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MAINTAINING THE COMMUNITY LEGAL ORDER IN A CHANGING WORLD

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I. Introduction

Mr President, when I was a student in Cambridge some 40 years ago, I learned that any serious lecture should begin with a joke. As no joke came to my mind, I have chosen tonight to begin with a riddle.
What are the differences between Cambridge and the recent annual seminar in Davos? From my point of view, there are three:

I was not invited to Davos (my President was), and I am much happier to have been invited to Cambridge.

As far as the sea level is concerned, Davos is higher than Cambridge; however without unduly flattering this audience, I am convinced that the intellectual level would be the same.

The high priests of Davos mostly preach against regulation (though this changes). I shall speak in favour of a useful level of European regulation.

Having said that, I shall borrow from Davos some topics which have an international dimension.

This will not come as a surprise to a university which is famous for its role in the development of international law. Cambridge men and women have made a particularly important contribution to the sane development of the international legal order—Jennings, Fitzmaurice, Parry and Dame Rosalind Higgins, to name but a few.

However, as you have noticed from the title, this lecture will concentrate on EC law. How could it possibly be otherwise in the context of the Mackenzie Stuart lecture for the Centre for European Legal Studies in

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Cambridge. I shall now set out the two key elements of this paper: the Community legal order, and the way the world is changing seen from a lawyer's perspective.

II. The Legal and Political Significance of the Community Legal Order

For those of you who are unfamiliar with the term "the Community legal order" or "*l'ordre juridique communautaire*", it signifies in English the Community legal system: a legal system that has been created by common agreement and which is part of national systems, but distinct.

The legal meaning of the term is based on a number of seminal constitutional judgments by the European Court of Justice: the two early judgments in *Van Gend en Loos*[1] and *Costa* v. *ENEL*[2] concerning primacy and direct effect, the judgment in *Simmenthal II*[3] concerning the relationship between the national judge, national law and Community law, and the decisions in *Les Verts*[4] and *Opinion 1/91*[5], in which the Treaties were qualified as a "constitutional charter".

It is interesting to note that the impact of such "constitutional" judgments is often not felt in other Member States until they are applied by national courts in those Member States. Thus the impact of the judgment in *Simmenthal* was not felt in the United Kingdom until the series of *Factortame* judgments, which showed that the Community legal order can restrain the adoption of legislation by Parliament,[6] require the Crown to be subject to the power of injunction of Her Majesty's courts,[7] and give rise to liability of the State for damage caused by such legislation.[8] The ruling on the damages question is presently before the English courts.

Perhaps the high-water mark of the application of the Community legal order by the English courts was the judgment by the House of Lords of 3 March 1994 in *ex parte EOC*.[9] In this judgment, the supreme court of the United Kingdom declared that national law was inconsistent with Community law on sex discrimination. It is noteworthy that in reaching this conclusion the House of Lords did *not* feel the need to consult the Court of Justice beforehand.

[1] Case 26/62 [1963] ECR 3.
[2] Case 6/64 [1964] ECR 1141.
[3] Case 106/77 [1978] ECR 629.
[4] Case 294/83 [1986] ECR 1339.
[5] [1991] ECR I–6079.
[6] Case C–221/89 *ex parte Factortame* [1991] ECR I–3905.
[7] Case C–213/89 *ex parte Factortame* [1990] ECR I–2433.
[8] Joined cases C–46/93 and C–48/93 *Brasserie du Pêcheur Factortame III* [1996] ECR I–1029.
[9] [1995] 1 AC 1.

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The political content and significance of the Community legal order are underpinned by the common constitutional traditions of the Member States (see *Internationale Handelgesellschaft*[10]) and the *acquis communautaire*. For present purposes the *acquis* has two functions: first, it marks a point of no return, which cannot be renegotiated with acceding countries, and second it is the source of a number of essential principles which may be taken over into the international arena and serve as the European contribution to the developing economic order. Seen in a broader sense, common legal traditions and the *acquis* constitute the backbone of our "European model of society".

III. Facing a Changing World

The world is changing every day, but I would highlight two main events which have a direct impact on the Community legal order. First, there is the collapse of the Soviet Union. This has resulted in the existence of a single superpower: the USA; it has opened up the prospect of a reunited Europe and the challenge of a major enlargement of the Community; and it has caused new threats to emerge. One of these is the search for cultural identity and the "clash of civilisations" put forward by Samuel Huntington in opposition to the "End of History" theory of Francis Fukuyama.

Second, there is the phenomenon of globalisation, the unavoidable global dimension of economic relationships. This was recognised recently at Davos where several speakers acknowledged that more economic international organisation is inevitable.

The phenomenon of globalisation has two main expressions: economic and financial globalisation (with results such as industrial relocations, massive capital flows and the Asian crisis) and the "global information society" (with enormous legal, cultural and economic implications for areas such as satellite TV, the TV Without Frontiers Directive[11]). In particular, the Internet and electronic commerce raise major legal questions, mentioned below.

IV. The Relationship Between the EC Legal System and the Changing World

The question arises whether there is, from a legal perspective, any relationship between the EC legal system and the changes presently taking place. In fact this relationship not only exists, but the future role of Europe

[10] Case 11/70 [1970] ECR 1125.
[11] OJ 1989 L298/23.

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depends on it. Hence this paper refers to *maintaining* the Community legal order in its title. The following analysis will focus on three main levels of political organisation (i) the Nation-State, and the regional level in certain Member States (including subsidiarity); (ii) the EC and common values; and (iii) the defence of common values before world-wide organisations such as the World Trade Organisation (WTO).

A. The Subsidiarity Principle and its Implementation

Subsidiarity is essentially about achieving the right balance between the emerging EC identity and national and regional traditions. To begin with the history, battle was started in earnest at the Birmingham European Council in 1990. The atmosphere was oppressively "Eurosceptic" and new "Euromyths" were flourishing daily. Brussels was accused of imposing fishermen's hairnets, banning curved cucumbers and curved bananas, and outlawing mushy peas, to name but a few of the complaints.[12] Today's battle, if we are not careful, could be over "Eurochocolate". In this respect, let me reassure you that the Commission supports the right of Cadbury's Dairy Milk to proudly call itself "chocolate", provided the consumer is properly informed of the content of the package, of course.

At Birmingham, the United Kingdom government argued that a preliminary vote by the Council on subsidiarity should be a precondition to discussion of the substance of any Commission proposal. After a long discussion at the highest level a balanced result was reached, and one which concluded that subsidiarity forms part of the overall judgment by the Council on a Commission proposal.

This result was embodied in Article 5 (Article 3b) of the Maastricht Treaty, discussed below. As for Amsterdam, requests made at the ICG to modify Article 5 were dismissed and the "Subsidiarity Protocol" agreed in Amsterdam simply reproduces the Birmingham result.

We may therefore conclude that subsidiarity has become "*yesterday's problem.*" However, subsidiarity remains a Treaty principle. In this sense it is both a legal rule and a state of mind.

First, there is no doubt that subsidiarity is a legal rule which must be respected and which can be enforced. The concept was enshrined by Maastricht in Article 5 of the Treaty. The first indent of Article 5 recalls the principle of attribution of defined powers (the EC, unlike Member States, has no generalised jurisdiction). The second indent sets out the subsidiarity principle itself, formulated in strong terms, which are of German origin ("only if and in so far as"). The third indent essentially relates to the proportionality principle.

The Court of Justice could obviously rule in an action for anulment

[12] See "EuroMyths & Misunderstandings" at http://www.cec.org.uk/myths/newmyths/index.htm.

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under Article 230 that Article 5 has not been respected in a particular case. There is virtually no case law up to now. Just one case refers to the second indent of Article 5 (*Germany* v. *Parliament and Council*[13]), where the Court simply checked that there was adequate "subsidiarity" reasoning in the preamble. One could imagine the Court adopting a "minimum control" approach whereby it would choose not to interfere with the political appreciation of "necessity". However certain questions would remain, such as the definition of what constitutes "exclusive competence".

Second, beyond its legal role, subsidiarity is a state of mind. The Commission has undergone a "cultural revolution" in this respect leading to a dramatic decrease in the number of legislative proposals. According to the Commission Annual Report of 10 May 1995 a high level of 185 proposals in 1990 had fallen to 51 proposals in 1994, and 52 in 1995, a decrease of some 75 per cent. At the same time, green books, white books and consultation papers are flourishing, giving full opportunity to national administrations, industry, consumers and others concerned to comment on whether envisaged legislation is necessary, or even desirable.

The Court of Justice itself, having grasped "l'*air du temps*," has also changed its approach and has clearly departed from its previous case law in its *Keck and Mithouard* judgment[14]. Before *Keck*, it delivered, in specific circumstances, judgments striking the balance between economic freedoms and social policy[15]; with *Keck* it takes a more general line.

B. The Development of Legal Principles Enshrining Common Values

The second level of discussion is the development by the European Community of a set of legal principles enshrining "common values" which may serve as a means of defending our common interests and our model of society. The first question that arises is whether any "European common values" in fact exist. On the one hand, it is argued that only a "transatlantic civilisation" now exists and that the "European model of society" is a myth. On the other hand, if we look at reality we see that European citizens are very much committed to protecting public health, to protecting the environment (Kyoto), to the safeguard of social security systems, to combating unemployment, to combating discrimination, on grounds of nationality and sex, and the new grounds enshrined by Amsterdam in Article 13, to the public service, and to respecting national traditions. In this respect Member States have a certain leeway in the manner they

[13] Case C–233/94 [1997] ECR I–2405.

[14] Joined cases C–267/91 and C–268/91 [1993] ECR I–6097.

[15] Case 145/88 *Torfaen Borough Council* v. *B & Q* [1989] ECR 3851; Case C–159/90 *Grogan* [1991] ECR 4685.

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choose to defend their own values, be they moral[16] or socio-economic values, such as the choice of the means for providing a service (for instance acting through a public service[17]), or a statutory monopoly.

It is possible to translate these values into legal principles by tackling them from a "fundamental rights" perspective. Human rights are not the sole property of the EC, or even of members of the Council of Europe. They are however the key to enlargement to the East (the Copenhagen principles), hence the new Article 7 of the TEU inserted by the Amsterdam Treaty specifically links EC membership to respect for human rights. In this respect the Treaty also contains Article 46(d) (Article L(d)) referring to the second indent of Article 6 (Article F), thus paving the way for jurisdiction of the Court over human rights in the third pillar.

In addition to these specifically "human rights" developments, common values have been developed in other areas. For example, the "non discrimination" principle has been extended in the new Article 13 of the EC Treaty, the principle of "sustainable development" has been inserted by the Amsterdam Treaty in Articles 2 and 6, and the "precautionary principle" was inserted in Article 174(2) (Article 130r(2)) by the Maastricht Treaty as concerns the environment. Common values may also be found in other Treaty chapters such as the new Employment Title and Article 16 and Declaration 13.

C. *The Defence of Common Values*

The developments discussed above show the need to defend common interests and the European model of society. We cannot escape the global society; it is more and more intimately linked with what used to be thought to be purely internal matters. For example, the introduction of EMU, which is eminently "internal", must be organised within a global as well as the Community perspective.

The danger of economic "globalisation" is that it may be used as a tool by dynamic economic forces to conquer market shares irrespective of legitimate divergences of views between nations or nation-groupings such as the EC concerning the protection of their "values". This may be seen in two areas.

First, the development of the Internet and electronic commerce gives rise to a gamut of new legal problems to be tackled, in areas such data protection, consumer protection, intellectual property, labour law and taxation. New areas of actual or potential protectionism have arisen, such as access to encryption software or registration of Internet addresses ("DNS", the

[16] Case C–159/90 *Grogan* [1991] ECR 4685; Case 34/79, *Henn and Darby* [1979] ECR 3795; Joined cases C–34/95, C–35/95 and C–36/95 *Konsumentombudsmannen* [1997] ECR I–3843.

[17] Case C–39/94 *La Poste* [1996] ECR I–3547.

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Domain Name System), and new challenges to the "physical" realm will arise from "cyber" commerce such as electronic money and electronic transfers.

Europe must address these issues before they are decided on terms which have been chosen by others. Let us not be shy or old-fashioned, but let us take care of our own interests and values in this new field.

Second, there is the World Trade Organisation and the threat of a "single reading" of the WTO rules. The Uruguay Round was a great achievement. In substance it brought about a major liberalisation in trade of goods and services. In terms of enforcement mechanisms it set up an Appelate Body composed of seven highly qualified lawyers reviewing the results of panels. In principle the new dispute-settlement procedure is more efficient, as it is no longer possible to employ a political veto.

However a tendency has developed for panels to disregard public policy exceptions and to give priority to free trade. Indeed, the WTO, although world-wide, is essentially concerned with free trade, and international regulation is developing more within other organisations.

Nevertheless we shall have to decide whether to enlarge the scope of the WTO to embrace competition, or to set up a similar dispute-settlement procedure for competition within, for example, a World Competition Organisation. The balance between free trade and public policy is also raised by the environment, in particular after Kyoto. The political question of "greening" the WTO is now on the table. The same type of question arises with regard to public health.

It is interesting to refer to the hormones affair in this respect.[18] The EC imposed an internal ban on the use of growth hormones for beef. In consequence a ban was also imposed on the import of hormone beef, which was challenged before the WTO. The WTO panel interpreted the SPS agreement in such a way as to give binding legal force to the "CODEX Alimentarius" recommendations: hence the EC was considered as having broken the WTO rules.

A minority of the scientific evidence was in favour of the EC ban, on the basis that added hormones created an additional risk of cancer. However the panel relied on the majority evidence and condemned the EC. On appeal the Commission succeeded in convincing the Appellate Body to reverse these conclusions. The Appellate Body recognised the sovereign right of each contracting Party to the WTO to choose, for health policy considerations, its "level of protection". This is a great victory both for EC consumers, and for the right of the EC to protect their interests and their health as it deems necessary.

In passing, the procedures before the WTO involve an amusing irony. When discussing supremacy, subsidiarity and all the internal issues dealing

[18] http://www.wto.org

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with the relationship between the various levels of government in the European Union, the Commission represents the Community view and has to battle with national authorities who are convinced, obviously quite erroneously, that the EU wishes to deprive them of their sovereignty. In contrast, when appearing before the WTO, the Commission takes the opposite line, that any loss of sovereignty is to be opposed. When the WTO imposes an "international" view, it shows the Commission what a *Simmenthal* or *Factortame* judgment feels like to a national government!

The difference between the two systems, however, is that Member States have, and have had, a say in the norms that are applied, which are the shared legal norms of our European model of society. So the result, whatever it is, is guaranteed to be compatible with their legal systems and traditions.

And this is the basic point in this paper: Europeans are faced, whether we like it or not, with a growing internationalisation and legalisation of the world economy. Rules are being developed which affect us. And if we do not take action to influence the development of those rules, we may not like the results at all.

V. Conclusion

On the one hand, there is probably still a long way to go before a European "Bill of Rights" can be adopted. We have to respect subsidiarity. On the other hand, in a global world there are probably more values in common between our Member States than divergences.

Whilst not sharing the pessimistic views of Samuel Huntington that the twenty-first century will be the century of the "war of civilisations", we must recognise that we are entering a form of economic conflict in which legal tools are used to penetrate markets and threaten our common European values and various cultural identities.

In this respect the Community legal order provides us with the means to defend our values. Fortunately the risk of wrecking it by a misconceived vision of subsidiarity has waned. The United Kingdom is once again "in the centre of Europe". Let us develop together *l'ordre juridique communautaire*—the Community legal system—for the benefit of our companies and of our citizens.

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