Cowen on Law: Selected Essays

Edited by Susannah Cowen
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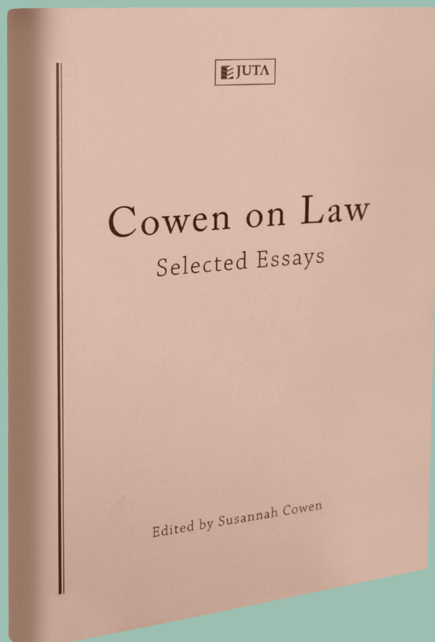

'For commercial lawyers the name "Cowen" has become synonymous with a particular book which, through five editions (all published by Juta & Co) retained in some form the name *The Law of Negotiable Instruments in South Africa*' (353).

Thus writes Charl Hugo, introducing the tenth chapter of this remarkable collection. That introduction reminds the reader just how seminal a work in its field that 'particular book' is, and just how much of an impression it has made upon international commentators.

The other chapters remind some, and inform others, of the fact that Cowen was very, very much more than Cowen on Negotiable Instruments. As a 'tribute from a daughter to a father' (xiv), the work surpasses success. No father could ask for more. As a gift to the South African jurist with a penchant for the long and the historical view, this is a true treasure. To the likes of this reviewer, it is a real joy.

What strikes one most is the eclecticism, the scope of interest and expertise of the man. Jan Glazewski specifically comments on this aspect in his introduction to the extracts on *Environmental Law* (228). Is it a forlorn hope that our universities can still produce this sort of roundedness, this particular breed of Renaissance man? If they can, good for them. If they cannot, this sort of work may remind them of what they should regard as their model product.

The tribute gains considerable weight from its recourse to an all-star cast to introduce the various chapters - Laurie Ackermann, Arthur Chaskalson, Jeremy Gauntlett, Pius Langa, Dennis Davis, Albie Sachs, Edwin Cameron, Jan Glawezki, Carole Lewis, David Unterhalter, Charl Hugo and Susannah Cowen do the honours. Each introduction was clearly the product of someone sufficiently impressed by the need to do justice to Cowen to have dispensed considerable acuity and effort in succeeding to do just that.

The editor explains that ' [o]ther than to give the subject of democracy pride of place and to put his work on negotiable instruments into perspective, there is no self-evident logic in the order of the remaining chapters, save an attempt to make one subject lead naturally to the next' (xiii). One may well say that the contents tend to progress from the philosophical to the particular, or, put differently, in the language of some modern day analytical jurists, from a discussion about Law to a discussion of the law. This arrangement mirrors Cowen's sense of the imperative of theoretical awareness even at the most practical or particular level, a motif that may well be regarded as the golden thread binding the set of extracts. This theme is most evident in his discussion of the need to bring theory to the 'principles' of statutory interpretation, of his understanding of the priority of jurisprudence to the craft of law, and, for example, of his recognised ability to provide a theoretical platform for his discussion on negotiable instruments that struck many in the common-law world as truly ground-breaking. This was a man who liked to know why he was doing something while he was doing it, and felt that such knowledge would always help him do it better.

A striking feature of what Edwin Cameron termed Cowen's 'unapologetically muscular argument' (202) is his constant striving towards perspicacious reductionism. He considers a topic, a debate, an area of dispute, and identifies the issues or questions that are at play. He tells you that, whichever way you look at it, these four, or five, or three, questions or issues, will be at the heart of the matter. And you find it difficult to disagree. For example, democracy is reduced in this fashion to a system that at heart is individual-centred and pluralist. How incredibly lucid. From this follows the essentially humanist concern of this system of government - the human being, with its diversity of clashing beliefs, each to be recognised as equally deserving of state attention, is the pivot around which democracy is constructed. Ronald Dworkin spoke in similar terms when he popularised the mantra of 'equal concern and respect' as lying at the heart of democracy. In similar vein, one is given eight deficiencies in the field of statutory interpretation, or eight recurring questions of principle insufficiently clearly identified and addressed for this area of law to make satisfactory progress as a field deserving of serious study. One is given six 'questions, or rather complexes of questions, which are, at the present time [1964], in developed societies, of fundamental concern to lawyers in their craft of lawyering, or of doing what Llewellyn calls "law jobs"' (150). Most fascinating among these (to this reviewer at least), is the question 'Why is it that the legal scholars of different countries, operating against the background of different historical circumstances and different economic, political, and theological systems, tend to concern themselves with different "fundamental" legal questions?' (155). One finds four critical aspects addressed by all theories of statutory interpretation (121); one is presented with three categories of Milton's arguments in *Areopagitica* (195) and one is advised of three significant components informing and common to the international student unrest in 1968 (205). Never is the list thus yielded and presented pedestrian or obvious; it is always a distillation of insight, rather than a mere list of contents. This is a recurring technique and it reveals the truth of what Laurie Ackermann saw in Cowen's style of analysis - an insight attributed to Cowen's mentor Professor Versfeld: 'When Socrates says what do you mean, he is saying let's take a look at the thing' (xxvii).

This ability to reduce to the essence was also what fuelled the influence of Cowen's arguments in dealing with the constitutional crisis of the 1950s. Cowen pointed out that everybody seemed to be asking the wrong question when dealing with the issue whether Parliament was bound by its own procedural provisions. The question was not whether Parliament was bound; the question was 'what was Parliament'. Cowen's argument, to the effect that the two-thirds majority provision was constitutive, rather than procedural, was a masterly act of doing the thing properly by first understanding exactly what it was one was doing. One cannot truly say whether this contribution, or his work in negotiable instruments, ought more accurately to define the legacy of his scholarship. Which is precisely why it is so good, for

the South African legal community, that this work was compiled and published.

There is strong feeling too, in some of the 'unapologetically muscular argument'. It comes starkly to the fore in the passion with which the pre-publication censorship to be introduced by the Publications and Entertainment Bill is excoriated in his 1960 lecture on the topic (189ff). It stands unabashed in his commitment to a theory of natural law - he is adamant that the authority of law stems from its truth, rather than from its conventional purity, and he would declare that the 'only satisfactory answer' to the problem of fostering the internalisation of the values of the Constitution is 'a committal to the natural law' (30). His faith in this regard was clear and one sees it in the following forceful expression to the reader who repudiates the notion that might is right and finds it hateful: 'there is, believe, me, only one alternative; and that is to recognise that the people's will can never make wrong right. It is sometimes said that the voice of the people is the voice of God. If this is meant to convey that the people can nullify God's law, there never was a more damnable heresy. There are rules which stem from a higher source than the people's will, and which are always binding on the people. And these rules are contained in what has long been known as the natural law' (32). He was, at the same time, aware of the danger of dogmaticism, and spoke ironically of 'room for a brace of instructive essays, entitled respectively, *Saving Natural Law from its Friends* and *Saving Realism from the Realists*' (167).

For one whose contribution was so eclectic, the final portion of the book, titled 'Fleece on the Hedges' is a fitting finish - here one finds the flotsam of a mind ever in contemplation, that had been collected in a file bearing the name of the title of the chapter. Some personal favourites include 'A plea for Civility as Essential to the Success of South Africa's Democracy' (370), characteristically entailing the identification of three essential elements for the success of this plea, and 'The Courage to Choose and Take Moral Decisions on Principle' (379).

I am very happy to have had the pleasure of reading this book. May many others share it.

Frank Snyckers, Johannesburg Bar

The Commonwealth principles: Endnotes
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'States should take measures to ensure that:

a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures …

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review.'

[13] Under the Gibraltar Constitution Order 2004: Appointment is by a Judicial and Senior Appointments Commission. In the event that the Attorney General (a public officer appointed by a Committee) is a Member of Parliament, his prosecutorial duties pass to a Director of Public Prosecutions who has like the Attorney General exclusive control over prosecutions and investigations. See also Falklands Islands Constitution (Amendment) Order 1997, Canada, Federal Accountability Act, Canada 2006; the Attorney General's power to institute and terminate criminal proceedings is vested in him to the exclusion of any other person or authority and is not subject to the direction or control of any other person. As previously stated (footnote 11) under the UK's Constitutional Renewal Bill 2008, the Attorney General is not to have power to terminate a criminal investigation or proceedings other than where it is necessary on grounds of national emergency.

[14] **LHPVII)(a)** 'Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of public business.'

'Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.'

Clause 14 of the Constitutional Renewal Bill 2008 (England and Wales) proposes that the Attorney General must lay before Parliament annually a report on the giving or withdrawal of any direction terminating an investigation or prosecution on grounds of national emergency and Clause 16 provides that the Attorney General must lay before Parliament a report on the exercise of his function.

LHPVII(c) 'Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the constitution, with relevant statutes and other law, including the law relating to the principles of natural justice' 'The Rule of Law (not best democratic principles) requires that the courts have jurisdiction to scrutinize government actions to ensure they are lawful: Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, *Judicial Independence*, Commonwealth Law Conference , Nairobi, Kenya 2007.

[15] Clause 3 of the Constitutional Renewal Bill 2008 (England and Wales) proposes that the Attorney General with the directors of public prosecutions shall prepare a protocol to be laid before Parliament of how they are to exercise their functions including the circumstances in which the Attorney General is to be consulted or provided with information.

[16] See footnote 15.

[17] Clause 3 of the Constitutional Renewal Bill 2008 (England and Wales) proposes that the Attorney General's function of superintendence of the directors of public prosecutions should not include power to give a direction in relation to individual cases except in so far as is provided in Clause 12 in relation to matters of national security.

[18] The Constitutional Reform Bill 2008, clauses 12-15.

[19] Ibid, Clauses 15 and 15(4). The exclusion of the courts' jurisdiction on grounds of national security was severely criticised by Lord Atkin, dissenting in *Liversidge v Anderson* [1942] AC 206, 244 ('In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace…..).' In the Commonwealth many jurisdictions, particularly in the Carribean (A-G of *St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637) have tended to follow Lord Atkin's judgment. Others such as Singapore (Re Ong Yew Teck) and Malaysia (*Karam Singh v Menteri Hal Ehwal Dalam Negeri* 1969) have tended to follow the majority. See also *Johnston v Chief Constable of The Royal Ulster Constabulary* [1987] 1 QB 129, 147; *Tinelly and McElduff v UK* ECHR 10 July 1998 paras 72-73; David Pannick QC *No Government should award itself unreviewable powers; The Times*, 3 July 2008.

In R *(Corner House Research) v Director of the Serious Office* [2008] 3 WLR 568 the House of Lords over-ruled a decision of the Administrative Court that submission to a threat was lawful only where there was no alternative course open to the decision maker and held that the Director of the Serious Fraud Office was entitled to exercise his discretion to discontinue the corruption investigation into the al-Yamamah contract between the UK and the Kingdom of Saudi Arabia involving BAE where he took the view that protecting the lives of British citizens outweighed the public interest in pursuing an investigation into an allegation of corruption. Authority made it plain that only in exceptional cases would the court disturb the decisions of an independent prosecutor and investigator.

[20] House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, *Reform of the Office of Attorney General*, 18th April 2008.

[21] The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, section 5 f , *'instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and subjected not only to requirements indicated in paragraphs d and e above but also to an appropriate specific control with a view in particular to guaranteeing transparency"* (emphasis added). Any such instruction, which must be in writing and published in an adequate way, must carry; "5d, *adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example: to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;- duly to explain its written instructions, especially when they deviate from the public prosecutor's advice and to transmit them through the hierarchical channels…; 5e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received.'*

The International Association of Prosecutors Statement of Standards of Professional Conduct for all prosecutors and of their essential duties and rights states in section 2 that where non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, *'such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.'*

No exception for national security cases is envisaged in either document.

[22] Commonwealth Westminster constitutions appear to give the power without restriction eg Bahamas Constitution 1973 (incl 2003 Review) and Gibraltar Const 2004. The issue has been considered extensively in Australia and Canada in efforts to avoid political interference. In Canada the Federal Accountability Act 2006 passed the power to prosecute to the DPP with discretion of the Attorney to intervene, but it was thought it is unlikely ever to be exercised. If the power is exercised there must be written notice and it must be published in the Gazette. In British Columbia a special independent prosecutor can be appointed in certain cases. In some other jurisdictions, notably Ireland under the 1937 Constitution the Attorney General does not have power to stop prosecutions. The DPP is accountable to the Oireachtas through the Public Accounts Committee (see page 34, House of Commons Constitutional Affairs Committee 5th Report.).

[23] Article 2 of the European Convention on Mutual Assistance contains a similar provision, but in European States the prosecutor and investigating judge are judicial officers.