

LEGAL ARCHIVES: THE NATIONAL
AND CULTURAL HERITAGE

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Memorandum by the Commonwealth Secretariat and
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From time to time the attention of the Commonwealth Secretariat has been drawn to a lack of appropriate legal archives in some Commonwealth jurisdictions. On occasion, this has been done by practitioners, unable to locate material needed for the preparation of, e.g. a constitutional case. At other times this has been done by academic researchers.

2. It is beyond doubt that properly organised legal archives are a vein rich in a nation's heritage. Not only are the sensational trials of the day encapsulated for posterity, but so, too, (and perhaps more importantly) is the way in which our respective peoples have organised and gone about their daily business. In no other field is the full range of human endeavour, from the executive to the individual, available to be preserved for posterity.

3. It is, of course, easy for the importance of legal archives to be overlooked in the crush of other seemingly more important matters of day-to-day concern. As Professor Knafla's paper notes, some archival systems have been more concerned with destruction than with preservation. Certainly, destruction is an essential component of any archival policy: historians, sociologists and psychologists may wish for everything to be kept, but the constraints on storage space dictate that any archival system be, at least to some degree, selective. There is, however, the always present problem of determining today what may, in the future, be thought to be relevant: and we ourselves are too close to the present and too distant from the future to be able to do this with any degree of certainty.

4. The paper suggests that adequate legal archives are a necessity, and points to recent developments, centred on Malaysia, in the South-East Asian region which are addressed to this need.

5. It is not anticipated that Ministers will wish to discuss the paper in any detail, but it is presented in the context of the Meeting providing an appropriate opportunity for any informal consultations to take place.

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ANNEX TO LMM(83)19

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Introduction

Legal records have long held a prominent place among the sources for history. Encompassing the records of Ministries of Justice, the offices of Attorneys-General, Solicitors-General and Director of Public Prosecutions (the legal policy-making, advising and prosecutorial arms of the State), the courts of law (central and local), and the legal profession (the link between the institutions of the law and society), these varied legal sources form both qualitatively and quantitatively one of the largest archival groups for the study and interpretation of the past. They are also one of the most difficult sources to organise, preserve and use.

2. Legal records on the one hand provide the only unimpeachable document of what individual members of society have contested in working out human relationships, and on the

other hand reflect the development of the law of the State in relation to society. In these sources also lies development and emergence of nations, thereby preserving the historic landmarks of a nation's heritage for succeeding generations.

3. An axiom of the common law is that law is a growing organism, not a system based on fixed doctrines; that it embodies the character, values, and tensions of a changing society. But we are usually too far from the past to judge ourselves, and too near to appreciate fully the distance.¹ For example, the law is by some regarded in technical terms, as comprising an archaic, complicated world divorced from the language of laymen; to them it does not appear to lie at the threshold of the future. As the famous legal historian has written: "Who shall interest us in contingent remainders, or the Statute of Uses, while Chinese metaphysics remain unexplored?"² Much has been written about legal institutions, and particular branches of the law, but until very recently the use of legal sources for the study of individuals, families and communities, business and commerce, governments, ideology, social forces and culture has not been prevalent.³

4. The law and its records are perhaps the most pervasive sources for the study of a country's people, their institutions and their culture. The legal record is an integral part of the legal system, a tool of judges, lawyers and researchers to apply and develop the law in order to meet the exigencies of the present and ward off the uncertainties of the future. For the historian, legal records provide information concerning persons and places, social and economic developments, crime, the sentencing policies of courts, matters and psychiatric and social welfare, and the interaction of individuals within society.^{4,5}

5. The problem with legal records is that few people really understand them. Files become massive with the growth of modern society and its bureaucracies. Over-stretched and over-worked practitioners both government and private trying to meet the daily crush of clients have come to regard the archives which their work has spawned as a luxury that can be discarded once their immediate use has disappeared. For some, at least, archives' policies are related solely to the periods laid down in their jurisdiction's Limitation of Actions Act.

6. The purpose of this paper is to review the way in which legal archives have become established and maintained in some parts of the common law world, and to provide some interim assessments and recommendations for their future preservation and usage. Against the background of the past, it examines the key guides to the preservation and destruction of court records, the importance of other legal records in the public and private domains, and the problems of preservation, management and accessibility.

Historical Background

7. The concept of a Court of Record means that the documents produced by such a court are a "record", and are thus a part of the law itself. The Public Records Act of 1838 was a landmark statute that brought the records of the English central courts under the purview of the Master of the Rolls, and the Public Record Office was built on the Master's estate in Chancery Lane, London. The original purpose was to bring the records of the courts to a government department in order to establish a system of organising, cleaning, repairing and preserving them, and making lists of contents. The early Victorians developed a deep appreciation for the past, and their purpose was to preserve the records of the courts. The Public Records Act of 1877 changed that. It authorised Inspecting Officers to prepare for the Master destruction schedules for legal records after 1715 (later amended to 1660). This change in attitude was given expression when many central court records were deemed by the 1877 Act to be "without value", and all local court records were called "utterly useless".⁶ The destruction of the heritage of past centuries was put in hand.

8. The results were disastrous. By the early twentieth century many records of the central, circuit, county and borough courts had been destroyed. Precepts, warrants, indictments, recognizances and depositions were scheduled for destruction after thirty years. The minute books were sufficient, it was said, although now we know that this was not the case. A Royal Commission, reporting in 1916, recommended destruction of such records after periods of two to ten years, while a case was still fresh in the docket. This recommendation was followed, in part, by a schedule of 1941 by which whole classes of records were jettisoned. When files were retained, they involved sensational cases of "public" interest, such as murder, treason, sedition and riot. Late Victorian and Edwardian society believed that only "class" crimes such as treason and riot were the foundations of law and history.⁷

9. The problems, however, were real. For example, the Supreme Court (civil side) records transferred to the Public Records Office (PRO) for 1875-1935 comprised four miles of shelving, and the absence of statements of claim and judgments made them unrewarding. At the same time, six miles of original wills were transferred, and these were seldom used because researchers preferred the registered copies. By 1958 the problem was even more acute. The records of magistrates' courts (which heard more than a million criminal cases a year) were being destroyed, while the circuit courts (which heard less than 30,000 a year) were preserved. Thus there were large numbers of legal records growing geometrically which were being systematically destroyed, and many of those that were preserved lacked vital information.⁸ The reliance on minute books was ill-founded. They were not documents "of record", they were not read or signed by judges, and were neither accurate nor complete. Finally, an Act of 1958 repealed several earlier ones, attempted to broaden the scope of what should be kept, and established a thirty-year policy for destruction.

The Denning Report

10. The Report of the Committee on Legal Records (1966) provided the basic framework for the preservation of court records in England. The Denning Report, while considered contemporaneously to be a reform of the previous Public Record Office Acts, was nonetheless in the late nineteenth century tradition in its attitude to record preservation: destroy. Certain "key" legal records were kept, and others were "selected" by specimen files or random sample. The great bulk of records was simply to be destroyed, and that word "destroy" dominates the lists of legal records in the appendices of the Committee's report. There was, however, a complete "system" for the administration of the legal records, and disposals were slated in an orderly and logical manner.⁹

11. The principles established for the destruction of court records were the result of a cost/benefit analysis. Each class of records was evaluated for the cost of keeping and maintaining them over their "probable" future value. Where a class was preserved in part, court officials would apply the criteria of selection, not experts in the field. Only the final selections would be made by a Public Records Office official. Great emphasis was placed on the availability of alternate sources of information such as newspaper accounts of cases, solicitors' files and government documents. Whether parties, lawyers, researchers or historians could locate these alternative sources, and whether their information would be reliable were questions which the Committee avoided. The principles were drafted not for future needs but for the exigencies of the time.

12. In the end, the sources of cases representing "public interest" continued to be given a higher profile than the mass of litigation which stemmed from the public "at large". Destroyed materials included petitions, summonses, writs, oaths, pleadings, motions, affidavits, depositions, cause books, transcripts, judgments, draft papers and correspondence. The materials preserved included documents relating to parliamentary, governmental and municipal concerns, court orders and rolls, minute books, bonds and recognizances, appeal papers and indexes. Often case files were "selected". Groups to be destroyed had specific years preserved by "random sampling". District, municipal and county courts suffered an even harsher fate. Most of their records were slated for destruction. Where the law touched moneyed interests, however, such as probate, divorce, railways, shipping and bankruptcy, the preservation recommendation was positive.

13. Quite rightly, the Denning Report has not been fully implemented. Authorities since that time have come to recognise the fundamental purpose of creating a public records archive: to preserve the legacy of the past. The Denning Report is now regarded by archivists as obsolete. Certainly, no government should rely on a system whose basic tenets were demonstrably unsound, even before the Denning Report was published.¹⁰

14. The only answer to the dilemma is for the disposition of court records to be done with the assistance of an inter-disciplinary body, one which includes representatives not only from government and the legal profession, but also from political, social and economic historians, and relevant constituents from the private sector.

Modern Alternatives

15. The English system has not been followed throughout the Commonwealth. Called a "record type" system, it is based on archival and administrative developments. A record type exists when the records are filed separately according to their provenance, creating, for example, groups of records for writs, affidavits, judgments and pardons. The user,

whether lawyer, litigant, researcher or historian, must canvass all the relevant groups to find information on a particular case or legal problem. A record "dossier" system is based on the activities of the court and a lack of administrative structure. A file, or dossier, is made of all documents concerning a particular case, and these files comprise a single record group for all litigation arising from that court. Thus the dossier is the most useful form of record-keeping for users whether their interest is legal or historical.¹¹ Since the method of keeping court records predetermines their use, alternatives to the records system deserve consideration.

16. The value of the dossier system has been demonstrated in parts of Australia and Canada, where most of the legal records are maintained simply. Duplicate material is not as prevalent, and specimen file selection or random sampling can be used to meet destruction schedules necessitated by lack of funds or space without losing either the breadth or depth of the sources.¹² That this system is a genuine alternative to the record type can be discerned from the Denning Report itself, where the suggestion is made to attempt the gathering of record types into dossiers when record system is itself large, complex and unwieldy.¹³ It must be remembered that the record type system is upheld in the Report (and earlier ones) not because it is a better system for users, but because it is a better system for destroying court records.¹⁴

17. The alternatives within the dossier system are varied. In countries like Malaysia and Singapore, where the historical-legal records are thin and archival staffs are small, a dossier system can encourage the preservation and maintenance of all the legal records in a form simple for users to benefit. And in countries like Indonesia and the Philippines, where there is a vast accumulation of records, the dossier system provides an easy means of destruction by random sampling when there are no other available resources for their preservation. The creation of the South-East Asian school for archivists in Malaysia will undoubtedly advance the historical consciousness of the area and suggest new archival schemes for the unique judicial systems and physical environment of the area.¹⁵

18. While the Denning Report eschewed the use of microfilm and modern technology to meet the demands of legal records, nonetheless these methods are being used successfully elsewhere. In Canada, for example, an ad hoc national legal records committee is being established to co-ordinate the preservation and research of court records.¹⁶ The provinces, too, where the dossier system is predominant, are beginning to respond to the needs of future users. New Brunswick, for example, transfers all court records to the Provincial Archives after five years, and the Archives organises and preserves its legal heritage without destruction of the originals. The New Brunswick system is a model for court records preservation. In Ontario, the Province has begun an ambitious programme of putting case files of the 19th century on computer tape. This not only maintains the records of the courts, but it also enables them to be studied with all the possibilities of computer analysis. Finally, in Alberta the space problem has been resolved by microfilming the case files of the major superior courts to 1972. In this way the court records of the Province are preserved efficiently and effectively in one location, and copies can be made for libraries and research centres. Computer potential is just now being examined, and its general use for indexing records is significant.

Legal Records in the Wider Context

19. The problems which confronted the movement to preserve court records in many countries in the middle decades of this century were problems which have not yet been met in dealing with other legal records in the public and private domains. In the public domain, court records are only one part of the legal processes. Committee, parliamentary and cabinet meetings to discuss, form and frame the law, the relevant correspondence, papers and studies, constitute the original records without which statute law itself would not exist. A general policy in most countries has been to preserve the parliamentary papers, and some of those of Attorneys-General and Solicitors-General, but these policies have not been uniform and rules for access by researchers often have not been made. On occasion officials actually take their papers with them on their departure from office, leaving wholesale gaps in the official record at the highest levels. Minutes of meetings are usually preserved, but these are little more than the shell of the record. Notes, internal memoranda and special studies are paramount for an understanding of how and why laws were made, amended or repealed, and thus crucial to the study of a nation's legal heritage. In addition, sources such as these are also revealing of the formation of national policy and the basis of political decisions in the growth of the nation State.

20. The private domain is perhaps the most overlooked sector of legal records. Its breadth and depth is often misunderstood or forgotten. The papers of law firms provide not only records for understanding the dynamics of one of the foremost professions of modern society, but also one of its major business groups. Correspondence notes and briefs provide the background of cases tried in courts, and also the evidence on which judges and juries have based their verdicts, in the absence of complete court manuscripts. In addition, the readiness today of parties to settle out of court and avoid litigation means that an increasing amount of potentially important material is accumulating in solicitors' offices instead of judicial archives. Their files, too, illustrate with revealing frankness the intimate minutiae of contemporary daily life, down to the detailed weekly expenditure of claimants in maintenance cases. As we look back on past generations, so will those of the future look at us and these files may, if properly preserved, give them unique insights into how we lived and what we did.

21. The records of law firms are perhaps as large in volume as those of the courts themselves, yet little has been done to provide for their preservation. A major reason is the problem of confidentiality. What can be seen, when, and by whom are problems which confront the legal records of the public domain as well as those of the private. What is needed first is a concerted effort to encourage law firms to preserve, and deposit, their records; and second, to determine the rules which will govern access and use. In the meantime, the archival concerns of preserving the records and properly listing them can be placed in motion while ethical and private considerations are being discussed and hopefully resolved.

22. Between the public and private domains of non-court record documents lie the personal papers of judges and legal officers. Many of these potential sources, including trial notes and bench-books, are important for an understanding of how legal process worked, and in providing insights into, and explanations of, decisions made in landmark cases. Many developed countries have made little effort to seek the retention of these valuable records. An ambitious project at Oxford has attempted to gather in one archive the papers of officials in the British Colonial Service, especially those who served in Africa and the Caribbean.¹⁷ The Oxford Colonial Records Project, instituted by the Commonwealth Studies committee in 1962, sent inquiries to thousands of officials who had served abroad.¹⁸ The result was the creation of a large collection which includes judicial correspondence, note-books and bench-books. Attempts by individual countries, perhaps through their law societies, to use this model to collect and preserve legal papers held within the countries would add immeasurably to their legal archives. Lists of these papers, cross-references with court records and other legal documents in the public and private domains, would give the legal heritage of a country the fulfilment of its promise.

User Demands and Archival Responses

23. The disciplines of genealogy, history, political science, philosophy, psychology, sociology, social welfare and environmental design are still in their infancy when it comes to the use of legal records, and it is impossible to foretell what uses will come to be made of them in the future. The major transformation which occurred in the last twenty years may well mark the beginning of a new era.¹⁹ Lawyers, and central and local authorities, need precise details about offences, orders and verdicts, convictions, acquittals, motions, and judicial reasoning. Genealogists require indexes of parties and easy access to the case materials. Historians and researchers need the preservation of everything in a useable format.

24. Where everything in a particular category cannot be kept, a comprehensive cross-section must be retained because the law and matters of public and private interest are constantly changing. Changes in the judicial structure, in criminal and civil procedure, in the character of civil litigation, and in the judicial work of administrative tribunals affect which particular record is important or unimportant as any transportation, commerce, industry, the family and social customs have within themselves broad shifts of interest and relevance. Alternative sources are usually unsatisfactory, and there is little logic in destroying original material in order to preserve the secondary.²⁰

25. Records management will be even more important in the future than it has been in the past. Preserving court records poses important responsibilities for their use. Thus the management of court records must be oriented to the needs of servicing reference and research, communications and scholarship.²¹ Some priority should be given to the development of aids for the explanation of legal jargon and as to the use of the court records. Those who use the archives should be encouraged to add to these. Guides to the

records should be detailed, including a discussion of the history of the records and archival annotation.²² "Calendars" (brief descriptions) of the various kinds of court records are invaluable for amateur and professional researchers who wish to use legal records successfully, as they serve to point the researcher in the direction he or she may wish to go. Given the complex nature of such records, more detailed and comparative studies are needed from the academic disciplines. On the level of the individual country, lists and analyses of legal records must be based not on a single archival source but on those from all sectors of the public and private domains²³ and a guide to related legal records in the Commonwealth would be invaluable for future research.²⁴

26. A major problem for the newly-independent nations, however, is getting started. Having overcome problems inherent in claiming priority insofar as resources may be involved (and any loss in priority may represent opportunities forever foregone) proper storage facilities are required for the particular climatic and environmental concerns of the area. The preservation of records includes adequate sorting, organisation, and listing of the contents. Not only professional archivists are needed in a developing country, but also sub-professional officials in the courts and departments of State who can take into consideration the future disposition of the records when they are originally formed and stored. Courses such as those at the archival schools in London, Liverpool and Wales in the United Kingdom, and the recently-established Institute of Archives Science for South-East Asia at the National Archives of Malaysia are useful examples of what can be done in other regions.²⁵ Courses on subjects such as the history and administration of legal systems, language, diplomatic and interpretative skills, research methods and management are as relevant for legal records as they are for the cultural heritage of a country.²⁶ Preserving legal records is necessary for orderly development and understanding of the law, our historical consciousness, and our social, economic and cultural milieu. Maintaining and facilitating their use will make that possible.

27. The preservation and maintenance of legal records is not merely, however, a Commonwealth phenomenon. Through UNESCO, a National Information Systems (NATIS) is being developed to create international aims for world-wide information systems. NATIS was created largely to assist the archives of developing countries, and it plans to be relevant to archival needs regardless of the country's legal system, social or political structure, or stage of development.²⁷ The emphasis is being placed on devising means for preserving records, and processes to facilitate their use. The concept is one of "autonomous archive administration", a system that will promote records retention and management, and remove it from the area of short-term political or economic expediency.²⁸ These aims are particularly relevant to the problems which confront the preservation and maintenance of legal records. Schemes based on the destruction of whole classes of records are not only detrimental to the legal and cultural heritage of fully developed countries, but they are also irrelevant to the needs of the developing countries.²⁹ Cost-benefit equations are particularly flawed, when the cost can be quantified but the benefit cannot. Natural resources are irreplaceable. What all Commonwealth countries have in common is a living legal system embodying shared traditions, and the preservation of their records assists in an identification and understanding of past, present and future.

FOOTNOTES

1. J.H. Baker, "The Dark Age of English Legal History", in Legal History Studies, ed. Dafydd Jenkins (Cardiff: University of Wales Press, 1975), pp. 1-27 at p.1.
2. The Collected Papers of F.W. Maitland, ed. H.A.L. Fisher (Cambridge: University Press, 1911), I, 190.
3. See, for example, the pioneering study of Michael Stephen Hindus, Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878 (Chapel Hill: University of North Carolina Press, 1980)
4. Ikorge L. Haskins, "Court Records and History", (1948)5 William and Mary Quarterly, 547-52; and Edward Dumbauld, "Legal Records in English and American Courts" (1973)36 American Archives, 15-32.

5. Hugh M. Walton, "Destruction Schedules: Quarter Sessions', Magistrates' Courts and Coroners' Records", (October 1965) III Journal of the Society of Archivists, 61-75 at p.61.
6. The legislation was reprinted in a Reprint of Statutes, Rules and Schedules governing the disposal of Public Records by destruction or otherwise, 1877-1913 (London: Her Majesty's Stationery Office, 1914)
7. Walton, "Destruction Schedules", loc.cit. pp.63-5.
8. See I.R. Jacob,"Later Legal Records and the Historian", Archives, VI (April 1964) 135-46; H.M. Walton,"Some Comments on Destruction Schedules", Archives, VI (April 1964),147-53; and Walton, "Destruction Schedules", pp.61-75
9. Report of the Committee on Legal records, called "The Denning Report" (London HMSO, Command 3084: 1966) pp. 1-16 and appendices I-X.
10. Walton,"Comments on Destruction Schedules", loc.cit. 147-53.
11. Gerald L. Fischer,"Letting the Dust Settle: Some Remarks on the Record Group Concept", (October 1973) IV Journal of the Society of Archivists, 640-5.
12. For example, Fischer,"Archival Development in South Australia", (1969) 18 Australian Library Journal, 69-79.
13. Committee on Legal Records, p.9, where this is suggested for Chancery records.
14. Ibid.,p.6.
15. Michael Cook,"The Planning of an Archives School", (October 1975) V Journal of the Society of Archivists, 232-44.
16. The organiser is Dr. Balfour Halevy, Librarian, York School of Law, Downsview, Ontario.
17. Duncan Chalmers; "Computer Indexing in the Public Record Office", (April 1981) VI Journal of the Society of Archivists, 399-413.
18. The collection is located at the Rhodes House Library. The Commonwealth Foundation Conference of African University Librarians at Lusaka in 1969 passed a resolution stating that all former colonies should be encouraged to form projects such as this one for collecting private papers.
19. J.R. Ede,"The Record Office: Central and Local", (October 1975) V Journal of the Society of Archivists, 207-14.
20. Jacob, "Later Legal Records", loc.cit 133-9.
21. The thesis of Michael Cook, Archives Administration (London: Dawson, 1977).
22. For example, Guide to the Records of the Bahamas, ed. D. Gail Saunders and E.A. Carson (Nassau: Government Printing Department, 1973).
23. For example, the excellent guide, Sources of Jamaican History 1655-1838, ed. K.E. Ingram (Zug: Inter-documentation Company,1976), two vols.
24. A model from the records of business history is that of Britain and the Dominions: A Guide to business and related records in the United Kingdom concerning Australia, Canada, New Zealand and South Africa, ed. Charles A. Jones (Boston: G.K. Hall & Co.,(1978)).
25. Cook, "Planning of an Archives School", loc.cit. 232-46.
26. See the stimulating comments of Michael Duchein, "The Archival Revolution: The challenge of modern archives to the archivist", (July 1972) V Southwest Asian Archives, 4-14.

27. J.H. d'Olier and B. Delmas, Planning National Infrastructures for Documentation, Libraries and Archives: Outline for a General Policy (Paris: UNESCO, 1974) .
28. S.C. Newton, "The Archives as Legislator", (October 1973) IV Journal of the Society of Archivists, 654-9.
29. An excellent model for a developing country is that of R.H. Bautier, "Principes de legislation et de reglementation des archives", in Manual d'Archivistique Tropicale, ed. Y. Perotin (Paris, 1966).
