EUROPEAN COMMUNITY LAW AND THE BRITISH LEGAL SYSTEM†

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The problem I am venturing to place before you today would at first sight seem to be remote in every possible sense of that word. It is remote in the geographical sense — because it arises some 11,000 or 12,000 miles away from here, but it is also intrinsically remote from your environment — it concerns the place English law is going to occupy in a European setting in the future.

And yet — looking at it a little more closely — is not the future of the legal systems applied in the British Islands, and especially of the English common law, a matter of most intimate concern to all those countries which derive their system and their institutions from what English settlers or conquerors brought with them when they first founded new political entities beyond the oceans? Is it not also true that even the constitutional arrangements of Britain, the relation between constitutional principles, legislation and the activities of the courts in the motherland of the common law, remain a matter of more than academic interest or incidental concern to Australians and New Zealanders? And is it not therefore apposite to devote a lecture, even so far away from England and from Europe, to the problem of the impact which the entry of the United Kingdom into the European Communities is going to have on the British Constitution and on the future of English law?

Let me say at the outset that the effect which our entry into the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community is going to have on English law has sometimes been tremendously exaggerated. By far the major part of the legal systems in force in the United Kingdom — the laws of England, Scotland and Northern Ireland, — will be unaffected by our entry into the European Communities. Thus most English lawyers — judges, civil servants, barristers, solicitors, — will continue their work without noticing any change at all. Community law will have nothing to say about most of those branches of the law which make up the bulk of a lawyer's work, — and I am not only thinking of such obvious things as family law and — except for some commercial aspects — criminal law and procedure, but also of the ordinary run of the law of

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property, of contract and of tort. These are the areas that produce the precedents which are of continuing importance to the common law world outside the British Isles. The kind of English case on which courts and practitioners, teachers and students rely in Australia will for a long time be hardly affected by the re-organisation of the relation between Britain and the Continent of Europe. To give an obvious example: the legal consequences of road accidents, and of work accidents will be the same whether we are in the Communities or outside. I am not excluding the possibility of an increased give and take between British lawyers and lawyers of the Continental community countries, nor the hope that this will lead to measures of reform, on both sides — may I emphasise this — on both sides of the English Channel. But this is only a by-product and not a necessary consequence of our entry. It is a most desirable by-product.

Nevertheless, the impact of Community law is going to be very considerable indeed. It will comprise not only the law governing customs and indirect taxes, but also the legal principles governing the movement of capital (such as exchange control), that part of labour law which deals with the organisation of the labour market, the law of social security, the entire body of law applicable to monopoly and competition, the right of professional and business establishment, the principles applicable to governmental subsidies of all kinds, and, in due course, aspects of the law of transport and of company law, to say nothing of the organisation of the market in agricultural products. This is an arbitrary and merely illustrative list, not by any means exhaustive. If the United Kingdom adopts a Convention signed by the Six, as I suppose it will, the procedure of the courts will in some very important respects also be affected, for example the principles on which the civil courts exercise jurisdiction in cases involving foreign elements may be modified, and foreign judgements, — those emanating from the courts of the other member countries, — will have to be recognised and enforced on a new basis. More importantly, however, in all matters touching the interpretation of the Treaties and of the law made by community organs under the Treaties, our courts will co-operate with the Court of the European Communities at Luxembourg in a manner which I hope to explain in a minute. There will also be situations in which the courts will have to enforce orders made by Community organs, for example in connection with the enforcement of the Community principles directed against restrictions of competition.

I cannot of course deal here with the multifarious ramifications of this development, and I do not intend to do so. What I propose to do is to say something about the constitutional aspect of the matter, that is about the channels through which community law will enter the British legal systems, and about the effect of this on the British Constitution itself.

Now this word 'Community Law' is ambiguous. It has a narrow and very technical meaning; it denotes the Community Treaties themselves

and the law made by the organs of the Communities under the Treaties; that is under the Treaty establishing the European Economic Community — known as the Treaty of Rome — the European Coal and Steel Community, and the European Atomic Energy Community, called Euratom. The Treaties and the law — the regulations, directives, decisions, etc. made under them, have been dealt with in the European Communities Act which has recently been passed by Parliament. In addition to the Treaty of Accession by which the United Kingdom joined the European Economic Community, the E.E.C., and the parallel international documents for the other two communities, we thus have a statute which links this community law in the narrow sense with the body of law existing in the United Kingdom.

In a wider sense, however, Community law includes all those legal institutions and principles which the Members of the Communities adopt as a result of being community members — voluntarily and not under Treaty obligations, either by Conventions outside the Treaties or simply by parallel enactment, very possibly with the help of the good offices of the Commission in Brussels and its civil servants, that is the chief executive organ of the Communities. This is to some extent facilitated by the Treaties. It may result from the simple fact of economic symbiosis. I propose at the end of my lecture to say something about such Community law in the wider sense which I consider as likely to be most important.

But first let me talk about the effect of the Treaties themselves and of the law made and to be made under them.

What, then, is it that gives to these Treaties a status within the legal systems of the member States that differs from that of any one of the numerous international treaties each member, including the United Kingdom, has concluded in the past? Perhaps you will allow me to answer this question not in my own words, but in those of the Court of Justice of the European Communities about whose functions I shall say a word or two presently. This is what the Court said in the leading case of *Costa* v. *ENEL* in 1964.[1] (I am using the translation in the Common Market Law Reports[2]):

> As opposed to other international treaties, the Treaty instituting the EEC has created its own order which was integrated with the national order of the member States the moment the Treaty came into force: as such it is binding upon them.

And further:

> By creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and, more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member-States,

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1 *Costa* v. *Ente Nazionale per l'Energia Elettrica (ENEL)* 3.8. 1964, 10 Rec. 143, at p. 158 ff.
2 1964, p. 455.

- albeit within limited spheres, having restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves.

A new legal order integrated into the legal systems of the member States, and a legal order — this is the gist of the matter — applicable not only to the member States, but to their nationals.

The Treaties, to put it differently, have not only created obligations and rights between States, but bodies of substantive law within those States. This, I think, is what we usually call 'supranational' as distinct from 'international' effects of an international treaty.

It is clear that the three Treaties, — and the same as I shall point out is true of law made under the Treaties, — contain provisions which are intended to bind the member States only, to put them under an obligation to do or not do something, provisions which create what I may call international rights and duties of the orthodox kind. On the other hand there are those provisions in the Treaties which are 'directly applicable', 'self-executing', law in the member States, and which create rights and obligations between the citizens and between each citizen and the Government and are applicable by the courts and administrative authorities of each member State. An example of the first type would be the provisions in the Treaty of Rome on State aids and subsidies[3]. Some subsidies are, others are not compatible with the Treaty. Whether any given measure taken by a State is so compatible is to be decided in accordance with a procedure regulated in the Treaty, and the Commission — the Communities' executive organ — has to set it in motion. The Court has held that this constitutes an obligation imposed upon the Governments to act in accordance with the decision taken about the lawfulness or otherwise of the subsidy, but the individual cannot derive any rights from this.[4] On the other hand, the Treaty of Rome provides that certain monopolistic agreements, — price fixing agreements, market sharing agreements etc., — are void. This means that the courts of each country will have to treat them as void.[5] This is law in the member States.

This distinction between what is merely an international law obligation and what is law in the member States can be very difficult in practice, and, as you will see, to find the line separating the purely international from the supranational substantive law is one of the principal functions of the Luxembourg Court. The case law of the Court is not always easy to understand, but one can extract from it at least one cardinal principle: what matters is not the wording of a provision, but the substance, and especially whether it is a provision which can be implemented without further governmental action.

I cannot overemphasise the importance of this distinction between what is self-executing, directly applicable, or directly effective, and what

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3 Art. 22, 95.
4 *See Costa* v. *ENEL, supra.*
5 Art. 85.

is not. Because it is only the former and not the latter type of provision which gives rise to the grave constitutional problems that concern me here, and because only a self-executing provision directly penetrates the legal systems of the member States.

The European Communities Act which has now been passed by Parliament seems to me to reflect this distinction precisely. It does so in Section 2, and the contrast between the effect of self-executing and non-self-executing Community law is mirrored by the contrast between Section 1 subsection 1 and subsection 2.

Subsection 1 lays down that all

> rights, powers, liabilities, obligations, and restrictions *from time to time* created or arising by or under the Treaties, and all remedies and procedures *from time to time* provided for by or under the Treaties, *as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom* (that is: self-executing as understood by the Luxembourg Court) shall be recognised and available in law, and be enforced, allowed and followed accordingly.

Here you have the incorporation into the legal systems of the United Kingdom of the entire body of existing and future community law. This subsection is the channel through which it enters and will continue to enter.

Subsection 2, however, provides for subordinate legislation for the purpose of implementing the Community obligations of the United Kingdom. This concerns the international law side of the matter, that is the implementing of the obligation of the United Kingdom to change its law, as distinct from the change of the laws of the United Kingdom by Community law directly. And it is important that according to subsection 4, but subject to some very important restrictions concerning taxation, retroactivity, sub-delegation of legislative power, and the creation of new criminal offences, this subordinate legislation may do anything that can be done by Act of Parliament. That is, it can change existing statute law, and of course the common law as well.

Now there is nothing particularly staggering in finding that an international treaty seeks to create a body of rights and obligations of private persons. If you take the international conventions seeking to regulate the liability of carriers by air to their passengers or the I.L.O. Conventions on freedom of association or a convention on the law applicable to the form of wills, you see that in each case the purpose is to create rights and obligations ultimately enforceable between passenger and carrier, employer and employee, or the next-of-kin and a testamentary legatee. Of course in the United Kingdom it is not the international treaty that creates the right, but the law made by Parliament in pursuance of the treaty: the Crown can bind the country in international law, but only Parliament can make English or Scottish law. Where, then, is the difference, between what is going to happen under the European Communities Act in relation to the European Treaties and what has hap-

pened, say, under our Carriage by Air Act of 1961 or our Wills Act of 1963 in relation to air carriers' liability or to the law governing the form of wills?

The first distinction surely is in the comprehensiveness of the incorporation: what is translated into municipal law is not a single specified convention, but a gigantic corpus of Treaties and of regulations. On principle it is the old legal mechanism, but the use to which it has been put is new in character.

The second distinction is in the relation to the existing body of English law, of Scottish law etc. We are familiar with the old and useful maxim: *lex posterior derogat legi priori* — the later law abrogates the earlier law — but in Britain this has (unfortunately perhaps) never been interpreted as permitting the courts to allow one statute to be used for the interpretation of an earlier statute which was not *in pari materia.* But this is exactly what is happening now: by sub-section 4 any enactment passed before this Act will be construed and have effect subject to community law, and this is precisely as it should be.

Thirdly, however, — and it is a point to which I shall revert, — the incorporation is not only that of existing, but also of future community law: Section 2 (1) speaks of rights etc. 'from time to time' created under the Treaties. This is the famous 'blank cheque' the political significance of which has in my opinion been misunderstood. As I say, I shall come back to this.

But the real legal problem lies elsewhere: it lies not in the relation of the new Act and of existing or even future Community law to existing legislation in the United Kingdom, but in the relation to future legislation, in the power of Parliament to change them. And now we are coming to the crucial issue.

The crucial issue is whether after our entry into the Communities, Parliament will be able to *change* the European Communities Act and to *change* such parts of the laws applicable in the United Kingdom as originate in community law. This is the issue, — I have so far managed to avoid the word, but I cannot do so any longer, — of 'sovereignty'.

'Sovereignty' is a word one seeks to avoid if one can because it has so many meanings. Surely we are not here talking about 'external' sovereignty. Every international treaty, the most insignificant commercial treaty with an obscure State the name of which we hardly know, is a limitation on the sovereignty of the country. It restricts its freedom of action. This is not what we mean by this problem of sovereignty which has been discussed so much. What we mean is that peculiar British institution, that fundamental norm of all law in the United Kingdom, which is called the 'sovereignty of Parliament'. The principle that, as an institution, Parliament is nationally omnipotent. That there is no higher law than an Act of Parliament, and that Parliament can do anything it pleases by passing a statute, except bind itself or a future Parliament, for it is the institution which is sovereign, not the concrete Parliament at any given time. Will the sovereignty of Parliament end on the

1st January 1973? Will there be a higher law which Parliament cannot change? It is a question which has three characteristics: it is loaded emotionally, it is fascinating theoretically, it is very unimportant from a practical point of view. But I have to face it.

Let me put it in precise terms: politically it is not only inadvisable, but extremely unlikely for Parliament to pass a statute in derogation of norms in any of the Treaties or in law made under the Treaties. If it did, the United Kingdom would have acted in breach of its international obligations, — a very grave matter which would also lead to consequences within the Community itself, consequences to which I shall refer. More than that, one can see looming on the horizon that which Dicey called a constitutional convention, a convention not to legislate contrary to Community law, — just as there is a Convention to honour the Act of Union between England and Scotland of 1707 and the Statute of Westminster of 1931. The Act itself tries to prevent the enactment of a statute contrary to Community law through oversight: it says in Section 2 (4) that any enactment *to be passed* shall be construed and have effect subject to community law, and in any event the courts would no doubt use their old and wise rule that whilst Parliament *can* legislate in violation of the international obligations of the United Kingdom it must always be presumed not to have wanted to do so. All this makes me think that this issue of legal sovereignty is not going to be of much practical importance. You can express it this way: politically Parliament unquestionably restricts its freedom of action very considerably indeed through the entry into the Communities, — this is a platitude, — does it also deprive itself of the legal power to shake off any of these restrictions?

May I once more let the Luxembourg Court speak on this matter? In the same case from which I have quoted[6] the Court went on to say that what the Court calls the 'integration' in the legal system of each member State of the Community law, and especially of the terms and spirit of the Treaty, has the corollary that it is impossible for the States to give priority over a legal order accepted by them on a basis of reciprocity to a subsequent unilateral measure which cannot be pitched against it. And the Court goes on to say that any other view would put in jeopardy the purpose of the Treaty and lead to discrimination by creating variations as between one State and another. This was said in 1964, but similar formulations can be found in more recent cases, and in a case of 1969 we find the clear statement that any conflicts between a rule of Community law and rules of municipal law must be solved by applying the principle of the superiority of the Community rule.[7]

This seems to me to mean that, according to the Court, the Community law is, within the legal system of each member State a 'higher law'. But

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6 *Costa* v. *ENEL*, *supra* at p. 1159.

7 *Walt Wilhelm*-v-*Bundeskartellamt*, 13.2.1966, 15 Rec. 1, at p. 15. For further recent cases see Bebr: 'Law of the European Communities and Municipal Law', (1971) 34 *Mod. L.R.* 481.

more than that, it is a higher law not by virtue of the constitutional provisions of the member States but by virtue of the law of the Community itself. According to this, therefore, the mere act of joining the Communities, that is the Treaty of Accession and its coming into operation on the 1st January 1973 would have been sufficient to incorporate into the laws of the United Kingdom such parts of the Community law as have a direct effect. The European Communities Act., *i.e.* the implementing statute, would be a work of supererogation, passed *ex abundante cautela.*

Is this the end of the matter? Does it mean that the principle of the Sovereignty of Parliament established by the Glorious Revolution will expire during the night from December 31st 1972 to January 1st 1973? I do not think so, but in saying this I am now entering into very deep waters, and into a legal controversy which has kept some of the best legal brains very busy in some of the Continental countries over the last few years. The question is this: if Parliament, by design or by mistake, enacts a statute at variance with Community law, is that statute void, void which means that an English Court would have to do the unheard of thing and refuse to give effect to an Act of Parliament, even as the Australian High Court is entitled and obliged to refuse to give effect to an unconstitutional statute? Does this follow from the '*primauté de la règle communautaire*', the 'superiority' of the Community rule?

Before I try to justify my view that it does not follow I should like to say that in Germany the matter is still in doubt and that neither in France nor in Italy has any such conclusion been drawn by the opinion prevailing in practice and in theory.[8] True, in the Netherlands[9] this conclusion was drawn by an express amendment of the Constitution, and in a most remarkable decision — a milestone in the history of international law, I venture to say, — the Belgian Cour de Cassation[10] held on the 27th May 1971 that in the event of a conflict between a rule of conventional international law (that is a Treaty) and a rule of Belgian internal law, international law was the higher law, and the Belgian internal law was inapplicable. This was decided with reference to a Belgian statute on import licences for milk products passed after the coming into force of the Treaty of Rome. In adopting this solution and the view of international law inherent in it, the Belgian Court laid down a principle of Belgian constitutional law. In doing so it said no more than that it translated the doctrine of the priority of community law into

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8 The literature on this problem, especially in Germany, is voluminous. For surveys see Brinkhorst and Scherers, *Judicial Remedies in the European Communities 1969*, p. 136ff; Bebr, *loc. cit.*

9 Art. 66 of the Constitution of the Netherlands — one of a group of Articles inserted in 1955 and revised in 1956. See Brinkhorst and Scherers, *loc. cit.* p. 172 ff.

10 *État Belge* v. *S A Fromagerie Franco-Suisse le Ski*, 27.5.1971, *Journal des Tribunaux*, 3.7.1971, 86th Year, p. 456 *(Conclusions Ganshof van der Meersch)*. The highest Court in Luxembourg had already decided to the same effect in 1954: *Chambre des Metiérs* v. *Pagani*, 14.7.1954, *Revue critique de Droit International Privé*, 1955, p. 293 ff. See Brinkhorst and Scherers, *loc. cit.*, p. 171.

Belgian law by drawing the conclusion that the rule *lex posterior derogat legi priori* did not apply, or, in other words, that by virtue of Belgian constitutional law, community law was in Belgium the 'higher law'.

The reason why I insist that in deciding as it did the Belgian Court applied Belgian Constitutional law and not Community law is that the Treaty does not contain any rule on the *consequences* in the legal systems of the member States of the priority of Community law. On the contrary, more than once has the Luxembourg Court disclaimed any intention to decide about the validity of any legislative or administrative measure taken in any member State in violation of Community law.[11] And it had to disclaim any such intention because the Treaty does not give it any jurisdiction to pronounce on the validity of municipal legislative or administrative acts. We must resist the temptation of thinking of the High Court of the Commonwealth of Australia or of the Supreme Court of the United States when contemplating the jurisdiction of the Court of Justice of the European Communities. It is something totally different. What is it?

The Court has under the Treaties a number of functions, but disregarding comparatively minor matters, we can say that it acts in three principal capacities: as the guardian of the legality of Community action, as the guardian of the observance by the member States of their Treaty obligations, and as the guardian of the uniform interpretation of Community law throughout the Community area.

In the first of these three capacities,[12] — the control of the legality of action taken by the Community organs themselves, — the Court exercises the jurisdiction of an administrative court in the Continental sense, and especially in the French sense. In fact this part of the Treaty closely follows the institutions and principles of French administrative law, and to the extent to which it exercises this function, the Luxembourg Court very much resembles the French *Conseil d'Etat* on its judicial side. You can also, if you like, say that it resembles a court in a common law country exercising its power to control the legality of administrative action, and certiorari and even mandamus[13] have their counterparts in the system of the Treaty. This is interesting and important, but not directly germane to what I am concerned with here.

I am much more concerned with the second of the three types of jurisdiction I have distinguished.[14] There the Court really acts like an international court, in some ways you might in this respect compare it with the International Court of Justice at the Hague. In these proceedings the Court pronounces on a State's compliance or failure to comply

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11 *E.g.* in *Humblet* v. *Etat Belge*, 16.12.1960, 6 Rec, 1132, English translation printed in Valentine: *The Court of Justice of the European Communities*, Vol. 2, p. 817; in *van Gend en Loos* v. *Administration Fiscale Neerlandaise*, 5.2.1965, 9 Rec. 1; 2 CML Rep. 105; and in *Costa* v. *ENEL*, *supra*, n. 1.

12 EEC Treaty Art. 173-175; ECSC Treaty Art. 33.

13 There are however big differences between mandamus and the *recours pour carence* under Art. 175.

14 EEC Treaty Art. 169-171; ECSC Treaty Art. 88.

with its obligations, and it does so either on a complaint by the Commission or on a complaint by another State. (This is the procedure under the EEC Treaty, under the Coal and Steel Treaty it is somewhat different). And — this is the important point — if it finds that a State has violated its obligations, — and now I quote Article 171 of the Treaty — 'such State is bound to take the measures required for the implementation of the judgement of the Court'. Thus — assume that the British Government were, after the 1st January 1973, to take a measure found to be a breach of its Treaty obligations, — shall we say introduce some measure of indirect taxation hitting the products of another member State more severely than 'similar domestic products'[15] — and assume further that the Government of that other member State or the Commission had taken the matter to the Court, it would then be the obligation of the British Government to ask Parliament to repeal the offending taxing statute. But, and this is the point, the taxing statute would be repealed by the authority of Parliament, not by the authority of the Luxembourg Court. Under the Treaty of Rome, — it is a little different under the Coal and Steel Treaty, — there is nothing the Community can do if the British Government in my hypothetical case fails to lay the requisite Bill before Parliament or if Parliament fails to pass it. The result would be a permanent breach by the United Kingdom of its obligation, — a very ugly situation one does not like to contemplate. The situation, I am confident, will not arise, and as a matter of international law it ought not to arise, but legally — and this is the point — it can arise. The provisions of the Treaty through which the obligations of the member States are enforced, — and this is what these provisions on the jurisdiction of the Court are about, — do not encroach upon the internal as distinct from the external sovereignty of the member States.

But this is not the principal point. The principal point arises from the third of the three basic jurisdictions of the Court, its function as the guardian of the uniform application of the Community law throughout the Community area. This is the famous Article 177[16]; I am told that something like two thirds of all cases pending in Luxembourg now arise under this provision. Under this Article the Luxembourg Court acts on a request by a court of law of the member States. The request is to give a preliminary, perhaps I had better call it an interlocutory, ruling (*à titre préjudiciel*) on certain types of questions the most important of which are the interpretation of the Treaty itself and the interpretation and the validity of any piece of Community legislation, — in a moment I shall say something about the various types of legislation by Community organs. Any court of a member State which considers that a decision on such a question is essential to enable it to render judgement, may send the case to Luxembourg for an interlocutory ruling, but if it is a court 'from whose decisions there is no possibility of appeal under

15 Art. 95.
16 It does not have a real counterpart in the ECSC Treaty, — its Art. 41 is different.

domestic law', — that is in our case the House of Lords, — it must do so. The Court may thus be asked to give a ruling by any court in the country, superior or inferior. In fact two of the most famous cases decided by the Court under Article 177[17] came one from a Dutch tax tribunal, the other from the *conciliatore* in Milan, a lay magistrate handling petty civil claims.

Now the Court has given a very sharp and narrow definition of its powers under this provision. One of the first major cases[18] in which the Court gave a ruling under Article 177 arose from Article 12 of the Treaty which says that during the transitional period before all internal tariffs were abolished the member States 'shall refrain' from introducing as between themselves any new customs duties on imports or exports. The Dutch Government had by an order altered the tariff position of some chemical and thus in effect increased the duty; the chemical was imported into the Netherlands from Germany. The Court held that Article 12 was 'directly applicable', that is, it not only imposed obligations on the governments, but conferred rights on the citizen; but it refused categorically to say what consequences this had in Dutch law, that is, whether it made the change in the tariff void or whether it enabled the Dutch importers to reclaim the duty they had paid. And similarly in the case arising from the nationalisation of the Italian Electricity Supply Industry, — the leading case of *Costa*-v-*ENEL*[19] from which I have quoted several times, — the Court said that under Article 177 the Court could not apply the Treaty to the facts of a case nor determine the validity of an internal measure in the light of the Treaty as it could in proceedings instituted in order to ascertain whether the member had or had not complied with the Treaty. In this latter case, however, as I have said, the decision of the Court only imposes on the Government an obligation to comply and does not invalidate any internal measure.

The decisive, and to me absolutely decisive, point in this somewhat involved line of reasoning is that the Court does not have the power under Article 177 to do more than to say how Community law is to be interpreted. It has no more jurisdiction under Article 177 than it has under any other provision of the Treaty to pronounce upon the validity of any piece of municipal law.

Or, to put it differently, the Treaty as interpreted by the Court establishes a legal order of its own, and that legal order becomes part of the legal systems of the member States. More than that, it is, from the Community's own point of view, in relation to the internal law of the member States, the 'higher law', and consequently the United Kingdom would violate its Treaty obligations if it passed legislation contrary to Community law. But what *result* this hierarchy of sources has in the

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17 The second and third of the cases in n. 11 *supra*.
18 The *van Gend en Loos Case*, *supra*, n. 11.
19 N. 1, *supra*.

legal systems of the member States is not determined by Community law, but by the laws of the member States.

The European Communities are not federations, if it is of the essence of a federation that the legislative *power* of each member (not only the *right* to legislate) is circumscribed by the federal law. The legislative sovereignty of Parliament will not be affected by entering the Community. By creating the Community the Six did not establish a new superstate.

All this of course, if I may remind you, is relevant only to those provisions of the Treaty which are directly applicable, and not to those which only impose obligations on the member States themselves. This same distinction is however fundamental not only for the Treaties themselves but also for an understanding of the legislative functions exercised by Community organs under the Treaties. This is most important. A gigantic mountain of regulations and directives has been piled up by the Community organs, mainly to give effect to the agricultural policy of the E.E.C. This too is going to be partly, but only partly, automatically incorporated into the British legal systems, and all that I said about the relation between the norms of the Treaties and the existing body of English and Scottish law applies *mutatis mutandis* to this Community legislation as well.

The legislation does not emanate from the European Parliamentary Assembly at Strasbourg, but from the Council — the organ representing the Members — and, to a minor extent, from the Commission, the executive organ of the Communities. Under the Treaty of Rome the legislative power may be exercised in the form of regulations or of directives. Regulations are directly applicable, self-executing, supra-national. 'They shall be binding' — says the Treaty — 'in every respect and directly applicable in each Member State'.[20] Directives create only obligations imposed upon the States themselves to take the requisite measures, though the Court has now held that in certain circumstances even a directive may be self-executing and thus create supra-national law in the member States.[21] Whether or not the legislative power of Council or Commission is to be exercised in one form or the other is often specifically said in the Treaty at the point at which the power is conferred, but in other cases it is left to the discretion of the Community organs themselves. The rules of competition have been implemented through regulations, the rules on exchange control through directives, — this is only an arbitrary illustration. Sometimes a matter is regulated partly in one way, partly in another: the common labour market (one of the most important aspects of the Communities), — that is the freedom of migration in the Community area, — was implemented mainly by a series of regulations gradually transforming the national labour markets into a Community labour market. But the complicated rules

20 Art. 189.
21 *Grad* v. *Finanzamt Traunstein*, 6.10.1970, Rec. 16, 825.

on co-operation between employment exchanges which were involved were put into directives: these could not possibly be made 'self-executing', too much administrative action was required at national level.

All that I have said about the place occupied by the self-executing provisions of the Treaty also applies to the regulations, with this difference that new regulations are constantly added to the existing corpus. The legislative fertility of the Community organs is most impressive. Thus, after January 1st 1973, new elements will continuously be added to the body of law applicable in the United Kingdom and you may say that in this sense the entry into the Communities is a 'blank cheque' to an outside legislative source. Only, let us not forget, that it is not all that much 'outside'. There will be British members in the Council (which is by far the most important legislative organ) and their outvoting is made difficult by the provisions on qualified majorities, quite apart from the fact that since the famous Luxembourg understanding of 1966 major decisions are not made by the Council unless all Members agree.

I said at the beginning that I should say something about various channels through which law emanating from Community sources would enter the United Kingdom, and this makes it necessary for me now, in conclusion, to say a little about harmonisation and about symbiosis.[22]

Clearly, the Treaties themselves, the regulations and the directives made in virtue of them are a most important instrument of harmonisation of law in the countries of the Community. Most of this is of course what on the Continent is called 'public law', that is the body of legal principles governing the mutual obligations between the individual and the State rather than those existing between individuals. Thus inevitably the enormous corpus of regulations and directives issued on matters such as freedom of establishment, on freedom of migration of labour, on freedom of movement of capital, on the regulation of agricultural markets, on assimilation of indirect taxes, is bringing about a measure of uniformity of law.

But this is not the only instrumentality of harmonisation. The Treaty also contains some provisions designed to facilitate the approximation of legislative and administrative provisions of the member States in situations where this does not automatically result from the enactment of the Treaty itself or of Community law made to implement specific provisions of the Treaty.[23] These provisions entitled 'approximation of laws' seem to me however so far to have played a comparatively modest role. Directives have been issued or are in course of preparation on technical matters such as the coloration of foodstuffs for human consumption or the size and shape of licence plates of motor cars, — im-

22 For a very useful analysis of the problem see Eric Stein, 'Assimilation of National Laws as a Function of European Integration', (1964), 58 *American Journal of Internat. Law* 1.

23 Art. 100-102. I am only dealing with Art. 100. Art. 101 and 102 have not, as far as I know, been applied at all so far.

portant matters no doubt but not exactly issues touching the fundamentals of a legal system. Nor can it be expected that these provisions for harmonisation or approximation will be destined to play a more exciting role in future. The powers of the Council to make directives for the harmonisation of laws are severely circumscribed: the member States can be directed to harmonise their legislation and administration only in so far as the relevant provisions 'directly affect the establishment and operation of the common market', and the Council can do this only by a unanimous decision on a proposal of the Commission.

I venture to think that the *rapprochement* between the legal systems of Britain and of the Continent will come, but that it will not mainly come through the action of the Community organs in virtue of their powers under the Treaty. The Community organs are playing and will continue to play an important role in this gradual growth of a corpus of European law, but not as decision makers or rule makers. Their role, and especially that of the Commission and its civil servants will be that of the technical expert and the honest broker, helping the member States to arrive at understandings which may either ripen into formal conventions on the enactment of uniform legislation or simply produce draft statutes which will then be adopted by the legislatures of the various member countries. I see the future of European law not mainly in the image of a body of federal legislation but of a growing corpus of uniform state laws. Is this not the way you have in fact brought about a large amount of unification of law over all or most of Australia, completely outside (but of course not against) the federal Constitution? Why should something on similar lines not happen in Europe?

The Treaty itself[24] provides that the Members are to enter into negotiations for the purpose of arriving at conventions on matters such as equal treatment of their nationals in all respects, on double taxation, on the recognition of companies, and the recognition and enforcement of judgements, and on some of these matters, *e.g.* the last two, Conventions have already been concluded which the United Kingdom will presumably adopt.

More than that: in many fields the Commission is expressly charged with the duty of playing that role of the Socratic midwife to which I have referred: I am giving (as close to my own interests) only the example of the promotion of close co-operation in the social field, which includes legislation on trade unions and collective bargaining.[25] It is true that this is so far only an aspiration, but it indicates the method by which a legal rapprochement may be brought about in the fulness of time.

In other words: I can see that the enlargement of the Communities may lead to an increased volume and tempo of unification of law in Europe, but I cannot see that this is going to result from an increase of

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24 Art. 220.
25 Art. 118.

the formal legislative powers of the Community.[26] Over the last quarter of a century a very considerable amount of such unifying work has already been done through various international organisations, and some of this, especially in commercial law, in labour law, and in private international law is reflected in the British statute book. One may say that an area of law lends itself to unification the less it is permeated by ethical convictions and cultural traditions. Anyone taking the trouble of comparing the unified branches of British law with those in which England and Scotland continue to go separate ways will know what I mean. Scotland has not got a separate company law (although until 1961 there was at least one remaining big difference[27]), nor has it a separate body of labour legislation, and even a uniform code of contract law is under the active consideration of the Law Commissions. But the mere thought of unifying land law would stir up a wave of indignation north of the Tweed. The fact of economic — and to some as yet unknown extent — political symbiosis has its own inexorable impact on the law. This is what happened in France, in Germany, in Italy before these countries achieved a systematic unification of their legal systems, and this is what must happen in Europe.

But on the other hand we should not forget how much cultural and therefore legal diversity can go with economic and even political unification. Can one imagine a more closely knit economic entity than the United States? And is it not true that to this day the French system of law continues to flourish in Louisiana, that the Spanish community of matrimonial property shows no sign of disappearing in eight States of the Southwest and West, and that altogether the most unbelievable divergencies in all sorts of legal matters exist, — sometimes between neighbouring States? Is it not true that in Canada French and English legal systems can exist side by side in a Federation with a range of federal legislative power compared with which the legislative powers of the European Community authorities look trifling? No comparative lawyer can deny that the closest economic symbiosis is compatible with the continued and permanent existence of widely different legal traditions.

I am therefore at the end of my lecture returning to its beginning. Let us not underestimate the impact of Community law on the legal systems of Britain, but let us not overestimate it either. And more than that, let us regard it as an asset and not as a liability that the common law tradition and what is called the civil law tradition will now be in closer contact. The experience of practising before the various judicial and other authorities at Brussels and Luxembourg will perhaps be an

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26 It is however proposed to enact the new European Company Law through a Regulation of the Council, for which a basis is found in Art. 235; see the Proposed Statute of a European Company, Supplement to Bulletin No. 8/1970 of the Commission. See on this: Pieter Sanders: 'The European Company on its Way' (1971) 6 *Com. M. Law Rev.* 29.

27 The absence of the floating charge in Scots Law. See Companies (Floating Charges) (Scotland) Act, 1961.

eye-opener to many English lawyers: they may discover that the common law may not necessarily be the last word in all matters of legal procedure, and, conversely, the Continental lawyers who will see their English and Scottish colleagues in operation may gain equally important new insights. It may be only a by-product, but in my submission it is likely to be an important by-product of our entry that it will help lawyers to overcome their intellectual isolation. And this may be a benefit to the whole common law world.