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Journal of the Commonwealth Magistrates' and Judges' Association

Vol 15 No 1 June 2003
As you read this you will either be planning your trip to Malawi or you will have sadly accepted that you will not be attending the 13th Triennial Conference of the CMJA. In fact, you shouldn’t accept you can’t get there: there is a terrific programme planned and you should register NOW. We shall seek to cover the programme highlights in the next issue. For this issue, we seek to offer a taste of Malawi with an article from Charles Mkandawire. The issue also includes lessons from history in reviews of books on older cases which should not be forgotten. More modern developments are explored in Dr Ebeku’s discussion of the judicial role in sustainable development. We are particularly pleased to report the wise words of the Chief Justice of New Zealand and the Lord Chief Justice of England.

Readers should be aware that, unlike most 30 year olds who hope to have reached financial independence by this age, the same cannot be said of the Commonwealth Judicial Journal. You will be aware if you are an associate member that our annual subscription does little more than cover the costs of delivery: it certainly does not cover the expenses of running the CMJA more generally. Country affiliations are also I gather not paying their dues on time which can cause serious cashflow difficulties at the Secretariat. We have been very lucky over the years to have had the generous support of the Commonwealth Foundation to allow us to produce this Journal and to send it to judges and magistrates in every Commonwealth country. As they reconsider their grant system, we cannot sit back and simply expect the money to come flowing in. There are those out there who consider that judges and magistrates should not be priorities for charitable largesse, that a judges’ and magistrates’ association should be able to support itself. There’s the rub. Those of us who believe passionately in the aims of this Association must think long and hard about whether we are also prepared to support it from our own resources.

There’s the rub. Those of us who believe passionately in the aims of this Association must think long and hard about whether we are also prepared to support it from our own resources. Re-read the aims of the organisation to be found in the inside back cover of this Journal. Promoting the independence of the judiciary; advancing education in law and the administration of justice – what could be more important? I have been associated with this Journal since 1988 and believe as passionately now as I did then that it is fundamentally important that judges and magistrates from the Commonwealth speak freely and confidently to each other on these topics. The world is not getting safer; the difficulties in maintaining the rule of law in many countries are ever more evident; the limits to the powers of world organisations such as the United Nations to maintain world peace... the Commonwealth continues to provide an important forum in which we can explore fundamental issues of concern to us all. The topics which will be addressed by the Triennial Conference (see p.48) are vital. Take corruption for example. I was intrigued by Keith Hollis’ closing words in his address to the Commonwealth Law Conference this April:

“There is nothing new under the sun. Corruption is the HIV of good governance. It spreads and devours judicial independence, making good governance and economic prosperity impossible to attain, and ultimately building the foundations of tyranny. In many Commonwealth countries it is the most important issue facing the judiciary. We must do all we can to slay this beast before it devours us and the basic truths which we all, as lawyers, believe in.”

Do you agree? It is depressing how few judges and magistrates, even those on the Council, choose to respond to the issues we raise in the Journal, or to suggest articles to the Editorial Board. Included with this Journal is yet another questionnaire seeking to provide evidence for potential funders that the Journal is actually read. If you are reading this Editorial, please also respond to the questionnaire. If you think the Journal could be more efficiently distributed in your jurisdiction, please let us know. If you can think of new sources of financial support, let us know. If you know candidates who should replace this Editor, let us know. After 14 years, it is time to find a new enthusiastic volunteer. Indeed, recently appointed a part-time judge (a Recorder) your Editor is ever more mindful of the importance of the CMJA. May the Malawi triennial be a resounding success.

The Editor welcomes contributions of previously unpublished work, such as articles, reviews, essays. Contributions, ideally no more than 3,000 words, should be sent to the Editor, Commonwealth Judicial Journal, c/o CMJA, Uganda House, 58–59 Trafalgar Square, London WC2N 5DX.
Latimer House Guidelines Update
As reported in Newsletter No 13, The Latimer House Guidelines were discussed in detail by Law Ministers at their St Vincent meeting in November, 2002. It was then agreed that the Guidelines would be referred to a small group of ministers to be convened by the Commonwealth-Secretary to ‘distil the essence’ of the Guidelines.

The Ministerial Group meeting eventually took place at Marlborough House on Friday, 16 May. India, Singapore and South Africa were represented at ministerial level, Kenya by the Attorney-General and the United Kingdom by a senior official from the Lord Chancellor’s Department. Australia, Ghana and Jamaica were unable to attend although Australia sent in its comments on the draft ‘distillation’ which had been prepared by the Commonwealth Secretariat. This draft was the subject of an exhaustive all-day discussion chaired by South Africa and attended as observers by representatives of the CLA, CPA, CMJA and CLEA. Karen Brewer represented the CMJA and I represented the CLEA. The observers were permitted to participate in the deliberations. At the end of the day, the draft was referred back to the Commonwealth Secretariat to produce an amended document. If approved by Law Ministers, the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government will go forward to Heads of Government, who next meet in Abuja, Nigeria, in December 2003.

The Latimer House process continues to show how the Commonwealth professional associations can play a constructive role in strengthening the fundamental political values of the Commonwealth.

Commonwealth Law Conference, Melbourne, April, 2003
The judiciary was well represented at the 13th Commonwealth Conference held in Melbourne in April 2003. 1500 delegates, including 150 judges of whom 30 were Chief Justices attended the Conference the theme of which was “Common Law – Common Good – Common Wealth”.

Access to justice, HIV/AIDS, terrorism, human rights and individual liberty were all on the agenda. In addition to dealing with issues of transnational concern, the conference provided the opportunity for lawyers to consider subjects including migration law, technology, law and journalism, business regulation, corporate governance and indigenous rights.

Amongst the plenary speakers were Rt Hon Dame Sian Elias CJ New Zealand, The Hon. Justice Murray Gleeson, CJ Australia, Rt Hon Beverley McLachlin, CJ Canada and Rt Hon the Lord Woolf of Barnes, LCJ (England and Wales). Other CJs present included The Hon Ernest Sakala, (Zambia), The Hon Karl Singh (Guyana), The Hon Ariranga Pillay (Mauritius), The Hon. Derek Schofield (Gibraltar), The Hon Sir Dennis Byron, (Eastern Caribbean), The Hon Sir David Simmons (Barbados) and The Hon B J Odoki (Uganda). A number of working sessions were directly relevant to the judiciary. One session was devoted to the role of the Chief Justice in different parts of the Commonwealth and was addressed by, inter alios, The Hon Ernest Sakala. A session on Commonwealth Final Appellate Courts and their perspectives on the common law included contributions from Sir David Simmons and Lord Philips (Master of the Rolls, England and Wales). A session on Judicial Ethics was addressed by the CMJA's Director of Studies, The Hon Judge Keith Hollis and by the Rt Hon Lord Justice Jonathan Mance, Court of Appeal, England and Wales.

The next Commonwealth Law Conference is scheduled to take place in the United Kingdom in 2005.
PROFILE

The Hon. Sir David Simmons BC, KA
Chief Justice of Barbados

Sir David Simmons obtained his LLB in 1963 from the London School of Economics and Political Sciences and in 1965, became the first Barbadian to be awarded the degree of Master of Laws from the University of London. He is a Barrister of Lincoln's Inn.

He lectured in law at colleges in London until 1970 when he returned to Barbados and joined the Law Chambers of Mr Henry Forde QC as he then was. Between 1970 and 1974, Sir David was a part-time lecturer in law at the University of the West Indies in Barbados.

He opened his own chambers in 1987 after being appointed Queen's Counsel in 1984 in the shortest time in the legal history of Barbados.

He was elected to Parliament in 1976 and served continuously for 25 years until 27 August 2001, when he retired from active politics. He was Attorney General twice (from 1985–86 and more recently from September 1994 to August 2001 and has been often called upon to act as Prime Minister.

He was also Chairman of three statutory boards, the National Housing Corporation (1976–1979), the Caribbean Broadcasting Corporation (1979–81) and the National Sports Council (1981–85)

He has spearheaded many initiatives in reforming the justice system of Barbados. He was one of the chief architects for the establishment of the Caribbean Court of Justice as a Final Appellate Court to replace the Judicial Committee of the Privy Council and to adjudicate disputes arising under the Single Market and Economy of the Caribbean.

In January 2001 he was awarded the Barbados Centennial Honour (BCH) and in November 2001 was awarded the Knight of St Andrew (K.A) in recognition of his contribution to public service and politics.

He became the 12th Chief Justice of Barbados on 1 January 2002.

Sir David is married to Madam Justice Marie MacCormack, the first woman to be appointed as a judge of the Supreme Court of Barbados and has two children.

Sir David was an outstanding schoolboy, athlete and cricketer. In 1970 he wrote the biography of the West Indian cricketer Charlie Griffith ("Chucked Around"). He was the legal adviser to the West Indian Players Association from 1987 to 1994. He is an Appellate Steward of the Barbados Turf Club and has been a sometime Barbados Correspondent to the Blood Stock Breeders Review.

He is a connoisseur and avid collector of calypso music and he plays the trumpet!
THE USAGES OF SOCIETY AND THE FASHIONS OF THE TIMES (W[H]ITHER THE COMMON LAW?)

by
Rt. Hon Dame Sian Elias, GNZM
Chief Justice of New Zealand

The following Keynote address was presented at the 13th Commonwealth Law Conference held in Melbourne from 13–17 April 2003 and has been reproduced with the kind permission of the author and the Organising Committee for the 13th Commonwealth Law Conference.

Introduction
In his Introduction to English Legal History,1 Professor Baker cites the Serjeant who in 1470 asserted that the common law had been in existence since the creation of the world. Well, as legal historians such as Baker have demonstrated, not quite. Another conceit, that the common law is an unchanging expression of sturdy English common sense (“flesh of our flesh, bone of our bone” as Lord Bingham put it),2 has also been convincingly exploded.3 The common law indeed has ancient roots, but many are not English at all. It has borrowed, adapted, travelled, and grown. It is more in debt to the doctrine of the civilians than we often care to acknowledge.4 There is no longer, if indeed there ever was, one substantive common law.5 And we no longer pretend that the judges draw the law from an eternal spring; we know that the common law has never stood still.

As many commentators have observed, the common law is not a body of law or even a body of principles so much as a method of legal argumentation. It is a method that acknowledges continuity as well as adaptability. The nostalgia we have for the common law as an expression of the wisdom of ages (part of the comforting “leaf-drift of history” described by Helen Waddell) is as much a source of its strength as its adaptability and vigour in changing conditions. Indeed, it is perhaps a necessary condition of change through case law (the solutions arrived at in actual cases) that the decision-makers be acutely conscious of historical context. The common law method seeks to meet the twin objectives of law that is stable but does not stand still.

Tension between these objectives of stability and change is nothing new. Baker quotes an eighteenth century judicial disagreement.6 In 1784 Lord Mansfield CJ accepted that, “as the usages of society alter, the law must adapt itself to the various situations of mankind”.7 Lord Kenyon CJ was of another mind: “I confess I do not think that the Courts ought to change the law so as to adapt it to the fashions of the times”.8 I have taken my title from this exchange. Whether the common law will wither, or whither it will go depends upon its fitness to respond to the usages of society while avoiding the fashions of the times.

The method of the common law
We tend to think of the common law as case-law, the decisions of the courts. It is true that it has always been in large part the product of the results in actual cases. And that has had a profound effect on our legal method (a matter I turn to shortly). But it is important at the outset to acknowledge that an explanation of the common law as simply the decisions of the courts is inadequate in itself. It ignores how the common law has developed.

Until the development of professional law reporting in the nineteenth century, the common law could not properly be discerned from the case-law. As Baker has pointed out:9

Only blind faith could persuade anyone who has tried to read the year books that the mediaeval common law was somehow derived from their contents. Trying to glean law from the year books is like trying to learn the rules of chess or cricket merely by watching video-recorded highlights of matches. The reader soon senses that contemporaries must have known something he does not, some common understandings to enable them to appreciate the moves. There must have been a body of presuppositions and ground rules which do not appear in the books themselves, except in oblique glimpses.
The problem was not easily overcome. As late as 1704 Holt CJ was complaining about the unreliability of these “scrambling reports”, which “will make us to appear to posterity for a parcel of blockheads”).

The common learning applied in the mediaeval courts of justice was developed in the Inns of Court. Those formidable centres of learning were said, in a description ascribed to Erasmus, to be “the university and church militant of the common law”. Although after the Civil War the influence of the Inns waned and the development and exposition of the common law shifted to the courts, it is important to remember that the common learning inherited by the courts was derived in large part from doctrine developed by the readers and benchers of the Inns. They drew on English custom, Roman law, Ecclesiastical law, and contemporary European as well as English legal theory. Nor did this approach change with the switch of authority to the courts. The extent to which the common law of obligations (often thought of as the judge-made “centre” of English common law) draws on Roman law, is demonstrated by Professor Ibbetson’s fascinating Historical Introduction to the Law of Obligations. And this process of borrowing from wider traditions and thinking has been an on-going one:

Both the classical forms of the tort of negligence and of contractual liability developed in the nineteenth century under the influence of the models of the Natural lawyers of the seventeenth and eighteenth centuries and their successors. Specific doctrines of the law of contract in particular were derived explicitly from the works of Pothier and Savigny: offer and acceptance, mistake, the requirement of an intention to create legal relations. All of the principal elements of the tort of negligence can be found in the writings of Pufendorf and his followers, and it may well be that nineteenth century common lawyers consciously replicated shifts in continental theory in common law contexts. There is good reason to believe that a similar process is at work in the modern day development of the law of unjust enrichment. The legacies of the past survive into modern law.

It is important therefore to acknowledge that the common law is not bereft of doctrine. Although we prefer to reason from actual case to actual case, it is against a frame of principle, which draws explicitly upon legal theory only part of which is home-grown or case-made.

What Sir Gerard Brennan has described as the “skeleton of principle” of the common law is also the necessary background to a proper understanding of the place of precedent in the common law. While the common law movement from case to case can be seen, as Lord Goff suggests, as a process of reasoning upwards from the facts (rather than as a process of reasoning downwards from abstract principles embodied in a code), the difference is not black and white. Pushed too far, it suggests Tennyson’s view of the common law as a “wilderness of single instances”. As Cardozo put it, such a view condemns the concept of law, to a series of isolated dooms, the general merged in the particular, the principle dethroned and the instance exalted as supreme.

When a case by case approach was coupled from the mid-nineteenth century with the discipline of accurate law-reporting and hierarchical organisation of the courts, it is not surprising that it led at times to an emphasis on precedent in which the duty of the common law judge seemed largely to be only reproductive. As Lord Reid pointed out in his celebrated speech to the Society of Public Teachers of Law in 1972, such emphasis “results in the dreary argument that the case is similar to A v B and C v D but is distinguishable from X v Y and In re Z”. It is the way of confusion and uncertainty. It may achieve a spurious consistency but, unless the broad sweep of common law principles is kept firmly in mind, it results in intolerable rigidity and artificial and unreal distinctions.

Lord Mansfield, in many ways the father of the modern common law, emphasised certainty and consistency of decision-making. But he was impatient of mechanical application of precedent, insisting that its only proper use was to ascertain the principles for application to the particular case. In Jones v Randall he expressed his views:

The law of England would be a strange science if indeed it were decided upon precedents only. Precedents served to illustrate principles and to give them a
fixed certainty. But the law of England which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.

These principles are derived not only from decided case-law but also from what Pound described as the “general body of doctrine and tradition” which is invoked in judgments and “from which we criticise them”. This body of doctrine and tradition must also be ranked as law because they are observed by the judge in the judicial process. They provide yardsticks against which decisions are taken. And, most importantly, they provide the analogies by which the common law judge reasons. Lord Goff has described the common law judicial process as “an educated reflex to facts”.

It is my experience that, when a Judge approaches a particular case before him, he tends to have an instinctive feel for the result in that case. This is not mere hunch; it is the fruit of an amalgam – an amalgam of his knowledge of legal principle, his experience as a lawyer, his understanding of the subtle restraints with which all Judges should work, his developed sense of justice and his innate sense of humanity, and his common-sense. It is a simple fact of life that a combination of these factors provides experienced Judges with a strong instinct for the appropriate legal result in any particular case. It is this intuitive feeling which persuades appellate Judges, as much as any reasoning from precedents, whether they should simply apply a precedent; or qualify it; or re-mould it; or depart from it.

The power of precedent is the “power of the beaten track”. No judgment is isolated from the existing order. But judges are not sheep. They must move from the beaten track for good reason. In the common law method the importance of judgments is to predict future outcomes. Law, as Cardozo pointed out, is a matter of prediction. It is that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in the prediction is always present. When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain. Farther down is the vanishing point where the law does not exist, and must be brought into being, if at all, by an act of free creation.

... We may frame our conclusions for convenience as universal propositions. We are to remember that in truth they are working hypotheses... The theme of the method of the common law as the method of the “working hypothesis” is one taken up by Lord Goff and Lord Bingham. It describes a method that is modest and careful, avoiding wide generalisations. It develops from case to case, in response to the problems brought before the courts by litigants. It means that any rule announced by a court is tentative. All the facts to which it may be applied cannot be foreseen. Professor Neil MacCormick has argued that any adequate overall view of law must recognise that it is “a form of institutionalised discourse or practice or mode of argumentation”. It is an “arguable discipline” in which all norms are “defeasible”. That does not mean that decisions are at large or at whim. Judges do not decide cases in a vacuum. They have the context of statutes, precedents, scholarly writing and shared moral values. They proceed by analogy from case to case. Certainty and consistency (the “beaten track”) are themselves powerful arguments and will usually prevail. As Cardozo recognised, nine-tenths or more of the cases that come before a court are predetermined. The scope for change is relatively small and should not be exaggerated.

But it should be recognised that the method of the working hypothesis is a method of change. And it is in that principle of change that the vitality of the common law is to be found. If it is to be successful, the method of the working hypothesis requires close attention to reasons and to the articulation of the principles which, applied directly or by analogy, underlie the determinations of the courts. The future of the common law depends upon the ability of our legal systems successfully to operate by this method of the working hypothesis.
method. I want to consider the challenges for common law methodology against a number of topics: statutes, human rights, internationalism, pluralism and diversity, and the strains the method of the common law imposes upon the judiciary of today.

Statutes and common law
In my country, the common law attached from 1840. But the circumstances of settlement meant that we have always depended heavily upon statute law. I expect that we share that characteristic with most other former colonies. As a result, such jurisdictions may have been comfortable about statutory incursions into and restatements of common law, even in areas such as contract law. Our legislatures have often had prodigious output, in New Zealand sometimes of pioneering law-reform without parallel in other jurisdictions. That experience may have made us more willing to wait for legislative correction of common law at times. More importantly, it led us to pay early and close attention to the meaning and policy of statutes, construed in the light of their purpose. Such attention to the contextual meaning of statutes may be said to be a characteristic of the New Zealand common law method. We have long employed purposive construction of statutes, at statutory direction. The Interpretation Ordinance 1841 thus provided that “the language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof”. This history has meant that in New Zealand we have had no difficulty in accepting that both statutes and common law operate within a single legal system and that the judges must make sure that both work without friction. It has been a short step from this acceptance to a willingness to work from statutory analogies in the development of the common law, discarding worn-out precedents which do not fit with legislative restatements or identification of where the public interest lies.

It is nearly 100 years since Roscoe Pound wrote of common law and legislation. He has been followed by Landis, Traynor, Cross, Atiyah, and Calabresi. Early judicial leads were given by Lord Diplock and Lord Scarman in the United Kingdom, and Kirby J in Australia. It is no longer realistic, if ever it was, to see statutes and common law as oil and vinegar. Statutes have refreshed stagnating pools of common law. They have provided analogies for the development of judge-made law, particularly where the legislation provides authoritative guide to “the usages of society”, providing the context for the development of common law. If there is a principle to be discerned from a statute or group of statutes (and sometimes it is not so easy to find one), it will not automatically provide an answer outside the scope of the statute. It provides rather an argument to be tested against competing principles drawn from other statutes or from the common law itself. By such process the common law method permits co-operation between Parliament and courts to promote coherence in our legal systems.

Beaton quotes Chief Justice Stone’s view that it is the role of judges to express “the idea of a unified system of judge made and statute law woven into a seamless web by the processes of adjudication”. In this task, judges need all the help they can get if they are to see the whole. As Beaton points out, “[t]he enterprise will require great care if we are not to lose sight of the wood for all the trees. But unless we do so, studying the common law will eventually be like shining an ever brighter light on an ever shrinking object”. A challenge for the common law method in what Calabresi has called the age of statutes is to develop an understanding of the reach and sense of the law as a whole and to avoid the shoals of illegitimacy by judicial overreaching.

Common law and legitimacy
The prevalence of legislation as a source of law since the nineteenth century may have obscured the role of judge-made common law in a number of common law jurisdictions. Certainly Cardozo in 1924 described, even in the United States, a suspicion and hostility towards “the creative activity of the courts” in the minds of laymen, based on an assumption that the role of the Judge is simply to apply statutes to facts. In New Zealand our reliance on statutes has made us more vulnerable to misconceptions about the nature of law. It is common for the suggestion that judges make law to be indignantly denied, even by those who might be expected to know better. That attitude poses particular challenges about legitimacy for the common law in New Zealand and perhaps also in other Commonwealth jurisdictions which share a similar heritage.
The imitation of significant developments of the common law in the United Kingdom (for example the substantial responses to commercial needs described by Professor Goode in his Hamlyn lectures) has not been controversial. It is not clear however that such sweeping home-grown judicial development would have been as acceptable. It may be that our traditions will operate to circumscribe the responsiveness of the common law of New Zealand to changing conditions, unless we can do rather better in explaining the role of the courts in its development and in gaining public acceptance of that role. Reasons for judgment are, as I will suggest further below, essential for judicial legitimacy in development of the common law in the age of statutes.

In many of our jurisdictions, statutes now occupy much of the traditional heartland of the common law. Much development of the common law now takes the form of statutory construction. This shift should not be exaggerated. As Lord Goff has pointed out, in codified systems as in common law systems, “the substantive law has to develop in some degree from case to case”. The working hypothesis is equally applied in construing statutes from case to case. That is particularly so where statutes are declaratory of the common law, employ open-textured drafting, or state general principles for the courts to apply. The construction of such a statute is not a mechanistic exercise. It is a high-order judicial task, which draws heavily on the methodology of the common law.

Internationalism

The world is shrinking. If borrowing from outside has always been a feature of the common law, that trend is only likely to accelerate. International legal regimes now provide the context in which much domestic law operates. Increasingly domestic legislation fulfils international obligations. International electronic commerce creates challenges domestic law cannot hope to meet, except through international co-ordination. As Kenichi Ohmae so memorably put it, “Nothing is ‘overseas’ any longer”. And judicial reaction to common problems, despite differences in culture and legal background, is likely to coincide. We reason from the analogies of foreign case-law and domestic statutes. International conventions and the determinations of international tribunals under them similarly provide assistance that we should be glad to receive.

Today it is difficult to believe that anyone seriously doubts the value for the common law method of international legal materials. They impact particularly in domestic criminal, labour, commercial, and human rights law. They are likely to become increasingly important in dealing with environmental law and with the vexed problems thrown up by terrorism and armed conflict within national boundaries as well as across them. It is no longer true to see international rules as simply binding on states in their relations with each other. They are the basis of rights and duties of individuals which, adopted into domestic law, are often capable of enforcement in courts. Sir Kenneth Keith has described the sweep of such obligations (which in New Zealand either give rise to or affect more than 200 statutes),

Their wide-ranging subject matter includes war and peace, disarmament and arms control, international trade, international finance, international commercial transactions, international communications, international spaces, the environment, human rights, labour conditions and relations, and other areas of international economic, social and cultural co-operation.

In the jurisdictions of the common law, reference to international materials is now relatively common place. International obligations have made startling inroads into common law doctrines of sovereignty in the United Kingdom. In many common law jurisdictions there are examples of the courts applying presumptions that legislation is to be construed in conformity with international obligations. Unincorporated treaties and judicial consideration of them by international bodies and the domestic courts of other nations are part of the materials routinely drawn on by courts working within the common law method. They are persuasive arguments in the search for reasons that convince.

The challenges of rights for common law method

The most dramatic illustration of the influence of international material on the common law is to be seen in domestic human rights law. Seven years ago Lord Cooke of Thorndon, expressed the view that although “[t]he world is moving towards an international law of human rights”,
the progress would be “lengthy”. He was right about the movement, but its pace has been rapid indeed. At the Commonwealth Judicial Colloquium in Bangalore in 1998, the participants were of the view that judges must interpret legislation in conformity with international human rights codes and must develop the common law “in the light of the values and principles enshrined in international human rights law”.

Even before enactment of domestic legislation giving effect to international human rights obligations in the United Kingdom and New Zealand, the pull of the international legal community in human rights was proving irresistible to the common law. Domestic legislation in both countries now requires the courts to act in conformity with human rights. It seems inescapable that the development of the common law will now march in step with human rights. And for those jurisdictions which have acceded to the Optional Protocol to the Covenant on Civil and Political Rights, the decisions of our courts are taken upon an international stage. The effect, as the experience of the United Kingdom with the European Courts suggests, is likely to be salutary. Human rights have “internationalised” our law. The habit is likely to spread.

In countries where the function of the common law judge is not well-understood, human rights litigation raises concerns about the legitimacy of judicial function. In addition, Carol Harlow has raised the dangers of “campaigning litigation”, which human rights litigation opens up and which may result in “colonisation of the legal by the political process”. She expresses concern about extension of standing to allow campaigning groups to argue for particular outcomes and the readier invocation of techniques such as the Brandeis brief to ascertain legislative facts. This may “push courts into areas of policymaking to which their processes are inherently ill-adapted”. It is suggested such litigation may escalate the scrutiny of judicial officers for association with the causes advocated, as Pinochet and Locabail illustrate. Harlow echoes T.R. Allan in expressing concern that the admission of pressure groups or factions or special interests may mark a corruption of the legal process: “To put this important point differently, too close a relationship between courts and campaigning groups may result in a dilution of the neutrality and objectivity of law.” In similar vein, Lord Hoffman has argued for judicial restraint in consideration of the limits which human rights impose upon democratic institutions. Judges must recognise that they are “not appointed to set the world to rights”.

It seems to me that criticisms such as these can be overstated. Judges who work within the common law method, case by case in actual controversies brought to the court by litigants, cannot believe they are appointed to set the world to rights. Brandeis briefs and relaxation of standing are techniques, sparingly used, which enable courts to be properly informed about all sides of a dispute. They are not techniques confined to human rights or public law litigation. Nor are they an invitation to judicial legislation. In appropriate cases they overcome deficiencies in adversarial process without subverting it. The labels too may mislead. “Campaigning” commercial enterprises are not unknown in modern litigation. And close scrutiny of the associations judges may have with litigants is a fact of life in litigation unconnected with political causes.

The application of human rights standards may bring some special challenges. In Lord Goff’s words, they invite downward reasoning from principles, rather than upward reasoning from the facts. But, as I have already suggested, it may be questioned whether this is a distinction more apparent than real since in the application of law to facts the common law has always sought organising principles. The real change brought about by human rights standards is the power of the organising principles they supply. This is not a revolution in method. At different periods in history the common law has been similarly galvanised by the great Charters and reforming statutes. The legislative statements enable judicial reasoning to be more explicit than it has perhaps been in the past in administrative law. The Courts have in the past been largely adrift in considering challenges to official conduct based on substantive values. They have had to seek such values in the statute, in the international context where applicable, and in judicially-identified enduring community expectations. Inevitably, the result has been deference to the decision-maker and a lack of clarity and persuasiveness in judicial reasoning where, as Michael Taggart has put it, judgments are too often
“characterised by assertions of unreasonableness or unfairness, and little else”.

Where legislative enactment of rights is available, conduct which infringes human rights must be “demonstrably justified” or “necessary” in a free and democratic society. This is the language of proportionality. The three-part approach adopted by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing* and adopted by Lord Steyn in *ex parte Daly* points in a direction most of us are likely to travel. First, the objective of the measure taken must be sufficiently important to justify limiting a fundamental right. Secondly, the measure must be reasonably connected to the objective. Thirdly, the limitation upon the right must be no more than is necessary to accomplish the objective.

Values which the courts have identified with difficulty (and little legitimacy) or have glossed over have now gained democratically conferred organising principles. The courts have a register against which to structure judicial reasoning. Statements of human rights in domestic law now provide a measure against which executive action can be readily tested. It would be naive to think that they will not ultimately come to exercise a huge influence on the interpretation of all statutes and the development of the common law. As Cooke P remarked of the New Zealand Bill of Rights Act in *R v Goodwin*:

The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.

Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be easy for judicial determination. But where a case is properly brought before the courts, they cannot avoid grappling directly with the issues. As Janet MacLean has persuasively argued, there is no illegitimacy in this. The courts act in dialogue with the legislature, not pulling against it.

What is developing is an elaborate system of deference depending on the right at risk... not all rights will be treated the same, and some rights, such as that to be free from unreasonable search and seizure, contain their own modifiers... over time, one would hope that a more explicit methodology will develop – adapting some version of proportionality doctrine, Wednesbury doctrine or a domestic version of the margin of appreciation doctrine. Such an approach has the potential to combine a sensitivity to democratic judgments, as well as providing a means by which to make quite forceful normative statements in a proper case. The existence of doctrines by which courts pay deference to legislative judgments does not depend on whether or not there is a striking down power. Equally, however, the normative force of a court's judgments will diminish the more contestable the “reasonableness” component, and according to the susceptibility of an issue to a legal analysis.

In the end, as Leventhal suggests, courts in common law jurisdictions will proceed in political thickets as they have always done, “carefully, pragmatically”.

They will have the comfort of standards developed by the courts of comparable jurisdictions and by international bodies. But the principal answer to suggestions of judicial overreaching lies in scrupulous adherence to common law judicial method, through the provision of reasons which convince.

**Reasons for judgment and judicial independence**

It will be obvious by now that I am of the view that the provision of reasons for judgement which convince is essential to change by common law method. And without change, without the “principle of growth” Cardozo believed to be part of the common law, it will wither indeed. Because our system relies so heavily on case-law, change always needs to be explained. The challenge for the future of the common law will be to attract and retain independent judges who observe the discipline of common law method, have the imagination to see when change is necessary, and the capacity to explain why in judgments that convince.

There are insidious pressures on common law method here. In Australia, the Chief Justices of Australia and New South Wales have spoken of the challenges for the courts posed by modern public service management, with its emphasis on transparency, accountability and objective measurement. None of us are immune from
these pressures. And for the most part they are appropriate responses to the reality that we cannot go on increasing the number of judges and courtrooms without depriving other important social institutions of resources. But modern case-management, the measurement of outputs, and a tendency to view litigants as consumers of services, carry potential risks to judicial independence and impartiality. Just as they must not trade off fair processes and just outcomes for efficiency and expedition, they must not erode the space judges need to reflect and convince especially in those cases where it is necessary to leave the beaten path, while fitting the new point of departure within the existing fabric.

Both Lord Reid and Lord Goff have emphasised that the common law depends upon the independence not of the courts, but of the individual judge. It is for that reason that both regard the dissenting judgment, not tolerated in most European traditions, as “liberating”. Because each judge is independent, “judgments tell the truth – the real reasons for our decisions, expressed, where appropriate, subject to the Judge’s own qualifications, hesitations and even doubts”. Again, if the common law is to maintain its dynamism, the pressures for efficiency must not be at the expense of the liberty of the judge to tell the truth as he or she sees it.

The common law method is not efficient. It needs time. That is why it proceeds from case to case, sometimes retreating, always cautiously. If we are too impatient of the process, we lose much of its value. If we streamline it too much, perhaps by composite opinions, we lose the authentic voice with its doubts and markings for the future traveller. Lord Reid suggested that the process cannot be rushed:

The truth is that it is often not possible to reach a final solution of a difficult problem all at once. It is better to put up with some uncertainty – confusion if you like – for a time than to reach a final solution prematurely. The problem often looks rather different the second time you deal with it. Second thoughts are not always best but they generally are.

We should not be complacent about our ability to attract suitable appointments to the bench. In a number of jurisdictions there is worrying resistance to recruitment from able men and women. And early retirements are now common. Lagging standards of remuneration and pensions are only part of the problem. It is no longer acceptable to many that judges are accountable through their reasons and through the appeal process. Judges who make mistakes on and off the bench are subjected to complaint and calls for removal. Many of our jurisdictions maintain formal disciplinary processes. I do not suggest that judges should not be criticised. But, as Felix Frankfurter put it in Bridges v California, the need is just as great that they be allowed to do their duty. Maintaining the right balance, achieving the public commitment which is the only sure protection for judicial independence, is one of the challenges for our systems.

Pluralism and diversity
The common law of England was applied to New Zealand first as a matter of common law. In 1854 the legislature gave statutory recognition to English law as at 1840, both statutory and common law “so far as applicable to the circumstances of New Zealand”. It was not until 1988 that the Imperial Laws Application Act attempted a list of statutes still in force in New Zealand, beginning with the Statute of Marlborough 1267. The common law of England was, rather oddly, said to continue to apply “so far as it was part of the laws of New Zealand immediately before the commencement of this Act”. Since the common law of England was modified by local custom attaching to native societies in the countries to which it was exported, what that provision means is unclear. The fact of the matter is that the common law has never been a seamless whole throughout the common law world. It was modified by the pre-existing custom of the local populations and it has continued to evolve distinctly in the separate countries to which it attached.

One of the challenges for the common law in the years ahead may be how it copes with modern pressures for local or social autonomy on the one hand and relocation of authority to supranational authorities on the other. These are the forces that in the United Kingdom have led both to devolution and accession to Europe. As Justice Sandra Day O’Connor identifies, the principle of subsidiarity applied in Europe shares common tactical roots with federalism and devolution. In the United Kingdom the courts have been at the forefront of both shifts.
In jurisdictions with indigenous minority populations, such as mine, the aspiration of plurality has been largely unmet. In New Zealand, preservation of Maori custom was an explicit promise to Maori when the Treaty of Waitangi was signed. Although the common law was acknowledged to adopt local custom, and although the Privy Council sternly told the local courts in 1901 that it was “rather late in the day” to hold that there was “no customary law of the Maoris of which the courts of law can take cognisance”, the common law of New Zealand largely failed to respond. Our constitutional arrangements until 1986 contained provision for Maori Districts in which Maori could live under those customs “not repugnant to the laws of humanity”. The provision was never used and remained a curiosity. Most of us had forgotten the promise of plurality it contained.

Claims for pluralism remain in a number of countries of the common law world. In others it is accepted and acted upon. We have forgotten in some of the old Commonwealth countries that custom has always been an important source of law. Sir John Salmond put it as the second most important source of law, after statutes. Its importance is reflected in the judicial oath common to our tradition. Our populations now have the example of the use of custom as law in the Pacific nations and the example of the communities empowered in the United Kingdom by devolution. It is impossible to say that in other countries our common law legal systems will remain immune from such movements. We may have to reconsider.

Diversity in the common law tradition is more readily accepted. While at times some of us may have been more deferential to “the latest gospel from London” than others, by 1987 Lord Cooke felt able to express the view that even in New Zealand our law had evolved into “a truly distinctive body of principles and practices, reflecting a truly distinctive outlook”. The Privy Council itself gracefully said as much in Invercargill City Council v Hamlin:

But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be Yes. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

The former Chief Justice of New Zealand, Sir Thomas Eichelbaum, has suggested that the continuation of appeals to the Privy Council from New Zealand may have resulted in some self-inhibition by the New Zealand Courts, because of the risk that any departure from English precedent would be overruled. It is impossible to know whether that is so. The common heritage pulls together, as the experience of those common law jurisdictions which have relinquished the Privy Council demonstrates. More often than not, when decisions in novel cases have to be measured against principle, it is likely that we will agree. The increasing internationalisation of law also pushes us together. Where we go different ways, it will be because there are reasons to differ. Those expressions of difference are themselves critical to the continued vitality of the common law.

Beatson has expressed an opinion that the European forces affecting the development of the common law in the United Kingdom “appear to be matched by centrifugal forces in Commonwealth common law systems, most noticeably and self-consciously seen in Australia and Canada but also evident in New Zealand”. He concludes that the United Kingdom’s and this country’s links with the common law world seem “looser and increasingly fragile”. I wonder whether that will prove to be so. Lord Bingham has described the common law as flowing now in a number of channels. He identifies the “diminished role” of the Privy Council as having given freedom to the courts of Australia, Canada, India and elsewhere to develop principles of their own. His view is that, as a result, the common law is strengthened by the dialogue, the process of “learning from each other” described in Invercargill City Council v Hamlin. And it may be that, through the dialogue, the rest of us will also gain important European insights. If so, the common law will only be enriched.

The novel questions we address in the future will still be addressed and resolved by the techniques of the common law. That point, the stability of the common law method, was made in his

Endnotes

5 Invercargill City Council v Hamlin [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).
6 Barker, above at n 1, 229.
7 Johnson v Spiller (1784) 3 Doug 371 at 373.
8 Ellah v Leigh (1794) 5 Term Rep 679 at 682.
12 Ibbetson, above at n 4, 296. See also, Allen, above at n 10, 272.
15 Aymer’s Field.
16 Benjamin N Cardozo The Growth of the Law (1924) 54.
17 Lord Reid, above at n 3, 26.
19 [1774] 113 Erg 37.
21 Lord Goff, above at n 14, 754.
22 Cardozo, above at n 20, 62.
23 Ibid. at 43 and at 73.
24 Lord Goff, above at n 14, 753.
25 Lord Bingham, above at n 2, 19.
28 British sovereignty over New Zealand was proclaimed on 21 May 1840 principally on the basis of the signing of the Treaty of Waitangi on 6 February 1840.
29 In New Zealand the common law principles are substantially restated and partly reformed in a number of statutes enacted in the 1970s: the Contractual Remedies Act 1979, the Contractual Mistakes Act 1977, and later, the Contracts (Privy) Act 1982.
30 Note, for examples, the development of a comprehensive “no fault” accident compensation scheme that began in 1972 (see the Accident Compensation Act 1972 and succeeding Acts); and the Law Reform (Testamentary Promises) Act 1949.
31 R v Hines [1997] 3 NZLR 529 at 539-540 per Richardson P and Keith J; Invercargill City Council v Hamlin [1994] 3 NZLR 513 at 528 per Cooke P.
32 Maintained in s 5 of the Interpretation Act 1999.
38 Sir Rupert Cross Precedent in English Law (2nd ed., 1968).
40 G. Calabresi A Common Law for the Age of Statutes (1982).
43 Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 (overturned by the High Court in Public Service Board of New South Wales v Osmond (1986) 195 CLR 656).
44 Professor Burrows (Statute Law in New Zealand (2nd ed., 1999) 324-325) refers to the atmosphere of change created by statutes and the transfer of ideas. Landis “Statutes and the Sources of Law” in Harvard Legal Essays (1934) at 213 (reprinted in (1965) 2 Harvard Journal of Legislation 7) refers to the “cross-fertilisation” of statute and common law (although laments its virtual absence at that time).
47 Cadozo, above at n 20, 155.
51 Ibid. at 13. Note, the New Zealand Law Commission estimated in 1996 that one quarter of the Acts in New Zealand raised issues connected to international law (A New Zealand Guide to International Law and its Sources (NZLIC R34)).
57 Lange v Atkinson (HC); See R v Secretary of State for the Home Department ex parte McQuillan [1995] 4 All ER 400 at 422 per Sedley J.
58 Smith and Grady v UK.
59 See, for example R v Butcher [1992] 2 NZLR 257 at 267 where Cooke P explained judicial remedy for breach of human rights as lying not in “judicial discretion but [in] the increasing international recognition of basic human rights”.
62 Harlow, above at n 60, 13.
63 Lord Hoffman Separation of Powers (The Comber Lecture, 2000).
64 See, for example, the calls for counsel to present Brandeis’s briefs where appropriate: Sir Ivor Richardson “Public Interest Litigation” (1995) 3 Waikato Law Review; Ivor Richardson “The Role of an Appellate Judge” (1981) 5 Otago Law Review 1.
65 As litigation about copyright, competition, and regulatory controls illustrates.
66 Man O’War Station Ltd v Auckland City Council (Judgment No 1) [2002] 3 NZLR 577 (PC); Locabail (UK) Ltd v Bayfield Properties Ltd [2006] QB 451, [2000] 2 WLR 870; Glenae Pty Ltd v Austraia and New Zealand Banking Group Ltd [1999] VSCA 35; Webb v R (1994) 181 CLR 41; Moch v Neddralv (Pty) Ltd 1996 (3) SA 1.
67 See Tavita v Minister of Immigration.
69 [1999] 1 AC 69 at 80.
70 [2001] 3 All ER 433.
71 [1993] 2 NZLR 153 at 156.
74 As Ibbetson, above at n 4, points out at 299.
75 Lord Goff, above at n 14, 755.
76 Lord Reid, above at n 3, 29.
77 314 US 252, 284 (1941).
78 R v Symonds (1847) NZPCC 387.
79 English Laws Act 1854; section 1 of the English Laws Act 1858.
80 Tjani v Secretary Southern Nigeria [1921] 2 AC 399.
82 R v Secretary of State for Transport; ex parte Factortame Ltd (No2) [1991] AC 603; R v
Secretary of State for Transport; ex parte Factortame [1990] 2 AC 85; Thoburn v Sunderland City Council.

83 Nireaha Tamaki v Baker (1901) NZPCC 371.
84 Baldick v Jackson (1910) 30 NZLR 343; Public Trustee v Loadsby (1908) 27 NZLR 801.
85 Constitution Act 1852.
86 The Maori Purposes Act 1962 is a more recent attempt at a measure of diversity but has also largely been overlooked and today reads rather oddly.
91 Beatson, above at n 46, 292–293.
THE INTERNATIONAL ROLE OF THE JUDICIARY

by

Lord Woolf

Lord Chief Justice of England and Wales

The following Keynote address was presented at the 13th Commonwealth Law Conference held in Melbourne from 13–17 April 2003 and has been reproduced with the kind permission of the author and the Organising Committee for the 13th Commonwealth Law Conference.

I am delighted to be in Melbourne attending another great Commonwealth Law Conference. Commonwealth Law Conferences are hugely enjoyable occasions and that is certainly true of this event. The hospitality, even by Australian and Victorian standards is exceptional. If I may, I will single out for praise just one member of the organising committee. I do so, because he has taken on a special role in relation to judicial contributions. I refer of course to Justice Bernard Teague. From my personal knowledge, I am able to pay justifiable tribute to Bernard for his indefatigable work to make the conference a success.

However, as I fear you are about to learn over the next 45 minutes, not everything that happens at Law Conferences is enjoyable. We attend because we find that what we learn assists us to perform our role in our own countries more effectively whether the role is that of a judge, a lawyer or an academic.

For the judiciary, certainly for the English judiciary, that role has been transformed during my judicial lifetime (which has just entered its 25th year). Until the 1970s, the role had hardly changed in over a century. A judge’s concern was to decide cases, but little more than that. The general attitude to reform was encapsulated in the oft-quoted remark a judge of the previous century: “reform, reform, do not talk to me of reform; things are bad enough already”. Trials were conducted almost exclusively orally and were extremely adversarial. Rumpole was not entirely a figment of a barrister author’s vivid imagination. Such advocates could be readily identified at the bar. One of my favourites at the time was Sam Stamler QC – not so much a Rumpole of the Bailey, but a Rumpole of the Strand. Today oral advocacy has a lesser role and written advocacy has become far more significant. However, the changes in the judicial role upon which I want to focus today are much more significant.

Just as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge’s responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.

At the forefront of these new responsibilities is achieving access to justice for those within the judge’s jurisdiction. But it is not on a judge’s many new domestic responsibilities that I want to concentrate today. Rather, it is the international dimension of the judiciary’s new responsibilities that I wish to stress. Chief Justice Murray Gleeson made reference to these new responsibilities in his admirable article, Global influences on the Australian judiciary, in the Australian Bar Review, when he said:

“In an open society, a nation’s legal system, and its judiciary, will always be exposed to international influences. Even when unrecognised, or unacknowledged, they will be reflected in the substantive and adjectival law applied by judges, in the structure and status of the judiciary, and its relationship with the other branches of government.”

The judiciary to which I am referring here are not the judiciary of the growing number of international and super-national courts and tribunals that are being established in different parts of the world. This, not because I do not support the contribution those courts and
Tribunals are making towards upholding the rule of law. On the contrary, I recognise their contribution is critical. These courts (for example, the long-established International Court at the Hague, the European Courts of Justice and of Human Rights, the new International Criminal Court and the Special Court for Sierra Leone about which Geoffrey Robertson spoke earlier in the conference) deserve our strongest support. We should provide that support by ensuring that international courts are properly resourced and are supplied with judges to serve upon them of the highest calibre from amongst the legal communities of our respective jurisdictions and, wherever practical, from amongst our own judiciaries.

But today, rather than members of international courts and tribunals, I am referring to the judiciary who day-by-day in each of our jurisdictions are responsible for providing justice to members of the public. It is my contention that all judges in every jurisdiction are, by the way they undertake their responsibilities, contributing to the quality of justice internationally.

Today no country is cocooned from its neighbours. Human beings do not live in hermetically-sealed containers. While we remain citizens of our individual nations, what happens in any part of the globe can affect us all. We not only have a global economy, we are part of a global society. As SARS has dramatically demonstrated, the health of any nation can be at risk if an infection affects any other nation. The same can be true of justice and the observance of the rule of law. The process may be slower, the rate of contagion not so high, but the spread of infection from one legal system to another is likely to be unstoppable unless a cure for the disease is found.

Terrorism and crime are no respecters of national borders. It is not countries which are subject to the rule of law which are the breeding ground of terrorism. It is where the rule of law has broken down that terrorism takes root. Crime thrives where law enforcement is weakest. It is no accident that the citizens of countries which observe the rule of law do not have to seek asylum.

A theme which has justifiably reverberated through the halls of this building since the conference started on Monday is that the observance of the rule of law is critical to progress in both the under-developed and developed worlds. Cherie Booth expressed admirably my own sentiments when she said that the rule of law, based as it is on HR values, is the key which can unlock greater economic and ethical wealth. The problems confronting the different nations in the Commonwealth are far from identical.

However, Cherie Booth was making the point (echoed today by Chris Patten) that, if real progress is to be achieved, it is necessary to improve the observance of the rule of law in every part of the Commonwealth and, indeed, of the globe.

Two months ago I attended the All Africa Conference on Law, Justice and Development in Abuja, Nigeria. Kofi Annan, Secretary General of the United Nations and James Wolfensohn, President of the World Bank, were both due to attend. Not surprisingly, in view of what was happening in other areas of the world, they were not able to do so, but papers were delivered on their behalf. Both recognised the importance of establishing effective justice systems in the developing world. I was particularly impressed by the comments of James Wolfensohn. Amongst the things he said were:

“[What] we know is absolutely critical – absolutely critical – is that there should exist a legal and judicial system which functions equitably, transparently and honestly. If these forms of legal and judicial systems do not exist in Africa, there is no way that you can have equitable development.”

And:

“Africa needs strong, well-established rule of law regimes to enable it to trade itself into prosperity and out of poverty.”

Kofi Annan expressed very much the same views.

Many of the countries to which reference was being made at the All Africa conference were Commonwealth countries. The state of the legal systems within those countries should be, and I believe is, very much a matter of concern to the more prosperous and better developed members of the Commonwealth. But it is not only out of self-interest that we feel outraged when we see the system of justice being traduced within another member of the Commonwealth.
Commonwealth. We know that the citizens of that country should, like our own, be protected by a system of justice that shares the values of our own. While in some Commonwealth jurisdictions, such as South Africa, the common law has a less dominant role, what should not differ from one country to another is the adherence to the rule of law.

I hope it is clear from my earlier comments, that I believe that the way in which the rule of law is administered by a judge in one jurisdiction either contributes to, or detracts from, the observance of the rule of law generally. Without taking away from the importance of this central thesis, I wish to turn now to the more direct contribution that is made by the judiciary of each of our jurisdictions. I will also mention the legal professions within our jurisdictions, whose contribution is equally important.

Perhaps the most obvious example of the type of contribution to which I am referring is that which the judiciary make to their own jurisprudence by referring to the jurisprudence of other jurisdictions when they give judgment. This is particularly true in the field of human rights because those rights represent international norms. One of the reasons why I personally am enthusiastic about the ECHR being made part of our domestic law is that it has enabled the judges in my jurisdiction to play a part which in the ordinary course of their duties trying domestic cases had hitherto been unavailable, namely contributing by their decisions to the evolving international jurisprudence of human rights. In the past, British judges could do this in the Privy Council, but that provided limited opportunities. Now they can join the great majority of judges in other jurisdictions in making a direct contribution.

As a member of the Privy Council, I had a limited exposure to the jurisprudence of other members, but nothing like that which I have now. The new exposure of our judiciary is of particular importance since, until the ECHR became part of our domestic law, there was no common law jurisdiction which directly gave effect to the ECHR in its courts. The Republic of Ireland had its Bill of Rights, of course, and has done an admirable job in keeping the common law flag flying in Europe though its contribution, as will be appreciated, has been that of a close relative of the Commonwealth rather than that of an actual member of the family.

Another example is provided by the Commonwealth Conference. The great majority of those attending are domestic practitioners or, like myself, domestic judges. However, by our discussions we are learning how to achieve higher standards of justice in our own jurisdictions.

On the Sunday prior to the conference, we had a meeting of Chief Justices of common law jurisdictions. One of my colleagues expressed surprise that I was able to be here after having already spent a week at a conference in Sydney. I answered that I would not have considered myself to have been doing my duty if I had not been able to make arrangements to be here (an opinion about which, I fear, you may already have reservations). Personalities aside, I am quite satisfied that attending conferences of this nature is part of the essential preparation of the judiciary for their duties. I say this in relation to what they can contribute and receive. Contribute not only in the business of the meetings, but also during the social events because of the ideas which informal exchanges of views can generate. The international contacts that are made can provide reference points for consultation and guidance for future development.

Another opportunity for exchanging views, the benefits of which I can vouch for personally, are the exchanges which take place now with increasing frequency between the judiciary of two or more jurisdictions. I know, for example, that my decisions have been influenced by the exchanges I have had with my Indian colleagues. Initially, I was astounded by the proactive approach of the Indian Supreme Court, but I soon realised that, if that Court was to perform its essential role in Indian society, it had no option but to adopt the course it did and I congratulate it for the courage it has shown.

I believe we have a responsibility to learn from each other not only in regard to substantive law, but also in relation to practice and procedure. When considering procedural reforms of our legal systems it would be a foolish reporter who did not look at the experience overseas. I certainly did so for my report on Access to Justice and, as you would expect, I received most generous assistance
wherever I turned – in particular, from the different jurisdictions in Australia.

Another benefit that can result from judicial exchanges is an improvement in international judicial co-operation. Sometimes this can be achieved by establishing international conventions. Such an approach is ideal if everyone is willing to participate and agree. Then, the judiciary's role can be limited to merely providing advice on what would be the most appropriate form for the convention to take. However, there can be a particular reason for a country not being prepared to join a convention, even though there is a real need for practical co-operation between two jurisdictions.

When this happens we have found that the judiciary can themselves, through direct contact, achieve what may be necessary. In the UK we now have a substantial Pakistani community. In the past there have been difficulties because of the lack of a convention to which Pakistan is a party to regulate the position where a marriage breaks up and a parent takes a child back to Pakistan (or vice versa). Until recently, there was no simple process of obtaining the return of the child. The court procedures could be slow and ineffective. Fortunately, a solution was found. The President of our Family Division made a visit to Pakistan and a delegation of Pakistani judges made a return trip to England. Out of this exchange, a protocol was established between the two judiciaries on their own initiative. The Protocol provided that, in the absence of special reasons, a child would be returned to its former country of residence so that issues as to care could be dealt with by the courts of that country. To ensure the smooth operation of the protocol, each country has identified a senior judge and has agreed that these two individuals will liaise if any difficulties arise. My informant tells me that the protocol is working well with considerable benefit to the children involved. It is intended to replicate the model with other countries that our not parties to the Hague Convention.

I turn now to what is perhaps the most important part of a judge's international responsibilities – making a contribution to other systems. The position, as I see it, is briefly as follows. If I am right that the legal systems of different jurisdictions are dependant upon each other, then the judiciary are not only responsible for promoting the quality of justice in their own jurisdiction, they are equally, so far as practical, responsible for making a contribution to the jurisprudence of other jurisdictions.

Individual judges and lawyers have in the past and, I hope, will continue in the future to make significant contributions to other jurisdictions, particularly with a view to enhancing the observance of human rights. In this regard, I am especially proud of the work done by the English bar and solicitors to obtain justice for those on death row in the United States. I know that the Australian and New Zealand judiciary go and sit in the small jurisdictions in the Pacific area which do not have the resources to provide the quality of judges that they themselves would wish from amongst their own citizens. The UK is, I believe, the only jurisdiction providing judges prior to retirement to the Court in Hong Kong, although Australia and New Zealand provide very distinguished retired members of the judiciary. The Special Court of Sierra Leone has amongst its judges a number of members who were judges of African States. These examples should be
precedents for other smaller jurisdictions to follow. It is an approach which enables them to demonstrate that their judiciary has the necessary quality and independence, but which is not inconsistent with national pride – a real disadvantage of appeals to the Privy Council.

In addition, I am sure we could do more to help each other by providing training. The training of judges needs to be in the control of judges from the country concerned, but judges from other jurisdictions can provide assistance when required. I know a great deal of valuable assistance is being provided already by and to different jurisdictions. I was particularly impressed by the contribution being made by Australia’s Federal Court to the Indonesian judiciary and was extremely grateful to Chief Justice Michael Black for allowing me to witness the ‘graduation ceremony’ for the members of the Indonesian judiciary who most recently completed a training course in Australia. For the new democracies of Eastern Europe, where the judicial and legal systems are still recovering from the cold war days, there are already many similar programmes in place.

Before coming to Melbourne I attended the 5th Worldwide Judicial Conference in Sydney. At that conference, the Hon Clifford Wallace, who has worked as hard (you could not work harder) as Justice Kirby to improve the standards of justice throughout the world, made a suggestion that I would warmly endorse. He suggested that each developed jurisdiction should pair up with one of the jurisdictions of the emerging democracies to mentor that jurisdiction as long as this was required. I believe he had very much in mind the precedent of the relationship between Indonesia and the Federal Court of Australia to which I have already referred. He would welcome volunteers.

It should not be thought that the benefits of such programmes are all one way or that it is only small countries that have need of assistance. I have had the good fortune relatively recently to visit three large jurisdictions – much larger than my own – at particularly opportune times. In each case, I have witnessed the start of a process of change prompted by those countries realising that adherence to the rule of law is of critical importance to their future development.

The first country was South Africa, which I visited in 1994 soon after Mandela had been released. I went to Bloemfontein with three colleagues for a conference on human rights at the South African Court of Appeal presided over by their Chief Justice. The conference was between the judges of South Africa and the judges of other African jurisdictions. We met for the first time in the library of the Court – the visiting judges (most of whom were black) in their lounge suits and the white judges of South Africa in their black robes. Initially the two groups stood apart, but then merged and started to talk avidly. From that meeting, I believe, grew the tree which now flowers as one of the great Commonwealth Courts, the Constitutional Court of South Africa.

The second country was China. I made two visits about 15 years apart. The change was dramatic, brought about, I believe, by exposure to foreign legal systems. On the first visit, although the Vice President (who was head of the Supreme Court) was interested in the western legal systems, he had no conception of how a legal system could operate. On the second visit in 2001, there was a hunger for advice so as to develop a system of justice which would support China’s growing trade.

The final country was Russia. The World Bank held a conference there last year on reforms of legal systems. As a result of the visit, I was convinced that Russia was committed to adherence to the rule of law. The conference was due to be opened by President Putin. In the event, he could not attend. I was one of a privileged few flown in his private jet to meet him in Moscow at the Kremlin. I was astonished to find that this was not a private meeting, but was to be broadcast on Russian television. I had been told that the President would welcome a question on human rights and the question I posed on capital punishment certainly received a positive response.

But to return closer to my chosen subject. A case in the UK which, I believe demonstrated a defining realisation of the importance of the interactive responsibilities of our judiciary was the General Pinochet litigation. Passing over the reasons for there having to be two hearings of the appeal, I believe the result of the case sent a strong message as to how different jurisdictions, Spain and the UK, could require even one of the most powerful citizens of another state to return
home to be held to account for his possible guilt of crimes against humanity.

My Scottish colleagues have recognised the need to be innovative in order to overcome geographical hurdles to achieve justice. I refer to their response to the Lockerbie terrorist incident. The decision to sit in a Scottish enclave in Holland was a remarkably imaginative way of enabling justice to be achieved for the relatives of the victims on the flight which happened to be passing over Scotland at the time the bomb exploded.

It is the fact that challenges posed by novel situations of this nature can be overcome, that makes the judicial role today so rewarding. They are achievements for the jurisdictions involved, but more importantly they contribute to the accumulated experience across all jurisdictions. If it has been done once, it can be done again. These contributions result in the reach of the rule of law extending more rapidly today than ever before.

We must not, however, be complacent. In recent years, there have been deeply worrying threats to the independence of the judiciary in some jurisdictions. Commendably, in a few other jurisdictions, and particularly in South Africa, the senior judiciary have publicly joined the protest of the UN rapporteur, politicians and the media. Others have, in private, provided support. However, it could be helpful if, in these situations, the collective voice of, say, the Chief Justices of the Commonwealth could be heard. But how could this be done. There is no organisation of Chief Justices in existence at present to take on this responsibility.

After much thought, I have come to the conclusion that it is doubtful whether such an organisation is practical or even possible. The need is intermittent, but when it arises it is urgent. There is a regular turnover in those who hold the office of Chief Justice. It is most unlikely any general mandate could be given without a meeting of those in office at the relevant time. Opinions could differ as to the nature of the problems differ.

Certainly the desirability of finding an answer, requires this issue to be on the agenda. What I have said emphasises the importance of, not only lawyers, but judges as well coming together at conferences such as this, the event last week in Sydney and the Chief Justice’s meeting on Sunday to discuss issues such as this. As Chief Justice Murray Gleeson also said in the article to which I referred earlier:

“Engagement between Australian judges and their overseas counterparts, whether of a civil law or common law background, is essential.”

I entirely agree and would adopt the same words in relation to the British judiciary. And I suspect the other Chief Justices present would do the same in relation to their judiciary. This is an important reason, among the many reasons, why I am so grateful to the organisers of this conference and my Australian colleagues for this opportunity to become more “engaged” during my visit to Australia.
JUDICIAL CONTRIBUTION TO SUSTAINABLE DEVELOPMENT IN DEVELOPING COUNTRIES: AN OVERVIEW

by
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Introduction

The concept of ‘sustainable development’ has become increasingly popular since it was employed and explained in the report of the World Commission on Environment and Development (WCED). Essentially, it means ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. More specifically, it is a concept which emphasises a ‘holistic approach’ to development – an approach that considers the need for environmental protection at the time of making a development decision, and does not privilege development needs over the need for environmental protection. In the words of one author, the concept ‘entails national policies and development plans [and judicial decisions] that look beyond the welfare of the present generation, by ensuring the utilisation of land, water, forest, wildlife, and air resources for the interests of the present and succeeding generations’.

Remarkably, before the idea of ‘sustainable development’ emerged, ‘development’ was conceived narrowly as ‘what poor nations should do in order to become richer’, regardless of the environmental implications. Yet, as explained in the report of the WCED, ‘environment’ is where we all live and ‘development’ is ‘what we do in attempting to improve our lot within that abode. The two are inseparable’. In fact, developing countries originally viewed the concept of sustainable development with great suspicion and circumspection. Essentially, it was seen as a strategy by the developed/advanced countries (from where the concept emerged) to perpetuate the dominance of developing countries or delay their development. As Mrs. Indira Ghandi, (former) Prime Minister of India, put it: ‘Many of the advanced countries today have reached their present affluence by their domination over other races and countries, the exploitation of their own masses and their natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality, or justice’.

As adumbrated above, since 1987 the concept of sustainable development has been increasingly employed, explicitly or implicitly, in several international instruments (declarations and treaties), including the 1992 Rio Declaration on Environment and Development and the 1992 Convention on Biological Diversity (CBD) as well as in national constitutions (and legislation). Notably, all the relevant declarations and treaties oblige and/or urge participating States to promote sustainable development in their respective jurisdictions. Beyond this, there is a UN Commission on Sustainable Development to which all States are expected to make annual report on its implementation of Agenda 21 (an Action Plan for sustainable development, drawn up at the 1992 Earth Summit at Rio de Janeiro, Brazil).

At the national level, there are several national constitutions (and legislation) worldwide providing for right to environment or sustainable development. And since one and half decade ago, particularly over the last few years, some of the national constitutional (and statutory provisions) have been the subject of judicial determination in national courts – particularly in the developing (also called Third World) countries. The aim of this article is to...
provide an overview of the contribution of these courts to the promotion and sustenance of sustainable development in their respective countries by their various decisions. Before this, however, it is instructive to briefly state some of the relevant national constitutional provisions (including relevant provisions in the national Constitutions of developed countries or parts thereof, to indicate the universality of the practice).

I. Sustainable development and national constitutional provisions

As earlier stated, since the 1972 Stockholm Conference on the Human Environment an increasing number of countries have included basic principles of environmental protection/sustainable development into their national constitution. In fact, there are over sixty countries across the world now with constitutional provisions guaranteeing right to a healthy environment or sustainable development, including some African countries and some component States of the United States of America. Surely, this reflects the importance attached to environmental issues since the constitution of a country or part of a country ‘constitutes the first and primary level in its hierarchy of judicial norms.’ In some cases such constitutional provisions are declaratory of the State’s duty to pursue environmentally sound development, sustainable use of natural resources and/or the maintenance of safe and healthful environment for the citizens of the State, whereas in others the constitution provides for the individual’s right to a clean and healthy environment and to have compassion for living creatures... 14

Every citizen shall have the right to a satisfactory and sustainable healthy environment, and shall have the duty to defend it. The State shall supervise the protection and the conservation of the environment.

In the same vein, the post-Apartheid Constitution of the Republic of South Africa (which came into force on 27 April 1994) stipulates that everyone has the right: (a) to have an environment that is not harmful to his or her health or well-being; (b) an environment protected for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development. 13

The same trend can also be found in the Constitutions of many Asian countries – for example, India, Vanuatu and China. The Indian Constitution of 1949 (as amended up to 1975) contains the following provisions:

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

It shall be the duty of every citizen of India – ... (g) to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures... 14

On its part, the 1980 Constitution of Vanuatu states that every person has the following fundamental duties to himself and his descendants and to others: to protect Vanuatu and to safeguard its national wealth, resources and environment in the interests of the present and future generations. 15 Lastly, China’s 1982 Constitution stipulates that ‘the State shall protect and improve the living environment, and prevent and remedy pollution and other public hazards’. 16 Furthermore, the Constitution provides for the rational use of natural resources and the protection of rare animals and plants. 17

With regard to Latin American and Caribbean countries, all constitutions enacted in those regions since the Stockholm Conference on the human environment ‘contain some important modern environmental protection principles’, and older constitutions have been amended to
incorporate such principles. For example, the 1980 constitution of Peru provides various rights and duties with regard to the environment, including the rights of citizens to live in a healthy environment which is ecologically balanced and adequate for the development of life and the preservation of the countryside and nature, citizens’ duty to conserve the environment, and the State’s duty to prevent and control environmental pollution. In the same vein, the 1980 Political Constitution of the Republic of Chile guarantees all persons the right to live in an uncontaminated environment, and imposes a duty on the State to watch over the protection of this right and the duty to preserve nature. Moreover, the State has power to make certain restrictions on the exercise of certain rights or freedoms where that is necessary to preserve the environment.

Moving to European countries, the Constitutions of Portugal and Bulgaria exemplify the trend. In Portugal, its 1982 Constitution provides that everyone shall have the ‘right to a healthy and ecologically balanced human environment and the duty to defend it.’ The Constitution further imposes a duty on the State to protect the environment, stipulating the necessary measures to be taken towards that goal. In the case of Bulgaria, its 1991 Constitution enjoins the State of Bulgaria to ensure the protection and conservation of the environment, the sustenance of animals and the maintenance of their diversity, and the rational use of natural resources. It further guarantees its citizens the right to a healthy and favourable environment and obligates them to protect the environment.

In the United States, although there is no provision for a right to environment in the national Constitution, a significant number of the component States of the country have included such a right in their respective constitutions. A few of these will illustrate this point. For example, the Constitution of the State of Hawaii provides that each person has the ‘right to a clean and healthful environment’, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Similarly, the Constitution of Massachusetts guarantees the people of the State the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment. It further states that the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. Another example is the Constitution of Pennsylvania, which guarantees the people of the State ‘right to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment’.

II. Sustainable development and third world judiciary

Traditionally, in most, if not all countries of the world, the constitutional role of the judiciary is the enforcement or implementation of laws (including the national/state Constitution). As will be seen presently, some Third World countries have exercised this role in the field of environmental issues by rendering decisions that promote environmental protection or sustainable development. A few examples will illustrate this increasing trend.

In M.C. Mehta v. Union of India, the Supreme Court of India restrained a series of tanneries from disposing of effluent into the River Ganges on the petition of a citizen. In making this order, the court relied on Article 48A of the Indian Constitution (which enjoins the State to endeavour to protect and improve the environment and to safeguard the wildlife of the country) and Article 51A thereof (which imposes a duty on every citizen to protect the environment). Interestingly, and very significantly, the court further supported its decision by quoting the 1972 Stockholm Declaration on Human the Environment with approval.

In another case, the Supreme Court of India similarly emphasised the need for sustainable development. Linking environmental protection to right to life, the court expressly stated: [T]he right to life is a fundamental right [which] includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.
A further example of judicial contribution to implementation of sustainable development can be found in the decision of the Philippines Supreme Court in the celebrated case of Antonio Oposa, et al V. The Honourable Secretary Fulgencio S. Factoran, Jr. and Another (popularly known as the Minors Case), where 45 children (represented by their guardians ad litem) instituted a representative action on their behalf and on behalf of future generations. The action was against government’s granting of Timber License Agreements beyond the sustainable capacity of the forest. The court held that the said agreements were contrary to the concept of sustainable development as recognised in the national constitutional provision guaranteeing right to a balanced and healthy environment. Furthermore, Colombian courts have also promoted the concept of sustainable development by enforcing constitutional provisions on right to environment in a number of decided cases. In one case, for example, the court held that living in deforested and polluted areas causes grave consequences to the life and health of indigenous peoples. In its words, the ‘devastation of their forests alters their relation with the environment and endangers their lives and culture and ethical integrity’. In another case, the court ordered the suspension of an asphalt plant operation, holding that:

[I]t is evident that there is a threat to a fundamental right recognized in the national constitution [right to environment]...which could be violated, causing irreparable harm to the community.

In Costa Rica, the Supreme Court of the country has also upheld right to environment, by ordering the closure of a dump that was threatening the rights to life and healthy environment under the national constitution, stating that ‘life is only possible in solidarity with nature’.

Finally, the Nigerian Court of Appeal decision in Shell V. Farah is a good example of judicial implementation of sustainable development. In that case, five families in K-Dere community in Rivers State sued Shell for damage arising out of the defendant’s oil production activities in K-Dere. As recounted by the Court of Appeal, the case concerned an oil blow-out that occurred in July 1970 from an oil-well known as Bomu well-11 and owned and operated by Shell. The blow-out (regarded in oil industry circles as an operational accident) lasted for several weeks before it was brought under control, during which time crude hydrocarbon, sulphur and effluent toxic substances were violently emitted in dense fountains. The emissions allegedly formed a thick layer over the surface of the plaintiffs’ adjoining land, destroying farmlands, crops and economic trees and natural vegetation of the impacted areas, with the resultant destruction of an impacted area of about 607 hectares. Before the incident, the plaintiffs used the land for farming, and hunting. Apart from asking for compensation, the plaintiffs also specifically asked for the rehabilitation of their impacted land by the defendant.

Interestingly, the defendant accepted responsibility and paid compensation to the plaintiffs for the crops and economic trees destroyed at the time of the incident, but paid no compensation for the damages to plaintiffs’ land which they ‘took over’, and promised to rehabilitate the affected areas. Fourteen years after the incident, the defendant had still not fulfilled its promise to rehabilitate the land and the plaintiffs decided to sue. During the trial, the court was confronted with two main issues: (1) whether the plaintiffs have been paid ‘adequate compensation’; and (2) whether the land has been rehabilitated.

The plaintiffs’ expert witness, who had studied the post incident impact on the plaintiffs’ land, stated that the soil sample studied were acidic and poor in total nitrogen as a result of the oil spillage. Consequently, he testified, a large portion of the affected land can still not support plant growth. He concluded that ‘the area cannot be deemed to have been rehabilitated to its pre-impact conditions and cannot be so unless certain further actions are taken.’ Against this conclusion, another expert called by the defendant maintained that the land has been rehabilitated. He stated that their study showed that in the badly affected area where crop performance is poor, the surface soil had been removed as a result of erosion occasioned by poor management. In his opinion, ‘soils of the area are inherently poor in fertility and the badly affected area by virtue of its depressional position had all that physical impediment’. In conclusion, he stated that ‘the poor performance of the crops in this area was not due to the pressure [presence] of crude
Thus, there were directly conflicting expert evidence before the court. However, unlike an earlier case where the Supreme Court decided against the plaintiff in a similar situation, the trial judge decided to resolve the conflicting evidence by appointing two ‘independent’ experts, one each nominated by the plaintiffs and the defendant independently. Their joint report to the court supported the findings of the plaintiffs’ expert witness. And on the strength of this, the trial judge accepted the evidence of the plaintiffs’ expert witness, and rejected that of the defendant’s expert witness, which it adjudged as not representing the true position of things. In conclusion, he held that the land needed rehabilitation and ordered accordingly. Remarkably, this decision was supported by the Court of Appeal, which pointedly stated:

[T]he damage the respondents [plaintiffs] suffered went beyond a mere damage to crops and economic trees, for according to the experts called on both sides the respondents’ [plaintiffs’] arable land was heavily polluted and rendered unproductive for many years.

It is noteworthy that this is the first (so far the only) case in Nigeria where the court awarded compensation to the plaintiffs-victims of oil-related environmental damage and at the same time ordered the rehabilitation of damaged land. Obviously, the order for rehabilitation of the damaged land protects the interest of future generations in line with the concept of sustainable development, and represents a significant shift in the attitude of Nigerian Judges to issues of environmental protection (particularly in cases involving oil development).

In summary, the foregoing judicial decisions show that developing countries’ judges have taken an affirmative attitude towards protection of the environment and the implementation of sustainable development. More specifically, in their role as interpreters of the constitution and all legislation they have demonstrated their sensitivity to such concerns in their various decisions.

Interestingly, there is evidence to indicate that Judges, including those of developing countries, are not yet satisfied with their contribution to the promotion and sustenance of the concept of sustainable development as seen above. At the recent Earth Summit at Johannesburg, South Africa, world judges presented the outcome of a Global Judges Symposium held a week earlier in Johannesburg, South Africa, jointly hosted by the United Nations Environment Programme (UNEP) and the Chief Justice of South Africa. In a declaration called the Johannesburg Principles on the Role of Law and Sustainable Development, the judges expressed a ‘firm conviction’ that the framework of international and national laws that has evolved since the United Nations Conference on Human Environment held in Stockholm in 1972 – the forerunner of the Johannesburg Summit – provides ‘a sound basis for addressing the major environmental threats of the day.’ Significantly, the Principles are envisioned as ‘action plan to strengthen the development, use and enforcement of environmentally related laws’. The Judges categorically recalled the ‘Principles adopted in the Rio Declaration on Environment and Development’ and ‘affirmed adherence to these Principles which lay down the basic principles of sustainable development’. The thrust of the declaration was admirably summarised by Arthur Chaskalson, Chief Justice of South Africa, thus:

Our declaration and programme of work are... a crucial development in the quest to deliver development that respects people and that respects the planet for current and future generations and for all living things.

III. Conclusion

This article has provided an overview of the contribution of developing countries’ judges to the promotion, sustenance and enforcement of the concept of sustainable development. It has been seen that despite the initial suspicion of developing countries on the concept, an increasing number of the countries, like developed countries, are including right to environment or sustainable development in their national constitutions. More importantly, it has been seen that developing countries’ judges have made significant contribution to the sustenance and implementation of the concept of sustainable development, through various decisions in which they have actively enforced relevant constitutional (and statutory) provisions, which otherwise may have no effect. As Klaus Toepfer (UNEP Executive Director) observed at the 2002 Johannesburg Global Judges Symposium (which produced the Johannesburg Principles on the Role of Law and Sustainable Development):
We have over 500 international and regional agreements, treaties and deals covering everything from protection of the ozone layer to conservation of the oceans and seas... Almost all, if not all, countries have national environmental laws too. But unless these are complied with, unless they are [judicially] enforced, then they are little more than symbols, tokens, [and] paper tigers... (Emphasis added).

Perhaps more significantly, this article has shown that despite their present contribution to the promotion and implementation of the concept of sustainable development as seen above, developing countries’ judges are prepared to make further contribution in the near future, as demonstrated by their recent commitment to the Johannesburg Principles on the Role of Law and Sustainable Development.

Endnotes

1 See WCED, Our Common Future, 1987. Prior to this, the concept had been used in the 1972 Stockholm Declaration on the Human Environment.
2 WCED, supra n. 1, 43.
5 See Gro Harlem Brundtland (Chair of the WCED) in her forward to Our Common Future, supra n. 1.
6 Ibid.
9 No such right can be found in any constitutional Charter of Nigeria – the most populous nation of Africa – since she became independent in 1960, despite suggestions that the Nigerian environment and the local inhabitants of the country suffer serious and various environmental problems (especially, oil-related environmental problems). The Nigerian constitutional provision referred to by Special Rapporteur Ksentini in her final report as an example of environmental protection related provision (See Ksentini, supra n. 7, Annex III) is, at best, merely a declaration of an aspiration. In any case, since Nigeria had incorporated the African Charter on Human Rights (which provides for right to environment – articles 16 and 24) into its domestic law (see African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983, Cap 10, Laws of the Federation of Nigeria 1990), ‘the right the clean environment is now part of Nigerian law’. See P.D. Okonmah, ‘Right to a Clean Environment: The Case for the people of the Oil-Producing Communities in the Nigerian Delta’ (1997) 41 Journal of African Law 43–67, at 66.
11 Ibid.
12 Some of the relevant constitutional provisions are reproduced in Ksentini, supra n. 7, Annex III. See also E.B. Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, New York, 1988, Appendix B.
13 Article 24.
15 Article 7(d).
16 Chapter 1, Article 9.
17 Chapter 1, Article 26. Similar constitutional provisions are contained in article 1 of the Constitution of the Republic of Philippines.
18 Wilson, et al, supra n. 9, at 192.
19 Political Constitution of Peru, Chapter 2, Article 123.
20 Political Constitution of the Republic of Chile, Chapter 3, Article 19(8). Similar constitutional provisions can be found in the Constitutions of Colombia and Costa Rica.
21 Part 1, section III.
22 Chapter II, Article 66.
23 Chapter II, Article 31. Further examples in Europe can be found in the Constitutions of Germany and Sweden.
24 Nevertheless, evidence suggests that the United States Government supports right to a healthy environment. For example, in her final report on the study of Human Rights and the Environment Special Rapportuer Fatma Zohra Ksentini noted a communication addressed to her by the Government of the United States in the course of the study, in which the Government stated President Clinton’s view: ‘The U.S. considers human rights and environmental preservation to be two of the highest priorities of this Government. On 11 February 1994, President...
Clinton issued an Executive Order to the heads of all departments and agencies of the U.S. Government on the subject: “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”. The purpose of this Executive Order was to underscore certain provisions of existing U.S. laws that can help ensure that all communities in the United States of America live in a safe and healthful environment. See Ksentini, supra n. 7, Annex III, Part B, Article 7(d).


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This case is considered in much more detail than V.

Shell

Noted in Ksentini, supra n. 7, at 108 (and references thereto).


37 Constitution of the Republic of Philippines, 1987, section 1. Significantly, the court ruled against the objection of the defendants, challenging the standing of the plaintiffs in bringing the action, and themselves and on behalf of future generations.

38 Article 49 (Amendment adopted on 7 November 1972).

39 Article 1, section 27. The language implored in no reference to any constitutional provision or post-1972 statute or treaty dealing with right to environment or sustainable development.

40 Article 49 (Amendment adopted on 7 November 1972).

41 The heavily polluted area to be rehabilitated was 13.245 hectares in size. For the purpose of the promised rehabilitation, the plaintiffs vacated the affected areas and could neither farm, build nor put the land into any use. See *Shell V. Farah* [1995] 3 *NWLR* (Pt. 382) 148, at 169.

42 The court, based on the special facts of the case, rejected the defendant’s contention that the case was statute-barred. See *Shell V. Farah* [1995] 3 *NWLR* (Pt. 382) 148, at 186–7.

43 Dr Edward Obiozo, a Biochemistry teacher with the University of Port Harcourt, Nigeria, who holds a B.Sc degree in Biochemistry and a PhD degree in Toxicology.

44 For details of the expert evidence, see *Shell V. Farah* [1995] 3 *NWLR* (Pt. 382) 148, at 181–2.


46 A team of experts undertook the study, only one of which gave evidence on behalf of the others.

47 Note 45, at 182.

48 Ibid, at 180–1.

49 See *Seismograph Service V. Aktornovno* [1974] 1 All NLR 104.

50 Note 45, at 182–3.

51 Ibid, at 184.

52 Ibid, at 176.

53 Frynas noted that the court ‘ruled that compensation should also be paid for the suffering of individuals as a result of the damage to the land’. See J. G. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities*, New York and London, Transaction Publishers, 2000, 212.


55 Similar observation had been made specifically about the Indian higher judiciary. See S.F. Puvimanasinghe, ‘Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with particular reference to South Asia’ (2000) *Sri Lanka Journal of International Law*, at 44. However, it should be noted that some judicial decisions in Nigeria do not fully advance the cause of sustainable development. See K.S.A. Ebeku, supra n. 53.

56 Held 26 August – 4 September 2002.

57 The Chief Justice of Nigeria and the Chief Justices of most African, Caribbean and Latin American countries, were among those in attendance.

All of us recognise the importance of on-going education training. Conferences that we attend and articles we read constantly challenge us to re-visit our own practices, to see what others are doing and to consider what we might do next as a matter of good practice. That is the way it should be, for law is a living thing, and whilst its development must be orderly it must nevertheless be demonstrable.

Chief Justices in countries that make up the Pacific Islands have been very far sighted. While recognising the need for on-going training and education, they knew that, given the very stretched resources involved in the South Pacific, a clear structure needed to be put in place to ensure that things actually happened.

The Chief Justices here belong to a body called the South Pacific Judicial Conference and 3 years ago that Conference decided that it would set up a specialist training unit. Funding was sought, particularly from the United Nations Development Programme and the Asian Development Bank, as well as from England, Australia and New Zealand, and a full time judicial education programme was set up. The programme operates in a rather clever way. There are 14 Pacific member countries that belong to the Pacific Education Programme. The Chief Justices of each country are expected to lead in terms of where each country wants to put its emphasis. However, as well as that leadership, the countries concerned have a National Education Committee and a co-ordinator who is the link between that committee and the full time Pacific Judicial Education Programme.

Countries decide what their needs are and then ask the Programme to deliver training in terms of those needs. There is a blend of using resources from the individual countries and expert assistance from outside. It is important to get the balance right. Countries need to take ownership of their own issues and solutions and not be dictated to. On the other hand the cold reality is that many countries in the Pacific cannot manage without outside support. On a daily basis the rule of law is put to the test in some of the countries here.

At present the Programme is funded solely by Australia and New Zealand. The total budget for the period July 2002 – June 2004 is $1.2 Million, a much appreciated but nevertheless fairly sparse financial base given the sheer amount of work that needs to be done.

To respond to the challenge of making resources go as far as possible the Programme’s present emphasis is to empower each Pacific country by promoting strong judicial leadership and expertise for local judicial trainers so that work is increasingly absorbed and delivered by members countries.

The key to all of this will be to keep the rate of progress even. For some countries, and the Solomon Islands is an example, the challenge to the rule of law for the judiciary is enormous. Survival is at times a challenge. A very great degree of support is therefore needed. On the other hand, Fiji is recovering from the trauma it experienced after the coup of the 19th May 2000 and strong judicial leadership and collective responsibility is once again emerging as important. Judicial education is crucial in keeping the momentum of that process going.

A challenge for well established and resourced judiciaries in the Northern Hemisphere and elsewhere might be to consider how support could be given to what is a unique and wonderful judicial education programme. Reinforcement of, and contribution to the Pacific Judicial Education Programme would go a long way in helping the rule of law and good governance to be maintained in the Pacific.
It is the duty of all magistrates to apply the law of the land as per established law and procedure. Yet the current magistracy comprises people from many different ethnic groups and religions, each bringing with them personal interpretations inherent within their tradition and heritage.

I recently spent some time trying to satisfy my curiosity as to what religious guidelines there were for Jews when administering justice. This proved a near impossible task, as whilst the Torah does recognise the secular appointment of judges, all laws relate to Halacha – the religious code and law that governs every facet of Jewish life. The theory being that as this covers each person’s daily life and actions, if followed properly no separate ‘legal’ code is required.

Nevertheless I did come across some interesting laws and commentaries, which I would like to share with my colleagues on the bench.

Within the ‘Halacha’ framework mentioned above each individual is told that when conducting any judgement on his fellow man within his personal life the following should be borne in mind.

- Every Jew is a judge when he decides issues for himself or when deciding his opinions of others.
- Do not trust yourself until the day you die.
- Judge your fellowman positively and on the side of merit:
  “Do not judge your fellowman until you arrive at his place”
  This is a positive commandment to judge others in a favourable light:
  “With righteousness you shall judge”
- Do not rely on your first thoughts. Be very patient and analyse the matter carefully so as not to err.
- One who rushes to decide is negligent.
- When we do not know the whole truth about others it is a mitzvah to judge them favourably.
- The quality of judging every person favourably is the greatest kindness one can perform for them.
- When a person does something there are many nuances to his/her feelings, part of him/her is all for it, part of him/her may resent it. These percentages vary and their intensity is always changing.
- Always separate facts from interpretation.
- An absolute prohibition against speaking negative words about others ‘lashon hare’.
- One who deals with others undemandingly, yielding and gently will himself so be judged. This is deemed an irrefutable spiritual law of nature.
- You will be judged by God as you judge others. This law ‘middah keneged middah’ literally means measure for measure – the Almighty will judge us strictly or leniently as a result of how we judged other people.
- Forgiveness – as part of religious law, did not exist until it appeared in the Torah.

For the administrators of justice these religious precursors in individual life were further reinforced and in some cases overridden by commentary on the role of a judge in court.

The sages accepted that God had the power to determine exact measure for whatever transgression required retribution but immediately identified that the human determination of such issues could not possibly avoid risk of error thus frustrating true justice.

When a judge comes to give judgement he should imagine that there is a sword behind him, which will strike him if he fails to give a true judgement according to the truth of the case.

Jewish teaching brands the perversion of the course of justice as the most alarming sign of society’s decay.

Judges must be competent and impartial and not appointed for social and family reasons.
The order of hearing cases would always be that of an orphan first, then a widow, then a woman, finally a man. Protection of the vulnerable being paramount.

Judges must give a patient and courteous hearing.

Fairness also means no judgement should be given out to pity the poor or out of respect to the standing of the rich.

No judge is allowed to receive a gift. You may think this obvious, yet this basic requirement for the absolute honest intention to accord justice to all is, even in England, only a relatively recent attainment. Gifts proffered by the victorious party to the Judge were accepted practice in many societies.

Do not use unjust means to secure the victory of justice.

The Hebrew conception of justice stresses the equality of man and that each human life is sacred and of infinite worth.

Justice is the awe-inspired respect for the personality of others and their inalienable rights.

To do justly and to love mercy – the world could not exist if it was governed by strict justice alone.

The Torah then expanded into ‘social’ justice on economical and social issues between group and group, class and class, the poor upon the rich, the helpless upon those who possess the means to help.

It even goes onto the concept of ‘International Justice’, which demands respect for each and every national group and proclaims that no people can of right be robbed of their national life or territory, language or spiritual heritage. Based on these teachings, the vision of a United Nations was first expanded by the prophet Isiah, 3000 years ago. Quite topical in the current climate.

I have just skimmed the surface of this fascinating subject but already uncovered; the principals of equality before the law, the dignity of the human person, sanctity of life, individual conscience, collective conscience and the concept of social responsibility with individual rights and community responsibilities. Love was promoted as a foundation of justice and for the first time, peace as an abstract ideal.

Justice, peace, truth – together called Mishal.

To modern man this all may seem nothing new, but whilst all great concepts and discoveries of intellect seem obvious once revealed it requires a special genius to formulate them initially.

These Jewish concepts of law and justice thousands of years old, form the basis of civil and common jurisprudence incorporated in many younger religions and still forming some of the main foundations of modern society.

The religious believe that God in his wisdom instilled in every human being a sense of justice and injustice to serve as the test to which all justice and injustice must be put.
HISTORICAL BACKGROUND

1.1 Court Structure
Malawi became an independent state on the 6th of July, 1964. Two years later, it became a Republic State. The court structure in Malawi since Independence has undergone a lot of metamorphosis. It is somewhat important to trace it from the time the protectorate was declared. In 1889, John Buchanan declared Nyasaland as a protectorate and on the 14th of May, 1891, Nyasaland was officially declared a protectorate. As a result of this declaration, judicial powers were removed from the natives.

Thus through the African order – in council of 1889, consular courts had no authority to adjudicate over Natives. The Collectors now District commissioners (Chief Executives) were given the powers to preside over cases where both parties were natives. They did that on behalf of the chiefs. But this did not mean that Local Chiefs could not hear or try cases. There was too much work for the Colonial Administrators as such, chiefs continued presiding over cases. But they could not pass death sentences without the sanction of the Commissioners. But there was no any enactment which authorized the chiefs to perform this judicial function.

In these collector’s courts, justice was to be administered according to English Law. The collector was however to have regard to Native Laws and customs as far as they were not repugnant to the spirit of English Law and Morality. This set up continued up to 1902 when the British Central African Order – in council was formed. Here the Collectors Courts disappeared. They were replaced by Magistrate courts.

1.2 Native Courts (1933–1962)
In 1933, the Colonialists had changed their official attitude on the administration of justice in the then Nyasaland Protectorate. The African Courts Ordinance was passed that year which empowered the provincial Commissioners to issue warrants setting up Native Courts in their respective provinces as they pleased. Only those chiefs who were considered worth were issued with the warrants. The constitution of these courts was in accordance with the customs of the area. These courts had both Civil and Criminal jurisdiction.

They could administer Native Law. They could administer customs as far as it was not repugnant to justice and morality or inconsistent with the provisions of any written law in force in the protectorate. The mechanism of appeals from these courts was very elastic. The appeal from a sub-native authority would go to a single body of chiefs or native authorized by the provincial commissioner.

A combination of Natives and chiefs would constitute a Native Appeal Court. From this court appeals were held by the District Commissioner, then by the Provincial Commissioner himself and ultimately to the High Court.

1.3 Local Courts (1962–1969)
By the year 1962, the Native Courts were renamed Local courts. Thus an appeal from the Local court went from the Local Appeal then to the District Appeal court and finally to the High court.

It will be seen from this 1962 arrangement that the court system was fused together whilst as the pre 1962 system was that the executive also performed judicial functions. This new arrangement completely separated the judiciary from the executive. The people manning the local courts were laypersons and at one point, they were known as Presidents of Local Courts. Thus on independence day, Malawi had one Legal System with the High court on top, the
Magistrate Courts at the bottom plus the Local Courts

1.4 Traditional Courts (1969–1994)

In 1969, there were further changes in the court structure. In 1969, Parliament in Zomba suddenly passed out a Local courts Amendment Act. This Act was necessitated because of what is popularly known as the Chilobwe Murders. The expatriate judges in the High Court were said to be incompetent, therefore, it was thought wise by the Legislature that there should be a system of courts in Malawi with concurrent jurisdiction to the High court system. These courts were to be presided over by indigenous Malawians. In these courts, customary Law was to be predominant. The amendment in Parliament was very brief but decisive. Section 5 of the Local courts amendment Act reads as follows:-

“The President may by order published in the Government Gazette make such amendments to any written Law as may appear to him be necessary or expedient for bringing the law into conformity with the provision of this act.”

The result of this sweeping amendment was the resignation of four expatriate High Court judges popularity referred to as “the exodus of judges.” The Regional Traditional Courts and the National Appeal Courts were established by virtue of this amendment. These two giant courts were given powers under the Traditional Courts Act to try serious offences like murder, treason, etc. Legal representation was not allowed in these two courts. The Regional Traditional Courts were courts of first instance only and they had only criminal jurisdiction. The National Traditional Appeal Court was purely an appellate court and heard both Civil and Criminal appeals from traditional Appeal courts as well as the Regional Traditional Courts. The composition in both of these courts was as follows:-

1 Three Traditional Chiefs
2 A qualified lawyer who was usually a Senior Resident Magistrate.
3 A court Chairman usually from the District Traditional court.

The decision of the majority was the one binding.

Thus between 1969–1994, Malawi had a dual Legal System, with a court system which operated parallel to each other.

The structure of this Legal System was as follows (see chart 1 on the next page).

The fact that the Traditional Courts were under the control of the Minister of Justice meant that these courts reported to the Executive Branch of Government. This therefore compromised the court’s independence.

1.5 Constitutional Changes in 1994

As a result of introduction of Multi-Party system of Government in 1994, Malawi had a new constitutional Order. This constitution brought drastic changes to the Malawi Legal System; especially in the areas of separation of powers, Human Rights and Court Structure. Malawi had moved away from the doctrine of parliamentary sovereignty to constitutional sovereignty.

In the field of Human Rights, the 1994 constitution has entrenched a comprehensive chapter on Human Rights. The court structure was also greatly redefined. The judicature (Judiciary) is a separate branch of Government.

1.6 Establishment of the Judicature

Section 9 of the constitution provides:-

“The judiciary shall have the responsibility of interpreting, protecting and enforcing this constitution and all laws in accordance with this constitution in an independent and impartial manner with regard only to relevant facts and the prescription of Law.”

1.7 The Role of the Courts in Malawi

Since 1994, the court structure in Malawi is as follows (see chart 2 on the next page).

1.8 The Malawi Supreme Court

This is the highest appellate Court of the land. It hears appeals from the High Court and such other Courts and tribunals as an Act of Parliament may prescribe.

1.9 Composition

The Justices of the Supreme Court of Appeal shall be:
Administered Written and Customary Law

Customary Law only applied by High court

Magistrate Courts manned by both Legally qualified and Lay Persons

NB. The courts fell under the Ministry of Justice and reported to the Minister of Justice.

Administered Written and Customary Law

Legal representation not allowed in the N.T.C.A and R.T.C

Predominantly manned by Lay Persons

NB. The courts fell under the Judiciary and reported to the Chief Justice

Chart 1.

Chart 2.
(a) The Chief Justice
(b) Such number of other Justices of Appeals not being less than three, as may be prescribed by an Act of Parliament. Currently there are five of whom one is a female.

1.10 Appointment
The Chief Justice shall be appointed by the President and confirmed by the National Assembly by a majority of two thirds of the members present and voting.

All other judges shall be appointed by the President on recommendation of the Judicial Service Commission.

1.11 Tenure of office
A person holding the office of Justice of Appeal shall vacate that office on attaining the age of sixty-five years. A person holding the office of Justice of Appeal may be removed from office only for incompetence in the performance of the duties of his/her office or for misbehaviour. The procedure of removal is clearly stipulated in Section 119 (3)(4) of the Constitution.

1.12 The High Court of Malawi
The High Court of Malawi is established under Section 108 of the Constitution. The High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any Law. The High court also acts as a Constitutional Court and or can review any Law and any action or decision of the Government. Apart from the High court being a court of first instance, it also acts as an appellate court, also reviews decisions from the subordinate courts.

1.13 Composition
Judges of the High Court shall be such number of judges, not being less than three. Currently, there are sixteen justices.

Appointment and tenure of office of a Judge of the High Court is exactly like that of Justice of Appeal.

1.14 Subordinate Courts
Subordinate Courts are established under Section 110 of the Constitution. Section 110 of the Constitution provides that:

110–(1) There shall be such courts, subordinate to the High Court, as may be prescribed by an Act of Parliament which shall be presided over by professional magistrates and Lay Magistrates.

(2) There shall be an Industrial Relations Court, Subordinate to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have such composition as may be specified in an Act of Parliament.

(3) Parliament may make provision for traditional or local courts presided over by lay persons or chiefs:

Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor Common law and statutory civil cases as prescribed by an Act of Parliament.

As of now, these traditional or local courts have not been put in place.

There are five (5) grades of subordinate courts in Malawi. All these are established under the Courts Act. These are:

- Courts of Resident Magistrate
- Courts of Magistrate of the first grade.
- Courts of Magistrate of the second grade.
- Courts of Magistrate of the third grade.
- Courts of Magistrate of the fourth grade.

All these are courts of record. Courts of Resident Magistrate are higher than the rest.

1.15 Composition
In practice the person appointed to be Resident Magistrates are those who qualify to be legal practitioners, whilst as in the other grades, the persons appointed are not qualified lawyers. But all these magistrates are appointed by the Chief Justice on the recommendation of the Judicial Service Commission as per Section 111 of the constitution.

1.16 Territorial Jurisdiction
As per Section 35 of the Courts Act, all Magistrate Courts have territorial jurisdiction throughout Malawi.

1.17 Civil Jurisdiction
Original jurisdiction is credited to subordinate
courts over all civil actions where the amounts in dispute does not exceed:
- K50,000 in the case of a court of Resident Magistrate;
- K40,000 in the case of a court of First Grade Magistrate;
- K30,000 in the case of a court of Second Grade Magistrate;
- K20,000 in the case of a court of Third Grade Magistrate;
- K10,000 in the case of a court of Fourth Grade Magistrate.

These are however very recent amendments to the Courts Act which were made in 2000.

The same amendment has also given jurisdiction to Magistrate Courts over customary law actions.

But the courts have no jurisdiction in the following matters:
- title to ownership of land except as provided by Section 156 of the Registered Land Act in Cap 58:01 of the Laws of Malawi;
- the issue of injunctions;
- guardianship of custody of infants;
- the validity or dissolution of marriage, except as provided by any other written Law;
- title to any right, duty of office; and
- proceedings seeking any declaratory decrees, i.e judgments which declare pre-existing rights of the litigants.

1.18 Criminal Jurisdiction

Section 58 of the courts Act provides that in the exercise of their criminal jurisdiction the powers of the courts shall be as provided by the courts Act, the Criminal Procedure and Evidence Code, and any other written law. In pursuance of this, the Criminal Procedure and Evidence Code provides in Section 13(1) (2).

13–(1) the Resident Magistrate Courts, the first or second grade Magistrate Courts can try any offence under the penal code but not treason, murder or manslaughter or attempts to commit or aid or abet, or counsel, or procure the commission of these offences.

13(2) The third grade Magistrate Courts may try any offence which is specified in the second schedule of the Criminal Procedure and Evidence Code so may the fourth grade Magistrate as long as the maximum sentence does not exceed the jurisdiction under section 14 of the Criminal Procedure and Evidence Code.

Resident Magistrate Courts and first grade Magistrate Courts may pass any sentence authorized by law but cannot pass a sentence of death or a sentence of imprisonment which exceeds fourteen years. Second grade Magistrate Courts may pass a sentence of imprisonment for a term not exceeding five years or a fine not exceeding K1,000 or both. Third grade Magistrate Courts may pass a sentence of imprisonment for a term not exceeding twelve months or a fine not exceeding K500 or both. Finally, fourth grade Magistrate Courts may not pass a sentence or imprisonment for a term exceeding six months or a fine of K250 or both.

1.19 Appeals

Appeals from the Magistrate Courts go to High Court. The High Court therefore supervises the work of the lower courts.

1.20 Confirmation, Reviews and Revisions

The high Court has general supervisory jurisdiction over all subordinate courts. It may, either of its own motion, or at the instance of any interested party; call for the record of proceedings in a subordinate court. This can happen at any stage of the proceedings. If a subordinate court imposes a fine exceeding K100 or any sentence of imprisonment exceeding two years in the case of a Resident Magistrate Court, one year in the case of a first and second grade Magistrates courts and six months in the case of a third Magistrates courts then the record of the case must be submitted to the High Court. The High court then exercises its powers of review. This is also required where a first offender is convicted and sentenced to imprisonment.

1.21 Inspection and Supervision

As per Section 361 of the Criminal Procedure and Evidence Code, any Resident Magistrate may call for and examine the record of criminal proceedings before the other subordinate courts. If he/she considers that the proceedings are illegal, or improper, or irregular, he/she must forward the record to the High Court.
1.22 The Industrial Relations Court

This is a new Court in the legal system of Malawi. As per Section 110 (2) of the constitution, the Industrial Relations Court deals with labour disputes and any other issues related to employment. The IRC is governed by the Labour Relations Act which is Act No. 16 of 1996. The Industrial Relations Court is a specialized court. It is headed by a Chairman who is appointed by the Chief Justice. The Chairman sits with assessors (two at a time) who are appointed by the Minister responsible for labour matters nominated by employers and employees organisations. The decision of the Industrial Relations Court is final and appeals go to the High Court but only on a matter of Law.
COMMONWEALTH LAW REPORTS

VAN ROOYEN AND OTHERS V STATE AND OTHERS

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South Africa
Constitutional Court
Chaskalson CJ, Langa DCJ, Ackermann, Kriegler, Mokgoro, O'Regan, Sachs and Yacoob JJ, Plessis and Skweyiya Ag JJ

11 June 2002

VR, who was convicted in the Pretoria Regional Court, appealed against his conviction and challenged the legality of the proceedings on the grounds that the court lacked the institutional independence required by the Constitution. Tshabalala, who was charged with murder, instituted review proceedings, contending that the Regional Court lacked institutional independence. Themalaros, who faced charges of fraud, entered a plea that the court had no jurisdiction to try him because it was not an independent court as contemplated by s 165(2) of the Constitution, which provided that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’. The three matters were consolidated in the High Court. The issues raised concerned the constitutionality of provisions of the Magistrates’ Courts Act 1944, the Magistrates Act 1993, the Regulations for Judicial Officers in the Lower Courts 1993 and the Complaints Procedure Regulations. The High Court ruled that various provisions of the legislation and regulations relating to the method of appointment, promotion and disciplining of magistrates, and the control that the executive had over the day-to-day functioning of those courts were inconsistent with the Constitution. The order came before the Constitutional Court to be confirmed in terms of s 172(2) of the Constitution. VR and Tshabalala applied for leave to appeal against certain parts of the order. The state and Minister of Justice appealed against certain parts of the order. Themalaros died before the judgment was given.


(1) The Constitution recognised that courts were independent and impartial and that all courts were entitled to the same basic institutional protection. That did not mean that all courts had to be treated in the same way. The Constitution differentiated between different courts and between the procedures for the appointment of different judicial officers. Relevant were the particular functions that such courts performed and their place in the court hierarchy. The judgments of magistrates’ courts were of first instance, their judgments were subject to appeal and review in the higher courts and they were supervised in the manner in which they discharged their functions. In that way they were protected from interference. They did not have a supervisory jurisdiction over the government and, unlike higher courts, had no inherent power. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters were not necessarily essential to protect the independence of courts that did not perform such functions. It followed that, whilst particular provisions dealing with magistrates’ courts could be examined for consistency with the Constitution, the mere fact that they were different from the provisions of the Constitution regarding the independence of judges of higher courts was not in itself a reason for holding them to be unconstitutional (see paras [19]–[30], below). Valente v R (1986) 24 DLR (4th) 161 and De Lange v Smuts NO [1999] 2 LRC 598 considered.
(2) Whether provisions regarding magistrates courts were consistent with the independence and impartiality requirements of the Constitution, was subject to an objective test properly contextualised from a balanced view of all the material information. The well-informed, thoughtful and objective observer had to be sensitive to the country’s complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it made between different levels of courts (see para [36], below). Dicta of Le Dain J in Valente v R (1986) 24 DLR (4th) 161 at 172 applied. R v Généreux (1992) 88 DLR (4th) 110 and Findlay v United Kingdom (1997) 24 EHRR 221 considered.

(3) The composition of the Magistrates Commission (MC) was not open to objection. Although the composition of the MC had changed by amendment to the Magistrates Act, and the governing party controlled the appointment of most of the members of the Commission, it could not be said that its composition had been changed for the purpose of giving the executive and legislature control of the Commission. Change to the Commission had made it more broadly representative of South African society as a whole. That would have been understood by an objective observer taking a balanced view of all the relevant circumstances. Moreover, changes to its composition had brought its membership closer to that of the Judicial Services Commission (JSC), its constitutional template, which the Constitution recognised as the body appropriately constituted for dealing with the appointment and impeachment of judges. Whilst there were some differences between the two bodies, it could hardly be said that the Constitution contemplated that legislation regarding the MC would be more rigorous than for the JSC. Also, it was established law that the appointment of judges by the executive or by the executive and Parliament was not inconsistent with the requirement that the judiciary be independent and impartial. The findings made by the High Court were premised on the assumption that the body would either be, or objectively be perceived to be, a sham. There was no basis for such an assumption. There was no reason to believe that the members of the MC would not discharge their duties with integrity, nor was there any reason to fear that they would not do so and, in the event that they did, powerful constitutional and judicial safeguards were in place. It followed that s 3(1) of the Magistrates Act was not inconsistent with the Constitution. It also followed that the MC, rights of review by higher courts and the duty of the MC and Minister to act in accordance with the constitutional principle of the independence of the judiciary provided sufficient safeguards against executive abuse. Therefore there was no basis for impugning the procedures in s 12 of the Magistrates Act regarding magistrates’ salaries, ss 13(1)(a) and (5)(a) of the Magistrates Act and reg 30 of the Regulations for Judicial Officers in the Lower Courts 1993 regarding the grounds on which magistrates could continue in office or retire early, ss 13(2), (3), and (4) regarding the removal of magistrates from office, reg 16 regarding promotion and reg 22 regarding transfer (see paras [38]–[74], [136]–[159], [212]–[215], [227], below). Ex p Chairperson of the Constitutional Assembly: In re: Certification of, the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 applied. Reference re Public Sector Pay Reduction Act (PEI), s 10; A-G of Canada et al, Interveners; Reference re: Independence of, Judges of Provincial Court, Prince Edward Island, Provincial Court Act, and Public Sector Pay Reduction Act; A-G of Canada et al, interveners (1997) 150 DLR (4th) 577 distinguished.

(4) The power in s 3(2) of the Magistrates Act, dealing with the term of office of members of the MC, that ‘any such appointment or designation [could] be withdrawn by the appointing or designating authority … after consultation with the Commission if in his, her or its opinion there [were] sound reasons for doing so’ was not an objective test. There was a difference between being nominated by the executive to perform a duty which called for an independent
decision, and being chosen by the executive to perform that duty in accordance with its ‘wishes’. To be consistent with independence, objective criteria had to be set for the exercise of that power by the executive. The appropriate remedy was in the form of a notional or actual severance, or reading in so as to bring the law within acceptable constitutional standards. Only if this was not possible, was a declaration of complete invalidity of the section or subsection to be made. It followed that s 3(2) could be saved by deleting the words ‘in his, her or its opinion’. Accordingly, the order of the High Court declaring the whole of s 3(2) invalid would be set aside (see paras [91]–[95], below). National Coalition for Gay and Lesbian Equality v Minister of Home Affairs [2000] 4 LRC 292 and State v Manamela (Director General of Justice Intervening) [2000] 5 LRC 65 applied.

(5) The fact that s 6A of the Magistrates Act made provision for a complaints system, and that that complaints system was established by the Complaints Procedure Regulations, was not open to objection since s 180 of the Constitution provided that ‘National legislation may provide for any matter concerning the administration of justice … including … (b) procedures for dealing with complaints about judicial officers…’ There was therefore no basis for the High Court’s finding that the provisions of s 6 and the Complaints Procedure Regulations were inconsistent with the Constitution because they gave the executive the exclusive power to create a mechanism for dealing with improper conduct by magistrates. National legislation was defined in s 239 of the Constitution as including ‘subordinate legislation made in terms of an Act of Parliament’ and the regulations passed by the minister were subject to constitutional control. It followed that the High Court order, in that respect, would be set aside (see paras [96]–[101], below).

(6) The High Court erred in finding that the procedure for appointing magistrates under s 10 of the Magistrates Act and s 9 of the Magistrates’ Courts Act was contrary to judicial independence on the grounds that the Constitution required strict and complete separation of powers between the executive and the judiciary. Total separation of powers was neither feasible nor required by the Constitution. The effect of the sections was that the minister had to consult the MC before making an appointment, but was not bound by its recommendation. The mere fact that the executive and the legislature made or participated in the appointment of judges was not inconsistent with judicial independence. Furthermore, the appointment of the MC to advise the executive was a check on the exercise of executive power, and not a flaw in the appointment process (see paras [102]–[110], below). Dicta of Constitutional Court in Ex p Chairperson of the Constitutional Assembly: In re: Certification of, the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 at [108]–[109] and [123]–[124] applied.

(7) The power in s 16(1) of the Magistrates’ Act enabling the minister to make Regulations regarding the conditions of service of judicial officers was not inconsistent with s 174(7) of the Constitution which provided ‘[o]ther judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice’. The power in s 16(1) was a legitimate delegation of authority that was necessary for effective governance and was consistent with the Constitution. What s 174(7) required was that the Act of Parliament had to ensure that the regulation of magistrates’ conditions of employment took place without favour or prejudice. Whilst the Magistrates Act did not contain detailed provisions dealing with all those matters, it did, in s 4(a), make provision for the MC whose principal object was to ensure that this was done and that was an effective and suitable means of securing the constitutional objective. The fact that grievances could be brought before the higher courts and that regulations could only be made after the MC had made recommendations, were subject to parliamentary control, and ultimately
constitutional control in the higher courts, meant that, viewed objectively, s 16(1) did not entitle the minister to impair the independence guaranteed by the Constitution (see paras [112]–[135], below). Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 applied.

(8) Viewed in the context of the functions that magistrates were required to perform, the provisions of the Magistrates Act dealing with the grounds upon which they could be removed from office were not inconsistent with judicial independence. The fact that members of the higher judiciary had greater protection than members of the lower judiciary did not mean that the protection given to the lower judiciary was inconsistent with judicial independence. The grounds for removal—‘misconduct, continued ill-health or incapacity’—were not materially different from the grounds for removal of judges in other countries and were also similar to the grounds for removal of members of the Public Protector, the Auditor General or members of the South African Human Rights Commission, the Commission on Gender Equality and the Electoral Commission. All those institutions were entitled under the Constitution to similar protection to that given to courts and their independence was also guaranteed. It followed that, in this respect the appeal would be upheld (see paras [161]–[166], below).

(9) Since the Constitution made provision, in s 177, for a judge to be suspended on the advice of the JSC pending its investigation, there could be no constitutional objection to a similar power being vested in the Magistrates Commission, pending an investigation by it into whether or not a particular magistrate was fit to remain in office. All those institutions were entitled under the Constitution to similar protection to that given to courts and their independence was also guaranteed. It followed that, in this respect the appeal would be upheld (see paras [161]–[166], below).

(10) The vesting, by reg 26(17) of the Regulations for Judicial Officers in the Lower Courts 1993, of a power in the minister to determine an appropriate sanction for a magistrate found guilty of misconduct was not consistent with judicial independence. Where sanctions were appropriate, they had to be imposed by an independent body charged with the investigation of the complaint—in this case, the MC. That inconsistency could not be remedied by actual or notional severance and accordingly reg 26(17) would be declared invalid (see paras [199]–[201], below).

(11) Section 14(1) of the Magistrates Act was inconsistent with judicial independence to the extent that it provided that judicial powers could be conferred on magistrates ‘in any specific case, by the Minister after consultation with the Commission’. Magistrates could have only those powers vested in them by law and it was not consistent with institutional independence to permit the minister to assign judicial powers to magistrates in addition to those that are ordinarily vested in them. Those words were therefore to be deleted, as the High Court had correctly held. However, s 14(2) was not inconsistent with judicial independence in giving the minister power,
after consulting the MC, to make regulations conferring on magistrates administrative powers and duties ‘which do not affect the judicial independence of magistrates’, including regulations empowering the minister to confer such powers. Ideally, magistrates were not to be required to perform administrative duties unrelated to their functions as judicial officers. To require them to do so would make them answerable to the executive, which would blur the separation of powers that existed between the executive and judiciary. However, there were reasons why some existing legislation made provision for administrative functions and duties to be performed by magistrates. Those provisions were not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system. The constitutionality of s 14(2) had not been challenged on the basis of the question whether administrative duties unrelated to their judicial duties could properly be assigned to magistrates, but only on the basis that the power to make regulations was vested in the minister. However, if regulations made under s 14(2) were inconsistent with judicial independence, they would be invalid in terms of the subsection. Since such regulations would be subject to constitutional control, there was adequate protection against any possible abuse of that power. The orders of invalidity of s 14(2) and, consequentially, s 14(3) were therefore set aside (see paras [228]–[234], below). *Fose v Minister of Safety and Security*[1998] 1 LRC 198, *Soobramoney v Minister of Health, KwaZulu-Natal* [1998] 2 LRC 524 and *South African Association of Personal Injury Lawyers v Heath* [2001] 4 LRC 99 applied.

Since s 175 of the Constitution provided for the appointment of acting judges there could be no constitutional objection to the appointment of acting or temporary magistrates under ss 9(3), (4) and (5) of the Magistrates’ Courts Act. The fact that there was no provision for that appointment to be made after consultation by the minister with the senior judge of the court was not sufficient to render the provision unconstitutional. However, s 9(4) did not require a temporary appointment to be for a fixed or determinate period and the form of agreement entered into between the state and temporary magistrates, which stated that an appointment to hold temporary or acting office was at the discretion of ‘the state’, was clearly inconsistent with security of tenure, which was an essential element of judicial independence. Also, the provision in s 9(4) for the appointment of a ‘competent person’ to act ‘generally’ or ‘in a particular matter’ in a regional or district court was inconsistent with judicial independence since such a person, not being a magistrate, would not benefit from security of tenure. The constitutional flaws in s 9(4) could only be resolved by redrafting. It followed that the order of invalidity made by the High Court concerning that subsection would be confirmed. However, s 9(3) provided for the appointment of a ‘competent person’ to act during the absence or incapacity of a magistrate or until a vacancy was filled, which were determinate periods during which the acting magistrate had security of tenure. Furthermore, s 9(5) empowered the minister to fix a salary for an acting magistrate, in consultation with the Minister of Finance, before the appointment was made for a limited period only, unless the appointee was a member of the public service who would continue to receive the salary ordinarily payable. Neither s 9(3) or s 9(5) impinged on judicial independence and the orders of invalidity made by the High Court would be set aside (see paras [242]–[249], below).

Section 12(2)(b) of the Magistrates’ Courts Act, which provided that the minister could prohibit additional or assistant magistrates from exercising powers or performing duties conferred or imposed on magistrates, was inconsistent with judicial independence. All magistrates, whether appointed permanently or temporarily, had to have the powers vested in them by law and it was wholly inconsistent with judicial independence to vest in the minister or any other person the authority to prohibit any magistrate from exercising or performing such powers. The High Court’s order of invalidity of s 12(2)(b) would therefore be confirmed (see paras [250]–[251], below).
(14) Although declarations of invalidity concerning regulations were not subject to confirmation by the Constitutional Court under s 172(2)(d) of the Constitution, in the instant case they were incidental to the findings of constitutional invalidity made by the High Court that were the subject of the appeal. No good purpose would be served by requiring the appeals concerning those regulations to be separated from the appeals concerning provisions of the Acts. The regulations dealt with important issues on which it was desirable that there should be certainty. In those circumstances and because of the compelling need to have certainty concerning the validity of conditions of service under which magistrates functioned, it was desirable to deal with all the orders made by the High Court (see paras [11], [12], below).

(15) There was no basis for granting to VR and Tshabalala the relief that they sought. While there were provisions of the Magistrates' Courts Act, the Magistrates Act and the regulations that were inconsistent with institutional independence, that did not mean that magistrates' courts had to stop functioning, that all decisions taken by magistrates had to be set aside as nullities and that persons convicted by magistrates of criminal offences had to be released from jail. Neither the quashing of VR's conviction nor the vacating of Tshabalala's charge was 'appropriate relief' in respect of the findings that had been made, since the legislation viewed as a whole was consistent with the core values of judicial independence and the findings did not affect the capacity of the overwhelming majority of the judicial officers presiding in magistrates' courts to conduct fair trials (see paras [262]–[267], below).

Per curiam. The language in which these conclusions of the High Court are expressed is unfortunate. The findings imply that Parliament changed the composition of the MC to give the legislature and executive control over the MC in order to enable the minister to manipulate it and the magistracy. Implicit in its findings is also the unjustifiable innuendo that the persons appointed to the Commission pursuant to this scheme would be seen to be willing to do the bidding of the minister. In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another. They should avoid gratuitous reflections on the integrity of one another. Regrettably the High Court in its judgment did not consistently fulfil this obligation (see paras [47]–[48], below).
BOOK REVIEWS
by
Mr Justice Gilles Renaud
Ontario Court of Justice

NAZI SABOTEURS ON TRIAL: A Military Tribunal & American Law
By Louis Fisher
Lawrence, KS: University Press of Kansas, 2003
Contents, Preface, Note on Citations, Chronology, Bibliographical Essay, Index of Cases, Subject Index, 200 pages, $29.95

Every so often, it is imperative that we as judges be reminded of the great dangers that threaten the independence of the judiciary in order that we steel ourselves with even greater resolve to ensure that no harm be done to this cardinal principle.

In this vein, I commend Nazi Saboteurs on Trial A Military Tribunal & American Law and its detailed and searching analysis of the ouster, by presidential decree, of recourse to the civil courts by accused foreign ‘combatants’ and the establishment of a special military court to permit a prosecution directed by the chief law officer of the Nation in order that those tried be found guilty and put to death, and of the acquiescence – if not complicity – of the Supreme Court of the United States in this transparent effort at protecting the State during times of acute peril. The factual backdrop to these events may be stated briefly: eight German saboteurs having substantial links with the United States are dropped off by submarine at two locations off the East Coast in 1942, but are captured prior to any acts of destruction, largely as a result of the actions of two of their number who contact the authorities. What was remarkable was the decision to withdraw their trials from the jurisdiction of local military officials having jurisdiction at the places of capture and the injunction that they be tried together, in a Justice department building, by a military tribunal convened in secret. To no one’s surprise, they were found guilty, and executed, save for the two who had denounced their fellow spies.

Hence, I can think of no better contemporary illustration of the potential menace to the independence of the judiciary than the establishment of a parallel court system having a particular vocation such as military commissions to try certain offences or offenders, on the one hand, and the refusal of the regular civil courts to scrutinize closely the legal and constitutional foundations for these ‘tribunals’, on the other.

Mr. Fisher’s book makes plain that the trial of eight Nazi saboteurs greatly undermined the integrity of the United States Supreme Court and its ability to act independently (and to be seen so to do) as a separate branch of Government. As the events subsequent to September 11 2001, have made plain, the political imperatives that may animate certain decisions said to be necessary to protect our way of life must not be allowed to impair the ability of the judiciary to evaluate critically whether these laws, regulations, edicts, etc., are consonant with the applicable legislative and constitutional schemes.

Leaving aside such weighty issues, I commend Nazi Saboteurs on Trial A Military Tribunal & American Law as an example of scholarship that furthers our understanding of the need for procedural safeguards for every aspect of the constitution of an adjudicative body, leaving aside the need for such safeguards in the selection of the judicial officers, of the prosecutors and of the place of trial, not to speak of the need for judicial oversight of the proceedings and the need for scrutiny by the media of the working of our system of justice.

Further, Mr. Fisher’s book offers a great deal of fundamental instruction and insight on the course of justice (and the fear of potential injustices) in the near future if special tribunals and courts are constituted in response to the
terrorism that has marked the start of this century. Read in conjunction with such excellent studies on government’s responses to
terrorism as in the case of The Security of
Freedom Essays on Canada’s Anti-Terrorism
Bill, edited by R.J. Daniels, P. Macklem and K.
Roach, [Toronto: University of Toronto Press,
2002], Nazi Saboteurs on Trial provides a
concrete example of the threat to the
independence of the judiciary when judges
begin to defer to the Executive the duty to
assess in a critical fashion the legality and
constitutionality of any measures, no matter the
political or military justifications that might be
advanced.

Rebellion and Invasion in the Canadas,
1837–1839
Canadian State Trials Volume II
Edited by F. Murray Greenwood and Barry
Wright
Toronto: Osgoode Society, 2002

The Canadian State Trials series seeks to
provide detailed and signal instruction in
respect to the instances, regrettably quite great
in number, in which the law was the instrument
selected by the State to protect itself from
threats, be they real or perceived. The title of
the well received first volume, Law, Politics,
and Security Measures, 1608-1837, makes plain
that no examination of the law in times of
upheaval calling for some form of security
measure would be complete without a review
of the politics of the time. It is in this vein that
the editors have assembled scholarly materials
on the period of the Rebellions or, as I was
taught in school, ‘l’époque des Patriotes’. The
result is a penetrating analysis of a period that
was marked by tremendous legal and political
upheaval, by the removal of judges and the
setting aside of fundamental freedoms, by the
failure to apply the traditions of the law as it
was understood by nearly all including the
poorer classes, and by a marked desire to
implement radically novel legislation poorly
understood by all, all of which has contributed
to our contemporary political and legal
dynamics to a significant degree.

The editors, the late Professor Greenwood, a
lawyer and historian of international repute
associated with the University of British
Columbia and Professor Wright, the director of
Carleton University’s Institute of Criminology
and Criminal Justice, have succeeded in
drawing what amounts to the definitive factum,
if anything may be said to be definitive in the
fields of law or history, on the role of the law
and legal institutions in times of revolt. And the
lessons they and the eleven scholars whose
work grace the pages of this elegantly written
book are not merely of interest for what once
happened – they are instructive today as we face
ever-increasing complex and subtle issues
respecting our fundamental freedoms as
citizens.

By way of illustration only of the scope of the
contributions found in Rebellion and Invasion
in the Canadas, 1937–1839, it will be
appropriate to draw attention to a few of the
Chapters, and only to the extent that the study
of the times serves to further our understanding
of the real fears associated with military justice
for civil issues, no matter how grave. Although
reasons of space prohibit a review of the
numerous other issues that are reviewed in a
thoughtful and objective fashion, it is hoped
that this limited perspective will suffice to
underline the great contribution to our
understanding of liberty in a constitutional
regime under a Rule of Law, not of might...

The first chapter, “Trying the Rebels:
Emergency Legislation and the Colonial
Executive’s Overall Legal Strategy in the Upper
Canadian Rebellion”, by Rainer Baehre, helps
us to gain a number of fundamental insights
into the politico-legal concerns that arise when
judicial officers involve themselves in
attempting to fashion responses to threats to
the survival of the political entity. Examples
abound of judicial “interference” in the
selection of the mode of trial, the rules of
procedure, the parameters of retrospective
legislation, and the “mixing” of law and justice,
notwithstanding that in certain respects, the
“ingérence” of the judges may have resulted in
a greater exercise of discretion by the
prosecutors and a reduction in the numbers of
those facing execution or transportation.

“The Toronto Treason Trials, March-May
1838”, is the title of Chapter 2. Authored by
Paul Romney and Barry Wright, it discusses in
great detail and with abundant reference to
primary sources and materials the special assizes
conducted to try some 149 prisoners. What is
revealed is a flawed legal procedure, especially
if compared to the treatment the accused would have received in England, and a cynical propaganda exercise, notwithstanding the significant exercise of leniency. One feature that I found remarkable was the precise attack on the partiality of the presiding justice by juxtaposing his jury charge as revealed by his benchbook and the media and other reports of the testimony of the participants. Of equal interest is the pains taking reconstruction of the voting patterns, for they were known, of the members of the jury. All in all, the bias that emerges ought not to be surprising in light of the involvement of the judiciary into the pre-trial manoeuvring and political weighing of the importance of the trials, resulting in rendering null most elements of due process, such as they were.

Moving from the trials held in Toronto to those convened in Hamilton and London, Chapter 3 discusses “The Treason Trials of 1838 in Western Upper Canada”. Penned by Colin Read, we are presented with an insightful study of the haphazard and blatantly unfair procedures that violated safeguards dating back to 1696. Foremost of interest is the respiting of sentences to await the political will and resolve of the executive, and to measure the potential consequences in a period in which border raids and incursions were still on-going and threatened. At the end of the day, the legitimacy of the evidence is very much in doubt, and the judges are denounced, yet again, for appearing to have weighed political ends as well as testimony. Of course, what more might be expected when the judges had been active in the actual defence of their cities during the worst of the crisis... Nevertheless, the study of these trials serves as a vehicle to remind us that pre-trial events may well be decisive in ensuring true justice and that the blurring of roles between Judicial Officers and “notables” may well doom justice, as well as defendants.

Chapter 4 is entitled “The Kingston and London Courts Martial”. In this essay, Barry Wright draws particular light on the political and legal issues that characterized the government’s vacillation in selecting the option of civil as opposed to military trials. Once again, a system is laid bare that failed to provide adequate legal safeguards for the accused.

In the final analysis, leaving aside all of the injustices that are described so ably by the contributors, the difficulties of balancing “firmness and leniency”, both from a practical legal perspective when faced with hundreds of trials, and from the point of view that it was necessary to rebuild a social cohesiveness after the “Troubles”, may be the lasting lesson advanced by this excellent contribution to legal history.
DON’T FORGET IT IS STILL NOT TOO LATE
TO REGISTER FOR THE

13th Triennial Conference,
24–29 August 2003

“Human Rights: Human Needs: Seeking a Judicial Talisman”
at the
Sun ‘n’ Sand Conference Centre, Lake Malawi, MALAWI

Human Rights: Human Needs
Seeking a Judicial Talisman

The 2003 Conference aims are to consider the role of the independent judicial officer:

– in the application of human rights’ principles to economic and cultural issues
– in the promotion of economic development and social stability
– in the promotion of parliamentary democracy and the independence of the judiciary.

The programme will include keynote speakers and panellists from all parts of the Commonwealth, representing all ranks of judicial officer. Among those who have accepted invitations to speak are: Chief Justice Chaskalson of South Africa, Chief Justice Beverley McLaughlin of Canada, the Lord Chief Justice, Lord Woolf

The following topics will be addressed:

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• The Role of An Independent Judiciary in the Promotion of Economic Development and in the Attainment of Social Expectations
• The Responsibility of the Judiciary for Delivering Justice
• Judicial Ethics & The Conclusions of the Limassol Colloquium on Combatting Corruption within the Judiciary
• Judicial Protection of Environmental Rights (Co-Sponsored by the Unep)
• Children and the Law
• Human Rights and the Individual
• Cultural and Social Influences on Human Rights Development

Further details can be obtained from the CMJA (Tel: +44 (0) 20 7976 1007/ Fax: +44 (0) 20 7976 2395   Email: triennial@cmja.org) or from the website: www.cmja.org