

Law and Democracy in an Interdependent World

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I consider myself greatly honoured to be asked to address the inaugural meeting of the Friends of the Institute of Advanced Legal Studies. I have long admired the Institute and, if goodwill were to be the only qualification for addressing you today, I should consider myself entirely suitable. Alas, I fear that rather more is needed.

The Institute has indeed grown to flourishing maturity and has amply borne out the promise in its 1948 prospectus of "becoming the focal point for legal research for the UK and for the British Commonwealth". It has long possessed a remarkable and catholic library, containing material from over 150 jurisdictions, supported now by information technology and a phalanx of acronyms including LEXIS, SLS LIBERTAS, and the seemingly more approachable JANET. The Institute has developed an important and valuable responsibility by way of its support for the London University LLM programme, and by way of the courses and discussion groups with which it is associated. For my own part I have for several years admired particularly the courses run by Sir William Dale for government legal advisers, principally from Commonwealth countries, and I expect there are those present today who, like myself, have had some association with that enterprise.

Exactly as its founders must have hoped and intended, legal scholars from abroad and their counterparts in this country find a meeting point here. The Institute's latest brochure refers to the visit in 1988 by Professor Valery Savitsky, Deputy

Director of the Institute of State and Law, Moscow; and, by any standard, that evidently was a remarkable occasion. It was the ability and openness of the Soviet delegation, and their readiness to discuss the difficulties faced by legal reformers in the Soviet Union, that especially impressed those who took part. The high point of that visit was Professor Savitsky's address to the Institute before leaving to prepare for the 19th Party Conference, during which Mr Gorbachev significantly spoke of "contempt of court" as referring to attempts by the Communist Party to influence the judges.

Since then it is as though we have been watching in the Soviet Union the opening of buds upon a tree that has not flowered in living memory. We all earnestly pray that they will not be shrivelled by a returning frost. You can see so easily what it must mean to those concerned with law in countries emerging from rule by tyrants to be able to come to this Institute, and to be able to read, and think about, its publications. This is a noble cause to befriend. I congratulate you, the founder Friends, and I wish your enterprise the exciting success that I believe is within your grasp.

The concept of interdependence

I have already revealed something of the ideas that have led me to speak today about an interdependent world. A former Foreign Secretary, Michael Stewart, who died very recently once said "Mankind is a good word for a Foreign Secretary to have firmly fixed in his head". It is a good word for those who

study and serve the law to remember too - except that they today might be prudent to substitute for it Humankind. In so many parts of the world, but to us most notably of course in Eastern Europe, encasements are falling away. Those who from within have brought this about now find themselves liberated, certainly, but exposed and possibly weak; as it were, gasping from their exertions amidst the ruins of their former prisons. They depend for direction, instruction, and protection from their own inexperience, upon those of us who have been spared what they did experience. Lech Walesa said to our own Foreign Secretary last December that he and his fellow amateurs (as he put it) had shown the professionals that the impossible was possible. The rest, he said, was up to the professionals. Perhaps never have the times more convincingly reflected Pascal's observation - "Plurality which is not reduced to unity is confusion; unity which does not depend on plurality is tyranny".

I believe it to be a responsibility for professional lawyers to help those people who depend upon us to establish in their reborn countries that matrix of expectations that we characterise as the rule of law. Today I shall first suggest that it is a dangerous mistake to suppose that for the rule of law to be established it is only necessary for the rule of the majority to obtain. Bullies have been known to have majority support. I shall argue that the rule of law derives from a culture which consists of values, connoting - to cite Professor Jolowicz - "a climate of legality and of legal order in which nations of the West live, and in which they wish to continue to live". I will offer some thoughts upon the notions that combine to compromise that culture. Then I will conclude by suggesting that there is a duty upon all who profess the law to give substance to the concept of interdependence, and I shall review ways in which that duty may increasingly be fulfilled.

The limitations of democracy

It is rather unfashionable to discuss the limitations of democracy these days, but I must do so at the outset. One can scarcely criticise those who have newly achieved democracy for their countries, after generations when their predecessors experienced only its denial, for believing that by their achievement they have also secured freedom under the law, and all that we are accustomed to enjoying with it. Even in our own native democracy, where we have grown used to that process described by Burke as "compromise and barter", whereby "we remit some rights, that we may enjoy others", constant vigilance is necessary to secure that those to whom the democratic process has duly and temporarily accorded power are reined in by the predominating influence of what we may call propriety. In my experience the reins need to be attached to a curb rather than a snaffle.

For our own part, we have been content not to press theoretical principles to logical conclusions: that is regarded, a trifle loftily, as rather un-English mistake, and the true reason for the avoidable and unnecessary demise of King Charles I. That is all very well: in this country we can afford not to define precise relationships within the State, since our experience of democracy has broadly coincided with our experience of the rule of law, and it is comfortable to assume that the first has led to the second. And it is no doubt true that a democratic society is less likely than another to cause or permit oppression, because it is likely that its legislature will be answerable to the general climate of opinion, which may generally be expected to uphold what is fair and just.

But by no means always. Societies may succumb to hysteria, our own not excepted. We read of an ugly epidemic of that nature at the outset of the First World War, when innocent people with

any perceived German connection at all were often treated most unjustly. Democracy alone can provide no sure safeguard against a majority that may be motivated by ill-will, or gripped by hysteria, or simply by fear. I vividly remember travelling in the USA in 1953, debating at universities when Senator McCarthy was in his evil and alarming prime, sustained by the Committee for Un-American Activities. Properly regarded, of course, that Committee itself should have been seen as the most unAmerican activity of all. In this country its emissaries, Messrs Cohn and Shine, were viewed incredulously and at first hilariously. But in America I met real fear, real suppression of freedom of expression, and an avid welcome for the modestly liberal and no doubt callow opinions that I expressed in debate about how communism should not be suppressed, but allowed and indeed compelled to compete in the open market for ideas; a welcome that was pathetic in its gratitude.

I have never forgotten the impact this made on me. Nor the fact that American citizens were ultimately protected from such injustice as arbitrary dismissal from public employment at that time, not through the intervention of an independent judicial review of executive action, for example, but through the courage of the broadcaster and journalist Ed Murrow, who bust McCarthy open.

I look back on that period as one of aberration in the history of that great country, but one that illustrated two things. First majority opinion can be more crushing than any law if it identifies and condemns a current heresy of which it is afraid. Secondly, to adopt the famous remark of Mr Justice Holmes, if there is any principle that more imperatively calls for attachment than any other it is the principle of freedom of thought - not free thought for those who agree with us, but freedom for the

thought we hate.¹

The culture of fairness

The influence of democracy on freedom is of course in general highly beneficent: but for a democratic society to be truly free it has to be underpinned by law, which must itself be applied by a judiciary if possible steeped in the culture of fairness but in any event independent of the executive, and immune from dismissal by it.

Without a judiciary that is truly independent and sustained in its independence the Halls of Justice are built on sand. It is of the most vital importance that we help our brethren in Eastern Europe and more widely to grasp these things. I had the good fortune to visit the People's Republic of China last year, with the Director of Public Prosecutions, whom by statute I superintend, although not when in China. We were the guests of the Supreme People's Procurator of the Republic, by whom we were received with the utmost cordiality and consideration. In the course of my visit I was deeply impressed by the quality and content of much of their statute law, all made in the space of 10 years since the end of the Cultural Revolution, which is now characterised as period of "mistakes" and which among many others had left a legal desert. The legislators had to start from scratch. Some of their law was in some respects more liberal than our own - notably the law of governing arrest and detention before charge. The staff of the Procuratorate seemed to me to have a real understanding of the importance of independence from the police. All, however, the judges included, were answerable to the Party.

Alas within 2 months came the massacre of Tiananmen Square and the repression that has followed it - a repression to which the Procuratorate and the judiciary

have tragically proved incapable of making any effective resistance. The culture of fairness proved capable of being simply wiped away, like mildew on a forgotten shoe. It could not stand against the Party bosses.

Yet since earliest times, at least since Solon the lawgiver, though by no means consistently, law has been used to serve the interests of fairness, and thus served to prevent the stronger man from having his way, rather than to smooth his path. "Thence the gift of law, lest the strong men get away with everything", says Ovid, although as usual in about half the number of words: "Inde datae legis, ne firmior omnia posset"². This is, I suggest, now to be regarded as a principle of legality itself. Wherever it may be found in operation it may be recognised as illustrating the rule of law.

The substance of the rule of law

We are all familiar with the meaning ascribed by Dicey to the rule of law - the predominance of regular law, and the absence of arbitrary power on the part of the Government; equality before the law, that is to say the subjection of everyone to the ordinary law of the Realm, and their amenability to the jurisdiction of the ordinary tribunals; and the fact that the constitution is the result of the ordinary law of the land. This formulation was an appropriate factual summary of basic principles of constitutional law as they stood in this country in 1885, and it still exerts a powerful influence among English lawyers. But, we are concerned today with the rule of law understood in a wider prescriptive sense than one which is merely descriptive of features of the British constitution. The Universal Declaration of Human Rights in 1948 declares that "human rights should be protected by the rule of law", as does the preamble to the European Convention on Human Rights. This speaks of

"The Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law".

Elements of this wider conception are found in the French "principle of a legalite", and in the German thesis of the Rechtsstaat, a system of government in which the acts of agencies or officials of all kinds are subject to the principle of legality, and in which procedures are available to interested persons to test the legality of governmental action and to have an appropriate remedy where the act in question fails to pass the test. As Professor Jolowicz pointed out as long ago as 1957, when he acted as secretary to the famous Chicago symposium on the Rule of Law as Understood in the West, "the rule of law is an expression of an endeavour to give reality to something which is not readily expressible".

It is based, first, upon the liberty of the individual, and has as its object the harmonising of the opposing notions of individual liberty and public order, the notion of justice maintaining a balance between these two. Secondly, the rule of law rests upon the supremacy of law over the Government, so that the individual may be protected from arbitrary government. Finally, Jolowicz made the all-important point, to which I have already alluded, that the rule of law does not depend only on contemporary positive law. While it may indeed derive expression from positive law, essentially it consists of applied values. Values provide the keystone.

If we speak to them of values, and a shared climate of legality, we can surely mark out common ground with our neighbours who follow a civil law tradition. Increasingly I think we shall also be able to reach out to find such common ground with the countries of Eastern Europe. As much may be

illustrated by the recent publication of the following propositions:

"The Party stands for the earliest formulation of legal acts guaranteeing the rights and freedoms of citizens".

"The Party will uphold a higher role of the court of law in protecting civil rights, the establishment of public-state commissions exercising law enforcing activities".

"The separation of legislative, executive and judicial powers is fundamentally important to the government's efficiency".

The Party in question is the Communist Party of the Soviet Union, which published this platform in February of this year.

A climate that sustains and respects the rule of law

But what are the ingredients of a culture by which a civilised society maintains and nurtures a respect for the rule of law? Just as St Paul reminds us that the body is made of many parts, with none more important than another, so I believe respect for the rule of law rests on the harmonious interaction of a number of themes. They include the engagement of the public in respect for legal principle; the education and organisation of the professions; economic organisation based on freedom; the accountability of decision makers, and the existence of public confidence in the judiciary's independence.

- *The engagement of the public*

For a climate of legality to be built up, the general public must understand and generally accept the broad legal principles on which the body politic is founded. If the public takes no interest in its laws, or is deterred from understanding their

essential principles by thickets of technicality and obscure wording or even unavailability of the very texts themselves, the rule of law is sure to suffer. Jonathan Swift illustrated this principle by parody in the account of Gulliver's Journey to Brobdingnag, in which it is found that:

"No law of that country must exceed in words the number of letters in their alphabet, which consists of two and twenty. But indeed, few of them extended even to that length. They are expressed in the most plain and simple terms, wherein those people are not mercurial enough to discover above one interpretation. And to write a comment upon any law is a capital crime. As to the decision of civil causes, or proceedings against criminals, their precedents are so few, that they have little reason to boast of any extraordinary skill in either."

I would not suggest in these surroundings that commenting on the law should be similarly curtailed. Rather fewer shelves would be needed in the library of this Institute. Clarity and comprehensibility in the law are to be striven for, no less than certainty. In Brobdingnag the people were not "mercurial" enough to discover above one interpretation. That is scarcely true of our own times, and we experience a tension between, on the one hand, the avoidance of ambiguity by the exhaustive statement of the law, and on the other the need for clarity and simplicity.

Examples in our own statute book are legion. The word "obtained" was left undefined in the Company Securities (Insider Dealing) Act 1985 in relation to the obtaining of information. You may think that the meaning of the word "obtain" in that context was simple and clear. That had evidently been Parliament's view. But argument demonstrated that two possible meanings could be perceived. The House of Lords

ultimately upheld the preference of the Court of Appeal, who at my instigation, had overturned the trial judge who had held that you do not "obtain" information unless you acquire it by dint of purpose and exertion. It might have been possible to have spelled out the draftsman's intention more clearly, but I doubt that the King of Brobdingnag would have approved the result.

Our own tradition has been to place a higher value on certainty than on generally accessible statements of principle. In many fields Parliament will not accept generalities in relation to the rights of citizens, but will demand detailed exposition on the face of the Bill, so that each detailed effect of the law can, as far as it may be foreseen, be debated within Parliament. The reining-in of executive pretensions inevitable leads to a need for detailed prescriptions by the legislature, or to the leaving of a wide measure of discretion to the judiciary to review the legality of executive action. In the field of public law, our own system contains examples of both approaches to this problem, as may be illustrated by planning or revenue law on the one hand, and the general development of administrative law on the other.

In other systems the balance may be different, as in the case of France where fewer prescriptions are made at the legislative level, but where administrative action is subject to much greater intensity of review - notably as the merits of administrative decisions - than would be applicable in this country. In both systems, however, the object is to cause the executive to act in accordance with legal principle, and by so doing to remove the scope for action that is arbitrary.

So clarity and comprehensibility as ingredients of the climate of legality contain an apparent contradiction. The

people will not be secure in their legal freedom unless arbitrariness in the exercise of executive power is constrained, but the methods of constraint may lead to the law becoming complex and remote, or obscure and unpredictable in its operation. A democracy has to support this tension, and evolve its own institutions by which it may be accommodated. The variety of institutions which the democracies have developed shows that what we share are not devices and techniques of government, but values.

- Education and organisation of the legal profession

I select as the next ingredient of that culture which preserves the rule of law the quality of a lawyer's education and training. As respect for legal principle is so much an attitude of mind, of conviction shared between those who practise or make the law, it must be carefully inculcated. Succeeding generations of students should still grapple with the works of Dicey and his critics, but such studies are now usefully enriched with comparative material from other common law and European States and, above all, by consideration of the European Convention on Human Rights.

More than 150 years ago de Tocqueville remarked that it was impossible to think of the English as living under any but a free government. For this to continue to remain true depends in no small measure on respect for legal and democratic values being renewed for each generation by means of education and example. Of course, any lawyer should have a technical expertise in his chosen field. Familiarity with the law of limitation of actions is necessary for lawyers practising in personal injury or building and construction work, as is the operation of the Police and Criminal Evidence Act for criminal practitioners. But the contribution of the law to the maintenance

of a democratic society cannot rest merely on technical expertise, because by itself this does little to articulate the values of a democratic society. Without the timely articulation of fundamental values by the lawyers, and the weaving of them by the judges into the fabric of the law, the forms of action in English law might still be ruling us from their graves, whilst our administrative law would have been stillborn.

Education and training lead me on to consideration of the organisation of the legal profession and the availability to the public of the legal services they need.

This has, of course, been extensively debated in this country since the publication of the Green Papers early in 1990 and the introduction of Courts and Legal Services Bill. I remarked on Second Reading of that Bill that, by virtue of the essentially adversarial nature of our procedure and the general absence of investigating powers of the court acting by its own motion, the courts in this country rely, perhaps to a unique extent, on the quality of the legal profession that serves both courts and public. The policy of Part II of the Bill is to remove unnecessary restrictions on competition for the provision of legal services, whilst maintaining the proper and efficient administration of justice.

It was encouraging to see agreement on both sides of the House on the broad aims pursued by the Bill. As one might expect, there was less agreement on the detailed method. Again, this is an area where shared values are of greater weight than organisational detail. No one could seriously argue that the rule of law does not operate in a democratic context in France, Germany, Australia or the United States, yet the organisation of their professions differs markedly in each of those countries, the essential factor common to all being the discharge of the primary, but twofold, duty owed to the

court and the client.

- A free market place for ideas

I choose as the next component in the climate of legality the link between economic organisation and political institutions. Recent history demonstrates a connection between individual freedom under law and a market-based economy, but I would never suggest that a 19th century economic liberalism was the only viable basis for the rule of law, or even an acceptable one. Nevertheless, it has been generally true that a broad distribution of economic power has tended to accompany political pluralism and individual freedom.

In a famous series of dissenting judgments in the 1920's, those redoubtable Supreme Court Justices, Louis Brandeis and Oliver Wendell Holmes, were apt to compare the freedom of speech within a democracy with the operation of a market. In Abrams v United States³ for example, they conceded that it might be "perfectly logical" to persecute the expression of opinions if one had no doubt as to one's premises or one's power, and to "express one's wishes in law and sweep away all opposition", but they balanced this positivist argument with these words:

"But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

This was Glasnost in the Jazz Age indeed. A market economy depends on the free exchange of information if it is

to function properly. If information is restricted, the market loses transparency and the corrective mechanism of competition operates, at best, imperfectly. Of course, freedom of speech - the right to receive and impart information - is not a mere commodity like a sack of potatoes. Rather it is, as the 1789 Declaration explains, "one of the most precious rights of man". Nevertheless, these rights operate in a natural harmony with the successful operation of a market economy. There is, at the very least, no essential contradiction between them.

By contrast, a command economy does not require the free exchange of information for its efficiency. The State must strive to be omniscient, and it requires the most detailed information as to the operation of a command economy, but this is in the nature of a one-way street and there is no special need for society at large to be able to exchange information freely. Short of a revolution, the public in a command economy has no inherent corrective mechanisms which it can operate. Accordingly, individual rights and freedoms do not bring any particular economic benefits. Indeed, it can be argued that such rights and freedoms obstruct the operation of the command economy and that the free exchange of information causes the command system to lose its cohesion. No doubt the policy of enforced collectivisation under Stalin was motivated by this perverse logic in the 1920's and early 1930's, and that hideously protracted episode provides an extreme example of the conflict of interest between the commanders and the commanded.

My proposition, then, is that if economic life is organised on the basis of a market, individual rights and freedoms are more likely to be preserved. Again, as with democracy itself, this is a matter of likelihood rather than guarantee.

- The accountability of decision makers

Turning now to the administration of justice, it is important for the climate of legality that the broad policies by which the law is enforced, and the resources devoted to it, should be matters for the fullest accountability to the electorate. In our dispensation, this is supplied by the accountability of the Lord Chancellor in the House of Lords and of the Law Officers in the House of Commons, either on behalf of the Lord Chancellor or in their own right as being responsible for prosecution policy or as the guardians of the law in the public interest. It is hard to imagine any limb of the powers of the State more invasive of personal liberty than the power to subject the individual to a criminal prosecution. It is, of course, possible - but hardly rational - to provide that any detected crime at all should be the subject of criminal proceedings. Besides being wasteful, I do not think the public would be content with such inflexibility. However, introducing an element of flexibility requires the exercise of discretion, and the risk of arbitrary power. In most, if not all democracies, decisions on prosecutions or other proceedings by the State are matters which are determined by the executive, with some measure of public accountability.

In my view, the best chance of sustaining public confidence in such a system is for a responsible Minister to be accountable to Parliament. By this means, the judgment of the executive as to where the public interest lies can be subjected to debate and questioning by the legislature. I do not believe that such judgments are properly left to the judiciary. Debate on such matters is, in today's political climate, tinged with imputation and accusation that the interest concerned is not public, but private or even party interest. To draw the judiciary into such debate would damage their impartiality, both in appearance and substance.

- Public confidence in the judiciary's independence

This leads me on to a further aspect of the climate of legality, which is the need for public confidence in the independence of the judiciary. In this context there is always a need for responsible restraint in the use that is made of the freedom of speech which is guaranteed by the rule of law. But governments, even of a benign persuasion, may themselves damage the perception of judicial independence by introducing legislation which draws the judiciary into determining questions of policy, rather than of law. It is principally for this reason that I would not expect a written constitution to be particularly effective or appropriate in this country.

I agree with the Report of the Select Committee of the House of Lords on a Bill of Rights which remarked that:

"In any country, whatever its constitution, the existence or absence of legislation in the nature of a Bill of Rights can in practice play only a relatively minor part in the protection of human rights. What is important, after all, is a country's political climate and conditions."

The political climate in this country has been one which has nurtured the concept of Parliamentary sovereignty, which in its classical formulation makes the Queen in Parliament the supreme source of law. Other societies have used a written constitution to mark a decisive break with a colonial past, as in the case of the United States or the Commonwealth of Australia, or as a means of reconstruction after a national calamity, as may be said of the Fifth Republic of France or the Federal Republic of Germany. For those states which provide for the constitutional review of legislation, a degree of politicisation of the judiciary is inevitable, as is shown by the intense debate over

appointments to the Supreme Court of the United States and the voluble speculation over whether a Justice is "liberal" or "conservative".

Happily for that great republic, the prestige of the court is so great and the responsibilities of the Justices so awesome, that political persuasions are subsumed in the burden of the office. It has not proved possible to predict the judgments of the Supreme Court by reason of supposed political persuasion of the Justices, as more than one President has found to his consternation. Whether such a system would work in this country will, I expect, be a subject for continuing debate, but what seems to me important is that in both this country and the United States, as well as the other democracies, the decisions of the judiciary should be accepted as based on objective application of the law, following open and free argument, and not on the basis of a concealed predisposition or prejudice. If this confidence be lost, it seems to me not to matter greatly whether a country's system provides for judicial control of both legislature and executive or of executive alone.

A recent example of the difficulties that may face the judges in determining issues of public policy is provided by R v Bow Street Magistrates' Court ex parte Choudhury, in which the applicant sought to persuade the Divisional Court that the offence of blasphemy should be extended to cover religions other than Christianity, so as to permit the granting of summonses against Salman Rushdie. The Divisional Court was not persuaded, Watkins LJ observing that "the mere fact that the law was anomalous or even unjust did not justify the court in changing it, if it was clear". Faced with such complex and difficult questions of public policy, the only safe course was to leave such matters for Parliament.

The demands of interdependence

- A role for common lawyers

If, as common lawyers, we can leave the shadow of Dicey behind us and visualise the rule of law in terms of shared values and a climate of legality, I believe we can look forward to a period of increasing and beneficial inter-dependence between legal systems, whatever their origins or ruling persuasions. The common lawyers have an unrivalled depth of experience on which to draw. The common law features more or less largely in one-third of the world. To echo Sir Frederick Pollock, its concepts are the rule of life "from the North Sea to the Pacific" and the "mould in which men's ideas of justice are formed". Within the Commonwealth it is, after the primacy of the Queen, probably the one common feature, the single tie that holds within the loosest bundle some 50 countries of various cultural traditions and economic and political organisation.

In the two meetings of Commonwealth Law Ministers, in Harare and recently in Christchurch, in which I have represented the United Kingdom, I have been rather moved by the strength and resilience of the shared common law tradition. It enables us to find common ground on the most testing of legal issues, such as sentencing, mutual criminal assistance, extradition, the right of silence and legislative drafting, to mention some of the subjects recently considered in New Zealand.

If our common law background can cope with the huge differences between North and South, we surely have some contribution to make to the reconciliation of East and West and their developing inter-dependence.

How, then, can this inter-dependence be fostered by the law? Commercial and private law have necessarily provided the

first legal links between widely differing societies. As Professor Goode has explained⁴, the English Maritime and Staple Courts and Courts of the Fairs and Boroughs determined disputes not by English domestic law, but according to the "general law of nations", and accepting the fact that the customs of merchants generated rights which required international recognition and which, for the stability of the European markets, needed to be interpreted in a broadly uniform fashion, with an overriding requirement of good faith. Even in the 13th and 14th centuries the exigencies of trade disregarded nationality or politics, and in our own time such concepts as bills of lading, negotiable instruments, copyright and patents are known to and recognised by nearly all countries of the world, whether capitalist or socialist. Increasingly, international trade is being governed by uniform laws proposed and developed by international institutions such as IMO or UNCITRAL.

- Judicial cooperation

Cooperation between judiciaries, in civil and commercial fields, also serves the demands of inter-dependence, and is developing quite rapidly. The recognition and enforcement of money judgments has a long history within the Commonwealth; the New South Wales Further Remedies to Creditors Act 1855 established the first stage in the first general scheme for judgment enforcement created anywhere in the common law world. More recently in Western Europe, there has developed the concept of giving full effect to civil and commercial judgments of all descriptions not limited to judgments awarding sums of money. The 1968 Brussels Convention between EC Member States, and the 1988 Lugano Convention between EC and EFTA States, also open up the possibility of cooperation between jurisdictions at the interlocutory stage, so that a plaintiff's legitimate claim is not defeated by the

movement of assets from one country to another.

The value of these provisions was shown recently in proceedings brought in France by the republic of Haiti to recover property held by the family of the deposed "Papa Doc" Duvalier. The English courts asserted jurisdiction to assist the French courts by granting a Mareva injunction in respect of assets held by the Duvalier family in England, even though the English courts had no substantive jurisdiction.

Cooperation on this close and continuing basis requires a degree of confidence in each other's judicial systems, which confidence one would expect between EC Member States. A similar cooperative regime is available under the Lugano Convention which is open to accession by third states. The two Conventions, taken together, institute a virtually uniform regime throughout Western Europe in this area, and one may hope for further accession by like-minded countries. The Conventions provide an illustration of Edmund Burke's thesis of "compromise and barter". The contracting states to the Conventions are obliged to limit the grounds on which they customarily assert civil jurisdiction but, in return, receive the assurance that their judgments will be enforceable and that their courts will not be reduced to beating the air.

Judicial cooperation in criminal matters, too, has proceeded rapidly. The Commonwealth has developed its own scheme for mutual assistance in criminal matters, and there has been considerable growth in cooperation to defeat drug-trafficking, including cooperation between this country and the Soviet Union. There is still much ground to cover.

- A shared respect for individuals

But underlying this cooperation there must be a shared respect for the rights of

the individual wherever he may live. Despite a common lawyer's scepticism of broad statements of principle, I must concede that the United Nations Universal Declaration of Human Rights and the Helsinki Final Act have had a considerable, even if indirect, effect. Of direct relevance to the UK was the European Convention on Human Rights which this country was the first to ratify. Of all international institutions, the European Court at Strasbourg is probably the one best known to popular opinion in this country, and I should be surprised if this were not also the case in the rest of Western Europe. There cannot be much doubt now that these instruments and institutions have had an effect in Eastern Europe and the Soviet Union. In all these countries, not even accepting Albania, where it must be startling indeed, a tide is now running strongly in favour of individual rights and freedoms, and away from the concentration of power and its arbitrary exercise. It is encouraging to see that the concluding document of the Conference on Security and Cooperation in Europe contains a statement confirming the universal significance of human rights and fundamental freedoms, and that respect for these

"is an essential factor for the peace, justice and security necessary to ensure the development of friendly relations and cooperation among themselves, as among all states."

Conclusion

It is, therefore, as amazed but delighted beholders that we find ourselves witnessing a benign explosion of liberating forces in Europe, the meeting point of the common law, the civil law and the socialist law traditions.

In half a century there has never been a more propitious time for hearts and minds to meet. So we must give the highest

priority to human contacts with our new colleagues in Eastern Europe and the Soviet Union in all fields and at all levels in the law. We must devise means whereby we can explain and proclaim the principles of our system and the moral values that are needed to underpin it. We must devise means by which the experience that is gained is shared and promulgated and we must be ready to offer help and counsel even before it is sought. To give our minds to all this has become a duty for all who profess the law, for judges, for practitioners, for academics, and indeed for those curious hybrids (a permanently endangered species) the Law Officers.

What a role there is here for this Institute especially. Let us each take care that in times to come we and our successors do not look back upon these days, when the Eastern sky was clearing and a free market in ideas was opening even amidst the rubble and the ruins of oppression, only to acknowledge ruefully that through lack of vision these higher opportunities were missed.

Notes:

¹US v Schwimmer 279 U.S. 644

²Ovid: Fasti Bk III

³250 U.S. 616 at 630

⁴Commercial Law p.32

The Chinese Digest of the Common Law

by Professor Derek Roebuck, City Polytechnic of Hong Kong

The Research Projects

Two research projects at the new law school of the City Polytechnic of Hong Kong may be of interest to members of the Institute. The first, a pilot study, was part of a more general project on the nature of the bilingual milieu in Hong Kong. Depending on the chosen definition, probably fewer than one out of ten of the inhabitants of Hong Kong are functionally bilingual, at least in English and Cantonese. They may speak more than one Chinese language but, for political reasons, those are always referred to as dialects. What matters is that the great majority do not speak the language of the law, the English Common Law, the only significant source of the legal system. The Basic Law, which will become the territory's constitution when it reverts to Chinese sovereignty in 1997, and for fifty years thereafter, enshrines Chinese as the official language -

whatever that will mean - and the English Common Law, amended by legislation, as the prevailing source of law.

The objectives of the pilot study were to investigate the methodologies needed to create in written Chinese a statement of the common law as it applies in Hong Kong and to test them by a substantial sample, a digest of the law of contract. When a further grant was received, to support the creation of a digest of the whole of Hong Kong's common law, the original research became in effect a feasibility study. That study is nearing completion, though the inquiries it has stimulated are not likely to be easily completed nor their interest quickly exhausted.

Strategy

Because we were determined to adopt as scientific an approach as we could