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HOW FAR HAS THE TIDE REACHED ?

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My Lords, Ladies and Gentlemen, I am delighted and honoured indeed to be invited to give this lecture. I am very flattered to find a place in a long line of successive distinguished lecturers.

When Lord Denning made his famous remark about the incoming tide of the European Community law, he was referring of course to its impact on the flow of case law. Comment and debate continue and will no doubt go on for a very long time. I would like today to widen the debate and consider the impact of the Community's activities on the policy making process and legislative responsibilities in the Member States more generally and not just with regard to the impact on common law. It is clear that the ambit of Community activity has greatly increased in recent years. There are many things in which the Community is involved which would have been regarded as way beyond its concerns a comparatively short time ago.

Of course the completion of the single market does not come into that category. That amounts to no more than the fulfilment of the original promise which lay unfulfilled for so long. But now one hears the Community talking about taking charge of monetary policy, the creation of economic and monetary union and the creation of a single currency: in all these areas one is seeing very much more than that incoming tide of law to which Lord Denning referred. One is seeing an advance on the policy front of a wholly novel kind, which will certainly have to be policed by lawyers when it is converted into legal texts. It is notable as a tide of political advance and administration, not just one of strict law. I think there is no doubt at all that many people, and not only in this country, feel that there is an inexorable quality about that advance which gives cause for concern, that the case for each one of those advances may be well made out, but that the cumulative effect is so overwhelming that one is left wondering where will it end. That feeling is perfectly respectable, in the face of so strong a dynamic. It has led to a response by those within the institutions of the European Community who understand that concern and feel that it is necessary to do something to allay it.

That feeling - that there must be some limits set, some principles laid

down as to what the Community can do and should do and what it cannot do and should not do - has led to the development of the concept of subsidiarity - an ugly word, but a necessary concept. Decisions should be taken and implemented at the lowest appropriate level of Government; one should only do at the European Commmunity level that which can best be done there.

Subsidiarity has been introduced into Community political discourse and Commission practice and now finds a prominent place in the Maastricht Treaty. Article 3b provides: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

There is therefore a double restraint. At the end of the provision, one finds the concept of proportionality, that no more should be done than is strictly necessary, and at the beginning, the concept of subsidiarity that one should only act at all in those areas which do not fall within the exclusive competence of the Community if, and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. The exclusion of those matters which do fall within the exclusive competence of the Community is of course an inevitable one, because in those matters the exclusion is clearly final.

Now, as a text in the Maastricht Treaty with no saving clauses, Article 3b will be fully applicable when the Treaty enters into force. It will be legally binding on the institutions of the European Community and therefore as such is plainly justiciable. All acts that the Community takes after the enactment of the Maastricht Treaty, in the sense of its ratification and coming into effect, can be challenged against that text as much as against any of the other provisions of the Treaty. The implications of this are considerable and may not have been fully thought out by political leaders.

A question which has to be asked is whether the insertion of a provision setting out a principle which is inevitably general in character, sweeping in its potential impact and likely to be controversial as applied to any particular set of facts will lead to the transformation of the European Court of Justice into a full-scale constitutional court on the lines of the United States Supreme Court? At this stage, before the ink is dry and certainly before the Treaty has been ratified, it is quite impossible to answer that question, but its importance needs no underlining. Until now the Court, although from time to time emboldened, sometimes to the discomfort of the Commission, sometimes to the discomfort of other Community institutions, Member States or private individuals, has adopted a posture which would seem to indicate a lack of desire to take that centre stage position in the areas of controversy from which the United States Supreme Court has never shirked. On the other hand, that could well be because the Court has had to interpret the Treaty as it stands. If one gives the Court this new responsibility, it is impossible to predict with any degree of certainty the extent to which the nature of its activities will change. Of course, the insertion of the subsidiarity principle is not just of interest if and in so far as the European Court of Justice picks up the ball and runs with it. It is also of of profound interest to see what effect the principle will have on the legislators. The purpose is plain, although the language is so general that it would be extremely difficult for anyone other than an ultimate judicial body to say that it must apply in a particular case. Nonetheless the intention is that the language should act as a restraint, a self-imposed restraint, where it is not imposed by the Court. And I accept that people will be fully persuaded by subsidiarity's power to restrain only when we have shown it in action. Meanwhile we will need some confidence-building measures to show that the concept is one which can be given reality.

What I mean by that is that we should show restraint even within our areas of competence and which as such would perhaps not come within the strict provisions of the subsidiarity rule as set out in the Treaty. The rule as set out in the Treaty is necessarily limited. The principle that led to the insertion of that rule is wider and I think that it would be in the interests of the Community if that principle were respected by all its institutions, treating it as a political principle as well as pro tanto a legal restraint. If that principle were given reality, it would actually make advances in more important matters much more acceptable. If people were persuaded that the Community was prepared to restrict itself to the

matters which it really could do well and only it could do, then I think they would be much more ready to allow its competence and activity to be extended into new areas. That is an enormously important thing to achieve because we would in that way have allayed the fears of inexorable onward advance.

For my part I accept the challenge that the Commission has now established by its policies and actions that it should leave issues most appropriately dealt with at national level in the hands of the Member States. At the same time we have to work to develop a consensus about what needs to be done at Community level. To reach that consensus it is important to accept that the categories of what does need to be done at Community level should not be seen as fixed forever. The most appropriate levels for legislation will vary in time as commercial and social activities develop in different ways. Some environmental issues for example are plainly transnational in scope while others are more local. Until a few years ago it seemed entirely reasonable to regulate posts and telecommunications at the national level with just a few international agreements to deal with technical matters such as payments and frequencies. Now on the eve of the creation of the single market for goods and services in the Community, the need to liberalise, with a minimum of Community-wide regulation, in these sectors seems quite natural.

As industry and individuals adapt their behaviour and movements to new developments, there are also political attitudes and developments of which we must be aware and to which the Community system must respond. We know that in the United States the movement to affirm states' rights has had many ups and downs in the constitutional development of that country. In the Community a similar debate with similar tensions is likely to take place in a different setting and should not be regarded as anything other than the normal ebb and flow of the tides of which Lord Denning spoke. Tides ebb as well as flow. In all the Member States and in the Community institutions themselves different views are heard about what should be done at Community level and national level. That should be a natural and healthy debate and we should not assume that the answer will always be the same. Subsidiarity should not be a static concern. It must evolve over time to take account of the developments in the real world. A proper understanding of subsidiarity, even when it is not forced upon us by the Court, is a healthy step which

would enable us to advance in the areas where things really do need to be done at Community level.

Now I, for my part, did try in the areas for which I am directly responsible to give effect to the principle of subsidiarity even before it came to the prominent attention of those concerned with actually redrafting the Treaty. If you look at the Merger Regulation to which Sir Sydney referred, it is very important to see it as an exercise in subsidiarity and not as an exercise in empire building. I certainly conceived it in that sense when taking it through the Commission, the Council of Ministers and the Parliament. Before that regulation, on the basis of mandatory judicial decisions with admittedly inadequate procedures, the Commission's view was that irrespective of the size of a merger it had the right to intervene. No provision was made for any particular threshold above which the Commission would intervene and below which it would not intervene. One of the features of the merger regulation therefore was to remove as far as is possible the hazard of double jeopardy of examination by both national and Community bodies, and to bring about a system in which the one stop shop as far as possible was created. What that meant was that if the Commission was given the right to decide cases which fell above the threshold set in terms of turnover then the Commission for its part would forego the right in almost all cases to intervene in mergers which fell below that threshold, where previously it had asserted its right to concern itself with all appropriate cases. That is one of the reasons why opinion in this country in business and industry was so strongly in favour of the merger regulation. The creation of the one stop shop offered a far more convenient service, provided of course that the Commission was prepared to commit itself to achieve results within a timescale at least as constraining as that which applied to the MMC. And that of course we did.

So there you can see an application of subsidiarity: dropping the right to intervene in cases where it was perhaps unnecessary for us to do so and on the other hand dealing (and dealing uniquely) with cases which were truly within the Community competence as defined by a threshold based on turnover. Since then of course, we have built up a body of case law. There is a particular provision of the merger regulation which allows a Member State to claim back a case if it considers that there is a threat to competition in a distinct local market within its borders, and the decision as to whether to hand back that case or not is one for the

Commission to take. The consideration of those national applications, few as they are, is a very important task and shows whether the Commission in the exercise of this new and very powerful jurisdiction sees itself simply as an empire builder, as a fighter for control, or is prepared to give effect to the principle of subsidarity to which I have referred.

Let me compare two cases: Steetley/Tarmac and Alcatel/AEG Kabel. The first case involved a merger, as you well know, between two United Kingdom companies. We analysed the markets and we were satisfied that they were local or regional within the United Kingdom and did not affect any other country. It was clear that the turnover involved was such as to bring the case within our jurisdiction. We were asked nonetheless by the British Governnment to send the case back for consideration under the United Kingdom competition law. It seemed to me that this was a case where there was indeed a competition problem worthy of examinaton. It was a case where the problem did not affect any other country in the European Community and it therefore seemed to me that the proper exercise of subsidiarity would lead to examination of the case under national jurisdiction. Its retention by the Commission would have evinced an intention to operate on a principle of jurisdiction which would not be consistent with due respect for the principle of subsidiarity. So I had no hesitation whatsoever in returning the case to the British Government.

The Alcatel/AEG Kabel case involved a merger between a French Company and a German Company. The German competition authorities asked us to refer the case to them since they feared the creation of an anti-competitive oligopoly in Germany. We looked at this long and hard and came to the conclusion that those fears were not well founded on one of the market sectors concerned, since in that particular case Germany was part of a wider market in the Community. In the other relevant market sector, the strength of the competition and the bargaining power of purchasers meant the merged company was unlikely to become part of an oligopoly joining with others to threaten competition. So we said no to Germany, this is an European Community matter; we have considered it carefully and have come to the conclusion that the merger should be allowed to go ahead. We did not refer the case back and cleared the merger ourselves. All that, incidentally, within six weeks of its notification.

I think the ability to distinguish in that sort of way is part of the process of confidence-building to which I referred above. We may be criticised in particular cases, but the important point for this purpose is the approach and the spirit with which we seek to interpret the power that has been given to us. The exercise of self-restraint is one of the best ways of building confidence in applying the principle of subsidiarity.

But I think that we have to go beyond that. If competence is conferred on us we should say that we will only exercise it if we think it is necessary to do so. We will not exercise it if there is a means of allowing national Governments to exercise it and the matter is more readily and better handled at national level. This will not satisfy the doubters. As new competences are confirmed, such as monetary policy, telecommunications or whatever, there may still be a feeling that even if we are sensible people, exercising self-restraint, perhaps compelled to do so by that new treaty provision, things are still moving all one way. It is for that reason that I believe it is important to build confidence by showing that the movement does not <u>have</u> to be all one way, that it is sometimes possible where appropriate not just to hand back cases but to hand back jurisdiction or competence, whether formally or informally. If people thought that there was something for which we were formally responsible, but in respect of which we decided we no longer needed to be responsible and we handed back jurisdiction and competence, rather than just showing self-restraint, then I feel public opinion would be more ready to confirm new confidence in us to do what really does need to be done at Community level.

Let us then consider how subsidiarity should operate to return to Member States legislative jurisdiction that the Community has exercised for a period. Let us take the example of drinking water. The Community has had the competence to legislate in that area. It has exercised that competence. It has legislated to improve drinking water standards. We have set the standards. We have raised consciousness. We have acted as a catalyst. The question now therefore could be asked, or if not now in a few years time, whether it might be better to leave further legislation and implementation to the Member States. I am not suggesting at this moment that we should formally renounce jurisdiction in this area. I think that if we were, in this case or some other, to say that our task is done, we would not have been wrong to exercise our

jurisdiction. The time would have come to hand that task back while we take on newer and more important tasks. That would allow for much more confidence and support for the Community in dealing with important matters such as monetary policy and, under Maastricht, in exercising a limited role in the areas of foreign affairs, security and defence.

But we are still left to consider the question of Article 3b. What will be its effect? I have talked of exercising self-restraint even when we have jurisdiction. I have gone beyond that and talked about the value politically of handing back jurisdiction in order to take on newer and fresher tasks. But the interpretation of Article 3b will certainly be one of the foremost considerations in the process of the application of the subsidiarity doctrine.

If one assumes that Article 3b is a binding provision of law, as it surely must be, Community actions reviewable by the European Court may be tested against it. National courts are also called upon to consider the interpretation and validity of acts of Community law and in so doing will also have to have regard to Article 3b, for there is nothing that denies them that right. Indeed it is their duty to do so, although I suspect that they will feel that they would be well advised in such perilous and hazardous new waters to make full use of Article 177 and seek preliminary rulings from Luxembourg.

What then of the ambit of Article 3b?. I have no doubt that it will apply to all Community acts after the enactment of the Maastricht amendments to the Treaty of Rome. It would also be wise of the Commission to re-examine the corpus of Community law to see what matters now under Community competence could properly be returned to national level.

That would in no sense imply that we were wrong to assume and exercise competence in the first place. In considering the whole question of where competence no longer needs to be exercised, we have to take account of economic and social developments. To take another example from competition policy; for the Community rules set out in Articles 85 and 86 of the Treaty of Rome to apply, there must be some actual or potential, direct or indirect effect on trade between Member States. In the formative years of Community law, for very good reasons, this notion was given a wide interpretation and applied to many

instances. It should be remembered that we were operating then in a period in which most Member States had no effective competition law. For competition policy to be established and applied throughout the Community's territory, it fell to the Commission to give a dynamic reading to the language of the Treaty articles. The European Court of Justice supported that view. But I expect that over time a stricter and narrower reading of the Treaty will emerge which will find less readily an effect on trade between Member States, where agreements or commercial conduct are analysed. Since the finding of an effect on trade determines whether Community jurisdiction does or does not exist, the consequences of the change that I foresee will be considerable. The Member States now have the necessary rules and enforcement mechanisms to give effect to competition policy. In an internal market in which commercial behaviour may have an impact at either the local or regional level, it makes sense to organise a division of labour and enforcement between the Commission and the national competition authorities of the Member States. This, as I have shown, is what we have done for mergers and I see no reason for it not to be done with restrictive practices and abuses of a dominant position as well. If there is no longer a need to strain for the widest possible interpretation, the Commission for its part will be free to devote its necessarily limited resources to genuine Community problems, which are enormous in scale, and to the major task of bringing competition to hitherto regulated markets.

This is the new frontier for competition policy: prising open monopolies which go beyond the exercise of legitimate public service functions in such areas as telecommunications and energy. This is where action is necessary at Community level.

The task of applying and enforcing the principles of competition throughout the Community in normal commercial matters is not over by any manner of means, but I think a shift of emphasis is timely. Although the example of subsidiarity in action in the merger field can be implemented elsewhere in competition policy, it is important not to present what I have said as in any way a retreat or a tactical attempt to lure people into acceptance of a new Community advance. It is rather a practical and sensible handling of resources in dealing with the problems of what should be done at Community level and what should be done at national level. These are problems which will not go away. They will in fact become greater because the developments of the last

few months and years illustrate the trend of events in the European Community.

I have already touched on the moves towards economic and monetary union. These show what we now have to be prepared to do at Community level. The idea of every member of the Community operating its own monetary policy and having its own currency would ensure that we retained a disadvantage in world competition which we cannot afford. Those who talk about sovereignty in this context are talking about a concept which has been asked to bear a far greater meaning than, in today's world, it can possibly sustain. What kind of sovereignty is it, I am frequently asked, to assert the right to change interest rates when that right is so totally constrained by what the Bundesbank chooses to do. It is an unusual sovereignty. It is the sovereignty, to quote a famous example, which is enjoyed only really by the man standing in the desert. So we see pressure for things to be done at Community level.

I have also referred to foreign policy and security policy. The difficulty of achieving these is enormous, and the need to build from the bottom up and not to seek to impose majority rule in an area where plainly that is currently unacceptable, was accepted at Maastricht. Nonetheless the beginnings of new confidences there are plainly to be seen.

If we look further ahead we are also going to find problems with relationships between the Community and the Member States reflected when we come to enlarge the Community as we most certainly will. The British Government has set as one of its priorities during the British Presidency moves towards the fitting into the Community some of the countries that have applied for membership. I am firmly of the view that European countries that are ready, willing and able to accept the obligations as well as the benefits of membership of the European Community should be admitted. We are not a closed shop, nor are we a smug class. We have to be ready to open our borders. The relevance of that to the kind of problems that I have been discussing is that we can probably operate as we are with a few more members. If we admit a substantial number of new countries we will not be able to maintain the institutions as they currently operate without coming to a grinding halt. It would be a tragedy to lure member states into the Community if the consequence of their admission was to destroy the very fabric that was attractive. It is clear that in 1996, possibly even a year earlier, there will

have to be another intergovernmental conference of the kind that preceded the Maastricht summit to discuss changes to the Community's institutions necessary to accommodate a larger number of members without at the same time weakening the Community and destroying its diverseness. What those changes will be it is impossible to predict at this stage. It is quite clear that anybody who thinks that the effect of admitting new members to the Community will be to reduce the pace of integration is ignoring the history of the Community in recent years. What happened was that when new members were admitted the Community was compelled to make changes, such as the Single European Act, which reinforced and streamlined the process of decision making. If you look at the problem caused by the fact that the Commission can only work effectively if it is limited in size, and consider the implications of that for national membership of the Commission on the part of every single member state in a very large community, you can see the kind of problems that arise. That is why sensitive handling of the problems I have mentioned is necessary, enabling the Commission to embark on the many new tasks which it meets in today's world and enabling the Community itself to tackle the wider horizons. It is essential that there should be a firm concept of subsidiarity and a readiness to apply it not just to movement in one way but to movement in both directions, to allow the ebb as well as the flow of the tide.

In all of this the law will be central. It will be central in applying the principles. It will be central in applying the new Treaty. Nonetheless I would not want to present a picture of fundamental change as far as the rule of law in the European Community context is concerned. The legal structure that has grown up over the last 30 years will remain fundamentally the same, with law as the key to the interpretation of Community competence. Community law is effective when it does well what any legal system should do. The special feature of Community law is its recognition that many policy goals can be reached only if rules are made and enforced at a supranational level.

So where do the ebb and flow of the Community tide leave national sovereignty? As I have shown, neither Community competence nor national sovereignty is a sacred cow or an indivisible notion. I look forward to a series of pragmatic functional decisions as to what works best at Community level and what should be done by Member States. Decisions in this regard should not be irreversible. Subsidiarity requires

us to decide what is best done individually and what together. But we have to accept, as I have said, that part of that concept is the idea of handing power back as well as reaching out to take it. Tides will ebb and flow.

Many of the crucial decisions will be political ones, but the introduction of subsidiarity as a legal principle means inevitably that lawyers too will be involved in that process. Lawyers will have to take a broader view, seeking the purpose of the law. That would strike no terror whatsoever in the mind of that very distinguished jurist in whose honour this lecture is given.