

World Justice Project
High Court Justices Symposium
July 8, 2013
The Hague, Netherlands

I. Introductory Session

The introductory session of the High Court Justices Symposium opened with welcoming remarks from Mr. William H. Neukom, Founder and CEO of the World Justice Project (WJP), and Mr. William C. Hubbard, the Chairman of the Board of the WJP. Mr. Hubbard welcomed the participants and reviewed the agenda for the day. Mr. Neukom offered an overview of the issues to be discussed, including a set of questions related to the meaning and importance of the rule of law. He placed special emphasis on the question of whether we share an understanding of what the law is and what it requires.

Two short presentations from Hon. Geert Corstens, President of the Supreme Court of the Netherlands, and The Rt. Hon. Beverley McLachlin, P.C., Chief Justice of the Supreme Court of Canada, placed the concept of the rule of law in our contemporary context. President Corstens and Chief Justice McLachlin raised a number of important issues such as the accessibility of legal institutions, the accountability of legal officials, the importance of equality of treatment and the timeliness of legal recourse and remedies. They also highlighted some of the challenges to the ability of legal systems in the 21st century to establish and maintain an effective rule of law system.

Following these presentations, Mr. Mark David Agrast, Chair of the WJP Rule of Law Index, and Dr. Juan Carlos Botero, Executive Director of the WJP, presented a description and analysis of the WJP Rule of Law Index.

The introductory session closed with a keynote address from Hon. Anthony Kennedy, Associate Justice of the Supreme Court of the United States. Justice Kennedy acknowledged that the rule of law is a complex concept. He emphasized the important relationship between the rule of law and freedom. He discussed both the ways in which courts and other legal institutions facilitate protections of freedom and the ways in which freedom is a necessary prerequisite to an effective system of the rule of law. In doing so, Justice Kennedy crystalized an important insight that ran throughout the morning discussions: that the rule of law can not be treated as a binary institutional choice (that we either have it or not) but rather the rule of law involves an ongoing institutional process of implementation and maintenance.

In the subsequent discussion among the group after Justice Kennedy's remarks, the following points were emphasized. First, the rule of law consists of more than formal rules and institutions. It also consists of the social and cultural norms that support the effectiveness of the legal system. Second, the rule of law is not self-

sustaining. It requires constant vigilance to maintain the effectiveness of the courts and other legal institutions. Third, the rule of law essentially requires the acceptance and commitment from the community as a whole. And thus, fourth, there is a need to nourish and sustain an understanding of the importance of the rule of law in the society as a whole. This task falls most importantly on the judiciary. There is a need for judges to take an active role in this educational project.

II. Roundtable Discussion Session I: Varieties of Justice Systems and the Rule of Law

The group broke into two separate discussions for the next session.

A. Sharia Law and Customary Justice: Practice and Challenges

The moderator for this session was Hon. Tassaduq Hussain Jilani, Justice of the Supreme Court of Pakistan.

The organizing question of this discussion was: How do countries reconcile the multiple systems of law, broadly defined, that exist in many, if not most, societies? The primary focus of the session was on Sharia law, but the discussion reflected the view that the issues raised by Sharia law applied to religious law more generally as well as to other forms of customary law in a society.

A number of important issues emerged in this discussion. First, there was some question raised about the extent to which Sharia law actually conflicts with state or constitutional law. There was some disagreement over the answer to this question. In some areas, the majority view was that there does exist real conflict today. The areas of the law in which there are some of the sharpest conflicts come in the area of human rights and, most specifically, the treatment of women and children. Second, there was an interesting discussion of the use of specialized religious courts to address those types of cases in which there has been an explicit decision to let religious law govern the case. There were some suggestions of differences in the extent to which the state authorized jurisdiction for these specialized courts. Third, differences were identified between how these issues are treated in secular states as opposed to those states that are constitutionally established as religious states. Some participants suggested that it is, in fact, easier for secular states to navigate issues of conflict between state law and religious law than for religiously constituted states. Fourth, there was strong support for the view that the ultimate authority of the highest level constitutional court needs to defend and maintain human rights even when this requires the judges to overturn the decisions of the religious courts. Fifth, there was some discussion in support of the view that incrementalism is the best approach for constitutional courts in those cases in which they have to rule contrary to religious laws.

B. Post-Conflict Transitional Justice, Reconciliation, and Reconstruction

The moderator for this session was Prof. Sam Rugege, Chief Justice of the Supreme Court of Rwanda. The primary focus of this session was a set of powerful accounts of the process of dealing with post-conflict transitional justice in three nations: Rwanda, Sri Lanka and Uruguay.

The discussion reflected the following themes. First, the basic challenge consists of satisfying the balance between resolving past conflicts on the one hand and the future welfare and development of the society on the other, the balance between retribution and restoration. Second, there are a creative array of institutional mechanisms and policies that have been developed to try to deal with these often competing goals (balancing the conflicting interests of the victims of past atrocities with the interests of future generations.) These mechanisms range from prosecutions to truth and reconciliation commissions and then to amnesties. Third, different combinations of these mechanisms and policies have been employed. The most common approaches have tended towards a primary emphasis on restorative approaches but inevitably there has been a realization that some retribution approaches have been necessary. Fourth, it is important to be able to assess when it is necessary to supplement the specific policies directed at the transition with related policies that will have an indirect effect on the success of the transition. Examples of the focus of such policies are (a) economic development/poverty reduction and (b) education (about the past, about the goal of the transitional policies, about the future requirements for the policies to be successful, etc.) Fifth, reconciliation is a challenge not just for countries that have experienced genocide and other kinds of violent crises, but also for any country that has to address past instance of society-wide discrimination and oppression. Here there was broad agreement that we need to expand the scope of this kind of discussion.

III. Roundtable Discussion Session II: Judicial Independence

After lunch the group once again broke into two separate discussions.

A. Judicial Discipline and Impartiality

The moderator for this session was The Rt. Hon. the Lord Woolf, former Lord Chief Justice of England and Wales. The general questions that motivated this discussion included: Can judges be effectively disciplined? Is such discipline inconsistent with judicial independence? If we allow for discipline, who does it best and under what circumstances?

This was a wide-ranging discussion. The main theme of the discussion was that judicial independence does not entail judicial immunity from discipline. The general sense of the group was that the value of judicial independence is a value for the

public, for society, and not for the individual judge. At the same time, the prevailing view was that judicial discipline must be exceptional or otherwise it can undermine judicial authority.

The discussion highlighted several levels of judicial misconduct. The main types that emerged from the discussion were criminal behavior, inappropriate judicial behavior (contrary to the rules of judicial practice, politically incorrect language, etc.), and political misbehavior (acting in an overly political matter). The consensus was that the mechanisms of discipline might differ across these different levels, but as a general rule, judges should be disciplined by judges (and not by members of the other branches of government.)

There were some additional interesting points raised in the session. First, there was a discussion of the role of appellate decisions in disciplining inappropriate judicial behavior. This was related to the effects of appellate decisions on the reputations of lower court judges. Second, some participants emphasized the importance of judicial commissions as a way of preventing inappropriate judicial decisions. In some countries these commissions provide advice to judges, helping them to decide before the fact what the appropriate kind of judicial behavior is in complex situations. Third, some others emphasized that the formal relationship between judges and political parties is regulated in various countries. The range of regulation runs from prohibitions against officially joining political parties in some countries to partisan judicial elections in others, like the U.S., where judges may run for office as an official candidate of political parties.

B. The Judicial Resources Crisis

The moderator for this session was H.E. Joaquim Benedito Barbosa Gomes, President of the Supreme Federal Court of Brazil. The discussion was conducted from the shared perspective that all judicial systems are short on funding. Judicial efficiency and independence are hurt by the lack of sufficient resources. Therefore, the primary question that structured this session was, short of an unforeseen windfall of resources, what can judges and courts do to deal with the insufficiency of resources?

A number of possible answers to this question were proposed. Three seemed to generate the most discussion. First, constitutional provisions that remove the authority of other branches of government over the budgets of the judiciary (e.g., a criterion where the budget is set by constitutional provision as a formula, such as a principle setting the judicial budget as a percentage of the overall national budget.) Second, the use of judicial fees as an alternative source of funds for judicial budgets. Third, the use of alternative dispute resolution procedures (like mediation) to diminish the judiciary's case-load and their costs.

The prevailing lesson from the discussion was the increasing role of administration for judges. The ongoing fiscal crisis for the courts has produced a new understanding for many of the judges: in addition to being good judges on the bench, they have to be good administrators.

IV. Judicial Social Responsibility: Best Practices in Rule of Law Engagement

The participants came back together for the final session. It was moderated by Hon. Hassan Bubacar Jallow, Prosecutor of the International Criminal Tribunal for Rwanda.

The discussion served as both a review of the earlier sessions and an opportunity for the participants to share their own suggestions about how judges can facilitate and enhance the rule of law. Not surprisingly, they returned to the themes of the introductory session. They emphasized the importance of transparency and the need for a better understanding about what courts and judges do. They highlighted the role of communication and education. There was a general consensus that the future of the rule of law depends on the willingness of all members of society to value and support the law and legal institutions. The discussion concluded with a general acknowledgement that judges have a crucial role to play in developing and maintaining public support of their courts in particular and the role of legal systems in general.