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The Common Law: Law for a Time, Law for a Place

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1. Mr David Coltart, the shadow Minister of Justice in Zimbabwe, visited Australia a few weeks ago. He spoke about the tragic situation in that country, where the poorest of the poor are oppressed by the Mugabe regime and obscene riches flow to those in government favour. Human rights are without protection and the economy is in free fall. The rule of law is moribund. Of course, the breaking down of the rule of law is a commonplace in every society in which tyrants impose their will. It is achieved either by denying the judiciary any effective jurisdiction or by making the judiciary the servile instrument of the executive government.

2. When we hear a powerful speaker describing the breakdown of law in his own country, we realize that we have hardly any appreciation of the destructive and corrosive force of a judicial power wielded in sympathy with political power, nor the depressing hopelessness of a people who have no effective remedy for injustice. In a society where the rule of law has no sway, remedies must be bought by corruption of the powerful. Liberty, which may stand in the way of power, is obtained only by subservience. Natural justice has no meaning; its place is taken by the adventitious will of the tyrant. Although we in Australia boast that we live under the rule of law, we seldom reflect on the laws, the traditions, the institutions and their personnel which make the rule of law the basic underpinning of our society. Nevertheless, Donald Horne says that the first of the civic values which most Australians would share is maintenance of the rule of law.

3. The rule <u>of</u> law is not the same as rule <u>by</u> law. There is a distinction to be drawn between them. Rule by law requires the courts to be the unreflective instruments of the political branches of government, or even to be a mere integer in the implementing of a political policy. It may be that Nazi Germany was ruled by law, many of Hitler's heinous policies being implemented by courts which applied laws framed in accordance with the prevailing ideology. The rule of law, on the other hand, seeks to do justice within the law; it operates when the courts are empowered to take account of the demands of justice in interpreting and applying the law and in exercising the discretions which they possess. The Cambridge academic, RWM Dias speaking of the application of legal rules, commented[1]:

"Rules do not of themselves decide disputes. Their structure, the fluidity of the meaning of words at their fringes and the possibility of making different statements to describe the same fact-situation combine to allow leeways to judges as to how they state, interpret and apply rules to facts. Likewise, it is commonplace that in this task they are guided by their sense of values according to which they balance the interests in dispute.

This explanation… makes it possible to relate judicial independence to the 'rule by law'/'rule of law' dichotomy. Where 'rule by law' obtains, the judiciary is a tool of government, which, along with others, reflects and implements official policies and interests. Where 'rule of law' obtains, judges are free to decide on values of their own, and the check on power derives from their being able to hold governmental

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1 RWM Dias:*"Gotterdammerung – gods of the law in Decline"* (1981) 1 Legal Studies 3 at 13.

interests in balance against others. In this way the British judiciary has built up its tradition of independence over the centuries"

There are many aspects to the rule of law and many conditions that must be satisfied before a system can be said to be entirely congruent with the rule of law. At base, there must be a separation of judicial power from the legislative and executive powers of government. Then the judges must be wholly independent – independent of government, independent of the rich and powerful, independent of pressure groups and ideologies. And the judges, whose task it must be to interpret and apply the law,[2] must be given a sufficient leeway by the law to allow its application so as not to work injustice in particular cases or in cases of a particular kind. If the judges do not have that leeway, issues which ought properly be decided by courts are effectively determined by the will of government expressed in a law created by government. Injustice is the inevitable result, and injustice leads to an erosion of the rule of law.

4. That is the evil to be seen in laws which deprive the courts of their ordinary jurisdiction – such as the restriction on the Federal Court's and Federal Magistrates Court's jurisdiction in judicial review under the Migration Act[3]. When courts are stripped of their jurisdiction over a particular subject matter, to that extent the subject matter is without legal control – an area of unbridled power. It is fortunate that s 75(v) of our Constitution reposes in the High Court a jurisdiction over the exercise of federal power that cannot be diminished by the political branches of government, though the burdening of that Court with cases that ought properly be decided elsewhere is unacceptable. The decision of the High Court in *Ex parte Aala*[4] and in *Plaintiff S157*[5] establish the limitation on legislative power to preclude curial challenges for jurisdictional error. There is evil to be seen also in legislation which prescribes mandatory or minimum sentencing regimes – regimes which remove a judge's ability to do justice in particular cases. Such legislation imposes a legislative judgment on a set of facts that, by tradition and by common sense, demand judicial evaluation.

5. These thoughts lead me to say something about three topics: first, the importance of the values which a judge brings to bear in decision-making and how that makes the role of the judge basic to the rule of law; second, the significance of values in the evolution of the common law; and, third, the critical importance of courts, constituted and working in accordance with the common law, to the peace and order of societies, especially if there is any concern about social stability.

6. The common law allows judges a leeway in rendering a judgment. But Mr Dias over-eggs the omelet in suggesting that judges "are free to decide on values of their own", although the context shows that he was speaking of those elements or stages in making a decision where more

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2 *Marbury v Madison* (1803) 1 Cranch 137 2 Law Ed. 60.

3 *Migration Act* 1958, ss. 475, 476

4 *Re Refugee Review Tribunal' Ex parte Aala* (2000) 204 CLR 82.

5 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

than one view is open. In a majority of cases, the value which affects a judge's decision is an ordinary community value – was the defendant negligent? What is a fair and reasonable price? Was the conduct dishonest? What is in the best interests of a child? Or, more controversially, what sentence would be just? In answering these questions, the judge reaches a decision in much the same way as a jury would reach its decision if the issue were to be determined by a jury. The judge draws on the same set of community values subject, however, to a qualification. Especially in sentencing, but in determining other issues as well, the value that the contemporary community would favour might be affected by prejudice or passion or might fail to take into account factors which the law declares to be relevant, for example, the prospect of reformation of an offender. The value which the judge applies is shorn of prejudice or passion and takes account of all factors that are legally relevant.

7. When we appreciate the way in which the common law underpins our society and depends on the judgment of the judge in the circumstances of individual cases, we can see how pivotal is the role of the judge in maintaining the rule of law. The judge is not a juridical robot. He or she has an active role to perform in every case. It may be in the evaluation of evidence, in determining the application of a rule of law (including a determination whether to distinguish a precedent), in exercising a discretion, in the granting or refusal of relief or in the imposition of punishment. The judge's active participation in the process is an integral element in the rule of law; it is an essential characteristic of the rule of law.

8. The work-a-day aspect of the rule of law may not be very glamorous, yet it is the role of the judge in the run of the mill cases in the trial courts which commends the rule of law to most of the people involved in litigation. These cases call for the judicial qualities of knowledge of the relevant legal principles, familiarity with the current community standards, a sound sense of justice, common sense and, of course, a robust independence and unquestioned integrity.

9. Sometimes I wonder if judges realize the pivotal role they play in creating and preserving the way of life that makes us proud to be Australian. Perhaps judges are depressed by captious criticism in some of the media, or the apparent indifference of the political branches of government towards the judicial branch, or the want of popular acclaim. It is easy for a judge to see himself or herself to be doing no more than shifting, Sisyphus-like, an ever extending case list, or repeating the same process day by day without public adulation or even public awareness. Yet a moment's reflection on what our society would be without a competent, dutiful, independent judiciary should be sufficient to convince the dispirited and the cynical of the importance of judicial work.

10. So I am privileged to join this Judicial Conference, to see again many old friends and colleagues and to say something about the primary trade tool of the Australian judge – the common law. The common law is not only the basis of the legal system; it is the champion of what we regard as civilized values and its principles. The rules of law are an articulation of the way in which the members of a society customarily act towards one

another and structure their relationships. Judge Cardozo in his definitive work on the judicial process said:

"Law is indeed an historical growth for it is an expression of customary morality which develops silently and unconsciously from one age to another."[6]

11. Of course, if we seek the ultimate foundation for our way of life, it must be found in the moral fibre of our people. But the moral fibre of a people and the system of law by which they are governed live in a symbiotic relationship. The moral fibre of a society is supported by the law and the underlying power of the State. If there were major disparities between the moral values of a society and its laws, there would be chaos or tyranny. Notions of equality before the law, the obligation not to use your property so as to damage another, the desirability of fulfilling a promise, the non-culpability for conduct that is affected by ignorance, mistake or insanity, the duty to hear a party before making an adverse finding – these are all concepts drawn from the community's sense of values. Yet those values inform principles of the common law.

12. Judicial values have, as we know, accounted for the development of the common law and today are the cause of, and justification for, the continuing development of common law. The occasions for modifying the common law are much less frequent than other occasions for the judicial application of values but it should not be thought that modification of the common law is dramatic and is to be found only in decisions of the higher appellate courts. It is a slow and incremental process, drawing on the experience of judges in contemporary cases. Cardozo saw this saying:

"This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier."[7]

13. Thus the fortunes of plaintiffs in negligence cases has waxed and more recently waned; judicial attitudes to the admissibility of "voluntary" confessions has become more sophisticated, forcing changes in police methods. Rarely, but only rarely, an appellate court may work a more substantial change in the common law. When a court, having authority to do so, is contemplating such a change in the common law, the values to which the court gives effect in making the change are not an idiosyncratic set of values but the historical values of the common law system and the enduring values of the contemporary community. That must be so, for the law cannot change merely to accommodate ephemeral changes in contemporary opinion.

14. But am I overstating the significance of values in judging? Are not the rules of the law sufficient by themselves for the disposition of cases without troubling about values? Oliver Wendell Holmes might have said so and "strict and complete legalism" might deny the existence of any leeway in the application of legal rules. After all, when, 50 years ago, Sir Owen Dixon spoke of the judicial method applied in our courts he said:

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6 Benjamin N Cardozo, "The Nature of the Judicial Process" (1921 Yale Univ Press, 21st Printing 1963) pp 104-105.

7 Cardozo, op cit, p 25.

"Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision ….conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."[8]

Today we should have to qualify this statement to allow for the exercise of some novel jurisdictions. The troublesome bioethical cases dealing with the beginning and ending of human life or surgical or medical intervention in the care of those incompetent to give consent raise issues which do not fall within settled legal doctrine. Judges have to decide such cases and they cast around for the values that can provide an external and expressible criterion for decision-making. Sir Owen's own judgments show that values played an unexpressed but important role in his decision-making. Else why, when appeal still lay to the Privy Council, would Sir Owen have chosen in *Parker v The Queen*[9] to refuse to follow *Director of Public Prosecutions v Smith*[10]*?* Whence did he derive his definition of duty of care owed to a trespasser in *Commissioner for Railways (NSW) v Cardy*[11]? And why did he attribute a particular operation to S.90 of the Constitution in *Parton v Milk Board (Vict)*[12]?

15. It is clear that the common law has developed to its present sophisticated condition by artisan judges who, with knowledge of existing rules, have moulded, added, rejected or resected them, to achieve a measure of justice in particular cases. And that is a technique which is essential to maintaining the law in a state that is serviceable for the community. It is a technique which distinguishes a society living under the rule of law from a society that is ruled by law.

16. Axiomatically, the common law judge must be familiar with the relevant law, not only to apply it precisely but also to be conscious of the measure of leeway which the judge has in reaching a decision that is just according to law. And the judge will have to attribute a meaning and operation to the relevant law by reference to the values inherent in the common law. That requires some familiarity with authoritative expositions of legal rules, and with their history and application. Usually this familiarity is acquired by reference to precedent but the mere words of a passage extracted from an earlier case may not fully express the value. Indeed, particular cases may need analysis to ascertain the underlying principle and the principle may need analysis to discover the informing value.

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8 Sir Owen Dixon "Concerning Judicial Method" (1955) published in *Jesting Pilate* (Law Book Co Ltd, 1965) 152, 155.

9 (1963) 111 CLR 610.

10 [1961] AC 260.

11 (1960) 104 CLR 274.

12 (1949) 104 CLR 229.

17. Occasionally, but only occasionally, changes in the enduring values of a society may evoke changes in the common law. Perhaps *Mabo [No 2]*[13] is the most dramatic modern example. The recognition of native title flowed from the change in the values of a society which, in earlier times (to adopt the language of Lord Sumner)[14] had perceived Aborigines as:

"so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

But now we are in a society which regards all people as equal before the law. Thus the enduring value which led to the decision in *Mabo* was the value of equality.

18. Such judicial leeway as is allowed in applying a legal principle may seem to be in tension with legislative supremacy. Trevor Allen argues that the two are reconciled by the adoption of principles of interpretation which serve to protect fundamental rights[15]. And fundamental rights are to be found in the values of the common law. They may be broadly expressed but their influence on the development and application of the common law is profound. Sir Anthony Mason recently identified several of the values of the common law. He said[16]:

"The common law stands for a set of concepts, interests and values which it has protected during the course of its long history. They include the rule of law, the independence of the judiciary, access to the courts, the separation of the powers of government, liberty of the individual, freedom of expression, freedom of association, no detention or imprisonment without lawful authority and natural justice, to mention but a few of them. These values have both generated and informed legal principles, including the rules of statutory interpretation."

The values of the common law are, to use a computer metaphor, a program running in the back of the judicial mind when a case is being heard and determined. But we should not overstate the legal relevance of values nor try to expand the areas of choice in decision making. Certainty in the law is itself a value of the common law that cannot be diminished by excesses of judicial enthusiasm.

19. The common law is noted for both its antiquity and its adaptability. The one contributes to its wisdom and certainty; the other to its relevance and utility in the modern world. As to its antiquity Holdsworth says that it was in the reign of Henry II when the courts were expanded in jurisdiction that we see "the beginnings of a centralised judicial system which administered a law common to the whole country".[17] Blackstone

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13 (1992) 175 CLR 1.

14 *In re Southern Rhodesia* (1919) AC 211, at pp233-234.

15 TRS Allen, *The Common Law as Constitution* in Courts *of Final Jurisdiction* (1996) Federation Press) 146, 156.

16 Sir Anthony Mason *The Role of the Common Law in Hong Kong* (15 March 2005) par. 3.

17 Holdsworth *History of English Law* Vol I pp 47-53.

notes that the judges drew on English custom[18], though the content was affected by the practices of the judges and lawyers of the time assisted by scholars familiar with Roman Law[19]. So the gestation period of the modern common law extends back for centuries. It is not surprising that the vast judicial experience during so lengthy a period has fashioned a sophisticated legal system the justice and the practicality of which is attested by generations of litigants and their lawyers.

20. But the common law is not immutable and we should not be reticent about the manner of change. Lord Goff of Chieveley has written[20]:

"It is universally recognized that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing citizens of this country with a system of practical justice relevant to the times in which they live."

21. Precisely because of its daily application from generation to generation and from place to place, it changes in response to the needs and aspirations of particular communities. The daily and ubiquitous application of the common law's values explains the practicality and the vitality of the common law. As the High Court said in the Native Title Case[21]: "The content of the common law will, in the ordinary course of events, change from time to time according to the changing perception of the courts". The pace of change may be slow but when a legal rule is varied and followed so that the variation becomes settled law, there is an assurance that it has been found to be just and practical in actual situations. Conversely, if experience shows that a proposed development of the common law is impractical or unjust, it is dismissed, even if the proposal emanates from a superior court. That is what happened to the *Beaudesert Shire*[22] tort of unlawful activity causing damage which was discarded in *Northern Territory v Mengel*[23].

22. The technique of development has itself been developed by common law judges. They eschewed the implementation of idiosyncratic ideas, but they have taken account of the exigencies of their societies. Benjamin Cardozo summed it up when he said that judicial development of the law is " … informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social

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18 Blackstone Vol 1: 17,68. The content was affected by the practices of the judges and lawyers of the time (AWB Simpson *History of the Common Law* (1987) 376) assisted by scholars familiar with Roman Law. Holdsworth *op cit* pp 175-176 pays tribute to the beneficial influence of the works of Glanvil and Bracton on the laying of the foundations of the common law.

19 AWB Simpson *History of the Common Law* (1987) 376.

20 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377.

21 (1995) 183 CLR 373, 486; see per McHugh J in *Re Colina, Ex parte Torney* (1999 200 CLR 386 at 400-401.

22 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145.

23 (1995) 185 CLR 307.

life."[24] Sir Owen Dixon's adoption of Maitland's description[25] of the common law's development as "strict logic and high technique" does not really bring out the diverse influences of which Cardozo spoke, though the term "high technique" might be intended to comprehend those influences. Cardozo expressed what underlies, albeit unacknowledged, the development of law when the mantra of strict and complete legalism is recited.

23. There was a time prior to the abolition of appeals from the High Court to the Privy Council when Australian law was constrained by the decisions of English judges, since, as Sir Anthony Mason noted[26], "the colonial common law inheritance was the English common law. The notion that the inheritance might ripen into an Australian, Canadian, New Zealand or Hong Kong common law took some time to develop". Once the constraints of Privy Council appeals were removed, the High Court was able to assume responsibility for declaring the common law of Australia. [27]That Court necessarily possesses a wide power to mould the law, conformably with constitutional and statutory law and in accordance with judicial method, to serve the contemporary needs of Australian society and to reflect contemporary society's enduring values[28]. Thus the High Court has been free to develop new principles of Australian law. That can be seen in cases such as *Commercial Bank of Australia Ltd v Amadio*[29], *David Securities Pty Ltd v Commonwealth Bank of Australia*[30] and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[31] to name a few. The Australian common law is free to develop differently from the common law of England, a recent example being *D'Orta Ekenaike v Victoria Legal Aid*[32] which maintained immunity for negligence in the conduct of court proceedings when the House of Lords had abandoned that principle in *Arthur JS Hall & Co v Simons*[33].

24. None of this is novel to an Australian Judicial Conference. We were all instructed that the common law has grown over the centuries and that its development has been a judicial creation. We have all known of Oliver Wendell Holmes' observation:[34]

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24 Benjamin Cardozo "*The Nature of the Judicial Process* (New Haven, Yale University Press, 1921) 113-114.

25 *Concerning Judicial Method* published in Jesting Pilate (1965, Law Book Co.) 152, 153.

26 Sir Anthony Mason: *The Break with the Privy Council and the Internationalisation of the Common Law* in "Centenary Essays for the High Court of Australia" (2004, Lexisnexus Butterworth) 66, 68-69.

27 See per Barwick CJ in *Mutual Life and Citizens' Assurance Co Ltd v Evatt;* per Brennan J in *Mabo [No. 2]* (1992) 175 CLR 1, 29.

28 Per Brennan J in *McKinney v The Queen* (1991) 171 CLR 468, 485.

29 (1983) 151 CLR 447.

30 (1992) 175 CLR 353.

31 (1988) 165 CLR 107.

32 (2005) 79 ALJR 755.

33 [2002] 1 AC 615.

34 "*The Common Law*", (43rd printing 1949 Boston page 1).

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries,...."

25. Now I should like to say something about the influence of the courts on social stability. Since retirement, I have had the privilege of sitting in two overseas jurisdictions where the common law system is in force. I know that some of you have already had that experience. There may be peculiarities of address or etiquette in each place – Australian judges find it a heady experience to be addressed as "My Lord" – but the ways of thought are the same. As the values derived from the history of the common law are shared in all common law courts constituted by independent and competent judges, there is a core of values which inform decision-making in each jurisdiction. The experience shows that the constitutional and statutory law of the overseas jurisdiction may be quite different from constitutional and statutory law of one's home jurisdiction but, because of the common principles and values of the common law, it is possible for Australian judges to take a full and equal part with their overseas colleagues in the administration of justice. Perhaps the great change that has taken place since the abolition of appeals to the Privy Council from virtually all of the erstwhile British dominions and colonies is the recourse to precedent from other common law countries. Common law courts in every jurisdiction, I believe, look to the decisions of other common law courts as persuasive precedents, the weight of any precedent being dependent on the authority of the court and the cogency of its reasoning.

26. Prior to the last coup in Fiji, Chief Justice Tuivaga, Sir Anthony Mason, Justice John Toohey, Lord Cooke of Thorndon and I sat together in the Supreme Court of the Republic of Fiji. For the Australians, of course, the sittings were very much a reunion of former colleagues and, having been declared constitutionally senile in this country, we enjoyed the opportunity of serving in another jurisdiction where we were deemed to be compos mentis and where the judicial techniques were the same as those in Australia. The coup put an end to our sitting on the Court. We had each sworn to uphold the Constitution of Fiji but, with the advent of the coup and the dismissal by the President of the Prime Minister, for my part I felt it was no longer possible to continue to discharge the obligations of that oath. I know that Sir Anthony was of the same view and that may have been the view of the other erstwhile members of that Court. All of us have ceased to be members now but I am pleased to see that Chief Justice Fatiaki has succeeded in having the Supreme Court reconstituted and it includes noted Australian jurists. In the interim, the Fiji Court of Appeal decided a case of political significance. I recount the decision because it shows that, when the peace and order of society are in question, the community must place its trust in a court which displays the independence and integrity demanded by the common law.

27. For a time after the military had wrested control from George Speight, the Court of Appeal was the final Court of Fiji. Its members included Mr

Justice Handley. In *Republic of Fiji v Prasad*[35] the Court heard an appeal against a decision by Mr Justice Gates in the High Court that the 1997 Constitution of Fiji had not been abrogated and was still the governing Constitution of the Republic. The de facto administration, headed by Interim Prime Minister Laisenia Qarase appealed against that decision. Professor George Williams, who was one of the counsel briefed to appear on behalf of the respondent Prasad describes the scenario:[36]

"*There was little to suggest that the decision of Justice Gates would affect political developments in Fiji. Given that the Military had already sought to abrogate the 1997 Constitution, why would it or its Interim Civilian Government obey a decision of a court of law? Indeed, no steps were taken to recall Parliament. Nevertheless, the proceedings took a decisive turn after the High Court decision when, instead of ignoring the orders of Justice Gates, the Interim Civilian Government decided to appeal to the Court of Appeal of Fiji and to submit to the jurisdiction of that Court. It was one thing to abrogate the Constitution, but it proved to be another thing entirely to deny the force of a decision of a respected judge, particularly when it was strongly and unequivocally backed by the international community. Even after the coup, respect for the rule of law and the judiciary prevailed as a fundamental principle of Fijian political culture. Certainly, a decision in favour of the Interim Civilian Government by the Court of Appeal would also have greatly assisted its aim of being seen domestically and internationally as the legitimate government of Fiji.*"

28. The appeal was, in a sense, a constitutional curiosity. It raised the question whether "a court created by a constitution lacks jurisdiction to determine the legality of that constitution or to do otherwise than to assume its ongoing effect."[37]. A negative answer to this question had been given by Fieldsend AJA in the High Court of Southern Rhodesia in *Madzimbamuto v Lardner-Burke*[38]who said:

"It is my firm conviction that a court created in terms of a written constitution has no jurisdiction to recognize either as a de jure or de facto government any government other than that constitutionally appointed under that Constitution."[39]

29. However, when an appeal against that Court's decision was taken to the Privy Council, it was accepted by the majority that a court sitting in a territory has to determine the status of a new regime which has usurped power and acquired control of the territory.[40] The members of the Fiji Court of Appeal adopted this view, holding that it was their duty "as Judges of Fiji" to consider whether, in accordance with the Kelsen doctrine

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35 [2001] 2 LRC 743.

36 *The Case that stopped a Coup? The rule of law in Fiji* 2003 Quentin-Baxter Memorial Trust Lecture, Victoria University of Wellington 27 November 2003.

37 Williams, op cit, p 13.

38 [1968] (2) SA 284, 431 quoted by Lord Reid at [1969].

39 [1969] 1 AC 645, 724.

40 Lord Pearce's position on this issue seems to be closer to the view of Fieldsend AJA though Lord Pearce's comment relates to a situation where there is a "true Sovereign" asserting sovereignty: see [1969] 1 AC 645, 732C.

of effectiveness, the new regime had effectively supplanted the old. The Court held that the Interim Government had failed to prove the elements necessary to establish that the new regime was constitutionally effective. But would the decision be accepted? In a note in the Law Quarterly Review, N. W. Barber observed:

"*The effectiveness of any Supreme Court forced to decide on the legality of an attempted usurpation will depend on the respect it commands within the society and the willingness of the revolutionaries to submit to judgment.*

In Fiji the Court rejected outright the claims of the usurper; the effectiveness of this decision will depend on the political strength of the court, a strength that can only be assessed in the reception of the judgment."[41]

The reception of the judgment is described by Professor Williams:[42]

"*The decisions of the High Court and Court of Appeal of Fiji demonstrate that the judiciary can play an important role in maintaining the rule of law even in the immediate period after a coup. The decisions of these Courts are unique in that they represent the only time that a domestic court has pronounced a coup illegal and the abrogation of a nation's constitution legally ineffective. Perhaps even more remarkable was that, immediately after this decision, the Prime Minister of the Interim Civilian Government, Qarase, announced that the nation would be returned to democratic rule under the 1997 Constitution. His government then resigned.*

However, Parliament was not recalled. Instead, it was dissolved by the President who called a general election under the 1997 Constitution and re-appointed the Interim Civilian Government as a caretaker administration. The general election held from 25 August to 5 September 2001 returned a coalition government led by Qarase."

30. So the decision in *Prasad* paved the way for a return to constitutional normalcy. *Prasad's* case shows that the rule of law depends ultimately on the authority of the Court in the community and, where democracy is practised, the people will favour the rule of law if they have confidence in the judiciary.

31. Next, I turn to Hong Kong. To an Australian judge sitting in Hong Kong, the public confidence in – indeed, enthusiasm for – the judiciary comes as an unusual and welcome surprise. To explain this, I must contrast the legal systems of two parts of the People's Republic of China: the Mainland and the Special Administrative Region of Hong Kong. One country, two systems.

32. First, the mainland system – the system of Chinese socialist legalism, as described by Mr Lay-Hong Tan in his recent article in the Australian Law Journal[43]. The foundation of this system is the Marxist theory that law rests on class struggle, but it has been modified in the People's Republic and the system is now described by the author as "legal pragmatism". He identifies the following characteristics:

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41 (2001) 117 LQR 408, 411.

42 Williams, op cit, p.16.

43 *Unravelling the complexities of the Chinese Legal System* (2005) 79 ALJ 97 p.68.

"*1. It over emphasises the instrumental facets of law.*

2. It regards law as an outcome of "actuality"

3. It treats law as a servant of policy.

4. It does not treat individual rights seriously.

According to this approach, the law is an instrument of the Chinese Communist Party (CCP). What this means is that after establishing "actuality", the CCP uses the law as an instrument to legislate appropriate policy."

33. Clearly enough, the values which underlie this system are different from the values which underlie the common law system of Hong Kong. I do not venture to criticize the system in the People's Republic or its suitability for the Chinese people. I mention it to contrast the role which falls to the judiciary in the Hong Kong Special Administrative Region of the People's Republic. Hong Kong, as you know, is governed under the Basic Law as agreed by the PRC and the British Government. The Basic Law is a statute of the National People's Congress. However, as Sir Anthony Mason has pointed out[44], "the Basic Law maintains the principles of the common law and basic elements of a common law judicial system in the Region. The conjunction of such a common law system under a national law within the larger framework of Chinese constitutional law is itself a fundamental aspect of the principle 'one country, two systems' recited in the Preamble to the Basic Law." In 1997, when Hong Kong reverted to China, the Court of Final Appeal was created to take the place of the Judicial Committee of the Privy Council in the Hong Kong hierarchy. Among others, judges or former judges from Australia, New Zealand and Britain were invited to sit with the Permanent Judges of Hong Kong to constitute the Court. At present, Sir Anthony Mason and I are honoured to sit on that Court.

34. Recently, the Court gave judgment in a case in which convictions had been recorded against participants in an unauthorized procession protesting against the earlier conviction of an "activist" for assault and obstruction of a public officer. The protesters relied on a provision[45] of the *Bill of Rights Ordinance* which recognizes the "right of peaceful assembly".[46] This provision evoked from the majority judgment this opening passage:

"*The freedom of peaceful assembly is a fundamental right. It is closely associated with the fundamental right of the freedom of speech. The freedom of speech and the freedom of peaceful assembly are precious and lie at the foundation of a democratic society.*

These freedoms are of cardinal importance for the stability and progress of society for a number of inter-related reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic

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44 *The Role of the Common Law in Hong Kong* University of Hong Kong, 15 March 2005, par12.

45 The Basic Law provides that the provisions of the International Convention on Civil and Political Rights should be implemented through the domestic laws of Hong Kong. The Bill of Rights Ordinance (cap 383) was enacted pursuant to the Basic Law.

46 Article 17.

society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive."

This declaration of the importance of values at the heart of a democracy, made by a Court whose competence, incorruptibility and independence is unquestioned, is characteristic of the approach taken by common law courts. The Bill of Rights Ordinance conferred an individual right which could not be overridden by an ordinary law regulating the conduct of processions but the values are said to be "fundamental" precisely because they are values at the heart of the common law system. The response of the public to such a judgment can be gathered from a comment which appeared in an article in the South China Morning Post[47]. The article was critical of some interpretations of the Basic Law which had been earlier issued by the Beijing Standing Committee of the National People's Congress pursuant to Art. 158 of the Basic Law. These interpretations, it was said, "have caused considerable damage to Hong Kong's confidence in the rule of law." But, the article continued:

"*In contrast, confidence in the judiciary remains strong, especially in the aftermath of the decision last Thursday by the Court of Final Appeal exonerating Falun Gong practitioners who were arrested in 2002 while protesting outside the central government's liaison office in Hong Kong*."

In another article dealing with the same case, Professor Yash Ghai wrote:

"*Judges now accept unequivocally their responsibility to review legislation as well as the policies and conduct of public agendas. They are the ultimate custodians of rights and freedoms, entrusted with the task of determining when rights may be legitimately restricted. There is no compelling reason for subservient deference to legislative and executive authorities, because the Basic law has put the duty of applying the law squarely on the courts.*

…..it is no surprise that the Court of Final Appeal is well on its way to establishing a reputation as a court of great distinction and learning, whose judgments are read, and cited, with respect in other jurisdictions."[48]

35. The authority of a court depends to no small degree on public confidence in its capacity to apply the law in a way which preserves and protects the social conditions under which the public lives. If the courts are independent, competent and incorruptible and if the legal system vests in the courts an effective authority to do justice, the courts command public confidence and society is stable. Indeed, those characteristics measure the state of a society under the rule of law for they assure protection of individual freedom, respect for human rights irrespective of race or religion, peaceful order, the just settlement of disputes and the just distribution of benefits – all the attributes of a society which treasures human dignity. And popular esteem of the judiciary follows.

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47 12 May 2005.

48 Professor Yash Ghai in article *"Great Guardian of Human Rights"* South China Morning Post, 10 May 2005.

36. In Australia, it is taken for granted that the courts are independent, competent and incorrupt and that they protect the rights of individuals according to law. Hence there is little public comment about the functions of the judiciary. There are occasional criticisms of particular decisions – usually in relation to a sentence pronounced in a case that has stirred the public's passions – but the criticisms proceed only on the footing that a particular decision is said not to accord with the standard of decision-making that is taken as the norm. The norm itself is assumed to be set at a high level of independence, competence and incorruptibility and a sensitivity to community values qualified by law. Institutionally, the courts are secure because the public insists that they be so.

37. Judges may feel that there is insufficient acknowledgement of the anxiety and effort that go into keeping up the high standard which the public expects but the rewards of judicial office are neither in public adulation nor in financial returns. The rewards are in the profound conviction that they are the guardians and ministers of the common law and, as such, they are essential and effective in preserving Australia as a free, peaceful, ordered and confident nation.