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**Commonwealth Magistrates' and Judges' Association**

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EDITORIAL

THE CONFERENCE THAT WAS NOT TO BE

Cardiff 2020. So much anticipation: warm and welcoming hosts, a beautiful historic city as the venue. A developing programme of presentations full of promise and immediate contemporary relevance. Alas, no one could have reasonably foreseen the state of the world today when the planning for Cardiff 2020 was first undertaken.

Mae’n drueni mawr. “It is a great pity.” (The editor expresses thanks to HH Milwyn Jarman QC for the translation from English to Welsh.) However, when viewed in the context of the tragic loss of life that has occurred (and which continues to occur) the world over, one must not overstate the upset and dislocation that greet the demise of a much-anticipated professional gathering.

CMJA conferences generate much intellectual ferment as discourse unfolds formally and informally between and among the many Commonwealth judges, magistrates and other justice system players who typically attend them. Personal and professional relationships are forged and renewed. The energy at each CMJA conference is palpable, as are the rewards of productive, intellectual cross-pollination. Attendees depart for all corners of the globe at the end of such meetings enriched and enlightened. And they bring the benefits of their learning and their new insights back to their colleagues at home.

The CMJA must and will do all it can, despite this setback, to maintain the discourse, promote ongoing learning and preserve the dissemination of relevant knowledge, all with a view to strengthening and promoting the rule of law in all Commonwealth member states.

Looking ahead, as readers will be aware, the CMJA’s Triennial Conference is scheduled to take place in Accra, Ghana, from 12-17 September 2021. We will have more to say about that conference in the December 2020 and June 2021 issues of the CJJ but, in the meantime, updates will be posted periodically, as they become available, via https://cmja.biz/

COVID-19 AND ITS LEGACY

The COVID-19 pandemic has introduced extraordinary situational and systemic distortions into the way life is lived all across the globe. Its toll on human health and on physicians, nurses and other front-line personnel has been enormous. The coronavirus has ravaged healthcare systems in the developed and developing world—some more than others. The pandemic’s adverse, long-term implications for individual economies in an increasingly globalised world order cannot yet be fully appreciated, much less properly measured, but they will be profound, both generally and for court systems particularly.

Crisis of this kind sometimes trigger responsive governmental action that can be overreaching, where the balance that is struck between near-term crisis management imperatives (on the one hand) and the erosion of individual liberties (on the other) can fairly be questioned. Similarly, the extent to which near-term, liberty-constraining measures can justifiably be left in place beyond the temporal bounds of a true emergency almost inevitably comes up for spirited debate in the wake of calamities of the kind we are now experiencing. In short, the current COVID-19 pandemic, like the 9-11 crisis and others before it, has numerous rule-of-law dimensions; its handling by governments within Commonwealth states warrants close scrutiny by everyone—members of the judiciary most of all—especially in the long term.

It is increasingly common to see pundits and media prognosticators giving early predictions about the ways that the ‘new normal’—even after a vaccine is found—will differ from what we all considered ‘normal’ before the pandemic. Certainly, like all human institutions, court systems within Commonwealth states have had to be nimble and adjust, in real time, to the procedural limitations brought on by the global effort to stop the spread of the COVID-19 virus. They, too, will emerge from the current crisis transformed in some ways that will be long-lasting. There are practical lessons being learned every day in courthouses in all member states that—more than just enabling the judiciary and other justice system players
to function as best they can at present—hold some promise for leaving a positive legacy of improved access to justice through formerly less conventional channels.

A time will come, after the current storm (figuratively) has stopped raging, when it will be appropriate to take stock of how various governments and justice systems within the Commonwealth have adapted to the pandemic—both from a broad and substantive rule-of-law perspective and from a practical nuts-and-bolts perspective—so that the lessons learned can be shared and built upon. In the meantime, we would refer you to the CMJA’s COVID-19 Forum if you wish to share your experiences now. But you can expect, in the coming months and years, to see that kind of subject matter addressed comprehensively in the pages of this journal and, of course, at future conferences of the CMJA.

**PICK UP YOUR PENS!**

Or your laptops. Or your iPads. Or whatever it is you use to write.

CMJA conference presentations, converted into articles, have historically supplied a not-insignificant amount of the content that appears between the covers of the two issues of the *CJJ* which are published each year. Thus, one of the unwelcome consequences of the demise of Cardiff 2020 is that this journal will not have that source of substantive content to draw upon. This means that if you have a subject that you believe is relevant and would interest other CMJA member/subscribers to the *CJJ*, there is no better time than the present to set your ideas down in writing and submit them to us for our consideration. We encourage you to re-familiarise yourself with our authors’ guidelines (printed in this issue under the heading ‘Call for Submissions’) and send your submissions in to us.

**WHAT AWAITS YOU IN THIS ISSUE**

There is interesting and informative content in the June 2020 issue of the *CJJ* which we commend to you. Brief summaries of the articles contained herein follow.

Sir Nicholas Blake has provided a thorough survey of the law of judicial review and a spirited argument for the continuation of a robust role for courts in ensuring that governments and their emanations operate lawfully within the bounds defined by their constating legislation and by the requirements of the common law that apply to them. At a time when COVID-19-related temporary expansions of government powers have been introduced in many jurisdictions, Sir Nicholas provides us with a timely reminder that judicial review provides the necessary mechanism for verifying (or not) that public authorities continue to act within the powers intended by the law and not arbitrarily. Judicial review thus protects the rights of the citizen, ensures harmony between the institutions of the state and promotes good government.

Dr Peter Stone has written an article that surveys the history of the protection of cultural property during times of armed conflict. This subject was very much front of mind for everyone not long ago when the shocking cultural atrocities that were committed by ISIS in locations like Palmyra and Nimrud were being reported daily. Dr Stone outlines the current international legislation that attempts to provide protection. He mentions the international community’s response through the UN and UNESCO, arguing that cultural property protection is both a legal responsibility and a military opportunity. Dr Stone devotes some of the space in his article to the work of the Blue Shield, the international advisory body to UNESCO with responsibility for the protection of cultural property during armed conflict. He notes with some regret that Commonwealth countries have been slow to ratify the most relevant international humanitarian law regarding such protection and he expresses the hope that there will be a concerted effort on the part of Commonwealth countries in future to address this failure, and for the Commonwealth to take a leading role in international efforts to protect both tangible cultural property and intangible cultural heritage.

Indigenous offenders are woefully overrepresented in the prison populations of many Commonwealth member states. The process of addressing that overrepresentation generally begins with formal acknowledgements of historical wrongs suffered by indigenous populations and proceeds from there. Yet,
the making of adjustments to the statutory and common law requirements for criminal sentencing necessary to redress, in part, the overrepresentation problem has proven especially challenging. Three experts on the subject—Dr Lorana Bartels of the Australian National University, Judge Wayne Gorman of the Provincial Court of Newfoundland and Labrador and Prof Khylee Quince of the Auckland University of Technology—have joined forces to prepare an article for this issue of the CJJ that compares and contrasts approaches to the sentencing of indigenous offenders that are currently in play in Canada, Australia and New Zealand.

The Rt Hon Sir James Dingemans, Lord Justice of the Court of Appeal for England and Wales, has written an interesting article in this issue that deals with the subject of the judicial career trajectory. Acknowledging that judicial careers chart a pathway through various stages—some reached as a matter of course and others being either optional or contingent—Lord Justice Dingemans outlines the particular benefits and risks which arise at each point along the way. Those aspiring to appointment to the bench, and those already appointed who seek promotion and advancement, will find that this article offers candid advice from a respected source regarding the risks and benefits unique to every stage.

And finally, we are pleased to welcome Lady Arden of the UK Supreme Court back again to our pages in June 2020. It is the 70th anniversary of the formation of the Commonwealth that is responsible for Lady Arden’s re-appearance in the present issue, this one being. We are grateful to have the opportunity to reproduce, in article form, the contents of the speech that Lady Arden delivered to the Commonwealth Lawyers’ Association in December 2019 in which her Ladyship discusses the rule of law within the Commonwealth as it has evolved over the institution’s first seventy years.

The Passing of the Hon Augustino Ramadhani

Lastly, we are saddened to report that the Hon Augustino Ramadhani—formerly the Chief Justice of Tanzania—died in hospital on 28 April 2020 after a lengthy illness. Mr Ramadhani was a man of many accomplishments and achievements. An ordained Anglican priest, at the time of his death he was the episcopal vicar of the church’s Dar es Salaam diocese. He served as Chief Justice of Tanzania until 2010 and, before that, Mr Ramadhani was (variously) Chief Justice of Zanzibar, president of the African Court of Human and People’s Rights and a brigadier general in the Tanzanian Defence Force. He was also a trained classical pianist.
CALL FOR SUBMISSIONS

The Commonwealth Judicial Journal (the ‘CJJ’) is the flagship publication of the Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) and has a readership of judges, magistrates and other legal practitioners from the Commonwealth and beyond. The CJJ invites submissions of manuscripts on various aspects of the law, in particular manuscripts focusing on the judicial function at the domestic, regional and/or international level.

Essays, book reviews and related contributions are also encouraged.

Please read the following instructions carefully before proceeding to submit a manuscript or contribution.

CONTACT DETAILS

Manuscripts sent by email, as a Word document, are particularly encouraged. These should be sent to: info@cmja.org

Alternatively, manuscripts may be sent by post to: CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, United Kingdom.

INFORMATION FOR AUTHORS

1. Manuscripts should ideally be submitted in Microsoft Word format.

2. Articles should include a 200-word (maximum) abstract.

3. Submissions should be accompanied by details as to whether the manuscript has been published, submitted, or accepted elsewhere.

4. Manuscripts should normally range from 2,000 to 3,500 words in length.

5. Any references and/or citations should be integrated in the main body of the manuscript, as footnotes/endnotes will normally be removed.

6. The CJJ encourages authors to refer to material from one or more jurisdictions across the Commonwealth.

7. All manuscripts received are evaluated by our Editor in consultation with the Editorial Board. Notification of acceptance, rejection or need for revision will generally be given within 12 weeks of receipt of the manuscript, although exceptions to this time frame may occur. Please note that our evaluation process takes account of several criteria, including the need for a balance of topics, the CJJ’s particular areas of interest which may change over time, etc., and this may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of a piece. The Editorial Board retains the discretion as to whether or not an article may or may not be published.

8. Please note that by submitting an article or other contribution for publication, you confirm that the piece is original and you are the author or co-author, and owner of the relevant copyright and other applicable rights over the article and/or contribution. You also confirm that you are the corresponding/submitting author and that the CJJ may retain your email address for the purpose of communicating with you about the article. You agree to notify CJJ immediately if your details change.

9. Please note that the CMJA retains the copyright of any articles once these are published in the Journal but in the interests of the widest dissemination, the CMJA may authorize publication of the articles in other appropriate publications.
IMPROVING GOVERNMENT DECISION-MAKING AND JUDICIAL REVIEW

By Sir Nicholas Blake QC. Sir Nicholas, inter alia, sat as a judge of the High Court of Justice, Queen's Bench Division, from 2007 to 2017 and currently sits part-time as a Judicial Commissioner of the Investigatory Powers Commission. This article is based upon a paper presented at the CMJA Conference, Port Moresby, PNG, September 2019.

Abstract: In a society governed by the rule of law, the meaning of the law is ultimately one for the higher judiciary to determine. Judicial review plays a central role in ensuring that the law passed by the legislative branch is properly applied by all public authorities, including the executive, and that the executive abides by policies the law promotes in the discharge of its functions. Checking that public authorities act within the powers intended by the law and not arbitrarily, protects the rights of the citizen, ensures harmony between the institutions of the state and promotes good government. In performing this function judges are not arrogating to themselves the power to make primary decisions or undermining democracy. Electoral accountability is a necessary but not sufficient guarantee of democracy. Recent case law from the UK Supreme Court demonstrates how judicial review promotes the rule of law, transparency and rationality in decision-making, and prevents unjustified discrimination. Despite recent concerns expressed by Jonathan Sumption and others, this is not subjective decision-making by judges, and the author suggests that the concept of proportionality as an aspect of judicial review, is a more coherent and principled method of review insofar as it differs from the traditional Wednesbury concept of rationality.

Keywords: Good government – the rule of law – the role of the judiciary – Wednesbury – rationality – proportionality – democracy – transparency – accountability – reasoned decisions – preventing discrimination – good government

INTRODUCTION

Siena Town Hall in Tuscany, Italy, has since 1340 been famous for its superb set of frescoes by Ambrogio Lorenzetti entitled ‘Allegory of Good and Bad Government and its Consequences’. It is not altogether surprising that Professor Martin Loughlin chose the image of good government as the jacket illustration for his scholarly musings in his 2003 work, *The Idea of Public Law*.

In the allegorical frescoes, Good Government has Wisdom at its head; Bad Government is led by Tyranny. Wisdom presides over the counsellors of the state and those involved in litigation, linking them with a thread that leads to concord and peaceful resolution of disputes. Their actions are inspired by figures representing Faith, Hope and Charity—theological virtues but not ones confined to the Christian religion—and the four cardinal virtues: Prudence, Temperance, Justice and Strength, the last designed to be subject to the laws and the application of justice. Bad Government of course only has the malevolent influence of Avarice, Pride and Vainglory to guide it.

The images contrast prosperity in town and country under Good Government, and misery and famine under Bad. Six hundred years before modern conceptions of public law, we have here all the rudiments of a philosophy of right, governance by the law, and the lawmakers in turn guided by wisdom, justice, prudence and charity.

It is improbable that the good burghers of Wednesbury Corporation were thinking of Lorenzetti’s frescoes when they decided to exercise their powers under the Sunday Entertainments Act 1932 and impose a condition preventing any child under 15 going to the cinema on a Sunday, whether accompanied by a parent or not. Although not considered to be a novel or remarkable one at the time, the resulting decision of the Court of Appeal in *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 KB 223 has been quoted extensively since the growth of judicial review in the United Kingdom for distilling the essence of
the appropriate constitutional function of the court in reviewing the exercise of an apparently broad discretion. 

*Wednesbury* itself is a disputed decision. The test of ‘so unreasonable that no reasonable authority properly directing itself could have reached it’, involves an element of tautology devoid of a working test to examine whether the power has been exercised lawfully. What lies beyond the bounds of reasonableness can itself become a subjective decision. Notoriously, paying equal pay to men and women was once considered so unreasonable as to be outside the powers of the local authority (*Roberts v Hopgood* [1925] 2 AC 578). Professor John Griffiths complained about judicial interference with local democracy in his book *The Politics of the Judiciary*. Sir Stephen Sedley in his essay ‘The Sound of Silence: Constitutional Law Without a Constitution’ (*Ashes and Sparks* CUP, 2011) is critical of the court’s turning a blind eye to a decision of a Sabbatarian group of councillors to misuse a power under a law intended to permit Sunday cinema to give vent to their own religious views and essentially penalise families for going to the cinema together.

In issues concerned with interferences with recognised human and civil rights and EU law principles, the British judiciary use the more nuanced technique of considering whether the interference is justified and proportionate. This means asking a series of questions essentially devised by the European Courts: whether the power has a legitimate aim; whether its exercise is sufficiently circumscribed by law or policy so as to be predictable and in accordance with the law; whether the interference is rationally connected to the purpose for which the power to interfere was conferred and whether it is proportionate in representing a fair balance. In Commonwealth countries, alongside these questions, the issue of whether the same results can be achieved by a less intrusive means is usually considered (see, for example, the Privy Council decision in *De Freitas v Minister of Housing* [1999] 1 AC 69, adopted by Lord Steyn in *R Daly v Secretary of State for the Home Department* [2001] UKHL 26 at 27. However, in *Keyu v Foreign Secretary* [2015] 3 WLR 1665, the UK Supreme Court declined to substitute proportionality for rationality irrespective of context, and the Court of Appeal have concluded that it is not open to them to administer the last rites to *Wednesbury* and christen a new dawn for proportionality. The question of whether a manifestly disproportionate decision could nevertheless be a rational one thus remains open to further debate at the highest level of judicial authority.

Proportionality has its critics. In a sequence of extra-judicial writings, recently repeated in his Reith Lecture, former Supreme Court justice Jonathan Sumption contends that for judges to decide on the proportionality of measures interfering with what he regards as an expanding field of private and family life rights, is to undermine the proper province of democratic government. I make no apology for supporting the different view that a proportionality assessment is a more principled and useful tool by contrast with *Wednesbury* irrationality; it asks relevant questions to the proper discharge of the judicial function, and communicates to colleagues in both European and Commonwealth courts what the judge is doing and why, and thus better promotes the prospect of mutual respect and understanding of these decisions. Even if and when the UK leaves the EU [this article was written before January 31, 2020, Ed.], it will still need to communicate with the European judiciary about justifiable interferences with respect to private life and communications, and one test would be preferable to two, albeit with the obvious point derived from proportionality principles that the more important the right the greater the need for justification of the interference. But whatever the precise test used in different jurisdictions of the Commonwealth and whether the judicial function rests on the common law, a local statute, a domestic constitution or an international human rights treaty, does judicial supervision of executive decision-making lead to better decisions?

The press and some politicians are inclined to see defeats in the courts as the product of a power struggle between the elected representatives and the courts. Notoriously, the most senior judges in England and Wales were dubbed ‘enemies of the people’ by the *Daily Mail* newspaper, without rebuke from the Secretary of State for Justice, for concluding that Parliament had to legislate for withdrawal from the EU following the referendum. On this view of the Constitution, all essentially
political questions are debates about who has the power to decide; and the executive is seen to be weaker if it cedes to or merely permits the judiciary to decide issues that were once wholly in the prerogative power of the executive. It is a view that appears to be gaining traction in some states where the executive can apparently fill the supreme or constitutional court with political nominations in order to disarm judicial opposition to legislative policy. It is a view that seems to have inspired the result of the Brexit referendum and the present political crisis in the UK, where subservience to EU law is seen as undemocratic and unduly restrictive of national sovereignty. To those states run by dominant personalities where checks and balances seem to be a hindrance to executive action with strong leaders at the helm, the thought that government could be improved by submitting to decisions made by truly independent judges might seem absurd. The academic partisans of the Judicial Power Project, an oxymoronic title given the content of the Project, would suggest that the judges should be confined to strict black-letter interpretation of the text provided by the legislature. Interpretation of the law, however, also requires the judge fearlessly to decide whether the public authority has complied with it in the particular decision under challenge.

There are compelling arguments that judicial supervision of decision-making limits arbitrary government and improves the quality of executive decisions being made, certainly in democratic states governed by the rule of law. Thousands of public law decisions are made in the course of governance in our increasingly complex societies. The purpose of judicial review is to ensure such decisions:

a. comply with both the primary law in force, and any relevant policies promoted by the executive for their being;

b. have been reached by a fair process often involving consultation with those likely to be affected or an opportunity to disabuse the decision-taker from a preliminary decision;

c. have taken all relevant considerations into account and excluded irrelevant ones;

d. are open to the decision-taker to reach for good reason having regard to its impact on others including in appropriate cases whether it is a fair balance of competing rights and interests; and

e. in complex cases at least have engaged in a reasoning process that explains how and why the decision was arrived at.

Cumulatively, these oversight functions ensure that the power is exercised for the permitted purpose and the executive has not exceeded the bounds of its authority. Provided these tests are met, there is no conflict between executive and judiciary. The judiciary does not seek to become the prime decision-maker in such cases but to ensure that all parts of the separate institutions of the state are working harmoniously within their proper spheres.

In this article I seek to explore the case for the contribution of judicial review to better government under two headings: rule of law and transparency

**Judicial Review and the Rule of Law**

The first meaning of the term ‘rule of law’, as explained by Tom Bingham in his magisterial book of the same name, is that the law applies to all persons within the state whether the executive or the ordinary citizen. In a democracy, government depends on the consent of people obtained from time to time in free and fair elections held regularly. However, success in elections is not a sufficient source of authority for government to act as it thinks fit. There is no dictatorship of the majority. The executive must act within the powers granted it by the laws adopted by previous legislators. If the government wants to change the laws, it must persuade the legislature to do so. Above all this was demonstrated in the judgment in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5. The rights granted to British citizens by EU law could not be taken away simply because of the result of a non-binding referendum. It required a change of the law by the legislature.

Second, the meaning of those laws and the authority to make decisions under them is reserved to the judiciary alone. This is the true province of the judicial part of the state and the basis of the common law hostility to ouster clauses that seek to restrict or exclude...
the jurisdiction of the High Court exercising judicial review. In the recent case of R (Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22, a majority of the Supreme Court, overturning the Court of Appeal, affirmed that the purported exclusion of judicial review of decisions of the Investigatory Powers Tribunal (the ‘IPT’) was ineffective, albeit that the IPT was presided over by a distinguished serving or former judge. The debate between Lord Carnwath, writing for the majority, and Lord Sumption for the minority, is an illuminating discussion of both legal history and principle and I have drawn on it in preparing this paper.

Drawing on the landmark case of Anisminic v Foreign Compensations Board[1969] 2 AC 147 and the cases that followed it, Lord Carnwath cites and approves those expressions of judicial opinion that state: it is a contradiction in terms for the legislature to create a body or tribunal of limited jurisdiction but leave it to that same body to decide for itself what its jurisdiction is, meaning in this sense exclusive competence to decide any issue of law coming before it (see Farwell LJ in R v Shoreditch Assessment Committee, Ex p Morgan [1910] 2 KB 859, 880). He quotes Blackstone’s Commentaries on the Laws of England, Book III, Chapter 4, p. 41-2 (written in 1768),

[W]here they concern themselves with any matter not within their jurisdiction... or if in handling matters clearly within their cognizance they transgress the bounds prescribed to them by the laws of England... else the same question might be determined different ways, according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is, therefore, a ground of prohibition.

Lord Nolan in M v Office [1992] QB 270 at 314H sought to express the relationships between courts and the executive as follows: “... [T]he courts will respect all acts of the executive within its lawful province, and ... the executive will respect all decisions of the courts as to what its lawful province is.”

Lord Carnwath noted that the focus of the actual decision in Anisminic was whether the Board had power to reach its decision and whether the error of interpretation it had made resulted in its decision being a nullity or void, a fact that could be declared by ordinary action rather than by quashing by judicial review. However, in 1982 a broader view prevailed when Lord Diplock summarised the effect of Anisminic in O’Reilly v Mackman [1983] 2 AC 237 at 279 in a speech agreed by the other members of the House:

The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported ‘determination’, not being a ‘determination’ within the meaning of the empowering legislation, was accordingly a nullity.

In other words, a determination arrived at on an erroneous view of the relevant law was not a ‘determination’ within the meaning of an ouster clause such as in Anisminic. Arguments about differences between jurisdictional and non-jurisdictional errors of law had become redundant.

From all this we are reminded that judicial supervision of the executive is needed to ensure that it remains within the law correctly understood, and not merely the executive’s view of what the law is or might usefully be considered to be. So important is this role that there is a very strong presumption against the executive and the legislature having excluded it, so that legal errors by decisions that purport to be final can always be corrected by the High Court exercising its function as ultimate arbiter as to the meaning of the law.

It is conceptually very difficult to imagine how this primary function of the judiciary is anything other than a benefit to good decision-making. It ensures both a harmony between the different branches of the state—legislature, executive and judiciary—and the proper relationship between the state and the citizen or subject when decisions interfere with their civil and political rights.
Unauthorised, and therefore unlawful, decisions may result in compensation being paid to those adversely affected by them; they may undermine investor confidence in the management of the economy; they can make government action unpredictable and arbitrary. This is the essence of bad government. For example, in the case of executive detention the writ of habeas corpus has for centuries required the detaining authority executive branch to justify the basis for detention. Thus, where there is power to detain pending removal those who entered in breach of the immigration laws, the case of R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74 established that it is not sufficient for the executive authority to plead that it reasonably believed that the person breached the conditions of entry by using deception; it must also establish on the civil standard of a balance of probabilities that the detained person actually did so.

Judicial Review and Transparency

In Lumba v SSHD [2011] UKSC 12, the Supreme Court went further than Khawaja and concluded that a person was unlawfully detained and that damages were recoverable when held pursuant to an unpublished policy that conflicted with the terms of a published policy. Lord Dyson thought that publication of policy was necessary to comply with the rule of law:

The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see In re Findlay [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it generally desirable in the interests of transparency.

Transparency is thus identified as another feature of good government that enables the citizen to predict how the executive will act and afford an opportunity to modify behaviour to avoid adverse consequences. It brings the business of government out of the unpredictable obscurity of the unaccountable exercise of prerogative discretion, into the measured light of day. This enables democratic oversight. How you can control the executive if you do not know what it is doing? A case in point is the reparations and change of heart towards the so called Windrush generation of British nationals of Caribbean origin, who came to build the public services of the nation after 1945 and were then caught up in a 2012 policy creating a hostile environment for undocumented migrants.

A closely related aspect of transparency is the emerging duty in certain circumstances to give reasons for a decision. The executive must not only disclose how it will make decisions in particular fields of public law but may well be obliged to inform those affected by its decisions why it has done so. The UK Supreme Court has reviewed the case law in Dover City Council v CPRE Kent [2017] UKSC 79 where planning permission was granted in an environmentally sensitive area despite the recommendation of planning officers. Once again it was Lord Carnwath who reviewed the case law on reasons in the planning context and the common law. He noted:

a. In Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153, Lord Bridge said of the duty imposed by statute on the Secretary of State (at p 170):

That they should be required to state their reasons is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed. It is the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done.

b. Sullivan J explained in R (Wall) v Brighton
and Hove City Council [2004] EWHC 2582 (Admin), at para 52):

Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority’s reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system...

c. Lord Brown in South Buckinghamshire District Council v Porter (No 2) [2004] 1 WLR 1953, para 36:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.


The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required ... the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty.

e. Outside the province of planning law, Lord Mustill in R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 gave another explanation of why reasons where required where liberty was at stake (p 565G-H)

To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view...

CONCLUSIONS

The quotations I have highlighted from the authorities stress the requirements of legality and transparency as reasons why the court will intervene in its supervision of executive decision-making. The same could be said of the case law on the separate topics of adequacy of consultation, and the substantive and procedural aspects of the public sector equality duty. Indeed, it may be that the red-haired example of irrational decision making given by Lord Greene in Wednesbury was a manifestation of the common law principle of equality as a fundamental principle of the rule of law. If so, this was an early call for non-discrimination in executive decision making. It is irrational to treat like cases differently and materially different cases the same. Indeed, this view of Wednesbury was adopted by McCombe J as he then was in R (Gurung and others) v Ministry of Defence [2002] EWHC 2462 (Admin) when quashing the decision of the Ministry of Defence to deny a prisoner of war gratuity to soldiers of the Gurkha regiments detained by the Japanese during World War Two, on the grounds that they (although not their officers) were assigned...
to the British Army of India at the time. The reasons for making these arrangements dating from the nineteenth century were so embarrassing and racially discriminatory that to use them as the basis for a 2002 decision was unlawful.

Government in the 21st century is a complex business, where decisions may have broad effect in a multifarious society of different identities and interests. Government must reach wise decisions according to law in the national interest and the court’s role is to assist it to do so by the examination of a contested decision for compliance with judicial review and related constitutional principles.

The conscientious executive has nothing to fear from the judge looking over the shoulder of the decision-maker (adopting the terminology of the Treasury Solicitors Guide to Judicial Review for civil servants). Rather, judicial review helps the decision-maker focus on the essential nature of the decisions to be taken: it directs the mind to the relevant evidence that points either way; the need to gather that evidence fairly; to apply the law and to identify the relevant policy. Where the decision involves the resolution of conflicts, the requirement of reasons explains why the proposed course of action is to be taken. In doing so it enables the decision-taker to achieve what was intended by the legislature and executive in the first place: it is the executive and not the judiciary that promotes the laws under which its departments work, the policies that it adopts to give effect to them, obtains by consultations or by other means the evidence it needs to reach informed good quality decisions and to maintain continued dialogue with civil society and stakeholders.

In the case of Pounder v HM Coroner Durham [2009] EWHC 76 (Admin) I had to consider the inter-relation of law and policy concerned with the use of force on child prisoner. I said, at para 57:

In my judgment, the principles of good government and human rights march hand in hand on the question of transparency and legal certainty. They may be summarised as “say what you mean and mean what you say. See also R Limbu v Secretary of State for the Home Department [2008] EWHC 2261 (Admin).

It is simply not the case that this is an arrogation of substantive decision-making by the judiciary. The professional judge must be conscientious in excluding personal preferences from the process of judgment, and hence the advantage of the kind of proportionality template used in the human rights context. Certainly, the principles of judicial review of decisions of public authorities must not be eroded into subjective judicial decision-making substituting itself through the doctrine of irrationality for the views of the elected representatives or their delegates.

We can readily agree with those who point out that the rule of law is not rule by judges and lawyers; that would indeed be judicial tyranny and would lead to the province of bad government. Judicial self-restraint—particularly on issues of moral, social and political controversy—is both necessary and desirable in a democratic state with a functioning separation of powers between executive, legislature and judiciary.

Judicial oversight of executive decision-making within a structured and coherent set of principles that have been given by both the common law and human rights norms, ensures that government is not arbitrary. Arbitrariness in all its forms is the enemy of justice today as in fourteenth century Siena. Judicial review is the enemy of arbitrariness and should bring with it confidence in institutions, peace, prosperity, public order and harmonious relations between citizens and between the citizen and the state.
Abstract: The world has reacted in horror over the recent specific targeting of cultural property and tourists in the Middle East and North Africa. These attacks follow the systematic targeting of cultural property in the fighting in former Yugoslavia in the 1990s. However, tangible cultural property and intangible cultural heritage have been constant, but frequently unintended, casualties of armed conflict since war began. This article sketches the history of the protection of cultural property in armed conflict, the current international legislation that attempts to provide protection and mentions the international community's response through the UN and UNESCO, arguing that cultural property protection is both a legal responsibility and military opportunity. It then focuses on the work of the Blue Shield, the international advisory body to UNESCO on the protection of cultural property during armed conflict. Commonwealth countries have been slow to ratify the most relevant international humanitarian law regarding such protection and the article concludes with a plea for a concerted effort from Commonwealth countries to address this failure, and for the Commonwealth to take a leading role in the international efforts to protect both tangible cultural property and intangible cultural heritage.

Keywords: Cultural property – cultural heritage – armed conflict – cultural property protection – the Blue Shield – 1954 Hague Convention.

Protecting Property, Protecting People

During armed conflict buildings, sites and objects are damaged and destroyed; people are killed. It is the nature of war, so we are told, that these things happen, and that it is a tragic side-effect of armed conflict that much of the damage and destruction, and many of the injuries and fatalities, are suffered by innocent ‘bystanders’—places and people frequently not directly involved in the conflict but simply caught up in it as ‘collateral damage’.

The, at least attempted, legal protection of non-combatants has a fairly long history. For example, in The Art of War, writing two and a half thousand years ago, the Chinese strategist Sun Tzu argued that the most successful military campaign was one that defeated the enemy without recourse to battle or the besieging of cities at all, implying little, if any, need for civilian casualties. The Durham Ordinances, drawn up by Richard II to govern the conduct of the English Army during the 1385 invasion of Scotland, explicitly banned the killing or capturing of unarmed women and members of the clergy. Rape carried the death sentence. Later, the failure to treat the wounded following the 1859 Battle of Solferino was the stimulus that led eventually to the creation of the International Committee of the Red Cross (‘ICRC’) and the 1949 Geneva Conventions.

However, many authors have recognised the indivisibility of the protection of cultural property and heritage (‘CPP’) on the one hand and the protection of people on the other. Sun Tzu also stressed the need to win the peace as well as the war and emphasised that it was clearly preferable not to destroy your enemy’s property, religious sites, or cities as this would lead to the resentment that would cause the next war. The 1385 Durham Ordinances forbade robbery and plunder and included a specific article not to damage religious or other cultural buildings. In his 1821 play, Almansor, referring
to the persecution of Islamic communities during the Spanish Inquisition but uncannily foreshadowing events to take place in 1930s Germany, the playwright Heinrich Heine wrote ‘Where they burn books, they will, in the end, burn people too’. Raphael Lemkin, a driving force behind the 1948 Genocide Convention had originally proposed protecting against two forms of genocide: ‘barbarity’, the premeditated destruction of national, racial, religious and social collectives, as well as ‘vandalism’, the ‘destruction of works of art and culture’. Sadly, the latter was dropped in the final drafting of the Convention. However, Article 53 of the 1977 Additional Protocol I to the Geneva Conventions, primarily drafted to protect people, prohibits ‘any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’, the use of ‘such objects in support of the military effort’, or action ‘to make such objects the object of reprisals’.

As cultural beings it is difficult for us to exist without our cultural references. Recent attacks by the Taliban in Afghanistan, Daesh (also known as Isis) in the Middle East, and Ansar Dine in Mali have, perversely, been encouraged by their awareness of this relationship and focused on the high-profile destruction of cultural property for perhaps three key reasons: First, many in these groups really believe it is their religious duty to destroy all remains of the past that they regard as idolatrous. Second, the destruction of cultural property has been an important double-edged propaganda tool. On one hand it has been used to upset, ridicule and emasculate the international community who deplore the destruction but who have been powerless to stop it; on the other, it has been deployed as a recruitment tool encouraging those young people disillusioned by the decadent ‘western’ norm to join the extremists’ cause. Third and finally, although the sums involved remain unknown, the looting, rather than destruction, of cultural property has created a definite income stream. Al Shabaab has also specifically attempted to undermine the economic stability of Kenya through targeting tourism based on cultural property.

This does not mean that we should prioritise protection of tangible cultural places (e.g. historic buildings, libraries, archives, works of art and archaeological sites) or intangible cultural heritage (e.g. the language, stories, songs and traditional knowledge of a community, held within, and transmitted by, people) over the protection of people. It does mean, however, that we should acknowledge that CPP is indivisibly intertwined with the protection of people. Two recent examples suffice to make the point.

First, as has been reported by Yazda, the global organisation that supports the Yazidi and other vulnerable ethno-religious groups, the planned genocide of the Yazidi people by Daesh went hand-in-hand with the destruction of Yazidi religious shrines and buildings. Second, the UN has documented the fact that massacred members of the community of the village of Brčko in former Yugoslavia were buried in the same grave as the rubble of their destroyed mosque. Indivisibly intertwined.

Theory into Law and Practice

Admittedly, it is only relatively recently that such advice about CPP has been acted upon. Despite the above protestations, for hundreds (if not thousands) of years armies and their generals were frequently paid by allowing them to loot indiscriminately. The 1648 Treaty of Westphalia is widely regarded as introducing, and cementing, the idea that states were made up of groups of people united by language and culture. However, it was not really until the 1815 Treaty of Vienna following the Napoleonic wars that the restitution of cultural property, removed for display and scientific study as ‘spoils of war’ (i.e. looted, or pillaged, ‘officially’ by the victorious generals/government), was enforced.

CPP was first enshrined in military practice during conflict in the 1863 Instructions for the Government of Armies of the United States in the Field (the ‘Lieber Code’) which stated: ‘Classical works of art, libraries, scientific collections... must be secured against all avoidable injury....’. A number of later international treaties—for example the Hague Conventions of 1899 and 1907, on the laws and customs of war on land—including articles protecting tangible cultural property. The 1935 Roerich Pact, signed by 21 countries in the Americas and ratified by 10, was
formally titled the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. The Roerich Pact built on and further developed the Lieber Code, stating that ‘[t]he historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents’ and that ‘[t]he same respect and protection shall be due to the personnel of the institutions mentioned above’.

Despite these increasingly specific legal protections, the First World War saw the unprecedented destruction of cultural property, partly through the increase in scale and impact of munitions; partly through the specific targeting of potential observation posts for air warfare, which included church towers along the Western Front; and partly through the broadening of war to include bombardment of towns to both target military factories and supply lines and to lower morale amongst the general population. The war also saw some positive action, however. In 1915 a Kunstschutz (art protection) unit was created in the German Army for the protection of historic buildings and collections. Capturing Jerusalem in 1917, the British commander Allenby instructed that ‘every sacred building, monument, holy spot, shrine, traditional site … of the three religions will be maintained and protected’ and, showing a nuanced understanding of cultural sensitivities, ensured that Muslim troops from the Indian Army were deployed to protect important Islamic sites. This is an excellent example of CPP as good military practice. It took no additional forces (Allenby’s troops all needed something to do) and at a practical level there was almost certainly no military difference in Indian Army troops carrying out this duty rather than British troops. The use of Muslim troops, nevertheless, showed sensitivity to the beliefs and values of a large section of the local population, thereby helping to undermine those who were attempting to spark a jihad against the Allies throughout the Ottoman Empire and, of considerable concern to the British Government, possibly sparking unrest amongst Muslim troops and across those parts of the Empire with large Muslim populations.

Despite, and because of, the enormous damage to European heritage, mainly along the Western Front in the First World War, the international community was still debating how to introduce better CPP in 1939. During the Second World War CPP was seen progressively as part of the responsibility of the combatants, and the Allies, and some elements of Axis forces, took this responsibility seriously. In the German Army the Kunstschutz unit continued to operate, although many of its activities appear to have been increasingly related to looting rather than protection. The ‘Monuments, Fine Arts and Archives Unit’ was created in Allied forces and these ‘Monuments Men (and women)’ made enormous efforts to protect cultural property in all theatres of the war. The unit had the full backing of Eisenhower, the Supreme Allied Commander, who wrote, immediately before the Normandy landings, reminding officers that ‘Inevitably, in the path of our advance will be found historical monuments and cultural centres which symbolise to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols wherever possible…’. Many cultural sites, buildings and collections were, of course, destroyed: but as much as possible was done by the ‘Monuments Men’ to limit the destruction and much pillaged material was restored to pre-war ownership.

The scale of destruction was partially the result of the continuing increased power of munitions and partly of decisions taken by both sides, contravening the 1907 Hague Convention, to actually proactively target cultural property as a means of warfare—for example in the Allied raids on Lubrick in March 1942 and the so-called ‘Baedeker raids’ carried out in retaliation on historic targets in England by Germany. Following the war, the international community, reacting to the intentional and collateral devastation of much European cultural property during the war, built on previous treaties and, in 1954, developed the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its 1st Protocol (the ‘1954 Hague Convention’). Together with the 1999 2nd Protocol to the Convention, they collectively remain the primary piece of international humanitarian law (‘IHL’) relating to CPP.

Unfortunately, almost in parallel with the development of this international convention,
a key part of its potential practical support was dismantled. At the end of the war the conscript ‘Monuments Men’ went back to their civilian lives and, apart from somewhat limited activity (for example, in USA Civil Affairs units), little remained of the military’s interest in CPP. Equally detrimental to CPP, the heritage community’s interest in the military also all but disappeared. Some limited CPP work was done in the former Yugoslavia and the international community did respond to this deliberate targeting of and damage to cultural property by producing the 2nd Protocol to the 1954 Hague Convention. However, it was not until the 2003 invasion of Iraq by the coalition led by the USA and UK (the ‘Coalition’) that CPP during armed conflict was brought back into sharp focus.

2003 and AFTER

In 2003, neither the USA nor the UK had ratified the 1954 Hague Convention. In 2002, in anticipation of the invasion, six so-called ‘think tanks’ were set-up in Washington to plan for post-Saddam Iraq. One of these had a sub-committee on culture… which never met. As a result, it appears that little was planned regarding CPP. No combat troops had orders to protect any cultural property or to stop looting, the national museum appears not to have been marked on combat maps, and the few American civil affairs troops who might have played a role in protection were still in Kuwait or the USA when much of the early looting took place.

As is so frequently the case, a number of things had combined to allow this failure to happen; three are particularly relevant. First, the individuals planning the invasion—politicians and military alike—simply did not see culture, cultural property, or the cultural heritage as important. Second, while the Coalition had enough troops to effectively topple Saddam Hussein, they did not have enough to provide a safe environment in which a new government could develop. CPP was very low on a long list of things that might have been nice to do if the resources were available; they were not. Third, and perhaps most problematic, the cultural heritage community and the military had failed to maintain the close links that had saved so much European and Far Eastern cultural property during the Second World War.

The lack of CPP in Coalition planning has been suggested as allowing the 2006 bombing of the al-Askari mosque in Samarra that has been identified by many commentators as the tipping-point when a restless population, tired of a foreign Coalition occupying its country, descended into a full-scale sectarian civil war that required Coalition troops to stay for a further five years. In 1917 the British took the opportunity to use the protection of sites to emphasise that they were beneficial liberators and through their actions they created a stable, secure, environment—a significant contribution to ‘mission success’ with little impact on military capability. If only someone in the Coalition had been aware of British CPP in 1917 Jerusalem things might have turned out very differently.

THE CURRENT LEGAL POSITION

As I write, there is a clear legal responsibility for all countries, and armed non state actors, to implement CPP. Avoidable damage to cultural property during conflict goes against customary international law and is specifically prohibited under the 1954 Hague Convention and its two Protocols of 1954 and 1999; the 1977 Additional Protocol I to the 1949 Geneva Conventions (Articles 53 and 85[4] [d]); and the 1998 Rome Statute of the International Criminal Court (Articles 8[2][b][ix] and 8[2] [e][iv]). IHL also stresses that occupying forces should not withdraw until there are competent authorities to whom governance can be handed over.

CPP is also slowly becoming an integral part of the UN peacekeeping agenda. Reference to the 1954 Hague Convention is explicit in the Agreement on the Status of the United Nations Interim Force in Lebanon (‘UNIFIL’) and was, for the first time, included as part of the mandate of a UN peacekeeping deployment for the United Nations Multidimensional Integrated Stabilization Mission in Mali in 2013. The UN Special Rapporteur for Cultural Rights recently condemned the intentional destruction of cultural heritage and called for the identification of best practices for its prevention, and for ‘raising awareness on the mutually reinforcing relation between the protection of cultural heritage and human rights and on the risks faced by defenders of cultural heritage’.
While the 1954 Hague Convention lays out what belligerent states should do regarding CPP during armed conflict, it places equal stress on what should be done in peacetime to prepare for good CPP during conflict, including, in Article 7, required preparations on the part of the military. The 1st Protocol deals mainly with reparation of cultural property following conflict, and the 2nd Protocol introduces the concepts of enhanced protection and potential criminal responsibility.

No one implies that CPP in times of armed conflict is easy, but the responsibility of all belligerents to plan for CPP under IHL is unequivocal. Since the failure of the Coalition that invaded Iraq in 2003, western militaries have begun to take CPP more seriously. The heritage community has also begun to accept its responsibilities to support their armed forces in the identification of cultural property and in helping to train those in uniform to be alert to their responsibilities for, and opportunities provided by, CPP.

As yet there have been no prosecutions under the 1954 Hague Convention. The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) has been the primary international court to address charges relating to the destruction of cultural property. Pavle Strugar and Miodrag Jokić were sentenced to seven and a half and seven years imprisonment respectively for the shelling, not justified by military necessity, of the World Heritage site of Dubrovnik. The ICTY prosecution of Dusko Tadić was the first that found the prohibition on attacking cultural property also applied to non-international armed conflicts, and the ICTY prosecution against Dario Kardić and Mario Čerkez clarified further individual liability for cultural property destruction. In 2016 the International Criminal Court (‘ICC’) convicted Ahmad Al Faqi Al Mahdi of the destruction of cultural property in Timbuktu and sentenced him to nine years in prison, with an order to pay 2.7 million Euros in reparation. The ICC is currently prosecuting Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud for both war crimes against the civilian population and against buildings dedicated to religion and historic monuments.

The Blue Shield—A Heritage Community Focal Point

Article 16.1 of the 1954 Hague Convention identifies a Blue Shield as the emblem of the Convention and the emblem to be used to identify property protected under the Convention. The 1999 2nd Protocol to the Convention established a 12-member intergovernmental committee to oversee its implementation and Article 27.3 of the 2nd Protocol, picking up the emblem identified in the 1954 Convention itself, identifies the Blue Shield entity as an advisory body to the intergovernmental committee. The Blue Shield international NGO is ‘committed to the protection of the world’s cultural property and is concerned with the protection of cultural and natural heritage, tangible and intangible, in the event of armed conflict, natural- or human-made disaster’. It is made up currently of nearly 30 national committees that elect an international board at the organisation’s triennial general assembly. The board oversees general activity and, currently through the support of the UNESCO Chair team at Newcastle University in the UK, co-ordinates and delivers work internationally.

While the primary context for the Blue Shield is IHL, and in particular, the 1954 Hague Convention, it works more generally within the context of the UN (e.g. Security Council Resolutions 2199, 2347 and 2368) and UNESCO’s cultural conventions and wider cultural protection strategy (e.g. the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage; the 2011 UNESCO Universal Declaration on Archives; and its 2016 Strategy for Reinforcing UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict). It is also informed by international initiatives regarding environmental disaster such as the Sendai Framework for Disaster Risk Reduction. Within this context, through its Articles of Association and board decisions, the board sets the framework within which national committees operate, respecting ‘the principles of joint action, independence, neutrality, professionalism, respect for cultural identity and diversity, and working on a not-for-profit basis’. The board has identified six, obviously inter-related and overlapping,
‘areas of activity’ (policy development; co-ordination, of Blue Shield and with other relevant organisations; proactive protection and risk preparedness; education, training and capacity building; emergency response; post-disaster recovery and long-term activity) that all national committees plan to and report on. Each national committee prioritises the six areas in relation to its particular national circumstances and identifies annual priorities and specific actions under each. The six areas present a coherent external agenda for the organisation while maintaining local relevance and together stress the dual nature of CPP as legal responsibility and military opportunity. The latter is not to say that the Blue Shield condones armed conflict but is, rather, an acknowledgement that for the military to take CPP seriously there has to be a military reason to do so.

While the heritage community needs to interact with and support the military as part of a constant relationship, the Blue Shield has also identified four particular aspects of this work (long-term rank and responsibility relevant education of all in uniform; information and training immediately pre-deployment to a specific region or country; during conflict; and during post-conflict stabilisation or peacekeeping activities). We also question the simple assertion that cultural property is damaged purely through collateral damage and have identified eight distinct reasons for such damage and destruction during armed conflict (lack of planning; lack of military awareness; collateral and accidental damage; specific (or deliberate) targeting; looting, pillage and spoils of war; deliberate reuse of sites; enforced neglect; and unrestricted development). If each of these were to be addressed coherently, the overall risk to cultural property during armed conflict should be reduced significantly.

The Blue Shield’s impact is slowly developing. For example, the UK and USA national committees were instrumental in lobbying for and supporting the introduction of national legislation that enabled the USA to ratify the 1954 Convention in 2009 and the UK to ratify the Convention and both Protocols in 2017. The UK national committee was also pivotal in the creation of the UK Ministry of Defence’s new CPP Unit that should be fully operational by 2021. The first training course for this unit, developed in conjunction with the UK national committee, was also attended by military personnel from Austria, Australia, France, Italy, The Netherlands and USA (both Special Forces and Air Force). The Argentinian national committee has produced a series of six TV programmes on the importance and protection of cultural property; the Georgian national committee has undertaken combined training for its military and heritage communities; the Polish national committee has been working with its Ministry of Culture and National Heritage and the Ministry of National Defence to establish an International Centre for Training and Research on Culture Heritage in Danger to be launched in May 2020; a member of the Dutch national committee has joined the advisory group for the Caribbean Expert Organization on Safeguarding Cultural Heritage in case of a natural disaster; a number of small island states in the Pacific have joined together to form Blue Shield Pasifica that has held workshops on the importance of ratifying the 1954 Hague Convention; and the Australian national committee organises an annual national campaign ‘May Day’ which urges cultural heritage organisations around Australia to focuses on disaster preparedness and response. This is just a snapshot of activity and new committees are currently being established in Greece, Mali and Mozambique.

More broadly, the Blue Shield supported the NATO affiliated Civilian/Military Centre of Excellence in the drafting of its 2015 publication, Cultural Property Protection Makes Sense and supported the development of NATO’s 2019 Directive on CPP. It has also taken part in an increasing number of NATO exercises adding cultural property-related issues to the training to ensure that CPP will not be essentially ignored in the future as it was in the 2003 invasion of Iraq. Finally, it has been involved in the training of UNIFIL three times since 2015 and has delivered training courses for the Fijian and Irish armed forces—who only deploy overseas as elements of peacekeeping operations.

The Blue Shield is referred to frequently as the ‘cultural equivalent’ of the ICRC. There are currently, however, three key differences. First, the Red Cross has had some 150 years to establish a world-wide reputation while the Blue Shield has been in existence for
just over 20 years and is virtually unknown outside those involved in its community and partners. Second, the Red Cross has a multi-million pound budget whereas—save for a time-limited, short-term subvention for an office from the municipality of The Hague, and the current support of Newcastle University through its UNESCO Chair in Cultural Property Protection & Peace—the Blue Shield has no core funding at all. Third, the Red Cross has a paid staff of some 12,000 people working in approximately 80 countries; the Blue Shield, by contrast, has no directly paid staff. Despite these obvious disadvantages the Blue Shield is slowly developing a capacity to act with respect to CPP that compliments, but does not overlap, the work of others in the field. It is currently laying the foundations for real ‘equivalence’ with the ICRC that will, in perhaps 50-100 years, make the analogy a reality. A major step was taken along this path in February 2020 when the two organisations signed a memorandum of understanding with the Director General of the ICRC affirming that ‘[p]rotecting cultural property and cultural heritage against the devastating effects of war unfortunately remains a humanitarian imperative, today perhaps more than ever. Joining forces with a partner like the Blue Shield is therefore extremely important for the ICRC’.

**The Commonwealth Response**

Currently only 20 Commonwealth countries have ratified the 1954 Hague Convention; only 13 have ratified the 1st Protocol; and only seven have ratified the 2nd Protocol. Of those who have ratified, few Commonwealth countries have fully implemented the Convention or Protocols. To raise consciousness about the issue, the Commonwealth Secretariat organised a workshop, to mark the World Day for International Justice, entitled ‘Protecting cultural heritage in the Commonwealth: New challenges and opportunities.’ It was held in London in July 2019. Sadly, despite invitations going to all Commonwealth High Commissions in London, only twelve Commonwealth countries were represented alongside the Red Cross, Blue Shield, UNESCO and a variety of UK Government departments and other interested parties. The meeting was, nevertheless, a very important first step towards having the Commonwealth take the CPP issue, and own its responsibilities and opportunities in that connection, far more seriously.

At a time when cultural property is being specifically targeted by armed non state actors, and when the American President can support the targeting of cultural sites in Iran as he did on 4 January 2020 (before being restrained by his Department of Defence), the world needs all countries to accept their responsibilities and to ratify all parts of the 1954 Hague Convention to clearly show that our human past points to what unites us rather than what divides us. To remain relevant the Commonwealth must be seen to be contributing to, and where possible leading, international priorities and agendas. The Commonwealth has a great opportunity to work together to ensure full ratification and, by doing so, to lead the world in the acknowledgement of the importance of cultural property, and therefore of CPP. The Blue Shield stands ready to support Commonwealth countries willing to accept this responsibility and opportunity.
SENTENCING INDIGENOUS OFFENDERS IN CANADA, AUSTRALIA AND NEW ZEALAND: A COMPARATIVE ANALYSIS

By Dr Lorana Bartels, Judge Wayne Gorman and Prof Khylee Qunice.

Dr Bartels is Criminology Programme Leader, Centre for Social Research and Methods, Australian National University, Canberra, ACT, Australia. Judge Gorman sits on the bench of the Provincial Court of Newfoundland and Labrador, Corner Brook, NL, Canada. Prof Quince is Director of Maori and Pacific Advancement, Auckland University of Technology, Auckland, New Zealand

Abstract: This paper presents an overview and comparative analysis of the key legislative, case law and policy developments in relation to the sentencing of Indigenous offenders in Canada, Australia and New Zealand. This highlights some positive steps to address their overrepresentation in the three countries’ respective criminal justice system, but also the need for further work to be done in this regard.

Keywords: Sentencing – indigenous (aboriginal) offenders – overrepresentation of indigenous offenders in criminal justice systems – legacies of colonial oppression of indigenous peoples – systemic disadvantages associated with indigenous ethnicity – statutory and common law recognition of systemic disadvantages for sentencing purposes – need for reforms and development in sentencing policies – differing approaches in different parts of the Commonwealth to sentencing indigenous offenders

INTRODUCTION

Indigenous offenders are overrepresented in the criminal justice systems of three former Commonwealth colonies, Canada, Australia and New Zealand. In Australia, Indigenous people account for 3% of the total population but 28% of the prison population, while the figures in Canada are 5% and 30% respectively. In New Zealand, Maori people make up 17% of the total population and 52% of the prison population.

It is beyond the scope of this paper to examine the complex reasons for this over-representation, although it is accepted that they include systemic racism and intergenerational trauma. What follows below is a brief overview of the sentencing approach taken in each country, with particular reference to specific legislative provisions and the use of cultural context information in court.

CANADA

In response to concerns about the overrepresentation of Indigenous offenders in Canada’s prison population, the Parliament of Canada added s. 718.2(e) to the Criminal Code of Canada, RSC, 1985. It states:

A court that imposes a sentence shall also take into consideration the following principles:

...(e) all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

This provision has been the subject of considerable academic comment (see, e.g., Kent Roach, ‘Ipeelee in the Courts of Appeal: Some Progress but Much Work Remains’ (2010) 67 CLQ 386) and judicial analysis, including by the Supreme Court of Canada. In a series of decisions (see R v Gladue, [1999] 1 SCR 688, R v Wells, [2000] 1 SCR 207, R v Ipeelee, [2012] 1 SCR 433 and R v Boutilier, [2017] 2 SCR 936), the Supreme Court has set out a number of principles that must be applied when a sentence is imposed upon an Indigenous offender in Canada. At the time the Supreme Court handed down these decisions, s. 718.2(e) did not include the words ‘and consistent with the harm done to victims or the community’. However, the added words do not appear to have changed the manner in which
s. 718.2(e) is being applied (see R v James, [2020] YKTC 7).

Over the course of these judgments, the Supreme Court has attempted to formulate a national approach to the sentencing of Indigenous offenders. The decisions contain some bold and general statements, but there is also some hedging of these comments by reference to a lack of intent to create a race-based sentencing process and to the result being the same for Indigenous and non-Indigenous offenders when a serious or violent crime has been committed. In Ipeelee, for instance, the Supreme Court indicated that ‘unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence’ (at para. 83).

Having said this, the Supreme Court's decisions contain a number of clear themes. The court has consistently characterized s. 718.2(e) as being 'remedial' in nature and thus constituting a new approach to the sentencing of Indigenous offenders. The court has also held that it is mandatory that judges take judicial notice of the history and present social economic plight of Indigenous Canadians and to apply the principles set out in Gladue in all cases involving Indigenous offenders.

In addition, the Supreme Court has consistently referred to the necessity of evidence concerning the offender's Indigenous background being presented at the sentence hearing. These reports have come to be known as 'Gladue Reports.' In R v Macintyre-Syrette, [2018] ONCA 259, the nature and importance of such reports was described in the following manner (at para. 14):

The Gladue factors are highly particular to the individual offender, and so require that the sentencing judge be given adequate resources to understand the life of the particular offender...The ordinary source of this information is the Gladue report.

In R v F.L., [2018] ONCA 83, the Ontario Court of Appeal asked the key question: ‘In what circumstances, then, will an offender's Aboriginal background influence their ultimate sentence?’ The court indicated that the answer is not ‘easily ascertained or articulated’ (at para. 38). It went on to state that ‘the mere assertion of one’s Aboriginal heritage is insufficient’ and that ‘more is required “than the bare assertion of an offender's Aboriginal status.”’ The court also indicated that it is

...insufficient for an Aboriginal offender to point to the systemic and background factors affecting Aboriginal people in Canadian society. While courts are obliged to take judicial notice of those factors, they do not ‘necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel (at paras. 38-39).

The Ontario Court of Appeal concluded in F.L. that the correct approach can be articulated as follows (at para. 40):

For an offender's Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender's case. This approach finds support both in Ipeelee and decisions of this court.

As a result, it was held that sentencing judges ‘must take judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society’ and then consider whether

...factors have impacted the offender's own life experiences – in other words, whether the offender has 'lift[ed] his life circumstances and Aboriginal status from the general to the specific'...If systemic and background factors have impacted an Aboriginal offender's own life experiences, the sentencing judge must then consider whether they ‘illuminate the offender's level of moral blameworthiness’ or disclose the sentencing objectives that should be prioritized.’ (at paras. 44-45).

This is similar to the approach adopted in relation to all offenders in Canada, in the sense that a Canadian sentencing judge must
impose a proportionate sentence based upon the offence and the offender’s degree of moral responsibility for the offence (see s. 718.1 of the Criminal Code and R v Levesque, [2000] 2 SCR 487 at para. 18). The only difference suggested by the reasoning utilized in F.L. involves the requirement for the sentencing judge, without the requirement of evidence, to accept the existence of there being systemic and background factors which have negatively affected Indigenous people in Canada. This interpretation would appear to effectively render s. 718.2(e) meaningless, despite the Supreme Court’s comments concerning its importance.

It has been over 20 years since s. 718.2(e) was added to Canada’s Criminal Code and its application remains a challenging one for sentencing judges. The section requires a broad application of judicial notice and an interventionist approach, but determining its practical effect on the sentence imposed in specific cases is still far from certain. As pointed out by Roach in the aforementioned article, Canadian appellate courts ‘have more often asserted than explained how Gladue factors have reduced moral blameworthiness, thus triggering concerns about respecting the fundamental sentencing principle of proportionality’ (at p. 387).

In September 2019, ss. 718.04 and 718.201 were added to the Criminal Code. These provisions concentrate on ‘Aboriginal female victims’ of crimes and state:

718.04. When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

718.201. A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

As can be seen, there is a potential conflict between the sentencing principles to be applied when an offender and female victim are both Aboriginal. Section 718.04 was considered in R v Flowers, [2020] N.J. No. 57 (Prov. Ct.) in which Porter J. stated:

In the context of Gladue and Ipeelee, I note that sentences should not be automatically reduced for aboriginal offenders, and that for more serious and violent offences sentences are likely to be similar whether the offender is aboriginal or not. I also note that it was never the intention of the Supreme Court in Gladue to disenfranchise Aboriginal complainants, or to devalue the impact of violent crime on them (at para. 19).

AUSTRALIA

The Australian sentencing landscape is complex, as it involves nine legislative and common law regimes across six states and two territories, as well as a Commonwealth (federal) sentencing framework, although federal matters only account for two percent of matters. It is beyond the scope of this paper to detail the variations across these jurisdictions, but there are widely varying sentencing laws and practices, as exemplified in incarceration rates (per 100,000 population) ranging from 138 in the Australian Capital Territory (‘ACT’) to 937 in the Northern Territory (‘NT’), with a national average of 218. What all jurisdictions have in common, however, is the over-representation of Indigenous offenders. Imprisonment rates range from 718 in Tasmania to 4,053 in Western Australia, with a national average of 2,524. Furthermore, Indigenous imprisonment rates are rising faster than the general population.

Courts in the ACT must consider whether an offender’s cultural background is relevant (Crimes (Sentencing) Act 2005 (ACT), s. 33(1) (m)), while courts in Queensland are required to have regard to any submissions from a representative of an Indigenous offender’s community justice group (Penalties and Sentences Act 1992 (Qld), s. 9(2)(p)). Courts in the NT may receive information about Indigenous customary law or the views of Indigenous community members, but there are limits on this information being received under both NT (Sentencing Act 1995 (NT), s104A) and Commonwealth (Crimes Act 1914 (Cth), ss. 16A-16AA) law. The remaining jurisdictions
do not have specific legislative guidance relevant to sentencing Indigenous offenders.

Notwithstanding these legislative constraints, as Elena Marchetti and Thalia Anthony discussed in ‘Sentencing Indigenous Offenders in Canada, Australia, and New Zealand; (in Michael Tonry (ed.), Oxford Handbooks Online: Criminology and Criminal Justice (Oxford, 2016) at pp. 1-30, Australian sentencing courts have generally allowed sentencing mitigation for Indigenous offenders in three contexts: to recognise disadvantage as a result of post-colonial conditions; as a cultural context for offending; and in circumstances where community punishment is administered in accordance with Indigenous law.

The most significant case on this issue is Bugmy v R (2013), 249 CLR 571, where the Australian High Court accepted the importance of recognising subjective factors in sentencing, such as ‘profound childhood deprivation,’ and that this may reduce an offender’s moral culpability. The court held that these principles apply to all offenders who have experienced deprivation, not only Indigenous offenders. However, the court refused to make any particular accommodation for Indigenous offenders and rejected the submissions calling for the model adopted by Canada in Gladue and Ipeelee (discussed above), justifying this by reference to the lack of legislative provisions analogous to s. 718.2(c) of the Canadian Criminal Code. The court also considered it antithetical to individualised justice (a core principle in Australian sentencing law) to consider systemic Indigenous disadvantage.

Indigenous sentencing courts constitute a positive, albeit limited, development. They are currently in operation in all states and territories except Tasmania, which has a relatively small Indigenous population, and the NT, where they have operated previously and will reportedly be reinstated soon. These courts enable Indigenous Elders (and other Indigenous people, including the offender, support persons and the community) to participate actively in the sentencing process and thereby provide a more culturally sensitive response. However, the courts implement the mainstream Australian laws and the judicial officer retains the final decision on an appropriate sentencing outcome.

Furthermore, these courts only deal with a small proportion of matters and, as Marchetti and Anthony have noted, ‘continue to operate at the margins of the court system’.

In 2017, the Australian Law Reform Commission (the ‘ALRC’) completed a report entitled Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples which contained 35 recommendations designed to address Indigenous over-representation in the criminal justice system. The recommendations covered a range of issues, including justice reinvestment, bail, sentencing, prison programmes, access to justice, Indigenous women, fines, driver licences, alcohol and police accountability. In relation to sentencing, the Commission recommended the introduction of legislation to require courts, when sentencing Indigenous offenders, to take into account unique systemic and background factors affecting Indigenous peoples. Implementing this recommendation would address the lacuna which impeded the High Court in Bugmy from recognising the systemic issues many Indigenous offenders experience. The ALRC also recommended that governments and, where relevant, other agencies and Indigenous organisations and communities, should:

• adopt models to facilitate the preparation of ‘Indigenous Experience Reports’ (analogous to the Gladue reports discussed above) for offenders being sentenced in the superior courts;
• develop options for presenting information about unique systemic and background factors that impact on Indigenous peoples in the courts of summary jurisdiction;
• improve access to community-based sentencing options, by:
  - expanding the geographic reach of such options, particularly in regional and remote areas;
  - providing options that are culturally appropriate; and
  - making these options accessible to offenders with complex needs, to reduce reoffending;
• implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending;

• provide the necessary programmes and support to facilitate the successful completion of community-based sentences by Indigenous offenders; and

• repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Indigenous peoples.

In addition, the ALRC recommended that, in the absence of appropriate community-based sentencing options, suspended sentences and short prison sentences not be abolished.

Although the ALRC’s report was tabled in the Commonwealth Parliament in March 2018, there has been no formal response from the Australian Government. In addition, some states and territories have taken steps that undermine the recommendations, for example, the abolition of suspended sentences and the extension of mandatory sentencing provisions to new offences. On the other hand, the ACT has commenced discussion around the creation of ‘Indigenous Experience Reports’, in line with the Commission’s suggestions. In addition, New South Wales has developed the Bar Book Project, to ‘assist in the preparation and presentation of evidence to establish the application of the Bugmy principles’ (see https://www.publicdefenders.nsw.gov.au/barbook). Nevertheless, there is significant scope for Australia to do more to improve its approach to sentencing Indigenous offenders, including learning from its Commonwealth counterparts.

**New Zealand**

Unlike Australia, there is a single criminal jurisdiction in New Zealand, with sentencing primarily governed by the *Sentencing Act 2002* (NZ), s. 27 of which (and its predecessor, s. 16 of the *Criminal Justice Act 1985* (NZ)) allows for the provision of contextual information about offenders to be put before a sentencing judge. The provision is ‘culturally neutral’, in that it is available to all offenders, despite being underpinned by political debate about concern for Maori over-representation specifically.

Section 27(1) provides:

*If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—*

(a) the personal, family, whanau, community, and cultural background of the offender;

(b) the way in which that background may have related to the commission of the offence;

(c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence;

(d) how support from the family, whanau, or community may be available to help prevent further offending by the offender;

(e) how the offender’s background, or family, whanau, or community support may be relevant in respect of possible sentences.

The court must hear a person called by the offender, unless satisfied it would be unnecessary or inappropriate (s. 27(2)), in which case, it must give reasons for its decision (s. 27(3)).

In its earlier iteration, the provision was underutilised, due to poor practitioner and offender knowledge. The re-worded provision not only gives clearer guidance as to the nature of the information sought from a ‘cultural speaker’, but also enables the court to suggest that such a speaker may be of assistance if the offender has not called one of his or her own volition (s. 27(5)). In *Akuhata v R* [2020] NZCA 19, the Court of Appeal split on the ramifications of a failure to engage s. 27 at first instance by either counsel or the court, signalling a potential line of appeal where
claimants could establish a likely difference in sentencing outcome, but for the failure to provide cultural information.

In addition, s. 8(i) explicitly recognises the relevance of cultural background in sentencing, providing that the court must take into account ‘the offender's personal, family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose’. Section 25(1)(b) allows for sentencing to be adjourned in order for a restorative process to occur. This is increasingly used in conjunction with ss. 27 and 8(i) to implement an intervention plan; when completed, this can be credited in mitigation of sentence or underpin an application for a discharge without further penalty.

As Hansard for 12 June 1985 confirms, s. 27 has been deliberately framed to apply to all defendants, to avoid any claim of racial bias, despite the clear pattern of over-criminalisation and over-imprisonment of Maori people for over 40 years. This ‘neutrality’ has hampered the use of both ss. 16 and 27 and the development of any resulting jurisprudence, due to a general lack of knowledge as to its existence until recently. It also means there are no clear signals as to the relevance or significance of historic disadvantage or the contemporary crisis in the overrepresentation of Maori offenders – there is no indication that the provision has a remedial objective. Courts are therefore looking to guidance from the common law and developments in Canada and Australia in this regard, although their different legal contexts have made this a patchy exercise.

For 30 years, these provisions lay relatively dormant. In one rare reference, Justice Gendall recognised that the intention of s.16 was that the court should receive information on Maori cultural patterns and alternative programmes for the rehabilitation of Maori offenders (Nishikata v Police Wellington HC, AP 126/99). In that case, the information was directed to mitigation of culpability and this has remained a common theme across the case law to date.

A concerted effort amongst the legal community since 2013 has seen a revival in the use of s. 27. This effort can be placed in the context of increased political and social discourse about Maori over-imprisonment and recent governmental commitments to decreasing the prison population by 30% over 15 years.

The first cases in this revival effort were perhaps unsurprisingly conservative in their approach. In both Mika v R, [2013] NZCA 648 and R.S. v R, [2014] NZCA 484, the Court of Appeal was clear that there was to be no blanket ‘Maori discount’, claiming in Mika that ‘Parliament could not have intended that a standard discount based on ethnicity should be applied undiscriminatingly’ (at para. 10) and in R.S. that ‘cultural background can never be a ground in itself for a discount on sentence’ (at para.18).

Nevertheless, Justice Williams in R v Rakuraku [2014] NZHC 3270 stated that the impact of R’s mitigating, personal and historical factors ‘ought nonetheless to be discernible’ and applied a discount of 12 months to R’s minimum period of imprisonment. Rakuraku also signals a perceptible change in the way in which s. 27 information is presented to the court; it was more extensive and sophisticated, with material directed to both collective historic disadvantage suffered by the offender's tribal community and the connection to him and his offending. This approach has since gained traction and has resulted in a rapidly developing line of jurisprudence, where mitigation and culpability are considered in disposition of cases.

There remains a concern about the relevance of s. 27 to the most serious offending. In R v Keil, [2017] NZCA 563, the Court of Appeal determined that the seriousness of the offending, coupled with goals of denunciation, deterrence and accountability, outweighed the countervailing mitigation detailed in his cultural report, for which K received no discount.

On the question of the ‘nexus’ between collective historic disadvantage and the particular offender, New Zealand courts have taken account of developments in Australia and Canada. In Solicitor-General v Heta, [2018] NZHC 2453, Justice Whata held that ‘the symptoms of systemic Maori deprivation
are reasonably self-evident ...[b]ut there must be some evidence identifying the presence of systemic deprivation in the offender’s background and linkage to the offending’ (at para. 50). The concern for causation seems to be less significant in the lower courts, dealing with less serious harms, where s. 27 information is most commonly used.

There has been a marked changed in sentencing outcomes for Maori offenders following the more cohesive approach to the use of and response to s. 27 information. Despite the statutory reference to a cultural ‘speaker’, information is now commonly provided via a written report, usually by an independent report writer. While some courts respond with an almost prescriptive discount of 5-30% in terms of sentence length for serious cases, in many cases the result is a qualitatively different sentence – a discharge without conviction or community-based or fiscal punishments, rather than custodial ones. For offenders facing imprisonment, cultural information can underpin appropriate accommodation (in a specialised Maori Focus Unit, for example) and programming interventions for rehabilitation.

**COMMON THEMES**

It emerges from the foregoing that all countries have taken some significant steps to ensure that the particular circumstances of Indigenous offenders are recognised in sentencing, but there is still some way to go in realising this fully.

Canada has enshrined the principle that courts must prioritise non-custodial sanctions when sentencing Indigenous offenders and adopted a framework for presenting relevant information to the courts, in the form of *Gladue* reports. However, it is difficult to ascertain the practical effect of this on the sentence imposed in specific cases.

In New Zealand, the relevant provision is framed in generic terms (i.e., is not only of application to Maori offenders), and it appeared to be under-utilised for many years, but recent decisions show a greater willingness to apply it, at least in less serious cases, which has resulted in non-custodial sentences being imposed in some cases. There is also an established process for providing culturally relevant information to the court.

Australia appears to have the furthest to go in this regard, with some jurisdictions making some legislative provision for cultural factors (on a discretionary basis), but most remaining silent on this issue. There is also no legislative or judicial exhortation to consider broader systemic issues, although Indigenous sentencing courts provide an opportunity for a more culturally appropriate means of sentencing, albeit only for a small proportion of Indigenous offenders appearing before the courts.

**CONCLUSIONS**

All three countries discussed in this paper feature legacies of trauma from colonisation and their impact continues to be felt, *inter alia*, by the over-representation of Indigenous peoples in the criminal justice system. Addressing this through sentencing reform is an important step, but can only be part of the solution.

The ALRC’s *Pathways to Justice* report has been described as a ‘dramatic legal reform blueprint to tackle soaring Indigenous incarceration rates’ (see Nicola Berkovic and Stephen Fitzpatrick, ‘Blueprint Aims to Halt the Indigenous Cycle of Crime’, *The Australian*, 29 March 2018). Its recommendations should not only be taken seriously by all Australian governments, but they may also hold relevant answers for other Commonwealth countries grappling with similar social and criminal justice issues.
THE JUDICIAL CAREER: FROM APPOINTMENT TO POST-RETIREMENT ASSIGNMENTS

By the Rt Hon Sir James Dingemans. Sir James Dingemans is a Lord Justice of the Court of Appeal for England and Wales. This article is based upon a paper presented at the CMJA Conference, Port Moresby, PNG, September 2019

Abstract: The judicial career trajectory typically passes through a number of stages. Some of them are reached as a matter of course and others are either optional or contingent. Particular benefits and risks arise at each point along the way. Those aspiring to appointment to the bench, and those already appointed, are advised to be mindful of the risks and benefits unique to every stage. Having appointment and promotion-related decision-making processes that are transparent and independent is essential to the preservation of both substantive and perceived judicial independence. Some of the unique risks that can arise should fully retired judges return to the active practice of law—an option that is viewed differently in different Commonwealth jurisdictions—are discussed.

Keywords: judicial careers – judicial training and continuing education – judicial advancement and promotion – processes for vetting candidates for judicial appointment and promotion – transparency – judicial independence – options for retired judges and the propriety of the same.

INTRODUCTION

The subject of judicial careers is a difficult one to attempt to make interesting. Judges talking to judges about judicial careers is not guaranteed to be a box office success. However, what I wanted to do was to look at the stages in a judicial career and, given the limited time available, make some short points in relation to each stage.

PART TIME (FEE-PAID) APPOINTMENTS—THE FIRST STAGE

The first stage that I wanted to address is part-time appointments, which are called fee-paid appointments in England and Wales, and the first point that I wanted to make in relation to this early stage of a judicial career is that the appointment should be through an independent and transparent process such as a Judicial Appointment or Judicial Service Commission. As fee-paid appointments are a gateway to a full-time judicial career, it is essential that selection is not exempted from consideration by a Commission. Otherwise there is a risk that either the executive appoints those who it prefers, or judges appoint those practitioners or academics who reflect their own image. The diversity of the judiciary depends on the involvement of the Appointments Commission at this stage. It is well known that in some jurisdictions ‘acting’ appointments are made. One of the distinct problems with ‘acting appointments’ is that such appointments are not always made by Appointment Commissions. An example of the proper regulation of acting appointments is found in section 106 of the Republic of Malawi (Constitution) Act which requires the involvement of the Judicial Services Commission in the appointment of both full-time and acting Justices of Appeal.

The second point that I wanted to make in relation to part time appointments is that the terms on which the appointment are made must be compatible with the independence of the part-time judicial officeholder. This was a point addressed by the Courts in Scotland in *Starrs v Ruxton* [2000] JC 208. It was held that a system which provided for part-time annual appointments by a member of the executive was not compatible with the right to a fair trial. This was because such appointments created the risk that a judge might seek to obtain another appointment by favouring the executive.

FULL-TIME APPOINTMENT—THE SECOND STAGE

The second stage is the appointment as a full-time judge. Again, in my view such appointments should be by way of Judicial Service Commissions. Written constitutions of Commonwealth states from the 1960s generally provide for Judicial Service Commissions. Most Commonwealth countries now make use of Judicial Appointments Commissions.
The United Kingdom with its separate legal jurisdictions of Northern Ireland, Scotland and England and Wales was a slow starter but there is now established a functioning and independent Judicial Appointments Commission.

The Commonwealth Magistrates and Judges Association (the ‘CMJA’), the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association combined to produce a paper proposing a model clause for a Judicial Appointments Commission. I know that different countries have taken different approaches to Appointments Commissions but a well-resourced, independent and transparent Appointments Commission strengthens the rule of law by ensuring the principled involvement of society at large in the selection of judges. This avoids selections by the executive geared to serving its own purposes or selection by judges of new colleagues reflecting their own image. It also avoids the risks of pressure to have elections to the judiciary with all the consequences that can bring.

THE WORK OF A JUDGE—THE THIRD STAGE

The third stage that I wanted to address was the work of a judge. If the Appointments Commission has appointed the right person, that judge will be courteous, fair, hard-working and learned in the law. But even such a judge cannot know everything. I wanted to address a point about judicial training. Judicial training is still a relatively new concept but training provided by serving judges to other judges can be invaluable. An academic or a practitioner appointed as a judge will not know how to manage long and complex trials. I still remember attending as a part-time Judge (Recorder) in England and Wales at the long and complex criminal trials seminar. Our syndicate leader, a very experienced Crown Court judge, made the point that the first thing that a judge must do in a very long case, before the jury is sworn and before any last-minute applications about evidence are made, is to timetable the case. This was required to be done even if the parties had lodged draft trial timetables. This was because it was the only time that the judge could get a realistic overview from the parties in order to ensure that the case would fit within the time allowed. Once the case was started it was too late. This was because it was inevitable that if a case is timetabled after it has started, one side or the other would consider that they were being unfairly rushed or penalised for earlier delays in the case. The sharing of this sort of experience is a principled aim of judicial training.

The second point that I wanted to address in relation to the work of the judge was the role of leadership judges. I know that this topic is being addressed in its own right at other sessions at this conference. All Commonwealth legal systems recognise the role of the leadership judge, if only by the appointment of a Chief Justice. The Chief Justice may (and in larger jurisdictions will have to) delegate leadership responsibilities to other judges. I strongly support the propositions that: (1) judges should be managed and led by judges and not, for example, by managers appointed by the executive; (2) judges who manage judges should sit in court, rather than become full-time administrators who can drift out of touch with the courtroom; and (3) there should be proper support to enable those leadership judges to carry out their work and leadership roles. Such support is likely to be administrative—for example, by providing to the leadership judge a spreadsheet of outstanding judgments. Having such information enables the leadership judge to speak to any judges who have judgments outstanding for more than three months and secure their agreement to (a) deliver any such judgment by a specified date, and (b) obtain the support or training necessary to ensure that the situation does not recur.

The third point that I wanted to make was that the executive has an obligation to provide suitable and sufficient funding to enable the full-time judge to carry out his or her work. This is addressed by the Latimer House Principles drafted by the CMJA and in another session at this conference.

PROMOTION—THE FOURTH STAGE

The fourth stage that I wanted to address was promotion within the judiciary. It is well-known that not every judge will want to be appointed to sit on appeal, preferring instead to sit at first instance. There is, in any event, not enough space for every judge
to be appointed to appeal courts. However, selection for any such appointment must again be transparent and fair. The involvement of Appointments Commissions in the promotion of full-time judges ensures that the executive does not promote only those whose worldviews coincide with the executive's own view, or that judges do not promote other judges in their own image. An important part of the role of leadership judges is to ensure that those judges who do want to be considered for promotion are supported in their aspirations and provided with the opportunity to do work which will enable them to demonstrate their ability to be appointed to sit on appeals.

**RETIREMENT—THE FIFTH STAGE**

The fifth stage that I address is retirement, and I wanted particularly to consider the issue of retirement ages. In England and Wales there was, as a matter of history, no retirement age. It is well-known that this meant that some great judges continued to sit at a time when their judgment was not what it had been. Thus, retirement ages were introduced. There was a retirement age of 75 for the senior judiciary (High Court judge and above) and 72 for other judges. This retirement age continues to apply to those appointed under the old scheme but the retirement age was lowered for all judges appointed after a certain date to 70. This meant that Lord Neuberger, as President of the Supreme Court, had to retire at 70 and was succeeded by Baroness Hale who was appointed before the change in retirement ages was introduced and so has a retirement age of 75.

This might be interesting as a matter of legal history, but enforcement of a requirement that judges retire by the age of 70 has led to the loss of some who still have much to give. This, in turn, has created pressures for the Judicial Appointments Commission because of the need to replace those judges. There seems to be some prospect that the retirement age may increase.

**POST-RETIREMENT ASSIGNMENTS—THE SIXTH STAGE**

The final stage to address is post-retirement assignments. There were two points I wanted to consider in the short time available to me. The first is the method by which judges are selected for further judicial work. It seems to me that such appointments must be on the recommendation of the Chief Justice or his or her delegate, or of an appointment Commission. If post-retirement judicial appointments are to be made by the executive, there may be a temptation for the judge coming up to retirement who wishes to continue to work to become executive-minded, or (which is just as damaging) there may be a perception that such a judge might give judgments in an attempt to obtain such an appointment. I know that in India many retired judges are appointed to chair tribunals. The involvement of the Chief Justice or an Appointments Commission in the selection process for such judges will mitigate the risks of concerns or criticisms arising from such appointments.

The second point I wanted to highlight was the question of whether retired, former full-time judges should ever be permitted to return to practice. I know that there is no uniformity of either views or practice about this across the Commonwealth. For what it is worth, my own view is that once a person has accepted a full-time judicial position, he or she should not be permitted to return to appear before the courts in which they have sat. I appreciate that this is what fee-paid judges do, but there is a principled distinction between a part-time appointment and a full-time judge. This is because full-time judges have given up practice and should be dedicating themselves full-time to the advancement of the rule of law as a judge. Permitting such a judge to return to practice creates two important risks. The first is that such a judge might attempt to rebuild a practice from those appearing before them (or at least that others might think that this is what has occurred). The second risk is that litigants might feel that they should instruct a retired judge because of the advantages of ‘knowing how it works’ that might accrue to the litigant, whether such an advantage is real or imagined. It might inhibit judges from talking freely to each other if there is a risk that the retired judge will be back before other judges in the future.

However, even if judges are prevented from appearing before the courts in which they sat, it is known that some judges have given advice on litigation coming before the courts in which...
they appeared. Madam Justice Lynne Leitch has very helpfully drawn my attention to a controversy in Canada where retired Supreme Court justices have provided advice on issues arising out of controversy surrounding deferred prosecution agreements known as the SNC-Lavalin affair. The fact that such advice has been given has become known and has generated critical media coverage. There are real risks in permitting retired judges to return to practice to provide such advice. This is because the provision of such advice can generate controversy. Further, it might mean that politicians would feel entitled to criticise the former judges because they were no longer judges, which risks blurring the lines about permissible and impermissible criticisms of judges. The retired judges might consider that providing private legal advice risks no public harm because they are simply providing their own independent legal analysis. However, it is well known that the privilege in any such legal advice belongs to the client, and clients may want to publicise any favourable advice that they receive. All of this risks the involvement of retired judges in public relations battles mounted by litigants.

**Conclusion**

It is apparent that a number of stages are reached over the course of a judicial career and that at each stage there are issues to be considered and addressed.
Abstract: The Commonwealth has evolved substantially over the course of its 70-year history. While its member states have acquired greater independence during those seven decades, they have also retained and developed important political, social, economic and cultural ties between and amongst themselves and Great Britain. The Commonwealth thus remains a vital and highly relevant international entity. Its various institutions—including the CPA, CLA, CLEA and CMJA—have from early days worked assiduously to promote democracy, good governance and the Rule of Law within Commonwealth member states. The creation, dissemination and adoption of the Latimer House Principles and their associated Guidelines has materially advanced that agenda, in part as a result of the proliferation of several important handbooks, treatises setting out model constitutional clauses, model polices and other like resources, thereby assisting in turning the promises of the Latimer House Principles and Guidelines into working realities across the Commonwealth. That said, there is more work to be done and the aforementioned Commonwealth institutions—with the way forward well signposted by the Latimer House Principles and Guidelines—are well positioned to ensure that progressive momentum is sustained as the Commonwealth approaches its centenary in 2049.

Keywords: Commonwealth, 70th anniversary of – Commonwealth, history of – Rule of Law – Latimer House Principles – Latimer House Guidelines – democracy – good governance – Commonwealth initiatives and resources created by Commonwealth institutions to advance democracy, good governance and the Rule of Law in Commonwealth member states

INTRODUCTION

The 70th anniversary of the Commonwealth in 2019 is a cause for celebration. The Commonwealth has now completed 70% of the journey towards the completion of its first century.
New Zealand, South Africa, the Irish Free State and Newfoundland):

- Section 2 removed the inability of Dominion Parliaments to legislate in a way which was ‘repugnant’ to English law or any UK statute, and it conferred on them the power to repeal or amend any British statute so far as it formed part of the Dominion’s own law.

- Section 3 established the power of a Dominion Parliament to make laws having extra-territorial operation.

- Section 4 declared that no future Act of the Westminster Parliament should extend to a Dominion as part of the law of that Dominion without the request and consent of the Dominion expressed in the Act.

So far so good. However, the Statute of Westminster gave rise to interpretative difficulties. It did not, for instance, make clear whether the Dominions had the power to alter any previously passed legislation of the Westminster Parliament setting up the legislature for that Dominion. The liberal point of view was that the Statute of Westminster made the Dominion legislature competent to legislate on classes of subjects which, before the statute, were outside its competence. On the more conservative interpretation, the effect of section 2 was not to enlarge the Dominion Parliament’s competence but simply to remove the disabling stigma of repugnancy from laws made by it within its area of competence.

Ultimately the doubt was clarified by the decision of the Privy Council in Moore v Attorney General for the Irish Free State, [1935] AC 484. The Irish legislature had abolished the right of appeal to the Privy Council and the Privy Council upheld its right to do so. The case was presided over by Lord Sankey LC.

Lord Sankey LC also sought to resolve another doubt arising from the Statute of Westminster in British Steel Corporation v The King, [1935] AC 500. At page 520, he held (in obiter) that, while the Westminster Parliament could in theory pass legislation extending to the Dominions without their express consent despite section 4 of the Statute of Westminster 1931, that possibility bore ‘no relation to realities’.

Returning now to the history of the Commonwealth, it was India’s desire to adopt a republican form of constitution while simultaneously retaining its link with the Commonwealth that prompted a radical reconsideration of the terms of that association.

This led to the London Declaration of 1949 when the representatives of the then eight members of the British Commonwealth, Australia, Britain, Canada, Ceylon, India, New Zealand, Pakistan and South Africa issued a communique stating that the Crown was ‘the symbol’ of the Commonwealth association but could be removed by a member as its head of state.

The London Declaration also emphasised the freedom and equality of its members, not just in their relationship to the Head of the Commonwealth but as a ‘free association of… independent nations’. It also stressed their cooperative ‘pursuit of peace, liberty and progress’.

In 2013, the Commonwealth Charter was agreed. It begins with the words, ‘WE THE PEOPLE OF THE COMMONWEALTH’.

The Commonwealth Charter contains sixteen articles on democracy, human rights, international peace and security, tolerance, respect and understanding, freedom of expression, separation of powers, the rule of law, good governance, sustainable development, protecting the environment, access to health, education, food and shelter, gender equality, the importance of young people in the Commonwealth, the recognition of the needs of smaller states, recognition of the needs of vulnerable states and the role of civil society. It ends by stating that:

We aspire to a Commonwealth... that is devoted to improving the lives of all peoples of the Commonwealth.

In July 2019, representatives of the member states reaffirmed their dedication to the core values and principles outlined in the Charter. They also committed to work towards
deepening the impact that the connected Commonwealth brings.

Those then are some of the landmarks in the Commonwealth’s history.

**WHY DOES THE COMMONWEALTH MATTER?**

A values-based organisation provides a forum for discussing values, for elaborating those values and for articulating and sharing them on an equal basis. The values cover many fields including the environmental: see for example the Commonwealth Blue Charter that set out agreed priorities for the maritime environment.

Here I focus on the values which concern the structure of civil society—namely the legal and constitutional ones. These values enhance not only stability and harmony in society, but also promote respect for the rules-based international legal order in international affairs, with its similar aims of peace and security.

**IMPORTANCE OF THE RULE OF LAW**

**GENERALLY AND TO DEVELOPMENT**

The Rule of Law is a most basic and fundamental value. This is expressed in the Commonwealth Charter of 2013:

> We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

Many learned scholars have written about the Rule of Law. It is a simple and effective principle. Essentially, it means that everyone, including the state, is subject to the law. In his book, *On History and Other Essays* (Blackwell 1983), the philosopher Michael Oakeshott wrote:

> The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.

Under the Rule of Law, the law must have certain qualities, for example, that it respects people’s rights as equal human beings.

In times past, there has been slavery and child labour—for example, small boys were used to sweep chimneys and women had to do embroidery work that made them blind. It was a cruel world, but we are a little wiser now. Of course, we still have a long way to go in realising everyone’s right to be treated equally, but that is what we are striving for.

A vital condition for the Rule of Law is an independent judiciary. Judicial institutions provide a means for the state to monitor compliance in a way which respects individual rights. To do this, judges must be independent. They also have to be wise. They must be able to rise to the trust their country puts in them. As Dr B.K. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, which drafted the Constitution of India, said in 1949 (on the day before the Constitution was enacted):

> …However good a Constitution may be, it is sure to turn out bad [if] those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.

The Rule of Law is also essential for successful development in a democracy. That is why so many international donors have ‘Rule of Law’ programmes or programmes for the capacity building of justice systems. The Rule of Law has many outward manifestations. According to the United Nations Report of the Secretary General on *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, the components of the Rule of Law include accountability to the law, fairness in the application of the law, the separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

When laws in certain areas of society are
either non-existent or unclear, they can hinder commercial transactions, sustainable land use, social welfare and crime prevention. Outmoded laws can preserve social practices which disadvantage poor and vulnerable members of society. All this can obstruct development. The same can be said where there is an absence of law to ensure the availability of clean water, the distribution of energy and the development of agriculture, and to safeguard the environment. Similarly, the law has both to protect intellectual rights and to facilitate the transfer of new technology so that people in developing countries can benefit from advances in science and technology.

Laws cannot in themselves lead to real change if they are not known and applied in practice. So proper and transparent systems and institutions are essential. Effective court systems and commercial dispute resolution mechanisms are crucial, as is the capacity of individuals to understand and consistently and fairly apply the law. Other vital systems include crime prevention and criminal justice and the elimination of corrupt or ineffective law enforcement.

**COMMONWEALTH DEVELOPMENTS**

One of the most significant articulations of the values of the Commonwealth is contained in the Latimer House Principles and Guidelines on the Three Branches of Government, agreed in 2009. I will come to these presently but first let us look at how they emerged in the slipstream of a number of other major constitutional steps within the Commonwealth.

First there was the Harare Commonwealth Declaration of 1991, whereby the Commonwealth Heads of Government (the ‘CHOGM’) at their meeting in that year, adopted as key principles: democracy, rule of law, and good governance.

Then, four years later, the CHOGM adopted the Millbrook Commonwealth Action Programme on the Harare Declaration. This coincided with the end of apartheid in South Africa.

The Millbrook Programme introduced compulsory adherence by member states to the Harare principles, as well as incentives for upholding the core values of the Commonwealth. The Commonwealth Secretariat was empowered to employ bilateral and multilateral punishments against offending members. Serious or persistent violations could lead to suspension or expulsion from the Commonwealth. The Millbrook Programme of 1995 cited an unconstitutional coup against a democratically elected government as a particularly serious violation.

The Millbrook Programme also set up the Commonwealth Ministerial Action Group (the ‘CMAG’) to examine cases of potential breaches and to recommend appropriate action to be taken by the Secretariat.

Finally, the Millbrook Programme also encouraged initiatives to provide more detailed guidance to member states on how they might embed Commonwealth values in their domestic systems.

**THE LATIMER HOUSE PRINCIPLES AND GUIDELINES ON THE THREE BRANCHES OF GOVERNMENT**

A Brief Account of the Development of the Latimer House Principles and Guidelines

A working group of the Commonwealth Parliamentary Association (the ‘CPA’), the Commonwealth Lawyers’ Association (the ‘CLA’), the Commonwealth Legal Education Association (the ‘CLEA’) and the Commonwealth Magistrates and Judges’ Association (the ‘CMJA’) — with representatives drawn from all over the Commonwealth — began to discuss what became the first instrument, the Latimer House Guidelines. After thorough debate and careful drafting, these Guidelines were first published in 1998 and were adopted by CHOGM in 2003. I was privileged to play a small part in their drafting.

The Latimer House Guidelines were incorporated into another instrument, the Latimer House Principles, a higher-level statement on the same subject area. This was approved by CHOGM and agreed in 2009 and it annexes the Latimer House Guidelines.
What do the Latimer House Principles Say?

The Latimer House Principles and their associated Guidelines are concise, and they are readily accessible via the link below:


It is to be noted that the Principles do not specify that a particular set of institutional arrangements is necessary to achieve compliance.

What is particularly interesting it is that the Principles are directed to the relationship between the three branches of government, i.e., they are directed to the separation of powers and the independence of the judiciary. Almost uniquely the Principles had to identify the proper scope of the competence of each branch in relation to the other. Thus, the Principles emphasise that each branch of government should show restraint in exercising the power within its sphere so as not to encroach upon the legitimate discharge of constitutional functions by others.

The Latimer House Principles comprise a high-level statement of principles. That means that they provide an overview. The generality of the Principles allows plenty of room for growth by interpretation in the light of experience and also for filling in by more detailed recommendations or model laws on particular topics. That gives the Principles a rather special role as an umbrella instrument. They reaffirm the fundamental values which unite all the members of the Commonwealth.

The Latimer House Guidelines expand on the Principles. To take the example of removing judges, the Latimer House Principles affirm that judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. The Guidelines give more detail:

i. In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to: (A) inability to perform judicial duties and (B) serious misconduct.

ii. In all other matters, the process should be conducted by the chief judge of the courts;

iii. Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

The Latimer House Principles also emphasise the importance of methods of ensuring accountability in relation to each branch of government, including the role of the judiciary.

On the accountability of the executive, the Guidelines refer to judicial review and The Lusaka Statement on Government under Law 1992, which deals sensitively with the role of the judiciary in relation to judicial review. This short statement highlights, for instance, the need for judicial restraint. Thus, the Lusaka Statement contains, for example, the following admonition to the judiciary:

By upholding these principles [which include “the requirements of good and efficient administration, the legitimate interests of third parties and major public interests should be given due weight”], the judiciary serves the public interest, not only in specific cases but by providing both guidelines for future administration and remedies where these are appropriate and proper procedures have not been followed. There is thus a creative tension between two branches of government - the executive and the judiciary - which endures to the public benefit. While it lies to the government to make and execute policy, it rests with the judiciary to ensure that policies are both made and implemented within the parameters prescribed by our Constitution and by our country’s laws, and for its decisions in these as in other matters to be respected.

Four Notable Initiatives Stemming from Latimer House Principles

The Latimer House Principles have generated further published guidance. I mention briefly four notable initiatives stemming from the Principles.
First, in 2013, the CMJA, the CLA and the CLEA jointly published a report proposing a model constitutional clause for judicial appointments commissions entitled *Judicial Appointments Commissions: A Model Clause For Constitutions*. The report was authored by Dr Karen Brewer (secretary-general of the CMJA), the Rt Hon Lord Justice Dingemans (the lead judge of the Judiciary of England and Wales for relations with the Commonwealth and, now, a Justice of the Court of Appeal) and Dr Peter Slinn (formerly the vice-president of the CLEA) and is accessible online via this link:


Second, in 2015, the Commonwealth Secretariat published *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (BIICL 2015), by J. van Zyl Smit (Associate Senior Research Fellow in the Rule of Law, Bingham Centre for the Rule of Law). This report is a treasure house of valuable information and is accessible online via this link:


Third, in 2017 the CMJA produced the *Commonwealth (Latimer House) Principles Practitioner’s Handbook* (Commonwealth Secretariat 2017) (sometimes referred to as the ‘Toolkit’) by Dr Karen Brewer, Dr Peter Slinn and HH Judge Keith Hollis. The Handbook is accessible online via this link:


Its purpose was to enhance dialogue between the three branches of government about their respective roles. This is a most impressive document, running to nearly 400 pages in length. It serves the dual function of a practitioner’s reference book and a training guide for judges who train other judges. It contains a detailed commentary on the Principles and a long appendix with headnotes of the key cases drawn from all over the world, including the Judicial Committee of the Privy Council.

Fourth, in 2018, a working group of the Commonwealth Journalists Association, including representatives of the CLA, CLEA and CPA, adopted the *Commonwealth Principles on Freedom of Expression and the Role of the Media in Good Governance* (accessible via the link below):

https://commonwealth.sas.ac.uk/sites/default/files/files/Publications/Commonwealth%20principles%20on%20freedom%20of%20expression%20and%20the%20role%20of%20the%20media%20in%20good%20governance.pdf

It is to be hoped that these principles will be approved by CHOGM in the fullness of time.

**Are the Latimer House Principles Working Well in Practice?**

A balanced answer to this question is I think given in a recent article by Dr Karen Brewer and Dr Peter Slinn entitled ‘The Commonwealth Principles (Latimer House) on the Relationship Between the Three Branches of Government: Twenty Years On’ (2018) Denn LJ 10. Both authors have been very closely involved with the Latimer House Principles over many years. They conclude that the Latimer House Principles are now firmly entrenched in the fundamental political values of the Commonwealth.

They record some setbacks along the way. They explain that the four sponsoring organisations tried to persuade the CMAG to monitor compliance with the Latimer House Principles or to appoint a Rule of Law Commissioner, but both measures were rejected. However, they note that the sponsoring organisations contributed to the development of tools, as I noted in the case of the *Commonwealth (Latimer House) Principles Practitioners’ Handbook* (or ‘Toolkit’).

Dr Brewer and Dr Slinn also explain that the sponsoring organisations have:

...undertaken training for parliamentarians, lawyers and judicial officers and provided
regular confidential briefings to meetings of Commonwealth law ministers and senior officials. In addition, the CLA, CLEA and CMJA have produced joint statements drawing public and official attention to such breaches. Joint statements in the form of press releases have been issued, inter alia, in relation to the impeachment of the Chief Justice of Sri Lanka, the forced removal and deportation of a Magistrate from Nauru, the removal of three judges in Zambia, the threat of impeachment of judges in Botswana, the arrest and detention of lawyers and judges in the Cameroon, executive threats against the judiciary in Kenya and threats to the position of the Chief Justices of Lesotho and the Seychelles. The effect of these statements is hard to assess. The intervention may have contributed to the restoration of the impeached Chief Justice of Sri Lanka after a change of government in 2015 even though she promptly resigned her position. Also regarding the Seychelles, a report of a fact-finding mission by the Southern African Chief Justices Forum relies on the Principles and the Guidelines in relation to judicial accountability and judicial security of tenure.

What one can surely say is that the Latimer House Principles and the Latimer House Guidelines represent a prodigious achievement. They demonstrate the member states of the Commonwealth acting together to help each other in their development and to share their common values in constitutional matters.

**CONCLUSION**

The adoption of the Latimer House Principles is a real achievement, bringing positive benefits and providing sure grounds for celebrating the Commonwealth’s 70th anniversary. The Principles have already borne fruit in leading to further developments to enhance the Rule of Law, and hopefully there will continue to be other sets of guidelines produced to give practical expression to the Latimer House Principles.

The expression ‘the yellow brick road’ from the *Wizard of Oz* is often used to express an ongoing course of action that a person takes believing that it will lead to good things. The Latimer House Principles and Guidelines are landmarks along that yellow brick road. People can see them from miles around and they are a beacon of hope. But the road leads onwards, and we must continue building it as the Commonwealth now marches decisively on to achieve a full century.

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**LAW REPORTS**

R (on the application of Miller) v Prime Minister Cherry and others v Advocate General for Scotland

17-19 September 2019
United Kingdom Supreme Court [2019] UKSC 41
Lady Hale P, Lord Reed DP, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Kitchin and Lord Sales JJSC

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On 27 or 28 August 2019 the Prime Minister advised Her Majesty the Queen that Parliament should be prorogued from a date between 9 and 12 September until 14 October 2019 and, on 28 August, following a meeting of the Privy Council, an Order in Council that Parliament be prorogued between those dates was made. Prorogation was a prerogative power exercised by the Crown on the advice of the Privy Council. It brought the current session of Parliament to an end, the next session beginning, usually a short time later, with the Queen’s Speech. The United Kingdom was due to leave the European Union (‘Brexit’) on 31 October 2019 (‘Exit Day’) and,
under the European Union (Withdrawal) Act 2018, Parliamentary approval was required of any withdrawal agreement reached by the government. While Parliament was prorogued, however, neither House could meet, debate or pass legislation. The Prime Minister's decision to prorogue Parliament was challenged in two sets of proceedings, one in Scotland (the ‘Cherry Case’) and one in England (the ‘Miller Case’). On 4 September 2019, the Lord Ordinary refused the petition in the Cherry Case, on the ground that the issue was not justiciable in a court of law. On 11 September 2019, however, the Inner House of the Court of Session allowed the petitioners’ appeal. It held that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of ‘stymying’ Parliamentary scrutiny of the executive, and that it and the prorogation which followed it were unlawful and thus null and of no effect. On the same day, the Divisional Court dismissed the claim in the Miller Case on the ground that the issue was not justiciable. It accepted the government’s submission that the courts should not enter the political arena but should respect the separation of powers. It held that the Prime Minister’s decision that Parliament should be prorogued at the time and for the duration chosen, and his advice to Her Majesty to that effect, were inherently political in nature, and there were no legal standards against which to judge their legitimacy. The Advocate General in the Cherry Case and the claimant in the Miller Case appealed to the Supreme Court. Both cases raised the same issues: (i) whether the Prime Minister’s advice to the Queen was justiciable in a court of law and, if it was, by what standard its lawfulness was to be judged; (ii) whether, by that standard, it was lawful; and (iii) if it was not, what remedy the court should grant. With respect to remedy, the government contended that to declare the prorogation null and of no effect would be contrary to art 9 of the Bill of Rights of 1688 or the wider privileges of Parliament relating to matters within its ‘exclusive cognisance’.

**HELD:** The appeal in the Miller Case would be allowed and the appeal in the Cherry Case would be dismissed for the following reasons.

(1) The decision of the Prime Minister was justiciable. In the case of prerogative powers, it was necessary to distinguish between two different issues: first, whether a prerogative power existed, and if it did, its extent; and second, whether, granted that a prerogative power existed, and that it had been exercised within its limits, the exercise of the power was open to legal challenge on some other basis. The first issue lay within the jurisdiction of the courts and was justiciable. No question of justiciability, whether by reason of subject matter or otherwise, could arise in relation to whether the law recognised the existence of a prerogative power, or in relation to its legal limits. Those were by definition questions of law and under the separation of powers, it was the function of the courts to determine them. The second issue, on the other hand, might raise questions of justiciability. The question then was not whether the power existed, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits was challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. A prerogative power was limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict. Two fundamental principles of constitutional law were relevant to the present case: Parliamentary sovereignty and Parliamentary accountability. For the purposes of the present case, therefore, the relevant limit on the power to prorogue was that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) would be unlawful if the prorogation had the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. That standard was not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it was a standard which determined the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. The court would have to consider any justification advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it was the court's responsibility to determine whether the Prime Minister had remained within the legal limits of the power. An issue which could be resolved by the application of that standard was by definition one which concerned the extent of the power to prorogue, and was therefore justiciable (see [35]–[37], [41], [42], [46]–[52]). **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, R v Secretary of State for the Home Dept, ex p Fire Brigades Union**
(2) The Prime Minister’s decision was unlawful. His action had had the effect of frustrating or preventing the constitutional role of Parliament in holding the government to account and there had been no reasonable justification for taking action which had such an extreme effect upon the fundamentals of democracy. It was not a normal prorogation in the run-up to a Queen’s Speech. It had prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and Exit Day. The circumstances were exceptional. A fundamental change in the constitution was due to take place on 31 October and Parliament had a right to have a voice in how that change came about. It was impossible for the court to conclude, on the evidence which had been put before it, that there had been any reason to advise Her Majesty to prorogue Parliament for five weeks until 14 October (see [56], [57], [61]).

(3) The court was not precluded by art 9 of the Bill of Rights 1688 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. Prorogation was neither a ‘proceeding in Parliament’ nor the core or essential business of Parliament. It followed that the Prime Minister’s advice, the Order in Council and the actual prorogation to which it had led were unlawful, null and of no effect. Parliament had not been prorogued and declarations would be granted accordingly (see [66]–[70]). R v Chaytor [2011] 3 LRC 1 applied.


Johar and others v Union of India and other petitions
6 September 2018
Dipak Misra CJI, Nariman, Khanwilkar, Chandrachud and Malhotra JJ

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The petitioners sought declarations in the Supreme Court that the right to sexuality, the right to sexual autonomy and the right to choice of a sexual partner were part of the right to life and personal liberty guaranteed by art 21 of the Constitution of India and that s 377 of the Indian Penal Code, in so far as it applied to consensual acts between adults in private, was unconstitutional. Section 377 provided that ‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished …’ In so doing, the petitioners challenged a decision of a two-judge bench of the Supreme Court in Suresh Kumar Koushal v NAZ Foundation [2014] 2 LRC 555 which had held that s 377 was constitutional. The petition came before a three-judge bench which took the view that the decision in Koushal required reconsideration, and that the issues raised in the petition should come before a larger bench. Before the larger bench, the petitioners’ further submitted, amongst other things, that s 377 violated the right to privacy because it subjected LGBT individuals to the fear of humiliation or rejection by society because of their manner of living; that the vagueness of the wording in s 377 violated the right to equality under art 14 because the section did not define ‘carnal intercourse against the order of nature’ and there was no intelligible differentia or reasonable classification between natural and unnatural sex as long as it was consensual; that s 377 violated art 15 (protection against discrimination) since there was discrimination inherent in the section based on the sex of a person’s sexual partner; and that s 377 had a chilling effect on art 19(1)(a) (the right to freedom of speech and expression) as it prevented the expression of sexual identity and orientation through speech and choice of partner. The respondent, the Union of India, submitted that the constitutional validity of s 377, to the extent that it applied to the consensual acts of adults in private, should be left to the wisdom of the court. However, a number of intervenors opposed the petition, submitting, amongst other things, that there
was no unbridled right to privacy; that the acts proscribed by s 377 were an abuse of privacy and personal liberty and transgressed the concepts of dignity and public morality; that those acts were likely to increase the spread of HIV/AIDS; that s 377 protected marriage and the family system; and that declaring s 377 unconstitutional could offend art 25 of the Constitution, which protected the freedom of conscience and free profession, practice and propagation of religion. The Supreme Court also considered, amongst other things, s 375 of the Indian Penal Code (describing the offence of rape), as amended by the Criminal Law (Amendment) Act 2013, and the Protection of Children from Sexual Offences Act 2012.

HELD: Petitions granted.

(Dipak Misra CJI and Khanwilkar J (Nariman, Chandrachud and Malhotra JJ concurring in the result for separate reasons)) (i) Recent Supreme Court case law had recognised an inalienable ‘gender identity’ and had correctly connected human rights and the constitutional guarantee of right to life and liberty with dignity. Identity, from the constitutional spectrum, could not be pigeon-holed singularly to the orientation that may have been associated with an individual’s birth and the feelings he or she developed on growing up. Such a limited recognition kept individual choice at bay. At the core of the concept of identity lay self-determination and the realisation of one’s own abilities in accord with constitutional norms and values.

(ii) The view that s 377 of the Indian Penal Code could be upheld because the LGBT community comprised only a minuscule fraction of the total population and that the fact that s 377 was being misused was not a reflection of the vires of the section was constitutionally impermissible.

(iii) The Constitution was a living and organic document capable of expansion with the changing needs and demands of society. It was the Constitution and its principles to which the courts bore their foremost allegiance and they should employ a progressive and pragmatic interpretation to combat the inequality and injustice that tried to creep into society. The role of the courts gained more importance when the rights which were affected belonged to a class of persons or a minority group which had been deprived of its basic rights since time immemorial.

(iv) The primary objective of a constitutional democracy was to transform society progressively and inclusively. The Constitution had been perceived to be transformative in the sense that the interpretation of its provisions should not be limited merely to the literal meaning of its words; instead they ought to be given a meaningful construction which was reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only included the recognition of the rights and dignity of individuals but also propagated an atmosphere wherein every individual was bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind struck at the core of any democratic society. When guided by transformative constitutionalism, society was dissuaded from indulging in any form of discrimination.

(v) Constitutional morality espoused a pluralistic and inclusive society and urged the organs of the state, including the judiciary, to preserve the heterogeneous nature of society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller section of the populace. Constitutional morality could not be martyred at the altar of social morality and it was only constitutional morality that could be allowed to permeate into the rule of law. The veil of social morality could not be used to violate the fundamental rights of even a single individual for the foundation of constitutional morality rested upon the recognition of diversity that pervaded the society.

(vi) The right to live with dignity had been recognised as a human right on the international front and by the Supreme Court. The Constitution had laden the judiciary with the duty to protect and ensure the right of every individual, including the right to express and choose without any impediments, so as to enable an individual to fully realise his or her fundamental right to live with dignity.

(vii) Sexual orientation was one of the many biological phenomena which was natural and inherent in an individual and was controlled by neurological and biological factors. The science of sexuality had theorised that an
individual exerted little or no control over who he or she became attracted to. Any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) The right to privacy was a fundamental right. The reasoning that only a fraction of the population comprised of the LGBT community and that s 377 abridged the fundamental rights of a miniscule percentage of the total populace was fallacious. The framers of the Constitution could never have intended that fundamental rights should be extended for the benefit of the majority only and that the courts ought to interfere only when the fundamental rights of a large percentage of the total populace were affected. The courts should step in whenever there was a violation of fundamental rights, even if the rights of a single individual were in peril.

(ix) There was a manifest ascendance of rights under the Constitution which paved the way for the doctrine of the progressive realisation of rights as such rights evolved with the evolution of society. That doctrine, as a natural corollary, gave birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. Accepting the view in Suresh Kumar Koushal v NAZ Foundation [2014] 2 LRC 555 would be tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and a denial of progressive realisation of rights.

(x) Autonomy was individualistic. Under the autonomy principle, the individual had sovereignty over his or her body. He or she could surrender his or her autonomy wilfully to another individual and their intimacy in privacy was a matter of their choice. Such a concept of identity was sacred and recognition of the quintessential facet of humanity in a person’s nature. Autonomy established identity and identity, ultimately, became a part of dignity in an individual.

(xi) Section 375 of the Indian Penal Code gave due recognition to the absence of wilful and informed consent for an act to be termed as rape; however, s 377 did not contain any such qualification, resulting in criminalising even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375, after the coming into force of the Criminal Law (Amendment) Act 2013, had not used the words ‘subject to any other provision of the [Indian Penal Code]’. That indicated that s 375 was not subject to s 377.

(xii) The expression ‘against the order of nature’ was not defined in s 377 or in any other provision of the Penal Code. The connotation given to the expression by various judicial pronouncements included all sexual acts which were not intended for the purpose of procreation. If coitus was not performed for procreation only, it did not per se make it ‘against the order of nature’.

(xiii) Section 377, in its present form, being violative of the right to dignity and the right to privacy, had to be tested against arts 14 and 19 of the Constitution and the law laid down in authority.

(xiv) An examination of s 377 on the anvil of art 14 revealed that the classification adopted under the section had no reasonable nexus with its object, as other penal provisions, such as s 375 and the Protection of Children from Sexual Offences Act 2012, already penalised non-consensual carnal intercourse. Section 377 in its existing form had resulted in an unwanted collateral effect whereby even consensual sexual acts by LGBTs, which were harmful neither to children nor women, had been targeted, resulting in discrimination and unequal treatment of the LGBT community violative of art 14.

(xv) Section 377, so far as it criminalised even consensual sexual acts between competent adults, failed to make a distinction between the non-consensual and consensual sexual acts of competent adults in a private space which were neither harmful nor contagious to society and was, therefore, manifestly arbitrary, becoming a weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, s 377 was liable to be partially struck down for being violative of art 14.

(xvi) Further, s 377 amounted to an unreasonable restriction of rights under art 19, for public decency and morality could not be amplified beyond a rational or logical limit and could not be accepted as reasonable grounds for curbing the fundamental rights of freedom.
of expression and choice. Consensual carnal intercourse among adults in a private space did not in any way harm public decency or morality. Therefore, s 377, in its existing form, violated art 19(1)(a) of the Constitution.

(xvii) Accordingly, s 377, so far as it penalised any consensual sexual relationship between two adults could not be regarded as constitutional.

Fleming v Ontario and others (Attorney General of Canada and others intervening)

21 March 2018, 4 October 2019
Supreme Court of Canada 2019 SCC 45
Wagner CJ, Abella, Moldaver, Côté, Brown, Rowe and Martin JJ

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A longstanding land dispute between the Crown and the First Nation of Six Nations of the Grand River resulted in the occupation by Six Nations protestors of a piece of land in Caledonia known as Douglas Creek Estates (‘DCE’). The Crown purchased DCE and permitted DCE protestors to continue to occupy the property which sparked other groups in the community to organise counter-protests against the occupation and against the response of the Ontario government and the Ontario Provincial Police (the ‘OPP’). The contentious atmosphere in the community culminated in violent clashes between the two sides. The OPP were called in many times to deal with the violence. Arrangements were put in place occasionally to allow the two groups to demonstrate peacefully near one another. One counter-protest group held a flag rally to protest the occupation of DCE and the flying of indigenous flags along the street which ran in front of the property. The plan was for participants to raise a Canadian flag across the street from the DCE front entrance. F, who intended to participate in the flag rally, walked towards the location carrying a Canadian flag. Police officers spotted F and headed towards him. F stepped onto DCE property which appeared to cause a reaction from the DCE protestors, some of whom moved towards F’s location. F was then arrested but released from detainment two-and-a-half hours later and a charge of obstructing an officer for resisting arrest was subsequently withdrawn. F brought proceedings against the Province of Ontario and seven OPP officers who had been involved in the arrest, claiming damages for, inter alia, wrongful arrest and false imprisonment. In finding in favour of F, the trial judge concluded that the officers’ conduct had not been authorised at common law. The Ontario Court of appeal by a majority allowed the appeal, concluding that the OPP officers had had the authority at common law to arrest F for an anticipated breach of the peace. F appealed. The Province of Ontario and the seven OPP officers argued that their actions had been authorised at common law by application of the ancillary powers doctrine, according to which, they claimed, there was a common law police power to arrest an individual in F’s circumstances in order to prevent an apprehended breach of the peace.

HELD: Appeal allowed.

(1) To determine whether a particular police action that interfered with individual liberty was authorised at common law, the court would apply the ancillary powers doctrine, which was designed to balance intrusions on an individual’s liberty with the ability of the police to do what was reasonably necessary to perform their duties. At the preliminary step of the analysis, the court had to clearly define the police power that was being asserted and the liberty interests that were at stake. The term liberty encompassed both constitutional rights and freedoms and traditional common law civil liberties. The analysis then proceeded in two stages: (i) Did the police action at issue
fall within the general scope of a statutory or common law police duty? (ii) Did the action involve a justifiable exercise of police powers associated with that duty? At the second stage of the analysis, the court had to ask whether the police action was reasonably necessary for the fulfilment of the duty. Three factors were to be weighed in answering that question, namely (a) the importance of the performance of the duty to the public good, (b) the necessity of the interference with individual liberty for the performance of the duty, and (c) the extent of the interference with individual liberty. The onus was always on the state to justify the existence of common law police powers that involved interference with liberty (see [43]–[48]); R v Waterfield [1963] 3 All ER 659, R v Dedman [1985] 2 SCR 2 and R v MacDonald [2014] 1 SCR 37 applied; R v Clayton [2007] 2 SCR 725 and Figueiras v Toronto Police Services Board (2015) 124 OR (3d) 641 considered.

(2) In the instant case, the proposed power of arrest would involve substantial prima facie interference with significant liberty interests. It would directly impact on a constellation of rights that were fundamental to individual freedom in society and would directly undermine the expectation of all individuals, in the lawful exercise of their liberty, to live their lives free from coercive interference from the state. The purported police power fell within the general scope of the duties of preserving the peace, preventing crime and protecting life and property. Preventing breaches of the peace, which entailed violence and risk of harm, was plainly related to these duties. The unique context of the respondents’ purported power of arrest made it particularly difficult to justify at the second stage of the analysis. There were a number of reasons why the standard of justification was especially stringent. The characteristics of the power, and in particular its impact on law-abiding individuals, its preventative nature and the fact that it would be evasive of review, all meant that it would be more difficult to justify as reasonably compared to other common law powers. In applying the second stage of the ancillary powers doctrine stringently, it was clear that a police power to arrest someone who was acting lawfully in order to prevent a breach of the peace was not reasonably necessary for the fulfilment of the relevant duties. Regarding the importance of the duty, there was no doubt that preserving the peace and protecting people from violence were immensely important. Concerning the necessity of the infringement for the performance of the duty, there might be exceptional circumstances in which some interference with liberty was required in order to prevent a breach of the peace. With respect to the extent of the infringement, any interference with individual liberty would be justified only in so far as it was necessary to prevent the breach of the peace from occurring. Where there were less invasive measures that would be effective in preventing the breach, they had to be taken instead. In considering these factors, so drastic a power as that of arrest could not reasonably be necessary. Circumstances could not be conceived of in which a common law power of arrest would be required in order to prevent violence from occurring where there were no other means, available either at common law or in legislation, that would serve this purpose. The respondents’ purported power of arrest would result in serious interference with individual liberty. As a result, such an arrest could not be justified under the ancillary powers doctrine. There was already a statutory power of arrest that could be exercised should an individual resist or obstruct an officer taking other, less intrusive measures. It was not reasonably necessary to recognize another common law power of arrest in such circumstances. The statutory powers were sufficient, and any additional common law power of arrest would be unnecessary (see [56], [67], [69]–[86], [88]–[92], [95]); R v Dedman [1985] 2 SCR, R v Clayton [2007] 2 SCR 725, R v MacDonald [2014] 1 SCR 37 and R v Penunsi 2019 SCC 39 considered.

(3) Accordingly, F’s arrest was not authorised at common law. The ancillary powers doctrine did not give the police a power to arrest someone who was acting lawfully in order to prevent an apprehended breach of the peace (see [7], [8], [101], [102]).
BOOK REVIEWS

Essential Magistrates’ Court Law

Howard Riddle, CBE and Judge Robert Zara

Authors (and CMJA members) Howard Riddle and Robert Zara—the first a former Senior District Court Judge (Magistrates Court) and the second a still-sitting District Court Judge (Magistrates Court)—had extensive judicial experience gained in England and Wales to draw upon when co-authoring Essential Magistrates’ Court Law. They expressed their purpose in writing this book as follows:

…to provide essential law that all magistrates and legal practitioners need to know and apply on points that arise in court almost every day… [in a comparatively slim, and we hope, readable volume.

The volume starts with a short history of the magistracy in England and Wales, including a very brief summary of the creation of the modern day police force from the Bow Street Runners by Chief Magistrate John Fielding to the Police Courts Act, 1879.

Interestingly, the authors point out that due to the uniqueness of the legal system in England and Wales, “no one in our jurisdiction can be convicted of, and remain convicted of, a criminal offence unless lay people (juries or lay magistrates) agree”—thus giving support to the adage that people should be judged by their peers.

Whilst we have seen the numbers of lay magistrates decline to 15,000 (2019 figures quoted), they are still an important part of the legal system. The authors point out that while the jurisdiction of Justices of the Peace (‘JPs’) is quite broad (covering family courts, youth courts, coroners courts etc.), their book in fact only deals with the role of magistrates (both lay and professional) in the criminal justice system.

The explanations offered in the publication are thorough, yet presented in simple terms, such that any reader can understand the procedures required to be followed by magistrates in dealing with their cases.

Essential Magistrates’ Court Law is handily divided into the different stages of a criminal case. Chapter three concentrates on the procedures for applications for warrants, summons bail, criminal behaviour orders and domestic violence protection orders. Chapter 4 outlines what magistrates need to be aware of when defendants appear in court (or not), such as the requirements for open court; the documentation that is required; issues relating to disclosure; how bailed defendants must be treated; ‘either way’ or hybrid offences and summary offences; and considerations governing how magistrates are to deal with young defendants. Issues relating to youth and vulnerable witnesses and defendants actually forms part of a more in-depth, separate chapter (Chapter 5) where the procedures for the protection of such persons (the use of video links, screens etc.) are outlined.

Chapter 6 concentrates on how trials should be conducted, rules of evidence and how the magistrate can manage the trial so there is no abuse of process. It also covers when and how to adjourn a trial; how to deal with late disclosure; and the subjects of hearsay and witness competence. Chapter 7 outlines the common offences and laws that govern these offences and how to hear cases in which they arise. Chapter 8 deals with common defences presented by defendants and ways magistrates can deal with those defences that align with the requirements of the Criminal Procedure Rules (‘CPR’). Chapter 9 focuses on sentencing and presents an outline of the various penalties and sanctions that magistrates can impose. It acknowledges that—whilst they are expected to be guided by the Sentencing Guidelines for Magistrates’ Courts—magistrates also have a duty to consider a range of factors when imposing sentence (such as intention, recklessness, negligence or knowledge of the risks, harm etc.), all with a view to deciding whether (for example) a prison sentence would or would not be an appropriate sanction for a particular offender in particular circumstances. The authors provide some interesting historical statistics on prisons, although they don’t draw any specific conclusions on the issue efficacy of imprisonment as a method for changing criminal behaviour.

Chapter 10 outlines developments that have occurred since 2000—in particular, the increasing use of technology in the courts (including the use of video links so defendants in prison don't have to travel to court for every appearance). There is also a section on the independence of the judiciary, which outlines improvements, such as the creation of the Judicial Appointments Commission and independent judicial conduct
investigation office. The chapter also addresses changes to the CPR, how cases are now managed, and the reduction in delays brought about by trial blitzes and the extension of court hours. The authors note some other, less welcome developments, including the increase in the numbers of unrepresented defendants appearing in magistrates’ courts. Mention is made, as well, of court closures and new pressures now being felt both by magistrates and legal advisors to the courts in England and Wales owing to recent austerity measures.

Whilst Howard Riddle and Robert Zara have only looked at laws and procedures that apply within the magistrates’ courts in England and Wales, much of the advice given in Essential Magistrates’ Courts Law on what needs to be considered by magistrates in the fulfilment of their duties is relevant to all judicial officers working in the courts.

Reviewed by Dr Karen Brewer
Secretary General, CMJA

HOLD ME IN CONTEMPT: A MEMOIR

Dr Shirani A. Bandaranayake

Dr Bandarananayake’s ‘memoir’ is a rare and vivid personal account by a member of the higher judiciary who found herself in the political firing line. She was the youngest and the first woman to be appointed to the Supreme Court of Sri Lanka in 1996. Her path to the higher judiciary was unique in Sri Lanka in that her professional qualifications were obtained locally and her career before elevation had been spent as an academic, culminating in appointment as Dean of the Faculty of Law, University of Colombo.

In 2011, Dr Bandaranayake was appointed as Chief Justice. In January, 2013, she was removed from office by President Mahinda Rajapaksha after a parliamentary process of impeachment which was subject to legal challenge (see Bandaranayake v Rajapakse, [2013] 2 LRC 126, reported herein at vol. 21, no. 2 in December, 2013, but reversed on appeal, [2015] 1 LRC 732). After a change of government, she was re-instated on 28th January 2015. She retired from office on the following day.

Dr Bandaranayake’s memoir gives a blow-by-blow account of the circumstances leading up to her impeachment, the impeachment proceedings themselves and her subsequent removal from office. She tells how, from the first day of her appointment, she found herself in conflict with the President, who ‘blew a fuse’ in rage and fury over the appointment of a secretary to the Judicial Service Commission. She felt that the President was displeased by her ‘disobedience’. She was also ‘horrified’ by apparent attempts to influence judicial decisions through messages from ‘official’ sources.

A politically sensitive decision of the Supreme Court over which she presided seems to have triggered the process which led to her removal. She gives a dramatic account of how, on the eve of the issuance of the decision, she was summoned to an urgent meeting with the President which she declined as her ‘belief and understanding of justice and how to mete it out, do not permit me to accede to his request’. A number of other incidents had convinced her that the whole Sri Lankan judiciary was under attack, including by methods of physical violence, and that its independence was threatened. In November 2012, Dr Bandaranayake was summoned to appear before a select committee of Parliament, the majority of the members of which were members of the President’s governing party, to answer 14 charges alleging corrupt practices and various irregularities in the making of official and judicial appointments. She gives a detailed account, from her viewpoint, of the select committee proceedings which duly led to her impeachment by parliamentary vote. She resisted pressure to retire voluntary and was removed from office by the President in January 2013. Her account ends rather abruptly at that point, as she faced investigations by the Bribery Commission. However, at that dark period in her life, she could take some comfort from reports on the impeachment proceedings by three distinguished international jurists, Professor Sir Jeffrey Jowell QC, Justice Pius Langa and Geoffrey Robertson, QC. The latter concluded that she was innocent of the misconduct charges which had brought about her removal from office—removal which was, in fact, an act of reprisal for the judgment which she had given against the government.

Dr Bandaranayake’s account of the events surrounding her impeachment and dismissal from office suggests scant respect of the government of the day in Sri Lanka for the core values of the Commonwealth in relation to the independence of the judiciary as reflected in the Latimer House Principles. Her intensely personal memoir reflects the trauma of a judge under siege—a salutary tale for our judicial readership.

Reviewed by Dr Peter Slinn
Chairman of the CJF Editorial Board
The magistracy of England and Wales is a democratic jewel beyond price

Lord Bingham of Cornhill, Lord Chief Justice

By a former chairman of the MA

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