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LEGAL CONFERENCES

Justice Michael Kirby

10TH COMMONWEALTH LAW CONFERENCE, NICOSIA, CYPRUS, MAY 1993 -

A GENERAL REVIEW

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The 10th Commonwealth Law Conference took place in Nicosia, Cyprus between 4-7 May 1993. About a thousand lawyers from all parts of the Commonwealth of Nations gathered together to exchange ideas about the legal system which they inherited from Britain. This system is still sustained by the link of the common law, the English language, shared traditions and membership of the free association of nations in the Commonwealth.

In a packed business programme, so many topics were covered that it is impossible in this note to do more than to provide a brief account of some items of special interest.

Opening ceremony

The conference opened on 3 May 1993 with a message from the Queen, as Head of the Commonwealth. The President of the Cyprus Bar Association, Mr Loukis Papaphilippou emphasised the "ecumenical dimensions" of the legal profession. However, he took the occasion to tell the participants about the suggested departures from international law and respect for human rights in the northern part of Cyprus which has been occupied by Turkish troops since 1974. This occupation has resulted in the displacement of about forty percent of the Greek Cypriot population. In Nicosia itself a militarized

dividing line runs through the centre of the city. This represents the border between the two parts of the island. The inaccessibility of the northern part of Cyprus was given emphasis during the conference by the news reports of the escape there of Mr Asil Nadir, a Turkish Cypriot, whose business empire, Polly Peck International collapsed resulting in criminal and civil proceedings against him which are before the English courts. His flight to Northern Cyprus resulted in the forfeiture of £3.5 million bail - the largest ever fixed by a court in Britain. During the course of the conference news media from London were busy tracking down legal luminaries of the United Kingdom, including the Lord Chancellor and the Director of Public Prosecutions, Mrs Barbara Mills QC.

A message from the Commonwealth Secretary General to the opening ceremony reminded the participants that Cyprus would be the host country of the Commonwealth Heads of Government meeting later in 1993. Chief Emeka Anyaoku also emphasised the importance attached in the Harare Declaration, issued by the last meeting of Commonwealth leaders, to the defences of the rule of law and the better protection of human rights throughout the Commonwealth of Nations. The themes of human rights, the independence of the judiciary and of the legal profession and the respect for the rule of law ran through the entire meeting in Nicosia. The Commonwealth Secretary General reminded the representatives of the Commonwealth's lawyers that they served one-fifth of the world's population and therefore had a vital rôle to play in the global movements towards civil, political, economic and social rights being of the greatest importance for the whole world.

The Attorney-General of Cyprus, Mr Michael Triantafyllides stated that Cyprus, although now overwhelmingly a Greek community, remained faithful to and proud of its heritage of the common law. It saw its inherited legal system as an important bastion for human

rights. Somewhat realistically he reminded the audience of Charles Dickens' aphorism that, if there were no bad people, there would be no good lawyers.

One of the most moving introductory speeches was made by Dr Roger Chongwe SC, President of the Commonwealth Lawyers' Association and Minister of Justice of Zambia. Dr Chongwe pointed out that his maternal grandfather had died in the First World War fighting with the Imperial British Forces, in a conflict which had arisen out of an event that had occurred at Sarajevo. He said that it was ironical and sobering that Sarajevo was back in the news, presenting another serious challenge to world peace and security. Dr Chongwe urged the universality of basic rights. He called attention to new specially urgent legal problems of the Commonwealth - including education for human rights, dealing effectively with problems of drug addiction, and addressing rising levels of crime and corruption.

The opening ceremony concluded with an address by the President of the Republic of Cyprus, Mr Glafcos Clerides. He renewed the commitment of Cyprus to safeguarding human rights and fundamental freedoms. He lamented the division of the island and explained the contemporaneous efforts to secure reunification upon just terms.

The opening ceremony was entertained by performances of extracts from the tragedies of Euripides, reminding the participants of the close links of Cyprus over many centuries before the Christian era, with the ancient civilisation of Greece.

Future of the legal profession

The business programme of the conference was divided into three themes: the legal profession by the year 2000; democracy and human rights in the Commonwealth and the lessons; and opportunities of global dimensions facing the legal profession. As already stated, it

is beyond the purpose of this note to review all of the papers presented. In the stream on the legal profession, Sir Kenneth Keith, President of the New Zealand Law Commission, addressed developments in international law and in law-making within domestic jurisdiction. Professor Yash Ghai of the University of Hong Kong criticised the "overwhelming institutional and doctrinal bias of the legal system" which, he said, favoured vested interests and protected privilege. Needless to say, his comments attracted hot debate both in and outside the conference venue.

Associate Professor Gerard Carney of Bond University in Queensland presented a paper on the rôle of lawyers in public integrity régimes. He outlined the work of the New South Wales Independent Commission Against Corruption, the Criminal Justice Commission in Queensland and the Independent Commission Against Corruption of Hong Kong. There are other such bodies throughout the Commonwealth including the Permanent Commission Against Corruption in Malta, the Contractor-General in Jamaica and Ombudsmen and Commissioners in other states with relevant anti-corruption duties. The requirements of the rules of procedural fairness and the impact of the common law upon the operations of such commissions in Australia was described with reference to such cases as *Ainsworth v Criminal Justice Commission* (1992) 66 ALJR 271 (HC) and *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 (CA).

The second segment of this session was chaired by the writer. It fell to him to present the paper by Justice Enoch Dumbutshena, former Chief Justice of Zimbabwe and now a Justice of the Supreme Court of Namibia. In his paper, Justice Dumbutshena recounted the challenges to the rule of law faced by judges from King James VI of Scotland (later King James I who confronted Sir Edward Coke in England) right up to the current time in a number of African states.

Other participants in this session were Lord MacKay of Clashfern, the Lord Chancellor of England and Wales and Madam Justice Beverley McLachlin, a Judge of the Supreme Court of Canada. Lord MacKay acknowledged the real but limited rôle of judges in lawmaking. He cautioned against the adoption of prospective over-ruling as a technique of appellate courts. He also explained the rationale for the exercise of care in the use of extrinsic materials in construing Acts of Parliament. Lord MacKay was the sole dissident in the recent decision of the House of Lords in *Pepper v Hart* [1992] 1 WLR 1032 where such use of Parliamentary speeches and ancillary reports was sanctioned by an extension of the common law. In many parts of the Commonwealth legislation has long permitted this facility to the courts.

Justice McLachlin was critical of self-satisfaction within the judiciary. She recounted the changing work of the judge, particularly in Canada where the *Charter of Fundamental Rights and Freedoms* has added to, and changed somewhat, the judicial function. She described changes in the administration of justice in Canada and the methods of handling complaints against judges. The changing relationship of the judiciary with the public and the media was also explored in a way highly relevant to recent developments in Commonwealth countries.

Other sessions in the stream of programmes relevant to the legal profession itself included: examination of the functions and work of national law societies; the development of codes of professional conduct; the significance of multinational legal practises and multidisciplinary partnerships and the particular difficulties presented by cross-border civil litigation. In an interesting session on skills-based training for lawyers, Professor John Goldring of the University of Wollongong in Australia examined

what he called "a neglected aspect of legal education". He stated that throughout the Commonwealth there is now a general re-evaluation of the content of legal education and training. In such a conservative profession this re-evaluation was itself an achievement. He described the practical training institutions which had developed in Australia and concluded that "the prevailing thinking in modern legal education is that the graduate should have the opportunity for intellectual development that a university course provides but also a high degree of flexibility, and should have the ability to learn quickly". The proper mix of intellectual and skills-based training was explored by other speakers in this session.

Democracy and human rights

The second theme of the conference on democracy and human rights in the Commonwealth opened with a perennial topic of concern to lawyers of the Commonwealth, viz the domestic implementation of international human rights norms. Important papers were read by Judge Rolv Ryssdal, the President of the European Court of Human Rights, Justice P B Bhagwati, the former Chief Justice of India and Professor Rosalyn Higgins QC of the United Kingdom. This session was followed by a hypothetical conducted by Mr Anthony Lester QC, President of Interights, a human rights organisation based in London. Mr Soli Sorabjee, former Attorney-General of India, spoke of the many current challenges to human rights in that country.

The Commonwealth Human Rights Initiative launched in Harare was described to the participants. In an important session chaired by Lord MacKay, a number of leading judges described national developments in administrative law. Lord Woolf of England explained recent developments in judicial review in England and Wales.

Later in this stream, Professor Albie Sachs of South Africa, an adviser to the African National Congress spoke movingly on the

advancement of human rights in his country. Professor Sachs also chaired a session addressed by a courageous lawyer from Kenya, Mr Gitobu Imanyara. Professor Sachs, who lost an arm as a result of a terrorist attack on him, stressed the need for reconciliation and steady progress towards effective defence of human rights in South Africa. He emphasised that the adoption of differential standards on human rights in Africa was unacceptable. He said bluntly that he had been disappointed by the deterioration of respect for human rights in some African States, including Kenya.

Another session in this stream was one on remedying miscarriages of justice in the criminal justice system. Suitably enough, the session was chaired by Sir Brian Hutton, the Lord Chief Justice of Northern Ireland. Lord Ross of Scotland explained the system in operation in Scotland to safeguard against injustices. Mr John Waddham of the Council for Civil Liberties in England outlined the notorious cases of miscarriages of justice in England, many of them well known in Australia. He explained the work of the Royal Commission presently investigating the criminal justice system of England and Wales and the proposals being put forward for improvement of the protection of suspects against miscarriages of justice.

The writer presented a paper to this session in which relevant developments of the law and practice in Australia were outlined. In a number of important respects, decisions of the courts in that country, led by the High Court of Australia, have introduced safeguards over the past decade specifically to reduce the risks of the kinds of injustice which have occurred in Britain. Particular mention was made of:

* The obligation to give a strong judicial warning about the

danger of convicting on disputed and uncorroborated confessions to police: see *McKinney v The Queen* (1991) 171 CLR 468;

- * The strict rule on warnings about identification evidence. See *Domican v The Queen* (1992) 66 ALJR 286 (HC);
- * The obligation to ensure a fair trial, including, where necessary, by ensuring adequate legal representation: see *Dietrich v The Queen* (1992) 67 ALJR 1 (HC); and
- * The independent obligation of courts of criminal appeal to review all of the evidence in order to safeguard against convictions which are deemed unsafe or unsatisfactory. See *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

Reforms in the police station, in the conduct of criminal trials and in post-trial judicial inquiries were also described.

Important sessions of this stream of the conference also dealt with the legal protection of children and the enforcement of the rights of women, including the significance of the *Convention on the Elimination of All Forms of Discrimination Against Women*. The stream finished with a most interesting session on access to information, with a suggestion that it constituted a new human right. In this session two papers were presented by lawyers with Australian connections. His Excellency Judge Weeramantry, Emeritus Professor of Law at Monash University in Melbourne and Judge of the International Court of Justice, gave a scholarly paper on "Access to Information: A New Human Right? - The Right to Know". The paper reviewed such developments as international broadcasting and data flows, and the national developments in providing enforceable rights to access to information. The "fine balance" between the confidentiality of reports and the respect for individual rights and family life were examined with proper reference to the impact of the new information technology upon this basic right as it is fast

developing.

Other speakers pointed to the enactment of freedom of information legislation in every jurisdiction of Australia. The "positive effect" of such legislation in promoting increased public confidence in the decision-making process of government was her conclusion. The United Kingdom, and many Commonwealth countries which inherited its bureaucratic tradition, still have no FOI legislation.

Developments in international law

The third stream of the business sessions dealt with international aspects of the law. Its topics ranged from rising crime rates in the countries of the Commonwealth to the special problems of combating serious fraud having inter-jurisdictional components; environmental law problems; international trade law issues; maritime law developments; the growing body of law caused by the movements of refugees and the changing content of intellectual property law.

The Commonwealth Law Conference, as usual, was accompanied by a series of associated meetings of lawyers from all parts of the Commonwealth. It was preceded by a meeting of Chief Justices of Commonwealth nations. During the sessions there were special meetings of Law Reform Commissioners and other specialised groups. A new specialised meeting of lawyers involved in the defence forces of Commonwealth nations was inaugurated at Nicosia.

The conference was also accompanied by the Commonwealth Mooting Competition which involved law students from twelve Commonwealth countries. These lawyers of the future argued before judges from all parts of the Commonwealth a legal problem of great contemporary relevance, viz alleged gender bias alleged to be contrary to the constitutional guarantees of a mythical Commonwealth state. The case

argued had some similarity to a decision of the Appeal Court of Botswana in *The Attorney General v Dow*, as yet unreported which, it may be hoped, will be reported in *The Law Reports of the Commonwealth*, published by Butterworths. This unique series collects annually some of the key decisions of Commonwealth courts. It publishes them in three annual volumes dealing respectively with constitutional, commercial and criminal law. With the decline of jurisdiction of the Privy Council, the *Law Reports of the Commonwealth* provide an important new vehicle for maintaining the intellectual links between judges and lawyers of Commonwealth countries. The 10th Commonwealth Law Conference demonstrated how strong and enduring these links still are.

The Nicosia conference was not all business. It was accompanied by an enjoyable cultural and culinary celebration of life in Cyprus. The relatively small Bar of Cyprus turned on a remarkably successful performance which cemented old Commonwealth friendships and established new ones. The next Commonwealth Law Conference will be held in Vancouver, Canada in 1997.