THE EUROPEAN COURT OF JUSTICE: WHAT DO WE DO?

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1. In the 1670s the diarist John Evelyn was looking around the rubble filled area where St Paul's cathedral had stood before the great fire of London. He saw a young boy who appeared to be shifting some stones. Evelyn asked him what he was doing. "I am helping Sir Christopher Wren rebuild St Paul's" came the reply. The boy might have said with total accuracy, that he was sorting out the larger stones for possible re-use. But his vision was larger and he saw himself as helping to build the future.
2. This evening I shall divide what I have to say into two parts. I shall start by trying to give you a feel of what we actually do at the ECJ – shifting the stones if you like, getting through our list. But I hope to finish by spending a little time looking at the broader picture and seeing what we have to contribute to making the future an improvement on the past.
3. A judge across the road is usually concerned with doing justice between litigants – either between individuals or companies (quarrelling about the existence or execution of a contract, the existence or compensation for a tort, the line of a border fence, etc); or doing justice between the individual & the state (in the context of the application of criminal law, environmental law, tax law etc.). At first instance and on appeal most of my energy and time was spent getting on top of the facts and looking for the just result. The essence of the matter was not – usually at any event - defining what the law was. That was usually common ground.
4. In the ECJ by contrast defining the law is the essence of our job. Determining the facts, or even controlling whether another court was entitled to determine the facts in the way in which it had, does not form a significant part of our workload. We usually, although not invariably, operate at a more abstract and general level – producing a ruling which will bind all the courts in all the member states. In that sense we sometimes seem like legislators. People ask: what mandate do these judges have to make the law? Surely there is a distinction between a legislator and a judge.
5. So there is. The legislator starts with a blank page and asks what should the law be, what is the best type of legislation to enact? The ECJ by contrast operates within a far narrower compass and asks how does the law which the legislator has enacted impinge on the combination of facts and problems which face the Court? What are the implications, in the area under consideration, of the rules to be found in the treaties and in the subordinate legislation? Where the answer to those questions is crystal clear, then the Court's function has no legislative element in it at all. Where however the answer is

not clear, then the Court has to produce an answer in the light of what it sees as the purpose of the legislator and sometimes the common legal traditions of the Member States. The task of producing that answer can at times resemble legislating. The Court is involved in it because the legislator did not clearly lay down what was to happen in the circumstances under consideration. This may be because he never applied his mind to that combination of facts or it may be that the legislators could not agree on a precise answer, adopted a rather vague formula and left it to the courts to find an answer when they were forced to.

6. I want now to give you a bird's eye view of the areas of law which come before the Court, the type of proceedings in which the points arise for decision, the parties who have an input into our decisions, and the manner in which we resolve the points.
7. The Court is concerned sooner or later with practically all the areas in which the Union has legislated. That covers a vast area – quite as varied as the Court of Appeal. So I'm not bored. Let me just list some of the fields in which I have personally been involved during my last 5 years at the Court. Free movement of persons, goods, services and capital, employment law, asylum law, discrimination on grounds of nationality, gender and age, human rights, labour relations, competition law, trade marks, direct and indirect taxation, education, health, gambling, judicial cooperation, environment law varying from planning procedures to the protection of flora and fauna and the free movement of Genetically Modified Organisms, road, rail, water and air transport, common economic policies, customs and immigration controls, recognition by one Member State of professional qualifications granted by another Member State, subsidies by the Union, subsidies by Member States, international trade agreements, private international law and public international law.
8. Questions involving these various fields come before us in various types of proceedings. The commonest are the preliminary references by national courts of questions of European law. The House of Lords and its equivalents in each of the 27 states, when they have to adjudicate on a case which involves the application of the law of the Community or of the Union to which the answer is not clear, are obliged to ask the ECJ for an exposition of the law in question. This may involve questions of interpretation of the Directive or Regulation in question; it may involve a question as to the validity of the European legislation or a question of the enforceability of some national legislation or practice. The ECJ

sends its answer to the preliminary question to the national court in question and the national court then applies that answer to the facts of the case before it. These sort of cases in the national court typically involve an individual or a company which claims that he or it is entitled to some benefit under Community law which has been denied to it by national ruling or practice – a fully qualified English dentist who wants to practice in France, an English taxpayer who wants to deduct from his taxable income the contributions he makes to a French charity, an Englishman who wants to have an operation in France and send the Bill to the NHS which is unable to treat him for the next year, an English company which wishes to be able to solicit bets in France on the result of soccer matches, an English worker in France who wishes to have access to French social security payments or schooling or wishes to bring his aged Chinese mother in law to live with them in France, an English company which wants to obtain a contract in France for the construction of a road. The list is endless.

9. The next most common cases are the so called direct actions where the ECJ is called upon directly to resolve a challenge as to the validity of some act or omission either by a Member State or by one or more of the Union's organs – the Council, the Parliament or the Commission. These actions take two main forms – against Member States and against one or more Community organs.
    a. One of the tasks of the Commission is to ensure that member States observe their obligations under the Treaty. When a Member State is alleged by the Commission to be in default of one of its obligations then the Commission starts an action before the Court against the Member State concerned. The Court, if it finds the case proved, then declares the Member State to be in default and, if the default persists can ultimately fine the State concerned. Which it does to the tune of tens of millions of Euros.
    b. So far as direct actions against the Community organs are concerned they tend to centre on the validity of some piece of Community legislation or of some action by the Commission. There are several cases a year where the dispute is between either one or more of the States and the Community organs. In these cases, sometimes it is argued that the Community has no business enacting the legislation concerned which is thus ultra vires because it concerns something which has not been allocated to the Community or is regulated by public international law. At other times it

is argued that, while the legislation in question falls within Community competence, it can only be enacted if there is unanimity in the Council or if the Parliament has been consulted or if the Commission has proposed it. These are thus constitutional law cases. What is interesting to observe is that the argument often reveals that Member States are at odds amongst themselves as to the appropriate course of action for the Court to take. Similarly the institutions are frequently at odds amongst themselves. However, whilst what I say is of course true, one must remember that the cases which come before the Courts are ones in which there is no agreement. For the vast amount of activities covered by community law no dispute ever arises. A judge sees things that go wrong – sitting across the road you might feel that all marriages fail and that fatal mistakes in medical procedures are the rule rather than the exception.

10. The third most common cases which come before the ECJ are appeals from the Community's Court of First instance which itself was concerned with the validity of some decision of the Commission. This may be a decision imposing a fine of hundreds of millions of Euros on a company for anti-competitive practices or it may be concerned with the validity of a Commission decision to declare that a Member state has granted an unlawful state aid or has failed properly to account for some aid which the Community has granted to the State in question.
11. So there you have our main fields of activity. As for the way we operate, much is conditioned by two major considerations. The first is that we are laying down the law for all the Member States and the Institutions of the Community. In consequence we give every opportunity to Member States and the institutions to address us before we arrive at a solution. So every time the House of Lords for instance send us a question we circulate it to all the Member States and ask them if they have any observations to make. Usually some do. This is very important to us because a major problem for any appellate court is to be conscious of all the knock-on effects its decision might have for cases other than the one it is specifically considering. That problem is with us in a particularly acute form if you bear in mind that we are laying down the law for 500 million people and 27 states each with their own preoccupations and way of doing things. It is surprisingly common to find that what is self evident in one jurisdiction is not seen as self evident at all in another. Sometimes one has difficulty in understanding the

problem which seems to worry the national court. Sometimes the proposed answers to that problem are wide apart and each has something to be said for it.

12. The second major problem is that we are a community of 23 languages and at least as many cultures. This poses problems for the judges who have to communicate with one another but, more importantly, these languages and cultures have shaped the way problems are perceived and formulated. There are ways of approaching problems which are familiar here but which are regarded as unprincipled and indefensible elsewhere. For instance, sometimes the question will arise before our court, as it can before any other court, "Do we have jurisdiction to deal with this question at all?" This may be a very difficult question to answer. However, the answer to the underlying question which has to be resolved is clearly one which causes the claimant to lose. In those circumstances an English judge will be inclined to cut things short and say "Even assuming in your favour, without deciding, that we have jurisdiction to decide the point, the answer is nevertheless that you lose." But to some of my colleagues this would instinctively appear as unprincipled. They will point out that the Court can not decide a point – however easy the answer might appear to be – unless it has jurisdiction to do so. Therefore the knotty jurisdictional point can not be avoided.
13. The fact that we have all these languages to deal with means that we translate all the essential documents into one language, French currently, we produce a judgment in French and then that gets translated into the 22 other languages. These two factors – the need to consult all the member states and the institutions and the need to translate back and forth – slow down the procedures of the Court to a pace which is not really acceptable. The average time between the lodging of a case before the Court and the pronouncement of the judgment has improved in the last 5 years from 27 months to 18 now I think but that still seems very long to the litigant. Unless perhaps he is used to the Delhi High Court where – so the Times stated the other day - even if the Court continues its habit of devoting an average of 5 minutes to a case, the backlog will take over 400 years to resolve.
14. So that is broadly what we do. If you want to ask questions about how we set about deciding cases I will happily take questions when I have sat down. However, before I do, let me stand back a bit and share with you something of what I see as the wider importance of what we are about. Like the boy helping Sir Christopher Wren.

15. The root questions facing us all are how do we organise our political lives so as to minimize war, starvation and other forms of deprivation both here and abroad and how do we best set about removing the obstacles which prevent individuals from developing their personalities.
16. For the last few hundred years the dominant political structure within which these problems have been tackled is the nation state. Sometimes this takes the form of the nation state acting on its own, sometimes acting through bilateral treaties, sometimes through international organisations whose members are appointed by the nation states. But, the basic atom from which all these arrangements have been constructed has been the nation state.
17. Because we are used to thinking in terms of states, and because those people who govern states, need the popular support of the citizens of that state, we tend to formulate *problems* in terms of the state – how can the state be made safe from aggression? How can we safeguard our national currency? How can we secure a favourable balance of trade? How can we ensure maximum employment within our borders? What is best for Britain, France, Germany etc.?
18. It seems to me that what has happened in the last couple of hundred years is that the historical image of the European nation state has been transformed, from an <u>empirical fact</u> which shaped life in Europe from the Thirty Years War onwards, into a <u>metaphysical entity</u> with its own soul and volition, which is taken for granted in political discourse world wide, as the prime political actor, and which some get close to worshipping as a god. I see much harm as having come from this approach. People are prepared to do things in the name of the state which few would contemplate doing in their own name.
19. I am no anarchist, but it seems to me, that many of those contributing to political discourse today are still operating with conceptual baggage which originated in, and was designed for, the age of princedoms. How often does one hear or read "We (or they) are a sovereign state; No interference with our (or their) sovereignty is legitimate." We tend to think that it is self-evident, that political systems have to be hierarchically organised, and that there must be the same final arbiter in all domains – the sovereign – whom no other authorities can overrule. Because of our history, we have a tremendously hard time conceiving of political systems where territory, identity and power are *separated*, functionally and/or spatially. We thus continue ending up with the federal or

national models, as the only conceivable outcomes of international transformation. That is why so much of the European debate – and not only in this country - is centred on such questions as: is the EU a new superstate? Are we moving towards a federal state? What has happened and is happening to our sovereignty?

20. I want to suggest that clinging to concepts designed for other times and other problems and applying those concepts to our current challenges, amounts to, first, moving voluntarily into an intellectual prison and then, declaring that prison to be an unalterable constraint. By so doing we are rendering it more difficult to find appropriate answers to the various questions with which we are surrounded. Don't you think that in public discourse it is too widely assumed that the nation state is the tool with which we must answer all questions.
21. We like the idea that decisions which affect us should be made by ourselves, or at least by people like us. With a stretch of the imagination we can just about see other British subject as being like us, as being "one of us". Once over the Channel the differences become more and more apparent. One might accept an English speaking Dutchman or Dane but once you are faced with a monoglot Rumanian, Slovenian, Estonian etc you are very conscious of their otherness, and no doubt they are equally conscious of yours. Once you go as far as China and the Gambia that is even more the case.
22. And yet we must face the fact that in the modern world, we must get along with these others, and try and avoid situations where they act to our detriment. They in their turn will want to avoid situations where *we* act to *their* detriment. The idea of a sovereign state which is the master of its soul and captain of its fate is perhaps attractive but it is not grounded in reality.
23. The first point to make is that no state is in fact omnipotent. In the nature of things, a state has never been totally free to do whatever it wants, since what one state wants is frequently wholly inconsistent with what another state wants. They can not both be free to do what they want. It has always been true - although the point has gained force as a result of modern technical and commercial developments - that those living in one state are profoundly affected by decisions made by people over whose decisions they have no direct control.
24. If you live, as I do, in the tiny state of Luxembourg there is something quite patently ludicrous about the idea of the rulers of that state ever being in a position to withstand the influences and

pressures emanating from outside its borders. For centuries it has been invaded and has had land taken away from it. Others have come in and attacked its religion and language and slaughtered its people.

25. If you live in this sceptered isle all this is less brutally self evident. Yet we all know that what happens beyond our borders affects us all. Our current prime minister, who repeatedly makes this point, is saying nothing very new. During the two world wars the citizens of this country, gave their lives and wealth, to try to keep themselves and other citizens, physically safe from actual or perceived threats from third parties, over whose decision making processes they had no control. Similarly, if third parties refuse to buy from our manufacturers of goods or providers of services, or to lend us money we are all in grave trouble. Our exchange rates and our interest rates are profoundly affected by decisions made by others beyond our borders. If there is an atomic power station or a polluting factory in Calais, it is capable of affecting the denizens of Dover, much more than anything in Inverness. All this is self evident.
26. This leads me on to my second point. The theory of the nation state implies, that the decision whether or no an atomic power station should be situated in Calais, is made by the French, and is one over which the British have no control. The concept of the nation state implies, that those outside the nation which makes a decision, play either no or a limited part in making that decision, even though it may profoundly affect them. Yet the decision made by the political institutions and market forces of those abroad, affect *us,* although we will not have been consulted about many of them. Conversely, the decisions made by *our* political institutions and the behaviour of *our* markets, seriously affect others whom *our* political institutions do not even *claim* to represent.
27. Given that contacts and consultations with those outside our borders are manifestly inevitable, the real question is how those contacts are best carried out, and how we can best secure an influence, over decisions which are going to affect us anyhow. Can this be left to private initiative? Should it be done between representatives appointed by states? Should *organisations* be created, in which the interests of individuals in various parts of the world are addressed? Who should choose those who make the decisions on behalf of such organisations? Driven by the necessities of the situation we have effectively decided to work through a variety of international organisations – the UN and its

many linked organisations, several international dispute settlement organisations, the WTO, the World Bank, the IMF, and indeed the European Union.

28. Of these, the EU is in many ways the most innovative. It, as it seems to me, offers the hope of *transcending* the sovereign state - rather than simply *replicating* it in some new superstate, some new repository of absolute sovereignty. It creates new possibilities of imagining, and thus of subsequently realising, political order on the basis of a pluralistic, rather than a monolithic, conception of the exercise of political power and legal authority.
29. It seems to me that one should see the Union as constituting the first truly 'multi-centred' polity since the emergence of the European State system. Instead of a new hierarchically organised sovereign construct, modelled after the nation state, we are confronting a situation where different authoritative orders and circles overlap, compete and collaborate. Thus we find that some matters are left to Member States, others to the Union. Some of the Union matters require the unanimous consent of Member states; others require merely the consent of a majority of Member states. Some matters require the consent of the European Parliament, others merely its consultation. Some matters can be regulated by the Commission acting alone; others require the assent of the Council.
30. I think that in Europe we are learning to live with decisions with which we do not agree, made by those whom we might not instinctively regard as one of us, because we know that others will at times be willing to live with decisions with which *they* do not agree made outside *their* borders. Of course the European institutions will from time to time produce decisions with which we are not in accord. The same happens with any national government. But overall we accept that it is in the common interest for the richer parts of the UK to subsidise the poorer. Moreover we have learned to accept decisions with which we are not in accord. Long ago we learned to think beyond our village. And even beyond England. Now we are learning to think beyond the UK. We have managed, for the first time in millennia, to avoid a war in Western Europe. We have become significantly less subject to deprivation. We have evolved a new type of political organisation. This all seems to me from a world perspective to be a hopeful development, and it is fascinating to be in Luxembourg playing a part in this unfolding process. Others outside the Union – in South America, in Africa, in Eastern Europe -are watching this

experiment with some interest. I hope it will prove a source of inspiration.