

IAN FORRESTER¹

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A Valediction, Forbidding Mourning

This evening I will speak about history, about European law, and about our court. My father was born in 1899. Trained to be a teenage artillery officer, he was never deployed in France. One uncle served in Gallipoli. A cousin died over Burma. A very typical European family history: we all have known elderly persons with astonishing stories of conflict, suffering and survival. Two judges in the Court of Justice concluded that they had been on opposite sides of a battle in Italy during our last European civil war. The great great grandfather of another judge was a soldier at Waterloo. A colleague present today told me that his two grandfathers were on opposite sides during the battle of the Somme. Robert Schumann, founder and visionary, was born in Alsace Lorraine, served in the German Army in the First War, and then served France during the second. Wars have marked our continent.

If you look at old maps, they can tell us how much frontiers and flags and allegiances have fluctuated back and forth. Norway and Poland vanished and, following the fortunes of war, reappeared. Croatia, Macedonia and Kosovo emerged from the disappearance of Yugoslavia. Serbia is a comeback. Even Belgium is a relatively youthful creation.

¹ Address delivered by Ian Forrester on the occasion of his demission from office as judge in the General Court of the European Union.

So national rivalries, religion, royal marriages have shaped our borders, which don't correspond to ethnicity, race or religion. Today the classic vectors – fear, hunger, and hatred have evolved. Their manifestations are different; but they exist and they are potent: refugees from the Syrian conflict, the rafts crossing the Mediterranean from Africa, the foreign tanks threatening Ukraine. Now, each alteration on the map was decided after delegates met to conclude a great conflict – 1648, 1715, 1756, 1815, 1871, 1919. Each treaty (Westphalia, Utrecht, Paris, Versailles) contained promises of friendship and cooperation. Each treaty was succeeded by another war thirty to fifty years later. My father, a history teacher, would have expected conflict if asked after WWII. And yet this wretched succession of events stopped, from the 1950s.

Born at the end of the war, I was a beneficiary of the new era. Little by little in concrete practical ways ordinary people got opportunities and lived year by year a little better. Europe became a continent where (almost) all states have promised equal treatment in the work place to men and women, safe and healthy norms for food and medicine and vehicles and water, access to healthcare, and pensions, not just to their own citizens but to the citizens of all the other states. And in the process eliminated military rivalry in Western Europe and created an area of prosperity which helped bring down the Berlin Wall.

Geography and peaceful commerce have given this continent wonderful richness and variety. Travel from Lisbon to Hamburg or Inverness to Dubrovnik and you will traverse extraordinary contrasts. We have 500 different cheeses; compare that to the meagre offering in the Walmart in Dallas! Languages, gardens, markets, cathedrals, small fields, wines and feast days: all very inefficient; all very European. When I grew up the normal horizon was one country, one region. Today a

university student in Liege will be looking at Bologna or Lund or Thessaloniki as a place to study or buy a house or work as a teacher or get married or open a business or retire one day. Same for his counterpart in Edinburgh, until the end of this year, at least. European law has opened up continental not national opportunities and expectations. That toothpaste cannot be squeezed back in the tube, I suspect.

Equally irresistible is the realisation that we are a highly regulated society and it seems inconceivable that that would change. Peace and geographic proximity offer opportunity; and compel cooperation. The challenges of refugees, of environment, of climate change, of fish conservation, of cross-border crime, cannot be dealt with unilaterally. Again I don't think the process is politically reversible in terms of public expectation.

Was Europe perfect? Did its obvious blessings flow to everyone or just a lucky few? Well, political leaders rarely acknowledged benefits from European cooperation, and the genuinely difficult negotiations to reach a compromise were trumpeted as battles with the shifty foreigners (don't trust them) and the mad federalists who worshipped the single European light bulb. Any success was bad, either because our minister had been weak or because the deal matched a greater European agenda.

Add to those political misrepresentations complexity of the decision-making processes in Brussels and the creaky institutional architecture of the Union. I could not accurately describe the differences between the treaties of Nice, Lisbon and Maastricht, and I suspect I am not alone, even in this room full of lawyers. And what good did these constitutional wonders do for the towns which had lost their

traditional industries? And did the UK government well estimate and provide for the challenges of handling the influx of workers from the new Member States eager to work in the UK? So what happened then?

I cite a prominent politician:

When a community is going through some period of stress... they are historically far more likely to turn on scapegoats in their midst. Anxiety is transferred to some readily identifiable group: Jews, foreigners, homosexuals, gypsies... they become a catch-all explanation for everything that has gone wrong in a society. Your kids can't get a house? It's the immigrants. Can't get a job? It's the immigrants. Can't see a doctor in A&E? It's the immigrants... people are only too willing to project their anger on to a particular group, and some politicians, alas, are only too willing to assist.

Who wrote that? Boris Johnson.

But here we are. What now? It is evident that Brexit will not be an overnight constitutional event. Brexit will be a process lasting for some years, with frequent moments of drama as decisions on specific policies or concessions are coming close.

We have read the declarations of the leaders. Even in the best of atmospheres, there is an immense amount to be settled if indeed the UK pursues diverging from EU norms as an affirmative political merit. That is a clear, even legitimate, political choice; but achieving it without too much damage will involve hugely delicate and

likely prolonged negotiations. Some of the fields are of immense importance for daily life. The status of the 4 million European citizens living outside the land of their birth presents vital human questions. There is an immense difference between having a right and having a right to request a discretion. Depending on a sceptical official's approval of whether you can stay, where you can work, what papers and other proof you need – these are real burdens, worst for the poorest, the least educated, the less confident.

The UK has particular grounds to be embarrassed, not least by the Windrush scandal. When lawful immigrants from the Caribbean of many years standing were deported because they lacked papers which were not legally necessary. Well-intentioned honest officials try to do the job of lawfully limiting the number of foreigners, and are calibrated so as to make it not easy. I was told, by a barrister, of a four year old child who received a stern communication saying that he had no right to remain and should leave the country inside a short period of notice. The decision was reversed on appeal. Such episodes do not confer confidence in the humanity with which the rules are applied.

Equally difficult choices are presented in the field of technical standards. For 47 years the UK has regulated collectively, pooling its sovereignty with its European partners in order to develop a competitive market that will favour innovation, risk-taking and the expansion of choice through competition, safety and prosperity. Regulation is an ongoing process as new techniques and products emerge. As we can't realistically have a parliamentary vote on each, the practice is expert advice, followed by adoption of secondary legislation. That can be criticised as obscure, elitist and undemocratic; and praised as efficient and rational in order to reconcile the concerns of a whole continent. The UK, far from being bullied or bossed about

by Brussels technocrats, has been one of the most skilful and influential authorities in these drafting processes.

Saying that we wish in principle to have rival standards designed for only one country sounds to be on the wrong side of the slope of history. Yet that appears to be what is politically identified as a worthy goal, whereby the UK can prosper in its dealings with other third countries.

And finally, cross-border arrangements regarding police cooperation, child abduction, terrorism, public health emergencies, European Arrest Warrants, and cooperation in civil justice: I cannot imagine not establishing cross-border cooperation in these fields, but that will involve procedures governed by EU law. Criminal jurisdiction can't be based on an informal friendly deal. There will be important bridges to build. I don't see an obvious solution.

Various patriotic declarations about independence have been made over the last three years, and then abandoned. But for the moment we must all acknowledge the expression of a well-supported political wish to diverge, but at the same time we must recognise that huge problems are yet to be settled. Brexit isn't over. The subjects are of immense importance and affect literally millions of people. It would be a very grave matter if they were not resolved; the necessary texts will take a long time to emerge as the questions are legally and institutionally complex. But I do not believe that intelligent leaders could tolerate recklessly created legal dangers.

January 31st was for me a day of sadness, not protest or rage or anger. The election in December delivered a popular mandate. But deeper, different damage had been done. Brexit politics have been poisonously confrontational and have made it almost acceptable to be sceptical about foreigners. Disagreement has been equated

with disloyalty, dishonesty, and worse. Insults, verbal abuse, threats of violence, and real violence: a member of Parliament lost her life at the hands of a fanatic. The coarsening of public discourse in my country – and others – must be a dismay for all people of goodwill. I deeply deplore the warlike tones in which negotiations, speeches and dialogues about Brexit mechanics are reported. The UK is not at war with its 27 partners.

I heard the new President of the Commission speak after her swearing in, with elegance, grace, clarity; and read with sadness how that same speech was presented in England as having been bellicose and inflammatory. There are immense, obvious, real political and economic challenges which diplomacy will have to bridge. I urge us all to refrain from presenting these as a prize-fight in which the winner knocks out the loser. This is a matter not just of aesthetics and good manners but real substance in that voters at war and voters at peace, as well as their political leaders, behave differently.

Now we here handle disagreement very well. I have seen fierce debates, impassioned exchange of ideas, the slow emergence of consensus on a text, multiple délibérés to reach consensus, as well as collegiality, sympathy, generosity, sympathy, solidarity. We don't have to please the voters or the press. But we are cautious. That leads to my recommendations.

As to our role

Especially when Brexit represents a manifestation of anger and hostility on the part of the unfortunate, and suspicions of privileged EU bureaucrats, our role is crucial. The legitimacy of the enforcement activity of the institution depends on the existence of effective, genuine, visible judicial review. That is elementary,

fundamental, crucial. Without the court, the Commission's activity, no matter how skilled or well intentioned, risks being called arbitrary, illegitimate, unjust. Our contribution enhances, not damages.

In a democracy the public authority must sometimes lose in its own courts. We do not respect electoral or judicial systems which record success for the government 99% of the time. I absolutely reject the notion that finding against the Commission lowers public respect for the institution. To the contrary, the public is likely to be comforted by the fact that the institutional system involves robust quality control. Merely checking formal legality may not be enough. We should not believe that judicial setbacks weaken the authority of the entity.

As to hearings

Each of the UK members of this court from 1973 has been a former advocate, accustomed to the robust dialogue of the courts in the UK. We enjoy verbal gymnastics. Judges are accustomed to test propositions verbally by asking provocative questions. In my younger days appearing before the House of Lords was like a gladiatorial contest with extra beasts in the arena. It is not rude to challenge an advocate's approach to some question; it is a welcome manifestation of judicial alertness. I recollect sad hearings from the old times in Luxembourg when days of preparation and hours of pleadings elicited not a single question. Far from being offended or disturbed by the challenge the advocate will welcome the chance of identifying the problem on the judge's mind. So, I say, press counsel to address the doubts you have. Don't be shy. You think it is rude? Counsel thinks it stimulating. You are doing a valuable service. Second, you are not revealing

prematurely your innermost thoughts; you are testing by hypothesis. Putting a question in debate does not mean you endorse or oppose it.

As to simplicity

I respectfully suggest that we can write more simply, more directly, less perfectly legally complete and more factually vivid. Why is the loser losing? Why is the winner winning? Did we have doubts? Was it really as straightforward as the judgment suggests? Is there nothing in the opposing arguments which detained us? I submit that there is no harm in acknowledging the strengths and weaknesses on both sides. I have been looking at the judgments where I was *assesseur* or *rapporteur* and I fear most of them are longer than they need have been. Especially in function publique cases, where the litigants are often more in need of common sense and courteous listening than of subtle administrative law analysis, we ought to produce a text which the parties can read inside forty-five minutes. Once again, remember the words of Vice-Chancellor Megarry: the most important person in a court room is the one who is going to lose.

And as to Scotland

Many of you have said “L’Ecosse est notre espoir” or have said you hope for Scottish independence and its re-entry to the European Union. England and Scotland have been united politically since 1707, the crowns since 1603, and are deeply interdependent. So independence would be a most complex matter of disentanglement. Opinions are divided and we know from Brexit the tragically

divisive nature of such debates about separation. Embarking on another referendum exercise might recreate the hostile miseries of June 2016. But I think it rather plain that the position of Scotland was gravely neglected. Its citizens voted heavily not to leave the EU and it was promised a full part in the Brexit negotiations, a commitment which has not really materialised. What is certain is that Scotland's government is dismayed by Brexit, wishes this institution well and sees itself as a small nation with a role to play in wider Europe. Maybe other structural architectural reforms may emerge as part of a broader response to Brexit.

In the hall outside sits a sculpture by Eduardo Paolozzi, entitled Master of the Universe. Like other important works of art, it contains echoes of past masterpieces, with eyes that recall Michelangelo's David, and a posture that recalls Newton and William Blake, poet, artist and mystic. Paolozzi was born in Scotland, child of Italian immigrants. As a teenager he was briefly imprisoned as an enemy alien and his uncle and father were killed when their ship carrying other enemy aliens to Canada was torpedoed. A child of Europe, a child of Scotland, a child of wartime. The sculpture is a manifestation of the goodwill of the government of Scotland to this court and the Union which it serves. The First Minister has said that she hopes it will be there when the Union returns to 28 Member States.

I have received great kindness and generous collegiality here. We have great debates about the drafting of our judgments, yet the lunch is cheerful, the dinner plentiful and the coffee animated. The référendaires know the gossip far better than we do, and talented youth offers the best insurance against old age. Especially during the long drawn out miseries of Brexit, not once did I hear anything other than sympathy, support and hope. I was given a sursis de déménagement for the hideous task of tidying my room and will be physically here in February. During an illness, I was royally supported. I am profoundly grateful. If a political typhoon

must engulf your country, this is a good place to watch the storm with friendly colleagues.

I enjoy reading the poets of the 17th century when the English language was in full reform influenced by Shakespeare and the King James Bible. John Donne served as the preacher of Lincoln's Inn where barristers train. He wrote for his family before a long absence, A Valediction, Forbidding Mourning. Also that "every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less". The UK is bigger than a clod, but it is not being washed away. I believe that the worst will not happen.

I had hoped to end my professional career on a high, in this fascinating institution. That is not to be. I have no intention of retiring. John Milton, the 17th century poet and radical thinker wrote in Lycidas, a melancholy celebration of a deceased friend, a line which might apply:

"At last he rose, and twitched his mantle blue

Tomorrow to fresh woods and pastures new"

So now I go in search of "fresh woods and pastures new". And I look forward to the adventures, challenges, disappointments and successes that European law can offer those who practise it. Where and how and what we will be at the end of the next ten years I do not know. But when I was asked if I wished to keep my toge, I said yes: maybe it will be needed again. Peut-être on en aura besoin.