

# **THE ROLE OF THE APPELLATE COURT**

by

**The Hon. Mme. Justice D.P. Bernard, O.R., C.C.H.  
Judge, Caribbean Court of Justice**

---

The topic of this address is multi-jurisdictional and multi-dimensional. As such it involves discussion of court systems which are jurisdictionally different even among countries which share a common law history. Primarily appellate courts are courts of review of the decisions of lower courts, and may be intermediate courts or courts of last resort with a power of review only on points of law where the leave of such a court is obtained or courts whose sole function is review of decisions concerning a country's constitution or basic law.<sup>1</sup>

Discussion of the appellate courts of a few selected Commonwealth countries (England and Wales, Canada, Australia, India, South Africa, New Zealand and the Caribbean) will form the basis of this paper, with some comparative reference to the United States Supreme Court. One of the enduring legacies of British colonialism being the court and judicial systems, it is appropriate to commence our journey with a historical tour of the systems of England and Wales.

## **ENGLAND AND WALES**

From the earliest years of trial by ordeal, the passage of the Judicature Act 1873 was transformational in the judicial system of England and Wales merging as it did the common law and equity, and establishing the High Court and the Court of Appeal. The Criminal Appeal Act 1907 brought into being the Court of Criminal Appeal, the jurisdiction of which later passed to the Court of Appeal under the Criminal Appeal Act 1966.

The House of Lords in addition to its legislative function, was vested with a judicial function as a court of last resort, its jurisdiction being regulated by the Appellate Jurisdiction Act 1874 and later Acts; its original jurisdiction is confined to peerage

---

<sup>1</sup> See the Constitutional Court of South Africa which will be discussed in greater detail later.

claims. The Court's appellate jurisdiction covers appeals from the Court of Appeal of England and Wales and Northern Ireland, civil appeals from the Court of Session of Scotland, appeals directly from the High Court of England and Wales and Northern Ireland "leapfrogging" the Court of Appeal, and appeals from the Court Martial Appeal Court. An appeal from a lower court is accepted only with leave of that court or of the House of Lords except an appeal from the Court of Session of Scotland which requires only to be certified that there are reasonable grounds for the appeal.

With the new Supreme Court (formerly the House of Lords) at the apex of the hierarchy of the English court system, the Divisions of the High Court (Queen's Bench, Family and Chancery) exercise appellate jurisdiction as administrative and divisional courts hearing appeals from crown courts, county courts, magistrates' courts and tribunals.

## DOCTRINE OF PRECEDENT

Inevitably any discussion on appellate courts involves the applicability of the doctrine of precedent which in one sense depends on the hierarchy of courts, and in another on whether an appellate court is bound by its own decisions known as "*stare decisis*." The hierarchy of courts dictates that the decisions of higher courts are binding on courts of lower jurisdiction, for example, decisions of the Supreme Court, Court of Appeal and High Courts bind the magistrates, crown and county courts in England and Wales. An appellate court such as the Court of Appeal may also be bound by its own decisions as was first decided in **Young v Bristol Aeroplane Co. Ltd.**<sup>2</sup> In that case the Court of Appeal held that it was bound to follow its own decisions and those of courts of co-ordinate jurisdiction, the only exceptions being (1) to decide which of two conflicting decisions of its own it will follow, (2) to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords, and (3) not to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.<sup>3</sup> A fourth exception where a law was assumed to exist in a previous case, but did not, was

---

<sup>2</sup> [1944]K.B., 718

<sup>3</sup> Re-affirmed By Lord Diplock in **Davis v Johnson** [1978] UKHL 1, [1979] AC 264

established in **R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board**.<sup>4</sup>

Lord Denning, that illustrious and renowned jurist of revered memory and who acquired the reputation of being the great dissenter while in the Court of Appeal (and also while in the House of Lords), expressed strong views against rigidly following **Young**, and found ways of getting around a previous decision if he felt that it was wrongly decided, sometimes by distinguishing it either on the facts or the law.

Unusually, the Criminal Division is not bound by its previous decisions, no doubt placing the need to be fair and just above the need to be certain and rigid.

Prior to 1966, the House of Lords like the Court of Appeal was bound by its own decisions; in fact as far back as 1898 in **London Street Tramways Company Ltd v The London County Council**<sup>5</sup> the House held that a decision upon a question of law is conclusive and binds the House in subsequent cases. The Earl of Halsbury, L.C. reasoned that although cases of individual hardship may arise after a judgment is given and which the profession may find to be erroneous, greater inconvenience would ensue in having each question subject to be re-argued and “the dealings of mankind rendered doubtful by reason of different decisions so that in truth and in fact there would be no real final Court of Appeal.”

This continued to be the position until 1966 when a Practice Statement (Judicial Precedent)<sup>6</sup> was issued in which the learned Law Lords recognised that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.” They reserved the right to depart from a previous decision whenever it appeared right to do so.<sup>7</sup> This did not affect the value of precedent in cases in lower courts, and all other courts that recognised the House

---

<sup>4</sup> [2001] QB 955

<sup>5</sup> [1898] A.C. 375

<sup>6</sup> [1966] 1 WLR 1234

<sup>7</sup> [Lord Reid stated in **R v National Insurance Commissioner, Exp Hudson** [1972] AC 944, 966 “the practice will be used “sparingly” when the previous wrong decision is thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy.”

Some examples where previous decisions of the House were overruled are **Conway V Rimmer** [1968] AC 910 overruling **Duncan v Cammell Laird** [1942] AC 624, **Milangos v George Frank (Textiles) Ltd** [1976] AC 443 overruling **In Re United Railways of Havana and Regla Warehouses Ltd** [1961] AC 1007. In the criminal jurisdiction **R v Howe** [1987] AC 417 overruling **DPP for Northern Ireland v Lynch** [1975] AC 653.

of Lords as the court of last resort. So far the position seems to be the same in relation to the new Supreme Court of England and Wales.

Before leaving the discussion on precedent mention should be made of the European Court of Justice in relation to the House of Lords and its successor, the new Supreme Court. This Court, now part of the English legal system by virtue of the European Communities Act 1972, and established under the Treaty of Rome 1957, is clothed with jurisdiction to determine questions of law pertaining to any Community instrument, and as such can overrule all other national courts including the Supreme Court (and former House of Lords) on matters of Community law. Only in this regard does the Supreme Court yield to any other court as the final arbiter of issues affecting nationals of England and Wales.

#### **THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**

The Privy Council as it is familiarly known (and will hereafter be so described) can be said to be the most multi-faceted court in the judicial system of the United Kingdom since its establishment by the Judicial Committee Act 1833. Besides being one of the highest courts in the United Kingdom it is also the court of last resort for several Commonwealth countries which were former colonies of Great Britain. In addition to jurisdiction in some domestic matters, the Government may refer any issue to the Committee for "consideration and report." Additionally, it is the court of final resort for the Church of England.

#### **PRECEDENT**

Judgments of the Privy Council in cases from overseas Commonwealth jurisdictions are only persuasive in courts of the United Kingdom, but are binding precedent in the lower courts of the jurisdiction from which they emanate.

Not unlike the former House of Lords the Privy Council never regarded itself bound

by its own decisions, and this was held to be so in three cases from the Caribbean.<sup>8</sup> Lord Hoffmann, however, in one instance was of the opinion that the fact that the Board has the power to depart from earlier decisions does not mean that there are no principles which should guide it in deciding whether to do so. He went on to state that *“if the Board feels able to depart from a previous decision simply because its members on a given occasion have a doctrinal disposition ‘to come out differently,’ the rule of law itself will be damaged and there will be no stability in the administration of justice ....”*

Further reference will be made later about the impact of the judgments of the Privy Council when discussing the appellate courts in the selected jurisdictions.

## **CANADA**

Within the hierarchy of the Canadian judicial system the Supreme Court of Canada which came into being in 1875 by an Act of Parliament, and is now governed by the Supreme Court Act, stands at the apex of a structure which is multi-dimensional. It comprises both federal and provincial court systems as well as military courts and tribunals. The Federal Court of Appeal hears and determines appeals from the federal court trial division and federal administrative tribunals, and the Provincial Courts of Appeal function as appellate courts for provincial, superior courts and provincial administrative tribunals. The Supreme Court is the ultimate court of appeal for all of these courts including the military courts.

Leave to appeal to the Supreme Court is given if the case involves issues of law or a question of great public importance that warrants consideration. In addition, the Court can hear references from the Governor in Council for opinions on the constitutionality or interpretation of federal or provincial legislation.

The early beginnings of the Supreme Court did not augur well for its future. Its first case in April 1876 was a reference sent from the Senate requesting the Court's

---

<sup>8</sup> **Neville Lewis v Attorney General of Jamaica (2000)** 57 WIR 275; [2000] UKPC 35C; **Charles Mathew v The State** (2003) 64 (WIR) 270; 2004] UKPC 33C; **Lemuel Gibson v The Government of the United States of America (The Bahamas)** 70 WIR 34; [2007] UKPC 52.

opinion on a private bill; it was not until one year after its first sitting that the Court began to sit regularly.

Despite the creation of the Supreme Court in 1875 the Privy Council continued to be the court of last resort for Canada until 1933 for criminal appeals, and 1949 for civil appeals.

## PRECEDENT

Shortly after appeals to the Privy Council were abolished, the Supreme Court's approach to decisions emanating from the House of Lords began to change, and their relevance to Canadian jurisprudence was called into question. Illustrative of this is the case of **Fleming v Atkinson**<sup>9</sup> involving a collision between a motor car and cattle on the municipal highway and consideration of the right of an adjoining landowner to permit cows to run at large on the highway. The question arose whether an English common law rule was applicable. It was held by a majority of the Supreme Court that the injured motorist was entitled to succeed. Reference was made to an English case of **Searle v Wallbank**<sup>10</sup> that the English common law rule was to the effect that highways in England having come into existence by dedication rather than by governmental action there was formerly no real risk of damage from the presence of straying animals, hence no duty of care to users of the highway. This had been followed in one case in Ontario of **Noble v Calder**<sup>11</sup> in which the English common law position as defined in **Searle v Wallbank** (supra) had been applied. Judson, J writing the majority judgment reasoned that the historical basis for the rule in **Searle** was dependent upon the peculiarities of highway dedication in England which had never existed in Ontario; the public right of passage on the highways of Ontario was never subject to the risk of stray animals as the highways were created by the province and vests in the province. He concluded that this alone was sufficient to distinguish the law of Ontario from the law of England and to render the principle stated in **Searle** inapplicable to Ontario.

---

<sup>9</sup> [1959] 18 DLR (2<sup>d</sup>) 81

<sup>10</sup> [1947] A.C. 341

<sup>11</sup> [1952] 3 DLR 651

Later in **Ares v Venner**<sup>12</sup> the issue of the admissibility of hospital records and exceptions to the hearsay rule arose for consideration and involved discussion of the House of Lords decision in **Myers v Director of Public Prosecutions**<sup>13</sup> and whether extension of the exceptions to the hearsay rule should involve a legislative or judicial solution. Hall J in delivering the judgment of the Court adopted and followed the minority views of Lords Donovan and Pearce in **Myers** which supported a judicial solution rather than a legislative one. Lord Donovan had expressed the view that “the common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds.” The opposite view was taken by Lord Reid who posited that “the most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature.”

Hall, J's opinion was that the Court (the Supreme Court) should adopt and follow the minority view rather than resort to saying in effect: “This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job.” This indicated a pragmatic and less rigid approach to precedent commensurate with modern conditions.

The scope of the Canadian Bill of Rights enacted in 1960 as a federal statute was limited, and rarely were such statutes deemed to be inoperative by the Supreme Court. However, in **R. v. Drybones**,<sup>14</sup> a landmark decision, the Court held that Section 94(b) of the Indian Act which prohibited Indians from being intoxicated off a reserve, was inoperative being in violation of Section 1 of the Bill of Rights which recognised the enjoyment of certain rights without discrimination based on race, colour or national origin.

However, in **Attorney General of Canada v. Lavell**<sup>15</sup> the Court held that the enfranchisement of Indian women for marrying a non-Indian as provided under Section 12(1)(b) of the Indian Act did not violate the respondent's right to equality

---

<sup>12</sup> [1970] SCR 608

<sup>13</sup> [1965] A.C. 1001

<sup>14</sup> [1970] SCR. 282

<sup>15</sup> [1973]SCR 1349

before the law under Section 1 (b) of the Bill of Rights and so the impugned Section of the Indian Act was not inoperative.

Dissatisfaction with the Bill of Rights eventually led to the adoption in 1982 of the Canadian Charter of Rights and Freedoms which was entrenched in the constitution of Canada. It broadened the scope of the fundamental rights and freedoms with wide powers of interpretation and enforcement being given to the courts, the Supreme Court of Canada being the ultimate authority. This mandate was utilised by the Supreme Court in several cases, two of them being foremost in mind – **R. v. Morgentaler**<sup>16</sup> (involving abortion rights) when the Court found that Section 251 of the Criminal Code violated a woman's right to security of the person under Section 7 of the Charter. The other was **Vriend v Alberta**<sup>17</sup> in which the Supreme Court held that a legislative omission regarding sexual orientation in the Alberta Individual Rights Protection Act violated Section 15 of the Charter.

## **AUSTRALIA**

Provision in Section 71 of the Constitution of Australia led to the establishment in 1901 of an appellate court known as the High Court of Australia with its first sitting taking place in 1903 and comprising jurists from the newly created Commonwealth of Australia with a jurisdiction embracing the state supreme courts. In **Dalgarno v Hannah**<sup>18</sup> (among the first cases decided by the High Court on appeal from the Supreme Court of New South Wales) the Court expressly stated that Section 73 of the constitution "provides that the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes to hear and determine appeals from all judgments, decrees, orders and sentences of any federal court, or court exercising federal jurisdiction, or of the Supreme Court of a state." Defying critics who at the time feared that the Court would be a tribunal with no real status, the Court spoke through its judgments and over the years gained a reputation for judicial excellence.

---

<sup>16</sup> [1988] 1 SCR 30

<sup>17</sup> [1998] 1 SCR 493

<sup>18</sup> [1903] HCA 1, [1903] 1 CLR 1

The High Court stands at the pinnacle in the hierarchy of courts in Australia with two streams – the superior courts which comprise the supreme courts in each state and territory and which normally hear appeals from inferior courts in their area, and federal courts which are superior courts with jurisdiction over laws made by the federal Parliament, and from the family court. Appeals to the High Court are by special leave only; hence for most cases the appellate divisions of the supreme courts of each state and the federal court are the ultimate appellate courts. The Full Court of the High Court is now the court of last resort for the whole of Australia.

#### THE HIGH COURT AND THE PRIVY COUNCIL

Section 74 of the Constitution prohibited appeals to the Privy Council on constitutional matters involving disputes about the limits of Commonwealth or state powers except where the High Court certified the appeal which occurred only once. In **Kirmani v Captain Cook Cruises Pty Ltd (No. 2)**<sup>19</sup> the High Court explained the reason for this to be that it rigorously insisted on maintaining its ultimate constitutional responsibility to decide conflicts between the Commonwealth and the states without the intervention of Her Majesty in Council; in fact, the Court felt that by granting a certificate for the appeal it would be abdicating its responsibility to decide finally questions concerning the limits of Commonwealth and state powers, questions which had a peculiarly Australian character and were of fundamental concern to the Australian people.

In 1968 by the Privy Council (Limitation of Appeals) Act all appeals to the Privy Council involving federal legislation were discontinued, and in 1975 the Privy Council (Appeals from the High Court) Act closed the door on all appeals to the Privy Council. In 1986 with the passage of the Australia Acts all appeals from state supreme courts to the Privy Council were finally terminated, leaving the High Court as the only court of last resort for all Australian courts.

#### PRECEDENT

The question whether the High Court should be bound by its own decisions (*stare decisis*) was decided as far back as 1913 when, in **Australian Agricultural**

---

<sup>19</sup> [1985] HCA 27, 159 CLR 461

**Company v Federated Engine-Drivers**<sup>20</sup> Isaacs, J reasoned that “where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of the Court to declare the law truly.” This liberal approach to precedent preceded the House of Lords Practice Statement (Judicial Precedent) by thirty-three years, and is consistent with the approach of the Australian courts to eschew rigidity in interpretation of the law in favour of pragmatism and practicality.

With the severing of ties to the Privy Council in 1968 and 1975 Gibbs, J in **Viro v R**<sup>21</sup> articulated the view that “*The Court was not bound by decisions of the Privy Council, which no longer occupied a position above the High Court in the judicial hierarchy. As such it was for the High Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment.*”

Similar sentiments indicative of the Australian High Court’s intention to create a jurisprudence relevant to the needs of its people and the development of the law in Australia were expressed by Barwick, C.J. in the said case, and repeated twenty-five years later by Kirby, J in **Barns v Barns**.<sup>22</sup> The High Court over the years has indeed fulfilled its mandate and continues to do so.

## INDIA

The Supreme Court of India which was inaugurated on 28 January 1950 as the highest court in the judicial system has a tri-partite jurisdiction – original, appellate and advisory. The exclusive original jurisdiction relates to disputes between Government and one or more states or between states involving any question on the existence or extent of legal rights or the enforcement of fundamental rights. The appellate jurisdiction covers judgments of one or more of the twenty-one high courts

---

<sup>20</sup> [1913] 17 CLR 261

<sup>21</sup> [1978] 141 CLR 88

<sup>22</sup> [2003] CLR 169: “Although this Court continues to pay respect to the judicial reasons of the Privy Council, especially in respect of Australian appeals at a time when the Privy Council was a court within the Australian judicial hierarchy, we are not bound by such reasons.” See also similar views of Crane J.A. in the Court of Appeal of Guyana in **Peter Persaud and Others v Pln. Versailles & Schoon Ord., Ltd** (1971) WIR 107 at 132 to this effect: “It is my considered opinion that consequent on the removal of the Privy Council as our final court of appeal, the doctrine of *stare decisis* ... is a dead letter with us; its former judgments are now only of persuasive authority. Of course, we shall continue to cite, apply and to follow them, and when we do so, they will thereafter speak with our authority.”

in civil and criminal cases, and the special advisory jurisdiction may be invoked by the President of India by specific referral to it according to the constitution.

One unique feature of the Supreme Court's jurisdiction is the somewhat recent innovation of entertaining and deciding matters of public interest sent to it by members of the public either by writ petition or a simple letter addressed to the Chief Justice of the Court. This "public interest litigation" has led to several landmark cases being decided by the Court.

Lower down the hierarchy in the judicial system are the high courts of each state, and below them subordinate district courts all dealing with civil, criminal and family litigation. The high courts serve primarily as appellate courts hearing appeals from lower courts although they have an original jurisdiction in civil and criminal matters specifically conferred on them by a state or under federal law. Constitutionally all inferior courts including the high courts are bound by the decisions of the Supreme Court.

The relationship between the executive and judicial arms of the State has not been without some degree of conflict since the establishment of the Supreme Court. One area of law which gave rise to a confrontation was the executive's attempt to abridge the fundamental rights provisions in the constitution by the passage of amendments to implement land distribution and which affected one's right to property. In **Golaknath and others v The State of Punjab**<sup>23</sup> the Court held that fundamental rights could not be abridged or taken away by amending legislation. In the course of one of the judgments the learned Justices opined that fundamental rights are the primordial rights necessary for the development of human personality, and were rights which enabled a man "to chalk out his own life in the manner he likes best."

Similarly in **Kesavananda Bharati v The State of Kerala**<sup>24</sup> the learned Chief Justice in his judgment emphasised the importance of the preservation of the freedom of the individual which could not be amended out of existence; therefore the fundamental rights conferred by the constitution cannot be abrogated, though a reasonable

---

<sup>23</sup> [1967] AIR 1643

<sup>24</sup> [1973] AIR SC 1461

abridgement of those rights could be effected in the public interest. The judgments of the other justices reflected the same opinion that amendments to the constitution could be made providing the basic structure remains intact. The fallout from this decision was that during a state of emergency in 1975 an amendment to the constitution was passed which nullified the effect of the decision. However, a few years after the emergency the Supreme Court reaffirmed its power of judicial review in another case.

#### PRECEDENT

For the Supreme Court of India like other final appellate courts “stare decisis” arose for determination in the case of **The Bengal Immunity Co. Ltd v The State of Bihar and Others.**<sup>25</sup> In doing so reference was made to decisions of the English and Australian courts as well as the Supreme Court of the United States of America. In the course of his judgment Das, CJ (ag.) concluded that there was nothing in the Indian constitution which prevented the Supreme Court from departing from a previous decision if it was convinced of its error and baneful effect on the general interests of the public. He articulated the view that in considering the applicability of English decisions it should be borne in mind that those decisions may well have been influenced by considerations which could no longer apply to the circumstances then prevailing in India. Bhagwati, J., another member of the Court, adopted the reasoning of other final courts that the only safeguard which should be put on the exercise of the power of reconsideration of earlier decisions was that the earlier decision should be manifestly wrong or erroneous particularly when the court is concerned with the construction of provisions of a constitution (as was the case before them) which cannot be easily amended. The Court ultimately decided to review an earlier decision in order to rectify an erroneous interpretation of the constitution which had resulted in considerable inconvenience and hardship.

On this issue the dissenting opinion of Ramaswami, J in **Golaknath and Others v The State of Punjab** (supra) was that even though the constitution is an organic document intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time, the Court must be reluctant to accede

---

<sup>25</sup> [1954] INSC 120

to the suggestion that its earlier decisions should be frequently reviewed or departed from. He opined that in such a case the test should be what is the nature of the error alleged in the earlier decision and its impact on the public good; further, it is also a relevant factor that the earlier decision had been followed in a large number of cases and multitude of rights and obligations had been created.

## **SOUTH AFRICA**

With the establishment of the Constitutional Court in 1994, South Africa now boasts of two courts of last resort in its judicial system, the other being the Supreme Court of Appeal. The Constitutional Court, however, is regarded as the highest court, and is the final court for appeals relating to the constitution. In this regard its decisions are binding on all other courts, and it has exclusive jurisdiction to declare any Act of Parliament invalid or unconstitutional.

The Supreme Court of Appeal formerly referred to as "The Appellate Division" which was first established in 1910 when the Union of South Africa was created, had a change of name under the constitution of 1996. It is the final court of appeal in all matters from the high courts and lower courts except those concerning the constitution when it gives way to the Constitutional Court.

In addition to its function as an appellate court in civil and criminal matters from the high courts, there is a special procedure for referrals to be made to the Supreme Court of Appeal by the Minister for Justice and Constitutional Development whenever there is any doubt as to the correctness of a high court decision in a criminal case on a question of law or where such a decision is in conflict with a decision given by another high court. The Supreme Court of Appeal may hear arguments in order to determine the issue for future guidance of all of the courts. Similar referrals may be made by the Minister to the Supreme Court after consultation with the South African Law Reform Commission where there are conflicting decisions in civil matters from different high courts.

In relation to constitutional matters, although the Supreme Court of Appeal may make orders upholding the validity of Acts of Parliament or concerning conduct of the President, an order of constitutional invalidity has no force unless confirmed by the

Constitutional Court. The importance and ultimate authority of the Constitutional Court as the final arbiter on all issues pertaining to the constitution was emphasised in the judgment of Chaskalson, P in **Re Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa**<sup>26</sup> which raised the question whether a court has the power to review and set aside a decision made by the President of South Africa to bring an Act of Parliament into force. The Transvaal High Court was requested to review and set aside the President's decision to bring a 1998 Act into operation in order to govern the registration and control of medicines for human and animal use. The High Court declared the decision of the President null and void, and referred it to the Constitutional Court for confirmation of its order. The Constitutional Court confirmed the order of the High Court but for different reasons raising the issue of whether the High Court's order setting aside the President's decision was a finding of constitutional invalidity that required confirmation by the Constitutional Court under section 172(2)(a) of the constitution.

In the course of his judgment Chaskalson, P stated that the Constitutional Court occupies a special place in the new constitutional order, and was established as part of that order as a new court to be the highest court in respect of all constitutional matters, and as such, the guardian of the constitution; it has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. He went on to say that that was the context within which Section 172(2)(a) provides that an order made by the Supreme Court of Appeal, a high court or a court of similar status concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President has no force unless confirmed by the Constitutional Court.

The constitution of South Africa has been regarded within legal circles as one of the most progressive within recent times particularly with regard to the protection of fundamental rights and freedoms, formulated as it was to correct the harsh abuses of the apartheid system. In this regard the role of the Constitutional Court was defined as protector and enforcer of the Bill of Rights embodied in the Interim Constitution of

---

<sup>26</sup> [2000]2ACC 1

1994. That Bill of Rights applied to all law, and Section 173 of the Constitution gives to all higher courts (the Constitutional Court, the Supreme Court of Appeal and the high courts) “the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

A very interesting case which exemplifies the Constitutional Court’s obligation to develop the common law in order to promote the objects of the Bill of Rights is **Alix Jean Carmichele v The Minister for Safety and Security and Another**.<sup>27</sup> The applicant sued the respondents for damages arising out of an attack on her by a man who was awaiting trial for attempted rape on another woman, and who was granted bail despite his history of sexual violence. Both the High Court and the Supreme Court of Appeal dismissed her claim on the ground that she had failed to establish a legal duty specifically owed to her by the police and prosecutor who could not therefore be liable to her for damages. In a unanimous decision the constitutional Court upheld an appeal against the decisions of the lower courts. In the course of a most enlightening judgment Ackerman and Goldstone JJ remarked that under the constitution of South Africa the duty cast upon judges is different in degree to that which the Canadian Charter of Rights casts upon Canadian judges. The South African constitution brought into operation, “in one fell swoop,” a completely new and different set of rights imposing on all of the courts a general duty to develop the common law where it deviates from the spirit, purport and objects of the Bill of Rights. This duty upon the judges arises in respect of both the civil and criminal law whether or not the parties in any particular case request the court to develop the common law.

The Constitutional Court remains unswerving in its mandate to uphold the law and the constitution of South Africa.

## **NEW ZEALAND**

The Supreme Court of New Zealand (like the Caribbean Court of Justice) is one of the newest courts of final resort among other such courts having come into existence on 1st January 2004 by virtue of the Supreme Court Act 2003 replacing the Privy

---

<sup>27</sup> [2001] CCT 48/00

Council as New Zealand's final appellate court. Appeals to the Supreme Court in civil matters only are by leave of the court if it is satisfied that is in the interests of justice to give such leave, and in the criminal matters specifically authorised by statute. Generally appeals are heard from the Court of Appeal only, but in exceptional circumstances the court may give leave to appeal from a decision of a lower court.

Prior to the establishment of the Supreme Court, the Court of Appeal of New Zealand had existed since 1862 hearing appeals from the High Court, then called the Supreme Court.

## PRECEDENT

A discussion on precedent in the court system of New Zealand should centre mainly around the decisions of the Court of Appeal having regard to its long existence and the more recent establishment of the Supreme Court which is now the final appellate court.

After the English decision in **Young v Bristol Aeroplane Co. Ltd** (supra) in which the Court of Appeal held that it was bound by its own decisions the Court of Appeal of New Zealand in **Re Rayner (deceased), Daniell and Others v Rayner and Others**<sup>28</sup> in a majority decision held that "*the Court of Appeal is free to overrule a judgment of that Court which is contrary to the current of New Zealand authority theretofore existing, or which, though not expressly overruled, is, in principle, in conflict with a decision of the House of Lords or the Privy Council or inconsistent with a judgment of the High Court of Australia.*"

The issue of *stare decisis* arose on several occasions after **Rayner** but with no definitive position taken.<sup>29</sup> In **Collector of Customs v Lawrence Publishing Co. Ltd.**,<sup>30</sup> Richardson J, stated that while the Court had not pronounced in any definite way on the circumstances in which it would reconsider an earlier decision the practice of the Court indicated a cautious willingness to review earlier decisions in

---

<sup>28</sup> [1948] NZLR 455

<sup>29</sup> See **Preston v Preston** [1955] NZLR 1251; **Re Manson** [1964] NZLR 257; **Mc Farlane v Sharp** [1972] NZLR 838

<sup>30</sup> [1986] NZLR 404

perceived appropriate cases, and a reluctance to be completely fettered by its own past decisions. He conceded that adherence to past decisions promotes certainty and stability, but concluded that the Court had the final responsibility within New Zealand for the administration of the laws of New Zealand, and while its decisions are subject to review by the Privy Council few litigants who are unsuccessful in the Court of Appeal feel able to follow that path; hence he thought it unwise to formulate any absolute rule.

Finlay, J in **Re Rayner** (supra) had stated in his judgment that "the Court of Appeal in New Zealand occupied a position in the judicial hierarchy which differed very materially from that of the Court of Appeal in England, and it followed consequently that the Court of Appeal was in effect, in nearly all cases, the final court of New Zealand. This was based on the fact of the final court (the Privy Council) being thousands of miles away. With the establishment of the Supreme Court of New Zealand this is no longer the position, and in light of this a more definitive position of the effect of *stare decisis* on the Court of Appeal inevitably will change if it has not done so already. The focus of the doctrine now shifts to the Supreme Court.

#### THE PRIVY COUNCIL AND NEW ZEALAND

This can best be addressed by reference to a speech given by Chief Justice Dame Sian Elias to the 13th Commonwealth Law Conference held in Melbourne, Australia, in April, 2003 before the establishment of the new Supreme Court.<sup>31</sup> While agreeing that the real benefit obtained by New Zealand's legal system from appeals to the Privy Council was the benefit of a second appeal, albeit in a tiny number of cases, Dame Elias posited the view that in some cases where the New Zealand Court of Appeal was rightly reversed, the same result would have been achieved on further appeal within New Zealand. She went on to state that the main reason that there were so few landmark decisions on appeal from New Zealand was that in the common law world such decisions were landmarks for all countries in that the common law tradition tended to pull all countries together in most cases. This meant that the landmark decisions of the House of Lords, or the High Court of Australia, or the Supreme Court of Canada generally gained acceptance in New Zealand and

---

<sup>31</sup> Parliamentary Library -background information service for members of Parliament 2003/02 8 May 2003

throughout the common law world as much as or even more than those of the Privy Council.

Dame Elias observed that the Privy Council had increasingly accepted that local conditions justify different treatment. Two cases amply exemplify this point of view. In **Invercargill City Council v Hamlin**<sup>32</sup> the Privy Council held that although inheriting English common law, it did not follow that New Zealand common law would develop identically. The Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England. Accordingly, the Court of Appeal was entitled consciously to depart from English case law on the ground that conditions in New Zealand were different.

Similarly in **Lange v Atkinson**<sup>33</sup> the Board noted that for some years it had recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. It concluded that the courts of New Zealand were much better placed to assess the requirements of the public interest in New Zealand than the Board, and accordingly on the particular issue it would not substitute its own views, if different, from those of the New Zealand Court of Appeal.

Since its establishment the Supreme Court decisions have covered a varied spectrum of issues. In **Ngan v R**.<sup>34</sup> the Court had to consider the scope and application of Section 21 of the New Zealand Bill of Rights Act 1990 regarding the right to be free of unreasonable search and seizure, and held that evidence of a crime discovered incidental to an inventory search of a car involved in an accident was admissible in court. The Court found that the Act did not make the search of **Ngan's** property unlawful.

---

<sup>32</sup> [1996] NZLR 513

<sup>33</sup> [2000] NZLR 257

<sup>34</sup> [2007] NZSC 105

Another decision of the Supreme Court delivered recently in the case of **Jeffries v The Privacy Commissioner**<sup>35</sup> involved the question of whether privilege is capable of applying to unsolicited communications and information, and whether the identity of the informant is capable of being within the scope of the privilege.

The Supreme Court of New Zealand seems well on its way to developing its own jurisprudence and carving a niche for itself among the final appellate courts both within and outside of the Commonwealth.

### **CARIBBEAN APPELLATE COURTS**

The grant of independence to the former British colonies of the Caribbean led to the establishment of appellate courts within their jurisdictions with the Privy Council retaining its status as the court of last resort for all except one.<sup>36</sup> The inauguration of the Caribbean Court of Justice in April 2005 has seen three Caribbean states, Barbados, Guyana and recently Belize, accepting this Court as their final appellate court.<sup>37</sup>

The appellate courts in the Caribbean<sup>38</sup> hear and determine appeals from their domestic courts, and have over the years sought to develop a jurisprudence which reflects the mores and customs of their societies while applying the common law which for all former colonies has been the common law of England. This was preserved legislatively after the attainment of independence, for example, in Trinidad and Tobago<sup>39</sup> and Guyana.<sup>40</sup>

However, in some instances, the common law did not always square with local circumstances and situations. Crane J.A. sitting in the Court of Appeal of Guyana in

---

<sup>35</sup> [2010] NZSC 99

<sup>36</sup> Guyana severed ties with the Privy Council in 1970.

<sup>37</sup> Antigua & Barbuda, The Bahamas, Dominica, Grenada, Jamaica, St Christopher & St. Nevis, St Lucia, St Vincent & The Grenadines, Trinidad and Tobago have still retained the Privy Council as their final appellate court.

<sup>38</sup> The Bahamas, Barbados, Belize, Guyana, Jamaica, Trinidad and Tobago, and the Eastern Caribbean Court of Appeal for Anguilla, Antigua & Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Christopher & Nevis, St Lucia, and St Vincent & the Grenadines.

<sup>39</sup> See Section 12 of Trinidad and Tobago Supreme Court of Judicature Act, Chap. 4:01

<sup>40</sup> See Section 3(b) of the Civil Law of Guyana Act, Cap. 6:01 in relation to immovable property.

the case of **Peter Persaud and Others v Pln. Versailles & Schoon Ord Ltd**<sup>41</sup> expressed strong views that despite the fact that statute stipulated that the common law of the (then) Colony was to be the common law of England, this in no way fettered the jurisdiction of the Guyana Court from itself developing and expanding the common law to meet the justice of the case when necessary.

#### EFFECT OF DECISIONS OF THE PRIVY COUNCIL IN THE CARIBBEAN

Apart from a few dependencies and small colonies in world-wide geographical locations the Privy Council's greatest remaining influence is felt within the Commonwealth Caribbean region comprising in some instances states that have shed the colonial mantle for over forty years. Being the court of final jurisdiction for these states their courts are bound by decisions emanating from the Privy Council with results which are oft times baffling and bewildering to citizens and which run counter to accepted norms in their societies.

The Trinidadian case of **Kizza Sealey and Marvin Headley v The State**<sup>42</sup> provides an apt illustration. The two appellants who were charged and convicted of murder appealed to the Court of Appeal of Trinidad and Tobago who dismissed the appeal whereupon they appealed to the Privy Council. The prosecution's case rested mainly on the testimony and positive identification of the appellants at the scene by an off-duty corporal of police who knew both of them from childhood and lived in the same neighbourhood; in fact one of the appellants under cross-examination at the trial admitted that he knew the police corporal who lived next to him. Their Lordships of the Privy Council at the hearing recognised that the case against the two appellants was a very strong one and that from a reading of the transcript the alibi evidence appeared unimpressive. However, allowing the appeal, a majority of the Board concluded that there was an omission of a good character direction by the trial judge which was a defect in the conduct of the trial despite the fact that the omission was not attributable to the trial judge, but the fault of defence counsel who did not raise it in evidence. They reasoned that whilst it appeared probable that the jury would have convicted they were unable to conclude that the jury would inevitably have convicted. Both the majority and the minority of the Board agreed that the alibi

---

<sup>41</sup> (1970) 17 WIR 107

<sup>42</sup> (2002) 61 WIR 491; [2002] UKPC 52

evidence was in reality very weak as against the strength of the evidence of the police corporal. In the opinion of the minority the appellants had had the benefit of the usual directions on the presumption of innocence and of the approach which must be taken to defence evidence; also it was stretching imagination too far to suppose that a good character direction would have made any difference to the result of the case.

The acquittal of the appellants still remains inexplicable to the average citizen of Trinidad and Tobago who cannot comprehend that two men who were positively identified by a reliable witness were freed despite the failure of their defence counsel to lead evidence of their good character. Such are the vagaries of the law.

There have been instances when the Law Lords of the Privy Council have conceded that judges of the domestic courts are in a better position to determine certain issues based on their knowledge of local conditions and their experience as happened in **Peter Seepersad v Theophilus Persad & Capital Insurance Co Ltd**<sup>43</sup> when the Board expressed the view that the amount determined by the Trinidad and Tobago Court of Appeal as damages for pain and suffering in an accident claim was the product of the views of appellate judges on a topic peculiarly within their own experience and their Lordships were not disposed to amend it. A similar approach was taken in **Basdeo Panday v Kenneth Gordon**<sup>44</sup> in a libel suit when the Board opined that how words of the alleged character would be understood and what effect such words would have on those who heard them are matters on which local courts are far better placed than their Lordships.<sup>45</sup>

## **CARIBBEAN COURT OF JUSTICE**

For the past five years since its inauguration on April 16, 2005 the Caribbean Court of Justice has sought as its mission to foster the development of an indigenous Caribbean jurisprudence, and visualises an accessible, innovative and impartial justice system reflective of the Region's history, values and traditions. This Court is regarded as being unique in that it seeks to combine in twin jurisdictions, appellate

<sup>43</sup> (2004) 64 WIR 378; [2004] UKPC 19

<sup>44</sup> (2005) 67 WIR 290; [2005] UKPC 36

<sup>45</sup> Similar approach adopted in New Zealand cases of **Invercargill City Council v Hamlin** (supra) and **Lange v Atkinson** (supra)

and original, the Caribbean Region's need for a court of last resort for domestic appellate courts as well as an international court with a mandate to interpret and apply, where necessary, provisions of a regional economic treaty.

Within one year of its inauguration the Caribbean Court was required to decide an appeal from a decision of the Court of Appeal of Barbados<sup>46</sup> on a constitutional motion involving, *inter alia*, whether, and in what manner unincorporated international human rights treaties which give a right of access to international tribunals affect the rights and status of a person convicted of murder and sentenced to a mandatory death penalty. The Court of Appeal of Barbados relied on a decision of the Privy Council in **Neville Lewis v the Attorney General**<sup>47</sup> (an appeal from Jamaica) by which it was bound, the Privy Council being at that time its final appellate court. The Caribbean Court felt obliged to determine whether **Lewis** should or should not continue to be the law of Barbados, and this required a re-examination of other judgments of the Privy Council. The Court was mindful of the fact that its establishment has given rise to speculation concerning its approach to judgments of the Privy Council. In deciding what this approach ought to be one has to bear in mind the stated mission of the Court which is to foster the development of an indigenous Caribbean jurisprudence. In pursuing this goal the Court in **Joseph and Boyce** postulated the view that it will consider the opinions of the final courts of other Commonwealth countries and particularly the judgments of the Privy Council which determine the law for those Caribbean states that accept the Privy Council as their final appellate court. It stated further that in this connection it accepted that decisions made by the Privy Council in appeals from other Caribbean countries while it was still the final appellate court for Barbados were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals emanated and the written law of Barbados. Further the Caribbean Court stipulated that these decisions continue to be binding in Barbados notwithstanding the replacement of the Privy Council unless and until they are overruled by the Caribbean Court.

---

<sup>46</sup> **Attorney General and Others v Jeffrey Joseph and Lennox Ricardo Boyce** (2006) 69 WIR 104

<sup>47</sup> (1999) 57 WIR 275, [2001] 2 AC 50

After extensive consideration and deliberation of the case law drawn from several jurisdictions on the issue mentioned earlier the Caribbean Court concluded that the result which it arrived at was not dissimilar to that reached by the Privy Council in **Lewis**, albeit by a different route, and saw no reason to disagree with the Board's conclusions.

Over the past five years of the Court's existence several other cases provided the opportunity to elucidate and interpret some troubling points of law particularly in cases concerning title to land in Guyana. In **Harrinauth Ramdass v Salim Jairam**<sup>48</sup> an appeal from the Court of Appeal of Guyana, the issues related to the ongoing debate of whether equitable interests in land are recognised in Guyana having regard to the development of the law governing immovable property and its Roman-Dutch history. A review and analysis of the relevant case law led to a final conclusion that equitable interests in land are not recognisable in Guyana. This was followed by another Guyanese appeal, **Jassoda Ramkishun v Conrad Ashford Fung-Kee-Fung**,<sup>49</sup> concerning the concept of fraud in relation to immovable property, the relevance of South African case law as well as the position of heirs as volunteer transferees and the grant of specific performance against a volunteer both in English law and Roman-Dutch law, issues which are of extreme importance to the development of land law in Guyana.

The Caribbean Court is still in its infancy when compared with other appellate courts with a final jurisdiction; hence it may be too early for it to decide whether it will be bound by its own decisions, which though it may result in certainty and stability may give rise to rigidity and inflexibility when later cases require the Court to revise its thinking on a particular precedent. However, a final court's review of its earlier decisions ought not to be undertaken whimsically or fancifully, but must be taken after careful consideration and a conviction that the earlier decision was completely erroneous.<sup>50</sup> A change in the composition of the court ought not to be good reason to depart from an earlier decision. However, in **Charles Mathew v The State**<sup>51</sup> the

---

<sup>48</sup> (2008) 72 WIR 270

<sup>49</sup> CCJ Appeal CV 14/2007

<sup>50</sup> See **The Bengal Immunity Co. Ltd v State of Bihar** [1954] INSC 120; **Queensland v Commonwealth** [1977] 139 CLR 585

<sup>51</sup> (2004) 64 WIR 412; [2004] 33 JCPC

Privy Council with an enlarged Board overruled **Balkissoon Roodal v The State**<sup>52</sup> (both cases from the Court of Appeal of Trinidad and Tobago) the purpose being to decide whether **Roodal** should be followed not only in Trinidad and Tobago but also in other Caribbean states which have similar constitutions and a right of appeal to the Privy Council. Their Lordships considered that “*it would be impossible to apply it to other countries merely for conformity with Trinidad and Tobago but equally impossible to declare that it was not the law in other countries but still formed part of the law of Trinidad and Tobago.*”

These are situations with which the Caribbean Court of Justice will have to grapple in the years ahead as it strives to develop its own jurisprudence.

### **SUPREME COURT OF THE UNITED STATES**

Although this paper is directed mainly at the role of appellate courts of Commonwealth jurisdictions, it can only be enhanced by a comparison with the court of final jurisdiction of the United States of America where there are more similarities than differences, the common law being the *fons et origo* of both jurisdictions.

Like any court newly constituted the Supreme Court established in 1789 in its early era heard few cases, the first being **West v Barnes**<sup>53</sup> argued in 1791 before the Jay Court (Chief Justice John Jay), two years later. It involved a procedural issue where the Court was required to overrule a Rhode Island state statute. However, **Marbury v Madison**<sup>54</sup> is regarded as the landmark case (Marshall Court) which formed the basis for the exercise of judicial review in the United States under Article 111 of the constitution, and which declared the Court to be the supreme arbiter of the constitution.

The Supreme Court’s main jurisdiction is appellate although it may exercise an original jurisdiction involving disputes between two or more states much like the Caribbean Court of Justice, but which it rarely exercises.

---

<sup>52</sup> (2003) 64 WIR 270; [2003] 78 JCPC

<sup>53</sup> 2 US 401 (1791)

<sup>54</sup> 5 US (1 Cranch) 137 (1803)

The United States court structure comprises courts of appeals which are intermediate appellate courts of the federal court system. These courts hear appeals from district courts within the federal judicial circuit, and review decisions serving as the final court in most federal cases. This is primarily due to the fact that fewer than 100 cases are heard annually by the Supreme Court which stands at the apex of the federal court system. On matters concerning interpretation of federal law and statutes, including the U.S. constitution, decisions of the Supreme Court are binding on all lower courts even on state courts which are not part of the federal system.

The Supreme Court has to its credit several important decisions handed down over the years during the tenure of various Chief Justices, the most notable being by the Warren Court (1953 - 1969) in **Brown v Board of Education of Topeka**<sup>55</sup> when it held segregation in public schools to be unconstitutional, and the Burger Court (1969-1986) in **Roe v Wade**<sup>56</sup> which ruled that the constitution protected a woman's right to privacy and control over her body thereby removing bans on abortion.

## PRECEDENT

With jurisdiction of courts within the United States judicial system comprising state and federal courts the doctrine of precedent follows the same pattern. As is generally accepted courts of lower jurisdiction are bound by the decisions of courts of higher jurisdiction, with the decisions of courts of last resort normally binding all courts within a court system. Within the states court systems, decisions of state appellate courts bind only courts of lower jurisdiction within that state, but not those of other states. Within the federal system higher federal courts bind lower federal courts within their jurisdiction. Conflicting decisions within federal courts as to the meaning of federal laws are usually resolved by the Supreme Court whose decision is binding on all courts.

What will now be considered is the Supreme Court's approach to precedent in relation to its own decisions. In **Burnet v Coronado Oil & Gas Co.**<sup>57</sup> Brandeis, J in a dissenting opinion expressed the view that "*stare decisis* is usually the wise policy

---

<sup>55</sup> 347 US 483 (1954)

<sup>56</sup> 410 US 113 (1973)

<sup>57</sup> 285 US 393 (1932) [1]

because in most matters it is more important that the applicable rule of law be settled than that it be settled right ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.” He went on to say that “the reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution.”

One can conclude that in constitutional matters the Supreme Court exercises more flexibility in applying the doctrine of *stare decisis*. In **Smith v Allwright**<sup>58</sup> the Court postulated that when convinced of former error it has never felt constrained to follow precedent, and where constitutional questions were concerned with corrections depending upon amendment rather than upon legislative action, the Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. There have been opinions expressed which indicate that while adherence to precedent is not to be applied rigidly in constitutional matters, any departure from the doctrine of *stare decisis* demands special justification. This was the view of O'Connor, J in **Arizona v Rumsey**.<sup>59</sup> Later in **Planned Parenthood of Southeastern Pa. v Casey**<sup>60</sup> together with Kennedy and Souter JJ, O'Connor J reiterated that view when seeking to uphold the earlier decision in **Roe v Wade** (supra) that "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."

## CONCLUSION

An assessment of the role of appellate courts in the jurisdictional hierarchy of any court system indicates that even though they are mainly courts of review of decisions of lower courts, in discharging this mandate one of the main objectives is ensuring stability in and conformity with the law even though not always resolutely adhering to consistency in their decisions. The waning influence of the House of Lords and the

---

<sup>58</sup> 321 US 649 (1944)

<sup>59</sup> 467 U.S. 203 (1984)

<sup>60</sup> 505 U.S. 833 (1992)

Privy Council on former colonies was aptly demonstrated when a majority of these independent states former colonies unapologetically indicated that the development of the law in their countries depended solely on the crafting of their own jurisprudence and not on one moulded in the traditions of their former masters. Unfortunately this approach has not been adopted by all of the newly independent states.

One feature common to all appellate courts in whatever jurisdiction is the doctrine of *stare decisis* which has been discussed. While its binding force affects lower courts in a judicial hierarchy, and is generally immutable, courts of last resort enjoy much more flexibility and freedom to effect change in their decisions. This sometimes depends on the composition of a final appellate court or the need for review if circumstances of a later case require that the relevant law be elucidated. One commendable aspect of a final court's decision not to be bound by its own decisions is that it is utilised sparingly and with special justification bearing in mind that such courts should be perceived as fulfilling their objectives of achieving judicial consistency and certainty in their decisions without making them the sacrificial lambs on the altar of expediency. This will always be the role of an appellate court in every jurisdiction where the common law is applied in whatever form peculiar to the needs and traditions of the people of that jurisdiction.

With the establishment of indigenous final appellate courts in most of the former colonies of Great Britain the judgments of these courts are often cited as persuasive authority in judgments of fellow appellate courts, and even in judgments of the House of Lords and Privy Council. This cross - fertilisation can only enhance and enrich the development of jurisprudence based on the common law across borders and continents within the Commonwealth.

I shall end this presentation by making reference to a lecture given by Sir Shridath Ramphal, former Commonwealth Secretary General, in 2009 entitled "*A Commonwealth of Laws: At 60 and Beyond*" and reported in the CMJA Commonwealth Judicial Journal of 3 June, 2010 which most of, if not all of us must have read. During the course of the lecture he made reference to the fact that strange as it may seem now, the issue of a Commonwealth Court of Appeal as a

final court of appeal for all Commonwealth countries, including Britain, was prominently addressed at 1965 Commonwealth and Empire Law Conference held in Sydney, Australia. Sir Shridath quoted from a background paper prepared by Lord Gardiner, then Britain's Lord Chancellor, when he was silk together with R. Graham Page, who put the case for a Supreme Court of the Commonwealth in terms which he said may surprise us today. One paragraph urged that with such a court Commonwealth countries would influence each other in the development of Commonwealth law. All countries submitting to the jurisdiction would in every way be treated on an equal basis, subordinating their own final courts of appeal to the overriding appellate jurisdiction of the Supreme Court of the Commonwealth.

Sir Shridath's opinion was that it was too late, and for all its merits, he believed it still is, at least today. He expressed the hope that if the Commonwealth itself prospers, some such collective judicial forum may one day become more generally acceptable. This may seem an impossible dream as we gather here today discussing the role of appellate courts in our various jurisdictions, but we can at least revel in the dream that at some distant futuristic day that dream may somehow become a reality. We can dream, can't we?

-- -- -- OoOoO -- -- --

Commonwealth Magistrates and Judges' Association  
13 - 16 September 2010  
Brighton  
United Kingdom