

JUDGE DAVID EDWARD ORAL HISTORY

Interview With Judge David Edward

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Session VII: Looking Ahead

DS: This is the Judge David Edward oral history.¹ This is taping session number seven.

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 to offer his observations on the current state of affairs in the European Union as well where the European Union may be heading.

DS: Judge, in this final session I'd like to ask you about the major challenges that lie ahead for the European Union. Let's begin with the new Constitution.² What are your feelings about the need for the new Constitution?

DE: I think it is reasonably agreed that the Treaty of Nice³ failed to deal with all the problems created by enlargement to a Community of 25 member states

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² The Treaty Establishing a Constitution for Europe was signed 29 October 2004 by the European Council. Ratification, which is now stalled, is pending. The Constitution will provide for a single foundation for the EU. The three pillars will be merged, even though special procedures in the fields of foreign policy, security, and defence are maintained. The EU and European Community treaties, as well as all the treaties amending and supplementing them, will be replaced by the Treaty Establishing a Constitution for Europe. According to the European Commission, "The integration of the Charter of Fundamental Rights into the text, the clear acknowledgment of the Union's values and objectives as well as the principles underlying the relationship between the Union and its Member States, allow us to call this basic text our 'Constitution'...In legal terms, however, the Constitution remains a treaty. Therefore, it will enter into force when only all Member States have ratified it, which implies popular consultations in some Member States. It should be noted that any modification of the Constitution at a later stage will require the unanimous agreement of the Member States and, in principle, ratification by all." European Commission, "Summary of the Agreement on the Constitutional Treaty," at http://europa.eu.int/constitution/download/oth250604_2_en.pdf. For full-text of Constitution, see http://europa.eu.int/constitution/en/1stoc1_en.htm.

let alone a community of 27 with Romania and Bulgaria and even more if the countries of the former Yugoslavia and possibly Turkey are included. Therefore, there was and still is a need for some degree of tidying up and modernization of the institutional arrangements.

In addition, I think, what is called the Third Pillar of Maastricht⁴ – originally called Justice and Home Affairs, now called Freedom, Security and Justice, I think – that that needed to be brought within the Community system rather than left on an intergovernmental basis. From the point of view of the citizen, that's quite important because at the moment many decisions under the third pillar are taken by the governments without any parliamentary scrutiny and without any judicial control of what they do.

I don't think that's satisfactory when one is dealing with things that are as of great importance to the citizen as potentially visas, asylum, terrorism, money laundering, people trafficking, child abduction, and so on. Therefore it was important, and in my view remains important, that the third pillar should be brought within the Community system.

There are a number of other points which were foreshadowed in the new

³ The Treaty of Nice was signed 26 February 2001 and came into effect 1 February 2003. For the full-text of the Nice Treaty, see http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/pdf/12001C_EN.pdf. For a summary of the Nice Treaty, see

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/03/23&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴ The Maastricht Treaty, also known as the Treaty on European Union (for full-text of the consolidated version, see http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12002M/pdf/12002M_EN.pdf), was signed 7 February 1992 and came into effect 1 November 1993. Originally the third pillar covered such policy areas as asylum, immigration, judicial cooperation, and policing. However, the Treaty of Amsterdam (see <http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/11997D/hlm/11997D.html>) moved the issues of asylum, external border controls, immigration policy, and visas to the first pillar, thus allowing some decisions to be made in Council by qualified majority voting. See Deirde Curtin and Franciska Pouw, "Justice and Home Affairs" in Desmond Dinan (ed.), *ENCYCLOPEDIA OF THE EUROPEAN UNION UPDATED EDITION*, Lynne Rienner Publishers (2000), p. 310.

⁵ The Charter of Fundamental Rights. Following the 50th anniversary of the Universal Declaration of Human Rights in December 1998, the Cologne European Council (3 and 4 June 1999) decided to begin work drafting a Charter of Fundamental Rights. The aim was that the fundamental rights applicable at European Union level should be consolidated in a single document to raise awareness of them. Subsequently, the European Union's Charter of Fundamental Rights was proclaimed by the Nice European Council on 7 December 2000. It is based on the Community Treaties, international conventions such as the 1950 European Convention on Human Rights, and the 1989 European Social Charter, constitutional traditions common to the Member States, and various European Parliament declarations. In its seven chapters divided into 54 articles, the Charter defines fundamental rights relating to dignity, liberty, equality, solidarity, citizenship and justice. The Constitution that is currently in the process of ratification integrates the Charter of Fundamental Rights and gives the Union the right to accede to the European Convention on Human Rights. The Charter, which until now has been a solemn Declaration by the institutions, is incorporated into the Constitution and provides the Union and the Member States with a list of fundamental rights that will be legally binding on its signatories. While the European Convention on Human Rights is limited to protecting civil and political rights, the Charter goes further to cover workers' social rights, data protection, bioethics, and the right to good administration.

constitutional treaty such as enhancing the role of the national parliaments in the workings of the European Union, because although the national governments are involved it depends very much on the governments how far they really pay attention to the views of their own parliament. And therefore I think there were a number of things that needed to be done, but all those things that I've mentioned could have been done by a new treaty without using the word "constitution."

The reason for using the word "constitution" seems to have been that people felt that the workings of the European Union should be defined in a single document which would define with more clarity and certainty the limits of the powers of the European Union – the relationship of the European Union to the member states – and also should include the Charter of Fundamental Rights⁵ as a statement of the fundamental rights of the citizen vis-à-vis the institutions of the Union. So there were a number of political, you might call them political, or even psychological reasons for wanting to have a constitution.

My difficulty about what they actually produced was that it was neither a constitution nor a treaty. It was a bit of both, and for me it was too much for a treaty and too little for a real constitution. At the end of the day what they produced was just another vast treaty and for me again – but not everybody agrees with this – part one of this treaty contained a number of very broad statements about the functions and working of the European Union which could very easily give rise to misunderstanding such as the bald statement that the law of the Union shall have primacy over the laws of the member states. Well, that in a sense simply restates something that has been true since 1964 and then the Court was simply interpreting what was the intention of the treaty makers in 1957. But simply to say "shall have primacy" states in a very bald way what is a rather sophisticated legal idea. It was a red rag to a bull as far as many people were concerned.

So I felt, and still feel, unhappy about that document, the constitutional treaty, but I think that something of that sort was necessary and will be necessary. But it does seem to me that the document in that form is not likely to make any progress now.

DS: What is your assessment of where things currently stand with regard to ratification?

DE: As I say, I think it won't make any progress.

The French and the Dutch, two of the original member states, have rejected it⁶ in a referendum, and I don't see much prospect of being able to go back to the peoples of those two countries and say, "You've got it wrong. You must vote again and vote yes." The only way in which you can persuade them to vote yes would be altering the terms of it or getting some kind of undertaking from them or in favor of them which would persuade people to vote yes. But then that changes the terms for everybody else and the other member states that have ratified on the existing terms will then say, "Well we need to look at it again, too."

Furthermore, it seems to me that as far as the other member states who have not yet ratified are concerned – many of which need to have a referendum for one reason or another – for those states to go along and say now vote yes when France and the Netherlands have voted no, it's very improbable that the population would be persuaded to do so or at least it's sufficiently improbable that it's not worth trying. But that's merely my impression. I know no more than you do as to what will happen.

DS: Judge, now I'd like to switch topics to your views of the future of the European Union's major institutions. I'd like to begin with the European Parliament. Do you think it will continue to gain in power and stature?

DE: I think it probably will.

I think, as I've said before, it is important that the European Parliament should be aware that it is an institution with limited functions and I don't mean severely limited functions, but the European Union has only certain powers. Within the European Union system the European Parliament has only certain powers and I don't believe personally that the European Parliament should be seeking to have all the powers and prerogatives of a national parliament, apart from anything else because that would put it into conflict with the national parliaments. So I think the European Parliament should recognize that its powers are, and will remain, limited to some extent.

But it is the nature of representative bodies to seek to represent their

⁶ On 29 May 2004 French voters rejected ratification by a 54.68 percent "no" vote on a turnout of 69.34 percent. On 1 June 2004, Dutch voters rejected ratification by a 61.70 percent "no" vote on a turnout of 63.00 percent. In the wake of the French and Dutch "no" votes, the European Council meeting in June 2005 called for a "period of reflection...to enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties. This debate, designed to generate interest, which is already under way in many Member States, must be intensified and broadened. The European institutions will also have to make their contribution, with the Commission playing a special role in this regard." European Council, "Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe," 16-17 June 2005, at http://europa.eu.int/comm/councils/bx20050616/index_en.htm.

constituents better, and I think inevitably the European Parliament will seek to enlarge its control over the affairs of the European Union. And although it is subject to a lot of criticism, many of its committees work extremely well and do a lot of good work.

I think some aspects of what it does – in particular the long speeches at plenary sessions – don't really advance the world very much, but nor then do they in a national context either.

I think what I would say is it was Professor Henry Schermers⁷ who made the point the function of national parliaments, the true function, has been less to be a legislature and more a body that exercises political control over the executive. Most legislation is promoted by the executive and the opportunity for the legislature in a parliamentary democracy – as opposed to a system like the American – the opportunity for the legislature to become the initiator of legislation and the master of all its technical details is becoming progressively limited.

It becomes correspondingly important that the parliament should scrutinize what it is asked to do in legislative terms by the government and should exercise effective control, political control, over the executive. And, I think Professor Schermers was right in emphasising that as a new view of the role of parliaments.

DS: And, how about the work of the Council of Ministers? Will the work of the Council of Ministers bog down as the European Union continues to grow in number of Member States?

DE: Manifestly, it is more difficult to operate a system with 25, 27, or 30 members than it was to operate a system with six, nine, 12, or even 15 members.

The divergence of interests between them become more and more considerable and, if you think about it, if you have a meeting of the Council of Ministers, and every minister is going to speak for five minutes, if you have 30 ministers that is going to take you a very long time actually just to get them all to say something for five minutes. The opportunity for serious negotiation and discussion is extremely small if everybody has got to speak.

What I think is likely to happen is that more and more will be done in the corridors by the diplomats and officials in Brussels working together because they have a very close working relationship and a lot of the work is done that way and one also has to remember that the Council of Ministers has a

⁷ Henry G. Schermers, "The European Parliament and the European Court of Justice," in Hand & McBride (eds.), *DROIT SANS FRONTIÈRES*, Birmingham, 1991, pp. 243-248.

permanent secretariat, quite a very large secretariat in Brussels, and I think a lot of the preliminary work will be done by them as it already is. The consequence will be that the ministerial meetings will become not less important but less decisive because the work will have to be done beforehand.

And then one comes against the problem that, as is proposed in the constitutional treaty, the proceedings of the Council of Ministers, it is suggested, should be public. But which proceedings are you talking about? Are you simply talking about proceedings in which every minister has five minutes to talk, because everyone will be bored stiff looking at that.

What people are really interested in is the nitty-gritty discussions. If they're going on behind the scenes and what is eventually presented to the public is a foregone conclusion, then that idea of transparency, as it's put, of Council meetings will be to that extent diminished and seen as a kind of illusion.

So, I think there is a problem for the Council of Ministers, so long as the system involves all the member states having to be involved in every decision, which may be inevitable. But it is nonetheless, I think, overcome to some extent by the system of qualified majority voting, which enables decisions to be taken without everybody having to agree on every dot and comma.

DS: What does the future hold for the European Commission?

DE: There are two ways of looking at it. One is that the Commission should continue as it is, which is the essential initiator of legislation and the guardian of the treaty. And, as I've said before, I think in many respects the Commission has been most successful when it has seen itself as, if you like, a somewhat technocratic institution and not too much as an active political institution as a kind of "European government."

I think those commissioners who have tried to enhance its role and, as it were, perceive the president of the Commission as being Prime Minister of Europe, if you like, have been going in the wrong direction. That's my personal opinion. I think if one pushes in that direction too much, the answer will be that the member states say no and they reduce the powers of the Commission rather than enhance them. I don't think it's very probable that the presidents and prime ministers of the member states are going to surrender their own powers to a non-elected Commission.

Now, in that event, you have two choices. You either say, "Well the Commission should remain with its existing functions; it shouldn't have any pretensions beyond what it does at the moment." Or, alternatively, you say,

“The Commission should be directly elected.” That may be possible, but I personally have serious doubts as to whether the people of Greece, Slovakia, Finland, Britain, and Portugal can really take part in a meaningful way in the election of 15 people or 25 people or even the president of the Commission. I don’t see how these people can appeal to the electorate in all these countries in a way in which the election can be meaningful. So I have personal doubts as to whether it can or should go in that direction.

DS: And finally, I’d like to ask about the European Court of Justice and the European Union court system. Soon after you joined the Court of First Instance, you were quoted about the changing role of the European Community courts. In a 1990 story the *Financial Times* wrote, “The interesting question for the longer term, [Judge Edward] says, is whether [the Court of First Instance] will result in the creation of a European federal court system similar to that in the United States with the European Court of Justice acting as a Supreme Court, or whether it is just the first example of the creation of a number of more specialized tribunals.”⁸

Bearing in mind your thoughts in 1990, how do you now see the future of the European Union court system?

DE: Well I think it isn’t very clear to see which way it is going and I personally took, to some extent, a vow of silence on this issue when I left the Court because I don’t know that people who have already left the Court are the best people to be pontificating about what the Court should do in the future. But obviously, there is an opportunity sooner or later to consider what is called the judicial architecture of the European Union.

Now, there are very broadly speaking, two ways of doing this. One is to go in the direction of the United States where you have state courts and the federal courts and at the apex you have the Supreme Court, which is a court of appeal from the federal circuit courts but is also open to appeal from the supreme courts of the constituent states. There’s no doubt about it that within certain limits the U.S. Supreme Court is “the supreme court.”

And there have been various proposals in academic circles for replicating in one form or another that system in Europe. I think there are good reasons for saying that this would be an unfortunate development in Europe because, as I’ve said before, I think one of the successes of the European court system is that the national courts have not felt – or on the whole have not felt – that the European Court of Justice is an appeal court controlling what they do and in a position to quash their decisions. It’s not in an appellate relationship in the way that the Supreme Court is with the courts of the states of the United States.

⁸ Robert Rice, “Europe learns to love its court,” *FINANCIAL TIMES*, June 6, 1990.

On the other hand, there must come a point at which the Court of Justice cannot continue to grow indefinitely with the addition of member states because one of the things that was done at Nice was to say that there shall be one judge for every member state. As has been proved in practice, it's extremely difficult to have a working court system in which 25 judges sit together in the way that six, nine, 12, 13, 15 judges used to sit together. To some extent this creates a problem because the decisions of the Court of Justice are no longer the decisions of all the judges sitting together and discussing together.

The point of view of member states for whom an issue is very important may simply not be heard because the judge from that member state is not a member of the chamber which takes the decision. So there is a good argument for saying that there should be a court with a much smaller number of judges – nine if you follow the U.S. Supreme Court, perhaps 12, 13 but at any rate, not more – which would mean you wouldn't have one judge per member state. You'd have to have a selection process but you'd have a court which sat together consistently and decided the most important questions.

Then you have the question, should that court really become a supreme court to which there could be a right of appeal from the supreme courts of the member states on the American pattern. That has dangers but it also has advantages because as the European Union enlarges, the risk, through the preliminary reference system of unequal application of the law over the whole area of the Union, the risk becomes greater. The member state courts will either not apply the law as it has been declared by the European Court or will simply not make references to find out what the law should be. So you're liable to have divergent interpretations of European law in the different member states. And as the activities of the European Union touch upon the fundamental liberties of the citizen, it can't be very satisfactory that the citizen has a right in one state which another state is not prepared to grant. And therefore, from the point of view of the individual citizen, maybe it is essential in the longer term that there should be a supreme court of the European Union which has an appellate jurisdiction from the courts of the member states.

In the meanwhile – because that's not going to happen in the immediate

⁹ The European Union Civil Service Tribunal, also known as the European Staff Court, was established on 2 November 2004 by Council decision. The new specialised court, composed of seven judges, will adjudicate disputes between the EU and its civil service, a jurisdiction that had been exercised by the Court of First Instance. Its decisions are subject to appeal on question of law only to the Court of First Instance and, in exceptional cases, to review by the Court of Justice. For more information about the EU Civil Service Tribunal, see http://www.curia.eu.int/en/instit/presentationfr/index_tfp.htm.

¹⁰ EC Treaty Arts. 220 and 225a may establish new judicial panels in order to exercise, in certain specific areas, the judicial competences laid down in the EC Treaty. See also European Atomic Energy Community Treaty Arts. 136 and 140b and the Treaty of Nice Declaration No. 16.

future – the problem is work load and how do you best spread the workload? Do you spread the work load by devolving certain things from the Court of Justice to the Court of First Instance and now from the Court of First Instance to, for example, the European Staff Court⁹? Do you continue creating specialist tribunals¹⁰ to deal, for example, with competition cases, with trademark cases, and so on, each of those courts being in an appellate system where there is a right of appeal to the Court of First Instance and a right of appeal from the Court of First Instance to the Court of Justice? Because that's a rather heavy system.

Also, personally, I'm not wholly convinced that it's a good idea to have too much specialization. I think that in the context particularly of the European Union it's important that questions which appear to be specialist questions should be seen in the round. I don't know that competition cases, for example, should be seen as merely an aspect of antitrust without being seen in the wider context of the treaty.

So there are many different strands to be thought about, and I personally have not come to a definite conclusion. What I think is unfortunate is that these things are not discussed in greater detail in political circles.

DS: In a 2002 article¹¹ published in the *Law Society Gazette*, you indicated that the funding of the European courts was inadequate bearing in mind the role they play. You were quoted as saying, "In the U.S., the efficiency of the court system is a matter of acute public interest, but not so in Europe, where frivolous attitudes can be struck." The article went on to quote you as saying, "Leaving aside the need that will arise for greater resources with the new countries added to the European Union, and further integration, the need for additional costs in the European Court of Justice is peanuts compared to the hidden cost of inefficiency in business terms of not funding it properly."

Is this funding issue likely to become more pronounced going forward?

DE: To be honest I don't know what the existing situation is. But the bizarre arrangement when I was there was that both the Council and the Parliament and the Commission examined every line of the Court's budget. If the Court wanted to transfer funds from the telephone account to the computer account, it had to submit this proposal to the Commission which would then comment upon it and forward it to the Council and the Parliament.

¹¹ Jeremy Fleming, "Striving to find a common language – as the European Court of Justice celebrates its 50th anniversary, it is trying to resolve internal differences," *LAW SOCIETY GAZETTE*, May 10, 2002.

The Court's budget, in relative terms, was not significantly more than the combined budget of the Economic and Social Committee¹² and the Committee of the Regions,¹³ and I don't think anyone would pretend that those two bodies are anything like as important to the working of the European Union as the Court of Justice.

My view – and it was shared by the British government – was that the budget of the Court should be decided as a general envelope. The Court would be told at the beginning of the year, “You have this amount of money to spend. Now get on and apply it,” and the way in which it was applied would be subject to audit by the Court of Auditors,¹⁴ of course, but would not be subject to the line by line scrutiny of the Parliament and the Council.

Well, the member states were never prepared to concede this and one had the idiotic situation round about the year 2000 when the Court asked for more interpreters – sorry, more translators. At that time there were 11 official languages and therefore 11 translation divisions and we asked for 11 more translators. The political institutions decided we should have five. That meant you could have one more translator for five divisions, but not for the other six.

Now, that in my view is frivolous and I don't think that that is a serious way of husbanding public money. I think that the Court could have been relied on to assume responsibility for administering a block budget subject to audit control of course. But that was my feeling at the time and I think that it's curious that the political institutions are prepared to expend very considerable sums of money, for example, on agricultural subsidies but also on development projects which, in terms of the volume of money, are much greater than the budget of the Court of Justice. They're prepared to do that at the stroke of a pen, but still insist on examining the Court's budget line-by-line. I don't think that's a serious way of proceeding if you want an efficient Court.

It doesn't even seem to me that it's necessary that the Court's budget should necessarily be increased globally, it's just that the Court should have more autonomy in the way in which it spends its budget.

12 The European Economic and Social Committee is a non-political body that gives representatives of Europe's socio-occupational interest groups, and others, a formal platform to express their points of views on EU issues. Its opinions are forwarded to the Council, the Commission, and the European Parliament. See http://eesc.europa.eu/index_en.asp.

13 The Committee of the Regions, which was established in 1994, provides local and regional authorities with the opportunity to be involved in EU policy development. Its role is advisory. See <http://www.cor.europa.eu/>.

14 The European Court of Auditors audits the collection and spending of European Union funds. In this regard, the Court of Auditors examines whether financial operations have been properly recorded, legally and regularly executed, and managed. See http://www.eca.eu.int/index_en.htm.

DS: Judge, a 2004 article¹⁵ in *The Economist* compared the workings of the European Court of Justice with the U.S. Supreme Court. The article noted that while the Supreme Court's work has attracted considerable attention, that has not always been the case for the Court of Justice. However, the article went on to state that the Court of Justice's "period of political invisibility is drawing to a close. In recent years, the court has become a target of criticism for Eurosceptics. Paradoxically, its great political visibility is coming at a time when it is becoming less reliably federalist."

Is the Court of Justice becoming more visible in a political context?

DE: I'm not sure that it is. What *The Economist* was talking about is what we talked about earlier. There was a period during the 1990s when the Court was an easy target for Eurosceptics. I think on the whole they've lost that argument. We were able to do enough to demonstrate that the image of the Court which they were portraying was a misleading image. So that's point one.

The second point I think is the parallel with the U.S. Supreme Court. Why are people fascinated by the U.S. Supreme Court? They are very largely fascinated by the interplay of personalities, by the "who is going to vote which way," "which way will the court go," "who's going to be the swing voter," and this goes back to what I said before about the absence of ideology on the Court of Justice.

The Court of Justice is less interesting because it's less easy to personalize than the U.S. Supreme Court. I think that should remain so for a variety of reasons which we've already discussed. But in any event, the attitude of American society to judicial institutions is very different from the attitude of European society. The Americans are much, much more interested in the legal process than Europeans are and one of the tokens of that is the extent to which American law schools teach court procedure. Court procedure is seen in American law schools as being an integral part of the study of the law. In most European law schools, it is not. Procedure is a matter for those who work in law courts rather than an integral part of the academic study of the working of the law. So the Americans are much more excited by the working of the law courts than the Europeans are, and I think that's a cultural difference.

The last point, I suppose, to take from *The Economist* article is that it said that the Court's greater visibility is coming at a time when it is less reliably federalist. Well, I suppose what they mean is that the Court is not, as it has been put, working to an integrationist's agenda to the same extent. Well, as I've said, the agenda is set by the treaties and the treaties latterly have laid

¹⁵ "Government by judges? The stability pact goes to the European court," THE ECONOMIST, Jan. 17, 2004.

out a less integrationist agenda than the original agenda. So it's not surprising that the court, interpreting the treaties, should be less integrationist or federalist, however you'd like to put it.

Coming down to the thing at the end of the day, I don't notice a tremendous amount of press interest being given to the work of the Court as opposed to a certain amount of interest in the individual decision when it comes.

DS Judge, I suggest we take a break now and then we'll resume and finish up this last session.

DS: Judge, now I would like to turn your attention to some of the likely major issues that the Court of Justice will be addressing. Let's start with citizenship.

The Treaty on European Union introduced the concept of European Union citizenship.¹⁶ Professor Stephen Weatherill has suggested that, "[T]he very language of citizenship suggests an attempt to convey something of the shifting sands of allegiance and legitimacy that flow from the deepening role of the European Union, and to add a (supplementary) European level of democratic legitimacy." But in the end he concludes, "For the time being, the status of citizenship of the Union offers more promise than fulfillment."¹⁷

What is the likelihood that citizenship issues will play a more prominent role in the Court of Justice's work?

DE: I don't attach perhaps quite the same importance to citizenship as Professor Weatherill and other writers on the same subject for this reason: I'm not sure that the average inhabitant of the European Union member states – and after all there are some 350 or 400 million of them – I'm not sure that the average inhabitant is seriously taken up with the question of democratic participation in the working of the European Union. And I'm not sure either that one should be analyzing citizenship in the same terms as citizenship of a state.

It's one thing to be a citizen of a state, it's another thing to be a citizen of the European Union. And to some extent, inevitably in that scale the European Union is going to be remote unless one goes in the direction of direct election. Now you have similar size of population in the United States and

¹⁶ Treaty on European Union, Art. 8. See also European Community Treaty Art. 17 which provides, "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby." See http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html#anArt17.

¹⁷ Stephen Weatherill, CASES & MATERIALS ON EU LAW 7TH EDITION, Oxford University Press (2006), p. 488.

obviously the individual citizen then does become involved in the process of election of the president. Are we going in that direction in the European Union? I rather doubt, I rather doubt it.

Therefore, to some extent the European Union is going to remain relatively remote from the average citizen except in economic and social terms. It is going to have considerable impact on the individual citizen in terms of ensuring the availability of goods through free movement of goods, ensuring fair competition between producers, manufacturers, producers, and sellers throughout the Union. It will have considerable effect on the citizen in terms of free movement of wage and salary earners, free movement of the professions, the capacity to go on holiday without having your passport checked – Schengen¹⁸ – and a number of other ways. I think these are, in practical terms, much more important to the average inhabitant of the member states than the rather more politically interesting areas of what is called democratic legitimacy.

And therefore I attach much more importance from the point of view of the average person to the economic side of citizenship. After all the treaty does say every citizen shall have the right to move freely within the territory of the Union. I attach a great deal of importance to that and rather less – I don't think it's unimportant, obviously not unimportant – that the citizens should have the right to vote in European Parliament elections. But I'm not sure that for the average citizen that is quite as important as the economic and social rights that equally flow from citizenship.

¹⁸ By the Agreement signed at Schengen, Luxembourg, on 14 June 1985, Belgium, France, Germany, Luxembourg, and the Netherlands agreed that they would gradually remove their common border controls and introduce freedom of movement for all nationals of the signatory member states, other member states or third countries. Subsequently, the Schengen Convention was signed by the same five states on 19 June 1990, but did not enter into force until 1995. It lays down the arrangements and guarantees for implementing freedom of movement. The Agreement and the Convention, the rules adopted on that basis and the related agreements together form the “Schengen *acquis*.” A protocol to the Treaty of Amsterdam governs the incorporation of the Schengen *acquis* into the Treaties. In order to provide a legal basis, incorporation entailed dividing the Schengen *acquis* under the first pillar (visas, asylum, immigration, and other policies related to the free movement of persons) or the third pillar (provisions on police and judicial cooperation in criminal matters). The legal incorporation of Schengen into the EU was accompanied by integration of the institutions. The Council took over the Schengen Executive Committee and the Council's General Secretariat took over the Schengen Secretariat. The protocol annexed to the Treaty of Amsterdam states that the Schengen *acquis* and the rules adopted by the institutions on the basis of that *acquis* must be adopted in their entirety by all applicant countries. The Schengen area has gradually expanded: Italy signed up in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and Denmark, Finland and Sweden in 1996. Iceland and Norway are also parties to the Convention. Ireland and the United Kingdom are not parties to the agreements, but, under the protocol to the Treaty of Amsterdam, they may take part in some or all of the provisions of this *acquis*. Moreover, although already a signatory to the Schengen Convention, Denmark may choose in the context of the European Union whether to apply any new decision taken on the basis of the Schengen *acquis*. For more information see <http://www.europa.eu.int/scadplus/leg/en/lvb/l33020.htm>.

Therefore, to bring this to a conclusion, my feeling is that there is a degree of down playing of the economic aspects of citizenship and a rather excessive concentration on the political aspects of citizenship and that it actually would be better to concentrate more – not exclusively, but more – on the economic aspects and emphasise to people what they gain as citizens from the integration of the market and the economic and social integration.

DS: Are there major internal market issues on the horizon?

DE: Yes, I think there are.

In the field of financial services, the internal market is not complete and financial services link up with taxation and many member states seem to believe that taxation is a “no go” area for the European Union. Actually, if you’ve been in the Court of Justice latterly when I was there, we had about 20 or 30 cases on taxation and far more cases on taxation than, for example, on agriculture.

I think there are areas of the internal market that will continue to be difficult where, because of the refusal of the member state to legislate, the Court of Justice will get cases which have to be decided. Again to some extent it’s a reproduction of the situation that arose in the 1970s; where the legislature refuses to legislate, inevitably cases will come up and will have to be decided by the Court. The Court will be blamed for deciding them. But one of the features of courts is that they have to decide cases that come before them whether they want to or not.

I think there are many aspects of the internal market that remain to be considered and – most importantly I think – there is the relationship between the freedom of movement ideas of the internal market and the whole question of the third pillar, justice and home affairs. Free movement is obviously one side of the coin but prevention of terrorism, prevention of illegal immigration, child abduction, people trafficking, money laundering, free movement of capital, and so on, movement of guns and searches at frontiers, obviously there are areas of third pillar activity which impinge upon the freedom of movement under the internal market idea and there will be a constant tension between the two.

DS: Just as a follow up question on the internal market – this issue of taxation has gotten a fair bit of play. In 2003 a *Financial Times* comment was headlined “Company tax law must not be made in court.”¹⁹

What about the issue of taxes and the role of the Court of Justice?

DE: Well, it’s interesting. That particular *Financial Times*’ article was written by the commissioner responsible for the internal market, [Frits] Bolkestein.²⁰ He had been arguing for a considerable time as against the member states, that they really had to face up to the impact of differential systems of taxation on the effective working of the internal market.

Now it’s important in this context to distinguish between the basis of taxation and the rate of taxation.

The particular article that’s referred to was written as a consequence of a judgment²¹ in which I happened to be the *rapporteur*. The issue was the taxation of the profits of parent and subsidiary companies. And, if I remember correctly, it was the Netherlands which treated the situation differently depending on where the parent and subsidiary companies were located. If they were entirely located in the Netherlands, they were taxed in one way. If they were located in different member states, they were taxed in a different way.

What the Court held was that this difference in treatment was contrary to the idea of free movement of companies, if you like. The possibility of companies setting up subsidiaries in other member states. I think that was the issue if I remember correctly.

As I’ve said, courts have to decide the cases that come before them and the issue was raised in the Dutch courts, should there be a differential system of taxation depending on where the parent and subsidiary are established? If they are established in a single member state, they are taxed in one way. If they’re established in different member states they are taxed in a different way. That’s an internal market issue, and you can’t avoid it by saying taxation is a “no go” area for the European Union. All it does is transfer the question to another area.

The point of the article in the *Financial Times* was not actually that the Court should not have decided the case, but rather that the member states should legislate to deal with issues of differential taxation rather than leave these

¹⁹ Frits Bolkestein, “Company tax law must not be made in court,” FINANCIAL TIMES, 21 October 2003, 23. In part Bolkestein wrote, “The European Court of Justice is increasingly taking over the role of lawmaker on crucial tax issues in Europe, not least in the area of company taxation.”

²⁰ Frits Bolkestein, from the Netherlands, served as Internal Market Commissioner from 1999-2004.

²¹ [Case C-168/01](#), *Bosal Holding BV v. Staatssecretarise van Financien*.

kind of issues to be dealt with on an ad hoc, one-by-one, basis by the courts. That was the argument of Bolkestein. He was trying to get the member states to recognize that they needed to face up to the problem of differential taxation, not differential rates, but differential bases of taxation

DS: And finally, social issues. Will the Court of Justice become more involved in social cases?

DE: Well, it already is very substantially involved in social cases. When I first went to the Court, there were a very large number of cases about gender equality in employment.

If you mean by social issues – the problem created by what is called in some countries social dumping that low-wage economies can afford to send workers to work in high-wage economies at low wages therefore on the one hand depriving the workers of that state of the work that they are entitled to have as they see it at high wages or, alternatively, driving down wages in these high-wage economies – well, that is partly a social issue but it's also an issue about competition. If you believe in competition, then part of the aspect of competition is that somebody who can do a job more cheaply should be allowed to do it and if you are not prepared to do the job more cheaply yourself, then you shouldn't complain if somebody comes in and does it for less if they are prepared to do it for less.

Now that's a somewhat simplistic view of the world because as we know the question of the level of wages also depends on the cost of living. The low-wage worker who comes into a high-wage economy will be sending the wages back not only to the family in a low-wage economy but to an economy in which the cost of living is less. That's one aspect of it.

Another aspect of it is that in the high-wage economies – typically the developed economies of western Europe – employers are required to assume very considerable obligations in relation to holiday pay, maternity leave, paternity leave, in the building industry bad weather payments, social security payments, medicare payments, and so on. It's all very well to say, "Oh well, you should compete with people who are prepared to do the job for less," but the short answer is you can't cut your rates to the same extent as these places because you have statutory commitments, legal commitments which make it more expensive to employ people than in the low-wage economies.

That again illustrates that if you are going to have a truly functioning internal market you have to have rules to decide whether if workers come from State A to work in State B they have to be paid the same minimum wage as workers in State B, whether the employer has to pay the same holiday pay,

maternity leave, and so on. You can't get away from the need to do some degree of harmonisation if you are going to have what is called a level playing field for competition. What is unsatisfactory is if the member states leave those kind of decisions to be left – to be decided by – the Court rather than decided by themselves as legislators.

Of course, the difficulty is actually in deciding what they are going to do because those who have highly protective social systems will argue for the maintenance of those systems and insist that all the other member states come up to the same level of protection, and the states that have a low level of protection will say, "No, no, no, there's no need to drive us out of the economy by placing on us burdens that we can't fulfill," and this applies particularly to the countries of eastern Europe.

Many of the countries of eastern Europe simply do not have enough money in the economy to offer the same social advantages as the developed economies of the west. They're coming towards it, but this is a problem and I think that this only goes to illustrate what I've tried to say that the creation of a true internal market in Europe is much, much more complicated than people suppose and it's not just about a free trade area. Many, many things like social security, like holiday pay, like taxation of parent and subsidiary affect the working of an internal market.

DS: Judge, I'd like to ask you about enlargement and its relationship to the Constitution. In assessing the future and considering enlargement you have written, "Under public international law, all states are equal. Malta with 400,000 inhabitants is as much a state as Germany with 90 million. Some states cannot be more equal than others and the power of veto (if that be the badge of sovereignty) must be the same for all. Yet the larger member states claim – with some reason – that power should be modulated in proportion to population. The logical consequence must be a system of qualified majority voting. If so, the legal consequences must be a departure from the traditional canons of public international law and a movement towards those of constitutional law. Whatever we call it, we are necessarily discussing a constitution."²²

Bearing this in mind, is the future of the European Union a constitutional debate?

DE: Yes it is, in this sense. You have to decide to what extent rights and obligations are going to be determined by the relatively abstract canons of public international law or by the much more developed canons of constitutional law. That is the underlying debate in all this.

²² David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," *EUROPEAN BUSINESS JOURNAL*, vol. 16 (2004), p. 120.

How far are you going towards a situation in which the member states are no longer, as it were, the masters of the treaties and you're going towards a situation in which the member states as actors in the scene are fully under, as much under constitutional restraints as the institutions they've created.

I think that is the debate, that's the underlying debate. It goes to the question of whether member states should be entitled to treat their own citizens less favourably than they're required to treat the citizens of other countries. It comes to the question of how far the member states are themselves constitutionally bound by the system they've created.

DS: I'd briefly like to ask you about the need for Americans and Europeans to better understand the other's system. In an article in 1979 published in the *American Bar Association Journal*, you wrote, "The parallels and the differences between the European Community and America are...worth studying, not for academic interest but because they may suggest new solutions to problems that refuse to recognize old frontiers."²³

Do you still think that's the case today?

DE: I think it's all the more appropriate. I mean, that's 26 years ago. It was when I visited the United States and spoke in Washington – or perhaps it was in New York – and that article was based on what I said at that time.

I think that the world and, if you like, globalization means that the world can no longer continue with what you might call the fiction of public international law – that all states are equal and are totally sovereign. States are interdependent and moreover some states are more powerful than others. Some are bigger than others, some have more population than others, some have more economic clout than others, some have more military clout and you've got to find ways of working together which don't simply depend upon each state having an equal vote, which is the theory of public international law.

Now, as I've said, you have situations in South America, Central America, Southeast Asia, to name only three areas where states – in particular relatively small states – are faced with the problem of economic integration, political integration, where they can no longer pretend that they are totally sovereign and can live apart from each other.

The question is how they integrate and the models previously available were all federalist models, if you like. Models which depended upon the creation

²³ [David A.O. Edward, "Europe and America: A European Lawyer's View, ABA JOURNAL, June 1979, p. 913.](#)

of a new entity with all the characteristics of a state. And that clearly they don't want. So the interest of the European Union, compared with the United States, is that the United States represents one model, the federal model, where you have a federal state with constituent states within it or a different kind of model which is the European Community model where you have a degree of economic, social, and political integration which is less than the creation of a new superstate. That is for me of interest to countries in other parts of the world who are looking for a solution to their problems.

DS: Judge Edward, you are still actively involved with the law. Can you tell us about your role as an Associate Judge in the Inner House of the Scottish Court of Session?²⁴

DE: The Court of Session is the supreme civil court of Scotland and very different from, and very separate from, the appeal court in England. The Inner House is the appeal court and I sit from time to time as an additional judge in that appeal court. Retired judges frequently do sit as additional judges in the appeal court when there aren't enough permanent judges to deal with all the work.

So what I'm doing there is simply sitting as an additional judge in the appeal court sometimes writing the opinion of the court – on one occasion writing a dissenting opinion – in all sorts of cases. All the cases that come before a national appeal court – problems of commercial leases, taxi licensing, immigration. All sorts of cases which are very different from the kind of cases I was doing in Luxembourg.

DS: You also have joined Blackstone Chambers²⁵ and are building a practice as a mediator. What led you in that direction?

DE: The tradition in Britain is that retired judges don't go back to the profession of advocate. They normally either sit as additional judges in the appeal courts, which is one possibility and I do, or they get involved in arbitration or, now, mediation.

Mediation is very different from arbitration because arbitration has now, I think, become very formalistic and another characteristic of it is it, at least commercial arbitration, has involved a vast amount of paperwork. Unless you have the support of chambers or an infrastructure, it's very difficult to get through the paperwork or even manage the paperwork. The attraction of

²⁴ The Inner House of the Scottish Court of Session is essentially the appeal court. However, it has a limited range of first instance jurisdiction.

²⁵ Blackstone Chambers, see <http://www.blackstonechambers.com/cv.asp?StaffID=97>.

mediation is that it is, as they say, paper light and the process is relatively short – one or two days per case.

Also, I was interested in mediation simply because it's a new aspect of legal work. I think we overlooked the importance of mediating disputes in the old days when I was a practitioner. Now that I've seen mediation at work, I can see the advantages of bringing people together and getting them to confront their problems together rather than fight it out separately before a court.

I don't suggest that mediation is the answer to all problems. Some problems require to be litigated. But I think it's a good thing that people should consider the possibility of mediation, and I'm interested in seeing how it works and how it can be developed.

DS: You are involved in many other key roles as well. Can you mention a few of them – for example the Carnegie Trust for the Universities of Scotland²⁶ – and tell us about your roles?

DE: At the moment, I'm Chairman of the Carnegie Trust for the Universities of Scotland. That was a trust set up by Andrew Carnegie²⁷ at the beginning of the last century with an endowment of \$10,000,000 which was an enormous sum at that time.

The aim of it was to enable the Scottish universities – there were four of them at the time – to develop in particular from Carnegie's point of view – develop greater aptitudes in the fields of science because laboratories and so on were expensive, but also have better libraries, better student accommodation, and so on.

The other side of it as far as he was concerned was to enlarge access to the universities for the people that he described as the qualified and deserving because the fees charged by the universities, although not large, were a disincentive for many people who simply couldn't afford to go to universities. Carnegie's benefaction, in fact, enormously enlarged access to the Scottish universities for many, many people, many thousands of people in the first part of the last century and also enabled the universities to develop by the construction of libraries, laboratories, student halls of residence, and so on.

With the assumption by the state of more responsibility for university funding and the abolition of tuition fees or the assumption of responsibility, again, by the state for tuition fees, the Carnegie Trust became less important

²⁶ Carnegie Trust for the Universities of Scotland, see <http://www.carnegie-trust.org/>.

²⁷ Andrew Carnegie, 1835-1919, was a Scottish-American businessman who founded the Carnegie Steel Company, which later became U.S. Steel. He was also a major philanthropist.

vis-à-vis the working of the universities to some extent. Also the value of the endowment fell because the restrictions on investment of charitable funds meant that the trustees of the fund in the early part, again, of the last century, were not able to invest in such a way as to keep pace with inflation. So the fund is less – proportionately less – than it might have been if there had been total freedom of investment.

Nevertheless, we have £2 million a year to distribute and £2 million a year goes a long way in helping researchers to go and look at a manuscript which they would not otherwise be able to look at, student travel expeditions to look at other parts of the world, scholarships for outstanding doctoral students, visiting professorships from other countries. There are many, many schemes which the Carnegie Trust runs using relatively small amounts of money. Small grants of that kind produce a disproportionate degree of value added – not disproportionate but not proportionate to the size of the grant. So that's one aspect and I'm closely involved in the work of that trust.

Within the last year we've also been responsible for organizing a ceremony in Edinburgh for the presentation of Carnegie Medals of Philanthropy to really outstanding philanthropists. The previous two ceremonies took place in New York and Washington. This was the first time that the ceremony had taken place in Scotland. And we welcomed the other endowments in what you might call the Carnegie family. So there is now building up a degree of mutual interest and understanding and cooperation between the endowments, particularly in the United States and in Scotland. So that's one aspect.

I'm also chairman of the Scottish Council of Independent Schools,²⁸ and that's not only the large fee-paying schools – boarding schools – but also many different kind of independent schools including quite small schools for children with behavioral disorders or learning difficulties, which are independent. What is becoming clear, I think, is that the state sector of education can't cope with everything. At the one end it can't have enough schools to cope with educationally difficult children for one reason or another. Correspondingly there's great difficulty for the state system in maintaining the teaching of subjects on the one hand which cost a lot of money such as physics, chemistry, and biology and on the other hand subjects which are relative minority interests such as language teaching. So there is a movement towards a greater symbiosis between the state sector and the independent sector and this is a particularly interesting time to be involved with the work of the independent sector.

As well as that I'm, as I mentioned, sitting part time in the Court of Session. I'm also closely involved with the work of the Europa Institute in the University of Edinburgh,²⁹ with which I was associated as director in the

²⁸ Scottish Council of Independent Schools, see <http://www.scis.org.uk/>.

²⁹ Europa Institute, University of Edinburgh, see <http://www.law.ed.ac.uk/europa/>.

former times and through that with the work of both the law faculty and to some extent the politics and international relations department.

I'm involved in committees in other universities. So altogether I have a large portfolio of different interests including in some universities overseas as you know.

DS: Returning to the subject of the European Union, Judge, you have written, "For myself, I believe that our endless discussion of How has caused us to lose sight of Why."³⁰

What did you mean by that?

DE: It was something I said at the time when there was this intensive discussion about the proposed Constitution and how the European Union should be organized.

Part of the problem about this is that from the point of view of the public, all they hear about is disputes about institutions and structures. They're not told about why the institutions and structures should exist in the first place.

Obviously at the very beginning one of the primary concerns was to avoid any further wars on the continent of Europe – which effectively destroyed the continent of Europe in the first and more particularly the second war and impoverished Europe – which was very prosperous at the beginning of the 20th century and required Marshall³¹ aid to put it back on its feet in the middle of the 20th century.

Now one can say that the risk of war between France and Germany has now receded to such an extent that it is absurd to talk about it. And if you say the European Union exists to prevent war between the nations of Europe, that's a rather far-fetched statement now although one shouldn't forget about Bosnia and the former Yugoslavia. There are flash points in Europe and the Balkans and there are flash points on the edges of Europe as we know all too well.

For me nowadays it is more important to realize if you have an economically stable area it becomes a politically stable area. And to have a zone of political stability in Europe is of value to not only the peoples of Europe but also the general condition of the world. Instability in Europe created wars

³⁰ David Edward, "Luxembourg in Retrospect: A New Europe in Prospect," EUROPEAN BUSINESS JOURNAL, vol. 16 (2004), p. 120.

³¹ On 5 June 1947 U.S. Secretary of State George S. Marshall outlined what was to become known as the "Marshall Plan." Under the plan, the U.S. offered Europe up to \$20 billion for relief if European nations could agree on a rational plan on how the aid would be used. This would mark the first time they acted as a single economic unit. See <http://usinfo.state.gov/usa/infousa/facts/democrac/57.htm>.

and created devastation not only for Europe but for others parts of the world as well.

When there was the Iron Curtain the European Union – the European Community – assured a degree of political stability to the west of the Iron Curtain. Joining the European Union was important for Greece, Spain, and Portugal because one of the conditions of joining was that they had to become democracies and all three of them had been dictatorships. And one of the conditions of joining the European Community at that time was that they had to commit themselves to a democratic form of government. And I think it can be said that certainly in the case of Greece – possibly also in the case of Spain and Portugal – the process of joining the European Union and being in the European Union has avoided any possibilities of those countries going back to a condition of dictatorship.

And the same is true of Eastern Europe. If there had been no European Union and the Soviet empire had collapsed, it's not at all clear what would have happened in Eastern Europe if there had not been the pressure to create democratic societies in order to join the European Union. And that is the argument equally vis-à-vis Turkey, that the reason why Turkey is making such an effort to become a fully democratic state and to be fully respectful of human rights is precisely because unless it does so it has no chance of ever joining the European Union. So the European Union creates a zone of political stability and also the incentive of joining requires the candidates to comply with certain minimum standards of democracy and human rights.

And I think therefore that that is the “why” of this operation, of the ultimate why. Of course it's also related to the prosperity of the member states and the well-being of their citizens. But the big ultimate why is this concept of the continent of Europe as being instead of a cauldron of dispute and warfare, being a zone of stability.

DS: On 7 January 2004, you said your final goodbye to Luxembourg and bid farewell to your years of service on the Court of First Instance and the European Court of Justice. At that ceremony, you put your career in Luxembourg into greater perspective and offered an insightful look at your life and your career in European law.

I'm wondering whether you would be willing to read to us part of what you had to say at that event?

DE: Yes. I began by pointing out that I would miss the companionship of the members of the courts and their families. And I went on to say,³²

³² [Allocution de M. de juge Edward lors de l'audience solennelle du 7 janvier 2004 à l'occasion de son départ.](#)

“The success of this institution depends – of course – on hard work and eager debate about the law. But it depends – even more – on the fact that the relationship between us, which begins as a purely professional one, quickly grows into a relationship of mutual respect and friendship. That is the glue that holds us together and ensures that, after vigorous argument and even strong disagreement, we can still laugh together as friends.

If someone had said to me, when I was called to the Scottish Bar 41 years ago, that I would end my career as a judge of a European court with colleagues from 15 countries from Ireland to Greece, and from Finland to Portugal, I would have said, ‘You must be mad.’

Like most of our citizens, then and now, my horizons were limited to my own work and my own country. It was not until 10 years later that I first became involved in European affairs.

What caught my imagination then, and remains my guiding star today, is the idea of a Europe where individuals are free to choose their own destiny – to go where they want, to live where they like, to trade and to work where they can.

The freedoms guaranteed by the Treaties are not just secondary ‘economic’ rights to be relegated to an Annexe of a new Constitution. They are rights in every sense as fundamental and important for the average citizen as those enshrined in the European Convention.

Robert Schuman warned us right at the beginning:

‘Europe will not be conjured up at a stroke, or by some master plan. It will be attained through concrete achievements that lead in practice to a community of interest.’

In spite of all the current pessimism and hostile rhetoric, the achievements of the past half century are immense and the community of interest is real. We should talk less about what is wrong and remember that, for someone of my age, born nearly 70 years ago, what is surprising is not how badly the system works but the fact that it works at all.

So let us celebrate what has been achieved and remember that it is here, in this Court, that the theories of equal treatment, non-

discrimination and freedom of movement have become a practical reality for our fellow citizens.

And it is here, above all, that those in authority have had to learn what has sometimes been a hard lesson for them: that the fundamental freedoms are to be restricted only for reasons of overriding public interest and in ways that are objectively justified, necessary and proportionate.

That is a real concrete achievement for the future of our continent and I am proud and privileged to have been allowed to play a small part in it.”

DS: And finally on a more personal note, The Lord Clarke³³ has written, “David has, as all really great jurists, in my experience, have, an acute sense of history and its importance. Such jurists bring illumination to present day problems in the law by undertaking intensely the historical process in which they are set. They also have a respect for and understanding of historical development which means that they avoid the too ready, superficial and slick solution to a particular new problem.”³⁴

Could you elaborate on the importance of history in your judicial philosophy?

DE: I think it involves two things. First of all, I think any understanding of the law we apply involves understanding how that came to be the law. If you understand nothing of history, you don’t understand why the law came to be as it is. You have to understand the social conditions in which rules were made in the European context – you have to understand the historical, political, social context in which they were made. And if you don’t understand that, you’re liable to see the rules as two-dimensional rules to be applied in some automatic fashion rather than as rules to be applied with an understanding of what they are there for. That’s the first element.

The other element, I think, is that a lawyer who has no sense of history really has very little idea of what the legal process is and how the legal process ought to develop. Because it hasn’t come from nowhere. What happens tomorrow will, to a great extent, depend on the decisions that are taken today. If you have no idea where you’ve come from – as Matthew Clarke said – there is a serious danger that you’ll adopt a slick, easy solution to a

³³ The Lord Clarke (Matthew Gerard Clarke) was appointed a Judge on the Scottish Court of Session in February 2000. From 1995 until his appointment he was a Judge of the Courts of Appeal of Jersey and Guernsey.

³⁴ The Lord Clarke, “Unfinished Business,” in Mark Hoskins and William Robinson (eds), *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart Publishing (2003), p. 31.

problem as you see it without having any understanding of how that particular solution will fit into the general context of the law and the legal system.

So for me, an interest in history is absolutely fundamental to an understanding of the law. And certainly in practice and as a judge I've very, very frequently felt it necessary to go back and look at the historical context in which a particular aspect of the law developed. I find it extremely useful as an advocate. In some of the cases I discussed in the earlier sessions, I would not have been able to advance the argument I did advance if I hadn't actually been able to go back and try and understand the law that we were discussing in the context in which it had been developed.

DS: Judge, finally in looking back on your life which parts do you recall with the most satisfaction?

DE: I don't know that I look back on any particular time in my life with more satisfaction than any others. I've had the great good fortune to have a very varied life which many lawyers do not.

I've been an advocate. I've administered the affairs of a professional body, both from a secretarial point of view and a financial point of view. I've led an international body, the Committee of the Bars and Law Societies of the Community as president. I've been involved in international cases, big international cases. I've taught in the university. I've written. I've had close relationships with people of all generations – in the early days with the fathers of the bar and the fathers of the European institutions and then in later days with people who were my pupils at the bar, at university, and the *référéndaires* and assistants I had in the Court of Justice.

And now I've got lots of other things to do and so I don't look back on any particular period as being the best period or one that's given me most satisfaction because really I've enjoyed all parts of it. Some parts of it involved a lot of hard work, but I've enjoyed all parts of it and derived satisfaction from all parts of it. I've been extremely lucky in that respect.

DS: Judge Edward, thank you again.

Interviewing you for this series of conversations has been an enormously enjoyable experience for me, and I think that your observations and insights are bound to educate, and indeed influence, this generation and many future generations as well.

DE: Well I don't know whether that will be true, but it's been an enjoyable

experience for me as well.

DS: Thank you very much.

DE: Not at all.