OPENING SPEECH

David A.O. Edward*

Your Royal Highness, Excellencies, distinguished colleagues, ladies and gentlemen,

It is an honour and a heavy responsibility to have been asked to deliver this address in Zutphen this afternoon.

British schoolboys of my generation were taught only one thing about Zutphen: that in the reign of the first Queen Elizabeth, Sir Philip Sidney was killed at the Siege of Zutphen. Sir Philip Sidney was the model of the Elizabethan knight: scholar, poet, diplomat, leader and warrior – the sort of person we would like to have been. After many exploits in the Netherlands, his thigh bone was broken by a shot from a Spanish musket fired from the walls of Zutphen. His friend Fulke Greville describes what happened next:

‘Passing along by the rest of the army, and being thirsty with excess of bleeding, he called for a drink, which was presently brought him; but as he was putting the bottle to his mouth he saw a poor soldier carried along, who had eaten his last at the same feast, ghastly casting up his eyes at the bottle; which Sir Philip perceiving, took it from his head before he drank and delivered it to the poor man with these words: “Thy necessity is yet greater than mine”.

‘And when he had pledged this poor soldier, he was presently carried to Arnhem where the principal chirurgeons of the camp attended for him; some mercenarily out of gain, others for honour to their art, but most of them with a true zeal (compounded of love and reverence) to do him good, and, as they thought, many nations in him.’

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1 Fulke Greville, The Life of Sir Philip Sidney, 1633.


The prosaic modern editor of Sir Philip Sidney’s poems\(^2\) points out that if so many doctors, ignorant of modern techniques of sterilization, examined him, probing his wound to remove the musket shot, that was probably what caused the infection that killed him. She also suggests that the water bottle story was borrowed from Plutarch’s Life of Alexander the Great.

So it appears that Sir Philip Sidney did not die at Zutphen; that he died as a result of medical negligence; and that the water bottle story is, after all, an invention. Nevertheless, looking for a suitable theme for this lecture, I have searched the poems of Sir Philip Sidney to find a text. But they are chiefly love poems with titles like *The Lad Philisides* and *Astrophil and Stella* – hardly suitable for a grave gathering of judges. There is, it is true, one poem written ‘to the tune of Wilhelmus van Nassouwe,’\(^3\) but I do not think you would thank me for reciting it to you this afternoon.

There is, however, another thing that we were taught at school about the Netherlands: that this is a land of dikes, polders and canals: areas of land won from the sea, separated from each other by canals, and protected from the sea by dikes.

Many lawyers of my generation look back to what they believe to have been a golden age – a golden age when the national legal systems were as distinct, separate and autonomous as the Dutch polders are, or at least are thought to be. In that golden age there was no talk of European law, whether of the Strasbourg, the Brussels or the Luxembourg variety. In that golden age, so it is thought, there were defined fields of law, separated from each other, as Dutch fields are separated by canals – though there may have been the occasional bridge over the canal, joining one field to another. In that golden age the provinces of the legislator, the executive and the judge were clearly defined and each branch of government kept to itself, within the powers allotted to it.

So, there were well-understood lines of demarcation between civil law and penal law, between contract and delict, between

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\(^3\) *Certain Sonnets*, no. 23: ‘Who hath his fancy pleased with fruits of happy sight ...’
OPENING SPEECH

substantive law and procedural law and, on this side of the Channel at least, between public law and private law. The lines of demarcation between the different titles of the law were so well understood that a German lawyer could say that whether he went to Sweden or Portugal, though he knew nothing of Swedish law or Portuguese law, nevertheless, faced with a legal problem, he could go to the library, find the appropriate book and almost certainly find the appropriate chapter in that book. Of course, that also shows that, in spite of the lines of demarcation, the laws of Europe already had something more fundamental in common.

When I was a student, public international law was regarded as a field entirely on its own. Private international law, although international in one sense, was truly a branch of national law. Together, public international law and private international law reinforced the dikes between the legal systems: public international law, because its function was to attribute and define competencies between sovereign independent states; private international law, because it provided rules to resolve conflicts of laws without attempting to remove the source of those conflicts, which lay in the differences between the national laws of the different states. So it was that a Scottish judge, Lord Hailes, who had learned his law at Utrecht, was able to say, when faced with the objection that English law was different from Scots law:

"By the articles of the Union,4 our own laws and forms of procedure are secured to us, and we have as little connection with those of England as with the laws of Japan, being as little bound to obey them."5

As far as Scotland was concerned, that particular golden age, if it was a golden age, came swiftly to an end before the end of the eighteenth century. Cut off from the Dutch universities, where for

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4 The Treaty of Union between England and Scotland, 1707.
5 Sir David Dalrymple, Lord Hailes, was one of the outstanding figures of the Scottish Enlightenment. It was he who encouraged Boswell to make the acquaintance of Johnson. For the quotation, see Roughead, The Trial of Deacon Brodie, p. 129.
they buy is safe to eat, and that the machinery they buy is safe to use. Real people want to trade in those goods. They do not want to be prevented by differences in standards of hygiene or safety, or by legal rules which, however laudable, make import or export more difficult. Inventors want to protect their inventions by patents; some also want to partition the market so that they can ensure that the prices they charge in one country are not forced down by parallel imports from another. People want to move across frontiers to study, to work, or to provide services. They want to take their families with them. They want their children to have access to education, and they want access to social security when they are ill. Other people want to cross frontiers to escape the police. Some people want to invest their capital in other countries because they will have a better return, others to hide it from the tax inspector or to launder the proceeds of crime.

These are the practical realities of today's world, both in human and in economic terms. Our aim must be to find a means by which we can achieve freedom of movement for people, for goods, for services and for capital, while maintaining the guarantees and safeguards that the public expects and the public interest requires. We need adequate legal machinery to balance these interests, and the judge, as part of the legal system, cannot avoid responsibility for helping to provide part of that machinery.

It is sometimes implied that the aim of the European Community legal system is to displace the national legal systems, and to displace national judges from the role that properly belongs to them. I would urge you to believe that that is not so. The aim is rather to make it possible for the national legal systems to deal with today's realities. So it was that, in 1963, in a case brought before a Dutch court by a Dutch company (Van Gend en Loos), the Court of Justice insisted that the purpose of the Treaties was to give people remedies which they could exercise in their own courts. Our aim in the Court in Luxembourg is not to tell national judges what to do, but to help them to do justice in accordance with the letter

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and spirit of the Treaties. That, correspondingly, is the purpose of the Court in Strasbourg.

But what, in this context, does 'justice' mean? It is a fine-sounding word, but I was struck by this quotation from an English periodical called *Racial Justice*:

'For some of us justice is a word we use. But for others justice is an experience – that must be endured. Or rather, the absence of justice. For it does not need a concept, a word carefully defined and correctly spelt, to remind us that justice is not ours. It is something that we have not got but know that we want; something we never had, but know that we have been denied; something whose presence is longed for, and whose absence is daily felt. When we are written off, abused, or put down, then we know that justice is more than a word. And we know even more clearly that injustice is more than a negation, it is pain, it is oppression, it is a destroyer of dignity.'

It is sometimes a humbling experience, working as I do with judges from other countries, to realize that what I regard as just and right may be regarded by others as manifest injustice. And that is so not only in obvious fields like sex discrimination, social security or the rights of workers to move from one country to another and take their families with them. An equal sense of injustice may be felt by the inventor who is denied the benefit of his patent, by the professional woman who goes to work in another country and then finds that her income is taxed more heavily because her husband does not live there, or by the tradesman who wishes to import goods but finds that they have been impounded by the customs because they do not comply with a hygiene or safety standard of which he was unaware.

Injustice appears in many guises, and is in many respects felt more acutely than justice. Here again, in the European field as in the national field, the judge has to strike a balance between the need to have clear and workable rules that apply to everybody and the claims of justice, or perhaps of injustice, in the particular case. The task of finding the correct balance is an enterprise in which we must all share.

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Many years ago now a distinguished English judge, Lord Denning, compared the effect of European law to that of an incoming tide, gradually but inexorably covering the land and finding its way into the estuaries and up the rivers. To a Dutch audience, that is perhaps an unhappy parallel, because your history is all about keeping back tides. In any case tides go out, and some people in my country would be happy to see the European tide go out and not come in again. So perhaps, after all, it is as well to avoid metaphors, whether they are about dikes or tides!

But it is clear that European law has affected national law in all countries in new and sometimes unexpected ways. There is an interesting parallel in the effect on the existing law of a new Constitution. Ireland is, in many respects, the country in which the common law remains most alive in its original form. Irish judges contributed greatly to the evolution of the common law in its formative years, and there are aspects of the old common law that have disappeared in England but remain alive in Ireland. Yet Irish law has been transformed by the existence of a written Constitution and by the willingness of Irish lawyers and judges to regard the Constitution as a new way of looking at the law as a whole. The same has been true in Spain: many, perhaps most, of the texts remain the same but, since the new Constitution of 1978, lawyers and judges look at the texts in a new light and apply them in a different way.

I do not think there is any legal system in the European Union that has not had to reassess its own legal institutions in the light of European Community law and European human rights law. In my own country it has been necessary for judges and lawyers to re-examine such basic ideas as the sovereignty of Parliament and the prerogative of the Crown. Ten years ago it was impossible – now it is possible – for a British judge to look at Hansard (the reports of Parliamentary debates) in order to resolve an ambiguity in a statute. Proportionality and legitimate expectation were words which simply did not appear in the vocabulary of a British lawyer.

10 Bulmer v. Bollinger SA [1974] Ch. 401 at p. 418F.
twenty years ago. Now they are beginning to be part of the common currency of legal debate. This would not have happened without some outside influences, mainly, though not exclusively, from Europe.

Some judges may lament some of these developments, and perhaps it is natural that judges and lawyers in all countries should fear for the future of the legal system to which they are accustomed and of which they are justly proud. Nevertheless, to the extent that our legal systems have been affected by other people’s law, should we not welcome what has happened? Are we not all the richer for it? We have all given something, but we have all received something in return.

Here at SSR there will be the opportunity to broaden and deepen that experience. I do not think we have anything to fear. May I therefore suggest, as a motto for the new premises of the SSR, the words written by a great English historian about the father of this nation:

‘Yet none could ever discover what that thing was that the Prince of Orange feared.’

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