Editorial:

One of the major challenges facing the world today is the relative fragility of democracy, transparency, and the rule of law in many countries. The rule of law in particular has been identified as a lynchpin for stable government and that legitimacy necessary for social, political and economic development. Its diffusion and nurture is therefore part of the universal duty incumbent upon all humanity.

In the Commonwealth the evolution and spread of the rule of law may be traced to the development of constitutional government in the United Kingdom. Lord Cooke of Thorndon built upon the views of Sir Owen Dixon, who saw the evolution of constitutional law, both in the United Kingdom, and in the overseas realms of the Crown, as the product of the interplay between three potentially conflicting conceptions. These were the supremacy of the law, the supremacy of the Crown, and the supremacy of Parliament. This interplay has produced the present constitutional structure, whose defining aspects were identified, though perhaps misunderstood, by Montesquieu. This is the origin and antecedent of both the rule of law and the separation of powers.

The supremacy of the law is an idea we owe to the early Middle Ages. There was then no concept of the sovereign state, at least in part because everyone had a different lord to whom they owed allegiance. With the Reformation a true theory of sovereignty became possible, because of the vast increase in the powers and activity of the legislature. Judges, as professors of the common law, claimed for it supreme authority. Had this been admitted they would have been the ultimate authority in the state, as perhaps they are today in the United States of America, where the separation of powers, and an entrenched constitution, ensure a major constitutional role for the judiciary. To many in the seventeenth century the law was the true sovereign.

The concept of the rule of law today may be seen in myriad places, and understood in various ways, but its general principles are well-understood, and applied generally, if not universally, throughout the Commonwealth and the wider world.

A legal or political principle, however universally accepted, only has impact if it is implemented and adhered to. In part the latter is where the legal profession – judges, lawyers and academics – can and must make an important contribution.

The legal profession has a unique position in the community in any civil society. Its distinguishing feature is that it is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. This stems from the fact that the protection of rights has been a historic function of the law, and it has been the responsibility of lawyers to carry out that function.

The profession also plays a most significant role in upholding the social fabric. This is largely because lawyers are the people who have a direct part to play in the maintenance of the rule of law which is in turn what fastens and upholds society. Indeed, the role of the lawyer spans the entire spectrum of national development activities. More often than not he or she is in the public limelight and his or her involvement in social and political issues draws upon them considerable conspicuousness and vulnerability.

Accordingly, the legal profession connotes a sense of public service. For this reason Roscoe Pound viewed a profession as composing a common calling in the spirit of public service. Similarly, according to Benna Lutta, the legal profession "can be said to be a kind of priesthood and dedicated to public service." Hence, it logically follows that the goodwill of the legal profession largely depends on the people it serves, that is, members of the public. The members of the public have to be able to trust the profession if they are they are ever going to be comfortable charging the profession with the aforementioned functions.

Consequently, to perform the said functions in the spirit of public service, a high ethical and professional standard must be maintained within the rank and file of the legal profession. The lawyer must consequently, amongst others things, be of high integrity, probity, honesty and competent. Like in any other profession, members of the legal profession must shun those things which are likely to bring the profession into disrepute. They must exhibit a great sense of integrity, and, must give proper professional service. As professionals, therefore, they should be viewed as a bulwark of society, and not an obstacle to progress.

Of necessity, lawyers should identify themselves in a positive and practical manner with the aspirations and efforts of the people they serve. They should shirk complacency and constantly engage in the reappraisal of values and methodologies. By so doing, lawyers will be able to establish and justify their worth in society.

Law may not be the only means of combating corruption but it is the principal way in a country founded on the rule of law. According to Dr. Nihal Jayawickrama, the former Executive Director of Transparency International, in a developing country or a country in transition, with weak governance institutions, corruption is likely to corrode the entire system. The legal profession has a pivotal role in the operation of institutions, not least in the provision of judicial personnel, but also in the administration of the laws, civil and criminal. The profession itself must therefore be held accountable for the conduct of its members. Where this alone is insufficient partnership with governmental, usually independent or quasi-independent bodies, is appropriate.

The autonomy and independence of the legal profession are important constitutional safeguards. In a free and democratic society the legal profession plays an important role; indeed without a free legal profession the basic safeguards of an unbiased judiciary and the impartial rule of law are threatened.

But this autonomy is not unqualified. The independence of the legal profession must be balanced by a responsible and impartial adherence to uniformly high ethical standards, accountability and transparency. This can involve – and indeed is increasingly involving – bodies other than the professional associations themselves, and individuals other than legal professionals.

Whilst preserving the highest moral and ethical standards, the legal profession, judges, lawyers and academics, can contribute to the preservation and enhancement of the rule of law in each of our countries, and more generally.

The articles in this edition of *The Round Table* contain a range of views on the role played by the rule of law, from the normative effect of the concept, to its more specific applications in individual circumstances.

Rhona Smith, in "Towards the rule of law's human rights requirements in Commonwealth States: selected observations" observes that there are many interpretations of the rule of law. Transforming from a 'thin' to 'thicker' conceptualisation means infusing 'quality', 'goodness' to the laws of the State. Accordingly, this centres attention on aspects of adherence to international human rights. Focusing on this point, and drawing on the literature linking rule of law with human rights, she conducts a preliminary evaluation of the extent to which Commonwealth states appear to respect this 'thicker' rule of law. She refers to a qualitative analysis of the comments and recommendations made to States during the first cycle of universal periodic review by the UN Human Rights Council, as well as a number of pre-existing statistical data on specific issues.

Andrew Unger, in "The Rule of Law in Zambia – Enhancing Access to Justice – The Law Association of Zambia and the South London Law Society Access to Justice Project", discusses the relationship between access to justice and the rule of law, outlines the current financial and operational limitations with regard to full access to justice in Zambia and

describes a practical project, undertaken by the Law Association of Zambia and the South London Law Society, supported by London South Bank University, to enhance access to justice in Zambia and thereby strengthen the rule of law. It encourages others, particularly Bars and Law Societies, law firms and University Law Schools, to undertake similar projects in Zambia and across the Commonwealth wherever they may be required.

Graham Ferris, in "The path dependant problem of exporting the rule of law", considers, first, that the executive operates through legally constituted channels: that administrative and political actions are constrained and channelled through legal authority. Second, that trial processes are robust: being genuine attempts to decide according to proof and law, rather than returning decisions that it is hoped will placate the powerful. Third, that no individual entities, be they corporations or individuals, be they economically or politically or militarily powerful, are able to act outside of the reach of legal remedy. He explains how North helps to understand how the failure to successfully implement or reform law is predictable if we ignore the relevant features of the society that receives legal transplant or legal reform efforts. Ultimately reform must involve domestic agents in its design and implementation because their knowledge of the subjunctive worlds of their own societies is a vital component in the reform process.

Chris McCorkindale and Nick McKerrell, in "Assessing the relationship between legislative and judicial supremacy in the UK: Parliament and the Rule of Law after *Jackson*", consider the place of the Rule of Law in a constitution, using as their example the constitution of the United Kingdom – in which supremacy rests not with the constitution as a document to be interpreted by a constitutional court, but with the legislature itself. Whilst traditionally the supremacy of the Crown in Parliament has meant that British courts have had no right to set aside even the most oppressive legislation, recent extra-judicial writings and obiter dicta in case law has been indicative of a shift in the judicial mood. In light of these

developments, the article asks where does the relationship between the supremacy of the Crown in Parliament and the rule of law stand now; where might that trajectory take us; and what might be done to reconcile the two.

Soli J Sorabjee, in “The Rule of Law”, observes that we may not be able to define Rule of Law with scientific precision but it cannot be dismissed as an elusive notion or as unruly horse. Rule of Law is the heritage of all mankind because its underlying rationale is belief in the human rights and human dignity of all individuals everywhere in the world. It needs to be emphasised that there is nothing western or eastern or northern or southern about the concept of Rule of Law. It has a global reach and dimension. Rule of Law symbolizes the quest of civilized democratic societies, be they eastern or western, to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence. It is entrenched in India to the extent that the Rule of Law cannot be abolished even by a constitutional amendment.

The concept of the rule of law has evolved since it was described by Aristotle, who said that “law should govern”, or Cicero, “we are all servants of the laws in order that we may be free”. In 1607, Sir Edward Coke, reporting his own *Case of Prohibitions*, wrote “that the law was the golden met-wand and treasure to try the causes of the subjects, and which protected His Majesty in safety and peace, with which the King was greatly offended, and saith, that then he should be under the law, which was treason to affirm, as he said; to which I saith, that Bracton saith, *quod Rex non debed esse homine, sed sub Deo et lege* (that the King ought not to be under any man but under God and the law)”. In 1885 Albert Dicey observed that no one can be punished or made to suffer except for a breach of law proved in an ordinary court; no one is above the law and everyone is equal before the law regardless of social, economic, or political status; the rule of law includes the results of judicial decisions

defining the rights of private persons. However we might today define the rule of law, its normative effect is enormous. It has, in large part, prevailed as a universal concept of law.

Noel Cox