THE DENNING LECTURE 1986

"THE INCOMING TIDE"

THE IMPACT OF COMMUNITY LAW IN THE UNITED KINGDOM

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SIR GORDON SLYNN

13 March 1986

"When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaties henceforth shall be part of our law."

No-one, I think, could resist the temptation to begin this year's Denning lecture, to be associated with which for me is a great personal pleasure, without reading the passage from which the Association has chosen its title. It is, I suspect, as well known in the European Community outside England as any other passage in the whole of the English law reports, rivalled in our domestic ethos only by "It was bluebell time in Kent". Indeed when Judge Pescatore of Luxembourg arrived in the University of Durham on the day when the report of the judgement appeared in "The Times" he began his lecture by referring to it. He said:- "I feel I have arrived in England from Luxembourg upon the crest of a wave".

That was in 1974, one year after we joined the Community. By 1979, in the Lord Fletcher Lecture, the simile had become a metaphor:-

"All this shows that the flowing tide of Community law is coming in fast. It has not stopped at high water mark. It has broken the dykes and the banks. It has submerged the surrounding land, so much so that we have to learn to be amphibious if we wish to keep our heads above water".

In 1986 those who want the Community to succeed tend to see primarily the delays and the difficulties, the conflict, a real one, of Community and national interest. These are obviously newsworthy, good natural copy for the media. They certainly exist and are for political leaders and administrators to resolve: to many they give the impression that the tide has stopped, even turned round.

There is, however, another side to the picture. the law has been described as the cement of the Community. As one who, if not a bricklayer, at least helps to mix the cement, I am increasingly conscious of the way in which the law is called upon to maintain such structure as there is, even to advance it.

It was an exceptional feature of the Treaty of Rome which distinguishes it from most other international treaties that Member States accepted that any dispute concerning its application or its interpretation should not be submitted to any other method of settlement than those provided for by the Treaty. It was perhaps a unique result that the participating States have come as readily as they have to accept as a normal part of life rulings as to the lawfulness of their activities in a Community context, rulings with which they comply. To that extent the rule of law prevails and is a positive plus to be remembered at times when the Council cannot agree or the Commission make visible progress.

This new legal order, an extended form of domestic law, the law of a region, did not however have its effect only on Member States. It was unusual in that it imposed obligations, and even more surprising and even more important, it conferred rights on individual persons and companies without these having to be transposed into national law, indeed sometimes in the teeth of opposition from some of the Member States.

The extent of the area now covered by this new legal order, which has its effect on our national laws, was accurately predicted in the metaphor but is not always seen in the round or fully realised.

At the national level the questions grow large, the impact of the answers potentially far-reaching. Can Ireland justify compelling wholesalers to purchase a percentage of their requirements of petrol from a nationally owned oil refinery? Can France justify preventing the sale of video cassettes for private use when they show films enjoying a right for prior exploitation in the cinema? Can the United Kingdom lawfully adopt an independent policy which leads to exporters of North Sea oil not supplying to Israel when the Community has an association agreement with Israel and a common commercial policy?

The answers to such major questions from whatever State they come have an actual or potential impact on the discretion and the decisions of our administration and our law-makers.

These are at the national level. The inhabitants of the Member States, human and corporate, at the business level are no less affected. Those engaged in finance, commerce and industry, who must consider not only national law and Community law separately but the interaction of the two, are bound to be aware of this impact. Some of it, of course, is well known. The imposition of customs duties on goods coming from Member States is prohibited; the imposition of such duties on goods from third countries, and the levels of those duties, falls to be decided now not by the United Kingdom independently but by the Community, and not infrequently by the European Court. Quantitative restrictions and measures having equivalent effect on imports and exports between Member States are precluded unless justified on grounds specified in the Treaty or accepted by the Court as being permissible. The United Kingdom was thus held not

entitled to keep out poultry from other Member States on the grounds that those States did not have a rule that the birds should be slaughtered if a certain disease occured; or to subject to tests heat-treated milk already adequately tested in the country of export. Conversely it could insist that France did not keep out British lamb; Italy was told that it could not tax Scotch whisky at a higher rate than Italian-made grappa. These are not just matters for the European Court - a glance at the law reports over the last five years shows that our national courts have been prepared to condemn practices as being contrary to Article 30 without finding it necessary to refer the case to the European Court. The Court of Appeal took this line recently when holding that a scheme for the reimbursement of chemists was contrary to Article 30 as discriminating against goods imported from other Community Member States. Innumerable regulations have been made concerning agriculture which affect our farmers where the decisions of the European Court have been of considerable importance. Restrictions on aids by a State to its own industry, thereby giving it a competitive advantage over the industries of other Member States are prohibited unless shown to be justified on grounds laid down.

Because these are well known I do not need to dwell on them. Instead I take a number of other examples in your specialist areas to illustrate the effect of the incoming tide.

When I was told to go to Luxembourg I was told that one of the major areas most likely to develop during my appointment there would be in the field of intellectual property.

In fact the direct harmonisation and co-ordination of national laws has not yet gone very far. For example, the Community Patents Convention, which creates few provisions harmonising national patent laws, but concentrates on the adoption of a Community Patent valid throughout the territories to which the Convention applies, has still not come into force. The United Kingdom has ratified it but five Member States have not done so, two of those having been in the Community since 1973. Whether the others should go ahead, and what form of Community judicial review there should be, are major contemporary issues. Trademarks are even further behind in the legislative process; the Commission's proposals for draft rules have not yet been adopted.

Yet that does not mean that nothing has happened. There have been significant developments in the jurisprudence of the Court. The Court has drawn a distinction between the existence of intellectual property rights and their exercise. Whereas the former is unaffected by the Treaty the latter is subject to rules on competition (Articles 85 and 86) and on the free movement of goods (Articles 30 and 36). Since Article 36 excludes from the prohibition contained in Article 30 restrictions justified for the protection of industrial and commercial property, it has been necessary to work out the scope of this exception.

In order to run together the national rights of the patent holder and the basic Community rules on the free movement of goods, the Court has developed the principle of the exhaustion of rights. According to this principle if the holder of a United Kingdom patent puts goods covered by that patent on the market of another Member State, or if he consents to their being marketed there, he cannot use his United Kingdom patent to prevent those goods from being imported into the United Kingdom and sold there. The patent holder has exhausted his rights by marketing the goods in Italy or consenting to their being marketed there. This principle is not of narrow application; it has been held to apply, not only where patents exist in the two countries concerned but even where goods are sold in a country in which they could not have been patented at all. Even if they are not patented in the second country they cannot be shut out from the country where the patent is held.

There is a recent refinement to the rule which has not yet reached the official law reports, which excludes the application of the principle where the goods have been manufactured in the second State under a compulsory licence granted by the authorities in that State. The owner of the patent had not consented to the operations of the third party and the Court held that he must, therefore, be allowed to protect the substance of his exclusive rights under the national patent by preventing the importation and marketing of products manufactured under the compulory licence.

This principle, which is of much potential practical effect, has been applied by the Court not only to patents but to trademarks, copyright and to a rather special form of legal right, the right of plant breeders. Its importance is to be seen from the fact that, in the case to which I have just referred, dealing with the compulsory patent licence, six Member States and the Commission intervened in the proceedings in order to support the patent holder.

This question is not the only one of current interest in the patent field as a recent reference by the House of Lords in **Allen & Hanburys Limited v. Generic (United Kingdom) Limited** relating to forms of injunctive relief under the 1977 Patent Act illustrates. Moreover, since the relevant provisions have been held by the Court to be directly effective their application will often be a matter for the national courts, and a number of cases alleging infringement of property rights English judges have had to deal with defences founded on Community law - "Euro defences" - most frequently surfacing in interlocutory proceedings where the courts have not found it necessary to refer the question at issue to the European Court of Justice.

My second example of a growth area, of direct relevance to your members, concerns money; banking, the movement of capital and insurance.

The Treaty does not have detailed provisions relating to banking but

legislation has been adopted laying down Community rules applicable to national banks which override national rules. Formal restrictions (those based on the nationality and residence of banks or their personnel) on the right of establishment and the free provisions of services were removed by the First Banking Directive 1973. National laws and administrative provisions relating to the establishment of credit institutions (those undertakings whose business is to receive deposits and other repayable funds from the public and to grant credits on their own account, including commercial and savings banks) were harmonised by a further directive. Such institutions must be authorised before being allowed to commence activities and certain minimum conditions must be met; Member States are required to collaborate in their supervision of such institutions and to supply each other with information. The United Kingdom has implemented this directive by the Banking Act 1979. This is a significant innovation since, as I understand it, supervision had previously been carried out by the Bank of England on a non-statutory basis. It is perhaps a little curious that the preamble to the 1979 Act recites as one of its purposes the amendment of the Consumer Credit Act 1974 and the law with respect to which section 7 of the Cheques Act 1957 applies, without indicating that one of its purposes was to give effect to the directive.

This sort of directive easily gives rise to practical issues at the national level. There is a provision in this directive that persons employed by the supervisory authorities are bound to observe obligations of professional secrecy subject to provisions laid down by the law. The Court, encouraged to do so by the United Kingdom, has recently held that a Dutch law entitling a witness in court proceedings to refuse to give secret information was compatible with the directive.

Insurance too has produced a number of directives concerning the authorisation of undertakings dealing in non-life and life insurance and with co-insurance. A proposal for a second non-life insurance directive has been before the Council for a very long time. What has been done is significant; what remains to be done is no less important. At present four cases are before the Court alleging that restrictive provisions adopted in France, Denmark, Ireland and Germany all infringe the Treaty and, in some instances, the insurance directives. It is said, for example, that to require a lead insurer in a co-insurance operation to be established in the country of risk is unjustified. It is also said that German rules are unjustified because they require insurers from other Member States, who wish to provide other forms of insurance in Germany

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These cases are obviously of great significance to the Community - in the French case five Member States intervened to support France, two Member States intervened to support the Commission. Whatever it decides the judgement of the Court will be of great importance.

Linked with the liberalisation of banking and insurance services is the progressive liberalisation of movements of capital, laid down by the Treaty but to be brought into effect by legislation. For example, in 1985 two directives were adopted which harmonised the laws of the Member States concerned with unit trusts and capital movements relating to unit trusts. In this area too there have been fundamental decisions of the Court, not least in importance those holding that current payments for goods and services in cash, which were not normally paid for in cash, could be subject to restrictions since the liberalisation of current payments related to payments by normal commercial methods; and that a person was entitled, as part of the provision of services, to take with him such monies as were necessary for the purposes of tourism, study, medical care or business travel. These decisions may not be of significance here at the moment but they have obvious implications for future exchange control policy.

Thirdly, of more general import, come Articles 85 and 86 prohibiting agreements between undertakings and connected practices which may affect trade between Member States, and abuses of a dominant position in the Community - the twin pillars of the competition rules where the Court becomes involved in the evaluation of economic data and which are of immediate significance to United Kingdom undertakings, not least because they are directly applicable and can be relied on in the national courts. As far as I can see whenever a conference on their scope and application is arranged it is at once fully subscribed if not over-subscribed.

The interaction of the two systems, Articles 85 and 86 and our own Restrictive Trade Practices Act, is no less interesting and is not yet fully worked out. That inter-relationship is plainly of importance. It is clear that national competition law cannot undermine Community law; if it is less

severe it must give way. Yet the one does not necessarily exclude the other and sets of parallel proceedings are possible though the Court has said that where the first authority has imposed a sanction that must be taken into account by the second authority dealing with the same alleged infringement. Other questions are lurking. Whether, if the Commission issues a negative clearance or a comfort letter to an undertaking in the United Kingdom, the national restrictive practice law may still be applied, has not been decided; nor has it been decided whether, if the Commission issues an individual exemption under Article 85(3) or if an agreement falls within a block exemption granted by the Commission, national competition law can still be applied.

These are only examples. One could look at the product liability directive, at directives on the Labelling, Advertising and Presentation of Foodstuffs, cosmetic products, misleading advertising and the recent directive on planning controls. In this area, the area with which your members are directly concerned, there is much more to come, boosted, no doubt, by the terms of the Single European Act, recently signed, which gives new powers particularly in regard to the environment, research and technological development. The agreement which has been recorded to achieve the internal market by 1992 is inevitably bound to produce new and more far reaching developments in many of the areas to which I have referred, not least in the areas of insurance, banking and the free movement of capital. The impact seems likely to be considerable.

Yet finance, commerce and industry, economic matters, do not exhaust the subject. From the perspective of Luxembourg I find particularly striking the impact Community law is having and is likely to have on the lives of individuals.

The Treaty sets up the European Economic Community which on the face of it sounds somewhat remote from ordinary men and women. Indeed one member of the House of Lords in the debate on the European Communities Bill said that:- "I venture to suggest that the vast majority of men and women in this country will never directly feel the impact of Community law."

Yet the Treaty, in creating a common market, aimed to achieve an accelerated raising of the standard of living; the Member States resolved to ensure not only the economic but also the social progress of their countries, and constantly to improve the living and working conditions of their peoples. There is no doubt that there has been in recent years much emphasis on the social or sociologoical aims of the Treaty both in the Commission and at the Court.

Not everyone wants to become a migrant worker - not even as a member of the European Court - and the number of migrant workers within the Community has been much smaller than expected, no doubt due to the recession. Yet important decisions have been taken to ensure that workers

can make full use of the freedom to move without discrimination based on nationality as regards employment, renumeration and other conditions of employment: just as they have been taken to enable businesses and the professions to be established and to enable services to be provided without restrictions other than those justified in the general interest, such as consumer protection, or on grounds of public policy, public security or public health.

It is as a result of the application of these rules that the complete control over the admission of aliens, long regarded as an essential attribute of our national sovereignty has been modified in respect of the nationals of other Member States, even if the United Kingdom retains its rights to decide who are its nationals.

This is not a matter of theory but of real effect and it may produce substantial limits on the power of the administration to refuse admission even on the grounds of public policy and public security. Twelve years ago the United Kingdom was held entitled to exclude a scientologist, the national of another Member State, because it disapproved of the practice of scientology even though did not ban it here. I am not at all sure that that would necessarily be the same result today. The Court has more recently held that to exclude a Community national on the grounds of public policy, a Member State must show that it takes effective measures to repress activities of which it disapproves on the part of its own nationals. So the result of the scientology case might just possibly have been different today. Even the criminal courts may find their powers restricted in relation to deportation if the immigration offence committed, such as a failure to notify the immigrant's presence, is not one which reasonably justifies such an order. In a different context, the Customs and Excise authorities have found in the last day or two that their power to seize goods, which they regarded as pornographic, are limited because they cannot show that similar powers are exercised in the United Kingdom. I have not yet seen any newspaper comment on that decision but I imagine that amongst those who have not read the relevant provisions of the Treaty or the case-law of the Court there might be a certain amount of astonishment at the result. But if national law simply says you cannot send these things through the post you cannot exhibit them but you may manufacture them, you may sell them, you may possess them, then it is a little difficult to say that public policy requires the Customs authorities to keep out the same or similar products made in other countries of the Community.

The creating of rights for individuals to move about within the Community is of course a two way process. A United Kingdom citizen can rely on Community law rights to move elsewhere in the Community; the United Kingdom is reciprocally bound to allow entry or establishment or the provision of services to nationals of the other Community States who wish to come here, since the provisions of the Treaty dealing with those

rights are of direct effect. So the English girl who established the right of a part-time worker with a genuine and effective job, which was not merely ancillary to other activities, to stay in another Member State and to take her non-Community husband with her, even though her income was less than that normally accepted as being a reasonable subsistence level, has opened the way for other nationals to come here on the same terms. Whether such a person has the rights of a worker if he needs social security to supplement his income in order to live is a question now pending before the Court.

What about the person who comes here in order to look for work? Does he have the right under the Treaty to come even for a limited period? That again is a question which has not been definitively answered.

So much for workers. So far as establishment and the provision of services is concerned there is a growing body of law which has affected and will continue to affect the way people can move to do business or to exercise their professions.

A prerequisite for mobility of the professions is that diplomas should be recognised across frontiers. So far as the medical profession, including nurses, midwives and pharmacists, is concerned there has been a considerable co-ordination. The subject matter of their professions and their practices does not vary very much from State to State. For architects there is mutual recognition without co-ordination. For lawyers, although there is already a Directive which allows them to appear in cases in other countries laid down in those countries, there is not yet a co-ordination of subjects or a mutual recognition of diplomas. The content of the diplomas varies so much from State to State. The question, however, is very much alive and certainly is of great interest to the CCBE and to the various national professional bodies. Because it has taken so long to produce directives - the architects' one took eighteen years - the new Commission has proposed a general directive applying to all qualifications other than those already dealt with. This approach is not free from controversy and lawyer's organisations in the Member States are actively considering whether such a directive can or properly should apply to lawyers or whether they should be dealt with separately. The directive, in whatever form it takes, will certainly have an effect in years to come in whatever form it is adopted. I confess that if I were now a young member of the Bar or a young solicitor, I would have some doubts about the merits of requiring a three year qualifying period just because the subjects I had studied differed substantially from those covered in the diploma of another Member State, if I thought I could get those subjects up in six months. The proposal of the new directive seems a very long way from passing the Bar exams with the aid of "Nutshells".

The Court has been much concerned, in this area, with defining the scope of the justified exceptions to the basic rules. It seems to me that it has achieved a sensible balance between the business or professional man and

national requirements. Thus the Englishman who wanted to provide technical personnel for limited periods in the Netherlands, a sort of up-market "lump", established that such a provision did constitute "the provision of services". Yet the Court accepted that it was reasonable, because of sensitive problems with the unions faced by the Netherlands Government, to require the provider of such services to be licensed. On the other hand the conditions for the grant of such a license must not discriminate against the national of another Member State on the ground of his nationality, and the Dutch were required to take into account the evidence, qualifications and guarantees which he had already provided in the United Kingdom.

The French authorities were told by the Court that they could not refuse to register a British architect with equivalent qualifications, nor a Belgian lawyer because his degree, though equivalent, was Belgian not French, nor a German lawyer, merely because he wanted to keep his office in Germany as well as in Paris, the maintenance of two principal offices being forbidden by the rules of the French Bar. In an opinion given last week, I came to the conclusion that the French rules preventing all doctors from other Member States from being employed or setting up or, save to a limited extent, providing services in France went too far and could not be justified.

These, the classic illustrations, happen to concern France. We should not assume that France is alone any more than that the United Kingdom is exceptional when it tries to keep out other peoples' turkeys or heat treated milk. This is all part of the growing process.

The impact of Community law on education is a matter of current concern both in the European Court and in the Courts of the United Kingdom. The United Kingdom like other Member States except Belgium (and Greece in relation to Belgians since Belgium does it to the Greeks) does not charge Community nationals fees over and above those charged to its own nationals for vocational training. The Treaty says nothing about education in general but it does require the Council to lay down general principles for implementing a common vocational training policy. On the basis of that provision, and programmes drawn up by the Community, the Court has held that vocational training, even if it includes an element of general education and at whatever level, is within the scope of the application of the Treaty so that prohibition of discrimination on the grounds of nationality applies.

The inevitable questions now follow. What is vocational training? Can it include university education? Is the law student or the medical student at the university undergoing vocational training? What about the student of the history of German or any other national philology? These and other questions will fall to be investigated in the coming months.

This subject may not be a wave within a wide river but it is certainly a ripple in a not insignificant tributary.

I should add that in my view as already expressed in an Opinion, these rules which the Court has developed in this area do not apply to the making of maintenance grants to students. If that is right it would follow that local authorities do not need to fear the burden of maintaining legions of students from other Member States.

Certainly no less significant has been the impact of Community law relating to sex discrimination in the field of employment. Men and women must by the Treaty receive equal pay for equal work and be treated equally. Under a directive adopted to harmonise the laws of the Member States the principle of equal pay is to apply to work of equal value. All discrimination on grouds of sex regarding all aspects and conditions of renumeration must be eliminated. There must be equal treatment for men and women as regards access to employment, vocational training and promotion and as regards working conditions. There must, under another directive, be equal treatment for men and women in relation to certain aspects of social security, in particular as to statutory schemes relating to sickness, invalidity, old age and retirement pensions, though in regard to the latter, Member States retain the right to fix different pensionable ages for men and women.

The impact of these provisions on the United Kingdom has been direct and striking, largely, I think, due to the energy of the Equal Opportunities Commission, which save in Ireland, does not have an equivalent in the other Member States - a factor which explains why so many of the Court's decisions have involved the United Kingdom, since I am not satisfied that all the other Member States are way ahead of us in this area merely because few or no such cases have come from them, even though some undoubtedly are.

Although there have been many important decisions in this area it is important always to bear in mind that following a reference by a national court of a question with interpretation of this Community legislation, the European Court does not interpret English statutes nor decide definitively whether such legislation is compatible with Community legislation. That is for the English court to decide. What the European Court does is to define the ambit of Community law so as to make it possible for the national courts to decide whether, on its interpretation of that law, the English legislation complies with the Community rule.

The case of the woman who sought to argue that the Equal Pay Act 1970 enabled her to compare her salary with that of a man formerly employed by the defendant company, as part of the exercise of deciding whether she was "employed on like work with a man in the same employment" provides a good, indeed a striking, example. The Court of Appeal, Lord Denning dissenting, held that under the English Act she could not do so. The European Court held that Article 119 of the Treaty was not confined to situations where men and women are contemporaneously doing equal work

for the same employer. It applied also where a woman received less pay than a man who had been employed prior to her employment and who was doing equal work for the employer. The Court did not say that that was the effect of the English statute. It was for the English court to deal with the matter in the light of the Community Court's ruling. Thus in an English case, where an Englishwoman employed in England sued her English employer under an English statute, the Court of Appeal, when the case came back interpreted the section in the light of the European Court's ruling. It did so because it accepted that Community law was supreme and that this provision had direct effect in England so that it must be applied without more ado by the English courts - "supremacy" and "direct effect" being the two pillars upon which the structure of Community law rests. As the Master of the Rolls put it:- "it is important now to declare - and it must be made plain - that the provision of Article 119 of the Treaty of Rome take priority over anything in our English statute on equal pay which is inconsistent with Article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law, and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it."

This is the classic English constitutional approach. It was reflected in an answer given by the Prime Minister in the House of Commons last week. There is of course another approach, namely that once a Member State joins the Community, Community rules apply under Community law itself rather than under the British statute, the European Communities Act 1972. However, it seems unlikely, at any rate in the foreseeable future, that the conflict between the two theories would have to be resolved.

This was clearly a landmark decision as to the impact of Community law in England though it is not without historical interest to note that the previous year a magistrate, not the Court of Appeal, in Northern Ireland had, rightly, dismissed a summons against a defendant under the law relating to the marketing of pigs on the basis that the Northern Irish legislation could not co-exist with, and therefore must give way to, the provisions of Community law on the free movement of goods and the common organization of the market in pig meat. At a blow the Northern Ireland legislation had gone.

There have been other cases under this reference procedure which are of great practical significance. Thus "pay" has been broadly defined to include other prerequisites which flow from the employment relationship; and to include a contribution to a retirement benefit scheme which is paid by an employer in the name of his employees as an addition to gross salary; "working conditions" have been held to include the age at which retirement is fixed, in a judgement which has attracted much attention because of the impact it was thought that it may have.

A lady employed as a dietician by an area health authority thought it was contrary to the law that she should be required to retire earlier than a man. The retiring age for women was 60, though in fact she went on to 62; for men it was 65. The English courts held that that was not contrary to English legislation because the prohibition of discrimination did not include provisions in respect of retirement. The question then arose as to whether it was contrary to the directive providing for equal treatment in regard to conditions governing dismissal. The European Court had already accepted that "dismissal" must be widely construed so as to include termination of employment; it now ruled that this was so even if the dismissal led to the payment of a retirement pension. That was no big advance; nor was it difficult to see how in ordinary language the policy of the employers could be other than discriminatory. The real difficulties were of a different nature and they illustrate both the width and the restrictions which the impact of Community law may have on national law. Member States can lawfully fix different retirement ages for men and women; and provisions hinged to these ages may be acceptable, as were British Rail's redundancy provisions which gave women the right to a lump sum on retirement at an earlier age than men. Could it be said that because a woman could lawfully be given a pension earlier than a man, though it was in essence discriminatory, therefore she could be required to retire earlier than a man. The answer was no, in my view rightly. The two may normally coincide in time but they are distinct concepts which have to be treated as such.

The difficulty in the lady's way was that this provision of Community law was contained in a directive which had not been implemented and not in the Treaty or in a regulation, which itself has direct effect in the sense that it is to be applied even without national legistlation to implement it. The Court has now put an end to the long years of academic debate by ruling that a directive does not create rights and obligations enforceable as between two private parties, but it does enable a citizen to say to its state:- "you cannot rely on the fact that the directive is not implemented because it is you who failed to implement it".

Then came perhaps the most important question of all in the case since it was found by the English courts that this lady was employed by an emanation of the State. Did the rule - so nearly an English estoppel - apply only to the exercise of sovereign power or public rights, such as the collection of taxes, or did it also apply to the employer/employee relationship? The Court held that it did apply to the latter relationship, so that it now falls to the English courts to apply the judgement.

Another employee, whose case was heard at the same time but attracted less publicity, failed to establish that there was any discrimination; even if she had succeeded in showing that there was discrimination she would have failed to establish any right enforceable in the national courts because she was employed by an independent company.

It may at first sight seem unsatisfactory that there should be this distinction between State and private employers. It springs entirely from the fact that the State can legislate whereas the private employer cannot, which puts the State employer in a fundamentally different position. If employees of private employers are at a disadvantage it is for the State to deal with the position by implementing the directives.

These cases illustrate graphically the wide-ranging effect which rulings on hypothetical questions of law given by the European Court can have on decisions in English cases.

The Article 177 procedure is not, however, the only way in which United Kingdom legislation in this area has been affected. The Commission as guardian of the Treaty can ask the Court to rule that English law or practice is inconsistent with obligations under the Treaty. By this route the provisions of the Equal Pay Act 1970 as amended by the Sex Discrimination Act 1975, were found to fall short of Community law in a number of respects. The most important of these related to the Community provision that there must be equal pay, not just for equal work but for work of equal value. Under our legislation the employee only got equal pay if the employer had instituted a job classification system to evaluate the equivalence of various jobs. That was held by the Court not to be enough. The employee whose employer had not instituted such a system was equally entitled to pursue a claim that her work was of equal value to that of a man. In other respects too the legislation has been held to be insufficient. Under the Treaty the United Kingdom was obliged to take the necessary steps to bring the legislation into line and new legislation has been introduced.

It is clearly not possible to draw a line and say that this subject is closed. The tide continues to flow. There is currently before the Court an important case in which a married woman is claiming that she is entitled to, but does not get, an invalid care allowance from the DHSS under the same conditions as a man or a single woman; and a case brought by a man, a bachelor, who objects to paying pension contributions for a surviving spouse which he insists that he will never have, which do not have to be paid by a woman, even though he will in due course get the premiums back.

Other areas are likely to be developed - equal treatment in occupational pension schemes outside the sphere of social security; further action under a resolution passed by the Council in 1982 to ensure the promotion of equal opportunities in practice for men and women particularly in regard to the higher levels of responsibility and management; the removal of discrimination in regard to taxation, so lucidly considered in relation to the United Kingdom by the Select Committee of the House of Lords; the equalisation of pension ages under state social security schemes where at present Member States have different practices.

Finally, though by no means compendiously, in relation to the effect of Community law on the individual, it is necessary to bear in mind one aspect

of Community law which is latent but which has of yet no impact in the United Kingdom. The Court has long since accepted that Community law includes rules gleaned not only from the laws and traditions of the Member States, but also from fundamental principles which they all accept. One source of these is the Convention of Human Rights. The provisions of that Convention as such are not part of Community law; the Community is not, and cannot since it is not a State, be a party to the Convention. Yet in relation to rights of property, to the practice of religious faith, to the right to be heard and to fair adjudication in a dispute, the Court has accepted that Community law includes principles as expressed in that Convention.

In none of the cases has such a right been vindicated. Indeed in a recent case argued on the basis of freedom of expression, where the lawfulness of a rule preventing the exploitation of video tapes until the showing of the film in a public cinema had run its course, the Court held that it had no power to examine the compatibility with the Convention of national legislation which concerned an area falling within the jurisdiction of the national legislators.

Yet the jurisdiction to recognise rights parallel to those contained in the Convention is there. Such rights will form part of Community law, directly enforceable in the Member States. This for the United Kingdom is of particular significance since the Convention is not at any rate so far part of English domestic law. To hold that a specific right enshrined in the Convention is part of Community law so that it must be given effect to in the United Kingdom where the Convention is not part of domestic law raises interesting questions which have not yet been fully investigated.

So much, briefly, for the extent of European law in a commercial context; so much for the impact of Community law on the individual. Finally I ask the question:- has accession to the Community had or is it likely to have any more general impact on our legal system and procedures? It is probably too early to say. On the ordinary procedures of our courts I suspect not. The growing practice of our appellate courts to hand down judgments, to have a prepared summary, to read documents in advance so as to save time at the hearing, though resembling more the working methods of the European Court, are purely coincidental changes.

Yet there is undoubtedly a greater exchange of views, not just on Community law as such but generally, between lawyers here and on the Continent than there was before accession. I notice a conference here next month between French and English lawyers on comparative methods of drafting legislation and the Lord Chancellor is to address the Paris Bar on "The spirit of the Common Law", so that the process is not all one way. It seems to me that in the context of the CCBE and FIDE particularly, these discussions imperceptibly will have their effect on legal thinking.

Just as the Treaty of Rome was an exceptional treaty, so the European Communities Act 1972 was an exceptional statute. I am not conscious of

any provisions elsewhere similar to those in section 2 of that act.

"(2) 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 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 recognised and available in law, and be enforced, allowed and followed accordingly."

"(4) Any enactment passed, or to be passed, other than one contained in this Part of this Act shall be construed and have effect subject to the foregoing provisions of this section."

The House of Lords in **Garland** in 1983 accepted that the rule of interpretation, that the United Kingdom statutes passed after a treaty was signed are whenever possible to be construed so as to render them compatible with the treaty concerned, applied a fortiori to obligations arising under Community law. Lord Denning in **McCarthys** v. **Smith** went further "if on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen, then it is our bounden duty to give priority to Community law".

On this view, section 2 of the act does entrench the principle of the supremacy of Community law to a considerable degree; it is an inroad into Parliamentary sovereignty. In both judgments the courts accepted that Parliament had, to a considerable degree, bound itself to refrain from enacting statutes conflicting with Community law.

What would be the position if Parliament deliberately passed an act with the intention of repudiating a provision of the Treaty or acting inconsistently with it, and said so in express terms, remains to be seen. Lord Denning in an opinion which the House of Lords said was a tenable view, though not deciding the point, thought that the courts would be obliged to follow the new statute. The alternative view is that even a deliberate and express infringement of Community law is precluded unless the 1972 Act is repealed and the United Kingdom withdraws from the Community, so that there is an even greater degree of entrenchment. As Professor Wade said in his Hamlyn lectures, at the end of the day it is for the judges to say what they will recognise as effective legislation. Fortunately so far the issue has not arisen, but what is plain is that the restriction on future legislation to enable the United Kingdom to comply with its Community obligations, which at first seemed a great novelty, shocking to some, is now less and less regarded as a novelty. The principle of the supremacy of Community law is seen more and more as part of our constitutional furniture. Passages in Dicey became history.

Whether this attitude has had its effect on what appears to be greater willingness to entrench a Bill of Rights on the model of the European Convention and whether it will have its effect on other legislation of equal

constitutional importance remains to be seen.

What is to my mind clear is that the national courts when construing Community legislation must adopt the methods or rules followed by the European Court. If it were otherwise totally different results would be arrived at in different Member States. Ordinarily there is a difference between the classic English attitude to statutory construction - largely literal because of the courts' reluctance to interfere with what Parliament has said, and because if Parliament does not like what the courts have done it can readily change it - and the approach of the European Court of Justice. If the latter produces by a literal reading a result which is clearly contrary to the principles of the Treaty, amendment is at the least extremely difficult and often unthinkable.

There were some who thought that this approach adopted in regard to Community legislation might have its influence on the approach of the courts to the interpretation of English law more generally. In 1974 in his Hamlyn lectures Lord Scarman thought that it would.

> "If we stay in the common market, I would expect to see its principles of legislative and statutory interpretation and its conception of an activist court whose rule is to strengthen and fulfil the purpose of statute law replace the traditional attitudes of English judges and lawyers to statute law and the current complex style of drafting."

Lord Denning in a judgement in 1977 advocated a similar change towards what he described as the European method of construction. And he described it in this way:

> "Some of us recently spent a couple of days in Luxembourg discussing it with members of the European Court and our colleagues in the other countries of the Nine. We had a valuable paper on it by the President of the Court which is worth studying ("Methods of interpretation as seen by a judge at the Court of Justice, Luxembourg 1976"). They adopt a method which they call in English by strange words - at any rate they were strange to me - the schematic and teleological method of interpretation. It is not really not so alarming as it sounds. All it means is that judges do not go by the literal meaning of the words or the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter of the legislation - they solve the problem by looking at the design and purpose of the legislature and the effect which it has sought to achieve."

Despite these efforts to dispel the idea that whatever begins at Calais must necessarily be foreign and therefore nasty and bad the process is bound to be slow if it occurs at all. There is, however, I forecast a latent impact.

In the same way, principles of Community law, there is some indication, may be creeping into English legal thinking. I doubt whether

"proportionality" is to be found in pre-accession judgments. It is a principle which originates particularly in German law, by which a legislative or administrative act is unlawful if it is disproportionate to the object to be attained. The European Court has adopted it and used it to strike down Community agricultural regulations on the grounds that they imposed disproportionate sanctions on traders who failed to comply with conditions laid down for the grant of aid. It used it recently where regulation provided for an export refund if sugar was imported and security lodged. The refund was only payable if an export licence was applied for by 12 o'clock on a particular day. The English company by an error only applied for the licence after 4 p.m. On any literal reading, the company forfeited the £1.6 million security it had deposited since the sanctions for the beach of the primary obligation to export and for the ancillary obligation to apply for a licence were the same. The Court held that the licensing system was merely an administrative function to enable the Community to monitor exports. To the extent that the regulation provided for the entire security to be forfeited for failure to apply for the export licence, it violated the principle of proportionality and it was therefore invalid.

I notice that in the GCHQ case (I think not for the first time) Lord Diplock suggested "the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow Members of the EEC". It remains to be seen whether that principle does indeed become part of English administrative law.

The protection of "legitimate expectations", adopted as a principle by the European Court from continental systems, has appeared in recent arguments before the courts. It is also interesting to note how, in relation to judicial review, the distinction between public and private law, which is so deeply embedded in the legal systems of most of the Continental Member States of the Community, has become part of English law, however much its use may have been criticised by some of the commentators. To what extent this is a matter flowing from the United Kingdom membership of the Community, whether "detournement de pouvoir" and the concept of the "juge legale" will follow, whether in deciding issues of Community law the English courts will modify the doctrine of precedent to the more flexible approach by the European Community Court, must be a matter of speculation.

Some of the influences have had their effect, others are inchoate. I leave with you, very briefly, two trailers labelled "Coming Shortly" each of which will justify at least one separate lecture and probably in academic circles provoke many.

In the first place we are well used here to the concept of Crown or public interest privilage and to Crown immunities enjoyed by the administration of the day. In some areas those rules remove questions from the jurisdiction of the courts.

Can these rules apply when a question of Community law arises? Can the Court of Justice, for example, be subject to limits of jurisdiction in view of its obligation to ensure that the interpretation and application of the Treaty the law is observed, and in view of the obligation on Member States not to submit a dispute containing the interpretation or application of the Treaty to any other method of settlement than those provided in the Treaty.

The only exception to the jurisdiction otherwise created is to be found in Article 31 of the recent Single European Act which provides that the court's jurisdiction shall not extend to certain provisions, notably those concerning the European Council and European co-operation in the sphere of foreign policy, which in any event is hardly a justiciable matter.

The compatibility of immunities known in the United Kingdom with Community law arises in an important case currently before the Court. It concerned a Woman Police Constable in Northern Ireland who had been employed on a full time basis. When her contract came up for renewal, she was given merely a part-time contract on the basis that only full-time members should carry arms and that only men should be required to carry arms. A certificate was signed on behalf of the Secretary of State, certifying that this was necessary. According to the Northern Ireland legislation a certificate signed by, or on behalf of, the Secretary of State certifying that an act, specified in the certificate, was done for the purposes of national security was to be conclusive evidence that these considerations are fulfilled. The matter came before the European Court on a reference from an Industrial Tribunal to which this lady went alleging that there had been discrimination on the grounds of sex and that she was only given a part-time contract. The judgment has not been given but you might be interested to hear a few of the words of the Advocate General, not the British Advocate General:-

"Formed of States based on the rule of law, the European Community is necessarily a Community of law. It was created and works on the understanding that all Member States will show equal respect for the Community legal order. Consequently, subject to review by the courts, the Community legal order expressly incorporates the concept of public order so as to reconcile the proper functioning of the common market with the necessity for the Member States to cope with emergencies which threaten their vital interests."

However that did not resolve the question as to whether the Court could be excluded from resolving the issue. The Advocate General took the view that the provision as to the evidential effect of a certificate does not exclude all possibility of a review by the national courts in such cases and therefore of a reference to the Court of Justice for a preliminary ruling. He said this:-

"The Treaty, like the case-law of the Court of Justice, therefore lays down the fundamental rule, a corollary of the principle of legality, that while the demands of public order may be allowed to modify the scope

of judicial review, they cannot override the right to obtain a judicial determination."

We shall now have to wait to see whether the Court is prepared to go so far in relation to Community law and whether that decision will be of any wider importance in the United Kingdom.

And then finally comes the question raised by the Burgoyne case as to which I must say very little as it is still before the House of Lords. It does however, in one sentence, raise very interesting questions as to the provision of effective remedies in domestic law. This is the case of the French turkey producers who sued for damages because of the ban on the importation of their turkeys, which was eventually held by the European Court to be an infringement of Community law. Community law requires that an effective remedy be available under national law. So far as I am aware, the only possibilities are interim relief and damages. If Community law requires that a person seeking to enforce Community rights should be able to obtain interim relief against a Member State, then that requirement would override any English provision or rule of English law to the contrary. However Community law does not require this. By the same token, if Community law required that damages were recoverable for breach of a Treaty obligation arising out of an honest error, then action for damages against the Crown would lie in such circumstances. But Community law does not require this either. If judicial review is not an effective remedy, then Community law requires that the plaintiff should be able to obtain either interlocutory relief or damages. It is for English law to make the choice. This may well raise the question, often discussed, as to whether it is right that interlocutory relief should no longer be available against the Crown or its officers.

In the early days the impact of Community law tended to be confined to certain specialised areas and outside those areas it was unusual for points of Community law to be taken other than specialised practitioners. What I have said shows, I think, that Community law now applies to such a variety of different areas of law that a practitioner cannot afford to ignore it. He cannot regard it as a marginal field of law to be left to specialists. It hardly needs to be said that the honoratus of this lecture has played a very considerable part in the evolutionary process which has taken place in this country. The 1973 simile, the 1979 metaphor, may have been a little ahead of their time. Like so many of his dissenting judgments they have certainly proved, in the end, to be right.