

Obituaries

THE RIGHT HON LORD COOKE OF THORNDON ONZ, KBE

Robin Brunskill Cooke, Baron Cooke of Thorndon, died in Wellington, New Zealand, on 30 August 2006. He had just passed his 80th birthday.

Robin Cooke was born on 9 May 1926. He was the son of Mr Justice Philip Cooke, a judge of the then Supreme Court of New Zealand. His early education was in his own country. He graduated Master of Laws in the then Victoria University College. Subsequently, he became a research fellow at Clare College and later still at Gonville and Caius College, Cambridge University, where he took the degrees of Master of Arts (1954) and Doctor of Philosophy (1955).

For a time, it was uncertain where Robin Cooke's great talents would take him. Many expected that he would pursue an academic career. However, in 1950 he was admitted to the New Zealand Bar and in 1954, the Inner Temple called him to the English Bar. At the Bar he demonstrated his great practical legal skills. In 1964 he was appointed Queen's Counsel and, in 1972, a judge of the then Supreme Court of New Zealand.

Cooke's intellectual gifts were acknowledged in 1976 when he was elevated to the New Zealand Court of Appeal. Ten years later he was appointed President of that Court, a position he held for a further 10 years. This was the time when, as Sir Robin Cooke, he wrote judicial opinions in all areas of the law which built up a following in Australia because of his erudition, elegant style, search for principle and adherence to a conceptual approach to the common law. It was during this period that Sir Robin led the New Zealand Court of Appeal to controversial decisions such as the one preventing the planned Rugby tour of South Africa by the New Zealand All Blacks in 1985 (*Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159); and decisions upholding union rights in employment contract disputes (*Brighthouse Ltd v Bilderbeck* [1995] 1 NZLR 158) and Maori rights under the Treaty of Waitangi (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *Ngai Tahu Maori Trust Board v Director of Conservation* [1995] 3 NZLR 534).

It was in the 1970s that, in a series of decisions, he expressed the opinion that "some common law rights may go so deep that even Parliament cannot be accepted by the courts to have destroyed them" (*Fraser v State Services Commission* [1984] 1 NZLR 116; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394). Similar views were urged on the High Court of Australia in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 409, 422, but without success. Cooke's period as President of the New Zealand Court of Appeal was marked by great creativity and openness to re-conceptualising legal principles. It was a period that paralleled similar contemporaneous developments in the High Court of Australia. In each instance, the change followed decades of unquestioning obedience to English law and its values, as expressed in the Privy Council, to which the courts of both countries were then joined.

Although Cooke long favoured the termination of New Zealand's links to the Privy Council, he became a Privy Councillor in 1977 and sat intermittently. His appointment in the same year as a Knight Bachelor was followed, in 1986, by his creation as a Knight Commander of the Order of the British Empire. In 1996, on his retirement from the New Zealand Court of Appeal, he was appointed to the House of Lords, the first New Zealand judge to be so honoured. Thereafter, he regularly sat in London both in the House of Lords and the Judicial Committee of the Privy Council. His reasons during this period evidenced a strong interest in upholding fundamental human rights, as provided in the independence constitutions of most of the nations from which appeals still lay to the Privy Council. A review by P Spiller of his judicial work during this interval appears in (2003) 3 *Oxford University Commonwealth Law Journal* 29. He was an exception to the supposed tendency of people, especially lawyers, to become more conservative as they grow older.

Before and during his extensive judicial service in Britain, Cooke performed duties as President of the Court of Appeal of Samoa, of the Cook Islands and of Kiribati. He served on the Supreme Court of Fiji (1995-2001) and as a non-permanent judge of the Hong Kong Court of Final Appeal from 1997

until his death. He had very close associations with universities, particularly the Victoria University of Wellington and Cambridge University in England. He was forthright in acknowledging his debt to academic and comparative law writing. In the Lords this led to a famous run-in with Lord Goff of Chieveley in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 693, 714ff. Lord Cooke's view has now prevailed.

Honours were heaped upon him. He received Honorary Doctorates from the Victoria University of Wellington, Cambridge and Oxford Universities. He was elected an Honorary Bencher of the Inner Temple (1985). He served as a Commissioner of the International Commission of Jurists from 1993 until his death. He was made a life member of LAWASIA and was appointed in 2000 to the Order of New Zealand, a rank reserved to only 20 living New Zealanders. To the end, he paid close attention to legal developments in Australia and closely followed the trend of authority in the High Court of Australia and intermediate courts. In this, he was repaying a compliment often accorded to his own reasons by courts throughout Australia and beyond.

His last years involved a constant struggle with illness, aggravated by the hectic pace to which he subjected himself as a judge and international arbitrator. He was involved in a number of battles with pneumonia. Eventually dialysis was necessary and he became increasingly frail. A fall shortly before his death weakened him greatly and interrupted the dialysis. When he died, Sir Geoffrey Palmer, President of the New Zealand Law Commission and one-time Prime Minister, declared that he was "the greatest judge New Zealand has produced".

Lord Cooke is survived by Lady (Annette) Cooke and their three sons. As an Australasian career in the law, his was unique. It is unlikely to be repeated.

Michael Kirby

SIR MICHAEL DAVIES

Sir Michael Davies, who died on 5 September 2006, was a great supporter of the New South Wales Bar. He resided near Wolverhampton, England, and maintained an intense interest in the Australian legal system.

Michael Davies was born in 1921. He obtained his Bachelor of Law at Birmingham University and was called to the Bar (UK) in 1948. At the Bar he developed a substantial practice as a junior barrister usually in the field of criminal work, both prosecuting and defending in the Quarter Sessions courts. In 1961, at the age of 39, he was invited to sit in Birmingham as an Assistant Recorder. In 1963 he became the Recorder of Grantham and was appointed Queen's Counsel. In 1965 he became the Recorder of Derby. He was appointed by Lord Hailsham as a judge of the High Court of Justice in November 1972.

Sir Michael took pride in the fact that he was the first Birmingham University law graduate to be appointed to the High Court. In a speech delivered to the Holdsworth Club of the University of Birmingham he said of his judicial appointment, "I had no connection with anyone in the law and I could not boast of a distinguished war record". He described himself as "the antithesis of the stereotyped privileged toff from whose ranks judges are supposed invariably to have been recruited".

Sir Michael presided over many leading cases including defamation cases involving famous personalities, including Sir Elton John, Koo Stark and the Count Nikolai Tolstoy case and criminal cases including that of the Great Train Robbers. His approach was direct and tempered by a wonderful sense of humour. On one of his visits to Australia, as the aircraft was leaving Perth the passenger beside him announced that this was the first flight of the aircraft since its major repairs following its disastrous Bangkok landing. Sir Michael replied dryly, "Well you might have told me that at the end of the flight!" He deplored affectation of any kind.

He was appointed Treasurer of Lincoln's Inn in 1991 and retired from the Bench during that year. Following his retirement Sir Michael was appointed to several tribunals, and wrote extensively on the subject of expert witnesses. His favourite statement was: "Straight talking – no bullshit!"

Sir Michael visited Australia several times. He proudly displayed the bumper sticker on his car in London bearing the words "I ran in the City to Surf", having participated on more than one occasion.