Bennion on Statute Law

Part 1 - Statutory Texts

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Legislation of the European Communities

Since 1972 there has been added to the basic legislative texts applying in the United Kingdom a further category. In addition to Acts of Parliament and statutory instruments, we now have Community legislation. As respects accessibility and comprehensibility it is a complicating factor of major proportions.

The status of Community legislation

There are two ways of regarding the status of Community legislation in United Kingdom law. One is to treat it as incorporated in that law solely by virtue of s 2(1) of the European Communities Act 1972. The other is to regard it as essentially emanating from an independent source of law having power by treaty to legislate for the United Kingdom. The position is an indeterminate one. Nobody supposes that the political organisation of Europe will remain as it is now. Either Britain is in transition to a European federation (in which legislative powers will be allocated by a new federal constitution) or it is in a temporary alliance. For the practical purpose of considering legislative texts and their processing it seems best to base our approach on the 1972 Act, taking care to respect the political realities so far as relevant.

The 1972 Act

The long title of the European Communities Act 1972 is of studied vagueness: 'to make provision in connection with the enlargement of the European Communities to include the United Kingdom . . .'. Section 1 defines 'the Communities' as meaning the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). As subsequently amended, it defines 'the Treaties' as meaning the Treaties establishing these three Communities, together with the 1965 Treaty establishing a single Council and a single Commission for the Communities. Also included in the amended defmition are the United Kingdom accession treaties and various ancillary treaties, agreements and protocols, including those

providing for the accession of Spain and Portugal in 1985 and the relevant provisions of the single European Act of 1986.

Section 2(1) runs to a mere eight lines. Yet by it was incorporated into our system a vast mass of law estimated to exceed ten million instruments, many unpublished. In determining what these instruments consist of, and the categories into which they are to be divided, it is necessary to study s 2(1) with care. Accordingly its main provisions are given below not as printed in the Act but broken up into clauses in the way used by the Composite Restatement method described in chapter 23.

European Communties Act 1972, section 2(1)

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties *and*
(2) all such remedies and procedures from time to time provided for by or under the Treaties
(3) as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom
(4) shall be recognised and available in law, and be enforced, allowed and followed accordingly.

Even when it is broken up in this way, we are left to struggle with the typical compressed language of common law drafting. In view of the importance of s 2(1) it is worth attempting to decompress it without altering the basic language. The resulting repetitiveness is a small price to pay for greater clarity.

RIGHTS AND POWERS

(i) All such rights and powers from time to time created or arising by or under the Treaties (ii) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom (iii) shall be recognised in law, and enforced accordingly.

LIABILITIES, OBLIGATIONS AND RESTRICTIONS

(iv) All such liabilities, obligations and restrictions from time to time created or arising by or under the Treaties
(v) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom
(vi) shall be recognised in law, and enforced accordingly.

REMEDIES

(vii) All such remedies from time to time created by or arising under the Treaties (viii) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom

(ix) shall be available in law, and allowed accordingly. PROCEDURES
(x) All such procedures from time to time provided for by
or under the Treaties (xi) as in accordance with the Treaties are without further
enactment to be used in the United Kingdom (xii) shall be recognised in law, and followed accordingly.

When s 2(1) is broken up in this way we see clearly that it is a strange way of importing foreign instruments into British statute law. Article 189 of the EEC Treaty requires the Council and the Commission to make regulations. It continues: 'A regulation shall have general application. It shall be binding *in its entirety* and directly applicable in all Member States' (emphasis added). But s 2(1) does not say that such regulations shall be part of British law, in their entirety or otherwise. If a regulation creates a right, the right is to be recognised and enforced in the United Kingdom. Similarly if it imposes a liability, or gives a remedy, or lays down a procedure. But is it certain that a regulation must do these things, and only these things? As often happens, decompression of a compressed text reveals that the drafting is misconceived. Section 2(1) is now taken to mean not what it actually says, but what it would mean if worded as follows: 'The Treaties, and all such instruments as are without further enactment to be given under the Treaties the force of law in the United Kingdom, shall have effect as law accordingly.' Lord Denning went to this extent in *Re Westinghouse Uranium Contract* [1978] AC 547, 564 when he said that s 2(1) had the effect of incorporating the Treaties and all provisions made under them 'lock, stock and barrel' into British law. This was in line with his statement in *Application des Gaz* v *Folks Veritas* [1974] Ch 381, 396, that arts 85 and 86 of the EEC Treaty 'are part of our law'. Lord Diplock has also said that art 85 'forms part of the law of England' *(Re Westinghouse Uranium Contract* [1978] AC 547, 636).

There has grown up under the Treaties a body of law usually referred to (together with the Treaties) as Community law. The guardian and enunciator of this law is the Court of Justice set up by the Treaties (referred to in the European Communities Act 1972, as the European Court). Section 3(1) of the Act firmly states that as far as Britain is concerned Community law is to be taken as being whatever the European Court says it is. This is in line with art 164 of the EEC Treaty which, as interpreted by the European Court, places upon that Court the duty of ensuring that, in the interpretation and application of the Treaty, Community law is observed.

The combined effect of ss 2(1) and 3(1) is therefore to make Community law (as expounded by the European Court) part of British law. Moreover Community law overrides inconsistent British

law, whether made before or after the accession of the United Kingdom (1 January 1973). Section 2(4) of the Act states that existing and future British enactments are to be construed and have effect subject to Community law. (The problems of interpretation to which this may give rise are discussed in chapter 9.)

It seems right to regard Community law as a type of statute law. Yet not only is it a type new to British jurisprudence, but it falls to be interpreted and applied along different lines. This means that from the point of view of the processing of British-type statute law, a main concern of this book, Community law is irrelevant. The principles of processing applicable to British type law do not apply to Community law, which is a product of Continental jurisprudence. The differences are twofold. First, under the Continental system regard is not paid to the literal meaning of the text if it conflicts with the underlying purpose or intention. Second, the absence of the doctrine of *stare decisis* means that judicial processing (in the sense of filling in and elaborating the textual meaning) does not occur. The court superimposes its view on the text, but that view does not form a binding precedent. It merely serves as guidance.

The concept of processing involves a textual approach to statute law. It is based on the idea that statute users can normally rely on literal meaning, as filled in and elaborated where appropriate by reported decisions and other forms of processing. This approach is not possible with Community law, and yet in Britain we now have a legal regime where the two systems co-exist. In these circumstances we can do little more here than describe what the relevant Community texts are. Their method of publication is described in chapter 7 and their interpretation briefly discussed at the end of chapter 8.

The European texts

The following texts are it seems to be treated as effectively incorporated into the body of United Kingdom statute law. Each type is briefly discussed below.

1 The texts of the Treaties themselves.
2 The texts of *regulations* made under the Treaties by the Council or Commission.
3 The texts of *directives* issued by the Council or Commission.
4 The texts of *decisions* taken by the Council or Commission.

Article 189 of the EEC Treaty also authorises the Council and the Commission to make *recommendations* and deliver *opinions*. Since however it goes on to state that these shall have no binding force they do not form part of the law.

Although the Treaties may be said to form part of the Community law imported into British law, not all their provisions have direct effect. This is because their wording is inapt for this. As Lord Denning has put it, an article of a Treaty can only have direct if it is 'sufficiently clear, precise and unconditional as not to require any further measure of'' implementation' *(Shields* v *E Coomes (Holdings) Ltd* [1978] 1 WLR 1408, 1414). This is the result of rulings by the European Court which, as stated above, has the final say on these matters.

In applying this principle the European Court has defined the literal meaning of the Treaties to an extent far beyond what an English court would have dreamed of doing. Many articles clearly contemplate, for example, that the rights they require will be conferred only by the detailed legislation of member states. Thus art 119 of the EEC Treaty says: 'Each Member State shall. . . ensure . . . that men and women shall receive equal pay for equal work'. This contemplates the passing of legislation. But the European Court has held, in this and similar cases, that individuals can obtain the right in question from their own courts even where the state has failed to pass the legislation or has framed it inadequately. (See the examples cited by Lord Denning, *ibid.)*

One consequence of this is that the careful provisions of Acts such as the Equal Pay Act 1970 and the Sex Discrimination Act 1975 are disrupted. The jurisdiction of courts and tribunals to entertain cases of sex discrimination must be treated as widened to include situations which art 119 covers but the Acts do not. The remedies provided by the Acts have to be widened to correspond. Unless Parliament steps in to amend the Acts, this widening has to be done by the courts themselves. We have the strange spectacle of English courts deliberately setting out to amend an Act of Parliament!

The direct effect of Treaty provisions means that we have entered a period when British courts, acting under the guidance of the European Court, have the task of converting vague statements into practical law. This is an openly legislative function, going far beyond the usual type of judical processing.

Regulations

A regulation of the Council or the Commission (for the EEC or Euratom) is arranged in the following way. First comes the number (regulations are not given a title), then the date and subject matter. For example:

COUNCIL REGULATION (EEC) NO 222/77
of 13 December 1976 **on Community transit**

Then follows a preamble, sometimes running to considerable length. This first recites the matters to which the Council or Commission has 'had regard'. It continues with one or more recitals each beginning 'Whereas'. These contain the justification for the regulation.
The body of a regulation consists of *articles*. These are numbered, but have no descriptive sidenote or heading. When sufficiently numerous, they are grouped under *Titles*. These do have headings. The subdivisions of an article are known as *paragraphs*. At the end of the regulation there may be an *annex*.
The numbering system applied to regulations has varied. From 1958 to 1967, regulations were numbered in two separate sequences: one for the EEC and the other for Euratom. From 1968, both types have been numbered in a single sequence. Numbering was continuous throughout the first five years, but from 1963 each sequence has recommenced at No 1 with the beginning of a calendar year.

Directives

Article 189 of the EEC Treaty requires the Council and the Commission to issue directives. It goes on: '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.' (Similar provision is contained in art 14 of the ECSC Treaty and art 124 of the Euratom Treaty, but in each case the term used is 'recommendation'.) Although it is clear from the wording of the Treaties that directives were not intended to have direct effect as law, that is not how the European Court has construed the Treaty provisions. It has treated directives as directly binding; as Lawrence Collins put it in his excellent book *European Community Law in the United Kingdom*, by a line of reasoning which starts by asking whether there is any reason why they should not be given this effect! (Collins 1980, p 56).
The fact is that the European Court regards it as its duty to build up the force and extent of Community law regardless of the literal meaning of Treaty provisions. The approach is illustrated by the case of *Van Duyn* v *Home Office* (1975) 1 CMLR 1, which concerned a Council directive as to the movement and residence of foreign nationals in member states. Did it confer on individuals rights enforceable in the courts of a member state? The United Kingdom argued that it did not. Since the language of art 189 distinguishes carefully between the effect of regulations and directives, the Council must be taken to rely on that distinction when deciding to issue a directive rather than a regulation. Such Anglo-Saxon reasoning did not appeal to the European Court.

The form of a directive is similar to that of a regulation. There is the same voluminous preamble (that in the Commission directive on elimination of customs duties dated 22 December 1969 for example contained no fewer than 18 recitals), and the nomenclature is similar. An illustration of how unsuitable the drafting can be for direct operation as law was given in chapter 2 (p 25).

There is no separate numbering system for directives. Since 1968 all directives and decisions of the three Communities have been lumped together with recommendations, opinions and financial regulations in a single sequence. The numbers recommence at No 1 at the beginning of the calendar year. The number is preceded by the year and followed by the name of the Community, eg Dir 72/182/Euratom. The pre-1968 system is too complex to be given here.

Decisions

The Treaties contain numerous provisions empowering the Council and the Commission to issue decisions on member states or individuals. By the same dubious reasoning as it has applied to directives, the European Court has enabled such decisions to have direct effect as law. Thus, even though a decision is directed to a member state, individuals can take advantage of it. Since there is no requirement to publish decisions, the consequences for the rule of law are serious.

As with directives, the form of decisions closely follows that of regulations. The policy adopted by the European Court robs these differences in nomenclature of any real meaning.

Statutory instruments implementing Community law

In addition to Community legislation having direct effect, there is in force in Britain a large body of statute law made under s 2(2) of the European Communities Act 1972. This authorises the making of statutory instruments for the purpose of implementing any Community obligations of the United Kingdom. The power does not allow sub-delegation nor does it extend to the imposing of taxation or the making of instruments having retrospective effect. It does not of course permit the overriding of Community law.

Statutory instruments made under s 2(2) are no different in juridical status from statutory instruments made under a provision of any other Act of Parliament. Indeed such other provisions have been frequently used for the same purpose as s 2(2).