Commonwealth Lawyers Association Regional Conference

Cooperation and Convergence - Judiciaries and the Profession

Chief Justice Robert French AC
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Introduction

It is a happy coincidence between the timing of this Conference and the High Court's list, that yesterday the High Court of Australia heard an appeal from the Supreme Court of the Republic of Nauru, a Pacific country which joined the Commonwealth of Nations in 1968.[1] In sitting on that appeal, the High Court exercised jurisdiction conferred upon it by an Australian law, the *Nauru (High Court Appeals) Act 1976*. That law was made by the Australian Parliament under an Agreement between Australia and Nauru to provide for such appeals. The Australian law is complemented by the *Appeals Act 1972* (Nauru), which confers corresponding rights of appeal for the purposes of Nauruan law.

The appeal involved a question whether fresh evidence said to justify a retrial of proceedings heard in the Supreme Court of Nauru in 2002 could be received by the High Court in the exercise of its jurisdiction. The Court gave a decision yesterday allowing the appeal. The Chief Justice of Nauru at the time of the proceedings under appeal was Barry Connell, an Australian lawyer. The current Chief Justice of Nauru is the Hon Geoffrey Eames QC, a former Judge of the Victorian Court of Appeal. The arrangements between Australia and Nauru, and arrangements with other Pacific countries in which serving or retired Australian Judges and practitioners provide judicial services, are indicative of the opportunities and possibilities for judicial cooperation in a variety of ways and at a variety of levels. For those who participate as judges in such arrangements on both sides, there are great benefits in terms of perspective and experience. When practitioners can appear in the courts of another

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1 *Clodumar v Nauru Lands Committee & Ors* [2012] HCATrans 94.

country and provide experience or expertise not otherwise available in that country, there are considerable mutual benefits.

It is interesting in this context to refer to the lecture entitled "A Commonwealth of Laws: At 60 and Beyond" delivered by Sir Shridath Ramphal in London on 7 December 2009.[2] He recalled a proposal which had been advanced at the Commonwealth and Empire Law Conference in Sydney in 1965 for the establishment of a Commonwealth Court of Appeal as a final court of appeal for Commonwealth countries. The case for a Supreme Court of the Commonwealth was put in a background paper prepared for the 1965 Conference:

> With such a court Commonwealth countries would influence each other in the development of commonwealth law. All countries submitting to the jurisdiction would in every way, be treated on an equal basis, subordinating their own final courts of appeal to the overriding appellate jurisdiction of the Supreme Court of the Commonwealth.

The idea had been proposed five years earlier by Lord Denning, and had some support from the then Lord Chancellor in 1965. Nevertheless, even in 1965, it was an idea whose time had passed. As Sir Shridath said:

> While many small countries were for it, most of the larger ones were not. Having labored over decades to establish national Supreme Courts of which they were rightly proud and confident, countries like Canada and Australia and India were in no mood, either professionally or politically, to head back to what they were inclined to see as a revamped Judicial Committee ...

One can also imagine the enthusiasm today of the British public and judiciary for an external appeal court.

Whether it would be possible to create a regional body which could serve as a final court of appeal for participating countries with limited judicial resources, may be debatable but is, perhaps, worth exploring. It could be supported by inter-governmental agreements and the domestic laws of the participating countries. There

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[2] Sir Shridath Ramphal, 'A Commonwealth of Laws: At 60 and Beyond' (Speech delivered at The Commonwealth at 60 Law Lecture, London, 7 December 2009).

would no doubt be constitutional issues relevant to the ability of a participating country to confer jurisdiction on such a court. The concept is not anywhere near as ambitious as that of a general Commonwealth Court of Appeal. In theory, it could provide a cost-efficient mechanism for judicial cooperation involving serving and/or retired judges of different jurisdictions sitting on the court from time to time on a sessional basis. Realistically, however, the preferred use of international judicial resources for countries who have a need for such assistance will involve sessional or part time appointments which can be phased out as the local judiciary develops. My own experience has persuaded me of the benefit of such arrangements.

Between 2003 and 2008, I served as a sessional judge of the Supreme Court of Fiji. The Court consisted of an Indigenous Chief Justice, Daniel Fatiaki, and serving Judges from New Zealand, the Federal Court of Australia and the Supreme Court of New South Wales. In April 2003, I had the privilege of sitting as a member of the Court with Justice Sir Kenneth Keith from New Zealand, now a Judge of the International Court of Justice, and Justice John von Doussa of the Federal Court of Australia, who later became President of the Human Rights and Equal Opportunity Commission. We sat together on an appeal called *Matalulu v Director of Public Prosecutions*.[3] The case had a rather complex background in Fijian customary law. It was a little like *Jarndyce v Jarndyce* in *Bleak House*. The principal litigation and satellite litigation had been going for about 11 years when we heard the appeal. The case concerned a contested election for appointment to the office of a Paramount Chief. There was a statutory framework within which decisions relating to disputed outcomes of such elections could be made. Two protagonists in relation to a disputed election, Mr Matalulu and Mr Rasolosolo, claimed to have particular responsibilities under customary law. They filed private complaints against an opposing party alleging that in the course of judicial review proceedings arising out of the election, he had committed perjury by swearing a false affidavit for use in those proceedings.

In the event, the Director of Public Prosecutions of Fiji ('the DPP') exercised a statutory power to take over the private criminal proceedings and then filed a nolle prosequi terminating each of them. The complainants sought judicial review of the

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[3] [2003] 4 LRC 712; [2003] FJSC 2.

DPP's decision to enter a nolle prosequi. The Court of Appeal of Fiji held that judicial review of such decisions was available only on rare occasions and dismissed the application. The Supreme Court granted special leave to appeal, but dismissed the appeal. In the course of our joint judgment, Justice von Doussa, Justice Keith and myself considered the general principles for reviewability of a prosecutor's decision to enter a nolle prosequi. Cases from many Commonwealth and other countries had been cited to us. They included decisions of courts in New Zealand, Australia, the United Kingdom, Canada, Northern Ireland, the United States, Hong Kong, Samoa, Guyana, Barbados and the European Court of Human Rights. We set out a number of circumstances in which a DPP's decision purportedly made under powers conferred by the Constitution of Fiji would be reviewable. We held that a purported exercise of power would be reviewable if it were made:[4]

1. in excess of the DPP's constitutional or statutory grants of power;

2. when contrary to the provisions of the Constitution the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion - if the DPP were to act upon a political instruction for example the decision could be amenable to review;

3. if the DPP acted in bad faith or dishonestly. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe;

4. if the DPP's exercise of power constituted an abuse of the process of the Court in which it was instituted;

5. where the DPP had fettered his or her discretion by a rigid policy, for example, one that precludes prosecution of a specific class of offenders.

We explained the reluctance of courts to interfere with such decisions by reference to:

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[4] [2003] 4 LRC 712 at 735-736.

> ... the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it was within neither the constitutional function nor the practical competence of the courts to assess their merits.[5]

The *Matalulu* decision having been made in a setting of customary law, and constitutional and statutory provisions which were together peculiar to Fiji, I did not expect it to have any interest or application beyond that country. It came as something of a surprise, therefore, to discover that subsequently the decision was referred to, quoted and approved, by the Privy Council on three occasions: one on appeal from Mauritius[6], another on appeal from Trinidad and Tobago[7] and a third on appeal from Jamaica.[8] It was also cited and applied in 2008 in the High Court of Justice in Northern Ireland[9] and, in 2009, in the decision of the House of Lords in *R v Director of the Serious Fraud Office*.[10] It was referred to most recently on 16 March this year in *Lord Carlisle v Secretary of State for the Home Department*.[11]

When the Court sat in *Matalulu* it was assisted by case law from a range of Commonwealth and other jurisdictions. What it said in *Matalulu* fed back into case law affecting Mauritius, Trinidad and Tabago, Jamaica, Northern Ireland and the United Kingdom. It was a paradigm example of cooperation between different national judiciaries in delivering justice in a particular country, where members of the legal profession were prepared to draw upon the learning and experience of a range of countries in assisting the Court and when the fruits of their labours were felt well beyond the place in which the case was heard.

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5 [2003] 4 LRC 712 at 735.

6 *Mohit v Director of Public Prosecutions of Mauritius* (2006) 1 WLR 3343.

7 *Sharma v Brown-Antoine* (2007) 1 WLR 780.

8 *Leonie Marshall v Director of Public Prosecutions* (2007) WL 2866; [2007] UKPC 4.

9 *Re Hammel's Application* (2008) NIQB 73.

10 *R (Corner House Research) v Director of Serious Fraud Office* [2009] 1 AC 756.

11 [2012] EWHC 617.

It is a sad postscript to that story that in 2006 the rule of law in Fiji was abrogated by a military coup. It is to be hoped that we will see, sooner rather than later, a return to constitutional, democratic government, the rule of law and respect for human rights in that country. The story of *Matalulu* is nevertheless a good vehicle for my theme, which is cooperation and convergence within diversity of the judiciaries and the legal professions of the Commonwealth. That theme is concerned not only with judges sitting on different national courts and legal practitioners appearing in different national jurisdictions. At a less intense level of judicial and professional cooperation, exchanges of information about approaches to such matters as judicial education, case management, alternative dispute resolution, court funding arrangements, and measures of efficiency in the use of public funds by the courts occur between many countries of the Commonwealth and beyond. My theme is, therefore, to some extent universal. It is, however, with the Commonwealth that we are primarily concerned.

The Commonwealth connection - historical entanglements

The Commonwealth of Nations has a certain organic untidiness about it which is redolent of much of the common law. The members of the Commonwealth combine diversity in peoples, language, cultures and institutions. What they share is an historical entanglement with the exercise of British Imperial power in the 18th and 19th centuries and the first decades of the 20th century.

That historical entanglement and its effects upon the evolution of our constitutions, our institutions and our legal systems, connects us. It is that connection which provides the occasion for the judiciaries and the legal professions of the Commonwealth to come together to identify and discuss those things which are of importance to all of us. They include the universal application of the rule of law, the establishment, operation, maintenance and protection of constitutions, institutions and legal systems which in turn protect, facilitate and advance the functioning of representative democracy and fundamental human rights and freedoms. It is those things which provide the infrastructure for free and prosperous societies. It is not necessary to be an expert in international trade relations and investment practices to observe that comprehensible, rational and fair laws, honest and competent public

officials, strong, independent and efficient regulators, and a strong independent judiciary and legal profession, are attractions for those who might contemplate doing business in the country in which these things exist.

In his 2009 Commonwealth of Laws Lecture, Sir Shridath quoted from an article by Professor James Reid in the *Commonwealth Law Bulletin* ten years before, who wrote:

> More common than other elements - more permissive than political systems or forms of government and applicable to all citizens of the Commonwealth, many of whom do not speak the English language in which it is generally treated - the law provides the main unifying factor which links member-states of the Commonwealth and their peoples in a body of shared principles and practices.

As Sir Shridath went on to say, after the Second World War our largely two dimensional world went global, affecting all countries and people and all systems on the planet. He said:

> Basic to those changes is law. That is the essential truth our profession must grasp - one that has some special implications for the Commonwealth.

The aspirations of the Commonwealth relevant to this theme were recognised and affirmed by the Commonwealth Heads of Government Meeting at Harare in 1991. The Heads of Government spoke, in the Harare Declaration, of 'the special strength of the Commonwealth ... in the combination of the diversity of its members with their shared inheritance in language, culture and the rule of law.'[12] That same declaration committed Member countries to work vigorously in the areas of democracy, democratic processes, institutions which reflect national circumstances, the rule of law, the independence of the judiciary, and just and honest government.

The Harare Declaration was reinforced by the Millbrook Commonwealth Action Program announced at a meeting in New Zealand in 1995. One of the measures proposed in that program was strengthening the rule of law and promoting

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[12] Harare Commonwealth Declaration, (1991) [3].

the independence of the judiciary through the promotion of exchanges among, and training of, the judiciary.

In 2003, the Law Ministers of the Commonwealth adopted a set of principles on the relationship between the three branches of government, known as the Commonwealth (Latimer House) Principles on the Three Branches of Government. These were seen as buttressing the Declaration of Commonwealth Values made at Harare and the Millbrook Plan of Action. They were the product of a collaboration involving the Commonwealth Lawyers Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Legal Education Association and the Commonwealth Parliamentary Association.

The Latimer Principles affirmed the proper relations between parliament and the judiciary and their critical roles in the promotion of the rule of law in a complementary and constructive manner. They affirmed the importance of an independent, honest and competent judiciary. In 2005, representatives of all 18 Commonwealth countries in Africa met in Nairobi and developed a Plan of Action for the implementation of the Latimer House Principles in Africa. A further Plan of Action for the whole of the Commonwealth was adopted at Edinburgh in 2008 by representatives of the organisations which I have just mentioned.

There have, no doubt, been occasions during the development of these aspirational principles and plans when some of their proponents have felt as though they are hitting their heads against a brick wall of realpolitik in countries where the principles are either not accepted or given lip service. Cultural change in some places is slow. Sometimes in the clash of arms the law is silenced. Lawyers and judges who can see themselves as part of a global community with shared values which the Commonwealth, as a body, asserts, will through leadership and advocacy in their home countries provide the best mechanisms for achieving change and convergence in values and fundamental principles.

This cooperative regional discussion is not an occasion for the pursuit of uniformity. No society within the Commonwealth of Nations is in a position to say: 'We have got it right. There is no better way than the way we do things.' Diversity in

cultures, in constitutions and in legal systems is something to be celebrated. It enables all of us to lift our sights above the day-to-day concerns we have as judges and legal practitioners working within our own national systems. It also provides an opportunity for fresh thinking and, perhaps, scrutiny of assumptions or premises which have become shibboleths.

On this occasion, Commonwealth lawyers can respond in positive and practical ways to the Queen's Commonwealth Day message, Connecting Cultures, delivered on 12 March 2012, in which Her Majesty said:

> Connecting cultures is more ... than observing others and the ways in which they express themselves. This year our Commonwealth focus seeks to explore how we can share and strengthen the bond of Commonwealth citizenship we already enjoy by using our cultural connections to help bring us even closer together, as family and friends across the globe.

The global neighbourhood - an international profession

The need for cooperation and the natural pressures for a degree of convergence between the judiciaries and the legal professions of the Commonwealth reflect the wider truth that today we live in a global neighbourhood. In our time, the words of the Roman poet Terentius, written in the 2nd century before the birth of Christ, are more powerful than ever before:

> Homo sum: humani nihil a me alienum puto
> I am human and nothing human is foreign to me.

They are valid despite the existence of global cultural diversity and within it different legal traditions. Ours is a time in which trade, commerce and people cross national boundaries with greater facility than ever before. It is a time in which the Internet has become a powerful instrument of a global market place for goods, services and information, as well as an instrument of social and political action. It is a time of increasing internationalisation of the legal profession.

The internationalisation of the legal profession is something of which I think we are all aware. In Australia, it has inspired a research project established by the

International Legal Services Advisory Council to consider the internationalising of the Australian Law Curriculum. The purpose of the project has been described as:

> To develop and model the effective integration of international and intercultural dimensions into legal education that will equip Australian legal graduates with the necessary international and intercultural competencies to work in a global legal context.

Many fields of legal practice and important elements of the Australian legal profession today have international dimensions. There is a significant number of Australian law firms with international offices. In recent years, international law firms have established themselves in Australia. There is a significant incidence of cross-border transactions which involve more than one legal system. International transactional models, such as standard contracts, informed by more than one legal system have been available for some time. International dispute resolution mechanisms, particularly international arbitration, are on the rise. Many subject areas of domestic law have, in one way or another, an international dimension. They include competition law, intellectual property law, environmental law, human rights law, criminal law, family law and taxation law. A prominent example in Australia is in the field of judicial review relating to asylum seekers.

Many Australian law graduates look for and take up opportunities to work in other countries in our region and beyond.

There is a developing global market for legal education services. That development has important consequences. An important consequence is the opportunity that is created for future law graduates to have gained an appreciation of the life, culture and legal systems of a society other than their own society. Related to that topic are the demands for mutual recognition of relevant elements of legal qualifications gained in law schools in different countries and the associated need to maintain standards for admission to practice. Resolution of those issues demands cooperation between national professions and admitting authorities.

An important aspect of internationalisation in the law is to be found in the interactions between national judiciaries and the professions. In the Asia Pacific

region this occurs through conferences and seminars, such as this and through organisations such as Lawasia, the International Association of Judicial Administration, biennial meetings of Chief Justices of the Asia Pacific and the Asia Pacific Judicial Reform Forum. Through such interactions common principles can be recognised and mechanisms for their application developed on topics such as judicial independence, judicial ethics, judicial education, case management, indices of court performance and courts' administration. Opportunities for continuing legal education in subject areas of common interest are also created.

Judicial decisions - international dimensions

The international dimensions of judicial decision-making can be demonstrated by reference to some recent High Court decisions. Two of these decisions were concerned with criminal law and family law, neither of which springs immediately mind as an obvious candidate for the application of international influences.

In criminal law, the decision of the Court in *Momcilovic v The Queen*[13] concerned the Charter of Rights and Responsibilities (Vic) and also the construction of State drugs legislation and its interaction with congruent provisions of the *Criminal Code Act 1995* (Cth) concerning possession and trafficking of drugs. The latter provisions implement an international treaty. The case also concerned the operation of the presumption of innocence as a civil right. The scope and content of the presumption is the subject of decisions of foreign and international courts applying such instruments as the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. In other decisions of the Court in 2009 and 2010 concerning the validity of legislation directed at money laundering and organised crime, there was reference to analogous legislation in other countries.[14] In a family law decision in 2009, the Court was required to consider the *Hague Convention on Civil Aspects of International Child Abduction*.[15]

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[13] (2011) 85 ALJR 957; 280 ALR 221.

[14] See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 344-345 [25]-[29]; *South Australia v Totani* (2010) 242 CLR 1, 32-33 [37].

[15] *LK v Director-General, Department of Community Services* (2009) 237 CLR 582.

A judgment of the Court, delivered on 1 December 2011, discloses facts which nicely illustrate the international dimension of some contemporary legal practice. The case was *Michael Wilson & Partners Ltd v Nicholls.*[16] It involved a legal practice incorporated in the British Virgin Islands but carrying on business in the former Soviet Union from offices in Kazakhstan. An Australian solicitor joined the firm as a director, and an Australian barrister and solicitor joined as associates. The Australians ultimately left the firm. They were connected with three companies, two of which were incorporated in the British Virgin Islands and the third in a Free Trade Zone in the United Arab Emirates. The plaintiff firm alleged that the Australians had directed clients away from the plaintiff and to their own benefit by having one or more of their associated companies act for the clients.

The plaintiff law firm initiated an arbitration in London involving the former director of the company. It also initiated proceedings in the Supreme Court of New South Wales against the two former associates. It sued the associated companies in the Eastern Caribbean Supreme Court. Complaints of criminal conduct were made to the United Kingdom, the British Virgin Islands and Switzerland.

The issues in the case, which ended up in the High Court, involved breach of contract and fiduciary duties, apprehension of judicial bias and whether the proceedings in the Supreme Court of New South Wales were an abuse of process having regard to the ongoing arbitration in London.

All of the international dimensions which I have mentioned are present in the practice of law today to a greater or lesser degree. They necessarily give rise to the need for, and the utility of, judicial and professional education programs which cross national boundaries.

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[16] (2011) 86 ALJR 14; 282 ALR 685.

Intercultural issues

The ILSAC Project to which I referred earlier, is directed not only to international legal issues affecting legal education but intercultural dimensions. There are few lawyers who can afford to be unaware, at least in a general sense, of the different legal traditions which the global market place encompasses. For they may be doing business with people from those different legal traditions. Moreover, different cultural attitudes to the law borne of different legal traditions may also exist or emerge within a single country, as the result of colonial history and later migration, including the movements of people displaced because of war, conflict, persecution, or economic or environmental catastrophes.

There are many examples of countries today in which more than one legal tradition may be found. The *Matalulu* case, with which I opened, is an example of an interaction between different legal traditions in Fiji. A good example to our north, although not part of the Commonwealth, is Indonesia. National laws enacted by the Indonesian legislature sit alongside laws from the Dutch Colonial period which derive from the civil tradition. The customary law or Ardat also subsists in different forms in different parts of the Indonesian Archipelago. There is a system of Religious Courts which administers family law for Muslims outside the system of family law administered by the general courts.

Issues raised by co-existing cultural traditions may bear some similarity to issues raised by co-existing legal traditions. Difficulties sometimes arise for a country's legal system in dealing with people from different cultures living within that country. This can arise acutely in the workings of the criminal justice system with respect to traditional indigenous people.

In a related context, customary law interacts directly with the national legal system in Australia in the hearing and determination of claims for the recognition of customary native title. It is appropriate that I mention this as 2012 is the twentieth anniversary of the decision of the High Court of Australia in *Mabo v Queensland*[17] in

[17] (1992) 175 CLR 1.

which the Court held that the common law of Australia could recognise rights and interests in land deriving from the traditional laws and customs of Indigenous people. The interaction required by that recognition between traditional law and custom and national laws has been reflected in the way that native title litigation has been conducted in this country. The Federal Court of Australia, which has had the principal responsibility for hearing and determining native title claims, has frequently taken evidence on the land the subject of the claim. It has rules of court providing for the reception of evidence, not only in the form of oral testimony, but also in the form of art, dance and song.[18] Some witnesses may give testimony with a group of their community and be permitted to consult with members of the group before answering questions. Some evidence relates to restricted traditional knowledge. In such cases the Federal Court has heard evidence in the presence only of male legal practitioners and expert witnesses and has restricted distribution of the transcript. The challenge to the judiciary and the profession posed by proceedings of this kind is not unique to Australia. Canada and New Zealand have confronted similar issues, although in a context dominated by treaty-based processes. Despite the differences there have been useful interactions between those involved in these processes.

Beyond the field of customary law involving indigenous people, problems can arise in court systems dealing with people from different cultures who are immigrants or prospective immigrants. When serving as a Federal Court Judge and dealing with judicial review applications by unrepresented asylum seekers speaking through interpreters, I sometimes wondered – how do you explain the limits of judicial review and jurisdictional error to a man fleeing from persecution in Iran? I also wondered how you explain it to anyone.

The appropriateness of having regard to cultural differences in the administration of justice has been the subject of debate in a number of countries. The debate is generated by the tension between the ideal that everybody should be treated alike and the reality that failure to recognise relevant individual circumstances and attributes may result in unfairness.

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[18] Federal Court Rules, 34.123.

There can be normative tensions between the legal rules of a host country and those of some of its immigrants, particularly in the area of human rights. The relationship between the freedom to practice religion and the equal treatment of women can give rise to such tensions.

The preceding are examples of contemporary interactions of different legal traditions and, indeed, different cultures within countries. There are many countries, members of the Commonwealth, in which these issues have arisen or may arise in the foreseeable future. The role of the legal profession and the judiciary in cooperative exchange to share approaches to reducing the tensions that can arise because of these interactions is fundamental.

Recognising difference

Cooperation and convergence between judiciaries and legal professions must take account of irreducible differences. I take as an example Australia and India. Every two years the High Court of Australia and the Supreme Court of India conduct a meeting between Justices of each Court, held alternately in India and in Australia. Common elements of our historical legal heritage and broadly common approaches to constitutionalism, the rule of law and the independence of the judiciary mean that there is much that we can usefully discuss. However, as with all such international discussions, there are intrinsic differences between legal systems which must be acknowledged.

In the case of Australia and India, the first important difference is simply one of scale. India has a population of more than 1.1 billion people, who occupy a land area of nearly 3 million square kilometres. Australia has just over 22 million people, occupying a land area of about 7.7 million square kilometres.

Another significant difference is India's long-standing religious and ethnic diversity which includes Hindus, Muslims, Christians, Sikhs and Buddhists. Both India and Australia are federations. But India's diversity informs the character of its federalism. It has been said to give rise to a sense among some groups of sub-State nationhood:

> Language combined with regional identity has proved to be the most significant characteristic of ethnic self-definition and among the 28 constituent territorial units that constitute India today, the Sikhs in Punjab, the Tamils in Tamil Nadu, the Bengalese in West Bengal and the Nagas in Naga Land are a good representative sample of the strong sense of sub-State nationhood that exists.[19]

The social, ethnic and religious heterogeneity that must be accommodated within the Indian constitutional system poses challenges that do not arise in Australia. While Australia has a considerable degree of cultural diversity which has developed following its post-war immigration program, that diversity is accommodated within a relatively homogenous envelope of attitudes. Further, our cultural communities tend to be geographically diffuse, rather than being concentrated within particular States or regions within States.

In the early days of India's independence, the diversity of its communities raised the question about inherent stability. It is not surprising therefore, that the Indian Constitution contains centralising features necessary to maintain the country's integrity.[20] Examples of such features include the ability of the Union Government to expand the scope of its legislative power vis a vis the States, the emergency rule provisions, the Union's ability to create new States and presidential powers to appoint State Governors and State High Court Judges.

There are important differences also in relation to the position of the judiciary under the Indian Constitution. Unlike the Australian Constitution, the Indian Constitution guarantees a number of fundamental rights and the Supreme Court of India has jurisdiction to enforce those rights. Unlike the position in Australia, the Supreme Court of India can be requested by the President of India to provide advisory opinions on questions of law or facts of public importance.

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[19] Burgess, *Comparative Federalism Theory and Practice*, (2006) 123.

[20] Dhavan and Saxena, 'Republic of India' in Le Roy and Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (2006) 165, 166; Zeenata Ara, *Changing Dynamics of Indian Federalism* (2008) 46.

There is also a strong tradition of public interest litigation in Indian courts which might well come within the rubric of what some people would described as judicial activism at or close to the boundaries between executive and judicial power. Differences between the Indian and Australian Constitutions, and judicial and legal cultures however do not preclude significant degrees of cooperation and communication between the profession and the judiciaries in each of our countries. What is true of Australia and India in this respect is not unique in the Commonwealth of Nations.

Judicial education

Judicial education has become a global phenomenon. It is a field in which there is already a significant degree of international activity and convergence, particularly in countries steeped in the traditions of the common law.

Planning for judicial education requires consideration of the judicial task and the competencies necessary to support it. The primary judicial task is to hear and decide cases that come before a court. In carrying out that task, judges, whatever their jurisdiction, must identify the applicable legal rules or standards, determine the facts of the case based on the evidence before the court and apply the law to those facts. The application of the law to the facts leads to the decision of the case by the award of some remedy or the imposition of some penalty, or by the dismissal of a claim for relief. These elements of the judicial task point to the sorts of competencies which are necessary for its proper discharge. They include the following:

1. An understanding of the nature of the judicial role in the constitutional setting in which it is to be discharged and the relationship of the judiciary to the other branches of government.

2. Knowledge of the law and the techniques for identifying legal rules and standards.

3. Competencies relevant to the fact finding including:

3.1 The capacity to distinguish relevant from irrelevant evidence.

3.2 The capacity to weigh evidence and to draw inferences from evidence relevant to the factual questions to be determined.

3.3 Where factual issues are to be determined in matters relating to the physical or life sciences, technology, economics or other disciplines outside the law, an understanding, or the capacity to acquire an understanding, of the underlying area of knowledge sufficient to enable the requisite findings to be made reliably.

3.4 Where factual findings require partly qualitative judgments such as judgments about reasonableness in tort or good faith in contract law or market definition in competition law or inventiveness or novelty in intellectual property law - an understanding of the nature of the qualitative judgment required and, if it be purposive, the purpose which it serves.

3.5 In cases raising cultural issues because of the involvement of indigenous people or members of particular ethnic or social groups an awareness of cultural differences which may affect or explain behaviour or testimony which may be relevant to the fact-finding function. Linked to this competency there will necessarily be an appreciation of the limits which the requirements of the rule of law and equality before the law impose on judicial responses to the recognition of difference.

4. Knowledge and experience of matters relevant to the judicial process including:

4.1 How to manage the litigious process to avoid unnecessary cost, delay and stress on parties.

4.2 The requirements of procedural fairness including absence of actual and apparent bias and the provision to any party of a proper opportunity to be heard before any decision adverse to the interest of that party is made.

4.3 The nature of judicial independence from government and from any organisation, group or individual interested in the outcome of the case.

4.4 The capacity to communicate with clarity orally or in writing the reasons for any decision that is made.

5. Knowledge of the ethical requirements of judicial office and the capacity to make practical judgments about ethical issues.

There are no doubt other judicial competences that could be suggested. It may be that the selection of those set out above is skewed by the traditions of the judicial systems of the common law world. Whatever its shortcomings, the list indicates the variety of matters that should be considered in ensuring that persons appointed to judicial office have, maintain and enhance the competencies necessary for its discharge.

The times are long gone when persons appointed to judicial office in the common law world were thought to ascend to the Bench on the date of their appointment, fully equipped with all the knowledge and skills necessary to the judicial task. And even those in civil law countries who have been appointed after lengthy education and internships, will still have a need for the lifelong learning that only experience and continuing education can bring. Judicial education and training upon appointment and during the tenure of judicial office is now a well-established feature of judicial systems around the world.

The growth of the importance of judicial education in many countries has created opportunities for cooperation between countries particularly in our region.

A number of Australia's courts have developed relationships with particular countries in the region and been involved in programs directed towards strengthening the rule of law and deepening legal expertise and mutual understanding among the judiciary in our region. There is something of an embarrassment of riches in the diversity of the interactions.

A brief and necessarily incomplete overview of judicial engagement in the region will give you some idea of its extent and diversity. Let me begin with the National Judicial College of Australia (NJCA). It is funded to provide ongoing

education to judges in Australia. That is its primary task. It is also a member of the International Organisation for Judicial Training. That organisation comprises a large number of member nations. The NJCA encourages judges from Asia Pacific countries to attend its Australian judicial programs. Judges from Papua New Guinea, the Solomon Islands and from Singapore have attended a National Judicial Orientation Program, a training course for newly appointed judges, conducted by the NJCA. The NJCA also regularly receives requests to meet with visiting delegations of judicial officers who are interested in judicial education in Australia. Such meetings have been held with delegations from China, Vietnam, Brunei, India, Singapore and East Timor.

AusAID, an Australian Government funding agency, provides law and justice assistance in the Pacific area. It co-funds the Pacific Judicial Development Program in which NZAid, its equivalent agency in New Zealand, is the lead donor. The Pacific Judicial Development Program aims to strengthen the capacity of judicial and court officers in the Pacific through training and skills development. The program comprises four components; access to justice, governance, systems and processes and professional development.

The Asia Pacific Judicial Reform Forum (APJRF) is a network of 49 superior courts and justice sector agencies in the Asia Pacific region which have come together to contribute to judicial reform in the region. It resulted from the 2005 Manila Declaration on Judicial reforms. That Declaration called for a judicial knowledge and technique sharing network. The purpose of the Forum was to create a network to support jurisdictions in the Asia Pacific region which are committed to advancing judicial reform. Coordination is provided by a secretariat chaired by Justice Kenneth Hayne of the High Court of Australia. It includes representatives from Australia, the Supreme Court of the Philippines and the United Nations Development Program's regional centre in Bangkok. Administrative support for the Forum is currently provided by the High Court of Australia, the Federal Court of Australia, the Supreme Court of New South Wales and the Judicial Commission of New South Wales.

Under a Pacific Judicial Development Program between 2006 and 2008, the Federal Court of Australia was involved in providing experts to assist the Pacific

Islands in areas including ethical and integrity frameworks and codes, leadership skills, policy and procedures to deal better with "family and the law" issues, human resource and financial management and inter-agency communication and coordination. They also provided expertise in connection with the streamlining of administrative systems and processes, the provision of training in criminal and civil law and procedure, and in decision making and judgment writing, as well as the use of evidence and training trainers.

The Federal Court has also entered into collaborative arrangements with Papua New Guinea, Tonga, Samoa, Solomon Islands and Vanuatu. The Family Court of Australia has a particular involvement with the Indonesian judiciary in relation to family law matters. There are many other interactions between Australia and other countries in the region aimed at fostering judicial education, training and development.

These are just samples of interactions between the judiciaries of Australia and its Region. There is a significant degree of cooperative activity occurring. There is, however, in my opinion, a need for a more coordinated national approach to these arrangements. There is no doubt that relationships of this kind are extremely valuable to all countries involved. It is particularly important that they be stable and ongoing relationships, rather than fly-in fly-out, short term, or ad hoc interactions of little lasting value.

Cooperation in substantive legal education

In closing, I should make some brief reference to cooperation and convergence in relation to the substantive law. There are differences in the substantive laws of the countries of our region reflected in their constitutions, their statutes and in the development of the common law. Despite those difference the internationalisation of the law creates opportunities for cooperation and convergence in continuing legal education for both the judiciary and the professions.

In important fields of commercial law particularly relating to contracts, corporate governance and regulation, intellectual property law and competition law

there is a good deal of common ground. The importance of these areas of substantive law and their transnational features highlight the need to ensure that the judiciary and members of the legal profession in countries to which they are relevant, are able to operate effectively within those fields of law in advice, transactional arrangements and judicial decision-making.

Conclusion

The Commonwealth of Nations is, in a sense, an accidental community. Its value depends upon its capacity to exploit the things that connects its members. This proposition was embedded in the Queen's message last month about connecting cultures. Cooperation between the judiciaries and the legal professions of the Commonwealth, to take advantage of the connection, strengthens it and ultimately the rule of law which is vital to all our societies.