

## JUDGE DAVID EDWARD ORAL HISTORY

Interview With Judge David Edward

Session: Number 3

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### Session III: University of Edinburgh Years 1985 - 1989

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

We are with Judge Edward in his home in Edinburgh. In this session, I will be asking Judge Edward about his years as a professor at the Edinburgh University,<sup>2</sup> which dated from 1985 to 1989.

Judge Edward, in 1985, you took a position at Edinburgh University. Could you tell us about the circumstances of your taking that position?

DE: The first and only professor of European Institutions at Edinburgh was Professor John Mitchell who had taught me as professor of Constitutional Law in the end of the 1950s. In 1968, having taken an immense interest in European institutions – not just the law, but also the political science and economics of the European institutions – he had set up a center for the study of European institutions and had been appointed professor of European Institutions.

He died very suddenly in 1980, and as luck would have it, or as ill fortune would have it, the very day he died the university had to freeze all appointments to professorial chairs. So the chair was frozen and nobody was appointed. Then in 1984, they opened the invitation for people to apply for this chair.

By that time I had done the *AM & S*<sup>3</sup> case and the *IBM*<sup>4</sup> case and I had

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

<sup>2</sup> University of Edinburgh, see <http://www.ed.ac.uk/>.

become really interested not just in what I'd known about before...in the European field which was the free movement of the professions, but by that time with the *IBM* case, I'd become interested in many other aspects of European law, especially competition law. So I thought well I'll apply for this chair.

The other reason I applied for it was because I'd reached a stage where, so to speak, I'd done all the things a successful advocate should do and I suppose I was entering the zone of being considered for appointment to the bench. And I thought I would like in the first place to teach, which had been something which I had been interested in because, as I said, I had an aunt who was a teacher and I'd been given a passion for education when I was young. So I was quite keen to go and teach and quite keen to learn more about European law because one of the best ways of learning the law is to teach it.

And so I applied for the chair with not much hope of getting it. However, I did get it. And that is how it happened. I have never regretted it, but it was regarded as a very bizarre thing to do for a senior member of the bar to decide to go off and be a professor.

DS: Did you have any trepidation as you left the practice and entered the academic phase of your career?

DE: Well I didn't wholly leave practice because I continued to consult and I continued to do a bit of court work although I couldn't do very much because part of the point of being appointed to this chair was to resuscitate the activities of the institute that John Mitchell had created.

At that time the law faculty at Edinburgh was just beginning to create the LL.M. degree – it had had a research LL.M. but not a taught LL.M. so there was a lot of work to be done and it wasn't possible to do very much practice except a certain amount of consultancy.

I suppose the main trepidation was really money because I was going from a very significant income at the bar to a minimum income as a professor. Although professors used to be paid well in relative terms, the academic salaries had fallen far behind. So it involved reverting to a situation really which I had been in in the 1970s when I was doing all this European work unpaid. From the family point of view it really wasn't the best thing to be doing from a financial point of view.

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<sup>3</sup> [Case 155/79](#) *AM & S Europe Ltd. v. Commission* [1982] ECR 1575; see further discussion in Session II.

<sup>4</sup> [Case 60/81](#) *IBM v. Commission* [1981] ECR 1857; see further discussion in Session II.

DS: How about Elizabeth and your children? What did they think about your...

DE: She said, "If you want to do it, do it. You'll always regret it if you don't."

But of course it depended upon being appointed. There was no particular reason why I should expect to be appointed because I had no academic credentials up to that time.

DS: You were appointed the Salvesen Professor of European Institutions and Director of the Europa Institute<sup>5</sup> at the University of Edinburgh School of Law.<sup>6</sup> What was your role in these positions?

DE: As professor, there was myself and a lecturer, Robert Lane, who is still there and with whom I wrote an introduction to European Union law. We were the only two teachers in the field of European Community law.

There was a German lecturer who taught a course in German government and public law but essentially we had to teach, between us, two undergraduate courses, one on the institutional law of the European Community and one on the substantive law, covering all aspects of both.

And then once we'd started the taught LL.M.<sup>7</sup> course we had to teach equivalent courses for the LL.M.'s, do seminars, and supervise post graduates, Ph.D. students, so it was quite – from a teaching point of view it wasn't an enormous teaching load relatively speaking, but it did involve teaching in a subject which was evolving very fast and trying as far as possible to give the students an opportunity not just to learn about European law but, where they were interested, get them placed in situations where they could develop it.

The other aspect of it was directing this institute which had become – it's not fair to say it had become moribund, but it needed a jump start again. The tradition was that there had been six high powered seminars led by commissioners or directors general or something in the course of the year and so it involved me in doing quite a lot of letter writing and encouragement to get big people to come and talk about aspects of European affairs. Because it wasn't just law, it was also politics, institutions, economics and having got them to come, then making sure they had an audience. Because the audiences had dwindled quite substantially. But by the end of it, we were filling quite a big room with standing room only for most of the lectures on most aspects of European affairs.

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<sup>5</sup> Europa Institute, see <http://www.law.ed.ac.uk/europa/>.

<sup>6</sup> University of Edinburgh School of Law, see <http://www.law.ed.ac.uk/>.

<sup>7</sup> Master of Laws.

We had a very good secretary who had devoted her life to the work with John Mitchell and then with me. She knew everything that was going on and helped enormously but it did involve time and effort. And the other thing was maintaining a good library at a time all the extreme financial stringency in the universities because the universities at that time were subject to very severe cuts.

DS: Judge, I'd like to ask you a little bit about Professor Mitchell. Over the years you have quoted Professor Mitchell and you have commented that he "profoundly influenced"<sup>8</sup> you. Among the things Professor Mitchell said and which you've quoted is the following: "Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other and, in the evolution of government, it is important that within acceptable limits individuals should be able to participate through the neutral mechanism of courts, not merely in maintaining the framework of rules, but also in advancing its construction. I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organized, it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security."<sup>9</sup>

What was it about Professor Mitchell's statement and your relationship with him that you found so compelling?

DE: I think the main thing about Professor Mitchell was that he did not swallow the conventional view of the British constitution, that there is a supreme parliament which has effective control of the executive and to which the executive is accountable.

He recognized long before most other constitutional lawyers in Britain that there was a gap in the protection of the citizen which he found had been filled in the continental systems in particular the French system which he admired – he admired it more than I do – but essentially what he admired was that there was a system of administrative law which ensured that the activities of the administration, the executive, were subject to a degree of judicial control. Now that's his essential point. One that the activities of government should not be totally free of scrutiny and that the individual should have an opportunity to have the activities of government scrutinized and not just through the rather vague ideas of scrutiny by the parliament. There should be a more specific remedy for the citizen, and that through a

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<sup>8</sup> [David Edward, "National Courts – The Powerhouse of Community Law," THE CAMBRIDGE YEARBOOK OF EUROPEAN LAW, vol. 5 \(2002-2003\), 1, p. 21.](#)

<sup>9</sup> [David Edward, "National Courts – The Powerhouse of Community Law," THE CAMBRIDGE YEARBOOK OF EUROPEAN LAW, vol. 5 \(2002-2003\), 1, p. 21-22.](#)

court.

But he also, I think in that passage, identified another point which is that government – governments have interests as governments which they share and to a certain extent share against the interests of the average citizen. That's what he means by governments have as many reasons for conniving between themselves as for opposing each other. One can see in the European field that very often the governments when they are discussing legislation they agree that "If you give me your vote on this, I'll give you my vote on that." And that's a perfectly normal phenomenon in the process of legislation, but it doesn't necessarily make for the best legislation and it doesn't necessarily work to the interests of the citizen, the individual citizen. So his point was that the individual citizen should have some where to go. That's the first point about courts and that courts are neutral in that sense vis-à-vis government and the citizen.

But the other point he makes I think is that the rules governing the process of government should not just be made by the legislature or by governments, but they should evolve through the process of examination of individual cases in the, if you like, in the conventional common law way, that the evolution of rules about good government should come about through examining individual cases and that's the way in which the individual citizen has a opportunity to play a part in the creation, as he put it, of the framework of rules.

Then putting all that together therefore, he maintained – and I think he was right – that courts have a role in democracy. Not in, as it were, taking the initiative themselves but in giving the opportunity for the citizen to come in and have the activities of government examined and tested and certain basic rules, basic principles laid down.

DS: On 28 October 1985, you gave your inaugural lecture as the Salvesen Professor of European Institutions at Edinburgh University. In that lecture you made several points that I'd like to take you back to.

You spoke of the fundamental role of the Community courts. You described that role as "to preserve the simple freedom of the individual to go where he wishes, to live where he likes, and to trade and to work where he can. That freedom is guaranteed to every citizen of the Community as a personal right which neither the member states nor the Community itself can take away. It is that simple freedom of choice for the individual which other regimes will not, and cannot, allow."<sup>10</sup>

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<sup>10</sup> [David Edward, "Community Law: Integration and Diversity," 31 JOURNAL OF THE LAW SOCIETY OF SCOTLAND 51, p. 57 \(1986\).](#)

Can you elaborate on what you said in October of 1985?

DE: I think you have to remember to go back to what Europe was. Europe was divided up into states with frontiers. Well within my lifetime, many states required an exit visa to allow people to leave the state, let alone an entry visa to come into it. So you had to get permission to leave.

I suppose one can say that these kind of restrictions on free movement would have gone anyway with globalization. But the idea that the citizens should be free to say, “Well I don’t like living here anymore,” or “I reckon I could make a better living elsewhere,” that isn’t comfortable for some regimes – dictatorial regimes. And you’ve got to remember that at the time when I wrote that Spain and Portugal and Greece had only very recently ceased to be dictatorships and the Iron Curtain was well and truly in position.

The countries of Eastern Europe were under that form of regime, the Berlin Wall was there, and the frontier throughout Germany. And the people behind it didn’t have an opportunity to get out.

So it was the idea that people should be able to move without having to ask government permission to do so and should be able to practice their profession or their trade and take their family with them and have them educated.

This is a very valuable economic and social right and that’s really what I was getting at. It’s a very valuable economic and social right which is now so much taken for granted in Europe. People don’t realize how difficult it was initially to achieve it.

DS: In that same speech you also talked about the important role of the Court of Justice in “...preserving the balance between the conflicting claims of Integration and Diversity...”<sup>11</sup> Continuing in this regard you said, “If the proper analysis of the current debate is in terms of powers rather than sovereignty, courts are the institutions whose function it is to see that powers are exercised lawfully and not usurped or abused.”

What did you mean by that?

DE: Well, I think there are two points. The point about powers I think is essentially what judicial review is about. Judicial review is about ensuring that those who exercise state authority, or any form of authority, are only entitled to do so in so far as they have been given power to do so and they

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<sup>11</sup> [David Edward, “Community Law: Integration and Diversity,” 31 JOURNAL OF THE LAW SOCIETY OF SCOTLAND 51, p. 57 \(1986\).](#)

mustn't use their powers for purposes other than what they were given for.

They must exercise them according to proper procedures and they must exercise them for correct purposes. And that is essentially the function of the court vis-à-vis the administration or the executive – to control the exercise of power. Not to make policy choices, but to enable those who exercise authority to be kept within proper limits.

The other point I was making was that as between integration and diversity – and it's an issue that goes on and on and on and will always go on. It is exactly the same issue as the federalist debate in the United States. To what extent if you are wanting particularly to create an effective economy on a large scale you have to integrate the economy. But to what extent in that event do you have to prevent the smaller units within the greater whole doing things in a different way. That's the issue of states' rights in the United States and it's the same issue as member states rights – what is called subsidiarity<sup>12</sup> – in the European context.

Really the issue is between the claims of integration and the claims of diversity, subsidiarity, federalism, whatever you care to call it, and the adjudicator of that is the court. It's a problem that is not new. It was there in the 1980s when I delivered that lecture and it's still here 20 years later. And will always be here.

DS: What were some of the things about your time at Edinburgh University that you particularly enjoyed?

DE: I enjoyed teaching. The difficulty was that the financial stringencies had become so much that a great deal of my time was taken up with administration.

I used to say that by the end of it teaching had become my hobby, there was so much administration. But I really did enjoy teaching and in particular I enjoyed creating these new LL.M. classes. I'm happy to say that many of the students I had then, both undergraduate and postgraduate, are still friends.

DS: Were there some things you just didn't like about....

DE: I hated the university administration and I always sympathized with those who had to be involved in it.

I don't think there is any ideal form of administration, but I think part of the

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<sup>12</sup> For more information on subsidiarity, see [http://europa.eu.int/scadplus/glossary/subsidiarity\\_en.htm](http://europa.eu.int/scadplus/glossary/subsidiarity_en.htm).

problem in the older universities is their degree of autonomy that faculties and schools used to have in days when money was if not plentiful but was enough – that degree of autonomy, to some extent, had to be limited.

But like all aspects of government once you start the process of controlling expenditure you actually have more people controlling the expenditure than the people who actually spend the money and you get a multiplication of administration and imposition of criteria, which seemed to me to be frequently inappropriate for the best running of an academic institution.

The other thing which I didn't see so much is this obsession about research as compared with teaching. It seems to me that in a university they should go together, not be seen as separate activities. That the university teacher should be concentrating on research and simply emerge from his study or laboratory in order to do a bit of teaching and then return to his research doesn't seem to me, that kind of dichotomy seems to be wrong.

DS: Looking back at your years at Edinburgh University, are there one or two things that are highlights that come to mind?

DE: Really, just the pleasure of teaching and the pleasure of the company of the students. As well, to be fair, the company of my colleagues. It was interesting and refreshing to go from the environment of the bar, which I enjoyed and had lots of friends at the bar. But academia was different from the bar.

DS: Judge Edward, thank you very much for sharing these thoughts.