

## **JUDGE DAVID EDWARD ORAL HISTORY**

**Interview With Judge David Edward**

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### **Session IV**

### **Years on the Courts: Part 1—1989-2004, How the Courts Operated**

DS: This is the David Edward oral history.<sup>1</sup> This is taping session number four.

I'm Don Smith. I teach European Union Law & Policy at the University of Denver Sturm College of Law. I'll be the interviewer for these taping sessions.

We are in the home of Judge David Edward, actually in the room where he practiced law for many years in Edinburgh, Scotland. In this taping session I will be asking Judge Edward about his service on the Court of First Instance and the European Court of Justice, which took place from 1989 through 2004. In particular I will be asking Judge Edward about the two courts and how they operated.

Judge Edward, before I begin asking about how the Court of First Instance and the European Court of Justice operate, I'd like to ask about your appointment to the Court of First Instance.

In 1989 when you were appointed to the Court of First Instance<sup>2</sup> the Conservative Government headed by former Prime Minister Margaret Thatcher was in power. I'm curious, did you have any interviews with members of the government or did Prime Minister Thatcher ever speak to you before your appointment?

DE: Certainly the Prime Minister did not. I was first asked by the Lord Advocate – who is the equivalent to the Attorney General in Scotland – whether I would be interested in the position. When I said I would, I eventually got a

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<sup>1</sup> Copyright 2006 David A.O. Edward and Don C. Smith.

<sup>2</sup> David Edward served as Judge on the Court of First Instance from 1 September 1989 to 10 March 1992.

letter from Geoffrey Howe,<sup>3</sup> who was then the foreign secretary, asking whether I would accept appointment and I replied that I would. That was the sum total of the governmental communication. I've never had any communications otherwise than that with any minister of the government.

DS: Was there any, to the degree that you know, any investigation of you or your background?

DE: I have no idea. Certainly nobody intruded on my space at that time.

DS: How did you find out about the appointment?

DE: I was asked whether I would like it.

DS: But did you receive a telegram or letter?

DE: I received a telephone call.

DS: And that was it.

DE: That was from the Lord Advocate who said that....well, I knew because of course I was teaching the subject, I knew that it was proposed to establish the Court of First Instance. It had never occurred to me that I might be considered for it.

DS: In 1996, you spoke to a group called the European-Atlantic Group,<sup>4</sup> and you said to that group that when you began work on the Court of First Instance, "few people had the least idea of what I was going to do."<sup>5</sup>

Did that reaction surprise you and did it change over time?

DE: No. People knew about the European Court of Justice, which had been there since the beginning, but the Court of First Instance – it was an odd title anyway, it still is an odd title; what do they mean the "court of first instance" – and for most people the idea that there should be a court which in those days was set up to do, on the one hand, employment cases involving employees of the Community and on the other hand, major cartel cases. That

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<sup>3</sup> The Rt. Hon. Geoffrey Howe served as U.K. Foreign Secretary from 1983-1989 in the government headed by Prime Minister Margaret Thatcher.

<sup>4</sup> The European-Atlantic Group, see <http://www.eag.org.uk/>.

<sup>5</sup> [David Edward, "The European Court of Justice – Friend or Foe?" European-Atlantic Group, 18 July 1996.](#)

seemed a very odd kind of court for anybody to go to. People didn't really know much about it at all.

DS: How did your family feel about you becoming a judge?

DE: They were excited about it because... The month I went to Luxembourg to be a judge of the Court of First Instance was the month in which our younger daughter, the 4<sup>th</sup> child, went to university. At that time all the children were in university so it was quite exciting. This was a new thing in life. They liked it.

DS: And how about Elizabeth? How did she feel about moving to Luxembourg?

DE: We weren't moving totally because we always maintained this house. We always kept this house and we came back to it. But for her it was quite exciting as well. It was a new life – different from what had been going on. Both of us, well, all of us, were quite excited. It was different.

DS: When you officially took your position, was there a swearing in or some sort of official ceremony?

DE: Yes. Every judge is required to take an oath before the Court of Justice. The oddity about our situation was that here we were 12 new members of this new court all being sworn in together. So that was the unusual feature. But otherwise it was something that has always happened and still happens.

DS: The Court of First Instance, as you have mentioned, was a new court when you were appointed. What can you tell us about the early days of the Court of First Instance?

DE: The first thing we had to do was to decide how we were going to operate. We had to, as it were, assign ourselves to chambers, as it's put, in which we would sit as three or five. We had to appoint the registrar of the court. We had to write our rules of procedure and determine how far we were going to follow the rules that had been followed up to then by the Court of Justice; how far we were going to create new rules.

We did create one very different type of procedure, which has the rather obscure title of "Measures for Organization Procedure." It involved determining how the big competition cases would be managed. We had some difficulty in getting that through as an idea of case management because up to that time the procedure of the Court of Justice had been very cut and dried. The idea that the court would determine how a case was going

to be handled, some people found rather shocking and new. But, we did it and it worked.

There was that and then of course we had to process the cases that were there to be processed. Because the Court of Justice knew there was this new court coming, we started with quite a lot of cases which simply had been stored up by the Court of Justice and handed over to us. It involved getting them done pretty quickly because by that time they were getting very old.

So it was a variety of things. Then the other big aspect that we had to deal with was how to deal with the big cartel cases. How to ensure that they were better dealt with, because the reason for setting up the Court of First Instance – or one of the reasons in the Council decision<sup>6</sup> that established the Court – was in order to have a closer examination of the factual basis of the Commission decisions. So we had to decide how we were going to do that, to what extent we were going to examine factual issues and how we would go about it.

So there was a lot to be decided, a lot to be investigated and changed at that stage.

DS: You have noted a number of things that you learned 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 to the Bench: 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.”<sup>7</sup>

Can you elaborate on these lessons?

DE: The first one as I said is just to sit quiet and listen. I never was wholly successful in learning that lesson, but I think it’s..... When you’re at the bar, you’re active. That’s what you’re there for. You’re either there for, you’re for one party or another and you’ve got to be active even if it’s the other side’s turn. You’ve got to be listening for the improper question or the improper turn of examination or the attempt to create a case which has not been pleaded or this sort of thing. So, you’ve always got to be active at the bar and what you have to learn when you become a judge is actually to be

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<sup>6</sup> [Council Decision 88/591](#), establishing a Court of First Instance of the European Communities [1988] O.J. L319/1.

<sup>7</sup> David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” EUROPEAN BUSINESS JOURNAL, vol. 16 (2004), p. 120.

passive and to know when to intervene. That's a different skill. So that's the first thing.

The second thing was particularly in the context of the European Court because no judge ever sits alone. Whereas the custom in the common law countries – although not in most of the continental countries – is for the judge to sit, one judge to sit alone in first instance, in Luxembourg, there are always at least three and it's not always easy to realize that what seems obvious to you does not seem obvious at all to your colleagues. Therefore, you have to learn the simple fact that people don't agree in the same factual circumstances. They don't necessarily take the same view of the facts or the same view, as I have said, of motives.

But the other point really that I made was when you're sitting on the bench you do actually see and frequently hear what people are saying at the bar. Depends how far the bench is away from the bar. But a lot of people – and I didn't realize this – a lot of people when they are at the bar don't realize that what they are saying and the gestures and the little muttered discussions and comments, they're actually being heard on the bench. I think people would be well advised to remember that the judge actually hears and sees quite a lot of what's going on.

DS: The European Court of Justice and the Court of First Instance are located in Luxembourg, while most of the EU's institutional machinery is located in Brussels.

What are your thoughts about the fact that the European Court of Justice was located away from the political center of the EU?

DE: I think it's a good thing. I think it means that the judges are not subject to any form of indirect political pressure. I mean, they are not subject to direct political pressure, but they're not subject to indirect political pressure and they don't become part of a kind of...the unkind would say it's a mafia, but the kind of groups that exist for example in Washington and they certainly exist in Brussels. Particularly in a place like Brussels where people are coming from other countries and they are living together and talking together.

In Luxembourg the judges by and large have a social life elsewhere or a social life with each other, but they are not subject to the constant rumor mill and gossip mill of Brussels. That helps their independence from the other institutions. I think it's a good thing, but it does mean that you are less aware of what's going on, naturally.

DS: To what degree – if any – did the Courts have communication or interaction with people in the other EU institutions?

DE: For the same reason as I've said, relatively little. There's another institution in Luxembourg called the Court of Auditors<sup>8</sup> and rather depending on the personal relationships, we saw quite a lot of our colleagues in the Court of Auditors.

By and large, not, there wasn't much coming and going.

DS: And just one more question on this theme. You have written, "To suggest that judges should...be accountable to public opinion, or that they should bend to the will of politicians or the press is a flat contradiction of the judicial oath."<sup>9</sup>

Bearing this in mind, how aware were the Courts, if at all, of the political winds that were blowing throughout the time you were a member of the Courts?

DE: What I'm trying to say is the judicial oath is to judge fairly and impartially. Therefore if you consider this is the right answer, you shouldn't be afraid of saying so because it's going to be politically unpopular. That's the one obvious point in that direction.

And, certainly, you shouldn't be open to pressure from politicians to decide a case in a different way.

On the other hand, judges shouldn't be so remote from the world that they don't know what's going on in the world. It's quite a different thing to say, "I'm not influenced by public opinion and not changing my mind about my judicial decision because of public opinion." It's one thing to say that.

It's quite another thing to say, "I don't care what people think." You have to be aware of the context in which your decision is going to operate. That applies in a sense more to how you express your decision than to what your decision is, particularly in the context where you're writing written judgments, you're producing written judgments.

DS: Judge Edward, there has always been a fascination among the public –

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<sup>8</sup> The mission of the European Court of Auditors is to independently audit the collection and spending of European Union funds and, as such, assess the way in which EU institutions discharge these functions; see [http://www.eca.eu.int/index\\_en.htm](http://www.eca.eu.int/index_en.htm).

<sup>9</sup> [David Edward, "The European Court of Justice – Friend or Foe?" European-Atlantic Group, 18 July 1996.](#)

particularly among lawyers – about how the Courts work. I’m wondering whether you can take us through the process and explain how a case was handled, perhaps by beginning with the role of chambers and how the chambers are selected.

DE: The chambers in the Court of Justice are selected at the beginning of each year. Essentially the judges are assigned to a chamber because they usually take the place of their immediate predecessor. So the British judge who succeeded me simply stepped into the same chambers as I was in, although they’ve been reorganized now since enlargement.

Broadly speaking, the chambers stay the same from year to year. The chambers are of significance for cases that are going to be judged by three judges or five judges. There is now a thing called the Grand Chamber, which didn’t exist when I was there. The choice was really between three judges, five judges or the plenary.

What happens when a case arrives is that it is examined by the registry to see whether it is formally in order. Once they are satisfied it is formally in order, then they register the case, give it a number and it is sent to the president of the court who then assigns one judge as a *judge rapporteur*, the reporting judge. And at the same time it goes to the first advocate general who assigns one of the advocates general to be the advocate general in the case.

As the case goes forward, if there is a procedural problem, then the *rapporteur* and the advocate general are consulted and they give their advice as to what should be done.

Once the pleadings are complete, the *rapporteur* is responsible for writing a report – a preliminary report on the case – which is presented to the Court as a whole. That report says, “This is a case about...free movement of goods. It raises the following issue....The arguments of the parties are broadly speaking as follows....I think this is a pretty straight forward case. I think it could easily be handled by a chamber of three judges.” Or, alternatively, “This is a case of enormous significance,” and in my day should go to the plenary. Or “This is a case which is not of vast significance but it’s difficult and therefore I think it should go to a chamber of five judges.”

The advocate general expresses his or her opinion at the same time on the basis of what’s being proposed by the reporting judge. And then the Court decides how the case is going to be dealt with. Then the case is set for oral hearing.

Nowadays it is not absolutely essential that there should be an advocate general so the case may be dealt with without an advocate general. After the oral hearing, if there is an advocate general, the advocate general delivers the

opinion on the case. Once that opinion has been delivered the reporting judge writes a note for the other judges which will say, “I agree with the advocate general and I propose to write a judgment in the same direction.” Or, “I don’t agree with the advocate general and I will write a judgment in another direction for the following reasons.” Or, “I agree in part and I don’t agree in part and this is what I propose to do.” Or alternatively, “I don’t agree with the advocate general and I think we should discuss it before I write any form of judgment.”

But at the end of the day it’s the judge *rapporteur* who will write the judgment or the first draft of the judgment. Depending on what proposal the judge *rapporteur* makes, the other judges have the opportunity at that point to say, “I don’t agree with you,” for example and even at that stage because another judge disagrees with the *rapporteur* the case will go for a discussion before any judgment is written.

Assuming that, either before or after discussion, it’s agreed what line the judgment should take, the judge *rapporteur* is responsible for drafting the judgment. And once the judgment is in draft, it goes to the chamber or the plenary for discussion. It may go through very quickly with very little discussion or it may be discussed over days, weeks, months with many different drafts being produced. It entirely depends on the circumstances of the case how quickly it moves through.

But at the end of the day, it’s the *rapporteur* who is responsible for making sure that a judgment is produced, getting it in final form, sending it for translation, and making sure that it’s ready to be pronounced on a given day. So the *rapporteur*, with or without the advocate general, essentially is responsible for the processing of the case.

DS: When the European Court of Justice was established in the 1950s, judges rarely if ever asked questions to lawyers appearing before them in oral hearings. But now that is more typical.

Can you explain how and why the oral hearings have evolved over time?

DE: I think that what you have to remember is that in the original six member states, the idea that a judge should engage in some sort of interplay with the bar – a discussion of the case with the bar – is regarded as rather improper. In other words, the more traditional French judge, for example, regards it as improper for the judge to show any kind of reaction to the pleadings, the oral pleadings, because in theory, at least, to do so means that you have made up your mind in advance. And you shouldn’t. So the view of many continental judges is the judge should keep quiet, totally quiet. Listen to what’s being said, then go away and decide.

Now we know that the common law tradition is quite different. It's not just that the common law judge does intervene more in discussing the case; we go quite to the opposite extreme. We think it would be improper for the judge not to disclose a problem at the stage of the oral pleading and to give the counsel the opportunity to discuss it because the judge might have quite the wrong end of the stick. So there is a culture difference there.

The problem in the European Court is that counsel from countries where there is no tradition of judicial intervention are not used to being asked questions. So they don't really know how to play the game that the common law advocate is well used to, which is – if the judge is particularly interventionist – a kind of fencing match with the judge. And of course anybody who sat in a common law tradition court knows that that's frequently the way in which the judge comes to a decision, testing out ideas and seeing what the answer is if there is an answer and discovering maybe that the first impression is entirely wrong. Well you can do that to some extent with counsel who don't share that tradition, but of course if they don't have any experience in working in that way, then the discussion is not very fruitful.

I had the experience of asking a question of a representative of one government – it was a rather difficult question for him – and his answer simply was, "I do not wish to answer that question." And that, as far as he was concerned, that was a perfectly good answer. Now if you have that degree of culture difference, then the extent to which you can transform the procedure into something like what we are accustomed to in Britain or the United States is very limited.

A further consideration is that in many countries...lawyers who plead in the civil, commercial and administrative courts in particular, don't engage in oral pleading. So you have not only a general culture of not asking questions or not having a discussion with the bench, but in particular in the kind of proceedings that go to the European Court.

The Court of First Instance did depart from this to the extent of tending to have a kind of question and answer session after hearing the main pleadings. So in the big cartel cases, very often counsel are allowed to make their submissions without much interruption and then at the end of that there will be a question and answer session in which the judges, in particular the *rappporteur*, probe particular issues that they are concerned about.

The main point is that it would be futile to suppose that the procedure in the European Courts can ever be the same as the procedure in the common law courts.

DS: I'd like to just go back to the role of the advocate general and to have you explain that and where it came from.

DE: It comes immediately from the situation in the administrative courts of France and other countries which model their administrative procedure on the system in France.

There is a person who is a member of the judiciary who goes away and studies the case independently and produces an opinion on the case. That is something for the judges to get their teeth into when deciding how the case should be finally decided.

Part of the reason for this is that, as I mentioned, there is no tradition of discussing the case with the advocates. So the judges have the submissions of the parties, but they need something else. They need more than that: an independent review of the case. And that essentially is what the advocate general is there to provide – a first assessment of the case by a person who has a judicial position. Not an advocate.

The title is slightly misleading, advocate general. But the advocate general is not an advocate. The advocate general is a judicial position. And the advocate general's opinion is a judicial opinion suggesting what are the issues, what are the options, what are the possibilities, and which line the Court ought to follow. But it's a more discursive thing than the judges' judgment.

DS: In 1990, while a member of the Court of First Instance, you were asked to serve as advocate general in the cases known as *Automec II* and *Asia Motor France*.<sup>10</sup>

What were the circumstances that resulted in your serving as advocate general on these cases?<sup>11</sup>

DE: When the Court of First Instance was set up they did not appoint separate advocates general to the Court of First Instance. The rules simply provided that a judge may be appointed ad hoc to fulfill the role of advocate general. So the rules of procedure envisaged that one judge might be appointed advocate general.

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<sup>10</sup> [Case T-24/90 Automec v. Commission](#) [1992] ECR II-2223 and [Case T-28/90 Asia Motor France and Others v. Commission](#) [1992] ECR II-2285.

<sup>11</sup> A detailed analysis of Judge Edward's role as advocate general in these cases has been written by Rosa Greaves, Allen & Overy Professor of European Law and Director of the Durham European Law Institute at the University of Durham. Rosa Greaves, "Judge Edward Acting as Advocate General," in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), pp. 91-98. The author described Judge Edward's advocate general opinion as "focused, carefully reasoned and aimed at assisting the [Court of First Instance] to reach a consensus judgment." P. 98.

We were a court of 12 and the rule in Luxembourg is that you must always have an uneven number of judges. So when the whole Court was sitting and when the case was important then one judge couldn't sit because there were 12 judges. The custom was that one judge, therefore, acted as advocate general and 11 judges acted as judges. In fact, there have been relatively few cases in which the Court of First Instance has sat as a full Court and the same reasoning wouldn't apply if there's an odd number of judges.

If I remember correctly, I was the last member of the Court of First Instance to actually act as advocate general. But the reason was that the point raised in *Automec* and *Asia Motor France* was an important point of principle. It was felt at that time that it should be judged by the whole Court so that meant somebody had to act as advocate general. I was asked to do it, but it was virtually the last thing I did as a judge on the Court of First Instance.

DS: A former member of the European Court of Justice, Fernand Grévisse, has said "deliberation is the heart of our work."<sup>12</sup>

Can you explain the process of deliberation?

DE: Well, it's what I have referred to already – he was talking about the judges and what differentiates that method of judging from the common law method of judging is that the discussion takes place between the judges in private rather than in open court between the judge and the bar.

In the common law system – if the system is working well and it doesn't always work well – the idea is that the problems of the case will be teased out in the course of the debate before the judge. In the continental system, for the various reasons I've discussed, that isn't so.

Therefore, the debate takes place between the judges. And when Fernand Grévisse said that is the heart of our activity, that is true. It is in the internal debate between the judges that the issues really come to be teased out. That is perhaps why, going back to the role of the advocate general, part of the point of the advocate general is to give the judges a starting point for their deliberation. That's a point of departure where you actually have an overview of the case. Then you come together and discuss it. But the discussions can go on, as I have said, for many weeks and hours. And this is particularly so in a court of that type where there are very different cultures, very different ideas.

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<sup>12</sup> David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

DS: Judge, now I'd like to ask about the preparation of judgments. You have written, "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."<sup>13</sup>

Judge, can you elaborate on the points that you made?

DE: Yes. I think this is the difference in the first place between the role of the advocate general and the role of the judges. In that system, the role of the advocate general is to express a personal opinion: "This is my opinion as to what the case is about, what the issues are, and what the answer ought to be."

The judgment of the Court is a judgment of the Court as a whole. It's not necessarily a unanimous judgment, but a judgment which will be signed as the judgment of the Court by all the judges who take part.

Now, the view, if you compare that with the common law system, according to the common law system, even in an appeal court – even if you go up to the House of Lords or the Supreme Court of the United States – the judges are expressing individual opinions and the reasons for the final decision have to be distilled from looking at the individual opinions. Of course, if there is a clear majority in one majority opinion, then the reasons for the opinion, the reasons for the judgment, will hopefully be clear from that judgment. But they are individual judgments, even if one is writing for the majority, it's nonetheless writing for that number of judges. And the minority do not sign that judgment. Now, that is the common law approach – each judge is expressing an individual opinion.

The broad continental approach and it applies in most of the European countries – and probably in most countries of the world actually – is that judges are not intended to be expressing personal opinions. Their function is to come together to discuss and either unanimously or, if necessary, by a majority decide how the case ought to be decided and then to set out the reasons for that decision in as objective a manner as possible. That's what my colleague meant when he said this is a good personal opinion. But it's not a judgment according to our view of what a judgment should be. Judges don't write personal opinions; they write judgments. As he said we've got to make it aseptic. In other words, we have got to make it dry, impersonal, and objective and that is the essential difference between that style of judging and the style of judging in the common law system. The judgment ideally should be objective and dry and to an extent uninteresting and unexciting.

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<sup>13</sup> David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," EUROPEAN BUSINESS JOURNAL, vol. 16 (2004), p. 120.

DS: The entire chamber signs each judgment so that there is a single collective judgment in every case. Francis G. Jacobs, a European Court of Justice Advocate General, has written that, “Although it cannot be demonstrated, the probability must be that the success with which the European Court of Justice has performed its role is to a large extent due to the institution of a single judgment.”<sup>14</sup>

How did this tradition and method of working develop and do you share Mr. Jacobs’ assessment of the importance of single judgments?

DE: One, I share his impression and his judgment. Why did it develop? The reason it developed was simply because at the beginning, none of the member states had a tradition of individual judgments or even dissenting opinions. The German Constitutional Court permits dissenting opinions. But, by and large the tradition in all the original six is that courts deliver a judgment, one judgment. I repeat, that’s not necessarily a unanimous judgment. They don’t necessarily all agree with it, but it is the judgment of the court.

So, the system begins with the advocate general and the judges. The judges are producing a judgment, the advocate general is producing an opinion. Why is it like that? It’s like that simply because it was like that in the beginning and has never changed. As to whether, what its effect is, I think Francis Jacobs is right.

It would have been very, very difficult in the early days, but I think all the way through, if people had been able to identify which judges had signed up to cases such as *Van Gend en Loos*<sup>15</sup> and *Costa v. Enel*<sup>16</sup> or *Simmenthal*,<sup>17</sup> all

<sup>14</sup> Francis G. Jacobs, “Approaches to Interpretation in a Plurilingual Legal System,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 298.

<sup>15</sup> [Case 26/62](#), *Van Gend en Loos v. Netherlands* [1963] ECR 1. In 1962 in *Van Gend en Loos*, the Court of Justice for the first time held that while Community law imposed obligations on individuals it also conferred upon them “right[s] which become part of their legal heritage.” *Van Gend en Loos*, at 12-13.

<sup>16</sup> [Case 6/64](#), *Costa v. ENEL* [1964] ECR 585. In 1964 in *Costa*, the Court of Justice held for the first time that Community law had primacy over Member State law. The Court held in part, “the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.” *Costa*, at 594. Lenaerts and Van Nuffel have written, “The Court derived the primacy of Community law from the specific nature of the Community legal order, referring to the danger that, if the effect of Community law could vary from Member State to Member State in deference to subsequent national laws, this would be liable to jeopardize the attainment of the objectives sets out in Art. 10 of the EC Treaty and give rise to discrimination prohibited by Art. 12 (see par. 1-019).” Koen Lenaerts and Piet Van Nuffel in Robert Bray (ed.), *CONSTITUTIONAL LAW OF THE EUROPEAN UNION*, 2<sup>ND</sup> EDITION, (Thomson Sweet & Maxwell) 2005, p. 666.

<sup>17</sup> [Case 106/77](#), *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629. In 1978 in *Simmenthal*, the Court of Justice held that “in accordance with the principle of precedence of Community

the great cases, it would have caused appalling confusion if particular member states had been able to say, “Oh, our judge didn’t sign up to that so we are not going to accept that judgment.”

I think it’s the anonymity, if you like, of the judgments that makes them acceptable. Or perhaps put it the other way, avoids a possibility of a style of argument that might otherwise be available.

DS In 1995 in commenting about the lack of dissents, you wrote, “It is not self-evident, to the present writer at any rate, that the merits of dissenting opinions and their contribution to the evolution of the Court’s case law would outweigh the disadvantages of further serious delay in producing judgments, particularly in references.”<sup>18</sup>

On the other hand, Professor J.H.H. Weiler has written, “I would argue for the introduction of separate and dissenting opinions. One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion. The dissent often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected.”<sup>19</sup>

With the benefit of hindsight, and considering Professor Weiler’s comments, do you still feel the way you did in 1995?

DE: Yes, I do. I think the problem with Professor Weiler’s comments is that they are the comments, although he has a very wide experience, they are the comments of someone who is essentially looking at this problem through common law eyes. Now, it is true that the Strasbourg court, the [European] Court of Human Rights,<sup>20</sup> has separate and dissenting opinions.

It is not self-evident to me that the idea of separate and dissenting, a majority

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law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community law.”

*Simmenthal*, para. 17. The Court of Justice went on to hold that “every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.” *Simmenthal*, para. 21.

<sup>18</sup> David Edward, “How the Court of Justice Works,” *EUROPEAN LAW REVIEW* 1995, 20(6), p. 539.

<sup>19</sup> J.H.H. Weiler, “Epilogue: The Judicial Après Nice,” in Gráinne de Búrca and J.H.H. Weiler (eds), *THE EUROPEAN COURT OF JUSTICE*, Oxford University Press (2001), pp. 215, 225.

<sup>20</sup> European Court of Human Rights, see <http://www.echr.coe.int/echr>.

opinion, a separate opinion, a dissenting opinion – it's not self-evident to me looking at some of the judgments of the Supreme Court of the United States, the House of Lords or the Strasbourg court – it's not self-evident to me that it's any clearer what the answer is. So I'm not totally convinced, and I've said there are good reasons why perhaps it was as well that there weren't in the evolution of the Court.

I don't altogether buy the notion that through the method of majority, concurring, and dissenting opinions, one has great clarity. I think experience shows that one frequently does not have great clarity. Lawyers are scrabbling around to try and find out what actually was the ratio decidendi of the case. That said, of course I accept that the separate opinion, the expression of individual opinions by the judges does have an enormous effect in the development of case law.

So you have a choice. Either you have a single judgment or you allow separate and dissenting opinions with all the pluses that produces in terms of jurisprudential discussion but also the downside of, as I said, not necessarily producing any greater clarity. At least with the single judgment of the court you know what the judgment is. The reasons may not be very clearly expressed, but at least you know the answer.

However, I think there are other reasons in the Luxembourg case which militate against dissenting opinions. The first is the time it would take and that's the point I made a way back in 1995. In order to dissent, you've got to know what you are dissenting against or from. Now in Strasbourg, which is the only real parallel leave aside the international court in Hague with very few judges, Strasbourg only operates in two languages, English and French. The majority judgment is written by the registry. It's not written by a judge, it's written by the registry after discussion and approved by the majority. The judges are therefore able to see what the registry's produced and then write their opinions if they wish to.

In Luxembourg, the system is the *rapporteur* and the discussion takes place, as I've said, between the judges. So, if you are going to have dissenting opinions, you've got to divide into the majority and the minority. The majority have to produce their judgment in order to be sure that you know what you are dissenting from. Here again, you differ from Strasbourg because the issue in Strasbourg is always, "Has Mr. or Mrs. X been treated in a manner by State Y which is a violation of the European Convention."

In the Luxembourg court, the questions, particularly in references, are not what is the answer "Yes?" "No?" to this question. They are really rather complex questions as to whether a particular regulation, and in what particular circumstances a national regulation constitutes a violation of the rule of free movement of goods or whatever. There are many more issues

bundled together which have to be decided before the national court delivers its opinion and decides the case.

Many Luxembourg cases are argued before there has been any judgment in any court below. So the chances of having a clear majority opinion from which to dissent are much less than in a case, for example in the House of Lords or the American Supreme Court, where there may be two, three, or four judgments of courts below and the issue is now pretty clear.

So, as I say, you need to know what the majority decision is before you write a dissent. Fifty percent of the cases in the Court of Justice are already taking two years and people feel that's too long. If you've got to have the judgment written by the majority and then the dissents written, you're going to add months, given the translation problems, to the production of the eventual judgment. So that's a downside.

Another downside is that, of course, you identify the judges who agreed and who did not agree. And as I say, member states might regard it as an excuse for not complying; that their judge did not agree with the majority judgment.

As regards to the process of deliberation, the process of deliberation wouldn't be the same because if the judges were dividing into majority and minority, the minority would not by now be taking part in the formulation of the majority judgment. And I remember many cases where I would not have been able to say at the end of the case after weeks of deliberation, and four or five or six different drafts, who voted which way at the beginning. The end judgment is frequently very different from what it started with and that's because everybody is taking part and not just the majority. I'm not satisfied in any event that it would produce better judgments.

My final reason for being against dissenting opinions is ideology. The one saving grace of the Luxembourg court is that the judges are not identified with being in the field of employment, in favor of gender equality or against gender equality; they're not in favor of states' rights as opposed to community rights; they're not in favor of free movement of goods as opposed to the environment. They don't become identified with particular ideological positions. And I think that's enormously valuable for the working of that particular court and I am only speaking about that particular court.

The only thing I would say is that I did meet two U.S. Circuit Court judges who said that given the pressures on judges in the United States, they wouldn't be wholly adverse to a situation in which they did not have to become personally identified with particular decisions because there is so much pressure on the individual judges now in the United States because of the opinions they've expressed. So I think the ideology point is actually

rather more fundamental than people allow for.

DS: Judge Edward, French is the official working language of the Court. Why was French chosen and what does that mean in terms of how the Courts operate?

DE: French was chosen because it was the majority language of those who were the judges when it all began. France, Belgium, and Luxembourg, in all three cases French is either the official language or one of the official languages.

The only other possible contender at the beginning would have been German and – in the period immediately after the war – it would have been totally inconceivable even if all the judges had been able to speak German, it is inconceivable that they would have adopted German as the one working language. It's not the official language, it's the working language. So it was the working language at the beginning and the short answer is it's never changed.

I think now the argument for retaining French as the working language is first of all that it is highly desirable that there should be a single working language which everybody operates in more or less well because it's much easier to discuss things on the basis of a text in one language than on the basis of parallel texts in different languages. And again, you've only got to look at the judgments of the Strasbourg court to see that there are quite often very significant differences between the English text and the French text.

From a practical point of view it is desirable to have one working language so long as everybody is capable of operating in it. The other reason is that as European Community law has developed, the jargon of the law – for all legal systems the jargon of the law is important – the jargon of the law is known. It's French. Everybody knows what *effet utile* means, or lawyers know what *effet utile* means, although “useful effect” would be a meaningless translation in English. Another example is *exigences impératives*, which was initially translated “mandatory requirements,” which means absolutely nothing at all in English. In the evolution of any legal system – this is why they used Norman French in the English courts – words came to have a fixed meaning and you used those words.

Because it all started in French and was written in French those are the words that are understood when people are writing judgments. To a certain extent therefore French in the beginning of the 21st century is in Luxembourg terms very much what Latin was in the 17<sup>th</sup> and 18<sup>th</sup> century. It was the common language of a particular form of activity. You knew what the Latin meant. Everybody knew the phraseology; they knew what the particular jargon meant. And therefore it's easier to stick with it.

There are difficulties about maintaining a single working language because you can't guarantee now as the European Union is enlarging, you can't absolutely guarantee that everybody will be able to work in that language. But, from a practical point of view, it's desirable to continue with it for so long as you can.

DS Judge, thank you very much. We'll end the first part of the session here and we will pick up with another round of questions a bit later.

DS: Judge, when we stopped for the end of Part A, you were talking about French being the official working language of the Court and describing the circumstances under which French became that. I wanted to ask you about your own French. You're fluent in French. When did you begin speaking French?

DE: When I was at school – again I started learning French at the age of nine. The person that taught it was actually – he wasn't a qualified teacher – he had taught himself French. He came from Glasgow and he had been a clerk in a Glasgow shipyard and he had taught himself French as a dead language in the library. He taught it to us in the same way as we learned Latin. So, I learned French in that way, very strong emphasis on grammar but no idea how to speak it.

After school, between school and university, I went for three months to Paris, in the summer of 1953, and by that time all the regular classes had finished. The question was how could I improve my French. I was staying with a French family, but somebody suggested I should go to an elderly lady who was a French phonetician. She taught me French pronunciation and made me write out vast tracts of French in phonetic script. So, I learned the grammar at school at an early age and then I learned the pronunciation, and putting those two together turned out pretty well.

DS: In a 1995 *European Law Review* article, you wrote about the function of the European Court of Justice. In part you wrote, "The function of the Court of Justice is exclusively to interpret the law to be applied, and then only insofar as Community law is relevant for decision of the case. In practice, the Court's ruling may determine the outcome of the case because the national court is left with no real discretion as to the result. But the purpose of the ruling is to interpret the law that would be applicable in any comparable case in any of the 15 member states."<sup>21</sup> There were 15 member states then.

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<sup>21</sup> [David Edward, "How the Court of Justice Works," EUROPEAN LAW REVIEW 1995, 20\(6\), p. 539.](#)

What are the consequences of this way of working?

DE: To put it the other way round, this is a consequence of the preliminary rulings system by which the Court of Justice is asked to say, in advance, “What is the law I am to apply,” rather than, “Have I got the answer right.”

The referring judge is asking for a ruling on the law before delivering a judgment in the case. So it follows that the judgment of the Court of Justice must be a judgment which states what the law is to be applied in any comparable situation.

Now, that of course is the theory of the thing. The reality is that the Court is increasingly careful to make sure that it doesn't stray beyond the necessities of the case in delivering its judgment. A consequence, I think, is that although the judgment is expressed in relatively abstract terms, the system has become very much a case law system and common lawyers are, or ought to be, accustomed to determining the *ratio decidendi*, the reasons for the judgment, in the light, not least, of the facts of the case.

I think the consequence is in the European system that although the appearance is of a judgment of general application, one has to be rather careful to see what the context was.

DS: Before leaving this general topic, I'd like to ask you about the role of precedent, an approach that Professor Alec Sweet Stone has described as allowing the European Court of Justice to govern “through propagating doctrinal frameworks that guide the augmentation and decision-making of lawyers, judges, and governmental officials.”<sup>22</sup>

You were quoted in a 1994 article in *The National Law Journal* saying that, “While there is a reluctance to overturn a precedent, it is, though, more of a psychological matter than a legal impossibility.”<sup>23</sup>

Can you explain the role that precedent plays in the European Court of Justice's work?

DE: Let's just for a moment consider what the role of precedent is in the common law system. The idea behind the common law system was that, in the very early days, the idea that the judges had, as it were, innate in them an understanding of the law. Therefore, as soon as a judge had pronounced upon the law that was a statement of the law.

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<sup>22</sup> Alec Stone Sweet, *THE JUDICIAL CONSTRUCTION OF EUROPE*, Oxford University Press (2004), p. 243.

<sup>23</sup> Patrick Oster, “Court of Justice Becoming Europe's ‘Supreme Court,’” *THE NATIONAL LAW JOURNAL*, Oct. 24, 1994, p. A1.

Traditionally, the English common law system worked on the basis that another judge of the same rank was already bound by a decision of his brother of the same rank and was definitely bound by a decision of an appeal court above. But that, for example, the court of appeal was bound by any previous decision of the court of appeal. So, the rule of binding precedent was very strict. That has been relaxed in England; it was never wholly the case in Scotland; and I'm not sure to what extent it's the case in the United States. I don't think it is.

I think one has, in the first place, to say that the notion of the binding precedent is now a much weaker notion even in the common law than it is in any other country. Then you contrast the situation in the countries which have a codified system and there the law is the code. And therefore although the *Cour de Cassation*,<sup>24</sup> for example, may have declared 15 times what the code means, that nevertheless does not create a binding precedent and the *Cour de Cassation* can rule another way.

In practice, in the continental countries, a ruling of a higher court tends to bind a lower court even if not in full theory. A judge of a lower court will, on the whole – because it's not profitable to do otherwise – will, on the whole, apply the law as declared by the higher court. I think the notion that there is some enormous gulf fixed between the attitude of the common law and the attitude of the civil law is not correct.

As a matter of psychology, and that's what I was saying, as a matter of psychology, judges will follow precedent. On the whole, judges won't go and do something different from what other judges have done for the very simple reason that part of the purpose of the law is that the same rules should apply to everybody and if judges were applying different laws or different rules according to their whim, the justice system would break down. So there is a general judicial disposition to follow precedent.

In the case of the European Court, there is no rule which binds the Court to follow exactly what it has done before and there are cases where the Court has reversed itself. There are cases where the Court has diverged from previous case law. But nonetheless, as I've said, and I think this is right, there's a psychological tendency to follow what was done before if there's no good reason not to.

DS: Judge, now I'd like to ask about your office – your cabinet – and how it was organized. But before getting to that, could you tell us why everyone in your cabinet called you “Professor” rather than “Judge?”

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<sup>24</sup> The Cour de Cassation is highest court in the French judicial system; see <http://www.courdecassation.fr/Accueil/anglais/anglais.htm>.

DE: I don't know. When I first went to Luxembourg to the Court of First Instance I only had two assistants, one legal assistant and one secretary. I think it was because the legal assistant had been one of my pupils at Edinburgh and therefore knew me as "Professor" and she continued to call me "Professor" and the other one did too, and that just stuck.

DS: Let's begin with the role of the *référéndaires* in your cabinet.

DE: Yes, that's the legal assistant. In the Court of Justice, a judge has three legal assistants and they are analogous to the law clerks in the American system. The difference in the American system, basically you are a law clerk for a judge for one year, and essentially as soon as you leave university or very soon after. It's a young lawyer's job. In the Court of Justice, it isn't necessarily a young lawyer's job. It's a well paid job and there was one *référéndaire* who was the *référéndaire* of the German Advocate General who started with the German Advocate General way back in the 1950s and retired in the 1990s, having done no other job in his life but be *référéndaire* to the German Advocate General. It's a different status.

The work of the *référéndaire* is very varied. The judge may, at one end, simply ask the *référéndaire* to research a point. But by and large the function of the *référéndaire* is to, as it were, break the bulk of the files, analyze what the files are about because the judge cannot conceivably read all of the paper that comes in, so you have to rely on the *référéndaire* to read the detailed documents, and then the *référéndaire* will make or will draft notes or judgments. And it entirely depends on the relationship between the judge and the *référéndaire* whether the judge rewrites or how the judge rewrites or whether the judge says, "I simply don't agree with that, go and try again," or, "I'll try writing that," or, "There's something wrong here, let me draft my own version of those five paragraphs and let's see where..."

So it's very much a personal relationship, depending entirely on the way in which the judge likes to work. I had been, as it were, brought up in the Scottish tradition of the relationship between QC<sup>25</sup> and junior<sup>26</sup> and very much my way of working with my *référéndaire* was the same way as I'd worked with juniors as a Queen's Counsel at the bar. But other judges have totally different relationships with their *référéndaire* so it is very personal.

DS: How did you choose your *référéndaires*?

DE: I chose them in part from personal knowledge. My very first *référéndaire*, I

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<sup>25</sup> Queen's Counsel.

<sup>26</sup> An advocate who is not a Queen's Counsel.

chose because she had been a pupil of mine in Edinburgh and I knew as soon as I was appointed to the Court of First Instance that that would be the person that I would take from Scotland. In some cases, from high praise from other people; several of them had been pupils of mine in one way or another. Some of them had come for a kind of internship – what’s called a *stage*<sup>27</sup> – for two or three months and I’d got to know them and thought they were good.

Latterly as that sort of generation of possible people – I no longer had pupils from university days – I had a sort of beauty parade. They came across and I’d talk to them a bit.

DS: Do you still stay in touch with them?

DE: Absolutely, yes. Yes.

DS: What are some of the things they’re doing now?

DE: Two of them, I think, are Community officials. One works in the [European] Commission, one works in the Council of Ministers. One is a professor in the Basque country. One is going up the ladder towards being a senior partner of a big London law firm. One works for an American law firm in Geneva, having worked for the WTO.<sup>28</sup> Several of them are at the English bar. I think four are at the English bar. One is at the Irish bar. I really can’t now remember. I think that’s all.

DS: It sounds like you are very proud of all of them.

DE: Yes I am. They were a very good lot.

DS: And how about your secretarial staff?

DE: Every judge, again, in the Court of Justice has three secretaries. In my case, what I did is I had one English speaking secretary who essentially ran my diary, my personal travel arrangements, my correspondence and so on and two French speaking secretaries who were basically responsible for the archiving of the cases, of the documents, making sure that things were done on time, but also spent a lot of their time, because they were French speaking, they revised everything that we wrote to make sure that the French

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<sup>27</sup> “*Stage*” is an abbreviated form of the word “*stagiaire*,” the French word for trainee or intern.

<sup>28</sup> The World Trade Organisation; see <http://www.wto.org/>.

was correct. Again, there was a great deal of teamwork between them and between them and the *référéndaire*.

DS: Who was Graham Paul?

DE: Graham Paul was the driver. Every judge in the Court of Justice has a driver, who's also responsible for various jobs in the cabinet and the office. Graham Paul was the driver from the time I became a judge of the Court of Justice until the time I retired. And he's still there as a driver of my successor.

DS: From what I've heard it seems you got to know Graham very well.

DE: Yes. We got to know all of them very well.

DS: Two former legal secretaries, Mark Hoskins<sup>29</sup> and William Robinson,<sup>30</sup> have written about another important member of your cabinet, Mrs. Edward. They wrote, "Of course, when one talks about the Edward Cabinet, it is impossible to omit mention of Mrs. Edward, known to all, including the Professor, as 'the Boss.' Elizabeth was very much a member of the Cabinet. Great fun, great company and a tireless worker in entertaining visiting groups of judges, academics and students."<sup>31</sup>

First I'd like to ask you about how Elizabeth came to be known as "the Boss?"

DE: I christened her "The Boss" because there's a magazine in Britain called *Private Eye*<sup>32</sup> and there was a spoof, a series of articles every issue, supposedly written by Mrs. Thatcher's husband about life in Downing Street and he always referred to Mrs. Thatcher as "The Boss." And I began to call Elizabeth "The Boss" and that's how it continued.

DS: Now your children, and...

DE: Everybody calls her "The Boss."

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<sup>29</sup> Mark Hoskins served as *référéndaire* to Judge Edward from 1994-1995.

<sup>30</sup> William Robinson served as *référéndaire* to Judge Edward from 1995-1999.

<sup>31</sup> Mark Hoskins and William Robinson, "Preface," in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. xv.

<sup>32</sup> PRIVATE EYE, see <http://www.private-eye.co.uk/>.

DS: Does anyone call her “Elizabeth”?

DE: Very few.

DS: What was Elizabeth’s role while you were in Luxembourg?

DE: She lived at home and supported in all sorts of ways, as Mark and William have written. She was there entertaining and supporting in other ways. I mean she spent a lot of time talking to the members of the cabinet about, you know, if they had problems or anything.

DS: Who were some of the people you entertained when you and Elizabeth, The Boss, were in Luxembourg?

DE: It would be difficult to say because in those days there were visits of judges two or three, judges or professors, two or three times a year. And in some years we’d have had as many as a hundred people going through the house in the course of the year. There were a very large number of people we entertained there.

DS: Were there mostly British judges?

DE: Mainly British, yes. Not entirely.

DS: As I understand it, you also entertained various American judges including Warren Burger<sup>33</sup> here in your house.

DE: That was here. That was because there was a meeting involving judges of the U.S. Supreme Court and judges of the European Court and the night before it started we had a dinner party here which Warren Burger and Justice Ginsburg<sup>34</sup> were there. I can’t remember. I think that was all. Justice Scalia<sup>35</sup> came to the conference, but I think he arrived later.

DS: Your cabinet enormously enjoyed working for you. Mr. Hoskins and Mr. Robinson have written that, “Being part of the Edward Cabinet in Luxembourg was a great privilege...and also great fun.”<sup>36</sup> Diane Hansen-

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<sup>33</sup> Warren E. Burger served as Chief Justice of the United State Supreme Court from 1969-1986.

<sup>34</sup> Ruth Bader Ginsberg, Associate Justice of the United States Supreme Court from 1993-present.

<sup>35</sup> Antonin Scalia, Associate Justice of the United States Supreme Court from 1986-present.

<sup>36</sup> Mark Hoskins and William Robinson, “Preface,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. xv.

Ingram<sup>37</sup> has written that, “Judge and Mrs. Edward are generous to a fault. The Judge always brings back small gifts from his business trips and holidays, and is a prolific postcard writer... There are also countless cabinet lunches and dinners [at the Edwards’ home], to which both staff and their partners are invited.”<sup>38</sup>

From the sounds of it, your staff was almost like an extended family.

DE: It was and is, yes. We still see a lot of them. I think in a way it was one of the advantages of having been in a very collegial profession both at the bar and at the university.

At the Scots bar, certainly in my day, we knew each other very well. We spent a lot of time in each other’s company and we knew each other’s families. And the same thing at the university. To some extent also, having four children, when I went to the university, the eldest daughter was of university age so to some extent I treated my students like my children and my children like my students and have done ever since. I don’t find it at all difficult – these kind of relationships. I enjoy them.

DS: Now, Ms. Hansen-Ingram has said that on Monday mornings during your meeting with your cabinet, you often told a story. One that was considered a favorite involved the time you stayed at a run-down New York gentlemen’s club and you weren’t quite sure if you were to seat yourself or wait to be seated in the dining room.<sup>39</sup> Could you recount that story for us?

DE: By no means was it a run down gentleman’s club, it was the Harvard Club of New York City. That was a corresponding club of my club in Edinburgh and this was a way back in the seventies. I had booked a room in the Harvard Club, not knowing what to expect.

I think I arrived on a Saturday or a Sunday, anyway, it was in the middle of August and New York was unbearably hot. I went down for breakfast with slacks and an open necked shirt. I asked the waiter, because I didn’t know where I should sit, I said, “What’s the form”? And the answer was, “The form is you go straight back upstairs and put on a tie and a jacket.” And that’s when I learned about New York manners. And also that New York is stuffier than Britain.

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<sup>37</sup> Diane Hansen-Ingram was secretary to Judge Edward from 1989-1998.

<sup>38</sup> [Diane Hansen-Ingram, “Tales From the Tartan Chambers,” in Mark Hoskins and William Robinson \(eds\), A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD, Hart Publishing \(2003\), 1, at 2.](#)

<sup>39</sup> [Diane Hansen-Ingram, “Tales From the Tartan Chambers,” in Mark Hoskins and William Robinson \(eds\), A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD, Hart Publishing \(2003\), 1, at 2.](#)

DS: Do you recall other favorite stories that you could recount?

DE: Not really, I don't. I can't remember now.

DS: In terms of the overall work of the European Court of Justice, you have written, "One of the most impressive, and in some ways most unexpected, features of the Court has been its relaxed, non-confrontational way of working. Every deliberation in a difficult case produces some surprises in the attitudes and votes of colleagues – the predictable does not happen and the unpredictable does."<sup>40</sup> What did you mean by that?

DE: It goes back to what I was saying about the process of deliberation. It takes place in private, what happens is not discussed outside, and the judges know each other extremely well.

There can be quite heated discussions, but you really don't know who is going to take what particular line and that goes back to the point I made about ideology. Everybody is able to approach every case with a fresh mind. I think it's that way of working is extremely helpful, particularly in a multinational environment.

DS: I'd like to ask you just a bit more on that same point. You have also written that, "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 multi-lingual, multi-national and multi-cultural environment of the Europe Union."<sup>41</sup>

Could you elaborate on this principle?

DE: Yes. You have to know that one of the principles of the French Revolution was to reduce the judges to a more modest level because what had been known as the *parlement*, and particularly the *Parlement* of Paris, had been very powerful; the judges had been very powerful. So the French code expressly prevents judges to express personal opinions on the law and says that the purpose of the judge is to apply the law as declared in the code and not to make the law. In other words, judges are supposed to be modest people. They are not supposed to be grand people who make law.

I think that the system in Luxembourg does actually encourage a degree of judicial modesty, partly because you discover that other people take a very different approach to the case than you take yourself so you are not

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<sup>40</sup> [David Edward, "How the Court of Justice Works," EUROPEAN LAW REVIEW 1995, 20\(6\), 539.](#)

<sup>41</sup> David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," EUROPEAN BUSINESS JOURNAL, vol. 16 (2004), p. 120.

necessarily – you realize very quickly that there are different points of view and you have to, it would be wrong to say compromise, but you have to accept that there are other points of view and these other points of view have to be accommodated. That it is legitimate for people to take a different view and, if possible, you have to look for a way in which the views can be reconciled. It's a way of working which is very different from the traditional view of the common law.

DS: On a more personal note, it has been written that every day – and irrespective of the weather – you took a bike ride around the village where you lived in Luxembourg.<sup>42</sup> Have you always liked biking?

DE: No. Edinburgh is not a city in which it is easy to go out on a bike. Edinburgh is a very steep city and the streets are not really very suitable for biking. I really took up bike riding in Luxembourg and I enjoyed it a lot. It's one of the things I miss most about not being there.

DS: Do you still bike ride here in Edinburgh or not?

DE: No. For a person aged over 70, it's not wise to go bike riding in Edinburgh.

DS: Do you have other hobbies or activities here that you enjoy?

DE: Yes. I like walking and I like photography and, if I've got time, I like reading.

DS: Judge Edward, thank you very much.

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<sup>42</sup> [Diane Hansen-Ingram, "Tales From the Tartan Chambers," in Mark Hoskins and William Robinson \(eds\), A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD, Hart Publishing \(2003\), p. 1.](#)