

***COMMONWEALTH
LEGAL
EDUCATION***

***Newsletter of the Commonwealth Legal Education
Association***

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The Commonwealth Legal Education Association

The CLEA was formed in December 1971. Its objects are to foster high standards of legal education and research in Commonwealth countries; to build up contacts between interested individuals and organisations, and to disseminate information and literature concerning legal education and research. Membership is open to individuals, schools of law and other institutions concerned with legal education and research.

The Association is headed by a President, currently in South Africa, Vice-Presidents in Jamaica, Sri Lanka and United Kingdom, a General-Secretary and an Executive Committee drawn from all the Commonwealth Regions.

Contact details:

John Hatchard, General-Secretary, Commonwealth Legal Education Association,
c/o Legal and Constitutional Affairs Division, Commonwealth Secretariat, Marlborough House,
Pall Mall, London SW1Y 5HX, United Kingdom.

Tel: +44 (0)20 7747 6415 Fax: +44 (0)20 7747 6406

E-mail: clea@commonwealth.int Web site: www.cleaonline.org

Subscription renewals and requests for publications may be addressed to the Association.

FROM JOHN HATCHARD GENERAL SECRETARY

The past twelve months has been a period of almost continuous activity for the Association. Rarely, if ever, has the Association been involved in so many diverse events in so many places around the Commonwealth. These are chronicled in the 2002-3 Annual Report of the Association that appears below.

The major event to report on since the last issue was the CLEA Conference held at the Law Faculty, University of Windsor in Canada. This was superbly organized by Jeff Berryman and attracted participants from around the Commonwealth and beyond. A note on the event also appears below.

I am pleased to report that the General Meeting approved the appointment/re-appointment of several Executive Committee members. Details below. The EC remains the key to the success of the Association and I very much look forward to working with the new committee.

Whilst this issue rightly looks back to past "glories", it is vital that the Association is always looking to the future. Here there are a number of exciting possibilities and serious challenges.

September 2005 sees the holding of the 14th Commonwealth Law Conference (CLC) in London. I think it fair to say that the Association has voiced its concern over certain aspects of past conferences. Most notably the extremely high registration fees that effectively preclude a significant proportion of the Commonwealth legal fraternity (and particularly law teachers) from attending. Also the programme and keynote speakers have not always reflected the needs and concerns of developing countries and small states. I am pleased to say that the Association is working very closely with the Commonwealth Lawyers' Association on the 14th version of the Conference and hopefully will be able to make a significant contribution towards making it a truly Commonwealth event that enables legal academics from all parts of the Commonwealth to participate fully.

This raises the issue of the future direction of CLEA conferences. This was a matter that was considered by the EC at its meeting in Windsor. In the past, our conferences have been Commonwealth-wide events. With the Commonwealth Law Conference moving to a two-year cycle, it is now possible for the CLEA conference to be part of this event (or alternatively as a separate event that immediately precedes the CLC). This would have the merit of enabling our members to attend the CLC as well. The CLEA would then concentrate on holding regular regional meetings that address the particular needs of local law academics. I would be interested in your views on this proposition.

Finally, finances. I make no apology for repeating my view set out in the Annual Report that:

The Association faces another period of considerable uncertainty regarding funding. Changes in the manner in which the Commonwealth Foundation utilises its increasingly frugal resources means that it is likely that the Association has got to look to secure itself financially through other means. During 2002-3, we were able to attract a significant amount of financial assistance for our various activities. But we need to improve.

Amongst other things, we must:

- expand our membership
- raise the profile of the Association
- make greater use of the electronic delivery of materials and information
- get more advertising revenue
- obtain project funding

As this issue of *Commonwealth Legal Education* demonstrates, the Association has a considerable amount to offer everyone. I hope that more readers will support its work.

John Hatchard
Marlborough House, London

October 2003

REPORT ON THE CLEA CONFERENCE ON REPARATIONS

Alicia Elias (University of Guyana)

On June 11-14, 2003, the Commonwealth Legal Education Association (CLEA) Conference on "Reparations, Theory, Practice and Legal Education" took place at the University of Windsor. The conference was organised by Jeff Berryman of the Faculty of Law, University of Windsor and the CLEA Executive Committee member for North America. Participants were drawn from 24 universities and institutions from the United States and from around the Commonwealth

Throughout the world attention has been focussed on the issue of reparations for past injustices and the role that such reparations play in reconciling various minority groups within a nation, or between nation states, towards a greater state of harmony and justice.

However, the issue of reparations presents fundamental challenges for the law. What harms warrant reparations? How far back in history should one go? Do reparations require a known victim and perpetrator, or can the present economic and social conditions of a recognised group be causally linked to the activities of an earlier dominant group or colonial government? Even where a past injustice has been recognised, how should reparations be effected? Should loss be compensated in money, or some other form of restitution? Even assuming a substantive claim arises; a reparation claim may entail complex issues of proof and the taking of evidence. How can oral history be presented in such circumstances? These were the issues the conference aimed to address.

The conference format followed a "roundtable" concept. Papers were distributed to participants prior to the conference and speakers were asked to lead discussions. The roundtable format maximized discussion and facilitated active rather than passive participation.

Day One: Theory

Discussions began with an introduction on the theoretical aspect of reparations. The focus was upon the legitimacy of claims for reparations and the capacity of the legal system to respond to them. The discussion was chaired by Dean of the Faculty of Law, University of Windsor and Prof. James of the same faculty. There was a stimulating overview of the use of existing legal doctrines, such as tort remedies, and their limitations. Speakers included Ken Cooper-Stevenson of the University of Saskatchewan, Mayo Morgan of the University of Toronto and Alfred Brophy of the University of Alabama. Max Du Plessis from the University of Natal, Durban provided an analysis on the international perspective of the subject.

Day Two: Practice

The conference addressed the practice of reparations with the focus on case studies drawn from around the Commonwealth. These addressed specific wrongs and measured their success against the goals identified for the specific scheme. The discussions addressed the theoretical underpinnings of the schemes discussed on Day One.

The situation in Canada with the Aboriginal Healing Foundation, and problems associated with residential schools were discussed by Georges Erasmus, the President of the Aboriginal

Healing Foundation. Slavery reparation in the United States was addressed by Roy Brooks of the University of San Diego and his theory of 'Atonement' brought not only a new perspective to the topic, but also provoked much critical analysis and discussion. David Levine of the School of Law, University of Hastings also discussed the hurdles one must overcome to have successful reparation litigation in the United States. Warren Freeman of the Faculty of law, University of Natal, discussed South Africa's land reparation and apartheid legal issues whilst Kerry Howe from Massey University, New Zealand, enlightened the group on the "Waitangi Tribunal" and Maori treaty claims. The reparation efforts in Sri Lanka were addressed by Joe Silva of the Sri Lanka School of Law.

Day Three: Legal Education

Discussions focused on legal education issues. The importance of including a discussion on reparations in the law school curriculum was recognised with the real question being how to achieve this. Particularly important here was the presentation by John McLaren of the University of Victoria who demonstrated a programme he is involved in with teaching a legal history course over the internet through a collaborative link between several Canadian and Australian universities.

It was agreed that developing a similar electronic course on reparations should be encouraged and Jeff Berryman undertook to develop this on behalf of the Association.

Finally, I would like to acknowledge the financial assistance of the Canadian International Development Agency (CIDA) that enabled participants from Guyana, Vanuatu, Sri Lanka and South Africa to attend the conference.

ANNUAL REPORT ON THE ACTIVITIES OF THE COMMONWEALTH LEGAL EDUCATION ASSOCIATION

For the period 1 July 2002 - 30 June 2003

OVERVIEW

It gives me great pleasure to present the Annual Report of the Association for the year 1 July 2002-30 June 2003.

As the Highlights section below demonstrates, the year was one of the busiest ever with events spanning the Commonwealth. Full details of all activities are found in *Commonwealth Legal Education* but there are a few developments I would like to highlight here.

Perhaps the most significant achievement during the year was the re-establishment of the CLEA Chapter in India. With so many law schools in that country, the Association has been seeking to re-activate the Chapter for some time. We are indebted to Dr S Sivakumar of the Kerala Law Academy for taking responsibility for overseeing the project. This means the Association now has two active Chapters in the region: the South Asia Chapter headed by Joe Silva and covering Bangladesh, Pakistan and Sri Lanka, and the South Asia (India) Chapter. I very much hope we will be now able to expand significantly our activities in the region.

Another notable feature of the year was the publication of two new books, including the 3rd edition of our *Directory of Commonwealth Law Schools 2003-4*. Thanks must go to Cavendish Publishing Ltd for all their assistance both with the books and also for the continued publication of the *Journal of Commonwealth Law and Legal Education*. The *Directory* is very much the flagship publication of the Association that prides itself in keeping law schools up to date with the Commonwealth and legal education in the Commonwealth. As with our other publications, the *Directory* comes free of charge as part of our membership packages.

You will see from the accounts that we incurred a loss over the year. This was entirely attributable to the costs of conferences and on our publication programme. We were fortunate to receive considerable financial assistance from a variety of sources but the significant balance was drawn from our own resources.

This comes at a time when the Association faces another period of considerable uncertainty regarding funding. Changes in the manner in which the Commonwealth Foundation utilises its increasingly frugal resources means that the Association must look elsewhere to secure itself financially.

One means of reducing costs and increasing our profile is through distributing our materials and information electronically. With the re-vamping of our web site this will continue. Yet we must not forget that many law schools in the Commonwealth are still far from being part of the global village.

Whilst preparing the new edition of the *Directory of Commonwealth Law Schools* I was struck by the many law schools that lack a web site and even access to the internet. This highlights one of the ongoing major challenges for the Association: to meet the needs and interests of a very disparate membership.

At the General Meeting of the Association in June, members took a significant decision concerning future CLEA conferences. Regional conferences will be expanded in order to address specifically the concerns of law teachers in those areas. This will build on the considerable success of our regional conferences for West Africa and South Asia. It is also planned for the Association to play a greater role in the now biannual Commonwealth Law Conference.

The "Young" Commonwealth

It is a salutary reminder to note that the majority of Commonwealth citizens are less than 25 years of age. Quite rightly, the Commonwealth and Commonwealth Associations are seeking to address the interests and needs of young people. As an Association of and for legal educators, much of our work is obviously geared towards benefiting the ultimate "consumer": the law student. This commitment was emphasised during the year with the holding of the Commonwealth Law Students' Mooting Competition and, for the first time, a conference specifically for law students.

Finally I would like to thank the President of the Association, David McQuoid-Mason and the members of the Executive Committee for their continued support throughout the year. I would also like to acknowledge, in particular, four members of the Committee: Alexis Goh, for organising the Commonwealth Law Lecture Series; Ros Macdonald, our moot co-ordinator, for her outstanding work on the organisation and running of the law students' moot competition; Dr S Sivakumar, for organising the CLEA regional conference in India; and Jeff Berryman for organising the CLEA conference in Canada.

As ever, the Association is indebted to Siew-Kee Lim for her administrative assistance. Without her the work of the Association would rapidly grind to a halt.

Special thanks also go to Di Stafford, who left her post as the Director of the Legal and Constitutional Affairs Division at the Commonwealth Secretariat and thus her *ex officio* office as CLEA Hon Treasurer. She has been a tremendous supporter of the Association and helped strengthen the already close links that we have with the Commonwealth Secretariat.

John Hatchard
General Secretary, CLEA
August 2003

HIGHLIGHTS OF THE YEAR 2002-3

July

Publication of vol 1(2) *Journal of Commonwealth Law and Legal Education*

CLEA representation on Commonwealth Expert Working Group on developing "Commonwealth Guidelines for the Treatment of Victims of Crime".

October

Publication of vol 91 *Commonwealth Legal Education*

November

CLEA representation at the Commonwealth Law Ministers' Meeting, Kingstown, St Vincent & the Grenadines

Publication of *CLEA Directory of Commonwealth Law Schools 2003-4*

December

Re-launch of CLEA South Asia (India) Chapter

Holding of regional conference in Kerala

Holding of first ever law students' conference in Kerala

Launch of *CLEA Directory of Commonwealth Law Schools 2003-4*

January

Publication of the CLEA's second e-book *Curriculum Development for the 21st Century*

February

Publication of vol 92 *Commonwealth Legal Education*

Publication of vol 2(1) *Journal of Commonwealth Law and Legal Education*

March

Publication of *Law and Development: Facing Complexity on the 21st Century: Essays in Honour of Peter Slinn*

Launch of the *Law and Development* book at Marlborough House, London

April

Workshop on International Co-operation in Criminal Matters, University of the South Pacific, Suva, Fiji Islands

Seminar on "Developing the Law Curriculum to Meet the Needs of the 21st Century Legal Practitioner" Commonwealth Law Conference, Melbourne, Australia

Commonwealth Law Students' Mooting Competition, Melbourne, Australia

Commonwealth Law Lecture given by Professor Helen Gamble, Melbourne, Australia

CLEA seminar on legal education at the Annual Conference of the Association of Law Teachers, University of Maastricht, Holland

May

CLEA representative attends meeting of Commonwealth Secretary-General's Ministerial Group to "distil the essence" of the Latimer House Guidelines

June:

Meetings of the CLEA Executive Committee and a General Meeting at the University of Windsor
CLEA Conference on "Reparations - Theory, Practice & Legal Education" held at the University of Windsor

Publication of vol 93 *Commonwealth Legal Education*

MEMBERSHIP OF THE CLEA EXECUTIVE COMMITTEE

At their June 2003 meeting at the Faculty of Law, University of Windsor, the CLEA Executive Committee made a series of recommendations regarding the filling of vacancies on the Committee. These that were accepted at the subsequent CLEA General Meeting. The following appointments/re-appointments were made:

South Asia (India)

S Sivakumar of the Kerala Law Academy.

South Africa

David McQuoid-Mason of the University of Natal

West Africa

Seth Bimpong-Buta of the Ghana Law School

The Caribbean

Keith Sobion of the Norman Manley Law School, Jamaica

Ad hoc members

It was agreed to invite both Alexis Goh and Jeremy Cooper to remain on the Executive Committee as ad hoc members with special responsibility for the Commonwealth Law Lecture Series and the CLEA web site respectively.

Hon Treasurer

Following the departure of Di Stafford, the position would remain vacant until the appointment of the new Director of the Legal and Constitutional Affairs Division at the Commonwealth Secretariat who would then become the *ex officio* Hon Treasurer.

CLEA EXECUTIVE COMMITTEE AND GENERAL MEETINGS

The CLEA Executive Committee met at the Faculty of Law, University of Windsor, Ontario, Canada on 12 June 2003. A General Meeting of the Association was held on 14 June 2003 at the same venue.

Highlights of the General Meeting

- The development of the CLEA web site was noted with pleasure. It was urged that development and expansion of the site should be a priority for the Association
- It was agreed to hold a regional conference and student law conference in Bangladesh, probably in early 2004
- It was agreed to hold another CLEA Law Student Essay competition. Joe Silva agreed to organise the event

- It was agreed to ask Ros Macdonald to pursue the development of the environmental law curriculum and a project on the use of Plain English

In view of the fact that the Commonwealth Law Conference (CLC) was to be held every two years and the desirability of working closely with the Commonwealth Lawyers' Association and the Commonwealth Magistrates' and Judges' Association, it was agreed that the Executive Committee examine the feasibility of holding the main Commonwealth Legal Education Association conference as part of (or immediately before) the CLC. This would enable more law teachers to attend the CLC. Concern was expressed about the very high registration fees charged at the CLC and it was agreed to take this matter up with the CLA.

It was also agreed to hold regular regional CLEA conferences as these had proved very popular and enabled topics of regional importance and interest to be discussed.

It was also agreed that the Association would support the call from the Community of Democracies for a "UN Decade of Democracy Education".

ADMINISTRATION OF THE ASSOCIATION

John Hatchard remained as General Secretary of the Association with Siew Kee Lim as his administrative assistant. Both work on a wholly part-time basis.

MEMBERSHIP AND FINANCIAL REPORT

During the year, the Association received funding towards its various projects as follows:

Commonwealth Law Students' Moot Competition:

Australian Bar Association
 Commonwealth Foundation,
 Commonwealth Lawyers' Association
 Law Institute, Victoria
 Queensland University of Technology

Commonwealth Law Lecture
 University of Western Sydney

CLEA Conference, University of Windsor
 CIDA
 University of Windsor

International Co-operation in Criminal Matters workshop, Fiji Islands
 Commonwealth Fund for Technical Co-operation

CLEA Regional Conference, Kerala
Commonwealth Foundation

Some funding for the administration costs of the Association was also provided by the Commonwealth Foundation.

It is pleasing to report that membership and other income also increased. However, the involvement of the Association during the year in three major conferences and other international meetings plus expenses incurred in developing the publication programme were a considerable drain on resources.

The Executive Committee is well aware of the need to improve finances and continues to work hard in this direction. Nevertheless, the fact remains that more must be done to secure the financial stability of the Association.

The Association has sought to pursue its membership drive in two main ways:

1. To introduce different membership rates to take into account regional variations
2. To devise an attractive membership package.

The Association remains indebted to the Commonwealth Foundation for its continued financial support and to the Commonwealth Secretariat for its support in kind. The Association is also indebted to the many people who provide voluntary assistance. Particular thanks go to Peter Slinn who continued to represent the Association at a number of important meetings. Without such assistance, most of the activities would have been impossible.

CLEA Balance Sheet at as 30 June 2003:

<i>Assets</i>	£	£
Cash at bank - Current Account	(5,060.00)	
- Deposit Account	15,588.47	<u>10,528.47</u>
 <i>Represented by</i>		
<u>Accumulated Fund</u>		
Balance B/Fwd as at 1 July 2002	13,740.13	
Less: Deficit for the year	3,211.66	<u>10,528.47</u>

CLEA ACTIVITIES

The activities of the Association are based on the Plan of Action that covers six themes namely:

- Developing human resources
- Developing non-human resources
- Curriculum development
- Professional training
- Strengthening links between law schools
- Strengthening clinical legal education and law clinics

The highlights of the Association's activities during the current year are provided below. Full details are set out in our regular publication *Commonwealth Legal Education* and on our web site.

CONFERENCES AND MEETINGS

"Legal Education Reforms for Transnational Practice" Kerala, India

The CLEA South Asia Regional Conference took place between 28-30 December 2002. The Chairman was Prof. (Dr.) N.R. Madhava Menon and the Organising Secretary was Dr S Sivakumar. There were participants from Sri Lanka, Bangladesh, Pakistan and India. This was an event of considerable significance for the Association as it marked the re-launch of the CLEA South Asia (India) Chapter. An important innovation was to combine the event with a Law Students' Conference.

There were 160 participants at the Main and Students' Conferences representing four nations of Commonwealth South Asian region.

13th Commonwealth Law Conference, Melbourne, Australia, April 2003

The CLEA was represented by David McQuoid-Mason, Ros Macdonald, Alexis Goh, Peter Slinn and John Hatchard. The Association shared an exhibition stand at the main conference centre with the Commonwealth Lawyers' Association and the Commonwealth Magistrates' and Judges' Association.

The Association was involved in three main events: the organising and running of the 7th Commonwealth Moot Competition (see below), the holding of the Commonwealth Law Lecture and the organising of a session on legal education at the main conference.

As its contribution to the conference theme of "The Legal Profession and Its Future", the Association's session was entitled "Developing the Law Curriculum to Meet the Needs of the 21st Century Legal Practice". The four papers delivered were by Sally Kift (Queensland University of Technology); Tanya Sourdin (La Trobe University); Gary Slapper and Emma Bland (The Open University, UK); and David McQuoid-Mason (University of Natal). John Hatchard chaired the session.

"Reparations- Theory, Practice and Legal Education" University of Windsor, Ontario, Canada, 12-14 June 2003

The Association's own conference was hosted by the Faculty of Law, University of Windsor. The event was organised by Jeff Berryman, the CLEA EC member for North America, and attracted participants from 24 universities and institutions from around the Commonwealth and the United States.

Commonwealth Law Ministers' Meeting, Kingstown, St Vincent and the Grenadines, November 2002.

Commonwealth Law Ministers held their triennial meeting in St Vincent and the Grenadines to which the CLEA, Commonwealth Lawyers' Association and Commonwealth Magistrates' and Judges' Association were invited to send observers. John Hatchard represented the Association.

Association of Law Teachers, 38th Annual Conference

Selina Goulbourne, the EC Member for Europe, organized a session on legal education.

PUBLICATIONS

The publication programme is now a key part of the work of the Association.

Books

CLEA Directory of Commonwealth Law Schools 2003-4

The 3rd edition of the Directory was published in November 2002 and was launched at the December 2002 CLEA regional conference in India.

The Directory is the CLEA's flagship publication. It contains an individual entry for over 500 Commonwealth law schools, including full contact details, courses offered, law journals published and research centres. The Directory also contains full details of the activities of the CLEA together with a major section devoted to law in the Commonwealth. This includes copies of the major Commonwealth instruments and Commonwealth activities of particular interest to law teachers and practitioners. The final section lists research centres and law journals by area of interest.

Facing Complexity: Law and Development in the 21st Century

This book is based on papers given at the June 2001 co-CLEA sponsored Cumberland Lodge conference on Law and Development. The volume is in honour of the CLEA Vice-President, Peter Slinn, is edited by Amanda Perry and John Hatchard.

The Book Launch took place in the splendid surroundings of the Blenheim Saloon at the Marlborough House. The Association is particularly grateful to the Commonwealth Secretariat for hosting the event.

e-books

The *e-books* programme was launched in 2001 and is designed to enable books and other materials to be accessed quickly and cheaply by law schools around the Commonwealth. The first

book *Legal Education and the Administration of Justice in West Africa* appeared as a CD Rom and is available on the CLEA web site.

The second in the series entitled *Curriculum Development for the 21st Century* was published as a CD Rom in January 2003.

CLEA Newsletter

Commonwealth Legal Education appeared three times during the year under the editorship of the General Secretary. Each issue appeared on schedule and went to CLEA members as well as to all known law schools and law libraries in the Commonwealth.

Commonwealth Journal of Law and Legal Education

This was the second year of publication of the Association's journal. Gary Slapper and Matthew Weait of the Open University remained as the Joint Editors.

CLEA Web Site

I am pleased to report that thanks to the very kind offer of the UK Centre for Legal Education based at the University of Warwick, the web site is now housed with the Centre and is currently being updated and expanded.

COMMONWEALTH LAW STUDENTS ACTIVITIES

7th Commonwealth Law Students Moot Competition

The Commonwealth Law Students Moot Competition took place in Melbourne, Australia in April 2003. The Association was able to fund, with the assistance of the Commonwealth Foundation, a number of competitors. A total of nine teams competed representing the following regions: Australasia, North America, the Caribbean, Europe, West Africa, South Asia (India), Southern and Eastern Africa, South Pacific and South Asia. The final was between India and the United Kingdom with victory going to the latter and with it the Turnbull Shield.

Much of the enormous success of the competition is due to the work of the CLEA Moot Co-ordinator, Ros Macdonald. The commemorative plaques for the finalists were kindly donated by the Commonwealth Lawyers' Association whilst the book prizes were kindly donated by Cavendish Publishing and Jordan Publishing.

1st Law Students Conference

On the topic of *Global Legal Education: Issues and Challenges*, the conference was attended by law students from Bangladesh India, Pakistan and Sri Lanka.

OTHER ACTIVITIES

Commonwealth Legal Education Association Research Centre

Work on establishing the Commonwealth Legal Education Association Research Centre at the University of Buea, Cameroon continues.

Curriculum Development Programme
Transnational crime course project

The joint project CLEA/Commonwealth Secretariat project on transnational crime continued with a training course held in April 2003 at the University of the South Pacific in Suva, Fiji Islands. This was attended by law teachers from Australia, Fiji Islands, New Zealand, Papua New Guinea and Vanuatu. The Association is extremely grateful to Kim Prost of the Criminal Law Unit, Commonwealth Secretariat for running the course.

Work is ongoing to assist law schools include aspects of the course into their programmes.

Human rights curriculum for the Commonwealth

Work on this curriculum continued with more material being added to the web site.

Commonwealth Law Lecture Series

The first series of Commonwealth Law Lectures came to an end during the year.

The Association is indebted to Alexis Goh of the University of Western Sydney for her role of "Series Co-ordinator". The lectures will be published in book form by Cavendish Publishing Ltd on behalf of the CLEA in 2003. It is hoped to start the second series in 2004.

Continuing work on the Latimer House Guidelines

At their Meeting in November 2002, Commonwealth Law Ministers discussed the Latimer House Guidelines. It was agreed to refer the matter to a small group of Ministers to be convened by the Commonwealth Secretary-General with a view to "distilling the essence" of the Guidelines. This meeting took place in London in May 2003. The CLEA was invited in an observer capacity and was represented by with Peter Slinn.

It is hoped that the document emanating from the ministerial group entitled *The Commonwealth Principles on the Accountability of the Relationship between the Three Arms of Government* will go forward for approval by Commonwealth Heads of Government at their Meeting in Abuja, Nigeria in December 2003.

Developing Commonwealth Guidelines for the Treatment of Victims of Crime

In July 2002, the Human Rights Unit of the Commonwealth Secretariat convened an expert group at Marlborough House in London. It was tasked with drawing up a series of "Best Practice Guidelines for the Treatment of Victims of Crime".

The Expert Group contained several CLEA members, including: Selina Goulbourne (University of Greenwich); Joe Silva (Sri Lanka Law College) and Robin Palmer (University of Natal).

Commonwealth Human Rights Initiative

The CLEA continues to support the work of the CHRI. During the period in question, the Association was represented on the CHRI Trustee Committee by and Peter Slinn.

JOURNAL OF COMMONWEALTH LAW AND LEGAL EDUCATION

The Association's own journal, *Journal of Commonwealth Law and Legal Education* is in its second year. Volume 2(2) has been published and available free of charge to all CLEA members as part of their membership package.

Articles in the current issue: "A Tale of Two Sectors: Dynamic Curriculum Change for a Dynamically Changing Profession" **Sally Kift** (Queensland University of Technology); "Legal Education, Internationalisation and African Law Schools" **Muna Ndulo** (Cornell Law School); "Kadis (Judges) of the Sharia Court of Appeal: The Problems of Identity, Relevance and Marginalisation within the Nigerian Legal System" **A.A. Oba**; "Land Titling and Urban Development in Developing Countries: The Challenge of Hernando De Soto's *The Mystery of Capital*" **Robert Home**; "Incorporating Transnational Crime Issues into the Law Curriculum: The Commonwealth Approach" **John Hatchard**

As the new volume illustrates, the *Journal* publishes a real diversity of articles both as regards topics and jurisdictions. It is a fully referred journal and we invite readers to submit articles and notes. Raymond Arthur has now been appointed Book Reviews Editor.

All correspondence should be addressed to: The Editors, JCCLE, The Open University, Law Programme, Walton Hall, Milton Keynes MK7 6AA, UK. E-mail: e.bland@open.ac.uk

One of the features of the *Journal* is the lively and thought-provoking Editorials. That in Volume 2(2) is no different:

LEGAL EQUALITY AND ECONOMIC INEQUALITY

Gary Slapper

One of the primary virtues of law is that it is supposed to apply equally to all within its jurisdiction. If rules are created in a democracy, and applied evenly across society, then law can be seen as a civilised system for ordering human affairs. In general, it is better to be ruled by rules than ruled by a tyrant. The former system offers for its citizens clarity and predictability whereas in the latter case, where the will of a tyrant is the law, uncertainty and unpredictability prevail.

Dictators and autocrats can rule in an erratic or capricious way, and often do so with all the terror, cruelty and insecurity that such a regime entails for the subjugated population. In the modern world, people feel much more comfortable when being compelled to do something (like file a tax return, drive within the speed limit, or respect human rights) by a democratically enacted law applying to everyone than by being commanded to do so by the diktat of an unelected or unaccountable ruler.

It is important, however, to recognise that although law can be seen as an equalising system that enhances and secures the civil life of populations, it often struggles in circumstances where there is a marked economic inequality among the population. In such societies, any equity that the law purports to exercise is discredited by stark inequalities in a population. This point was made in a particularly sharp way by the French writer Anatole France who noted, in 1894,

"the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

We live, six billion of us, on the same planet but yet in very diverse circumstances. We exist in a world where palaces cast shadows over pauperism. The economic differences between the haves and have-nots (both within many Commonwealth countries, and between some Commonwealth countries) is so pronounced that the respective rich and poor populations look like they are peoples from different historical epochs. The celebrated English cricket commentator, John Arlott, was once asked by officials in apartheid South Africa to fill in a form which, among other things, asked him for his race. He wrote down "human" and refused to change it. We are one people but the conditions we live in vary greatly. Most people on the planet do not have a toilet. While one third of the world's population over eats, another third is malnourished. A few years ago, the United Nations FAO released statistics showing that 30,000 children were dying every day of malnourishment-related conditions. That fact is repellent enough but it takes on an even more discomfiting dimension when one considers that, as from this year, clinical obesity is the number-one unnatural killer in the United States.

Swaziland provides an illustration of how far the legitimacy of a system of social governance can be attenuated by economic factors. In this Commonwealth country, two-thirds of the population live below the poverty threshold. The unemployment rate stands at 45 per cent of the workforce, and the country is one, where, along with Zimbabwe, Zambia, Malawi, Mozambique and Lesotho, over 14 million people are at risk of starvation. One in five of the adult Swaziland population is HIV-positive. Yet, although the national annual health budget is only £12.6m, the King of Swaziland, 35-year-old Mswati III, recently made arrangements to purchase a new private jet costing £28m.

Even if it had a legal system in which constitutional democracy and the rule of law were embedded, the economic divide in Swaziland would mock the legitimacy of any system of government wanting to exercise power on behalf of the whole community. However, things are worse than that. The situation is exacerbated by the open contempt of the ruling élite for the rule of law. When the country's most senior judge, Chief Justice Stanley Spire, refused to dismiss a case brought against the King for allegedly abducting an 18-year old girl to be his wife, the King sacked the judge. There have been no elections in Swaziland since 1968, and political parties have been banned since 1973.

John Rawls, who died in November 2002, was one of the great philosophers of the 20th century. One of the central parts of his work was on the theme of "justice as fairness". Following from the philosophies of John Locke and Jean-Jacques Rousseau, and developing the notion of a "social contract", Rawls posited the principle that in order to test whether social arrangements are fair,

we must ask whether people would have signed up to an original agreement articulating “the principles of justice for the basic structure of [that] society”. These are:

“...the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social co-operation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.” (Rawls, 1971: 243)

People, though, might hypothetically sign up for all sorts of things that they do not really want. They might sign up for a society founded upon the principles of slavery if they were under sufficient duress to do so. Also, people might decide whether to sign up for a type of society according to how well it suited any relevant feature they saw themselves as possessing. Thus a person who was very strong, or clever, or disabled, or atheist (or all of these) might look at the blueprint of a posited society to see how well off and well treated such a person would be in such a society.

To counter such tactics, and to make the decision-making more objective, Rawls introduced the idea of a “veil of ignorance” to cover those who were deciding whether any given society was one for which they would sign up. So, when they came to choose the basic principles of justice, people, we have to imagine, would not know their own characteristics. They would then have to opt for a society that they believed would give them the best life if they were, because of their personal circumstances, in the worst position.

The hub of the theory comes in the contrast to the way we live today. Rawls argues that:

“...each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair.” (Rawls, 1971: 244)

This theory is highly contentious and has generated a response of over 5,000 books and articles. It has provoked counterblasts from right-wing and left-wing political theorists, and a myriad of jurists and philosophers. Whatever one’s detailed analysis of Rawls’s theory, however, it is worth pondering what people would say if they were presented with an accurate description of life in some parts of today’s Commonwealth, and asked whether they would like to become members of such societies without knowing in advance what status within the society they would occupy. What if, in respect of a number of countries, you found many facets of the society attractive, and so notionally signed up for it, but then found that when the “veil of ignorance” was lifted, you were a man or woman with several children, a partner who had died from AIDS, and no income? What if you were a political opponent of the government, or a gay or lesbian person, or a trade union member, or a member of a minority ethnic group?

King Mswati III of Swaziland recently resisted social and legal change with these words:

"Although the whole world is preaching democracy, it does not mean we have to follow them. Democracy is not good for us, because God gave us our own way of doing things."¹

Swaziland is a stark case of social injustice but it is not the only country among the Commonwealth's 54 that can be put into such a category. The question is for how long the peoples of the Commonwealth will tolerate such a state of affairs.

References

Rawls, J (1971) *A Theory of Justice*, Cambridge, MA: Harvard University Press.

¹ Leyla Linton 'Democracy no good for Swaziland', *The Independent*, 21 April, 2003

THE LATIMER HOUSE PROCESS

The Latimer House Guidelines were discussed by Commonwealth Law Ministers at their November 2002 Meeting in Kingstown, St Vincent and the Grenadines. It was agreed that the Commonwealth Secretary General convene a small group of Law Ministers to review and develop principles based on the Guidelines. Following the meeting of the group in May, a draft was agreed upon and this was circulated to other Law Ministers for comment. The latest draft is as follows.

COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT

REVISED DRAFT
25 June 2003

Commonwealth Heads of Government warmly welcome the contribution made by the Commonwealth Parliamentary Association and the legal profession of the Commonwealth represented by the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association to further the Commonwealth Harare Principles.

They acknowledged the value of the work of these Associations to develop the Latimer House Guidelines and resolve, in the spirit of those Guidelines, to adopt the COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT.

Objective

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country an effective framework for the implementation, by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

I The Three Branches of Government

Parliaments, Executives and Judiciaries are the guarantors/guardians in their respective spheres for the maintenance of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

II Parliament and the Judiciary

- (a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for the making of legislation and for the judiciary's responsibility for the application of the law.
- (b) Judiciaries and parliaments should fulfil their respective roles in the promotion of the rule of law in a constructive manner.

III Independence of Parliamentarians

- (a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.
- (b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

IV Independence of the Judiciary

An independent, impartial, and honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to an extent permitted by the law of each Commonwealth country.

To secure these aims:

- (a) Judicial appointments should be made by on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: -
 - equality of opportunity for all who are eligible for judicial office;
 - appointment on merit; and
 - that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.
- (b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;
- (c) Sustainable funding should be provided at all levels to enable an informed and competent judiciary to perform its functions to the highest standard;
- (d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit for discharge of their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent and vibrant legal profession is fundamental to the upholding the rule of law and the independence of the judiciary.

V Public Office Holders

- (a) Merit and proven integrity, regardless of disability, should be the criteria of eligibility for appointment to public office and, where relevant, to selection for election.
- (b) Subject to (a), measures should be taken, where possible, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

VI Ethical Governance

Ministers, Members of Parliament, Judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate codes for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

VII Accountability Mechanisms

(a) Executive Accountability to Parliament

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of public business.

Parliamentary procedures should provide adequate mechanism to enforce the accountability of the executive to Parliament.

(b) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principle of judicial accountability underpins public confidence in the judicial system.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, the law should provide for disciplinary procedures that are fairly and objectively administered. Where disciplinary procedures might lead to the removal of a judicial officer, those procedures should include the right to representation before an independent and impartial tribunal.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

(c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law and with the rules of natural justice.

VIII The law making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

- There should be adequate parliamentary examination of proposed legislation
- Where appropriate, opportunity should be given for public input into the legislative process
- Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

IX Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

- (a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances;
- (b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its reporting.

X Civil Society

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

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