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## The European Union and the Rule of Law

Sir Francis Jacobs  
Holdsworth Club Presidential Address  
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After centuries in which the abuse of power led to terrible evils, not least in Europe in the Second World War, the rule of law embodies at its core the idea that all exercise of power should be subject to the law.

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# The European Union and the Rule of Law

Being the Presidential Address of

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# The European Union and the Rule of Law

In China, over 2000 years ago, according to the current British Museum exhibition 'The First Emperor', he, among other extraordinary achievements – unifying the country, introducing a single language and a single currency – also created the rule of law. It raises the perennial question: what is meant by the rule of law? I want to reflect on that question by taking the example of the European Union. Before I embark on that, I would like to thank the Faculty of Law for the invitation to preside over the Holdsworth Club and to give this year's Holdsworth lecture.

In my very primitive filing system in which I have striven over the years, with absolutely no success, to keep my papers in order, I was intrigued to discover last year a file named Holdsworth. It contained some rather elderly Holdsworth lectures, which I used to be sent regularly and indeed used to read with much interest. Of course I never envisaged that it would one day fall to me to try to keep up the tradition of this institution, which now extends over nearly eighty years and which I think has no parallel in any other British university. In discussions with George Applebey, who has been extremely helpful with the arrangements for this lecture, he revealed that one particularly illustrious predecessor as President of the Holdsworth Club took advantage of the fact that the lecture in those days was given after dinner and delivered the lecture in song. I am happy to reassure you that I will not venture to follow that example, as that would very quickly empty the room.

It is a special pleasure to be invited by Professor Arnall as Head of Birmingham Law School, too long ago a greatly valued assistant to me at the European Court of Justice, and author of what is unquestionably the most significant book on the ECJ, *The European Union and its Court of Justice*. And it is very good to meet again many colleagues and friends from the Faculty. It is also a special pleasure to see here this morning Professor Neville Brown, professor for many years at this Faculty, and not merely a friend and colleague, but also co-author with me of a lighter book on the Court, which led to many agreeable meetings in London, Luxembourg and Wolverhampton. It is a lighter book, as shown by the fact that we signed the foreword to the second edition at the ground of a

well-known local football club. In my recent Hamlyn lectures, *The Sovereignty of Law: the European Way*<sup>1</sup> (moderately priced and easy to read) I tell the story of how, some years back, that little book on the Court went to Moscow, and the repercussions which it had there, reaching even to the Kremlin. There was at that time some hope that the imploding Soviet Union would be replaced by an association of States, an association modelled on the European Union, with a court of justice modelled on the ECJ, and based on what can now be called the European conception of the rule of law. What is that? The question takes me back to the First Emperor in China who, as I have mentioned, not only unified China territorially but also introduced across the vast territory of China a single language, and a single currency. What the rule of law meant in those days, two millennia ago, was essentially the exercise of power to enforce the law, and there was no sense, I suspect, that there were any constraints on that power. While of course it is essential that the law should be obeyed and enforced, as a pre-condition of the very existence of a civilised society, the rule of law today has, at least in Europe, a very different connotation. Essentially, it seems to me, it is no longer about the exercise of power to enforce the law; rather, it is about the control of power by the law. After centuries in which the abuse of power led to terrible evils, not least in Europe in the Second World War, the rule of law embodies at its core the idea that all exercise of power should be subject to the law. In particular it means, on a more humdrum but fundamental level, that the decisions of public authorities should be open to review by independent courts. And it is here that the European Union is so remarkable. The EU recognises this vital value to a far greater extent than any other previous or contemporary international or transnational body. In that respect it represents no less than a revolution in the organisation of States. The need for the rule of law in this sense was recognised from the outset. The Schuman Plan in 1950, which led quickly to the first European Community, the European Coal and Steel Community, envisaged that the new institutions established by the Treaty – institutions which would exercise substantial powers, if only in a limited sector of the economy – should be subject to review by a court. The Court of Justice of the ECSC, ancestor of the present ECJ, was set up for this purpose on 4 December 1952.

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<sup>1</sup>Cambridge University Press 2007.

Having leapt rapidly from 200 BC to AD 1952, I must slow down a little, but I want to trace in the briefest outline the main stages by which the rule of law subsequently developed in the European Community – now the European Union. Such an outline is useful for several reasons: not least because the very gradualism of the process seems to have played an important part in its success – as it did in the development of that separate European legal order, the European Convention on Human Rights. The establishment of a Court to review the measures and actions of the Institutions and the Member States, introduced under the ECSC Treaty which entered into force in 1952, was carried forward into the EEC Treaty in 1958. That led to significant developments in the rule of law in the evolving Community legal system.

### **Direct effect**

Perhaps the single most significant concept is that of direct effect, laid down for the first time in a judgment delivered by the European Court of Justice in 1963. The question referred to the Court in *van Gend en Loos*<sup>2</sup> was essentially whether a specific Treaty provision could be enforced in the national courts in the face of conflicting national legislation. Here the Court held that the Community constituted 'a new legal order of international law' for the benefit of which the States had limited their sovereign rights, and the subjects of which comprised not only Member States but also their nationals. The Treaty created individual rights which the national courts must protect. The ruling, although at the time controversial, was crucial to the effectiveness of Community law and indeed to the very existence of the rule of law. In the first place, it meant that individuals could secure recognition and enforcement of their rights in the national courts. Secondly, the principle of direct effect had the vital consequence – as the ECJ recognised in its judgment – of making the national courts the principal instrument for the effective application of Community law. Otherwise, enforcement of Community law would have been left almost entirely to the discretion of the European Commission, which under the EEC Treaty could take enforcement action before the ECJ against Member States. The Commission used that discretionary power very hesitantly in the first decades of Community law. Moreover the action had a limited effect: if successful, it led only to a declaratory judgment against the Member State.

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<sup>2</sup>[1964] ECR 585.

So there developed in the EC – through *van Gend en Loos* and the subsequent case-law – a special role for individuals in ensuring observance of the rule of law. The Treaties gave individuals a limited role in the review of measures of the Institutions: they had a limited standing before the Court of Justice itself – and any such standing was itself novel under international law. Direct effect had consequences which in one respect went further: where a Member State infringed the Treaty or failed to comply with its Community obligations, then when individuals' rights were affected they could challenge that breach or that failure in the Member State's own courts. There was a further consequence: the principle of direct effect led naturally to the recognition of the primacy of Community law. If Community law was to be applied by the national courts, it had to be applied uniformly across the Community as a whole. There was therefore no room for the idea that the application of Community law might have to yield to the national law of a Member State, so that in the event of conflict between the two, national law might prevail. Community law must necessarily prevail over national law. That was indeed inherent in the very idea of a Community based on the rule of law. The primacy of Community law, resulting both from the inherent logic of the Community system and from the *van Gend en Loos* judgment of 1963, was spelt out in the *Costa v. ENEL* judgment in 1964.<sup>3</sup>

### **Primacy**

In *Costa v. ENEL* the Court stressed the unique character of the EEC Treaty:

'In contrast with ordinary international treaties, the Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'

On the basis of the special character of the EEC Treaty the Court has developed a detailed statement of the primacy of EC law. In the result, EC law, of whatever status, prevails over conflicting national law, of whatever status. EC law prevails, regardless of whether the national law is prior or subsequent to the EC rule. And this view seems fully justified. Although the primacy of EC law is nowhere stated in the Treaty, it can properly be regarded as a necessary consequence of a Community based on law. Most commentators

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<sup>3</sup>[1964] ECR 585.

have fully accepted that consequence; and it was progressively accepted by the courts of the Member States, with very occasional reservations – which were mostly hypothetical. It is accepted in the leading English textbooks on UK public law, constitutional law and administrative law, again with some qualifications.

It has been accepted also by the highest courts in the United Kingdom, in a striking departure from constitutional orthodoxy. It involves, necessarily and uniquely, a departure from the sovereignty of Parliament.

### **The internal market and the rule of law**

The rule of law has gone well beyond the constitutional foundations of the Community and permeates the case-law of the ECJ: not least in the most central areas of EC law, the law of the internal market. The Court of Justice has exercised strict scrutiny over national measures affecting the fundamental freedoms of the Treaty – especially the free movement of goods, of persons, of services. Here the rule of law imposes requirements also on the national courts. The European Court of Justice, in its case-law on the internal market, has required that similar principles of judicial review should be applied by the national courts; and that those courts should have jurisdiction themselves to review where necessary the decisions of national authorities affecting the exercise of Community law rights. Let me summarise, in outline only, what the principles developed by the Court in this context include:

- Individuals must have effective access to their national courts to claim Community rights which have direct effect
- They must be able to challenge before their national courts the decisions of national authorities affecting his Community rights: those decisions must therefore be sufficiently supported by reasoning to enable the national courts to review them. This went further, I think, than English law, which did not generally impose the requirement of reasoning to support a decision
- The national courts must review such decisions for compliance with the principle of non-discrimination; thus for example national law must treat Community rights no less favourably than rights protected by national law
- The national courts must, when reviewing decisions of national authorities affecting Community rights, apply the principle of proportionality. This is not the place for a full discussion of this principle. It must suffice to make, very briefly, three points



First, the principle of proportionality requires, among other things, that the authorities do not impose on the individual a burden which is disproportionate to the aim of the measure. As it is often put, the questions to be considered include whether the measure was suitable or appropriate to achieve the desired aim; and whether it was necessary to achieve that aim, or whether a less burdensome measure would have been sufficient.

Second, the principle requires closer scrutiny than the test traditionally applied under English law, namely the so-called 'Wednesbury' test, named after the *Wednesbury* case.<sup>4</sup> That test imposed a low standard of review; it was even stated in that case that to be unlawful, the measure must be 'so absurd that no sensible person could ever dream that it lay within the powers of the authority'<sup>5</sup> (Lord Greene MR).

Third, the principle of proportionality, as well as imposing a higher standard on the authorities, may also require the courts to balance the competing interests: an exercise which was not required under the traditional English law approach.

- The national courts must provide effective remedies for the enforcement of Community rights

Overall, the internal market provides a particular illustration of the ways in which the notion of the rule of law permeates the substantive as well as the constitutional law of the European Union.

### **Jurisdiction of the European Court of Justice**

In many ways the key to the effectiveness of the EC legal system has been the jurisdiction of the European Court of Justice itself. Its wide powers of judicial review in direct actions before the Court, and its jurisdiction to give preliminary rulings on almost all questions of Community law, have played a major part in ensuring the legal basis of European Community measures.

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<sup>4</sup>[1948] 1 KB 223.

<sup>5</sup>At 229.

The ECJ has taken a broad view of its jurisdiction: what is particularly relevant for our purposes is that it has done so precisely where that was necessary to ensure observance of the rule of law.

Under the original Treaty text, the Court could review legally binding acts of the Council and Commission. The Court has interpreted that text in the light of its purpose, which is to be found in the basic Treaty provision setting out the task of the Court: to ensure the observance of the law in the interpretation and application of the Treaty. That purpose, the Court held, could not be fulfilled unless it was possible to challenge *all* measures, whatever their nature or form, which are intended to have legal effects.<sup>6</sup> Although the Treaty referred to review of acts of the Council and Commission, in the *Les Verts* case the Court held, again in order to ensure observance of the law, that it could review measures of the European Parliament.<sup>7</sup> Equally, although the Treaty provided that actions for judicial review could be brought by a Member State, the Council or the Commission, the Court held that it could entertain certain actions brought by the European Parliament. The Parliament could bring a case before the Court 'provided that the action seeks only to safeguard its prerogatives'. 'The absence in the Treaties of any provision giving the Parliament the right to bring an action may constitute a procedural gap... (But) it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties.'<sup>8</sup>

These bold decisions of the ECJ on the scope of judicial review can be justified as being necessary to guarantee the rule of law. As the Court expressed it in *Les Verts*, the Community 'is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.

Here the Court uses for the first time a description of the Treaty as the basic constitutional charter of the Community; it invokes expressly the idea of the rule of law; and it gives an explicit account of what the rule of law requires.

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<sup>6</sup>See *Commission v. Council* (the ERTA case) [1971] ECR 263.

<sup>7</sup>*Les Verts v. European Parliament* [1986] ECR 1339.

<sup>8</sup>*European Parliament v. Council* [1990] ECR I-2041.

The bold approach by the ECJ to the scope of its jurisdiction has parallels, I would suggest, in the decisions of other leading courts, especially where constitutional issues arise. But it can also find some justification in the rigidity of the constitutional arrangements of the EC, where any amendment of the Treaty is extraordinarily cumbersome, requiring ratification by all the Member States. That process now also involves popular vote by referendum in some States. We know that in some countries the referendum is not a well-established institution, and that the outcome of a referendum may reflect other factors beyond the issue put to the people – for example, the not uncommon factor of a general discontent with the government of the day. None the less, despite such difficulties, it has proved possible to obtain several major amendments to the founding Treaties: the Single European Act, Maastricht, Amsterdam, Nice, and now perhaps Lisbon (the Reform Treaty). And those amendments have occasionally served to endorse the ECJ's decisions by amending the Treaty to reflect the principles adopted by the Court. The Treaty now provides expressly for actions against the European Parliament. Treaty amendment also provided for actions brought by the Parliament: however, the right of the Parliament to bring proceedings was limited – following the exact wording of the Court's judgment – to actions brought for the purpose of protecting its prerogatives. And it might be added that actions brought by the European Parliament have sometimes had what seem very worthwhile results in leading to the annulment by the Court of unsupportable Community measures.

It is useful to recall in this context that when the EC was founded (the European Coal and Steel Community in 1952, the European Economic Community in 1958), the European Court of Justice was set up to protect against misuse of the powers of institutions, and to ensure respect by Member States for their Treaty obligations. In other words, it guarantees the rule of law. The importance of ensuring observance of the rule of law can be regarded as justifying a broad interpretation of the Court's jurisdiction, sometimes going beyond the text. If the ECJ cannot exercise such control, no court can do so.

There are thus powerful arguments for this broad approach, which gives effect to what the Treaty, taken in its context, intended. Hence also the need for an evolutionary interpretation of the Treaty. Under the original Treaty, powers were carefully distributed among the institutions, with a system of 'checks and balances'. The Parliament, or 'Assembly', as it was called, initially had

no law-making powers and it therefore doubtless seemed unnecessary to grant the Court powers of judicial review over the Assembly. But as the Assembly's powers developed, and it was re-styled 'European Parliament', there would have been a serious lacuna, and a rupture of the balance of power, if alone of the political institutions of the Community (Council, Commission, Parliament), its acts had remained immune from judicial review.

The Court thus developed the vital principle of institutional balance. In the early years, it sought to ensure that the very limited powers of the Assembly – essentially its right to be consulted – were fully respected. In later years, as the Parliament progressively acquired the role of a co-legislator with the Council (representing the Governments of the Member States), it seemed necessary to recognise a limited right of action for the Parliament, to ensure that the powers conferred on it by the Treaty could not be disregarded by the other institutions. Subsequently, as we have seen, these innovations, introduced by bold decisions of the ECJ, were confirmed by being given Treaty expression.

All this seems to me part of what we mean by the rule of law. But could it be said that such an adventurous approach by courts is itself *contrary* to the rule of law – with the courts themselves acting unlawfully, contrary to the text? Not, I would suggest, where it is necessary to review the exercise of powers by the political institutions of the Community, which would otherwise be subject to no restraint. To restrain the excess of power, it is vital that courts should exercise review: in that respect, the broadest approach to their jurisdiction seems justified.

### **Single European Act**

The first major Treaty amendment was the Single European Act. It introduced voting by a qualified majority in the Council, essentially in order to attain the internal market. It recognised that a substantial body of legislation was essential for the internal market, and that to maintain a requirement of unanimity could paralyse the legislative process. But voting by what is essentially a majority of Member States, however qualified that majority, can be regarded as raising vital issues of sovereignty, and indeed democracy, on which I will venture some remarks later.

There was also a significant development in the rule of law. The establishment under the Single European Act in 1989 of the Court of First Instance, created

to hear certain actions at first instance with a right of appeal to the Court of Justice, was intended to improve observance of the rule of law in a very specific sense, namely to 'improve the judicial protection of individual interests.'<sup>9</sup> At first the new Court, which was merely 'attached' to the Court of Justice, had a limited jurisdiction. But the jurisdiction of the Court of First Instance has been progressively extended, and the Treaty (Article 220), as amended by the Nice Treaty, fully recognises the separate status of the Court of First Instance and now imposes the same fundamental task on both Courts:

'The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.'

At least an important part of this task is to ensure that the *rule of law* is observed.

### **The Treaty on European Union**

After the Single European Act, the next round of treaty reform was very substantial: the Maastricht Treaty or Treaty on European Union of 7 February 1992. That Treaty made great innovations, including provision for a single currency and for citizenship of the European Union. On the judicial front too, there were significant innovations. Judgments of the ECJ against Member States were given teeth: at the instigation of the United Kingdom, substantial financial penalties could be imposed on Member States which failed to comply with judgments of the Court. (And at about the same period, the Court itself developed the principle that where individuals suffered loss as the result of a breach of Community law by a Member State, they were entitled, subject to certain conditions, to recover damages from the Member State in the national courts.)

### **The jurisdiction of the Court – the 3 pillars**

On the jurisdiction of the Court of Justice – the key to the rule of law – the result of the Maastricht Treaty was perhaps one step forward but two steps back. The *Les Verts* case was decided twenty years ago, in what can now be seen, in terms of the jurisdiction of the Court, as a halcyon age. That was when the Court's jurisdiction was broadly comprehensive. Almost all

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<sup>9</sup>See the preamble to the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

questions under the EC Treaty could be raised before the ECJ. Subsequently however the Maastricht Treaty set up entirely new fields of activity for what now became the European Union and introduced the so-called three-pillar structure, which largely confined the jurisdiction of the ECJ to the first, 'Community', pillar, with virtually no jurisdiction under the second pillar (Common Foreign and Security Policy), and very limited jurisdiction under the third pillar (Justice and Home Affairs).

There was some extension of jurisdiction in relation to these matters a few years later under the Amsterdam Treaty, but only at the price of greater complexity, and possibly confusion. Matters relating to asylum, immigration and certain other questions were transferred from the third pillar to the 'Community' pillar, but with different, and sometimes optional, provisions on the jurisdiction of the ECJ.

So there emerged a whole range of different regimes in relation to very similar areas, even excluding the rather separate second pillar: there is the traditional Community regime; the variants on that regime for first-pillar matters transferred by Amsterdam; and the revised third pillar regime.

There is now far greater uncertainty about the borderline between these regimes than there was with the previous dividing line between the first and third pillars. The net result is both to limit in an apparently random way the jurisdiction of the ECJ and to create apparently maximal confusion about its scope. These developments are particularly regrettable given that what has proved the key to the development of the Community legal order has been the jurisdiction of the ECJ. Perhaps paradoxically, it can almost be said that the basic all-encompassing provisions of the original EEC Treaty conferring jurisdiction on the Court have proved more important than its substantive provisions. And incidentally that is why, in assessing what needs to be done to reform the EU, and particularly in considering the Reform Treaty, it is appropriate to look in the first place at the Court's jurisdiction.

There is a further paradox in limiting the Court's jurisdiction under the third pillar, in particular, which is concerned with matters fundamental to the rights of the individual, especially in relation to criminal law and criminal procedure. It is true that the ECJ has striven, as in the *Pupino*<sup>10</sup>

<sup>10</sup>[2005] ECR I-5285

case, to remedy some of the lacunae thus opened up. But a proper solution to the patchwork created by successive perhaps rather ill-thought-out Treaty amendments can now be found only by a full-scale recasting of the Treaty, removing the unfortunate three-pillar structure.

### **The Lisbon Treaty**

This is indeed one of the features, and one of the great merits, of the Lisbon Treaty. Although it would still restrict the jurisdiction of the Court, it would do so in a less arbitrary fashion. This will be perhaps its main contribution to strengthening the rule of law. But it will also improve the procedure for appointment of members of the European Court of Justice and the Court of First Instance, thus strengthening the independence of the judges and advocates general. It will meet a long-standing criticism of the Union's judicial system by enlarging the standing of individuals to challenge Union measures before the Court of First Instance (to be styled 'the General Court'). It will extend review beyond acts of the Institutions of the Union, to include also review of acts of bodies, offices or agencies of the Union intended to produce legal effects. And if one regards human rights as, if not part of the rule of law, then intimately connected with it, it will be relevant also as requiring the European Union to accede to the European Convention on Human Rights and will give legal force to the EU Charter of Fundamental Rights: although it must be accepted that each of these steps poses great problems of its own. Overall, the Treaty of Lisbon shows a firm commitment to strengthening the rule of law in the European Union, and contains a number of practical advances to that goal.

### **The expansion of the European Union**

Another, much neglected part of the story of the rule of law in the European Union is its progressive enlargement from the original six to the current 27 Member States. Here I will refer only to the most recent enlargements.

The fifth enlargement of the European Union, which took effect on 1 May 2004, embracing eight of the countries of central and eastern Europe, as well as Cyprus and Malta, was the most remarkable of all. For more than 40 years, since the end of the Second World War and as part of that war's terrible legacy, these eight countries had formed part of the Soviet empire, economic freedom extinguished under a system of State control, political freedom suppressed by all the apparatus of the police state.

I do not know whether the organisers of today's lecture chose the date for its historic significance. But the fall of the Berlin Wall 18 years ago today, on 9 November 1989, only 15 years before enlargement, symbolised, in the most dramatic way possible, the end of Soviet domination in central and eastern Europe, the collapse of the Communist ideology and the end of any challenge to the economic and political model of western Europe.

Indeed it may not be over-dramatic to recall, as Chris Patten has suggested, the scene in Beethoven's opera *Fidelio* in which the prisoners stagger into the light, dazzled by freedom (*Mir ist so wunderbar*). In any event the fall of the Wall marked, in effect, the final stage in the emergence of those countries first from Nazi, then from Soviet tyranny. Just yesterday it was announced that most of the central and eastern European countries would be joining the passport-free travel area of Europe, extending to no fewer than 24 countries in Europe, and even including some non-member States (but not, of course, the United Kingdom). Again it was freedom under the law, and freedom guaranteed by law, which was the keystone of enlargement. Look at the conditions for new Member States laid down by the EU at the Copenhagen Council in 1993, which became known as the Copenhagen criteria, but which simply codified the existing values of the EU. They put as the first requirement: 'That the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.' Only after that came the economic requirements of membership. Such conditions as respect for the rule of law and for human rights are not entirely novel as conditions of membership of international organisations. What is perhaps novel is the insistence upon compliance, the establishment of scrutiny and safeguards, and indeed assistance with compliance: not merely on these aspects, but a massive programme of assistance to meet the standards of the European Union: a programme which transformed the applicant countries.



What is most striking about the fifth and sixth enlargements, compared with the previous ones, is that, because of the situation of the applicant countries of central and eastern Europe, the enlargement process entailed as a precondition of entry the total transformation of the economy, the political structure, and it may even be said the very society of those nations. What this meant in practice was a vast programme of reform: Of the economy; of the environment, even of the political system. What interests us most, in the present context, is the transformation that took place in terms of constitutional and legal values. Only a few examples must suffice.

New constitutions, and Constitutional courts, were established; that was done in part because of concerns about the independence of the ordinary courts – the independence of the courts being perhaps the most fundamental prerequisite of the rule of law. So there were also measures to strengthen the ordinary courts, to improve the court systems, to provide training for judges. There remained concerns, right up to the time of their accession, about the readiness of Bulgaria and Romania, including concerns about the judicial systems. And there were concerns about imposing continuing conditions to be fulfilled after, rather than before, accession. But it must be remembered that, if the EU appears, in certain limited respects, more tolerant today about conditions for accession, there are two great differences between the current and the earlier enlargements. First, many of the recent new members have had much further to go to fulfil even the basic requirements of membership. Second, the Union which they are joining is today far more developed than in the case of the earlier enlargements and has itself in many fields attained higher standards.

The story of how the prospect of accession to the EU proved a powerful incentive to achieve radical transformations in its neighbouring nations seems to have neither any precedent in relations between States nor any counterpart elsewhere in the world today.

As to the past, only the reverse process – from liberty to servitude – seems to have been achieved, and that by a process of armed conquest and subjugation – the rule of law in the more traditional sense.

### **The loss of sovereignty**

The concern over loss of sovereignty has, I suggest, some dubious aspects, but others which are better founded. The traditional notion of the sovereign State is outmoded. It has been replaced, I would suggest, by two main ideas. First, there is now, and increasingly, an allocation of powers, which are divided, in different realms, among different levels of government: local, national, regional, global. This is true, very obviously, in political terms, but it is also increasingly true in legal terms. In legal terms, the last word, on certain matters of international security, now rests with the United Nations Security Council; on many aspects of international trade, with the World Trade Organisation and its Court (the 'Appellate Body'). In Europe, the last word on human rights is often for the European Court of Human Rights; the last word on the European internal market is for the European Court of Justice. Second, the formerly sovereign States can effectively act jointly by sharing their powers. There are advantages today in thinking in terms of 'powers' rather than 'sovereignty'. Powers can be shared, whereas it is difficult to think of shared sovereignty.

And there are obvious advantages in sharing powers in particular fields. The world has moved on since the EEC was founded fifty years ago. In many, and apparently ever more, fields action is needed on the international level. It can be achieved only by the painful, but often productive, process of negotiation. The European Union collectively can obviously achieve more in international negotiations than the Member States could achieve individually.

Many aspects of State action do not fall within national frontiers: not only international trade in goods and services, but other markets of many kinds: financial markets, energy markets, markets for the exchange of carbon emissions, and many others. The protection of the environment and the conservation of natural resources cannot sensibly be left any longer to 'sovereign' States.

Then there is the perennial problem of democratic control. Where powers are shared between States, such control, historically based on national parliaments, may be more difficult. But democratic control has not operated, even within the unitary State, as well as might be assumed by those concerned

by its apparent erosion. Indeed the notions of sovereignty and democracy are not natural bedfellows at all. Within the UK, the supposed combination of sovereignty and democracy has often amounted to a Parliament controlled by an apparently all-powerful executive government – what Lord Hailsham described as an elective dictatorship. In recent years, the Government's respect for the wishes of the electorate sometimes seems to translate into a legislative logjam responding to little more than the need for the Government to be seen to be active – even if only by reaction to so-called 'focus groups', or even to the latest headlines in the tabloid Press.

Let us look for a moment at the role of democracy in the UK. A first major element of our modern democracy is that in the area of economic policy – the area most directly relevant for the EU – the role of the Government, accountable in a limited measure to Parliament, has gradually been eroded. And it has been eroded as a matter of deliberate choice. The State has indeed in some areas withdrawn from the field and has been replaced as final arbiter by the market. Markets are widely, and perhaps rightly, now regarded as a better means of adjustment than the State. That became very clear when one considers the fate of State-run economies, of the type which operated in central and eastern Europe. But more generally in western societies, and not least in our own system, the fact is that the Government has significantly abdicated its role in favour of the market. And when the market needs to be regulated, that is done by a market regulator – a regulator again expressly independent of the Government.

The crowning example in the UK in recent years concerns what many regard as nowadays as one of the central instruments of economic policy – the control of the principal lending rate. In a spectacular decision in the very first days of the incoming Labour Government ten years ago, the then Chancellor of the Exchequer, Gordon Brown, handed over that crucial power to the independent central bank, the Bank of England. Subject only to rather limited constraints, it is the monetary committee of the Bank of England, not the Government, which now decides. Where then the sovereignty of parliament and an administration accountable to Parliament? Other areas of economic and financial policy, it is true, are still decided by the Government, including taxation policy – although in the light of recent Government activity in this area one might question the wisdom of leaving this area exclusively to the Government.

A second major element of our democracy – and perhaps any modern democracy – is that fundamental social and economic decisions are increasingly being taken not by the government nor by the legislature but by the courts. This is partly, I think, a matter of necessity and partly a matter of choice.

Among the best examples are areas where the courts essentially have to resolve conflicts between competing values: between free competition and the protection of intellectual property; or between free trade and the protection of the environment. It is no coincidence that in such fields as these, a leading part must be played, and is being played, by the ECJ. But in any event, such issues have to be resolved by courts.

Review of government action is still perceived in England as the province of administrative law: separate systems of economic law, environmental law, etc. are not yet fully formed. Indeed in England the development in the role of the courts was slower than elsewhere – perhaps because we had an exceptionally good administration in the form of the traditional Civil Service. The all-wise administrator could be relied upon to put things right. The courts were rarely needed. Perhaps that was only an illusion. But it may help to explain the late and slow development of administrative law in England. Now not only is there a vast body of judicial review – perhaps one of the most promising fields for you intending practitioners in the English courts today – but the role of the courts is even greater, with the introduction of the Human Rights Act. Again, the United Kingdom was almost the last country in the West to have a Bill of Rights in the modern sense – and possibly, to need one?

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In the European Union, the democratic function should fall on the European Parliament. But inevitably, because of the size of the Union, with a population now of around 500 million, the European Parliament is extremely remote from the electorate; the same is no doubt true of the largest democracies everywhere, and especially perhaps in India and the United States. Yet the European Parliament, as co-legislator with the Council, now exercises far greater control and influence over the content of European legislation than the national parliaments of almost all, and perhaps all, the Member States

can exercise over domestic legislation. Nonetheless, it may be desirable for national parliaments to have some greater measure of influence on European legislation.

What is most valid in concerns of this kind is the concern about the exercise of the European Union's competencies in areas where the case for European action is not fully made out. The line is a very difficult one to draw; but could more be done to reinforce the frontier? This may not be strictly an issue of sovereignty, since we are looking at a system of shared powers. But it is perhaps the central issue for the future of the relationship between the European Union and its Member States.

### **EC law and International Law**

My last topic is EU law and international law. The European Union provides a good model here. It illustrates the potential for the transnational rule of law. And it provides a model for the reception of international law. In its case-law, the ECJ recognises the binding force of the main sources of international law: both of customary law, and of treaties concluded by the European Community and by its Member States. Indeed it recognises the direct effect of treaties in situations where some of the national systems do not.

It was at one time widely accepted that EC law was somewhat negative in its attitude to international law. This may have been partly true, and partly based on misunderstanding. It could be explained in part by the need, which the ECJ visibly felt, to distance EC law from traditional international law, as it did in the *van Gend en Loos* case in 1963<sup>11</sup>, precisely enabling the EC to move beyond the traditional constraints of treaty law and of State sovereignty. EC law was described by the ECJ as 'a new legal order', even if it was still, at the time, a new legal order *of international law*; its effects within the Member States were, according to the Court's case-law, very different from those of other treaties; later, the EC Treaty was, according to the Court, the basic Constitutional instrument of the EC.

Similarly, in an early period, the ECJ was regarded as being somewhat negative towards guarantees of human rights based on national law or on the ECHR, apparently concerned that might threaten the primacy of EC law.

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<sup>11</sup>[1963] ECR 1.

If there was, at one time, some substance in these views of the ECJ, the position is radically different today. Let me take three examples.

### **United Nations Law**

I mention as a first example United Nations law: in recent years, the ECJ has had to consider in various situations the meaning and effect of UN Security Council resolutions. This occurred first in relation to UN sanctions following the war in the former Yugoslavia. A series of cases, including the *Bosphorus Airways*<sup>12</sup> case, shows the ECJ securing the effective implementation of the Security Council resolutions, while taking account of the interests of individuals affected by the sanctions.

Another recent group of cases – some before the Court of First Instance – have been concerned with measures against terrorism, again implementing UN Security Council resolutions. In the *Yusuf and Kadi* cases the Court of First Instance accepted the priority of United Nations law; indeed its judgment contains some striking pronouncements to that effect. On appeal, one of the main issues to have crystallised is an issue fundamental to the rule of law: the right of those severely affected by a measure to effective judicial review. No such review appears to have been available within the UN system itself; yet it would be unsatisfactory if every local court throughout the world potentially had jurisdiction to review UN measures. The best outcome might be for a strong signal to be sent to the UN to encourage it to set up rapidly its own system of review. In any event, the record of the Court of First Instance and of the ECJ demonstrates the openness of the European Courts to UN law and to general international law.

### **Treaties concluded by the Community**

I take as my second example the approach of the European Court of Justice to treaties concluded by the EC itself.

As is well known, the Court has taken a broad view of the Community's treaty-making power; and if one takes a broad view of what counts as a treaty, the Community has concluded, over the years, a large number of treaties – reckoned at more than a thousand. The Court has taken a broad view, also, of its jurisdiction to interpret treaties: thus it has held that treaties –

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<sup>12</sup>[1996] ECR I-3953.

even ‘mixed’ agreements, ie, those concluded jointly by the Community and its Member States – constitute ‘acts of the institutions of the Community’ within the meaning of Article 177, later 234, of the Treaty, and therefore fall within its jurisdiction under that article to give preliminary rulings on their interpretation.

The Court’s case-law on the interpretation of those treaties is now substantial, and is very positive in terms of international law. The Court has proved ready, in contrast to some of the national legal orders in Europe, to recognise the provisions of such treaties as having direct effect wherever their provisions so admit. The result is that the provisions are directly enforceable in the national courts at the instance of individuals seeking to enforce the treaty obligations. In deciding whether there is direct effect, the Court rightly looks both at the nature of the treaty and at the character of the provision in question. Remarkably however it is only in one instance that the Court has held that the treaty by its very nature precludes direct effect: that is in the case of the GATT and its successor the WTO Agreement.

The Court does not impose, as a condition of direct effect, the requirements often imposed by other legal orders such as reciprocity. Increasingly also, it seems, the Court is going beyond its earlier case-law, where it seemed to stress, as a ground for according direct effect to a treaty, a special relationship between the Community and the treaty partner. In recent cases, for example, it has accorded direct effect both to association agreements with European countries and to a treaty embodying a less close relationship, the Partnership and Cooperation Agreement with Russia.<sup>13</sup>

Similarly the language of the treaty presents less of an obstacle to direct effect than might be supposed. In one case in which I was Advocate General I found the issue of direct effect a difficult one, although I reached an affirmative conclusion. The Court however seemed from its affirmative judgment relatively untroubled by the issue.

The Court’s policy of openness to treaties of this kind and its very positive treatment of them is apparent also from its approach to their interpretation. It is axiomatic that treaties must be interpreted in the light of their aims and purposes, and in the context in which they operate. It follows that agreements

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<sup>13</sup>The *Simutenkov* case, judgment of 12 April 2005.

with third States cannot necessarily be given the same interpretation as the treaties establishing the Communities themselves. The Court was therefore sometimes led to interpret, for example, a free trade agreement with a third State differently from the EC Treaty, even though the wording of the provision in question is identical or very similar. The EC Treaty could be given a 'Community' interpretation going further than would be appropriate for an 'ordinary' treaty. All this is entirely consistent with the classic principles of treaty law and treaty interpretation, as set out in the Vienna Convention on the Law of Treaties.

In recent years, however, the Court has tended to extend the 'Community' interpretation, reached in a purely internal Community context, to treaties concluded by the Community with third States. This has been true in particular of provisions prohibiting discrimination on grounds of nationality. Such provisions have been interpreted within the Community context rather extensively, as exemplified by the well-known *Bosman* ruling, perhaps as a case concerning professional football one of the most often cited of all the Court's judgments. Essentially, the Court held that sporting associations could not exclude nationals of other Member States from membership of sports teams. But that case-law has now been extended to non-EU nationals, first under Association Agreements with third States where the Agreement was intended to forge a particularly close relationship with the Community, and now even under a less intimate 'Partnership and Cooperation Agreement', in the instant case with Russia.<sup>14</sup>

These cases thus provide a good illustration of the openness of the ECJ to international law in the particular shape of treaties concluded by the Community (or jointly by the Community and its Member States), and a readiness to adopt a maximal interpretation of some of their provisions, especially where the critical issue of equal treatment is at stake.

### **The European Convention on Human Rights**

My third and final illustration of the theme of openness to other legal systems is the evolving approach of the Court to a system of law based on a treaty to which the Community is *not* a party: the European Convention on Human Rights. As is well known, the Court in recent years has adopted a very

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<sup>14</sup>Simutenkov, loc.cit.



positive approach to the Convention. Over the past ten years, in particular, it has regularly cited, and has sought to follow, the case-law of the Strasbourg Court. That is particularly striking when it is remembered that the ECJ does not generally cite the case-law of any other court. Exceptionally, there are occasional references to, for example, a decision of the International Court of Justice; but these are exceptions which seem to serve only to 'prove the rule'.

For practical purposes, it can even be suggested (as I mentioned in my Opinion in the *Bosphorus Airways* case in 1996) that the position is as if the Community were a party to the Convention, and that the Convention can be regarded as part of Community law and can be relied on as such both in the ECJ and in the national courts where Community law is in issue. The Strasbourg Court in effect accepted this when it came in turn to decide the *Bosphorus* case in 2005.<sup>15</sup> Here the issue was whether the seizure of a Serbian aircraft by the Irish authorities, under UN sanctions against the former Yugoslavia, violated the property rights of an apparently innocent third party, the Turkish company which had chartered the plane. As the sanctions were implemented in the EU by an EC regulation, the Irish Supreme Court had referred the case to the ECJ, which had found that the Irish authorities had acted lawfully. But the Irish decision could still be, and was, challenged by the airline in Strasbourg.

There the European Court of Human Rights reached what may be seen as a remarkable decision of a general character. It examined the overall case-law of the ECJ in the field of observance of fundamental rights, and then set out in detail the judgment of the Court (and the Opinion of the Advocate General) in the Luxembourg proceedings in the *Bosphorus* case. On that basis, it held in effect that, given the scrutiny by the ECJ of Community measures for compliance with human rights, it was, and would remain, unnecessary, where such scrutiny had taken place, for the Strasbourg Court to conduct its own review. There are, of course, important qualifications in the Strasbourg judgment. Nevertheless, it provides extraordinary testimony on two points: first, the care which the ECJ has taken to accommodate human rights concerns; secondly, the willingness of the Strasbourg Court, for its part, to recognise the special features of the EU legal order.

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<sup>15</sup>European Court of Human Rights, judgment of 30 June 2005.

**Concluding remarks**

I will keep my concluding remarks brief. Courts today are extraordinarily powerful. They take, in many and increasing fields, decisions which are effectively often irreversible. This applies even more in some respects, within their fields of competence, to the European courts – especially the European Court of Justice and the European Court of Human Rights. Overall this can be a valuable method of taking decisions, especially where the Courts can forge common values, from which every national system can in some respects benefit. It can be criticised as undemocratic, but a little reflection shows the unreality of a truly democratic process. Nevertheless it is essential that the Courts retain, speaking very broadly, the approval or at least the acceptance of informed public opinion. Not the approval of the tabloid press, at one extreme, or indeed the approval of professors of law, at the other, for such approval is unattainable.

The power of the courts carries with it a heavy responsibility. Judicial power also can be abused, even if the consequences are less drastic for the citizen than other abuses of power. Yet in some areas it is right that the courts should be bold. They should be bold in exercising, and if necessary extending, powers of judicial review, even if this requires a very generous interpretation of their jurisdiction. So in the context of the EU they should control rigorously any excess of power by the political institutions. But where the political institutions do have competence to act, they must also have any necessary implied powers – any powers needed to exercise their competence realistically. That is perhaps the most important line which the ECJ has to draw. As the Union becomes more powerful, it becomes all the more important that it be correctly drawn.

Similar considerations apply to human rights. The ECJ has developed a truly impressive case-law, unsupported in the early years by the Treaty. But the Court seems occasionally to have been tempted in some recent cases to go too far: to see human rights issues where they are not always visible to others, and where the issues could adequately be resolved on the basis of EU law. And it should not be lost to sight that, where human rights are invoked, they are rarely absolute: the appropriate balance has to be found with the public interest.

Overall however, there is no doubt that the European Union presents a truly historic example, a unique example, of an organisation based on the rule of law. The EU has many faults; there is no need for me to enumerate them, because they are fully exposed in the media, and some of the stories are true. But overall: not only has Europe, in the shape of the European Union, enjoyed a remarkable record of peace, of prosperity, of social harmony, of environmental progress, and of many other achievements: it can also claim to be uniquely based on the rule of law.

**Francis G. Jacobs**



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