Article 169, to take a member state to the ECJ for failure to comply with Treaty obligations. Case law is just as much "law" as legislation and there is no reason why a member state could not become the subject of investigation.


\[91\] Ward v. Bd. of County Comm'rs, 253 U.S. 17 (1920).


\[93\] See Justice Jackson in Herb v. Pitcairn, 324 U.S. 117, 125-6 (1945).

\[94\] See for example, the House of Lords in Pickstone v. Freemans plc [1988] 1 AC66 on the interpretation of Article 119.

\[95\] The litigants would have the usual rights of appeal available to a higher domestic court.

\[96\] See supra notes 40-45 and accompanying text.
by the Commission if it persistently misinterpreted community law in the manner suggested.

3. Procedure

Finally, there are a few practical comparisons in the operation of the courts that are worthy of note. Firstly, both courts make declarations. However, that is the only order that the ECJ may make, whereas the Supreme Court is not so restricted. Further, a declaration of the ECJ will declare the meaning of community law; one in the Supreme Court could also declare the rights of the parties. Additionally, the Supreme Court has the power to enforce its judgments if necessary, which the ECJ does not.

Secondly, there are many similarities in the conduct of the cases although these may not, at first, be apparent. The ECJ hears both sides, any interested parties and the Advocate-General. The Supreme Court hears only both sides, but has much assistance by way of amicus curiae. In this way, therefore, each court has a wide variety of arguments and opinions presented to it.

Finally, the format of the judgments of the courts are different. It has already been seen that the ECJ delivers only a single judgment. Supreme Court decisions usually consist of one majority judgment and one dissent, but there are more than one in either or both categories on occasions. This distinction is expected because of the need in the ECJ to eliminate any hint of national bias, which need is obviated in the United States' system. Furthermore, community law is still in the early stages of development and it could be argued that a single judgment promotes its uniformity. Again, this reason is not relevant to the United States.

CONCLUSIONS

The objective of securing "one law" that is common for all states is more difficult to achieve in the EEC than in the United States. One reason for this is the differences in the legal systems of the member states of the EEC. In the United States, the legal systems of most states are "common." The single exception is Louisiana where the law is based on the French system. However, this is not a major problem as it is not difficult for Louisiana to interpret and apply federal law because that law is specific, especially where it is embodied in a statute. Although there can always be problems with interpretation, it is infrequent that there is doubt about the substance of the law.

As far as the United Kingdom is concerned, it is much more difficult for that nation to adjust to community law, if only because there are so many gaps to fill in and that has to be achieved without the aid of the literal rule. Thus, the courts of the United Kingdom have experienced problems in determining the meaning of some
aspects of community law. Such difficulties are enhanced by the fact that community law is constantly being developed by the ECJ. For example, in the early cases that were referred to the ECJ on the interpretation and application of Article 119, the ECJ repeatedly stated that the Article applied only to direct and overt discrimination. But in a later case, Jenkins v. Kingsgate (Clothing Productions) Ltd.,\(^{98}\) the ECJ held that Article 119 applied also to indirect and overt or disguised discrimination where that discrimination was intentional.

Another difference between the two systems is that there is a more concentrated effort in the EEC to achieve uniformity. This is effected, inter alia, by having community law cover more aspects than does federal law. Federal law has been in place for over 200 years. At the time of the United States Constitution, many states were either in the process of, or had only recently achieved, the regularization and efficient administration of their own legal systems. Thus the federal system and the state systems grew and developed together, alongside each other.

Again, this is different in the EEC. The legal systems of many member states have been in place for centuries and this alone makes them more resistant to change. This is especially true where, as in the case of the United Kingdom, the existence community law involves issues of supremacy and sovereignty. Technically, such issues were resolved by the European Communities Act 1972, but sovereignty goes much deeper than that. In the United States, all citizens think of themselves as “American” first, rather than as “Ohioian” for example. That is not so in Europe, where individuals regard themselves as “English”, “French” or “German” first, and not as “Europeans”. This reason alone indicates that the system of community law is best suited for its purpose. The fact that it operates only through the medium of the legal systems of the member states means that the problems of supremacy and sovereignty are minimised. Further, the system itself also promotes both uniformity and compliance in the various member states. It is difficult for the lay person in the EEC to identify readily a piece of community law. The same is not true for the majority of federal law in the United States.

Thus, each system has many common aims and objectives. The operation of the systems, however, is not identical, but each is best fitted to achieve those aims and objectives within the confines of the systems in which they have to operate.

\(^{98}\) Supra note 36.