

A Little Cloud Like a Man's Hand

The text of a lecture delivered to the Faculty of Advocates by D. A. O. Edward, CMG, QC, Salvesen Professor-elect of European Institutions at the University of Edinburgh.

It is a great honour to have been invited to deliver the traditional Saturday afternoon lecture before the Faculty's biennial dinner. I hope to offer you a few random reflections that have occurred to me after twenty-two years in practice and many hours spent talking to lawyers, here and elsewhere in Europe, many of whom are here today.

As to the title—A Little Cloud Like a Man's Hand—you may remember that the prophet Elijah engaged in an early version of the Reagan/Mondale debate with the prophets of Baal. Having won the debate, and having taken the precautionary measure of slaying his opponents, he went up to the top of Mount Carmel and told his servant, "Go up now, look toward the sea." His servant went up and looked, and came back and said, "There is nothing." But that did not suffice and he was told, "Go again seven times." At the seventh time he said, "Behold, there ariseth a little cloud out of the sea, like a man's hand." And, very soon after, it came to pass that the heaven was black with clouds and wind, and there was a great rain. It seems to me that there is at least one little cloud on the horizon of which we ought to take notice now, because I suspect the rainstorm may be heavy, and we ought to be thinking about how we prepare ourselves to meet it.

Without wishing to sound too apocalyptic, I think there are several developments, of which we are only seeing the beginning, but which are liable to undermine many of the basic assumptions on which our legal system—and therefore our profession—works.

Whether we are Common Lawyers from England, Scotland or Ireland, or Civil Lawyers from the mainland of Europe, we assume that there is a common stock of legal science—developed in Western Europe, and attaching particular importance to individual rights—which can be taught at university and applied in practice. Now there are, of course, wide divergences of substance and method—and sometimes of underlying philosophy. Nevertheless, speaking very broadly, we share a number of basic beliefs about the structure of the law, the function of the courts and the function of our profession. The best proof of that shared heritage has, first of all, been found when meeting lawyers from other countries and talking over common problems with them. I have always found that the differences, important as they are, are far fewer than the things that unite us. The second thing has been the course run by the British Council, here in Edinburgh, for young European lawyers. After a very short time, these young men and women—trained in quite different systems and speaking different languages—are able to participate actively in our work and to give us some ideas as to how we can work better and how much we can learn from each other.

Our judicial systems differ on the question whether it is the function of a court to discover the facts or to discover the truth. The two are not necessarily the same, but our approach is the same to this extent, that we assume that the facts or the truth

can be discovered by using the simple human faculties of sight and hearing—by seeing and hearing witnesses, by looking at documents, by hearing tape recordings of voices, and so on. In this respect, our judicial procedure is no more than a commonsense application of the theory of rationalist philosophers—that what is true is what is capable of verification by sensory perception.

Stemming, possibly, from these assumptions about the nature of Law and the nature of judicial inquiry, we make corresponding assumptions about the nature of our profession. In particular, we assume that what we do is useful. The question I want to put to you this afternoon is whether we can safely continue to make these assumptions and, if we cannot, what are the further questions we should be asking. The first aspect of the problem concerns the effect of modern science on what is our stock in trade—namely, words—and let me begin with a simple example relating to the structure of the law of parent and child.

Until recently, our law was based on the traditional Western view of monogamous marriage, and the distinction between legitimate and illegitimate children. We have had to adapt the law to take account of polygamy and adoption, and—more recently—the changing views of society about the institution of marriage and the status of illegitimate children. We were able to adapt the law fairly easily because we were dealing with legal concepts, operating against the background of certain verifiable facts about the process of human conception and birth. It was simply a matter of redefining and reallocating legal rights. This could be done, so to speak, within the system. Now, progressively, genetic engineering is posing a quite new range of problems—precisely because we can no longer take those 'verifiable facts' about conception and birth for granted. Successively, we are being faced with the reality of artificial insemination, test-tube babies and, now, surrogate motherhood.

The question now has to be asked: in what sense is the product of a fertilised ovum taken from one woman and implanted in another, the 'child' of either of them? The very simple words 'mother', 'father', 'son' and 'daughter'—probably the first words in human vocabulary—have suddenly become inadequate to define the complex relationships that modern science creates. The consequential problems for the lawyer go further and deeper than simple problems of legal science that are capable of being resolved within the system, because the simple words have to be looked at afresh and, in some cases, are inadequate.

It seems to me that similar but, at the moment, less obvious problems are going to be presented by what is known as the electronic revolution. Now it is easy to talk contemptuously about 'the tyranny of the computer'. But the fact is that many of the children who are going to nursery school today will probably find it easier to use a computer than to read a book, or write with pen and paper. It is also easy to dismiss the whole thing as 'rubbish in, rubbish out', because the products of computers are only as good as the people who work them. But the development of sophisticated software makes that sort of

comment increasingly facile, and even naive. The electronic revolution is quite as fundamental and far-reaching as the invention of printing. One recent introduction, now available, is called 'electronic mail'. A letter can be typed at a terminal in Edinburgh and received at a terminal in London, the central processing unit connecting the terminals being situated in London, Paris or Washington. The text can be stored in any of these places. In none of them will there be any inspectable document unless somebody chooses to print out the text. The stored text, wherever it is, consists of nothing more than charged particles, susceptible all the time to interference and manipulation. One software program being developed will take electronic mail to the next stage. The businessman will come in in the morning and ask, 'What letters have come in for me?' The computer will answer, 'I have received fifteen letters, of which only nine are important. The other six do not call for reply and you don't need to look at them.' In fact, those six 'letters' may never be 'seen' by anyone at the receiving end.

One important question therefore is: what are the consequences for the law of contract? Has a contract been concluded when the letter of acceptance has been transmitted by electronic mail, but has not been seen by anybody at the receiving end other than the computer? Is a printout of what is *now* in the computer—which is, as I say, susceptible to interference and manipulation—sufficient evidence that the contract was made? And where was it made—in Edinburgh or London, where the sending and receiving terminals are, or in Washington (in a different time zone) where the text is processed and stored? And how is a court to verify, by any normal process to which we are accustomed, whether, when and where, a contract has been made?

This illustrates, I think, that the electronic revolution challenges quite elementary assumptions that we make about time and place. These assumptions are external to our system, and the problems these new developments create cannot be wholly resolved within the system. Indeed, one of the oddities about electronic processes is that they are not really verifiable in any ordinary sense. They depend on 'the marshalling of free electrons' and an electron has been defined as 'an elementary particle, assumed to be a constituent of every atom'. We are dealing with something that is capable of theoretical proof; we are dealing with something that is capable of verification in the sense that, given the right equipment, it works; but other than that, we cannot see it, hear it or touch it. Taking that a bit further, computer vocabulary as a whole is a vocabulary of analogy. It is full of analogy, using words drawn from everyday life and applied to the workings of the machine in order to find some words to describe them. But the analogy is not the reality.

It seems to me, following from that, that a question we must begin to ask ourselves is whether the service we offer in our legal system is going to be of the slightest use to the consumer of that service if we do not take account of these facts. People do, and they will increasingly, make records, store information and communicate with each other by methods that the legal system finds it very difficult to cope with.

It is no good our saying that those who come to the law for a service must adapt to the law's requirements. That is as unreal as the attempts of the prophets of Baal to capture divine attention. If we are not going to become as obsolete and absurd as the prophets of Baal, what do we have to do? This is a particular problem for our generation, since it is we who must begin to adapt. As I say, there is a new generation to whom the electronic world will be as familiar as the world of books and documents is to us. We can leave the problem to them, but I do not think that would be wise or fair. Furthermore, progress in

that direction will not stop, and it seems to me that we have to think whether we need a new approach to legal science. Is it any longer going to be something which can be learned once and for all in the university and applied later, with refresher courses? That is one question. And the second question is this: are we not going to need the particular skills and perceptions of the young, because they are the people who understand, more than us, what this is about and how it works?

Another question I would like to put to you is this: is it clear that our judicial system is inherently strong enough to survive? I leave aside the pressures on the system from raucous attacks on 'political non-elected judges', defiance of the courts, and the prescriptions of those who believe that everyone else's system must be better than the one we have at the moment. What concerns me is that our system, and the way it protects the rights of the individual, is a relatively recent product of Western civilisation, which itself is based upon a belief in the sanctity of the individual and the value of individual rights. The permanence of our system, and of the values it seeks to uphold, depends, to a great extent, on the economic dominance of the West and—I think also—on our will to *make* these values permanent but adaptable. We can no longer simply *assume* that others will take them for granted.

Leave aside the contempt for the individual shown by totalitarian régimes and collectivist—but basically Western—philosophies. Have we begun to appreciate the unimportance of the individual as such to the Islamic mind or the Eastern mind? The economic power of these countries is growing, and we must be prepared to begin to see problems in their terms.

Let me take a simple example which affects the use of litigation in court as a method of resolving disputes. In traditional Japanese thinking, the lawyer is not a person deserving of respect, but a distinctly inferior person. Why? Because when two people are in dispute, they disturb the peace of society, and it is their obligation to society, which is greater than the individual, to restore peace by resolving their differences. The lawyer, on the other hand, lives by disputation; and a judicial system that produces a result where one party must win and another lose is *inherently* disturbing to the peace of society. Now we can simply carry on and insist that our way is better. But there is evidence that a similar attitude to what we do is gaining ground in the West. We are familiar with the idea that family disputes are better resolved by conciliation than by litigation. But it is coming in commercial disputes too, where the traditional system of arbitration suffers from most of the same defects as litigation. In the United States, for example, there is a new development—the growth of the firm of professional conciliators, who will come in, look at the dispute and propose a remedy. That avoids litigation, it avoids arbitration, and it produces, so it is said, a quick result.

If these developments are coming up on us—if these are real clouds—then I think we must be considering carefully and in depth what our system is setting out to achieve, and particularly whether the best route to truth, and the best route to justice, is by two-sided argument. Now I said I was not going to propose solutions, and I do not, because I believe the route we follow now is specially valuable in that it places a particular emphasis on the right of the individual to be heard, to make his point of view known. But, on the other hand, if the system is effectively going to be bypassed, will it preserve the values it seeks to preserve; and, if not, what has to be done?

You may think that my ideas are apocalyptic and absurd. If you do not, then I suggest that the first step must be to recognise that these problems are not specifically Scottish, English, French or German. They are problems alongside

which our existing differences are utterly insignificant. In particular, they transcend the day-to-day problems relating to the structure of the profession, and that subject so beloved of those who go to the meetings of the CCBE—establishment.

If I have a reason for believing in the European institutions—a difficult belief to sustain sometimes—it is because I believe that the peoples of Western Europe, who gave birth to the legal systems of the Western world and the values they seek to preserve, have a special responsibility and a unique opportunity to face these problems together. And if I have one reason, more than any other, for leaving practice and becoming

a professor, it is because I believe that neither the profession nor the judges, nor the academics, can tackle these problems alone. In particular, we cannot afford to leave it to the politicians or the bureaucrats. As a judge of the European Court said at a meeting in Edinburgh, “It’s the lawyers who make the good distinctions; the politicians only make those that are useful to them.” There is an appalling danger in the field I am talking about of superficiality and over-simplification. There is, I would suggest, an enormous amount to do, and an enormous amount that we can do together.