This paper assesses the British contribution to law and legal process in the European Union since British accession to the European Community in 1973. Although the European Community has been subsumed within the European Union since the Treaty of Maastricht, the Court of Justice remains the “Court of Justice of the European Communities” and “Community law” remains the conventional description of this field of law. So, at the risk of some terminological imprecision, the expressions “European Community” and “Community law” are used throughout. The paper does not seek to address other areas of law and law making in Europe, notably the work of the Council of Europe in the field of human rights, where Britain has made and will continue to make a significant contribution.

All the original Six member states of the European Community belonged to the civil law tradition. The structures and procedures of the Community and Community law were put in place when Britain remained outside. Even today, the question most frequently put to me by visitors to the Court of Justice is whether I do not find it difficult, as a lawyer from the common law tradition, to come to terms with the Community system and to work with judges from the civil law tradition. It is assumed that there are two (and only two) very different and incompatible traditions which are subjected to enforced cohabitation. Some lawyers on both sides of the divide go further, contending that enforced cohabitation will, in the longer term, undermine the essential characteristics and strength of both traditions.

In spite of these preconceptions, British lawyers do not, in practice, seem to have found it difficult to adapt to the requirements of Community law. They have, on the whole, contributed as positively to the development of Community law as the lawyers of any other country, including those of the original Six. In certain respects, they have done so in ways that would not readily have been predicted.
There are perhaps four reasons why this has been so. First, there are many more than two legal traditions in Europe. Second, the historic differences between the common law and civil law traditions are only marginally relevant to the primary concerns of Community law. Third, British law, like the law of other countries, has itself undergone a significant culture shift since at least the 1960s. Fourth, the day-to-day operation of the Community system places a premium on co-operation rather than confrontation and, as Jean Monnet observed, “The British... are at their best if you firmly offer to work with them on an equal footing.” (This is sometimes called British pragmatism.)

(1) There are well-known and well-defined differences between the systems of the Anglo-Irish-American common law tradition and the systems that drew their inspiration from Roman law and the Napoleonic reforms. These differences lie in the traditional fields of civil law—the law of persons, property and obligations (contract, delict and tort)—and civil procedure; criminal law and procedure; and the domain of public law. Within these fields, a lawyer bred in one tradition would expect to go into a law library in another country of the same tradition and find the way around: the books will be arranged under the same categories with the same titles, and a problem will be discussed in broadly the same terms. Exploring a law library in a country of the other tradition is more of an adventure.

Beyond that, the notion that there are two, and only two, traditions is misleading. National systems which originally drew their inspiration from the same source have since gone their own ways. Germany and France belong to the civil law tradition but their legal systems are very different, both substantively and procedurally. They are in turn very different from the systems of Scandinavia which are themselves far from uniform. Irish law retains many characteristics of the English common law, including some that have disappeared in England, but its recent development has been strongly influenced by the existence of a written constitution and this has been true also of Canada and Australia. Amongst countries that have a written constitution, there are significant differences, both in content and structure. Some constitutions contain a bill of rights: others do not. Some countries have a separate constitutional court: others do not.

So, whatever may have been the situation (or the perceived situation) when Britain entered the Community in 1973, the reality now is that there can be as many divergences on a given point between lawyers of the same tradition as there are between those of different traditions.

(2) Apart from public law, the areas of law with which Community law is primarily concerned are not the areas of law where the civil law/common law divide is most marked. Community law exists, first and foremost, to solve the economic and social problems of the twentieth and twenty-first centuries whose effects spill over the jurisdictional frontiers of national legal systems. These problems are not amenable to solutions at the level of purely national law, even

with the help of public and private international law and the processes of inter-governmental co-operation.

Moreover, the economic and social attitudes and preoccupations of today are very different from those that prevailed even fifty years ago and would hardly have been recognised by the great jurists of the civil law or common law traditions. Competition law, consumer law, employment law and the law of public procurement have invaded the traditional domains of contract, delict and tort, while changed attitudes to the sanctity (and indeed the necessity) of marriage have profoundly affected the law of persons, property and status.

(3) Over the last 50 years there has been a culture change in British law. The extent of the change can be judged by recalling that in the late 1950s, administrative law covered little more than the law of local government and public utilities, the concept of a separate domain of droit administratif having been condemned by Dicey. Judicial review (as such) was unknown. Employment law was at least as much about the contractual rights of employers as those of employees, and there were no Employment Tribunals. Human rights law and the concept of unlawful discrimination were unheard of. The House of Lords was bound by its own precedents. Statutes were interpreted strictly without reference to their legislative history or regard to the spirit of the legislation.

These features of the British legal scene were regarded by earlier generations as quintessential characteristics of the common law tradition. To a law student today, they would seem quaint. Yet British lawyers who have lived through the period of change, and probably most law students as well, would stoutly maintain that the common law tradition remains alive and well.

Britain is not unique in this respect. Other European legal systems have undergone comparable changes because, although their cultures were very different, the economic and social pressures have been the same. Facing up to common problems, including the challenge presented by Community law, has brought about a “gradual convergence” of outlook and attitudes. Although the convergence is far from complete—and is indeed unlikely ever to be complete, the process of legal integration in Europe has been less confrontational than it might have been expected to be. To quote Jean Monnet again, “When you take people from different backgrounds, put them in front of the same problem, and ask them to solve it, they’re no longer the same people. They’re no longer there to defend their separate interests, and so they automatically take a common view”.

(4) Convergence has been helped by the nature of the Community system which puts a premium on co-operation in both the legislative and the judicial

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process. Although politicians and the media tend, after summits and major negotiations, to claim victory for their national positions, the reality is that the Community’s legislative process involves so many actors and takes so long that the end result rarely reflects the position from which any national negotiator started out. Similarly, the absence of dissenting opinions in the Court of Justice makes it impossible to tell whether, or to what extent, any particular judge influenced, or even agreed with, the Court’s judgment.

Particularly in the field of public or administrative law, there has been an osmosis between Community law and national law, including British law. Concepts from national systems, such as proportionality and legitimate expectation, have been adopted in Community law and thence into other national systems. This process is going on continuously and it is rarely possible to identify the moment in time when a particular concept formally entered Community law or national law.

For all these reasons, it is not easy to identify particular points on which the British contribution to law and legal process in the European Union can be said to have been decisive one way or another. It is possible to identify some important individual contributions but, on the whole, the most that can be said is that there are areas where, without British participation, things would probably be different from the way they are today. These can be focused under the following broad headings: legislation and the legislative process; the Court of Justice and legal process; the legal profession; and teaching and writing about Community law.

I. LEGISLATION AND THE LEGISLATIVE PROCESS

Two specifically British contributions stand out. First, as an individual contribution, there was Lord Cockfield’s programme of legislation for completion of the internal market (the 1992 programme) which, in large part, is now the core of substantive Community law. Second, as a collective contribution, there is the continuing work of the House of Lords Select Committee on the European Communities.

(1) The importance of completing the internal market had been recognised in the Single European Act and was an essential element in the platform of the Delors Commission which took office in 1985. Up to that time, although there were many proposals on the table, they were uncoordinated and there was no comprehensive programme for legislative action. This was supplied by Lord Cockfield, one of the two British Commissioners, whose White Paper\(^5\) identified the remaining barriers to trade within the Community and proposed a timetable for their elimination over the lifetime of two Commissions (i.e. by 1992).

\(^5\) *Completing the Internal Market, COM(85), 310.*
Several characteristics of the Cockfield White Paper are typical of British administrative method and reflect the fact that Lord Cockfield had started his professional life as a civil servant in the Inland Revenue. In Britain, a proposal for legislation does not emerge from the department promoting it until other interested departments have been consulted. They may, of course, disagree with what is proposed but, if so, their objections and the reasons for them are known.

This was not true of the European Commission which tended to operate "vertically", each Directorate pursuing its own legislative projects without finding out how they might be viewed by others. Many of the matters raised in the White Paper were the primary responsibility of Directorates other than those for which Lord Cockfield was responsible, but his careful "horizontal" preparation ensured that the White Paper was produced and approved by the Commission as a whole with remarkable speed.

In addition, the Cockfield White Paper contained a detailed and specific analysis of the problem and the proposed solution: what were the barriers to trade and why, and what type of legislation was required in each case to remove the barrier—harmonisation or mutual recognition? The proposals were made objectively and without regard to their political popularity. Indeed, Lord Cockfield’s insistence that some degree of fiscal harmonisation was a necessary condition of a complete internal market seems to have led Mrs Thatcher to believe that he had "gone native" and withdraw her support.6

While the President of the Commission, Jacques Delors, led the political drive for the 1992 programme, it is very doubtful whether, without Lord Cockfield, it would have succeeded in the way it did.

(2) The House of Lords Select Committee has, over the years since accession, produced hundreds of reports on proposed Community legislation which are widely read and jealously guarded as indispensable quarries of information that cannot readily be found elsewhere. Some other Parliaments, particularly in Scandinavia, conduct similar enquiries through committees. But the reports of the House of Lords Committee are unique in bringing together in a single volume the relevant written documents together with the oral evidence of politicians, Community and national officials, academics and interested individuals and groups. They also contain a succinct description of the proposed legislation, its purpose and advantages, and any problems it seems to present. A person with considerable experience of appearing before parliamentary committees in Britain and elsewhere remarked to me that he would normally study the papers in the taxi on the way to the meeting; for the House of Lords he would set aside two days for preparation.

(3) As regards form and content, British influence can probably be detected in the greater degree of detail that has tended to characterise Community

legislation since the 1970s, particularly in the case of directives. It is sometimes forgotten that the common law doctrine of the sovereignty of Parliament had as its corollary the principle that common law rights are overridden only by express legislation. This has led to a preoccupation—some would say an obsession—in Westminster and Whitehall that legislation, both primary and secondary, must cover all eventualities and leave nothing to chance.

By contrast, the continental tradition, reflected in most of the Community legislation before British accession, has been to legislate in terms of principles. A good example is Regulation 1612 of 1968 which, with few amendments, has stood the test of time. Following this tradition, directives were intended to set out the result to be achieved, leaving detailed implementation to the member states according to their own legislative traditions and methods.

If hearsay is to be believed, British negotiators called for greater detail and precision in Community legislation. Whatever the cause, some directives have become so detailed as to be indistinguishable from regulations, and to leave little for the national legislator to do. There are indications that this trend has, to some extent, gone into reverse, and this may be an example of the gradual convergence of approach.

II. THE COURT OF JUSTICE AND LEGAL PROCESS

(1) Notable individual contributions have been made by the three British Advocates General (Jean-Pierre Warner, Gordon Slynn and Francis Jacobs). They have demonstrated that common lawyers have no difficulty whatever in coming to terms with, and contributing to, the Community legal system. The extent of their influence can be judged by the frequency with which their opinions are cited by other Advocates General and in academic writing. Notable examples are the opinion of Jean-Pierre Warner in Transocean Marine Paint,9 the opinions of Jean-Pierre Warner and Gordon Slynn in A M & S,10 and the opinion of Francis Jacobs in Hag II.11

Lord Mackenzie Stuart as President of the Court made a major contribution in improving the productivity of the Court and in requiring the member states to take seriously their responsibility for appointing the members of the Court in good time and providing it with the resources necessary to do what they expected of it.

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8 German negotiators may also have demanded greater precision, being concerned that the Rechtsstaat requires an explicit legal basis for legislative or administrative action.
(2) Some characteristics of the British approach to law and litigation can be found in the current practice of the Court of Justice and the Court of First Instance. Before British accession, it was virtually unknown for the members of the Court to put any questions to the advocates appearing before them. Now this is common in hearings before Chambers of the Court of Justice and, more particularly, in hearings before the Court of First Instance.

Otherwise, the common law tradition of oral advocacy has found relatively little place in the practice of the Court of Justice. The reason lies largely in the problem of language. Although the rules are somewhat more complicated, the practice basically is that advocates plead in their own language and the judges speak whatever language they find most easy. What is said by the judges and advocates must be interpreted into the other languages being used in the case. This makes it virtually impossible—particularly in plenary hearings of the Court—for judges and advocates to engage in the active dialogue between bench and bar that is so characteristic of British procedure.

Some British advocates have found it difficult to adapt to a system where the main lines of argument have to be set out in written papers and a time limit is imposed on oral submissions. But their difficulties have been matched by those of advocates from other countries where there is no tradition of oral pleading in civil and administrative cases or where the advocates’ arguments are never tested by questions from the bench. Moreover, part of the culture shift in Britain has been towards greater reliance on written argument and a stricter limitation of the time allowed for oral submissions. If pleading in Luxembourg still involves a culture shock for British lawyers, it is certainly less extreme than it used to be.

The oral submissions of British advocates are, in general, much appreciated by the Court for their clarity and relevance, though advocates from other countries can display the same qualities in equal measure. What has become more noticeable in recent years is the very high quality of British written pleadings, particularly those submitted by the United Kingdom government. More than one member of the Court has remarked that the quickest way to find out what a case is really about is to read the submissions of the UK government.

There appear to be two reasons for this. First, as would be the situation at home, the UK government is represented before the Court, not by departmental civil servants, but by independent advocates with experience in court work. Second, as has been mentioned above in connection with the Cockfield White Paper, the British civil service works horizontally. The position taken by the UK government before the Court is established after consultation between all the relevant departments and then presented by an advocate, part of whose function when preparing the case is to test the soundness of the arguments being advanced and to suggest how they can be presented in a way that will catch the attention of the Court.

(3) It can also be argued that Britain has brought to the Court a greater awareness of the help that judges can derive from good advocacy, both in defining the
factual context of the case and in arguing the law. It is alleged that in some coun-
tries judges regard the facts as unimportant and advocates are happy to leave the
law to the judge. If so, the British system may have gone too far in the opposite
direction, allowing an inordinate amount of court time to be devoted to witness
evidence and discouraging judges from researching the law for themselves. At its
best, however, the British system ensures that the case will not be decided on a
factual basis that is erroneous or incomplete or on a view of the law on which
the parties have never had an opportunity to comment or contest.

The caseload of the Court of Justice is now such that the Court needs all the
help it can get in focussing the issues and identifying the points of law that need
to be decided. Although the Court is often called upon to decide issues of prin-
ciple that go beyond the scope of the instant case, clear definition of the factual
context in which the problem arises helps to identify the issues that need to be
decided for disposal of the case and can frequently illuminate the practical con-
sequences of preferring one view of the law to another.

(4) In so far as British influence can be detected in the judgments of the Court,
it may be significant that it was only after British accession that the Court began
explicitly to refer to previous judgments as precedents. Before that, it was pos-
sible to infer “established case law” only from repeated use of the same formula
in a succession of judgments. The practice of citing previous case law is more
transparent and easier for busy lawyers to follow. In either case, however, there
is a risk that repeated use of the same formula will invest it with almost biblical
sanctity, making it more difficult to develop or modify the case law. Rather sur-
prisingly, given the importance that used to be attached in British law schools to
finding the ratio decidendi of a case, few British commentators have used these
techniques in analysing the case law of the Court.

(5) The English courts have been very active in making references for pre-
liminary rulings to the Court of Justice, sometimes in circumstances which
amounted to a challenge to conventional wisdom. Thus, the Vice-Chancellor’s
reference in Van Duyn\textsuperscript{12} was the first suggestion from a judicial source that
a directive might have direct effect. The House of Lords’ reference in Factortame\textsuperscript{13} put in issue both the doctrine of parliamentary sovereignty and
the rule that an injunction could not be granted against the Crown. And, very
recently, the reference in Courage\textsuperscript{14} puts in issue the doctrine that a contract-
ing party cannot invoke the illegality of a contract to which he is a party as a
defence to a claim for payment or in order to claim damages from the other
contracting party.

By making these references, the English courts have contributed greatly to the
development of Community law.

\textsuperscript{12} Case 41/74 Van Duyn v. Home Office [1974] ECR 1337.
\textsuperscript{13} Case C-213/89 R. v. Secretary of State for Transport, ex parte Factortame [1990] ECR 1-2433, and [1990] 2 AC 55.
At the time of British accession, there were very few organised law firms in the
original six member states. At most there were groupings of advocates who
shared chambers and overheads in the same way as English barristers. Indeed, it
was seriously questioned in some quarters whether British solicitors could prop­
erly be regarded as members of the same profession for the purposes of the
directive on lawyers’ services. Nowadays one need only look at lawyers’ letter­
heads and read the professional journals to see the extent to which the law firm
on the Anglo-American model has become the norm in continental Europe, at
least in the major centres of commerce and population.

The change has been due mainly to the demands of the corporate client,
which have become ever more insistent, and the cost of the professional infra­
structure necessary to service them. It has also been due as much to competition
from American firms established in Europe as to British influence. The specifi­
cally British contribution seems to lie in promoting alliances between firms in
different countries without destroying their individual national identity as
opposed to the incorporating union preferred by American firms where the
European firm is subsumed in the corporate identity of the world-wide
American firm.

However, this is a field in which it is dangerous to generalise. There seems to
be a global tendency towards a legal environment in which a few very large firms
service the multi-national corporate market and somewhat smaller firms service
niche markets (including the needs of high net worth individuals), while SMEs
and ordinary individuals are serviced by lawyers working alone or in much
smaller local groupings.
cases) or for use by law students. There were always some books in which an academic writer would take a fresh look at a particular area of the law and reduce the statutes and precedents to a coherent system, but these were exceptional and not always highly regarded by judges and practitioners. Law teaching tended to consist in an uncritical survey of the principal statutes and cases, the aim being to ensure that the student, when eventually let loose on the public as a member of the legal profession, knew the elements of the law.

Here again, there has been a major cultural change in Britain over the past fifty years. But it would hardly have been predicted that Britain would effectively take the lead in teaching Community law and in producing a range of systematic studies both of Community law as a whole and of particular subject areas. The current output of books and periodicals is vast and many of the courses offered by the universities, particularly LL.M. courses, could be filled several times over.

Of course, publication in English ensures a wider market than in any other language so that scholars from other countries frequently write or publish translations of their books in English. Also, many of those who have taken the lead in teaching and writing in British universities hail from other countries. Nevertheless, the phenomenon is interesting and the reasons for it deserve some discussion.

One reason seems to be that in many other countries—particularly those of the original Six—Community law was perceived, not as a subject in its own right, but as an aspect of one of the classical domains of law teaching and writing. Thus, the institutional law of the EC was treated as an aspect of public international law or constitutional law, while the various areas of substantive Community law, in so far as they were discussed at all, were treated as aspects of the corresponding domains of national law (such as business law or intellectual property). This is still the case to some extent.

Also, following the civil law tradition, most of the writings on Community law were commentaries, article by article, on the Treaties or, case by case, on the leading judgments of the Court of Justice. With very few exceptions, there were no books for students or practitioners which presented Community law as a whole, showing the interdependence between the historical context, the institutional structure and the substantive law. There were also very few books on the commercially most important topics—competition law and free movement of goods.

In Britain, by contrast, public international lawyers or constitutional lawyers did not regard the institutions of the Community as particularly relevant to their

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studies. Those who took an interest in Community law tended, if academics, to be comparative lawyers who were interested in substantive law or administrative law or, if practitioners, to be commercial lawyers who were already concerned with restrictive practices, intellectual property or trade law.

In either case, since Community law was entirely novel from a British perspective, an understanding of the historical and institutional context was seen as essential to a proper understanding of the substantive law and vice versa. This approach was reflected in teaching and writing. From a relatively early stage in comparison with other countries, professorial chairs and lectureships specifically for Community law were established and courses were organised, and as the popularity of self-financing Masters’ degrees increased during the 1980s, Community law became a natural component of the LL.M. syllabus.

All generalisations are dangerous, but it is legitimate to argue that British lawyers and British universities were the first to teach and write about Community law as a system. This is paradoxical since one of the defining characteristics of the civil law tradition is often said to lie in the systematic exegesis and codification of the law: the common law is thought to be rather untidy.

Systematic teaching and writing about Community law is necessary to make sense of the claim that it constitutes a “new legal order” and, in the long term, this may prove to have been the most significant contribution Britain has made.

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16 The exception was the late Professor JDB Mitchell, Professor of Constitutional Law at the University of Edinburgh, who instituted regular seminars on Community developments in 1962, and created a Centre of European Governmental Studies (now the Europa Institute) in 1968. Professor Mitchell’s interest in Community law stemmed from his early interest in the control of public utilities and nationalised industries which led him to study the mechanisms of the Coal and Steel Community.
