



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

**THE RIGHT HONOURABLE THE LORD JUDGE,  
LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**COMMONWEALTH LAW CONFERENCE**

**CAPE TOWN**

**18 APRIL 2013**

**“EQUALITY BEFORE THE LAW”**

This meeting has taken place in South Africa. That is about the most obvious, and to the extent that anything obvious is daft, the daftest observation in this conference. But I want to emphasise the point from the outset. First, however, hasn't it been a triumphant Conference? The triumph has had many different facets. We can pause to admire the hard work and wise decision-making of the organisers, the high quality of the speakers, the immense kindness of those who looked after us, the pleasantness of the facilities. The programme has been wonderful and we have been spoilt for choice about the different sessions to attend. All this should be acknowledged.

But at this stage of the conference I do not think there is any point in trying to point to individual items and highlight them. Well, perhaps there is one. And it has a resonance for each and every one of us, from whichever country we come. 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. Yesterday 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.

I have however tried to discern in my own mind what has made this conference so particularly special to me. What is it about this particular conference that has been so successful? I offer you very personal thoughts, and I offer them with respect. I do not intend to be controversial, and I certainly do not intend to cause any offence. But surely the starting point is that this conference has taken place here, in Cape Town, in South Africa.

It is easy to overlook its most obvious feature. 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. Perhaps most significantly of all, we have shared exactly the same spaces, sitting side

by side in conference meetings, and enjoying our food at the same tables, men and women of all races, men and women of every skin colour.

This has happened here 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.

One of my hobbies is cricket, which like the common law, is another manifestation of events which took place in a tiny off- shore island on the edge of Europe, which has crossed the oceans, although not perhaps with quite the same success as the common law. There are many more important things than cricket. It is in the end only a game. But because cricket is one of my hobbies, one of my heroes is a South African. In those days the colour of his skin defined him as a Cape Coloured. With the support of the people who lived near and around him, he had the courage to go to England where, because of his own skill, and solely on his own merits, he was eventually selected to play cricket for England. In 1968 he played a magnificent innings against Australia, in the summer before a winter tour of South Africa was due to take place. In the entire history of the game, seen in purely batmanship terms, there undoubtedly have been greater feats of batmanship, but there has never been a more important innings in its impact on history. His innings was a triumph on a personal level. He would now be selected to return to play in his own country as a man whose skin was not white against an all white South African team, before segregated spectators, the achievement of his ultimate ambition. For the authorities who ruled this country in those days he could not and must not be allowed to do so. The story of pressures and corruption is told in a number of different accounts, but none better than Peter Osborne's carefully researched study entitled, 'Basil D'Oliveira, Cricket and Conspiracy'. From it I derived the words of the Prime Minister of South Africa at that time, translated into English,

*"Over my dead body will we allow a black man, a coloured man, an Indian man to become a Springbok, whether it be in rugby, cricket, football, you name it".*

And so the tour was called off. Skill and ability had nothing to do with it: a black man could not play rugby, nor cricket, nor football for his own country. Nor could a Coloured man. Nor could an Indian man.

English is a language of extreme delicacy and great subtlety.

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 doesn't tell you anything at all. It is an incidental fact of less than trivial importance. 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.

As I emphasise, cricket is only a game, and Basil D'Oliveira was free to walk about the country in England, into and out of the same public places as his white-skinned fellow cricketers, many of whom became his closest friends. He died recently in England, garlanded with well-earned admiration, respect and affection.

At the time these events opened the eyes of well-meaning people all over the world about something – not very much - of the realities of apartheid South Africa. Even a number of well-meaning people never really understood it. But they balked at the astonishing proposition that a man could not play cricket – after all, just a game - 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. But this was only cricket, it was not life. 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 90<sup>th</sup> day, be rearrested, and again locked up in solitary confinement for a further 90 days, and so on. As Judge Pillai asked us to note, it was of course legal, lawful, in the sense that it was the law enacted by the body in the constitution vested with responsibility for creating the law. The law countenanced what Justice Albie Sachs, himself a victim of it, described as “state terrorism”.

The law, as enacted, perverted the very simple principle that we are all equal before the law. I hope that I may be forgiven for appearing to be making a discordant note, but I have detected a tendency in the public mind, perhaps outside South Africa rather than in it, but many of us here today do not come from South Africa, and perhaps because of the overwhelming impact of Robben Island and all it stood for, to overlook that women, too, were victims of this state terrorism, not simply because their men suffered directly, but because they too endured direct hardship.

Let me briefly underline that women as well as men were subjected to torture. The horror of isolation for long periods is described by Emma Mashinini, detained in 1981 in Pretoria. Can you imagine the self-torture and sense of guilt as she recalled the face of her youngest daughter, and then, struggling and struggling (“struggle” is her word) just not being able to remember the name of her little girl. This agony went on for days. If you read her description, it was an emotional crucifixion. I could not read her own words out to you without tears coming to my eyes, and to yours too. My single point is that women as well as men tasted the ashes of anguish and desolation.

Eventually, this horror came to an end. Nevertheless, can we please remember it is still less than 20 years since free elections were held in South Africa. I can remember my own sense of awe, watching as vast long crowds of people who had never been able to vote before, stood in patient queues, enfranchised at last. Those television pictures are engraved on my memory. And within a year legislation was drafted to create a Truth and Reconciliation Commission. The purpose was to establish the gross violations of human rights, which is too broad a phrase to describe the whole story, because it fails to capture the daily, repeated instances of man's inhumanity to

man – that is, let us be clear, individual man’s inhumanity to an individual man or woman – all committed between 1960 and 1993.

I can only speak as an observer, and I hope I have not got this wrong, I understand that this Commission was the product of the new constitutional arrangement. The 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. The story is told in many different places, but for myself, “Country of My Skull” by Antjie Krog will remain one of the most disturbing books I have ever read. And again, if I may respectfully commend it, the judgment of Ismail Mahomed, then Deputy President of the Constitutional Court, who became the first Chief Justice of South Africa whose skin colour was black, described the conflicting principles which were involved in the creation of the amnesty allowed to the perpetrators of state brutality.

If I may quote from his judgment about this Act

*“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 rigors of law”.*

The search for the truth which was what,

*“ the victims of repression seek so desperately to know, is in the circumstances, much more likely to be forth coming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve..... With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order”.*

I am speaking here with due humility. This is not my country. Self-evidently I was never a victim of state terrorism. Quite what those who were such victims, and their families, think is, I suspect, buried in the inner most recesses of the mind, to which we consign our most dreadful moments. Whether every victim agreed with the process, it is clear that the main objective was to secure the peaceful future of the country, and this outweighed any other considerations. It was a high risk strategy and it was not inevitable that it would have the desired result. This conference proves that it did.

I mean not the slightest disrespect to Nelson Mandela, a man who I believe to have been one of the greatest human beings of this, or the last, or indeed any previous century, but, as with my reference to women, I pause to reflect that he was not alone. But this objective was identified by Nelson Mandela himself, quoting on his release in Cape Town in 1990, from his own speech made in court in Johannesburg in 1964, as he was about to start his quarter of a century and more in custody, cherishing an *“ideal of a democratic and free society in which all persons live together in harmony with equal opportunities. It is an ideal which I hope to live for, and to see realised. But (addressing the judge) my Lord, if needs be, it is an ideal for which I am*

*prepared to die*". Notice, as long as 1964, facing a possible death sentence, the emphasis on living in harmony and equality. Isn't it a blessing that he lived to see the realisation of his ideal?

One of the books, and for a time just about the only book available to those imprisoned in Robben Island was the Robben Island Shakespeare, also known as the Robben Island Bible, because the political prisoner to whom it belonged was able to keep it, and then let his co-prisoners see it from time to time, when he persuaded his warders that the book he was reading was a religious Hindu bible. On the text, thirty four of those prisoners marked particular passages which appealed to them. In that book, signed N R Mandela, we find this passage:

*"Cowards die many times before their deaths:  
The valiant never taste of death but once.  
Of all the wonders that I yet have heard,  
It seems to me most strange that men should fear,  
Seeing that death a necessary end,  
Will come when it will come."*

*(Julius Caesar; II, ii, 32-37)*

He dated this entry 16 December 1977. For those of you who do not know your history of South Africa, the very date itself is significant, it was the holy day for Afrikaners, the date of the Battle of Blood River, the day when the Treckers, many of whose descendants supported apartheid, prayed to God promising that if they were given victory against huge odds, the day of the battle would be kept forever as a holy day.

Mr Mandela fully appreciated the significance of the date. 16 December was the date deliberately chosen for the start of explosions fifteen or so years earlier. In the book, to write 16 December was a gesture of defiance.

During World War II Winston Churchill gave this advice to the world. In war, "resolution"; in defeat, "defiance"; in victory, "magnanimity"; in peace, "goodwill". In the life of Nelson Mandela and those who underwent similar experiences, and in the work of the Truth and Reconciliation Commission, that thunderous advice was fully implemented. Indeed I cannot think of a better example.

These were not abstract ideas occurring in an academic discussion. This was the harsh reality. I have not been trying to encapsulate the ghastliness of conditions on Robben Island or indeed on events twenty years ago for their own sakes. Nor could I if I tried. Nevertheless, I believe that there is even more to all this, although there need not be any more to it because it is quite enough in itself, than the successful struggle against oppression. The success of that struggle and the way in which the immediate aftermath was approached in South Africa achieved something of far wider importance than was ever realised at the time. Quite apart from the achievement of a peaceful change in government, and the establishment of a new constitution, both remarkable achievements for South Africa itself, achievements of the nation of South Africa alone, here, of itself, an example was provided to the world of the peaceful restoration of equality before the law and the unacceptability of discrimination, not merely on the grounds of skin colour, but also race and creed and gender and sexual orientation and family background: indeed of discrimination in all the many forms in which it may manifest itself.

We all learned from it. The entire world learned from it. It was a lesson in humanity, for humanity, enriching us all. The removal of discrimination which underpins the principle of equality before the law, or the impartiality of the law, or the even-handedness required of the law, which is my basic theme today.

The rule of law is a phrase which has spawned many children. We can all make it say many things, and even the greatest jurists among us struggle from time to time to define precisely what we do mean. But 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. It is not a complete answer, because, as we have noted, in a dictatorship, every citizen, or virtually every citizen except for the dictator's friends and family, is treated equally, but, on proper examination, their equality rests in the dismal fact that although there may be law, the rule of law is an outcast. In any society, some are richer, whether from birth or by acquisition, wiser, or indeed physically stronger, and others are impoverished, or stupid, or weak, so that in all these sorts of respects, it is absurd to consider that they are all the same. They are not. But 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.

We must be treated equally; that does not mean we must be treated identically, but, as I emphasise, equally. The difference is subtle, but important. You may say that a young man born into privilege who commits a crime deserves heavier punishment than a young man of similar age with all the disadvantages of a dreadful start in life, who has had no opportunity to learn any better. Whatever you may say, this is a simple example of the individualism which is also a necessary ingredient of the rule of law. We are dealing with individuals, not some group or groups, and if we start approaching cases on the basis of a group or groups, then some in the groups will be treated unjustly. Pause for a moment to reflect, that if we are not very careful indeed, if the law starts to treat one group rather than each individual comprised in it differently from another group – we are starting a very dangerous journey of which the very evil of apartheid was the ultimate culmination. Perhaps therefore we should identify the principle more clearly: perhaps it is better expressed by asserting that none of the considerations which can lead to prejudice against an individual citizen has the remotest relevance to the way in which the courts should deal with him or her or his or her case. So skin colour, race, gender, religious creed, sexual orientation and family background must be totally excluded from consideration in the judicial process.

We aim to do justice, according to the oath I took, “without fear or favour, affection or ill-will”. A similar oath is taken by every judge in the common law world. It means, but it does not simply mean, that the judge must be courageous in facing possible personal threats whether from individuals or officers of the State: it goes much further. What the oath means is that, whether all those untoward threats are absent or present, the judge must be blind to prejudice: impartial, fair, balanced, with a true appreciation of the common humanity which binds us all and which we have all – everyone of us - inherited. In that way we ensure equality before the law.

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.

Perhaps then, above all, above all else this conference in Capte Town has underlined for me that of all the many facets of the rule of law, we 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.

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