Should we come together? Reflections on different styles of judicial reasoning

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If one looks at the judgments of the senior courts in the EU, we certainly seem to be apart in the way we frame our judgments and the way we argue within them.

1. Different judgment styles

It is obvious that there are different judicial styles – between nations and between individual judges within nations. Nonetheless some broad observations can be made. Can I start with the jurisdiction I know best? Things are starting to change there but I think the following remarks are still generally true.

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a) The English judgment

During my time as an English judge I confess that in general I came to my conclusions not by applying a rigorously schematic and analytical approach involving a check list of factors to take into account to the task but rather more by using what one might describe as a legally educated instinct. I would ask myself what seems sensible. Does this interpretation give a sensible result in this case? What about other cases? Having come to a provisional conclusion I might then return to look more carefully at the statute law and the case law to see whether the result I had instinctively arrived at could be reached following orthodox exposition of the law. If not I would carefully re-examine my provisional conclusion to see whether I ought to change it. If I felt that justice required me to keep to my conclusion I would ask myself whether it was open to me to elaborate the law in such a way as to permit me to arrive at this result. Very seldom did I find myself feeling compelled to do that which I thought was unjust. A sentence such as "the justice of the case requires ..." is quite common in English judgments and is not generally criticized as being too vague and lacking in explicit principle. The ultimate expression of this approach is of course the unreasoned jury verdict: "How do you say? Guilty or not guilty?" No more is asked for.

Clearly one of the desirable things about a system of justice is that the result should not depend upon which judge happens to be trying your case. This is why I refer to a legally educated instinct. I mean by this the instinct which one gets as to what would be the generally accepted opinion of ones colleagues. We certainly try to avoid palm tree justice since, as an English judge once wrote, '*quot palmae, tot sententiae*'.

As to the form of the judgment, there is no regularly accepted order in which matters are dealt with. Some judges have a recognizable style of their own.

I have the impression that in several continental countries the thinking process of the judge would be more rigorously schematic as to the order in which questions are approached and providing an answer to each question in that order. Does the claimant have standing? Is he of age? Is he of sound mind? Does the Court have jurisdiction? In England these things tend not to be consciously checked by the court unless a party raises the point. The English concept of *locus standi* is notoriously wide. At the ECJ when one reads references from national courts one notices that in some countries the judge is accustomed to follow a particular order of questions, starting with admissibility, through which he works his way, whether or not there is any real dispute about those matters or not.

Although we are at the beginning of a process of gradual change, the UK judge has traditionally been chosen in his late 40s or 50s from successful advocates. He has a wide experience. He is used to having clients and explaining why a judge has given judgment against them. He has substantial self-confidence arising from the fact that he was picked out to be a judge after being a successful practitioner. He

starts his judicial career by sitting alone but yet dealing with very important matters. By continental standards he is very well paid. Judges are generally held in high esteem and trusted in the UK. They are seen as the defenders of the individual against the mighty. The judge operates as a single judge and tends to explain his judgments as though he were trying to explain to the loser why a fair judge has decided against him.

He states what he sees as the problem, the possible solutions, what he sees as the advantages and disadvantages of one course, what he sees as the advantages and disadvantages of the other course, and why he prefers the course he has chosen and why, if this be the case, he disagrees with other judges who have expressed different views.

In England, quite an important part of the process of reaching judgment takes place in the interaction between the judge and counsel in court. If the judge feels that the application of a general rule of law would lead to a result which is unjust in his eyes he may well try and persuade counsel not to rely on a particular line of argument. This can be particularly the case in cases involving the Government. The judicial pressure can take various forms from the raised eyebrow, the loaded question "I confess I have a lot of sympathy for the position of the defendant although this might require some re-examination of the law. Is it really the desire of the Minister to extract every last penny from this widow in the present case? Would you take instructions?"

The style of individual judgments dominates even the appellate courts where individual judgments are as a rule delivered by each judge. Those judgments may agree in the result but for differing reasons. They may dissent in the result. The end result for the lawyer in the street can be confusing. For the citizen the confusion of the lawyer is expensive.

The ECtHR broadly speaking follows this tradition.

b) The French judgment

But, as *Churchill* pointed out, the Almighty in his infinite wisdom did not see fit to make the Frenchman in the image of the Englishman. The French civil judgment is at the other extreme. As you know, it consists traditionally of a single sentence structured as a syllogism where the result follows logically from the statement of the facts and the statement of the law leaving no room for doubt as to the contents of the two statements or as to the result.

One possible explanation of this difference in English and French styles of giving judgment arises from the greater self-confidence of the English judge. I have the impression that for much of French history the judges have been seen with some distrust as liable to impose their notions on the democratic will as expressed by the legislator and as lacking a proper justification for any inventiveness on their

part. This has led to a certain defensiveness and is perhaps responsible in part for their singularly unrevealing style of the French civil judgment.

Judges in all countries are from time to time faced with problems for whose solution the existing law does not provide clear guidelines but for which they have nevertheless to produce a solution. They can not just push the case away. The French style of judgment conceals from all except the jurist that the court had to make new law in order to find a solution. This may make it easier to swallow by the citizen.

This task is made easier by the French love of abstracts nouns. They refer happily to "The principle of legal certainty", "the principle of equality", "the principle of fiscal autonomy", "the principle of solidarity" and so on. The UK judge tended traditionally not to use such language. Certainly in the past, the English judge has tended to translate "The principle of primacy of Community Law" for the UK audience as "Community law trumps national law" – a homely analogy from the bridge table designed to make it all seem more comprehensible. Now, as the Luxembourg and Strasbourg decisions are becoming more widely known and as Acts of Parliament start using the concepts of citizens having rights I think we are moving to a greater acceptance of rights and principles in the judicial language.

I have the impression that in Germany, too, the judgment tends to take the form of a revelation of an objective truth available to any skilled mind which cares to look for it. "*Man weiß ja, das es geradezu als Ausweis richterlicher Qualität gilt, daß man schlußendlich nicht unsicher ist, jedenfalls nicht unsicher erscheint.*"[1]

This is not so strongly felt in England.

The ECJ started by following the French tradition but has moved a certain way in the English direction. The judgments vary as to the degree they expose the reasoning of the court. In so far as they don't this can be the result of the style of the person who made the first draft, it can be the result of being a committee judgment and it can be the result of caution on the part of the Court where it is feeling its way.

The remaining European countries seem to fall somewhere in between the English and French positions. For reasons of history some, led by the Germans, seem to have a particular horror of moving away from the *gesetzlicher Richter* and a particular attachment to a precise observation of the formalities.

c) Certainty versus judicial discretion

I have the impression that the UK judgments rely much on the judge's sense of justice in an individual case whereas in many continental countries a higher value

1 *Jung*, Richterbilder – ein interkultureller Vergleich, Nomos, Baden-Baden 2006, 92.

is placed on having a clear, foreseeable inflexible rule. One sees this in the reactions in England to the decisions of the ECJ in Brussels convention cases such as *Owusu*[2].

d) Differing legal approaches

I have noticed in several different contexts how different ways of thinking result in different formulations of the problem to be resolved. Take for instance a case currently before the ECJ.[3] There is a factory in the Czech Republic near the Austrian border. A landowner in Austria complains of the alleged adverse effects of emissions. The question is which court – Czech or Austrian – has jurisdiction to decide this point. AG *Maduro's* opinion has been published. The Austrians argue that one of the rights inherent in owning the plot in Austria is the right not to be interfered with by emissions coming from elsewhere. They categorize the dispute as one concerning 'rights *in rem* in immoveable property'. The English would be more inclined to categorize it as a tort or delict question.

English tradition generally tends not to start with talking about rights but rather with the assumption that you are in principle free to do whatever you want unless someone else is entitled to stop you. However we are moving over to a rights based culture.

It is easy for an Englishman to underestimate the importance of logic to the French. When I was with the Conseil d'Etat and had the privilege of listening to the debate on the framing of judgments I noticed that if someone demonstrated a lack of logic in the draft then the draft was altered. When I was talking years ago to a Frenchman about a possible future European Constitution he remarked that it was obvious that the constitution would have to enunciate various rights and principles, moving from the general to the particular. I suggested that any document phrased in such a way would tend to be unacceptable to an Englishmen. He would feel that human beings don't behave in a logical way and therefore it is asking for trouble to try and ensure that their behaviour fits into a logical framework.

e) To whom is the judgment addressed?

The language in which a judgment is framed tends at the national level to depend on the type of action: family, criminal, contract, tort, administrative, constitutional – and on the level of the jurisdiction which is deciding it.

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2 ECJ, C-281/02, *Owusu*, Rec 2005, p. I-1383.

3 ECJ, C-343/04, *Cez*, pending. The case turned on Article 16(1) (a) of the Brussels Convention which provides that the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction, regardless of domicile, "in proceedings which have as their object rights in rem in immovable property [...]".

At first instance – the judge is addressing his remarks primarily to the litigants but with an eye on any higher court and the public.

In an appeal court one is more aware of the effect any ruling might have on other cases having nothing to do with the litigants before you. So the judgment is addressed more to other judges.

In the ECJ and the ECtHR the court will have in mind how a judgment will be received in the Member States and by judges in the national courts. In principle the answer which the ECJ gives to a preliminary reference should be of use to the court which posed the question but also to the judges from the other 24 states next time they come across a similar problem.

2. Do the judgments reveal all the thinking of the judges?

Your instinctive reaction might be: of course. You would, I think, be wrong.

a) The single judge

Even when a single judge uses the relatively transparent style of giving judgment used in the UK, in my experience it is not unknown for other unexpressed factors to have played a part in persuading a judge to reach the result expressed in the judgment. He may, for instance, think that the reasons expressed in the judgment are adequate and that, although he has other reasons, these might give rise to controversy and it is unnecessary to ask for trouble. My personal preference in such cases was to indicate that other reasons might perhaps be relied on but that it was unnecessary in the context of the present case to decide those points. If I found the other reasons personally persuasive I might set them out in what I hoped was a seductive way. This would discourage appeals and, if there was an appeal, it would make the task of any Appeal Court easier. By contrast I have known judges who, wanting to see a development of the law in a particular direction, preferred to base their decision on the controversial points and to mention the other uncontroversial points simply as supporting material. I incline to the view that this is against the interest of the litigants even if more interesting for the lawyers and that a good judge should avoid such an approach.

Incidentally, when I once indiscreetly asked a lawyer whether a particular judge was in his opinion a good judge, he gave me a reply which I treasure: "There are no bad judges. There are good judges and better judges. Yes he is a good judge."

Judgments are sometimes framed widely, sometimes narrowly. Why?

The more broadly a judgment is framed, going beyond what the case requires, the more it is liable to an accusation of gratuitous judicial activism. But the narrower it is, the less principled it sounds. But judicial reticence also can have political results and should not be regarded as neutral. So the reasons vary from case to case. But, in courts which have a practice of only delivering a single judgment composed by a committee the fact that a committee composed the judgment may well play a part.

b) The Committee judgment

The ECJ and the higher continental jurisdictions operate as a Committee judge. I'd rather put it the other way round: Judges sitting in the ECJ and the higher continental judges must produce a single committee judgment – a task which in general does not face the UK judge even at the appellate level. This has a huge influence. In books on sociology, management of companies and so on there is a vast amount of literature as to how committees reach decisions. A number of things are obvious to everyone.

- Not everybody's point of view can prevail. You must have a genuine willingness to accept that the other person's idea is better than yours.
- Even when you are sure that yours is the best idea, you must chose which issues are important to you and be prepared to let others win the argument on the other issues so as to have their goodwill on future occasions.
- There is a pressure to reach a decision. To insist on your point of view will delay the proceedings. Therefore you can not do it all the time.
- You will need to reach other decisions in the future with the same committee and so you must try not to irritate anyone and certainly not to create a desire in others next time to pull your judgment apart in revenge.
- Compromise is the name of the game.

Of course judges are grown up and in general have enough self-discipline not to be childish. But still you want to live and work amongst people with whom you are at ease and who are at ease with you.

The result of all this shows in the judgments. Someone is content with the result but is unhappy with a paragraph of the reasoning. The draftsman of the judgment does not want to make an issue of it in case either the agreement to the result disappears or the whole judgment for which the parties have already waited a long time has to be rewritten. So he lets the paragraph disappear. This especially if it has happened a few times in the course of a long judgment can leave the reasoning not as coherent as one would have wished. A camel is a horse designed by a

committee. One advantage of the French style of judgments is that because the court only announces its conclusions the fact that different judges came to the same conclusion for different reasons can more easily be concealed from the reader.

So the best committee judgments tend by their very nature to be less crisp and coherent than the best individual judgments. They certainly do not necessarily reveal what persuaded each judge in the majority to vote in favour of the final decision. There are times when if you are content with the end result you do not feel it worth spending time arguing about the reasons.

3. Do we produce different end results?

Clearly there are differences in the style of judgments in different countries. Clearly there are cases where the solution to the same factual problem results in different answers in different countries - in one state the claimant wins and in the other the defendant wins.

But I have the impression that these cases are a very small proportion of the cases decided. Many turn on facts. At conferences with judges from other countries over the years I have often sought a reaction to a particular case which I was trying in England. The end result tended to be the same. The route was frequently different.

4. Should we come together?

In many fields regulated by national law it seems to me that there is no particular reason to come together. Styles of talking and thinking are part of national culture and if one alters them, at any rate if one does this over a short period of time, one risks that the judgment gets out of touch with the citizen.

However, I am strongly in favour in principle of judges having some knowledge of how problems are seen outside their own particular legal culture. This may be highly educative and lead to useful developments. By way of contrast, the American Supreme Court judge *Antonin Scalia* takes the view that, at any event in cases involving constitutional entitlements, what happens outside his own country should as a matter of principle be of no influence on judges. Thus in *Lawrence v Texas*[4] referring to submissions that other legal systems had decriminalised sodomy between consenting adults in private he said in a dissenting opinion

4 539 U.S.558, 598 (2002) cited in Tulane Law Review [Vol. 80:11 2005].

> "Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. [...] The Court's discussion of these foreign views [...] is therefore meaningless dicta. Dangerous dicta, however, since 'this Court [...] should not impose foreign moods, fads or fashions on Americans'."

I would not advocate such an approach in Europe. It seems to me beyond argument that the judicial mind should in an ideal world be furnished also by material coming from those operating in other jurisdictions. The judge will sometimes find inspiration in the ideas of others. For instance, the principles of proportionality and legitimate expectation coming from Germany have undoubtedly inspired not only the ECtHR and the ECJ but also English judges. They are useful intellectual tools for solving particular types of dispute or tension which are common to us all. This has to a degree led to a coming together but that is because the ideas are useful rather than because there is any merit as such in coming together.

The ECtHR and ECJ certainly look at the position of Member States. In practice the ECtHR and the Advocates-General of the ECJ go further and look even outside the Union for inspiration.

The case for some *rapprochement* as opposed to a mere seeking of inspiration becomes stronger when one is dealing with cases which involve the Convention. If a national court wishes to understand the jurisprudence of the ECtHR it must learn the language used by that court. Certainly if a national judge has to resolve an uncertainty in the Convention or a Community instrument which has not been clarified by the two international courts then it is useful if he adopts in his judgment a reasoning process which is easily accessible to judges from other Member Countries.

The case for some *rapprochement* becomes even stronger when we are dealing with fields covered by Community law. Many expressions have an autonomous Community meaning and national courts must understand this. The process of making references to the European Court is more likely to be fruitful if the question is expressed in the concepts used by that court. Those are the concepts in which the eventual answer will be framed.

So to sum up. I think we are coming together as Community Law and Convention law is cited more and more in our courts. There is however a danger that in making our judgments understandable to each other we lose the ability to communicate with our own citizens. This is dangerous. So I am content to let things take their natural course slowly. I am content not to lay down rules which everyone has to follow all the time. But then I recognize that this gradualism is a very English characteristic.