Forty years of EU law in the United Kingdom and Ireland
by Dr. John Temple Lang

Notes for the Edinburgh Conference: Panel on Europe in Legal Practice

The national courts are acting as Community courts of general jurisdiction.

It will naturally take time for all of us to be initiated in the formidable principles of constitutionalism.

The EEC Treaty ... constitutes the constitutional charter of a Community based on the rule of law.

So massive was the struggle to found the Roman people
Vergil, Aeniad i. 33.

In dhiaidh a cheile a thógtar na caisléain (castles are built by degrees).
Irish saying.

In my opinion the counsel of fools is all the more dangerous the more of them there are.
Laxdaela Saga, ch. 31

Abstract

The EU was intended to do something never done before, to create a community on
the basis of a treaty that would turn into a constitution. The basic building blocks were the
“Community Method” of legislating and the European Court of Justice judgment in Van

1  Cleary Gottlieb Steen & Hamilton LLP, Brussels: Professor, Trinity College Dublin: Senior Visiting Research Fellow, Oxford.
Gend en Loos², making it clear that national courts have responsibility for applying EU law. Drawing on the Treaties and the case-law of national courts, the judgments of the European Court of Justice have successfully built up a whole new kind of legal system. EU law is not perfect, and it is still a work in progress, but it is now one of the great legal systems of the world.

Since 1970 there have been very many developments in Europe and within the UK, with enormous cumulative effects for law and for many lawyers. The single most important development is that questions of EU law can arise in any national court, and can be referred directly to the ECJ. Every national judge is now a European Union law judge. We have more judicial dialogue between national and European Courts than exists between courts anywhere else in the world. There is now a large volume of EU case law on a wide variety of subjects.

The practice of law has become much more international. Lawyers and their clients seek each other out across frontiers. Law students study outside their home countries, as ERASMUS students or as post-graduates. Many lawyers have a working knowledge and understanding of EU law. University law teachers need to adapt fully to the more competitive and more international environment for young lawyers. But the legal profession is still organised on an essentially national basis.

There is still much popular ignorance and prejudice against the EU, especially in England. University law teachers have a responsibility to understand, to explain, and to defend EU law. They should not allow young lawyers to be prejudiced against EU law. The UK is drifting into a serious mistake through ignorance and prejudice. It should not be left to Americans to point this out.

Three Questions

What has the EU done?

What has changed in EU law for UK and Irish practitioners in the 40 years since 1973?

What should we be doing now?

What has the EU done?

The EU was a very rare thing, a genuinely new political invention. The EU was intended to do something never done before, to create a community, the exact nature of which was not defined, made up of States with very different traditions (and so with none of the advantages of the first thirteen States of the USA), to guarantee peace and prosperity in Europe. That was to be done incrementally, according to Jean Monnet’s insight. Nobody had ever previously written a treaty that was intended to turn into a constitution. We must recognise the originality, the greatness of the vision of lawyers like Michel Gaudet and Pierre Pescatore. Of course the EU had to legislate. But the EU legal order, the basic principles and constitutional structure, was completed by ECJ, just as Marbury v Madison was one of the corner stones of the US Constitution. The EU was built “on the shoulders of giants”. We should recognise the wisdom of the steps taken, the foundation stones: the “Community Method” of legislating while safeguarding minority interests, based on the Commission’s duty to make proposals in the interests of all; Van Gend en Loos, confirming that EU law rules are directly applicable, leading to the duty of national courts to give “effective” protection for rights given by EU law to individuals, the duty for national courts


The Treaties were novel in many ways, not least because they set up a regime for controlling State owned enterprises and State Subsidies. This had never been done before.

“Community law is not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent”: Tridimas, The General Principles of EU Law (2nd ed., 2006) p.18. “It would be the height of folly – and self-defeating – to think that things never heretofore done can be accomplished without means never heretofore tried”: Francis Bacon, Novum Organum (1620) book 1, sec (vi).
of “loyal cooperation”, and exclusive competence of the EU in certain areas. The ECJ built a consistent, coherent and effective legal system, which works substantially as it was objectively intended to work. The ECJ made national courts responsible for applying EU law. Every national court, in its own sphere, is now a European Union law court of general jurisdiction.

Key features of the EU legal order are judicial control of EU legislation and judicial review of all administrative decisions. We take these for granted now, but when the first Treaties come into force they were unfamiliar ideas in some States.

All this was done without anything corresponding to the Federalist Papers in the United States. This lack of an authoritative discussion and explanation was probably unfortunate. We have to make up for it. We miss Madison and Hamilton.

An incremental, step by step, approach was deliberately chosen (Monnet’s “functionalism”). This was quite different from the US Constitution. Europe has been in a continuous state of development. During those forty years, EU law has come to maturity, in a remarkably short time. The ECJ compares well, if comparisons are useful, with ECtHR and with the US Supreme Court, especially bearing in mind the novelty of the EU vision, and the relatively high turnover of judges in the ECJ. It has been more consistent, and less influenced

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While Van Gend en Loos was very important, it was not “judicial activism”. What are now Articles 267 and 288 TFEU provided that national courts would interpret and apply rules of EU law and that Regulations would be directly applicable. So it was clear from the Treaty itself that some rules would be applicable in national courts. If Regulations, which could be adopted by qualified majority voting, could be directly applicable, a fortiori Treaty provisions, which had been adopted unanimously, could be also. It remained only to decide which provisions were directly applicable, and what the consequences were.

5 “...two essential features of the way in which the Court approaches its task. The first is its view that Community law is and ought to be systematic: That Community law is a system of law and not just an ad hoc collection of rules and diplomatic compromises written down in the treaties: ” Edward, The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice, in Miller and Zimmermann (eds.), The Civilian Tradition and Scots Law (1997, Duncker & Humblot, Berlin) 316-318.

6 When we read the Treaties we are not even reminded of Montesquieu or de Tocqueville.
by political fashions, than the US Supreme Court. The ECJ moved from relying largely on national case-law as its sources of authority (very rarely on public international law) to a point at which it can now rely largely on its own case-law, supplemented and sometimes corrected by the case-law of the European Court of Human Rights and the EFTA Court.

**The European Convention on Human Rights**

EU law was not the only important and entirely new legal invention influencing in Europe in the last 40 years. The ECHR came into force at much the same time as the first EC Treaty, and the ECtHR judgments have also steadily built up a large body of case law, cautiously, and without always making underlying principles explicit. ECHR is “unquestionably the most successful system for the international protection of human rights”.7

It is not sufficiently remembered in England that the Convention was drawn up primarily by Conservative lawyers, the most important of them being Sir David Maxwell Fyfe (later Lord Kilmuir), and that the European Convention was strongly supported by Churchill.8

EU law undoubtedly had its origins outside the UK. It is the biggest importation into UK law since Lord Mansfield in the eighteenth century. But the Convention on Human Rights originated largely in the United Kingdom.

The ECJ took an important step in the series of judgments confirming that human rights were part of EC law, and the EU took an important step in adopting the Charter of Fundamental Rights. National courts now have a responsibility for applying the Charter, though only when implementing of EU law.9

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8 For example, this is not mentioned in Roberts, A History of the English-Speaking Peoples since 1900 (Harper Collins / Weidenfeld & Nicholson).
Under the UK Human Rights Act 1998 the courts may make a declaration of inapplicability that has in practice (of course not in theory) much the same effect as a ruling of a UK court that UK legislation is inconsistent with EU law. In both cases an Act of Parliament may not be acted upon. There has been a constitutional innovation (if not a revolution). In Ireland, the European Convention on Human Rights Act 2003 adopts the same approach as the UK Act, although of course the higher Irish courts can declare an Act incompatible with the Irish Constitution as well as with EU law.

**What has changed for practising lawyers since 1970?**

A symbiosis

Symbiosis is now a better metaphor than Lord Denning’s tide flowing up the estuaries. EU law is influencing, mingling with and percolating into many fields of national law. In early London-Leiden meetings there was much discussion about whether EU law should be taught as one separate course, or should be part of the courses on company law etc. Now we take it for granted, I hope, that every national law course should include, as an integral part and seamlessly, whatever rules or principles of EU law are relevant. These must now include the Charter. It would be impossible and undesirable to keep them separate.

Examples from cases on the principle equal pay for men and women, the most important single principle of EU law: the principle of effective protection of rights given by EU law prevented an employer from penalising a female employee who had insisted on equal pay by giving her a bad reference when she left (*Coote v Granada*, 1998). It prevented the statute of limitation running when an employer had untruthfully told another woman that she was being paid as much as men (*Levez v Jennings (Harlow Pools)*). If you think that the second of these results is obvious and natural, please look at the majority judgment of the US Supreme Court in *Ledbetter v Goodyear* (2007), and the dissent of Justice Ginsberg in that case.12

12 The ruling of the majority was later reversed by Federal legislation.
What we have now is a continuing mingling, symbiosis, mutualism and co-evolution, of national and EU law, and of national and EU/EEA Courts.\textsuperscript{13} “The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”.\textsuperscript{14} This symbiosis is the principal source of some of the most important judgments of the Court of Justice. National courts are now accustomed to analysing ECJ judgments substantially as they analyse judgments of their own courts.

In contrast, the European Convention on Human Rights is more clearly separate from the national laws that must comply with it. Cases such as \textit{Robathin}\textsuperscript{15} in which the Court in Strasbourg suggests how national authorities should comply with the Convention, are less usual.

**New private organisations, information and activities\textsuperscript{16}**

What has happened is the effect of a great many developments that individually we take for granted, but which are worth listing because their cumulative effect is considerable, although it is much greater for some kinds of legal practice than for others:

- The College of Europe in Bruges and the European University Institute in Florence

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\textsuperscript{15} Robathin v Austria, judgment dated 3\textsuperscript{rd} July 2012, no. 30457/06.

- Biennial conferences of FIDE, the Fédération International pour le Droit européen; annual London/Leiden meetings, regular conferences of the Academy of European Law in Trier, numerous academic and even more numerous commercial conferences.

- Two annual conferences in New York at Fordham University, dealing respectively with EU Competition law and with intellectual property rights

- Annual conferences of the St Gallen International Competition Law Forum

- Visits of judges to ECJ, meetings of judges

- The activities of the Consultative Commission of European Bars and Law Societies (nothing like as influential as the English Law Society or the American Bar Association, and still some way even from having common rules of professional ethics for lawyers, e.g. on conflicts of interest, the duty not to mislead public authorities, and the duty not to help the client to break the law).17

- Numerous Monnet and other Professors of EU law, journals, university courses (including “law and language” courses), compulsory professional courses, ERASMUS programmes. Nationals of one State become professors in others. In the EU, students of “social sciences and business and law” make up the biggest category of students doing an ERASMUS period abroad, 34.6% in 2010-2011. (There are unfortunately no separate statistics for law students). Neither the UK nor Ireland is among the five Member States that send the most students abroad18


- A vast volume of legal writing, books and articles, in many languages, some excellent, some descriptive, some poor, some ephemeral and not peer reviewed. Increased numbers of Festschriften for judges as well as professors, and many “named” public lectures: Hamlyn, Denning, Mann, Lasok, MacDermott, Fletcher, Walsh, Lauterpacht. There are comprehensive commentaries on the Treaties, in various languages.

- The internet and the enormous benefit of being able to read judgments from courts everywhere (plus its use for teaching). But we still need a comprehensive computerised database of all articles and papers on EU law, including conference papers and papers in Festschriften. Publishers are still not taking advantage of the internet to speed up publication.

- The Association of Competition Law Judges, a specialised but important group.

**Official activities**

- Above all, EU law questions arising before national courts (unlike ECHR, until recently) including lower courts, and being referred to the ECJ under Article 267. “It is through Article [267] that the great “constitutional” cases came before the Court”. Many of the most important questions of EU law were first raised by national judges, not by the ECJ.

A significant number of the most important judgments were given in cases referred to the ECJ by courts in the United Kingdom:

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19 There are a number of services which are based on the internet and which greatly facilitate legal research, of course not only on EU law.

20 Lane, Article 234: a Few Rough Edges still, in Haskins and Robinson (eds.) A True European: Essays for Judge David Edward (Hart, 2003) 327. Lane went on “This constitutionalisation of a Community judiciary .... has met with astonishing success.... Except for an extended spat with the French Conseil d'Etat, now resolved, it has... won the consistent acquiescence and support of the high courts”. Tridimas, The General Principles of EU Law (2nd ed., 2006) at p.556 writes “There is little doubt that the success of the ECJ in constructing the edifice of European law and attaining the constitutionalizing of the Treaties owes much to the approval, encouragement and cooperation of national courts”. See Slaughter, Stone Sweet & Weiler (eds.), The European Courts and National Courts: Doctrine and Jurisprudence (Hart, 1998) p.306.

- National judges are appointed to ECJ, then they come back to national courts. So do their legal secretaries.

- The setting up of the European Economic Area and the EFTA Court.

- British and Irish judges and Advocates General in the ECJ and the General Court, by asking questions, have made oral hearings in Luxembourg more useful than they used to be (in spite of the fact that many lawyers have not adapted to this).

- Regular meetings of officials of Member States on a vast range of issues, pooling information and discussing experiences, notably in committees of the Council.

- The European Competition Network, of national competition authorities (generally considered to work well).

- Article 267 TFEU interventions by Member States, in cases referred to the ECJ by national courts.

21 The European Competition Network was set up when Reg 1/2003 came into force. 88% of all EU competition law decisions since then have been by national authorities: France adopted 90, Germany 84, Italy 88, Spain 73, The Netherlands 41. The UK adopted only 16 decisions. The Commission adopted 89.
- Freedom of establishment (movement) for lawyers throughout Europe.

- A recently increasing number of interventions by the Commission in national courts, in competition cases, on both substantive and institutional questions.\(^{22}\)

- Specialised competition law courts have been set up in various countries.

- Hearings by the European Union Committee of the House of Lords on legal issues.\(^{23}\)

- There is a tendency for national laws to imitate EU law on particular issues, even when there is no obligation to do so. Sometimes this is because EU law requires “effective” protection to be given to rights under EU law, and that protection must be ensured by national courts in all Member States.\(^{24}\) Sometimes it is merely because EU law provides a reasonable answer to a question which has not been answered by national courts. In other cases EU law provides better protection than national law, and the national courts see no justification for maintaining inadequate or unsatisfactory remedies. In other cases it is simply inconvenient to have different rules for EU cases and for purely national cases, and the courts apply the EU solution to both. In cases under the European Convention on Human Rights, all national courts are required to ensure similar levels of protection. This entirely voluntary convergence is particularly noticeable in the sphere of competition law. There is, of course, an increasing convergence in financial regulation.

These developments are noticeable and important primarily for lawyers in national capitals. In future, European Union patent litigation may become concentrated on Germany and the UK.

\(^{22}\) See e.g. Case C-429/07, X. BV, [2009] E.C.R. I-____.


Implications for practicing lawyers

EU law is not, for most practitioners, a single area of law, but a series of specialized areas such as social security, value-added tax, State aid, mergers, restrictive agreements and abuse of dominance, agricultural law, fisheries law, telecommunications, energy, sex discrimination, environment, transport, trade law, intellectual property, etc. Few practitioners, if any, would claim to cover all these areas. In addition, there are the rapidly expanding areas of immigration and police cooperation.

Specialisation involves the risk that practitioners may be insufficiently aware of the broad picture: not merely the “General Principles” (proportionality, legal certainty, etc.) but also the institutional structure and rationale of the EU. Law teachers know them, but not all practitioners do.25

Lawyers who would not plead in a language not their own in a court in another State may find themselves pleading in their own language in the ECJ in Luxembourg. So they need to understand the differences between the way the ECJ handles procedure and precedents and the way in which their own courts handle them.26 They certainly need to be aware of the differences between the ECJ and their national courts, and of how the ECJ thinks.

Relatively few practising lawyers appear regularly before the European Courts: lawyers who frequently represent Member States, and a few lawyers who appear often in e.g.

25 Even the Commission is not always right on broad principles and institutional issues: Opinion 1/91, [1991] E.C.R. I-6079, on the first version of what ultimately became the European Economic Area Agreement, was an error of judgment by the Commission. Its recent failure to intervene in national courts when companies which were obliged to licence patents on reasonable and non-discriminatory terms sought injunctions against users was also a mistake: the Commission, by saying that it was contrary to EU law to seek injunctions in some circumstances, put itself unnecessarily in conflict with national courts. In “reverse payment” pharmaceutical patent cases the Commission seems to have greatly underestimated the difficulties caused by twenty seven national patent laws (plus Croatia, plus the three EEA States, plus the proposed Unitary Patent).

social welfare, tax, trade, competition and trademark cases, and lawyers representing the European Commission. There may be a gap opening between lawyers based in capital cities of Member States, who go regularly to Luxembourg, and lawyers in cities that are not national capitals. Since any lawyer in any court may have a case that could go to Luxembourg, probably there is a need for seminars on pleading in the EU Courts, and on preparing questions for national courts to ask.

Above all, there is a lot more case law to read. EU law is no longer, as it was fifty years ago, a sphere of a few lawyers with an interest but little experience. EU law has moved from being primarily a subject for professors to being primarily a subject for practitioners.27

To a considerable extent as a result of the efforts of British lawyers, the Court of Justice recognised that legal professional privilege is a principle of EU law.28 In *R. (Morgan Grenfell v Special Commissioner of Income Tax*, [2003] 1 AC 563 Lord Hoffmann said that legal professional privilege “is a fundamental human right long established in the common law”.

Written advocacy has always been the main part of procedure in the EU Courts, but it was only in 1995 that parties in English court cases were required to provide a written skeleton argument before the hearing of every action.29 This was a significant step towards the kind of primarily written procedures that are common in the rest of Europe, and away from the English tradition of oral argument. As written arguments are more important than oral advocacy in the EU Courts, they are more often made by solicitors without counsel (and in other Member States, by unified teams of lawyers).

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Implications for the Legal Profession

The legal profession in Europe is still organized on a purely national basis\textsuperscript{30} and there is unfortunately no European profession in any meaningful sense. But the profession has become, for many lawyers, more international and more competitive, in several ways. Lawyers based in England have opportunities to attract clients in other Member States, and find themselves in competition with law firms and lawyers of other nationalities based in Belgium, Germany, France, the Netherlands, and elsewhere. In effect, today English lawyers have one million potential competitors all over Europe. Some originally English law firms have merged with firms in Germany and the Netherlands, or have set up branch offices in other countries. Many US law firms have set up in Europe. One or two other law firms have deliberately selected, recruited and trained the best young lawyers from all over Europe and elsewhere, irrespective of nationality, and have offices in selected cities in other countries where they have the most business. The effect of all this, for the very best young lawyers, is that the profession has become very much more competitive, and that standards are extremely high.\textsuperscript{31} Lawyers are now allowed to advertise, and they find reasons to approach potential clients. Lawyers change law firms more often than they used to. A gap is opening between the best lawyers and the rest. Unfortunately, there are not enough legal jobs for all the young lawyers.

The combination of increasing economic pressure and lack of an effective Europe-wide system of ethics and discipline for lawyers is undesirable. But lawyers, preferring self-regulation, would oppose efforts to adopt or impose a more effective or more harmonised system. They were extremely reluctant to accept even the modest directive on freedom of establishment for lawyers.\textsuperscript{32}


\textsuperscript{31} Temple Lang, What should a law degree in Ireland be designed to do today? 34 Dublin University Law Journal (2011) 1-22.

Law practice is more international because, among other reasons, so many countries all over the world have adopted competition laws that mergers must be notified and leniency applications considered in many States.

The legal professions in the UK and Ireland are also becoming more competitive for other, domestic, reasons.

The increasing competition among European lawyers is illustrated by the growth of annual lawyers’ directories providing assessments of the expertise of lawyers and law firms.

Much of this development is the result of EU directives on freedom of establishment and freedom of services for lawyers. Some of it is due to young lawyers doing ERASMUS periods or post-graduate studies outside their own countries. Other young lawyers have joined the European Commission, and some have left it again to go into private practice in a way that used to be commoner in the USA. Many young lawyers consider working as lawyers outside their own country. You should prepare them for this. In Brussels there are many small branch offices of law firms based in England, Germany, Spain, Sweden, France, Norway and even next door in the Netherlands. There are 147 non-Belgian lawyers registered in Brussels with the Brussels Bars.33

Some of this development is due to economics. Economic integration leads to mergers, and big mergers must be notified to the Commission. Companies doing business all over Europe may need advice on many States’ laws. Finance has become international, more and more sales are made on-line. Lawyers from all over Europe deal regularly with the Commission in merger, State aid and other competition cases. Price fixing agreements usually apply in several countries, and involve each country’s laws. The competition fines imposed by the Commission are now routinely in millions of Euros. Naturally, there is more money for lawyers to defend their clients’ interests (especially when criminal penalties are possible). Clients routinely ask several law firms of different Member States to tender for specific tasks, and to say what they will charge. Big companies try to get the very best lawyers. E-mails mean that legal advice is demanded, and must be given, much more quickly. Practising lawyers need to be aware of legislation of other countries on e.g. money-laundering and corruption.

At least partly due to the effects of EU law, companies now seek legal advice at an earlier stage in deciding their conduct than they used to. They seek strategic advice, and are not simply reacting defensively when trouble starts. This involves lawyers more in the policy-forming stages. In addition, many more companies now have in-house legal departments, although the advice of those departments is not protected by legal privilege. In-house lawyers have become very important clients.

33 There are now a variety of ways in which young lawyers can use a qualification in one jurisdiction to obtain a qualification in another, which would otherwise have taken longer or been more difficult or expensive. Whether lawyers who use some of these indirect routes are as well trained as those who do not is open to doubt.
All this means that lawyers of one nationality or tradition have to work closely with lawyers of another. To do so efficiently and effectively they each need to know something about the other’s practices and ethics. Legal arguments made before the significance of EU rules were fully understood may need to be modified or abandoned. Arguments that seemed strong in a national court may seem weak or in need of revision before the ECJ. Greater flexibility is needed than would be necessary in a purely domestic case. Pleading in the ECJ, the advocate has to convince judges with backgrounds that differ from one another, as well as being different from the advocate’s own.

An increasing number of young European lawyers have done a post-graduate law degree in the USA. This is a significant influence, especially if they have also worked in US law firms. US universities were taking an active interest in European law since the Communities (as they were then) were set up in 1958. US lawyers saw the similarities between European and US law before many European lawyers did, even European lawyers in federal countries such as Germany. In 1960 Eric Stein and Peter Hay in the University of Michigan edited two volumes on the emerging law of the Communities. In 1966 Andre Donner, President of the ECJ from 1958 to 1964, gave the Rosenthal Lectures in Chicago on The Role of the Lawyer in the European Communities.34

Because more people are living outside their country of origin, and because private international law is developing, many more lawyers who would not consider their practice to be international are having to deal with private international law issues such as enforcement of foreign judgments, houses and apartments in other jurisdictions, double taxation, and family law questions. Bankrupts are moving to the UK to try to benefit from the short bankruptcy periods under UK bankruptcy law. Claimants may need to decide in which Member State it would be most advantageous to make their claims. Forum shopping requires a knowledge of both procedure and substantive law in other jurisdictions.35

35 “Rome I” on the law applicable to contractual disputes Reg. 593/2008, and “Rome II” Regulation 864/2007 on the law applicable to non-contractual obligations, are likely to affect every lawyer in Europe. See also Reg. 2201/2003 on jurisdiction and enforcement of judgments in matrimonial matters and Reg. 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

For an example of what may be a choice of procedures on EU law issues (Article 258 or Article 267) see Temple Lang, The Duty of National Courts to Provide Access to Justice in...
Common law lawyers should be aware of the different atmosphere in a legal system in which the judgments of three of the European Courts (ECJ, EFTA Court, General Court) are always collective judgments, and there are no concurring or dissenting judgments. (Concurring and dissenting judgments are allowed in the European Court of Human Rights and in the International Court of Justice). This means, among other things, that the personalities of Advocates General are better known than the personalities of most of the judges in those Courts (with exceptions such as Pierre Pescatore, David Edward, Carl Baudenbacher and Koen Lenaerts, because of their extra-judicial writings and activities). This contrast is greater than it would have seemed forty years ago, before British judges such as Lord Bingham were writing so extensively and so well.

National judges now need to decide issues of EC law as and when they arise. They may also be obliged to raise some questions of EU law on their own initiative, in particular the overriding rules described as “public policy”. They may be called on to consider more economic issues than they are accustomed to, and this has led in practice to specialized courts for e.g. competition cases.

UK judges now have jurisdiction to declare national measures contrary to EU law and to the Human Rights Act. These powers involve greater responsibilities, and more controversy, and make judges even more important than they were.

Nominations for judges of the European Court of Justice and the General Court are now screened by a committee or panel under Article 255 TFEU. This has proved to be useful and important, and there should be an equally serious assessment of judges nominated to the European Court of Human Rights.

For the judges in the two EU Courts, the workload has greatly increased, and they have too little time to reflect on important issues. The ECJ received 404 new requests for the EEA, in EFTA Court (ed.), Judicial Protection in the European Economic Area (2012, German Law Publishers, Stuttgart) 100-135 at 107-109.

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rulings under Article 267 in 2012, and 136 appeals from the General Court. The turnover of judges is undesirably high and this has a number of inconvenient consequences. The ECJ has no control over the number of cases submitted to it, and has had to devise several procedures for disposing of cases that do not need full consideration.

The ECtHR has a huge backlog of undecided cases.

**Influences and changes for lawyers**

Examples of influences and changes, with important cumulative effects:

1.1. Lawyers now have at least a verbal familiarity with General Principles of EU law: proportionality, legal certainty, legitimate expectations, the duty of loyal cooperation. These principles were derived from national laws, and are in return influencing national laws. They are both rules of interpretation and, on occasions, overriding rules. They form a new area of administrative law.

There are many more lawyers now who know some European law. (In 1970, very few UK lawyers knew any). A generation has grown up that has studied it. Is there a generation gap developing?

Overall this has led to a realisation that EU law is distinct both from national law of Member States and from public international law, and has its own ethos and logic. But UK lawyers were slow to study EU law, and I have the impression that even today many UK lawyers’ knowledge of EU law is rather superficial.

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37 Court of Justice of the EU, Annual Report 2012 pp.87 et seq.

38 By contrast, the turnover of judges in the EFTA Court is low, and the Court has benefited greatly from this.


Beck, The English Courts and the Application of Community Law, 12 Irish Journal of European Law (2005) 184-216 argues that the traditional reliance by English judges on counsel to cite all the relevant cases is an obstacle to the faithful application of an unfamiliar
1.2. Lawyers now realise that EU law points can arise in almost any area of law, and that they could, if they wish, ask any court to refer questions to ECJ.

1.3. “Judicial dialogue” now occurs regularly between national courts and ECJ, national courts and ECtHR, ECJ and ECtHR, EFTA Court and ECJ, General Court and ECtHR, EFTA Court and national courts. (Due to the accidents of European history, we now have four European Courts). We have more explicit judicial dialogue in Europe than anywhere else in the world.41 (Compare this with e.g. the views of Justice Scalia in the US Supreme Court, objecting to any attention being paid to courts outside the USA). This means that lawyers appearing before the ECJ must cite the judgments of the EFTA Court and the ECtHR.

1.4. Lawyers are now accustomed to reading ECJ judgments describing and analysing issues arising under other national legal systems. They know that they should look at the case-law of national courts in other Member States on questions of EU law.

Some lawyers at least are familiar with the idea that they should look at other national laws for precedents on EU issues, to “see how it is done” there. E.g. the Pfleiderer42 line of cases in different national courts, on disclosure to private claimants of applications for leniency in competition cases.

1.5. All this has made us less “national” in our outlook, given us a wider awareness.

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Now we can, if we choose, make comparisons with a large number of other European countries (I believe that David Cameron greatly admires Sweden) and these comparisons can be made on a reasonably objective basis, without having to learn all the other languages, due to EU publications reporting on all Member States.

All this should mean less ignorance and self-satisfaction.

Because I also come from a small jurisdiction, I think this is specially important, it offers a broader vision.

None of us lift up our eyes to the hills often enough, but we are at least led to lift them up to the horizon.

How much this was needed is illustrated by what a friend of mine in a British university told me some years ago. A colleague who had just agreed to teach private international law asked if it would be desirable to learn a second language!

1.6. Lord Bingham; especially his judgments in *Customs and Excise v Samex*, [1983] and *R. v International Stock Exchange ex p. Else*\(^43\), (explaining why the ECJ is best placed to decide questions of EU law), and There is a world elsewhere (Mann lecture 1991, also in Bingham, The Business of Judging, 2000).

1.7. Better knowledge of EU law should lead to better understanding

A few years ago the Commission was ridiculed for proposing a limit on the noise made by lawnmowers. But this was needed because a noise limit was a (German) protectionist measure: “noisy” British lawnmowers could not be sold in Germany. A complaint had been made by the British Lawnmower Manufacturers Association (a practical body of men, I take it).

1.8. Lawyers have become accustomed to looking at the economic effects of legal measures, and dealing with economic evidence. Examples include determining:

\[^43\] [1993] Q.B. 534 at 545 C – G.
- if the formal recipient of State aid is the real beneficiary\textsuperscript{44}
- if an apparently non-discriminatory measure discriminates in practice\textsuperscript{45}
- if restrictions on when or on what terms goods may be sold restrict imports\textsuperscript{46}
- if refusing a favourable reference to a woman who insisted on equal pay is discrimination\textsuperscript{47}
- if an apparently general measure is a selective State aid\textsuperscript{48}
- if indirect discrimination is occurring\textsuperscript{49}

and it is often necessary to decide whether there is a sufficient effect on trade between Member States.

1.9. Sir Patrick Neill (as he then was) in a book in honour of Professor Wade\textsuperscript{50} analysed the case law of the ECJ and the ECtHR and concluded that the influence of those Courts may be leading to a general duty under English law to give reasons for administrative decisions. That was in 1998, and I believe the process has gone further since then. (In EU law it is based on the Treaty, under ECHR it is based on case law).\textsuperscript{51}

Public law in the UK (not only in connection with the EU) has changed greatly since 1970.

1.10. The ECJ has built up a large case law on what is now Article 4(3) (ex-Article 10), the duty of national authorities and the Commission to cooperate to achieve EU objectives, and to ensure that it works as it was objectively intended to work. This case law is now so extensive that it is not usually thought of as a single line of cases. This Article has led to the important principles that national courts must give effective protection to rights given by EU law, the duty to give direct effect to directives against the State, and the duty to interpret national legislation as far as possible so as to comply with EU law. Simmenthal shows that Article 4(3) confers powers as well as duties on national courts.

1.11. The scope of EU law has broadened greatly, to include international relations, economic and monetary union, and Police and Judicial Cooperation (Justice, Liberty and Security). The volume of case law in these spheres will greatly increase in future. These are new and important areas of EU law.

1.12. It seems likely that more and more human rights cases in the sphere of EU law will be decided by the European Court of Justice under the Charter, rather than by the Court of Human rights in Strasbourg under the Convention, especially in the


53 Bay Larsen, From Palma de Mallorca – via Schengen – to Luxembourg: some notes on the case-law of the European Court of Justice in the field of police and judicial cooperation in criminal matters, in Baudenbacher and others (eds.), Liber Amicorum in honour of Bo Vesterdorf (2007 Bruylant) 723-744. “Under Article 10 EC [now Art. 4(3) TEU] relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith ... That principle is of general application and is especially binding in the area” of justice and home affairs: Case T-228/02, Organization des Modjahedines, [2006] E.C.R. II-4665. Decisions of Eurojust, Europol and OLAF (the antifraud office) are open to judicial review.

54 “...the European Union’s Court of Justice in Luxembourg will have a considerable opportunity to develop a larger human rights role for itself vis-à-vis the Union and its Member States”: Harris, O’Boyle &Warbrick, Law of the European Convention on Human Rights (2nd ed., 2009 page 36. Temple Lang, Precedents and Judicial Dialogue in European
spheres of asylum, immigration and criminal law. The ECJ can decide cases more quickly than ECtHR. The Charter is now an integral part of EU law, and will be applied as such. Lawyers find it easier to bring human rights cases in national courts than in Strasbourg. The ECJ is required to interpret the Charter so as to provide at least as much protection for fundamental rights as is given by the Convention, so that in the sphere of EU law there is never any incentive to go to the ECtHR rather than the ECJ. It seems unlikely that the ECtHR will disagree with the ECJ.

1.13. The enlargement of the EU from nine to twenty eight States (plus the three States in the EEA), and the 17 country Eurozone, has greatly increased the complexity of EU law.

1.14. Repeatedly the Court adopted important judgments that established or confirmed “constitutional” principles that were, at most, implicit in the Treaties but not stated expressly in them. None of this long series of important judgments has ever been reversed by an amendment of the Treaties, and some have led to explicit statements being included in the Treaties when they were revised. There has been, in effect, a continuing vote of confidence by the Member States in the Court and the reasonableness of its judgments. This has been so even when, as in the case of the Simmenthal judgment, there was controversy over precisely what it decided, and in the case of Francovich (because civil servants feared having to pay compensation).

The controversy over whether directives could have direct effects against the State finally died down.

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55 Croatia is the twenty-eighth EU State. Enlargement has been the EU’s most successful policy.


1.15. Some features of the EU are being copied cautiously in regional economic integration organisations in Asia, Africa, Latin America and the Caribbean. EU competition law is being copied in many countries. It is easier to copy than US antitrust law. The International Competition Network has been set up.

**Prejudice and ignorance**

1.16. Is there less prejudice against the EU than there used to be?

Even in the 1960s, before the UK joined, there was prejudice in England against the EC (as it then was), and the implications of joining were minimised. This was never the case in Ireland.

Clearly, there is **more** popular prejudice now in England than there was, prompted by the continuous propaganda of the malevolent Rupert Murdoch and Conrad Black press, and probably by the same kind of right wing US money that has been noticed in Ireland in recent EU-related votes. England has been isolationist and dismissive of foreigners since the Reformation. 58 There is, I think, **less** prejudice against the EU now among most of the better educated people in Britain. I hope there is less criticism like that of Margaret Thatcher and of Sir Patrick Neill, as he then was. 59 There is less prejudice against “Euro defences”.

But there is still plenty of prejudice, and not only in the Conservative Party. The EU is thought “mad, bad and dangerous to know”. A couple of years ago I was...

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“If we imagine we can be seriously, accurately informed about what is happening in Europe or Asia by reading a British daily paper, we are suffering a dangerous delusion”: Timothy Garton Ash, Free World (Penguin 2005), p 204.


told that among public figures only Christopher Patten, Kenneth Clarke, Christopher Haskins, Niall Fitzgerald, and Peter Sutherland would speak in favour of EU in the UK. At one point the Institute of European Affairs in Dublin was regarded as the only English-language think-tank which was in favour of “Europe”.

Widespread aversion to EU law leads to misunderstanding, and to underestimating its importance and its practical and intellectual strength.

Ireland and Scotland are different, among other reasons because Ireland has a written constitution with judicial review, and because Irish voters are well informed about EU issues as a result of a series of referenda. Scots lawyers, because they deal with two legal systems, practice comparative law, as M. Jourdain spoke prose, and Scots are not isolationist. “The Scottish legal system is not, and has never claimed to be, self-sufficient... So their lawyers are necessarily, to some extent, comparative lawyers. This creates a habit of mind which may, for want of a better word, be called “international”.”60 Northern Ireland has been otherwise preoccupied. There is no similar prejudice against the EU in any other country, although in Norway there is reluctance to refer questions of EEA law to the EFTA Court.

So what should we all be doing now?

2.1. We should make sure that we know what we are talking about and not e.g. accuse ECJ of “judicial activism” incorrectly. Sturgeon (2009) is activism, but to cure a drafting defect in a poorly drafted Regulation, and to avoid a mess. But the judgments saying that EU law includes human rights principles were not activism: Member States were bound by ECHR, so the EU had to be also.61


61 Although France ratified the Convention only in 1974, and recognised the right of individual petition only in 1981.

We should understand how strange and ineffective the EU would be if the Court of Justice had decided differently the important cases on the relationship between EU law and national law. Would we prefer if the Court had decided that rules of EU law had no direct effects
2.2. We should make sure we understand the reasons for features of EU law. The Commission has exclusive right to propose EU measures, to protect minorities from majority voting (a mediation theory device, not previously a political invention). In principle Commission proposals could be amended only by unanimity. The less homogenous Europe is, the more this role is needed. But it does mean that the European Parliament has no power to initiate legislation, a fact that clearly needs to be explained. This is the “Community method”, as distinct from intergovernmentalism, and is an essential feature of the institutional balance of the EU as it was originally conceived. Understanding is a prerequisite for intelligent assessment and for constructive action.

2.3. We should apply the same ethical standards in EU as in UK. One English professor made a habit of getting pleadings in EU cases and publishing the arguments (over the professor’s own name) while the cases were sub judice. I do not think the professor would have done this at home.

2.4. All university law teachers should consider whether our courses and the ways we are teaching them are sufficiently adapted to the more competitive and more international world. The first aim should be to make the students understand that EU law is for all lawyers, not only for a few specialists, and that important

(Van Gend & Loos), or that national law rules could prevail over EU law (Costa v. ENEL), or that Member States need not pay compensation when they infringe EU law and cause loss (Francovich), or that fundamental rights were not part of EU law, and therefore had to be protected by national courts, or that national courts do not need to give “effective” protection to rights given by EU law? What if the Court had said that a Member State could take advantage, in its own courts, of its failure to implement a directive (Marshall v Southampton Health Authority)? In what way would it be better if lower courts were not allowed to refer questions to Luxembourg (Cartesio, 2008) so that time and money would be spent on appeals before the ECJ could answer the question? Other important “constitutional” cases are ERTA [1971], Simmenthal [1978], Les Verts [1986], Foto – Frost [1987], Factortame II [1990], Opinion 2/94 on Accession to the ECHR [1996] E.C.R. I-1759: Organisation des Modjahedines [2006] E.C.R II-4665, Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention [2006] E.C.R. I-1145; Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakat [2008] E.C.R. I-6351: Case T-85/09, Kadi III [2010] E.C.R. II-5177: Cases C-188 and 189/10, Melki and Abdeli [2010] E.C.R. I-5667: Case C-617/10, Åklagaren v Fransson, [2013] E.C.R. I-____, paras 43-49: Joined Cases C-411/10 and C-493/10, Secretary of State for Home Department, [2011] E.C.R. I-____, 21st December 2011 and Opinion 1/09 on the Proposed European and Community Patents Court (2011). These judgments have not been reversed by Treaty amendments.

questions of EU law can arise anywhere at any time. This means making students aware when EU law influences national law. If you are not doing this, you are not doing your job. You cannot teach every aspect of EU law, but you need to make students aware of situations in which EU law is likely to apply. You may need to broaden the scope of what you are teaching, as if every student would go on an ERASMUS year, and needed to prepare for it. Even if they stay at home (indeed, in particular if they stay at home), they will benefit from a wider vision and a greater understanding. British students cannot afford to be less well educated and trained than lawyers in other EU States. The second aim should be to teach students more of the techniques and practices that they are now too often left to learn after they have finished their courses. We have been turning out incompletely educated lawyers, and we have been producing lawyers who are not well trained for the non-legal jobs that many of them will ultimately do.

2.5. We should recognize the great achievement of the Court of Justice. Starting with nothing but a framework Treaty, and using principles derived from national laws, the Court has successfully built up a whole new legal system, with great potential for contributing to human prosperity and cooperation. EU law is now...

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63 For example, national courts are obliged as far as possible to interpret national legislation so that it is consistent with EU law: Case C-397/01, Pfeiffer, [2004] E.C.R. I-8835: Case C-212/04, Adeneler v Ellenikos Organismos Galaktos, [2006] E.C.R. I-6057. So lawyers need to know when EU law applies even when they are interpreting national legislation. Member States must not rely on an interpretation of secondary legislation which would be in conflict with fundamental rights or with other general principles of EU law: Joined Cases C-411/10 and C-493/10, Secretary of State for Home Department, [2011] E.C.R. I-____, 21st December 2011. National courts must give “effective” protection to rights granted or guaranteed by EU law: e.g. Case C-185/97, Coote v Grenada, [1998] E.C.R. I-5199, paras.21-24. Case C-62/00, Marks & Spencer, [2002] E.C.R. I-6325, para.36: Craig, EU Administrative Law (2006) ch.21. EU Regulations such as Reg. 593/2008 on the law applicable to contractual disputes and Regs. 44/2001 and 2201/2003 on enforcement of judgments can apply even to stay-at-home solicitors, and they will notice the different style of legislative drafting.

64 “No doubt can exist that the Member States intended to vest the Community with a Court to which all means of law-finding should be open which have been constructed over centuries in a legal tradition and culture common to the whole of Europe”: Bundesverfassungsgericht, BVEnf GE 75, 223 at 243, translated and cited by Everling, on the Judge-made Law of the European Community’s Courts, in O’Keeffe and Barasso (eds.), Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn of Hadley vol. 1 (2000 Kluwer) 29-44 at 36. Sutherland, Joining the Threads: the Influences Creating a European Union, in Curtin & O’Keeffe (eds.), Constitutional Adjudication in European Community and National Law (Butterworths 1992) 11 wrote “In constitutional terms what has been achieved during those forty years has been quite remarkable... the treaties have gradually assumed a constitutional character largely through the interpretative process to which they have been subjected”.

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one of the great legal systems of the world. After 1500 years, we are building a common law for Europe.65

Our responsibilities

2.6. All of us, law teachers and practising lawyers, have a responsibility to explain, educate, defend.66 Those of you who live in Britain need to be more “proactive”. Alan Dashwood once said he would write to correct every error of fact by the then Financial Times European law correspondent.

If you are not doing this, you are not carrying out your responsibilities. Remember, courts cannot easily defend themselves against even immoderate or absurd criticism. You are allowing young lawyers to become prejudiced against European law. I am told that attendance at conferences in England on EU law is declining because people are assuming that the UK will leave.

As law teachers, you cannot by yourselves provide the leadership and strategic vision that Europe had fifty years ago, and needs today. But you should be able to make sure that those who you know are no longer ignorant and prejudiced. As long as they remain so, they are unlikely to make a constructive contribution to anything.

2.7. But you should also look critically at the EU as it stands since the Lisbon Treaty. The original institutional balance has been altered. The influence of the Commission has been significantly reduced. The Commission has more powers, and less prestige. The powers of the European Parliament have increased greatly. The Community Method has been eroded. It is not clear that the result is


satisfactory\textsuperscript{67}, in particular because it is not clear that when there is qualified majority voting, the European Parliament can provide the safeguards for Member States in a minority that the Community Method was deliberately designed to ensure.

It is not in the interests of the UK to weaken the Commission. The UK should be trying to improve the EU, not only to obstruct it.

\begin{enumerate}
  \item There is no doubt that as the Eurozone becomes more integrated, the gap between the Eurozone States and the other EU Member States will widen. This is unfortunate, and we should do all we can to minimise its effects. If there were less prejudice in England against “Europe”, it would be easier for the UK authorities to make satisfactory arrangements with the Eurozone.
  \item These are your responsibilities, in the EU law sphere, because the UK is drifting towards a very serious mistake, through a combination of ignorance, prejudice, absence of leadership, and failure to speak out. Not enough has been said about this in recent years.
\end{enumerate}

In some respects, England has moved backwards. The country that drafted and promoted the European Convention in Human Rights in 1950 objected to the Charter, which is in almost the same terms, sixty years later. This is a great pity, because human rights are more important than consumers’ rights, and should have a greater appeal. Recently the UK’s policy in the EU has been primarily to obstruct, and not to improve.

Margaret Thatcher made anti-European prejudice seem respectable. In the House of Lords debate on 7\textsuperscript{th} June 1993 on the Maastricht Treaty she made an extraordinarily aggressive speech about the European Court of Justice.

It is shocking that it was only in 2013 that senior business people in the UK began to say that for the UK to leave the EU would be extraordinarily unwise.

A very distinguished US Professor, Anne-Marie Slaughter, has described Margaret Thatcher’s views of Europe, and the opinions of the present admirers of those views, as “deeply anachronistic and dangerous” and as “likely to leave Britain outside global power circles altogether”. She went on “should this part of Thatcher’s legacy triumph, she will have done her nation a disservice of millennial proportions”. 68

Why was it left to Americans (and to Australians, Japanese, Poles and Irish people) to say this? Why has it been left to President Obama to say that the UK would lose much of its influence in the world if it left the EU?

“Where there is no vision, the people perish” (Proverbs, ch. 29, v. 18). The New English Bible translation goes on “but a guardian of the law keeps them on the straight path”.

If UK left the EU, the UK would have to negotiate new trade agreements with every country in the world, and to do so without the bargaining power of the EU. So it would end up with less favourable terms. The UK would also lose almost all of its influence over the EU, its principal export market, and its natural ally. The UK would lose much of its importance and value to the USA. By being outside the euro and arguing about whether to leave the EU, the UK has already lost influence. Many Commission officials already assume that the UK will leave, whatever concessions might be given to it. The UK’s military contribution to NATO is not as essential as it was, so that source of influence is also reduced. (Norway and Switzerland have no significant influence over EU policy. Even if the UK joined the EEA, it would still have to negotiate all its trade agreements). It is impossible to see any way in which the UK would be better able to export to emerging markets if it were to leave the EU. Why is this not understood? Once said, it is obvious. The UK will not “find a role”, to use Dean Acheson’s phrase, by leaving the EU.

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68 Financial Times, 13th April 2014, “Thatcher’s legacy is Britain’s not-so-splendid isolation”.

In the House of Commons in 1990 Geoffrey Howe, announcing his resignation as Foreign Secretary, said “The Prime Minister’s perceived attitude towards Europe is running increasingly serious risks for future of our nation”.

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2.10. It seems likely that there will be a referendum in the UK. If you want to influence the result, you need to start now. If you want the British people to vote in ignorance, you need only do nothing.