THE DAVID HUME INSTITUTE

The Future of Legal Systems

Presidential Address to The David Hume Institute

delivered at the Royal Society of Edinburgh, November 1989

THIJMEN KOOPMANS

With a commentary by NEIL MacCORMICK

Hume Occasional Paper No.13

After a distinguished career as Professor of Law at the University of Leiden (1965-78) where he was ultimately Dean of Faculty of Law. THIJMEN KOOPMANS was appointed a Judge of the Court of Justice of the European Communities in 1979. He will shortly return to the Netherlands as a Judge of the Netherlands Supreme Court at The Hague. He is renowned as an expert on Comparative Public Law, a fact recognized by his award of an Honorary LL.D. at the University of Cambridge in 1984. He succeeded Professor George Stigler, Nobel Laureate in Economics, as the Honorary President of The David Hume Institute in 1988.

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The David Hume Institute,
21 George Square,
Edinburgh, EH8 9LD.

ISBN 1 870482 08 5

Printed by Pace Print (Edinburgh) Ltd.

ACKNOWLEDGMENT

The David Hume Institute acknowledges with gratitude the financial contribution towards the cost of publication of Judge Koopmans' Address received from Shepherd and Wedderburn WS, 16 Charlotte Square, Edinburgh, EH2 4YS.

FOREWORD

The Second Presidential Address to the Institute was delivered on 2nd November 1989 at the rooms of the Royal Society of Edinburgh. The interest aroused by Judge Koopmans' address can be gathered from the fact that his audience bombarded him with comments and questions on that occasion, although ample time for discussion had been set aside in a separate seminar. On the latter occasion Professor Neil MacCormick and Professor David Edward (deputizing at very short notice for the Rt. Hon. John Smith QC, MP) supplied appreciative, critical commentaries. The ensuing debate on Judge Koopmans' view that we may be returning to something like a 'common law of the world' was highly instructive to lawyers and non-lawyers alike, and the Judge's long extempore reply was the soul of wit and wisdom. Unfortunately, a defective tape-recorder failed to pick up the debate and the reply, but happily, Professor MacCormick was able to supply us with his commentary.

The Institute has to state that it does not have a collective view on any issue and publication of any of its papers does not imply a commitment to the position of any author. Notwithstanding any disclaimer of this kind, its members cannot fail to be honoured by being allowed the opportunity of publishing Judge Koopmans' excellent address, and pleased that the distinguished legal firm of Shepherd and Wedderburn WS have helped them to do so.

Alan Peacock
Executive Director

THE FUTURE OF LEGAL SYSTEMS

Judge Thijmen Koopmans

Speculating about the future is always a somewhat risky business, and the risks tend to increase as the scope of the speculation grows wider. Nevertheless, I shall try to express some views about the future of the world's legal systems - no less. I am aware that I shall thus reach a level of generality which has hardly been matched in the British Isles and which is most unusual for a lawyer. It may also not seem a very suitable tribute to David Hume, in whose name today's proceedings are conducted. However, I derive some comfort from Hume's claim that one may "hope to establish a system or set of opinions which, if not true (for that, perhaps, is too much to be hoped for), might at least be satisfactory to the human mind".When we speak of legal systems, we usually refer to national systems: one may have a good knowledge of French law, or be a student of Soviet law. It is perhaps unnecessary to say, here in Edinburgh, that there are exceptions to this rule. At the same time, it could be argued that Scotland is an exception which proves the general rule, as Scots law could only survive because it had developed into a mature legal system when Scotland was still a completely independent nation-state, before Union. On the basis of premises such as these, it is generally assumed that the future of legal systems is intimately linked to the fortunes of the nation-state - not only in legal literature but also, and perhaps more so, in political and economic essays in reviews and newspapers. It is my purpose today to undermine this general assumption.

I shall first try to set the scene by showing that the idea of associating the law with the State made its appearance in European history only recently. After the "reception" of Roman law in the twelfth century, by which I mean its rediscovery and gradual reintroduction, a great part of Europe was again governed by Roman law, as it had been before the fall of the Western Empire in the fifth century. Or rather, to put it more accurately, medieval Europe was governed by a peculiar mixture of Roman law, as the generally applicable legal system, of canon law, dealing especially with marriage, family and succession, and of local and regional bye-laws, concerning matters such as policing and local commerce. Such was the situation in particular in the Eastern part of the European continent. When the cities developed in the later Middle Ages, a new commercial law came into being, which included new principles and rules on insurance, on maritime law and on companies; but it was, in principle, a uniform law, applied in Genoa and Pisa as well as in the Hanseatic ports on the Baltic and North Sea coasts. Law was considered as something universal, not as something that had been given or issued by the State, or by princes, dukes or counts.

For many countries, this was not just a passing or short-lived experience. In the United Dutch Republics, the same mixed system continued in force, although canon law was, in some respects, succeeded by precepts of the Dutch Reformed Church, and although the number of local and provincial regulations increased considerably in the course of the seventeenth and eighteenth centuries. The same system was still working when the republics collapsed as French troops marched in to import the blessings of the Revolution in 1795 - not quite two centuries ago. In the German countries, Roman law was still considered as the generally applicable legal system throughout the nineteenth century, to be relied on when no imperial statute, princely decree or local bye-law provided a solution. The supplementary force of Roman law was formally abolished when the German civil code, the Bürgerliches Gesetzbuch, was introduced in 1900, thus bringing to an end a tradition of nearly seven centuries. It is true that Germany may have been rather slow to change, but it was not until the nineteenth century, in post-Napoleonic days, that the old continental states as well as the new ones gradually discovered the necessity of having their own national codification of civil, commercial and criminal law. And little by little, they came to think of a national legal system as an expression of their political independence, just as they would later cherish other symbols of national sovereignty such as a flag, an air force and an army of diplomats.

Before I turn to the trend in the opposite direction, I should add a word or two about some aspects of the Roman law tradition which are of particular importance for our purpose. It was not difficult to accept Roman law as a generally applicable system because it comprised certain elements which reinforced the underlying concept of the universal character of the law. Roman lawyers considered that part of the law might vary from people to people, or from tribe to tribe, but that part of it was common to every nation. This idea is beautifully expressed in the opening sentence of the main textbook of the time which is available to us, the Institutes of Gaius: "All peoples who are governed by statutes and customs use law which is partly theirs alone and partly shared by all mankind". And that is so, he explains, because "the law which natural reason makes for all mankind is applied in the same way everywhere". After the reception, commentators insisted that Roman law was to be applied not because it was Roman, but because it embodied the common core of legal principles: it was the "ratio scripta". This concept re-emerged in the seventeenth century as part of the natural law tradition. It found its expression, in particular, in the famous work of Grotius on the law between nations, "De iure belli ac pacis", published in 1625. The introduction to that work (the "Prolegomena") makes a certain number of statements about the nature of the law, in order to show that law governs not only relations between individuals, but also between entities such as states. Grotius tells us that there are principles of law which are so "manifest and clear"

that they "are beyond question, so that no one can deny them without doing violence to himself". And that is the case, he explains, because "among the traits characteristic of man is an impelling desire for society, that is, for social life, not of any and every sort, but peaceful, and organised according to the measure of his intelligence".

This universalistic concept of law was one of the main casualties of the development of the modern nation-state and of the concomitant growth of theories on national sovereignty. The process may already have started with the work of King Henry II of England and with the framing of the theory, in the late Middle Ages, that the King of France was sovereign in his own realm ("imperator in regno suo"); it accelerated between 1750 and 1850 and came to full fruition after World War I when, at Versailles, the doctrine seemed to prevail that, on a world-wide scale, every people was to build a nation which would constitute a sovereign state. From the middle of the nineteenth century onward, certain fashionable theories of law were based on a strict identity between State and law, in the sense that the validity of legal norms could only be established by presupposing a sovereign person or entity dictating, by an act of will, the fundamental rule or rules of the legal system.

It is not my intention to discuss these theories, but to show that, from an empirical point of view, developments are now occurring which challenge the very foundations of our concept of national legal systems. These developments cannot be traced to one single cause, or chain of events; that makes them the more interesting. I shall try to elaborate this thesis under five headings:

- the parallelism of developments in the western world over the last sixty or seventy years;

- the experience of the European Communities in so far as they teach us something about the impact of economic integration and political co-operation on legal evolution;

- the progressive "westernisation" of a great part of the world, and the enormous economic and cultural "interpenetration" which we have been witnessing during these last ten or twenty years;

- the reception of elements of Western law in non-Western countries and the growth of a world market;

- and finally, the gradual internationalisation of legal standards.

This is quite a programme, and some of you may be wondering why I did not decide to write a book full of references, diagrams and footnotes. I am

afraid, however, that my temperament is more like that of Alfred Jingle when he told Mr Pickwick how he had made an epic poem on the July revolution while being on the spot: "fired with an idea - rushed into wine shop - wrote it down - back again ... another idea - wine shop again - pen and ink ... noble time, Sir". Or, in Jingle's own summary: "bang the field-piece, twang the lyre". I often feel like doing part of my work under similar conditions.

Most of you will remember Andrew Shonfield's book on Modern Capitalism. It was published in 1965 and it aimed at giving a comprehensive view of the institutional equipment of economic policy in Western Europe and the United States. It compared efforts at planning the economy in France, Sweden and the Netherlands with selective interventions in the economy by public authorities in Britain and in Italy, with the global control of the national economy in post-war Germany and with the New Deal and its aftermath of "government by agency" in the United States. This comparison showed, according to Shonfield, that a "new capitalism" was developing, covering an "international society" and characterised by a "new balance" between public power and private enterprise. At first sight, Shonfield's analysis does not seem very helpful in understanding the problems of today: his new capitalism has been replaced by a "newer" capitalism looking somewhat like old capitalism, with its belief in the market, its reduction of government interference and its emphasis on deregulation. The economic system of America after Reagan, or of Thatcherite Britain, can hardly be analyzed in terms of planning, of agencies or of balance between private and public power. However, a second look at the situation today yields the surprising conclusion that this "newer" capitalism developed not only in countries like the United States and Great Britain, where the political majorities of the day vociferously proclaimed their belief in market forces, but also in countries such as Sweden, France and Spain, where socialist-oriented governments professed their attachment to planning and economic intervention, but conducted in practice an economic policy broadly based on a progressive limitation of interference in the working of market forces. Ways and means of coming to this result may have been different, but the general trend was the same. In the early eighties, a left-wing French government discovered, to its own amazement, that it would only be able to follow completely the course suggested by its ideological commitments if it withdrew from the European Community - and it could only have done so at a tremendous political and economic price.

A look at the economic development of the eighties seems, therefore, to confirm the principal tenet of Shonfield's theory, namely that the Western countries meet the same challenges and come to comparable solutions, albeit with variations stemming from differences in traditions and in political

outlook. Financial and industrial links, as well as an ever-growing amount of trade between these countries, tend to reinforce this parallelism continually. Over the last twenty years, all of them have lived through the energy crisis, the recession, the steel crisis, the economic revival, environmental problems such as coastal pollution by oil slicks and acid rain damage to their forests, and so on. Economically, there surely is a certain entity that can be called the Western world. However, this entity also exists from a cultural point of view. Countries like the United States, Canada, the EC-States, the Scandinavian countries and the small neutral countries in Europe all share a certain cultural experience. Their inhabitants read each other's magazines and look at each other's TV programmes, they develop the same tastes in music, drinks, dress and make-up, they have the same best-seller lists, they admire or dislike movies by Woody Allen or Steven Spielberg; they even have the same fashions of drug addiction.

Common trends in economic, social and cultural life are bound to generate common trends in the evolution of law; and that is indeed what we actually see happening before our eyes. We see that identical events or tendencies affecting social life, like immigration and street violence, raise similar problems with regard to the capacity of the police, the courts and the prison system, but that they are also conducive to comparable new debates on problems like political asylum, race discrimination and prison reform. We also see that joint economic and technological developments provoke the same type of law reform, for example with regard to product liability or to copyright in computer programs. Most interesting of all, we come to realise that the subject-matter of many important legal debates in Western countries is the same even when no direct cause of an economic, social or technical character can be easily discerned: I am thinking of issues such as sex discrimination, abortion, capital punishment, voting rights for non-nationals and so on. These circumstances, taken together, seem to suggest that Western countries do not only share a set of values, but also experience the same evolution in their system of values and in their ideas as to its relevance for the solution of legal problems.

I turn now to the European Community. Its experience shows indeed how profoundly the evolution of law is affected by the process of economic integration and political co-operation. That is so in different ways. First, European Community law governs directly certain matters formerly controlled by national legislation: examples abound, but it is sufficient to mention anti-trust law, the common customs system and the regulations on the common agricultural policy and on fisheries. Secondly, some important areas of national law are partially or entirely harmonized in order to meet the requirements of the common market: such is the case with company law and with the value added tax regime. Thirdly, harmonization also occurs

where it is not actually required, but where it nonetheless facilitates economic integration: thus, we have a directive on product liability and a treaty on the jurisdiction of courts in civil and commercial matters. Finally, there is, quite naturally, a growing tendency to look at the situation in other Member States as a source of inspiration for law reform and for new developments in case law. English administrative law is a good example. The introduction of the application for judicial review as a general remedy, replacing the old fragmented system of prerogative writs, brought English public law much closer to its continental counterparts. Continental influence can also be found in matters of substance: a Scottish author, analyzing the recent ruling of the House of Lords on the Cheltenham "Government Communications Headquarters" (GCHQ), discovered that part of the judgment was based on a legal principle (protection of legitimate expectation) which was "a novelty in English law", lacking "discernible English parentage"; and he added: "To find the true ancestry one does not have to look far across the Channel." In view of this result, it is curious to recall that the GCHQ case found its origin in a conflict between the trade unions and the Prime Minister.

Historically speaking, the European Community forms an interesting paradox. The early European federalists, whose importance for the start of the integration process has been paramount, aimed explicitly at abolishing the nation-state in Europe. The State was their black sheep; it should wither away in the framework of a federal system vaguely resembling an idealised picture of the United States of America. What is happening in fact is an undisturbed survival of the State, with all its paraphernalia and its huge government bureaucracy. But at the same time, the State is not any more the unique, or even the main, source of the law; it is embedded in a plurality of European and international structures which contribute, in their own different ways, to making the law evolve. This conclusion illustrates my point that we should dissociate, in our thinking, the law from the State. I am comforted in this conviction by the results of a colloquium held in Florence in 1978 on the theme: "new perspectives for a common law of Europe". The organizer of the conference, Professor Mauro Cappelletti, disclosed that the "deepest impression" he retained from it was "one of many threads, all leading toward the design of a new law, indeed a new profile of Europe". These threads included, he said, the emergence of a new higher law, comprising many components (he referred, apart from Community law, also to the European Convention on Human Rights), as well as a host of parallel coordinated developments within the various countries. He concluded: "The end result may still be uncertain and vague, but all those threads converge to delineate what might one day appear as the most profound transformation, indeed the most significant revolution, in the long history of legal, and not only legal, civilization in Europe".

After everything I have said today, it is perhaps not necessary for me to spell out my agreement with Cappelletti's view, including his image of the threads. This view has the additional advantage of showing that the movement towards a common law of Europe is not confined to the European Community. The European Convention on Human Rights applies to all Western European States, and as it has its own mechanism of implementation, it gradually ensures the imposition of uniform minimum standards in Western and Central (what until two weeks ago we called non-Communist) Europe. But there is more: countries like Norway, Sweden, Austria and Switzerland have entered into free trade agreements with the EEC, as well as a convention with the Member States of the Community on the jurisdiction of courts in civil and commercial matters. Moreover, some of these countries adjust their commercial rules, especially their quality standards for foodstuffs and other products, to EEC-standards, in order to remain competitive in the common market; they adapt their legislation to the degree of harmonization attained in the Community. The Community therefore acts as a magnet; its achievements often operate as a signal to the whole of Western Europe.

However, I should like to go one step further, and that may appear to you a giant step, or even a leap. The question which is really interesting, quite novel, and indeed where speculation is extremely hazardous, is the following: do experiences in Western Europe shed any light on possible developments on a much larger scale - even, perhaps, on a world scale? In this risky area, we have to proceed slowly by first preparing the ground carefully. There can be no doubt that many non-Western countries are closely linked to the West by industrial connections or by trade. That is certainly the case of the oil-producing countries, but also, for example, of the so-called newly industrialised countries of South-East Asia. Furthermore, there is something like a world financial system, the centre of which used to be in the United States, but seems nowadays to be located somewhere between the European Community, the United States and Japan. The debt crisis of the Third World may indeed show that this world financial system does not always work too well; but it illustrates, at the same time, that such a system actually exists. Of course, some states are more involved in financial, industrial and commercial links with the West than others; but we have already seen that a similar situation prevails in Western Europe: some countries are more implicated in economic integration than others. We can go further: the world economic system does not only exist, it shows every sign of gaining silently universal application. It is, for example, very difficult for a non-Western State to opt out of the system. Some Third World governments became aware of that difficulty as time went on after they had announced their intention of pursuing their economic development on a "go-it-alone" basis. Such was the experience of Guinea and Indonesia in the fifties, and of Angola and Somalia in the seventies - and it may be that the People's Republic

of China is in the process of making the same discovery in 1989.

Everything considered, it seems difficult to deny that there is a world market and something like a world economic system. It is less solid than the Western system, but, in some respects, it is held together by strong links. Is there also, as in the West, a cultural component? Here, the picture becomes somewhat blurred, as it is difficult to find reliable information. On the other hand, we should probably not underestimate the influence of such disparate items as colour magazines, pop music, radio news, jeans, fashionable drinks and TV series. A westernised elite often sets the pace, but that is not necessarily so. A French author of a recent book on "L'occidentalisation du monde" tells us that he was walking with a friend in Algiers on an early summer evening in 1985, and that he found the streets very quiet; but his friend said: "Regarde, les rues se vident; c'est l'heure de Dallas." And the success of the famous open air pop concert of Woodstock was, twenty years after the event, repeated in Moscow in the summer of 1989. In some respects, the Western world certainly acts as a model for the rest of the world - I hasten to add that I am stating this as a matter of fact and am not expressing any kind of approval or disapproval.

Is it also possible that these trends are influencing legal evolution in the non-Western world? In other words, could one imagine that parts of Western law would be introduced, or would serve as a model, in African and Asian countries, as well as in Eastern Europe? The answer is undoubtedly in the affirmative; the history of this century is already studded with examples of the reception of Western law in many parts of the world. During the first half of the century, Turkey, Japan and the USSR adopted civil and commercial codes inspired by the German and Swiss codes, sometimes virtually taking over the texts of these codes, which were then considered as the most modern pieces of legislation, word for word. In the second half of the century, newly independent states often maintained, for the moment, the existing colonial legislation which incorporated much of the law of the former colonial power. As a result, we still find a civil law of obligations that closely resembles the system of the French Civil Code in Senegal and Madagascar, elements of English common law in Singapore, Ghana and Israel, and a developed system of French-style administrative law in the Ivory Coast and in Tunisia.

Much has been written on reception of Western law: does it really supersede the earlier applicable legal system, in particular if that is a traditional system closely linked to the culture and religion of a certain country, region or tribal society? The available evidence suggests that it does so in some respects but not in others. To put it simply: it is not difficult to introduce and to apply English or German company law or to enact and enforce Western-style legislation on insurance, banking, trust, investment, patents and copyright.

By contrast, the reception of Western law has relatively little impact on areas such as marriage, family law, succession and, sometimes, land law. In this regard, studies on Turkey, Israel and West Africa all point to the same result. As one Israeli scholar put it, reception is a success in "emotionally neutral and instrumental areas of activity", but it rarely affects "basic institutions rooted in traditions and values".

Now let us consider these findings in the light of what I said earlier on the gradual evolution of a world economic system. They seem to show that reception of Western law is possible in the very areas of activity which form part of that economic system. That, in its turn, may mean that the facts of economic life and the growing importance of the world market may put pressure on non-Western countries to adjust their laws, particularly on commercial and economic matters, to the requirements of their trading partners. The European experience suggests that pressure of this kind may increase as economic links grow closer. I feel bound to add that such a development would by no means confirm the well-known thesis of "neo-colonialism" by the Western powers: first, because nations which have never been ruled by colonial powers like Russia or China may find themselves one day exposed to the same kind of pressure; and secondly, because adjustment and harmonization of legislation can take many different forms, such as international treaties, decisions of international institutions, and autonomous action by national authorities.

For my part, I conclude that the growth of a "common law of the world" is imaginable if we look beyond the year 2000. Part of the law will remain untouched by it and probably be left to the exclusive jurisdiction of national authorities. I recall, at this point, that Roman law, when it was the common law of medieval Europe, left matters like marriage and family to the Church. I take it, indeed, that European integration will not touch these matters either.

That brings me to the final part of my excursion into the future. Two further elements may reinforce the internationalisation of legal systems. The first element consists of the way human rights are to be guaranteed. In Europe, the implementation of the European Convention on Human Rights, as interpreted by the institutions created by the Council of Europe, has had a clear influence on the level of protection granted to aliens, prisoners, conscripts and suspects. However, protection of human rights has also made headway on the world scene, as appears from the conclusion of the United Nations Covenants on Human Rights of 1966 and the East-West Helsinki agreements. Methods of uniform definition of minimum standards on a world scale are still in their infancy, but they are developing and may have a future. The second element is world peace. I cannot get rid of the idea that mankind is

finally becoming too civilised, or too scared, to solve its conflicts by making war. New forms of conflict management will be necessary, and they may include compulsory jurisdiction of courts or compulsory arbitrations. These mechanisms will again result in common legal standards. I add this, however, simply as an afterthought.

I am convinced that a common law of Europe is developing very rapidly. The real question is whether the evolution of a world economic system will not, in the long run, create a movement towards a common law of the world; and, in my view, we should seriously envisage such a possibility. Whatever the future may have in store, however, the time when law and State could be considered as Siamese twins is over. We should put our thinking on legal problems in a completely different perspective, that of the birth, or rebirth, of a law which is common to all nations. You may find this, in Hume's terms, "nothing but sophistry and illusion"; I can only reply that, to my mind, our progress towards internationalisation of the law has gone much further than we usually imagine. It is, of course, always reassuring to regard the world we are familiar with as something which is more or less static. There are, however, moments in history when we have to recognise the dynamics of the human situation and the strength of the forces of change. It may well be that we are witnessing such a moment at present. Events of real importance often arrive noiselessly - on stockinged feet. As Alfred Jingle would have said: "Capital notion that - very".

The Author acknowledges the assistance of Ms Eleanor Sharpston, legal secretary at the Court of Justice of the European Communities, who improved his English.

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REPLY TO "THE FUTURE OF LEGAL SYSTEMS"

BY JUDGE THIJMEN KOOPMANS

Professor Neil MacCormick

It is a very special pleasure to reply to such a splendid paper as that of Judge Koopmans, and an honour to do so as a Vice President of the David Hume Institute, but there is clearly a certain difficulty and embarrassment in going about the task and the way I have to do it. To reply in the heat of the moment as we did yesterday is one thing. To come back the following evening before a different audience to discuss the paper is perhaps another matter.

It has become something of a fashion at the David Hume Institute for papers and speeches to begin with an epigraph from the works of the great man. I am inclined to start with what is in fact one of my favourite quotations from the Enquiry regarding the Principles of Morals. " "I hate a drinking companion", says the ancient Greek proverb "who never forgets. The follies of the last debauch should be buried in eternal oblivion, in order to give full scope to the follies of the next" ". I hope not to incur a parallel reproach in casting up to Judge Koopmans all that he said last night but at any rate I shall confine myself exclusively to what he said before dinner.

Essentially I wish to agree with the main case but later to quarrel a little with some aspects of his way of putting it. In the terms I would like to restate it the case goes like this: We in Western Europe for certain, and perhaps to a considerable extent we the inhabitants of the planet earth, are moving out of a particular phase of legal development towards a newer (and yet also older) understanding of the nature of law. After a period in which most thought about law has presupposed the sovereign state as the source, ground and home of law in its most authentic form, we are now rediscovering a ius gentium and finding in forms of non-state law the framework for a new economic order in world-wide markets. It is, perhaps, a case of the lex mercatoria re-emergent in a new and more broadly based form. Anyway, the outcome (at least in commercial matters) is that states are ceasing to have the monopoly over law that they have for so long enjoyed. If we seek an explanation of this change from Judge Koopmans, we shall find it principally in the spreading internationalisation of trade and of popular culture so prominently observed in the modern world.

Some may feel uneasily that this thesis smacks a little too much of economic determinism to be fully acceptable in polite Humean (or perhaps even polite human) society. But it would then be a sufficient reassurance to remark that

well before Marx, Adam Smith's theory of the four stages of social and legal development had established quite enough of a thesis about the economic context of legal institutions to secure the entire respectability of the case before us. What comes to mind, one might almost say, is the suggestion that the completion of the stage of development into Smithian commercial society, the fourth stage, is its radical internationalisation. While Smith saw that within particular countries the evolution of commerce favours the idea of liberty and a considerable reduction in the coercion of the state, Judge Koopmans now adds that the contemporary internationalisation of commerce entails a yet more radical revolution in the diminution of the role of the state. Whereas Engels predicted the withering away of law and state in a post-capitalist world, we may be witnessing a post-socialist world in which it is the state that is withering away while the law comes into its own again here as a rational basis for the administration of things.

For this to be possible, we might have to revise some long dominant views about law. Here I for one certainly agree firmly with the Judge in his reference back to some old controversies about law. Translating it into Scots terms I remind you that Stair defined law as "the dictate of reason", while for Erskine it is "the command of the sovereign"; where Stair follows Grotius in the tradition which stretches back to St Thomas and through him to the jurists and philosophers of the ancient world, seeing law primarily in terms of rational order, Erskine is more with Pufendorf and that other intellectual tradition in which law is located fundamentally in the will, divine law in God's will, and human law in man's (and here I think one does say "man's" advisedly).

As a student of legal philosophy I feel ever more convinced that it is not in a supposed opposition between "natural law" and "legal positivism" that the profoundest oppositions in thought about law are to be found, but rather in this dispute between rationalism and voluntarism, and this is a dispute which cuts across other typologies of legal thought. Yesterday indeed, at a seminar earlier in the day, I learned from Dr David Leaman of Liverpool that an exactly parallel clash between a form of voluntarism and rationalism can be found between some of the more orthodox Islamic theologians of the Middle Ages and philosophical proponents of Islam such as Averroes, who did, of course look to Aristotle with an appreciation matched strikingly in medieval Christian philosophy by St Thomas. I mention this not out of a desire to parade ostentatious learning or (at least not only out of such a desire) but because yesterday our very distinguished Canadian visitor Dr Flora MacDonald made the point that in any discussion of the internationalisation of law and legal ideas one has to bear in mind the huge significance of the Islamic world and world-view. It may in this context be worth observing that within the Islamic tradition there are perhaps different strands of

rationalism akin to those to which Judge Koopmans draws attention (rightly in my respectful view). There may be available elements in Islamic tradition which after all parallel the tendencies in Western thought most hospitable to current development.

However that may be, the implications of drawing that gap between rationalism and voluntarism are clear enough. As Stair observes, custom and case law (and doctrinal debate, he might have added) are likely to be better ways of capturing the rational sense of law and practice than are decision and enactment. The authenticity of law anyway depends more on its reasonableness as a standard for conduct than on the authority of its maker or enunciator. But for a voluntarist it has to be primarily through ratione imperii, not imperio rationis, that law governs and secures authenticity. Law is law not by authority of its intrinsic reason but by reason of its enacting authority.

David Hume's critique of ethical and jurisprudential rationalism dealt it a death blow; but the practical point of the rationalist debate survived in Hume. For in his view custom and tradition remain the essential vehicles of law and its development. The reasonable is not then something extraneous to law but something constructed by or within it. In a curious way the rationalist argument can survive the rejection of Grotian rationalism. Like F.A. Hayek, I am of the view that a Humean critical rationalism is the best stance to adopt on the questions of practical philosophy. But his most direct successors were far from taking that view.

With Bentham and Austin, and with Dicey's apotheosis of the dubious doctrine of Parliamentary sovereignty, the nineteenth century in Britain marked the near total triumph of juridical voluntarism. All the more so in revolutionary and post-revolutionary France did the doctrine of law as the expression of will (here doubtless, the will doctrine owes more to Rousseau than to Bentham) triumph. With the revolution was born the sovereign state, the soi disant "nation state" of modern times. Savigny's critique of codification at least matched a delay in German developments, but in due course it was the post-Bismarckian nation state of imperial Germany that achieved its bourgeois codification, that is, its Bürgerliches Gesetzbuch.

I am at one with Judge Koopmans in thinking that the present transcendence of that predominant voluntarism inherited from the 19th century is a positive one. But it would be foolish not at the same time to acknowledge that the movements involving codification, emphasising the importance of legislation and stressing that the task of the judges to discover and implement the state's or the law giver's will rather than to second guess the legislature, was and does remain one which is essential to the construction of such notions as

the rule of law and the Rechtsstaat; and, further, some such doctrines are in some form essential to the very idea of political democracy. It is therefore a serious question and one which I should like to pose here, namely, what place Judge Koopmans sees for democratic processes and how these processes have to be institutionalised in the world of the post-sovereign-state law which he envisages.

So my first main comment is that I agree with the general line of argument and prediction being made and its conclusion and I share the implicit value judgement but this leaves us both with a problem about democracy and a question what to do about it.

My second main comment starts from my disagreement over aspects of the way in which the case was put. At the beginning of his lecture, Judge Koopmans implied that Scotland was anomalous in having a legal system without being a nation. In parallel, he suggested that the Soviet Union has a national legal system. This implies for me a too quick identification of state with nation. As a notable lover of Dickens, I am sure that Judge Koopmans shares my admiration for Silas Wegg's masterly evasion of Mr Boffin's question whether he knows a certain book: "I haven't been not to say right slap through him, very lately, having been otherways employed, Mr Boffin". The name of the book in question, so far as Mr Boffin had been able to capture it was, "His name is Decline-and-Fall-of-the-Rooshan-Empire". Recent events suggest that Mr Boffin may not have been so much in error as just ahead of his time.

I bring in the "Decline and Fall of the Rooshan Empire" to make the point that although of course there is one use of the concept national in which the USSR may count as a nation, the more significant fact about the Soviet Union is that it is very much a multi-national system. Current developments inside the Soviet Union and within the Soviet area of influence in Eastern Europe have something of nationalism about them. This has itself given rise to a degree of alarm and unease, or to an element of caution in welcome expressed by observers of the changes underway.

Certainly on the whole, nationalism in all its forms has had poor press among liberal and socialist opinion within the west and to a large measure because of the atrocities of the Second World War. I think it is important when we talk about the issues raised in Judge Koopmans' paper to bear in mind the significance and the reality of nationalism as well as internationalism in the modern world. This involves me in criticising the identification, or the seeming identification, of state and nation at the beginning of the paper.

To develop this theme a little, I must expound briefly some ideas about the

concept of nation and national identity, and then consider their moral implications. I start from the assumption that all individuals are "contextual individuals". Our sense of identity arises from our experience of belonging within significant communities such as families, schools, workplace communities, religious groups, political associations, sports clubs - and also nations, conceived as cultural communities endowed with political relevance. A nation is constituted by a sense in its members of important (even if internally diverse) cultural community with each other based in a shared past, a "heritage" of common ways and traditions, including at least some of a family of items such as language, literature, legend and mythology, music, educational usages, legal tradition, religious tradition, all of which cumulatively are regarded as bearing on the legitimacy of government at least in the sense that governmental decisions which denigrate or belittle any of the focal elements in a given cultural tradition are viewed as abusive of power. Nations exist wherever there are substantial numbers of individuals who share in some degree a common consciousness of this kind.

Observe that I do not say that the nation is made up of the sum of such individuals, for that would be to commit what I regard as the fallacy of individualistic atomism. The individuals in question necessarily have it as a part of their sense of identity that they are of this culture and heritage, so the nation is as much an essential factor constitutive of their being who they are as their being so is constitutive of its being what it is. It's rather like the fact that you can no more have shareholders without a company whose shares they hold than you can have a company without shareholders to hold its shares. This does not make either companies or nations mystical or chimerical entities. They are institutional facts, points of imputation, respectively of legal and of moral imputation, essential to the way in which we make sense of economic and of cultural and political life.

We may conclude that nations are quite real and quite identifiable. They do not exist because of deliberate once-for-all choices or decisions, although the choices and decisions of many contribute to how they are and change and develop or grow or atrophy or wither away. Nor is there anything in this account to guarantee them any special primacy in our consciousness or any sort of natural or necessary exclusiveness or special geographical spheres one as against another. They can and do overlap and intertwine with each other and with other significant political and non-political groups communities and organisations of all sorts.

Even if all that is sound as a brief description of what is involved in nationality, it leaves open the question what (if any) moral or political principles can be set up as relevant to the state of affairs described. If there really are nations with an existence such as I impute to them, what difference does that make?

What ought to be done about them, what, if any, rights do they have, and why?

The answer begins by taking up the basic moral imperative of respect for persons. If, as I claim, a sense of nationality is for many people constitutive in part of their sense of identity and even of selfhood, then respect for this aspect of their selfhood is as incumbent as respect for any other, up to a certain point. The key point is, of course, that at which one national self-expression or self assertion becomes destructive of another. The Irish joke and the lust for Lebensraum are at bottom objectionable on the same ground, albeit with mighty differences of degree. Within the limits set by equal respect and equal allowance of self respect, respect for persons must include respect for national identities.

A serious question is how that respect should manifest itself in the new international order envisaged by Judge Koopmans. A part of the answer is clearly that the old (and morally objectionable) absolutism of nation-state nationalism based on doctrines of illimitable sovereignty must be abandoned, and abandoned without regret. In turn as new confederations emerge, for example in the case of the European Community, these can and should create space for the flourishing of some of the nationalities which were wholly or partly submerged within the " nation-states" of the 19th century. This would involve an upward and downward diffusion of power - a wholly good thing from the point of view of the rationalist legal order envisaged by Judge Koopmans. It may be that there is a kind of rationalism and a kind of nationalism that are not mutually incompatible. For my part, I favour them in their mutually compatible forms, but only in those forms.

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