The 18th Commonwealth Law Conference

By Kim Hawkey and Mapula Sedutla

The 18th Commonwealth Law Conference, which took place in South Africa for the first time from 14 to 18 April, brought over 900 Chief Justices, judges, lawyers, legal academics and others in legal-related fields to Cape Town to focus on current trends under the theme 'Common challenges – common solutions: Commonwealth, commerce and *ubuntu*'.

De Rebus editor Kim Hawkey and deputy editor Mapula Sedutla prepared this report on the conference.

International keynote speakers opened the conference each day, followed by a total of 48 panel sessions (with over 175 speakers) divided into four streams, namely:

• Corporate and commercial law.
• Legal and judicial profession.
• Constitutionalism, human rights and the rule of law.
• Contemporary legal topics.

For more information, see the conference website www.commonwealthlaw2013.org/

Opening ceremony

South African Chief Justice Mogoeng Mogoeng and Justice Minister Jeff Radebe addressed delegates during the opening ceremony of the CLC, which was also attended by Supreme Court of Appeal President, Judge Lex Mpati; Western Cape High Court Judge President John Hlophe; Public Protector Thuli Madonsela; outgoing Commonwealth Lawyers Association (CLA) President, Boma Ozobia; and outgoing co-chairpersons of the Law Society of South Africa (LSSA), Krish Govender and Jan Stemmett. The LSSA hosted the event.

Mr Govender welcomed delegates to South Africa, while Ms Ozobia read a message from Queen Elizabeth wishing delegates well in their deliberations at the conference.

Minister Radebe welcomes delegates to the 'agenda setting' conference

In a welcome speech, Minister Radebe emphasised the international reach of the legal profession, as well as South Africa's place in the Commonwealth and its destination for international 'agenda setting and agenda changing conferences' such as the Commonwealth Law Conference (CLC). He noted that the conference was only the second conference of its kind to take place on African soil.

'Your presence here from all the corners of the globe is an indication of the global reach of the legal profession itself. Your … being in Cape Town for your conference is, to all South Africans, not a ritualistic annual exercise, but a confirmation of the embrace which the world has extended to our new democracy,' he said.

Minister Radebe told delegates he 'concurred' with the theme of the conference, which would provide an opportunity to grapple with some of the challenges facing the profession internationally.

The Minister added that the issues expressed in the conference's theme resonated with the Singapore Declaration of Common Principles, including human rights, socio-economic justice, good governance, the rule of law, egalitarianism and peace.

He also briefly addressed an issue of concern in some Commonwealth countries, namely the safety and security of members of the legal and judicial professions. In this regard, he said:

'A state that prides itself on the supremacy of the rule of law should, in parallel responsibility, also accept the safety and security of the practitioners who make that use of law possible. For the conference to revisit and to seek total adherence to the Latimer House Principles will not be an exercise of self-preservation, but the preservation of the rule of law itself.'

In conclusion, the Minister left attendees with these words: 'The future of the rule of law, and the improvement of jurisprudence for the benefit of millions of the people of the world, is in your hands.'

Chief Justice Mogoeng addresses criticism of judicial appointments

In a keynote address, Chief Justice Mogoeng spoke about the separation of powers and the system of judicial appointments in South Africa, which was the subject of much scrutiny in the recent past.

Chief Justice Mogoeng used the platform of the international conference to tell delegates that the ‘race factor’ in the country’s judicial appointment system was being ‘distorted’, which was creating a ‘false impression in the international community that we want reverse apartheid’.

In addition to tarnishing the judiciary’s image internationally, the Chief Justice warned of other effects closer to home:

‘The surest way to weaken and ultimately destroy democracy is to neutralise a country’s legal profession, or rather the organised profession, to delegitimise the judicial appointment authorities and, by extension, its judicial officers.’

This was underscored by the importance of the judicial arm of government in a democracy, which is the ultimate guarantor of a democracy, he said.

‘I believe that democracy can survive if there are serious issues in the executive and the legislature, on condition that we have a sound, stable and truly independent judiciary in place,’ he said, adding that: ‘No judiciary is perfect but, as South Africans, you have to tread gingerly when you deal with issues central to the survival of a judiciary and, by extention, a constitutional democracy.’

In response to media reports of meetings of the Judicial Service Commission (JSC) the week prior to the conference, Chief Justice Mogoeng informed delegates of the composition of the JSC, its processes, mandate and progress to date.

Media reports of the JSC sitting had been dominated by a discussion document on transformation of the judiciary, and the appointment of white males in particular to the Bench, prepared by former General Council of the Bar deputy chairperson Izak Smuts, who was a commissioner of the JSC until his resignation during the sitting.

The Chief Justice referred to s 174 of the Constitution, which provides the criteria for judicial appointments and which has been the subject of much debate and discussion. However, Chief Justice Mogoeng said that, in light of South Africa’s past, ‘whether or not we need to transform the judiciary does not require a debate’ and ‘transformation does not need to be defined’.

He said that the JSC was fully aware of its mandate: ‘We know what the problem is. We need to address it responsibly. … So how can we play games, as the JSC, with this enormous responsibility and great privilege?’ he asked.

‘I wonder, if we have even the slightest measure of confidence in the judiciary, how we can suggest that the leadership of the judiciary and the profession would recklessly subject the South African public to a judicial officer who does not have what it takes to administer justice, especially in circumstances when many South Africans have had to endure the agony of courts being constituted [in a certain way in the past],’ the Chief Justice said. In respect of this, he referred to the following 1962 statement in court by former President Nelson Mandela: ‘It makes me feel that I am a black man in a white man’s court.’

However, the Chief Justice said that a number of white males had been appointed to the judiciary in the past few years and he provided statistics to support this. He added that statistics could be provided to show that any perception that ‘there is a hunger to maybe get even with our white male compatriots is unfounded’.

In conclusion, Chief Justice Mogoeng called on the legal profession to support women and black practitioners:

‘We need to encourage women and black students to pursue law as a career. We need to find a way to give them what they need when they qualify because many black people and women who have qualified were forced to fall out of the organised profession because quality work was not forthcoming. Some chauvinism is still there and the inclination to support financially those you know is part of human nature. Our white compatriots are in top structures and this trickles down to those they hire and brief,’ he said.

This, he added, was important for the country as a whole:

‘We would serve our country well if we develop all South Africans to support black practitioners so that there is a pool out of which transformation can happen – otherwise the pool will dry up and South Africa will be left with no option but to go back to where it was pre-1994. This is an exaggeration, but it is necessary to make the point.’

United Nations High Commissioner for Human Rights

In a keynote address, United Nations (UN) High Commissioner for Human Rights, Navi Pillay, addressed three areas in response to the general theme of the conference, namely:

• The nature of human rights.

• The relationship between the rule of law and human rights and how this affects the administration of justice at the national level.
• Examples of how international human rights standards have been invoked before national courts.

In doing so, Ms Pillay spoke on the judiciary as the core guarantor of human rights and highlighted how ordinary lawyers can ‘make a difference’.

The nature of human rights

Ms Pillay focused on the indivisible nature of human rights, with specific reference to political and civil rights and economic, social and cultural rights. However, she noted that human rights are also inalienable, universal and interdependent.

Further, Ms Pillay said that human rights must be applied on the basis of non-discrimination and equality.

In respect of the indivisible nature of human rights, Ms Pillay noted that when the Universal Declaration on Human Rights was adopted, civil and political rights, as well as economic, social and cultural rights, were included, yet when the negotiations in the General Assembly took place for an international treaty on human rights, a ‘far-reaching decision’ was taken to have two separate international treaties – one on civil and political rights and another on economic, social and cultural rights.

‘This subsequently has created a situation in which some states have ratified one of these covenants, but not both. Other states have ratified both covenants, but treat civil and political rights as so-called “hard” rights that are straightforward to apply, while viewing economic, social and cultural rights as “soft” or “aspirational” rights that are only goals to be achieved progressively,’ Ms Pillay said.

However, the High Commissioner said that this division of ‘indivisible’ rights was ‘not coherent’. She referred to the right to life to illustrate this. This right not only ensures that no one shall be arbitrarily deprived of his or her life, but the right could equally be understood as being grounded in economic, social and cultural rights.

‘Who would argue, for example, with the proposition that the state has an affirmative duty to … reduce and eliminate unsafe drinking water and malnutrition, which can shorten life?’ she asked, noting that there had been cases where national courts recognised that health-related rights were inherently linked to the right to life, and emphasised that this protection was ‘just as important as the traditional view of the right to life as a civil and political right’.

Another example she cited was the right to security of the person, which is classically understood as prohibiting the state from engaging in arbitrary arrest and detention and placing a positive duty on the state to provide security, preventing and apprehending those involved in crimes of physical aggression.

‘The security of person needs to be addressed both from a point of view of law enforcement, and from the point of view of crime prevention, by addressing the reasons why individuals, and young persons in particular, are often attracted to criminal activity,’ Ms Pillay said.

Despite this, she said that some states gave higher priority to economic rights than to civil and political rights, preferring to focus on the right to economic development than on development in the broader sense.

‘The argument, at least as I understand it, is that for rapid economic growth to occur, a country needs what is euphemistically called “stability”, which in practice means long periods of one-person rule, with repression of dissent and the opposition. I am profoundly disturbed by such models of development by states that appear to accept violations of civil and political rights as the so-called “price to pay” for rapid economic development,’ Ms Pillay said.

She added that a sole focus on economic growth often ignored whether the gains of economic growth were evenly distributed.

‘While I strongly support the right to development, it has to embrace not only its important economic component, but also civil and political rights. True “development” includes freedom of expression, the right to protest, freedom of association and the right to uninhibited participation in public debate in politics and in government,’ she said.

On this aspect, she concluded: ‘So when we talk about the indivisibility of human rights, we cannot separate political and civil rights and economic, social and cultural rights. Experience has taught us that a predominate focus on political and civil rights without taking into account economic, social and cultural rights may penalise a significant part of the population, just as a model that focuses on economic growth at the expense of the protection of civil and political rights may equally lead to political upheaval.’

Relationship between the rule of law and human rights

Ms Pillay noted the importance of the rule of law being anchored in human rights.

‘Any approach to the rule of law that does not refer to human rights can enable a state to legitimise a wide range of human rights violations,’ Ms Pillay said.

In support of this, she referred to her experience of growing up in apartheid South Africa, when the state was based on the rule of law, but was not anchored in human rights. The result, she said, was a state based on fear, repression and discrimination.

‘So the rule of law does not mean simply that the laws governing society should be passed by a democratically elected parliament and interpreted by independent and impartial courts. It also means that laws that are not in conformity with human rights and fundamental freedoms should be declared invalid and struck down.’

Applying human rights and the rule of law to day-to-day professional lives

Under this heading, Ms Pillay focused on three topics, namely –

• pre-trial detention;
• torture or other ill-treatment of detainees; and
• the independence of judges and lawyers.

• Pre-trial detention

Ms Pillay said that abuse of pre-trial detention was ‘one of the most fundamentally important issues’ for legal professionals where they could ‘make a difference’, noting that a Brazilian study had found that legally represented defendants were twice as likely to be released pending trial than those without representation.

Ms Pillay said that journalists, human rights defenders, non-governmental organisation representatives and opposition leaders may suffer unlawful or arbitrary arrest and detention and, although international standards provided for a presumption in favour of release pending trial, in many cases this presumption was reversed.
She urged lawyers to support efforts to apply the standards on unlawful or arbitrary arrest and detention set out in the International Covenant on Civil and Political Rights. In addition, lawyers could rely on the principle of *habeas corpus*, which was protected by international human rights law. Another option if national remedies were inadequate was to file a petition with the UN's Working Group on Arbitrary Detention.

• Torture

In this regard, Ms Pillay highlighted some of the human rights mechanisms to facilitate discussion and publicise cases of torture and ill-treatment internationally.

'Lawyers from the Commonwealth should acquaint themselves with these international treaties and international mechanisms, and draw upon them when needed,' she said.

• Independence of the judiciary

On the independence of the judiciary, Ms Pillay said: 'An independent judiciary is at the heart of human rights protection … . Without an independent, impartial and competent judiciary, there is no credible institution to protect human rights.'

She also highlighted a 'dangerous' development of executive power in overriding court decisions it does not agree with or attempting to change the composition of a court or limit its jurisdiction.

'I cannot emphasise enough how dangerous a development this is, because it violates the principle of separation of powers, the pluralistic distribution of power in a democratic state, and weakens or cripples the core institution that acts as guarantor of human rights,' she said.

Where judicial independence has been compromised, justice is no longer viewed as fair and transparent, but dishonest and biased, and the population loses faith in the courts and the rule of law, Ms Pillay said. However, the High Commissioner added that this was reversible and lawyers 'can make a difference' by staying engaged and advocating for judicial reform when necessary.

Related to judicial independence, Ms Pillay noted the importance of the independence of lawyers and the Bar, and of actively resisting state attempts to control the conduct of lawyers or to bring Bar associations under the state. In this regard, she highlighted the appointment of a Special Rapporteur on the Independence of Judges and Lawyers, who receives complaints, visits countries and engages in dialogue with states.
'Lawyers in Commonwealth countries should be aware of this human rights procedure and should make full use of it if there is interference with the independence of lawyers, or when national efforts to bring about judicial reform fail,' Ms Pillay said.

End note

In concluding, Ms Pillay referred to a number of 'tremendously inspiring' domestic court decisions where international human rights treaties had been successfully invoked, including in South Africa.

Further, international human rights standards may assist in interpreting provisions in national constitutions, she added.

'I mention these cases in the hope that they will spark off ideas for your own work when you return to your offices. … They illustrate how creative and innovative legal arguments can be made on the basis of the universal human rights that have been articulated in international human rights treaties,' Ms Pillay concluded.

Kim Hawkey, kim.hawkey@derebus.org.za

The Constitutional Court 20 years later

Former judge of the South African Constitutional Court, Justice Kate O'Regan, led the second day's plenary session. Justice O'Regan discussed the role and work of the Co-nst-itutional Court nearly 20 years after its formation. She opened her address by providing delegates with a brief history of the developments that led to the two-phase process that resulted in the South African Constitution.

Justice O'Regan said that the first phase of the constitution-making process included the development of an interim Constitution in 1993, which was later followed by the country's first democratic elections in 1994. Justice O'Regan added that the second phase included a Constitutional Assembly, which had a public participation programme, with 1,7 million submissions received and 20 000 participants and 717 organisations involved.

She further said that, almost 20 years later, the country was still far from realising the founding provisions of the Constitution. She added that the founding values of the Constitution were cited in the jurisprudence of the Constitutional Court and were rooted in the norms and values of the court.

Appointment of Constitutional Court judges

Justice O'Regan took delegates through the procedure of appointing Constitutional Court judges. She explained that the court employed 11 judges, who were presided over by the Chief Justice and Deputy Chief Justice, who were both appointed by special procedures. She said that the Judicial Service Commission (JSC) called for nominations of Constitutional Court judges and interviewed the shortlisted candidates in a public commission. Justice O'Regan said that the JSC was composed of 23 members, namely –

• the Chief Justice, who is the chairperson of the commission;
• the Minister of Justice;
• the President of the Supreme Court of Appeal;
• one Judge President;
• four practising lawyers;
• one professor of law;
• four presidential nominees; and
• ten members of parliament (four from the upper house and six from the National Assembly, three of whom must be members of the opposition).

Generally, the JSC sends the list of names to the President, which must contain three names more than the number of appointments to be made. The President consults with the Chief Justice and leaders of political parties represented in the National Assembly before appointing the judges from the list, said Justice O'Regan. She added that the demographic requirement of the judges, which the JSC struggles to meet, must be in accordance with s 174 of the Constitution, which states that the judges be 'appropriately qualified', 'fit and proper' persons and 'reflect broadly the racial and gender composition of South Africa'.

In 1994 the Constitutional Court was composed of nine men and two women, seven of whom were white and four were black. Presently, the court is composed of eight men and two women, seven of whom are black and three are white, said Justice O'Regan. (This excludes the latest appointment to the Bench, Mbuyiseli Madlanga, who will take up the post with effect from 1 August 2013.)

Demographics of the Bench

At the time of her presentation, Justice O'Regan said that the Bench consisted of 241 judges (149 black and 92 white), while in 1994 the Bench had 166 judges and all but five were white. She emphasised that the demographics of the Bench were important, as this enhanced the legitimacy and impartiality of the courts and, therefore, 'enables judges to identify their own blind spots and avoid reinforcement of prejudice masquerading as common sense'.

The Constitutional Court building

Justice O'Regan recalled that the location of the Constitutional Court was a former prison, which once housed Mahatma Gandhi and Nelson Mandela. She said that the idea to transform a prison into a court was to show that 'from our painful past, we can build something new'. She added that the interior of the court ensured that counsel looks eye-to-eye at the judges, to show that the judges do not have a weighty authority over them and to avoid the sense that counsel has to look up at the judges, making it a democratic meeting place.

Jurisdiction of the Constitutional Court

Speaking on the jurisdiction of the court, Justice O'Regan said that the litmus for jurisdiction was whether the case was a 'constitutional matter'.

She said that, initially, determining what constituted a constitutional matter was difficult, given the responsibilities imposed on the court by the Bill of Rights. She said that the court was the highest court of the land. Further, she said there were three ways in which matters could come before the court, namely by –

• appeal (as of right in rare cases, but generally only if the court grants leave);
• confirmation (it is the only court that may declare a law invalid); and
• direct access.

The court delivered 470 judgments between February 1995 and March 2013, an average of 26 per year, while there have been approximately 130 applications for leave to appeal per year.

Among the cases that were heard by the court, 147 of these were on contestation of legislation. In the field of criminal law and procedure, 22 declarations of invalidity were made, including the declaration that the death penalty was unconstitutional (*S v Makwanyane and Another* 1995 (6)

BCLR 665 (CC)), as well as a declaration that corporal punishment of juveniles in the criminal justice system was unconstitutional.

The court has also heard 20 cases concerned with the right not to be the subject of unfair discrimination, said Justice O'Regan.

In closing, Justice O'Regan said: 'Constitutional democracies are often contested and noisy – South Africa is no different. Although we face tremendous challenges, our Constitution is a robust document that provides a value-based guide for this and future generations. The role of the court is to protect rights and the Constitution, and to ensure that government pursues the vision of our Constitution.'

Mapula Sedutla, mapula@derebus.org.za

Developments in Sri Lanka and Zimbabwe

In a plenary session chaired by Lord Anthony Lester QC; executive director of Zimbabwe Lawyers for Human Rights, Irene Petras; President of the Bar Association of Sri Lanka, Upul Jayasuriya; together with the executive director for the Foundation for Human Rights in South Africa, Yasmin Sooka; spoke on developments in Zimbabwe and Sri Lanka respectively.

In opening the session, Lord Lester noted that Zimbabwe, which is currently outside the Commonwealth, and Sri Lanka were selected for discussion as the situations in these two countries had 'a particular urgency' about them that required 'close attention'.

Zimbabwe

Ms Petras provided an update on the situation in Zimbabwe as it approaches national elections. She also read a message from Zimbabwean human rights lawyer Beatrice Mtetwa, who did not attend the conference on legal advice after her recent arrest and detention, which attracted international attention.

Ms Petras said that Zimbabwe's Global Political Agreement, which established the current inclusive government, was to provide a new constitutional framework and create conditions for free and fair elections. She reported that the constitutional revision exercise was almost complete and that a draft – although not perfect – had been 'overwhelmingly accepted' by referendum, which indicated citizens were ready for a 'fresh start'.

The next step was to align the country's laws with the new constitutional provisions, especially the electoral laws, which needed to be finalised by 29 June, the date scheduled for parliament's dissolution.

'It is likely that the revisions will be rushed through, with minimal public input or scrutiny. Nevertheless, the general revision of laws on a broader basis must continue beyond elections and be encouraged,' she said.

Although an election date had not yet been set at the time of the conference, Ms Petras said that the country was 'essentially in an election period', which resulted in challenges: 'A new challenge resulting from the inclusive government is reduced opposition to the status quo by politicians, many of whom are benefiting from and enjoying the fruits of office. Civil society has essentially had to become a form of opposition to keep the politicians in check and push for reforms. For such reasons, it has been targeted accordingly.'

This included 'selective targeting' of mobilisers, educators, human rights monitors and those providing legal and medical support services.

'Instead of beating or arresting hundreds, key individuals are now targeted to serve as a lesson and warning for others, she said. Recent examples included:

• Raids on 'questionable search warrants' of key non-governmental organisations.
• Arrest and prosecution of key individuals from these organisations to keep them 'hamstrung in court' and away from their core business.
• Criminalisation of their work through suggestions that they are operating unregistered organisations, and are spies and criminals out to defraud the public.

In addition, Ms Petras said that lawyers and select members of the judiciary had been targeted through, for example, vilification in judgments and the media and attempts to deregister human rights organisations considered to be 'a challenge'.

Such attacks had been 'a psychological blow' for some, while others had 'become more determined', she said.

‘The effect has been harshest on civil society and human rights defenders, who are concerned and fearful about who will assist them and how safe they will be if lawyers are now being targeted, coupled with ... the targeting of independent-minded judges for removal,’ Ms Petras added.

In conclusion, Ms Petras called for support for civil society and the legal profession. She highlighted interventions in the past that had been of assistance, such as scrutiny and public outcry and monitoring court proceedings, as was done in Ms Mtetwa’s case. She added that more could be done, including:

• Supporting local law-based organisations and encouraging continued independence in the execution of lawyers’ duties.
• Encouraging members of Commonwealth judiciaries and the legal profession to apply pressure on their Zimbabwean peers.

‘The message from lawyers back home is simple – we have not given up, and we will continue to do what we can for as long as we must to push for the rule of law, constitutionalism and the opening of space for human rights defenders ahead of elections,’ Ms Petras concluded, prior to reading the message from Ms Mtetwa.

Message from Beatrice Mtetwa

In a written message, Ms Mtetwa said that in recent months there had been ‘a crackdown on civil society activists’, most of whom she had been involved in defending. She noted that these activists were deemed to be involved in election-related advocacy.

‘My arrest in the course of the discharge of my mandate as a lawyer is, of course, meant to discourage human rights lawyers from representing their clients in so-called political cases, particularly as we enter the election season. This is, of course, a blatant and unashamed interference with my internationally recognised fundamental right to practise law without undue hindrances and interference,’ Ms Mtetwa said.

She said that the legal profession in Zimbabwe was ‘extremely grateful’ for support from colleagues in the international community and that without such support she would probably ‘still be languishing in custody’.

In conclusion, Ms Mtetwa said: ‘The observance and maintenance of the rule of law is an international principle that lawyers the world over should fight [for] together without apology.’

Sri Lanka

Mr Jayasuriya said that the legal profession in Sri Lanka was facing ‘tremendous challenges’ linked to threats to the independence of the judiciary. In particular, he spoke about the controversial impeachment of the country’s former Chief Justice Shirani Bandaranayake.

‘The strength of the Bar and the Bench are closesly linked and complement each other. We may call ourselves twins – we may stand or fall together. There is thus a critical link between the independence of the judiciary and the legal profession,’ he said.

He added that judicial independence was essential to the proper performance of the judicial function in a society dedicated to the rule of law and, ‘if confidence in the judiciary evaporates, so does public respect for the judiciary’.

Thus, the Bar had a ‘solemn duty to stand up to judges acting according to political dictates and to defend judges who fight political demands at the expense of civil liberties’, he said.

This introduction related to the situation in Sri Lanka after what he described as ‘doomsday’ had arrived a few months previously.

He recounted how Justice Bandaranayake had been removed from office in January after a parliamentary committee found her guilty of ‘trumped up charges’, which she had denied.

The impeachment followed a Supreme Court ruling against the Divi Neguma Bill proposed by a cabinet minister, the President’s brother.

Despite the Supreme Court finding that the parliamentary committee’s proceedings were unconstitutional and the Court of Appeal issuing a writ overturning the committee’s findings, the Chief Justice was impeached after the government ignored these orders, and a new Chief Justice was sworn in during January, Mr Jayasuriya said.

He also highlighted other developments, including the transfer of a number of judges and magistrates out of stations before the end of their tenure, emphasising that judges must have security of tenure.

In addition, he cited threats of violence, biased state media and vacancies in the judiciary as contributing to an ‘unhealthy situation’.

‘Other law enforcement-linked agencies, such as the Attorney-General and the police face serious problems due to political institutionalisation and loss of independence,’ he added.

Mr Jayasuriya said that the courts were ‘symbols of freedom’ and the executive should not be able to ‘extend an iron fist’. He said that lawyers had to ensure the protection of their clients’ right to a fair trial.

‘It is the duty of the legal profession to act and restore the independence and confidence in the judiciary. … We must work in solidarity with the legal community in this global community, as lawyers and judges, to rally around and share our plight and protect the rule of law and the dignity of the legal profession,’ Mr Jayasuriya concluded.

Ms Sooka added to Mr Jayasuriya’s presentation by confirming support for the ousted Chief Justice and proposing a suitable response from the Commonwealth community.

‘The rule of law is under siege in Sri Lanka. Any voice of dissent is targeted and disappears,’ Ms Sooka said.

The response from the Commonwealth legal community should be to stop the Heads of Government meeting taking place in Sri Lanka later this year, Ms Sooka said.

‘We should send them a message – you cannot be awarded if you fail to adhere to the standards of your peers,’ she said, adding that the community should ‘make an example’ of the members of parliament who were part of the impeachment of the Chief Justice and should ensure that they could not travel.

‘Sri Lanka should not be able to participate in any events of the Commonwealth,’ Ms Sooka concluded.

Resolution on Sri Lanka

Following these presentations, Ms Ozobia announced a resolution on the situation in Sri Lanka by the Commonwealth Lawyers Association (CLA), the Commonwealth Legal Education Association (CLEA) and the Commonwealth Magistrates' and Judges' Association (CMJA). The resolution was adopted unanimously at the conference.

The resolution notes that membership of the Commonwealth is seen as 'a badge of respectability'; however, this badge was 'being tarnished by repressive actions in Sri Lanka', including –

• the continued erosion of the independence of the judiciary through the impeachment of the Chief Justice and the subsequent relocation of magistrates and judges;
• the executive's failure to abide by court orders; and
• the 'gross and persistent harassment' of members of the legal profession and others.

The resolution calls on members of the Commonwealth, through the Commonwealth Ministerial Action Group, to place Sri Lanka on the agenda of its next meeting, which was to take place on 26 April 2013, and suspend it from the councils of the Commonwealth 'for serious and persistent violations of the Commonwealth fundamental values'.

'This suspension would not preclude the people of Sri Lanka from participating in non-governmental Commonwealth activities,' the resolution notes.

In the resolution, members of the Commonwealth were also urged to reconsider the holding of the next Heads of Government meeting in Sri Lanka, as doing so would –

• tarnish the reputation of the Commonwealth, especially as the Sri Lankan head of state would thereby assume the role of chair-in-office;
• call into grave question the 'value, credibility and future' of the Commonwealth; and
• be seen as condoning the action of governments that violate its principles and would undermine the moral authority it purports to have in protecting and promoting fundamental values of the rule of law and human rights.

Notwithstanding this, the CLA, CLEA and CMJA affirmed their support to those seeking to uphold the rule of law in the country.

Kim Hawkey, kim.hawkey@derebus.org.za

Closing ceremony

The chair of the closing ceremony, executive governer of the Akwa Ibom State of Nigeria, Obong Godswill Akpabio, thanked the Commonwealth Lawyers Association (CLA) for hosting a 'successful' conference. He added that no venue was more fitting than South Africa to host the Commonwealth Law Conference (CLC).

The closing ceremony's keynote speaker was Lord Chief Justice of England and Wales, Lord Igor Judge, whose address, titled 'Equality before the law', was met with a standing ovation when he concluded.

At the outset, and highlighting one of the main points raised at the conference, Chief Justice Judge said:

'Never take the rule of law for granted. Never, ever. The best of constitutions can be subverted. The democratic process itself can, as it did with Hitler in Nazi Germany, bring an evil dictator to power. As a result, unnumbered millions died – millions in concentration camps, millions fighting to rid the world of the wickedness he had spawned. It all stemmed from the subversion of the democratic process. ... Those brave lawyers from Zimbabwe and Sri Lanka reminded us of the need for eternal vigilance. We, as lawyers, have the trained eyes to see, and the trained lips to voice the alarm signals. We have a particular responsibility to be vigilant.'

Chief Justice Judge said that the location of the conference, South Africa, should not be overlooked, adding: 'This vast group of common lawyers, judges, advocates, academics, researchers, men and women of unimpeachable intellectual quality and professional integrity, has gathered together without reference to the colour of their skins, and we have shared our views and experiences.'

He added that the significance of this was that this happened in South Africa, 'where, not so very long ago, the colour of your skin, not your qualities as a human being, decided everything about the life that you would lead, and the human company that you could keep, in a country where the law itself negated the principle of equality before the law'.

Chief Justice Judge further said: 'Let me give you an example. If I say: "I am a white man", let us be clear that "white" is an adjective. It simply describes the colour of my skin. But, on the level of apartheid, it meant that the colour of my skin defined me. It became the most important thing about me. In apartheid times, that absurd fact defined your very humanity. Yet if I say: "My skin is white", that is a true fact, but it tells you absolutely nothing about the human being I am: All my

qualities, all my deficiencies. In fact, described in this way, the colour of my skin is of total irrelevance. … It would be of no importance if the colour of my skin was white, black, green, red or blue – you might look at me, but you would not judge my humanity. And, if we are to be judged equally before the law, that is how skin colour must be seen, not as a matter of convention or convenience, nor even, valuable as it is, as a right provided by a written constitution, but as a matter of principle so fundamental that it cannot be changed, and, if it is changed, no matter what the pretensions of that state to embrace the rule of law, the rule of law is shattered.'

Chief Justice Judge referred to former South African-born English cricket player, the late Basil D'Oliveira, who was not permitted to play cricket in the South African team because of the colour of his skin.

He said: 'At the time, these events opened the eyes of well-meaning people all over the world about something … of the realities of apartheid South Africa. Even a number of well-meaning people never really understood it. But they baulked at the astonishing proposition that a man could not play cricket … in South Africa, against white South Africans, just because of the colour of his skin. He could not even walk onto the pitch with them. … And, of course, what happened to D'Oliveira was trivial compared to the fate of those who were executed and incarcerated, and those who lived under a law which, in the spurious interests of protecting the public from acts of terrorism, meant that you could be locked up for 90 days in solitary confinement without being charged and, on your release after the 90th day, be rearrested, and again locked up in solitary confinement for a further 90 days, and so on.'

Chief Justice Judge recalled the 'horrors' of apartheid, which also included the torture of men and women. He added: 'Eventually, this horror came to an end' and the Truth and Reconciliation Commission was created, as a product of the new constitutional arrangement. He said that the purpose of the commission was 'to establish the gross violations of human rights, which was too broad a phrase to describe "the whole story", because it failed to capture the daily, repeated instances of man's inhumanity to man … all committed between 1960 and 1993'.

Also, '[t]he purpose was to ensure that just because the full facts would be made public, the overwhelming public response thereafter would be to reject any system which allowed these events to occur', said Chief Justice Judge.

With regard to the amnesty granted to perpetrators of gross human rights violations, the Chief Justice quoted the judgment of the then Deputy President of the Constitutional Court, Judge Ismail Mahomed:

‘Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of law.’

The Chief Justice added that the Truth and Reconciliation Commission ‘was a high risk strategy and it was not inevitable that it would have the desired result’. However, he said: ‘This conference proves that it did.’

Chief Justice Judge referred former President Nelson Mandela, who he considers to be one of ‘the greatest human beings of this, or the last, or … any previous century’.

He said that Mr Mandela, as early as 1964, emphasised living in harmony and equality, and who said that he cherished an ‘ideal of a democratic and free society in which all persons live together in harmony with equal opportunities’ – an ideal for which he was prepared to die.

Chief Justice Judge said that South Africa’s achievements in respect of a peaceful change in government and the establishment of a new Constitution were both examples provided to the world of the peaceful restoration of equality before the law and the unacceptability of discrimination.

Regarding the phrase ‘the rule of law’, he said: ‘As lawyers, we rather understand when the rule of law is applied, and recognise it, and understand and recognise when it is not. But if we are looking for one crucial ingredient in the rule of law it is that we must live in a society in which every citizen is treated equally by the law. … Neither money nor wisdom nor strength nor social position nor political or financial power should ever attract special privileges or special treatment from the law. The poor man at his gate is entitled to treatment equal to that of a President or Prime Minister. … So skin colour, race, gender, religious creed, sexual orientation and family background must be totally excluded from consideration in the judicial process.’

Chief Justice Judge said that judges must aim to do justice according to the judge's oath – 'without fear or favour, affection or ill-will'. He said that the oath meant that the judge must be courageous in facing possible personal threats from individuals or officers of the state. He added that the oath went further to mean that the judge must be blind to prejudice, impartial, fair, balanced, with a true appreciation of common humanity.

'In that way, we ensure equality before the law,' he said.

He added: 'Ultimately, that is the basis for the achievement of every human right, an issue which has been a major topic of discussion throughout this conference. Let us just examine it. Do we ignore the poisoned river because it is the poor, rather than the middle classes, who live and suffer in proximity to it? Of course not. Do we ignore the unlawful arrest of an individual who has been charged with a dreadful offence, or indeed who has been demonised by society? Of course not. Do we allow freedom of speech only to those who agree with and express views which we share? Of course not. A human right that is not universally available to every citizen in the country is a contradiction in terms. It is equality before the law that underpins the concept and ultimate achievement of the rights bestowed upon us by our common humanity.'

In closing, Chief Justice Judge said that the conference had underlined the many facets of the rule of law.

He added: '[W]e must remain resolved that whatever the colour of our skin, race, creed, gender, or whatever it might be, the starting principle for the rule of law is that, in law, we are equal, and that it is the fundamental obligation of the law to treat us so. Here in Cape Town we have been vividly reminded by the living recent history of South Africa that this indeed must be and must remain our common purpose and that we must be vigilant to maintain it.'

Announcements

Mark Stephens CBE (left) was announced as the new President of the Commonwealth Lawyers Association. Other announcements included the first recipient of the Commonwealth Rule of Law Award, Canadian lawyer Robin Sully, and the winners of the 13th Commonwealth Moot competition, the United Kingdom team, Daniele Selmi and Matthew Sellwood.

Mapula Sedutla, mapula@derebus.org.za