Journal of the Commonwealth Magistrates’ and Judges’ Association
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EDITORIAL

BEFORE WE SAY ANYTHING ELSE...

Since the last issue of the Commonwealth Judicial Journal was published in June of this year, the Commonwealth and its realms have lost their sovereign and the Commonwealth its Head. More accurately, the world lost a beloved figure who, with few dissenters, was universally revered and respected as a beacon of integrity and an exemplar of stability in an ever-changing and sometimes bewildering world. (Yes, the monarchy as an institution without doubt has its questioners but its last incumbent had almost none.)

Closer to home, the Commonwealth Magistrates’ and Judges’ Association lost its esteemed Patron.

It is difficult to speak of the late Elizabeth II and her calm and steadfast dignity without having recourse to language that smacks of cliché. Yet, the admiring epithets that have circulated so widely after her death are no less apt for that. The Queen’s steady hand as head of state was an unfaltering one: this despite the fact that her reign began in times of post-war prosperity and then quickly moved forward (or backward) into the cold war period. Her Majesty’s reign carried her on into the 1960s and 1970s when, in the West, widespread optimism and small-l liberal values experienced a renaissance. It continued as the world witnessed a sharp contraction of those values following the postmodern era while, simultaneously, it began finally to face the existential crisis that is climate change. Optimism is now indisputably in decline, cynicism is in the ascendency and trust in governments and other civic and constitutional institutions has been shaken. All of this, too, the Queen witnessed, attentively and empathetically, but with her characteristic determination to see things through.

Despite seismic changes in society at large (and, indeed, within her own family), there were very few missteps in late sovereign’s discharge of her weighty responsibilities over her 70 years and 214 days of service to the United Kingdom, the Commonwealth and the world. History will, we think, judge Queen Elizabeth’s reign kindly. For now, we acknowledge our gratitude for her legacy and example, and we mourn her passing.

THE CONSTITUTIONAL CRISIS IN KIRIBATI

Maintenance of the rule of law requires an independent judiciary. The central meaning of this concept rests on the separation of powers. — per Hastings CJ, Republic v Lambourne [2021] KIHC 8 at 53

Any institution that places the preservation and strengthening of the Rule of Law at the centre of its mandate—as its raison d’être, if you will—must be deeply concerned with developments in the Commonwealth state of Kiribati. The preservation and strengthening of the Rule of Law across the Commonwealth is quintessentially the CMJA’s core concern, and so the CMJA looks with dismay upon the steadily worsening constitutional crisis that is unfolding in Kiribati.

Once known as the Gilbert Islands, a British colony, Kiribati gained its independence as a sovereign and democratic state on 12 July 1979 and simultaneously became the 41st member of the Commonwealth. It has a written Constitution that, in its current iteration as in the original, reflects the separation of powers as a constitutional norm. More particularly, Kiribati’s Constitution contains provisions that, both implicitly and explicitly, evince a commitment to the principle of judicial independence. Article 10(1) for example—which falls under the subheading ‘Provisions to secure the protection of law’ within the Part entitled ‘Protection of Fundamental Rights and Freedoms of the Individual’—guarantees the constitutional right of an accused person in Kiribati to a fair trial by an ‘independent and impartial court established by law’.

Would that it were so easy. These stirring words in the Kiribati Constitution take the island state only so far. As Tolson LJ (as he then was) once famously said, ‘The rule of law is a fine concept but fine words butter no parsnips’.

The Rule of Law in any true, tripartite democracy depends upon mutual respect and acknowledgement of the separate and fundamental roles played by the legislative, executive and judicial branches of government. This necessitates respectful deference, on the part of the executive and legislative branches,
to the role of the judiciary as the arbiter when questions come before courts for adjudication where possible executive overreach, actions taken in excess of jurisdiction or other forms of alleged unlawful action on the part of the other two branches of government are placed in issue.

The Kiribati government’s shoddy treatment of Judge David Lambourne and his judicial brethren has raised all of these generally unquestioned constitutional norms up into the public consciousness in a dramatic way. The government’s conduct in this regard has drawn almost universal condemnation from critical thinkers, statesmen and from bodies and organisations mandated to promote the Rule of Law across the world. In a joint statement issued on 3 November 2022 on the most recent developments in the Lambourne matter, the CMJA, the Commonwealth Lawyers Association (the ‘CLA’) and the Commonwealth Legal Education Association (the ‘CLEA’) have stated, in part:

Kiribati has committed to the shared fundamental values and principles of the Commonwealth. At the core of these values is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. We acknowledge that issues will arise which create challenges, and we respect the independence of Commonwealth members to make decisions, but these should be in accordance with the shared values and international standards.

So what exactly happened to set this constitutional crisis in motion in Kiribati?

Judge David Lambourne is an Australian citizen who has lived and worked in the island state for almost 30 years, serving inter alia as a People’s Lawyer (a legal aid position) and the country’s solicitor-general. In 2018 he received a judicial appointment to the Kiribati High Court for an indefinite term.

It also happens that he is married to the current Leader of the Opposition in Kiribati. Judge Lambourne has stated publicly that he believes that the hostile initiatives that have been taken against him by the Kiribati government giving rise to the current constitutional crisis represent a ‘determined attempt by the government to try and force my wife out of politics’.

In February 2020, during the early days of the global COVID-19 pandemic, Judge Lambourne was in Australia attending a conference. While he was there, Kiribati closed its borders to incoming travelers on safety grounds, and when he made attempts to return home on repatriation flights, he was consistently refused a place. His income was also cut off and border officials declined to issue him a work permit. Citing recently enacted legislation purportedly affecting all superior court judges in Kiribati, government officials explained to Judge Lambourne that he could only return to the country if he signed a contract that retrospectively limited the duration of his judicial appointment to a fixed term of three years, leaving him with only weeks remaining to the end of that appointment. He refused at first, but eventually signed under duress and under protest.

These actions of the Kiribati government, including the passing of retrospective legislation purporting to impose fixed term appointments on him and all members of the judiciary, were challenged by Judge Lambourne and in a ruling by Chief Justice William Hastings given November 2021, those actions were declared unconstitutional. Specifically, Hastings CJ declared:

(a) Judge Lambourne continued to ‘hold office as a judge of the High Court of Kiribati for an indefinite period’ (subject to conditions not relevant here);

(b) legislation purporting to retrospectively vary and limit judicial terms of office was ‘inconsistent with the Constitution and void to the extent of the inconsistency’; and

(c) ‘[t]he exercise of statutory discretions by public officials must recognise the constitutional nature of a judge and be in accordance with the Constitution’.

In response to the Chief Justice’s ruling, Kiribati’s attorney-general, Tetiro Semilota, reiterated her intention to keep Justice Lambourne out of his judicial post.
In May of 2022, the Kiribati government took steps to suspend his judicial appointment, premising its actions on allegations of misconduct against him that are conspicuously free of any specificity. (Those allegations cite, simply and generically, his ‘inability to perform functions of his office and his misbehaviour’.)

Again, Judge Lambourne filed a court challenge, this time attacking his suspension by the Kiribati government as being unconstitutional. The matter was put on Chief Justice Hastings’ list for hearing in June 2022. That hearing could not proceed because, before it could commence, the Chief Justice’s appointment, too, was suspended.

Judge Lambourne returned to Kiribati in August 2022 on a visitor’s visa to rejoin his wife and family. This led to an attempt by the government to deport him—a plan that was expressly disallowed at an emergency hearing of the Kiribati Court of Appeal. The deportation effort continued despite the order given by the Court of Appeal and culminated in a confrontation between immigration officials and the pilot of the commercial aircraft chosen to remove him. The pilot refused to board Judge Lambourne on his flight against his will. A second emergency hearing of the Kiribati Court of Appeal followed the next day, Judge Lambourne was granted bail after having been placed briefly in administrative detention and a week later a three-member panel of the Court of Appeal upheld Chief Justice Hastings’ previous ruling declaring all of the Kiribati government’s actions against Judge Lambourne unconstitutional.

Subsequently in September 2022, all members of the three-member panel of the Kiribati Court of Appeal who decided Judge Lambourne’s constitutional challenge in his favour were also suspended. Proceedings brought by the government aimed at removing them from office on grounds of inability or misbehaviour are now pending.

As a result of all of the foregoing, as of early September 2022, Kiribati had no judges serving on its superior courts—at least, not until 28 October when attorney-general Tetiro Semilota was appointed per saltum to the position of Acting Chief Justice of Kiribati. The Guardian newspaper well captures the affront to democracy reflected in that latest of the Kiribati government’s star-crossed anti-constitutional manoeuvres in a sub-headline for a story it ran on 30 October 2022:

Tetiro Semilota appointed from within ranks of government that fired country’s most senior judge, another from high court and whole court of appeal

Dr Anna Dziedzic—a legal academic of considerable reputation and stature whose scholarly contributions appear from time to time in the pages of this journal—described the gravity, magnitude and long-term implications of the Kiribati government’s actions in the Lambourne matter in an article recently published in The Interpreter.

Judicial independence and the rule of law have been undermined as the executive refuses to comply with court orders regarding the deportation. The institution of the judiciary has been eroded, which not only means that the people of Kiribati do not have access to justice, but that a key mechanism of government accountability has been removed. This is significant: in the past, the Kiribati judiciary has been a pragmatic actor in Kiribati’s system of government, providing advisory opinions to clarify ambiguous constitutional provisions to facilitate governance. Such constructive checks and balances on power are unlikely under current conditions.

It seems barely possible to believe that such a spate of flagrantly unconstitutional action could be unfolding in a sophisticated Commonwealth state in 2022. But we live in an era of shifting sands where truth, democratic norms and the Rule of Law itself are all sometimes openly discredited by those bent upon the relentless pursuit of power, advantage and personal gain.

The separation of powers is a pillar of the tripartite arrangement in Parliamentary and constitutional democracies. The place it reserves for the judiciary at times when the executive or legislative branches are alleged to have transgressed is especially important.
The fundamental rights and freedoms of citizens of so-called democratic states where the separation of powers is not honoured through genuine observance by governments of an independent judiciary’s constitutional role are placed in grave peril. It is for this reason that entities such as the CMJA, the CLA and the CLEA must and will continue to raise their voices resolutely against the actions of government actors, like those in Kiribati, whose unconstitutional conduct demands both condemnation and reform. In the words of the CMJA, CLA and CLEA joint statement of 3 November 2022:

**Kiribati has committed to the shared fundamental values and principles of the Commonwealth. At the core of these values is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. We acknowledge that issues will arise which create challenges, and we respect the independence of Commonwealth members to make decisions, but these should be in accordance with the shared values and international standards.**

We call upon the Government of Kiribati to respect the orders of the Court in the litigation involving Judge Lambourne, to reconsider the appointment of the Attorney General as Acting Chief Justice and to demonstrate respect for and uphold the independence of the judiciary, Commonwealth Principles, and other relevant international standards of due process.

It seems fitting to close this discussion of the crisis in Kiribati with a quotation from de Montesquieu, who famously said as long ago as 1748:

*When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the power of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.*

Plainly, the problems plaguing Kiribati are not new. Neither is the constitutional norm of the separation of powers, as a remedy for such problems, anything new. History continues to teach us the same lesson: eternal vigilance is, indeed, the price of liberty.

**Togo and Gabon**

On 25 June 2022, at the Commonwealth Heads of Government meeting in Kigali, Rwanda, the former French colonies of Togo and Gabon were admitted as the 55th and 56th members of the Commonwealth. The official news release concerning the new member states described the eligibility requirements for admission as follows:

*The eligibility criteria for Commonwealth membership, amongst other things, state that an applicant country should demonstrate commitment to democracy and democratic processes, including free and fair elections and representative legislatures; the rule of law and independence of the judiciary; good governance, including a well-trained public service and transparent public accounts; and protection of human rights, freedom of expression, and equality of opportunity.*

**CMJA Conference in Cardiff**

While it is some time away, it is not too soon for readers to diarise the CMJA’s next annual conference to be held in Cardiff, Wales from 10-14 September 2023.

The COVID-19 pandemic rather spoiled matters in 2020 when Cardiff was to be the host city for that year’s conference. Those who were looking forward to gathering together for intellectual stimulation and friendly fellowship in the warm and welcoming company of their Welsh colleagues shall, we think, have their wishes fulfilled at last next September. The conference theme that has been chosen for 2023 is ‘Open Justice Today’.

The coronavirus hasn’t been invited to the 2023 conference and isn’t welcome. Whether it will crash the party, no one can say with certainty. However, conference organisers and prospective attendees are a hopeful lot and so we’re all approaching the Cardiff gathering with a robustly positive attitude.
WHAT AWAITS YOU IN THIS ISSUE

We have in this issue fine articles by:

- Lord Dyson on what can and cannot be safely said by judges and judicial officers extra-judicially;

- Justice Beverley McLachlin on the benefits and risks that attend the modern practice whereby judges are now emerging more regularly from their former ‘ivory tower’ isolation and engaging directly with those whom they serve;

- Dame Vera Baird on recent legislative reforms in the UK that expand the range of offences that fall under the ‘intimate partner violence’ rubric and the somewhat uneven successes of those reforms to date in relation to the charging and prosecution of those offences;

- Dr Leonardo Raznovich on decisions issuing from the Judicial Committee of the Privy Council recently that have set back some progressive legislative reforms in certain Caribbean states regarding LGBTQI+ rights. Dr Raznovich raises the broader question of whether, in light of such decisions, having the JCPC continue to serve as the apex court for those Caribbean states should be revisited;

- Hon Keith Hollis on the issue of judicial wellbeing and the various ways, both personal and institutional, that it can be fostered (the first in a series); and

- Prof Paula Giliker on the doctrine of vicarious liability as it has been refracted through the lenses of the UKSC and the apex courts of Canada, Australia, Ireland, Hong Kong, and Singapore.

No Law Reports are included in this issue of the CJJ. They are on hiatus as we reformulate our approach to them. The Editorial Board feels that the inclusion of a few headnotes in extenso has not been a good use of journal space. It is planned that future issues will contain digests of a broader range of cases.

We have three outstanding book reviews in this issue, namely:

- a review, by Justice Joseph Fok, of Constitutional Statecraft in Asian Courts by Yvonne Tew;

- a review, by Dr Peter Slinn, of Selected Papers and Lectures on Ghanaian Law by S.K. Date-Bah; and

- a review, by Dr Robert Diab, of The Courts and the People: Friend or Foe? (The Putney Debates 2019).

And if I may digress for just a moment, I will say that many of the substantive points that Justice Fok makes in his excellent review of Constitutional Statecraft in Asian Courts regarding the Rule of Law and the separation of powers resonate strongly with some of the points made above in the part of this Editorial that deals with the current crisis in Kiribati. This quotation from Justice Fok is an especially good example:

*It is undeniably the case that the extent to which courts can protect and develop constitutionalism in practice depends in part on executive and legislative branches eschewing thin conceptions of the Rule of Law and accepting the courts’ judicial review role as a proper collaborative check and balance on their powers.*

And lastly, before closing, readers are urged to take time to give a close and respectful reading to the obituaries published in this issue for three distinguished and exemplary contributors to the success of the CMJA who we have lost in the last short while, namely Michael Lambert FCA, CBE; John Buchanan PhD, JP; and Peter Latham FCA.
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 submitting a manuscript or contribution.

**Contact Details**

Manuscripts sent by e-mail, as Word document attachments, are particularly encouraged. These should be sent to CJJEditor@shaw.ca with a copy to info@cmja.org. Alternatively, manuscripts may be sent by post to CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, UK, marked to the attention of the editor.

**Information for Authors**

1. Manuscripts should 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. Hyperlinks should not be embedded in manuscripts submitted for publication.

7. Manuscripts should be purged of all ‘track changes’ notations before being submitted.

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

9. 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.

10. By submitting an article or other contribution for publication, you confirm that the piece is original and that 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.

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 authorise publication of the articles in other appropriate publications.
OBITUARIES

The CMJA mourns the recent deaths of three individuals who, over many years, have been important and influential in the pursuit of the Association’s mandate to promote the Rule of Law across the Commonwealth.

MICHAEL LAMBERT FCA, CBE

Michael Lambert—who, sadly, died on 23 August 2022—considered his work for the Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) to be his greatest achievement. The CMJA, in turn, feels a deep institutional debt of gratitude to Michael for his 45 years of voluntary service to the Association. He took great pride and pleasure in promoting advanced training and best practices for magistrates, judges and judicial officers across the Commonwealth. It was that contribution for which he was recognised with the award of the CBE in 2006.

In 1994, Michael was invited to become Executive Vice-President of the CMJA (essentially the executive chair) and served in that capacity for twelve years. He continued to serve concurrently as Treasurer until 2002. Overall, Michael attended some 35 international legal conferences in locations including Cape Town, Edinburgh, Malawi and Toronto. Those conferences were always attended by leading members of the Commonwealth judiciary and frequently the host country’s president or prime minister.

The first conference Michael led was closer to home, at the University of Oxford in fact. It was, truth be told, a somewhat inauspicious start for Michael. He parked his car in college grounds without permission and had to make a grovelling apology to the College principal. Matters did not improve when distinguished guests complained about staying in student accommodation with shared bathrooms. Lord Hailsham had his dinner whisked away by college servants before he had finished eating. However, Michael soon saw the lighter side of CMJA conferences when a group of senior judges, slightly worse for wear, led by the Canadian delegation, had to climb the college walls to get in late at night after the gates had been locked.

The obituary for him that ran in The Times on 5 November 2022:

Stylish and fun-loving, he ran shoots, sailed, even crossing the Atlantic in his seventies, drove Aston Martins and collected Dutch art and antiques. He was a charismatic figure who hated to lose and liked to win. Despite that, there remained about him a gentle, almost Edwardian, air. He also knew how to throw a party, for which he would sometimes don headgear from his ‘silly hats’ collection, among them a fez and a judge’s wig.

Other aspects of Michael’s lighter side are captured in this quotation taken from the obituary for him that ran in The Times on 5 November 2022:

Michael’s ties to the CMJA began with his father—a magistrate on the Uxbridge bench until his retirement in 1977. During that time, Michael’s firm provided accounting support to the CMJA. Magistrate Leonard Lambert also served as the CMJA’s Treasurer. Sir Thomas Skyrme, then the Association’s President, invited Michael to take his father’s place as CMJA Treasurer upon retirement. Michael agreed.

As time progressed, Michael showed the value of expertise in another discipline (in his case, accounting) could bring to CMJA’s internal legal discussions. He thus became a close confidante of Thomas Skyrme and many of the other senior judges who led the CMJA, including Richard...
Banda, then Chief Justice of Malawi, and his wife Joyce (who became President of Malawi). Michael and his son Simon were proud to help fund a school for girls in Malawi.

As has been noted, Michael was passionate about improving training for judges and magistrates as a way of bolstering the Rule of Law across the Commonwealth. He believed the CMJA could play an important part in fostering global harmony and worked assiduously toward that goal.

One of the highlights of his time in high office was the CMJA's contribution to the joint colloquium at Latimer House with the Commonwealth Parliamentary Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association in June 1998. The meeting yielded the ‘Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence’ which were eventually distilled into the ‘Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government’, endorsed and accepted by the Commonwealth Heads of Government in 2003. The Latimer Principles became part of the Commonwealth fundamental values in 2005, promoting the separation of powers, the Rule of Law and human rights.

The organisation and execution of the CMJA's international conferences were always a test of Michael's diplomatic and organisational abilities, never more so than in 1994 when the conference was held at Victoria Falls, Zimbabwe. There, Zimbabwean President Robert Mugabe had a place in the conference programme as a speaker. His subject was the virtues of judicial independence as a democratic value and the text of his speech had been carefully brokered by the CMJA with the President's aides. As matters unfolded, however, President Mugabe departed from that text to launch a vicious and intolerant attack on Prime Minister Tony Blair, railing against the PM’s ‘reliance on homosexual advisers’!

When Michael Lambert eventually retired from the CMJA, he was honoured by the CMJA General Assembly—led then by the President of the CMJA, former Deputy President of the UK Supreme Court, Lord Hope of Craighead. The Assembly made him an Honorary Life Vice-President. This, Michael quipped, allowed him thereafter to ‘attend the conferences without having to work—which is ideal!’.

On learning of his death, Michael’s friend—the Immediate Past President of the CMJA, Justice Charles Mkandawire—described Michael as ‘a thoughtful person, committed, truthful, effective, efficient, loving; a man of extraordinary generosity. He had a passion for justice, judicial independence and the Rule of Law’.

Michael was much admired and will be missed.

**Dr John Buchanan JP**

Dr John Buchanan—who in 1985 was appointed Secretary of the Commonwealth Magistrates’ Association (the ‘CMA’) as it then was—died, sadly, on 21 August 2022. John was a member of Gravesham Magistrates Bench and continued to sit as a magistrate during his term of office as Secretary of the CMA. He oversaw the conversion of the CMA to the current Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) in 1988.

Throughout his time as Secretary, John travelled to Council meetings and training courses across the Commonwealth and always appreciated the friendships he made during these travels. He was accompanied on many occasions by his wife, Mary, to such meeting and events.

John was heavily involved in the organisation of the Cyprus Conference (1985) as well as the Triennial Conferences in Ottawa (1988) and Sydney (1991). He modernised the CMJA’s administration and masterminded the move of the CMJA offices from the basement of the Magistrates’ Association of England and Wales...
(in Fitzroy Square) to self-contained, well equipped premises in Duke Street. John was also instrumental in the drafting of the CMJA’s new constitution, integrating judges as members working closely with the then Chairman of Council, Sir Brian Roberts. He represented the CMJA at Commonwealth meetings on a number of occasions. John continued as an active member of the CMJA and attended CMJA events and conferences when he could until his death. He always remained interested in the activities of the CMJA.

John was born in Scotland but spent his early years in Manchester where he attended university to study physics. He undertook post-graduate studies in Manchester and Switzerland where he studied cosmic rays, ultimately completing his PhD.

John worked for the UK government on armament research and then for the Reed Paper Group where he was responsible for research on packaging. He then worked for Unilever where he served as Research and Development Manager. He was a Fellow of the Institute of Physics and of the Institute of Packaging; he also acted for a time as the President of the Stationers Company and of the City of London Livery Company for the Communications and Content Industries.

Patrick Latham FCA

The CMJA Honorary Treasurer, Patrick Latham, died sadly on 7th August 2022. Although he suffered from a long illness, few knew of the extent of it and it was not until the last 10 days of his life that he was obliged to cease serving in his role as Treasurer—a role in which he had worked tirelessly and conscientiously.

Patrick was educated at Wellington College and qualified as a Chartered Accountant. For many years he worked as Finance Officer in a variety of international companies, finally ending his professional career with Cancer UK. He made a significant contribution to the professionalism of the management of charity funds and founded the Institute of Legacy Management.

Patrick married Shah and in 2021 celebrated their golden wedding with their two children and four grandchildren. He was a keen and accomplished golfer, and he and Shah enjoyed many happy holidays involving long distance walking—often at great speed—in many parts of the world.

In 2012 the Commonwealth Magistrates’ and Judges’ Association was looking for a Treasurer. Having just retired from a full-time position in that capacity with Cancer UK, Patrick was persuaded to take on the assignment with the CMJA. His knowledge and skills, coupled with an enormous amount of time and hard work, transformed the Association’s accounts. This contribution was accompanied by wise and clear advice on all matters concerning the Association. No charity could have received better service and be more indebted to its Treasurer than the CMJA.

The role of CMJA Treasurer included involvement in attending annual conferences held in various Commonwealth countries and Patrick and Shah attended at least eight of these in locations ranging from New Zealand to Guyana to Zambia and to Papua New Guinea. Both he and Shah worked hard assisting with the finances and administration of the conferences.

News of Patrick’s death produced notes of great appreciation from all over the Commonwealth. So many of them emphasised his great skill, kindness and integrity and expressed appreciation for his friendship and good humour.
BEYOND THE BENCH: WHAT CAN JUDGES SAY EXTRA-JUDICIA LY?

Rt Hon Lord Dyson, a former Justice of the UK Supreme Court. This article comprises the author’s keynote address at a conference, entitled ‘Beyond the Bench’, which was held in September 2022 at Newcastle Law School (UK). The conference was generously funded by the Society of Legal Scholars.

Abstract: Attitudes within the judiciary regarding what judges can say, extra-judicially, have been evolving. It was once considered improper for judges to make public any statements at all. While there is still no clear consensus, it is now generally accepted that judges’ freedom of expression is deserving of considerable deference and protection, and that the limits on judges’ freedom of expression should be minimal, even where the subject matter of comment may be legally controversial. Examples of circumstances where extra-judicial comment remains unwise and ill-advised are provided, while a case is made for a generally more liberal approach than previously existed—an approach where the tight restrictions of the past can and should be relaxed. It is axiomatic that judges’ extra-judicial comments should be, and are overwhelmingly likely to be, measured and responsible.

Keywords: Extra-judicial commentary by judges – judges’ freedom of expression – Evolving standards and practices regarding extra-judicial commentary by judges – differing considerations regarding extra-judicial commentary given by sitting and retired judges – practical limits on the ability to constrain judges’ freedom of expression

INTRODUCTION

What judges do is very important. It affects the lives of most if not all of us in different ways. Until recently, they have been seen as rather remote, austere figures about whom little is known as individuals. And yet they are very public figures. Their salaries are paid out of the public purse. Although their independence is rightly prized as an important feature of our unwritten constitution, they are public servants in the sense that what they do is in the public interest. It is in the public interest that they determine private and public law disputes fairly and in accordance with the law. It has been accepted for some time that serving judges, when performing in the public arena, should not be restricted to speaking through their judgments. The cautious and rather austere Rules that were promulgated in 1955 by the then Lord Chancellor, Lord Kilmuir, stated that, generally speaking, it was undesirable for judges to make public any statements at all. But these were abolished by Lord Mackay of Clashfern in 1987. He said that judges should be allowed to decide for themselves what they should do; but he was careful to say that they should avoid public statements either on general issues or on a particular case which cast any doubt on their complete impartiality and that they should avoid issues which were or might become politically controversial.

FORMAL MECHANISMS: A GUIDE BUT MINIMAL TRAINING

When I was appointed as a high court judge in 1993, I received no training or guidance as to what I might say extra-judicially. The convention that judges did not need to be told how to do any aspect of judging was long-standing. Whatever its juridical basis may have been, there was no doubt that it was well entrenched until fairly late in the 20th century. The Judicial Studies Board (now the Judicial College) was established in 1979. Until then, judges had received no formal training. Many older judges were resistant to the idea of judges being told how to do their job. But over time, training was welcomed, and its scope was extended. It came to be appreciated that there were aspects of judging that could be taught: it was not all about untutored, innate and instinctive judgment.

How far (if at all) it was proper for me as a serving judge to travel outside the confines of judging or what it would be proper for me to do when I retired was left entirely to me to decide. It was left to the judgment and good sense of the individual judge to act as they thought...
appropriate. It may be that it was felt by senior judges that to prescribe the contours of what was permissible would breach the canon of non-interference with judicial freedom.

The Guide to Judicial Conduct was first published in 2003. By this time, I was in the Court of Appeal. It was published without fanfare and I did not receive any training as to how the Guide should be applied in practice. That is perhaps not surprising because the Guide is based explicitly on the principle that responsibility for deciding whether or not a particular activity or course of conduct was appropriate rests with each individual judge. As the Guide says:

[It] is therefore not a code, nor does it contain rules other than where stated. Instead, it contains a set of core principles which will help judges reach their own decisions.

The three basic principles guiding judicial conduct are stated to be judicial independence, impartiality and integrity.

The Guide does go on to give some useful guidance on specific issues which are germane to this seminar. Of particular relevance is the statement that, by long standing convention, judges should not comment publicly on (i) the merits, meaning or likely effect of government policy or proposals, including proposed legislation; (ii) the merits of public appointments; or (iii) the merits of individual cases. The conventions are said to operate to promote the dignity of the judicial office, the finality of judgments and, crucially, the independence of the judiciary from the other branches of government.

Despite this guidance, much continues to be left to the good sense and judgment of the individual judge. Thus, for example, the Guide states that judges should, so far as is reasonable, avoid extra-judicial activities ‘that are likely to cause them to have to refrain from sitting because of a reasonable apprehension of bias’. The question of whether there is a reasonable apprehension of bias is by no means always easy to resolve, as some of the decided cases testify. And yet that is the test that a judge is required to apply when deciding whether, for example, to speak extra-judicially on an issue. The prudent approach is to say no in cases of doubt. But some judges are more cautious than others. Some will harbour doubts in circumstances where others would not.

Commenting on Government Policy

I shall start with the convention that judges should not comment publicly on government policy and proposed legislation. No serving judge would consider it right to comment on policy or legislation outside the sphere of Justice and I am not aware of any judge having done so. Public comments by serving judges on Government policy outside the sphere of Justice would be rightly regarded as none of the judge’s business and in breach of the separation of powers.

But what about comment on policy or legislation within the sphere of Justice? The Guide states that there is, in principle, no objection to members of the judiciary speaking on legal matters which are unlikely to be controversial at lectures, conferences or seminars. But opinions may differ as to what is likely to be controversial. By convention judges may speak privately to Government about policy and proposed legislation. Indeed, Government welcomes such private comments and finds them a useful part of the consultation process that leads to legislation. This is especially the case as regards contributions from leadership judges, in particular the Lord Chief Justice. Judges also respond privately to consultation papers issued by the Law Commission. Public comments by serving judges on government policy or proposed legislation are rare. One exception is where they are invited by a Select Committee of Parliament to give evidence about policy or proposed legislation.

The existence of the convention that, generally speaking, a serving judge should not comment publicly on government policy or any proposed legislation is not in doubt. In my view, this is a sensible convention. To have various judges expressing a multiplicity of opinions about government policy or legislation would serve no useful purpose. Worse, it would run the risk of confusing the general public about what the judiciary thinks about potentially important legal issues, thereby undermining public confidence in it.
COMMENTING ON THE MERITS OF INDIVIDUAL CASES

The other convention that I wish to mention is that judges should not comment on the merits of individual cases. What is objectionable about judges criticising or otherwise commenting on the judgments of other judges extra-judicially? It seems to me that there needs to be a compelling reason to justify such an interference with a judge’s right to freedom of expression. The principal reason given by the Guide appears to be to avoid the risk that the judge may have to refrain from sitting in a case because of a reasonable apprehension of bias. This could arise where a judge has commented on a judgment in case A in which an issue has been decided and the same issue arises in case B which the judge has been asked to hear. I accept that there is a risk of this occurring very occasionally. If it does, the judge may feel the need to recuse himself or herself. It will usually be possible to identify the risk in advance of the hearing and a different judge asked to hear the case. This is unlikely to cause any problem. The possibility of the need for a recusal seems to me to be a weak justification for advising judges never to comment on the merits of other cases.

The convention is not justified on the basis that there should be comity between judges. Judges act independently of each other. They owe no duty to each other. They frequently express disagreement with each other in judgments in appeals or in dissenting judgments. So why should they be inhibited from criticising or otherwise commenting extra-judicially on judgments of other judges?

One reason might be that the most effective way to arrive at a sustainable conclusion on a point of law is to have it tested in the crucible of oral argument by opposing advocates. A judge who ventures into difficult areas of law without the benefit of adversarial argument, so the argument might run, is less likely to produce a good decision than one who has witnessed the testing of the arguments by opposing advocates. I suggest that this is not a convincing reason for judges to refrain from expressing their opinions on legal issues extra-judicially. Brilliant judges may well be more likely to produce a good decision on their own than less talented judges are able to do even with they have the benefit of adversarial argument. After all, academics usually write without the benefit of adversarial argument and some of their work is outstanding.

Another reason might be that to allow judges, especially lower tier judges, to criticise the judgments of their peers or even judges senior to them might create confusion, at least in the minds of laypersons; and it might damage the reputation of the judicial system. It might be said that this would be bad for the Rule of Law. This does not seem to me to be a good reason for muzzling judges either. It is inherent in a system like ours in which decisions within the judicial system are susceptible to appeal that judges may disagree with each other.

I conclude, therefore, that there is no good reason for judges to feel inhibited about commenting on decisions of other judges. Senior serving judges frequently give lectures and participate in seminars on all manner of legal subjects. They are encouraged to do so. The role of a UK Supreme Court Justice includes ‘promoting understanding of the justice system, the Supreme Court and the Rule of Law both inside and outside the Court, for example through lectures’. It is inevitable that such lectures will include discussion about important court decisions. It is unrealistic to suppose that such discussion will be entirely descriptive and neutral. Anodyne description is unlikely to be of much interest or value and certainly would not warrant input from a Justice of the Supreme Court. What is required and expected is a critique and an element of evaluation. And indeed, that is what happens. I gave many lectures in my judicial career on all manner of topics relating to the law and the justice system. Some contained more controversial comment than others. So far as I am aware, I was never criticised for doing so. I hope and believe that some of the lectures made a contribution to the understanding of the law and the system. I also believe that the fact that I was speaking as a judge (rather, say, than as an academic lawyer) did provide some added value.

PUBLICLY DEFENDING ONE’S OWN JUDGMENTS

Moving away from the convention of not commenting on the merits of individual cases,
I should mention the convention that judges should not defend or explain in public their judgments. If a judgment is unfairly criticised, it is tempting to answer back and correct what the judge thinks should be corrected. But this is a temptation that should be firmly resisted. First, the judge is not best placed to make an objective assessment of the fairness of the criticism. Secondly, to answer back may well merely provoke a response and potentially lead to an unseemly squabble, with allegation followed by counter-allegation. Thirdly and fundamentally, such an exercise is damaging to the dignity of the judicial office. If the criticism is based on a misunderstanding of the judgment, it may be possible for the Judicial Office to set the record straight. But otherwise, the judge simply has to take the criticism on the chin and move on. Memories are very short. Even if the judge is angered and feels deeply wounded by the unfairness of the criticism (and judges do have feelings), those who read the criticism will almost certainly forget it very quickly.

**Engaging with the Media**

An important convention that is almost universally observed by serving judges is not to engage with the media. So far as I can recall, I only breached this convention twice during my judicial career. The first time was when I gave an interview to Frances Gibb, the legal editor of *The Times*, shortly after I had been appointed to be the judge in charge of what became known as the Technology and Construction Court. The second was shortly after I had been appointed Master of the Rolls when I was interviewed again by Frances Gibb. On both occasions, I was speaking to the media in my leadership capacity and not simply as a judge. On both occasions, I wanted to give information about the court over which I was presiding. The second occasion was the more arresting.

I felt that there was little public awareness of the importance of the Court of Appeal and the work that it did. I told the Head of Communications in the Judicial Office that I wanted to request an interview with Frances Gibb. He thought that this would be risky and counselled against it. But I went ahead. The interview resulted in an excellent article published under the headline ‘We are the powerhouse, the real engine room, says Dyson’. I recognised that I had taken a gamble, because I would have no control over the content of the article. But I judged that Frances was unlikely to cause real damage to the reputation of the Court. In the event, the article raised the profile of the Court and boosted the morale of my colleagues. So everyone was happy.

Since I was appointed as a judge in 1993, there has been a considerable relaxation in what is regarded as acceptable for a judge to do. This reflects the more relaxed attitudes that have become evident in relation to the legal profession and, perhaps, society more generally. A good example is the televising of court proceedings. This would have been unthinkable even in the late 20th century. In a similar way, the televising of Parliamentary proceedings would have been unthinkable until shortly before it was introduced in the 1980s. These days, televising of these important public activities is not regarded as controversial. On the contrary, it is regarded as highly desirable and an important element of our open democratic system.

But there continue to be limits to what is considered appropriate for a judge to say and do extra-judicially and I have outlined some of them already. One of the leading judges who was keen to loosen the stays was Lord Taylor of Gosforth. He was Lord Chief Justice from 1992 until his untimely death in 1997. He decided to participate in the BBC programme Question Time. He was a modern, approachable man and he wanted to show the public what kind of person was head of our justice system. I recall watching the programme. It was a public relations flop. It was obvious that he felt seriously inhibited about saying anything interesting at all. What made matters worse was that many of the questions were about political issues of the day and had nothing to do with the justice system. He never appeared on this or any similar programme again and I am not aware that any other senior judge did so either.

The position of retired judges calls for separate mention. It might be thought that retired judges should not be inhibited in the way that serving judges are and should be. Why should the principles of promoting and preserving judicial independence, impartiality and
integrity apply to them? They are no longer deciding cases. The answer given by the Guide is that a retired judge may still be regarded by the general public ‘as a representative of the judiciary’ so that retired judges should exercise caution to avoid any activity ‘that may tarnish the reputation of the judiciary’.

I question whether this is a convincing justification for the restriction on retired judges’ freedom to comment on aspects of the judicial system or on decided cases. Interference with any person’s right to freedom of expression requires cogent justification. This includes the right to freedom of expression of retired judges. The general public may believe that retired judges are representatives of the judiciary, but they clearly are not. They are not performing judicial functions and no informed member of the general public can reasonably believe that they are doing so.

There is a real public interest in learning from retired judges what they think about burning legal issues of the day. They may have much to contribute to the debate generated by legal reforms or important decisions of our highest courts. The general public are permitted to hear from academics and journalists and frequently do so. Why should they be prevented from hearing what retired judges have to say, especially recently retired senior judges? The best of these have had great experience of thinking about and dealing with legal issues in the real world of the courtroom. The risk that if they speak they may tarnish the reputation of the judiciary seems far-fetched to me. Judges tend to be cautious and circumspect in what they say. They are unlikely to go wild once they retire.

It is interesting that the Guide merely advises retired judges to ‘exercise caution’. It is difficult to know what this advice means in practice. My impression is that very few retired judges have the appetite to comment on Government policy or court decisions. But some do and the media rapidly work out who they are. Perhaps the most well-known of these was the late Judge Pickles. He was a circuit judge who was given to making forthright comments on cases even before he retired. His production of comments gained momentum after he retired. The media loved him and I expect many members of the general public did too. He was not an outstanding jurist, but that did not matter so far as the media were concerned. Judge Pickles was something of a maverick.

**Concluding Thoughts**

In my view, there is nothing objectionable in retired judges speaking publicly about legal issues of the day, including interesting current cases. It is axiomatic that comments should be, and are overwhelmingly likely to be, measured and responsible. If they are, no right-minded person would consider that they will damage the reputation of the judiciary or the justice system. I doubt whether even intemperate or inflammatory comments would do any real damage. In an extreme case, the Lord Chief Justice might feel impelled to say something. Almost certainly it would be better to ignore such comments. But it is not possible to prevent a retired judge from saying or doing something inappropriate if that is what they want to do. In my opinion, none of these possible difficulties is sufficient to justify seeking to interfere with a retired judge’s right to freedom of expression.

I should add that there may be a useful analogy here with former members of a Government Cabinet. They are free to comment on decisions of their former colleagues. Once they cease to be members of Cabinet, they are no longer bound by the convention of Cabinet collective responsibility. It is no easier to see what justification there could be to restrict their freedom to comment on Government decisions than to restrict the freedom of retired judges to comment on decisions of judges.

As a postscript, I should say a word about the publication of judges’ memoirs and diaries. First, memoirs. In writing my own memoir, *A Judge’s Journey*, I did not think as hard as perhaps I should have done about whether there were any areas of my professional life that should have been off-limits. I gave a frank account of what it was like for me to be a judge and about some of the key events of my judicial life. I do not recall any incidents which I wanted to describe, but did not describe because I felt inhibited about doing so.

As for diaries, I did not keep a diary (other than an appointments diary). It is well known that Lord Hope of Craighead did keep a
detailed diary of several years of his life in the UK Supreme Court. The details included descriptions of the deliberations of the Justices of the Court and the exchanges that passed between them. I confess that it would never have occurred to me to publish to the world such exchanges. It seems to me obvious that they are confidential. If judges know or believe that what they say to their colleagues when they are discussing how a case should be decided is likely to be published, that is bound to have a seriously inhibiting effect on what they say. It is one thing to keep a record of the exchanges for one’s personal use. It is quite a different matter to publish the record to the world for all to see. I greatly regret the fact that Lord Hope chose to publish this record.

I should conclude my remarks by congratulating the Law Faculty of Newcastle University for organising the seminar at which the keynote address that served as the basis for this article was delivered. The subject of extra-judicial activity is important and has not received the attention that it deserves. In recent years, there has been growing interest in academic circles and more widely in judges: who they are and what they do. But there has been insufficient focus on what it is legitimate for serving and retired judges to do when they are not deciding cases. This seminar, to which some very distinguished academics have contributed, has gone some way to making good that deficiency. I hope that it will stimulate more thought and discussion about this important subject.

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JUDGES AND THE PUBLIC: IVORY TOWER RECLUSES OR ENGAGED ACTORS?

Rt Hon Beverley McLachlin, the former Chief Justice of Canada and currently a Non-Permanent Justice of the Hong Kong Court of Final Appeal. This article comprises the author’s address to members of the Hong Kong judiciary at a meeting of the Hong Kong Judicial Institute on 12 December 2019

Abstract: Historical norms discouraging the engagement of the judiciary with the media and the general public called for almost complete isolation. However, in modern times the case for cloistering judges has undergone increasing critical scrutiny and been found wanting. The enlargement of the role of judges in people’s ordinary lives by the enactment of legislation such as the Canadian Charter of Rights and Freedoms has occasioned a reconsideration of past practices. Citizens are entitled to know something about the individuals who have increasing power and responsibility profoundly to affect their lives. Judges cannot therefore properly carry out their judicial functions from within ivory tower-like silos, remote from the citizens they serve. Further, judges must, in some circumstances, be able to take steps to defend themselves or legal institutions from unfair attacks by supplying otherwise unavailable background facts and information. It benefits society generally for judges sometimes to address the public on legal subject matter of general application. It is argued here that the cautious and measured relaxation of historical norms witnessed in this area in recent years has been a positive development. The author proposes some rules of thumb, drawn from her own experience as the Chief Justice of Canada during this transitional period, that judges can follow when considering engagement with the media and the general public.

Keywords: Historical norms governing engagement of the judiciary with the media and the general public – ‘cloistering’ of judges – changing policies and practices regarding public-facing activities of judges – judges’ ability to respond to unfair attacks – rules of thumb to guide judges in ensuring their engagement with the media and general public is measured and properly cautious

INTRODUCTION

Judges are different, set apart, aloof from the world. They live in ivory towers, remote from the bustle and controversy of the real world far below. They do not go to community meetings. They do not talk to the press. When people criticise them, they do not respond, bearing their frustration in silence. What I have just described is the classic view of how judges should conduct themselves.

The classic view of judges as remote from the ordinary hoi poloi has come under question in recent decades, however. More and more, modern judges are climbing down from their ivory towers and mingling in the world. They are going to community meetings to talk about their work. They are giving public speeches and lectures. Judges responsible for the administration of justice, like Chief Judges, give state of the union addresses, issue press releases, submit to media interviews and brave the assaults of press conferences.

What is going on? Why are things changing? Is the new openness practiced by many judges good or bad? How, in particular situations, should a judge respond to demands for openness. I do not claim to have definitive answers to questions such as these. My goal tonight is more modest. I want to share with you my experiences in moving from the classic model of the isolated judge, to a more open model. I hope the challenges I faced will resonate with you and generate a conversation about the difficult issues judges face given the emerging demand for more judicial transparency and openness.

THE CLASSIC MODEL

I joined the Bar in 1969, more than fifty years ago, when the classic ivory-tower model for judicial conduct still ruled supreme. Judges were seldom seen outside the courthouse. On rare occasions they sallied forth for bar or professional events, on condition that the organisers provided a separate VIP reception room and an elevated head table, designed to
distance them from the mass of ordinary lawyers teeming below. Judges, it was said, spoke only through their judgments. Rarely if ever did they give speeches. They seldom conversed with lawyers and never with the public.

The classic model served, or was thought to serve, two purposes. The first was to perpetuate public respect for judges and the courts. Like robes and high benches, the remoteness of judges accentuated the specialness of their calling. Judges were high priests, a cut above ordinary mortals. Their remoteness served as a symbol of their independence and impartiality. Ordinary mortal concerns could not sway them. They issued their rulings from on high on the evidence and legal submissions vented in the courtroom, and those alone. The second and related purpose of the classic model was to minimise the possibility that an unfortunate comment or demonstration of human fallibility would diminish public respect for the judge and thus the court as a whole. Don’t let the judges out; they cannot be trusted to behave.

When I was asked to go on the bench at the tender age of 37, I drew up a list of pros and cons to help me make my decision. High on the con side of the list was the isolated position of judges. I was too young, I thought, to withdraw from the world. Yet if I said yes to judging, I would have to accept that. In the end I did say yes, resigning myself to life in the judicial equivalent of a convent, except for private time with my husband, son and a few close family members and friends.

So, it came as a surprise when shortly after being sworn in, I encountered my first lesson in openness. When I was sworn in the Supreme Court of British Columbia in 1981, I was only the second woman on the Court. The appointment of a woman was understandably newsworthy. I received an interview request from a reporter with the Vancouver Sun. The Classic Model Begins to Yield

My first reaction was to decline; judges don’t give interviews. But before I did, I mentioned it to my Chief Justice, a legendary Canadian judicial icon named Allan McEachern. He cocked his head and said, much to my surprise, ‘Do it, the people of B.C. are entitled to know who their judges are.’

The Chief Justice of the Supreme Court, Brian Dickson, could have reacted by pulling his judges firmly up the steps of the ivory tower and locking the door behind them. Instead, he adopted a policy of openness. It had a number of facets.

But my Chief Justice’s words stayed with me: ‘The people are entitled to know who their judges are.’ I realised that judges are human beings performing a public function that had the potential to profoundly affect the lives of men, women and children. The public was indeed entitled to know something about the people who had been entrusted with this formidable responsibility. It was a matter of transparency and preserving confidence in the judiciary. The world was beginning to change. Secrecy and withdrawal might stoke concerns about whether a young female judge could do the job; bringing my experience out into the open had the opposite effect.

The Transformative Influence of the Charter Upon the People’s Right to Know

My appreciation of the people’s right to know who their judges are took another leap forward when I was appointed to the Supreme Court of Canada eight years later. With the adoption of the Charter of Rights and Freedoms in 1982, the Supreme Court of Canada was confronted with the task of interpreting the new constitutional guarantees of rights. The Court from its earliest cases took a broad and generous approach to those rights. As a result of its declarations of incompatibility with the guarantees of the Charter, laws began to fall. Many Canadians voiced alarm. The phrase ‘judicial activism’ punctuated op-ed opinion pieces and letters to the editor. Who were these nine people who were changing the legal landscape and striking down laws Parliament had duly enacted?

The Chief Justice of the Supreme Court, Brian Dickson, could have reacted by pulling his judges firmly up the steps of the ivory tower and locking the door behind them. Instead, he adopted a policy of openness. It had a number of facets.
The Chief Justice invited a national news magazine to do an in-depth story on the Court and encouraged the judges to give lengthy interviews to the reporter in charge. The result showed the Justices of the Court not just in their formal role as judges, but in their private lives. The public learned that the Justices of the Supreme Court were not occult recluses, but real people who skied on the weekend and sometimes went to the movies. They also got a glimpse of the huge workload of the Justices and learned about how heavily their judicial responsibilities weighed upon them. Whether they agreed with a particular decision or not, people understood that the process was independent and impartial, and that the Justices worked indefatigably to get to the right answer in the cases they heard.

The Chief Justice didn’t stop there. In the early nineties he opened the way for televising of the Court’s hearings. We were careful to ensure that this did not impact on the proceedings. After a few days, my colleagues and I forgot that the tiny stationary cameras perched near the ceiling were even there. I am not convinced trial proceedings should be televised, because of the impact cameras might have on witnesses and parties. But at the appellate level, Canadian experience with televising hearings has been positive. I believe it has increased Canadians’ confidence in the Supreme Court and indeed, the entire justice system. People say, ‘I’m not sure I understood everything that was said, but it was impressive to see lawyers debating differences in such a civil way, and to see how engaged the Justices were’.

Chief Justice Dickson encouraged the Justices of the Court to give speeches to community groups and participate in legal education programmes. The Justices did not talk about particular decisions, to be sure. But they were able to enlighten people as to how the Court worked in general terms and participate in discussion on general legal topics.

Finally, the Chief Justice established a press officer (the Court’s Executive Legal Officer) to liaise with members of the press. This was followed by a judge-led Media Committee to work with the media and vet their concerns and proposals.

**Increasing Transparency Bolsters Public Confidence in the Judiciary**

While other factors doubtless played a role, steps such as these helped bolster public confidence in the judiciary in general and the Supreme Court in particular in the years that followed. Year after year, the Court scored high—well above Parliament and other institutions of governance—on polls that ranked public confidence in institutions.

When I assumed the role of Chief Justice of the Supreme Court in 2000, I resolved to continue—and indeed enhance—the policies of openness my predecessors had put in place. I gave a press conference at the outset of my tenure and thereafter each year at the meeting of the Canadian Bar Association. We introduced measures to enhance reporting, including lockups which allowed instant reporting on release of opinions. We introduced plain-language summaries of the cases. From time to time, other justices and I gave press interviews. All of us made speeches to legal groups. We took the Court on ‘retreat’ to different parts of the country to allow the Justices to meet people there and allow them to interact with us. We commenced live-streaming of important cases so that people who could not come to the courthouse could view the proceedings in real time. In all these ways and more, we tried to help the public understand who its judges were, how the Court functioned, and how the cases brought before the Court were unfolding.

**Challenges Encountered Along the Way**

Two particular areas raised challenges as we moved forward: (1) attacks against judges; and (2) speeches to the profession and the public. Let me say a few words about each.

**Unfair Attacks**

First, how should a judge respond to an unfair attack? Over time, I moved from the position that judges should never—or almost never—respond to public criticisms against them, to the position that in some circumstances a short, factual rejoinder may be necessary. It is wrong and usually counterproductive to get into an argument or exchange of opinion with the press, a politician or a critical member of
the public. It lowers the judge into the arena of public opinion and all who scrabble there, and the judge usually emerges with a draw or worse. For this reason, I believed, judges should not respond to allegations that they had said something politically incorrect or erred in some other way. In Canada, the Judicial Council exists to judge these things; writing an irate letter to the editor defending oneself is only likely to stoke the flames already making the judge uncomfortably hot.

However, as I have said, in exceptional circumstances it may be necessary to issue a brief factual statement when a judge is attacked. The public is entitled to know the facts before it judges a judge, and sometimes the judge or his or her Chief Justice is the only person who can supply critical facts.

This was how I approached one of the most difficult incidents of my time as Chief Justice. The government of Conservative Prime Minister Stephen Harper had suffered a number of losses in the Supreme Court, culminating in a six-to-one decision that his most recent appointment to the Court did not fulfill the requirement in the Supreme Court Act that judges appointed from Quebec to the Court must have been members of the Quebec Bar for ten years, or a federally appointed judge in Quebec. We ruled that the candidate in question, a Federal Court of Appeal judge named Marc Nadon, did not qualify because he was neither a Quebec lawyer nor judge, as the Act required. It was a painful decision, given we had already sworn in and welcomed Justice Nadon to the Court.

Shortly after the release of this decision, I awoke to a newspaper headline proclaiming that the Prime Minister was saying I had acted unethically by interfering with the appointment of Justice Nadon to the Supreme Court. In fact, I had never discussed Justice Nadon with either the Justice Minister or the Prime Minister. My only involvement, apart from sitting on the case to remove him, had been a call to the Justice Minister to discuss with him my concern that any candidates for the pending Quebec vacancy would need to fulfill the requirements of the Supreme Court Act—a call that took place months before Marc Nadon was named as a possible candidate.

Confronted with the Prime Minister’s indictment—one which if proved would probably have sounded the death knell of my judicial career—I pondered how to respond. A senior Justice advised me not to respond, and I could see his point. But, on the other hand, I knew I had done nothing wrong and that the allegation that I had interfered with the Nadon appointment was patently false. The public, I decided, was entitled to know the facts. Then they could make up their minds.

The same morning that the Prime Minister made his allegation, my office put out a brief, factual statement, stating that I had done nothing wrong and going on to state ‘These are the facts’. The statement briefly catalogued the relevant events chronologically. It was clear that my only contact with the Justice Minister was months before Justice Nadon’s name had circulated, making it patently obvious that the Prime Minister’s accusation was groundless. The press and legal commenters all agreed. Although the government continued to bluster and the Prime Minister never apologised, the matter was over. My greatest fear throughout was that the Prime Minister’s comments would damage the reputation not only of me, but of the Court. In the end, the reputation of the Court emerged enhanced. This would not have happened had I not decided that the public was entitled to know the basic facts of what had transpired.

I add this. At one time in England and in Canada, the minister responsible for the administration of justice regarded it as his duty to defend judges who were falsely accused of wrongdoing. This was done on the understanding that a judge could not speak out to defend him- or herself. Unfortunately, this tradition is no longer honoured in Canada. The Minister of Justice, far from defending me from the Prime Minister’s accusations in the Nadon affair, supported the Prime Minister. And when the popular press in the U.K. labelled three Divisional Court judges ‘Enemies of the People’ for ruling that Parliament had a say in Brexit negotiations, no member of government came to the judges’ defence. Bar associations often rise to the defense of the judge, but they may not know all the facts and their intervention may be late. In these circumstances, it becomes important for someone to put forth the facts pertaining to the matter. Sometimes that task
necessarily falls to the Chief Justice of the Court.

Judges Making Speeches

This brings me to judges making speeches. During my time on the Supreme Court of Canada, I, like other judges of the Court, made many speeches, usually to legal audiences, but sometimes beyond. This confronted us with the question of what judges should talk about and what they should steer clear of. Two kinds of speeches need to be distinguished for this purpose – talks to the legal community on legal issues, and speeches to the general public.

At legal conferences discussing a particular area of the law, we contributed on points of general application, but steered clear of discussing the merits of particular judgments, whether in lower courts or our own. On such matters, judgments speak for themselves and extra-judicial comments may muddy what the case actually stands for. The Court learned from the experience of one of the judges, who suggested at a legal conference covered by the press that lower courts had applied a decision he had written on a controversial matter too broadly. The matter was reported, provoking an editorial in a leading newspaper which asked: ‘What is the state of the law on this question? What the judge said in his judgment? Or what he is now telling assembled lawyers and judges?’ This is a situation no judge and no court want to find themselves in.

Outside the professional realm, the judges of the Court often gave public addresses. In this arena, our rule of thumb was to steer away from pronouncements on the state of the law. My personal rule was that I would not discuss cases decided in the previous decade or so, and I would not comment on issues that might come before the Court in the future. I would usually make this clear at the outset if the speech was followed by a question period.

While this rule placed a broad range of topics outside the realm of what I could talk about, it left other important areas open for exploration, like the role of the Supreme Court, the importance of the Rule of Law, and the state of the justice system. I expanded my early Chief Justice’s comment that the people are entitled to know who their judges are to a broader proposition: The people are entitled to know who their judges are and how the justice system operates.

This led me to talk about the need for better access to justice, which in turn led to improvements in how justice in Canada is delivered to ordinary women, men and children. The public, I realised, saw the Chief Justice as the spokesperson for the judiciary and the justice system. With no one else speaking up on justice matters, it sometimes became important to address them directly.

While I came to believe that on occasion judges should speak up on justice issues, I approached this responsibility with great caution and circumspection. Before making a speech or commenting on a particular matter, I always asked myself a series of questions. Did the proposed intervention fall within the range of what judges can or should talk about? Was it necessary, in order to provide facts or information that might otherwise not be put before the public? When tempted to comment on a matter of current interest, I learned to ask myself a simple question: ‘Will good come of this?’ If I could not answer the question with an affirmative yes, I kept silent.

Some Rules of Thumb for Judges to Consider Regarding Public Engagement

Let me offer a few rules of thumb I developed over the years. Perhaps you will not agree with some, perhaps you would add others. But here is my list.

1. Never discuss the internal process of how a particular decision was made;
2. Never discuss judicial colleagues or internal relations at the court;
3. Never discuss recent decisions of your court in detail or matters that may come before the court in the future;
4. Steer away from political issues and matters of social controversy;
5. Before speaking publicly on a matter, ask whether your intervention is necessary or helpful. Ask yourself: ‘Will good come of this?’;
6. On matters of alleged judicial misconduct, clarifying the facts may be helpful on serious matters in the public arena, but statements of opinion and argumentative ripostes should be avoided;

7. Know your personal strengths and weaknesses as a communicator. Use a press officer or ask another judge to respond to an issue if you feel you are not the right person to speak on a matter;

8. Review what you are going to say with a trusted advisor before saying it; and

9. Don’t use social media. Twitter and Facebook, for me at least, are out.

**IN CONCLUSION**

Allow me to conclude. We live in a time when courts and judges are closely watched. That is good; it shows that people are concerned about justice and the justice system. Judges no longer live in remote ivory towers; they live in the real world. Judges still speak mainly through their judgments and hold themselves aloof from political controversy and social opinion. But from time to time it is appropriate that they venture into the public forum – at professional gatherings on legal issues; to inform the public on who its judges are and how its legal system functions; and rarely, but importantly, to clarify facts when judges or courts are attacked.
DEVELOPMENTS IN THE INVESTIGATION AND PROSECUTION OF DOMESTIC ABUSE AS INTIMATE PARTNER VIOLENCE IN ENGLAND AND WALES


Abstract: *The Domestic Abuse Act 2021 defines domestic abuse as coercive and controlling behaviour (‘CCB’) and should encourage use of the offence of that name in s 76 of the Serious Crime Act 2015, which represents the true nature of the crime. However, two new individual offences are created reflecting typical threats used to control a victim and common assault is made a more useful charge. More protective bail conditions can be imposed for safety and deterrence purposes, as new legislation has reversed 2017 law which unwisely restricted the use of pre-charge bail as a whole. Sentencing guidelines properly reflect the nature of this offending. However, confidence that police and Crown Prosecution Service will step up is low following the murder of Sarah Everard by a police officer and the serial decline in prosecutions for gender-based crimes. Hopeful signs are the appointments of a national change-leader in policing and a new Domestic Abuse Commissioner.*

Keywords: Domestic Abuse Act 2021 – intimate partner violence – coercive and controlling behaviour – police investigation of domestic violence offences – new non-fatal strangulation or suffocation offence – new threat to publish intimate photos offence – anomalies in the charging and prosecution of domestic violence offences – challenges in obtaining evidence from alleged victims – domestic homicide – specialist domestic violence courts – bail reforms relating to domestic violence – sentencing reforms relating to domestic violence – Domestic Abuse Commissioner

INTRODUCTION

For the first time ever in England and Wales there is a statutory definition of ‘domestic abuse’. It is intended to permanently demolish the notion that abuse is just an occasional slap or punch. Section 1 of the Domestic Abuse Act 2021 (the ‘Act’) lists in the definition, emotional, psychological, economic and sexual abuse and—importantly—a course of controlling or coercive behaviour. The latter is how many male perpetrators use all kinds of abuse in campaigns to undermine their intimate partners’ self-esteem and assume control. The perpetrator must be ‘personally connected’ to the victim to fit the definition; two thirds of domestic abuse victims are intimate partners.

The Act was driven by former Prime Minister Theresa May and much improved on its way through Parliament by her willingness to listen to frontline voices from our expert violence against women and girls (‘VAWG’) charities. However, it is being implemented amidst a plethora of inquiries, inspection reports and action plans stemming from the shocking abduction and murder of 33-year-old Sarah Everard in March 2021 by a serving police officer. There has also been a series of scandals caused by misogynistic and racist messaging amongst police and about institutional failure to deal with domestic abuse perpetrated by officers themselves. Because of these events, female confidence in police has, not surprisingly, declined. More than 30,000 people, overwhelmingly females, responded to the Government’s consultation on a VAWG Strategy in 2021 voicing predominantly negative views of criminal justice. It may seem ironic that what followed was the resignation of the first woman Metropolitan Police Commissioner, Cressida Dick, but that was triggered by her comment that the problems were the fault of ‘a few bad apples’ whereas what is realistically required is profound cultural change in the police. To that end, there is now an excellent national change-leader in Assistant Chief Constable Maggie Blyth, and an emerging Police National Improvement Plan. However, but neither is likely to have significant effect for some time.

INVESTIGATIONS

The police force’s role is to investigate an offence, create a case and then submit it to the
Crown Prosecution Service who will take it to court, if they agree that it should be prosecuted.

Each police force should have a domestic abuse strategy and most train all their officers to some extent about domestic abuse, including those who are first responders to calls and neighbourhood police, where they still exist. There are often specialist departments to provide follow-up and investigation with officers specially trained to deal sensitively with complainants, using their knowledge of domestic violence offending to focus investigation and to advise on safety. Cases can be allocated to neighbourhood or specialist teams according to a risk assessment tool—currently one called DASH, an acronym for ‘Domestic Abuse, Stalking, Harassment and Honour Based Violence Assessment’—identifying who is at greatest risk of further harm from the abuser.

Probably driven by economies, there has in recent years been a cut in arrests and an increase in suspects being invited to police interviews on a voluntary basis. This is not reassuring for victims. And fewer arrests have meant less use of pre-charge bail, an important protective and deterrent measure. Bail use also fell drastically (from 26% to 3% of cases according to Her Majesty’s Inspectors of Constabulary, or ‘HMICFRS’) across all offences as a result of legislation restricting its use in 2017. That was effectively reversed in the Police, Crime, Sentencing and Courts Act 2022 but police are still playing catch-up. The use of bail with conditions, such as exclusion zones for the defendant, should now be encouraged again, potentially reducing re-offending and reassuring domestic abuse complainants.

However, HMICFRS reported, in June 2021, that three-quarters of domestic abuse-related crimes reported to the police were dropped in the preceding year. Some 55% were discontinued because the victim felt ‘unable to support the prosecution’ and a further 20% because the police found ‘evidential difficulties’.

There was ‘a huge variation’ between specific forces in recording the first category, ranging between 36%--itself an alarming figure—and 71%. The inspectorate noted that the overall rate at which investigations were closed early, for this and other recorded reasons, had ‘worsened considerably over the past five years’ calling it ‘a huge concern’. They commented that ‘[a] victim may be reluctant to give evidence, due to fear of having to relive their experiences or of reprisals from the perpetrator and/or their family’. They add that in some cases, police may be able to proceed on an ‘evidence-led’ basis—that is, without the complainant—by using police body-worn video and 999 calls, but this is not always the case. There has certainly not been a commensurate upturn in evidence-led cases.

THE PREVALENCE OF DOMESTIC ABUSE

It is salutary to note that HMICFRS also describes domestic abuse as ‘epidemic’. The Crime Survey for England and Wales (‘CSEW’) shows that there were 2.3 million victims in the year to March 2020 (5.5% of adults aged 16 to 74). Some 1.6 million were women and 757,000 were men. There were a record 845,734 domestic abuse-related crimes reported to police in 2020-21, representing 18% of all police-recorded crime and one-third of violent crime. But the confidence problems set out above are seriously exacerbated by the fact that domestic abuse prosecutions have nose-dived over the past five years, the most recent decline being from 61,169 in 2019-20 to just 54,515 in 2020-21.

CHARGES

The new definition of domestic abuse is very welcome but there is still no criminal offence called ‘domestic abuse’, a flaw for purposes of labelling and for accessible statistics. Set out in similar terms to the new definition, though, is the offence of coercive and controlling behaviour (‘CCB’) to be found in s 76 of the Serious Crime Act 2015. This criminalises repeat or continuous CCB towards someone ‘personally connected’ if it has a serious effect on them which the perpetrator knew or ought to know would occur. A ‘serious effect’ is where the behaviour causes the victim fear of violence at least twice or serious alarm or distress which has ‘a substantial adverse effect on [the victim’s] day-to-day activities’. A perpetrator knows or ‘ought to know’ that a ‘serious effect’ will occur if a reasonable person in possession of the same information would know.

The intention behind the offence, as with the
new definition, is to move first the criminal justice system and then popular thinking beyond the notion that domestic abuse fits within what Professor Evan Stark, in 2012, called a 'violent incident model' with assaults seen as if they were unconnected individual occurrences. The wish was to embed a vital conceptual change towards understanding the deliberate and oppressive nature of domestic abuse. Such a revised view would also provide a better legal framework to capture non-physical abuse, not prosecutable under alternative offences as physical abuse might be. And it would also reflect how a repeat pattern of abuse could be more injurious than assault and could thus lead to harsher punishments.

However, there were very few prosecutions for the offence at first, undoubtedly because this conceptual shift needed to occur. By the year to March 2019 there were 17,616 charges, increasing to 24,856 the following year and by March 2021, the number climbed again to 33,954. Though this is progress, it is still a tiny number compared to the 845,734 domestic abuse offences recorded. A government review in 2021 found that a staggering 93.4% of CCB victims are women. This suggests that the offence is capturing the essence of male-to-female domestic abuse so perhaps a template for how it should be investigated could be developed by the College of Policing to drive its use. However, at present no fewer than 86% of CCB charges are discontinued through ‘evidential difficulties’ and it is relatively rare that CCB is charged on its own. In more than half of the cases it accompanies a charge of physical violence, the facts of which could easily be rolled up into the charge of CCB itself.

The VAWG charitable sector says that CCB is charged with a violent offence ostensibly to boost the overall seriousness of the behaviour but is dropped if a plea deal can be cut around the violence. It is also far easier to prosecute a single act of violence than to collect evidence about a course of conduct, yet this approach undermines the very purpose of the offence to shift the concept of domestic abuse from individual acts of violence to its reality as a course of conduct.

The lack of a new offence and this thin take-up of CCB mean that incidents of behaviour within the statutory definition will continue to be charged as individual incidents of violence or criminal damage. Plus ça change. Common assault, causing grievous bodily harm and criminal damage are frequently used charges.

Common assault prosecutions were until recently hampered by the status of being summary-only offences, meaning that they are triable only in the Magistrates Court and only if a summons is issued within six months. Many domestic abuse survivors who suffer common assault—typically being spat at or having a fist raised in their faces—are trapped by the power dynamics of the relationship for too long to meet the time limit. It can take months or years to find support and leave a dangerous relationship. So, while a six-month time limit works to get simple street or pub fights speedily through court, it is ineffective for domestic abuse. There was cross-party agreement during the House of Commons debates on the Police Crime Sentencing and Courts Bill in January 2022, that many domestic abuse perpetrators were escaping justice. For common assault offences in domestic situations since June therefore, the six-month period will only start from the date of reporting to the police, though the whole prosecution must be finished within two years. There is no evidence of the impact of this change yet, but the domestic abuse charities are positive about it.

Thus, one of the common charges for behaviour within the new definition has been strengthened but also important are two new offences created by the Act which outlaw specific behaviours characteristic of abuse, but which have not before been criminalised.

The first is an offence of non-fatal strangulation or suffocation (added by the Act as ss 75A and 75B of the Serious Crime Act). It emerged from careful data collection at the St Mary’s Sexual Assault Referral Centre in Manchester. The Director, Dr Catherine White, catalogued hundreds of female abuse victims who reported being strangled or suffocated as a demonstration of the fact that the perpetrators’ control was so complete that they could kill them at will. Neither act necessarily leaves mark on the body and complaints were not being taken seriously by police. A question about whether a victim has experienced strangulation is in DASH (the police domestic abuse risk assessment form) but a positive answer usually led only to a tick in a box.
Dr White was able to put forward material showing the level of terror that these actions instilled and that there was a high risk of brain damage or death even from their use as threats. A woman who has suffered strangulation or suffocation is seven times more likely to be killed by her partner. It became imperative to make this into a specific offence and it now carries a maximum sentence of five years imprisonment on indictment. There is a defence, namely that the victim consented to the strangulation or suffocation, (a ‘rough sex’ defence). But that does not apply if serious harm is intentionally or recklessly inflicted. The law has not allowed anyone to consent to such a level of harm since the case of R v Brown [1993] 2 WLR 556.

Police seem keen to take up training which is already available for this new offence, and they will be expected to consider prosecution at the earliest opportunity

The second new offence derives from widespread evidence that domestic abusers use threats to publish intimate photographs as a means of control. This seems particularly to follow any hint that the victim may leave. The abuser will show her intimate photographs, taken in their relationship with or without her consent, and threaten to email them to her employer, her mother, her children or to post them on a pornographic website. This can be a paralysing threat. It is very hard to stop someone posting material online and once it is there it can be endlessly, almost irreversibly, replicated and spread. Two reports issued in 2019 and 2021 from Professor Clare McGlynn of Durham University and colleagues—namely, Shattering Lives and Myths and Torture for the Soul—describe the impact of these offences. Where material has been posted it is described as ‘like being raped in public again and again’. Victims say that they dare not go out or meet new people since they are sure that everyone has seen the images and will recognise them. Typical is a quote in the second report which chronicles the experiences of 75 victim-interviewees from Australia, New Zealand and the United Kingdom. The victim relates:

I cut myself off from all of my friends. I cut myself off from my family...and just stayed at home in my room... because I couldn’t face the world.

The Act therefore has added an offence of making such a threat to the existing crime of disclosing private sexual material in section 33 of the Criminal Justice and Courts Act 2015. The maximum penalty for either is two years of imprisonment. In the case of a threat, the gravamen of the offence is well reflected by the proviso that the prosecution will not have to prove that an image it is threatened to distribute actually exists.

**DOMESTIC HOMICIDE**

At the very top of the tree of domestic abuse there is homicide. Abuse often worsens the longer it continues, and domestic abuse is the most common type of repeat violence. A tragic consequence is that the CSEW records 247 domestic homicides by a partner or ex-partner between 2018 and 2020 of which 214 (59%) of the victims were female and 33 (9%) were male. There are two developments in this area. A declaratory provision was put into the Domestic Abuse Act seeking to end the defence that a homicide victim masochistically demanded the acts that caused death—again, a ‘rough sex’ defence. As set out above, it is already established law (R v Brown) that there is a low limit to the level of violence to which someone can consent. The true issue in the ‘rough sex defence’ seems to be whether, in such as case, there was the intention to kill or cause grievous bodily harm to establish a charge of murder. The second development follows a letter which the Domestic Abuse Commissioner (Nicole Jacobs) and the author as Victims’ Commissioner, wrote to the then Lord Chancellor, Robert Buckland. We raised concerns of a potential imbalance between domestic homicide sentences handed down to men and apparently harsher ones given to women. In response, he established an inquiry, last year, to be carried out by leading criminal defence silk, Clare Wade KC, but it has not yet reported.

**PROSECUTIONS**

Although the number of domestic abuse crimes recorded by the police has been increasing annually by between 5% and 6%, prosecutions have slumped for the fifth year in a row. It is of concern that the percentage of those prosecutions which produce a conviction has grown over the same five-year period to an
extraordinary figure of 78%. Three years ago, the Government established an ‘End to End Rape Review’ to consider the similar, though even steeper, collapse in rape prosecutions. In its final report, the Review team commented:

*There has been an increase in the proportion of convictions alongside the fall in charges which many could perceive to be an indication of a change in approach towards charging more ‘certain’ cases.*

That the Crown Prosecution Service is charging many fewer cases of gender-based crimes in order to gain a higher conviction rate has been the subject of much campaigning and of an unsuccessful judicial review in respect of rape cases. A whistle-blower disclosed to press that there was, in 2016/17, a deliberate decision to charge fewer rapes to achieve a 60% conviction rate. The decision was promulgated in ‘road shows’ to every CPS Area by the then Director of Public Prosecutions’ closest adviser. The potential denial of justice to women whose cases would have gone forward prior to this has now spread, through the similar reduction in charges, to domestic abuse. It remains a major unresolved issue of accountability for the criminal justice agencies in England and Wales.

**The Courts**

Most domestic abuse cases are prosecuted within the summary jurisdiction of the Magistrates Courts where there will, ideally, be a Special Domestic Abuse Court (‘SDAC’). Special Domestic Violence Courts, as they were then called, were rolled out in 2005-06 together with the new role of Independent Domestic Violence Advocate (‘IDVAs’). These are trained advisers who can support victims through the aftermath of domestic abuse and, in the context of the criminal justice system, stand by them from report to court. The SDACs were a response to the failure of incident-based criminal courts to grasp either the coercive nature of domestic abuse or the problems of dealing with cases where a complainant and a defendant are in an intimate relationship. Their ‘special’ nature is due to twelve key components. These include careful case allocation by police, trained and dedicated criminal justice staff, courts with separate entrances and waiting areas and—importantly—the presence of an IDVA at preliminary hearings so that the complainant’s views on bail, child contact and similar issues can be put forward. Though there have been multiple ‘deep dives’ and evaluations of these courts, there has been no shift from the position that the SDAC system is effective in proportion to the presence of those key components.

Funding reductions to the criminal justice system have depleted the SDACs, both in numbers and in their capacity to deliver the 12 components. To look into this, as a Police and Crime Commissioner in the north-east of England (an elected role responsible for overseeing local police and supporting victims), the author initiated a series of observations of local SDACs by Soroptimist Clubs who watched batches of cases from the public gallery and reported on what they saw. Their first report, *Specialist Domestic Violence Courts—How Special are w Special Are They?*, released in 2017, chronicled a shortage of IDVAs. It also hinted at loss of specialist training for magistrates who were allowing defendants to ‘game the system’ by pleading not guilty and causing adjournments, presumably to persuade/oppress complainants against testifying, since they would then plead guilty if the complainants entered the court building, long before they entered the witness box. Observation projects in Wiltshire, North Wales, London and the West Midlands, some shortly to be reported, will show similar concerns. Together, they indicate the need for a major effort if we are to restore these courts to their once exemplary state.

Some more serious cases are heard in the Crown Court and the new Act has made domestic abuse complainants automatically entitled to Special Measures in every court. Special Measures have been available since the Youth Justice and Criminal Evidence Act of 1999. They allow arrangements such as testifying from behind a screen or across a television link to enable witnesses, who are vulnerable or intimidated, to give their best evidence. There is a now long-established ban on defendants personally cross-examining complainants in such cases.

The Sentencing Council sets out in its guideline on domestic abuse, an admirably clear understanding of the long-term coercive
nature of domestic abuse. It merits reading, particularly on such relatively subtle points as

A court will take account of an offender’s positive good character. However, it is recognised that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face. In respect of offences committed within a domestic context, an offender’s good character in relation to conduct outside these offences should generally be of no relevance where there is a proven pattern of behaviour.

The Sentencing Council’s guideline concludes:

Offences involving serious violence, or where the emotional/psychological harm caused is severe, will warrant a custodial sentence in the majority of cases.

Sentences for domestic abuse cases can include restraining orders to protect the victim. There are also new Domestic Abuse Prevention Orders, building on earlier orders but with power to order positive activities for a defendant. Those can include attendance at a domestic abuse perpetrator programme and there is an emerging government perpetrator strategy, funded separately the VAWG sector. It should lead to the further development of programmes for all levels of perpetrator, from a multi-agency control system (‘MATAC’) which resembles integrated offender management to the DRIVE Project (which is a system of one-to-one mentoring for the most serious perpetrators).

There is also a move to recognise in law that many victims of CCB are subject to a level of control resembling that used on victims of modern slavery and that they should have a defence, equivalent to that in Section 44 of the Modern Slavery Act if they are coerced into offending.

TO CONCLUDE ON A POSITIVE NOTE

Perhaps the key development from the new Act is the establishment of a Domestic Abuse Commissioner, a new post, ably filled at present by the greatly experienced Nicole Jacobs. It carries broad duties from mapping services to raising awareness and encouraging criminal justice outcomes. Progress will come through the Commissioner in pursuing those aims, through DCC Blyth and her colleagues in driving police commitment to tackling domestic abuse and thus give a start to the restoration of confidence. Government encouragement of more prosecutions of gendered abuse cases invoking the array of new offences will improve the chances that the broader purpose of the new Act may be achieved.

PLEASE DON’T FORGET TO PAY YOUR MEMBERSHIP DUES ON TIME.

Arrears in Membership dues adversely affects the work that the CMJA can undertake on behalf of its membership and the work that the CMJA does on promoting and protecting judicial independence across the Commonwealth.

We would urge all Member Associations and Individual Members to pay their Membership on time
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: LAST DEFENDER OF THE ILL EFFECTS OF EUROPEAN COLONIALISM IN THE CARIBBEAN REGION?

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Abstract: This article discusses three recent decisions of the Judicial Committee of the Privy Council for the Caribbean states of Bermuda, the Cayman Islands and Trinidad and Tobago. In the first two jurisdictions, the Privy Council determined that their constitutions, enacted by the UK Parliament, do not require equal marriage. The effect of these decisions is to entrench constitutional segregation of vulnerable minorities based on an immutable personal characteristic (i.e., sexual orientation). In Trinidad and Tobago, the Privy Council reiterated that all colonial laws are immune from constitutional challenge regardless of how inhumane or degrading they may be, thus facilitating the constitutionality of colonial laws that criminalise and discriminate against LGBTIQ+ people. In this article, the author argues that the Privy Council had competing authoritative choices for the possible outcomes in all three cases but preferred approaches that are inimical to the rights of LGBTQI+ people in the subject Caribbean states. Moreover, the Board’s attempts to justify its choices remain unpersuasive in that, arguably, it failed to follow its own long-established principles of constitutional interpretation in systems with codified written constitutions when making the three decisions examined here. Regrettably, the Privy Council has never in its history delivered a decision that furthers LGBTQI+ rights in the Caribbean and, indeed, has even reversed judicial progress regarding LGBTQI+ people delivered by judges domestic to Caribbean states, given the effects of its decisions upon LGBTIQ+ people resident there.

Keywords: Constitutional rights in Bermuda, The Cayman Islands and Trinidad and Tobago – human rights – constitutional and human rights of LGBTIQ+ people – constitutional protection of human rights – principles of construction of constitutional enactments – the Rule of Law – jurisdiction of the Judicial Committee of the Privy Council as an apex court for Commonwealth countries and British Overseas Territories in the Caribbean region

INTRODUCTION

A report entitled The Human Right to Respect Sexual Orientation and Gender Identity in the Caribbean and Latin America—Current Situation and Perspectives (IIHR 2021) (the ‘IIHR Report’) has explored how pre-colonial historical studies indicate that people in the Caribbean region, today identifying as LGTBQI+, were neither repressed nor stigmatised by some pre-colonial cultures, but positively valued by them (IIHR Report, 45). (The pre-colonial historical studies cited in that Report include the 1556 work, by Bartolomé de las Casas, entitled Apologetic Summary History of the People of These Indies, (since republished, Nigel Griffin tr, Penguin, 1992)).

This accepting attitude collided head-on with the culture and legislation of the European colonising countries which, throughout European history, had been brutal and sadistic towards LGBTIQ+ people. The phenomena of segregation and criminalisation of LGBTIQ+ people in the Anglophone Caribbean are a consequence of colonial laws exported to the region by the British Empire: see the IIHR Report at 48. Those colonial laws are precisely the ones about which former British Prime Minister Theresa May offered an apology in 2018 (as reported in The Guardian for 17 April 2018):
These laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK’s Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.

Against this background, justices of the UK Supreme Court (the ‘UKSC’)—who serve also as members of the Judicial Committee of the Privy Council (the ‘JCPC’ or ‘Board’) which sits as the ultimate court of appeal in the Caribbean for eight countries (Antigua and Barbuda, Bahamas, Granada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago) and six British Overseas Territories (‘BOTs’) (Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Monserrat and the Turks and Caicos)—have, surprisingly, enabled the perpetuation of the mistreatment of LGBTQI+ citizens in some Caribbean states by reversing progressive lower court decisions and upholding the enforceability and constitutionality of anti-LGBTQI+ laws in those states.

In this article the author asserts that the JCPC has entrenched segregation on grounds of sexual orientation in Bermuda and the Cayman Islands and facilitated criminalisation of LGBTQI+ people in Trinidad and Tobago. It goes on to offer arguments as to why, in the author’s opinion, these decisions were wrongly decided as a matter of principle and of law. The article concludes with some reflections on the role of the JCPC in hindering progress for LGBTQI+ rights in the Anglophone Caribbean.

**Defined Terms Employed to Identify Lower Court Decisions**

The analysis presented in this article focuses largely, as mentioned, on final appeals heard by the JCPC in cases that originated from Bermuda, the Cayman Islands and Trinidad and Tobago. A number of lower court decisions in the matters originating in Bermuda and the Cayman Islands particularly come up repeatedly for mention here as well. It will assist the reader to have defined terms to make the decisions from Bermuda and the Cayman Islands easily recognisable and distinguishable in the text that follows. Accordingly:

**The JCPC Decisions**

- AG of Bermuda v Roderick Ferguson [2022] UKPC 5 shall be referred to hereinafter as ‘Ferguson-JCPC’
- Chantelle Day et al v The Governor of the Cayman Islands et al [2022] UKPC 6 shall be referred to hereinafter as ‘Day-JCPC’
- Chandler v The State No 2 (Trinidad and Tobago) [2022] UKPC 19 shall be referred to hereinafter as ‘Chandler-JCPC’

From time to time the three above-noted JCPC decisions will be discussed together and where that occurs, they will be referred to, collectively, as the ‘Trilogy’.

**The Lower Court Decisions from Bermuda**

- The Supreme Court decision, R Ferguson v. AG & OutBermuda et al v. AG [2018] SC (Bda) 45 Civ (6 June 2018) shall be referred to as ‘Ferguson-BermudaSC’

**The Lower Court Decisions from the Cayman Islands**

- The Grand Court decision, Day et al v. Governor of the Cayman Islands et al [2019] Grand Crt (CI) Civil Causes 111 & 184 (29 March 2019) shall be referred to hereinafter as ‘Day-CaymanGrand’
- The Court of Appeal decision, The Deputy Registrar of the Cayman Islands and The Attorney General of the Cayman Islands v Day (Chantelle) and Bush (Vickie Bodden) CICA No. 9 of 2019 (7 November 2019) shall be referred to hereinafter as ‘Day-CaymanCA’

**Segregation on Grounds of Sexual Orientation: Bermuda and the Cayman Islands**

The Ferguson-JCPC and Day-JCPC cases originated in the BOTs of Bermuda and the
Cayman Islands. In international law, BOTs have a dependent relationship with the UK in that its Parliament is the constitution-maker and ultimate ruler. The UK remains responsible for BOTs’ breaches of international law. In this context, the legislatures in these BOTs, driven arguably by their interpretation of Christian values, have sought to continue practices that stigmatise and denigrate LGBTQI+ people by passing for religious purposes the Domestic Partnership Act (2018), s 53 (Bermuda) (the ‘DPA’) and the Marriage (Amendment) Act 2008, s 2 (Cayman Islands) (the ‘MAA’), to prevent same-sex couples from marrying in those jurisdictions.

Upon the constitutionality of the DPA and MAA being questioned, the Supreme Court and Court of Appeal for Bermuda, and the Grand Court for the Cayman Islands, all concluded, as applicable, that those enactments were unconstitutional (although in Day-CaymanCA, the Cayman Islands Court of Appeal disagreed). Guided by courts of other common law jurisdictions with codified written constitutions, the decisions in Ferguson-BermudaSC, Ferguson-BermudaCA and Day-CaymanGrand held that human dignity and non-discrimination required equality of treatment for LGBTQI+ citizens. Hence, those courts interpreted their constitutions as requiring equal marriage and, thus, found unjustified breaches by the DPA of section 8 (freedom of conscience) (Ferguson-BermudaCA at 77) and by the MAA of sections 9, 10 and 16 (right to private and family life, freedom of conscience and prohibition of discrimination) (Day-CaymanGrand at 354). In Day-CaymanGrand, Chief Justice Anthony Smellie, incumbent in that post for more than 24 years, concluded at 320 that in the absence of any prohibition to same-sex marriage, to interpret the constitution otherwise would be akin to upholding criminalisation of interracial marriage. As noted, the Cayman Islands Court of Appeal disagreed in Day-CaymanCA, holding at 97-107 that section 14(1) of the constitution is a lex specialis in that it intended to define marriage as heterosexual, barring a constitutional right for same-sex couples to marry to be found elsewhere in the constitution.

The JCPC overruled the unanimous judiciary of Bermuda in the Ferguson case and the reasoning (also rejected in Day-CaymanCA) of Chief Justice Smellie in Day-CaymanGrand. The JCPC did accept that the constitutions of Bermuda and the Cayman Islands do not prohibit same-sex marriage (Ferguson-JCPC at 91 and Day-JCPC at 59). It acknowledged that preventing same-sex couples from accessing marriage is victimising and denigrating of gay people, even if they have access to functional equivalent frameworks. For, example, in Ferguson-JCPC:

...[T]he restriction of marriage to opposite-sex couples may create among gay people a sense of exclusion and stigma’ [at 89]

However, the JCPC ultimately concluded that LGBTQI+ people are not constitutionally entitled to equality of treatment in this regard. The Board’s reasoning was that the European Convention on Human Rights (the ‘ECHR’), which does not guarantee a right to same-sex marriage, should be followed because BOTs’ constitutions incorporate the ECHR. Hence, judgments from other common law jurisdictions had no precedential value and could not provide a template for BOTs in which society had developed ‘differently’. The JCPC justified this outcome for Bermuda due to the lack of specific ‘protection in the Constitution against discrimination on the ground of sexual orientation’ (Ferguson-JCPC at 64 and 90). For the Cayman Islands, even though its constitution prohibits discrimination based on sexual orientation, the JCPC felt compelled to adopt the Court of Appeal’s, rather than Chief Justice Smellie’s, construction (as articulated in Day-CaymanGrand) in which the constitutional right to heterosexual marriage had been elevated to a lex specialis (Day-JCPC at 41).

The JCPC hence used sexual orientation, an immutable personal characteristic, as a differentiating factor at a constitutional level, resulting in the entrenchment of segregation (likely in perpetuity given that it refers to a politically disfranchised minority). This was similarly seen on grounds of race in 1896 in the American case of Plessy v Ferguson 163 US 537. In that case, the Supreme Court of the United States held that the constitutional requirement of equality of treatment did not render segregation on grounds of race unlawful discrimination. This brought about the doctrine of ‘separate but equal’, invoking a
twisted constitutional construction of equality which negated the offensive use of race, also an immutable personal characteristic, as a differentiating factor.

CRIMINALISATION OF LGBTQI+ PEOPLE: TRINIDAD AND TOBAGO

In Chandler-JCPC, the JCPC was concerned with the interpretation of the so-called ‘general savings’ clause found in the first constitutions of the Bahamas, Barbados, Guyana, Jamaica, and Trinidad and Tobago. That clause had been held in a number of earlier decisions to provide absolute immunity to colonial laws from any constitutional challenge for breach of the bill of rights, regardless of how ‘inhumane or degrading’ they may be: Boyce v the Queen [2004] UKPC 32 (‘Boyce’), Matthew v State of Trinidad and Tobago [2004] UKPC 33 (‘Matthew’) and Watson v the Queen [2004] UKPC 34, (collectively, the ‘Boyce Authorities’). Together, and importantly, the Boyce Authorities reversed the JCPC decision given a year earlier in Roodal v Trinidad and Tobago [2003] UKPC 78 (‘Roodal’), in which the Board construed the general savings clause differently, holding that such a clause may prohibit the court from relying upon the bill of rights of the constitution to invalidate a colonial law, but that it does not prohibit the court from modifying the law to bring it into conformity with the constitution where possible. In Chandler-JCPC, the JCPC confirmed the Boyce Authorities mainly on grounds of stare decisis (Chandler-JCPC at 54-66). Chandler-JCPC, as a binding precedent, thus perpetuates the harm for which former Prime Minister May apologised in 2018 by upholding the enforceability of anti-LGBTQI+ colonial laws, including those that criminalise LGBTQI+ activity.

UNDERMINING THE RULE OF LAW ON A MATTER OF PRINCIPLE

Equality and human dignity are foundational to the Rule of Law in society. The JCPC has stated, in Matadeen v Pointu [1998] 1 AC 98 (PC) (Mauritius), at 109, that:

Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently. Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution.

The Inter-American Court of Human Rights agreed, raising these principles to the status of ius cogens, holding in Inter-Am. Ct. H.R., Advisory Opinion OC-18/03, 17 September 2003, Series A No. 18, at 110 that:

...the principle of equality before the law, equal protection before the law and non-discrimination belongs to ius cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.

Any constitutional interpretation must endeavour to respect equality and human dignity given that where constitutions allow for their violation, they are in essence disregarding the Rule of Law: see T. Wheatherall, Ius Cogens: International Law and Social Contract (CUP 2015 at 41). To the extent that the Trilogy hinders, in perpetuity, the progress of LGBTQI+ rights by segregation and criminalisation, it is argued here that those decisions disregard of the Rule of Law. This breach of the Rule of Law in the Anglophone Caribbean is exacerbated by the fact that the harm caused by these interpretations is not intangible, but real and quantifiable. The social and psychological harm has been revealed in the IIHR Report and the collective economic harm to LGBTQI+ individuals has been quantified to fall between US$1.5 and US$4.2 billion per year, equating to 2.1% to 5.7% of Caribbean states’ collective GDP: see The Economic Case for LGBT+ Inclusion in the Caribbean (Open for Business 2021).

It remains to analyse whether the law unequivocally required the Trilogy’s extravagant result with its potential precedential value and consequences reaching beyond the Caribbean jurisdiction from which they originate. In the latter regard, see the case of Sham Tsz Kit v. Secretary for Justice [2022] HKCA 1247; CACV 557/2020 (Hong Kong) in which the Court followed Ferguson-JCPC and Day-JCPC, demonstrating that these decisions are hindering progress in securing LGBTQI+ rights in parts of the world even where the JCPC’s decisions are no longer binding.
UNDERMINING THE RULE OF LAW AS A MATTER OF LAW

Ferguson-JCPC and Day-JCPC (Bermuda and the Cayman Islands)

The issue before the JCPC in the Bermuda and the Cayman Islands cases was whether each BOT’s constitution (enacted by the UK Parliament), reasonably construed, protects vulnerable minorities from discrimination and segregation. The JCPC answered negatively. The problem is that the language in each constitution does not require a negative answer; it is argued here that the JCPC, in arriving at that outcome, ignored and distorted its own long-established principles of constitutional interpretation.

The ‘living tree’ doctrine (Edwards v AG of Canada [1930] AC 124) is in practice dead for the constitutions of Bermuda and the Cayman Islands in that they cannot grow to protect LGBTQI+ people. In Ferguson-JCPC, the Board made clear that section 8 cannot be expounded to address the lack of protection against anti-LGBTQI+ discrimination, as the judiciary of Bermuda did, because there is no indication of ‘legislative intent’ that the constitution of Bermuda should grow beyond the rights conferred by the ECHR (Ferguson-JCPC at 19). Reliance on ‘legislative intent’ to justify this approach contradicts the ‘living tree’ doctrine and the principle that constitutions grow beyond the drafters’ intentions: Minister of Home Affairs v Fisher [1980] AC 319 (Bda), at p. 328G. Lord Sales, dissenting in Ferguson-JCPC, reminded the majority that the ‘living tree’ applies to the ECHR, as a living instrument, which supports the interpretation of section 8 as including a right of marriage for same-sex couples (Ferguson-JCPC at 146-158).

In Day-JCPC, the Board blocked a right to same-sex marriage from being found anywhere in the bill of rights for the Cayman Islands, notwithstanding the existence of a constitutional protection of LGBTQI+ people against discrimination in section 16. It did so by construing section 14(1) as lex specialis. This segregating construction, in defiance of the ‘living tree’ doctrine, was held to be permanent: it would not change even if, in the future, the ECHR were to require same-sex marriage (Day-JCPC at 41). The inconsistency between this approach in Day-JCPC (where the main hurdle was the lex specialis) and the majority’s approach in Ferguson-JCPC (where there was no lex specialis and no words of limitation in section 8 to restrict expanding the constitution) is shocking and rightly highlighted by Lord Sales (Ferguson-JCPC at 146-158).

Moreover, the language of section 14(1) of the Cayman Islands constitution does not assist the JCPC in arriving at its conclusion. Section 14(1) reads ‘Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family’. In plain English, this provision does not prohibit same-sex marriage, nor does it define marriage; rather, it sets up the minimum requirements that marriage legislation should have. The Court of Appeal for the Cayman Islands in fact had to ‘deconstruct’ and generously ‘reconstrue’ section 14(1) to give its exclusionary effect, holding that the main verb ‘respect’ was irrelevant (Day-CaymanCA at 95-96), thus, arguably destroying the logic and the syntax of its language. Such an approach to the construction of constitutional language is contrary to the principles that:

(a) where the ordinary meaning of words requires an outcome, this outcome must be delivered as otherwise the result is not interpretation but divination (Matadeen at 108); and

(b) derogations from constitutional rights and freedoms ‘are ordinarily to be given strict and narrow, rather than broad, constructions’ (R v Hughes [2002] 2 AC 259 (PC) (St Lucia) at 35).

Finally, it is contended here that the JCPC reinforces these outcomes by reference to majoritarian ruling and suggestions that religious views are to be elevated over and above the values of human dignity, equality, mutual respect and social harmony (Ferguson-JCPC at 26, 42 and 58 and Day-JCPC at 39). Reliance on the will of the majority undermines the role of a constitutional court, which is to protect rights for minorities even against the will of the majority. Lord Sales, dissenting in Ferguson-JCPC, reminded the majority of this fundamental role (Ferguson-JCPC at 142),
explaining that in systems with an entrenched constitution and bill of rights, no assistance could be derived from the wishes of the majority to determine whether the constitution protects vulnerable minorities from discrimination and segregation (quoting A v Secretary of State for the Home Department [2004] UKHL 56 at 38-42 (per Lord Bingham citing West Virginia State Board of Education v Barnette 319 US 624 (1943) at 3)).

In Day-JCPC, reliance was also placed on the ‘reference to “traditional Christian values” in the preamble … and … to “the distinct history, culture [and] Christian values” in section 1(2)(a) of the Bill of Rights’, holding that they ‘reinforce the point [of lex specialis] which led to this emphasis being given to opposite-sex marriage in section 14.’ (Day-JCPC at 39). However, Section 1(2)(a) and the preamble are selectively quoted: Section 1(2)(a) also affirms ‘the rule of law and the democratic values of human dignity, equality and freedom’. It is argued that the JCPC should have quoted these words and provided reasons for why it gave more force to Christian values than to the Rule of Law and all of the other values which feature, alongside Christian values, in the preamble. Without articulating a reason for its choice, the JCPC seems to have relied on its own predilections and moral values in preferring the construction of the Cayman Islands Court of Appeal over the construction preferred by Chief Justice Smellie in the Grand Court. This is, of itself, arguably contrary to the authority of Reyes v The Queen [2002] UKPC 11 (Belize) at 26.

Chandler-JCPC (Trinidad and Tobago)

The Chandler case required the JCPC to revisit the tension between two parts of the Trinadian constitution: the bill of rights and the general savings clause. The JCPC had two options: to give the general savings clause a strict and narrow interpretation in favour of the bill of rights or to give the general savings clause its broadest and fullest meaning with the effect of rendering the bill of rights, in perpetuity, absolutely otiose in relation to any colonial laws. The former approach was taken by the JCPC in Roodal and also by the Caribbean Court of Justice when it reversed Boyce, in Nervais v Regina [2018] CCJ 19 (AJ), McEwan v Guyana [2018] CCJ 30 (AJ) and Bisram v DPP (Guyana) [2022] CCJ 7 AJ (GY) (collectively, the ‘CCJ Authorities’). The JCPC followed the second approach in the Boyce Authorities, later found by the Inter-American Court of Human Rights to be in breach of international law (Boyce v Barbados, ACHR Series C no 169 of 20 Nov 2007). In Chandler-JCPC, contrary to the principle that ‘if it is reasonably possible to give domestic law a construction which will accord with international law obligations, the courts will do so’ (Boyce at 54) and that derogations from constitutional rights and freedoms are to be given strict and narrow, rather than broad, constructions (Hughes, at 35), the JCPC invoked the doctrine of stare decisis to confirm the Boyce Authorities. The problem with using stare decisis was that Caribbean confidence in the administration of justice had been shaken, in 2015, by public revelations made by Lord Millet as to how the fate of the Boyce Authorities had been sealed before the hearing had even started. In his memoir, As in Memory Long (Wildy 2015), Lord Millet stated extrajudicially:

Lord Bingham presided, and in accordance with precedent nominated the eight most senior Law Lords to sit with him. Lord Hoffmann went through the list and thought that they would be split 4-4 with Lady Hale, the newest and most junior member (who had been appointed to take my place on my retirement) as an unknown quantity. He was worried that she might side with the abolitionists [referring to those supporting the outcome in Roodal]. So he spoke to Lord Bingham, and suggested that it would be good public relations if we invited a senior judge from the Caribbean as the ninth member. Not suspecting Lord Hoffmann’s true motive, he readily agreed, and asked Lord Hoffmann who he thought should be invited. Lord Hoffmann recommended Mr Justice Zacca, an appellate judge from Jamaica whom he knew to be a sound and conservative lawyer… [at 189]

Those revelations, if true, make a mockery of the right to a fair and public hearing by an independent and impartial tribunal. Following their release, it is suggested that the JCPC ought to have set aside the decision in Boyce and those in the Boyce Authorities. The precedent for doing so is R v Bow Street Metropolitan
Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 2) (1999) All ER 577, in which the House of Lords set aside its own decision for apparent judicial bias of one of its members (in that case, Lord Hoffmann’s failure to declare links with Amnesty International—an intervener).

Beyond the problems of using stare decisis, the outcome in Chandler-JCPC is premised on what the author considers to be two material errors in law.

First, there is arguably an error in statutory construction concerning the interaction between the 1962 Trinidadian Order and the constitution. It will assist here to restate their relevant sections:

The 1962 Trinidadian Order

Section 2(1): ‘The [colonial] (Constitution) Order in Council 1961 ...is revoked.’

Section 3: ‘Subject to the provisions of subsection (2) of this section and the other provisions of this Order, the [new] Constitution shall come into force in Trinidad and Tobago at the commencement of this Order.’

Section 4(1): ‘Subject to the provisions of this section, the operation of the existing [colonial] laws after the commencement of this Order shall not be affected by the revocation of the [colonial Constitution] but the existing [colonial] laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.’

The Trinidadian Constitution (general savings clause)

Section 3(1): [the Bill of Rights] ... shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.

Boyce was the leading case within the group of decisions referred to herein as the Boyce Authorities. Boyce was decided on the basis of the interaction between the 1966 Barbadian Order and constitution. The ratio in Boyce was then applied to Matthew (for Trinidad and Tobago). In Boyce, at 54, the JCPC held that the power of modification (equivalent to section 4(1) above) did not apply because it would be perverse that the general savings clause would preserve the validity of a colonial law only to the extent that the law could not be modified. The language in the 1966 Barbadian Order and constitution may explain this outcome, immaterial now since the Caribbean Court of Justice reversed Boyce for Barbados (see the CCJ Authorities), but the language of the 1962 Trinidadian Order and constitution, reproduced above, does not assist in applying the same ratio to Matthew.

Section 2(1) of the Trinidadian Order revokes the colonial constitution, hence colonial laws lost their legal force. This force is reinstated by section 4(1) subject to the requirement that colonial laws must be modified to be brought into conformity with the new constitution. Moreover, the new constitution is brought into operation by section 3, but subject to the other sections of the Order. Section 3 does not exempt section 4(1) from applying; as a matter of statutory construction, the JCPC cannot obviate the application of section 4(1), as it did in Matthew, without breaching section 3 and contradicting its own principle of construction—namely, that where the ordinary meaning of words requires an outcome (i.e., in this case ‘subject to the other sections’), this outcome must be delivered as otherwise the result is not interpretation but divination (Matadeen at 108). Parking that issue, if the JCPC is correct and section 4(1) of the Order does not apply, this cannot be narrowed only to the power of modification, but it must include the aspect of section 4(1) that deals with reinstatement of legal force. The paradox that emerges is that if the reinstatement of legal force of section 4(1) does not apply, and the JCPC did not give any reason why it should, then the colonial laws would have never regained legal force and effect, which they had lost by effect of the revocation clause. This would lead to the absurdity that the constitutional general savings clause, textually read, becomes nugatory in that section 3(1) of the 1962 constitution states that it applies to ‘laws in force at the commencement of the constitution’, but none would have been in force without section 4(1) being operative.
There emerges not just a simple difference of opinion as to which is the best choice for resolving the tension between constitutional clauses as the JCPC suggests in Chandler-JCPC at 74, but a material matter of construction. The Boyce Authorities and now Chandler-JCPC apply partially section 4(1) (i.e., reinstatement of legal force to colonial laws) but obviate the application of the requirement under which their legal force is brought back (their modification). This requires more than simple assertions of perversity and irrationality, which neither the majority in Matthew nor Lord Hodge in Chandler-JCPC provided.

It is argued that a second error in law in Chandler-JCPC derives from the justification in the Boyce Authorities to choose a solution that placed the Trinidadian constitution in breach of international obligations. Lord Hoffmann’s explanation, quoted above, was that it was not reasonably possible in 2004 to give section 4(1) a construction which would accord with international law and added: ‘the construction of article 4(1) ... [in Roodal] is unreasonable to the point of being perverse. There is no ambiguity about the matter’ (emphasis added): (Boyce at 54). This reasoning is applied in Matthew in paragraph 24. The Board in Chandler-JCPC insists that the interpretation given in the Boyce Authorities remains the preferred interpretation as opposed to the approach taken in Roodal and the CCJ Authorities, but critically, it does accept that there is now ambiguity: ‘[a] difference of opinion... with tenable arguments on both sides’ (Chandler-JCPC at 74). The admission that there are now tenable arguments on both sides and yet the choice preferred by the JCPC is to retain the approach taken in Roodal is disturbing in that it contradicts, at its core, the central justification in the Boyce Authorities to reverse Roodal.

**Final Reflections**

When it heard the Ferguson, Day and Chandler appeals, the JCPC had choices. In Ferguson-JCPC and Day-JCPC, the Board could have followed Lord Sales, the unanimous judicial bench of Bermuda and the Cayman Islands Grand Court, all of them consistent with the position reached by courts of most Commonwealth jurisdictions. In Chandler-JCPC, the Board could have returned to its own decision in Roodal, or, by taking into consideration the 2007 decision of the Inter-American Court of Human Rights, followed similar reasoning as in the CCJ Authorities. The JCPC instead chose outcomes the effect of which reversed the expansion of rights for LGBTQI+ people, favour segregation (and bring it back in Bermuda where it had ceased to exist) and enforce ‘inhumane or degrading’ colonial laws.

Decisions construing constitutional legislation require courts to rely on the language of the enactments that are under consideration together with fundamental principles of constitutional interpretation and relevant precedent in order to reach sound conclusions. It is argued that the problem with the Trilogy is that the language of the subject enactments, properly construed, does not support the JCPC in the outcomes it delivered. The author contends that in coming to its conclusions, the JCPC ignored some of its own established principles, thereby undermining the reasonableness of the outcomes in each of the Trilogy cases. It is not open to the JCPC to justify varying or modifying the language as it did, unless there was ambiguity in the legislative texts or some manifest absurdity. This suggests that the outcomes in those cases are the result of the JCPC’s own predilections and moral values.

The Trilogy has yielded results harmful to the interests of the LGBTQI+ populations in Bermuda, the Cayman Islands and Trinidad and Tobago (and perhaps beyond). That is the Trilogy’s legacy. In Ferguson-JCPC and Day-JCPC, the Board concluded that equality and human dignity do not permeate Caribbean constitutions because they are different. In Chandler-JCPC, the Board confirmed absolute immunity of all colonial laws from any constitutional challenge for breach of fundamental rights and freedoms, regardless of how ‘inhumane or degrading’ they are.

The JCPC has issued findings against LGBTQI+ people in the Caribbean prior to the issuance of the rulings in the Trilogy. Discrimination on grounds of sexual orientation was enabled by the JCPC in Surratt v Trinidad and Tobago [2007] UKPC 55. In Surratt, the domestic Court of Appeal had found, *inter alia*, that to exclude people from the protection of the
law on grounds of their sexual orientation was unconstitutional. That conclusion was overturned by the JCPC. The Trilogy, however, goes further. It confirms the regrettable state of affairs that the JCPC has never in its history delivered a decision to further LGBTQI+ rights in the Caribbean. This comes not out of a hesitancy to intervene, but rather because it acted to intervene and stop progress on LGBTQI+ rights. The JCPC did so by using, as contended here, unorthodox tools of construction, thwarting judicial progress regarding LGBTQI+ rights delivered by Caribbean home-grown judges over the last 20 years. No apex court in the Americas has so consistently denied LGBTQI+ people the ability to assert and advance their rights under their constitutions in modern times. In this the JCPC has unfortunately emerged as the last defender of some of the most regrettable effects of European colonialism in the Caribbean Region.

If the apology of former Prime Minister May represents the UK government’s position, then it is long overdue and apposite for the UK Parliament to act: the JCPC is, after all, its creation (The Privy Council Act 1833). The charade of sitting back and allowing British judges to continue to enforce anti-LGBTQI+ laws first brought to the Caribbean region by the UK, for which the UK executive has apologised, needs to stop. A simple solution would be to amend Section 3 of the Privy Council Act 1833 so as to restrict access to the JCPC to Governments appealing matters decided by the courts of appeal in their jurisdiction in favour of expounding the rights enumerated in the bills of rights of their constitutions. This would emulate the approach taken with respect to access to the European Court of Human Rights or the Inter-American Court of Human Rights. As a matter of policy, judges sitting in the JCPC are foreign judges for the jurisdictions for which they act, just as are judges sitting in Strasbourg and at the Inter-American Court of Human Rights. There is no reason why British judges should continue to be called upon and held responsible for deciding or advising His Majesty to enforce abhorrent colonial laws and to prevent the growth of human rights in the Caribbean region any longer. This is particularly so in circumstances where the local governments are systematically failing to persuade their own Caribbean judicial bench to refrain from expounding constitutional human rights for, among others, the LGBTQI+ members of their populations.
SOME THOUGHTS ON JUDICIAL WELLBEING

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Abstract: Meeting the many demands of judicial office can and should be fulfilling and personally satisfying for judges and magistrates. However, certain aspects of that important work can be taxing in various ways. It behoves judges, magistrates and those who provide administrative leadership for them to be mindful of the pitfalls of heavy workloads, relentless deadline pressure, prolonged exposure to unsettling evidence and conflict and the like and to anticipate and prevent such aspects of adjudicative work from causing mental and physical difficulties for judges and magistrates. Too little attention is given to the ways in which the judicial workplace and work experience can be structured and managed so as to promote judicial wellbeing. Where judicial wellbeing is imperilled, the quality and integrity of justice being dispensed will inevitably suffer. The author of this article—which is the first of a series addressing approaches to judicial wellbeing in different Commonwealth states—provides from long experience on the bench a number of practical suggestions as to how a healthy work/life balance might be achieved and maintained by judicial officers, wherever they may be situated.

Keywords: Judicial wellbeing – work-related stress – work/life balance – preservation of good mental and physical health while under pressure – vicarious trauma – collegial supports – institutional supports

INTRODUCTION

An increasing feature of any interaction, national or international, between judicial officers is expressions of concern, not just about our conditions of work and terms of employment, but of the physical and mental stresses associated with the role of the judge and magistrate and their effect on our own personal wellbeing and on our ability to do the jobs that we are appointed to do.

It is hoped that this article will be the first in a series to be published in this journal, addressing what I will call ‘judicial wellbeing issues’ from different perspectives across the Commonwealth. The physical and mental stresses on a judicial officer in, say, Kenya, are likely to be very different from those in, say, Kiribati, or Canada. But there are common threads, and it is worth exploring these for the possible benefit of us all.

THREATS TO JUDICIAL WELLBEING ARE REAL

Amidst the ‘big issues’ that we discuss at our meetings—such as judicial independence and the Latimer House Guidelines—the insidious and corrosive effects of pressures on the individual wellbeing of judicial officers are often overlooked, but they can be just as important. Judicial officers need to be robust, healthy and well-supported to carry out their proper constitutional function of independently assessing evidence, knowing and applying the law, and giving timely and coherent judgements. Let there be no doubt: there is a problem of judicial wellbeing, a problem which the global pandemic has only served to bring to the fore. That problem will only be properly managed and overcome with greater self-awareness that, as judicial officers, we all need to take active steps to look after ourselves and pay greater attention to our lifestyles, our diet and exercise.

LAPSES IN JUDICIAL WELLBEING VIEWED AT CLOSE HAND

Until retirement I sat as a judge in the south east circuit in England. When I look around at my contemporaries, I see that a disproportionate number have suffered debilitating mental and physical illnesses which have led to long absences, sometimes with early and unplanned retirement. This is the case in a relatively prosperous and well-served jurisdiction. Anecdotally, the situation is worse elsewhere and the editor and editorial board of this journal would like to use the opportunity presented by this publication for others to share the difficulties in their jurisdictions and potential remedies that they may have come across.
From a physical point of view, the very word describing what a judge does—we ‘sit’—is indicative of the unhealthy nature of the job. Many drive to court, make a short walk from the court car park to chambers, sit and read papers, walk into court where we sit in one position, possibly for some hours. There may be a lunch break, which can often be brief and hurried, followed by further hours sitting in court, and then time in chambers dealing with out-of-court issues. Finally, this is followed by an exhausted drive home. The work of the day has brought mental, but not physical, exhaustion.

The mental exhaustion comes about from the need to concentrate on often complicated issues for long periods. We need to be mentally alert, whilst all the time being aware that the issues we deal are likely to be of fundamental importance to the lives of the people in court, who, throughout, have us under close observation. This, for many, is an added source of stress.

Of course, this is the job that we ‘signed up for’ on appointment, but in many cases we can no longer be confident of the availability of types of support for our work that once could be taken for granted (for example, administrative support and the need in our listing for time to reflect and to catch up with developments in the law). We are all familiar with the budgetary constraints under which public services continually labour, and which seem to be universally harsher and harsher, year by year. Many judicial officers now are appointed at a much younger age than may have been the case in the past. There are obvious advantages in this, but a major disadvantage is that lengths of service before retirement may now be very long indeed. This, coupled with perhaps limited opportunity for career development, can add to staleness and frustration as case after case, often of a similar nature, is listed before us. Ticketing of judicial work may not have helped: the varied diet of cases with which many used to be familiar is now less likely to be on offer.

Not only is this situation unhealthy for the individual judicial officer, but it is profoundly unhealthy for the judicial systems in which we work and for the communities we serve. Trials may be conducted too hastily, rushed decisions may be poorly made without due consideration of all the relevant evidence and applicable law, increasing in turn pressures on courts of appeal. Cases may have to be adjourned unnecessarily, perhaps on short notice, when judges are unwell, or transferred to different judges unfamiliar with the background, resulting in more loss of time. Good judges may leave, or take early retirement, disillusioned with the pressures of the job, or may not apply for full time appointment in the first place after comparing the judicial life and rewards, with the life and rewards of private practice.

In many, perhaps most, of our jurisdictions there is what I might call a tradition of robustness both at the Bar and on the bench. There can be an expectation that those whose careers are made in and around courts of law are able to keep a healthy distance from the grim issues which they often have to address, and shrug off the daily pressures. I am conscious of approaching my own legal career in this way on occasion. This is all very well but it can lead to impatience and intolerance and worse. It can also disguise resulting mental and domestic pressures. I am sorry to say that many of us may be familiar with the occasional truth of the caricatured judge who has ‘taken to the bottle’.

THE OVERARCHING IMPORTANCE OF BALANCE

Although there may be many administrative steps and judicial techniques which could, and should, be taken to improve the situation, I would argue that the issue can simply be summed up in one word: ‘balance’. As in so many other walks of life, the achievement of balance in judges’ lives and work leads to better performance by us in our work, and happier lives all round.

SOME SUGGESTIONS RE: ADMINISTRATIVE FOSTERING OF JUDICIAL WELLBEING

I would outline a few simple areas where I believe judges could be helped in achieving that balance, seen in turn from the points of view of judicial administration, individual judicial officers, and finally from the perspective of judicial bodies, and especially international judicial bodies such as the Commonwealth Magistrates’ and Judges’ Association.
By judicial administration, I mean the administrative structure in which we do our work. I include, I think importantly, those judges who have taken on administrative and leadership roles. Judicial administrators and what I may call ‘leadership judges’ have a difficult job to do. First, their budgets will be constrained, and they are probably under great pressures from what may be unreasonable and unnecessary performance targets. The pressures mean that they may be constantly ‘firefighting’. A few ground rules may help them:

- They should at all times be respectful of the independence of the individual judicial officers. Any administrative guidance or direction should bear this in mind. Where disciplinary steps seem to be necessary, there must be a clear identification of whether or not an issue is one of health and stress or one of misconduct in some way. There must be clear due process that is respectful of the individual involved whilst being mindful of administrative needs;

- Leadership judges themselves should be appointed for their known empathy for their colleagues and be given time and training to carry out their function properly;

- Listing should always be a judicial function, with judicial officers giving clear guidance to listing officers which has been negotiated and agreed by the relevant judicial body and which is properly mindful of the need for the court’s business to be got through;

- Time should be given in the judicial day for judicial officers to be able not only to ‘take a break’, but also to catch up with the work that they have to do out of court, which may well include finishing reserved judgements and preparation for future trials;

- There should be very clear protocols and time limits on reserved judgements, and where there have to be further delays these should be negotiated between the judge concerned and the relevant leadership judge;

- Judicial itineraries should be devised with a realistic expectation of what is expected of a judge for travelling, bearing in mind his or her own domestic arrangements and commitments; and

- To help avoid undue pressure on individual judges there should be training in, and encouragement of, *ex tempore* judgements, especially where the issue at stake is a minor or procedural one. Coming from a jurisdiction where such a course is quite general, indeed expected, it has always surprised me to find how few Commonwealth jurisdictions fail to encourage *ex tempore* judgements. Where an adequate notetaker is unavailable (and this may be provided by the parties’ own advocates), or there is no adequate recording facility (which with modern and inexpensive technology should be increasingly rare), a judge could prepare the briefest note of the reasons for the decision, which could be on the court file. I am reminded of the, possibly apocryphal, story of the first instance judge who was a renowned caricaturist. On an appeal there was nothing from which the Court of Appeal could ascertain the reason for what seemed to be a perverse decision. They called for his notebook. This contained a caricature of the appellant with the inscription ‘a liar, and a good liar too’. The appellate court decided that they had an adequate explanation for the judge’s decision; he disbelieved the appellant, which he was entitled to do, and dismissed the appeal.

Every jurisdiction, and most judicial officers, may have other suggestions which could help. We would be interested to hear of them.

**WHAT CAN INDIVIDUAL JUDICIAL OFFICERS DO TO PRESERVE THEIR OWN PHYSICAL AND MENTAL HEALTH?**

This brings me to individual judicial officers. What can they do? What should they do to preserve and enhance their own wellbeing? First of all of course, they must always keep in mind their proper constitutional role and their judicial oaths. It often surprised me during my own judicial career how often I could draw comfort from reminding myself of my oath.
Some other ideas:

• Take time to prepare. Work hard, but if more time is needed than is available, insist on having that time, and ensure that you use it for the purpose of preparation;

• Do not allow yourself to be distracted or harried, whether by litigants, administrators, advocates or, dare I say it, judicial colleagues;

• If during a trial you find yourself losing concentration, take a short break. You do litigants no service by continuing to sit in court when you are unable to concentrate on the job in hand;

• Avoid long-reserved judgements. They clutter up the mind, and lead to unnecessary anxiety. When you do give judgment, make it brief and to the point, ensuring, as you must, that all of the salient points are covered, but avoiding being distracted by every issue that the parties wish you to consider where they are irrelevant to the matter before you. Many times in my own court I have found myself saying words to the effect that ‘much time has been spent on this issue, but I am satisfied that it is one on which I need not make a judicial finding to determine the final outcome of the case’. Remember that it is your job to come to a decision. Come to it, give your reasons, and move on. Don’t worry too much about the Court of Appeal. It is part of their job to deal with the mistakes which we may have made, and, with respect to any appellate judges who may be reading this, we don’t want to do them out of gainful employment!; and

• Try to ensure that your diet of work is a varied one. It cannot be healthy for a judge to spend his or her time, day after day dealing with, say, allegations of sexual abuse.

I will not here make suggestions as to the personal health and wellbeing of individual judges. I am in no way qualified to do so. We are all bombarded with advice on diet and exercise and we should be mindful of that advice, but above all, keep a balance between our life as a judge and our domestic life, making the most of the comfort that friends and family can give.

**The Importance of Judicial Associations**

One of the many advantages of membership of judicial associations is that it gives us an invaluable opportunity to compare our lives with those of our colleagues. This helps to keep in proportion the anxieties which may come upon us. Throughout my judicial career, I took especial comfort in my own membership in different judicial bodies, both national and international. Active participation in their programmes by all levels of the judiciary and magistracy should be encouraged by judicial administrators and the senior judiciary. They enable one to have regular contact with colleagues who may be struggling with similar issues. They help to promote a collegiality which can greatly assist with the pressures of the job. In the case of CMJA meetings, these would often be held in environments very different from the one in which I worked. The CMJA’s programmes in particular enabled me to keep a sense of proportion about the issues with which I was faced. They helped me achieve a degree of balance in my work as a judge.

**Concluding Thoughts**

We do the parties who appear before us no service if we involve ourselves with the drama and emotion of their case. We have to keep a professional distance, but without losing our empathy or interest. ‘Enjoy’ is perhaps an odd term to use for the work of a judge or magistrate, but all professionals wish to enjoy the work that they do, and only by cultivating that distance, and keeping the balance in our life and our work, can we find true satisfaction in our work. We are entitled to expect our administrators, as well as our judicial colleagues, to understand and respect this.
Abstract: The doctrine of vicarious liability in tort is both controversial and on the move. The rule—which holds one party (usually an employer) strictly liable for the torts of an employee that take place in the course of their employment—is one that conflicts with notions of corrective justice rendering an innocent party liable for the torts of another. And yet recent judicial decisions from apex courts across the Commonwealth have adopted an expansive approach to the test for vicarious liability, giving rise to questions as to how far the doctrine should extend. It is also an area where there has been considerable cross-citation between common law jurisdictions, notably of decisions of the UK Supreme Court, the Supreme Court of Canada and the High Court of Australia. Drawing on P Giliker (ed), Vicarious Liability in the Common Law World (Hart 2022), this article will examine key decisions in England and Wales, Canada, Australia, Ireland, Hong Kong, and Singapore and address three key questions: What insights can we gain from scrutinising other common law jurisdictions on the operation of this doctrine? Is there a ‘common law’ approach to vicarious liability? How (and why) should lawyers engage with case-law from other common law jurisdictions?

Keywords: Vicarious liability – tort law – common law Supreme Courts – judicial decision-making – cross-citation of case-law – comparative law

INTRODUCTION

The doctrine of vicarious liability in tort continues to trouble Commonwealth courts. There has been an extraordinary growth of case-law on vicarious liability in the last 20 years. One reason for the litigation is that its scope is contentious. In imposing strict (non-fault)-based liability on innocent parties (usually employers) for the torts of their employees committed in the course of employment, the doctrine runs counter to ordinary notions of corrective justice, that is, making the wrongdoer pay. Equally, the doctrine covers not only negligence, but also intentional torts such as sexual abuse (Lister v Hesley Hall Ltd [2001] UKHL 22, Bazley v Curry [1999] 2 SCR 534, Prince Alfred College v ADC [2016] HCA 37), assault (Mohamud v Morrisons [2016] UKSC 11), fraud (Skandinavska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd [2011] SGCA 22) and even murder/robbery (Li Hoi Shuen v Man Ming Engineering Trading Co Ltd [2006] 1 HKLRD 84). The doctrine will only apply, however, where:

(i) the tortfeasor is in a relationship with the defendant that gives rise to vicarious liability; and

(ii) the tortfeasor commits the tort in the course of this relationship.

The courts have faced the two key questions: what kinds of relationships give rise to vicarious liability? and how broadly should the ‘course of employment’ test be interpreted? A willingness to expand vicarious liability has led some courts to interpret conditions (i) and (ii) above very generously. As we will see, this is not an approach taken by all courts across the Commonwealth but the courts in England and Wales and Canada, in particular, have led the way in interpreting both tests broadly, giving rise to a concern that the doctrine is placing an unduly heavy burden on innocent defendants who might struggle at times to obtain the insurance cover necessary to satisfy the compensatory burden it imposes.

In examining these questions, I will draw on a recent study (P Giliker (ed) Vicarious Liability in the Common Law World (Hart 2022)) in which leading tort academics from across the common law world examine how the courts in their home jurisdictions have interpreted and applied the test for vicarious liability, critically assessing its current operation and predicting
its future development. The book draws on systems where there is an established history of cross-citation in this field, examining vicarious liability from the perspective of Canada, England and Wales, Australia, Ireland, Singapore, Hong Kong and New Zealand (with an additional chapter highlighting the relationship between English and Scots law). As we will see, while developments in the Supreme Court of Canada and the UK Supreme Court have been influential, this has not prevented the High Court of Australia from developing its own distinctive response, while the apex courts of Ireland and Singapore, in particular, have provided valuable critical commentary on key English and Canadian cases and highlighted some of the difficulties in transplanting these cases into other common law jurisdictions.

THE RELATIONSHIP TEST

Employee v Independent Contractor

The most common relationship giving rise to vicarious liability is that of employer/employee and, in the past, Commonwealth courts have concentrated in distinguishing employees under contracts of service from independent contractors for whom no vicarious liability will arise. Cases such as Ready Mixed Concrete (South East) Ltd v MPNI [1968] 2 QB 497 and 671122 Ontario Ltd v Sagaz Industries Canada Ltd [2001] 2 SCR 983 highlight that it does not make sense to anchor liability on an employer for acts of someone who is in business on his or her own account. Rather, any test must focus on the substance of the parties’ relationship rather than relying on simplistic tests of control or authority. The High Court of Australia (the ‘HCA’) took this a step further in Hollis v Vabu Pty Ltd [2001] HCA 44 in finding an unidentified bicycle courier wearing the Vabu tabard satisfied the employee ‘economic reality’ test despite the fact the couriers were paid fixed rates per job and used their own bicycles. Here, the HCA was influenced by the fact that the couriers were presented to the public and to those using the courier service as ‘emanations’ of Vabu. More recently, however, the HCA has warned that the emphasis should be on whether a labourer is conducting his or her own independent business, as distinct from serving in the business of the employer, advising the courts to avoid relying on an impressionistic checklist of factors representing the totality of the parties’ relationship: Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1, 34-35).

‘Akin to Employees’

More recently, however, the courts have sought to recognise the changing nature of the workplace and its impact on vicarious liability. The ‘gig’ economy has given rise to a new category of workers who are hired under precarious contracts often with no guarantee of work. Classifying these workers as ‘employees’ able to benefit from employee protection has proven controversial in that they bear few of the hallmarks of the traditional employee. Yet such workers often fulfil many of the roles traditionally held by employees such as cleaners, delivery personnel, human resource operatives, IT specialists etc. Should, therefore, vicarious liability extend to these relationships which essentially replace many traditional ‘employee’ relationships? McHugh J in Hollis v Vabu warned (at 85) that ‘[i]f the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships’. Courts have also faced the dilemma of workers who are not technically ‘employees’ (Catholic priests, for example, in many jurisdictions are classified as officeholders) but whose work patterns mirror those of employees.

Many common law jurisdictions have come to accept that, to remain relevant, vicarious liability should apply to relationships ‘akin to employment’ (see Doe v Bennett [2004] 1 SCR 436, Various Claimants v Catholic Child Welfare Society (CCWS) [2012] UKSC 56, Hickey v McGowan [2017] IESC 6, Ng Huat Seng v Mohammad [2017] SGCA 58). While the logic of extending the doctrine to relationships that are factually close to that of employment seems self-evident, the application of this test has raised concerns as to how proximate to employment this relationship should be. Should foster parents, for example, be regarded as ‘akin to employees’ of the local authority? (Armes v Nottinghamshire CC [2017] UKSC 60 (yes); KLB v British Columbia [2003] 2 SCR 403 (no)). What about prisoners working in a prison kitchen? (Cox v MoJ [2016] UKSC 10 (yes)). In contrast, Australia has resisted such a step, preferring to adhere to its totality of relationship test, despite pressure to extend vicarious liability to the torts of abusive priests (see, recently, DP v Bird [2021] VSC 850).
It is of interest that having advocated a generous approach to the ‘akin to employment’ test in Armes and Cox (noted above)—an approach followed in many Commonwealth countries—the UK Supreme Court (the ‘UKSC’) in 2020 argued for a narrower, less policy-led, interpretation of this test, casting doubt on the Armes case: Barclays Bank plc v Various Claimants [2020] UKSC 13. Baroness Hale in Barclays (at 16) was critical of a tendency in the English courts ‘to elide the policy reasons for the doctrine of the employer’s liability for the acts of his employee … with the principles which should guide the development of that liability into relationships which are not employment, but which are sufficiently akin to employment to make it fair and just to impose such liability. Canada, however, continues to regard policy as relevant (Sagaz (2001); Doe (2004)) and it remains to be seen how far the courts can (and will) seek to divorce policy considerations from the ‘akin to employment’ question.

Common Law Reflections

Extending the relationship giving rise to vicarious liability beyond that of the traditional employee has proven controversial. While we might argue that it should include workers who are not classified as employees on a technical basis (e.g. Catholic priests), this does not answer the question of how ‘akin’ the relationship should be to that of employment. One answer would be to prefer Australia’s current approach which applies the employment test liberally, but this leaves much to the discretion of the court (and the test does not currently extend to priests). I would argue that a better answer would be for the courts to recognise that the changing status of workers requires an evolution of the meaning of ‘employee’. Here the courts are responding to the fact that many of the tortfeasors for whom vicarious liability would traditionally have been applied are no longer hired as such. My own view is that Armes does go too far and that this has led to a backlash but that there is much to be said for an incremental and controlled development of the ‘employee’ concept to include workers whose status is very close to that of a traditional employee. This prevents employers from contracting out their services to avoid the imposition of vicarious liability at the expense of tort victims.

The Course of Employment Test

The Salmond Test

Under the traditional Salmond test, employers would only be held strictly liable for their employee’s torts if the tort amounted to ‘either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master’: JW Salmond, The Law of Torts 1st ed (Stevens and Haynes 1907) 83. This test was embraced by the common law world, see, e.g., Canada (WW Sales Ltd v City of Edmonton [1942] SCR 467), Ireland (Reilly v Ryan [1991] 2 LR 247), Australia (Deatons Pty Ltd v Flew [1949] HCA 60) and Singapore (Keppel Bus Co v Sa-ad bin Ahmad [1974] 1 W.L.R. 1082). Yet the validity of the Salmond test came to be threatened by the willingness of the courts to extend vicarious liability to intentional torts such as fraud, civil theft (conversion) and battery. This came to a head in the late 1990s when a number of prominent cases were brought claiming vicarious liability for acts of sexual abuse by employees in childcare settings. Judges quite rightly were uncomfortable with the idea that the serious crime of sexual abuse could be regarded as a ‘wrongful and unauthorised mode’ of undertaking childcare.

The Close Connection Test

The alternative ‘close connection’ test was introduced in Canada (Bazley v Curry) and the UK (Lister v Hesley Hall) in 1999 and 2001 respectively. This test provided a means of circumventing the limits of the Salmond test and responding to a wave of claims in these jurisdictions arising from historic sexual abuse scandals involving residential schools, children’s homes and other religious institutions. Bazley, in particular, sought to cover torts where there was ‘a significant connection between the creation or enhancement of a risk [of injury] and the wrong that accrues’ (at 41). Lister was less overtly policy-based—‘vicarious liability would arise where the employee’s torts could be said to be so closely connected with his employment that it would be fair and just to hold the employers vicariously liable’ (at 28)—although later case law became more reconciled with Bazley’s enterprise-risk rationale. The Commonwealth reaction to Bazley/Lister was generally favourable and interestingly did not focus on the differences between these decisions, notably as to the role of policy in applying the close connection test.
The Singaporean courts, in particular, have been willing to embrace a close connection test based on enterprise-risk reasoning (Skandinavska (2011); Ng Huat Seng (2017)), with other jurisdictions such as Hong Kong and Ireland following suit (Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd (2002) 5 HKCFAR 569; Hickey v McGowan (2017)).

However, applying a test constructed in the light of sexual abuse scandals has not been without problems. It does not resolve to what extent legal systems should embrace enterprise risk as the main justification for all instances of vicarious liability. Notably the UKSC in the Catholic Child Welfare Case (2012) cited five justifications in total, although it recognised that risk was particularly appropriate to cases of abuse. Equally it does not resolve whether the Bazley/Lister test should apply to all torts including negligence (where the Salmond test works without any real problems). While Canada and Hong Kong applied the test immediately to all torts, the UK dithered for a number of years. One further difficulty has been changing position of the UKSC in relation to the application of the connection test, moving from a test of close connection (Lister (2001)) to one of sufficient connection (Mohamud (2016)) and then back again (Various Claimants v Morrisons [2020] UKSC 12). Singaporean and Hong Kong courts, for example, have wrestled with persuasive authority coming from the UK only to find the UKSC changing its mind a few years later. The reaction from Australia has been even more forceful. In Prince Alfred College v ADC (2016), the High Court of Australia rejected the Bazley/Lister close connection test, stating (at 43-45):

...[the] decisions of the courts of Canada and the United Kingdom... have provided a springboard for the development of tests which have regard, more generally, to the connection between the wrongful act and the employment and, in the United Kingdom, to what a judge determines to be fair and just... They do not reflect the current state of the law in Australia and the balance sought to be achieved by it in the imposition of vicarious liability

The Occasion Test

In Prince Alfred College, the HCA not only rejected the Bazley/Lister test but outlined its own test. In cases of this kind, the courts should consider any special role that the employer has assigned to the employee and the position in which the employee is placed in relation to the victim: Prince Alfred College, 81. In determining whether the task delegated to the employee provides the ‘occasion’ for the tort, the courts will examine factors such as authority, power, trust, control and the ability to achieve intimacy with the victim.

This test has met a mixed response. It is not clear it extends beyond intentional torts such as sexual abuse (the context of the case). Commentators have queried whether a test of occasion is any better than the close connection test in excluding situations where the employment only provides the opportunity for the tort—where, it is agreed, vicarious liability does not arise. My own view is that the HCA was reacting to the then leading UK decision of Mohamud which gave the impression that the close connection test had been watered down to one of sufficient connection—reasoning which it rightly criticised as allowing the mere opportunity of wrongdoing potentially to satisfy the test. The HCA was also critical of the overt reference to social policy in Mohamud. The UKSC in Morrisons (2020), however, met this criticism by rejecting any suggestion that the close connection test was one of opportunity or based on social policy, confining policy concerns to sexual abuse cases. In this light, one might question to what extent the practical application of the Prince Alfred College ‘occasion’ test would differ from that of the revised Morrisons ‘close connection’ test in sexual abuse cases.

Common Law Reflections

A study of the judicial treatment of the course of employment test provides us with an excellent overview of the development of vicarious liability across the common law world. The Canadian and UK courts have provided a test that is capable of dealing with compensation claims for institutional child sexual abuse via the mechanism of vicarious liability, but this test(s) has been used, as we have seen, in relation to tort law generally. It has also, in the UK at least, been a test in flux, with the UKSC changing it position from Lister (2001) to Mohamud (2016) and then back to the stricter test of Morrisons (2020). In my view, the current response of the UK courts in Morrisons (2020)—that requires that the
tort is so closely connected with the tasks the employee was authorised to do that it could be fairly and properly be regarded as in the course of employment—is a sensible way forward and one more likely to operate successfully in Commonwealth jurisdictions. In common with the HCA's approach in *Prince Alfred College*, both the UKSC and HCA advocate an incremental approach, supplemented by reference to past case-law. Despite, therefore, formal differences, the connection and occasion test are drawing closer together.

**Conclusions**

In the last 20 years, apex courts in common law jurisdictions have been asked to rethink the test for vicarious liability in tort. There are several reasons for this. The first is the global scandal of historical child sexual abuse from residential schools in Canada, to children's homes in England and Wales to religious institutions in Australia. All three jurisdictions have undertaken public inquiries in the hope of preventing such terrible events happening again. Victims have sought to rely on vicarious liability partly through difficulties in identifying abusers due to lapse of time, but also through a sense that the institutions, although not technically at fault, should be held responsible to them for their suffering. This required a broader test for vicarious liability. However, other pressures exist. The changing nature of the workplace means that many workers are no longer technically employees but working under contracts by which they find themselves labelled self-employed, although in some cases the nature of the job has not changed. It would diminish vicarious liability if the torts of these workers were no longer covered by the doctrine. This has required a re-examination of the 'relationship' and 'course of employment' tests.

Revising the test for vicarious liability, and importantly identifying a theoretical justification for expansion, has not been a straightforward process. Here, common law cross-citation has proven helpful in inspiring legal development, supported by academic analysis from across the common law world and a range of judicial expertise that no one system can provide. Cross-citation importantly can serve to justify legal change (see Singapore, Hong Kong, Ireland) or provide the critical framework in which a different path is chosen (Australia). It is also a process that is non-hierarchical. In 2020, for example, in revising the UK approach, the UKSC in *Barclays Bank* found inspiration in the decision of the Singapore Court of Appeal in *Ng Huat Seng*. Equally, despite no open acknowledgement, the UKSC in *Morrisons* was, in my view, influenced by the Australian condemnation of its decision in *Mohamud* and by doubts about the breadth of the sufficient connection test in *Prince Alfred College*.

In the best dialogues, then, we do not always agree but we learn. We listen to and consider counterarguments, new ideas and different approaches in determining our own application of the law. Comparative approaches assist us by permitting a cross-fertilisation of ideas improving the quality of legal reasoning. There are, however, a few caveats to this positive picture. In looking at other systems, they must provide a source of reliable and persuasive authority. We must also recognise certain dangers such as ignoring domestic influences that shape the law. For example, Australian law must be viewed in the light of legislation that deals with vicarious liability claims for sexual abuse. It is important also not to be uncritical of source material—mistakes can be made. Australia, as we have seen, has condemned what it regarded as the excesses of the *Mohamud* approach. Equally, Ireland was critical in *Hickey v McGowan* of the UKSC's treatment of vicarious liability claims against unincorporated associations in CCWS, whilst the Singapore Court of Appeal in *Ng Huat Seng* advised against too broad a notion of relationship.

What we see, therefore, is not a 'common law' approach to vicarious liability, but rather a healthy dialogue in relation to a doctrine shared across legal systems with a common legal heritage. Vicarious liability is not a straightforward topic. Anything that is controversial rarely is. However, by comparing decisions across the Commonwealth, we gain a clearer understanding of its application in practice, its theoretical underpinnings, where the courts have gone wrong and where judicial reasoning has operated in a sensible and coherent way. While each legal system will continue to develop its own domestic doctrine, a comparative study of vicarious liability continues to provide inspiration for legal systems across the common law world.
BOOK REVIEWS

Constitutional Statecraft in Asian Courts

Yvonne Tew

As its title indicates, this book addresses the subject of developing constitutionalism in Asia. It does so by examining the role of courts in protecting and building constitutionalism in ‘aspiring but fragile democracies’ (p. 10), in particular Malaysia and Singapore. Both share a number of common features, including the post-colonial origins of their respective constitutional histories and also, more relevantly, governance by a dominant political party or coalition. In the case of Malaysia, it was only in 2018, after six decades of rule by the Barisan Nasional ruling coalition, that a democratic change of government occurred. Singapore has been governed by the People’s Action Party since it became a unitary sovereign state in 1965.

Each country has a written constitution embracing a separation of powers doctrine and containing a supremacy clause empowering courts to invalidate legislation and executive action in breach of protected rights. Yet, due to wide amendment powers, and frequent resort to those powers by their governments and a tendency towards deference by the courts to the executive, the courts of both countries have, it is suggested, been slow to exercise strong constitutional review.

But this thought-provoking study suggests there is reason to think the tide may be turning and that courts in both Malaysia and Singapore are developing a willingness to undertake a stronger, more robust, judicial review of legislation and executive action. More importantly, in the latter parts of the book (Parts II and III) the author advocates ‘a framework for constitutional adjudication designed to enable courts to promote and develop constitutionalism, in particular the separation of powers and Rule of Law.

The author sets the scene (in Part I) by helpfully identifying a number of polarising dichotomies (universalism vs. relativism; individualism vs. communitarianism; civil liberties vs. economic development) producing different views of rights protection. Each of these dichotomies, which the author suggests are false, play into the debate pitting Western liberal democratic thinking against so-called ‘Asian values’. The embracing of Asian values is problematic since, as the author points out, it is possible to regard Asian values as not much more than conservative Western values and merely a rhetorical tool in rights discourse. The author argues cogently for an account of constitutionalism that is ‘contextually attentive to the constitutional framework of the Asian democracies in which it operates’ (p. 33).

The author continues to set the scene by describing the historical background of the establishment of the Federation of Malaysia and the Republic of Singapore respectively (pp. 35-41). Readers unfamiliar with the history of these former British colonies, will find this provides valuable context, sketching the origins of the 1957 Merdeka (Independence) Constitution of the Federation of Malaya and the ‘cobbled together’ (p. 40) Constitution adopted by Singapore when it left the, by then, Federation of Malaysia and established the independent Republic of Singapore on 9 August 1965. The structure of the constitutional and court systems in Malaysia and Singapore are briefly described, giving helpful context to subsequent references to cases decided respectively by the Federal Court of Malaysia and the Singapore courts. A subsequent chapter (Part II, chapter 3 at pp. 69-91) gives a more detailed description of the process by which Malaysia’s Merdeka Constitution came into being, under the auspices of the Reid Commission, chaired by Lord Reid, and the relatively ‘messy’ process by which Singapore’s Constitution was assembled.

The task of establishing a culture of constitutional adjudication and judicial review is a challenge. As the author points out, there is a long history of judicial deference to the political branches in Malaysia and Singapore. Singapore’s apex court has never declared a law unconstitutional in its history, and prior to 2017, Malaysia’s Federal Court had not struck down a federal law in twenty years. The apparent reluctance of Malaysian and Singaporean courts to exercise a strong judicial review jurisdiction may stem,
ironically, from legal traditions inherited from the UK and its Diceyan notion of Parliamentary sovereignty, a concept which is misplaced in the written Constitutions of Malaysia and Singapore. Instead, the author points out, the constitutional architecture is different, calling for the approach laid down by the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 giving a ‘generous’ approach to rights in constitutional interpretation and avoiding ‘the austerity of tabulated legalism’ (p. 42).

Instead of this generous approach, the author explains that courts in Malaysia and Singapore traditionally adopted an inward-looking approach to constitutional adjudication, construing their Constitutions within the ‘four walls’ of the document, a doctrine laid down in a 1963 decision of the Malaysian Supreme Court (the precursor of the Federal Court), *Government of Kelantan v Government of Malaya* [1963] 29 Malayan LJ 355.

In a lucid analysis, the author charts (in Part II) a framework for constitutional adjudication built on three principal mechanisms. These are: (1) an unalterable constitutional basic structure doctrine, as articulated by the Indian Supreme Court in *Kesavananda v State of Kerala*, AIR 1973 SC 1461 (pp. 140-147); (2) a generous, purposive approach to interpretation of rights guarantees (pp. 147-149); and (3) robust proportionality analysis in constitutional rights adjudication (pp. 149-153). She does so by reference to the constitutional history of both countries (chapter 3), the court’s defence of the separation of powers doctrine (chapter 4) and the understanding of the Rule of Law as a fundamental feature of the constitution’s core structure, even within countries such as Malaysia and Singapore practising ‘authoritarian constitutionalism’ (chapter 5). This part concludes with an analysis of the courts in transition in both countries (chapter 6).

In the course of these detailed arguments, the author illustrates the framework she develops with reference to a number of landmark decisions, which are revisited at different points in the text and in different contexts. These include: (1) *Semenyih Jaya v Pentabdir Tanah Daerah Hulu Langat* [2017] 3 Malayan LJ 561 in which the Federal Court endorsed the constitutional basic structure doctrine in reading down (but not expressly invalidating) part of a statute seeking to subject the courts’ power to Parliament, contrary to Article 121(1) of the Constitution; (2) *Indira Gandhi v Pengarah Jabatan Agama Islam Perak* [2018] Malayan LJ 545 in which the Federal Court addressed the constitutional religion clause declaring Islam to be the religion of the Federation and affirmed that ‘the separation of powers, the rule of law and the protection of minorities’ are ‘part of the basic structure of the Constitution’ that ‘cannot be abrogated or removed’ (ibid. at 90); and (3) *Chng Suan Tze v Minister of Home Affairs* [1988] 2 Sing. L. Rep. (R.) 525 in which the Singapore Court of Appeal rejected a subjective or unfettered ministerial discretion as being contrary to the Rule of Law.

Yet, as against these instances of judicial assertiveness, it remains the case that in political systems subject to a dominant party or coalition, constitutional and legislative amendments are a relatively easy tool for the executive to bypass or override judicial decisions. The Malaysian Constitution has been amended through more than 50 amendment acts, containing around 700 textual amendments and in Singapore more than 40 constitutional amendment acts have been passed (p. 59). The Singaporean example, in the context of security legislation, is the decision in *Teo Soh Lung v Minister of Home Affairs* [1989] 1 Sing. L. Rep. 461 following the constitutional amendments introduced as a reaction to the *Chng Suan Tze* decision, is cited as an ‘infamous’ episode (p.118).

The final part of the book (Part III) examines how constitutional adjudication has been approached in practice in the two jurisdictions by reference to judicial decisions relating to the sensitive subjects of: (1) religion (chapter 7), a ‘fault line in contemporary Malaysia politics in recent decades’ (p. 163) given the interface between civil and Sharia courts; and (2) internal security (chapter 8), in countries where resort to emergency powers and laws regulating security and public order have long formed ‘a comprehensive network of state control’ (p. 189), and where clashes over the legality of preventive detentions have been a feature of the institutional contest between the political branches and the judiciary. At the outset of the book, the author asks whether the courts of Malaysia and Singapore
see themselves as engaged in a Sisyphean task (p. 5) and she returns to this characterisation at its conclusion (p. 197). Yet, whilst recognising that judges cannot be expected to be Herculean (p. 17), she challenges the courts to rise to the task, warning of the danger when constitutional exceptions become normalised (p. 213). It is the courts’ constitutional responsibility, she points out, to articulate and uphold the principles fundamental to the constitution’s architecture, especially when the political branches depart from core principles (p. 213). She concludes by suggesting that the constitutional transitions of Malaysia and Singapore raise similar core issues of democratic constitutionalism across other fledgling democracies in Asia and expresses the hope that courts will play a role as partners in the enterprise of constitutional statecraft (pp. 214-219).

Readers may legitimately question how active a role courts can play in the task of ‘statecraft’. Apex courts in common law systems decide issues framed in the context of adversarial litigation. Their decisions say much about the health and robustness of the Rule of Law in their respective jurisdictions. But just how far beyond that they are proactively able to build and sustain constitutionalism is necessarily limited by other factors including their functional place in their particular political structures. It is undeniably the case that the extent to which courts can protect and develop constitutionalism in practice depends in part on executive and legislative branches eschewing thin conceptions of the Rule of Law and accepting the courts’ judicial review role as a proper collaborative check and balance on their powers. In fairness, the author acknowledges the importance of other institutional actors, instead locating ‘the courts’ approach to constitutional adjudication within the broader political context of these emerging Asian states’ (p. 45).

Nevertheless, at a time in history when countries may once again find themselves facing ‘existential challenges’ like those faced by Malaysia and Singapore when their constitutions were created (p. 212), this book provides a timely reminder that, if constitutionalism and human rights are to be protected, courts need to rise to the challenges posed.

Reviewed by Hon Joseph Fok, Permanent Judge, Hong Kong Court of Final Appeal

SELECTED PAPERS AND LECTURES ON GHANAIAN LAW

Samuel K. Date-Bah

In the first issue of the Commonwealth Law Journal published in 2016, I reviewed author Samuel K. Date-Bah’s Reflections on the Supreme Court of Ghana, written by him from the perspective of a retired justice of that Court. Date-Bah now offers, as a ‘product of the confinement consequent on the pandemic’, a compendium of his selected letters and papers, principally but not exclusively on Ghanaian law, prepared for diverse fora in Ghana and abroad. As the author justifiably claims, the variety of topics covered amounts almost as a mini reader in Ghanaian law. However, the topics are often treated from a comparative perspective, so that the book is of value to lawyers and others interested in the legal process in developing countries.

The papers are arranged in four parts.

Part I is devoted to the legal system and legal education in Ghana, enriched by the author’s insights as a legal academic (before his elevation to the bench). In tracing the development of law teaching, he emphasises the importance of comparative law and laments the decline of teaching of the subject in the Law Faculty of the University of Ghana. He also advocates an infusion of a clinical legal education element in the curriculum in co-operation with the vocational education programme of the Ghana Law School. Date-Bah makes some telling observations regarding the role of the Law Faculty in the governance and socio-legal development of the country. ‘Legal Education’, he observes, ‘is about enthusing a fresh generation of lawyers each time about the rule of law and the potential of law as an instrument of social ordering and development’. (p. 70)

Part II deals with the judiciary, with particular reference to judicial independence in the light of the Commonwealth Latimer House Principles on the relationship between the three branches of government—the legislature, the executive and the judiciary. Date-Bah seems satisfied with the protection of judicial independence in Ghana under the
current constitutional dispensation, which is buttressed by a code of conduct which protects the personal independence of judges. The author emphasises the role of the judiciary in providing relief against human rights abuses. He draws on his own experience on the Supreme Court bench, where he sought to uphold the application of international human rights norms, sometimes in the face of reluctance by fellow judges who favoured a ‘less internationalist’ approach. He cites the case of *Dexter Johnson v Republic* [2011] 2 SCLR 601, where he was in the minority in finding that the death penalty for murder was unconstitutional and incompatible with the fundamental human rights of the appellant. Date-Bah also includes in this Part a chapter on judicial remuneration and promotion. While claiming that the position of the judge in Ghana in these respects is generally satisfactory, he notes that private legal practice generates more remuneration than that paid to judges. Readers of this review throughout the Commonwealth will no doubt confirm the truth of this observation. Another problem familiar to judges is that of delays in the judicial process. The author applauds the recent creation of a Commercial Court in Ghana with the objective of reducing delays in the dispute resolution process.

Part III, under the rubric of ‘Human Rights and Good Governance’, examines attempts in Ghana to build a robust ethics infrastructure to promote a national integrity system. This exercise involves measures dealing with corruption, enhancing the role of the media and encouraging public participation in the democratic process. The role of an independent, accountable and well-resourced judiciary has a crucial role to play. This Part includes a chapter on emergency powers, the use of which, as the author observes, may compromise democratic governance and processes. This chapter was written before the use of such powers during the pandemic brought this issue into sharp relief throughout the Commonwealth. Given Ghana’s experience of abuse of power by past military regimes and of past failures by the judiciary to assert itself in the face of such abuses, current legislation seeks to strike a balance between security and democratic rights. However, at the time of writing, no state of emergency had been declared under the 1992 Constitution to deal with COVID-19. It would be instructive to have Date-Bah’s analysis of the Ghanaian government’s response to the pandemic. This Part concludes with an analysis of case-law on the Ghana parliament’s constitutional mandate to approve international business agreements made by the government. Perhaps this chapter would have been more appropriate in the concluding Part.

Part IV deals with business law, a subject which the author notes is not taught in Ghanaian law schools, but which encompasses a wide range of legal subjects. There is a fascinating account of the law reforms introduced after independence in 1957 by a brilliant group of foreign lawyers recruited as consultants by Nkrumah’s Attorney General, Geoffrey Bing QC. As a result, Ghana’s progressive company and contracts legislation reflected reforms the wisdom of which the authors were unable to persuade the authorities in their home countries to adopt. These expatriates were supported by a team of able Ghanaian lawyers, including Patrick Atiyah, who later became Professor of English Law at Oxford University. The Part concludes with chapters which adopt a comparative approach to competition law in West Africa. The case is made for African states’ accession to the United Nations Convention on Contracts for the International Sale of Goods, and some observation are offered on arbitration. In respect of the latter, the author emphasises the importance for practising lawyers and for national judges of an understanding of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the transnational case law on its application and interpretation.

Although the volume contains a selection of papers on a wide range of topics rather than forming a unitary whole, the overall effect is to provide insights for several categories of reader. Judges will value the perspective of a fellow judge, practitioners will relish the case-law analysis and academics will value the comparative insights.

Reviewed by Dr Peter Slinn, Chairperson of the Editorial Board of the Commonwealth Judicial Journal and, inter alia, a founder member of the Commonwealth Human Rights Initiative, the Commonwealth Legal Forum and the Latimer House Working Group
In January of 2017, the Supreme Court of the United Kingdom decided a case described by The Guardian at the time to be ‘one of the most important constitutional cases ever to be heard by the Supreme Court’. A petitioner had sought a ruling on whether Theresa May’s Conservative government had to obtain Parliament’s approval before it began to formalise Britain’s exit from the European Union. The Court held that it did, which provoked a firestorm in the media. The Daily Mail ran a headline decrying the judiciary as ‘enemies of the people’.

Concerns about the independence—even the very status—of the courts, including the power of judicial review, have been at the forefront of law and politics in the UK ever since. The issue is almost at a boiling point in the United States, with the recent overturning of Roe and President Trump having spent much of his time in office attacking judges and courts. Similar concerns about the role of the judiciary are pressing in Hungary, Poland, Turkey, Brazil, the Philippines and other countries where populist leaders have sought to undermine the Rule of Law.

The book under review contains a series of papers that consider the fate of the judiciary in an age of populism. They arise from the 2019 Putney Debates, an event hosted by the Faculty of Law at Oxford and inspired by the original Putney Debates of 1647. That year, Oliver Cromwell and members of his New Model Army, having recently defeated the forces of Charles I in the Civil War, gathered with a group of civilians at St Mary’s Church in Putney (Southwest London) to debate the Constitution and future of British government.

With a similar aim to raise and address core questions about British democracy, the 2019 event was staged at that very same church, bringing together a group of law scholars (most from the UK and specifically Oxford), along with former Justice Robert Sharpe of the Ontario Court of Appeal. For anyone thinking seriously about what the rise of populism and anti-elitism mean for courts, papers in this collection contain a wealth of insight and stimulating reflection.

In broad terms, the papers fall into three groups. One draws on legal and political theory to explore tensions between judicial review and the ideals of democratic citizenship or popular sovereignty. Another group debates practical strategies for how the judiciary might bolster its standing in public perception in the course of making impartial and often unpopular decisions. A third group of papers looks at important moments in judicial and political history that have shaped public perceptions around judicial review and independence and form the context in which current tensions and aspirations play out.

Of the many strong contributions to this volume, I single out only a few I continue to ruminate over—to lend a sense of the tenor of the work.

Justice Sharpe’s paper draws on his experience as an appellate judge and on decisions by Canada’s Supreme Court to shed light on the challenge of preserving both the independence and high repute of the court in a liberal democracy. Judicial review will often offend popular sentiment, Sharpe notes, but courts are an essential place where ‘the citizen may go to challenge the arbitrary or oppressive actions of the state’. Courts are also standard-bearers. ‘Where justice is not dispensed with impartiality in the courts,’ he writes, ‘there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions’. Yet we begin to test the limits of judicial independence by continuously placing judges in the position of deciding ‘contentious moral and social issues’—a position they were not often in at the time that the ideal of independence was forged. Sharpe’s solution is not for judges to ‘become timorous souls’ but to ‘ensure that their decisions are well supported by legal principles rather than their personal or political preferences’. Can a more rigorous, principled jurisprudence help courts weather the storm of populism?

Professor Butt’s paper suggests that judicial legitimacy in the US and the UK, among other places, needs to be revived in a more drastic fashion, involving something analogous to the
broad public participation that took place in South Africa’s constitutional reform exercise of the mid-90s. The public would better understand and appreciate judicial review if it had a hand in articulating the constitutional role of the courts in a new or updated constitution. The popular discontent with judges in many places may have to do less, his reading suggests, with disinformation or partisan division fueled by social media and more to do with a waning sense of connection with original constitutional aspirations and beliefs.

Professor Paz-Fuchs considers the role of the court in Israel, taking its particular challenges as ‘an interesting case study’ on whether courts are democracy’s ‘friend or foe.’ He draws an illuminating distinction between judicial power and independence. Judicial power may increase (or not) relative to the legislature and the government when a court acquires (or loses) the power to strike down legislation or executive action (rather than merely declaring them contrary to a statute or convention). This does not necessarily increase judicial independence, and concerns about independence are best understood by thinking about it as analytically distinct from judicial power. The more crucial question is whether cases tend to be decided in primary reliance on political rather than legal principles. Surveying a series of decisions in Israel’s apex court involving rights infringements in the occupied territories, Paz-Fuchs notes a long-standing pattern of siding with the government to suggest a threat to the independence of that Court just as serious as the one arising from popular disapproval. The question his essay poses is whether the tension between majorities seeking to preserve power and minorities seeking protection may soon reach such a pitch as to render the Court’s role or legitimacy untenable.

Other papers canvas questions of transparency in judgment, the judicialisation of politics, and the challenges of promoting public understanding of the role of judges. The collection is bookended with thoughtful introductory and concluding essays by the editor, Professor D.J. Galligan of Oxford Law. Together the papers contain a much needed, thoughtful and informed debate, and one that is a pleasure to read.

Reviewed by Dr Robert Diab, Professor, Faculty of Law, Thompson Rivers University, Kamloops, British Columbia, Canada
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