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A new legal order of international law: Scottish judges and the shaping of a supranational union.

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2023

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**Scotland and the European Court
of Justice 1973 - 2023
Looking Back, Thinking Forward**

A New Legal Order of International Law: Scottish Judges and the Shaping of a Supranational Union

*A nation within a state, dances across its boundaries, says
what needs to be said*

(Not so) Trivial Pursuit - Scottish EU Judges Version

- 1. Which Judge Rapporteur is responsible for the shortest judgment ever to issue from the EU Court?
- 2. How many bottles of whisky were imported by the Dassonvilles? (Bonus points for naming the brands of whisky)
- 3. At which university was Rudy Grzelczyk a student? (Bonus points for his degree subject)
- 4. Which post-WW 1 Treaty purported to deal with the situation between Turkey and self-determination for Kurdistan?
- 5. Who wrote the lines “*Scotland small? Our multiform, our infinite Scotland small?*”

Scottish Judges and the Shaping of a Supranational Union

Seeing the structure in a
new light



Shaping a Supranational Union

- Judge Mackenzie Stuart 1973 – 1988
- Pioneer, and President; From Aberdeen Sheriff Court to the Kirchberg
- Judge David Edward 1989 – 2004
- Unique role: Court of First Instance (1989 – 1992), Advocate General, Court of Justice (1992 -2004); Junior to Mackenzie Stuart as Senior
- Judge Ian Forrester 2015 – 2020
- Devilling for (future) Judge Edward: End of an era; tenure overshadowed by Brexit
 - “...sense of a legal and historical communion between the law of Scotland and other European systems of law”

Shaping a Supranational Union

- "Supranational"
- *Van Gend en Loos*, case 26/62
- No *stare decisis*, no doctrine of precedent
- No dissenting judgments
- Judge Rapporteur role

Distilling the Essence of the Common Market

Judge Mackenzie
Stuart

Judge Rapporteur
Case 8/74 *Dassonville*



Shaping a Supranational Union

- Judge Mackenzie Stuart – Judge Rapporteur in case 8/74 *Dassonville*
- Defined meaning of Art 34 TFEU
- Most important EU judgment? Second most cited by EU judges
- AG J-P Warner: Introduces a common law inspired “reasonableness”
- Too broad a definition?
- Enduring legacy: Continues to shape the functioning of the internal market – since 2020, 10 citations

The destiny of EU Citizenship



Judge David Edward

Judge Rapporteur

Case C-184/99 *Grzelczyk*



Shaping a Supranational Union

- Judge David Edward: authoring an anthem for EU Citizenship?
- Case C-184/99 *Grzelczyk*
- *"Union citizenship is destined to be the fundamental status of nationals of the Member States..."*
- Rooted in prior caselaw: *Konstantinidis, Bickel and Franz, Uecker, Martinez-Sala, Kaur*
- Codified in EU Legislation (Dir 2004/38)
- 150 citations of the *Grzelczyk* "mantra", 2001 - 2023
- Enduring legacy: 16 citations in EU court since Brexit
- Four Grand Chamber judgments 2020 - 2023: *A, BY, VMA* and *S*

“A Scot without Borders”

Judge Ian Forrester

Judge Rapporteur

Case T-316/14 *PKK v The Council*



Shaping a Supranational Union

- Judge Ian Forrester
- Shepherding the Scottish judicial voice in Luxembourg to a close
- Judge in the first instance General Court; implications, comparison with CJEU
- Brought significant competition law expertise to the role
- The *PKK v Council* saga; a drama in four acts
- T-316/14 (2018) Council act listing PKK as terrorist organisation, annulled
- C- 46/19 P (2021) overturns 2018 judgment and refers case back to the GC
- T-316/14 RENV (2022) annulled the 2014 acts maintaining the listing of the PKK on the EU's terrorism sanctions list
- Enduring legacy: pending case C-44/23 P.....

Shaping a Supranational Union

Looking back: evidence of the extent to which Scottish judges have uniquely helped to shape the “new legal order”

Looking back: connections, collegiality, compassion and clarity all fed into the unique contribution of the three Scottish judges

Looking back: the supranational legal order would have remained abstract without cases like *Dassonville* and *Grzelczyk* providing the substance for supranationalism

Looking forward: their legacy lives on in Luxembourg

***The beneficent lights dim
but don't vanish. The razory edges
dull, but still cut. He's gone: but you can see
his tracks still, in the snow of the world***