EU Institute in Japan, Kansai

EUIJ-Kansai Seminar Series

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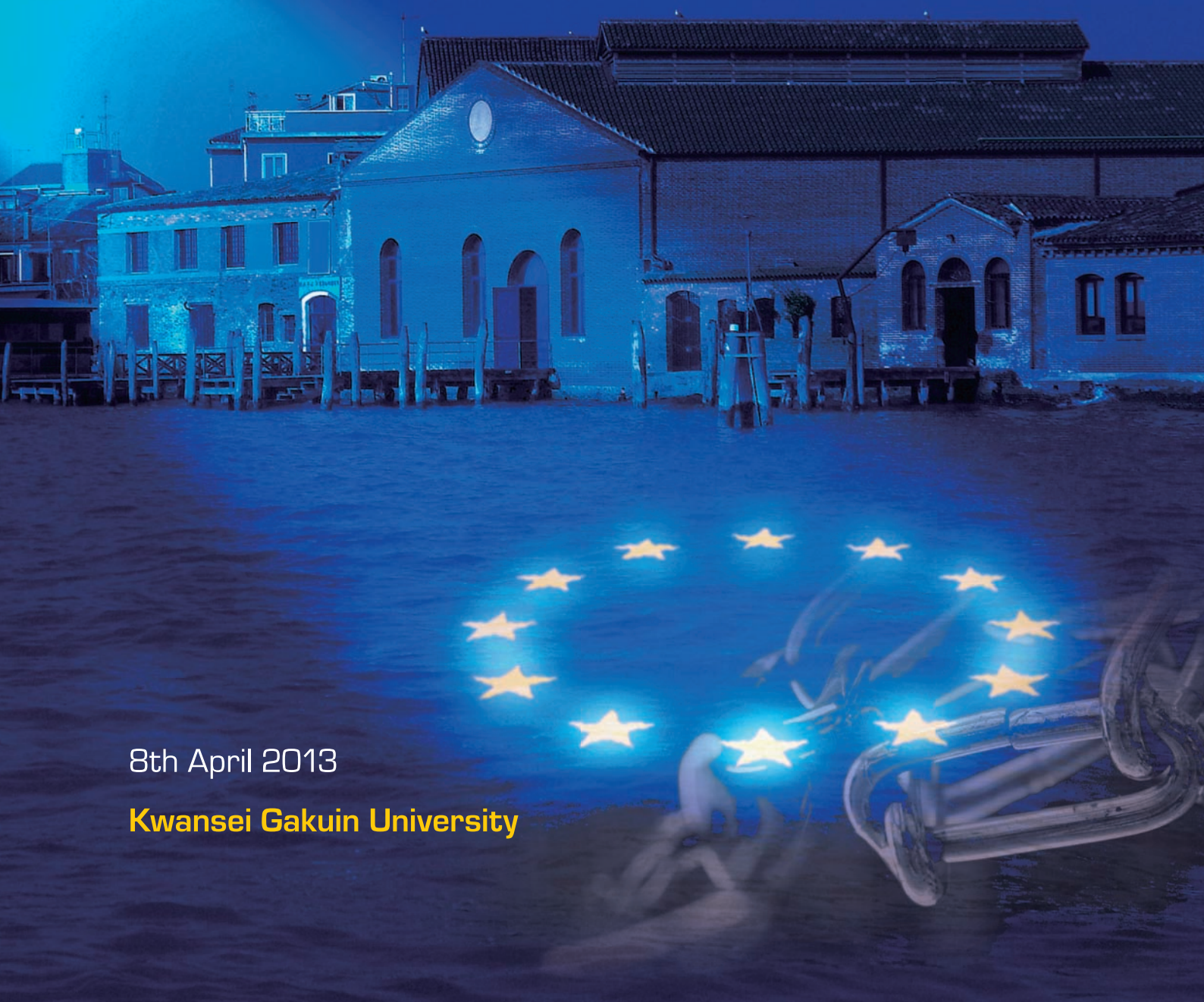
Constitutionalism and the EU



8th April 2013

Kwansei Gakuin University

EU Institute in Japan, Kansai (*EUIJ-Kansai*)

EUIJ Seminar Series No.178

Constitutionalism and the EU

Edited by

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EU Institute in Japan, Kansai
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The Report on *EUIJ-Kansai* Seminar Series No.178
"Constitutionalism and the EU"

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Edited by Akira Ichikawa

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About EUIJ-Kansai

The EU Institute in Japan, Kansai (*EUIJ-Kansai*), formed by 3 universities of Kobe University (Co-ordinating university), Kwansei Gakuin University and Osaka University, was established on 1 April 2005 with financial support from the EU. The organisation operates in four-year periods; eight years after the institute's inception, and we are looking forward to embarking on the third phase, which starts on 1 April 2013.

Here at the *EUIJ-Kansai*, we promote education and academic research on the EU, and encourage the spread of information about the EU. Through these activities, we seek to contribute to the strengthening of ties between Japan and EU.

The integration of Europe countries at an incredible pace and the EU is playing an increasingly important role in the world, but Japan remains largely unaware of the EU's significance. In the 2nd phase, between 1 April 2009 and 31 March 2013, the Institute's organization was expanded to include the Kyoto University's Institute of Economic Research and Kansai University as partner universities, which gave a tremendous boost to our education and academic research on the EU.

We operate a vitally important project. And during the upcoming 3rd phase, scheduled for three years concluding on 31 March 2016, we will further expand our line-up of partner universities to include Wakayama University and Kagawa University. Our goals for the upcoming term are:

- To be the center of academic excellence in education and research of the EU studies
- To disseminate information on the EU
- To increase the level of EU awareness among the general public

We remain dedicated to making a genuine contribution to the world through useful EU-related research and, to that end, we look forward to your on-going support and cooperation.

Takayuki Yamaguchi
Vice-president, EU Institute in Japan, Kansai
Professor, School of Business Administration
Kwansei Gakuin University

Foreword

Since the very conception of the European integration, there has been one core question that has attracted much attention and yet it remains contested and in a way unanswered until present; what is the legal nature or structure of the European integration ? Among them, the compatibility of the structure of the European Union with constitutionalism has come out as a sort of dominant problem whose answers have reached and persuaded the widest circle of influential stakeholders with the greatest impact on the social and legal construction of the European integration.

In recent years, the debate has intensified, in particular, over whether the Union's constitutional order is, or should be, a federal arrangement, notwithstanding broad acknowledgement by most commentators that the European Union is not a federal state in which the sovereignty problem is solved. It may be relevant precisely because the meaning of federalism and constitutionalism has changed in response to cultural and structural shifts within the nation-state and at the international level. There is no doubt that finding answers to these questions will promote a better understanding of the structure of EU law and democracy in general.

On April 8th, 2013, we had the privilege of having Professor Sir David Edward, a former judge of the Court of Justice of European Communities, give a talk on constitutionalism and the EU. Thanks to his in-depth analysis and the attendees' active participation, we had a most fruitful discussion on various issues concerning the legal structure and the constitutional problem of the EU. I would like to express my deep appreciation to all those who supported or participated in the seminar.

Hitoshi Kimura
Professor, School of Law and Politics
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EU Institute in Japan, Kansai (*EUIJ-Kansai*)
EUIJ Seminar Series No.178

Constitutionalism and the EU

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Professor Sir David Edward
Professor Emeritus at Edinburgh University
Former Judge at European Court of Justice

"Constitutionalism and The European Union"

Could I say first what a great pleasure and privilege it is to have been asked to come and speak here. I hope that what I say will be interesting for you and also promote discussion.

The subject for discussion is whether the structure and working of the European Union is compatible with contemporary ideas of constitutionalism. “Constitutionalism” is a word of which one might say, in the words of a famous comic character in British literature, "words mean what I want them to mean." But for the purpose of this discussion, I think we can identify four basic elements of constitutionalism:

- The exercise of power must not be arbitrary. Put another way, that is expressed as the principle of “the rule of law”.

- The authority of government derives from, and is limited by, a body of fundamental law known as the constitution; in other words, government derives its authority from a law which is higher than the government itself.

- The essential characteristics of a constitution are: first, that it confers power; secondly, that it limits power; and thirdly (particularly in Europe after the experience of the Second World War), the constitution protects the individual and, in particular, protects minorities. (I'll come back to the last point as it's a very important consideration).

- Power is exercised and controlled through institutions.

Now, as regards the European Union: the nature of the European Union, originally the European Community, was characterized as early as 1956 by

the Advocate General of the Court of Justice in a case concerning coal and steel[1] in this way:

> "The Community is created by the Member States on a model which is more closely related to a federal than to an international organization."

It is true, of course, that the European Community and the European Union are created by international treaties, but, nonetheless, from the very beginning it was said that the model was more federal than international.

The Advocate General also said,

> "Although the treaty was concluded in the form of an international treaty, it is nevertheless the Charter of the Community since the rules of law which derive from it constitute the internal law of that Community."

You will that note the word used is "Charter"; he did not expressly say "Constitution".

However, in 1986, in a case concerning the rights of a political party in the European Parliament[2], the Court did use the word "Constitution". It said:

> "The European Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."

Here already, there is the idea of "the rule of law": that there is a fundamental law which confers power and limits power and which is exercised and controlled through institutions.

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[1] Case 8/55 *Fédération Charbonnière de Belgique (Fédéchar) v High Authority* [1954-56] ECR 245.

[2] Case 294/83 *Parti Écologiste 'Les Verts' v European Parliament* [1986] ECR 1339

A further aspect is that in 1963 the Court said[3]:

> "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals."

> "Independently of the legislation of member states, Community law not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage."

Thus, the constitution protects and gives rights to the individual as well as government, That principle was well-established by the early 1960s and was expressly stated as a constitutional principle in 1986.

I could give you a long history of this development but we don't have time for that today. So I go to where we stand now. We must look at the European Union after the Lisbon Treaty, the most recent treaty, which completely restructured the founding documents.

There are three basic documents:

- the Treaty on European Union, which sets out the very broad principles;
- the Treaty on the Functioning of the European Union; and
- the Charter of Fundamental Rights, written in the year 2000, and now, by the Lisbon Treaty, declared to have the same legal status as the Treaties themselves.

The Treaty on European Union begins by setting what are called the Competences of the Union - the powers if you like, but the word "competence" is slightly more than power.

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[3] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

The Treaty now says (and this is the first time this has been said) that

> "Competences not conferred on the Union shall remain with the Member States."

So you have there a limitation of power. And then it is more precise:

> "The limits of Union competence are governed by the principle of conferral" and
>
> "The use of Union competence is governed by the principles of subsidiarity and proportionality."

We must note that Article 6 says:

> "The Charter of Fundamental Rights has the same legal value as the Treaties."
>
> "Fundamental rights, as guaranteed by the European Convention on Human Rights, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

So individual rights, including those rights that come from the Member States' own constitutional traditions, constitute general principles of Union law.

We must go next to the institutions. Article 13 says:

> "Each institution shall act within the limits of the powers conferred on it in the Treaties."

It enumerates five principal institutions:

- the European Council, which consists of heads of state and government (that expression being necessary because in France in

particular the head of government is also the head of state, whereas in most European countries the head of government is not the head of state);

- the European Parliament, which represents the citizens;
- the Council, which represents the ministers of Member States (this is confusing because the word Council is used twice so you have to distinguish between the European Council and the Council);
- the European Commission, a body which is different from any other kind of governmental body on the international stage; and
- the Court of Justice.

Their functions are again defined:

> "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions."
>
> "The Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed", while "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

So the European Parliament and Council together exercise legislative and budgetary functions, and the Court ensures that the law is observed.

The next question is, What is meant by "the law" in this context? Here we must go back to the beginning. Remember, we're looking for a body of fundamental law.

The sources of law of the European Union are:

- international law (obviously);
- the treaties;
- what are called "general principles of law" : those principles that all entities which operate according to the rule of law accept such as the right of defence and the right to be heard - the basic rules of law that we all share;
- and also - very importantly in the context of the EU - the national law of the Member States; EU law is relatively young but the Member States have developed over a long period of time and they have highly developed ideas of constitutional law, substantive law, and procedural law; the European Union would not be able to operate without sharing some of those ideas.

Those are, broadly speaking, the fundamental characteristics of the European Union.

The question which we now need to discuss is, Why is it said that the EU does not comply with the criteria of constitutionalism?

There are three basic reasons why people say that the EU is not a fully constitutional entity:

- The first is that it is not a state and you can only have a proper constitution if you have a state.
- The second is that constitutionalism requires that judicial control must be complete, and in the European Union it is incomplete.
- The third is that the European Parliament does not comply with the principles of democracy.

The first argument, that the European Union is not a state, unquestionably is true – it is not a state. (A lot of people, particularly in Britain, are concerned that it has ambitions to be a state, but as far as I'm concerned, that is mainly mythology. The EU is certainly not at the moment anything which could be said to be a state.)

On the other hand, the EU is “state-like” in the sense that its institutions have powers of government which they can exercise over Member States and individuals – the term “individual” being treated for this purpose as covering both natural and legal persons, that is to say, human beings and those entities that have legal personality, for example corporations.

So although it is not a state, it has been said by the Court of Justice to have a constitutional charter, and as I've indicated, it certainly complies or fits the basic criterion of constitutionalism.

The second objection is that the jurisdiction of the Court of Justice is incomplete, and again this is certainly true because the Treaty expressly states that

> "The Court of Justice shall not have jurisdiction with respect to common foreign and security policy … [except] decisions providing for restrictive measures against natural or legal persons." [4]

Here you see the protection of the individual expressly provided for, but the political institutions are not otherwise subject to judicial control in respect of common foreign, and security policy.

The Treaty also states that

> "The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise by Member States of their responsibility for the maintenance of law and order and the safeguarding of security."[5]

The purpose of that provision is not to limit the jurisdiction of the Court of Justice in relation to matters falling within the competence of the Union, but rather to say that Member States are entitled to carry out their normal

[4] Treaty on the Functioning of the European Union (TFEU), article 275.
[5] TFEU, article 276.

sovereign police and law enforcement operations without control by the Court of Justice as an organ of the European Union.

Although the scope of judicial control is incomplete, one would not normally expect the courts to have jurisdiction over foreign and security policy, The jurisdiction of the Court of Justice in matters concerning individuals is protected. The limit of the Court of Justice's jurisdiction not to become involved in the police and law enforcement operations of the individual Member States is simply a logical limit of the power of the European Union.

The third objection, and this is essentially an objection which comes from the Constitutional Court of Germany in a judgment on the Lisbon Treaty, dated 30 June 2009. I will quote directly from the judgment.

The Germany Constitutional Court says that the source of constitutional legitimacy is “the self-determination of the nation according to the will of the majority in freedom and equality."

Secondly, according to the principle of democracy,

> "The right to vote is the most important right of individual citizens to democratic participation guaranteed by the German Constitution," and,
>
> "The right of citizens to determine the scope of public authority through the exercise, in equality and freedom, of the right to vote is the fundamental element of the principle of democracy."

So the power of the state comes from the people and that power is conferred by the vote of citizens, exercising their vote in equality and freedom.

And then the Court goes on to say that:

> “This central requirement of democracy can be based on different models. But one thing is common to all systems of representative democracy: the will of the majority formed in freedom and taking due account of equality.”

> "The principle of democracy cannot be weighed against other legal interests: it is inviolable."

Now I stress that these are all words of the German Constitutional Court.

Against that background, the Court goes on to analyze the nature of the European Union and it says:

> "The democracy of the European Union is said to be analogous to the model of a federal state."

The model normally set up for this purpose is the parallel with the United States of America, the idea being that the European Parliament and the Council of Ministers, because they are the final legislative and budgetary authority, are the equivalent of Congress. The European Parliament is said to be the House of Representatives, and the Council the Senate. As you know, the Senate of the United States represents the States, two senators for each State no matter how large or small it is. That is the theoretical model of federation on which the EU is said to be built.

But then the German Court looks at what is the reality - the constitution of the European Parliament. Germany has a population of more than 80 million, France, Italy, and the United Kingdom 60 million, Spain and Poland 40 million, then Romania and the Netherlands somewhere between 20 and 16 million, and gradually you get down to three states at the bottom which have a population of 700,000 or less. Yet, the allocation of seats in the European Parliament are 99 to Germany and 5 or 6 when you get down to the very small states at the bottom.

The Court says this arrangement is "over-federalized": "Judged by the criterion of representative democracy, the EU is over-federalized." This is so because the German and French members of the Parliament represent nearly a million citizens each, the Swedish representatives represent just under half a million each, the Luxembourg members represent 83,000 each, and the Maltese members represent 67,000 people. So you have some

members who represent nearly a million people and some who represent just over one-twentieth of a million.

The Court then goes on to say, rather sarcastically,

> "Representation in the European Parliament is not linked to the equality of citizens of the Union but to nationality, a criterion that is actually an absolutely prohibited distinction for the European Union!"

Why does this anomaly occur? The Court says:

> "This contradiction can only be explained by the character of the (European) Union as an association of sovereign states."
>
> "The power to transfer sovereign powers to the European Union comes from the Member States."
>
> "They remain the Masters of the Treaty."
>
> "The source of authority is the nations of Europe bound together democratically by the constitution of their respective States."
>
> "Even after the Lisbon Treaty, the European Union lacks a political decision-making body which has come into being by equal election of all the citizens of the Union."
>
> "So, judged by that criterion, the European Parliament is not a body that represents a sovereign European nation," and
>
> "The Council is not a second chamber but a body representing the Masters of the Treaty. The Member States remain Masters of the Treaty."

The Court finally goes on to declare what are the legal consequences of this. The first is that:

> "If legal protection cannot be obtained at EU level, this Court [the German Constitutional Court] will review whether legal measures of the EU have kept within the boundaries of the powers accorded to it."

In other words, we, the German Constitutional Court, are entitled to determine whether the Union has acted within its powers.

Consequently,

> "This may result in Union law being declared inapplicable in Germany, and oblige German bodies not to apply EU measures that transgress competences or violate constitutional integrity."

That, in summary, is the argument of the German Constitutional Court as to why the EU is not a fully constitutional entity.

So we come up against two questions: one is whether we have a workable *political* system; the other is whether we have a workable *legal* system.

The first question is whether we can have a workable political system if each State claims the right to say how the Treaties are to be interpreted and to say what are the permissible limits of the process of integration. If the German Constitutional Court is right, the Supreme Court of Malta or the Supreme Court of Cyprus is equally entitled to say, of any act of the European Union, that the Union is acting beyond the powers conferred and that act will not be applicable in Malta or Cyprus. Germany is the biggest State but the logic of the argument applies to the smallest as well. Can you have a workable political system if that argument is right?

The second question is whether you can have a workable legal system if the measures taken by the institutions of the Union (to which, as the Court said in 1963, the Member States have surrendered their sovereign rights, albeit within limited fields) are liable to be declared inapplicable by a national court of any one of 27 countries, soon to be 28 and possibly, in the future, over 30.

And again, there are other questions. How do we balance the requirements of representative democracy based on equality (the German theory) and the nationhood of states whose populations range from less than half a million to 90 million? Bear in mind that the fundamental concept of public international law is that all states are equal. How do you balance the German court's theory of representative democracy against the reality of statehood and the rights of statehood?

Remember too in this context that eastern Europe in particular, until the end of the First World War, was totally dominated by four empires: the Empire of Germany, the Empire of Austria-Hungary, the Empire of Russia, and the Ottoman Empire of Turkey. The nationhood of the states of eastern Europe is a nationhood that emerged out of the idea of self-determination So you have here a conflict between the German concept of numerical or statistical democracy, and the notion of nationhood and the rights not just of states but of nations.

Thus we must go on to the question, do we all agree that statistical equality of voting power is the fundamental element of the principle of democracy? That is contestable.

The third question following from those two is, "If those are the principles of constitutionalism, how far are they relevant to a body such as the European Union?" Is the European Union condemned to be a limping constitutional entity unless and until, it achieves total numerical democracy?

My provisional conclusion is the following.

The comparison with the United States does not help in the sense that the analogy of the European Parliament and Council representing Congress, the European Parliament representing the House of Representatives, and the Council representing the Senate, is not a useful model for the European Union, though there are certainly parallels.

There is a fundamental difference between Europe and America. Europe is historically divided by history, language, religion, ethnicity, and in more

modern times, nationalism. As somebody has said, in Europe the unseen guest at every table is history. So we cannot forget history. These considerations and others will continue to condition the evolution of Europe in ways that do not operate in America, so it is of only limited usefulness to draw parallels between the European Union and the federal nature of the United States of America.

So I conclude that we are not creating the "United States of Europe" in that sense. On the other hand, we have created more than a purely intergovernmental "Europe of States", the expression beloved of General de Gaulle, the president of France who saw the development of the European Community, as it then was, as dangerous to his concept of the absolute sovereignty of states.

My very modest conclusion is that what we have, whatever its theoretical faults, is at least better adapted to the realities of the European continent. Thank you.

Presentation by Professor Sir David Edward
"Constitutionalism and The European Union"
Kwansei Gakuin University, 2013

Q&A Section

Moderator: Thank you very much, Sir David. [*applause*]

Edward: So it's open to you for discussion and questions.

Moderator: Okay. You finished your lecture earlier than scheduled and so that allows us to discuss, a concession much longer than we expected. So we'll move on to the Q&A session. Your active participation will be highly appreciated. And before you speak, please identify yourself, your name and the name of the institution, the faculty you're from. So are there any questions or comments?

Question (Armand De Mestral): Thank you. I'm Armand De Mestral and I'm a professor of law at McGill University in Canada. Thank you very much for your very stimulating presentation, and I would like to support your conclusions that if one is thinking of comparative federalism, the wrong place to look is the United States. But I would suggest to you that if you want to look in North America, there is a country [*laughter*] where you might well find some inspiration, if you don't start from your own of course, Great Britain. My country is certainly not one which could sustain the analysis of the German Constitutional Court.

Edward: No.

Question (De Mestral): We are not based on the affirmation of a nation through self-determination. When I was a young student there were many who were affirming that Canada is based on the union of two founding peoples. Today that is a little harder to identify. We think much more in terms of multiculturalism or interculturalism, but in fact we're dealing with an affirmation of not only French-Canadian nationalism, a more complex

Anglo-Canadian nationalism, and the affirmation of some 50 to 60 aboriginal First Nations.

Edward: Yes.

Question (De Mestral): And just in the far north, the Inuit work in seven official languages and yet affirm their unity as a people part of Canada. Not all of the First Nations consider themselves Canadians but they are they there and they occupy the territory. They haven't got much choice unless they want to go to the States.

But my point is simply that there are different ways of affirming a polity, and I think you've put it very well, that European polity is not going to emerge as the United States of Europe, in the same sense as the United States of America, but that there are other polities around which can provide perhaps examples of living single political entities, well-recognized, and whatever their difficulties are surviving very ably, very happily in the world in the last 150 years.

Edward: Yes, I am grateful to you. I think Canada is an excellent example. The difference I suppose between Europe and Canada is that the historical mess of Europe is much more complicated than even that of Canada. You have Quebec and the common law provinces and also the original people, but we have this enormous burden of history and internal warfare which has really poisoned Europe. But Canada is unquestionably a good parallel.

One professor said to me that we have a perfectly good parallel on our own doorstep quite apart from the United Kingdom: the Netherlands are a federal creation and why don't you look there? Why is everybody always going to look at the United States? I think that is right.

A British statesman called James Bryce, one of these people who knew everything, wrote a lot about constitutions, and if I'd been giving a full lecture on this I would have gone into his ideas. But one of his essential points was that a constitution has two main functions: one is to hold people together, and the other, the opposite, is to prevent people splitting apart. You

may need in that context to give greater rights to some people than to other people, and he cited the specific example of Quebec. You have to give the Quebecois certain greater rights, for example three seats on the Supreme Court, when in terms of population they wouldn't be entitled to three out of nine seats.

I think that there are many other models which are more apt. Our problem in Europe is that the words I have quoted have been said by the Constitutional Court of the largest country and economically the most powerful country, so I think it creates a really fundamental problem for us. It is very characteristic of German thinking, however.

I tried to explain at one seminar that, in the United Kingdom, England and Scotland have separate systems of criminal law with no common court of appeal, to which a German professor said "That is impossible" and that, as far as he was concerned, was that. That was the end of the discussion. [*laughter*] So you do have a certain problem of attitude in the largest and most powerful country. It's rather as if Ontario was announcing theories that would mean that Prince Edward Island had very few rights.

Question (Tam Mito): Thank you very much for a very fascinating talk. I'm Tam Mito from the KGU School of Law and Politics. I wonder whether what you describe as the constitution or constitutional framework of the EU is fundamentally the same as, say, a domestic constitution, the constitution of many countries, such as Japan or other countries, in the sense that we guarantee for instance equality before law, right? But within the EU, is it guaranteed?

For instance, when we think about same-sex marriage, it is legal in the Netherlands or Spain but in most other European countries that's not the case. Do you think the national law of the other states will be changing in the way Spain or say the Netherlands has changed? So individual rights, human rights, do not seem to be the same beyond certain national borders.

Edward: Well, I think that is certainly true in a sense. You have to recognize of course that that is also true of the United States. The United States has

same-sex marriage in some States and no same-sex marriage in the majority of other States. A United States Supreme Court Justice, who has just retired at the age of 92, told me that if he had his personal choice he would condemn capital punishment tomorrow, but he believed as a federal judge that it is the right of the individual States to decide. So I think it's consistent within that concept of federalism to have unequal situations.

(In Europe we also have – and I didn't mention this – the European Court of Human Rights, which is being asked at the moment to pronounce on issues like same-sex marriage.)

For me, the most important thing to understand is that the European Union is an experiment. The experiment is not complete. It is an attempt to overcome history, and the success of the attempt is not helped if you insist on theoretical answers. The very beginning of the experiment was a speech by the French Foreign Minister, Robert Schuman, who said, "Europe will not be made all at once or by a single plan; it will be made by practical achievements". I think that's right.

Question (Mito): Thank you. Do you think then that Europe will evolve over time, has Canada has done in the Canadian federation, and towards the end do you think there are more common, say, legal and cultural foundations? European universities have actively systematized exchange between different countries and European students have to spend at least one semester year in a different country, including here, and do you think it will kind of homogenize the attitudes of young people towards the future, towards European destiny?

Edward: Will there be what has been called a gradual convergence? Yes, there will. It is happening. It is, as you say, notably happening in the universities; that's where you see the diversity. If I go back to my own experience, going to university for the first time since 1953, such diversity was inconceivable. Yes, there were a few Americans and a few South Africans and a few came from other countries, but essentially Oxford was a British university. Now, like Edinburgh, it is a totally multinational university. If you talk to my children and if you talk to their children, many

of the attitudes which we took for granted, they do not. It's not that they don't share them, they don't understand them. They don't know what you're talking about. So I think that will change over time.

But on the other hand, look at football. There is a kind of obsession in Europe about national football teams, and that I think will not be obliterated with time. Commentators in Britain imagine bureaucrats in Brussels who want to invent the European Football Team, so that we will not be allowed to have national football teams because there will have to be a single European Football Team. [*laughter*]

In my own country, Scotland, we have been part of the union for 300 years, but now we say we want to be separate. So I don't think you're going to get rid of that. [*laughter*]

Question (Mito): Chelsea Football Club is owned by Russian… [*laughter*]

Edward: Oh, yes, absolutely. That's because they have the money.

Question (Mito): Yes.

Edward: But some of them have lost it.

Moderator: Any other questions or comments?

Question (Francis Rawlinson): Yes. My name is Francis Rawlinson and I used to work for the EU and now I teach about the EU at this university. I just wonder whether the debate about whether the EU is a federal system or evolving toward a federal system and is a constitutional system is as important as the problem of achieving practical representation of people's views on EU legislation, the democratic deficit problem, which is especially felt in the smaller countries of the EU. I think Germany is not so affected.

Is the argument in Germany about constitutionalism really going to have practical importance for the EU in the future? Or is not the problem of democratic representation of people in European legislation more important

for the European Union as a whole than this theoretical discussion of whether the EU is constitutional?

In other words, what practical significance does this attitude of the German Constitutional Court have and is it really as important as the general problem of the alienation of people in the various countries from the European Union as a whole?

Edward: That's a very good point. I think we have another ingredient, as it were, to the mix, which is certainly true in Europe. That is a general disenchantment with the political class, the general feeling amongst ordinary people that politics is run by a self-perpetuating class. You notice in Britain, even in the Labour Party, which is theoretically the party of the workers, only a tiny proportion of the members of the British Parliament have ever done a manual job. A very large number of them have never done anything other than be politicians or advisors to politicians or in some fashion engaged in politics. I think that's another problem about the democratic legitimacy problem - a sense you can have all the theoretical statistical equality you like, but the average person on the street in Germany, in France, or Malta, is not really going to see the 800 people in the European Parliament as anything to do with them.

That is already true in Scotland. People are saying: "I'm not interested in your theoretical argument. I want my job and I want enough money to live on – that's what concerns me, not whether Scotland is independent, and equally not whether the European Union is constitutional". So I think we have - I don't know whether it is shared in other countries but it is certainly there in many European countries - a general feeling of disconnection between the political activity and the concerns of ordinary people. Is that true of Japan? I think it is.

Question (Mito): Especially among young people. They are not political, meaning not very politically active, but are happy as long as they are comfortable I think.

Edward: Yes. At a recent conference in Edinburgh about Europe and the Arab World, there was a young Libyan student, and you know the recent history of Libya. One of the issues was, what is the effect of the Arab Spring and the removal of the dictator Gaddafi? And this student said: I don't want to be a democratic politician, I just want to realize my own ambitions – that is what it means to me. I think that is true of a great many young people. What they want is stability, a stable environment in which they can realize their own ambitions.

Question (Mito): I think there are some exceptions globally, for example young Indian students are very active politically.

Edward: Yes.

Question (Mito): Or maybe some Chinese students. But I think in affluent societies, they seem to be content with the way things are and less involved in public affairs.

Edward: That's true. Yes, of course, and particularly under dictatorships, the radical student is a very important element, but what struck me was the way this Libyan said it.

Question (Mito): It was quite amazing to hear words like that from a Libyan student.

Edward: Yes.

Question (Yasue Mochizuki): But we should also say perhaps that those people who are looking for democracy, they really don't know what democracy is, what they are fighting for; perhaps they expect too much from democracy. After all the turmoil it is really difficult to democratize and have a stable society, so perhaps that's the reason why the students seem to be so conservative.

Edward: I think part of the problem is that we don't live in a world which fits these ideas. The vice-president was saying at lunch that we live in a world

in which for you North Korea is as important as any other thing could possibly be, but for us it is very far away. I think that the world has changed, so to some extent many of these ideas are ideas of an earlier time.

Moderator: Well, speaking of Japanese politics, the disproportionate allocation of seats between urban and rural constituencies in 2010 helped some councilors to get elected and in 2012 the House of Representatives election was held invalid, unconstitutional, by some courts of appeal, including the Supreme Court. Are there any moves, and ways, to reapportion the seats of MEPs in European countries? If not, why not? And if that were achieved, would it help to show the constitutionalism of the EU in the member countries?

Edward: Well, there is a way of doing it because the German Constitutional Court was right in saying that the Member States are the masters of the treaties. The system for the European Parliament now is that the total number of members is fixed. When Croatia joins in July, Croatia will be given seats but it will not be given additional seats. Some seats will be taken from other states.

Moderator: Oh, right.

Edward: But that is about political negotiation. Luxembourg has more seats than Malta, although there is no conceivable logical reason why Luxembourg should have more than Malta. It just happens to be that Luxembourg was there at the beginning and Luxembourg was determined it was not going to lose its number of seats.

Moderator: That's pretty much the same in Japan. Politicians are reluctant to tackle the problem because it is too sensitive.

Edward: But you see in Britain part of the difficulty of statistical democracy. The islands in the north of Scotland are 1,000 miles from the central government and it would be ludicrous to say that it's undemocratic that the member of Parliament representing those islands represents fewer people than the member of Parliament representing a part of London. Purely

statistically, the whole of the north of Scotland would be represented by one member who would have hundreds of miles to cover.

Question (Yasue Mochizuki): My name is Mochizuki, professor of law, School of Law and Politics. I have a question about the enlargement of the European Union. As you have mentioned, Croatia is going to be a member and other countries in the former Balkan states are looking to be members of the EU. I think there is one basic question about what democracy is.

The European Union is supporting democracy, which, as you said, means representation of the people, but the Balkan countries used to be very democratic, to be even too decentralized. That is required to change, and the EU is expected to enforce its concept of democracy. There seems to be a tension between what democracy is possible between the EU and these countries. How do you think the EU can solve that problem or the challenge of the concept of democracy itself, or how they can integrate countries that are by EU standards too democratic?

Edward: Well, put it this way, I don't think there is any theoretically perfect answer. For me, but this is perhaps because I'm British, the answer is that it works. As somebody said, the surprise is not how badly it works but the fact that it works at all. When I graduated in law in 1962, if they had said to me, in 50 years' time you will be a judge of a court with judges from Finland and Portugal and Greece and Sweden, I would have said, you are mad, that is inconceivable. But the fact is that it works, and I think it's better to try and find things that work.

Part of the problem now with the European Union is that it is faced with problems for which the rules offer no solution. There are no legal rules which provide a solution to the problem of Greece running a totally unworkable tax system or Cyprus attracting money to its banks from Russian oligarchs and then lending the money to Greece. You can't solve these problems by rules. So you have to look for practical solutions. But then we are all faced more or less with that problem.

Question (Rawlinson): I'd like to come back to this question of the attitude of Germany to the European Union. There was the judgment of the German Constitutional Court last September, as you will know, on the decisions by the German chancellor on the euro bailouts, and the Constitutional Court found that as long as the German Parliament was consulted and could approve the various bailouts, then the decisions by the chancellor were not unconstitutional.

So does not the German Constitutional Court take a practical view of whether the German people or the German Parliament is properly involved in the decision-making, and is not so worried in fact by the theoretical constitutional arguments which have been raging for a very long time in German Constitutional Court. Despite those arguments, there have been judgments by the European Court on the German Beer Purity Law, for example, which was clearly wrong under EU law, and it seems the German Constitutional Court has accepted the judgment of the European Court in cases like that, although they seemed to run counter to the arguments of the Constitutional Court in the judgment you have quoted. But still in practice the Germans have accepted the legislative powers of the European Union.

Does not the German Constitutional Court hold back on applying the full implications of this judgment of 2009 in practice?

Edward: I think that is true. If you look particularly at the history of the German Constitutional Court and the European Court of Justice, there has always been this tension, who is the ultimate master. But a Judge from the German Supreme Court, the *Bundesgerichtshof*, rather than the *Bundesverfassungsgericht*, the court that deals with civil, commercial and criminal matters in national law, said to me, thank goodness for the European Court because we find the judgments of the Constitutional Court sometimes impossible.

So I think there is a natural tension between courts. You can see it in the United States, tension between the supreme court, the federal courts, and the state courts. You can see it in Britain. It is a natural state of affairs, that there is a tension between states, between courts. And the question is, at

what time will a court, as it is said, back off - when will it enunciate a principle and then find, well, the principle doesn't apply in this case. I think that there is an interesting study as regards the politics of courts, meaning by that the kind of *judicial* politics of how they relate.

Question (Sachiko Yoshimura): First of all thank you very much for a very stimulating and very clear presentation. My name is Sachiko Yoshimura and I teach international law and organization the School of International Studies at this university, and I would like to ask you about the harmonization of international law and European Union law, which is symbolized by the 2008 judgment of Kadi and Al-Barakaat, which was a surprise and rather upsetting for international lawyers. I was very upset to see the judgment because it kind of overruled the United Nations charter, which is considered as the constitution by some researchers of international law. This case is under review again in the European Court, but I would like to know whether there can be harmonization between European Union law and international law, such as the Charter of the United Nations.

Edward: Yes. Well, that is a good example of what I said in answer to the previous question, that you have a situation where there is an obvious tension between the regime of international law and the regime of European Union law. A decision of the Security Council is law and all states of the world have to accept it. This decision of the Security Council imposed an obligation to take measures against Mr. Kadi, but those measures are unlawful when judged against fundamental rights.

So what is the obligation of a court which claims that its constitutional charter incorporates fundamental rights? Does it say, well, sorry, this man must suffer because we provide no remedy, or do you say, no, this man must not suffer, therefore we must provide the remedy. There is no logical answer to this, I think. I suppose I go right back to the beginning. The rule of law is about not making arbitrary decisions: so a decision which deprives somebody of his or her fundamental rights is fundamentally unlawful, and whether you're the Security Council or anybody else, ultimately you cannot do that.

Question (Yoshimura): Perhaps the reason why the international lawyers are upset by the decision is that there is the supremacy clause in the Charter of the United Nations, Article 103 of the Charter of the United Nations, which says that if the obligation under the Charter of the United Nations and the other obligations by the Treaty contradict, the United Nations charter will prevail. So perhaps the reason why the international lawyers are upset is that there is a supremacy clause, namely the Charter of the United Nations, and yet the European Union Court gave judgment which said that the fundamental rights will prevail, which is a contradiction. Perhaps, as you say, there will be no definite solution tov this problem.

Edward: The only thing I would say is this. You have to remember that many countries in Europe have lived under a dictatorship. They have lived in a world where the judges say "That is the law and I must apply it", however contrary to fundamental rights that is.

A very good example is in Germany during the Hitler period. The laws against Jews in Germany were passed by a supposedly democratically elected parliament. When Hitler came to power, he came to power in an election which elected a majority of Nazi members of parliament. The laws were passed by that parliament which, on the theory of democracy, was a democratically-elected parliament, and the German judges felt, "That is the law enacted by the parliament and I must apply it."

Now the whole purpose of international human rights law is to say, no, that is not right. Look at the circumstances surrounding the creation of the United Nations charter. I don't know whether you've seen it but there was a famous book by the professor of international law in Cambridge, Hersch Lauterpacht, who became a judge of the International Court. He wrote a book during the war called *An International Bill of the Rights of Man*. The first part of the book was designed to demonstrate that human rights, respect for human rights as a fundamental law, is consistent with the classical theories of international law and that the more recent theories of the absolute sovereignty of states were not actually compatible with the reality of international law.

So I think that in a sense you have to understand the European Court's judgment in Kadi as coming from that framework of mind. In the United Nations charter, Article 2 (I think) affirms human rights, so you can't justify an affront to human rights just because the Security Council has power to do it.

Question (Yoshimura): Thank you very much.

Moderator: We have only a few minutes left, so any final comments or questions? Nobody? All right. I wish we could have more time to continue this interesting discussion but I think we've run out time, and, please, let's give Sir David a big round of applause for his excellent speech and the wonderful discussion. Thank you so much. [*applause*]

Edward: Thank you for being such a lively audience. Thank you.

Moderator: Thank you. I can now close the meeting.

【Lecturer's Profile】

Prof. Sir David Edward

Professor Emeritus at the School of Law, University of Edinburgh. Admitted to the Scottish Bar in 1962 and appointed Queen's Counsel in 1974. He was appointed one of the inaugural judges of the European Court of First Instance in 1989, and as a Judge of the Court of Justice of European Communities in 1992, a position from which he retired in 2004. He was appointed a Knight of the Order of St Michael and St George in 2004, and in 2005 was sworn of the Privy Council. His activities include a Fellow of the Royal Society of Edinburgh, an honorary Fellow of University College, Oxford, and honorary Bencher of Gray's Inn.

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