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CENTENARY REFLECTIONS ON THE GLOBAL DIGEST OF LAW 1919 - 2019

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A lot was happening in the world one hundred years ago. After the Armistice of 11 November 1918, the guns fell silent on the battlefields of the Great War (1914-18). In Germany, Austria-Hungary and Russia the rulers of three mighty empires had been overthrown and their empires dismantled. The successful Allies, led by the United Kingdom, France and the United States of America summoned the defeated Central Powers to learn the terms of the peace treaties. In 1919, the world prayed that the "war to end wars" would bring peace and a restoration of order to the international community.

Some hopeful developments quickly followed the end of the war. By 1919, the British Empire appeared to have emerged from the Great War with its territories enhanced and its authority increased. Most of its dominions and colonies had contributed to the success of the Allies on the battlefield. Many were beginning to think in terms of greater legal and political independence. So this was the environment in which, on 1 February 1919, Butterworth & Co in London launched their bold new project *The English and Empire Digest* (*E & ED*). It had taken 5 years to get it ready for publication. Whilst Britain's fate hung in the balance, this astonishing work of taxonomy and legal analysis was being assembled. It was designed to share with judges and lawyers in the United Kingdom, the

Empire of India, the Dominions and other territories beyond the seas the shared blessings of English law and British justice.

The *E & ED* offered succinct, accurate and informative summaries of judicial decisions which encapsulated the principles of the English common law. That was the law substantially applied throughout the Empire on which 'the sun never set'. Most of the law in the Empire was still, in 1919, declared by the judges, not made by parliaments. The judges were men (and there were no women at that time) professionally trained, uncorrupted by personal interest and skilled in the analysis and exposition of the law that proceeded, as Tennyson had put it, "from precedent to precedent". The judge-made law was conceived as an integral body of rules to be discovered and expounded by judges, assisted by trained lawyers.[1]

In the Introduction to the new *E & ED*, the managing editor of the new project captured the symbolism of moving from war to law:[2]

> "[I]t was in order to uphold … freedom and all the principles of right which are so dear to the Empire, that her sons came together from all quarters of the world and fought and learned to appreciate more fully the sterling qualities of each other during the great War that has ravaged the world for the last four years. Now, when the dawn of Peace has arisen and the bonds of friendship… are daily becoming more secure, it is a fitting moment to produce a work that… will trace

[1] I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada*, McGill-Queens Uni Press, Montreal, 1992, 22; R.J. Sharpe, "The Old Commonwealth (a) Canada" in Louis Blom-Cooper, B. Dickson and G. Drewry (eds) *The Judicial House of Lords* 1876-2009, OUP, Oxford 252.
[2] T. Willes Chitty (Managing Editor), "Introduction", *E & ED,* Butterworths, London, 1919, Vol 1, xci.

> the source and growth of the law of England and of the Empire … in the era of Peace we hope is now opening out before us."

The cases recorded in the first years of the *E & ED* included many that reminded the readers of the impact of the recent war on the law's discipline.[3] Whilst the orders and reasoning of the Judicial Committee of the Privy Council were legally binding in nearly all of the British dominions and colonies at that time, formally the decisions and reasoning of the House of Lords in English cases were not.[4] This notwithstanding, even in the 1960s many judges in Australia and other lands still treated the House of Lords' decisions as binding on them.[5] In the far flung Empire, judges and lawyers pored over the reasoning of the Privy Council because, until the middle of the 20th century, its judges at Westminster had the final say over most (or all) areas of their law. Soon, however, the judges were beginning, for their differing reasons, to question and challenge this obedience.[6]

Notwithstanding formal constitutional independence and the partially liberating provisions of the *Statue of Westminster,* the decisions of the English judges continued to have a huge influence on the judges and lawyers of the Empire and later Commonwealth. They would consult the *E & ED* to find what the English judges were saying. In consequence, their reasoning provided a market for the *E & ED* even in fully independent countries. Subsequently, when the English judges occasionally

[3] See e.g. *Stable Restable: Dalrymple v Campbell* [2019] P 7; [1918] All ER Rep 290. *Morgan v Caldwell* (1919) 88 LJKB 1141; [1919] All ER Rep 332; *Roura and Forgas v Townend and Ors* [1919] 1KB 189; [1919] All ER Rep 341. *Foreign Steamship Co. Ltd v R* [1918] 2 KB 879; [1918] All ER Rep 676; *Rodrigeuz v Speyer Bros* [1919] AC 519; [2019] All ER Rep 884.
[4] *Skelton v Collins* (1966) 115 CLR 94 at 104. See also M.D. Kirby "Australia" in LBlom-Cooper and Ors *ibid* n. 1, at 342 fn 27.
[5] *Barker v The Queen* (1963) 111 CLR 610 at 632-633, per Dixon CJ.
[6] *Arthur J.S. Hall & Co v Simons (HL)* [2002] 1 AC 615 not followed *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

acknowledged errors in their past reasoning (for example on advocates' immunity from suit in negligence or on joint criminal responsibility of co-offenders),[7] these revelations persuaded independent courts elsewhere to follow their lead.[8] However, sometimes judges (especially in Australia) declined to see the light.[9]

However, the outcome of particular cases were less important that the recognition that a global conversation was continuing between courts and judges in Commonwealth countries, especially over the content of the basic principles of the common law. The decisions of the senior judges of the United Kingdom continue to this day to influence high courts of the former British Empire.[10] In earlier decades (except in Privy Council decisions arising from the jurisdiction in question) it was rare to see references by English judges to judicial reasoning in Commonwealth countries. However, in more recent times the conversation of shared ideas has become much more reciprocal.[11] This phenomenon, led by Lord Bingham of Cornhill and his successors, has made awareness of comparative constitutionalism, comparative treatment of human rights law and of other fields of legal doctrine valuable and influential. It enhanced the value of a global digest. That value continues and increases, with the aid of new technology.

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[7] A. Chaskalson, "South Africa" in Blom-Cooper, ibid, 360 at 362 referring to *Regal and African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD).
[8] *R v Jogee*; *Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7. Not followed *Miller v The Queen* (2016) 259 CLR 380.
[9] See e.g. *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. Cf *Dimes v Proprietors of the Grand Junction Hotel* (1852) 3 HLC 759; 10 ER 301; followed *Rameshwar Prasad (VI) v Union of India* (2006) 2 SCC 1, 170, para [33]; not followed *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2001) 205 CLR 337.
[10] Adash Sein Anand, "India", in Blom-Cooper, *ibid*, 367 at 369
[11] M.D. Kirby, "Australia" in Blom-Cooper, *ibid* at 338 at 345. See also the influence of the Supreme Court of India on the House of Lords in Anand, *ibid*, 367 at 375.

Eventually, the word “Empire” in the title of the old *E & ED* came to appear anachronistic. The age of authority and obedience gave way to the age of persuasion and influence. This is still with us.

It would be a mistake to think that everything about the English common law in the early days of the *E & ED* was good and just. There were, for example, many decisions demonstrating ingrained discrimination against women, even the refusal to include them in the statutory word “person”, [12] as Baroness Hale and many others have pointed out. Just as surprising to today’s eyes, were the numbers of cases reported in the first volumes of the *E & ED* showing hostility towards sexual minorities in the judicial rulings digested there. Yet arguably, the worst forms of discrimination, contained in the early volumes, were on the grounds of race. Including the race of Indigenous people in settled colonies.[13]

Just weeks after to the launch of the *E & ED* in February 1919, the Amritsar Massacre occurred at the Jallianwala Bagh in April 1919. More than a thousand peaceful demonstrators were shot dead at close range on orders of Colonel Reginald Dyer of the British Army in India. In the House of Commons Winston Churchill denounced this action as “monstrous”. Prime Minister H.H. Asquith described it as “one of the worst outrages in the whole of our history”.[14] The Queen, as Head of the Commonwealth, on a visit to India in 1997, paid respects to the memory of the dead and injured. Many historians trace the beginning of the end

[12].B. Hale, “Non-Discrimination and Equality” in Blom-Cooper, 574 at 575 referring to *Nairn v University of St Andrews* [1909] AC 147.
[13] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.
[14] Cited Derek Sayer “British Reaction to the Amritsar Massacre 1919-20”, *Past and Present,* May 1991, issue 31, 131.

of the British Empire to the shots that rang out from Amritsar. Those shots proclaimed that non-settler territories would have to struggle and fight for the freedoms and liberties taken for granted by subjects and settlers of British stock. "British justice", in and after 1919, was sometimes selective.

This makes all the more remarkable the continuing global power and influence of the ideas of English law and the shared work of the judges and lawyers writing in the English language. Two series published by LexisNexis Corporation, (the successor to Butterworth & Co) contribute to this legacy to this day. These are *The Digest* (successor of the *E & ED*) and *The Law Reports of the Commonwealth - LRC* (a series of leading judicial decisions of general interest and value from all Commonwealth countries, published since 1985).

Those who launched the *E & ED* a hundred years ago, and the *LRC* more recently, gave substance to the idea of a peaceful association amongst nations and lawyers, linked ultimately not by guns and power but by reason, a common language, and shared ideas of law, justice and fair procedures, upheld before independent decisionmakers that would be more enduring. The publisher in London and those who conceived and implemented these series, and who adapt and preserve them worldwide for the current age, deserve our grateful thanks and heartfelt praise.

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