

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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“IN EUROPE, HISTORY IS THE UNSEEN GUEST AT EVERY TABLE”

DAVID EDWARD*

As a distinguished Scottish journalist once observed, “In Europe, history is the unseen guest at every table.”¹

I will take history as my theme, though it is the history of events that happened during my own adult lifetime. History is not the less instructive because it is recent. Professor Christopher Andrew, in his history of MI5 (the British internal security agency), wrote about what he called the “historical attention span deficit disorder”:

“Short-termism has been the distinguishing intellectual vice of the late twentieth and early twenty-first centuries. For the first time in recorded history, there has been a widespread assumption that the experience of all previous generations is irrelevant to present policy. Institutions, like individuals, diminish their effectiveness if they fail to reflect on past successes and failures”²

The apparent suddenness of the British decision to leave the EU has focused attention on the search for *future* solutions. Explanations of the vote itself have concentrated mainly on the *current* state of UK politics with some sociological and psephological interest in the attitudes of neglected areas of the country. The Prime Minister, Theresa May, in her speech in Florence on 22 September 2017, suggested a historical explanation for Brexit:

“[P]erhaps because of our history and geography, the European Union never felt to us like an integral part of our national story in the way it does to so many elsewhere in Europe.”³

* Professor Emeritus, University of Edinburgh; Judge of the European Court of First Instance 1989–92, and of the European Court of Justice 1992–2004.

1. Allan Little, 2012 MacCormick Lecture at the Royal Society of Edinburgh <www.europarl.europa.eu/unitedkingdom/en/edinburgh-office/activities/older_activities/news_activities_2012/eu_budgetwithgeorgelyonmep/maccormickeuropean2012.html>, and, for a report, see <rse.mtcserver6.com/cms/files/events/reports/2012–2013/Neil_MacCormick_Lecture_2012.pdf>.

2. Christopher Andrew, *The Defence of the Realm: The Authorized History of MI5* (Allen Lane, 2009), pp. 848–49, and *Intelligence analysis needs to look backwards before looking forward*, at <www.historyandpolicy.org/policy-papers/papers/intelligence-analysis-needs-to-look-backwards-before-looking-forward>.

3. <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

Like many others, I found this a superficial observation,⁴ but it contains a grain of truth. To have a “national story” implies that there is a degree of emotional engagement on the part of the people who make up the “nation”. And whose “national story” is it anyway? – a complicated question in the UK. For many of those who voted “Remain”, the motive for doing so was economic rather than emotional. This may explain why some of them now accept Brexit as inevitable. Our “nation” remains deeply divided.

To take a longer view, I go back to the decade of the 1950s, when the first steps were taken towards the creation of what is now the European Union.

In the early 1950s, the British sense of Empire was still alive and vigorous: further European entanglements were not for us. I remember, during my national service in the Royal Navy in 1955, sailing into the Grand Harbour of Malta, drawn up in bell-bottom trousers on the upper deck of an aircraft carrier, while bands played, and salutes were paid to the Admirals whose flags flew on Fort Saint Angelo and sundry other ships and shore stations. The main purpose of our voyage was to transfer troops from Port Said to Cyprus in order to deal with the activities of General Grivas. That was still imperial Britain in action: both Malta and Cyprus were under British rule.

One year later, the humiliating end to the invasion of the Suez Canal was followed by a severe reduction in the ships and manpower of the Royal Navy. The battleship *Vanguard*, and various cruisers and destroyers that we had seen lying at anchor in Portsmouth Harbour, were sent to the breakers’ yards. Several of the regular officers, for whom a naval career had been assured since boyhood, were offered “voluntary retirement”. As a naval historian has put it, “Britain’s true place in the new world order was finally recognized”.⁵

So, I was conscious that the great days of the British Empire, on which I had been fed as a schoolboy, were over. But the imperial dream lives on in some of the Brexit rhetoric. Even for those who would disown such attitudes, it is still the Empire, far more than the EU, that “feels like part of our national story”. And the sense of Britain’s imperial past sustains some of the arguments about loss of sovereignty that arose in the Referendum debate. You cannot work day by day in the great Gothic Palace by the Thames without being tempted to such archaic fantasies.

The creation of EFTA at the end of the 1950s, in which Britain played a leading role, sought to mirror the free trade aspects of the EEC without creating a customs union, still less the degree of social and political integration that the EEC Treaty required. Since EFTA did not create a customs union, Britain’s traditional trade with the countries of the Commonwealth

4. See my letter to *The Times* of 25 Sept. 2017.

5. John Roberts, *Safeguarding the Nation: The Story of the Modern Royal Navy* (Seaforth Publishing, 2009), Ch. 1.

could continue. Nevertheless, only fourteen months after the EFTA Treaty came into force, the Prime Minister, Harold Macmillan, announced to the House of Commons that the UK would apply to join the European Communities.⁶ Although the application to join was, of course, for economic reasons, that was not the main reason that Macmillan gave to the House of Commons. He said:

“This is a political as well as an economic issue. Although the Treaty of Rome is concerned with economic matters it has an important political objective, namely, to promote unity and stability in Europe which is so essential a factor in the struggle for freedom and progress throughout the world. In this modern world, the tendency towards larger groups of nations acting together in the common interest leads to greater unity and thus adds to our strength in the struggle for freedom. I believe that it is both our duty and our interest to contribute towards that strength by securing the closest possible unity within Europe.”⁷

The speech is a reminder of the serious instability of the world order at that time: the building of the Berlin Wall started less than a fortnight later. The speech also gives the lie to those who claim that our purpose in joining the EEC was purely economic and that we did not know that it would involve political integration. The message is as relevant today as it was then.

The UK’s application to join the EEC was followed by those of Denmark and Norway, while Ireland had earlier asked for negotiations.⁸ These applications were rebuffed by President de Gaulle. This was described, much later, by the French Foreign Minister, Couve de Murville, as *une sorte de trahison*.⁹ But Robert Marjolin, one of the French negotiators in 1956–1957, and then Vice-President of the Commission, confessed to a sense of relief:

“not that I was against British entry into the Community, but because I felt that the change in British thinking was not yet complete and also that the Six needed a few more years to finish what they had begun”.¹⁰

6. The three Communities (ECSC, EEC and Euratom) were still separate.

7. www.cvce.eu/content/publication/2002/9/3/a5c95873-aca0-4e9f-be93-53a36918041d/publishable_en.pdf.

8. For a history of the birth of EFTA and the applications to join the EEC, see Norberg and Johansson, “The History of the EEA Agreement and the first twenty years of its existence”, in Baudenbacher (Ed.) *The Handbook of EEA Law* (Springer, 2016), p. 3 et seq.

9. Christopher Audland, *Right Time Right Place* (The Memoir Club, 2004), p. 132.

10. Marjolin, *Architect of European Unity: Memoirs 1911–86* (Weidenfeld & Nicolson, 1989), p. 340, citing Miriam Camps, *Britain and the European Community 1955–1963* (Princeton University Press, 1964), for an analysis of the differences in British and European “thinking”.

In May 1967, the Labour Prime Minister, Harold Wilson, made a fresh application to join, which was vetoed by de Gaulle in November 1967. This application was more obviously motivated by economic considerations, given the serious deficits and sterling crises that resulted in devaluation of the pound sterling, also in November 1967. By that time, the fears for European security that had inspired Macmillan were less acute.

When the UK, led by Edward Heath, joined in 1973, the EEC had already been operational for fifteen years, and the end of the transitional period had come and gone. The consequence was that the UK was required to accept the substance of the *acquis communautaire*,¹¹ which it had had no part in creating. We had not shared in the relative prosperity and sense of solidarity that membership of the Community had brought to the original Six. The French policy of the “empty chair” had seriously dented that solidarity, but as Marjolin somewhat cynically observed:

“The risk of institutional paralysis in the EEC had become so great, at a time when Britain’s entry no longer presented the same threats as it did ten years earlier, that France rightly decided to agree this time.”¹²

Acceptance of the *acquis communautaire* faced us with serious problems of adaptation. The attitude of some Commission officials with whom we had to deal was not always conciliatory. When it was pointed out to the official in charge of the first Lawyers’ Services Directive, that the legal profession in Britain and Ireland was organized differently from the profession in the original Six, we were told “Well, you’ll just have to change”. Fortunately, attitudes changed sufficiently to achieve a compromise on that issue by 1977. However, the idea that the “European project” and the *acquis communautaire* are a template, into which the Member States and all they do must fit, lives on. I shall say more about this later.

The celebrations of Britain’s *joyeuse entrée* in 1973 were followed almost immediately by the first oil shock, the collapse of the Heath Government and Harold Wilson’s so-called renegotiation of the terms of entry. Although the subsequent referendum came out firmly in favour of continued membership, the economic conditions of the 1970s were not such as to engender affection for the Community as a safe harbour in which to ride out the economic storm: as Marjolin said, the legislative machinery of the Community was in semi-paralysis.

11. The Oxford English Dictionary traces this expression back to “1966 or earlier”, observing that it is “not dated in dictionaries of French”.

12. Marjolin, op. cit. *supra* note 10, p. 358.

Progress in realizing the common market, long after the end of the transitional period, was left largely to the Court of Justice, notably in *Reyners*, *van Binsbergen* and *Thieffry* for free movement in establishment and services, and in *Cassis de Dijon* for free movement of goods.¹³ British lawyers played an active part in these developments. Henry Schermers once said to me that, whereas German lawyers came to Community law through constitutional law, and French lawyers came through international law, British lawyers came to it through comparative law. This explained why British lawyers concentrated particularly on the law of the Common Market and contributed so much to its development.

But this did not touch the minds of the general public. They were much more impressed by Mrs Thatcher's cry, "I want my money back". The eventual concession of the UK budget rebate was an implicit recognition that the financial terms of UK entry had not been realistic or fair.

Once the budget issue had been resolved, the high point of British relations with the EC came in the mid-1980s, with the Single European Act; the development of the 1992 Programme (largely the work of the British Commissioner, Lord Cockfield); and the integration into the Treaty framework of Political Cooperation (PoCo), which the British had played a significant part in developing during the 1970s and early 1980s, adding a much-needed Atlanticist dimension. However, no sooner was the Single European Act in place and the 1992 Programme under way than ideological warfare broke out between Jacques Delors, the President of the Commission, and Margaret Thatcher – Delors urging the "federalist" vision of a European Union; Thatcher in her Bruges speech setting out a "Gaullist" vision of a Community of States. Delors was most specific in an interview with French television:

"My objective is that before the end of the millennium Europe should have a true federation. The Commission should become a political executive which can define essential common interests ... responsible before the European Parliament and before the nation-states represented how you will, by the European Council or by a second chamber of national parliaments."¹⁴

Mrs Thatcher responded in her "No! No! No!" outburst in the House of Commons,¹⁵ which led, directly or indirectly, to her defenestration, and to a

13. Case 2/74, *Reyners*, EU:C:1974:68; Case 33/74, *Van Binsbergen*, EU:C:1974:131; Case 71/76, *Thieffry* EU:C:1977:65; Case 120/78, *Cassis de Dijon*, EU:C:1979:42.

14. Remarks on French television. (23 Jan. 1990), quoted in Charles Grant, *Delors – Inside the House that Jacques Built* (Nicholas Brearley, 1994), p. 135.

15. 30 Oct. 1990.

never-ending sense of betrayal on her part and on the part of those who purport to be her disciples. “Europe” thus became an emotional issue, symbolizing a deep ideological divide within the Conservative Party, exacerbated by influential sections of the British media, especially the *Daily Mail* and, from time to time, the *Daily Telegraph* and the *Sun*.

The atmosphere became so poisonous during the 1990s (when the ECJ was pilloried for supporting equal rights for women and protection of workers!) that I found it unwise, in some social circles, to admit what my job was. We have never been able to put all this behind us.

That is a very superficial account of the UK’s relationship with the EU, but it may help to explain the lack of emotional commitment to the EU on the part of most British people. We did not come to the EU in the wake of dictatorship at home, and the EU has not been for us, as it has for others, a homeland of freedom from repression. On the contrary, after two bruising rebuffs, we were offered membership essentially on a take-it-or-leave-it basis.

I should add two other points to explain the Brexit outcome.

First, a form of institutional Euroscepticism has characterized the British Treasury, our most powerful civil service department. From the beginning, the post of UK Permanent Representative to the EU was held by one of the highest-ranking diplomats in the Foreign Office. Gordon Brown, who had been Chancellor of the Exchequer for ten years before he became Prime Minister, appointed a Treasury official, and so it has continued.

The new Treasury mindset was illustrated in the lecture given by Sir Ivan Rodgers, in which he sought to explain (and justify) the European “diplomacy” of Prime Minister David Cameron, culminating in his renegotiation of the terms of British membership in December 2015/January 2016. According to this account, Cameron, with Rodgers by his side, stood alone in defence of British interests against the malign forces of the EU 26/27, led by France and Germany.¹⁶ The lecture gave no sense of the essence of diplomacy – building and nurturing alliances, and seeking to understand and allow for the motives of others and the pressures to which they were subject. The blunt fact is that UKREP has lost its status amongst the institutions and delegations in Brussels. As our “global” pretensions have increased, our actual influence has diminished. Only 6 percent, or thereabouts, of the *fonctionnaires* in the institutions are UK nationals.

Second, except in Scotland and Northern Ireland, the Remain campaign was based almost entirely on economic arguments (“What’s in it for us?”) that were inherently unprovable and, in some cases, absurd. There was no appeal to the future prospects of our young people or our obligations to the people of the

16. The text of the lecture can be found, amongst other places, at <www.politico.eu/article/ivan-rogers-david-cameron-speech-transcript-brexit-referendum/>.

other Member States, especially those of Eastern Europe whom we had been so keen to bring in, in order to “widen” rather than “deepen” our relationships. There was almost no reference to the complex problems of relations with, and within, Ireland, which have loomed so large subsequently.

Of course, it is easier to tell a lie than to explain why it is a lie. This was a problem for those who had to explain the complexities of the EU in the face of manifest untruths told by influential politicians who now parade their incompetence in the corridors of power.

But even in Scotland, which voted 62 percent in favour of Remain, the sense of outrage at the politics of London did not last, and the Conservative Party gained a substantial number of seats in the Westminster Parliament in the 2017 election. Nicola Sturgeon’s call for a second Independence Referendum in consequence of Brexit proved to be wholly counter-productive.

What lessons can be drawn from our sad experience for the future of Europe? For me, one part of the answer, at least, is rather simple: *it is that the EU is not only misunderstood, it is unloved.*

For those of us who are proud to call ourselves “Europeans”, our attachment is not to the EU and its institutions as such. It is a more complex attachment to the other peoples of Europe with all our idiosyncrasies and varied histories, while not forgetting, or seeking to minimize, the horrors. For myself, I attach greatest importance to the width of vision and experience that Europe now offers to our children and grandchildren that was closed to earlier generations by two World Wars and the Iron Curtain. For me, one of the greatest tragedies of Brexit is that these windows into the past and the present are being closed by the vainglorious obsessions of a clique of English nationalists.

Jean Monnet wrote, “Rien n’est possible sans les hommes, rien n’est durable sans les institutions”.¹⁷ Yet, the EU and its institutions are misunderstood and unloved. We need to consider why this should be so, and, again, go back to the beginning. The original purposes for which the European Communities were established were essentially three:

- to make war between France and Germany materially impossible, starting with the sharing of production of coal and steel;
- to provide a counterbalance between the two superpowers, the USA and Russia; and
- to create a zone of economic and political stability in Europe, starting with shared economic stability in the Common Market.

17. Monnet *Mémoires*, Fayard 1976, p. 360; also, Monnet *Memoirs* (Collins, 1978), pp. 304–305.

As matters stand now, the first aim was achieved long ago. The second, emphasized by Harold Macmillan back in 1961, is more important than ever, as Theresa May herself has recognized. As regards the third, the sad fact is that, sixty years on, the single market is still incomplete. The reason, so it seems to me, is that politics have been allowed to outrun economics.

Launching the idea of the Coal and Steel Community, Robert Schuman said:

“Europe will not be made all at once, or according to a master plan [*une construction d’ensemble*]. It will be built through concrete achievements [*réalisations concrètes*] which first create a de facto solidarity.”

These two sentences seem to me to embody four important points that remain valid today:

- The building of Europe can only be a gradual process – it can proceed only at a speed that the population are prepared to accept;
- It cannot be done according to a preconceived master plan;
- What is needed first is a real sense of solidarity;
- Solidarity comes from concrete achievements.

There have always been those who have had a vision of a “United States of Europe”, with institutions copying, or in some sense mirroring, those of the United States of America – see, for example, Jacques Delors’ statement of his objective for 2000 quoted above. The blunt fact remains that this objective was not achieved, and still shows no sign of being achieved. The reason was given by Robert Marjolin:

“The fact that I felt ... uncomfortable with extreme European views also explains why I never spoke of the ‘United States of Europe’, an expression used by many excellent minds fascinated by the power that unification had given the British colonies of North America in the late 18th century and thenceforward. This analogy between the two continents always seemed to me eminently superficial. What could there possibly be in common between the British establishments of the Atlantic coast in 1780 or thereabouts, which were less than a century and a half old, which shared the same language, the same law and, essentially, the same institutions, which had never fought one another, and the old States of Europe – France, Britain, Germany, Italy – some of which, admittedly, had unified in the 19th century, but which had national traditions going back to the Middle Ages? *Because the term ‘United States of Europe’ creates illusions in minds that are ignorant of history, I have always refused to use it.*”¹⁸

18. Marjolin, op. cit. *supra* note 10, pp. 267–268 (emphasis added).

For me, the vision of a politically integrated Europe of the type envisaged by Jacques Delors, is not only unrealistic but counterproductive, as the Brexit vote has shown (as well as the earlier rejection of the European Constitution by the people of France and the Netherlands). Moreover, it is at variance with Robert Schuman's original idea of a gradual process, built brick by brick, which would take its own time without being fitted into a preconceived master plan. It is, after all, an unprecedented political experiment, and there is no rational reason why its institutional machinery must be tailored to the pre-existing categories of political science. On this issue Robert Marjolin wrote

"The institutional quarrel has always seemed rather pointless to me. Between maintenance of national sovereignties *in toto* and their dismantlement, there is a middle way. For me this middle way represented the reality, the hypothetical extremes – full maintenance of sovereignties or their dismantlement – being mental constructs. The middle way was a treaty whereby the signatory States would pledge themselves to one another indefinitely and undertake to carry out certain acts by specific dates."¹⁹

That is what the Member States did when they pledged themselves to complete the Common Market by the end of 1969, and having failed in that, to commit themselves to complete the Single Market by 1992. Jacques Delors said, "*On ne tombe pas amoureux d'un grand marché*"²⁰ That may be true if one speaks of *le grand marché* in purely commercial terms ignoring the *opportunities* that are offered by the Four Freedoms.

When I left the Court of Justice in 2004, I spoke of my first acquaintance with the European Community in the late 1960s:

"What caught my imagination then and remains my guiding star today, is the idea of a Europe where individuals are free to choose their own destiny – to go where they want, to live where they like, to trade and to work where they can.

The freedoms guaranteed by the Treaties are not just secondary 'economic' rights to be relegated to an Annex of a new constitution. They are rights in every sense as fundamental and important for the average citizen as those enshrined in the European Convention."²¹

19. Ibid.

20. <www.cvce.eu/obj/discours_de_jacques_delors_devant_le_parlement_europeen_17_janvier_1989-fr-b9c06b95-db97-4774-a700-e8aea5172233.html>, page 3.

21. *Allocution de M. le juge Edward à l'audience solennelle de 7 janvier 2004 à l'occasion de son départ* <www.law.du.edu/documents/judge-david-edward-oral-history/2004>.

I follow Hersch Lauterpacht, later a Judge of the International Court of Justice, in believing that “the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law.”²² This is as true of the law of the European Union as it is of any other system of law. As Judge Trabucchi urged in his *note en délibéré* in *Van Gend en Loos*, the issue was whether the Court would recognize “l’existence et [le] fondement communautaires d’un nouveau droit des citoyens vis-à-vis de leur État.”²³

The Single Market, albeit incomplete, is truly a “concrete achievement” such as Schuman envisaged, unparalleled and unprecedented elsewhere in the world. And it has created a “de facto solidarity” among the peoples of Europe, precisely because it offers opportunities which none of the Member States alone can offer. Properly explained, that is what will catch the imagination of the people, far more than projects for the development of political institutions. One cannot *tomber amoureux* of the grandiose palaces that the institutions have created for themselves at public expense. At the end of the day, as Marjolin said:

“A treaty is just a piece of paper. One or more signatories can tear it up, admittedly, but that is equally true of any organizational formula: any legal construct is perishable. The only answer is the existence of a will to live together, the realization by nation-states that, whatever the disadvantages of the Community, they are better off in it than out of it.”

There is an urgent need to nurture the will to live together. In order to do so, we must listen more attentively and respectfully to the historic divergences and differences between the Member States and between their constituent parts. Too little attention and respect has been paid to the question *why* people in different parts of Europe see things differently and have different priorities. That needs to be remedied, and then we can have a respectful and constructive conversation about such different points of view.²⁴

Let me end by adding my congratulations, as Chairman of the Europa Institute of the University of Edinburgh, on the sixtieth birthday of the Europa

22. Letter to his wife dated 4 Sept. 1942, quoted in E. Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge University Press, 2010), p. 252.

23. The text of Judge Trabucchi’s Note addressed to the other judges can be found in S. Azzalini (Ed.), *La formazione del diritto europeo: giornata di Studi per Alberto Trabucchi nel centenario della nascita* (2008), pp. 213–223. The Note contains many of the ideas buried in the text of the judgment.

24. I am indebted for these expressions to a leader article in *The Guardian*, 2 Jan. 2018, about the problem of the union of the United Kingdom.

Institute of Leiden. We are, so to speak, your younger sister, only fifty years old next year, so our congratulations are both warm and respectful.

I have a particular personal reason for gratitude to the Europa Institute of Leiden because it is probably to Henry Schermers, its Director for many years, that I owe my appointment to the Chair of European Institutions at Edinburgh – a practitioner cuckoo in an academic nest. He was my guide, philosopher and (rightly critical) friend, and helped me greatly in my first steps in the world of academia. We graduated together as honorary Doctors of Laws at Edinburgh, and Henry's portrait in the Senate Room here shows him wearing his blue Edinburgh hood. He was a great man and a profound scholar to whom I owe a deep debt of gratitude.

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