Lord Mance at the World Policy Conference, Monaco
Destruction or Metamorphosis of the Legal Order?
14 December 2013

No man is an island. But, until quite recently, the legal orders within which particular communities live have been seen as culturally specific and separate. Once it may have been possible to identify a common law of Europe, a ius commune, based on Roman law. But, after the Treaty of Westphalia and even more so with the emergence of the 19th century nation state, legal systems developed within national boxes, often marked with the words constitution and code.

Today's globalised world is different. We have developed over-arching supranational principles and courts, which interact with domestic tribunals. I shall concentrate on the European project, resting on the twin foundations of the European Convention on Human Rights and the European Union. But international law in a more general sense has also come to be important in the determination of all sorts of domestic issues.

Courts are thus confronted with novel issues and tensions. How far must they look outside their own system? How far is their system part of a larger system? How far is their system subsumed, consumed, superseded, by another?

Noone has a single identity. We have mixed characteristics, inter-relating with those possessed by others in a confusion of overlapping circles. Human dignity and happiness depend on the extent to which society recognises and enables us to express all aspects of our identity. The possession of aspects of character which are both national and supranational is or ought to be enriching.

Unfortunately, however, identities are, in public discourse, often over-simplified, and often presented in unitary and conflictual terms. When changes to domestic law are impelled from outside, fears can in this way be raised about loss of identity. The European project raises questions about identity - for societies and individuals and how they view themselves.

The Council of Europe's Convention on Human Rights came into existence as a means to bind Europe to fundamental principles which would eliminate any recurrence of the horrors of the period ending in 1945. It is a truism, at least in Europe, that such a Convention is a living instrument. But there is a difference of view about what this means. Clearly, it means that the understanding and

application of concepts like "cruel or unusual punishment", "family" and "family life" may change with social conditions. But how far the express Convention rights should be mined and their ambit extended in a continual process of discovery of new implications, not infrequently overlapping with domestic law, can be controversial.

The origins of the European Communities or now Union are found in a parallel aim, to merge German identity within a larger body, which would prevent any recurrence of the murderous aggression which devastated Europe prior to 1945. Over time, however, a broader rationale has emerged, to preserve Europe's role and European principles and significance in the wider world, in the face of the emergence of new powers, political as well as economic, in other parts of the world.

Article 2 TEU states that the European Union is founded on values, common to all member states, of respect for human dignity, freedom, democracy, equality, the rule of law and human rights. The recitals speak of these as developing from Europe's "cultural, religious and humanist inheritance", and of a desire "to deepen the solidarity between [Europe's] peoples while [at the same time] respecting their history, culture and their traditions". Article 67(1) commences Title V TFEU on The Area of Freedom, Security and Justice by stating that the Union shall constitute such an area "with respect for fundamental rights and the different legal systems and traditions of the Member States".

There are here of course tensions. Tension is also evident in the further recited resolve "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". Article 5 explains that "the use of Union competences is governed by the principles of proportionality and subsidiarity". The latter principle means that the Union should only act on objectives which cannot be sufficiently achieved by the Member States, but can be better achieved at the Union level. Protocol No 2 seeks to fill out and reinforce both principles. It includes a provision giving national Parliaments a new power to issue reasoned opinions objecting to any particular measure as not conforming with the principle of subsidiarity.

How far European states would go with the European slogan of "ever closer union" was always a question. This was particularly so, in the case of the United Kingdom, unconquered, geographically detached and with strong traditional links

outside Europe - counter-poised to Europe, rather than conscious of the "common destiny" that was Robert Schumann's vision.

Both the Convention and the European Union operate within highly legal frameworks, and each has its own innovative and very powerful supranational court, able to make decisions binding either directly or, in the case of the Strasbourg court, at the very least at the international level.

Not too surprisingly, some EU legislation passed by qualified majority vote, and some decisions of the Luxembourg and the Strasbourg courts, have aroused public debate. There have even been expressions of concern from some judicial colleagues. Speaking of Strasbourg jurisprudence, Lord Justice Laws[1] recently said that "the greatest challenge of our human rights law is that it appears to merge" the "protection of fundamental values and the business of elected government". Another, Lord Sumption, speaking to the title "The Limits of Law"[2], has suggested that the "living instrument" approach as applied in Strasbourg jurisprudence "is not always easy to reconcile with the rule of law" and that it "gives rise …. to a significant democratic deficit in some important areas of social policy". He ended his speech, apocalyptically:

> "Even in a case where the limits have been exceeded, I am not going to suggest that the fabric of society will break down because judges …. make law for which there is no democratic mandate. The process by which democracies decline is more subtle than that. …. What happens is that they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different, like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance."

In fact, the British common law system has been almost alone in the world in operating on a pure principle of Parliament sovereignty, unconstrained by any written constitution. Written constitutions, containing fundamental rights chapters, exist in most countries, including virtually every former British territory given independence by the Westminster Parliament. Law exists as a basis for social activity and to constrain the activities of errant minorities. The fundamental rights chapters of constitutions are there for the very purpose of constraining the activities of majorities. History contains some sobering reminders of the ability of elected majorities to perpetrate unfairness and injustice. The Human Rights Act

[1] In Lecture III of his Hamlyn Lectures delivered on 27 November 2013 under the title "The Common Law and Europe".
[2] In the 27th Azlan Shah lecture delivered in Kuala Lumpur on 20 November 2013.

1998 was passed by the United Kingdom Parliament for the very purpose of giving domestic effect to the Convention rights. It is a constitutional (with a small 'c')' instrument bringing the United Kingdom much closer to the majority of other countries in this field. Parliament has decided that judges should have the role of adjudicating upon such rights, and in exercising this role should take into account the Strasbourg jurisprudence. Judicial decision-making in this respect cannot be stigmatised as in itself undemocratic in this context, any more than it could be in the different context of *A v Home Secretary* (the "*Belmarsh*" case) [2005] 2 AC 68, para 42, in which the House of Lords held the detention of aliens without trial unjustifiably discriminatory.

There is of course scope for argument about what counts as fundamental. And there may be doubts about the wisdom of some more extended interpretations. Lord Sumption's approach would limit the judicial role to "cases of real oppression and … the truly fundamental", leaving other matters to be dealt with at a political level. It is not clear to me how far his counsel of restraint is associated with the fact that the Strasbourg court operates independently of any legislature with direct ability to modify its decisions. But, on any view, what is "truly fundamental", or what is appropriate for political rather than legal resolution, must be a matter of judgment, and to some extent perhaps philosophy[3].

Underlying attitudes to Europe and concerns about identity and self-determination may affect this judgment. I have heard it said that, when the Strasbourg court disagrees with a decision taken in France, the blame in France is directed at the French decision-maker, whereas, in the United Kingdom, it would be directed at the Strasbourg court. But all courts are aware of limits to their competence or suitability to resolve some important issues - e.g. relating to the allocation of resources – as well as of the need to have regard to the choices of institutions elected or entrusted with public functions. At the international level, this is also reflected in the margin of appreciation; and the Strasbourg court has given real weight to this and to member states' evaluation of local circumstances in significant recent decisions[4]. The potential for good in fundamental rights

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[3] Mr Justice Sopinka observed in the Canadian case of *Rodriguez v Attorney General of British Columbia* (1993) 3 SCR 519, 590 that there is "a good deal of scope for personal judgment" and care is needed that the principles of fundamental justice are not "in the eye of the beholder only".

[4] E.g. in the Grand Chamber decisions in *Taxquet v Belgium* (926/05) (16.11.2010) (the Belgian jury case), *Lautsi v Italy* (30814/06) (18.03.2011) (the Italian crucifix case), *von Hannover v Germany* (40666/08 & 60641/08) (07.02.2012) (privacy) and *Austin v United Kingdom* (39692/09, 40731/09 & 41008/09) (no deprivation of liberty involving in the kettling of demonstrators by police in Oxford Circus – a decision reached by a majority of 14 to 3 that might have gone the other way without causing surprise).

provisions at a European level ought not to be ignored. Nor should we think that we are the only country whose lay or legal population feels from time to time strongly about some decisions.

In relation to the United Kingdom, the Convention and Strasbourg case law has over the years led to the removal of sentencing discretion from the executive, the lifting of the ban on homosexuals in the armed forces, the ending of detention without trial of aliens suspected of terrorist involvement, prevention of deportation of aliens who would if deported face a real risk of torture or inhuman treatment or of a flagrantly unfair trial and the state being held responsible for complicity in illegal rendition and torture abroad. The domestic effects of decisions reached in some of these areas may sometimes pinch, but it is difficult to regard it as unforeseeable that a court, established by consent of European states to give effect to the Convention, should reach them. At the international level, the Convention has also been a positive inspiration for - and an impetus for lifting standards of treatment of - Europeans across the wider continent.

Similarly, and without becoming too political – or falling into the fallacy post hoc, propter hoc - the European Union and its predecessor Treaties have seen Europe experience fifty years of, basically, peace, weaving an unprecedented net of governmental and institutional collaboration between its component states and offering inspiration and assistance to emerging democracies around the Union's periphery, and developing what has been described as an "intermediate" sphere of largely majoritarian cooperation, which makes Europe more than its governments or its institutions[5]. The Union has developed a common internal market, a high level of consumer and environmental protection and important measures enabling the different legal systems of Europe better to interact.

At the same time, it is unsurprising to find concerns about supranational invasion of areas of law previously seen as quintessentially national. National identities remain strong within Europe - in the case of older established states, perhaps stronger than in the case of some of the newer democracies, which are glad to be part of a wider supportive Europe. Taking the UK, the European flag does not fly over Whitehall buildings (which happen to include our Supreme Court), as it does in other European capitals. And European courts and law seem to become a target of sections of the press - without any distinction being necessarily drawn or perhaps sometimes even understood between Brussels and Luxembourg on the

[5] The word "intermediate" comes here from Luuk van Middelaar's study *The Passage to Europe,* which won the European Book Prize in 2012.

one hand and Strasbourg on the other. Unfortunately, the current Eurocrisis, which can only be resolved by cooperation between EU countries, also has some effects of increasing nationalistic sentiments and anti-European feelings.

Concerns about supranational invasion operate at various levels. At one level, practitioners regret the loss of sensitive principles worked out in practice over decades, if not centuries, in favour of sometimes ill-drafted and mechanistic solutions achieved by compromises at a European level. Professor Trevor Hartley wrote in 2005 an article entitled "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws"[6]. But Europe's activity in the area of conflict of laws has been with the admirable purpose of ensuring the smooth working together of different European legal systems – by enabling individuals and companies to predict which law and which court within Europe would resolve any issues arising between them. Admittedly, the Commission went too far in then proposing that the same principles should be imposed on all EU countries in respect of all litigation coming before their courts, whether it had anything to do with Europe or not (apart from the fact that parties had chosen to litigate here or had been able to sue or be sued here). That proposal was however seen off by opposition in a number of EU states. In legal matters, Europe has in my experience had a record of acting quite consensually, and not over-riding the interests of at least the large member states like the UK.

In other areas - internal market and consumer and environmental protection for example – Europe has intervened not just to ensure that different systems co-operate well, but to harmonise substantive legal principles across members states. This can of course be more controversial – so much so that the Commission now proposes to legislate not by replacing national substantive law, but by offering a parallel optional legal system operating in each EU state for sales or for insurance contracts. This addresses concerns about the imposition of untested and artificial systems, though whether the development of such a parallel system will prove successful or worth the time and money involved is a different matter.

One problem for the common law about any developments which supersede existing law is their potentially isolating effect in relation to the rest of the world. In the other common law countries - Australia and New Zealand and those vibrant Far East commercial and legal centres, Hong Kong and Singapore - English common law has traditionally been influential. Now one hears (as a concealed

[6] International and Comparative Law Quarterly, volume 54 (2005), pp. 813–828

selling point in the case of Hong Kong and Singapore) that English common law is treading a path of its own, losing touch with that of its old pupils.

Another level at which concerns are sometimes expressed about European legal developments is the basic democratic level. The existing European structures are presented as remote from those affected by their activities; and as reaching decisions independently of, and sometimes in disregard of, the wishes of the peoples of Europe. In a recent talk[7], the legal adviser to the Council of Ministers, Hubert Legal, noted that

> "What matters most to make judges legitimate, in our European tradition where they are not elected, is that their ability to deliver judgments that are, in form and substance, socially acceptable – not in the populist sense of the emotional reactions of social groups but in the global sense of the permanent and essential character of a society of shared values".

The relationship between European judges and the peoples of Europe is therefore a particularly delicate one. Decisions extending by way of interpretation the ambit of the rights protected under the Human Rights Convention are effectively impossible to reverse, however strong a popular feeling there might be about them, since changing the Convention requires unanimity.

EU legislation is agreed by a process with greater democratic elements which is however still fairly remote from the peoples of Europe. A Commission proposal is followed by detailed negotiations level within the Council of Ministers. This acts since the Treaty of Lisbon in a form of co-partnership role with the European Parliament, which however rarely attracts public interest or votes. National Parliaments to a greater or lesser degree scrutinise their national ministers' activities on the Council of Ministers.

Recently our far from Eurosceptic Attorney General, Dominic Grieve QC MP, delivered a frank attack on the process by which the Commission brings forward some legislative proposals, accusing it of unacceptable and "aggressive" exploitation of the rules to "side-step" opt-outs negotiated by EU member states. He said: "It conveys the impression of an intellectual game designed to subvert the agreements which Ministers, answerable to electorates, entered into in good faith." In practice, however, the European Council or Council of Ministers can and often does act as a counter-weight to such risks. Hubert Legal in his recent talk probably expressed the Council of Ministers' likely attitude to Commission proposals to

[7] Given under the heading of "The Future of the Union's policy for justice" on 21 November 2013.

address problems in national justice systems under the single market provisions of the Treaty (where the UK has no right not to opt in), rather than under Title V on Freedom Security and Justice (where the UK does have a right not to opt in). He said "There is quite enough work on the table by virtue of Title V not to look for parallel tracks or to precipitate matters in a way that might render ownership or even simple acceptance well nigh impossible".

As to the Treaties and measures agreed under them, the long-established jurisprudence of the European Court of Justice is that it is the final arbiter of both their scope and their effect. The European Court of Justice has had a very important part in the consolidation of European legal principles across our single legal space. This Court's approach to interpretation is heavily teleological, with results sometimes surprising for lawyers used to attaching weight to the legislator's precise words. Its interpretations of the Treaties are difficult to reverse, although its decisions on individual measures can sometimes be redressed or ameliorated[8]. Its jurisprudence even occasionally tempts reactions in national legal circles paralleling that of Dominic Grieve in relation to EU legislation.

In *Test Achats v Conseil des ministres* (Case C-236/09) the European Court of Justice famously decided that motor insurance premia must be the same for men and women. The lesson a Commission official drew from this decision was that "the Court will show less tolerance towards clumsy political compromises expressed in self-contradictory legislative rules". Vice-President Reding endorsed this lesson in a speech to FIDE[9] in Talinn on 31 May 2012. I am not concerned with the merits of the decision in *Test Achats*, but such comments do concern me. As Winston Churchill said "Democracy is the worst form of government, except for all those other forms that have been tried from time to time"[10]. The European legislative process may be imperfectly democratic, but it is the best we currently have; and compromise is the essence of democracy. For better or worse, European legislators have to reach compromises. As the President of the European Council, Herman van Rompuy said in his speech to this Conference yesterday, "The Union functions thanks to – is even built upon – negotiation and compromise". It would not enhance faith in the admittedly imperfectly democratic European project if the attitude expressed by the Commission's officer towards legislative choices were to gain sway.

[8] As for example by the recent revision to the Brussels Regulation on Civil Jurisdiction and Judgments 1215/2012 of 12 December 2012, addressing problems arising from several Court of Justice decisions.
[9] Fédération Internationale pour le Droit Européen
[10] House of Commons, Nov. 11, 1947.

A leading role in defining the relationship of European and national legal systems has been taken by the German Federal Constitutional Court. It has insisted on the primacy in principle of democratic oversight at a national level, while democracy at a pan-European level still remains primitive. As its Vice-President, Professor Dr Ferdinand Kirchhof, recently put it[11]: "a constitution which is directly based on the sovereignty of the people takes precedence over a supranational treaty which has only an indirect democratic legitimisation". But the Federal Constitutional Court has also advocated and practised a sensitive approach of mutual restraint, careful to acknowledge the role of Europe. This role is foreshadowed in the German Constitution, the Grundgesetz, itself. Article 23 proclaims the German Constitution to be "inspired by the determination to promote world peace as an equal partner in a united Europe". The Constitutional Court will thus accept and defer to European law laid down by the European Court of Justice, as long as (solange) this essentially respects German fundamental rights. The Constitutional Court has also made clear that it reserves the power to adjudicate upon the scope of application of European law under the Treaties, and to reject any decision of the European Court of Justice applying European law more widely. Other constitutional courts across Europe have followed this lead.

The European Court of Justice has from time to time nonetheless tempted adverse national reactions. This is particularly so in *Åklagaren v Hans Åkerberg Fransson* decided on 26 February 2013[12]. The Court was considering the sphere of application of the Charter of Fundamental Rights. Article 51 of the Charter itself proclaimed that this should only apply to member states "only when they are implementing Union law". In *Åkerberg Fransson* the Court said that this phrase was to be understood as applying wherever a state acts "within the scope of European law". On this basis, the European Court took what Vice-President Kirchhof described as a "daring step". It held that the Charter covered an issue whether Mr Fransson could at one and the same time be given an administrative fine and prosecuted for failing to comply with his duty to file a proper tax return. It did so on the basis that the tax in question happened to be VAT, which is a tax required under EU law, although the same issue would have arisen had it been a nationally based tax like income tax. In so holding, it disagreed with the submissions of the Commission and all governments that appeared before it as well as with the opinion of Advocate General Curz Villalón.

[11] In a speech entitled "Cooperation between National and European Courts".
[12] Case C-617/10.

The German Constitutional Court reacted speedily and vigorously, in a decision of 24 April 2013[13], and in out of court speeches by its President[14] and Vice-President[15]. The latter made clear that the Constitutional Court would regard it as beyond the European Court's powers – ultra vires – if the European Court were to apply the Charter to any legal relationship not "determined" by European law by "a legally-binding instruction for the specific case". There is therefore a potential for direct conflict between the national constitutional and European legal orders. But it will probably be avoided if, as both the President and Vice-President counsel, the European Court of Justice engages in the constructive dialogue which they invite.

The British position is strikingly different. Parliament by the European Communities Act 1972 stipulated that all rights, powers, liabilities, obligations and restrictions arising by or under the European Treaties "are without further enactment to be given legal effect or used in" the UK. This gives rise to a paradox. Having so stipulated, no explicit constitutional buttress remains against any incursion by EU law whatever. Indeed, the 1972 Act has itself been given a constitutional status lifting it above ordinary statutes. The ordinary rule that a subsequent inconsistent statute impliedly overrules an earlier has no application to it: *Thoburn v Sunderland C. C. (*the "Metric Martyrs" case)[16].

There are therefore few limits to the dominance of EU law. One recently acknowledged limit concerns the meaning in a domestic context of "the Treaties". In *Assange v Swedish Proscecution Authority*[17], and again in *Bucnys v Ministry of Justice, Lithuania*[18], the Supreme Court noted that the 1972 Act expressly excluded measures agreed in the field of criminal law under the old third pillar of the former TEU. Another is that there are other constitutional statutes, such as Magna Carta, the Bill of Rights 1989, the Act of Union 1707 and the Human Rights Act 1998, which (it might be argued) cannot themselves have been intended to be affected by the 1972 Act. A third point is that, even before the Human Rights Act, common law courts were in the process of developing a concept of fundamental common law right, to which some special preference might in this context also be given. But, if and so far as these limitations exist, they are self-evidently less effective

[13] No 31/2013.
[14] In his Sir Thomas More lecture on "European Integration and the Bundesverfassungsgericht" delivered in Lincoln's Inn, London on 31 October 2013.
[15] In the speech mentioned in the last but one footnote above.
[16] [2003] QB 151
[17] [2012] UKSC 22, [2012] 2 AC 47.
[18] [2013] UKSC 71, [2013] 3 WLR 1485.

deterrents to European pro-activity than those which a country with a written constitution possesses.

In relation to the European Convention on Human Rights, the legal position is more subtle. First, the principle of Parliamentary sovereignty is more clearly preserved. The Convention rights only apply to the extent that they are not incompatible with primary legislation. If they are incompatible, all that domestic courts can do is declare this, by an order which does not itself change British law, but leaves Parliament free domestically to re-consider its stance. That is the position arrived at in relation to the vexed issue whether any prisoners should have the right to vote in the UK. The present legal position has been declared incompatible with the Convention by a domestic judgment, and it is up to Parliament to decide on what to do. Second, domestic courts are by the 1998 Act given a wide power and duty of corrective interpretation, which enables then to reshape the precise wording of legislation to meet the Convention rights, so long as they do not go outside the spirit or against the grain of the legislation. Thirdly, however, domestic courts are under the 1998 Act not bound by decisions of the European Court of Human Rights. We are bound simply to take such decisions into account, not to follow them. We do usually follow any clear line of Strasbourg jurisprudence, especially when it is found in a Grand Chamber decision. But we have disagreed with a quite clear line of section decisions, after which a Grand Chamber has been prepared to re-consider and modify its jurisprudence. The best example of this is *R v Horncastle*[19], where the Supreme Court refused to accept the Strasbourg jurisprudence according to which it appeared a conviction could never be founded on hearsay evidence which was the sole or decisive reason for the conviction. In *Al-Khawaja and Tahery v UK*[20] the European Court of Human Rights modified its former jurisprudence.

The EU's increasing interest in fundamental rights is not matched by a similar flexibility. Subject to whatever effect may attach to Protocol No 30 negotiated by Poland and the United Kingdom, domestic courts have to accept the scope and interpretation which the Luxembourg court puts on the meaning of rights contained within the Charter of Fundamental Rights which applies, as I have said, "when they are implementing Union law". That is no doubt part of the background to the German Constitutional Court's reaction to *Åkerberg Fransson*. The Commission recently floated the idea of making the Charter binding when states implement not just EU law, but any law. The Charter would then become

[19] [2009] UKSC 14, [2010] 2 AC 373.
[20] Applications 26766/05 and 22228/06.

the equivalent of the fundamental rights chapter of a written constitution for Europe. But there is no prospect whatever of this happening in the near future.

I have focused on the inter-relationship of national and European law and legal systems. Before concluding I should note briefly how intensely relevant wider international law has become for domestic judges, at least outside the USA. Both formal instruments like the UN Charter and the Torture Convention, as well as softer legal instruments like the Universal Declaration of Rights and reports of the UN Human Rights Council and decisions of other international courts such as the Inter-American Court of Human Rights are all examined and can be influential in domestic proceedings. Conflicts may arise between different legal orders, but in the absence of any over-arching world jurisdiction these are of a different and milder nature to that capable of arising within Europe.

National legal systems have local support and are a focus of national loyalties. Even if some would identify some of the reasons as conservatism or tribalism, de Toqueville was right 200 years ago to say that:

> "Decentralization has, not only an administrative value, but also a civic dimension, since it increases the opportunities for citizens to take interest in public affairs; it makes them get accustomed to using freedom."

In matters which relate to legal relations, this is bound to mean differences in law. We already see these increasingly with the devolution models which have been adopted for Scotland, Northern Ireland and Wales within the UK. These are models based on subsidiarity and they reflect the overlapping and enriching identities that the peoples of Europe and its member states enjoy.

Ultimately, the European project must rest on mutual trust, goodwill and co-operation. Mutual trust is an article of faith of the European Union. But it requires real sensitivity to build and maintain. Over-ambitious steam-rolling of centralising projects in order to promote the European project can achieve precisely the opposite result. There is already healthy informal dialogue between national jurisdictions and our supra-national courts. In the case of the Strasbourg court, this can be seen in the judgments. In the case of the Luxembourg court it is no less real, but less apparent. That is because the Court of Justice does not in its committee style approach overtly engage with national jurisprudence (save in Advocate Generals' opinions, which are however neither binding nor decisive). That is a pity. Good fences build good neighbours, but so does good open conversation over the fences.

There is still a danger that our supranational legal systems and courts operate too distantly from the national systems which their decisions impact. The general references to proportionality and subsidiarity in the European Treaties need to be seen to work in practice. We need impact assessments that rigorously scrutinise Commission proposals, regardless of how cherished they may be, to assess their value, proportionality and consistency with subsidiarity. We look to see in the Strasbourg case law a permanent recognition of the importance of the margin of appreciation and "the fundamental principle of subsidiarity", underlined by the Brighton Declaration on the Future of that Court of April 2012.

As a colleague, Lord Hope, said in a domestic context: "In the field of constitutional law the delicate balance between the various institutions …. is maintained to a large degree by the mutual respect which each institution has for the other"[21] . The same applies at the international level. The United Kingdom has traditionally been an effective, and welcome, operator on the Brussels scene. If it wants its voice heard, it is necessary that it should be. The United Kingdom was also a leader in the preparation and issue of the Brighton Declaration. Common lawyers are eminently adaptable. Their contribution in co-operation with European supra-national courts and other European national courts has I believe been very fruitful and significant in the past.

In my experience there exists a real appreciation within European institutions and European and national legal communities of the contribution that the common law, with its experience and clear thinking pragmatism, offers. This is not I think sufficiently appreciated within the UK. While there are some unresolved issues and tensions at a European level, I would respond with confidence to the title of this session that I have no sense at all that the United Kingdom's legal system or we, its common lawyers, judges and courts, are about to be over-whelmed or lose our identity in the face of any outside threat. On the contrary, we are a positive contributing force in the web of interconnected systems that make up the modern legal world.

[21] Jackson v Attorney General [2005] UKHL 56, para 125.