Judge David A.O. Edward

Justice in Europe

~The Franco-Scottish Society 1995 Lansdowne Lecture~
JUSTICE IN EUROPE

JUDGE DAVID EDWARD

There are three reasons why I feel it a particular honour to have been invited to deliver the Lansdowne Lecture in this centenary year of the Franco-Scottish Society.

The first is that the name of Lansdowne has, throughout this century, been associated with efforts to bring about a better understanding between the peoples of Europe. The presence of Lord Lansdowne among us today is both an honour and a challenge for me, as well as a delight for all of us.

The second reason is that this is the centenary year of an association founded to give expression once again to the relationship between Scotland and France - our own “special relationship”. We should remember that, at the time when the Society was founded, France was not the most popular country in Britain. The Entente Cordiale was still to come, and British thought (including Scottish thought) was more influenced by German thought. Take the example of Lord Chancellor Haldane and the many other Scottish lawyers who went to Germany to study law and philosophy during the nineteenth century.

At the same time, towards the end of the nineteenth century, a new relationship was growing up between Britain and the United States, based on the notion that the two countries shared certain common characteristics; that the separation at the time of the American Revolution was only temporary; and, in particular, that both nations shared the common inheritance of the Common Law.

So France had little influence here although it was a country to which the British went for holidays, as you can see from the names of hotels all over France. What is significant and important is that, one hundred years later, the friendship between Britain and France, and particularly between Scotland and France, should appear natural to us all.

I have paid tribute to Lord Lansdowne and to those who had the imagination to create this Society. But I have a third, and particularly personal reason, for feeling honoured to deliver this Centenary Lecture.

The Franco-Scottish Society played an important part in forming my own ideas when I was young. As Lord Balfour said when introducing me, I was born and
brought up in Perth and my father was a keen member of the Perth branch of the Society. I remember very well, and particularly during the war, the enthusiasm with which he used to go to branch meetings and the excitement when, as a special constable, he had a small part to play in mounting the guard for General de Gaulle on one of his visits. Many people in Perth at that time had relatives in the 51st Highland Division who were captured at St Valery, and the twinning between Perth and St Lô was a very early example of town twinning. So the friendship and understanding between France and Scotland that the Society stood for were part of my upbringing.

Even at that time I suppose my thoughts were turning towards a career in the law but it would not have occurred to me, and I do not suppose it would have occurred to anybody else, that 50 years later I would find myself sitting with a French judge on a European Court that works in French, with two French secretaries in my office. That is a surprising manifestation of what has happened in those 50 years.

When I say that we work in French, I have to confess that the French we use is not the French of the Académie. When the Registrar of the Court, who is French, wrote an article, one of the members of the Court said to him: “Usually when I read your memoranda I can understand what they say. But this article is quite beyond me”. The Registrar replied: “That is because I wrote the article in French.” So the French connection can be tenuous!

The topic suggested for this lecture is “Justice in Europe”. It was selected with a broad scope - intentionally so. It gives me the opportunity to speak about two things - Justice and Europe, and how they come together; and to give you, as far as I can, an insight into what it is like to be involved in this new process of creating a system of justice for a continent.

Europe has become a focus of integration - a focus which is accepted in this country with more or less enthusiasm, depending on how you see it. That is true in France as well. There are Eurosceptics as much in France as there are here. But let us remember that, in the 1940s, when I was first introduced to the Franco-Scottish Society, Europe was anything but a focus of unity. It was the theatre of war, massacre and hate. People too readily forget that what is happening today in Bosnia was the norm for Europe for most of the early part of this century. The idea that people can be thrown out of their houses, massacred, raped, ‘cleansed’ and left with nothing was normal for many people in Europe at that time.
The perceived solutions to the problem during the inter-war years and immediately after the war were based on the idea of self-determination for nation states. That idea was based on what, to some extent, is a reality: that peoples see themselves as having something in common which sets them apart from their neighbours - not only religion, not only language, but also something which in a broad way we call nationhood. Perhaps of all the peoples of Europe, the Scots should be most conscious of that because, almost 300 years after the Treaty of Union, we remain conscious of our nationhood. We remain a nation without a state.

Between the two World Wars, the idea was that nations should be allowed to run their own affairs as independent sovereign states. The difficulty was that nations don’t fit frontiers. Again we Scots are unusual in that respect since we have only one relatively short, well-defined and uncontested land frontier. But the peoples of central and eastern Europe didn’t fit the frontiers into which they were born, into which for one reason or another they had migrated, or into which they had been forced.

Under the great European empires it was possible for people of different backgrounds to co-habit in a way which perhaps gave them little by way of personal freedom, but at least did not stimulate the desire to kill each other. The problem about the theory of the nation state was that however you drew frontiers for the nation, there was always a minority within those frontiers. Numerical democracy, pure numerical democracy, put power in the hands of the majority who could, if they wished, entirely disregard the wishes of the minority. That was the excuse that Hitler found for annexing the Sudetenland, because the Sudeten Germans were a minority in a new nation state, Czechoslovakia, run by people with whom they felt no affinity. The self-determination solution to the European problem therefore offered only a partial answer.

The post-war solutions that have survived are two-fold and both involve, to a greater or lesser extent, the ideas of law and justice which were not inherent in the notion of self-determination. (International law protected the rights of nation states but did not go far to ensure protection of minority rights within the sovereign nation state.)

The first post-war solution, developed in the Council of Europe (an intergovernmental organisation which still exists) was the promulgation in 1950 of a European Convention on Human Rights. It owed a great deal to the tradition, in which France and the United States were the leaders, of promulgating in a positive
way the inalienable rights of individuals. What was unusual in 1950 was that the idea of a Bill of Rights for Europe was promoted particularly by the British. The Convention was largely drafted by a draughtsman in the Home Office and was piloted through the Parliamentary Assembly of the Council of Europe by Sir David Maxwell Fyfe, a Scotsman who later became Lord Chancellor Kilmuir.

It is said that the Home Office draughtsman thought that what he was doing was simply setting down the rights of the Englishman as found in the common law of England. It has been a matter of some surprise and even disappointment for some people to find that application of that law may actually involve contraventions of the Convention on Human Rights. But that is another story.

The essence of the Convention system was that there should be a judicial body, supra-national in character, which would interpret the Convention and rule on whether nation states were in violation of it vis-à-vis their own citizens. It set, if you like, a minimum standard of justice as between the state and the citizen. Rather surprisingly, given the importance of the Declaration of Rights in France, France did not ratify the Convention on Human Rights until quite late on, in the 1970s.

The Convention has become important vis-à-vis the new democracies of Eastern Europe. It is a touchstone for continuing democracy in these countries that they accept unambiguously and unconditionally the obligations of the Convention - the obligation to treat their own citizens, and treat other people including aliens, in a way that is consistent with human dignity and human decency.

The Convention on Human Rights is essentially about individual rights although it also has something to say, for example, about press freedom. The more complicated problems of establishing an economic and political basis on which nation states could live together were not solved by the intergovernmental solution of the Council of Europe. This led to the experiment of the European Community, in particular the European Coal and Steel Community in 1952.

The novel element in the Coal and Steel Community was the idea, not only that states should live together under a system of common rules designed to ensure that they abide by the obligations they undertook when they signed the Treaty, but also that these rules should be enforced by common institutions, including a judicial institution, the Court of Justice. That was a wholly new idea. This weekend, while we are meeting here, the foreign ministers of the member states are meeting again in Messina, where they met 50 years ago to carry the process started by the Coal and Steel Treaty one stage further in the treaties establishing the European Economic
Community and the Atomic Energy Community (Euratom).

The aim of the three Communities was to overcome the problems that intergovernmental systems could not solve, and to do so in a way that respected the rights of small states. It is very easy for big states to get together to achieve economic goals, at least for a short time. It is not so easy for small states to play a part in that process, unless they have a clearly recognised place in the institutions and they have means to enforce their legal rights as members of those institutions.

The Community solution therefore essentially involves binding the member states into a legal relationship with each other, involving checks and balances such as you would expect to find in a written constitution. The Court of Justice is given the specific task of ensuring that, in the English text, “the law is observed”. (In certain other language texts the Court is charged with the duty of “ensuring respect for law and justice”.)

The Court has three characteristic functions. First, it has a constitutional function in which, to a substantial extent, it has drawn on the experience of Germany and Italy. The constitutional function consists in defining the relationship between the member states themselves, between the member states and the Community, and between the institutions of the Community: in other words, ensuring that the checks and balances are respected and maintained. This has become more important, and will continue to be important, as the European Parliament is given greater powers and seeks to enlarge those powers.

The second function of the Court of Justice is to act as the administrative court of the Community, ensuring that, in dealing with individuals and companies, the Community institutions observe certain minimum legal standards of behaviour. In that respect the Court and its work owe a great deal to France because it is France, above all, over a period of 200 years, that has developed one of the most sophisticated systems of administrative law in the world. It is not a system which is universally admired because it involves “the administration controlling the administration” through the Conseil d'Etat, rather than control by a court which, particularly to a modern German, might not be acceptable. Nonetheless it is a highly sophisticated system which has produced, not through a code but through what is really a form of common law, a series of principles for good behaviour on the part of administration.

That is something whose value we in this country have only come to realise relatively recently. When I studied law at Edinburgh University there was an optional subject called “administrative law”. It covered the law of meetings, the law of
water, the law of sewage and, a very modern tinge in those days, the law of town and country planning. That was all that administrative law was about. Nowadays, you only have to read the newspapers to read daily of people going to court with applications for judicial review of administrative action. The development of that idea is one which began in France and for which all the nations of Europe owe a great debt to France.

The third function of the Court of Justice, besides its constitutional and administrative functions, is to assist the courts of the member states in applying the law of the Community. The authors of the treaty did something which was rather remarkable: they thought of subsidiarity before modern politicians had adopted it as a war cry! They did not create a European appeal court but left the application of Community law for most purposes to the courts of the member states. The Court of Justice was given the task of working with the courts of the member states in defining what is the law they should be applying when they have to apply Community law.

That system of justice has meant a constant flow of ideas, not only between Luxembourg and the individual courts of the member states, but throughout the Community, because in one way or another everybody is affected by the ideas that come to Luxembourg from the member states and go out from Luxembourg to the member states. That is a very important element in creating, if you like, a common law of Europe.

One of the areas in which such a common law has been developed is discrimination between men and women. It isn't entirely popular in Britain, this area of law. It is said, although incorrectly, that the Luxembourg Court made it necessary for the British government to pay enormous sums of money to ladies who had left the armed forces because they became pregnant. But I don't think there is any doubt that the status of women is better for the work of the Luxembourg Court. Their status is better for the fact that Britain has had to accept, as part of its law, a common feeling about the importance of equal treatment of men and women. Similarly every member state has had to accept the idea of the right of free movement: the right to go where you want to go; to go where you want to study; to go where you want to work; to go where you can earn money if there is money to be earned; to take your family with you and to have your children educated in the country to which you choose to go. These are important rights. They are important rights precisely because the system I spoke about earlier, of nation states confined within frontiers, did not guarantee such freedom. Even in the late 1940s, in many countries of Europe including western Europe, it was necessary not only to have permission
to get into a country but to have permission to get out of it. That is an idea which seems to us now to be astonishing and even absurd. But not in those days and certainly not in Europe beyond the Iron Curtain. The fact that it is now regarded as absurd is precisely because there is a legal right to move, enforceable before the Court.

It is fashionable nowadays to take all that for granted and to say that, having achieved it, we do not need the machinery any more. But I do not think that that really will do. If there is to be an opening towards the East in a way which is lasting, and a way in which people are going to accept, then there must be a binding legal basis which recognises the rights of individuals, the rights of minorities and the rights of small states as well as big ones.

Criticism of the Community has come in recent months to focus on the Court of Justice on which I serve. It is said that the judges of the Court of Justice have exceeded their powers and that they have stepped beyond the legitimate rôle which is given to them of interpreting the Treaty.

The picture of the Court of Justice as a body of judges engaged in some form of self-aggrandising personality trip is an accusation which has always been made of judges. So the French code civil in 1803 said in Article 5:

"Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises".

The message is that the job of judges is to apply law made by others, not themselves. The difficulty about that is that the civil code in Article 4 also says this:

"Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable du déni de justice".

In other words, if the judges do not "find" the law, they deny justice.

That is the greatest difficulty for judges when they are called on to decide a new problem because they have to find the law from somewhere. Otherwise, they are guilty of a denial of justice and that, specifically, is the problem for our Court. Where do we find the law and, if we do find the law in a place that people don't expect, are we guilty of arrogating to ourselves a rôle which was not given to us?
How far can and should we go?

Gibbon, a long time ago, said that the laws of a nation are the most instructive portion of its history. And Sibyl Bedford, in a book called *Faces of Justice*, made a very interesting observation about the law and its connection with real life. She said:

"The law, the working of the law, the daily application of the law to people and situations is an essential element in a country's life. It runs through everything; it is part of the pattern like the architecture and the art and the look of the cultivated countryside. It shapes and expresses a country's mode of thought, its political concepts and realities, its conduct. One smells it in the corridors of public offices, one sees it in the faces of the customs officers. It all hangs together whether people wish it or not, and the whole is a piece of the world we live in."

The idea that the law is something that belongs to us, and belongs to us as people different from other people, is important. Any attempt to impose uniformity on the legal systems of Europe is, I think, bound to fail. In the early nineteenth century the introduction of jury trial in civil causes to Scotland was hotly opposed by Sir Walter Scott. He thought it was

"founded on what he should venture to call Anglomania - a rage of imitating English forms and practices, similar to what prevailed in France about the time of the Revolution, respecting manners and dress. We may very effectually destroy our own integrity of judicial system; but we can no more make it the English law, than a Frenchman could make his feelings those of an Englishman, by wearing boots, a drab great-coat, and a round hat instead of a cocked one."

There is sound sense in that and it is, I think, important in the European enterprise to recognise how far we can go and what are the limits. There will necessarily and reasonably be a reaction if the Community seeks unnecessarily to disturb people's own view of what their law should be and how it should be administered.

But there is a great deal of nonsense talked in both directions. For example, there is much talk in this country about the inquisitorial nature of French judicial procedure. But the French judicial system is only partly inquisitorial. The civil courts are almost not inquisitorial at all. In fact in many respects the civil judge in Scotland takes a much more active part in the proceedings than the civil judge in
France. Similarly, there is enthusiasm in France for the British tradition of oral advocacy which we are beginning to abandon, or at least to modify, because we have come to recognise that oral justice, where trials can take months or even years, is very expensive and therefore fully accessible only to a few. There is a feeling on both sides that there is something which we could do better if we copied the other person. The difficulty is that copying a solution taken out of its context doesn’t make a coherent whole.

Nonetheless, there is a gradual convergence - but it is a gradual convergence of ideas or approach, rather than uniformity of legal texts or the procedure we adopt. We are learning from each other in a way which was not possible before, precisely because of the osmosis of ideas from one country to another through the process of a centralised, but not over-centralised, Community judicial system.

What, then, do we have in common? Just this: that all the judges in Luxembourg - certainly all those with whom I have worked - would regard as fundamental the rather simple words of the Scottish judicial oath: that the judge will “do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill-will.”

That is a straightforward statement of the ideal of justice which all of us try to promote and to live by. At least I hope so.