



Panel: Law in the Domestic Courts of Other Nations

Kurt Riechenberg

Summary

The Interface Between the Legal Order of the EU and Foreign Sources of Law

Since 1952, the European Union has witnessed its transformation from an international organization (with relatively limited and mostly economic objectives) to a quasi (federal) constitutional legal order. As the Court stated in its 1986 *Les Verts* judgement:

The European Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*.

The Treaty has reserved for the Court of Justice the crucial role to ensure adequate and effective enforcement of Community law. By empowering the Court with mandatory jurisdiction over direct actions against Member States and Community institutions and by introducing the unique mechanism of preliminary references, the drafters of the Treaty have devised a system that has proven to be one of the main devices for the advancement of European integration.

* The European Community Treaty, or Treaty of Rome. Signed in 1957, it remains the primary source of European Union law. As the founding document of the European Community, it provides the the overarching framework and process for EU development.

According to Article 220 of the Treaty, the task of the European Court of Justice is to ensure that in the interpretation and application of Community law “ the law is observed.”

What is that law?

First, it is the Treaty and its Protocols and the entire body of EU legislation.

Beyond these legal instruments the Court has created a case law based category of “ general principles of law” (II).

Being a relatively young and unique legal system, it does not surprise that recourse to "other" legal sources appears in the Treaty itself, but also that it has been developed by the Court as an instrument to shape the scope and the meaning of Community law. In addition, European legal culture – as we know it today – seeks to inspire itself by references to other legal traditions, including the case law of national and international tribunals.

I. Treaty provisions as "explicit invitations" to incorporate "foreign" concepts into the EU legal system:

Article 288, paragraph 2, of the Treaty provides that "in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

In the field of environmental protection, Article 174, paragraph 2, of the Treaty requires Union policy to be "based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that polluter should pay".

The "precautionary principle" not being defined in a legal instrument, it is generally accepted that the Court should draw upon other legal sources in order to define and to develop this principle of constitutional nature.

In the *Arnold André* judgment, the Court has summarised this principle in the following terms:

When it is impossible to determine with certainty the existence or the scope of an alleged risk due to the insufficient, inconclusive, or imprecise nature of results or studies, but the probability of real damage to public health persists in the case that the risk would materialise, the principle of precaution justifies the adoption of restrictive measures. [...] In order to justify application of the precautionary principle, the risk alleged must be proved to be more than hypothetical.

II. The Court's jurisprudence establishing "general principles of law"

One of the most salient aspects of the Court's "constitutional" case law is the framing of "general principles of law", such as proportionality, legal

certainty and the protection of legitimate expectations. These notions are nowhere to be found in primary or secondary EU law. However, being a need to use such concepts in order to interpret and apply Community law, the Court felt itself legitimated to incorporate these "general principles of law" into the Community legal order.

The relevant case law has been based upon comparative legal research within the Court itself (drawing mainly upon the different national legal systems in Europe). As a result of this process the Court has developed and refined the above mentioned and other principles which today have a status and significance of their own. It should also be noted that the States, the legal community and the academic world have accepted this jurisprudential "technique" as being in conformity with the Court's mission.

The most spectacular example is the Court's case law in the field of fundamental rights. The background is that the Treaty, even after many amendments, does not contain a "Bill of Rights."

In 1969, the Court held for the first time that fundamental rights should be included among the "general principles" of Community law (Stauder).

Since then the Court has consistently held that fundamental rights form an integral part of these general principles. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from international treaties for the protection of human rights on which the Member States have cooperated or of which they are signatories. In that respect the Court has always attached "special significance"

(Connolly v. Commission) to the European Human Rights Convention (EHRC). The first mention of this instrument was made by the Court in 1974 (Nold).

The new in Article 6(2) of the Union Treaty now reads:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Over the past 30 years the Court has developed a comprehensive case law on fundamental rights protection and subjects EU legislative and administrative measures to fundamental rights scrutiny. EU fundamental rights review also applies every time a State acts within the realm of the EU law.

In particular the Court has integrated the EHRC standards as defined in the jurisprudence of the European Court of Human Rights (ECHR) in its case law. The Court has not even hesitated to reconsider its own case law and to realign with that of the ECHR (Roquette Frères).

III. The effects of international agreements within the Union:

Article 300, paragraph 7, of the Treaty provides that "agreements concluded by the Union are binding on the institutions of the Union and on its States". It is settled case law that the provisions of such agreements form an integral part of the Community legal order and prevail over EU legislation (Haegeman). The Court has also held that an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives (International Air Transport Association).

To be distinguished from EU and State obligations is the question of the effects of such agreements with regard to individuals. According to the Court's case law, a provision in an agreement concluded by the Union with another country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision argued by an individual contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures (Simutenkov).

IV. The effects of GATT (WTO) rules:

World trade provisions have been argued in many cases before the Court during the past 30 years. Since the entry into force of the WTO agreements the question as to who may rely upon provisions of these agreements (against whom and under which conditions) has received renewed attention.

The Court has held that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court may review measures of Community institutions (Portugal v. Council).

There are, however, two exceptions to this principle. The first is where a contested Community measure expressly refers to a particular WTO provision (the so-called Fediol exception). The second is where, in passing legislation, the Community intended to implement a particular obligation assumed in the context of the WTO (the so-called Nakajima exception).

The Court has considered the implications of the reciprocal nature of the WTO agreements setting out the circumstances in which WTO rules may form a ground of review of Community measures. The starting point is that the WTO agreement is still founded, like GATT, on the principle of negotiations. The Court has expressly noted that some of the contracting parties, which are among the most important commercial partners of the Union, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their tribunals when reviewing the legality of their rules of domestic law (Germany v. Council). Therefore, according direct effect to WTO rules would deprive the EU legislative or executive bodies of the discretion enjoyed by the Community's trading partners. The Court stressed that "such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of WTO rules" (Van Parys).

While the Court of Justice has refused to accept the direct effect of the WTO agreements, they are directly applicable in the Community legal order and binding on the Union. The Court has also held that EU legislation should be interpreted, as far as possible, in the light of the wording and purpose of a WTO agreement (*Heidelberger Bauchemie*). In particular, the Court has cited decisions of the WTO Appellate Body on the interpretation of certain provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), emphasizing that when called upon to apply national rules with a view to ordering measures for the protection of rights in a field to which the TRIPs Agreement applies and in which the Union has already legislated, as is the case with the field of trade marks, "national courts are required under Community law to do so, as far as possible, in the light of the wording and purpose of the relevant provisions of the TRIPs Agreement" (*Anheuser-Busch*).

V. Rules of customary international law in the EU:

In the hierarchy of norms, the Community's general international legal obligations fall between the Treaty and secondary legislation. As such, the Court is obliged to examine whether the validity of Community laws may be affected by reason of the fact that they are contrary to a rule of international law.

In 1992 the Court held that the European Union must respect international law in the exercise of its powers (*Poulsen*). For example, rules of customary international law concerning the termination and the suspension

of treaty relations by reason of a fundamental change of circumstances are therefore binding upon the Community institutions and form part of the Community legal order.

The Court has not hesitated to refer to a judgment of the International Court of Justice, which has held that "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases" (Racke).

An individual relying in legal proceedings on rights which are derived directly from an agreement with a non-member country may therefore not be denied the possibility of challenging the validity of a regulation which suspends trade concessions granted by that agreement on the grounds of customary international law governing the termination and suspension of treaty relations.

VI. United Nations Resolutions and EU law:

In a recent judgment relating to economic sanctions taken against individuals suspected of association with terrorism, the EU Court of First Instance examined the status of the United Nations Charter with regard to EU law. According to the Court of First Instance, the Community, although it is not a UN Member, "must be considered to be bound by the obligations under the Charter in the same way as its Member States". The Court of First Instance held that the EU and the States "must leave unapplied" Community law whenever it raises "any impediment to the proper

performance of [EU and States] obligations under the Charter of the United Nations" (Ahmed Ali Yusuf v. Council and Commission).

The Court of First Instance also recognized the existence of peremptory norms of international law, characterized by the Court as "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible". Resolution of the UN Security Council thus must "observe the fundamental peremptory provisions of jus cogens". If they fail to do so, they would bind neither the member countries of the United Nations nor, in consequence, the Union and its States.

VII. "Judicial culture" – The Court's references to the jurisprudence of other courts:

For the first time in 2001, the European Court of Justice referred to a judgment of the Federal Constitutional Court of Germany in order to support a reasoning in which the Court stressed that in the field of public health assessment of risks is liable to change with the passage of time, particularly as a result of technical and scientific progress (Mac Quen).

Over the past 15 years, the Court has directly or indirectly made use of the case law of non-EU tribunals showing certain deference to such case law rather than advancing interpretations of its own. In its more frequent reliance on international case law, the Court seem to demonstrate a greater openness with respect to such external sources than was the case

in the earlier years of European jurisprudence. It may be that in these early stages, the Court was more concerned about the autonomy and uniqueness of the Community legal order. Since then international cooperation and international law have developed significantly and the European Union has become a leading actor in this field. The practice of the Court therefore reflects this general trend. It can also be said that the practice of the Court demonstrates openness and curiosity as well as a special sensitivity to the intelligent development of the rule of law.

The references to the opinions cited are found in the list of ECJ/CFI judgments.