Law and Culture — A European Setting

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Jean Monet is reputed to have said soon after the war, "Si l'Europe était à refaire il faudrait peut-être commencer par la culture."

How literally do we take that?

I occasionally have the impression in this country when I read the speeches of some politicians that it is taken very literally. They seem to see us moving to a stage when the works of Milton, Darwin, and Benjamin Britten will be piled high in the Grand' Place in Brussels to make a bonfire for Jacques Delors to light; when our poets will need to write hexameters in Eurospeak; when our painters will be allowed to use, or will be conditioned to use, only gold and a particular shade of blue; and when our orchestras will play only integrationist anthems.

Perhaps in choosing as his title "Law and Culture in Europe in the Next Millennium" Senator Cossiga had such an Orwellian vision. Perhaps, and more likely, he saw something quite different — a rich new culture independent of, if growing out of, the cultures of the former nation states of Europe.

With, generally, a more limited range of vision and, specifically, a shorter time scale, I took a less expansive title, though trying to retain the essential words in his theme. Both words, "law" and "culture," have immediate relevance to the purpose of the Tanner lectures, namely, to study the areas pertinent to the human condition, interest, behaviour, and aspirations. The development of law as part of national and European culture and the intervention of law in cultural activities have, in Professor Obert Clark Tanner's words, "practical consequences for the quality of personal and social life."

Paul Valéry said that "toute race et toute société publique est fondée sur une certaine idée de l'homme" ("Regard sur le monde actuel") and if culture in the broad sense is the visible expression

of that idea, then it is clear that culture cannot exist without rules of law, but that those rules of law spring from that culture and that different cultures will produce different rules of law.

I shall refer to "Community culture" rather than "European culture" because I do not forget that the European Economic Community and Europe are not coterminous and that what the outsider may see as European culture derives from an area that is not necessarily the same, and indeed is not the same, as that which is today seen politically, economically, militarily as Europe. Yet unless the European Union, or indeed the European Community, falls apart (which, despite what Harold Macmillan might have described as little local difficulties, I do not envisage) it is likely in the lives, even in the working lives, of those who are undergraduates today to become more nearly coterminous with Europe in the cultural sense. I take that European cultural sense again from the words of Paul Valéry: "toute race et toute terre qui a été successivement romanisée, Christianisée et soumise, quant à l'esprit, à la discipline des Grecs est absolument européenne." The expansion of the economic Europe to the cultural area which is the wider Europe will have a considerable effect on the culture and the law of the European Community and its constituent parts.

A wide concept of culture in a Eurpoean setting raises many questions, only a tiny proportion of which can be dealt with in one lecture and in one seminar. In this lecture I observe the rule that the cobbler should stick to his last: I shall speak without apology as a lawyer, I of course recognise that there are political issues which can be brought into the debate — how far have we gone in recognising the possibility, let alone the achievement, of a true European identity; how far are those who pursue the ideals of a Europe combined, rather than a Europe divided, ahead of their time, out of communication with those who in a democracy should decide, or at the least understand, what is to be done; how far at this stage can we or should we truly get rid of intranational differences of education, of taste, or of activity, when we still have

not just here, but in all the countries of Western Europe, great differences internally of wealth, of education, of taste, and of activity? These I do not regard as questions for me in this lecture. I ask the more pragmatic question, as to what has been done, what is being done, insofar as concerns the law and culture in a European setting.

First, as to the law.

There has for long been some law common to Europe as a whole (e.g., commercial law) ; and in earlier times, before the emergence of the nation state, Roman law constituted a ius commune for Europe.

That there is now a body of rules sufficiently coherent as fairly to be described as a law for Europe albeit in the sense of a law for the European Community is obvious. That there is some law for a wider Europe, through the European Convention of Human Rights, is no less obvious.

The latter may indeed give a clearer idea of man's vision of man than the former, even though it can be said that a convention setting out human rights in a world of rapidly changing mores and political trends can become inflexible and outdated in the absence of a court which takes the initiative.

It is, however, the former which has the most immediate impact, the effect of which is the easier to perceive. Europe as a constitutional, a political, an economic unit, as an integrated union of states, depends very largely on the development of the law. The Treaty of Rome gave a framework laying down broad aims and broad areas of action to be undertaken and broad principles to be applied. There was to be freedom of movement of goods, services, and people; no discrimination on the grounds of nationality or sex; fairness in competition; no state intervention to prop up industries in order to give them advantages against similar industries in other states. In a word, removing barriers was the critical factor in laying the foundations of an ever closer union among the peoples of Europe.

Although this is fleshed out by volumes of subordinate legislation, regulations, and directives, it is the jurisprudence of the Court that has been no less important an element (perhaps a more important element) in the Europeanisation of the twelve Member States.

Its rôle has not always been appreciated. In recent debates in the House of Lords on the Maastricht Treaty it was described as "sinister," "crusading," and "ceaselessly imperialist," though the latter is perhaps an unintended compliment to the process of Europeanisation. The Court was criticised for drawing upon the objectives of European integration to inform its rulings; it was said, critically, that it allowed Community law to override national law; it was said that in some way it undermined the basis on which we are required to obey the rule of law, that it did not have proper judges.

I do not seek to defend any particular decisions, even particular trends of the jurisprudence of the Court — lest *qui s'excuse s'accuse* — but it is plain that the Treaty envisaged that there should be law for the Community which would be separate from, or in addition to, the laws of the individual Member States. The most fundamental question of all was to decide the relationship between that Community law and national law, both of which fell to be applied by national judges. The progressively integrationist aims of the Treaty, with the object of changing economic and social relationships in the Community, were plainly stated and the Court of Justice would have been failing in its judicial duty if it had not given effect to them.

The result has been to create in forty years a genuine law for Europe, what the Court called a new legal order, what has been described as the law of a region, that is to say, the law of Europe. In terms of legal development, this has been remarkable. The Court found that the Treaty not only imposed obligations on states, but conferred rights on citizens which could be enforced in national courts and all citizens in Europe enjoyed the same Treaty rights. National judges were duty bound to give effect to such European Community rights and they must devise procedures to

make them effective, discarding their own national procedural rules if they were not effective to protect European Community rights. European law must have precedence, must be supreme, where there is a conflict with national laws. General principles of law derived from a study of the legal ideas accepted in all or some of the Member States, adapted as appropriate in the new setting, must be made to apply everywhere in the Community when European rights and obligations are in issue. Thus fundamental rights, legal certainty, and proportionality came to be adopted as part of the common law of Europe.

There is thus not just a law for Europe in relation to states and institutions, to be applied by a remote court comparable with the International Court of Justice at the Hague; there is a law in Europe to be applied by national judges which affects citizens and trading companies, as between themselves and as between them and their states.

The task of judges in the Member States, applying not only their domestic law but European law, is not necessarily an easy one, even with the guidance of the Luxembourg Court. National legislation and national laws continue in force; principles of domestic law are well entrenched. There are, however, already some clearly defined areas where Community legislation and principles must prevail. This is European law "tel quel." It is not surprising that its adoption should have caused problems with some national courts, since the spirit of the nation state continues to exist. The German Federal Court anxious to protect the Grundegesetz, the Italian Corte Costituzionale unwilling to lose its control of the legality of domestic legislation, the French Conseil d'Etat anxious to avoid Community directives, which left discretion to the Member States, from being given automatic effect in national law indicate the conflict.

With new areas of Community competence, even allowing for current enthusiasm for the notion of subsidiarity, this body of European law is bound to increase, not least since the Community

now has clearer competence under the Maastricht Treaty in relation to such matters as the environment, technological development, and education.

But there is another aspect of this. Judges in the European Member States no longer sit in isolated compartments — the Irish and the English with the common law, the French with their civil law codes, the Germans and the Danes and some of the others with something that differs from both, even if in some respects it is much closer to one than the other. There is already a question for the lawyer of today, and it will be an interesting question for legal historians, as to how far domestic law and practice have been modified by Community law rules, even when the former are not directly affected by, or overruled by, the latter. I am not competent — I doubt if anyone is yet — to know how far, and where, national laws, quite independent of Community law, have been affected — in a sense "Europeanised." In the United Kingdom it is, however, noticeable that "legal certainty," frequently relied on as a principle of European Community Law, appears from time to time in English judgments. "Proportionality" — a test of reasonable conduct by Community institutions, but also by national authorities in applying European law — is not so far accepted as being applicable in our domestic law. It is, however, to be noted that in the House of Lords recently one Lord of Appeal accepted it as a test and two thought that it might be developed on a case by case basis, though, as so often happens, when judges are cautious about a new idea, not in that case. Two others resolutely rejected it. It seems to me that the more we study the test, the more we see how cautious the European Court is in applying it, the more we may come to wonder whether it is not a useful tool, and one not quite so different in its use from the doctrine of Wednesbury reasonableness which we now use and to which it appears that the majority of English judges are devoted.

No less interesting in this context is the question whether the domestic law and practice of one state will influence other states

in the Community. The development of judicial review in this country has not ignored the ways of the Conseil d'Etat in France. Even if we have a different system, our thinking is not so far apart as it used to be and at least English and French lawyers can have a meaningful discussion, and are on the same wave length, when they talk of administrative law. Professor C. J. Hamson's Hamlyn lectures and Sir William Wade's seminal writings on administrative law came at the right time for my generation of judges. I should be very surprised if the proposed changes in Italian criminal procedures have not followed some study of our system here. Frequently, I hear French and German lawyers comment on the merits of some of our rules and law and practice — our ideas on the right to a hearing, fair trial, due process. The converse is no less true. The teaching of comparative law, of European Community Law, and of the law of individual states and the many serious conferences organised by European associations of lawyers can only nurture this growth. As a result differences in methods and procedure in the law are often seen to disguise similarity in substance and result.

I find this not only a necessary step in the achievement of European union which all the Member States have adopted. In the pursuit of justice and in the improvement of national law in all the Member States, it is intrinsically desirable.

How far Community law will be observed in the various Member States is relevant to the question of whether there is really a ius commune even if it is not at all the same as the medieval concept of ius commune. Traditionally the attitude of people here is broadly to respect and to obey the law, in particular to accept, however critically, and to comply with, the decisions of the judges. This hai been until recently partly due to an innate belief in the rule of law, partly due to the status of the judges, which, as far as the highest civil courts are concerned, springs from their small number and the limitation on access to the higher courts. There is a popular belief here, which I do not suggest is justified, not only that other na-

tionals do not pay their taxes, but that they do not obey the rulings of the courts. Even if this belief is wrong the different structure and composition of courts and the attitude of people towards the judges' rulings are inherent to our different cultures. These attitudes may not readily change when domestic rules are in question.

Community experience is certainly that some countries are slower than others to give effect to directives — not in the sense that they do not comply adequately but in the sense that they do not comply at all. The arguments justifying inaction are often specious, usually based on local administrative or political difficulties. The Court of Justice at Luxembourg never accepted these and until a few years ago there was a substantial degree of compliance with the Court's rulings, though Italy, for example, had to be brought back more than once in relation to its rules designed to protect art treasures. Recently some anxiety has been felt about delays in complying with the judgments of the Court and second or third applications have been made to the Court for a declaration that there was a failure to implement directives. This was disturbing, though I had the impression that the anxiety expressed may have been somewhat exaggerated. However, it led to the feeling, I believe raised initially by the British Government, that the Court should have power to fine governments in default since no other sanctions seemed appropriate. This was adopted in the Maastricht Treaty, although not without some reservations on the part of some members of the Court who felt that this could be damaging to the atmosphere of co-operation that it sought to achieve. Since the European Court has now recognised the liability of a state to compensate a citizen who suffers loss by that state's failure to implement a Community directive, the sanction of a fine may be less needed. There is now a further incentive for all states to observe the Court's rulings and the regulations and directives which are issued.

Parallel with these developments there is a question as to whether the time has come to establish a truly European Law

School. There are arguments in favour and arguments which underline the inherent difficulties of such a proposition. On the one hand, such a school would undoubtedly aid the process of integration and it would encourage people to study each other's legal system, thereby in the long run encouraging their mobility as lawyers. It would aid the creation and understanding of the growing ius commune and would at least provide a common education for the lawyers who took part in it. On the other hand, national law still plays the major part in our lives and will continue to do so; there is enough of that law for students to study. Legal education differs very much in the Member States in its aims, in its content, in the number of students who undertake it, so that perhaps it is all a theoretical exercise.

I agree that there is a problem. It may be too large a task for the present time. However, if anything is to be done it seems to me that the aim initially should be to tackle such a proposition at postgraduate level — the study of the theory and philosophy of law, of its sources and principles, the study of comparative law, the generally accepted basis of administrative law, of criminal law, of public international law.

This would permit only a few students to be involved and it is better perhaps that all universities should seek to teach the general principles and legal problems existing in the various European systems rather than that for the moment we should concentrate on trying to set up a centralised European Law School — though for my part I hope that this will come.

Maybe in the long term even a law school taking students from all over Europe and preparing them for legal practice and a qualification valid in all the Member States is theoretically possible. It would be a basic common course. Such a qualification is obviously easier in other disciplines such as medicine and architecture, but in the long term it is not impossible to envisage it as a possibility for law. On any view the directive on the provision of legal services, the directive on the mutual recognition of diplomas, and the pro-

posed directive on the right of establishment should go some way towards building up a European legal profession.

I conclude that we are on the way to a new ius commune for Europe — very different from Roman law, but in some ways deriving from it — perhaps very different from the concept of ius commune that existed centuries ago. Maybe we do not yet see it sufficiently clearly. But all these factors lead us towards it. There is a network of cross-influences — rules adopted by the Community, the interaction of national laws, increasing educational exchange. I am of course not blind to the deep-seated differences and difficulties. I am, however, willing to recognise and not to encourage the movement which appears to be taking place.

Then as to culture.

If European law, as distinct from national law, had initially to be positively imposed, assertively created, in the new Europe, it is no less plain that an effort to create artificially a European Community culture would be doomed to failure. If such a culture is to exist, distinct from national cultures, it needs to grow so that one day outsiders (by whom alone perhaps a culture can be identified) can see that there is such a culture, just as we can see that there is an American culture in the United States side by side with local cultural traditions, since, happily, southern hospitality and New Orleans jazz have survived whatever may be decided in Washington, done in New England, or distributed from Hollywood.

Yet the concept of a European culture, a Community culture, lay not far below the surface in the Treaty of Rome even if it was not expressly mentioned. There was for example to be an accelerated raising of the standard of living and closer relations between the states belonging to the Community. The states affirmed as the essential objective of their efforts the constant improvement of the living and working conditions of their people. The harmonious development of their economies was to be ensured by "reducing the differences existing between the various regions and the backwardness of the less favoured regions."

But what is to be understood by culture? The word is used with different meanings. It is interesting to note that *Larousse* defines culture as the "ensemble des connaissances acquises: ensemble des structures sociales, religieuses, des manifestations intellectuelles, artistiques qui caractérisent une société." The *Oxford English Dictionary* defines culture as "the training and refinement of mind, tastes and manners; the condition of being thus trained and refined; the intellectual side of civilisation."

This distinction is borne out by two other definitions. Thus the first is on the same lines as *Laroasse:* "the totality of the knowledge and practices, both intellectual and material, of each of the particular groups of a society, and — at a certain level — of a society itself as a whole. From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, in their relationships and totality, 'culture'" (C. Guillaumin, "Women and Cultural Values: Classes according to Sex and Their Relationship to Culture in Industrial Society," *Cultures* [1979], 41).

Another definition follows the *Oxford English Dictionary:* "the highest intellectual achievements of human beings; the musical, philosophical, literary, artistic and architectural works, techniques and rituals which have most inspired humanity and are seen by Communities as their best achievements" (Lynde1 V. Prott, "Cultural Rights as Peoples' Rights in International Law," in James Crawford [ed.], *The Rights of Peoples,* Oxford, 1988, p. 94).

In the broad sense referred to by these definitions, culture as the expression of a way of life has already been considerably influenced by the laws and practices adopted by the European Community. The removal of barriers to enable men and women to cross frontiers and indeed to change their country of residence, the ease with which goods can move from one state to another, the

harmonisation of national rules relating to the manufacture and distribution of goods, to the organisation of the professions, will all considerably influence the way we behave, the way we think. It will take time to see the effect of these influences since prejudices are deep-seated in national consciousness. The Germans emotionally as well as economically did not want to have beer made in a way which was contrary to a sixteenth-century Bavarian statute. The Italians passionately, as well as commercially, did not want pasta made from wheat acceptable in France, which was different from that traditionally used in Italy. Typical was the Alsacien who, when told by an American in 1920 that "things must have been bad under the Germans," replied, "But not as bad as under the Swedes" — which was three centuries earlier.

But changes are evident, not just for the rich, the élite, but for everyone. The extent to which we travel as tourists, the style of the clothes we wear, the cars we buy, the haircuts we favour, the toiletries we use all show this. Resist, as we may, the political concept of a union, even more of a federation, increasingly in the countries of the Community people begin to think and begin to feel European. They will eventually be seen by outsiders as being European in a real sense. This process may lead eventually to a feeling that there is a Euorpean political culture — not just because members in the European Parliament associate in political as well as, perhaps essentially rather than, in national groups, but because national politicians will come to accept the existence of a European Union and the need for a Union Parliament, which is distinct from their national parliaments.

But cultural integration in this sense can only develop if people feel that they belong to a European entity and that feeling is stronger than national or local resistance.

If the Community continues, the influence which is already evident is bound to continue and perhaps to accelerate. How many weeks' holiday a year workers should have, what our views should be on abortion, how much we should concentrate on eating or

dressing well are all aspects of life which are affected by the sight of what others do when we visit their countries and when they visit ours. The more tourism develops, the more this effect will be seen. And yet, again, it must not be exaggerated even at a superficial level. Resistance to foreign habits continues and there are many aspects of life at the social level that are untouched.

It may seem in the end that national traits, national prejudices, national knee-jerks are the real barrier to creating a European unity, law, and culture.

I give one precise example of difficulties in practice. The patenting of biotechnological inventions is a matter that currently concerns the Council for the Commission and the European Parliament. Should ethical considerations have any relevance? Is it right to say that patents should not be granted if they are, in the words of the draft directive, "contrary to public policy or morality"? How far are these words different from "ordre publique or morality" referred to in the Council of Europe's patent convention? Is it really possible to contemplate that different states would regard the same matters as being contrary to or in accordance with "public policy or morality"? Could we really have a European approach to a decision as to whether a process "for modifying the genetic identity of the human body" was "contrary to the dignity of man"? And yet if this harmonisation is to take place we must seek to establish a common approach and acceptable common standards.

I ask myself whether membership in the new Europe has had any effect on the press, which is perhaps the most influential on, and in some ways the most indicative of, national culture in a broad sense. It is true that we already have some newspapers in several countries which could be described as positively directed towards European affairs and a European distribution. The *Financial Times,* which was always on my desk by 8:30 A.M. in Luxembourg, is one illustration. There are other newspapers in France, Germany, and England that are widely read and there is of course the ubiquitous *European.*

But the difference between press laws and practices are striking. Photographs of people in intimate embraces which appear with impunity here have led to compensation for the invasion of privacy and to a fine in France. We do not have the equivalent of Article 9 of the Civil Code. I am told that the Dutch press has a voluntary embargo on stories or rumours about the private lives of their royal family, an embargo which does not exist here. Belgian and French friends on the Continent are astonished at personal stories which are published in our press here. On the other hand, details of judicial or police investigations seem regularly printed in France with wide, if not wild, allegations made, which we would consider detrimental to a fair trial, a denial of the presumption of innocence, and a breach of the confidentiality of the investigation process. Then again defamation laws are much less strong, for example in France, with minimal awards of compensation and small fines. These distinctions certainly reveal differences in the wider concept of culture.

Many examples of deep-rooted differences in the general culture can be found. Personal differences, no doubt reflecting cultural differences, are strong. Edward Hall wrote that the northern states of Europe are "monochrome": the Anglo-Saxons like doing one thing at a time, the Germans and the Danes like precision and orderliness; the people of the Mediterranean countries are "polychrome": they like to be engaged in many activities, they prefer variety to depth, they attribute more to creativity and to imagination. These differences may well be reflected in the progress of economic development across the Community.

In the other sense referred to earlier, how far is the Community relevant to culture in the narrow sense of art, music, literature, communication, education, what the *Oxford English Dictionary* called "the intellectual side of civilisation"? The states of Europe share a cultural dimension, a cultural interest, and a cultural variety which affect the quality of life of its people in a way which may be unique. The influence of Greek philosophy, of the emphasis on the dignity of man and of the rights of man, and of the importance

of religious and particularly Christian beliefs is common to each of the different states of Europe. Through Helen Waddell's Wandering Scholars, through the Renaissance, through scientific discoveries, through the processes of the Industrial Revolution until the present century there has been contact and communication. For centuries these European cultures have tended to influence each other and to combine in literature and in music. In the present century they have come together in popular idiom through the press, through the cinema and radio and through television, through plays and music. The Eurovision Song Contest and "Jeux sans Frontières" are obvious examples. Greater mobility through aeroplanes, trains, and road transport and greater communication have significantly aided this process.

The retention of this diversity is essential. Such diversity in language and tradition, in style and habits, is the cultural wealth of Europe that must be preserved. There is a growing feeling that the creation of a European culture must develop independently of the North American cultural model, perhaps even be prepared to defend itself against the latter, albeit this already has had a profound effect on the cultures of all the states of Europe. We must positively support the remarkable range of museums and art galleries and ancient buildings that we have, which in themselves perhaps indicate the way in which our future cultural development should go.

In 1944 André Malraux said, "Le devoir de la loi et des services publiques n'est pas de maîtriser les arts mais de les servir." The European Community, as such, clearly has a role to play in encouraging national cultures by financial support and by administrative action, in providing centres for research and work in all areas of knowledge and the arts. It can also do much, not least in films and the media, in assisting the cultural industries of the Member States on a European basis. In this the Community should not, and does not, interfere with national cultures.

Despite the fact that cultural activities as such are not mentioned in the Treaty of Rome and that there was resistance by

Member States to Community efforts to base cultural measures on Article 235 of the Treaty — the United Kingdom not acknowledging Community competence in culture and pressing for a proper legal and financial basis for work in this area — the history of Community participation in cultural matters shows an increased awareness of their importance intrinsically, though, more particularly, because of their relevance to the economic and social aspect of Community action. As early as 1977 the Commission communication to the Council dealt with "Community action in the cultural sector" (November 22, 1977, supplement, 6/77 Bull. EC). This was followed by specific measures that were largely a symbolic recognition of the importance of promoting culture. Then leading up to 1992 came a Committee on Cultural Affairs and meetings of national Ministers of Culture and in 1987 a further communication, "a fresh boost for culture in the European Community" (CON/87 603 Final [Supplement 4/87 Bull. EC]). This latter document stressed the importance of the interrelationship between the economy, technology, and culture. "The success of various symbolic initiatives had demonstrated that Europe's cultural dimension is deeply rooted in the collective consciousness of its inhabitants. Their values constitute a common cultural heritage, characterised by dialogues and exchanges between peoples and men of culture based on democracy, justice and liberty. It expresses itself in the diversity of our local, regional and national cultures. It is the basis of European union which has goals other than mere economic and social integration, however important this may be." It added that "the creation of a European cultural area involves giving priority to the free movement of cultural goods and services, improving the living and working conditions of those involved in cultural activity, creating new jobs in the cultural sector in association with the expansion of tourism and regional and technological development and encouraging the emergence of a cultural industry which will be competitive within the community and the world at large."

There was no doubt that the Community was inhibited from taking too many steps, even those intended to encourage the cultural activities of the Member States themselves. There was no power specifically to deal with cultural matters and measures which were adopted had to be shown to be such as contributed to the harmonious development of economic activities throughout the Community so that action could be said to be directed to attain, in the operation of the Common Market, one of the objectives of the Community. Reliance on this has led to some rather debatable decisions. Nevertheless, even before the Maastricht Treaty much had been done. There have been substantial grants for work to preserve monuments and sites and historic buildings. Substantial repairs have been done to the Parthenon and to the Acropolis in Athens, to buildings in Coimbra and in Lisbon. There has been financial support for many other cultural activities — for the European Community Youth Orchestra, the European Community Youth Opera, the Poetry Festival, the European Community Baroque Orchestra. There have been prizes for literature, for architecture, and for poetry. The establishment of the European City of Culture and the recognition of countries in central and Eastern Europe for cultural purposes have been important. There has been emphasis on the preservation of architecture, on the importance of reading and encouraging, not only translations, but the training of translators and other similar cultural activities.

The Maastricht Treaty in many senses proved controversial, so much so that little attention was paid to what seems to me to be potentially a significant part of the Treaty. It recited that Member States, "desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions," adopted the measures set out in the Treaty. In Title I, Section F1, it is provided that "the Union shall respect the national identities of its Member States whose systems of government are founded on the principles of democracy." By Articles 126 to 128 of the Treaty the Community is now authorised to contribute to the development

of quality education by encouraging co-operation between Member States and by giving support, "while fully respecting the responsibility of Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity." Community action is to aim at "developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States." Vocational training is given a higher profile, the Community supporting and supplementing the action of Member States. Of considerable importance is Article 128, which merits quotation: "The Community shall contribute to the flowering of the cultures of the Member States while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."

Action by the Community is thus to be aimed at spreading awareness of the cultures and history of the European peoples, at conserving the cultural heritage of European significance, and at artistic and literacy creation, including that in the audio-visual sector. The Community is to co-operate with international organisations and in particular with the Council of Europe in cultural matters. The latter is particularly important in view of the fact that European culture is wider than that which exists in the Community alone. It is also important that incentive measures in the sphere of education, vocational training, and youth and in the sphere of culture are to exclude any "harmonisation" of the laws and regulations of the Member States.

Two principles have been adopted. First, the Community will maintain respect for cultural diversity and the specific national, regional, and local features of the Member States. Second, it will respect the principle of subsidiarity. Its objectives are to preserve Europe's past by helping to conserve and increase awareness of a common cultural heritage in all its forms; to generate an environment conducive to the development of culture in Europe by taking cultural aspects into account in other policies and programmes and by supporting artistic and literary creation; and to help ensure that

the influence of European culture is felt throughout the world by co-operation with other states.

The Commission has already issued a further communication to the Council, entitled "New Prospects for Community Cultural Action." Its aim is to provide a general reference framework within which specific proposals can be submitted by the Commission. It is a significant step. It recognises to a high degree the importance of holding discussions with professionals and competent authorities in the Member States to ensure concerted action in the Community, subject to respect for the principle of subsidiarity, so that the Community will encourage helpful co-operation only when it complements the action by the Member States.

It was easy to look askance at Community statements of general policy, to shudder at the prospects of bureaucratic interference with cultural activities. It is not difficult to understand why in 1978 in the Sub-Committee of the Select Committee on European Communities of the House of Lords one member of the committee asked why, in the light of existing organisations like the Arts Council and the British Council, which were perfectly competent to co-operate with other nation's organisations, it was necessary to set up this new structure. The member said, "I cannot see for the life of me why we should have this thing at all."

At the same time it has to be recognised that the Commission has got the capacity to lend support for the arts and to organise exchanges and co-operation on a European scale which would not be open to the Member States themselves. So long as the Commission regards it as its function to assist in the preservation and development of national cultures it seems to me that it is following the right policy.

Previous reference to the value of cultural activity in the economic and social development of Europe might have produced a certain cynicism as to the Community's motives. This is partly explained by the previous need to find an economic article in the Treaty of Rome that justified cultural activities. That is no longer

necessary, and it seems to me that the aims of the Community as now stated are genuine and that its achievements have been considerable.

These supportive activities have been important, but they have not been all; there has been other action relevant to cultural development in Europe.

In a number of areas important steps have been taken that have served the arts without dominating them. I merely illustrate them.

First, intellectual property laws are not the same throughout the Community and the differences can constitute a barrier to the free movement of goods and services. The Community is anxious to remove these barriers through harmonised rules. The Trade Mark Convention has already achieved substantial uniformity in Europe since it was agreed upon in 1978, though that is not a Community measure. The Trade Mark Directive will have a similar effect. Copyright creates a different problem. It is an English invention based on the idea that the author should be able to exploit his or her work. The test is basically economic. The civil law does not have exactly the same thing. It has a *droit d'auteur* which lays much more emphasis on intellectual creativity. There is thus a difference between the rules that are applied. Reconciling these two different approaches to copyright has led to considerable debate, for example, in relation to a proposed Data Base Directive, as data bases may be derived from skill and labour (and so will be protected in United Kingdom law under copyright) rather than creativity (in the absence of which they will not be protected in some other states). The test proposed is that data bases should be protected by copyright *only* if they have an element of originality by reason of their selection or arrangement.

If there is to be an internal market and free movement of services, an author's rights must be protected on a harmonised basis. This will come in time, but it involves give and take on all sides. It might be thought that since there are only two common law countries in the Community, they should give way to the others,

but it is generally accepted that there are aspects of the common law system which should not readily be abandoned. The Community is moving towards the adoption of a directive which will lay down periods during which copyright and certain related rights can be protected. Further directives will be needed to deal with other aspects of intellectual property. The rental and lending of works have been the subject of discussion for a long time and intellectual property rights are being discussed in the context of the GATT Uruguay Round.

Second, the removal of borders in the Community will make it easier for national treasures, paintings, manuscripts, and sculptures to be smuggled from one state to another. For that reason the Commission has proposed a scheme under which goods can be recovered if another Member State contends that they are the national treasures of that state. Great anxiety has been felt on this by art dealers in the United Kingdom largely because of the high percentage of art exports from other Member States to the United Kingdom which are in private hands, though the directive is limited to those listed in the annexe to the directive, or which form part of the public collection of a museum or gallery. The state claiming the treasures applies to the court and, if the goods are returned, the bona fide acquirer of the goods from whom they are taken will be compensated. This will enable goods to be returned to the state from which they were wrongly taken. The directive is not, however, retroactive, so that certain well-known treasures about which disputes exist will not be affected by its terms. The regulation also makes provision for licences to be obtained before such national treasures can be exported from one Member State. This seems to be an important method of protection, but it has led to anxiety that powers given under the regulation may be exercised restrictively.

Third, it has long been felt important to encourage and protect the audio-visual industry in the Community in view of the importance of cinema and video in cultural activity. The Television

Broadcasting Directive (89/552 of October 31, 1989) recites that the Treaty of Rome provides for the free movement of services without exclusion on grounds of their cultural and other content and that this right is a specific manifestation in Community law in relation to broadcasting and television distribution of the more general principle of ensuring freedom of expression that is enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. To this end restrictions on freedom to provide broadcasting services within the Community must be abolished. Laws must be co-ordinated and this co-ordination "must be aimed at facilitating . . . the free movement of information and ideas within the Community." As a result of the rules adopted, "the independence of cultural development in the Member States and the protection of cultural diversity in the Community remain unaffected." Basically it is the laws of the emitting state which prevail and only exceptionally may a receiving state suspend the retransmission of televised broadcasts.

Member States are required to ensure that European works (being works originating in Member States of the Community or other European states, parties to the Council of Europe Convention on Transfrontier Television) occupy a majority proportion of transmission time other than that reserved for news, sports, advertising, and teletext services. Similarly, at least ten percent of transmission time and of the programming budget must be reserved for European works created by producers who are independent of the broadcasters. Cinematograph films may not be shown for two years from the first showing in a cinema unless the holders of the rights in them agree. Member States "where they consider it necessary for language policy may lay down detailed or stricter rules in particular on the basis of language criteria."

Specific rules are laid down for advertising that must be inserted between programmes and be readily recognisable as advertising. Subliminal techniques and surreptitious advertising are prohibited; tobacco advertising is forbidden and there are rules about

advertisements relating to alcohol and for the protection of minors. Television advertising is not (a) to prejudice respect for human dignity; (b) to include any discrimination on grounds of race, sex, or nationality; (c) to be offensive to religious or political beliefs; (d) to encourage behaviour prejudicial to the protection of the environment. A person whose legitimate interests have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedy.

This is a delicate matter in the cultural sphere — how to achieve high standards without unduly interfering with national sensibilities.

The teaching of languages throughout the Community is obviously a starting point for cultural understanding and activity and is the link between the broader and the narrower concepts of culture. No doubt "Erasmus," "Comet II," and the "Use for Europe" programmes provide a special opportunity for those students who can participate. But the Community needed a broader-based programme and this was achieved by a Council decision establishing an action programme to promote foreign language competence in the European Community called "Lingua." Its emphasis is on a programme to train language teachers, to enable students to move around the Community for language studies, to encourage students in other disciplines to learn a language, and not least to recognise the importance of language teaching as part of the vocational training of workers and trainees, particularly in small and medium-size enterprises.

The emphasis in the programmes on the value of language learning for the completion of the internal market and on its economic and commercial significance may be thought to override cultural values. But that should not be misunderstood. There was at earlier stages no very clear Treaty provision to give the necessary powers to develop such an action programme. It clearly went beyond the establishment of general principles for implementing a common vocational training policy as provided for by Article 128 of the Treaty of Rome. It had, therefore, to be shown that it con-

tributed to the harmonious development of economic activities throughout the Community so that action could be said to be necessary to attain, in the operation of the Common Market, one of the objectives of the Community. The link with harmonious economic development, so far as languages are concerned, can be said to be a genuine one and it was much to be encouraged not least since the decision on Lingua itself stressed the cultural significance of language learning as a means of enhancing understanding and solidarity between the peoples which go to make up the Community, whilst preserving the linguistic diversity and cultural wealth of Europe.

It is not, however, only Community regulations and directives which have been concerned with European cultural development. The European Court itself has been involved in decisions which impinge on cultural activities. The Court has accepted that the protection of cultural diversity may, exceptionally, justify national rules even where the result is a division and partitioning of the Common Market. Thus, Community rules may affect education and training even if education and training are not specifically covered by the Treaty. In other cases it is held that cultural factors may have to give way to the overriding rules of the Community. National cultural policy rules which are real obstacles to the basic objectives of the Community such as free movement and open competition must give way to those objectives. Thus, an attempt by Italy to argue that the rules on the free movement of goods did not apply to art treasures, so that an Italian tax on exports was valid, failed (Case 7/68 1968 ECR 618). Private and public retail price maintenance for books, which was said to be necessary for the protection of the book trade, was set aside, as being incompatible with competition in the Dutch booksellers case *(VBVB v. VBBB* 43 & 63/82 1984 ECR 19).

The link between the creation of the Common Market and cultural activities can further be seen in the series of cases that came before the Court relating to education and vocational training. The

Treaty said nothing about education in the broad sense. In relation to vocational training all it required was that the Council should lay down "general principles for implementing a common vocational or training policy capable of contributing to the harmonious development both of national economies and of the common market." A French girl went to Belgium to study strip cartoon design. She was asked to pay a registration fee not required of a Belgian student. This she regarded as discriminatory. Article 7 of the Treaty prohibits discrimination on grounds of nationality, "within the scope of the application of this Treaty." The issue was, thus, whether the student could fit her case into "the scope of application of the Treaty" if education and cultural activity were not mentioned. Initially that did not seem very easy. The Court, however, took the view that "the common vocational training policy referred to in Article 128 . . . constitutes an indispensable element of the activities of the Community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standard of workers." The ability to study in another Member State was an important aspect of free movement. It enabled people to complete their training and develop their particular talents in a Member State which offered the particular subjects desired to be studied as part of vocational training (Case 293/83 1985 ECR 593).

This led to many other cases in which the Court stressed that the principle was limited to vocational training (though as far as universities were concerned, it took a liberal view of what subjects could be regarded as vocational training) and that rights of access without discrimination were to be strictly construed, so that they did not include maintenance grants. Nor did they apply to schools. Similarly, in relation to migrant workers, a fairly restrictive approach was adopted. Students are not migrant workers if a work placement prior to going to university is found to be merely ancillary to their studies. The study undertaken by a worker must relate to his or her existing work unless he or she is involuntarily unemployed.

The balancing exercise is not always easy. In the interests of protecting a language which was the constitutional and first language of Ireland, the Court upheld on cultural grounds a requirement that teachers in Ireland should have passed a proficiency test in Irish even though almost all communication, literature, and instruction in the particular teacher's subject, the history of art, was in the English language (Groener, Case 379/87 1989 ECR 296C). Whether the Court got the balance right in this case may be debatable from the point of view of the free movement of workers, but the recognition of the cultural dimension was important.

For the future, there are ambitious plans to encourage the distribution of books and reading, to encourage translation as one of the best ways of promoting cultural exchange and of preserving artistic and literary creativity of our different countries. Clearly the Commission cannot force the pace, but even though it is not there to create a separate European culture, it has a great opportunity to facilitate cultural activity by enabling people to co-operate with those in other countries, to pass on information, and to encourage quality as well as quantity. There is already in Europe out of many diverse cultures a community of cultures with which people ought to be made more familiar in order to lead to a common cultural identity. This can only be done by education in our own different cultural heritages. If it is not done, the danger of being submerged by external cultural influences is all too evident.

No longer shall we have Helen Waddell's Wandering Scholars.

No longer shall we have the eighteenth-century Grand Tour when the privileged had the chance to tour around Europe, sometimes for long periods, seeing the best of everything, which was no doubt highly productive for some, and less so for others.

Yet today we have an extraordinary opportunity at all levels to travel, to study, to see, and to listen. The task of the Community, but no less of our governments and of industry and, it has to be said, of each of us in a privileged position, is to ensure that the humanist tradition be renewed, that the Grand Tour adapted to

modern conditions be revived, be it physically or intellectually by distance learning.

The starting point is no doubt to ensure that students travel and that university teachers travel. "Erasmus" made a good start, but only a tiny percentage of students can be involved. At the same time there has to be a Europeanisation of our universities, not only to attract Community students but also to attract students from other countries. It may involve the setting up of modular degrees with credits to be taken in different universities.

Travelling cannot be simply a postgraduate luxury. Yet this latter is also important. The European University Institute in Florence has made a remarkable start at a high level of postgraduate study. As a member of its research council I was greatly impressed by the range of Europe-related subjects which were taught and on which the faculty produced papers — history, economics, politics, philosophy, art, as well as law. Increasingly in the United Kingdom it seems that universities have a combined course involving a language and a period spent in a continental university. The Europeanisation of our universities is everywhere a critical starting point and it is beginning.

As far as the law is concerned, there have been great steps in universities in this country, but even more so in the College of Europe in Bruges, the new European Institute in Trier, the European and international studies schools in Amsterdam, and other Dutch universities.

This is all very important, but the bonding together culturally of Europe will come not just through the educational élite, but by passing on the history, the geography, the arts of Europe to citizens at all levels. I spoke recently at a language institute at Santander. Some 3,000–4,000 Spanish part-time students were learning a second European language. Eighty percent studied English. It was almost a cultural shock to see in one of the classrooms that the dominating picture was a newspaper photograph of the Lord Chancellor — surrounded by many articles and pictures explaining the English legal system.

Differences of language, of course, will remain a problem — though it is as well to remember sometimes that the Spanish, Italian, and Polish languages seem more effective in some parts of the United States of America than does English. Diversity of language may be the greatest barrier to the creation of a European culture and a European identity and yet it is the greatest contribution to that culture. We must proceed on the basis that we shall remain a plurilingual society. But at the same time we shall need to have one language for common exchange. Years ago, I thought that this would have to be French. There seems, however, to be a feeling even in French-speaking countries that realistically this will have to be English, though at a recent conference in Morocco the French-speaking nations showed that the Francophiles, and particularly the French, will, rightly, insist on the importance of their language. In the United Kingdom we should not lose any possible initiatives on this. Of course *they* should learn English, but there is no less an obligation for *us* to insist on at least one second European language being taught everywhere in the United Kingdom. Realistically, it should be French, but if English rather than French were to become the working language of Europe, the Germans and the Spanish would vie to be the second language.

Law, culture, and achieving the aims of the Tanner lectures come back to education in its widest sense. I recall what is said to be a Chinese poem of 500 B.C.: "If you think in terms of a year plant a seed; if you think in terms of 10 years plant a tree; if you think in terms of 100 years educate the people." Only in this way will the words of Victor Hugo in 1845 be realised: "Un jour viendra où vous France, vous Russie, vous Italie, vous Allemagne, vous toutes nations du continent, sans perdre vos qualités distinctes et votre glorieuse individualité, vous vous fondrez étroitement dans une unité supérieure, et vous constituerez la fraternité européenne. . . . Un jour viendra où il n'y aura plus d'autres champs de bataille que les marchés s'ouvrant au commerce et les esprits s'ouvrant aux idées."