

The European Union as a Source of Inspiration

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WHAT YOU FIND inspiring depends to a degree on where you come from and what you are looking for. So, by applying the principle of transparency, let me put my cards on the table.

Those who founded the European Communities, and indeed both Jack Mackenzie Stuart and I, went through the last World War. I imagine that I will be the last judge of the Court in Luxembourg of whom this can be said. If you have been through such an experience, it is something which marks your whole life.

I was born in Berlin, spent my early childhood being bombed there by the British, and then, to escape the bombs, moved to my grandparents in what is now Poland. However, threatened by Soviet armies I moved thence to Bavaria where I waved a white handkerchief at advancing American tanks in 1945. My father, a German who had been born in what is now Poland, fell in Italy just before the end of the Second World War. He had been born in Stettin because his father had settled there. Why? Because as a result of the First World War, in which he had fought both on the western and the eastern fronts, he had lost his family home in what is now Estonia. My mother, most of whose friends had been shot or hanged or bombed, died soon after my father. I was eventually taken to England by my German uncle who had married an Englishwoman before the war. My wife's story is much the same. Her family comes from Austria and some escaped to England; others died in the concentration camps.

The founders of what is now the European Union will have known scores of people with this sort of background. It is worth remembering that the last of the Displaced Persons Camps established in Western Europe was not closed till 1957.¹

* This is the text of the Mackenzie-Stuart lecture presented by Judge Schiemann in the Law Faculty, University of Cambridge on 9 February 2012.

¹ Föhrenwald in Bavaria.

If you look at the Preambles to the Treaty establishing the European Coal and Steel Community you find evidence of what the founders of the Communities were seeking to avoid and what they were looking for:

CONSIDERING that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it,

...

RESOLVED to substitute for age old rivalries the merging of their essential interests; to create by establishing an economic community the basis for a broader and deeper community among peoples long divided by bloody conflicts and to lay the foundations for institutions which will give direction to a destiny henceforth shared, ...

When Jean Monnet saw the spectacle of ruins left by two world wars, he could have chosen a policy of revenge against Germany—as Clemenceau had done after the First World War—or for domination—as Stalin did in eastern Europe. He did not. He felt that the solution to age-old conflicts lay in the peaceful organisation of common action by institutions created for that purpose. This choice of encouraging common endeavour was not an obvious one. However, it is one which, with hindsight, one can see has been outstandingly successful in achieving his aim of peace. Certainly the policies of Communities have been infinitely less harmful to the world than the policies of Clemenceau or Stalin.

Currently active politicians born after the threat of war among the western European states was all over take it as a self evident truth unworthy of remark that there has been no war between states in Western Europe for the last 60 years and that there is not likely to be one in the future. The previous one thousand years, of which this could not be said, have passed into history. That is manifestly a cause for rejoicing. There is a strong case for saying that this happy result has been achieved in part as a result of the existence of the Communities.

This is happily now history. But history can be a source of inspiration. With the passing of time the following questions posed themselves. Can what has worked in Western Europe be applied, for example, in the Balkans with their equally bloody history? Can it be applied to German–Polish relations? We are in the process of finding out but the auguries are in general good. What is worth noting is that the model established by the ECSC Treaty has proved inspirational for countries for which it was not designed and thus has proved useful in the search for world peace. I give an example close to home. I once asked an Irish ambassador to Luxembourg whether he considered that the European Communities had done anything to help the process of healing the centuries old tensions between the UK and Ireland. He said he had no doubt that this was so. Not because of anything the Communities had done as such, but because the decision-making process

within the Union was such that there were weekly meetings between Irish ministers and UK ministers and between Irish civil servants and UK civil servants. He said that those meetings were about problems they had in common and that after a while it had become clear to each side that the other was not exclusively peopled by devils and bigots, but that common solutions to common problems could be worked out by patient negotiation. Monnet would have been pleased.

The steady growth of the Union from the original 6 to the present 27, with Croatia due to join us next year and others in the wings, shows that the Union has continued and will continue to attract. Moreover it has become much more outward looking than it was in the beginning. So let us leave the history of wars behind and see what is inspiring the current generation of politicians. That inspiration is evident from the preambles to the Lisbon Treaties. In the UK we are no longer accustomed to preambles in our legislation but we should realise that in the other Member States and in the Court of Justice preambles are taken seriously as indicating the desired direction of travel by the heads of state whose names immediately precede them. On reflection, that is perhaps not surprising.

The numerous preambles are worth reading slowly. One is tempted to skip but one should not. These are solemn declarations by which each Member State is bound. They give us an insight into what has attracted the newer Member States.

In the preambles to the Treaty on European Union we find the heads of state including, of course, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland:

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter ... and in the ... Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including ... a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence ... thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice ...

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

...

The preambles to the contemporaneous Treaty on the Functioning of the European Union cover some of the same ground, but contain a few significant additions:

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

...

These preambles clearly echo the aspirations of the current Member States. Many of these are countries which have escaped dictatorships—with their secret police, their absence of freedom of speech, and their absence of any rule of law worthy of the name. Many are countries which have in the life of the European Communities been occupied by foreign forces or which have been ravaged by military formations of one sort or another. For all these countries the EU provides something which they desperately lacked. It seems that this is something either not understood or not regarded as significant by many in the UK. But it is hugely important to realise that, by the citizens of such countries, the institutions of the EU and of the Council of Europe are regarded as safeguards to a better life. I have talked to judges who have had all their telephone conversations tapped by government for years. They desperately longed to be under a regime which does not permit this. It may be just me, but I sometimes have the feeling that in the UK, a judge of the CJEU or of the ECHR is, simply by virtue of the office he holds, widely regarded with something varying from distaste to bemusement. It is not so in countries which have escaped from fascist or communist dictatorships. There, I think I can say, we tend to be looked up to with hope and expectation.

Roy Jenkins in his autobiography referred to ‘our national habit of never joining in any European enterprise until it is too late to influence its shape. Then when, wholly predictably, we are eventually forced to apply for membership, we complain bitterly that the shape suits others better than it suits us’.² I fear he has a point. The point not only applies to policies such as the Common Agricultural Policy and the Fisheries Policy, but also to the very way in which language is used.

There are many in the UK who find the phraseology used in the preambles overblown because we are, or in any event used to be, less used to phraseology of this kind than lawyers and politicians in many other countries. We might prefer to say ‘we are all equal before the law’; others

² Roy Jenkins, *A Life at the Centre* (London, Politico’s Publishing, 2006) 484.

prefer to say we must act in accord with 'the principle of equality'. One thing is clear: one must not let such linguistic differences get in the way of our common endeavours.

Many people in this country think that the mission of the Union should be purely to encourage more trade. They are, and this has been the case for decades, suspicious of wider aims although they regularly sign treaties which affirm their attachment to those aims. In this, I have no doubt that they are out of step with much of what the Union stands for so far as other Member States are concerned. Many of them, I would guess a substantial majority at any one time, are in sympathy with the wider political and social aims which appear in the Treaties.

Selfishness is a human characteristic which we all display from babyhood onwards. We can all *understand* complete selfishness both in individuals and in states. However, I think no-one one finds such an attitude to be a source of *inspiration*. There are two ways of combating the fact of widespread selfishness: one is to expand the concept of self and the other is to recognise a duty to help one's neighbour who is not oneself. They come to much the same thing. It is widely accepted that we should not act purely selfishly, but should include in the concept of 'one of us' the rest of the family. Most, I think, would go further, to differing degrees, so as to extend the concept of 'one of us' to the village, the town, the county and the country. One of the inspiring aspects of the European enterprise has been the attempt to widen the concept of 'one of us' beyond the boundaries of the nation state. Perhaps the width of the circle of those with whom a sense of solidarity is felt can be regarded as a measure of the success of any civilisation.

Some, understandably, have an instinctive difficulty in regarding a German, an Italian or a Romanian as 'one of us'. If you are not familiar with such people, their literature and their music, they may seem very strange. For persons with this difficulty, the concept of a duty to help one's neighbour is perhaps more useful in the fight against selfishness. Even those who do not like the social habits of the man next door will recognise the sentiment 'He is not one of us but he is after all human and our neighbour'. What causes difficulty to some is exactly the difficulty which gave rise to the parable of the Good Samaritan. Who is my neighbour? Could he possibly include an Italian? Is the Scot my neighbour? If so, will he cease to be a neighbour if Scotland votes for independence? Is the Ulsterman but not the Irishman who lives in Dublin? For other Member States, many of whom have had borders which have shifted frequently over the centuries, these puzzles are very real. I find that the approach of the EU which attempts to say 'one way or another we must solve our problems jointly' eminently inspiring and moreover eminently practical.

It is important for us to realise that, for most Member States, new and old, social solidarity, both within and outwith national borders and indeed

Union borders, is an important part of the creed they profess in public. I accept that they do not always act in accordance with the tenets of their creed—and I confess that one of my disappointments in Luxembourg has been to witness the degree to which Member States do not live up to their own promises—but they deeply believe them nonetheless.

One can be too cynical about this. Who in their personal life does not fall short of his own genuinely held ideals? Politicians by the need to get elected are strongly tempted to promise whatever will secure them a vote. Of course it is easier for the *recipients* of aid to approve of the principle of solidarity than it is for the *givers* of aid. But even the latter, including the UK, in fact and in principle approve of using their own resources towards helping the ex-fascist states and the ex-communist states and other poor countries to achieve a higher standard of living. It is obvious to all that those states simply cannot pull themselves up by their own unaided efforts and that it would be highly dangerous for the peace of Europe if these states became lawless and irresponsible. There are inevitably arguments about quantum but the principle of helping your neighbour is accepted in the Union just as it is in the UK where no-one thinks twice about the richer helping the poorer.

I have the impression that those who have joined the Union in the last 10 years and those who plan to do so have all been influenced by the feeling that their economic prosperity will be advanced by so doing. Having had the experience, many of them, of closely regulated and state-directed economic activity, it seems that the market orientated philosophy of the Union is broadly to their taste. For all its defects, they find it more inspirational than the systems from which they managed to break away. That said, they seek to soften its hardness by applying the principle of solidarity.

There are also those who have found the establishment of the euro inspirational both as a practical reality and as a sign of solidarity. If you live in tiny Luxembourg, where practically every citizen goes abroad every week, or if you are in the export or import business or if you are a frequent traveller, the sheer convenience of the euro is of course more self evident than if you are a local journalist in rural England and do not go abroad. What is becoming increasingly self-evident, although it was in fact seen by some both within and outwith the European Institutions from the beginning,³ is

³ Jenkins, *A Life at the Centre* (n 2) 480:

Callaghan [in 1978] asked Giscard whether it was not essential that economic convergence and monetary integration did not get out of step with each other. We ought surely not to advance one without the other. It was a point of some importance for it revived the old Janus-like approach which had been such a recipe for stagnation in the Community of the mid 1970s. If I had one insight of significance it was that this was a fundamentally hobbling doctrine. If a breakthrough was to be made a monetary leap had to occur on its own in the hope that economic convergence would thereby be assisted and would follow, but certainly not making it a prior condition.

that the existence of the euro in effect *compels* moves towards solidarity, not merely amongst those countries who have adopted it but also those who have not. The outsiders recognise that they can be so damaged by what is happening to the insiders that it becomes evident that they must act to help the insiders overcome their problems. Thus the interests of the insider and the outsider coalesce. I do not say that the way the euro crisis has been allowed to happen, and the way it has been managed, is necessarily ideal. But I do say that we can learn from the experiment and that the *experiment* has been inspirational and that the experiment continues. Monnet proclaimed presciently that 'Europe will be forged in crises, and will be the sum of the solutions adopted for those crises.'

Many have been inspired by the sheer freedom to move themselves, their families and their possessions from one state to another without being subject to state control. Most of us in the UK have not had the experience of being in effect imprisoned in our own countries and we do not instinctively appreciate the exhilaration felt by those who have been so imprisoned and can now move as of right to other countries. Not merely does the existence of such a right add to their personal freedom, but it also provides a spur to improvement for those states which find that their populace or their assets are leaving because of various things which are wrong in their state of origin. Such states can no longer merely put up a wall and shoot those who try to leave. In the UK we have not had significant control of travel for years—although I am old enough to remember when it was forbidden to take more than £50 out of the UK on holiday. But the citizens of many Member States were not permitted to travel at all. They find this freedom exhilarating.

Many have been inspired by the attachment of the Union to human rights. That attachment is, in my experience, much stronger in those who have lived in polities which do not respect such rights than in those who have benefited from such rights much as they benefit from air, without giving either much thought. Things look very different if you have been imprisoned for disagreeing with the government, tortured to betray a friend, or simply had to exercise permanent self-censorship.

I suspect that many have been inspired by the progress made in the Union in providing for mutual recognition and enforcement of judgments in civil matters and also mutual cooperation in criminal matters. There are snags and difficulties in both fields but what exists is, I would have thought, clearly better than the previous situation.

I conclude this catalogue of developments in the Union which have proved inspirational for many people by recalling its emphasis on preserving and safeguarding the environment. That is a field where it is obvious that the problems are such that many of them simply do not admit of national solutions. Pollution, whether travelling by air or by river or underground,

drifts across frontiers. This is less obvious if you are an island but even we must acknowledge that if an atomic reactor explodes in Calais, the people of Dover will be affected whether or not they have signs saying this is a nuclear-free area.

Having looked at the position within the Union I turn to note that it is clear that the Union has already proved an attractive model, not merely for those who have joined since 1952 and those who still wish to join, but also for those *outside* Europe who to a degree have been inspired by the Union. One could give examples from many fields but since I am a member of the Court it seems appropriate to cite an article in *West European Politics*⁴ by Karen J Alter which she introduces with these words:

Up until the creation of the European Court of Justice ... and the European Court of Human Rights, international courts were primarily designed to adjudicate disputes between states when both parties desired it. With consent required for litigation to proceed, governments could simply refuse to litigate cases where serious issues were at stake. The architects of the European Community, however, wanted meaningful international oversight of state behaviour. They added design features to make international oversight possible, including compulsory jurisdiction so that states could not block valid cases from proceeding and the right of non-state actors to initiate legislation. These design features, and others, have been copied. There are now 11 operational copies of the ECJ ... Europe's most important legal export is not so much its formal legal institutions, but rather the embedded approach to making international law effective. European style international courts exist where international legal rules are part of national legal orders, and where national and international judges mutually converse about the application of these rules in concrete cases. Because supra- and sub-national actors are applying the same or similar law to concrete cases, European style International Courts are generally perceived to be better able to work with domestic lawyers, administrative actors and judges to facilitate the domestic application of international law than are inter-state courts.

She concludes⁵ that:

The ECJ model has clearly diffused around the world. The best explanation for this fact is that regions are drawing lessons from the ECJ's experience ... Supra national legal architects also learned from the ECJ's experience ... they also explicitly incorporated the ECJ's revolutionary doctrines of direct effect and the supremacy of Community law, and the idea that 'Community law' is distinct from traditional international law... Judges and lawyers working in regional international courts also learn from the ECJ's jurisprudence, although they use this jurisprudence as a guide rather than as dogma.

⁴ Karen J Alter, 'The Global Spread of European Style International Courts' (2012) *West European Politics* 35(1) 135, 135.

⁵ Alter, 'The Global Spread' (n 4) 150.

I agree with Professor MacCormick that the EU offers the hope of *transcending* the sovereign state rather than simply replicating it in some new superstate, some new repository of absolute sovereignty. It creates new possibilities of imagining, and thus of subsequently realising, political order on the basis of a pluralistic rather than a monolithic conception of the exercise of political power and legal authority.⁶

It has been suggested that one should see the Community as constituting the first truly 'multi-centred' polity since the emergence of the European State system in the sixteenth century. Instead of a new hierarchically organised sovereign construct modelled after the nation state, we are confronting a situation where different authoritative orders and circles overlap, compete and collaborate.⁷ Back to the Middle Ages and perhaps not the worse for it.

Professor MacCormick pointed out some time ago that:

The key question becomes whether there can be a loss of sovereignty at one level without its inevitable and resultant re-creation at another. Is sovereignty like property, which can be given up only when another person gains it? Or should we think of it more like virginity, something which can be lost by one without another gaining it—and whose loss in apt circumstances can even be a matter for celebration? ... The idea of subsidiarity points us to better visions of democracy than all-purpose sovereignty ever did. This is a possible future reality preferable to the past of nostalgic mythology.⁸

In short he saw the Union as a source of inspiration.

Professor Poiares Maduro wrote⁹ that the discovery 400 or 500 years ago that different melodies could be heard at the same time in a harmonic manner was one of the greatest developments in musical history and greatly enhanced the art and pleasure of music. In law too, we have to learn how to manage the non-hierarchical relationship between different legal orders and institutions and to discover how to gain from the diversity and choices that are offered to us without generating conflicts that ultimately will destroy those legal orders and the values they sustain. There is much to be gained from a pluralist conception of the EU legal order. In a world where problems and interests have no boundaries, it is a mistake to concentrate the ultimate authority and normative monopoly in a single source. Legal pluralism constitutes a form of checks and balances in the organisation of power in the European and national polities and, in this sense, it is an expression of constitutionalism and its paradoxes.

⁶ Neil MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 2001) 191.

⁷ See references in Marlene Wind, 'The European Union as a Polycentric Policy: Returning to a Neo-Mediaeval Europe?' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003) 127.

⁸ MacCormick, *Questioning Sovereignty* (n 6) 126.

⁹ Miguel Poiares Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?' in Weiler and Wind (eds), *European Constitutionalism Beyond the State* (n 7) 98.

The EU undoubtedly is one of the great political and legal experiments in world history. Some things have worked well, others less so. The same is true of the governance of each Member State. Since the bulk of today's audience is academic perhaps I can suggest that it is your task to help us all identify both what has gone wrong, so that others can learn not to make the same mistakes, and what has worked well in the Union—so that others may draw inspiration from it.

A recurrent question is whether *everything* must be resolved before anything can sensibly be resolved. To take the example of the single currency: is the creation of a unified currency before one has agreed a unified fiscal policy a good idea? It seems generally agreed that to have a unified currency has advantages but that to have such a currency without having a unified fiscal policy will not work in the long run. Given that Member States had resolved to pursue an ever closer union, Monnet's approach was to establish a monetary union before having a unified fiscal policy in order, in effect, to force the Member States to agree a unified fiscal policy. Other states can see to what that has led and will consider whether, even at the risk of not achieving anything, it is better to wait until you have a unified fiscal policy before establishing a single currency.

Another recurring question is whether the governance of a Union such as ours should be inspired by the old model of heads of individual states, each briefed by their own civil service meeting to achieve as much as possible of what was on their national agenda, or whether it should be inspired by a system such as that established by the Coal and Steel Treaty with its strong High Authority to which substantial powers had been delegated, and which could propose things it regarded as being in the common interest, and in which the discussion focused on whether the proposal was indeed in the common interest.

De Gaulle made clear his preference for the former. Monnet had an equally clear preference for the latter. There are arguments either way, but the experiments have been going long enough perhaps to enable one to draw some conclusions as to the relative efficiency of these approaches and as to whether one should pay the price of loss of efficiency in order to gain some other desideratum.

The prophet Joel¹⁰ tells us that 'it shall come to pass that your old men shall dream dreams and your young men shall see visions'. When I was an undergraduate at Cambridge, at the time of the first UK application to join the Communities, some of us organised a seminar in Jesus College to which students from all over Western Europe were invited. We wanted to demonstrate enthusiasm for a closer European Union. We saw visions, if you

¹⁰ Bible. OT. Joel. 2: 28.

like. Now I am older I may be dreaming but I am convinced that in many respects the EU can be seen as a source of inspiration.

I leave you with the conclusion of Monnet's Memoirs:¹¹

Have I made you understand that the Community which we have created is not an end in itself? It is a process of transformation which continues that from which our national forms of life have emerged in an earlier phase of history. Like our provinces yesterday, our peoples today, if they wish to measure up to what is required to achieve progress and remain masters of their destiny, must learn to live together under rules and institutions freely accepted. The sovereign nations of the past are no longer the framework in which the problems of the present can be resolved. And the Community itself is only a stage towards methods of organisation of the world of tomorrow.

¹¹ Jean Monnet, *Mémoires* (Paris, Fayard, 1976) 642.