Luxembourg in retrospect: a new Europe in prospect

Sir David Edward

Sir David Edward was a Judge of the European Court of First Instance from 1989 to 1992 and of the European Court of Justice from 1992 to January 2004. This article is a revised version of his Valedictory Address delivered in the Foreign and Commonwealth Office on 28 October 2003. He explains how the European Courts work and gives an impression of what it was like to work as a judge in that multilingual, multinational and multicultural environment. He sets the work of the Courts in the wider context of developments since 1950 and looks ahead to the challenges facing the new Europe of 25 member states.

When I went to Luxembourg as a judge in September 1989, the Single European Act had come into force only two years before. The 1992 programme was gathering pace but was far from complete. We were still 'the European Community'. Maastricht and the European Union, EMU and the euro, Schengen, Amsterdam, Nice and Enlargement all lay in the future. Greece had been a member state for less than ten years and Spain and Portugal for less than four. The Berlin Wall was still standing and the GDR was still operational. The three Baltic states were an integral part of the Soviet Union.

Then, two months later, the Berlin Wall fell. The Baltic states and many others regained their independence, though not without difficulty: in 1991 Soviet tanks rolled into Vilnius and killed 14 people at the TV tower. As events in Bosnia showed, Europe remained unstable and the euphoria that provided the initial impetus for Maastricht turned very quickly to disillusionment.

Now we are passing through another period of disillusionment. But disillusionment with the European project is not new. The whole history of events since 1950 is one of repeated mood swings between euphoria and disillusionment.

The Schuman Declaration and the 'supranational' Coal and Steel Treaty in 1950–1951 were followed almost immediately by the failure of the European Defence and Political Communities. As a French participant in the negotiations for the EEC Treaty has written:

The French delegation fought against the institutional system, seeking to reduce the supranational character of the ECSC model, to delay majority voting and to limit the powers of the future European Commission. In sum, the French administration was 'anti'. If one doesn't know that, one cannot understand the institutional crisis of 1965 in Brussels at the
time of General De Gaulle. (Deniau, 1977, p. 60)

Nevertheless, the negotiations were successful, and the period from 1959 to 1964 was one of enthusiastic implementation of the EEC Treaty during which the Court of Justice laid the constitutional foundations of the Community with its judgments in Van Gend en Loos and Costa v ENEL. But this was followed almost immediately by the institutional crisis of the 'empty chair' when France refused to participate in meetings. The Luxembourg Compromise which brought the crisis to an end admitted a general right of veto even where the Treaty provided for majority voting. In consequence, the institutional system, which was supposed to complete the common market by the end of 1969, ground to a slow crawl.

There have been many false dawns since then. But now the 1992 programme is nearly complete and the internal market is a substantial reality. Although not all EU members are part of them, Schengen is working and the euro is operational. The second and third pillars of Maastricht (Foreign and Security Policy and Justice and Home Affairs) have led to a degree of close cooperation between the member states that was almost unthinkable fifteen years ago.

Above all, we have achieved enlargement. Historic regions, cities and peoples (the geography of War and Peace) have emerged from the shadows of the twentieth century and in many cases have achieved, for the first time ever, genuine independence in a stable political environment.

So the fifteen years since I first went to Luxembourg has been a truly historic period. How did it appear at the time to a Judge of the European Court (the ECJ)? What have been the successes and disappointments, the frustrations, the enthusiasms and failures?

Luxembourg in retrospect

For the most part, I had no sense of being at the centre of things. It is true that the ECJ can no longer be said to be 'tucked away in the fairyland Grand Duchy of Luxembourg, and blessed with benign neglect by the powers that be and the mass media'. But Luxembourg remains relatively remote from the frenetic political village of Brussels and, by and large, the Court has been left to get on with its work. The Court's judgments sometimes cause a ripple on the surface of public consciousness and, very occasionally, a tidal wave.

Public, political and media reactions are quite unpredictable. Judgments of the plenary court in cases that were said to threaten the very foundations of the health care systems in the member states (e.g. Smits & Peerbooms) passed almost without comment. But a judgment of a chamber of five judges that seemed to follow well-established case law on the taxation of parent and subsidiary companies (Bosal Holdings) led to an article in the Financial Times by Commissioner Frits Bolkestein entitled 'Company tax law must not be made in court'. The headline distorted the Commissioner's message: if the member states want to control the agenda, they must be prepared to legislate in the field of direct taxation. In a sense, that has always been the story. Litigants and taxpayers do not wait for the legislator: they go to court to prove their point and the legislator follows.

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The Court of First Instance

I went to Luxembourg in 1989 as the first British judge of the Court of First Instance. This was a new institution with two limited and quite unrelated categories of jurisdiction: staff cases, where the Court acts as an Employment Appeal Tribunal, and competition cases, where it acts as a Competition Appeal Tribunal.

Some of the staff cases displayed an exaggerated legalism, perhaps inherited from the high-flown conception of la fonction publique on which the Community civil service had been based. But the staff cases also showed up genuine injustices and, above all, the lack of a rational and transparent career structure for Community civil servants. Nationality is allowed to play too great a role in recruitment and promotion. This is a fundamental
flaw in the system for which the member states are largely responsible and I do not believe it will be solved by the facile remedies of management techniques.

**Nationality is allowed to play too great a role in recruitment and promotion**

The competition cases were concerned essentially with two areas – on the one hand, restraining the economic, and therefore the social, power of corporations and, on the other, ‘maintaining the constitutionality of bureaucracy’ – a phrase coined by Professor John Mitchell, who taught me constitutional law and whose Chair I inherited at the University of Edinburgh. As he said, ‘the disciplines of courts help governments to be good, even more than they compel them to be so’ (Mitchell, 1968). It is through judicial review of their acts that administrators learn that they have to comply with certain rules and observe certain standards.

What did I learn from my time at the Court of First Instance? First, I learned (or tried to learn) the lessons that all British advocates have to learn when they make the passage from the Bar (lawyer) to the Bench (judge): to keep quiet, and to appreciate that others may take a quite different view of the same facts and circumstances, including the assessment of people and their motives. I also learned something I am sorry I did not learn earlier – how much you can see (and hear) from the Bench of what is going on at the Bar.

Second, I learned 'ECJ method' – how to be a judge in quite a different system. I will come back to that.

Third, I took part in establishing and developing procedures that would enable the new Court to perform effectively the role assigned to it – better fact-finding, or rather, better control of fact-finding by the institutions, especially the Commission. In essence, our task was to ensure a higher degree of 'quality control' in decision-making. On the whole, I think we were successful.

The Court of Justice

In 1992, I passed from the Court of First Instance to the Court of Justice. That was very different. Whereas the Court of First Instance worked almost exclusively in chambers of three or five judges, the Court of Justice worked a good deal of the time in plenary. The number of Judges did not change significantly while I was there: there were thirteen when I joined in 1992 and fifteen when I left in 2004. But the Court felt smaller in the early days, even in plenary, perhaps because we sat fairly close together round a table rather than, as became necessary later, in a horseshoe formation at one end of a much larger table. Sometimes, if the argument became heated, as it occasionally did, one felt uncomfortably close.

There were strong personalities: Federico Mancini – tall, handsome and opinionated, a passionate and amusing Euro-enthusiast; René Jolivet – learned, equally opinionated, almost Euro-sceptically dry, withdrawn but with a vulnerable charm; Kostas Kakouris – deeply religious, passionate about human rights and distrustful of reason as the solution to every problem ('sometimes one must believe'); and Fernand Grévisse – a man of infinite courtesy, the distinction of whose career during World War II was only revealed at his funeral with full military honours at Les Invalides.

The ECJ is different from any national court for a variety of reasons. It must work in all the official languages – eleven when I left, now twenty. Its judgments must be written in one language (currently French) and then translated into all the others. The Judges must try to understand the methods and concepts of quite different legal systems – more than fifteen before I left, now nearly thirty. And one aspect at least of the procedure is unique.

The system of 'preliminary references' under Article 234 (formerly Article 177) of the Treaty empowers any court or tribunal of any member state to ask the ECJ to state what is the law to be applied before the case is decided. When the case comes to the ECJ, there will not necessarily have been any judgment of any national court dealing with the point at issue. As Justice Ruth Bader Ginsburg of the US Supreme Court remarked when discussing it with us, 'I see that the ECJ is not a court of first instance, but it may often be the court of first look'.

The reference from the national court will be written in one language and couched in the concepts of one legal system. But the answer to be given by the ECJ must be capable of being applied in any language by the judges of any legal system. The reference will often have been made by the national judge without the help – and in some cases without the knowledge – of the parties. The
parties and the member states may, but need not, intervene before the ECJ to plead their point of view, and the Court has no power to compel them to do so. The factual background may be incomplete or unexplained, and the legal context in which the case arose before the national court may be uncertain or obscure. The oral hearing may or may not fill the gaps or contribute to one’s understanding of the case.

Although the purpose of the procedure is to enable the ECJ to interpret the law to be applied, the Court is charged by the Treaty with the duty of ensuring that ‘in the interpretation and application of this Treaty the law is applied’ (Article 220). So it may be necessary, not only to interpret the law but to give some guidance to the national court as to how the law should be applied to the circumstances of the particular case.

These special features of the ECJ explain the importance of the complementary roles of the Judges (especially the Judge Rapporteur) and the Advocate General.

The role of the Advocate General is widely misunderstood and widely misrepresented. It is often said that ‘in 80% of cases the Court follows the Advocate General’. This is true in the sense that, in a large proportion of cases, the Court reaches the same result as the Advocate General. This is not surprising because there will often be broad agreement as to what the result should be – indeed, it may be fairly obvious from the beginning. But even where the result is obvious, there may be different reasons for arriving at it.

The function of the Advocate General is neither to give a judgment nor, in spite of the English text of the Treaty (Article 222 EC Treaty), to make ‘submissions’. Although it is a ‘judicial’ function, the Advocate General is neither a judge nor an advocate. His or her function is to provide the Judges with an ‘opinion’, analysing the issues and the strength of the conflicting arguments, setting out the options and making a proposal as to how the case should be solved. Above all, the Advocates General have the privilege of writing in their own language and in their own individual style.

The function of the Judges is not to decide whether the Advocate General was right or wrong, but to determine collectively (as a ‘college’) how the case should be decided, what reasons should be given and how they should be expressed. The Judges come from different countries and different legal traditions using different languages. They have to deliberate and write their judgment in a language which, for the majority, is not their mother tongue.

The purpose of the Judge Rapporteur is to prepare the case for the other Judges, to identify the important points and the potential pitfalls, to write a draft judgment on the basis of which the Judges can deliberate and give effect to what they decide.

Fernand Grévisse said that ‘deliberation is the heart of our work’. Deliberation (le délibéré) is the process by which the Judges, either in writing or meeting together, debate how the case should be solved. It is not unique to the Court of Justice – many continental courts work in that way – but it is particularly important for the working of the ECJ and is probably the most fundamental point of difference between it and any court in the common law world.

When I produced my first draft judgment, one of my colleagues said, ‘That is a very good opinion, now we must make it a judgment. We must make it aseptic.’ The scope for individuality lies, not in the public expression of one’s own opinion, but in the development of personal relationships so as to be able to persuade others of one’s point of view and to accommodate or reconcile divergent points of view.

The purpose of deliberation is, in the end, to produce a judgment that all the Judges can accept as legally defensible even if they disagree with the result, and – which is very important – a judgment that will work in all languages and all legal systems.

In common with the tradition in most member states, no dissenting opinions are possible, but this does not imply that there is no internal disagreement between the Judges. On the contrary, there are often strong disagreements and the skills of advocacy learned at the Bar can be useful in persuading other Judges to one’s point of view. But the purpose of deliberation is, in the end, to
produce a judgment that all the Judges can accept as legally defensible even if they disagree with the result, and - which is very important - a judgment that will work in all languages and all legal systems.

There is therefore a strong incentive to conciliate. Of course, it is sometimes frustrating not to be able to speak with one's own voice as an Advocate General can do and it is sometimes necessary to go along with a judgment that represents the lowest common denominator of conflicting opinions. But it is a system with which I felt comfortable. The principle of collegiality is an incentive to judicial modesty, as it is intended to be, and it is well adapted to the needs of a court that has to work in the multilingual, multinational and multicultural environment of the European Union. The individual Judges cannot be criticised for disloyalty to the interests of their own country nor, correspondingly, can the member states find an excuse for not accepting the Court's judgment on the ground that 'their' Judge did not vote for it. Above all, it ensures an absence of ideological lobbies. In my experience, it was never possible to predict with certainty how any particular Judge would react to a particular case.

The Court has often been criticised for 'activism' in promoting an integrationist agenda. Other commentators, taking the opposite point of view, have referred to a bygone 'heroic period' during which the Court, in coalition with the Commission, was the 'motor of integration': now, they say, the Court shows greater deference to the member states and the coalition with the Commission has come to an end. Since both theories are advanced on the basis of the same evidence, neither is likely to be true. But even if, like all generalisations, they contain a grain of truth, I do not see things that way.

Until Maastricht, integration was the agenda of the Treaty. The Maastricht, Amsterdam and Nice Treaties have changed the emphasis, giving subsidiarity as great an importance as the 'ever-closer union'. So if (which I do not believe) the Court has shown greater deference to the member states, this is because it is the duty of the Court to interpret the treaties as they are, not as commentators on either side would like them to be. If there ever was a coalition between the Court and the Commission, it is surely a sign of institutional maturity that they can live independent lives.

The problems faced by the Court in the 1990s were different from those of the so-called heroic period. Most (though not all) of the major constitutional decisions had already been taken. The Court had established the principles of the primacy and direct effect of Community law (Van Gend en Loos, Costa v ENEL and Factortame) and state liability for loss caused by failure to comply with Community law (Francovich). But two problems remained - or rather one problem with two aspects. First, the basic principles had to be applied to new situations which did not quite fit the formulae by which the principles had traditionally been stated. Second, in order to do so, the principles had to be shown to be based on a coherent legal theory. This was done, essentially, by reliance on the conventional criteria of public international law and, especially, that of obligation.

Treaties are international contracts creating mutual obligations between states. The contracting parties cannot resile unilaterally from the obligations they have undertaken. That, in Community law, is the doctrine of primacy. Where the parties have no freedom of manoeuvre, they cannot avoid judicial enforcement of their obligations - the doctrine of direct effect. And parties must make good any damage caused by failure to fulfil their obligations - the doctrine of state liability. Repeatedly, in the case law of the Court during the past decade, emphasis is placed on the obligations of the member states and of the institutions, vis-à-vis each other and also towards those who are affected by what they do (Intervenvironnement Wallonie, Portugal v Council and Köbler).

Next, in at least three important respects, the Court had to refine the criteria to be used in applying the principles of Community law. First, the basis of state liability for breach of Community law appeared to be different from that on which the Community institutions could be held liable for the consequences of unlawful decisions on their part. This was illogical and a common basis of liability had to be established (Brasserie du Pêcheur, Dillenkofer and Bergaderm).

Second, while it had been accepted that the member states retain their autonomy in matters of procedure, it became necessary to define the limits of that autonomy. This was done by introducing the principles of equivalence and effectiveness: the remedies available for breach of Community law must at least be equivalent to those available for breach of national law and they must be effective (see, for example, Case C-78/98 Preston & Others).

Third, the Court refined the principle of proportionality and generalised its application. Proportionality is the principle that defines the
circumstances in which administrative or legislative action can interfere with individual rights. There must be a legitimate and overriding objective of public interest. The measure taken must be necessary to achieve that purpose, and it must be proportionate (in the narrow sense) in going no further than is necessary to achieve that purpose.

These criteria have been applied to the administrative and legislative acts of the Community institutions and to measures taken by member states whose effect is to limit or interfere with the economic freedoms guaranteed by the Treaty (freedom of movement of goods, persons, services and capital; see, for example, Case 55/94 Gebhard). This is essential if the internal market is really to be 'an area without frontiers in which freedom of movement of goods, persons, services and capital is ensured' (Article 14(2) EC Treaty).

The internal market is not, and never was, a purely economic goal, still less is it simply a free trade area. Taken together with Union citizenship introduced by the Maastricht Treaty (Articles 17-22 EC Treaty), its purpose is to ensure the legally enforceable right of citizens to go where they wish and take their families with them, to live where they like and to trade and to work where they can. This is fundamental to the Community idea. The task of the Court - not always an easy one - has been to hold the member states to their contract with each other and with their citizens.

I accept that not every judgment of the Court to which I signed my name is a model of clarity or logic. That is hardly surprising since I signed more than 1300 judgments and was Judge Rapporteur for 300 of them. For all judges, there will always be a tension between achieving impregnable legal reasoning and achieving a practical, workable result, acceptable to common sense and justice, and doing so within a reasonable time. The best I can claim for the Court of Justice during my time is that it has become an accepted and respected part, not only of the Community legal system, but also of the national legal systems, including our own.

That is good, not only for lawyers, but for the individual too. To quote John Mitchell again:

Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other and it is important that, within acceptable limits, individuals should be able to participate, through the neutral mechanism of courts, not merely in maintaining the framework of rules, but also in advancing its construction. The role of courts has - or should have - something to do with the realities of democracy since it is through them that the individual can play a larger part in government while gaining a greater sense of security. (Mitchell, 1968)

Looking back, my chief regret is that the Court did not succeed in putting an end to 'reverse discrimination' - the idea that, because we are dealing with international treaties, member states are entitled to treat their own citizens less favourably than they are required to treat the citizens of the other member states.

### A new Europe in prospect

In the declaration that started it all, Robert Schuman, the Foreign Minister of France, said:

Europe will not be conjured up at a stroke or by some master plan. It will be attained through concrete achievements that lead to a practical community of interest.

For all that the sceptics may say, there have been concrete achievements that have led to a practical community of interest for the individual as well as for governments: citizenship and non-discrimination, a vastly greater concern for human rights, the achievement of the internal market and, although not all members are part of them, Schengen and the euro.

Above all, there is an institutional framework within which, for the first time in history, the peoples of Europe can work together for common social, political and economic goals. Jean Monnet liked to quote the Swiss Henri Frédéric Amiel:

Each man's experience starts again from the beginning. Only institutions grow wiser; they accumulate collective experience; and from this experience and wisdom, men subject to the same laws will gradually find, not that their natures change but that their behaviour does. (Duchêne, 1994, p. 401)

Pursuing the same line of thought, Monnet himself wrote:

Men who are placed in new practical circumstances, or subjected to a new set of obligations, adapt their behaviour and become
different. If the new context is better, they
themselves become better: that is the whole
rationale of the European Community, and the
process of civilisation itself. The difficulties that
Europeans still encounter every day in their
relations with each other should not mislead us:
those difficulties are now internal problems,
similar to those which we normally solve,
within our countries, by discussion and freely
agreed decisions. Like all practical systems, the
Community cannot prevent problems arising:
but it offers a framework and a means for
solving them peacefully. That is a fundamental
change by comparison with the past - the very
recent past. (Monnet, 1978, pp. 389-90)

We are now facing a new challenge. The centre of
gravity of the European Union has shifted
eastwards and the dynamics of the system are
bound to change. A Court of 25 judges cannot
work in the same way as the Court of fifteen judges
in which I worked. The same must be true of the
other institutions. The ‘ever-closer union’ is bound
to be different from what was envisaged in the
1950s. But we also need to consider whether, and if
so in what sense, the European Union can be a
‘union of sovereign nation states’.

### Whatever we call it, we
are necessarily discussing
a constitution

Under public international law, all states are
equal. Malta with 400,000 inhabitants is as much a
state as Germany with 90 million. Some states
cannot be more equal than others and the power of
veto (if that be the badge of sovereignty) must be
the same for all. Yet the larger member states claim
– with some reason – that power should be
modulated in proportion to population. The
logical consequence must be a system of qualified
majority voting. If so, the legal consequence must
be a departure from the traditional canons of
public international law and a movement towards
those of constitutional law. Whatever we call it,
we are necessarily discussing a constitution.

Constitutions – at least for entities as complex
as the European Union – necessarily imply
compromise. Population (statistical democracy)
cannot be the sole determinant. New Hampshire
and Bremen must, in some respects and for some
purposes, wield the same power as California or
Bavaria. There must, as Madison saw more than
two hundred years ago, be checks and balances.

It is useful to remember where this idea came
from. It derived from the Calvinist view of man
taught to Madison by President Witherspoon, an
exiled Scot, at Princeton University. The depravity
of man requires a distrust of everything he does,
especially in politics. Political power affords the
greatest temptation for human weakness, which
requires a system of government that pits ambition
against ambition (Sheldon, 2001).

This approach to constitution-building was
refined by James Bryce, an Ulster Scot, who played
a major role in devising the constitution of
Australia and elsewhere. In an essay entitled ‘The
action of centripetal and centrifugal forces on
political constitutions’, he argued that the purpose
of a good constitution should be to restrain the
forces that divide (the centrifugal forces) such as
ethnic rivalry, religious differences and economic
grievances, and to promote the forces that unite
(the centripetal forces), notably trade and freedom
of movement (Bryce, 1901). To achieve this,
power should be devolved as much as possible,
central power should be restrained and, if
necessary, special exceptions should be made to
deal with special situations.

These are not new ideas and they remain good
criteria for building a workable constitution. In
particular, we should recognise that distrust of
power is a healthy instinct. In an essay on
Edinburgh, the novelist Muriel Spark wrote:

> In my time, the society existing around [the
> Castle Rock] generally regarded the
> government and bureaucracy of Whitehall as
> just a bit ridiculous. The influence of a place
> varies according to the individual. I imbibed,
> through no particular mentor, but just by
> breathing the informed air of the place, its
> haughty and remote anarchism. I can never
> now suffer from a shattered faith in politics and
> politicians, because I never had any. (Spark,
> 1970, p. 153)

The importance of why

For myself, I believe that our endless discussion of
How has caused us to lose sight of Why. When I
first became involved in European affairs as a
delegate to the Council of Bars and Law Societies
of the EC, the older members included one who
had lost a leg at Stalingrad; one who had ended
the War as the commander of a Hitler Youth
Battalion and woke every night from the nightmare of hearing the boys' voices calling for their mothers; two who had been in concentration camps - one of them in Dachau; one who had been in the Dutch Resistance; and a Belgian of Romanian Jewish ancestry who spent six weeks in a hen house in the middle of a field waiting to guide the paratroopers at Arnhem. If that generation were prepared to make the effort of reconciliation for the sake of future generations - and it was a great effort for some - why should not I?

The tension between the political and economic arguments for integration and respect for diversity will always be there. In the City of Luxembourg, on one side of the valley stands the house in which Robert Schuman, the father of European integration, was born. On the other side, on the wall of the old Fish Market, there is an inscription which has almost become the unofficial motto of Luxembourg: Mir wolle bleuwe wat Mir sin (We want to remain what we are).

Making a success of enlargement will call for sacrifices and compromises, political and economic. We should remember that all European peoples have had 1000 years of history. The only difference is that some have been more fortunate than others.

References


Cases

Case C-168/01 Bosil Holdings, judgment of 18 September 2003.