



JUDICIARY OF  
ENGLAND AND WALES

GOVERNMENT LEGAL DEPARTMENT - INTERNATIONAL CONFERENCE

INTERNATIONAL AND EUROPEAN LAW: A VIEW FROM THE BENCH

KEYNOTE SPEECH OF LADY JUSTICE ARDEN

15 OCTOBER 2015

1. There are two themes that I want to address. The first is increasing judicialisation in fields of international and European activity, and the second is increasing centralisation in European Union law.<sup>1</sup> Having briefly identified those two themes, I will draw matters together by asking – where do we go from here?

2. So to start I turn to increasing judicialisation.

*Increasing judicialisation*

3. What do I mean by judicialisation? Sometimes by that term we mean that new courts and tribunals are established to deal with new matters – for example the tribunals to deal with complaints about refusals of information under the Freedom of Information Act 2000. Alternatively we mean that courts are exercising their powers in areas that were previously not the subject of judicial scrutiny. It is the latter meaning that I have in mind for today's purposes.

4. There has been an increasing judicialisation in all aspects of life in Western society, and this has been as true in relation to matters of international law and justice as in relation to other matters.

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<sup>1</sup> References in this speech to EU law are not intended to bear on the debate whether the UK should or should not be in the EU. I am simply proceeding on the basis of the legal situation as it is today.

5. We would I hope all agree that in a democratic society governed by the rule of law public authorities must act in accordance with the law and that there should be no exceptions to this rule.

6. In the past, however, many areas of life would not have come before any court. That is the case in connection with the law of armed conflict.

7. I will draw on two examples from the jurisprudence of the Strasbourg Court about detention. The first case is *Al-Jedda v UK*<sup>2</sup> in 2011. Here the Strasbourg Court had to deal with the Convention compatibility of the detention of an Iraqi national (who also had British nationality) by British troops in Iraq. The Strasbourg Court held that this had been in violation of Article 5 of the European Convention on Human Rights.<sup>3</sup> As a detainee Mr Al-Jedda was within the jurisdiction of the UK. The Strasbourg Court rejected the argument that the United Kingdom was, by virtue of UN Resolution 1546, entitled and bound to detain individuals whom it thought were acting in a way detrimental to the interests of security in Iraq. The Strasbourg Court held that the UN resolution did not authorise detention, only arrest. The Convention had precedence over the UN resolution.

8. The law, however, is constantly developing. The doctrine of precedent does not apply in Strasbourg in the same way that it applies in our domestic courts. In the more recent decision in 2014, *Hassan v United Kingdom*,<sup>4</sup> the Strasbourg Court recognised that the arrest of Iraqi nationals during combat operations in 2003 was not in violation of the Convention because it had been lawful under international humanitarian law. The Strasbourg Court held that, on a true construction of the Convention, it was not necessary for the UK to enter a formal derogation from the provisions of the Convention. Article 5 had to be read as containing an exception where the detention was in compliance with international humanitarian law. The Court held that the detention had been lawful under international law (Third Geneva Convention). In this case the Strasbourg Court gave precedence to the law of armed conflict. It reached a more realistic result than it had done in *Al-Jedda*. It did so notwithstanding that *Hassan* was a case of unlawful killing as well as detention.

9. So what we see is judicial scrutiny of acts of detention in times of armed conflict and we see a jostling for position between international humanitarian law and Convention jurisprudence. The Strasbourg Court has moved the law on, and provided for scrutiny under the Convention in circumstances where there was often no judicial supervision in the past. The Strasbourg Court

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<sup>2</sup> *Al-Jedda v UK* (App. NO. 27021/08) [2011] ECHR 27021/08.

<sup>3</sup> Referred to in this paper as “the Convention”.

<sup>4</sup> *Hassan v UK* (App No. 29750/09) [2014] ECHR 29750/09.

appears to have recognised, as it has on other occasions, that in some fields compromises are necessary. Nonetheless, what is clear is that there is a considerable increase in the areas where courts will supervise the legality of operations. Moreover, in some situations, including armed conflict and asset-freezing orders,<sup>5</sup> there is competition between different international courts as to who should govern the space.

10. As an aside I should explain that the application of Mr Al-Jedda to Strasbourg was the result of a decision of the House of Lords that he had no cause of action *under English law* for damages for detention. This led Mr Al-Jedda to bring an action in the English courts *based on Iraqi law*. This came up to the Court of Appeal and I sat on the case.<sup>6</sup> The majority upheld the decision of the judge that Mr Al-Jedda had no cause of action *even under Iraqi law*. I dissented on that point so I had to go on to deal with act of state. But more importantly for today's purposes I also held that the British government should be held to account not under the Convention but under the Geneva Conventions, which apply in the same way to all states. I explained why in my judgment this was important:

If courts hold states liable in damages when they comply with UN resolutions designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states.

This holding has, I suggest, now assumed greater relevance following *Hassan*.

11. We have seen in many cases, perhaps most recently in the cases about assisted dying, that the courts have held that some matters are more appropriate for Parliament. Of course in the field of international law (as opposed to national or even EU law) this is not a possible option. I have often wondered if that is a liberating factor in international law or not. I expect that it is not. There is a different basket of factors which bear on a court's decision to develop the law, such as the views of the community whom the court serves. In Strasbourg that would be the practice in the majority of Convention states. Whatever the correct principle, the absence of a legislature makes the decisions of judges even more important because on them almost entirely will rest the onus of balancing law and the need to keep it up to date. And the more judicial decision-making there is, the more likely it is that general principles have to be developed because there are no legislative rules that can be invoked.

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<sup>5</sup> See e.g. *Kadi v Council of the European Union* [2009] AC 1225.

<sup>6</sup> *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758.

12. In the field of terrorism, things have moved on from the days when the hot topic for discussion was detention. The hot topics are now data protection and act of state. You will no doubt remember the decision of the Court of Justice two weeks ago in *Schrems*,<sup>7</sup> holding that the US/EU sharing agreement failed to observe EU law in certain respects.

13. What are the consequences of this judicialisation? I think there has to be a recognition that judges are today not simply applying the law but are also creating it. In many respects, in the international field, this is a good idea since it spreads international law. However it also means that those whose activities were previously rarely scrutinised by a court will now have to get used to the idea that there will more often be judicial scrutiny. That in turn leads on to difficult questions as to who should be the judges and their qualities and qualifications. I have argued in the past that judges today need to have a much increased sensitivity to the way in which other legal systems operate and to have an interest and ability in comparative law. I will explain in a moment why I think these matters are so important. Before that I will turn to my second theme.

#### *Increasing centralisation*

14. This is really an observation with respect to European Union law. The system is now a relatively mature system of law. In formal terms, member states and EU institutions owe an obligation of mutual co-operation but in the case of the Court of Justice it is in practice much more like an obligation of obedience than co-operation. What one sees is that the Court of Justice has increasingly taken a centralising role in Europe and has built up its own power.

15. The doctrine of primacy of EU law is a good example of this. The Court of Justice expects member states and their courts loyally to apply EU law within the scope of EU law.

16. Moreover the system of preliminary references gives the Court of Justice considerable practical ability to extend its powers. It requires references to be made by supreme courts whenever there is the slightest doubt about the effect of EU law and the Court of Justice is thereby enabled to lay down what European Union law will be before other national courts have had an opportunity to consider the point and express their views.

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<sup>7</sup> *Schrems v Data Protection Commissioner*, Case C 362/14.

17. In any event, the weight that the Court of Justice gives to the views of any national court is not transparent. The Court of Justice takes the view that it should not refer to the reasoning of national courts save where it is absolutely necessary.

18. The centralising effect of EU law also flows from the general principles of EU law. I have already referred to the tendency of international law to work on the basis of general principles. This is also true in the case of the Court of Justice. Take for instance the principle of effectiveness. Since that applies to rights conferred by EU law, obstacles in domestic law must be swept aside.

19. There are other techniques that the Court of Justice has developed in order to exact loyalty from national courts. These include Member States' liability for non-implementation of directives<sup>8</sup> and the liability imposed on states for the acts of their courts when they do not recognise and enforce EU law.<sup>9</sup> These reinforce the position of the Court of Justice as the court at the top of a hierarchy of national courts.

*Where do we go from here?*

20. It is of course essential that national courts remain in the game. Indeed I would say it is important for national courts to assert themselves if they are going to stand any chance of influencing the development of international or European law. This is a difficult exercise. However, influence can happen, and I can give you a recent example based on *Benkharbouche v Sudan*.<sup>10</sup>

21. This was a claim by a domestic worker against the embassy which employed her. The State Immunity Act 1978 provides for the state to have immunity from employment claims unless the employee was a UK national or was habitually resident here when the contract was made. Neither of these exceptions applied to Mrs Benkharbouche, but her employment claims fell within the scope of EU law. The Court of Appeal held that state immunity in these circumstances violated both Article 6 of the Convention (right to a fair trial) and Article 47 of the Charter of Fundamental Rights (right to an effective remedy). The Court of Appeal could make a declaration of incompatibility under the Human Rights Act 1998 but that would not enable the claimant to pursue her claims. But the Court held that under the doctrine of primacy of EU law it had to give effect to

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<sup>8</sup> *R v Secretary of State for Transport ex parte Factortame Ltd* C-48/93.

<sup>9</sup> *Köbler v Republik Österreich* (Case C- 224/01).

<sup>10</sup> [2015] IRLR 301 (delivered 5 February 2015), affirming the judgment of Langstaff J.

Article 47 and to disapply the relevant provisions of the 1978 Act so that Mrs Benkharbouche could pursue her claims. The violation of the Charter was one which could apply horizontally in a dispute between private parties because it did not require any further definition in national law.

22. It is interesting to see that this part of the decision in *Benkharbouche v Sudan* seems already to have foreshadowed developments in the Court of Justice's own jurisprudence on the enforcement of rights via the Charter. In a recent Finnish case, the Court of Justice also applied Article 47 of the Charter to enable it to enforce Charter rights horizontally between private parties.<sup>11</sup>

23. This may be a somewhat remote example of the potential influence of our decisions, and certainly one swallow does not a summer make. However, it is my firm view that in order to retain the integrity of our own legal system we must ensure that our domestic law is properly understood in Europe and that we are able to influence EU law's development. We also need to understand what other member states are saying about EU law in order to understand the pressures that the Court of Justice is subjected to and to be able to work around them.

24. This week, the President of the European Court of Human Rights has been in London. He gave a lecture on "Whither Judicial Dialogue". He devoted his lecture to explaining the importance of dialogue of various kinds between judges of the Strasbourg Court and judges from national courts of the Convention states. He spoke, as he put, in glowing terms about the informal form of dialogue.

25. I entirely agree. To my mind, dialogue is one of the ways in which Europe will make most progress in building its new legal orders.

26. It need not always be an uphill struggle. EU law may reach a plateau where it can cease to be so focused on centralisation and expanding the reach of EU law. Some years ago and for many years I followed the path of negotiation of EU directives in the principal field of law in which I practised, namely company law. Some of them had been agreed before the UK joined the common market, and they espoused a theory of company law which was inconsistent with our own. For instance, the continental Europeans focussed on minimum share capital whereas English law permitted companies to be formed with absolutely nominal amounts of share capital – often only £100. English law takes the view that, if creditors lend money to a company which is inadequately

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<sup>11</sup> *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* C-396/13, paras 19 to 26, 15 February 2015.

capitalised, more fool them. So after we joined the common market the minimum capital requirement had to be enacted into English law. Step 1 was that the UK was able to limit it to public companies so that, with inflation, it rapidly became an irrelevant sum. The encouraging thing is that, since the UK joined, the EU has never tried to raise minimum capital of a relatively nominal sum (currently £50,000 for a PLC) to anything which would be a realistic amount in today's money. Moreover, after we got to about the 12<sup>th</sup> Company Law Directive, the DTI (as it then was) was able to persuade the Commission that it really was time to call a halt to harmonisation of company law (Step 2). The Commission has never seriously sought to pick it up again and so the harmonisation of company law directives has ceased to be the problem that it once was. English company law now has implemented the directives with its character largely unchanged. We have to take a long-term view when it comes to the process of adapting to EU law.

27. I leave you therefore with two thoughts. First, the activities in the international sphere and in the European Union are increasingly judicialised. Second, within the European legal order, there is an increasing and observable level of centralisation. These lead me to believe that there is scope for increasing the influence of English judges and that of English law internationally, and that it would be beneficial both to the rule of law and the integrity of our own legal order that we should be able to do so. English law is a valuable asset which we should use to best advantage.

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