

## **EDITORIAL INTRODUCTION**

### **IN PRAISE OF COMPARATIVE CONSTITUTIONAL LAW: LESSONS FROM THE COMMONWEALTH**

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Constitutions come in all shapes and sizes. Some provide for a federal or confederal structure whilst others adopt a unitary model. Internal ethnic, religious or other factors may determine the structure and distribution of constitutional powers, issues that are often of less significance in a constitution written for a more homogenous population.

The development of modern constitutions also varies considerably. As Kirby points out, the ‘Australian Constitution is, historically, a product of an imperial statute enacted by the United Kingdom Parliament.’<sup>1</sup> Other documents have emerged as ‘the result of a long and bitter struggle, involving bloodshed, the imprisonment of many leaders and acrimony together with recriminations’: a point also noted by Kirby in relation to India but certainly of more general application.<sup>2</sup>

In some cases, constitutions have emerged from fully representative Constitution-making bodies and were carefully crafted to address past wrongs and to herald (it is hoped) a new era of constitutional and democratic government. The prime example here is the Constitution of South Africa 1996 which emerged from the building of a broad-based consensus on the terms of the new document. This included the establishment of a democratically elected Constitutional Assembly which was mandated to draw up and adopt the new Constitution. This process has become increasingly common in Constitution-making.

Again, the content of constitutions may vary considerably and what is included in the document may also depend on the time and place of its enactment. Thus, as Beck points out in his book that is reviewed in this special issue, Henry Higgins who was ‘a principal player in the formulation of the Australian Constitution, was

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<sup>1</sup> See below p 27.

<sup>2</sup> See below p 30. For the Anglophone African experience, see John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004) 13–19.

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largely motivated by the desire to ensure that [the Seventh Day Adventist Church] along with others would support federation'. As a result, section 116 of the Australian Constitution provides for 'religious freedom'. By way of contrast, in the drafting of the document, no account was taken of the rights of the indigenous peoples and as Dodson and Perrett put it:

For countless generations before the current Constitution was imagined, the continent of Australia was subject to a complex and very different set of interlocking rules.... But colonialism proceeded in Australia without acknowledgement of this ancient and ongoing legal heritage.<sup>3</sup>

As regards fundamental rights, some documents contain a 'meagre collection of rights'<sup>4</sup> whilst others include detailed provisions relating to the protection and promotion of such rights. In fact some recent constitutions have greatly expanded the scope of judiciable rights. For example, the Bill of Rights in the Constitution of Kenya 2010 includes detailed provisions relating to environmental rights; economic and social rights; and family rights and consumer rights.<sup>5</sup> The Australian Constitution, albeit based on its US counterpart, contains no Bill of Rights and few rights provisions. These provisions are limited to religious freedom: section 116, trial by jury: section 80, acquisition of property on just terms: section 51 (xxxii), the right to vote: section 41 and prohibition of discrimination on the basis of state of residency: section 117.<sup>6</sup> Again, there are different views as to the legal effect (if any) of the preambular article which opens the fundamental rights chapter in many Commonwealth constitutions.<sup>7</sup>

Given these differences, amongst others, the merit of exploring 'comparative constitutional law' is worth considering. Questions such as 'Why compare' and 'What are we comparing?' spring to mind. It is hoped that this special issue of the *Denning Law Journal* will provide some answers to such questions.

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<sup>3</sup> See below p 180.

<sup>4</sup> A phrase used by Kirby in comparing the Australian constitutional provisions with the detailed fundamental rights provisions in the Constitution of India: see below p 33.

<sup>5</sup> See Constitution of Kenya 2010, chapter 4.

<sup>6</sup> Rights such as freedom of political expression have been 'read in' to the Australian Constitution on the basis that as it is a Constitution for a democracy, such freedoms 'must' be contained within the provisions albeit not explicitly stated: *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106.

<sup>7</sup> See for example *Newbold v Commissioner of Police* [2014] LRC 684 (The Bahamas); *Re BR (Adoption)* [2014] LRC 347; *Masupha v Senior Magistrate* [2014] LRC 433 (Lesotho).

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The Commonwealth provides the key link here. Twenty-three of the jurisdictions considered in this special issue are (or in the case of two, were) members of the Commonwealth. These are Australia, Botswana, Canada, Ghana, India, Kenya, Lesotho, Malawi, Maldives, Mauritius, Namibia, Nigeria, Pakistan, Seychelles, South Africa, Sri Lanka, Tanzania, Trinidad and Tobago, Uganda, United Kingdom, Vanuatu, Zambia and Zimbabwe.<sup>8</sup>

As Brewer and Slinn point out<sup>9</sup> the Commonwealth is a voluntary association of fifty-three independent and equal sovereign states that is not formed by a binding treaty, but which has ‘consensus’ at its heart.<sup>10</sup> This is reflected in the fact that all Commonwealth member states share the fundamental political values as enshrined in the Harare Commonwealth Declaration, i.e:

- Democracy: Democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
- Fundamental human rights: Including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.

The result is that in the constitutional and legal field, Commonwealth member countries have much in common.

### *i) Common [legal] language*

Whilst the people of the Commonwealth speak many different languages, they communicate with each other through the shared English language. As a result, their constitutions, laws and the decisions of their superior courts are almost invariably written in English. This greatly facilitates the sharing and comparing of

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<sup>8</sup> Zimbabwe and the Maldives have withdrawn from the Commonwealth, although in 2018 Zimbabwe applied to re-join. The reasons for the withdrawal of the Maldives are noted by Brewer and Slinn: see below p 112.

<sup>9</sup> See below p 102.

<sup>10</sup> The Preamble to the *Charter of the Commonwealth 2013* states that ‘the Commonwealth is a voluntary association of independent and equal sovereign states, each responsible for its own policies, consulting and co-operating in the common interests of our peoples and in the promotion of international understanding and world peace, and influencing international society to the benefit of all through the pursuit of common principles’. It adds that the ‘special strength of the Commonwealth lies in the combination of our diversity and our shared inheritance in language, culture and the rule of law; and bound together by shared history and tradition; by respect for all states and peoples; by shared values and principles and by concern for the vulnerable’.

constitutional principles and knowledge.<sup>11</sup> At the same time, as Scutt points out,<sup>12</sup> the English language has inhibited women's rights in judicial interpretation, with the word 'person' in the British North American Act (now the Constitution Act) 1867 being classed by the Supreme Court of Canada as denying women a role as senator, until the Privy Council stepped in.

*ii) Common legal traditions*

The laws, legal system and legal traditions in the majority of Commonwealth states are based on the English common law. For example, as Kirby notes in relation to Australia and India, many of their distinctive legal traditions are identical or similar including providing strong constitutional provisions protecting the tenure of superior judges.<sup>13</sup> Brewer and Slinn also highlight the fact that the Commonwealth (Latimer House) Principles outline the constitutional requirements that all Commonwealth member states should have in place in order to uphold the independence of the judiciary.<sup>14</sup> This is a point of particular significance given the fact that the judicial interpretation of a constitutional provision may have profound political repercussions: a point neatly demonstrated by the 2018 Sri Lankan crisis noted below.

*iii) Common constitutional principles*

The colonial 'heritage' has also had a considerable influence on many constitutions. The French model was introduced into many former French colonies and often remains largely intact. Likewise the Westminster export model formed the basis for the independent constitutions of many Commonwealth states, particularly those in the Pacific, Caribbean and Africa.<sup>15</sup> Despite the many constitutional ups and downs over the years brought about by the introduction of the one-party state or the establishment of military rule, the model still forms the basis for numerous current documents.

This provides an excellent basis upon which to compare critically constitutional provisions. The point is neatly illustrated in the article by Hatchard in which he

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<sup>11</sup> See for example Hatchard below on p 53.

<sup>12</sup> See for example p 124.

<sup>13</sup> See below p 24.

<sup>14</sup> See below p 105.

<sup>15</sup> It is worth noting that whilst the independence constitutions in Anglophone African states were based on the Westminster export model, the democratically elected nationalist leaders played a crucial role in shaping the documents in many instances, and indeed on some key issues their voices were decisive: see Hatchard, Ndulo and Slinn (n 2) 15–19.

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compares and contrasts the provisions relating to the Office of the Auditor General in nine Anglophone African states. He notes that even where the original independence constitution has been replaced or significantly amended, many of its basic features remain, including those relating to the Auditor General. However, the analysis highlights the fact that in several jurisdictions the office and office-holder are not provided with adequate protection against attempts to undermine their work and that there is a need to strengthen key provisions.<sup>16</sup>

The constitutional relationship between the President, the Prime Minister and the legislature is one that has raised considerable controversy in many Commonwealth member states. A particularly difficult issue can arise in some jurisdictions where the President has the power to remove the Prime Minister from office. As Kirby notes ‘The Westminster system affords a swift and flexible means of terminating an incompetent, unpopular or misbehaving head of government’.<sup>17</sup> However, in some situations this power may appear somewhat too ‘flexible’ and may well require the judiciary to enter the arena in order to protect the constitution.

The 2018 constitutional crisis in Sri Lanka highlights the point. On 9 November 2018 the President of Sri Lanka dismissed the incumbent Prime Minister and purported to make a new appointment. The President also issued a proclamation dissolving Parliament with immediate effect and requiring the holding of fresh parliamentary elections. This was at a time when the incumbent Prime Minister claimed to enjoy a majority in Parliament. This provoked a major constitutional crisis.<sup>18</sup> It was left to the Supreme Court of Sri Lanka to rapidly intervene by issuing an interim order on 14 November 2018 staying the operation of the proclamation pending a full hearing of the issues.<sup>19</sup> On 12 December 2018 a full bench of the Supreme Court in *Sampantham v Attorney General*<sup>20</sup> unanimously ruled that the presidential proclamation of 9 November 2018 which purported to dissolve Parliament was in breach of Article 70(1) of the Constitution of Sri Lanka and thus the action of the President was null and void. The Court added that ‘The Constitution governs the nation. Disregarding the Constitution will cast our country into great peril and mortal danger. The Court has a duty to uphold and enforce the Constitution’.<sup>21</sup>

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<sup>16</sup> See below pp 51–77.

<sup>17</sup> See below p 22.

<sup>18</sup> See Presidential Proclamation 2076/70 of 9 November 2018 in which the President sought to exercise his powers under Articles 33, 62, 70 of the Constitution of Sri Lanka.

<sup>19</sup> See *Sampantham v Attorney General* SC FR No 351/2018 (unreported 14 November 2018).

<sup>20</sup> See Applications 351/2018–361/2018 (unreported 12 December 2018).

<sup>21</sup> *Ibid*, 85.

*iv) Common interpretation of constitutional principles*

Kirby has noted that ‘sometimes the interpretation of constitutional principles can take a wrong turning or a right turning’ bearing in mind that ‘Constitutional texts and doctrine, being expressed in words, will often be ambiguous’. He goes on to point out that sometimes in making choices the judges’ ‘lesser angels will prevail’ whilst at other times their ‘better angels’ will gain the upper hand.<sup>22</sup> Herein lies the importance of developing common principles of constitutional interpretation and as Slinn has noted:

There has emerged a shared inheritance of judicial decisions in interpreting bills of rights which, despite the diversity of constitutional forms and governmental systems, have many provisions in common.<sup>23</sup>

A major contribution comes from the *Bangalore Principles on the Domestic Application of Universal Human Rights Norms*. These were adopted at a judicial colloquium in 1988 chaired by Justice P N Bhagwati and as Kirby points out, these ‘suggested that, where there was ambiguity in the state of the law, a court should prefer the meaning or expression of the law that conformed to international human rights norms to one that did not’.<sup>24</sup> As he later explains, he adopted this approach when invoking the ‘interpretative principle’ in the groundbreaking decision of *Mabo v Queensland (No 2)*.<sup>25</sup>

A series of judicial colloquia followed the Bangalore Colloquium with paragraph 4 of the *Balliol Statement* of 1992<sup>26</sup> highlighting the importance of judges adopting a common approach to the interpretation of constitutional provisions:

The general principles enunciated in the colloquia reflect the universality of human rights – inherent in humankind – and *the vital duty of an independent and impartial judiciary in interpreting and applying national constitutions, ordinary legislation and the common law in the light of those principles.* (emphasis added)

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<sup>22</sup> See below p 42.

<sup>23</sup> Peter Slinn, ‘The Commonwealth and the Law’ in James Mayall (ed), *The Contemporary Commonwealth: An Assessment 1965-2009* (Routledge 2010) 39–40.

<sup>24</sup> See below p 43.

<sup>25</sup> See below p 45.

<sup>26</sup> Concluding statement from the judicial colloquium held at Balliol College, Oxford in September 1992.

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In the light of the different constitutional orders in the Commonwealth, the final words of paragraph 4 are also particularly relevant:

These general principles are applicable in all countries but the means by which they become applicable may differ.

The development of Commonwealth-wide principles was greatly enhanced with the decision in *R v Big M Drug Mart Ltd* in which the Supreme Court of Canada considered the interpretation of the Canadian Charter of Rights and Freedoms.<sup>27</sup> Here Dickson J, giving the judgment of the court, noted:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In *Hunter v Southam Inc* [1984] 2 SCR 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.<sup>28</sup> (emphasis added)

Dickson J then went on to state:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.<sup>29</sup>

A further important point was made by Lamer J in the Canadian case of *Dubois v R*:

Our Constitutional Charter must be construed as a system where every component contributes to the meaning as a whole and the whole gives meaning to its parts ... The court must interpret each section of the Charter in relation to the other.<sup>30</sup>

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<sup>27</sup> *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 18 DLR (4th) 321.

<sup>28</sup> *Ibid* [116].

<sup>29</sup> *Big M Drug Mart* (n 27) [117].

<sup>30</sup> [1985] 2 SCR 350, 356.

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This approach to constitutional interpretation has ‘hugely enriched’ the jurisprudence of courts around the Commonwealth.<sup>31</sup> Indeed the approach taken in the *Dubois* case was adopted (along with numerous other Indian and Sri Lankan cases) by the landmark decision in 2018 of the Supreme Court of Sri Lanka in *Sampantham and Others v Attorney General*.<sup>32</sup>

Even so, as Bloch and Rubenstein point out in their article on section 44(i) of the Australian Constitution,<sup>33</sup> there may be considerable judicial disagreement on the interpretation of constitutional provisions and these can have lasting political consequences: in this instance disqualification from membership of the Australian Parliament due to dual citizenship.<sup>34</sup> The authors neatly compare and contrast the differing approaches to the interpretation of section 44(i) taken by the court in Australia including the extent to which judges should take into consideration the history of a specific constitutional provision. As they suggest: ‘Where the history suggests that framers [of the constitution] drafted the text to meet a specific purpose, and that purpose no longer exists, the text in question can be rendered obsolete.’<sup>35</sup> Perhaps a consideration of the principles laid down in *R v Big M Drug Mart Ltd* and *Dubois v R*, and the numerous similar Commonwealth decisions might have assisted the court in interpreting the constitutional provision.

### *v) Common sharing and utilising of comparative Commonwealth jurisprudence*

Given the above, it is no coincidence that it is now commonplace for judges to make use of comparative Commonwealth jurisprudence in determining constitutional matters. An outstanding example is found in the 2017 judgment of the Supreme Court of Kenya in the important case of *Odinga and Others v*

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<sup>31</sup> Slinn (n 23) p 40.

<sup>32</sup> n 19.

<sup>33</sup> See below p 80.

<sup>34</sup> An interesting distinction between the Australian Constitution and the British North America Act (now the Constitution Act) is that the Canadian dual citizenship provision excluded a Canadian citizen from becoming a senator if, having been appointed, he or she took up dual citizenship – not if he or she held it at that time of appointment: section 31 ‘The place of a Senator shall become vacant in any of the following Cases: (1) ... (2) If he takes an Oath or makes a Declaration or Acknowledgement of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power...’

<sup>35</sup> *Ibid* p 89.



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*Independent Electoral and Boundaries Commission and Others*.<sup>36</sup> The matter arose following the disputed 8 August 2017 presidential election in Kenya. The petitioners asserted:

... in the conduct of the presidential election, the [Independent Electoral and Boundaries Commission] ... so flagrantly flouted the Constitution and the written election law on elections that in the end it completely subverted the will of the electorate.<sup>37</sup>

One important issue raised in the case concerned the standard of proof applicable to election petitions. The Supreme Court of Kenya, quoting from an article by the first author in an earlier issue of the *Denning Law Journal*,<sup>38</sup> noted that the courts in numerous Commonwealth jurisdictions had adopted different approaches as to requisite standard of proof in such cases. Thus in India, the criminal standard is applied, in England and Mauritius it is the civil standard, whilst in Zambia, as well as previous Kenya decisions, the standard of proof is said to be higher than the balance of probabilities but lower than beyond reasonable doubt. To the disappointment of the first author, the Court did not adopt his argument in the *Denning Law Journal* that the standard of proof in election petitions is the balance of probabilities but maintained that it was the ‘intermediate standard of proof’. Nevertheless the willingness of the court to review comparative constitutional approaches is commendable.

Even more commendable was the decision of the Supreme Court of Kenya in the same case that the presidential election of August 2017 was not conducted in accordance with the principles laid down in the Constitution of Kenya and the electoral law. Accordingly non-compliance with these principles ‘affected the process leading to the declaration of [Uhuru Kenyatta] as President elect in a very substantial and significant manner’ so as to render the declaration null and void and the election rendered invalid.<sup>39</sup> The principled stance of the Supreme Court of Kenya in so holding provides both an important constitutional precedent as well as reinforcing the importance of protecting and upholding the independence of the

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<sup>36</sup> Presidential Petition No 1 of 2017, [2017] eKLR.

<sup>37</sup> Ibid [214], of the majority judgment, Ojwang J dissenting. In particular, it was alleged that the Electoral Commission violated articles 81 and 86 of the Constitution of Kenya by failing to ensure that the conduct of the elections [of 8 August 2017] was simple, accurate, verifiable, secure and accountable: *ibid*.

<sup>38</sup> John Hatchard, ‘Election Petitions and the Standard of Proof’ (2015) 27 DLJ 291.

<sup>39</sup> *Odinga and Others* (n 36) [383] of the majority judgment.

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judiciary. The December 2018 decision of the Supreme Court of Sri Lanka<sup>40</sup> illustrates the same point.

For legal researchers, comparative constitutional jurisprudence also provides a wealth of material, for a suitable precedent from a Commonwealth country is seemingly never far away. For example, the presidential power of pardon has received some publicity, especially over the issue as to whether a President can pardon him/herself. This matter was explored in the, perhaps unlikely, jurisdiction of Vanuatu (a Commonwealth member state) where the Constitution is based on the Westminster export model. As is the case in numerous other Commonwealth constitutions, section 38 provides that the President of the Republic 'may pardon, commute or reduce a sentence imposed on a person convicted of an offence'.

In October 2015 Marcellino Pipite, the then Speaker of Parliament, and fourteen other MPs (each of whom were members of the government) were convicted of corruption and the bribery of officials,<sup>41</sup> the Supreme Court of Vanuatu having found that they had accepted bribes from the opposition to support a vote of no confidence. At the time, the State President was out of the country and in his absence Pipite was appointed Acting President. In this capacity he proceeded to grant a presidential pardon to himself and ten of the other parliamentarians claiming it was to 'maintain stability in the Government of the Republic of Vanuatu'.<sup>42</sup> In *Natuman v President of the Republic of Vanuatu*<sup>43</sup> the three applicants who were all members of Parliament sought a declaration that the granting of a pardon to himself by Mr Pipite, the Acting President of Vanuatu was unconstitutional. It was claimed that the conduct of Mr Pipite in granting a pardon to himself and other government officials had breached his constitutional duties, amongst others, to act with integrity and avoid conflicts of interest. Saksak J agreed, holding that Mr Pipite, as Acting President, had exercised his powers of pardon 'wrongly and unlawfully' and his action was therefore ultra vires section 38 of the Constitution. The pardon was therefore 'unconstitutional, invalid and of no force or effect'.<sup>44</sup>

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<sup>40</sup> See n 19.

<sup>41</sup> Contrary to section 73 of the Penal Code.

<sup>42</sup> Pardon dated 10 October 2015 (*Gazette* No 87).

<sup>43</sup> [2015] VUSC 148.

<sup>44</sup> 'Conclusions'.

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The Court Appeal of Vanuatu in *Vohor v President of the Republic of Vanuatu*<sup>45</sup> upheld the decision of the lower court, Lunabek CJ, giving the judgment of the court, emphasising that the then Acting President:

[H]ad a duty to conduct himself so as not to place himself in a position in which he had or could have had a conflict of interest, or in which the fair exercise of his public duties might be compromised.<sup>46</sup>

The *Wednesbury* principles therefore applied and the ostensible reason for the pardon, i.e. to maintain the stability in the Government of Vanuatu, was ‘plainly an irrelevant consideration’. The decision to pardon was also a clear misuse of public power and was ‘so outrageous in its defiance of logic [and] accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’.<sup>47</sup>

In essence, a self-pardon is a constitutional impossibility. Whilst the President has the power to grant a pardon to ‘any person’ convicted of a criminal offence, the act is clearly open to judicial review and must be ruled unlawful.

### *vi) Common interest in protecting the rights of minorities*

The importance of providing effective constitutional protections for minorities is also discussed in this special issue. For example, in their insightful ‘Comment’, Dodson and Perrett (both members of the Australian Parliament) highlight the fact that the rights of the Indigenous peoples in Australia (as in some other jurisdictions) remain a work in progress. The Australian Constitution, they observe, is imposed over what may be the most longstanding system of law without any recognition or acknowledgement of that reality – a reality not only for Indigenous Australia but for non-Indigenous Australia too. They posit that consistent with the recognition in the Constitution of federal government responsibilities there should be a new ‘caring for country’ provision, which would incorporate Indigenous Australia’s stewardship of country and the need for environmental protection and promotion to preserve the integrity of the land or regain it where ravaged by mining corporations.<sup>48</sup> They go beyond a simple ‘rights of minorities’ plea to one that promotes the principle that ‘we are in this together’: Indigenous peoples and

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<sup>45</sup> [2015] VUCA 40.

<sup>46</sup> Ibid [23].

<sup>47</sup> *Vohor* (n 45) [31] adopting the words of Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374.

<sup>48</sup> See below p 185.

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settlers, colonists or invaders have commonalities that, through recognising Indigenous peoples' law, can ensure that a constitution can reflect ancient past as well as common law.

Kirby also emphasises that it is often up to the courts to interpret constitutional provisions in support of the rights of minorities, as reflected in the approach of the courts in India and Australia and in many other constitutional courts around the world especially on the issue of discrimination on grounds of sexual orientation.<sup>49</sup> Sometimes, as Scutt points out,<sup>50</sup> this requires constitutional amendment whether by interpretation of the original words of the constitution's provisions, or by referendum or whatever 'change' mechanism is provided in the constitution to bring it into conformity with contemporary standards. In the case of same-sex marriage, following a plebiscite with an overwhelming majority supporting the proposition that 'love is love', hence encompassing the right to marry whatever the sex/gender of the parties, the Australian Parliament incorporated this into statute law. No constitutional change was necessary, the marriage power stating simply:

The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to: Marriage ... section 51 (xxi)

Thus marriage in Australia now means a state-sanctified union between a woman and a man, a man and a man, or a woman and a woman.<sup>51</sup>

### *vii) Common access to comparative constitutional materials*

The sharing of comparative constitutional jurisprudence has been greatly enhanced by ready access to relevant cases and materials. Through the pioneering work of the *Law Reports of the Commonwealth*, for example, judges, legal practitioners and law teachers can enjoy access to a wealth of constitutional decisions, complete

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<sup>49</sup> See below p 45.

<sup>50</sup> See below p 140.

<sup>51</sup> Although see the discussion prior to the plebiscite drawing attention to the differing views of High Court judges from 1908 through to 1999 on whether 'marriage' had a constitutional meaning (consistent with *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130, 133) unable to be re-defined by Parliament: Ian Ireland, 'The High Court and the Meaning of "Marriage" in Section 51(xx) of the Constitution' (Research Note no 17, 2001-02) Department of the Parliamentary Library, Parliament of Australia <<https://www.aph.gov.au/binaries/library/pubs/rn/2001-02/02rn17.pdf>> accessed 20 December 2018

with detailed headnotes, spanning the Commonwealth. More recently, the development of freely accessible on-line legal information institutes, and in particular the Commonwealth Legal Information Institute, has further facilitated access to Commonwealth constitutional materials.<sup>52</sup>

For law teachers, legal education conferences can provide a platform for the sharing and exchange of comparative information and ideas. For example, in 1995 the Commonwealth Legal Education Association held a conference in Durban, South Africa. This was attended by law teachers from around the Commonwealth including several eminent Indian academics. One key session was on the new Constitution of South Africa in which several local speakers highlighted the challenges facing the Constitutional Court of South Africa (CCSA) in interpreting some of its key provisions. Remarkably, the Indian participants almost invariably pointed out that the Indian Supreme Court had already dealt with the particular issue in question. Perhaps not surprisingly, the CCSA has made good use of this jurisprudence in several cases.

***viii) Constitutional problems and the role of Commonwealth associations: the Sri Lankan example***

In their article on the Commonwealth Principles, Brewer and Slinn highlight the key role played by the four Commonwealth associations in helping to shape the Commonwealth's fundamental political values which have been endorsed by all Commonwealth member states.<sup>53</sup> Regrettably, in practice some Commonwealth member states have not always been prepared to uphold their commitments and as the authors point out, Commonwealth associations continue to play an active role in drawing attention to any breaches of those fundamental values and attempting to hold governments to account through the 'green channel'.<sup>54</sup> Much of this work is done through the issuing of joint statements drawing public and official attention to such breaches.

The constitutional crisis in Sri Lanka, noted above, is of particular interest in that it highlights the importance of all Commonwealth member states adhering to their commitments made in the Commonwealth Charter, the Harare Commonwealth Declaration and the Commonwealth Principles and to abide by the terms of their national constitution. In response to the crisis, in November 2018 the four

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<sup>52</sup> Available at <commonlii.org> accessed 20 November 2018.

<sup>53</sup> The Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association and Commonwealth Parliamentary Association.

<sup>54</sup> See below p 106.

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associations issued a joint press release in which they expressed their ‘Deep Concern at the implications of the continuing political crisis for the rule of law in Sri Lanka’ and called upon the parties to observe scrupulously and in good faith the provisions of the Constitution relating to the respective roles of the executive, parliament and the judiciary, together with the provisions of *The Commonwealth Charter* and the *Commonwealth (Latimer House) Principles on the Three Branches of Government*. They also highlighted ‘the references in the [Commonwealth] Charter to the responsibility of governments, political parties and civil society for ‘upholding and promoting democratic culture and practices and to the recognition of the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary’ and ‘The requirement in *The Latimer House Principles* that ‘Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference’.

Overall, it is hoped that this special issue of the *Denning Law Review* will help to highlight the importance and relevance of the study of comparative constitutional law, particularly in relation to Commonwealth member states and that it has provided some answers to the questions as to the merits of undertaking such a study.

It is further hoped that it will prove of interest and use to members of the judiciary and legal profession as well as legal researchers. Similarly, that it will encourage teachers of public law to make use of the enormous resources available to help students understand and appreciate the importance of comparative constitutional law and how to make use of it effectively.

Finally, it is hoped that it will also reinforce to members of the Executive and Parliaments alike one constant and fundamental point. That is that the constitution is the supreme law of the state. To paraphrase the words of Lord Denning: ‘Be you ever so high, the Constitution is above you.’<sup>55</sup> It follows that a court has a ‘sacred duty to uphold the integrity and supremacy of the Constitution.’<sup>56</sup>

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<sup>55</sup> In *Gouriet v Union of Post Office Workers* [1977] 1 QB 729, 762, Lord Denning quoted the words of Thomas Fuller: ‘Be you ever so high, the law is above you.’

<sup>56</sup> *Sampantham and Others v Attorney General* (n 19) 69.