

JUDGE DAVID EDWARD ORAL HISTORY

Interview With Judge David Edward

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Session V

Years on the Courts: Part 2 – 1989-2004, Recollections About Membership on the Courts

DS: This is the David Edward oral history.¹ This is taping session number five. I'm Don Smith. I teach European Union Law and Policy at the University of Denver Sturm College of Law. I'll be the interviewer for these sessions.

We are in the room where David Edward met clients while he practiced law in Edinburgh, Scotland.

In this session, I'll be asking Judge Edward about his years of service on the Court of First Instance and the European Court of Justice.

DS: Judge Edward, in this session, I'd like to ask you more about the Court of First Instance and the European Court of Justice, their work and some of their judgments. In session IV., you talked about the circumstances of your selection to the CFI.

Before starting this session, I'd like to ask you about your appointment to the European Court of Justice. After having served two and one-half years on the Court of First Instance, in 1992 you were appointed to the European Court of Justice.

What was your reaction when the Conservative government headed by Prime Minister John Major² asked you to move up to the Court of Justice?

DE: The situation was that I knew from rumors, really, that my name was under consideration for appointment to the Court because it was known that my predecessor³ was going back to Britain to become a judge in the House of

¹ Copyright 2006 David A.O. Edward and Don C. Smith.

² John Major was British Prime Minister from 1990-1997.

³ Sir (now Lord) Gordon Slynn served as the British member of the Court of Justice from 1988 to 1992 before joining the Law Lords.

Lords. So the process of selecting his successor had started some six months before. I knew that my name was one of those being considered so it wasn't altogether a surprise when I was actually selected. The moment when I knew was when I received a telephone call asking if I would accept nomination.

DS: Did you ever speak to the prime minister?

DE: Absolutely not. I've never spoken to any of the prime ministers.

DS: Continuing on, by the mid 1990s, there had been several widely published disagreements between you and various members of the Conservative Government.

In 1996, the Press Association wrote this about you: "Ironically, the fact that the British choice for European judge is so vehemently opposed to U.K. governmental policies on the EU can only increase the Prime Minister's credit rating with Britain's partners for picking such a suitable man for the job, regardless of personal political views."⁴

What was your reaction to this observation?

DE: I think it really involves a misunderstanding of what had happened.

When I was appointed in March 1992, the 1992 programme⁵ was coming to fruition and there was quite a lot of enthusiasm in Britain, including in the Government, for 1992 and what that was going to bring. You have to remember that one of the reasons for the fall of Margaret Thatcher⁶ had been her attitude to Europe and it was felt that at that stage the British Government had changed in its attitude.

Subsequently, there was the Maastricht Treaty⁷ and a fundamental disagreement in the Conservative Party about the attitude to Europe and by the mid-1990s, the Government and the Conservative party had become

⁴ Geoff Meade, "Shy judge is keen on Europe," Press Association, Nov. 13, 1996.

⁵ The Single European Act (SEA) established the "1992 programme," which envisaged inter alia adoption of more than 280 legislative measures aimed at fully integrating by the end of 1992 the goods, services, and capital markets. The SEA, signed in Luxembourg on 17 February 1986 by the nine Member States and on 28 February 1986 by Denmark, Italy and Greece, was the first major amendment of the Treaty establishing the European Economic Community (EEC). It entered into force on 1 July 1987. See http://www.europa.eu.int/scadplus/treaties/singleact_en.htm.

⁶ Margaret Thatcher was British Prime Minister from 1979-1990.

⁷ The Maastricht Treaty, which is also known as the Treaty on European Union, was signed in the Dutch city of Maastricht on 7 February 1992. The Maastricht Treaty came into force on 1 November 1993. For the full-text of the treaty, see http://www.europa.eu.int/scadplus/treaties/maastricht_en.htm.

Euroskeptic.

The attitude to the Court on the part of the Government seems to have been conditioned by a number of articles that had been written about the court which again rested on a misapprehension as to what the Court had done and what its attitudes were. The Government appeared to be swayed by these articles and had become hostile to the Court of Justice and then put forward a number of proposals which were described, I think, by John Major, as being intended to clip the wings of the Court.

I had a problem about this for two reasons. First of all it didn't seem to me that the Court needed to have its wings clipped, as it was put, if one understood properly what the Court had been doing and why it had been doing it. And the other problem was that the proposals put forward by the Government were either totally impractical or, to the extent that they were practical, they would actually have extended the time taken by the Court in deciding cases. One of the criticisms of the Court was that it took too long to decide cases. It seemed to me that the proposals being put forward were wrongheaded and it was my duty to say so.

Secondly, that the reasons for putting forward these proposals were wrongheaded and that is what led to the disagreement.

DS: Jumping ahead a few years, in 1998 you were reappointed to the Court of Justice. Can you describe what happened when you were re-appointed?

DE: It was 2000. The arrangement is that when you are appointed initially you're either appointed for a period of six years or, if you take over from somebody else in the middle of their six years, then you first serve the unexpired portion of those six years. And so I was reappointed having been originally appointed in March 1992, my predecessor's term of appointment would have ended in October 1994. I was reappointed in 1994 and again in 2000.

On both occasions, I was simply telephoned by the legal advisor in the Foreign Office and asked if I would like to continue. I think the underlying reason was that Lord Chancellor Mackay⁸ I think expressed the view that it was constitutionally improper not to reappoint a sitting judge if that judge was within retirement age. Other member states do, in fact, change their judge almost every six years, but in Britain I think the tradition is that if you are under retirement age then you will be reappointed, so it was almost a formality.

⁸ James Mackay, Baron Mackay of Clashfern, U.K. Lord Chancellor from 1987-1997.

DS: Now returning to the early 1990s, you were sworn in as a member of the European Court of Justice – which has been called “probably the most influential international legal body in existence”⁹ – on 10 March 1992.

Do you recall what happened on your first day on the European Court of Justice?

DE: My recollection is that either on that day or the immediately following day, I was actually acting as judge rapporteur in a hearing in a case which had been started by my predecessor. So, I was pitched in at the deep end. I didn’t have any time, as it were, to learn the job before doing it. But I had been in the Court of First Instance, and so I was aware of how things worked in Luxembourg.

DS: One of your predecessors as the U.K.’s member on the European Court of Justice was Lord Mackenzie-Stuart,¹⁰ who had served on the Court beginning when the U.K. joined the Community in the early 1970s.

At his death in the spring of 2000, *The Independent* wrote, and I think you’re familiar with, “It was Mackenzie-Stuart’s good-humored readiness, not simply to accept that other judges saw things from a different point of view, but to learn why they did so, that earned him the trust and respect of his colleagues and led to his election as President of the Court – an office he neither sought nor wanted.”¹¹

How well did you know Lord Mackenzie-Stuart and what do you remember about him?

DE: I knew Lord Mackenzie-Stuart extremely well because when I joined the Scottish bar in 1962, Lord Mackenzie-Stuart was practicing as a QC at the Scottish bar and we did many cases together when he was a QC and I was a junior advocate. So I knew him extremely well at the bar in Scotland and had kept in touch with him over the years when he was in Luxembourg.

I think, indeed, that I was I who wrote the obituary in *The Independent* that you quoted. It is certainly true, I think, that when he went to Luxembourg in 1973, he was the first, so to speak, common law judge in the Court of Justice.

⁹ Karen J. Alter, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE*, Oxford University Press (2002), 229.

¹⁰ Alexander John Mackenzie-Stuart was born in 1924. In 1951, he was admitted as an Advocate at the Scottish Bar and was appointed Queen’s Counsel in 1963. In 1972, he became a Judge of the Court of Session, the Supreme Court of Scotland. He was a Judge at the Court of Justice between 9 January 1973 and 6 October 1988 and President of the Court from 10 April 1984 to 6 October 1988. In recognition of his contribution to the work of the Court of Justice and to European Community law he was created a Baron of the United Kingdom with the title of Lord Mackenzie-Stuart of Dean. He died on 1 April 2000.

¹¹ “Obituary: Lord Mackenzie-Stuart,” *THE INDEPENDENT*, 10 April 2000, 6.

There was considerable suspicion as to what would happen when Britain joined the European Community and whether this would be a cuckoo in the nest. I think one of his great achievements was to ensure that the British jurists were accepted as part of the system and not as a cuckoo in the nest.

DS: Now I'd like to ask you some general questions about the work of the Court of Justice.

You have written, "It is, in almost every respect, the greatest strength of the Court of Justice as a law-creator that it brings together in a single working institution representatives of nearly all the classical legal systems of Europe."¹²

Can you elaborate on your thinking?

DE: Yes. I think the point really is that it is a multinational institution. It's a multilingual institution. But more particularly, as I said in that quote, it brings together the classical legal traditions of Europe.

That means that for the first time, it's not simply a matter of studying each others' systems as a matter of interest – historical interest or comparative law interest – it does mean that the European Community law system has to take account of the fact that the legal traditions of the member states are very different and to try and find ways in which a commonly acceptable solution can be found to many problems, especially the procedural problems.

The system has to be capable of ensuring that the law will be applied in the same way in all the member states, even if the member states have different systems or application of the law.

DS: In a 1979, while you were president of the Council of Bars and Law Societies of the European Community,¹³ you addressed the National Conference of the Law Society of England and Wales.¹⁴ In your remarks you said, "In Community law the intention is more important than the literal meaning of the words which are used; and in an analysis of whether a particular act is or is not in conformity with Community law, the reality of what is happening is more important than any theoretical legal analysis. The Court will ask the question in relation to a provision of national law, 'What is

¹² [David Edward, "How the Court of Justice Works," EUROPEAN LAW REVIEW 1995, 20\(6\), 539.](#)

¹³ Created in 1960, the Council of Bars and Law Societies of Europe (CCBE) is the officially recognised representative organisation for the legal profession in the European Union and the European Economic Area. See the Council of Bars and Law Societies of Europe at <http://www.ccbe.org/>.

¹⁴ The Law Society of England and Wales is the regulatory and representative body for solicitors in England and Wales; see <http://www.lawsociety.org.uk/home.law>.

its practical effect? Does it obstruct the aims of the Treaty, even though the precise words of the Treaty don't appear to apply?"¹⁵

What did you mean by this and is it still the case?

DE: I think you have to remember that that quotation comes from something I said in 1979 and we, at that stage, had only been in the European Community for six years.

The problem was, at that time, that British lawyers were arguing very much on the basis of a strict interpretation of the words of the Treaty in the English language, not realizing that the Treaty had, in fact, been written in other languages and only translated into English at the time we joined. That was the first problem.

And then the other problem was applying the apparently strict terms of the treaty, then they asked whether, for example, British legislation was in terms compatible with the strict terms of the Treaty.

What I was trying to emphasize was that the interpretation of the Treaty is interpretation in relation to its purpose as well as its strict wording. It's not enough simply to ask whether a national measure is, formally speaking, apparently compatible with the terms of the Treaty, but one has to go on and ask, "What is the effect of this national measure; how does it actually work." That is the issue, does the way in which that national measure works, is that compatible with Community law or not, rather than a strictly textual analysis.

DS: I'd like to ask you now about some specific concepts that are part of EU law.

The early years of the European Court of Justice have been described as a "heroic period." In this regard, you have written that in the 1960s, the European Court of Justice "fashioned two essential constitutional tools of an integrated economy with the principles of primacy and direct effect: Community law, where it applies, takes precedence over national law and, where it creates a clear and unambiguous obligation, national courts must enforce it."¹⁶

Can you elaborate on these tools and how they have evolved over time?

DE: What one has to remember is that at the time when the European Economic Community started, it wasn't certain whether that particular treaty was

¹⁵ [David Edward, "The challenge of the EEC," JOURNAL OF THE LAW SOCIETY OF SCOTLAND, vol. 25/1980, p. 146, 147.](#)

¹⁶ [David A.O. Edward, "What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration," 5 COLUMBIA JOURNAL OF EUROPEAN LAW 1 \(1999\), p. 9.](#)

simply a treaty between states, creating obligations between states or whether it also reached down into the national legal systems and created enforceable rights and obligations within the national legal system, enforceable by the national courts.

The Coal and Steel Treaty¹⁷ had been slightly different because it was, from the beginning, intended to create supranational control of the coal and steel industries, very limited. But the European Economic Community Treaty¹⁸ was a much wider treaty, but correspondingly less supranational.

The question arose at a very early stage – did the Economic Community Treaty create rights and obligations enforceable in the national courts? This was a question which the Court of Justice had to decide in 1963. And again in 1964, the question arose as to whether member states could legislate in a manner inconsistent with their obligations under the treaties.

Essentially, what the Court of Justice did in two cases in 1963 and 1964, was to emphasize that by the Treaties, the member states had undertaken certain obligations, not only towards each other but also towards their citizens, and that these obligations were enforceable not only in international law, but also by the courts of the member states where it was clear that a Community law obligation existed. That was the underlying thinking of the Court at that time. It was on that foundation that the enforceability of Community law was built.

DS: There are several other key concepts I'd like to ask about:

In the late 1970s, the European Court of Justice took a decisive step to ensure the free movement of goods in the case known as *Cassis de Dijon*¹⁹ – a case involving a French liqueur. The European Court of Justice said in part, “It...appears...that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Art. 30 [now Art. 28] of the Treaty. There is therefore

¹⁷ The European Coal and Steel Community (ECSC), also known as the Treaty of Paris, was signed 18 April 1951 in Paris and entered into force 23 July 1952. The treaty was concluded for a period of 50 years from the date it entered into force. The signatory governments were Belgium, France, Italy, Luxembourg, the Netherlands, and the German Federal Republic (i.e., West Germany). Under the ECSC, which was Europe's first supranational organization, the signatory countries' coal and steel industries were regulated by the High Authority. For the full-text of the ECSC Treaty, see http://www.europa.eu.int/scadplus/treaties/ecsc_en.htm.

¹⁸ The European Economic Community Treaty, also known as the Treaty of Rome, was signed 25 March 1957 and entered into force 1 January 1958. The signatory countries were Belgium, France, Italy, Luxembourg, the Netherlands, and the German Federal Republic (i.e., West Germany). For the full-text of the EEC Treaty, see http://www.europa.eu.int/scadplus/treaties/eec_en.htm.

¹⁹ [Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein](#) [1979] ECR 649, 3 CMLR 494.

no valid reason why, provided that they have been lawfully produced and marketed in one Member State, alcoholic beverages should not be introduced into any other Member States.”²⁰

You have said that the European Court of Justice’s decision in *Cassis* “...formed the cornerstone of the Single Market programme...”²¹

What did you mean by that?

DE: The problem that arose in *Cassis de Dijon* was that the German alcohol law prevented the import of a liqueur called Cassis de Dijon from France because the alcoholic strength of the liqueur was different from the alcoholic strength of liqueur prescribed by German law. The oddity was that it was actually under the alcoholic strength prescribed by German law for a drink of that kind.

The Germans maintained that their alcohol laws were in existence for the protection of public health. The question was, could Germany prevent Cassis de Dijon from being sold in Germany on the basis of an alcohol law which was said to be based on grounds of public health?

You had a conflict between the general principle of free movement of goods and the principle that member states are entitled to protect their own citizens and make legislation for the protection of public health. That was the underlying tension.

What the Court of Justice said was essentially two things. First of all that member states were entitled to take measures to protect public health, but they must not go further than was necessary for the protection of public health.

Secondly, in considering whether it was necessary to exclude goods from other countries, they had to take into account the fact that other countries also had laws for the protection of public health. Basically, therefore, they had to rely – each country had to rely – on the fact that other countries took similar measures for similar purposes. That was the basis of the doctrine of mutual recognition or mutual trust.

So, *Cassis de Dijon* essentially said in considering whether you can use your own legislation to keep out goods from another country, first of all you’ve got to consider whether that other country also has similar rules which serve the same purpose and achieve the same result. And secondly, you have to

²⁰ [Case 120/78 Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein](#) [1979] ECR 649, 3 CMLR 494.

²¹ [David Edward, “The European Court of Justice – Friend or Foe?” Address before the European-Atlantic Group, 18 July 1996.](#)

consider whether your own rules need to be applied in this way, in this situation.

It was essentially those underlying ideas that led to the 1992 programme²² because it meant that the legislation, which was necessary to complete the internal market, didn't have to go through the process of harmonizing every single rule on every single type of goods throughout the Community because it would never have been finished if that had been so.

DS: In the early 1990s, the European Court of Justice established the principle of state liability for breach of European Community law.

In the case of *Francovich and Bonifaci v. Italy*,²³ which Professor Alec Stone Sweet has characterized as the “most spectacular development”²⁴ in the field of EU remedies, the European Court of Justice said, “It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of a Community law for which a Member State can be held responsible... It follows that the principle of state liability for harm caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.”²⁵

Would you mind commenting on the significance of this decision and how it has been taken forward by the European Court of Justice?

DE: I think it forms, if you like, the third leg of a tripod of the basis of European Community law and the enforceability of European Community law beginning with the notion of primacy that where there is a conflict between a Community rule and a national rule, then the national court must apply the Community rule.

Secondly, the rule of direct effect, that where the rules of Community law are clear and unambiguous then the national courts must enforce them.

But thirdly, if a member state fails to comply with its obligations under the Treaties and where harm has been caused to an individual or a company, in consequence of the failure to comply with the Community rule, then the

²² The so-called “1992 Programme” was the result of the Single European Act, which served as “a political commitment” to remove barriers that were preventing the realisation of the completion of the internal market. Paul Craig and Gráinne de Búrca, *EU LAW: TEXT, CASES AND MATERIALS 3RD EDITION*, Oxford University Press (2003), p. 19.

²³ [Cases C-6 & 9/90](#) *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

²⁴ Alec Stone Sweet and Thomas Brunell, *THE JUDICIAL CONSTRUCTION OF EUROPE*, Oxford University Press (2004), 95.

²⁵ [Cases C-6 & 9/90](#) *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

member state has to compensate the injured party. That is, as it were, a means of ensuring that member states not only are under an obligation to comply with Community law, but that they are liable to a sanction if they don't. The sanction, the effective sanction is actually having to pay damages to anybody who is injured as a result of the failure to comply.

The idea that the member states might have to pay damages had been foreshadowed in a much earlier case under the Coal and Steel Treaty. So it wasn't a wholly new idea although at the time of the *Francovich* decision it seemed to burst on the world as if it was a wholly new idea.

But it really follows from the, in a sense, the same analysis as one has in the civil law. If two parties enter into a contract then, in the first place, they are bound by the terms of the contract. Secondly they cannot act inconsistently with the terms of the contract. And thirdly, if they don't comply with the terms of the contract and the other party is injured as a result, then they have to pay damages by way of compensation. In a sense, *Francovich* simply brings together the ideas underlying the fact that the Treaties are international contracts between states.

DS: Now, has there been some expansion of state liability over the course of the last decade?

DE: It's not so much an expansion of the idea of state liability, but a more close definition of the circumstances in which state liability arises. There have been a series of cases on that issue, but I wouldn't say that it has led to an expansion so much as a clearer definition.

At the stage of *Francovich*, it was very much the first statement of the principle, but once one has stated the principle then it's necessary to go further and explain how that principle applies in particular circumstances, or doesn't apply.

DS: You have said that the subsidiarity principle should not be carried too far and have warned that if the European Union wants to create a real internal market with free movement of people, then care must be taken on the extent to which member states should be able to legislate in ways that could create barriers to this free movement. "There are tensions that exist and we have to find ways to modulate them and balance interests," you've been quoted as saying.²⁶

Moreover, Lord Mackenzie-Stuart wrote in 1992 that, "The court's task is, in

²⁶ Scottish Executive, Our Future in Europe, Scotland Week 9-17 October 2001 at http://europa.eu.int/constitution/futurum/documents/other/oth101001_en.pdf, p.15.

any event, rendered almost impossible by the definition of subsidiarity given in the Maastricht Treaty. I have described the chosen formula as ‘gobbledygook,’ and I see no reason to change my view.”²⁷

How has the principle of subsidiarity been developed by the European Court of Justice?

DE: In the first place, let’s be clear what “subsidiarity” means. The principle of subsidiarity was, I think, first defined by the Pope in the 1930s as being the principle that where authorities act in such a way as to affect the citizen, the decision should be taken as close to the citizen as possible. In other words, decisions should be taken locally if they can be taken locally; they should be taken regionally if they can be taken regionally; they should be taken nationally if they can be taken nationally.

The principle as enunciated in the Treaty of Maastricht²⁸ really is that the Community of the European Union should only act when it is clear that it is necessary for the Union to act and the member states can’t achieve the same effects on their own. That’s what it’s about.

Lord Mackenzie-Stuart had a very strong view which I, in the light of events, don’t really share. He felt that it was what he called “gobbledygook.” I think it’s a fairly good principle that if the European Union is going to act there should be a clear justification for doing so, and it should be clear that one can’t leave decisions to be taken by the member states.

The problem in the context of the European Union is that if you are going to achieve an internal market in a world where there are very wide differences of law and legal systems, it’s not always easy to be clear when it is necessary to find a solution for the whole of the European Union – then 15 states, now 25 – overriding the possibility for the national parliaments to make their own rules because to the extent that national rules differ there may be, in practice, a barrier to free movement of goods, persons, services or capital. It’s easy enough to announce the principle of subsidiarity, it’s much less easy to say when it should apply.

In fact, the Court of Justice has, in certain respects, applied the principle of subsidiarity without expressly saying that that is the principle it is applying. More often, in the context of proportionality, considering the appropriateness

²⁷ Lord Mackenzie-Stuart, “A flaw at the heart of the Maastricht Treaty,” THE TIMES (London), 11 December 1992 (accessed via Lexis-Nexis).

²⁸ The Treaty of Maastricht, also known as the Treaty on European Union, was signed in the Dutch city of Maastricht on 7 February 1992. It entered into force on 1 November 1993. It is also known as the Treaty on European Union. For the full-text of the treaty, see http://www.europa.eu.int/scadplus/treaties/maastricht_en.htm.

of a national measure, the Court asks the question: Does this measure serve a legitimate purpose; is it objectively necessary to achieve that purpose; and is it proportionate? And in a sense, that is an application, in other words, of the principle of subsidiarity: Do we need to interfere here or do we not?

Although, in fact, the Court of Justice has not on very many occasions had to consider the principle of subsidiarity as such, it has in a number of cases done what the principle of subsidiarity expects to be done, namely to consider whether the member states should be free to legislate or whether the legislation they adopt – or the administrative laws they adopt – are such as to create an unacceptable barrier to free movement.

DS: Judge Edward, now I'd like to move to competition law and your role in the development of the concept of collective dominance.

Mark Clough, a partner and solicitor advocate at Ashurst Morris Crisp, has written that you “launched the debate about the definition of the concept of collective dominance under Art. 82 EC^[29] when the CFI confirmed the principle of collective dominance in its 1992 judgment in the *Flat Glass*³⁰ case. More recently, David Edward was the Judge Rapporteur in the leading judgment of the ECJ on collective dominance under Art. 82 EC in the *Cewal*³¹ case.”³²

Can you tell us about these judgments and the significance of collective dominance under Art. 82?

DE: The idea of collective dominance arises in the context of Art. 82 and Art. 82 outlaws abuse of a dominant position. Abuse of a dominant position means that a corporation, an undertaking, becomes so powerful in the marketplace, that it's able to act independently of its competitors and is able, by its conduct, to place its competitors at such a disadvantage that they are not able

²⁹ European Community Treaty Art. 82 provides, “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. ¶Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

³⁰ Joined Cases [T-68/89](#), T-77/89 and T-78/89 *Società Italiano Vetro SpA v. Commission* [1992] ECR II-1403.

³¹ Joined Cases [C-395/96 P](#) and [C-396/96 P](#) *Compagnie Maritime Belge SA, Compagnie Maritime Belge SA and Safra – Lines A/S v. Commission* [2002] ECR I-1365.

³² Mark Clough, “Collective Dominance – The Contribution of the Community Courts,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 161.

to compete with it. That's what abuse of a dominant position means in short terms.

The problem of collective dominance arises where you have a group of corporations who, together, are so powerful in the marketplace that they can rig the market for themselves, for their own benefit, and exclude competition or make competition exceptionally difficult for those who want to get in on the market.

There was a very long and sometimes heated debate as to whether there could be a situation of collective dominance if the undertakings involved were, formally speaking, were independent of each other. There wasn't any doubt that a group of companies could be dominant, hold a dominant position, and that was the group entity idea, that although the companies were separate companies, nonetheless they belonged to a group of companies and that that group of companies could be dominant. But the other question was whether a group of independent companies, with no common shareholding or management, whether they could collectively be dominant.

The *Flat Glass* case was brought by the Commission against a group of producers of flat glass. The Commission argued that collectively those producers, who were not connected by shareholding or management, the Commission argued that they were collectively dominant in the market. The Court of First Instance actually held that they were not and, in fact, exonerated one of the companies from the allegations of market abuse that was alleged against them.

But the Court of First Instance did say, if you like as an obiter dictum, that the notion of collective dominance could be applied where the companies concerned, even if independent, acted in such a way together on the market as to dominate it. That situation arose in the *Cewal* case, where several companies, I can't remember how many – I think there were two, perhaps three – shipping companies, were dominating the market in maritime transport from Africa and they were adjusting their freight charges in such a way as to exclude competition from another freight company. There, the Court of Justice held that there was a situation of collective dominance.

My view is that collective dominance is a situation that you can recognize when you see it. You look at the facts, and see whether in fact these companies are acting together in such a way as to dominate the market and exclude competition. But it depends not on a theoretical analysis, but much more on a practical analysis of what the economic situation is in the particular market.

DS: The Court of Justice's method of interpretation has been a matter of

considerable interest. Francis Jacobs,³³ a former Advocate General, has remarked that, “It is well known that the Court often relies on ‘teleological’ approach, seeking to give effect to the object and purpose of the measure. It relies often also on the context of the provision, seeking to ensure that the interpretation makes sense in the scheme of the piece of legislation as a whole, and where necessary in the scheme of European law more generally.”³⁴

Can you elaborate on the teleological and contextual approaches to interpretation and perhaps give some examples of where these approaches have been used?

DE: I think it’s important to stress that what is called the teleological approach is not something fundamentally different from the normal approach to interpretation.

The strict construction approach is an approach which was adopted in the common law because the courts felt that it was their obligation to protect the citizen against any intrusion on property rights, especially in the matter of taxation unless the legislator had very clearly legislated in a way that permitted the state to interfere in that way and, in particular to permit the state to levy taxes. And this was the courts seeing themselves as the protector of the citizen in particular in relation to rights of property, but also in relation to measures affecting the liberty of the subject. You don’t affect the liberty of the subject unless by clear words.

Now on the other hand the courts in the common law system when interpreting a contract have always interpreted not simply the words of the clause that happens to be in consideration, but that clause in the context of the contract as a whole. And if the contracting parties have clearly set out the purpose for which they are entering into the contract, then the court takes that into account.

So there is not a true dichotomy between the two methods of interpretation so much as that one method of interpretation is more appropriate in one context than in another.

In the Community law context, as I’ve said, what we’re talking about is international contracts. The Treaties are international contracts between states. And those Treaties set out very clearly what is the purpose behind them. That purpose underlies not only the words of the Treaty but also all the legislation that is made under the Treaties.

³³ Francis G. Jacobs served as Advocate General from 7 October 1988 to 10 January 2006.

³⁴ 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), pp. 297, 298.

Therefore it's perfectly natural that the Court should consider – when considering either the interpretation of words of the Treaty or considering the interpretation of the legislation made under the Treaties – it's perfectly natural the courts should consider what the purpose of all this is. And that is what the teleological approach is.

On the other hand, as one of the very earliest advocates general said, if the words are clear you don't need to interpret them. You simply apply them. So if the words are clear – and they must be clear not only in one language but generally if the words are clear – then the Court simply applies those words. If the words need to be interpreted, then the Court takes account of the purpose lying behind the Treaty provision or the words of the legislation.

DS: Now I'd like to ask you about the relationship between the European Court of Justice and the member state courts, a relationship that has been very important over the history of the European Union.

In 1995 you wrote, "It is one of the strengths of the Community legal system that there is no separate 'federal' court structure (which demonstrates that subsidiarity did not begin with Maastricht). The courts of the Member States are the Community courts of general jurisdiction, the role of the Court of Justice being complementary, rather than hierarchically superior."³⁵

And then in 2002 you wrote, "I do believe that underlying the success of Community law as a system is the willing acceptance of the Court's judgments by all (or perhaps virtually all) national judges in all (or perhaps virtually all) member states – the willing acceptance that the judgments of the Court provide appropriate legal criteria in the light of which to judge the case before them...It may seem paradoxical to say that the national courts are the powerhouse of Community law. Surely it is the Court of Justice that is the powerhouse. But there is good reason why it is truly the national courts that generate the electricity."³⁶

Can you elaborate on these thoughts?

DE: I think that a number of strands go together. Talking about the quotations at the end, first of all, what I was considering in that particular piece was the question whether the problems of Community law are generated, the issues that arise in Community law, are generated in the national courts or in the Court of Justice.

³⁵ [David Edward, "How the Court of Justice Works," EUROPEAN LAW REVIEW 1995, 20\(6\), p. 539.](#)

³⁶ [David Edward, "National Courts – The Powerhouse of Community Law," THE CAMBRIDGE YEARBOOK OF EUROPEAN LAW, vol. 5 \(2002-2003\), p. 1, at 3.](#)

What I tried to argue was that in fact the Court of Justice only judges cases that come to it because a problem has arisen in a national court, and therefore the electricity that drives the Community law system is actually generated in the national courts and not in the Court of Justice. The Court of Justice doesn't deal with cases until they arrive there and they arrive there because an issue has arisen in the national courts which needs to be decided by the Court of Justice.

What I was trying to argue in the other quotes, was that the success of the Community law system does depend on the fact that the Court of Justice is not hierarchically superior to the national courts. It is not, in that sense, a supreme court. And indeed, there isn't a federal structure of courts superior to the state court system.

The national courts are the courts of general jurisdiction for Community law apart from the relatively limited class of cases that can be litigated directly in the Court of Justice or before the Court of First Instance. All other issues of Community law must be litigated in the national courts. Their decisions are not subject to appeal to the Court of Justice. The relationship is simply that if the national court requires guidance as to the law then it asks the Court of Justice to rule on the law to be applied.

The situation may have to change, I suppose, in the future, but at least up to now it seems to me that the success of the Community law system does depend, and has depended on the fact that the national courts don't feel that they are hierarchically inferior to the Court of Justice; that they are the courts that take the decisions and they look to the Court of Justice for guidance rather than look at it as an appeal court which is going to overrule what they do.

DS: On a related topic, Professor Karen Alter has argued that, "It is hard to underestimate how much the preliminary ruling mechanism [EC Treaty Art. 234³⁷] has mattered in developing the ECJ's web of legal precedent [and] building legitimacy and support for the ECJ..."³⁸ Similarly, it has been written by Professor Robert Lane, "It is Art. 234, in tandem with direct effect

³⁷ European Community Treaty Art. 234 provides, "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. ¶Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgment, request the Court of Justice to give a ruling thereon. ¶Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

³⁸ Karen J. Alter, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE*, Oxford University Press (2002), p. 230.

created through the medium of Art. 234, which makes the national judge a Community judge and all national courts Community courts of first instance.”³⁹

Can you elaborate on these observations?

DE: I think they’re just making the point in different ways that I’ve made in answer to your previous question. I think the point really is that the Court of Justice exists to guide the national courts rather than to control them. That respect for the autonomy of the national legal systems is one of the reasons why the Community system has worked as well as it has and why the national courts have not held themselves to be in conflict with the Community court.

DS: Now I’d like to focus on your 15 years in Luxembourg from 1989 to 2004, which you have described as a “truly historic period.”⁴⁰

What events in particular were historic and what was their impact.

DE: I think it’s necessary to consider what happened immediately before and what happened during the 1990s.

During the period up to 1985 and the passing of the Single European Act, there had been a period when the legislative process of the European Community had virtually come to a halt because of the Luxembourg Compromise. There certainly was some legislation, but not a lot of it and the consequence of that was that the internal market, the common market, envisaged by the original Treaty, simply was not being brought into effect. It fell to the Court, therefore, through a series of cases, *Reyners*⁴¹ and *Van*

³⁹ Robert Lane, “Article 234: A Few Rough Edges Still,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 327.

⁴⁰ David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

⁴¹ [Case 2/74 Reyners v. Belgium](#) [1974] ECR 631. In explaining this case, two long-time Court of Justice observers have written, “In this case the Court appeared determined that, despite the slow pace of harmonization of national laws in the field of free movement and establishment of self-employed persons, the Treaty could be directly invoked by individuals in order to challenge obvious instances of nationality discrimination against them. The basic principle of non-discrimination was deemed to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved. Whereas many cases on direct effect concern the enforcement of obligations against a Member State which has failed properly to implement Community requirements..., the *Reyners* case shows the Court employing the direct-effect concept to compensate for insufficient action on the part of the *Community* legislative institutions.” Paul Craig and Gráinne de Búrca, *EU LAW: TEXT, CASES, AND MATERIALS* 3RD EDITION, Oxford University Press (2003), p. 187.

*Binsbergen*⁴² in the field of establishment and services, and *Cassis de Dijon*⁴³ really to fill the gap left by the legislator.

The Single European Act was founded, in certain respects, on the jurisprudence of the Court of Justice. The Court of Justice had created the context in which the 1992 process became possible and provided the legal infrastructure on which it became possible. So that was the context up to 1985.

And then there was a period of relative euphoria as the 1992 programme was developed, culminating with the fall of the Berlin Wall. Everybody expected everything to be – that a brave new world was beginning. After the Maastricht Treaty, it became clear that there wasn't a brave new world beginning and there was a new wave of Euroskepticism.

At the same time, the Maastricht Treaty had reinforced the idea of subsidiarity – it didn't introduce the idea of subsidiarity really, but reinforced that idea – the idea that the Community ought to do less and interfere less with the autonomy of the member states. And the Maastricht Treaty introduced, or reinforced, a number of conflicting political imperatives, notably protection of the environment which, in certain respects, is in conflict with the principle of free movement. Environmental protection is one reason for restricting free movement.

So the Court was faced with a new set of priorities set by the treaty makers. The, if you like, integrationist agenda of the 1957 Treaty⁴⁴ was moderated by the Maastricht Treaty. To some extent further moderated by Amsterdam and Nice. The Court was faced with the problem of reconciling the well established principles of free movement with the new principles introduced by Maastricht and subsequently that was one element.

In addition, the very large volume of legislation which followed the 1992 programme had to be interpreted. In many cases the legislator had adopted a form of words which was deliberately ambiguous, leaving it to the Court to decide how to apply the words. Simply because the member states, when legislating, couldn't agree on the solution so the words were left ambiguous.

⁴² [Case 33/74](#) *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299. In *Van Binsbergen* the Court held that in a legal proceeding the right to represent parties could not be restricted by the Netherlands to only persons established in the country. The freedom to provide services, the Court said, prohibited all restrictions "imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to person established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service." *Van Binsbergen*, para. 10.

⁴³ [Case 120/78](#) *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, 3 CMLR 494.

⁴⁴ European Economic Community Treaty also known as the Treaty of Rome.

The Court was faced during the 1990s with a quite different set of problems from the set of problems with which the Court had been faced when the legislative machinery of the Community wasn't working at all and it was in that sense that the Court had to develop new criteria, new techniques to deal with the new problems.

That's the reason why I thought it is an historic period, but it was a different kind of historic period from what has been called the "heroic period" of the early days, which was actually, in many ways the legal problems were simpler in those days than they are now.

DS: Judge, I suggest we that we take a break at this point and we'll come back and reconvene and finish up this session in just a few minutes.

DS: Judge, we'll pick up where we left off at the end of part A. You have said that particularly in the mid-1990s, "The Court was far from neglected by the powers that be and the mass media."⁴⁵

What did you mean by that?

DE: I was really picking up on something that had been said very much earlier by, I think it was Professor Eric Stein at Michigan Law School who said that the Court lived in the far away fairyland Duchy of Luxembourg and ignored by the media and the powers that be.⁴⁶

I was saying that by the 1990s it was far from ignored by the media or the powers that be and that was simply a reflection of the problems that arose in the mid-1990s particularly in Britain because of the great wave of Euroskepticism and the identification by some people of the Court as the great enemy of the people.

So that was really what I was picking up on – that we were no longer able to live in an ivory tower, we were down in the forum with everybody else.

DS: You have written that the problems the Court of Justice faced in the 1990s were different from those of the so-called heroic period and you've drawn a number of conclusions that I'd like to ask you more specifically about.

⁴⁵ David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

⁴⁶ Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *75 AMERICAN JOURNAL OF INTERNATIONAL LAW* 1 (1981); Prof. Stein wrote, "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe." Stein, p. 1.

First, you have written that, “Repeatedly, in the case law of the ECJ during the past decade, emphasis is placed on the obligations of the member states and of the institutions, vis-à-vis each other and also towards those who are affected by what they do.”⁴⁷

What was the significance of this emphasis?

DE: I think the significance of the emphasis was particularly in evolution of the doctrine of direct effect but also the doctrine of primacy and the doctrine of state liability.

The problem had been that while all these doctrines were accepted the rationale of the doctrines wasn't very clear and it was difficult to know how they should be applied. And this arose for example in a series of cases, of which one was *Kraaijeveld*,⁴⁸ the Dutch dikes case. But there were other cases about direct effect of directives and it was necessary to step back from the more recent case law and go back to the beginning to emphasise what were the origins of these doctrines in what I've described as the reciprocal obligations of the member states resulting from their contract in the Treaties.

It was by going back to those original ideas that the Court was able to produce a coherent rationale for the idea of direct effect of directives, obligations for example – the obligations of member states during the period between the time when a directive is adopted and the time when a directive has to – the deadline for putting a directive into effect.

DS: Next, you have written that, “In at least three important respects, the Court had to refine the criteria to be used in applying the principles of Community law. First, the basis of state liability for breach of Community law appeared to be different from that on which the Community institutions could be held liable for the consequences of unlawful decisions on their part. This was

⁴⁷ David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

⁴⁸ [Case C-72/95 Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland](#) [1996] ECR I-5403. In “[Direct Effect: Myth, Mess or Mystery](#)”, in PRINSSSEN & SCHRAUWEN (EDS.) [DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE](#), Europa Law Publishing, 2002, pp. 3-13, Judge Edward wrote, “In *Kraaijeveld*...the issue was whether the claimant could rely on the directive to ensure that, before a dyke was constructed which would prevent their access to the water, its environmental impact should be assessed. The consequence of the assessment might or might not be that the dyke would be constructed blocking their access to the water. What mattered was that the procedural obligation be complied with. Then, and only then, would the substantive question arise whether the dyke could be built or not. ¶[The Court's answer [...was] that there may be circumstances in which a state measure may be declared inapplicable without going so far as to secure for the private individual the exact legal position which he would have had if the State had taken the correct positive measures for performance of its obligation.”

illogical and a common basis of liability had to be established.”⁴⁹

How did the Court of Justice go about addressing this issue?

DE: To go back the problem was that the idea of Community liability had been developed during the 1960s, 1970s, particularly during the 1970s, the circumstances in which an individual or a corporation could look to the Community for reparation for damage caused by an unlawful act and the Court had put together a series of criteria by which to determine whether the Community was liable for damages so that was one aspect of the matter. The other was following *Francovich*,⁵⁰ the development of the idea of state liability for breach of Community law.

What was felt was that it was illogical that the criteria developed for Community liability should be different from the criteria for state liability. What was necessary in the cases, for example, following *Brasserie du Pêcheur*⁵¹ and so on, what we had to do was to bring together the notions of state liability and Community liability and establish common criteria for both.

DS: Third, you have said, “[W]hile it had been accepted that the member states retain their autonomy in matters of procedure, it became necessary to define the limits of that authority.”⁵²

In what way did the Court of Justice define the limits of that authority?

DE: The original idea following from the fact that the courts of the member states are the Community courts of general jurisdiction, the Court of Justice had proceeded on the assumption that each member state had total control over its own systems of procedure and that’s common sense because the procedural systems of the member states differ very much; they proceed on the basis of the underlying assumptions which are not always the same as between them and it would not be for the court to tell the member states how to run their own legal systems.

⁴⁹ David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

⁵⁰ [Cases C-6 & 9/90 *Francovich & Bonifaci v. Italy*](#) [1991] ECR I-5357.

⁵¹ [Case C-46/93 *Brasserie du Pêcheur SA v. Germany*](#) [1996] ECR I-1029, [1996] 1CMLR 889. “The Court of Justice made clear [in this case] that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances.” Koen Lenaerts and Piet Van Nuffel in Robert Bray (ed), *CONSTITUTIONAL LAW OF THE EUROPEAN UNION 2ND EDITION*, Thomson Sweet & Maxwell (2005), p. 675.

⁵² David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

On the other hand, the difficulty is that you can't always disassociate procedure from substance and if a situation arises in which the member state procedure makes it impossible for it to comply with Community law, then the member state procedure has to give way. Otherwise a situation will arise in which a member state can avoid its obligations under Community law by invoking the different procedural law difficulties of its own internal legal system and that is clearly an unacceptable situation because it means that Community law will not be uniformly applied.

Really, I think the point I was making was that it became clear in the course of those years that there were circumstances in which although one accepted the autonomy of – the procedural autonomy of the courts of the member states – there were some situations in which the member states could not be allowed to invoke that procedural autonomy as a basis for not complying with a substantive Community obligation. Again, it seems to me to be common sense. One just has to accept that the principle is procedural autonomy, but there must be exceptions.

DS: And finally, you have written that, “The Court refined the principle of proportionality and generalized its application.”⁵³

How did the Court address the matter of proportionality?

DE: Proportionality, as I've said earlier, arose in a series of ways. It arose away back with *Cassis de Dijon*, even before *Cassis de Dijon*. The question is under what was Art. 36, now Art. 30,⁵⁴ the exceptions to the general principle of free movement of goods but also the exceptions of public authority and so on in the field of services and establishment. In those areas the Court had said the principle is free movement but there is this exception, but this exception must be interpreted strictly and limited to its true purpose.

Now, over the years, it became necessary to make that structure more refined. And essentially what the court did was to adopt what I think was a German approach of administrative law, which was called proportionality in the broad sense. Essentially, it involves asking three questions. Does the measure have a legitimate purpose? Is the measure objectively necessary to achieve that purpose? And is it proportionate – does it do only so much as it necessary to achieve that purpose or does it go beyond? That is what has

⁵³ David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

⁵⁴ European Community Treaty Art. 30 provides, “The provisions of Articles 28 and 29 [involving prohibition of quantitative restrictions between member states] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

been called narrow proportionality – the third question.

Really, the Court, increasingly proceeded by asking those three questions to see whether a national measure could be regarded as compatible with the Treaty obligations. Then, as I have said, it generalized the application as a means, for example, of reconciling the demands of environmental protection with the principle of free movement or consumer protection with the principle of free movement or professional discipline with the idea of free movement of the professions.

Essentially, what the Court was doing was adopting a single set of criteria for judging national measures against Treaty obligations.

DS: Judge Edward, you have written that, “Looking back, my chief regret is that the Court did not succeed in putting an end of ‘reverse discrimination’ – the idea that, because we are dealing with international treaties, member states are entitled to treat their own citizens less favourably than they are required to treat the citizens of the other member states.”⁵⁵

Why do you think the Court never ended “reverse discrimination?”

DE: I think because the Court recognized that it was dealing with a situation created by international treaties.

Now, international treaties bind member states as regards to the obligations they owe to each other and that they owe to the citizens of each other. But, international treaties do not normally bind member states in the way they treat their own nationals. That’s an internal question. As the Court has put it “a purely internal question.”

Reverse discrimination is a situation in which, because of the operation of European Community law, a member state is required to treat the citizens of other member states in a particular way but then says, “Well alright I accept that I have to treat the citizens of other member states in that way, but I’m not going to treat my own citizens in that way. I will apply different criteria to my own citizens.”

That is a perfectly acceptable situation in theory when one is talking about international treaties, but I don’t think it is an acceptable situation in the long term in a situation where one is working towards, if you like, a more constitutional law approach to European Community obligations rather than an international law approach.

⁵⁵ David Edward, “Luxembourg in Retrospect: A New Europe in Prospect,” *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

From the point of view of Community law, I don't think it's acceptable that a member state should be entitled to treat its own citizens less favourably than it's bound to treat the citizens of other member states.

DS: Do you have any predictions about the future and whether the Court may remedy this?

DE: It's not a question of remedying it; it's a question of determining the extent to which it is acceptable for such a situation to continue.

Over the years, particularly in the field of treatment of third country nationals – for example, visas, asylum, rights of third country spouses – the Court has increasingly relied on the European Convention on Human Rights⁵⁶ as a basis for limiting the scope for reverse discrimination. But I think the problem remains that we are in a treaty context and even the constitutional treaty did not really put an end to the idea of reverse discrimination.

I'm not in a position to predict when the Court will be able to say when reverse discrimination is no longer possible, but I think that the time will come inevitably because it will be regarded as unacceptable that this situation should continue.

DS: Judge, during your time on the Court of Justice were there any cases in which you were involved that you felt particularly strongly about?

DE: I don't feel that I felt strongly about cases in the sense that I was greatly incensed by the result to which the Court had come and I felt very strongly that the Court should not have come to that result, although there were cases where I did disagree strongly with the majority and, of course as we've discussed, there isn't the possibility of writing dissenting opinions.

In fact, I suppose I signed, in the course of my time there, I signed more than 1,300 judgments and I think the number of cases in which I would actually have felt so strongly that I'd have wanted to write a dissent could be counted on the fingers of two hands. Perhaps 10 or 20 cases. Not because I agreed every time with the result, but I didn't feel so strongly that the result was wrong that I would have wanted to dissent.

⁵⁶ The European Convention on Human Rights was adopted in 1950 by the Council of Europe and came into force in 1953. The convention defines the list of freedoms and rights (e.g., protection against torture and inhuman treatment, the right to life, the right to a fair trial, respect for one's private life, the freedom of expression, thought, conscience, and religion) which member states must guarantee to everyone in their jurisdiction. See <http://www.hri.org/docs/ECHR50.html>.

Actually I think, at any rate, 50 percent of the cases where at the time I would have dissented, I think in about 50 percent of the cases I would have accepted the fact that I was wrong at the time and the majority were right. That's why I personally don't feel particularly strongly about the fact that there is no scope for dissenting opinions.

However, what I did feel strongly about was much more a general feeling that the Court must maintain the position that it maintained right through which was holding the member states – as Lord Mackenzie-Stuart put it – holding the member states to their contract.

It was very often the pleadings of the member states – and sometimes even of the Commission – were to say, “Oh times have changed. We must accept that we can't have total free movement of goods. We can't have total free movement of persons. We can't have total free movement of construction companies providing services in other member states.”

I felt it was very important that the Court should maintain the first principles of the Treaty because, as I've said elsewhere, I believe that the notion of free movement is more than simply an economic advantage. I believe it's a very important aspect of citizens' rights and therefore to be modulating the free movement principles of the Treaty – because it was felt to be inconvenient at the time by the member states – that the Court should not succumb to that. I don't think the Court did succumb to that, but I felt very strongly that it should not do so and always argued in that sense.

DS: Judge, were there any cases in which you were involved that attracted considerable public attention or political reaction?

DE: The one very obvious example in Britain was the working time directive⁵⁷ where the Community had enacted a directive on working time and it had adopted it by qualified majority voting and the United Kingdom was in the minority. There was a challenge before the Court of Justice as to whether the correct legal basis for that directive had been adopted. Whether it was correct to adopt that directive on the ground of the internal market justifying it.

Now the Court said⁵⁸ that the qualified majority basis had been correct and that created a fair row in the United Kingdom and involved me in particular being the subject of a derogatory article in the I think it was the *Mail on Sunday* or the *Daily Mail*, illustrated by a picture of me on my bicycle which was not a particularly flattering picture.

⁵⁷ Working Time Directive 93/104/EC; see <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0104:EN:HTML>.

⁵⁸ [Case C-84/94](#) *United Kingdom v. Council* [1996] ECR I-5755.

That lasted for a while and of course it came in the middle of the Euroskeptical period in the middle of the 1990s. What was surprising for me was not so much the political reaction to particular cases, but the fact that one couldn't predict which cases would give rise to a violent political reaction and which would not.

For example, when the Court decided⁵⁹ that people were entitled to get health care in other member states there was considerable concern expressed by the member states in their pleadings that this was going to upset their health care provisions and actually when the judgment came out, it gave rise to very little reaction at all contrary to one's expectations.

On the other hand, what seemed to be rather self-evident decisions gave rise to rather violent reactions. So it wasn't predictable and it wasn't, to be honest about it, entirely rational. It just depended on the spin that the press or politicians chose to give particular cases at a particular time.

DS: Judge, now I'd like to ask you about the judges with whom you served. During your tenure on the Court of Justice, were there any judges, in particular, who were noteworthy or special?

DE: I wouldn't like to say that any particular judge was noteworthy or special in the sense that they were, as it were, more important than others, but obviously there were some who were rather special characters in their own way.

For example, Judge Mancini,⁶⁰ the Italian judge, was a particularly charismatic kind of character and he always took a particularly personal line – not always a predictable personal line – but one always enjoyed hearing what he was going to say and of course he was a great advocate of the Community.

At the other end of the scale, so to speak, was Judge Joliet,⁶¹ who was the Belgian judge. He wasn't a Euroskeptical, but he was always urging caution in the direction the Court might go and he held very strong opinions and if one was on the other side from him then the argument could sometimes become fierce. It was good humoured in the end, but he was a man of strong opinions.

⁵⁹ [Case C-157/99 *B.S.M Geraets-Smits and Stichting Ziekenfonds VGZ and between H.T.M. Peerbooms and Stichting CZ Grolep Zorgverzekeringen*](#) [2001] ECR I-5473.

⁶⁰ G. Federico Mancini served on the Court of Justice from 1988 until his death on 21 July 1999. In 1982 he joined the Court as an Advocate General. Earlier he held distinguished chairs in law at the universities of Bologna and Rome.

⁶¹ Judge René Joliet, from Belgium, was a member of the Court of Justice from 1984-1995.

Then, there was Judge Kakouris,⁶² who was the Greek judge, who had a rather spiritual view of life and, being Greek, he frequently said, “All you Latin lawyers, you don’t understand about the ultimate purpose of life and you’re too logical. There are times when you just have to say ‘I believe’ and accept that is the basis for taking a decision rather than trying, in a Latin kind of way, to reason it out to the end.” He was rather a special person in his own way, but there were many others.

President Rodriguez Iglesias⁶³ was a person of considerable influence right through the time he was on the Court, from the time when I went there to the time when he retired as president.

I wouldn’t like to do more than illustrate with a few cases – perhaps the other one to mention would be Judge Grévisse⁶⁴ because Judge Grévisse had been very severely injured during the war when he was in the Free French and he’d had a rather colourful past as a member of the Resistance. Really, we didn’t know how colourful his past had been until he died and was buried with full military honors in Les Invalides in Paris.⁶⁵ He was a very modest man and a very kind and nice man although, again, a person with very clear views as what ought to be done

DS: Were there some judges with whom you had a particularly close relationship?

DE: I suppose the answer is that perhaps I had a closer relationship with some than with others, but I must say that on the whole – right through from beginning to end – the relationships were extremely good with all of them as far as I was concerned. I don’t know, they may have found me madly irritating, but at any rate our personal relationships seemed to be extremely good.

⁶² Constantinos Kakouris, 1919-2000, from Greece, was a member of the Court of Justice from 1983-1997. In 2000, on the occasion of Judge Kakouris’ death, Judge Edward wrote, “‘Do you have ghosts in Scotland?’ were the first words addressed to me by Constantinos Kakouris, the Greek judge at the European Court of Justice. ¶|On being assured that we did, he told me of the ghosts, about which he had been told by his grandmother, at Olympia, near Pyrgos in the Peloponnese where he was born. It became clear that his ghosts were not dismal Celtic wraiths, but the lively, and for him still living, inhabitants of the Greek classical landscape. His Greece was not the athletic home-from-home of English public schoolboys but rather, as he said in an address to the students of the University of Athens, a land where ‘classicism and the mystical perspective of the Orthodox live side by side and confront each other.’” David Edward, “Obituary: Judge Constantinos Kakouris,” THE INDEPENDENT, 6 May 2000, p. 7.

⁶³ Gil Carlos Rodriguez Iglesias, from Spain, served as President of the Court of Justice from 1994 to 2003.

⁶⁴ Fernand Grévisse, from France, was a member of the Court of Justice in 1981-1982 and 1988-1994.

⁶⁵ Les Invalides, located in the 7th arrondissement in Paris, is a series of monuments and museums where some of the country’s greatest war heroes are buried.

DS: Did the judges ever talk about politics among yourselves?

DE: Oh yes, yes. We frequently discussed politics – national politics and international politics and European politics. We discussed that. But, we didn't discuss it in the context of the cases. The cases were discussed on their own terms and not in political terms.

DS: Was there much socialisation among the judges?

DE: Oh, quite a lot, but as the Court grew, I suppose there was rather less. I suppose another one that I ought to mention was President Due,⁶⁶ the Danish judge, who was the president when I came to the Court of First Instance and then when I moved to the Court of Justice. He was a very fine man and perhaps one thing to mention about him was that he said to me, I think in about 1989, that discrimination was the most important legal concept of the late 20th century. And I think he was right about that.

That's why I feel so strongly about reverse discrimination. But he said that discrimination was the one fundamental legal concept which had been, so to speak, the invention of the late 20th century.

DS: The work of the Court of Justice has been an on-going source of comment by academics and the media. And I'd like to ask you to comment about a couple of things that have been written.

Professor Renaud Dehousse has stated that, "The ECJ has promoted a pro-integration line for decades."⁶⁷

In 2003, an article in *Business Week* stated, "Tour the low-rise, modern headquarters of the European Court of Justice, located on a wind-swept plateau on the fringes of Luxembourg, and it's hard to believe that this is one of Europe's most dynamic and radical institutions." The article went on to say, "But the court, whose primary purpose is to interpret the meaning of European Union treaties and directives and to make sure they are applied uniformly across the 15-member union, has become a major driver of European economic integration."⁶⁸

What are your thoughts about these assessments of the Court of Justice?

⁶⁶ Ole Due, from Denmark, was a member of the Court of Justice from 1979-1994. He served as president of Court from 1988-1994.

⁶⁷ "Government by judges? The stability pact goes to the European court," *THE ECONOMIST*, Jan. 17, 2004.

⁶⁸ David Fairlamb, "They're Changing the Face of Europe; Judges on the European Court of Justice Have Become Major Players in the Drive for Economic Integration," *BUSINESS WEEK*, Nov. 3, 2003.

DE: I suppose that what underlies them is this idea that the Court had, and has had, all the way through an integrationist agenda as it's put. I think that's wholly misleading because the truth is that the integrationist agenda was in the Treaties.

The Treaties say that the purpose, or the European Economic Community Treaty said the purpose is to achieve an ever closer union amongst the peoples of Europe. Going back to what I said earlier about purposive construction – if the contracting parties have said that their purpose is economic integration, then it's not surprising that the Court, which is interpreting their contract, their agreement, should accept that that is the purpose and adopt an interpretation which is consistent with the purpose rather than inconsistent with the purpose.

So what I say is the Court – insofar as the Court had what could be called an integrationist agenda – it was the agenda that the member states had set for the Court. Perhaps I'd go back to the remark which I quoted earlier from Lord Mackenzie-Stuart that the task of the Court was to hold the member states to their contract. And that is what the Court has tried to do all the way along.

However, having said that, one of the difficulties of the 1990s and why it was an historic period in a different sense, is that the Maastricht Treaty to some extent altered – it didn't alter the terms of the contract – but it altered the tone of the contract by putting greater emphasis on member state autonomy on the principle of subsidiarity and the Court took account of that.

Some people have criticized the Court for what it did during the 1990s and that it became – as I think as one academic said – more subservient to the member states. Well, again, I think that's misleading.

The fact is that the member states said we want our contract to be interpreted with greater regard to the principle of subsidiarity and the Court did no more than accept what they had said, how they wished their contract to be interpreted.

DS: Judge, you retired from the Court of Justice on 7 January 2004 although you could have served until 2006.

What were your reasons for retiring early?

DE: I think there were a number.

In the first place, I'd been there for 14 years and 14 years living abroad, working abroad, working outside your own country, is quite a long time. It's

almost a quarter of a normal life. It's one thing to be living in Luxembourg if you have a home in Paris or Brussels or London because you can travel back and forth fairly quickly. But having a home in Scotland, it's almost a day's journey to get back in both directions. So it wasn't very easy to have one's home in Edinburgh and live in Luxembourg for an extended period.

Secondly, we were beginning to have more and more grandchildren and it was less and less easy to see them when we were living in Luxembourg.

Third consideration was I was nearing the age of 70, which in normal terms is quite beyond the normal retirement age and I was quite interested in doing other things besides being full time as a judge of the Court. By the time I left the work of a judge was really more than a full time job. There were very few evenings when I didn't take work home. And very few weekends when I didn't take work home. So the time for retirement had come, I think.

And, lastly, there was the consideration of enlargement because enlargement was going to come in May 2004, and if I stayed on it meant that I would stay on over the period of enlargement and then, in any event, I would go in 2006, just two years later. My successor⁶⁹ would have to come, as the British judge, into a Court that was quite different and would be the junior judge of 25 judges. It seemed to me to be fairer to my successor that he or she should come to the Court at the time when it was 15 and should be there before the judges from the new member states came. So it seemed to me to be fairer to go at that stage and leave the field clear for my successor to be part of the adaptation of the Court to the new situation.

DS: What do you recall about your last days as a member of the Court of Justice?

DE: What I recall most – two things I recall.

First of all there was a party just before I left to which I invited the members of the staff of the court who had been particularly helpful. And to my astonishment I was presented with a very fine old view of Luxembourg to which the members of the staff of the Court had contributed. I don't remember any other occasion when a member of the Court was presented with a gift to which the members of the staff had voluntarily contributed. That struck me very forcibly, the extent to which I seemed to have established a good working relationship with the members of the staff.

The other thing which struck me was the sense of, almost a sense of loss, in losing the companionship of the people with whom I had been working, both the members of the Court and most particularly the secretaries with whom I had worked over the years.

⁶⁹ Konrad Hermann Theodor Schiemann joined the Court of Justice on 8 January 2004.

I think I was perhaps more affected by the process of leaving than I had expected.

DS: Have you had any regrets that you retired early?

DE: No. I think the time had come.

I've developed other interests back here. I've never been idle since I left. There's a time for everything and the time for leaving Luxembourg had come.

Obviously, I would have been interested to be there during the time of enlargement. I would have probably enjoyed helping the new judges to settle in. But that, as I say, was a reason why I thought it was better to go and let my successor be part of that.

DS: At a ceremony at Buckingham Palace you were conferred a Knights Commander of St. Michael and St. George⁷⁰ in 2004 by Queen Elizabeth. I'd like to close this session by asking several questions about this.

How would you describe the ceremony?

DE: The ceremony of investiture is something which Buckingham Palace has perfected over the years. About a hundred people receive some decoration or other at a time and the ceremony starts at 11 o'clock and finishes somewhere between 12 and 1.

It is done with military precision. Everybody is instructed very clearly in what they have to do and there are people to help you at every moment – to show you what to do. Really, it is British ceremony at its absolute best. There are no mistakes. Nothing is left to chance

DS: Had you ever met the Queen before?

DE: Yes, I'd met her on a number of occasions. Not for any length of time but certainly to speak to her, I'd met her on a number of occasions before.

DS: Did she say anything to you at the ceremony?

⁷⁰ A British order of chivalry, The Most Distinguished Order of Saint Michael and Saint George was established by George, Prince of Wales (later George IV) on 28 April 1818.

DE: Yes. What happens is that first of all you have to kneel down and she taps you on both shoulders with the sword. She doesn't say anything, the idea that there's "rise Sir so and so" that is fiction. She doesn't say anything at that stage.

Then she shakes you by the hand – no....she knights you first, then she puts on the insignia and then she shakes you by the hand and then she says a few words and then it's clear that that's it. You bow, take three paces back and go away and the next person comes on.

As I say it's done with military precision. It's a very impressive event.

DS: Was this honour anything you ever expected?

DE: I suppose I'd been 14 years there as a representative of the United Kingdom and I suppose it was inevitable that I would get something of that sort, yes.

DS: Has this changed your life in any way?

DE: What? A knighthood?

DS: Yes.

DE: No, not really. I don't feel so anyway.

DS: Judge Edward, thank you again for speaking to us about your years on the Court of First Instance and the European Court of Justice.