JUDGE DAVID EDWARD ORAL HISTORY

Interview With Judge David Edward
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Session VI:
The Evolution of the European Union

DS: This is the Judge David Edward oral history.[1] This is taping session number six. 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, from 1962 to 1985.

In this session I'll be asking Judge Edward about the evolution of the European Union.

DS: Judge Edward, I'd like to have you reflect on the evolution and development of the European Union. I'd like to begin this conversation with some questions about the Treaties.

Several years ago, you wrote this about the establishment of the European Coal and Steel Community:[2] "The choice of coal and steel, at the beginning, was significant strategically and geographically."[3]

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[2] The European Coal and Steel Community (ECSC) was established by the Treaty of Paris, which was signed on 18 April 1951 and began operations in Luxembourg in June 1951. The ECSC was Europe's first supranational institution. The signatory countries were Belgium, France, the Federal Republic of Germany (i.e., West Germany), Italy, Luxembourg, and the Netherlands. The plan for what was to become the ECSC is largely credited to two Frenchmen, Robert Schuman who served as French Foreign Minister from 1948 to 1953, and businessman Jean Monnet. On 9 May 1950 Schuman, with assistance from Monnet, issued what was to become known as the Schuman Declaration. The aim of the Schuman Declaration was, among other things, to consolidate the French and German coal and steel industries. Schuman said, "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *defacto* solidarity." Neill Nugent, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 5TH EDITION, Duke University Press (2003), p. 34. For the full-text of the Schuman Declaration, see http://europa.eu.int/abc/symbols/9-may/decl_en.htm. In his memoirs, Monnet said, "The Schuman proposals provide a basis for the building of a new Europe through the concrete achievement of a supranational regime within a limited but controlling area of economic effort…The indispensable first principle of these proposals is the abnegation of sovereignty in a limited but decisive field." Jean Monnet, MEMOIRS, Collins (1978), p. 316. For full-text of ECSC Treaty, see http://europa.eu.int/scadplus/treaties/ecsc_en.htm.

What did you mean by the terms "strategically" and "geographically?"

DE: If you read the Schuman Declaration[4] which, as it were, announced the program for the Coal and Steel Community, what Schuman said was that by creating a supranational control of coal and steel one would by that means put the weapons of war out of the control of any single nation.

It's difficult to reflect now on that, but it shows that coal and steel were essential to any warfare; that you needed coal to make steel and you needed coal to power railways and to provide electricity. You needed steel to make guns and weapons.

If you took coal and steel out of the control of the individual nation states and put them under the control of a higher authority you deprived the individual nation states of the means of producing the weapons of war. So that was the strategic consideration.

The geographic consideration was that one of the main areas of coal and steel production was at the point where Belgium, Luxembourg, France, and Germany meet, particularly in the Saarland,[5] which had been disputed area between France and Germany over many years. But, also in the coal fields of Lorraine.[6] And Germany had annexed Alsace[7] Lorraine after the Franco-Prussian war in 1870. So these particular geographical areas round the foot of Belgium, Luxembourg, northeast France, and Germany were very important from a geographical and strategic point of view and that's what I meant by strategically and geographically.

DS: You have described the European Economic Treaty[8] as "a long and carefully drafted document containing a precise prescription for economic integration,

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[3] David Edward, "Nations, states, people and commerce," in Geraldine Prince (ed), A WINDOW ON EUROPE, Canongate Press (1993), 46, at 54.

[4] The Schuman Declaration was made by Robert Schuman, who was foreign minister of France from 1948-1953, on 9 May 1950. The declaration has been described as "a historic announcement." John Gillingham, EUROPEAN INTEGRATION 1950-2003: SUPERSTATE OR NEW MARKET ECONOMY? Cambridge University Press (2003), p. 22.

[5] The Saarland is now a German state. See http://www.english.saarland.de/.

[6] Lorraine is a region in France sharing a border with Germany; for a map of Loraine see http://www.map-of-france.co.uk/map-of-lorraine.htm.

[7] Alsace, a French region which borders Lorraine, also shares a border with Germany; for a map of Alsace, see http://www.map-of-france.co.uk/map-of-alsace.htm.

[8] The European Economic Community (EEC) was founded by the Treaty of Rome, which was signed on 25 March 1957 and came into force (along with the European Atomic Energy Community) on 1 January 1958. The signatory countries were Belgium, France, the Federal Republic of Germany (i.e., West Germany), Italy, Luxembourg, and the Netherlands. Peace and prosperity were underlying themes in the EEC Treaty preamble as well as the aspirational goal of achieving "an ever closer union among the peoples of Europe." The EEC Treaty is best known for its establishment of the European Common Market. In this regard, "The

and it is important to emphasise that it is not just a prescription for a free trade area."[9]

In another article you wrote, "[T]he task of those who wrote the [European Economic Community Treaty] was to create an enforceable Commerce Clause without the rest of the Constitution. Their achievement was, as I have said, essentially technocratic, but it was none the worse for that."[10]

What did you mean that the treaty was "not just a prescription for a free trade area" and that it was "essentially technocratic?"

DE: As regards not being just a free trade area, there were free trade areas already and in particular once the European Economic Community got started, Britain with six other countries, set up the European Free Trade Association[11] – EFTA – which continued and still survives in the three countries of the European Economic Area[12] together with the countries of the European Union.

A free trade area in those days was a free trade area for free trade in goods.

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treaty proper included provisions for a customs union, a common commercial policy, a common transport policy, competition policy, limited monetary policy cooperation, and coordination of macroeconomic policy. A provision on social policy called for the establishment of the European Social Fund to contribute to retraining and other assistance to workers. The treaty also established a European Investment Bank…The treaty's provisions for the free movement of persons, services, and capital were tentative, reflecting the tension between what was theoretically desirable and politically practicable in the establishment of the common market." Desmond Dinan, EUROPE RECAST: A HISTORY OF EUROPEAN UNION, Lynne Rienner Publishers (2004), p. 77. For full-text of the EEC Treaty, see http://www.europa.eu.int/scadplus/treaties/eec_en.htm.

[9] David Edward, "Nations, states, people and commerce," in Geraldine Prince (ed), A WINDOW ON EUROPE, Canongate Press (1993), 46, at 55.

[10] 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), 8.

[11] The European Free Trade Association – EFTA – was established on 3 May 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. It has been suggested that "EC member states resented what they saw as Britain's efforts to undermine European integration by diluting the nascent EC in a wider free trade area. Robert Marjolin, a vice president of the new [European] Commission, saw the proposal as 'a great danger, that of being more or less sucked into a vast European free trade area in which [the Community] would have lost its individuality, and which might have prevented it from fully establishing itself according to the terms of the Treaty of Rome.'" Desmond Dinan, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION, Lynne Rienner Publishers Inc. (1999), 41. While still in existence, it has only four members – Iceland, Liechtenstein, Norway, and Switzerland. See http://secretariat.efta.int/.

[12] The European Economic Area (EEA), established on 1 May 2004, set up an internal market governed by the same basic rules involving the 25 EU Member States and the three EEA EFTA states (Iceland, Liechtenstein, and Norway). These rules aim to enable goods, services, capital, and persons to move freely about the EEA in an open and competitive environment. The goal of the EEA Agreement, as set forth in Article 1, is promoting a balanced and continuous strengthening of economic and trade relations between the contracting parties. The EEA was established "to allow those European states who were not committed to full EU membership to obtain some of the benefits of the internal market." Tony Storey and Chris Turner, UNLOCKING EU LAW, Hodder Arnold (2005), p. 185. See http://secretariat.efta.int/Web/EuropeanEconomicArea/introduction.

In the first place, the European Economic Community Treaty differed from that in being a community for free movement of persons, services, and capital as well as goods. That's one element.

But it was also expressly intended to be a first step in the process of European integration. So it was a political move as well as an economic move.

But it also had elements which went far beyond the limits of a free trade area. First of all, a customs union and secondly, social provisions and the provisions for association with the African, Caribbean, and Pacific countries so the former colonies of the member states. So there were a series of elements in addition which differentiated what was created at that time from a pure free trade area.

As regards it being a technocratic achievement, what I meant by that – and why I say it is none the worse for that – is that it did involve writing down extremely detailed prescriptions as to how this was to be achieved. The U.S. Commerce Clause[13] is, I can't remember just a few lines, but if you're going to have as intense a degree of economic integration as was envisioned in the European Economic Community, and you start from a situation of member states with widely differing legal systems – systems of government, court systems, and so on – with the enormous differences between the member states that existed in Europe which certainly didn't exist in the United States at the time of creation of the United States, then you've got to spell this out in much greater detail and the detail is essentially technocratic. It's not the work of ordinary people, even ordinary lawyers, working to create a people's constitution. It's much more the work of specialists, creating a very detailed treaty.

DS: You also have written the following about the European Economic Community Treaty: "The purpose was overtly more than to create a free trade area. On the contrary, it was expressly a political purpose, the political purpose being political integration through progressive economic integration or, as it was put in the preamble, the achievement of 'an ever closer union among the peoples of Europe.' The method used was the pooling of sovereignty, the exercise of joint sovereignty, for defined if limited

[13] Art I, section 8, clause 3 of the U.S. Constitution provides that the U.S. Congress has the exclusive power "To regulate commerce within the states, with foreign nations, and with Indian tribes." See http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html.

purposes."[14]

What made the original signatory countries to the European Economic Community Treaty willing to hand over some of their collective sovereignty?

DE: I think it was a realization of two things.

First of all that the economy of Europe in the mid-50s – after the creation of the Coal and Steel Community – the economy of Europe began to slow down and the basic concern at that time from an economic point of view was to see how you could regenerate the European economy. What was called the Spaak Report[15] comparing the situation in Europe with the situation in the United States pointed out that to have a really vibrant economy, you need a large market. So, from an economic point of view, the view was taken, and still is taken, that you need economic integration in order to create a large market which is the basis on which the economic actors can find room to function. So that was one element, the creation of an economic area.

But the other consideration was that after the Coal and Steel Community, there had been an attempt to create a European Political Community[16] and a

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[14] David Edward, "Nations, states, people and commerce," in Geraldine Prince (ed), A WINDOW ON EUROPE, Canongate Press (1993), 46, at 56-57.

[15] Paul-Henri Spaak, Belgian Foreign Minister, chaired the Spaak Committee that in March 1956 recommended to the six member states of the European Coal and Steel Community that a common market be established. Tony Judt, POSTWAR: A HISTORY OF EUROPE SINCE 1945, The Penguin Press (2005), p. 303. The Spaak Committee's report gave rise to the negotiations leading to the signing and ratification of the Treaty of Rome. Desmond Dinan, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 2ND ED., Lynne Rienner Publishers (1999), p. 114.

[16] The objective of the European Political Community (EPC), proposed by Italian Prime Minister Alcide de Gasperi, was to establish an "overarching political community" for the European Coal and Steel Community (ECSC) and the proposed European Defense Community (EDC). Desmond Dinan, EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION, Lynne Rienner Publishers (2004), pp. 61-62. Gasperi's proposal is found in Article 38 of the European Defense Community Treaty, which was signed on 27 May 1952. Among other things, Article 38 called for the establishment of "…a permanent organization…of a confederal or federal structure…" to oversee the EDC and ECSC; see http://aei.pitt.edu/5201/. In March 1953 a draft treaty to establish the EPC was adopted. The first article of the proposed EPC Treaty said, "The present Treaty sets up a European [Political] Community of a supranational character." Desmond Dinan, EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION, Lynne Rienner Publishers (2004), p. 62. The Treaty envisioned the establishment of a political community "that cleverly merged British parliamentary democracy with the American constitutional principle of the separation of powers." Mark Gilbert, SURPASSING REALISM: THE POLITICS OF EUROPEAN INTEGRATION SINCE 1945, Rowman & Littlefield (2003), p. 59. Had the Treaty been enacted, it would "have been an organization more advanced along the road of European integration than the most optimistic EC member states hoped would come out of the 1991 intergovernmental conference that resulted in the Treaty on European Union." Desmond Dinan, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 2ND ED., Lynne Rienner Publishers (1999), pp. 26-27. Ultimately, the EPC proposal died when the EDC Treaty collapsed. Desmond Dinan, EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION, Lynne Rienner Publishers (2004), p. 60.

European Defense Community.[17] You have to remember at that time that the Cold War was beginning to get, if you like, colder or hotter, however you care to mention it.

The division of Europe was more acute and it was felt that there needed to be a new political initiative, but the political community and the defense community having failed there was no point in trying further political initiatives. So the idea was that if you created an economic union then you would create the conditions in which people became more accustomed to the idea of European integration and therefore more ready for political integration. And to some extent that prediction was proved right.

There have been setbacks and perhaps the enthusiasm for political integration hasn't gone as far as the greatest enthusiasts at the time would have wanted, but that was part of the plan.

DS: Tony Judt, author of *Postwar: A History of Europe Since 1945*, has written this about the Treaty of Rome: "The only truly significant innovation – the setting up under Article 177[18] of a European Court of Justice to which national courts would submit cases … – would prove immensely important in later decades but passed largely unnoticed at the time."[19]

Is it true that the impending importance of the preliminary reference provision was largely unnoticed at the time?

DE: I suppose it would be true to say that nobody envisaged at the time that there

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[17] The European Defense Community (EDC) Treaty was signed by the six original members of the ECSC on 27 May 1952. Under the treaty, the EDC – focused exclusively on defense – would have been a "supranational community, with common institutions, armed forces, and budget. The EDC was supranational because its decisions (some of which could be taken by majority vote) would be binding and because the treaty envisaged the fusion of forces, not just their coordination." Trevor C. Salmon, "European Defense Community" in Desmond Dinan (ed.), ENCYCLOPEDIA OF THE EUROPEAN UNION UPDATED EDITION, Lynne Rienner Publishers Inc. (2000), p. 195. Ultimately, the EDC died in the summer of 1954 when the French Chamber of Deputies rejected ratification. However, it has been suggested that the EDC "left an interesting legacy. Having marked the high point of European federalist aspirations, the failed proposal quickly acquired the aura of a great opportunity lost. As the EC struggled through the political setbacks of the 1960s, the economic difficulties of the 1970s, and a belated revival in the 1980s, supporters of supranationalism harked back to the early 1950s as the European movement's golden age. If only the EDC and the related political community had been ratified, the argument goes, European integration would have reached a level considered unattainable in later years. Yet the collapse of both proposals and the failure of subsequent initiatives along similar lines clearly indicate the limits on European integration in the 1950s and beyond…The outcome of both issues allowed them to concentrate instead on the kind of integration politically possible in the 1950s and for many years thereafter: functional economic integration." Desmond Dinan, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 2ND ED., Lynne Rienner Publishers Inc. (1999), 27-28. See http://aei.pitt.edu/5201/.

[18] Art. 177 of the original European Economic Community Treaty was the preliminary ruling provision; it is now Art. 234 of the European Community Treaty.

[19] Tony Judt, POSTWAR: A HISTORY OF EUROPE SINCE 1945, The Penguin Press (2005), p. 303.

would be a Court of Justice quite as busy as the Court of Justice has become.

Of course, at that time it wasn't totally clear what kind of cases would come to the Court and indeed for a very long period after its institution – apart from the cases arising under the Coal and Steel Treaty – the cases coming to the Court of Justice fell very largely into the areas of agricultural quotas and subsidies and customs classifications, customs duties and the sort of nitty-gritty of the customs union and the trade in goods.

It wasn't for perhaps 30 years that the scope of the Court's activities really extended far beyond that. And that simply reflects the fact that the activity of the Community had extended far beyond that by that time. I suppose looking at it in1958 – if one tries to put oneself in the position of the people who created it – they can't really have expected that it would be as important as it turned out to be.

On the other hand, the fact is that they put it in. And, again, you have to remember that there was provision in the Coal and Steel Treaty for a reference procedure as well. They weren't entirely oblivious to the fact that there was going to be activity for the Court of Justice which would involve some degree of relationship with the member state courts. I suppose that what could hardly have been foreseen at the time was the intensity of that relationship and the volume of work it would create.

But I'm not that sure I agree with the proposition that that is the one innovative thing. I think there were a number of innovative things, not least the creation of the political institution, the High Authority[20] for the Coal and Steel Community and the Commission for the Economic and Atomic Energy Communities. That was innovative in its own way also.

DS: The next major treaty was the Single European Act.

In a 1987 article[21] in the *Common Market Law Review*, you described the Single European Act as a "political manifesto." You went on to write, "The Single Act is a moral and political commitment on the part of all the Member States to make a reality of the internal market by 1992. That is not a commitment which could have been taken for granted. Nor, to be frank, is the aim of making a reality of the internal market an aim to which the more 'progressive' Member States have always shown a whole-hearted commitment."

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[20] The European Coal and Steel Community's High Authority was the supranational institution charged with developing a common market in steel and coal.

[21] David Edward, "The Impact of the Single Act on the Institutions," COMMON MARKET LAW REVIEW 1987, 19, at p. 20.

What did you mean by this?

DE: You have to understand the context. There was a school of thought led, if you like, by Judge Pierre Pescatore,[22] who had recently retired from the Court of Justice who had been one of the negotiators of the original treaty. There was a school of thought that the Single European Act was either unnecessary because it added nothing substantive to the original treaties or was a step back because it gave the member states excuses for not accepting the degree of commitment to integration that the original treaties envisaged.

That article in the *Common Market Law Review* was in fact an article based on a talk I gave at a meeting of what was called the London/Leiden meetings at which Judge Pescatore had launched a fierce attack on the Single European Act and I was replying to it.

The point I was making was, first of all, that the Single European Act – even if it didn't add significantly to the substance of what was already in the treaties – the signing of the Single European Act involved a political commitment to make a reality of the internal market because up to that time the member states had not made a reality of the internal market. So signing up to the Single European Act was a declaration of political will, if you like. That was the first point I was making.

And the other point at the end was perhaps a sort of dig at the original six member states.[23] Some of the original six were saying, "Oh, the Single European Act doesn't go far enough." But, in fact, if you looked at history the original six member states weren't the most enthusiastic sometimes about doing what required to be done in order to make a reality of the internal market. You've only got to look at the situation of France, in 1966, when France adopted the policy of the "empty chair"[24] in order not to have qualified majority voting in agricultural matters.

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[22] Pierre Pescatore, from Luxembourg, was a member of the Court of Justice from 1967-1985.

[23] The original six member states were Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands.

[24] The transitional provisions of the European Economic Community Treaty called for qualified majority voting in the Council of Ministers to be introduced in January 1966. Up until then, unanimous voting had been in place. French president Charles de Gaulle objected to Community's move towards a more supranational scheme, which qualified majority voting would have contributed to. In addition, "De Gaulle objected to an important institutional reform proposal made by the Commission – which was combined with a proposal to resolve a conflict over agricultural policy – for the Community to raise its own resources from agricultural levies and external tariffs, instead of being funded by national contributions. He strenuously objected to the 'federalist logic' of the proposal and, after a failure to reach a compromise in the Council, France refused to attend any further Council meetings and adopted what became known as the 'empty-chair' policy. This last for seven months, from June 1965 until January 1966, after which a settlement was reached, which became known as the Luxembourg Compromise or the Luxembourg Accords." Paul Craig and Gráinne de Búrca, EU LAW: TEXT, CASES, AND MATERIALS 3RD ED., Oxford University Press (2003), p. 13.

So really what I was saying was even if the Single European Act isn't everything people would have desired and even if it doesn't represent a major step forward vis-à-vis the original treaties, nonetheless it is a step forward in political and moral terms.

DS: In the run up to the ratification of the Maastricht Treaty,[25] you said in a speech at Napier University, "Maastricht is above all a political commitment – a political commitment, not to ditch the nation state, but to compensate more adequately and more effectively for its weaknesses and its shortcomings."[26]

What did you mean by the phrase "to compensate more adequately and more effectively" for the weaknesses and shortcomings of the nation state?

DE: What I was trying to point out, I suppose, is this: Europe consists of nation states each with its own customs, its traditions, its legal system, its political system, its assumptions about how life ought to be lived. And going right back to the beginning the fact is that if you continue on the basis of nation states going their own way, you will from an economic point of view have a fragmented market. You will not have an integrated market and therefore your won't get the economic advantages of an integrated market. But the member states of Europe – even Germany, Britain and France and Italy – are not big enough in themselves to play a major part in world affairs.

And so you have to give up some degree of sovereignty in order to get the advantages of size and collaboration and that's really what I was saying. You have to give up something in order to get the advantages of size, but that's an elementary point about human life. You know everybody can go and live in a cave on their own, but if they do that then they live in a cave and eat berries and they'll die.

DS: You have also written that, "The Treaties of Maastricht and Amsterdam, together with the Community Treaties, are a 'constitutional charter' but not a constitution as such. They create institutions and define their spheres of competence and their powers, but the institutional structure is fuzzy since it includes the Member States which are both within the system and outside

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[25] 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. The Maastricht Treaty changed the name of the European Economic Community to simply "the European Community." It also introduced new forms of co-operation between the Member State governments – for example on defence and in the area of "justice and home affairs." By adding this inter-governmental co-operation to the existing "Community" system, the Maastricht Treaty created a new structure with three "pillars" which is political as well economic. For the full-text of the treaty, see http://www.europa.eu.int/scadplus/treaties/maastricht_en.htm.

[26] David Edward, "Nations, states, people and commerce," in Geraldine Prince (ed), A WINDOW ON EUROPE, Canongate Press (1993), 46, 62.

it."[27]

Can you elaborate on your thinking on this point?

DE: Yes. I think the essential point about the "constitution" of the European Union being created by treaties is that it's the member states who create the treaties. They are, as the Germans say, the masters of the treaties.

So the member states in an intergovernmental conference[28] can change the treaties. They can, as it were, alter the contract they have made and there's nobody to stop them doing so. So to that extent the member states are outside the treaties; they are the creators of the treaties.

But the system is such that the member states are also important actors in putting the treaties into effect. Not only the courts but the administration of the member states are closely involved in the working of the European Community and the European Union and in the process of putting the decisions they've made into effect.

So, really what I'm saying is that the difference between the treaties as a constituent charter and the constitution of a state is, well, one of the main differences, is that the member states which have to comply with the constitution and have to act within the constitution can also themselves change the constitution.

DS: The Treaty of Rome was primarily about commercial and trade matters. How has this changed during the years since the establishment of the European Economic Community?

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[27] 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), 12-13.

[28] Intergovernmental conferences (IGCs) are negotiations undertaken by the Member States vis-à-vis amending the treaties. The most important IGCs in recent years have resulted in the following treaties: (1) the Single European Act (1986), which introduced the changes needed to complete the internal market on 1 January 1993; the Treaty of Maastricht (1992) involved the Treaty on European Union, which was negotiated at two separate IGCs, one on economic and monetary union (EMU) and the other on political union, instituting the common foreign and security policy (CFSP) and cooperation on justice and home affairs (JHA); the Treaty of Amsterdam (1997) was the result of the IGC launched at the Turin European Council in March 1996 and which aimed to revise those provisions of the Maastricht Treaty which gave rise to problems of implementation and to prepare for future enlargement; the Treaty of Nice (2001), which followed an IGC launched in February 2000 to address the issues not resolved by the Treaty of Amsterdam, namely the size and composition of the European Commission, the weighting of votes in the Council of Ministers, the possible extension of qualified majority voting in the Council, and closer cooperation - included during the Santa Maria de Feira European Council of June 2000;and the Treaty establishing a Constitution for Europe (2004), which has not yet been implemented.

DE: It is true that it was initially substantially about trade matters. It was a follow on from the GATT[29] and an attempt to create an integrated economic market in goods, and a lot of the effort at the beginning went in to that not least because unlike most free trade agreements of the time the agreement included agricultural products. Normally agricultural products were excluded from free trade agreements. That was enormously important not just to France but to other original founding members.

The community was also about free movement of persons, services, and capital and some substantial progress was made in that area at the very beginning of the 60s by establishing freedom of movement of workers – that's to say salaried people, people working for wages or salaries and the establishment of the principle that people were entitled to go to other countries to look for work, to find work, to keep work, and to have social security and to have educational and social advantages not just for themselves but also for their families.

Quite an important step was taken in that respect at a very early stage for the establishment of free movement of persons in that limited area. In the 1970s, with the Court of Justice decision in *Reyners*[30] in particular, there became a greater pressure for free movement of the professions, although steps had already been taken to ensure free movement of doctors. In the 70s you see greater movement towards free movement of the professions, and you see a greater degree of activity in the field of free movement of money. Not necessarily complete freedom of movement of capital but freedom of movement of money. Freedom of movement to go and enjoy services in other member states and that continued, really, up to Single European Act.[31]

The Single European Act, I suppose, marked the end of the period during

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[29] The General Agreement on Tariffs and Trade.

[30] Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631. Reyners was a Dutch citizen who earned his legal degree in Belgium. Nevertheless, he was refused admission to the Belgium Bar solely because he was not a citizen of Belgium.

[31] 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. The SEA was the first formal revision of the European Economic Community Treaty (EEC Treaty). It has been said, "The SEA's insertion of Article 8a (presently renumbered as Article 14) into the EEC Treaty gave Treaty force to the policy goal of completing the internal market…The definition of the internal market as 'an area without internal frontiers' adds significantly to the attainment of the 'four freedoms.'" George A. Berman, Roger J. Goebel, William J. Davey, Eleanor M. Fox, CASES AND MATERIALS ON EUROPEAN UNION LAW 2ND EDITION, West Group (2002), p. 543. EC Treaty Article 14 provides in part, "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992…The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty." For the full-text of the SEA, see http://www.europa.eu.int/scadplus/treaties/singleact_en.htm.

which it was the Court of Justice that was driving forward the process of free movement, but also the beginning of a period when the legislative arm of the European Community was bringing into being the necessary legislation to make the internal market work, to do the things the Court of Justice couldn't do.

DS: In 2000 you said, "And I must admit that you cannot sit in the European Court of Justice for more than 10 minutes without realizing that the Internal Market is not complete. The reason for this incompleteness, it seems to me, is because Europe's problems are specific. Europe's problems are, as I have said, characterized by many languages, many traditions, many legal systems, and many different ways of approaching things as mundane as company accounting."[32]

Does that remain the case today and, if so, do you foresee a time when the market is entirely integrated?

DE: If you look at the internal market of the United States it is not entirely integrated and that's more than 200 years after the United States came into being and the commerce clause was enacted. I suppose quite a lot of the work of the federal courts, the circuit courts, and the Supreme Court is concerned with the extent to which freedom of commerce, in the broad sense, is incompatible with the complete exercise of states rights.

I think it would be a rash person who would say that the internal market will at some stage be totally complete and there will be no longer be any barriers to free movement of goods, persons, services, and capital. That's one aspect of it.

But the other aspect of it is that – and this lecture you quoted from was a lecture in Columbia University in New York – and what I was trying to explain to an American audience was that the problems of Europe are not precisely the same as the problems of the United States. The nation states of Europe, as I've said, were very different and still are very different in many respects and are entitled to remain so.

The difficulty is that that which seems obvious and natural to State "A" may act as a barrier to trade with State "B." For example, if State "A" is very enthusiastic about environmental protection and enacts rules about, for example, glass bottles for liquor and State "B" doesn't comply with those rules then State "B" won't be able to export liquor to State "A." And, State "A's" view of what is environmentally necessary may seem self-evident to the people of State "A," but nonetheless it acts as a barrier to trade with State

[32] David A.O. Edward, "Perspectives on Competition Law: Problems and Solutions," 23 FORDHAM INTERNATIONAL LAW JOURNAL 274 (2000), 277.

"B." And that will continue to be so. But it's the very individual character of the nation states of Europe that makes it particularly difficult to ensure total freedom of movement.

But that applies equally in fields like company accounting, like the rules governing the professions, and many other respects. The member states differ in the way they approach things and these differences can be barriers to free movement.

DS: As a final question on this topic, in 1996 you said, "We now recognize that systematic exclusion of those outside, and discrimination against those inside, the frontiers of the state is neither humanly acceptable, nor in the long term, economically efficient. The European Community has never been, for me, the way to a new European state which would only recreate the problem at a different level. On the contrary, the Community is an experiment in the creation of a new type of political structure."[33]

What did you mean by the phrase "a new type of political structure" and does it still apply today?

DE: I think it applies all the more. The great error of some protagonists of European integration and a great many academics, in my opinion, has been to insist on analyzing the European Union and where it is going to in terms of concepts that fit existing concepts of federation – for example the United States, for example Germany – and believing that what the European Union is headed for must be some form of federation similar to the United States – a state solution – creating a new state in international law with all the inherent characteristics of statehood in international law.

Now my view is, and always has been, that the strength of the European Community and the European Union is simply not to be going down that line at all, but to be finding another way of achieving economic, social, and political integration which does not involve reproducing, on the European continent, something the same as the United States on the American continent but creating a union.

I would prefer that it had remained, been called a community which would be a means of integration of a different kind. And I think that is precisely why the countries of South America and the countries of Southeast Asia and some of the countries of Africa have started to move in the same direction of creating relationships between them analogous to the relationships of the states of the European Community and not, quite deliberately, going in the direction of integrated federation.

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[33] David Edward, "The European Court of Justice – Friend or Foe?" European-Atlantic Group, 18 July 1996.

So my view is that all talk which presupposes that Europe is necessarily headed in the direction of a federated superstate is not only totally unrealistic but not consistent with what was the original conception. The original conception was not to head in that direction, but to head in the direction of a different kind of relationship.

DS: In your response, you mentioned that you would have preferred the name remain "community" rather than "union" and I'm wondering if you could elaborate on that.

DE: First of all, the expression "European Community" indicates that you are not looking for a "union." You are looking for something different.

Secondly, the word "union" creates psychological problems for many people because it indicates that what you are looking for is "United States of Europe" in the same sense as you are looking for "United States of America."

And thirdly, and most importantly from my point of view, the use of the word "union" created a problem particularly for Norway, because the Norwegians had had union with Sweden and Denmark and there was a considerable amount of understandable psychological resistance to recreating something out of which they had already come in order to achieve their independence.

So my view is that the word "community" is less threatening to those who do not want Europe to go in the direction of a superstate and is also indicative of the fact that one is creating something different from a new state. I always have been extremely hostile to the adoption of this word "union" – but I think it's too late now.

DS: And now I'd like to ask you a bit about the institutional balance of power and how it has shifted since the establishment of the European Economic Community.

What role has the European Court of Justice played in those shifts?

DE: I think that the function of the Court of Justice is in this respect two-fold.

The first is to make sure that the institutions of the Community keep within the powers they've been given by the treaty, that they use their powers properly, they don't misuse their powers, and that they use their powers according to transparent methods of procedure. That's one side.

But the other side is to ensure that they treat each other properly and one of the elements in that has been, in the first place, the relationship between the Commission and the Council of Ministers. In the days, particularly when the Parliament did not have legislative powers, it was necessary to insure that the novel relationship between the Commission and the Council – because the Commission was a totally new kind of political actor – that that relationship should be one in which each side respected the prerogatives of the other.

And then as the European Parliament came to acquire greater powers under the treaties – it came to acquire greater powers progressively – then it was necessary to ensure that both the Commission and the Council respected the prerogatives of the Parliament. But correspondingly that the Parliament also recognized – and this is an important point I think – that it is not a parliament in the sense of a state parliament with all the inherent prerogatives of a state parliament. Like all the other institutions, its powers are laid down in the treaty and they are not necessarily the same as the powers of a state parliament.

So it's important on the one hand to ensure the Commission and the Council respected the prerogatives of the Parliament, but also that the Parliament did not arrogate to itself powers that it hadn't been given. And I think the Court, in a relatively low key way, did quite a lot to ensure that the institutions recognized the limits of their own powers.

DS: In the spring of 1999, the European Commission resigned en masse following allegations of corruption by at least one commissioner. In the wake of that development, Grant Baird, who was then executive director of Scottish Financial Enterprise, wrote in *The (Scotland) Sunday Herald* that the European Commission needed a heavyweight, but not necessarily a political heavyweight, to serve as the next Commission president. "We need a public servant of standing, with no debts to pay, and no special interests in his or her baggage, and who will get on with the business," Mr. Baird wrote.[34] One of the candidates he identified for this position was you.

Do you remember Mr. Baird's piece and if so what did you think about it?

DE: To be honest, I'd never heard of it until you quoted it to me. I've never seen it before.

Certainly there couldn't have been the slightest question of any judge being appointed a Commissioner far less president of the Commission. On the other hand, leaving aside my own position, I think Grant Baird had a point and still has a point.

[34] Grant Baird, "Let's be radical and hire more civil servants," THE SUNDAY HERALD, March 21, 1999, p. 9.

I think that the notion that the Commissioners should be, as it were, political ministers as opposed to – some people see this as a derogatory term, but – technocrats, people who really understand the problems of the creation of an internal market, the maintenance of an internal market, and the creation of an effective economic, social, and political union. These skills are not necessarily there in the modern politician, which is not to decry the modern politician but simply to say that the modern politician is not necessarily a person with these particular skills.

And I think the Commission needs these skills and the great example, so it seems to me, is the British commissioner who was appointed in the 1980s by Mrs. Thatcher, Lord Cockfield.[35] Lord Cockfield had experience in the Inland Revenue[36] as a civil servant and also in business, but he was essentially a technocratic person. And it was Lord Cockfield who identified what were the problems about making the internal market work, who drew up a white paper known as the Cockfield White Paper,[37] which said what needed to be done and identified in precise detail, I think it was 530 legislative measures that would be necessary to make the internal market work. That was the work of somebody who really understood the internal machinery of government rather than somebody who understood the politics of government.

That's really what I would say may be lacking – that the member states appoint commissioners who are good in terms of the political work but don't fully understand what the technical work involves. That's certainly not true of all of them. Some of the commissioners, for example the Slovenian commissioner[38] for research and development fully understands on a technical level what is required. But it's not true of all of them.

DS: Now I'd like to ask you more specifically about the relationship of the U.K. to the European Union. The U.K.'s position vis-à-vis the EU has generally been an ambivalent one and I'd like to ask you about that particularly as it has evolved since the 1990s.

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[35] Lord Francis Arthur Cockfield, Vice-President of the European Commission with special responsibility for the single market, was the person behind the 1985 White Paper on the Completion of the Internal Market.

[36] Inland Revenue was the British Government department responsible for collecting direct taxation. On 18 April 2005, Inland Revenue was merged with HM Customs and Excise to form a new department, HM Revenue & Customs.

[37] "Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)" COM(85) 310, June 1985. For full-text see http://europa.eu.int/comm/off/pdf/1985_0310_f_en.pdf; for full-text of annex see http://europa.eu.int/comm/off/pdf/1985_0310_f_en_annexe.pdf.

[38] Janez Potočnik, a native of Slovania, was appointed and confirmed as a European Commissioner in 2004.

In 1992, the *Glasgow Herald* published a story indicating that you had stated your support (at a lecture at Napier University in Edinburgh) for a "yes" vote by the U.K. on the matter of ratification of the Maastricht Treaty. The story went on to say, "[Judge Edward] referred to Lady Thatcher's view that what was wanted was a confederal Europe based on co-operation between independent sovereign countries loosely linked in a free trade area, and said, 'She should know better.'"[39]

What did you mean by that?

DE: I think I've already really said what I meant. It's simply that the creation of an internal market allowing free movement of goods, person, services, and capital is far, far more than the creation of a free trade area and is much, much more difficult than the creation of a free trade area.

Really the point I was making was that you actually have to accept that it is much more difficult to achieve, technically much more difficult to achieve, and politically much more difficult to achieve even if you stop at the level of the internal market and don't go any further into questions of social market, environmental protection, and so on.

And we've got new problems such as people trafficking, money laundering, visas, asylum, terrorism, and so on, quite new problems coming over the horizon. But even if you stop at the level of the internal market it's absurd to talk about it simply being a loosely connected free trade area between sovereign states. That was not what was envisaged from the beginning and it is certainly not what we signed up to in 1973.

DS: Judge in 1995, referring to comments from then Home Secretary Michael Howard,[40] you were quoted in *The Lawyer* as saying, "It's not true, as the Home Secretary recently said, that the Court consistently leans to giving more power to Brussels. It's a statement, coming from a man with QC after his name, which is as remarkable as it is untrue."[41]

Can you explain what this was all about?

DE: This again goes back to that tiresome period in the middle of the nineties when the Conservative Government, which was by that stage on its last legs, decided to get on the bandwagon of Euroskepticism and attack everything

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[39] "Benn presents petition in Commons urging referendum," THE GLASGOW HERALD, Nov. 4, 1992.
[40] The Right Hon. Michael Howard, QC, MP, was first elected in 1983 to the U.K. House of Commons. He served as Home Secretary from 1993-1997 in the Government of Prime Minister John Major. Subsequently he was leader of the opposition Conservative Party from 2003-2005. Mr. Howard remains a member of parliament.
[41] "Howard rebuked for EU remarks," THE LAWYER, 14 March 1995.

that the European institutions did and they found the Court a convenient whipping boy for themselves – a target.

And Michael Howard said that the Court consistently leans against the rights of the member states. And looking at the Court's case law that is simply not true. But of course, the Court's case law by that time was already two feet per year and I don't suppose that Michael Howard or any other minister had bothered to inform themselves as to what was in that two feet of case law. But it simply wasn't true.

DS: Then, Judge, in 1996, you had a celebrated disagreement[42] with then Foreign Secretary Malcolm Rifkind[43] – who as a matter of fact in the 1960s had been a junior colleague of yours – about the Conservative Government's plans to reform the European Court of Justice. In fact at one point during this episode, the Press Association suggested that you were "no friend of the Government's policies on the EU."[44]

What was the government's plan and what, if anything, ever came of it?

DE: Well, I think that we've touched on this already in an earlier session. The Conservative Government had identified – for reasons I've never fully understood – the European Union as being "the enemy" and set out on this bandwagon of Euroskepticism with the Court being particularly a target.

The reason why the Court was a target was because a number of articles had been written by people who misrepresented what the Court had done. So the Conservative Government decided, as John Major put it, to clip the wings of the Court. And they made a series of proposals about the future of the Court and the working of the Court, many of which were simply totally impracticable and many of which would have made the Court work less well.

My objection to what they were doing was that they put forward these ideas without any attempt to find out how they would work, and in particular insisted on those ideas after I had explained in considerable detail in private correspondence or private papers precisely why these proposals wouldn't work or why they would make the Court work less well. And you have to remember that while the British Government was very keen to clip the wings of the Court they also wanted to rely on the Court as the means by which the other member states would be required to continue to create the internal market.

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[42] Dan Atkinson, "Diary," THE GUARDIAN, 24 July 1996, p. 15.
[43] The Right Hon. Malcolm Rifkind, QC, MP, served as Secretary of State for Foreign and Commonwealth Affairs from 1995-1997 in the government of Conservative Prime Minister John Major. He was a member of the House of Commons from 1974-1997 and then again from 2004.
[44] Geoff Meade, "Shy judge is keen on Europe," Press Association, 13 November 1996.

So the interest of the Government was on the one hand in supposedly clipping the wings of the Court, but on the other hand ensuring that the Court continued to make the other member states respect the rules of the internal market.

I pointed out how totally inconsistent this position was. And they proceeded repeatedly to make these proposals in spite of an attempt being made to explain to them why the proposals wouldn't work and might even result in a result less favourable to the United Kingdom than the existing arrangement. That was the origin of the problem.

DS: In a 2004 article in *The Times*, you indicated that part of your role as a member of the European Court of Justice was to help explain the European Union to the U.K. legal profession. In this regard, you were quoted as saying, "I regarded that as part of my function: to explain the court to the British judiciary and the legal profession and, so far as I was able, to the British public."[45]

With the benefit of hindsight, how would you assess your effectiveness?

DE: I don't claim anymore for myself than to have done what I set out to do. It did involve a considerable amount of work.

It involved on the one hand what we've discussed, bringing a lot of judges and academics and other people to Luxembourg and showing them the workings of the Court, entertaining them, discussing things with them when they were in Luxembourg. But it also involved frequent visits to the United Kingdom to address meetings of lawyers, judges, universities, and so on. I regarded that as part of the job although it would have been in many respects a great deal more agreeable to have the weekend off and have the time to myself.

I regarded it as part of the work of the judge to explain how the Court worked. I suppose I can claim a certain amount of credit for ensuring that people understood what we did better than they would have done if I hadn't tried to do it. That's the most I can say.

DS: Looking at things from today's perspective, how would you assess the current Labour Government's position and relationship vis-à-vis the European Union?

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[45] Frances Gibb, "Counting the years? Re-invent yourself," THE TIMES (London), 9 November 2004, p. 5.

DE: I don't fully understand it, because Mr. Blair,[46] the prime minister, began by saying that he wanted Britain to be at the heart of Europe, but I just don't see that in practice that has been what has happened and I think it goes back to something I was talking about before.

Making the European Union work is something that involves a great deal of detailed work – detailed study, detailed attention – and the modern politician isn't very keen on that and actually to get down to the nitty-gritty of understanding the problem and working one's way through it, it doesn't lend itself immediately to media interest and the modern politician is interested in media interest, the immediate sound bite if you like.

And I'm disappointed in a way about the way in which some ministers have simply failed to understand what is involved in the process of being part of the European Union and really stimulating it to work well. I think that's the most I would say. I'm disappointed.

DS: Judge Edward, thank you very much for sharing these insights about the evolution of the European Union.

[46] The Right Hon. Tony Blair, MP, British Prime Minister from 1997-present.