SEPARATION OF POWERS
IN A CONSTITUTIONAL DEMOCRACY

A CONFERENCE IN BLANTYRE, MALAWI
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NOTES FOR AN ADDRESS
BY ANTHONY BRADLEY[1]

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In Shakespeare's Henry VI, Part 2, the rebel Jack Cade is contemplating what a paradise it will be when he is king: 'There shall be no money. All shall eat and drink on my score, and I will dress them all in one livery'. His follower Dick the butcher interjects: "The first thing we do – let's kill all the lawyers" to which Jack Cade responds: "Nay, that I mean to do"

Introduction

1. This address is concerned with constitutional fundamentals – immensely broad themes such as 'government according to law', and 'democracy through law' - which are found in every political system that is based on principles of democracy and the rule of law.

2. Experience of many democratic societies has shown the need for three institutions within a state's system of government -

(a) a government with executive powers,
(b) an elected legislature with three main functions
> to represent popular opinion between elections
> to exercise oversight of government (accountability)
> to make new laws; and
(c) a system of courts and judges to administer civil and criminal justice – both between private persons, and as between private persons and the state

3. A structure containing these three branches seems essential if the state is to deliver what the people hope or wish to receive. As the Preamble to the Malawi Constitution states "the people of Malawi … *seeking* to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful

[1] Emeritus Professor of Constitutional Law, University of Edinburgh. Barrister of the Inner Temple, London.

international relations (and) *desirous* of creating a constitutional order … based on the need for an open, democratic and accountable government: HEREBY adopt" the Constitution. This aspiration covers peace and security, stability and the means to live, as well as social advance and economic progress.

4 A structure of this kind embodies a commitment to certain broad and multi-faceted concepts (democracy, the rule of law, equality, respect for fundamental rights and freedoms etc). The structure is not needed in a state that is based on the absolute power of one person or one family, or on the authority of one ruling class, or of one dominant faith (where the structures of the religion are also the structures of the state). But what would be the effects on democracy and the rule of law in combining any two of these branches of the state:

(a) executive and judicial functions combined
(b) legislative and judicial functions combined
(c) executive and legislative functions combined?

Would many of us willingly opt for a system in which a democratic element, the rule of law or other essential features of civil government were lacking?

5. The need for the three branches of the state is expressed at the start of the Malawi Constitution : sections 7, 8 and 9 set down the distinct responsibilities of the executive, the legislature and the judiciary (as well as certain aspirations about the way in which each branch shall perform its functions).

6. Although in discussing 'constitutionalism' we are dealing with fundamental concepts of democratic government, it is difficult to separate theoretical questions from the experience of actual peoples. (Suppose it is proposed that suspected criminals should be put on trial before the elected representatives of the people – what would be gained if this should come to pass, and what would be lost?) The concept of 'separation of powers' embodies lessons of practical experience as well as broad values.

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The separation of powers and the rule of law

7. Students of politics, particularly students of American government, are familiar with the separation of powers. That doctrine (or at least, one version of it) is basic to the very structure of the US Constitution, just as it has influenced the Malawi Constitution – with separate chapters of the Constitution vesting legislative powers in the elected parliament, executive power in the president, and judicial power in the courts. But, as a foundation for the American system of government, the US Constitution provides (sometimes expressly but often by implication) not for the complete separation of the three powers, but for the way in which they inter-relate. The principle of 'checks and balances' qualifies the separation of powers in many respects.

8. In every state, the interface between the main institutions of the state is of central importance. Even it is accepted that different forms of separation exist, it can also be claimed that the separation of powers is not an 'optional extra' – on the contrary, separation must exist in some form or other if the rule of law is to be observed. A structure of government committed to the rule of law must necessarily

provide for a separation between the key functions involved in administering powers of government and the machinery of justice.

9 Thus, the Malawi Constitution declares the fundamental principles of national policy and protects fundamental human rights and freedoms, before coming to define the powers of the main organs of the state. Amongst these organs are the **Parliament**, in whom all legislative powers of the Republic are vested; the **President,** who is Head of State and Government and who must "provide executive leadership in the interest of national unity in accordance with the Constitution and the laws of the Republic" (section 88(2); and the **judiciary,** who "shall have jurisdiction over all issues of judicial nature" (section 103(2) and shall exercise their functions "independent of the influence and direction of any other person or authority" (section 103(1)). Similar provisions are found in many other constitutions.

10. Such constitutions are based on the principle that the three functions of (a) governing the country (b) making laws, and (c) deciding cases according to law, are best performed by different institutions. At a time when appeals still went from the courts in Sri Lanka to the Privy Council in London, an English judge (Lord Pearce) said that the provisions of the Constitution of Sri Lanka made manifest

> "an intention to secure in the judiciary a freedom from political, legislative and executive control. [Those provisions] are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature". [2]

In that case, the Judicial Committee held that the integrity of the judicial system could not be violated without the national constitution itself being amended, when the government wished to provide a wholly new system of trial for those charged with taking part in an unsuccessful coup.

11. Moreover, the constitution of the United Kingdom is founded upon a similar basis, even though there is no document spelling out the separation of powers, and many exceptions to the doctrine exist. Certainly, there are close links between the executive and the legislature, since the Ministers who form the government are all members of the legislature and individually and collectively responsible to Parliament. One leading US constitutional lawyer has recently argued that this close relationship between executive and legislature may well make for more accountability in government than the separation of personnel that the US constitution requires. [3] Many Commonwealth constitutions, but not the Constitution of Malawi (see section 97, providing that Ministers are responsible to the President – not, it would seem, to the Malawi Parliament) follow the British approach which is based upon the

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2 *Liyanage v Reginam* [1967] 1 AC 259.

3 See B Ackerman (2000) 113 Harvard LR 634.

requirements that Ministers are members of Parliament and are responsible to it for the performance of their functions.

12. But it would be wrong to suppose that the British constitution is ignorant of the separation of powers. An issue of separation as between the executive and the legislature arose in 1995, in the *Fire Brigades Union* case, which concerned a decision by the Home Secretary not to bring into force a statutory scheme for compensating victims of criminal injury and instead to make changes in the existing non-statutory scheme. The Fire Brigades Union, whose members would have gained from the statutory scheme, successfully argued that the Home Secretary's decision not to bring in the statutory scheme was not properly made. The issues in the case divided the judges, but one of them, Lord Mustill, said this about the separation of powers:

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended." [4]

13. The essence of this passage applies to very many countries – subject to the qualification that many Commonwealth constitutions do not permit the legislature to make such laws as it pleases, but only laws that are consistent with the Constitution, in particular laws that respect fundamental human rights and freedoms. The key point is that the rule of law itself depends upon there being a distinction between courts, executive and Parliament. 300 years ago, Montesquieu wrote in his celebrated work, *The Spirit of the Laws*,

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression." [5]

14. The separation of powers is therefore concerned with the distribution or division of powers. The concentration of all state power in the hands of one person or of one small governing group is likely to lead to the despotic use of power. The

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4 *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513

5 *De l'Esprit des Lois*, Book XI, ch 6, quoted in MJC Vile, *Constitutionalism and the Separation of Powers* (1967), 90.

political need for the distribution of powers can be met by basing that distribution on the various functions that may be exercised in relation to the law:

> "While the classification of the powers of government into legislative, executive and judicial powers involves certain conceptual difficulties, within a system of government based on law it remains important to distinguish in constitutional structure between the primary functions of law-making, law-executing and law-adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive". [6]

15. Although the relationship between executive and legislature may vary widely (as is shown by the contrast between the US model and the British structure of cabinet government), it nonetheless remains vital that the judiciary should remain independent of both the executive and the legislature. Article 14(1) of the UN's International Covenant on Civil and Political Rights, 1996, begins with these sentences:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing *by a competent, independent and impartial tribunal established by law*."

A very similar provision is found in the European Convention on Human Rights, article 6(1). The increasing body of decisions that now exist in relation to international instruments such as the ICCPR and the ECHR include decisions as to whether judicial independence is sufficiently protected in national law. [7]

The role of the judiciary in modern society

16. In the rest of this paper, emphasis will be given to the importance of judicial independence, since this is probably the most direct consequence of the separation of powers. It is hoped to show that the importance of this principle is not solely theoretical, and that it affects the way in which the working of government, legislature and courts impinge on the welfare of individuals, groups, localities, and of the whole community. The former Chief Justice of India, P.N.Bhagwati, emphasised the responsibility which all persons exercising public power owe to the people.

> "Every power holder, whether legislative, executive or Judicial is, in the ultimate analysis, accountable to the people. This accountability goes with the exercise of power because the power holder in a democracy governed by the rule of law derives its power from the people. … This accountability is not to any particular individual or to any particular Government, but it is to the people of the country." [8]

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6 AW Bradley and KD Ewing, *Constitutional and Administrative Law*, 13th edn, 2002, p 89.

7 See e g *McGonnell v UK* (2000) 30 EHRR 289 and *Starrs v Ruxton* (1999) 8 BHRC 1

8 "Judicial Independence vs public Accountability: a Debate" quoted by the Attorney General of Trinidad and Tobago to the Mackay Commission of Enquiry into the legal system in Trinidad and Tobago (1 June, 2000) 3-4.

17. The primary role of the judiciary is to adjudicate upon the disputes that come before them – whether these involve serious criminal charges, or disputes between private persons or companies – for instance, disputes over compensation for the victims of accidents, business transactions that have gone wrong, the seizure of property, family breakdown, or misconduct by employers. To this we can add – dispute arising out of unfair and abusive decisions made by public authorities. (By contrast, in the French tradition of public law, decisions of public authorities are reviewed by the Council of State and by special administrative courts, not by the ordinary civil courts.) In settling these disputes, judges carry out their duties publicly, and must based decisions on the discipline of the law – not upon their own personal preferences or sympathies.

18. One reason for the importance of judicial decisions is that the judges are not just dealing with the particular parties that are in court in any one case. Their decisions also have an impact on the life of the whole community. The public interest is particularly strong in criminal justice. In civil disputes arising between private parties, there is (or ought to be) a strong public interest in the proper administration of justice. There is an even stronger public interest when the dispute is between a private person and a public body exercising executive power.

19. Moreover, in the common law tradition that has been inherited in many African countries, the decisions of the courts are a source of law for the future – whether by interpreting Acts of Parliament or developing aspects of the law which have not been subject to legislation by Parliament or settled by earlier decisions of the courts. And in many African constitutions, the superior courts are tasked with the role of protecting the fundamental rights guaranteed by the Constitution, whenever any person alleges that those guarantees have been, are being or are likely to be violated (see the Malawi Constitution, ss 15 and 46).

The independence of the judiciary

20. If decisions with such far-reaching consequences are to be made with full regard for the law, with even-handedness and fairness, then judicial independence is a pre-requisite. This is a phrase that is not always easy to define. In 1988, a senior British judge wrote that if a thinking person were asked what the words 'judicial independence' meant,

> "he would probably say that a judge should be free of any pressure from the government or anyone else as to how to decide any particular case."

The writer added that the same person might say, if asked why judicial independence was important,

> "the courts are there to protect the rights of the individual as against the state by ensuring that executive powers are lawfully exercised." [9]

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9 Lord Browne-Wilkinson "The Independence of the Judiciary in the 1980s" [1988] *Public Law* 44.

21. In fact, judicial independence goes more widely than this. Thus no judge must be 'judge in his own cause', and must not act in a case in which there is a danger that his decision would be biased. This rule was applied in Britain when the ultimate court of appeal, the Law Lords, held that a previous decision of the Law Lords - that General Pinochet could be extradited to Spain because of criminal acts committed when he had been president of Chile - must be set aside. The reason for setting it aside was that one of the five judges deciding that case (Lord Hoffmann) was, unknown to Pinochet's lawyers, chairman of a charitable branch of Amnesty International, the human rights organization; he had sat as a judge at the hearing of the appeal, even though Amnesty International had appeared on the appeal and had argued for Pinochet's extradition. Lord Hoffmann had no financial interest in the appeal, but this was immaterial in view of his close association with the charitable arm of Amnesty International. In considering the rule against bias, another judge (Lord Hope) said:

> "It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of [a departure from] impartiality." [10]

Subsequently, the Law Lords have held that the test of apparent bias on the part of a court is whether, having regard to all the relevant circumstances, as ascertained by the reviewing court, a fair-minded and informed observer would conclude that there was a real possibility that the first court had been biased. [11]

The accountability of the judiciary

22. In some cases that come to the courts, there is only one possible outcome if the law is to be upheld. But often the facts of a dispute are not clear, or the relevant rules may be uncertain: so the decision by the court may go either way. In such cases, if the losing party is dissatisfied by the court's decision, he or she has the right to appeal. If so, the appeal court must make its own decision of the dispute. If the appeal judges differ from the first judge, this in itself is not a criticism of the first judge – sometimes new evidence may be brought forward or new arguments are made that make all the difference to the case.

23. But sometimes the appeal hearing may reveal that something went wrong with the way in which the first decision was made. Possibly the judge did not allow one party a proper chance to present their case, or failed to deal with the main arguments presented to him, or delayed for far too long before writing his judgment. In such a case, the appeal judges may criticise the first judge for such matters. Recently, the English Court of Appeal made serious criticisms of an experienced High Court judge for excessive delay in delivering his judgment, the delay having caused the judge to make obvious mistakes in his account of the evidence. The effect of this criticism was to cause the judge in question to retire from his position, earlier than he would otherwise have done.

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10 *R v Bow Street Magistrate, ex parte Pinochet (No 2)* [1999] 1 All ER 577, 593.

11 *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465.

24. This is an unusual and extreme example, but it illustrates the discipline that the system of appeals provides. The possibility of a judge's decision being reversed or criticised on appeal is a salutary discipline and is the primary means by which a judge is held publicly accountable for his decisions.

25. But the need for a proper measure of accountability goes beyond this, since the courts routinely make many decisions which do not directly give rise to a right of appeal but which can adversely affect individuals who are involved in proceedings before the courts. The problem of delay in administration of justice arises in nearly all countries. Yet, 'Justice delayed is justice denied'. Thus there should not be unnecessary adjournments of a case: once a hearing starts, it should be completed as soon as possible and not adjourned while the evidence is only partly heard. After the trial is over, litigants ought not to have to wait for an excessive period before judgment is given. And an appeal should be heard and decided without excessive delay.

26. So too, a party to a case must receive a fair hearing, whatever section of the community that he or she may come from. No judge must allow such matters as a person's ethnic origin, colour, race, religion, gender or political beliefs to influence the conduct of the trial or the making of the decision. Such conduct would breach the individual's constitutional right to equality before the law (see e g Malawi Constitution, s 20).

27. One matter for which judges are criticized from time to time is the making of derogatory remarks about a witness on a matter that is unrelated to the substance of the case. Judges are, of course, human beings, but they in court they should confine remarks and comments to whatever is in issue between the parties.

28. An important point behind examples such as these is that judicial independence ought not to become a shield for the imperfect or inefficient administration of justice. Full-time, professional judges ought because of their training and experience to be fully committed to delivering justice in the society which they serve. They, like all those who hold public office, must recognise the importance of observing the requirements of the national constitution at all times.

Is judicial independence compatible with judicial accountability?

29. In 1998, the Latimer House Commonwealth conference (attended by some 40 judges, lawyers and parliamentarians from over 20 countries) considered the relationship between the executive, the courts and Parliament. There was common acceptance of the independence of the judiciary, but there was also considered to be a need for mechanisms of accountability. The conference considered that each organ of the state should "exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions". While dialogue between the judiciary and the government might be appropriate, in no circumstances should such dialogue compromise judicial independence. Amongst the mechanisms considered by the conference that would promote accountability were the provision

of judicial education and training and the existence of fair procedures should the disciplining or removal of a judge from office be necessary.

30. As regards public criticism of judges' decisions, the conference made two points:

> "(1) Legitimate public criticism of judicial performance is a means of ensuring accountability; and
> (2) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts."

31. It will be evident that the purpose served by judicial independence is to enable judges to make decisions in accordance with the law, without fear or favour or improper influence from any sections in society or from any quarter in government, industry or business. In any state, there may be room for improvements in the functioning of the courts and for making the courts more efficient. Sometimes it is a question of whether the state can provide the resources for such improvements.

Financing justice

32. To mention the provision of resources brings in a dimension of the justice system which arises at the interface between the judiciary and the executive (in the person of the Minister of Justice or other Minister responsible for legal affairs). In many countries, the constitution guarantees payment of the salaries of the judges (see e g Malawi Constitution, s 114); thus the salaries are authorised by the constitution and payment is not dependent upon annual approval being given by Parliament, as is the case for most other forms of public expenditure. But constitutions do not give similar protection to, for instance, the library resources that a court must enjoy if it is to be able to do its work properly. Despite the authority that attaches by virtue of their office to those who are judges, it was observed by Hamilton in *The Federalist*, Number 78, that in the US Constitution the judiciary, from the nature of its functions, would always be "the least dangerous" branch. As Hamilton explained this term:

> "The executive not only dispenses the honours, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may be truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty." [12]

33. Hamilton's language comes from the 18th century, but the point made is still significant. Certainly, the judges must have the independence to take decisions in accordance with the law. But questions as to the administration of access to the

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12 M Beloff (ed), *The Federalist* (1948 edn) LXXVIII, 396.

courts, the provision of staff, buildings, books and computers for the courts, the availability of legal aid for those who cannot afford legal representation - all these matters are ultimately the responsibility of the government of the day, since the resources involved have to come from the resources available to the government for all public purposes. Both politics and public expenditure are forced to speak the language of priorities. Increasing the resources for one public service is almost certain to mean less for other community needs.

34 Certainly, the judiciary are likely to have a very clear view of what improvements in the administration of justice and the court service they would like to see – but so too do health administrators, educationalists and other public administrators in respect of the services which they provide. All these needs must be brought together and decisions made as to the priorities of what the country can afford in the next budgetary period.

35 In a lecture by a British judge which was quoted earlier, [13] the speaker examined the implications for judicial independence of the fact that the allocation of public resources to the court system is a matter for the executive. He concluded that the problem is a universal one, and that there was not a single solution to the problems that can arise at this sensitive interface between the judiciary and the executive. There would never be sufficient funds to meet all the demands of the legal system and the amount of the funds available had to be determined politically. The judges should be involved in the budgetary process, since they had first-hand knowledge of what was needed. Ultimately compromise was unavoidable: it was impossible on constitutional grounds for the judges to be directly responsible to Parliament for expenditure on the courts.

36. The matter was put even more plainly in 1996 by another British judge, Lord Bingham, then Lord Chief Justice:

> "I subscribe to the view that there are other constitutional principles, besides judicial independence, that must be recognised and respected. One principle, possibly equal in importance to judicial independence, is the right of the legislature to decide how public money is to be spent. Thus, I do not support the view that the judiciary should write its own cheque, and I have come to realise that it is, in fact, salutary that the judiciary should not have that power. If mistakes are to be made in budgeting or funding operations, it is better that they be made by someone other than the judiciary".[14]

37. Although discussion is necessary on budgetary matters between the Minister concerned and the Chief Justice as representing the whole body of judges, it may be well be desirable for others to participate in the dialogue – for example, a body such as a Judicial Service Commission, assuming that its constitutional remit includes such financial matters. If litigants are failing to get justice from the courts, then the

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13 See para 20 above.

14 Lord Bingham, Lecture to the Judicial Studies Board, in J Hatchard and P Slinn (eds), *Parliamentary Supremacy and Judicial Independence: a Commonwealth Approach* (1999), 76

litigants themselves are entitled to raise their concerns with the executive and with Parliament. The legal profession itself may have concerns that it wishes to bring to public attention. If there is a concern that the system of justice is not meeting the needs of the people, then the concern deserves to be publicly discussed, just as with any other public service that is not seen to be performing its obligations to the public at large.

Access to justice

38. This final section relates the independence of the judiciary to a fundamental problem that arises in virtually all legal systems. [15]

39. National constitutions and treaties concerned with human rights (such as the International Covenant on Civil and Political Rights) are based on two assumptions: (a) that all persons within the jurisdiction concerned must be able to benefit from human rights provisions and (b) that national courts have a role to play when individuals suffer action that erodes or ignores their human rights. [16] Under many constitutions, the High Court or Supreme Court has a special responsibility for protecting human rights, including a power to provide appropriate relief for breaches of such rights even if this goes outside the usual remedies available from the court.

40. These constitutions also provide for the independence of the national judiciary. The Latimer House Guidelines for the Commonwealth on parliamentary supremacy and judicial independence (already mentioned) sought to promote an effective relationship between national legislatures and the judiciary based on mutual respect for the constitutional functions of each institution. Amongst the guidelines there adopted was that

> "People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed".

41. At Bangalore, in July 1998, a workshop on access to justice organised by the Commonwealth Secretariat was attended by participants from six Commonwealth countries in the Asia region and from diverse professional backgrounds. A workshop on the same theme had earlier been held in Kingston, Jamaica in April 1998 for participants from Caribbean and Pacific jurisdictions. These workshops sought to identify the reasons why, despite the crucial importance of access to justice, it is a complaint from very many jurisdictions that individuals and groups are excluded from access to the courts and the legal system. Such exclusion is in itself a breach of a fundamental right; it also deprives those excluded from seeking judicial protection for other fundamental rights that the national constitution affords to them. Indeed, the implications of exclusion go further than this, since those excluded are not merely deprived of special constitutional protection for their

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15 This section is drawn from material contained in A W Bradley, "Access to Justice – the Rule of Law and the Legal System", presented to the Commonwealth Law Ministers' Meeting in April 1999.

16 As well as the ICCPR, already quoted, see American Convention on Human Rights 1969, Article 8(1); and Article 25: "Everyone has the right to simple and prompt recourse ... to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention...". African Charter on Human and Peoples' rights 1981, Article 7(1): "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force..."

human rights; they are also at risk of being excluded from the benefits of living in a society that has a legal system. The effect of exclusion at the extreme is that individuals cannot by recourse to due process of law protect themselves as citizens, as consumers and as employed persons, as owners or possessors of their homes or other resources, and as family members; they cannot by legal means prevent themselves and their families from being exploited, nor their physical environment from being ravaged and polluted.

42. The Bangalore Workshop identified the causes of exclusion from access to justice as including status, poverty, gender discrimination, ignorance, language, delay, high cost of legal services, inadequate and outdated procedures, lack of adequate training for justice personnel (including the police), geographical and structural impediments. Some causes of exclusion derive from factors that exist outside the legal system, such as issues of infra-structure, geography and level of economic development, resources for education and social structures within the community. Other causes of exclusion derive directly from the legal system itself:

> the mystique about the law fostered by some lawyers
> the complexity or obscurity of legal procedures
> the high cost of contentious litigation
> the failure to ensure that legal services are available to all persons
> the frequent lack of legal aid and assistance that might to some extent redress economic inequality in society
> a failure to reform substantive rules of law
> procedures and rules of evidence that are inappropriate or outdated
> judicial attitudes that emphasise legal technicality for its own sake at the expense of justice or that tend to delay justice for no good reason.

43. Some of these obstacles to access to justice are directly related to developmental issues. Thus the effectiveness of social legislation depends on public awareness of the law and on advice and assistance for members of the public being available to those who need it; this may be more likely to come from non-governmental organisations rather than the legal profession. Those communities affected by the greatest inequality or discrimination (resulting, for example, from ethnic, cultural or gender-related causes) are the least likely to benefit from legal measures, or to be able to take advantage of legal procedures relating to the problems. By contrast, other obstacles result from failures of a professional or personal kind: inexperienced, untrained or overworked prosecutors; judges who grant unnecessary adjournments because they do not wish to deal with the substance of the case; lawyers who invoke inappropriate procedures from ignorance or as an excuse for time-wasting and piling up costs in the hope that the other side will go away – and so on.

44. To a greater or lesser extent, problems of this kind exist in all jurisdictions. As Professor Hazel Genn has commented,

> "Concern about the 'failure' of the civil justice system is everywhere. It is argued that the courts are too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want" [17]

[17] See her stimulating paper "Understanding Civil Justice" in Freeman and Lewis (ed), *Law and Opinion at the End of the Twentieth Century*, OUP 1997, p 155.

She also drew attention to the problem that there are

> "profound dysfunctional effects of legal process. Law can create and reinforce inequalities in society. Litigation can exacerbate and prolong conflict. Litigation can simply offer an outlet for vindictiveness rather than an opportunity for vindication. Regulation can be seen as burdensome.. ... Laws can be unjust in both design and effect". [18]

45. Even in a country which at a national level has an adequate supply of well-trained and experienced lawyers, this can conceal great inequality in access to legal services within local communities. It is never possible to assume that there are no unmet legal needs in society. In other jurisdictions, it may be immediately evident that the judicial system is not functioning particularly well, that many people have no realistic prospects of benefiting from it (for example, if there is no legal aid), and that the legal system is inadequately resourced.

46. Given the wide variations that exist between different legal systems, it is worth considering whether there are any generally applicable principles by which the problem of access to justice may be approached. And are there practical measures that should be encouraged by governments, the courts and the legal profession that would help without requiring an impossible provision of new resources?

47. The workshops on access to justice held in Kingston, Jamaica and in Bangalore in 1998 did not solve these intractable questions. Nonetheless, various conclusions may be drawn from their proceedings.

Need for effective rights

48. The starting point must be that human rights treaties and national constitutions are "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". [19] Access to justice is both a human right in itself and also a gateway to enforcement of other human rights. It is also a fundamental condition of life under the rule of law.

Proper functioning of the courts

49. Judicial protection of human rights is not likely to be effective if the legal system in general (including decision-making by the courts in 'private law' matters; the executive's willingness to respect judicial decisions that affect official power; and the law reform process) is not functioning effectively. Why should we expect judicial remedies for protection of human rights (as a matter of public law) to be working effectively if ordinary judicial remedies are not available to those who have suffered wrongs such as breach of contract, commission of a tort or invasion of property rights? Is justice being properly dispensed when the legal system is prone to long delays, even in the trial of serious offences? [20]

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18 Ibid., pp 172 and 164.

19 *Airey v Republic of Ireland* (1979) 2 EHRR 305, 314.

20 See e g *Sookermany v DPP of Trinidad and Tobago* (1997) 1 BHRC 348 (trial for murder ten years after the killing; held, that the national constitution did not include the right of a person accused of crime to be tried within a reasonable time).

Responsibilities of the state

50. The essential measures to enable justice to be done by an independent judiciary are a direct responsibility of the state. The court system needs to be established at several levels (national, regional and local), but more is required than court buildings, qualified judges and a trained court staff. There must be a legal profession capable of meeting the public's various needs for legal services, advice and representation. In a market economy, some legal services may be left to the market, since lawyers are likely to meet the needs of those with resources to pay for them. But there are likely to be unmet needs for legal services if means of ensuring public provision is not found.

Legal aid provision

51. A great diversity exists in different jurisdictions as regards the provision of legal representation to assist those who cannot afford to pay for it. In some jurisdictions, there is an acute need for legal aid for those accused of serious (even capital) crimes and no answer has been found to the question of how to ensure legal assistance for those whose constitutional rights have been ignored. International treaties set minimum standards for entitlement to legal assistance, at least in criminal cases. Even in a civil case the interests of justice may require that legal representation be provided at public expense. [21] Because of the extent to which justice in the common law tradition depends on the adversarial system, other problems giving rise to access to justice questions arise when in jurisdictions that provide for a full legal aid scheme, it is no longer possible to maintain provision at the same level and economies have to be made.

Judicial independence and public accountability

52. Judicial independence is not an excuse for a failure by the state to make proper provision for the structure of justice. Nor, as we have seen above, is judicial independence a reason why there should not be public accountability for the legal system and the functioning of the courts.

Judicial training

53. Judicial independence is not incompatible with requiring judges to receive training on appointment and from time to time thereafter. The Bangalore workshop already mentioned concluded that judicial training "is an essential element of the measures for ensuring the independence of the judiciary" and recommended that adequate arrangements including the establishment of judicial academies should be made for this. One necessary warning note to be sounded here is that the control of judicial training must remain in the hands of the judiciary and not be taken over by politicians or civil servants. As well as the need for training in court-room techniques and judicial behaviour, there should be training from time to time on major new legislation that is likely to affect the conduct and decision of cases in court.

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[21] In *Airey v Republic of Ireland* (1979) 2 EHRR 305, a married woman needed an order of judicial separation from the High Court to protect herself and her children from assaults and abuse by her violent and drunken husband . Held, European Court of Human Rights, legal representation was necessary to ensure that she had a fair trial of her civil rights and obligations and to ensure due respect for her private and family life.

54. Training of judges should extend to international treaties and other instruments that may influence the outcome of relevant cases, whether involving human rights or other issues. Judges are increasingly likely to have to decide cases with a human rights dimension and need to understand the problems to which such cases give rise and to be familiar with comparable case-law from other jurisdictions.

Judicial appointments

55. The Bangalore Workshop emphasised that it is the responsibility of the state to ensure that the method by which the judiciary are selected for appointment is open and transparent. Various constitutional procedures exist to ensure proper judicial appointments, but these do not always succeed in their objectives.

Public interest litigation

56. The obstacles that confront under-privileged individuals and groups in securing access to justice are such that there is a case to be made for enabling a court to investigate a particular cause of injustice, even though the matter has been brought to the court in the public interest, and not by the claimant or applicant acting to defend his or her own rights and interests. Public interest litigation has (under the inspiration of Justices V R Krishna Iyer and P N Bhagwati) gone very far in the Indian scheme of constitutional protection, where disadvantaged groups (including most recently child labourers and female employees) [22] may by a simple letter invoke what has been called the 'epistolary jurisdiction', that can lead to remedial orders being issued by the court to improve the position for the future. An experienced practitioner in this jurisdiction has written:

> "The Indian PIL [public interest litigation] revolution is a unique response to a felt necessity. It has worked to make justice accessible to the masses, cutting across procedural and technical barriers. It has made fundamental rights a reality for the victims of undeserved deprivation". [23]

The resolution of disputes outside the courts

57. There is little value in enabling members of the public to have access to the court system if this will not give them access to justice in the full sense of that word. There is abundant evidence from many jurisdictions that (a) there is not a single model of civil procedure suitable for resolving all disputes; cheap and practical procedures are essential for many small claims; (b) many disputes (e g in the fields of housing or employment) are suitable for resolution by bodies such as employment or housing tribunals, in which lawyers do not have a privilege of representation; (c) in many cases a just and equitable outcome to a dispute can be attained through alternative methods of dispute resolution, such as arbitration, mediation and conciliation. There is a strong case to be made for regarding the ordinary civil courts as one amongst a whole spectrum of procedures, and also for enabling traditional civil procedures to benefit from the experiences of other methods of decision-making.

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22 See *Mehta v State of Tamilnadu* (1997) 2 BHRC 258 and *Vishaka v State of Rajasthan* (1997) 3 BHRC 261.

23 See Indira Jaising, "Public interest litigation: the lessons from India" in R. Smith (ed), *Shaping the Future: New Directions in Legal Services* (1995), chap 12, at pp 186-7.

Scope for developing standards

59. A conference dedicated to the separation of powers in a constitutional democracy cannot produce a complete answer to the problem of how to ensure that the people as a whole benefit from the constitutional guarantee of judicial independence. Since questions of access to justice and judicial accountability arise in every jurisdiction, attention needs to be given to the following questions:

(a) what are the main obstacles to access to justice, and what are the most likely means of overcoming them?
(b) how can it be ensured that an individual who secures access to the courts has access to a system that dispenses justice, in the full sense of that word?
(c) should archaic court procedures be replaced by simpler and more effective processes?
(d) how can the provision of legal services to disadvantaged groups, individuals and localities be improved?
(e) is there a need to improve the appointment, training and accountability of judges?

Conclusion

60. No simple conclusions are possible in relation to all the issues raised in this paper. I am in no doubt that in a democratic society founded upon the rule of law, the relations between judiciary and executive must be based on mutual respect and trust, and a willingness to accept the foundations for cooperation and coexistence upon which the community depends. In relation to the need for mutual respect between these institutions of the state, it is relevant to remember a wise observation by Lord Nolan in a case in the English Court of Appeal, in which the actions of the Home Secretary in removing a Zairean asylum-seeker to his own country were being scrutinised by the court, and the outcome was a holding that the court had authority to find the Home Secretary's action to be in contempt of court, because it breached an order given by the court that the Zairean was not to be removed:

> "***The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is***". [24]

[24] *M v Home Office* [1992] QB 270, 314. And see *M v Home Office* [1994] 1 AC 377.