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The Commonwealth Lawyers' Association exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.
For more information about the CLA please visit the Association's website at:
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Message from the President

I hope that wherever you are in the Commonwealth and in whatever situation you, your family, friends and work colleagues find yourselves, that you will keep well and keep positive.

In these times of social isolation, I have not been able to see my grandchildren other than on Facetime. Two weeks ago, Emmeline, aged 5, became upset that she could not ride her bicycle. With what I thought was grandfatherly wisdom I said to her: "Emme, it's all a question of balance".

Two weeks on and I was sent a heart-warming clip of Emme riding her bicycle in the grounds of Stormont Park in Belfast – even taking one hand off the handlebars to show her amazing new skill. She cycled past her mother looking up at the camera phone and giving a broad grin of happy confidence. She had found her balance.

On 9 March 2020, before matters were seriously locked down in the United Kingdom, I attended the Commonwealth Service in Westminster Abbey. I was privileged to see Her Majesty Queen Elizabeth, walking in to take her seat for the Service and beside her Prince Charles and the Duchess of Cornwall, beside them the Duke and Duchess of Cambridge and behind them the Duke and Duchess of Sussex. While that attracted great attention the reading at the Service captured my focus.

This was the familiar story of the Good Samaritan (in the Bible, Luke 10:29-37) and was read (extremely well) by Prime Minister Boris Johnston. It was the Samaritan who helped and this prompted the question "Who, do you think, was a neighbour to the man who fell into the hands of the robbers?"

At times of lockdown we are experiencing a great reach of friendship from people across our Commonwealth and the use of technology is truly establishing that we are all neighbours. The indiscriminate spread of the Covid-19 virus shows that we are all one humanity.

Following the Westminster Abbey Service, I took part in a conference organised by the Commonwealth Institute on religious freedom and media freedom in the Commonwealth. We heard case studies from three countries in the Commonwealth where journalists shared their experience of how freedoms were curtailed. This despite the Commonwealth Declaration on Freedom of Expression and the Role of the Media in Good Governance in which the CLA participated and despite, of course, the rights to the freedom to hold views and express views in the Universal Declaration of Human Rights. Many legal colleagues are denied their rights to speak freely in representing their clients – and the CLA issued statements recently concerning advocate John Sangwa SC of Zambia and Fatma Karume of Tanzania.

I contributed some thoughts about the experience of Northern Ireland and how "political architecture" could assist to assure respect for difference and coalescence around matters of shared interest. The mandatory coalition in the Northern Ireland Executive and the societal consequences of equality legislation brought in to Northern Ireland, to ensure that difference was taken into account in decision-making by public bodies showed, I suggested, how designed structures could assist in addressing religious intolerance.

One controversial contribution came from Akbar Khan former Secretary General of the Commonwealth Parliamentary Association. He made the – undeniable – point that while the Commonwealth had issued many Declarations it was not obvious that in fact changes consistent with those Declarations had been implemented.

Now we are subject to lockdown. Parliaments rapidly pass emergency legislation. Scrutiny by Parliament of the proposals of the Executive is limited. Our individual freedoms to associate and to travel are curtailed.

It is time again to reflect on the importance of the Rule of Law – a cause central to the CLA. Across the world measures to tackle the pandemic are put in place. These confer more powers on police and law enforcement agencies and grant extensive powers to the Executive, while the Rule of Law is not much mentioned.

It has caused me to reflect on whether the actions taken are truly proportionate. I return to the advice I proffered to my granddaughter – "it's all a question of balance".

– Brian Speers

Editor's Note

The good news of the production cycle of this journal being restored – after delays in the release of a few recent issues – has been overshadowed by the devastating pall of gloom cast by the coronavirus crisis. This crisis has been described variously as "the modern plague" and "the worst disaster to have struck humanity in recent years"; its effects are still being evaluated or speculated upon, with no definitive answers provided even by experts. As this issue goes to press, it is not at all clear how the crisis is likely to end.

Among the many concerns sparked off by the pandemic are possible threats to the rule of law. The Commonwealth Lawyers Association, like a number of other professional bodies, has expressed its views on the subject in a statement put out on 9 April 2020. Among other things, the Association has stated that "decisions concerning restrictions of movement and liberty must be taken against the clearest weight of scientific evidence. To confine people in their homes or anywhere else (and often in cramped, not necessarily sanitary conditions, which themselves are a source of ill health, disease or contamination) requires commensurate evidence that such confinement is of benefit to them and the society where restrictions are imposed." It has called upon governments to act proportionately, and to ensure that emergency powers are only valid for the time of the emergency.

We carry two articles relating to coronavirus in this issue. The first is an analysis, in accessible language, of the possible implications of Covid-19 related disruptions on contracts, employment relationships etc, from a leading London-based law firm which offers some practical risk management measures that companies should consider adopting. The article also discusses if concepts such as force majeure and frustration, well known to common law lawyers, might have any application in relation to transactions affected by the virus.

The second article focuses on a specific aspect of coronavirus-related contingency measure which has been adopted by the education sector (and in particular the higher education sector) in several jurisdictions, viz the provision of online delivery of instruction. In this article, Julian Sladdin, an expert on the subject, warns against the risks of this measure, however superficially attractive it may seem. His analysis draws attention to the duty of care that education providers have to students which run the risk of being compromised in certain circumstances.

Away from coronavirus, we carry a thoughtful article on algorithms, artificial intelligence and the law by a member of the UK Supreme Court bench, Lord Sales. In this article, the learned judge discusses the far-reaching implications of AI and addresses a fundamental question, namely how should legal doctrine adapt to accommodate the new world? He offers an easily understood analogy to explain the possible risks:

> We need to think now about the implications of making human lives subject to these processes, for fear of the frog in hot water effect. We, like the frog, sit pleasantly immersed in warm water with our lives made easier in various ways by information technology. But the water imperceptibly gets hotter and hotter until we find we have gone past a crisis point and our lives have changed irrevocably, in ways outside our control and for the worse, without us even noticing. The water becomes boiling and the frog is dead.

Lord Sales's reflections could not have come at a more opportune moment given the dire warnings that have already begun being expressed about the increasing role that artificial intelligence and machine-led initiatives will assume in the post-coronavirus world.

Another thoughtful article of practical relevance that finds a place in this issue is about access to justice and how this important human right may be realised. The author, Lord Justice McCloskey of the Northern Ireland Court of Appeal, focuses his observations on immigration law and practice (where he has a particular expertise, having served in the recent past as the UK's most senior immigration judge) but his article contains much food for thought in general terms as well.

Here's hoping that you will all stay safe in these dangerous times!

– Dr Venkat Iyer

Call For Articles

The Editor of The Commonwealth Lawyer journal invites articles by lawyers covering news, notices and events, plus case notes or articles of more depth, such as thought-leadership pieces. Opinion pieces are most welcome.

These can be either academic in nature or practitioner-oriented. Also welcome are news about books of potential interest to readers of the journal published in any Commonwealth jurisdiction or transcripts of important speeches delivered

Articles should ideally be:

- 2,000-4,000 words for full-length articles
- Around 1,000 words for case notes and similar articles
- Original work, not previously published elsewhere
- In Microsoft Word
- Sent to **commonwealth_lawyer@hotmail.com**
- Please include the author's name, occupation, law firm (if applicable), country, and email address
- Contributions are particularly invited from the smaller - and less-frequently reported - jurisdictions of the Commonwealth.
- There are no set deadlines for submission, so materials are welcome anytime.

The Editor reserve the right to edit articles. Authors are responsible for complying with copyright laws. Authors should be CLA members or willing to become one. Some reasonable flexibility is allowed, if the content is exceptional, in order to encourage submissions. However, priority is given to CLA members. The Editor, Dr Venkat Iyer, is happy to answer any queries you may have or provide any further guidance that you may need.

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Articles

Algorithms, Artificial Intelligence and the Law

Philip Sales

Introduction

The topic I have chosen is a huge one. However, it is so important that I think lawyers generally – and that includes judges – should be trying to think through the issues which are already with us and those which are coming down the track towards us. And coming very fast.

How should legal doctrine adapt to accommodate the new world, in which so many social functions are speeded up, made more efficient, but also made more impersonal by algorithmic computing processes?

At least with computer algorithms, one still has human agency in the background, guiding processes through admittedly complex computer programming. Still more profoundly, however, how should legal doctrine adapt to processes governed without human agency, by artificial intelligence – that is, by autonomous computers generating their own solutions, free from any direct human control?

We need to think now about the implications of making human lives subject to these processes, for fear of the frog in hot water effect. We, like the frog, sit pleasantly immersed in warm water with our lives made easier in various ways by information technology. But the water imperceptibly gets hotter and hotter until we find we have gone past a crisis point and our lives have changed irrevocably, in ways outside our control and for the worse, without us even noticing. The water becomes boiling and the frog is dead.[1]

Often there is no one is to blame. As James Williams points out in his book *Stand Out of Our Light*,

> At 'fault' are more often the emergent dynamics of complex multiagent systems rather than the internal decision-making dynamics of a single individual. As W. Edwards Deming said, 'A bad system will beat a good person every time'.[2]

This aspect of the digital world and its effects poses problems for legal analysis.

Conceptual distinction

I draw a conceptual distinction between algorithmic analysis and manipulation of information, on the one hand, and artificial intelligence on the other. There is no clear dividing line between these. The one shades into the other. Still, they are recognisable and useful general categories for the purposes of analysis. The main substance of this article is directed to the algorithmic analysis part of the picture, since that is really where we are located at the present. But many of my comments apply also to artificial intelligence, and at the end I deal with some distinct doctrinal issues which apply to AI as a distinct category.

An algorithm is a process or set of rules to be followed in problem-solving. It is a structured process. It proceeds in logical steps.

This is the essence of processes programmed into computers. They perform functions in logical sequence. Computers are transformational in so many areas because they are mechanically able to perform these functions at great speed and in relation to huge amounts of data, well beyond what is practicable or even possible for human beings. They give rise to a form of power which raises new challenges for the law, in its traditional roles of defining and regulating rights and of finding controls for illegitimate or inappropriate exercise of power. At the same time, alongside controlling abuse of power and abuse of rights, law has a function to provide a framework in which this new power can be deployed and used effectively for socially valuable purposes. In that sense, law should go with the flow and channel it, rather than merely resist it.

The potential efficiency gains are huge, across private commercial activity and governmental, legislative and judicial activity. Information technology provides platforms for increased connectivity and speed of transacting.

So-called smart contracts are devised to allow self-regulation by algorithms, to reduce the costs of contracting and of policing the agreement. Distributed ledger technology, such as blockchain, can create secure property and contractual rights with much reduced transaction costs and reduced need for reliance on state enforcement.[3] Fintech is being devised to allow machines to assess credit risks and insurance risks at a fraction of the cost of

1 Cf J Williams, *Stand Out of Our Light: Freedom and Resistance in the Attention Economy* (2018), 93-94.

2 Ibid, 102.

3 World Bank Group, "Distributed Ledger Technology (DLT) and Blockchain" (2017).

performing such exercises by human agents.[4] In this way, access to credit and to insurance can be greatly expanded, with all that implies for enhancing human capacities to take action to create prosperity and protect against risk.

The use of digital solutions to deliver public welfare assistance offers the prospect of greatly reduced cost of administration, and so in theory the possibility of diverting the savings into more generous benefits. It also offers the potential to tailor delivery of assistance in a more fine-grained way, to feed through resources to those who need them most. The use of online courts through use of information technology offers the potential to improve access to justice and greatly reduce the time and cost taken to achieve resolution of disputes.

More widely, people increasingly live their lives in fundamentally important ways online, via digital platforms. They find it convenient, and then increasingly necessary, to shop online, access vital services online, and to express themselves and connect with other humans online.

Artificial intelligence

What I am calling Artificial Intelligence (AI) is something at the stage beyond mere algorithmic analytical processes. I use 'artificial intelligence' as a shorthand for self-directed and self-adaptive computer activity. It arises where computer systems perform more complex tasks which previously required human intelligence and the application of on-the-spot judgment, such as driving a car. In some cases, AI involves machine learning, whereby an algorithm optimises its responses through experience as embodied in large amounts of data, with limited or no human interference.[5] I take AI to involve machines which are capable of analysing situations and learning for themselves and then generating answers which may not even be foreseen or controlled by their programmers. It arises from algorithmic programming, but due to the complexity of the processes it carries out the outcome of the programming cannot be predicted by humans, however well informed. Here, the machine itself seems to be interposed between any human agency and what it, the machine, does.

Agency, in the sense of intelligence-directed activity performed for reasons, is fundamental to legal thought. For legal regulation of this sort of machine activity, we need to think not just of control of power, but also of how agency should be conceptualised. Should we move to ascribe legal personality to machines? And perhaps use ideas of vicarious liability? Or should we stick with human agency, but work with ideas of agency regarding risk creation, on a tort model, rather than direct correspondence between human thought and output in the form of specific actions intended by a specific human agent?

Underlying all these challenges are a series of inter-connected problems regarding (i) the lack of knowledge, understanding and expertise on the part of lawyers (I speak for myself, but I am not alone), and on the part of society generally; (ii) unwillingness on the part of programming entities, mainly for commercial reasons, to disclose the programme coding they have used, so that even with technical expertise it is difficult to dissect what has happened and is happening; and (iii) a certain rigidity at the point of the interaction of coding and law, or rather where coding takes the place of law.

These problems play out in a world in which machine processing is increasingly pervasive, infiltrating all aspects of our lives; intangible, located in functions away in the cloud rather than in physical machines sitting on our desks; and global, unbound by geographical and territorial jurisdictional boundaries. All these features of the digital world pose further problems for conventional legal approaches.

Law is itself a sort of algorithmic discipline: if factors A, B and C are present, then by a process of logical steps legal response Z should occur. Apart from deliberate legislative change, legal development has generally occurred from minor shifts in legal responses which take place to accommodate background moral perspectives on a case, which perspectives themselves may be changing over time. With algorithms in law, as applied by humans, there is scope for this to happen in the context of implementation of the law. But algorithms in computer code are not in themselves open to this kind of change in the course of implementation. Richard Susskind brought this home to me with an analogy from the card game Patience. It has set rules, but a human playing with cards can choose not to follow them. There is space to try out changes. But when playing Patience in a computer version, it is simply not possible to make a move outside the rules of the game.[6]

So coding algorithms create a danger of freezing particular relationships in set configurations with set distributions of power, which seem to be natural and beyond any question of contestation. The wider perceptual control which is noticeable as our world becomes increasingly digital also tends to freeze categories of thought along tram-rails written in code.[7] Unless resisted, this can limit imagination and inspiration even for legislative responses to digitisation.

All this erodes human capacities to question and change power relations.[8] Also, the coding will reflect the unspoken biases of the human coders and in ways that seem beyond challenge.

Moreover, coding algorithms are closed systems. As written, they may not capture everything of potential significance for the

4 See Lord Hodge, "The Potential and Perils of Financial Technology: can the law adapt to cope?", the First Edinburgh Fintech lecture, 14 March 2019.

5 Financial Stability Board, 'Artificial Intelligence and machine learning in financial services' (1 November 2017).

6 Jamie Susskind refers to this effect as "force": algorithms which control our activity force certain actions upon us, and we can do no other: J Susskind, *Future Politics: Living Together in a World Transformed by Tech* (2018), ch 6

7 J Susskind, *Future Politics*, ibid, ch 8.

8 Cf Ben Golder, *Foucault and the Politics of Rights* (2015).

resolution of a human problem. With the human application of law, the open-textured nature of ideas like justice and fairness creates the possibility for immanent critique of the rules being applied and leaves room for wider values, not explicitly encapsulated in law's algorithm, to enter the equation leading to a final outcome. That is true not just for the rules of the common law, but in the interstices of statutory interpretation.[9]

These features are squeezed out when using computer coding. There is a disconnect in the understanding available in the human application of a legal algorithm and the understanding of the coding algorithm in the machine.

Intersection between law and coding

This is the rigidity I have mentioned which enters at the point of the intersection of law and coding. It is a machine variant of the old problem of law laid down in advance as identified by Aristotle: the legislator cannot predict all future circumstances in which the stipulated law will come to be applied, and so cannot ensure that the law will always conform to its underlying rationale and justification at the point of its application. His solution was to call for a form of equity or flexibility at the point of application of the law, what he called epieikeia (usually translated as equity), to keep it aligned to its rationale while it is being applied and enforced.[10]

A coding algorithm, like law, is a rule laid down in advance to govern a future situation. However, this form of equity or rule modification or adjustment in the application of law is far harder to achieve in a coding algorithm under current conditions.

It may be that at some point in the future AI systems, at a stage well beyond simple algorithmic systems, will be developed which will have the fine-grained sensitivity to rule application to allow machines to take account of equity informed by relevant background moral, human rights and constitutional considerations. Machines may well develop to a stage at which they can recognise hard cases within the system and operate a system of triage to refer those cases to human administrators or judges, or indeed decide the cases themselves to the standard achievable by human judges today.[11] Application of rules of equity or recognition of hard cases, where different moral and legal considerations clash, is ultimately dependent on pattern recognition, which AI is likely to be able to handle.[12] But we are not there yet.

As things stand, using the far more crude forms of algorithmic coding that we do, there is a danger of losing a sense of code as something malleable, changeable, potentially flawed and requiring correction. Subjecting human life to processes governed by code means that code can gain a grip on our thinking which reduces human capacities and diminishes political choice.

This effect of the rigid or frozen aspect of coding is amplified by the other two elements to which I called attention: (i) ignorance among lawyers and in society generally about coding and its limitations and capacity for error; and (ii) secrecy surrounding coding which is actually being used. The impact of the latter is amplified by the willingness of governments to outsource the design and implementation of systems for delivery of public services to large tech companies, on the footing that they have the requisite coding skills.

Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights, recently presented a report on digital welfare systems to the UN General Assembly.[13] He identifies two pervasive problems. Governments are reluctant to regulate tech firms, for fear of stifling innovation, while at the same time the private sector is resistant to taking human rights systematically into account in designing their systems.

Alston refers to a speech by the UK Prime Minister Boris Johnson to the UN General Assembly on 24 September 2019 in which he warned that we are slipping into a world involving round the clock surveillance, the perils of algorithmic decision-making, the difficulty of appealing against computer determinations, and the inability to plead extenuating circumstances against an algorithmic decision-maker.

Through lack of understanding and access to relevant information, the power of the public to criticise and control the systems which are put in place to undertake vital activities in both the private and the public sphere is eroded. Democratic control of law and the public sphere is being lost.

In his book, *How Democracy Ends*, David Runciman[14] argues that the appeal of modern democracy has been founded on a combination of, first, providing mechanisms for individuals to have their voice taken into account, thereby being afforded respect in the public sphere, and secondly, its capacity to deliver long term benefits in the form of a chance of sharing in stability, prosperity and peace. But he says that the problem for democracy in the twenty-first century is that these two elements are splitting apart. Effective solutions to shared problems depend more and more on technical expertise, so that there has been a movement to technocracy, that is, rule by technocrats using expertise which is not available or comprehensible to the public at large. The dominance of economic and public life by algorithmic coding and AI is an important element of this. It has the effect that the traditional, familiar ways of aligning power with human interests

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9 See eg the principle of legality and the effect of s 3 of the Human Rights Act 1998: P Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598. These are but two specific examples of a much wider phenomenon.

10 Aristotle, *Nichomachean Ethics*, V 10. 1137b, 12-29.

11 For a discussion of the possibilities, see R Susskind, *Online Courts and the Future of Justice* (2019), Part IV.

12 See J Susskind, *Future Politics: Living Together in a World Transformed by Tech* (2018), 107-110, on the ability of AI to apply standards as well as rules.

13 Report A/74/48037, presented on 18 October 2019.

14 D Runciman, *How Democracy Ends* (2018).

through democratic control by citizens, regulation by government and competition in markets, are not functioning as they used to.

At the same time, looking from the other end of the telescope, from the point of view of the individual receiving or seeking access to services, there can be a sense of being subjected to power which is fixed and remorseless,[15] an infernal machine over which they have no control and which is immune to any challenge, or to any appeal to have regard to extenuating circumstances, or to any plea for mercy. For access to digital platforms and digital services in the private sphere, the business model is usually take it or leave it: accept access to digital platforms on their terms requiring access to your data, and on their very extensive contract terms excluding their legal responsibility, or be barred from participating in an increasingly important aspect of the human world. This may be experienced as no real choice at all. The movement begins to look like a reversal of Sir Henry Maine's famous progression from status to contract. We seem to be going back to status again.

Depersonalisation

Meanwhile, access to public services is being depersonalised. The individual seems powerless in the face of machine systems and loses all dignity in being subjected to their control. The movement here threatens to be from citizen to consumer and then on to serf.

Malcolm Bull, in his recent book *On Mercy*,[16] argues that it is mercy rather than justice which is foundational for politics. Mercy, as a concession by the powerful to the vulnerable, makes rule by the powerful more acceptable to those on the receiving end, and hence more stable. In a few suggestive pages at the end of the book, under the heading 'Robotic Politics', he argues that with a world becoming dominated by AI, we humans all become vulnerable to power outside our knowledge and control; therefore, he says, we should programme into the machines a capacity for mercy.[17]

The republican response to the danger of power and domination, namely of arming citizens with individual rights, will still be valuable. But it will not be enough, if the asymmetries of knowledge and power are so great that citizens are in practice unable to deploy their rights effectively.

So what we need to look for are ways of trying to close the gap between democratic, public control and technical expertise, to meet the problem identified by Runciman; ways of trying to build into our digital systems a capacity for mercy, responsiveness to human need and equity in the application of rules, to meet the problem identified by Malcolm Bull; and ways of fashioning rights which are both suitable to protect the human interests which are under threat in this new world and effective.

We are not at a stage to meet Malcolm Bull's challenge, and rights regimes will not be adequate. People are not being protected by the machines and often are not capable of taking effective action to protect themselves. Therefore, we need to build a structure of legal obligations on those who design and operate algorithmic and AI systems which requires them to have regard to and protect the interests of those who are subject to those systems.

Because digital processes are more fixed in their operation than the human algorithms of law and operate with immense speed at the point of application of rules, we need to focus on ways of scrutinising and questioning the content of digital systems at the ex ante design stage. We also need to find effective mechanisms to allow for systematic ex post review of how digital systems are working and, so far as is possible without destroying the efficiency gains which they offer, to allow for ex post challenges to individual concrete decisions which they produce, to allow for correction of legal errors and the injection of equity and mercy.

Precisely because algorithmic systems are so important in the delivery of commercial and public services, they need to be designed by building in human values and protection for fundamental human interests.[18] For example, they need to be checked for biases based on gender, sexuality, class, age, ability. This is being recognised. As Jamie Susskind observes in his book *Future Politics*,[19] progress is being made towards developing principles of algorithmic audit. On 12 February this year the European Parliament adopted a resolution declaring that "algorithms in decision-making systems should not be deployed without a prior algorithmic impact assessment…"[20]

***Ex ante* review**

The question then arises, how should we provide for *ex ante* review of code in the public interest? If, say, a government department is going to deploy an algorithmic programme, it should conduct an impact assessment, much as it does now in relation to the environmental impacts and equality impacts in relation to the introduction of policy. But government may not

15 This sense exists in some contexts, while in others the emerging digital systems may be hugely empowering, enabling far more effective access to a range of goods, such as, education, medical guidance and assistance, and help in understanding legal entitlements: see R Susskind and D Susskind, The Future of the Professions: How Technology Will Transform the Work of Human Experts (2015). Of course, what is needed are legal structures which facilitate this process of enhancing individuals' agency while avoiding the possible negative side-effects which undermine it.

16 M Bull, *On Mercy* (2019).

17 Pp 159-161.

18 See J Williams, *Stand Out of Our Light*, 106: the goal is "to bring the technologies of our attention onto our side. This means aligning their goals and values with our own. It means creating an environment of incentives for design that leads to the creation of technologies that are aligned with or interests from the outset."

19 J Susskind, *Future Politics: Living Together in a World Transformed by Tech* (2018), 355.

20 European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)), Strasbourg.

have the technical capability to do this well, particularly when one bears in mind that it may have contracted out the coding and design of the system on grounds that the relevant expertise lies in the private sector. And those in Parliament who are supposed to be scrutinising what the government does are unlikely to have the necessary technical expertise either. Further, it might also be said that provision needs to be made for impact assessment of major programmes introduced in the private sector, where again government is unlikely to have the requisite expert capability. Because of lack of information and expertise, the public cannot be expected to perform their usual general policing function in relation to service providers.

Therefore, there seems to be a strong argument that a new agency for scrutiny of programmemes in light of the public interest should be established, which would constitute a public resource for government, Parliament, the courts and the public generally. It would be an expert commission staffed by coding technicians, with lawyers and ethicists to assist them. The commission could be given access to commercially sensitive code on strict condition that its confidentiality is protected. However, it would invite representations from interested persons and groups in civil society and, to the fullest extent possible, it would publish reports from its reviews, to provide transparency in relation to the digital processes.

Perhaps current forms of pre-legislative scrutiny of Acts of Parliament offer the beginnings of an appropriate model. For example, the Joint Committee on Human Rights scrutinises draft legislation for its compatibility with human rights and reports back to Parliament on any problems.

But those introducing algorithmic systems are widely dispersed in society and the across the globe, so one would need some form of trawling mechanism to ensure that important algorithms were gathered in and brought within the purview of pre-scrutiny by the commission. That is by no means straightforward. The emphasis may have to be more on *ex post* testing and audit checking of private systems after deployment.

Also, it cannot be emphasised too strongly that society must be prepared to devote the resources and expertise to perform this scrutiny to a proper standard. It will not be cheap. But the impact of algorithms on our lives is so great that I would suggest that the likely cost will be proportionate to the risks which this will protect us against.

There should also be scope for legal challenges to be brought regarding the adoption of algorithmic programmes, including at the ex ante stage. In fact, this seems to be happening already.[21] This is really no more than an extension of the well-established jurisprudence on challenges to adoption of policies which are unlawful[22] and is in line with recent decisions on unfairness challenges to entire administrative systems.[23] However, the extension will have procedural consequences. The claimant will need to secure disclosure of the coding in issue. If it is commercially sensitive, the court might have to impose confidentiality rings, as happens in intellectual property and competition cases. And the court will have to be educated by means of expert evidence, which on current adversarial models means experts on each side with live evidence tested by cross-examination. This will be expensive and time consuming, in ways which feel alien in a judicial review context. I see no easy way round this, unless we create some system whereby the court can refer the code for neutral expert evaluation by my algorithm commission or an independently appointed expert, with a report back to inform the court regarding the issues which emerge from an understanding of the coding.

The ex ante measures should operate in conjunction with ex post measures. How well a programme is working and the practical effects it is having may only emerge after a period of operation. There should be scope for a systematic review of results as a check after a set time, to see if the programme needs adjustment.

Challenges to individual decisions

More difficult is to find a way to integrate ways of challenging individual decisions taken by government programmes as they occur while preserving the speed and efficiency which such programmes offer. It will not be possible to have judicial review in every case. I make two suggestions. First, it may be possible to design systems whereby if a service user is dissatisfied they can refer the decision on to a more detailed assessment level – a sort of 'advanced search option', which would take a lot more time for the applicant to fill in, but might allow for more fine-grained scrutiny. Secondly, the courts and litigants, perhaps in conjunction with my algorithm commission, could become more proactive in identifying cases which raise systemic issues and marshalling them together in a composite procedure, by using pilot cases or group litigation techniques.

The creation of an algorithm commission would be part of a strategy for meeting the first and second challenges I mentioned – (i) lack of technical knowledge in society and (ii) preservation of commercial secrecy in relation to code. The commission would have the technical expertise and all the knowledge necessary to be able to interrogate specific coding designed for specific functions. I suggest it could provide a vital social resource to restore agency for public institutions – to government, Parliament, the courts and civil society - by supplying the expert understanding which is required for effective law-making, guidance and control in relation to digital systems. It would also be a way of addressing the third

21 See the report in *The Guardian*, 30 October 2019, p 15, "Home Office faces legal case over visa algorithm programme".

22 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; R *(Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), [137]; R *(S and KF) v Secretary of State for Justice* [2012] EWHC 1810 (Admin), [37].

23 See eg R *(Detention Action) v First-tier Tribunal (Immigration & Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341; R *(Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92; and F Powell, 'Structural Procedural Review: An Emerging Trend in Public Law' (2017) JR 83.

challenge – (iii) rigidity in the interface between law and code - because the commission would include experts who understand the fallibility and malleability of code and can constantly remind government, Parliament and the courts about this.

Already models exist in academia and civil society, bringing together tech experts and ethicists.[24] Contributions from civil society are valuable, but they are not sufficient. The issues are so large, and the penetration of coding into the life of society is so great, that the resources of the state should be brought to bear on this as well.

As well as being an informational resource, one could conceive of the commission as a sort of independent regulator, on the model of regulators of utilities. It would ensure that critical coding services were made available to all and that services made available to the public meet relevant standards.

More ambitiously, perhaps we should think of it almost as a sort of constitutional court. There is an analogy with control and structuring of society through law. Courts deal with law and constitutional courts deal with deeper structures of the law which provide a principled framework for the political and public sphere. The commission would police baseline principles which would structure coding and ensure it complied with standards on human rights. One could even imagine a form of two-way reference procedure, between the commission and the courts (when the commission identifies a human rights issue on which it requires guidance) and between the courts and the commission (when the courts identify a coding issue on which they require assistance).

The commission would pose its own dangers, arising from an expert elite monitoring an expert elite. To some degree there is no escape from this. The point of the commission is to have experts do on behalf of society what society cannot do itself. The dangers could be mitigated, by making the commission's procedures and its reports as transparent and open as possible.

All this is to try to recover human agency and a sense of digital tech as our tool to improve things, not to rule us. Knowledge really is power in this area. We need to find a way of making the relevant technical knowledge available in the public domain, to civil society, the government, the courts and Parliament. Coding is structuring our lives more and more. No longer is the main grounding of our existence given by the material conditions of nature, albeit as moulded by industrial society. Law has been able operate effectively as a management tool for that world. But now coding is becoming as important as nature for providing the material grounds of our existence.[25] It is devised and manipulated by humans, and will reflect their own prejudices and interests. Its direction and content are inevitably political issues.[26] We need to find effective ways to manage this dimension of our lives collectively in the interests of us all.

A further project for the law is to devise an appropriate structure of individual rights, to give people more control over their digital lives and enhance individual agency. One model is that proposed by the 5Rights Foundation,[27] who have called for five rights to enable a child to enjoy a respectful and supportive relationship with the digital environment: i) the right to remove data they have posted online, ii) the right to know who is holding and profiting from their information and how it is being used, iii) the right to safety and support if confronted by troubling or upsetting scenarios online, iv) the right to informed and conscious use of technology, and v) the right to digital literacy. These need to be debated at a legislative level. Such a rights regime could usefully be extended to adults as well.

In view of the global nature of the digital world, there also has to be a drive for cooperation in setting international standards. Several initiatives are being taken in this area by international organisations. An algorithm commission could be an important resource for this, and if done well could give the UK significant influence in this process.[28] Following through on these initiatives is important because there is a geographic bias in the production of digital technologies. In the years 2013-2016, between 70 and 100 per cent of the top 25 cutting edge digital technologies were developed in only five countries: China, Taiwan, Japan, South Korea and the USA.[29]

Adaptation of legal doctrine

I will turn now to sketch some preliminary thoughts about how legal doctrine may have to adapt in the increasingly digital age. Such are the demands of bringing expertise and technical

24 For instance, in the field of digital healthcare systems, the International Digital Health and AI Research Collaborative was established in October 2019 to bring together health experts, tech experts and ethicists to establish common standards for delivery of digital health services. It will have the capacity to review and critique systems adopted by governments or big tech companies.

25 Cf Simone Weil, "Reflections Concerning the Causes of Liberty and Social Oppression" in *Oppression and Liberty*, trans A Wills and J Petrie (1958).

26 See J Susskind, *Future Politics* (n 6).

27 *https://5rightsfoundation.com.*

28 Eg the G20 AI Principles (2019), Tsubuka; the OECD Council Recommendation on Artificial Intelligence (2019) OECD/Legal/0449, calling for shared values of human-centredness, transparency, explainability, robustness, security, safety and accountability; the UN Secretary-General's High-Level Panel on Digital Cooperation report, *The Age of Interdependence* (June 2019), which emphasises multi-stakeholder coordination and sharing of data sets to bolster trust, policies for digital inclusion and equality, review of compatibility of digital systems with human rights, importance of accountability and transparency; that report indicates that the UN's 75th anniversary in 2020 may be linked to launch of a "Global Commitment for Digital Cooperation". See generally, A Jobin, M Ienca, & E Vayena, "The global landscape of AI ethics guidelines" (2019) *Nature Machine Intelligence* 1(9), 389-399.

29 OECD (2019) *Measuring the Digital Transformation – A roadmap to the future.*

30 See also Lord Hodge (n 4).

knowledge to bear that it is not realistic to expect the common law, with its limited capacity to change law and the slow pace at which it does so, to play a major role.[30] It may assist with adaptation in the margins. But the speed of change is so great and the expertise which needs to be engaged is of such a technical nature that the main response must come in legislative form. What is more, the permeability of national borders to the flow of digital technologies is so great, that there will have to be international cooperation to provide common legal standards and effective cross-border regulation.

(A) The challenges of an algorithmic world

I will now offer some thoughts at a very high level of generality in relation to three areas: (1) commercial activity; (2) delivery of public services; and (3) the political sphere.

(1) Commercial activity

I will highlight four topics.

First, there is the attempt to use digital and encryption solutions to create virtual currencies free from state control. However, as Karen Yeung observes, points of contact between these currency regimes and national jurisdictions will continue to exist. The state will not simply retreat from legal control. There will still need to be elements of state regulation in relation to the risks they represent. She maps out three potential forms of engagement, which she characterises as (a) hostile evasion (or cat and mouse), (b) efficient alignment (or the joys of (patriarchal) marriage), and (c) supporting novel forms of peer-to-peer co-ordination to reduce transactional friction associated with the legal process (or uneasy co-existence).[31]

Second, there is the loss of individuals' control over contracting and the related issue of accessibility to digital platforms. Online contracting has taken old concerns about boiler plate standard clauses to new extremes. For access, one has to click to accept terms which are massively long and are never read. Margaret Radin has written about the deformation of contract in the information society.[32] She describes what she calls "Massively Distributed Boilerplate" removing ordinary remedial rights. She argues for a new way of looking at the problem, involving a shift from contract to tort, via a law of misleading or deceptive disclosure. A service provider would be liable for departures from reasonable expectations which are insufficiently signalled to the consumer.

The information and power asymmetries in the digital world are so great that we need a coherent strategic response along a spectrum: from competition law at the macro level, to protect against abuse of dominant positions;[33] to rights of fair access to digital platforms; to extended notions of fiduciary obligation in the conduct of relationships[34] and an expansion of doctrines of abuse of rights, which in the UK currently exist only in small pockets of the common law[35] and statute;[36] to control of unfair terms and rebalancing of rights at the micro level of individual contracts.

Third, intellectual property has grown in importance and this will continue, as economic value shifts ever more to services and intangibles. A major project is likely to be development of ideas of personal data as property of the individuals from whom they are derived, for them to participate in their commercial exploitation and to have rights of portability. On the other hand, the veto rights created by intellectual property are likely to become qualified, so as not to impede the interconnected and global nature of the digital world. They may become points creating rights of fair return to encourage innovation as economic life flows through and round them, as has happened with patent rights under so-called FRAND regimes. In these regimes, as the price of being part of global operating standards, patent holders give irrevocable unilateral undertakings for the producers and consumers of tech products to use their patents on payment of a fee which is fair, reasonable and non-discriminatory.[37] It is possible that these sorts of solutions may come to be imposed by law by states operating pursuant to international agreements.

The fourth topic is the use of digital techniques to reduce transaction costs in policing of contracts, through smart contracts which are self-executing, without interventions of humans. An example is, where payment for a service delivered and installed on a computer fails to register on time, the computer shuts off the service. Smart contracts will become more sophisticated. They will create substantial efficiencies. But sometimes they will misfunction, and legal doctrine will need to adapt to that, in ways that are supportive of the technology and of what the parties seek to do. The recent decision in Singapore in *B2C2 Ltd v Quoine Pte Ltd*[38] provides an arresting illustration. A glitch arising from the interaction of a currency trader's algorithmic trading programme with a currency trading platform's programme

31 K Yeung, "Regulation by Blockchain: the Emerging Battle for Supremacy between the Code *of* Law and Code *as* Law" (2019) 82 MLR 207.

32 M Radin, "The Deformation of Contract in the Information Society" (2017) 37 OJLS 505.

33 Autorité de la concurrence and Bundeskartellamt, *Algorithms and Competition* (November 2019).

34 Cf *White v Jones* [1995] 2 AC 207, 271-272, per Lord Browne-Wilkinson: fiduciary obligations are imposed on a person taking decisions in relation to the management of the property or affairs of another.

35 See eg J Murphy, "Malice as an Ingredient of Tort Liability" [2019] CLJ 355.

36 See eg s 994 of the Companies Act 2006, giving members of a company the right to complain of abuse of rights by the majority where this constitutes unfair prejudice to the interests of the minority.

37 *Huawei Technologies Co. Ltd v Unwired Planet International Ltd* [2018] EWCA Civ 2344. The case is under appeal to the Supreme Court. See also the discussion about FRAND regimes in the communication from the Commission, the Council and the European Economic and Social Committee dated 2017 (COM (2017) 712 final), referred to at para [60] in the Court of Appeal judgment.

38 [2019] SGHC (I) 03.

resulted in automatic trades being effected to purchase currency at about 1/250th of its true value, thereby realising a huge profit for the trader. The trading platform was not permitted to unravel these trades. Defences based on implication of contract terms, mistake and unjust enrichment all failed.[39] The judge had to make sense of the concept of mistake in contract when two computer programmes trade with each other. He did so by looking at the minds and expectations of the programmers, even though they were not involved in the trades themselves.[40] But in future the programmes may become so sophisticated and operate so independently that it may be that this process of looking back through them to the minds of those who created them will seem completely unreal. Legal doctrine is going to have to adapt to this new world.

(2) Public administration, welfare and the justice system

Digital government has the potential for huge efficiency savings in the delivery of public services and provision of social welfare. But it carries substantial risks as well, in terms of enhancement of state power in relation to the individual, loss of responsiveness to individual circumstances and the potential to undermine important values which the state should be striving to uphold, including human dignity and basic human rights. These include rights of privacy and fair determination of civil rights and obligations. Philip Alston writes in his report of the "grave risk of stumbling zombie-like into a digital welfare dystopia" in Western countries.

He argues that we should take human rights seriously and regulate accordingly; should ensure legality of processes and transparency; promote digital equality; protect economic and social rights in the digital welfare state, as well as civil and political rights; and seek to resist the idea of the inevitability of a digital only future.

Legal scholars Carol Harlow and Richard Rawlings emphasise that the implications of the emergent digital revolution for the delivery of public services are likely in the near future to pose a central challenge for administrative law.[41] Procedures, such as allow for transparency, accountability and participation, are a repository for important values of good governance in administrative law.[42] But it is administrative procedures which are coming under pressure with the digitisation of government services. The speed of decision-making in digital systems will tend to require the diversion of legal control and judicial review away from the individual decision towards the coding of the systems and their overall design.

Similarly, online courts offer the opportunities for enhanced efficiency in the delivery of public services in the form of the justice system, allowing enhanced understanding of rights for individuals and enhanced and affordable access to justice. But the new systems have to allow space for the procedural values which are at the heart of a fair and properly responsive system of justice.[43]

(3) The interface with politics and democracy.

A number of points should be made here. The tech world clearly places our democracy under pressure. Law is both the product of democracy, in the form of statutes passed by Parliament, and a foundation of democracy, in the form of creating a platform of protected rights and capacities which legitimise our democratic procedures and enable them to function to give effect to the general will.[44] I have already mentioned the dilemma identified by David Runciman, namely the problem of disconnection between democracy and technical control in a public space dominated by code. There are plainly other strains as well. Here I am going to call attention to four. Time does not allow me to explore solutions in any detail. As a society we are going to have to be imaginative about how we address them. The task is an urgent one.

First, we are witnessing a fracturing of the public sphere. Democracy of the kind with which we were familiar in the twentieth century was effective because Parliament worked in the context of a communal space for debating issues in the national press, television and radio, which generated broad consensus around fundamental values and what could be regarded as fact. Jürgen Habermas, for example, gave an attractive normative account of democracy according to which legislation could be regarded as the product of an extended process of gestation of public opinion through debate in the communal space, which then informed the political and ultimately legislative process and was put into refined and concrete statutory form by that process.[45] But information technology allows people to retreat from that communal space into highly particularistic echo-chamber siloes of like-minded individuals, who reinforce each other's views and never have to engage or compromise with the conflicting views of others. What previously could be regarded as commonly accepted facts are denounced as fake news, so the common basis for discussion of the world is at risk of collapse. In elections, the detailed information about individuals harvested by computing platforms allows voters to be targeted by messaging directed to their own particular predilections and prejudices, without the need to square the circle of appealing to other points of view at the same time. We need to find ways of reconstituting a common public space.

Secondly, Jamie Susskind points out that the most immediate

39 The case is going on appeal.

40 Para [210].

41 C Harlow and R Rawlings, "Proceduralism and Automation: Challenges to the Values of Administrative Law" in E Fisher and A Young (eds), *The Foundations and Future of Public Law* (2020, forthcoming), ch 14.

42 Harlow and Rawlings (n 39), 297.

43 See generally R Susskind, *Online Courts and the Future of Justice* (2019).

44 See P Sales, "Legalism in Constitutional Law: Judging in a Democracy" (2018) *Public Law* 687.

45 J Habermas, *Between Facts and Norms*, trans. William Rehg (1996), ch. 8; C Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2007), 239-243; P Sales, "The Contribution of Legislative Drafting to the Rule of Law" [2018] CLJ 630.

political beneficiaries of the ongoing tech revolution will be the state and big tech firms:

> The state will gain a supercharged ability to enforce the law, and certain powerful tech firms will be able to define the limits of our liberty, determine the health of our democracy, and decide vital questions of social justice.[46]

There is already concern about the totalitarian possibilities of state control which are being illustrated with China's social credit system, in which computers monitor the social behaviour of citizens in minute detail and rewards or withholds benefits according to how they are marked by the state. But Susskind argues that digital tech also opens up possibilities for new forms of democracy and citizen engagement, and that to protect people from servitude we need to exploit these new avenues to keep the power of the supercharged state in check.[47] In relation to the tech companies, he argues for regulation to ensure transparency and structural regulation to break up massive concentrations of power. Structural regulation would be aimed at ensuring liberty for individuals and that the power of the tech companies is legitimate.[48]

Thirdly, James Williams, in his book *Stand Out of Our Light*,[49] identifies a further subtle threat to democracy arising from the pervasiveness of information technology and the incessant claims that it makes on our attention. According to him, the digital economy is based on the commercial effort to capture our attention. In what he calls the Age of Attention, information abundance produces attention scarcity. At risk is not just our attention, but our capacity to think deeply and dispassionately about issues and hence even to form what can be regarded as a coherent will in relation to action. He points out that the will is the source of the authority of democracy. He observes that as the digital attention economy is compromising human will, it therefore strikes "at the very foundations of democracy", and that this could "directly threaten not only individual freedom and autonomy, but also our collective ability to pursue any politics worth having."[50]

He argues that we must reject "the present regime of attentional serfdom" and instead "reengineer our world so that we can give attention to what matters."[51] That is a big and difficult project. As Williams says, the issue is one of self-regulation, at both individual and collective levels.[52] It seems that law will have to have some part to play in supporting achieving it, perhaps through some form of public regulation. We have made the first steps to try to fight another crisis of self-regulation, obesity, through supportive public regulation. Similarly, in relation to the digital world, as Williams points out, it is not realistic to expect people to "bear the burdens of impossible self-regulation, to suddenly become superhuman and take on the armies of industrialized persuasion".[53] But at the moment, it is unclear how public regulation would work and whether there would be the political will to impose it.

Fourthly, the law has an important role to play in protecting the private sphere in which individuals live their lives and in regulating surveillance. For example, the case law of the European Court of Human Rights[54] and of our own Investigatory Powers Tribunal[55] sets conditions for the exercise of surveillance powers by the intelligence agencies and provides an effective way of monitoring such exercise.

The challenges of Artificial Intelligence

> *(B) Some of the challenges to legal doctrine in relation to AI will be extrapolations from those in relation to algorithmic programming. But some will be different in kind. At the root of these is the interposition of the agency of machines between human agents and events which have legal consequences. An example which is much discussed is that of a driverless car which has an accident.*

Existing legal doctrine suggests possible analogies on which a coherent legal regime might be based. The merits and demerits of each have to be compared and evaluated before final decisions are made. We should be trying to think this through now. There is already a burgeoning academic literature in this area, engaging with fundamental legal ideas.

Legislation at the EU level is beginning to come under consideration, stemming from a European Parliament Resolution and Report in January 2017.[57] On the issue of liability for the acts of robots and other AIs, the resolution proposes including a compulsory insurance scheme, compensation fund and, in the

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46 *Future Politics* (n 6), 346.

47 *Future Politics* (n 6), 347-348 and ch 13, "Democracy in the Future".

48 According to Susskind's vision, the regulation would implement a new separation of powers, according to which "no firm is allowed a monopoly over each of the means of force, scrutiny, and perception-control" and "no firm is allowed significant control over more than one of the means of force, scrutiny, and perception control together": *Future Politics* (n 6), 354-359.

49 J Williams, *Stand Out of Our Light*, (n 1).

50 Ibid, 47.

51 Ibid, 127.

52 Ibid, 20.

53 *Ibid, 101.*

54 Eg *Liberty v United Kingdom,* app. 58243/00, ECtHR, judgment of 1 July 2008.

55 Eg *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKIP Trib IPT 15_110_CH 2 and related judgments.

56 *European Parliament, Report on civil law rules of robotics* (A8-0005/2017) (27 January 2017) and *European Parliament, Resolution on civil law rules of robotics* (P8_TA(2017)0051) (27 January 2017).

57 Para 59.

58 See eg Jiahong Chen and Paul Burgess, "The boundaries of legal personhood: how spontaneous intelligence can problematise differences between humans, artificial intelligence, companies and animals" (2019) 27 Artificial Intelligence and Law 73-92. See also G Hallevy, *When robots kill: artificial intelligence under criminal law* (2013); S Bayern, "The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems" (2016) 7(2) European Journal of Risk Regulation 297-309; Bayern et al, "Company Law and Autonomous Systems: A Blueprint for Lawyers, Entrepreneurs, and Regulators" (2017) 9(2) *Hastings Science and Technology Law Journal* 135-162.

case of sophisticated AIs, "a specific legal status for robots in the long run".

On one approach,[58] sophisticated AIs with physical manifestations, such as self-driving cars, could be given legal personhood like a company.[59] However, types of AI differ considerably and a one-size-fits-all approach is unlikely to be appropriate.[60] It may be necessary to distinguish between ordinary software used in appliances, for which a straightforward product liability approach is appropriate, and that used in complex AI products.[61]

A contrary approach is to maintain the traditional paradigm of treating even sophisticated AIs as mere products for liability purposes.[62] A middle way has also been proposed, in which some but not all AIs might be given separate legal personality, depending on their degree of autonomous functionability and social need;[63] but may be denied "[i]f the practical and legal responsibility associated with actions can be traced back to a legal person".[64] There are concerns about allowing creators or operators of AIs to enjoy a cap on liability for the acts of such the machines, which Jacob Turner calls the "Robots as Liability Shields" objection.[65]

However, legal personality for AIs could be used in conjunction with other legal techniques, such as ideas of vicarious liability and requirements for compulsory insurance.[66] These are familiar ways of distributing risk in society.

Conclusion

It is time to conclude. Algorithms and AI present huge opportunities to improve the human condition. They also pose grave threats. These exist in relation to both of the diverging futures which the digital world seems to offer: technical efficiency and private market power for Silicon Valley, on the one hand, and more authoritarian national control, as exemplified by China, on the other.

The digitisation of life is overwhelming the boundaries of nation states and conventional legal categories, through the volume of information which is gathered and deployed and the speed and impersonality of decision-making which it fosters. The sense is of a flood in which the flow of water moves around obstacles and renders them meaningless. Information comes in streams which cannot be digested by humans and decisions flow by at a rate that the court process cannot easily break up for individual legal analysis. Law needs to find suitable concepts and practical ways to structure this world in order to reaffirm human agency at the individual level and at the collective democratic level. It needs to find points in the stream where it can intervene and ways in which the general flow can be controlled, even if not in minute detail. Law is a vehicle to safeguard human values. The law has to provide structures so that algorithms and AI are used to enhance human capacities, agency and dignity, not to remove them. It has to impose its order on the digital world and must resist being reduced to an irrelevance.

Analysing situations with care and precision with respect to legal relationships, rights and obligations is what lawyers are trained to do. They have a specific form of technical expertise and a fund of knowledge about potential legal solutions and analogies which, with imagination, can be drawn upon in this major task. Lawyers should be engaging with the debates about the digital world now, and as a matter of urgency.

[The Rt Hon the Lord Sales is a Justice of the Supreme Court of the United Kingdom. This article is based on the text of the Sir Henry Brooke lecture for BAILII, delivered on 12 November 2019. The author would like to express his gratitude to Philippe Kuhn for his research assistance and to Richard Susskind for his comments on a draft of the lecture. He wishes to state that the views expressed and any errors are his sole responsibility. A revised and updated version of this lecture is to be published in [2020] Judicial Review.]

59 The common factors being (1) physical location, (2) human creation for a purpose or function and (3) policy reasons for anchoring liability back to other natural or legal persons: Chen and Burgess (n 58), p81.

60 Chen and Burgess (n 58), p 74.

61 Chen and Burgess (n 58), p 90.

62 S Solaiman, "Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy" (2017) 25 (2) *Artificial Intelligence and Law* 155-179. Solaiman objects to extending the corporate model to sophisticated AIs, principally on the grounds that this would serve the undesirable aim of exonerating the creators and users from liability where significant harm to humans can or has been caused by AIs and the inability to apply a rights-duties analysis.

63 Robert van den Hoven van Genderen, "Legal personhood in the age of artificially intelligent robots" in Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (2018: Edward Elgar), ch 8.

64 Van Genderen (n 63), 245.

65 Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan: 2018), 191-193.

66 See Lord Hodge (n 4): "The law could confer separate legal personality on the machine by registration and require it or its owner to have compulsory insurance to cover its liability to third parties in delict (tort) or restitution".

Articles

Coronavirus and the Law

Norton Rose Fulbright

Introduction

Companies globally are being impacted by the coronavirus outbreak, through both the labour market and their supply chain. Travel restrictions on Chinese workers are preventing the normal resumption of work after Chinese New Year and affecting the operation of manufacturing plants within China as well as the Chinese labour market outside China.

The shutdown of Chinese manufacturing is likely to have an impact on the global supply chain along with a consequential impact on construction projects and other downstream industries. Disruption may spread indirectly to other markets, including key commodity markets (copper, iron ore, zinc, nickel, lithium, oil and LNG). In particular, many mines in emerging markets rely upon the free movement of people, in and out of country, who rotate their work shifts on a periodic basis. With a significant proportion of mines having Chinese personnel, this creates a high risk of spread. We are already seeing restrictions on travel affect construction and operation activities on mine sites in Africa for example.

The shipping industry is likely to be impacted in a number of ways: not only through disruption to voyages to and from China, but also from delays in other countries as a result of quarantine and port checks due to cases, or suspected cases, of the coronavirus amongst crew and passengers on board vessels. Delivery of cargo may be delayed, or cargo may need to be discharged at alternative or interim ports, with expensive consequences and significant logistical and insurance implications. The construction of new building vessels and scheduled ship repairs and upgrades are being delayed as a result of the impact of outbreak on the Chinese workforce which could adversely affect operating schedules. There have already been press reports that Chinese energy companies may be considering rejecting scheduled LNG cargoes claiming force majeure as national demand weakens.

As well as investigating the contractual implications, effective work health and safety systems and strategies for workers, sites and the wider community should be put in place to preserve business interests and to ensure the safety of workers while plans for business continuity should also be implemented to allow for the recovery of operations if required. These plans will need to be developed globally, particularly in the maritime industry, where strategies around the safety of crew and passengers aboard vessels and the potential impact on any destination ports of outbreaks of the virus during voyages will need to be addressed.

The rights of employees and users of services must not be overlooked. Although the outbreak of the coronavirus has been declared a global health emergency by the World Health Organization, response must be reasonable and proportionate so as not to affect human rights enshrined in the Universal Declaration of Human Rights. The right to health provides for the right to access healthcare, the right to access information, the prohibition of discrimination in the provision of medical services, and the freedom from non-consensual medical treatment. Arbitrary detention or discrimination will give rise to potential claims. Quarantines or restrictions on the right to freedom of movement imposed (as opposed to voluntarily entered into) must be proportionate, safe and respectful. They must be imposed in a non-discriminatory way for legitimate aims and not targeted at people of select race or origin.

We consider below some of the relevant contractual provisions and risk management strategies which may be invoked in the wake of the crisis. Whilst the analysis below focuses on the position under English law, similar considerations are applicable in other jurisdictions. Our global teams are already advising on these issues in a number of jurisdictions.

A force majeure event?

Affected parties should consider whether their contracts make provision for force majeure clauses and whether the outbreak falls within the protection offered by the relevant clause. Force majeure events are, broadly speaking, unexpected circumstances outside of a contracting party's reasonable control that, having arisen, prevent it from performing its contractual obligations.

Release from performance as a result of force majeure is not recognised as a standalone principle of English common law. It is therefore a matter for parties to deal with expressly in their contracts and the protection afforded by the clause will depend on the precise drafting. In the event of a dispute as to the scope of the clause, the English courts will apply the usual principles of contractual interpretation.

In the construction context, the internationally used FIDIC Conditions of Contracts define '*Force Majeure*'[1] as an exceptional event or circumstance which is beyond the control of the party affected and which the party affected could neither have foreseen or provided against before entering into the construction contract nor avoided once it had arisen. The event must also not be the fault of the other party.

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1 In the 2017 edition of the FIDIC Rainbow Suite, the term "*Force Majeure*" has been replaced by "Exceptional Events".

The FIDIC Conditions contain an illustrative list of the sorts of exceptional events and circumstances that may constitute force majeure events. Subject to providing the requisite notice, the contractor may be entitled to an extension of time and/or recovery of costs incurred as a result. If the exceptional event is prolonged, the option of termination may arise. However, many FIDIC contracts are heavily negotiated and amended. The contractual clauses will therefore require analysis and the occurrence of a force majeure event will depend on the circumstances of the case. For example, in the absence of a relevant authority imposed curfew or strike action, a worker's decision not to show up for work is unlikely to be sufficient to justify suspension of performance.

If the outbreak constitutes a force majeure event under a construction contract, employers could be faced with contractors (and contractors with sub-contractors and suppliers) claiming they are entitled to invoke provisions in their contracts and to suspend performance. If the contract contains cost protection measures that relate to force majeure events, employers could also be faced with claims arising from the impact of the outbreak. Depending on the terms of the agreement, the affected party may be under an obligation to mitigate the effects of the event, sourcing materials or workers from elsewhere. Questions of concurrent claims may also arise, adding complexity to the analysis.

In the maritime sector, there have already been reports that Chinese shipbuilding yards have declared force majeure under some of their shipbuilding contracts as a result of the delays caused by the outbreak. The force majeure clause and the surrounding circumstances will need to be evaluated on a case by case basis, as will the effect of any resulting disruption in planned employment for the vessel.

Not all contracts will have force majeure provisions: for example charterparties may not have these clauses, although they will contain other provisions specifically drafted to deal with situations where the voyage is affected by an infectious disease (such as the BIMCO Infectious or Contagious Diseases Clause) which may be triggered and/or relevant as a result of the outbreak. These contracts will require additional consideration as to the nature of the impact of the outbreak on the contract and the effect that this might have on the parties.

Frustration?

Under English law, if a contract becomes impossible to perform as a consequence of the outbreak, it may be open for a party to argue that it has been frustrated. The financial consequences of a contract being frustrated are complicated but the parties are discharged from further performance of their obligations. However, it is difficult to establish frustration. In particular, it cannot be used (a) where the parties have contractually agreed the consequences of the supervening event (for example by the use of a force majeure clause), (b) an alternative method of performance is possible, (c) because performance has become more expensive or (d) because a party has been let down by one of its suppliers.

Implications under funding arrangements?

Businesses affected by the outbreak will also be reviewing their credit agreements to assess the implications under the terms of these agreements with funders.

It is likely that funders will require the provision of information under their (often wide) information undertakings. If the loan is not fully drawn, the parties will be examining whether the circumstances will result in a draw-stop, particularly if force majeure has been triggered under key contracts for the business or project. Ongoing analysis will be required to determine whether any event of default has been triggered. Credit agreements, particularly in construction financings, will include events of default for abandonment or suspension of construction works, for failure to achieve construction milestones or to progress the works, and, may also include a material adverse change clause.

Ultimately whether or not the impact of the outbreak constitutes a material adverse change for the purposes of a representation and warranty, condition precedent or event of default is a matter of contractual interpretation. Material adverse change clauses are not standard. For example some relate only to a material adverse change in the ability of a counterparty to meet its obligations under the relevant contract, others are far more extensive and are triggered by a material adverse change in a counterparty's overall financial condition or in its business or prospects.

It is unlikely that the fact a counterparty is located in an area which is affected by the outbreak would of itself constitute a material adverse change in its financial condition (although, depending on the surrounding facts, it might have a material adverse change in its prospects). However if a counterparty subsequently experiences financial difficulties as a consequence, then that deterioration in financial condition could constitute a material adverse change in its financial condition. It has been held that for an event to be material it must (a) not be temporary and (b) significantly affect the party's ability to perform its obligations under the contract. It is not known how temporary the outbreak will be and, in any event, a temporary event may have permanent consequences. To establish a material adverse change is inevitably going to be a highly subjective process involving careful consideration of the drafting and surrounding circumstances.

Nonetheless where a counterparty is suffering financial problems as a result of the outbreak, it is likely that other contractual provisions will also be triggered, such as a breach of a financial covenant, a payment default or the failure to perform an obligation. It would be much easier to rely upon and enforce those more specific contractual provisions than to argue that a material adverse change has occurred.

Conclusion: practical steps

The potential business disruptions from the outbreak cannot be underestimated given the importance of Chinese exports, labour and demand for goods to the global economy.

Risk management measures which corporates should consider include:

- Inserting express infection disease/epidemic wording into new contracts (and amending existing contracts if possible).
- Checking the terms of existing contracts for protection, including force majeure clauses.
- Check insurance arrangements – especially where cargo is delivered to an interim port or to some other port.
- Conducting risk assessments, considering factors specific to suppliers and working conditions.
- Keeping up-to-date with details of the affected areas through WHO's Disease Outbreak News.
- Ensuring proper training and providing information and education on the virus for the workforce including how the virus spreads, how to prevent the virus in order to prepare workers and how to dispel myths, fears and misconceptions.
- Auditing suppliers and reviewing their respective work health and safety systems and policies, especially relating to virus and disease control, ensuring they are up to date and appropriate, or requiring compliance with applicable company policies on the subject.
- Engaging with safety managers and ensuring there is continual and ongoing communication with workers, providing updates on the outbreak and training refreshers and drills as and when required.

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Articles

Statutes and Equity

James Allsop

Introduction

This article is about statutes and equity, and their important relationship. What I am offering are reflections and thoughts, not any over-arching theory. The matters I wish to discuss are relevant to how one thinks about the value or norm that underpins insurance – good faith. They raise questions about the techniques in requiring and assessing decency in commercial behaviour.

The relationship between statutes and equity is important – how they work together, the legal techniques in understanding and applying statutory provisions and equitable principles, and their respective places in a legal system built on the foundation of the common law in a democratic society.

Statutes

Let me begin with statutes. In a representative federal democracy, statutes take their place as the expression of will of Parliaments within their circumscribed ambits of lawful power. Above all, a statute is a statement of will. The will, its meaning and reach, is to be discovered by, in the first instance, the process of ascription of meaning to the words used by Parliament, by the processes of construction and interpretation. Ultimately this is a judicial task. As John Chipman Gray[1] pointed out over 100 years ago, however precise and peremptory the words of a statute are, it is for the courts to ascribe the meaning to them: to interpret the legislative act.

This is especially so in a federal compact where the divisions of responsibility and authority are constitutional questions, the answers to which are exclusively part of the judicial task.

The form and nature of the Parliamentary will or command are various. A statute may fulfil many functions: creating a criminal offence, providing for a new or varied right of action, or a tax, or the rules for the order of priorities for private securities, or for the admissibility of evidence. The function may be apt for strict rules admitting of great precision, or not, as the case may be. One feature of modern statutes has been the creation of norms of conduct expressed generally as commands for an expected standard of behaviour in relation to social, often commercial activity: s 52 of the Trade Practices Act 1974 (Cth) (now s 18 of the Australian Consumer Law), and other provisions in trade or commerce that deal with unconscionable conduct and unfairness.[2] Some of these norms have an obvious relationship with equity, borrowing directly from it or using it terminologically and substantively as the statute's source of norms and values.

These statutes are examples of legislative policy, expressed in the required norm of conduct, becoming a source of law – as Cardozo J said in 1937: "a new generative impulse transmitted to the legal system."[3] Also, these statutes are more like vehicles for the development of a field of substantive judge-made law, the task of the courts being not so much to construe the language and ascribe meaning, but to develop the norm or doctrine chosen as the criterion for the operation of the statute; that is, to fill out the content of the norm. In these kinds of provisions the Parliament plainly intends the courts to give shape to the broad mandate of the statute by the values and norms that the statute has expressly or implicitly chosen.[4] Further, these statutes can be seen to be what Justice Gummow referred to as "a socially directed rule, expressed as an abstraction, to the infinite variety of human conduct revealed by the evidence in one case after another".[5] Such a rule (usually generally expressed in its abstraction) calls forth the need for the process of characterisation of the facts by reference to the content of the statutory norm aided, but not exhausted, by the construction and interpretation of the provision. This distinction, but relationship, between construction and interpretation, on the one hand, and characterisation, on the other, is important.

Such a rule also calls forth the need for caution in the process of construction and interpretation, in the ascription of meaning. The reach of operation or engagement of the provision will be drawn from its application over time to that infinite variety of conduct. That means great caution needs to be shown in not attempting to fix for all time a rigid content of meaning to the words by over-definition at the outset. The temptation on judges (to which they often succumb) is to take the generality of the words chosen, rearticulate them in terms of attempted exhaustive meaning, often narrowing the generality in search of certainty, and then apply the rearticulated meaning to the facts before them. This risks freezing, by the rules of precedent, the

1 John Chipman Gray, *The nature and sources of the law* (The Macmillan Company, 2nd ed, 1931) at 124-125.

2 Competition and Consumer Act 2010 (Cth) sch 2, ss 20, 21, 22, 23 and 24; Australian Securities and Investment Commission Act 2001 (Cth), ss 12BF, 12BG, 12CB, 12CC, 12DA, 12DB and 12DC.

3 *Van Beeck v Sabine Towing Co* 300 US 342 (1937) at 351.

4 *See State Oil Co v Barkat Khan* 522 US 3 (1997) per O'Connor J, and see the illuminating lecture by WMC Gummow, 'The Common Law and Statute' in *Change and continuity: statute, equity and federalism* (Oxford University Press, 1999) at 6-11.

5 Gummow, above n 4, at 18.

meaning of the general words to one particular application of them by attempted rearticulated exhaustive definition. What is thereby created is a more particular and more precisely worded substitute or default or re-presentation of the general word. It is, of course, necessary for the judge to articulate in the context of the human conduct before him or her, why the general words apply or not, as the case may be. That articulation should explain what are the human elements that, in all these circumstances, lead to the conclusion (by way of characterisation) that the general words apply, or not. By this process, construction of meaning of the words is interwoven with application to factual context and with explaining or articulating the relationship between the two.

Limits of text

The above involves a recognition that words can only do so much. There is a limit to text. Text is the vehicle for meaning, but meaning must apply to a whole human context. If a person is required by a statute to act fairly, or efficiently, honestly and fairly, or in good faith, or not unconscionably or in bad faith, the task of the court is to ascribe a generality of meaning to such words that conform to the generality of the expression, and develop through articulated application of them over time, case by case, the human reality of that meaning. This is not to be achieved through exhaustive particularised definitional reduction of the general into re-expressed atomic particular expression supposedly capable of fitting over the infinite variety of facts. It will be achieved by interpreting the words of generality by reference to the values that the statute requires and articulating, on a case by case basis, why the general words are engaged, or not. This recognises the reality that some concepts can only be expressed at an appropriate level of generality if they are to maintain their whole intended meaning.

Whilst statutes frequently provide for broadly expressed socially directed norms, there is a countervailing modern tendency in many other provisions of statutes (sometimes those accompanying the general norm) to see expression with attempted exhaustive and deconstructed particularisation. There is an apparent drafting determination to express ideas both exhaustively and by reference to particularised lists in a deconstructed fashion. One example will suffice. Sub-section 961B(1) of the Corporations Act 2001 (Cth) requires a person who is providing personal financial product advice to act "in the best interests of the client". The language is simple, as simple as the concept itself, informed as it is by fiduciary loyalty. The provision is followed by sub-s 961B(2) (somewhat misleadingly referred to by some as a "safe harbour provision") which sets out a long and cumulative checklist of matters which, if all done, will satisfy sub-s 961B(1). The general norm based on experiential and relational values is deconstructed and particularised into a collection of examples, thereby fragmenting the wholeness of the simple idea in sub-s 961B(1). The technique also limits the scope of the wholesome fiduciary notion with its contextual wholeness by focusing on a structured list of factors which may be inadequate in a given set of circumstances to vindicate the underlying norm.

Equity

Let me turn to equity. Equity is a word used in various senses. In a most general sense, equity in human transactions is that which is founded on justice, honesty and right and which arises ex aequo et bono: justice or a form of natural law.[6] As administered in courts of equity the jurisdiction was not as unformed, but nevertheless the principles that engage a court of equity derive from duties of imperfect obligation, reflecting the requirement to act honestly and with good conscience. This can be contradistinguished with the rule or right in law based on the perfectly formed and rule-based obligation, producing the correlative right, and so the contradistinction between right and obligation.

The work of equity, save in its exclusive jurisdiction, was the amelioration or supplementation of the application of the rule at law, or under statute. Aristotle defined the very nature of equity as the correction of the law, by ameliorating the defect of the necessary universality of law's rule.[7] This is the amelioration of the application of the abstract by reference to principles born of values derived from human experience and a sense of right conduct.

The human reality is that every system of law by written rules must be defective. There is an impossibility in devising abstracted universally applicable rules to cover every situation. There is a vain futility in attempting to write a rule, sub-rule and exemption for every human contingency. The answer has always lain in a flexible amelioration according to values and imperfect obligations to adapt to the just result, but only where necessary, and where the balance takes one.

The place of equity's approach to statute in the development of the modern approach to statutory interpretation is beyond today's subject matter. But the modern rejection of a literalist approach to meaning has its echoes, if not roots, in the conception of the equity of the statute.[8]

Although equity is founded on the ameliorative and supplementary character of principle morally founded, it is also deeply conceptualised. By the word conceptualisation I do not mean taxonomical categorisation. In *The Paradoxes of Legal Science*,[9] Cardozo said that "a fruitful parent of injustice is the tyranny of concepts". He was referring to taxonomy – the creation of categories by reference to abstraction that so often break up a whole human exchange or an experientially derived concept into parts. This deconstruction is often accompanied by decontextualisation – the removing of the whole from its human or experiential context. The technique of equity involves the

6 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Little, Brown and Company, 1853) at [1].

7 See Aristotle's *The Nicomachean Ethics*, Book 5, Ch 15.

8 See Gummow *op cit* at 18-22.

9 Benjamin N Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, 1928) at 61.

rejection of this approach and of rigid categorisation or taxonomy. Equity's conceptualisation is informed by its pragmatism, and the experiential sources of human activity, human relationships and human weaknesses and vulnerabilities in the formation of its doctrines.

Taxonomy

This urge to taxonomise or categorise is a human urge of the brain.[10] It is part of the human urge for certainty. Cardozo's warning in 1937 was explained in 1867 by Henry Maudsley in *The Physiology and Pathology of the Mind*,[11] when he said that humans have:

> a sufficiently strong propensity not only to make divisions in knowledge where there are none in nature, and then to impose the divisions on nature, making the reality thus conformable to the idea, but to go further, and to convert the generalisations made from observation into positive entities, permitting for the future of these artificial creations to tyrannise over the understanding.

This is an invaluable insight for lawyers into their techniques of thinking. Lawyers and drafters should have it on a sign on their desks. The urge to abstract and categorise human conduct into divisions by rules, and, often through metaphor, to view the divisions as almost physical conceptions taking the place of reality. Thus abstracted taxonomy is made almost physical by metaphor.

Of course, rules are essential, and taxonomical organisation is of assistance, often necessary assistance, but neither is everything, especially in equity, when conceptualisation is about human relational engagement, and addressing the relevant question in context. In legal reasoning, especially concerning concepts of subtlety that lack rigid definition, there can be utility, but danger lies, in giving physical form and structure in the imagination to conceptions, principles and relationships. Imagination,[12] and the imagined form of thoughts, can be seen as a foundation of transmissible human ideas and conceptions through the collective imagination; but imagined structure can become a false default for the conception, the principle, and the relationship and their application to the context of the concrete legal problems that may involve the harmonious interplay of equity and statute.

The nature of equity influences the necessary technique of its application. In *Jenyns*,[13] Dixon CJ, McTiernan and Kitto JJ discussed the technique of equity as follows:

> The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: "A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case": The Juliana. (Citations omitted)

This requirement for complete analysis of the facts is mirrored by equity's technique in how it conceptualises. The concepts and their proper conceptualisation require an adherence to the demands of context, including importantly the reason why a question is being asked, and the relationship of that to the underlying applicable norm. Thus in Meagher, Gummow and Lehane, in commencing the tour de force that is Chapter 4 entitled "Equitable Estates and Interests", the authors say:[14]

> An examination of the nature of equitable estates and interests demonstrates that in equity there is no system or hierarchy of property concepts which, once comprehended, is a sufficient guide for all purposes and at all times. The truth is that the equity conscience elicited varying resolutions of competing or inconsistent interests and doctrine was tempered with pragmatism.

In 1981, in *Burns Philp Trustee Co Ltd v Viney*,[15] the deeply erudite equity judge's equity judge, Justice John Kearney, said:

> The administration of equity has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations. The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which the fundamental equitable rules fall to be applied.

This approach was, however, framed and informed by stable principles built on the imperfect obligation of good conscience.

Subtleties

Some of the subtleties in the formation and application of equitable doctrine can arise from the nature of the process of

10 See Iain McGilchrist, *The Master and His Emissary* (Yale University Press, 2009).

11 (Appleton, New York, 1867) at 323-324.

12 Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Vintage Publishing, 2015) at 27-34.

13 *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 118-119.

14 *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Butterworths, 2nd ed, 1984) at 97 [401].

15 [1981] 2 NSWLR 216 at 223-224.

characterisation discussed by Dixon and Evatt JJ in *Attorney-General (NSW) v Perpetual Trustee Co.*[16] Characterisation, with its importance of the essential over the inessential and of substance over form, plays its part, beyond construction and definition, in moulding conceptions and giving a contextual answer to concrete legal problems. Examples of this equitable approach can be seen in the proper characterisation of rights of a residuary legatee in an unadministered estate in *Livingston's Case*,[17] of a beneficiary under a discretionary trust in *Gartside v Inland Revenue Commissioner*,[18] of a mortgagor seeking to set aside a fraudulent sale by the mortgagee in *Latec Investments*,[19] of a company's continuing (beneficial) ownership of company assets in a winding up in *Linter Textiles*,[20] and of the purchaser's or option holder's interest after contract.[21] Danger lies in moving from the process of characterisation from the facts of a concrete legal problem to creating a defined category therefrom, with abstracted defined elements, which category will drive further analysis by mechanical general application. The danger is to be appreciated by recognising, as shown by *Latec Investments*, that an equitable right may be characterised differently depending on the context.[22]

Let me return to statutes and their relationship with equity. The statutes that deal with moral values are expressed in language that evokes a moral sense and a requirement for a conscious awareness of self and empathy. Questions such as "Is that fair?" or "Is this unconscionable conduct?" evoke a relational human value and emotion. To answer such a question one does not go to a particularised definition or a checklist, but to a source of rightness of human engagement. It is as much empathetic emotion or sentiment, as rule.

Moral values are not worked out rationally; they are not defined. Moral values can be seen as a form of experience that is irreducible, like colour or smell.[23] So, expressing rules for them is difficult, and expressing definitions of them is impossible.

How does equity do it? It recognises moral values in their relational context at the requisite level of generality: loyalty, honesty, trust, confidence and conscionability born of the context and the particular relationship. The extent of such concepts and what is required depends always on the circumstances and context. Expressions such as "relation of confidence", "relation of influence", and "fiduciary relation" do not describe fixed categories possessing fixed and uniform characteristics. Their content and the obligations of conscience flowing from them depend upon the particular circumstances.[24]

There are also rules, sometimes very strictly applied, such as the conflict rule governing fiduciaries. Such rules are directed proscriptively to context; not prescriptively requiring the doing of certain things at certain times. This reflects the inability to express a moral value other than at the requisite level of generality (such as sub-s 961B(1)). To require particular things to be done (such as in sub-s 961B(2)) presumes that one can predict the factual context of the moral value and the best way in that context to see it vindicated. On the other hand, one can protect the moral value and its vindication by expressly forbidding behaviour or states of affairs that is or are likely to undermine the value. An example is the rule not to put oneself in a position where one's self interest may possibly conflict with the duty to the person to whom undivided loyalty is owed. The rule is simple and born of human experience. Its strictness in its unqualified expression creates the environment for trust to be confidently expected, and it also creates the ease of assessment of breach. What attracts the rule is a human relationship of a particular character. The rule protects the relationship prophylactically.

Statutes that deal with morality or rightness of behaviour need to be expressed at a requisite level of generality. They must, however, also provide the values and considerations that will attend the judgments that must be made of the generally expressed norm. But the expression of those statutory considerations should not be definitional. To the extent that the statute over-particularises a human, relational, moral value by abstractly expressed prescriptions, it risks draining the human reality from it, by transforming something able to be recognised as a whole (loyalty, trust, acting in another's interests) into a deconstructed checklist, unrecognisable as a whole, only seen to be satisfied by detailed consideration of abstracted parts.

Structure and form

It is important to recognise, however, equity's structure and form and its proper rejection of mere idiosyncratic personal response. In *Muschinski v Dodds*,[25] Deane J expressed this forcefully, but recognised the informing and inspiring role of values, in particular fairness and justice, in the development of equitable principle.

Let me illustrate by an examination of the equitable rules or

16 (1943) 63 CLR 209 at 226-227.

17 *Livingston v Commissioner of Stamp Duties* (1960) 107 CLR 411; *Commissioner of Stamp Duties v Livingston* (1964) 3 All ER 692; 112 CLR 12; *Meagher, Gummow & Lehane* (LexisNexis, 5th ed, 2015) at [4-025]-[4-160].

18 *Gartside v Inland Revenue Commissoners* [1968] AC 553; [1967] UKHL 6; 1 All ER 121; 2 WLR 277; *Meagher, Gummow & Lehane* (5th ed) at [4-075]-[4-080], [4-115], [4-220].

19 *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265; *Meagher, Gummow & Lehane* (5th ed) at [4-165]-[4-260].

20 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20, 220 CLR 592 and ElecNet (Aust) *Pty Ltd v Federal Commissioner of Taxation* [2016] HCA 51; 259 CLR 73.

21 See eg *Lake Macquarie City Council v Luka* [1999] NSWCA 447; 106 LGERA 94 and *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

22 Such as for divisibility or for priorities.

23 As McGilchrist, above n 10 at 86, said of Scheler and Wittgenstein, referring to Max Ferdinand Scheler's *The nature of sympathy* (1923) and Ludwig Wittgenstein's *Tractatus Logico-Philosophicus* (1921).

24 *In re Coomber* [1911] 1 Ch 723 at 728-729; and *Jenyns* 90 CLR at 132-133.

25 (1985) 160 CLR 583 at 615-616.

principles attending moral behaviour and conscience, and an illustration of their application by a master of equity.

Equity would set aside a transaction if it was the product of undue influence or of unconscionable behaviour. These expressions of generality overlapped, but undue influence focused on the freedom of will of the donor and unconscionability on the behaviour of the recipient taking advantage of a weakness or vulnerability of the donor. The framework of relief was given structure by a degree of taxonomy made flexible by generality informed by principle. So, for undue influence, if property was transferred by one to another in certain categories of relationships, equity would presume undue influence. These presumptions were not abstractedly rule-based, but were derived from the wisdom of human experience. If penitent gave to priest, if client to solicitor, if child to parent, if patient to physician, if ward to guardian, and if fiancée to intended husband, equity would require the recipient, the person with the presumed influence, to prove that the transaction was the product of a free will. Flexibility was provided for by the ability to prove that an ad hoc relationship of influence existed such that the recipient, the person with proved influence, was required to prove that the transaction was the product of free will.

The doctrine of unconscionable bargains was directed to the conscience of the party by reason of his or her behaviour in taking advantage of the vulnerability of the other. The expression of the rule or principle only went to a certain degree of generality still framed by value judgment to allow the equitable technique described in Jenyns to be applied. This approach was assisted by the willingness of equity to apply the evidential burden of proof flexibly upon demonstration of the hallmarks of unconscionability, through relationship or circumstance.

Let us see this at work in *Johnson v Buttress*,[26] a case of undue influence. It is a story that is to be read and imagined. It is a story set in the depression years in Sydney of an old man, a little odd and of little intellect. He was known as "Rocker". He was a poor working class man of little emotional stability who had come to the end of his working life. His wife had died. Mrs Johnson and her family were middle class people who knew Rocker through his deceased wife.

The case is the epitome of the technique of equity in Jenyns. It demonstrates, completely, how one does not deal with these equitable issues using labels or mechanical integers. There are no elements to a cause of action, as at common law. One must absorb the humanity of the relationship and examine what happened. The prose of Dixon J is evocative, yet restrained.

> Rocker owned an allotment in working class Maroubra on which his cottage stood. He transferred it to Mrs Johnson. They were good to him, so he thought. The introductory picture of the relationship and the class differences in depression era Sydney are beautifully expressed:[27]

> The transferee…is a married woman named Mary Elizabeth Johnson. Her husband conducted a photographer's studio in Sydney and she occupied herself with the responsibilities of a family of three grown-up children, a son and two daughters, and of a home at Rose Bay, where they all dwelt together. She had known the deceased Buttress for more than twenty years. Their acquaintance arose from his marriage. His wife, a widow with three sons, had a half or stepsister who was Mrs Johnson's aunt. This connection does not seem close but it proved sufficient to put the parties on the footing of relations. Buttress worked as a labourer at quarrying or the like, and the modes of life of the two families were not the same.

In the restrained and insightful language of the day, full of the implicit and unstated, the family participants and their lives were briefly sketched. Then there was a detailed examination of the transfer that was made. The narrative revealed the growing dependence of Mr Buttress on Mrs Johnson and her family after the death of his wife. The evidence did not disclose any predation or dishonesty of Mrs Johnson or the family. Indeed, Ms Johnson, Mrs Johnson's daughter, gave evidence that some few days before the transfer, Buttress talked to her mother and to herself about transferring the land at Maroubra and it was discussed in the family in a general way. In the first instance, her mother refused to have it; but her mother later decided, in discussion with Mr Buttress, that she would take the transfer and that the family would look after him for the rest of his life: give him a home, and give him everything he wanted, and give him the rent of the house.

The facts did not amount to proof of any unconscionable taking advantage of weakness or a positive body of evidence inconsistent with a full understanding of the consequences of his act. However (and this is the importance of the flexibility of equity's approach), if the evidence revealed a pre-existing relationship of influence, this would throw upon Mrs Johnson the burden of justifying the transaction as an independent act resolved upon by a free and understanding mind. This she could not do. However, if positive proof was required that the transfer was procured by improper exercise of an actual ascendency or domination gained over Mr Buttress in respect of the transaction, the case would fail.

In discussing the possibility of an ad hoc pre-existing relationship of influence, Dixon J expressed the principle with illumination:[28]

> But while in these…relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendency or influence over that other,

26 (1936) 56 CLR 113.

27 Ibid at 126-127.

28 Ibid at 134-135.

> or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position.

In looking at the facts before him, Dixon J expressed himself with beauty and humanity:[29]

> The first and most important consideration affecting the question is the standard of intelligence, the equipment and character of Buttress. …it is the man's illiteracy, his ignorance of affairs, and his strangeness in disposition and manner that provide the foundation for the suggested relation. For many years he had leant upon his wife, and it is evident that, after her death, he was at a loss for guidance and support. He turned first to one and then to another for a prop. His affairs of business were in reality few and simple. But to him they seem to have loomed large. A claim that his deceased wife owed money for some cash orders threw him into a state of great excitement. The question whether he could obtain an old-aged pension troubled him. … In making a will in favour of his stepson's child, and then a second will in favour of Mrs Job, he showed how unstable his attachments were. …Little doubt can be felt that ultimately he came so to depend upon Mrs Johnson that a full relation of influence over him subsisted. …[The evidence] draw[s] a picture of an ignorant labouring man depending in many essential matters upon one whom he regarded as having all the advantages of education and position and in whom he confided. This picture is borne out by the description of his manner of life and the accounts of what he said from time to time. But the question remains whether, at the time of the transfer, she stood in that or any less relation of influence. It is not, I think, illogical to consider as an additional piece of evidence bearing upon this question the significance of the transfer itself. …the fact that Buttress was prepared to make over to her his sole property shows how far his trust in her had advanced. Faith in her future beneficence towards him must not be confused with present dependence and subjection. But the condition in which his ignorance and illiteracy placed Buttress must be kept in view. That condition coupled with his temperament, his odd behaviour and his inferior mental faculties made the habitual guidance and support of some one almost essential to him. That person would be called upon either to tolerate or to manage him. At a later date, Mrs Johnson occupied this position. At an earlier date, Buttress was instinctively seeking someone who would undertake it. … But [the evidence] shows beyond doubt that such matters of business as he had occasion to transact were managed by, or under the supervision of, Mrs Johnson. It shows that he was constantly in her company and that he relied upon her advice and depended on her kindness.
>
> I think that when the circumstances of the case are considered with the character and capacity of Buttress they lead to the conclusion that an antecedent relation of influence existed which throws upon Mrs Johnson the burden of justifying the transfer by showing that it was the result of the free exercise of [Mr Buttress's] independent will. This, in my opinion, she has quite failed to do.

The judgment reveals the empathetic understanding of the human condition and of human relations that is involved in the assessment of human moral norms. The judgment also reveals equity's concern with, and protection of, the weak or vulnerable.

Conclusion

As Parliament reaches to require commerce to behave with a modicum of decency, fairness and good faith, it will be important for the nature and techniques of equity to be applied in the resolution of disputes about such issues. This will involve an eschewing of any mechanical or rule-based approach to defining the norms or to articulating the wrong. What is required is the articulation of a narrative as to why, in all the circumstances, the norm of required behaviour was not met.

In this way, the living relationship between rule, value and the just experiential application of them will be advanced through a modern jurisprudence of statutes exhibiting and requiring equitable technique, a technique that rejects simple bright lines where fairness and decency of behaviour are being called for.

We saw in the GFC what happens when decent behaviour is submerged in a sea of greed. Moral norms in business not set effectively by regulatory checklists, but by the evolution, contextually, of norms expressed at the appropriate level of generality, with a clear identification of the values relevant to this assessment.

[The Hon James Allsop is Chief Justice of the Federal Court of Australia. This article is based on the Kenneth Sutton Lecture delivered by him on 12 November 2019 in Sydney.]

[29] Ibid at 136-138.

Coronavirus: Risks in Online Delivery of Education

Julian Sladdin

Introduction

Universities, colleagues and other higher education (HE) providers should develop a code of conduct to account for the risks to student wellbeing that arise from moving to an online delivery model during the coronavirus crisis.

HE providers have a duty of care to their students which is not diluted by the current circumstances of the pandemic. Guidance has been produced which can help HE providers meet their legal obligations while they help students achieve their academic ambitions using digital technology.

The move to online delivery

It is likely that the social distancing directions in the UK, required to stem the Covid-19 pandemic, will bite for many weeks, if not months, to come. Schools, colleges and HE providers are therefore working hard to assure their students that the need to cease traditional face-to-face teaching is not a closure.

Many institutions have shown great ingenuity and flexibility in rising to this challenge at extremely short notice. It is a testament to this hard work that the majority of students in the UK are continuing to receive teaching and learning opportunities through a variety of different online mediums including Zoom, Moodle, Skype and Panopto.

In most cases this work pre-empted the recent request from Michelle Donelan, the higher education minister in England, who on 20 March said that online provision be made as widespread as possible in the coming summer term.

However, providers who are moving to an all online model of delivery need to be mindful that for many students this may increase their sense of isolation and anxiety. It might also create additional risks of harm to those students if they do not have sufficient mechanisms in place to support their wellbeing and protect them from online abuse and harassment.

Digital natives?

Based on recent statistics, it is arguable that the latest generation of student, age adults are "digital natives".

They are the first generation for whom the use of smartphones and social media has been common place and part of the culture into which they have grown up. An Ofcom report in 2016 revealed that social media has a near-universal reach among 16-24 year olds in the UK, and that 99% of respondents claim to use it at least weekly.

However, as a result of the present crisis there is increasing evidence that such a bald statistical approach to the present generation of students is extremely misplaced both in terms of their perceived technical capabilities, never mind their assumed knowledge of social media and other risks.

In fact the move to online delivery has left many students exposed. Students who no longer can access computer rooms on campus are now seeking support from their institutions and student unions due to lack of access to appropriate hardware – we understand many students are accessing loan laptops from their institutions – and other facilities including a broadband connections, and software upgrades to run applications required to access teaching.

There is presently no formal statutory duty that specifically states that higher education providers are responsible for the safeguarding of all their students – given those students are adults – but there is a contractual obligation and a general duty of care toward them exists in common law too.

This error in assuming a level of capability is sadly consistent with similar beliefs that students who have had increasing access to digital content through school and adolescence are educated as "digital natives". This term suggests that these students are well versed in spotting and mitigating the legal and safeguarding risks posed by that wider digital access. In reality, the assumption is misplaced, resulting in insufficient mechanisms being in place to tackle not only the risks of online harassment but also the protection of the wellbeing of students while accessing a provider's services.

Duty of care

There is presently no formal statutory duty that specifically states that higher education providers are responsible for the safeguarding of all their students – given those students are adults – but there is a contractual obligation and a general duty of care toward them exists in common law too.

The extent of the duty to protect a student's wellbeing and mental health has not been tested in the courts. Whether a duty of care exists, or has been breached, will be fact sensitive.

In England and Wales the courts have applied a three stage test to establish whether a legal duty of care exists. The test is as follows:

- On the facts, the harm suffered by the claiming party would have been reasonably foreseeable to the defendant based on; and
- There was a relationship of proximity between the defendant and the claiming party – often called the assumption of responsibility; and
- On the facts of the case it is fair, just and reasonable for the court to impose a duty of care on the defendant party in favour of the claimant.

In the event that a provider fails to meet its duty to its students there is a significant risk of a successful claim for damages arising out of that provider's negligence.

The common law duty of care covers access to online services and this is reflected in digital policy, most notably with the recent online harms white paper, particularly related to the provision of an online service or content.

While the institutional-student contract legally limits any duty to the provision of the agreed education and support services, providers also need to be aware that there is a risk in providing further services – such as digital platforms. This risk arises if in providing those further services they fail to ensure that those facilities are monitored, which would potentially expose students to online behaviours or material which might negatively impact upon their mental health. Such an oversight may result in it being held in breach of its duty of care.

In cases where a student becomes the subject of abuse, or is at risk of abuse, within an online environment provided by their higher education provider, the institution needs to be able to demonstrate due diligence. This might involved, for example, using well-defined 'acceptable usage' policies, and implementing appropriate monitoring approaches and effective staff training to recognise and support those students at risk. The provider also needs to be aware of the potential impact of online abuse and how they might support students whose wellbeing has been affected as a result.

It should also be remembered that conduct classed as harassment is a breach of criminal law. The provider will be advised to direct the reporting student to report the matter to the police or pursue an action under the Protection from Harassment Act 1997.

The provider will also have parallel powers under its own internal procedures to consider disciplinary action and precautionary measures pending the outcome of any formal process. These can be used to avoid circumstances where the alleged harassment is allowed to continue or where a reporting student is expected to have contact with the responding student pending an investigation. It may be an actionable breach of duty on the part of the university if it adversely impacts on the reporting student's safety, wellbeing or mental health.

The extent of the duty placed on a provider in respect of a student may be increased where that student is regarded as a vulnerable person. This could be as a result of the student being under 18, and regarded as a minor, or having mental or physical disabilities.

Extent of the problem

The explosion in general digital use in recent years has highlighted the significantly increased risks which students face from individuals who seek to use online networks to perpetrate acts of harassment. In a study by the charity Ditch the Label, one in two young people stated that they had been bullied online before the age of 25. Furthermore, between 2017 and 2019, the number of people who stated that they have experienced online harassment overall jumped from 17% to 30%.

As the present mitigations to address social distancing and the spread of Covid -19 in the UK mean that all educational institutions will have no option but to increase online delivery over at least the summer term, including a move to online assessments instead of traditional examinations, there is an urgent and critical need for providers within the HE sector to consider their legal duties to any staff and students taking part in any online activities sponsored or sanctioned by them.

In particular, misuse of social media and other online platforms can leave students exposed to abuse. This can affect their mental health and wellbeing. It can also risk disrupting their education and potentially impact on their future employability and career prospects. To tackle online harassment and cyberbullying, all institutions need to consider the specific threats as part of their duty of care to all students as part of a wider strategy to tackle violence, harassment and hate crime on campus.

Code of conduct

As part of that process HE providers need to set clear online conduct guidelines for both students and staff. This includes making reference to online harassment in disciplinary policies and procedures and their student code of conduct.

In particular, both students and staff need to clearly understand the boundaries of acceptable use and the likely ramifications that over-stepping those boundaries could have on other staff and students. Students who face such conduct also need to know that they will be appropriately safeguarded should they face such behaviours online, including harassment, hate speech and the sharing of harmful or illegal content.

Recent comments from internet safety experts say less than a quarter of UK universities have adequate procedures to deal with harmful or illegal online behaviour by students and staff, including the possession and sharing of child abuse images.

Guidance

In this context universities are already in receipt of a number of pieces of guidance which are directly relevant to the risk of harassment against staff and students.

The November 2016 Universities UK (UUK) 'Changing the Culture' report considered how universities tackle serious cases of misconduct including sexual violence, harassment, hate crime and gender-based violence. This report was followed by guidance on how to handle student misconduct which may also constitute a criminal offence. Pinsent Masons assisted in preparing that guidance, which set out the overarching principles for addressing misconduct allegations at HE institutions, but did not specifically address the online setting.

To promote good practice across the sector, UUK subsequently extended its 'Changing the Culture' project to highlight the need for a similar zero-tolerance approach to online harassment, in its September 2019 publication, *Changing the Culture: Tackling online harassment and promoting online welfare*. That report recommends that staff receive specialist training from internet safety experts or the police, and that providers work with and support victims of online harassment.

The report distinguishes "online harassment" from "cyberbullying," which is defined in UK law as inappropriate behaviour online that could constitute a criminal offence. It follows research by professor Emma Bond, University of Suffolk's director of research, and Katie Tyrell, research associate at the University, into the issues.

The acts of online harassment listed in UUK's 2019 report include cyberstalking, doxxing, trolling and sexting. However, it acknowledges that there could be overlaps with cyberbullying and that as technology and social media evolves, more forms would emerge.

The report indicates that providers must better engage with the issue and raise awareness of how to report and better support students, as posting intimate images of non-consenting others along with identifying information leads not only to humiliation and embarrassment but could also increase the potential for further online and offline harassment.

To help HE providers deal with these, UUK makes the following recommendations:

- moving accountability for tackling online harassment to the senior leadership team
- meaningfully and consistently involving students in the development, execution and assessment of initiatives to tackle online harassment, as well involving students' unions, academics and all staff
- updating partnership agreements, such as the student contract or code of conduct, to include expected behaviours in the online sphere
- adopting the term 'online harassment' in policies and making clear to staff and students that what can be referred to as 'cyberbullying' can constitute harassment or a hate crime
- implementing accessible reporting mechanisms for students to make a disclosure or report
- collecting data on how online harassment is experienced within the student cohort and providing governing bodies with regular reports on online harassment
- working with partners , including schools and colleges, to provide early information to students on arrangements to tackle harassment and consequences of inappropriate behaviour online
- regularly reviewing policies and using tools, such as the University of Suffolk's higher education online safeguarding self-review tool, to support this
- encouraging staff as role models in championing appropriate online behaviour
- considering adopting the questions on the National Student Survey (NSS) relating to student safety

The University of Suffolk's higher education online safeguarding self-review tool is highlighted as a good practice example others could follow. Created by professor Bond, this tool is a checklist on policies and practices and is free for any institution to use.

The UUK guidance also has strong government support. A Department for Education spokesperson has said: "Online harassment is unacceptable in any circumstance and can have a devastating impact on the victims. We expect universities to follow this guidance and put robust policies and procedures in place, including effective disciplinary processes and ensure that victims are supported."

Finally, although, now suspended due to the present Covid-19 restrictions, the Office for Students (OfS) consultation on setting potential expectations for the handling of sexual misconduct and harassment issues in the HE sector is also worth reflecting on. While this consultation is not specifically focused on online use, and in many ways is simply confirming the principles already enshrined in the UUK guides, it does gives a very good indication as to what steps the regulator expects all providers to be doing both now and in the future.

[The author is a Partner at Pinsent Masons Solicitors, London and this article has also been published at https://www.pinsentmasons.com/out-law/analysis/coronavirus-education-online-delivery-risks.]

Articles

Effective Access to Justice: Myth or Reality?

Bernard McCloskey

Introduction

In the world of litigation, in its multifarious forms, issues of mental capacity almost invariably raise questions of effective access to justice and procedural fairness. While international human rights instruments such as the European Convention on Human Rights and Fundamental Freedoms[1] and the United Nations Convention on the Rights of the Child[2] can sometimes wield some influence in resolving questions of this kind resort to the riches of the common law frequently provides the best solution. This is so because one of the greatest strengths and successes of the common law is the contribution which it has made to the development and protection of fair hearing (or due process) rights. It may be said that such rights are of elevated importance in every context where the litigant or, indeed, a witness, suffers from some form of mental incapacity. And every such case places the spotlight firmly on the presiding judge.

Access to the Court has been described as a right of constitutional stature.[3] Thus it is possible, for example, to challenge by judicial review measures such as excessive Court fees, invoking this constitutional right. Notably, it has also been possible to bring challenges of this nature without any reliance on the common law. In R *(Unison) v Lord Chancellor*[4] the challenge to the instrument of subordinate legislation whereby fees were introduced in Employment Tribunals for the first time[5] was based substantially on principles of European Union (EU) law. In particular, the challenge invoked the established principle of EU law, now enshrined in Article 47 of the Charter of Fundamental Rights of the EU, that persons who claim that their rights under EU law have been infringed must have access to an effective remedy for the breach.

The foregoing may be considered a paradigm illustration of the valuable contribution to the UK legal system which is now under threat in the Brexit process. Though the common law was not expressly invoked, its influence in the development of this principle of EU law is readily ascertainable. Thus in *Johnston v Chief Constable of Royal Ulster Constabulary*[6] the European Court of Justice described the so-called "effectiveness principle" as something common to the legal systems of all Member States.

While immigration proceedings are a main focus of this commentary, it is instructive to cast one's eye towards a broader panorama. A brief review of the leading cases in both the United Kingdom and the Commonwealth shows that a person's right of access to the Court is not absolute. Thus, for example, both reasonable time limits and reasonable court fees have been upheld. Equally legislative measures of acute political contention have been affirmed, one of the clearest illustrations being the statutory amnesty from suit granted to those who made full disclosure to the Truth and Reconciliation Commission in South Africa, upheld[7] by the Constitutional Court of that country.[8]

It is helpful to formulate the overarching principle. Given that everyone is bound by, and entitled to the protection of, the law, resort to the Court is essential for the purpose of determining legal rights and resolving legal disputes. This is nothing less than a fundamental requirement of the rule of law. It is no coincidence that the ultimate judicial arbiters on disputes relating to restrictions on access to the Courts are Constitutional Courts and Supreme Courts, reflecting the importance of the right in play. Such cases not infrequently entail judicial review of public policy. In this context one is at once reminded that capacity to bring or defend legal proceedings is a long entrenched requirement of our legal system. Equally there is no right of access to the Court for the purpose of pursuing a frivolous or vexatious claim or otherwise misusing the process of the Court. Considerations of balance and proportionality are invariably to the fore.

Access to justice in recent immigration litigation

The sphere of immigration litigation underscores the enduring vigour and influence of the common law. This is especially evident in two of the most important decisions. In R *(Kiarie and Byndloss) v Secretary of State for the Home Department*[9] the

1 Part of UK domestic Law via the Human Rights Act 1998.

2 "UNHRC": barely visible in the domestic law of the United Kingdom. And see Section 55 of the Borders, Citizenship and Immigration Act 2009.

3 R *v Lord Chancellor, ex parte Witham* [1998] QB 575.

4 [2015] EWCA Civ 935.

5 By the Employment Appeal Tribunal Fees Order 2013 (SI2013/1893).

6 C-222/84, [1987] QB 129 at [17] (page 147).

7 See for example, *Mwellie v Ministry of Works* etc [1995] 4 LRC 184 and *Bahamas Entertainment v Koll* [1996] 2 LRC 45.

8 *Azanian People's Organisation v President of the Republic of South Africa* [1997] 4 LRC 40.

9 [2017] UKSC 42.

United Kingdom Supreme Court decided unanimously that the making of a ministerial certificate the effect whereof was that the immigrant could pursue an appeal to an immigration tribunal only from abroad was unlawful. The essence of the illegality lay in the breach of the principle of effectiveness, in a context where the financial and logistical barriers to giving live evidence to the Tribunal from overseas were virtually insurmountable. Notably, the principle of effectiveness was considered to derive from the procedural dimension of Article 8 ECHR. The decision of the Supreme Court displays a welcome grasp of practical realities: the unavailability of legal aid; the improbability of securing legal representation; formidable difficulties in giving and receiving instructions where legal representatives were engaged; the availability of facilities for live evidence; securing the attendance of UK based witnesses at the Tribunal hearing; and the ability to navigate one's way through bundles of documents.

While it might seem to many observers that the appeal could equally have succeeded on the basis of common law fair hearing principles, the decision is, once again, a signal illustration of the influence of international law in the United Kingdom legal system.

The principle of effectiveness featured prominently again in *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor*.[10] It confronted squarely the question of the effective right of access to immigration tribunals by incapacitated and vulnerable individuals. The factual matrix, in brief compass, involved the Secretary of State's refusal of an asylum claim by a citizen of Afghanistan aged 15 years. There ensued the dismissal of the Appellant's appeal by the FtT[11] in circumstances where the evidence included the report of an expert in psychology drawing attention to the Appellant's moderate learning difficulties and impaired intellectual skills and recommending that a series of measures be adopted for the hearing: informality, restrictions on those attending, specially tailored questions et al. The FtT dismissed the appeal, as did UTIAC[12] on further appeal.

Neither Tribunal paid proper attention to the expert psychological evidence. In the language of the Court of Appeal, neither Tribunal took –

> …sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him.[13]

The legal infirmity thereby generated was the familiar one of common law procedural unfairness. The judgment continues:

> The Appellant was a vulnerable party with needs that were not addressed.[14]

The framework of legal principle rehearsed by the Court of Appeal is worthy of note:[15]

> a. Given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';
>
> b. While an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
>
> c. The findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;
>
> d. Expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and *JL (medical reports – credibility) (China)* [2013] UKUT 00145 (IAC), at [26] to [27]);
>
> e. An appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and
>
> f. In making asylum decisions, the highest standards of procedural fairness are required.

Predictably, the Court emphasised that this is not an exhaustive or immutable checklist.[16]

The Court of Appeal next turned to consider the extant Tribunal rules, practice directions and guidance. It observed that adherence to these measures would have served to avoid the procedural unfairness which had been permitted to permeate the proceedings at both levels.[17] The judgment states:

> Critically, the Appellant's age, vulnerability and learning disability could have been recognised as taken into account as factors relevant to the limitations in his oral testimony. Likewise, the Tribunal's procedures could have been designed to ensure that the Appellant's needs (including his wishes and

10 [2017] EWCA Civ 1123.

11 First-tier Tribunal (Immigration and Asylum Chamber).

12 Upper Tribunal (Immigration and Asylum Chamber).

13 At [16].

14 Ibid.

15 At [21].

16 At [22].

17 At [23].

feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.

Drawing attention to various provisions of the FtT Rules (rule 2, the overriding objective, rule 4, the Tribunal's power to regulate its own procedure and rule 14, the Tribunal's broad power to give directions) the Court concluded:

> It is accordingly beyond argument that the Tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the Tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves, this flexibility and lack of formality are made clear.[18]

The Court of Appeal also placed some emphasis on the need for early alertness on the part of the Tribunal in cases of impaired capacity and the desirability of an early case management hearing and specially tailored case management directions.[19] The judgment also draws attention to:

(i) The Senior President of Tribunal's Practice Direction "First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses" [October 2008].

(ii) The Joint Presidential Guidance Note No 2 of 2010.

The Court of Appeal cautioned that a failure to give effect to these instruments would normally constitute a material error of law.[20] These measures repay careful reading. They have the following central features:[21]

a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);

b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);

c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);

d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and

e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

Next the judgment draws attention to the advent of section 55 of the 2009 Act suggesting that the statutory duty to have regard to the best interests of any affected children in the discharge of immigration, asylum and nationality functions extends to Tribunals.[22] The Court also discourages excessively elaborate and literal interpretation of the Guidance Note.[23] Next, the Court decided that a direction for the involvement of an intermediary is possible.[24] Finally, the Court interpreted the relevant primary and secondary legislation as supportive of the conclusion that Tribunals are empowered to appoint a "litigation friend".[25] The relevant passage is at [44]:

> I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached. It must be remembered that this step will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child.

Notably, the need for intervention by the Tribunal Procedure Committee, in the form of procedural rules, was expressly acknowledged.[26]

The right of effective access to a Court must, I suggest, be the core element of every litigant's right to a fair hearing. It is this right which unlocks all of the other constituent ingredients of a fair hearing – the independence and impartiality of the tribunal, the right to be alerted to the case to be answered and so forth.[27] It has been consistently recognised in various juridical contexts – European human rights, EU law and domestic law – that being a right which by its very nature invites regulation by the State limitations, including financial limitations, may be valid, but provided only that these –

> …pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[28]

18 At [27].

19 At [28] – [29].

20 At [30].

21 At [37].

22 At [36].

23 At [37].

24 At [38].

25 At [38] – [42].

26 At [4] and [45].

27 *Podbielski v Poland* (Application No 39199/98) and [2005] ECHR 543 at [61].

28 Ibid at [63].

It is abundantly clear from all of the leading cases addressing this issue that context is of crucial importance. The common law had, of course, taught us this from long ago. Thus, in one case, the court fee in question – approximately €115 – for the enforcement of a judgment, did not, objectively, appear unreasonable. But it was held to constitute a disproportionate restriction on the right of access to the Court on the ground that the claimant's monthly income was a pension of just €19.[29] The same conclusion was made in another case where the fee in question equated to the average annual salary in the state concerned.[30]

As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to the litigant's fundamental right to a fair hearing. For the migrant litigant the context will frequently include elements of family separation, vulnerability of all kinds, psychological trauma, emotional instability, an unfamiliar language and an alien country and culture. Sheer desperation is common place. Worry, perplexity, fear and uncertainty abound. Furthermore, the factor common to many migrant litigants is a lack of support - moral, psychological, material and financial.

Accordingly, an assessment in any given case that a migrant litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. But the typical migrant litigant will not have available a pool of candidate litigation friends to which to turn. This stands in marked contrast to the British national litigant who, typically, can call on a parent, parental figure, older sibling or other blood relative for this purpose. There is, therefore, an unmistakable disparity of treatment issue.

The need for a simple, accessible, expeditious and workable framework to give effect to the assessment that a migrant litigant should have the benefit of a litigation friend is incontestable. In the absence of this – coupled with the necessary related public funding – the pioneering decision in AM (Afghanistan) will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing. Are we in the UK really prepared to sink to depths so low?

Post-AM: whither?

At this point, one pauses – and, unfortunately, continues to do so. Clearly, a framework of procedural rules is required to give proper effect to the litigation friend mechanism. Whimsical and essentially unregulated and unsupervised judicial decision making in a matter of this importance simply will not work. Procedural regulation is required not merely in the interests of legal certainty and consistent, predictable judicial decision making but, fundamentally, in furtherance of the overarching right in play, namely the litigant's right to a fair hearing.

Funding will obviously be an issue, one of not less than vital importance, predictably the biggest issue of all. In the same breath one adds that the corollary of every judicial assessment that a person is of sufficiently impaired capacity to warrant the assistance of a litigation friend, or some other comparable support measure, must surely be that a failure to provide such facility will impact adversely on the person's right to a fair hearing – one of the fundamental, inalienable rights in the UK legal system. It is trite that rights of this kind must be practical and effective, not theoretical or illusory. This principle also was entrenched in the common law, before the (welcome) advent of international law influences. It has been said by the ECtHR:

> This is particularly so of the right of access to the Courts in view of the prominent place held in a democratic society by the right to a fair trial…[31]

In that case, which concerned the availability of legal aid, the test which the Strasbourg Court formulated was:

> …whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.[32]

The procedural framework which I have advocated above is nowhere to be seen. It would appear that The Tribunals Procedure Committee, with its many and under – resourced commitments, has not yet devised a model. Presumably the related issue of judicial training and expertise similarly lies dormant.

Conclusion

One recalls the scholarly argument of Dr EJ Cohn[33]:

> Our law makes access to the Courts dependent on the payment of fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force is willing to grant legal protection to its subjects. Where there is no legal protection, there is in effect no law. Insofar as citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent.[34]

In a later passage the author refers to the plight of those

29 *Apostol v Georgia* [2006] ECHR 999.

30 *Kreuz v Poland* [2001] 11 BHRC 456.

31 *Airey v Ireland* [1979] 2 EHRR 305 at [57].

32 Ibid.

33 An academic writer and author of an article published in the *Law Quarterly Review* in 1943.

34 EJ Cohn, "Legal Aid for the Poor – a study in comparative law and legal reform" 59 LQR (1943) 250 at 251.

citizens who are too weak to protect themselves and reasons:

> Just as the modern state tries to protect the poorer classes against the common dangers of life such as unemployment, disease, old age, social oppression etc, so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The state is not responsible for the outbreak of epidemics, for old age or economic crises. But the state is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the state to make its machinery work alike for the rich and the poor.[35]

It seems remarkable that these wise words were written fully 75 years ago. Today they would appear to resonate as strongly as ever. One might justifiably question whether access to justice – a cornerstone of the rule of law – has in truth been moving in a progressively backwards direction.

It is also instructive to recall that the supposedly enlightened UK legal system has been legislating for free legal advice and representation for some five centuries (since 1494) following the example of a Scottish Act of 1424.

These admittedly gloomy reflections prompt the recollection that philanthropy and human solidarity have for long been established features of the UK legal system. The so-called "dock brief" gained currency in the 18th century when the practice whereby the trial judge in a criminal case asked the barristers who had speculatively attended the court room to represent the accused without any fee developed. And one looks back with unvarnished admiration at the altruism of those involved in the Bentham Committee (established in 1929) and the Poor Man's Lawyer at Toynbee Hall (from 1884). By 1928 there were 27 such centres operating in London, spreading to the main provincial towns and cities. The momentum towards a proper legislative vehicle gradually became irresistible, culminating in the Legal Aid and Advice Act 1949.

The noble work of the Bar Pro Bono Unit dates formally from 1972. It involved a commitment by participants to offer at least three days advice and assistance annually without charge. Solicitors established an equivalent agency. In 1996 the Bar Pro Bono Unit provided free advice and representation to 1615 individuals. The suggestion that, now, there is a more compelling need than ever for this service seems incontestable. My personal experience has been that the law departments of universities are increasingly alert to this and examples of impressive free legal advice and representation schemes are multiplying. These almost invariably require voluntary input and assistance from practicing professionals. It has been my pleasure to make a modest contribution to some such worthy ventures.

The principles which inspired the development of the Toynbee Hall Poor Man's Lawyer over a century ago continue to resonate: that the laws of our country exist for the benefit of the poor as well as the rich; that equality before the law is a mere pretence if some citizens can assert and protect their rights while others cannot; and that the rule of law will be empty of meaning if justice is not available to every citizen, irrespective of means. The underlying precept was expressed memorably by Colonel Rinborough during the Putney Debates of 1648:

> The poorest he that is in England has a life to live as the greatest he.

The case for a keen sense of civic duty, an altruistic disposition and solidarity with the weakest and most vulnerable of our fellow citizens seems more powerful than ever before. If Government will not act, conscientious and responsible lawyers and other professionals must attempt to at least partly fill the void. I have witnessed with admiration approaching awe how some of the worst paid cases have been conducted by legal and other professionals to the highest standards imaginable. This has served to rekindle my innate belief in the rule of law. To all young aspiring lawyers especially I say *"seize the day"*. *Carpe diem!*

[The Rt Hon Sir Bernard McCloskey is a Judge of the Court of Appeal in Northern Ireland.]

[35] Ibid page 256.

Articles

Rule of Law in Myanmar since the 'Transition': A Comparative Perspective

Myint Zan

Introduction

As of April 2020 four years have passed since the National League for Democracy ("NLD") government came to share power in Myanmar (Burma).[1] This author would opine that the NLD is a power-sharing government. Most comparative constitutional scholars dealing with the Asia-Pacific region would know that under the 2008 Myanmar Constitution, the Commander-in-Chief of the country's Armed Forces appoints 25% of parliamentarians, not only at the Union level but also at the State/Regional levels.[2] Moreover, three important Ministries – Defence, Home Affairs and Border Areas – under that constitution are reserved to military men.[3] Additionally, most of the 'Permanent Secretaries' in the Ministries are ex-military personnel. At least a significant minority, if not a majority, of the Director-Generals in the Ministries are also ex-military and at the lower township levels, in what are called the General Administration Departments, at least some staff are ex-military. The current (March 2020) Chief Justice is an ex-military person,[4] as is the current Attorney-General.[5] As of January 2019 three out of nine Judges of the Union Supreme Court have been ex-military or from the Judge Advocate General's Office.[6] The main purpose of the explanation above, however, is not to state, much less elaborate on, the almost entrenched praetorianism in Myanmar but to briefly explain and justify the writer's use of the term 'power-shared NLD government'.

Rule of law ranking

On 19 October 2018 the sixth meeting of the 'Rule of Law and Justice Sector Coordinating Body' was held in Naypyidaw. This body, formed by a notification of the Union government in February 2017, consists of 17 members including the Chairman

1 The 'transition' happened on 1 April 2016. Most of the members of the new government were sworn in by 1 April 2016. The Presidential sash was handed over from former President U (previously General) Thein Sein to then new President U Htin Kyaw on 31 March 2016. (President Htin Kyaw retired out of his own accord from the Presidency in March 2018 and President U Win Myint is the 10th president of Burma/Myanmar since Independence in January 1948. For the handover of the Presidential sash in March 2016 and swearing of the new cabinet see, *The Global New Light of Myanmar*, an official government English daily, 31 Mar 2016, 1 Apr 2016 and 2 Apr 2016, *www.moi.gov.mm* (accessed 23 Oct 2019).

2 See Ss 74 (a) and 141 (b) of the English translation of the 2008 Myanmar Constitution. The English translation of the Constitution can be downloaded from various web sites on the world wide web. In March 2020 over eighty amendments to this constitution submitted by the mainly NLD led committee were resoundingly defeated; since then, only relative two minor amendments mainly to do with Burmese words and arguable semantic connotations were passed by the *Pyindaungsu Hluttaw*, (Union Legislature) since only two of these amendments obtained more than 75% vote of the membership of the *Pyidaungsu Hluttaw* required by the Constitution. As these two amendments are largely cosmetic in nature and of no real significance from the Rule of Law point of view, this writer will not discuss them here.

3 S 232 (b) (ii) of the English translation of the 2008 Constitution states: "In order to appoint the Union Ministers the President shall: … obtain a list of suitable personnel nominated by the Commander-in-Chief of the Defence Services for Ministries of Defence, Home Affairs and Border Affairs." [Spelling and syntax as written in the Constitution.] All the Ministers of Defence, Home Affairs and Border Affairs appointed under that constitution since March 2011 have been, and are, serving military personnel – they were and are all 'military men'.

4 The website of the Union of Myanmar Supreme Court, *www.unionsupremecourt.com.mm*, states: "Chief Justice Htun Htun Oo has been appointed [sic] as the Chief Justice of the Union at the Supreme Court of the Union of Myanmar since March, 2011. He had previously been appointed as the Deputy Chief Justice of the Supreme Court in March 2007. Chief Justice Htun Htun Oo was born in 1956. He got [sic] his B.A. (Law) Degree in 1978 and LL.B. Degree in 1979 from Yangon Arts and Science University [sic: from 1964 to at least May 1989, including the year he reportedly graduated (1979) the University's formal name was *Rangoon* Arts and Science University]. *He served at the Office of the Judge Advocate General for over 25 years* up to the post of the Assistant Judge Advocate General." (emphasis added).
The Union of Myanmar Supreme Court website has a section 'Our Judges'. Brief biographical sketches of the Judges as at October 2019 are stated there. Three of the nine Supreme Court Judges, Chief Justice Htun Htun Oo, Justice Tha Htay, Justice Aung Zaw Thein had served in the Judge Advocate General's Office and were full-time military officers.

5 The web site of the Union Attorney General Office (UAGO), *www.oag.gov.mm*, can be accessed in both Burmese and English languages. Neither the Burmese nor the English language information provided indicates the current Attorney General's background. The current Attorney-General's name on the website is Tun Tun Oo, the same name as Chief Justice Htun Htun Oo but with a different spelling. Chief Justice Htun Htun (a former Lt Colonel) and Attorney-General Tun Tun Oo (a former Colonel) are two different persons. As the author of the article is in a Committee (see note 6 below) which Attorney-General Tun Tun Oo chairs and has met him, the author can vouch that the Attorney-General is a former Colonel.

and Vice Chairmen.[7] The Chairman is the Union Attorney-General. The author is a member of the Committee but this article is written in his personal capacity.

At the above meeting a presentation was made in English by a person from the World Justice Project concerning the 'status' of the Rule of Law in some countries of the world in 2017-2018. Based on a variety of factors, too numerous to mention here, the World Justice projects 'ranks' 113 countries on the basis of their adherence to the standards of the rule of law.[8] The Report or 'List' is based on interviews and questionnaires sent to, and meetings with, tens of thousands of respondents. A 'ranking' is made from '1' to '113'. It is stated that Myanmar stood 100 out of 113 (the smaller the figure the better the ranking). In the 2017-2018 ranking, Denmark was at number 1 and Venezuela at number 113. The rank of Malaysia in the latest list (this is an annual list) is 55, forty-five positions above Myanmar's and the rank of the Republic of Korea was (for the year 2018) 20 eighty, 80 positions above Myanmar.[9]

Comparison with Malaysia

The writer has taught law and law related subjects for about 14 years in four different universities in Malaysia between 1990 and 2016. Based on this experience a few well-known cases decided in that 'higher ranking' neighbouring country of Malaysia, which like Burma had been under British rule, will be mentioned briefly on a comparative basis. Malaysia's legal system and some of its laws in part at least are also based on and suffused with a British or 'common law' legacy.[10]

A contested concept

The 'Rule of Law' is a contested concept and has been (including in Burma) misappropriated by the authorities for a long time.[11] The author recalls that in a 'Rule of Law Seminar' held jointly between the Attorney-General's Office and the European Union on 9 February 2013 a presenter stated that even if the days of the Burmese kings were feudal, in the judicial and legal system there was 'rule of law'.[12] The speaker said that because

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7 The author understands that the appointment of the Committee was announced in the Myanmar government gazette, in the Burmese language sometime in February 2017. The author has not seen a copy of the Government gazette though he was informed by mail of his appointment and has attended meetings held in Naypyidaw, the administrative capital a few times and these meetings were always chaired by Union Attorney General Tun Tun Oo.

8 See WJP [World Justice Project] Rule of Law Report 2017-2018 at *www.worldjusticeproject.org* where among other things the methodologies, the interviews, the data etc. are explained and the 'ranking' of 113 countries listed.

9 The 2019 World Justice Project Rule of Law Ranking has also been issued: see, *www.worldjusticeproject.org*. In it the list is extended to 126 countries and Denmark is still the first, Venezuela still the last; Malaysia has moved up as has the Republic of Korea. Myanmar ranks arguably lower (or has at best not improved its ranking), in the 2019 Index (110 out of 126, compared to 100 out of 113 in 2017-2018).

10 When the author was a graduate law student in Australia in the late 1970s and early 1980s he was asked what sort of legal system Burma had. In a sentence the author replied that it was "mixture of common law, customary law and socialist law". The author's short answer was premised on the basis that in terms of constitutional and public law and the organisation of the court system, the post-1962 orientation in Burma had much in common with one party regimes and rough similarities in constitutional structures with current Chinese, Laotian, Vietnamese and pre-1989 Soviet and East European regimes; in terms of some substantive criminal, civil and other procedural laws it was largely "common law" and in terms of family and personal laws, it was based on "customary" law. It is hoped that it is no more incorrect than, say, classifying the current legal system of Malaysia, in a sentence, as being based on common law, Islamic law and customary law, with of course, Malaysia, unlike Burma since 1962, having a common law system in its Westminster-type constitution and public law. In Burma too the basic Westminster system of Government was incorporated in the 1947 Constitution and continued to hold sway in the pre-1962 period. The author went on to say: "If the author has to describe the Burmese legal system today (1998) it would be "common law, customary law and martial law since SLORC [the State Law and Order Restoration Council] has openly stated that it rules by military decrees. In both the socialist era of 1962-88 period and the post-1988 SLORC era 'socialist law, namely military and party policy' and 'martial law' respectively will always take precedence over common law and customary law which have indeed been "subordinate" parts of Burmese law for the past three and a half decades." – Myint Zan, 'Law and Legal Culture and Constitutions and Constitutionalism in Burma' in Alice Tay (ed) *East Asia, Nation Building, Trade* (Nomos Verlagsgesellschaft Baden Baden, 1999), p 200-01, fn 73. (hereafter 'Law and Legal Culture') Twenty years later in 2019 with the advent of the new Union Legislature (in Burmese *Pyidaungsu Hluttaw*, established on 30 March 2011) with a 'Prime Minister' under the State Peace and Development Council (SPDC) regime, the laws issued by the Legislature post March 2011 are not formally 'martial laws', at least not to the same extent as between 18 September 1988 (the date SLORC took over in a coup) and 30 March 2011 the day the SPDC, led by then Prime Minister Thein Sein, 'transferred power' to the 'elected' President Thein Sein (former general and the same person). Still, though the decrees and laws are not issued by the military Council all the laws, decrees issued by the post-September 1988 regimes namely SLORC and SPDC, remain in force until they are formally repealed.

11 The author would eschew the use of the word 'previous regimes' of the State Law and Order Restoration Council and State Peace and Development Council since a few of the people associated with those regimes are still in positions of power in the NLD-military or military-NLD power-sharing 'people's government'.

12 The news item regarding the seminar can be seen in the front page of *The Global New Light of Myanmar* of 10 February 2013 under the heading 'Myanmar belongs to the Common Law Legal System'.

there were, in feudal times, various laws and procedures and also different compartments or departments in the days of Burmese kings there was rule of law.

Daw Aung San Suu Kyi (not State Counsellor as yet) immediately and appropriately responded from the audience that what the speaker had indicated was 'rule by law' not 'rule of law'. This writer also challenged the presenter as to his contention about the presence of the 'rule of law' in a system where Kings had power over the the 'lives, heads, hairs' of their subjects.[13]

In one of the co-ordinating body meetings a member of the Pyithu Hluttaw ('Union Legislature', the writer prefers the transliterated term rather than the not-so-precise 'Parliament')[14] who was also a member of the co-ordinating body stated that we Burmese are very used to the idea and practice of rule by law throughout the decades. Hence, he inferred, it would be difficult to implement the rule of law and its attendant ideas, practices and attitudes.

In September 2018 at a Hluttaw (Legislature) session the Minister to the State Counsellor Office U Kyaw Tint Swe (a former military officer) stated in effect that (apparently) in countries in transition from full-fledge military or authoritarian rule 'it takes an average of 10 years for the rule of law to take firm hold'.[15]

Twenty-four years before U Kyaw Tint Swe's statement in 2018 Daw Aung San Suu Kyi, in a presentation, in absentia made in November 1994 entitled 'Empowerment for a Culture of Peace and Development'[16] at a conference in Manila) did not seem to agree with the idea that because other, mainly if not almost exclusively, Western countries took decades and perhaps even well over a century to become democracies other developing countries may also take that long and therefore should be accorded 'space' and 'time'.

Daw Aung San Suu Kyi in effect stated that this was (and is) not necessarily a felicitous idea to espouse and indeed is not quite tenable. We, the developing countries, inferred Daw Aung San Suu Kyi, can learn the lessons of those who had trodden the same path of (or towards) democracy, human rights (and one could add) 'rule of law'. The exact words of Daw Aung San Suu Kyi (of 1994) are:

The argument that it took long years for the first democratic governments to develop in the west is not a valid excuse for African and Asian countries to drag their feet over democratic reform. The history of the world shows that peoples and societies do not have to pass through a fixed series of stages in the course of development. Moreover, latecomers should be able to capitalise on the experiences of the pioneers and avoid the mistakes and obstacles that impeded early progress. The idea of "making haste

13 As far as the author is aware, the one-day proceedings were conducted in English with simultaneous interpretation; the writer would that add that at times 'inconvenient' translations were not published as part of the seminar proceedings. A small booklet translated into Burmese without including the discussions but carrying the translation of excerpts from the speeches were published, a copy of which the writer has in his possession: the discussions or 'interventions' stated above were not published in translation. But the author can vouch for the fact that such exchanges or discussions did occur during the seminar.

14 Ordinarily and in the strict sense of the word 'Parliament' is used for systems which can be said to exercise some form of Parliamentary democracy where a political party or a combination of political parties which wins a majority of votes generally heads the executive government and usually governs through a 'Prime Minister'. For example since Burmese independence the system practised in the Union of Burma from January 1948 to March 1962 can be described as Parliamentary democracy. Indeed the now long defunct 1947 Constitution of the Union of Burma actually used the term 'Parliament' in both the Burmese and English versions of the 1947 Constitution. The English version of the 1947 Constitution can be downloaded from *www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwi30-WNr8HlAhULeysKHfjoC5QQFjABegQIABAC&url=https%3A%2F%2Fwww.ilo.org%2Fdyn%2Fnatlex%2Fdocs%2FELECTRONIC%2F79573%2F85699%2FF1436085708%2FMMR79573.pdf&usg=AOvVaw3PtTMz0Rb06_CY1bfUrjR0* (accessed 29 Oct 2019). The Burmese version of the 1947 Constitution can be accessed at *www.burmalibray.org/doc23/1947/1947* Constitutition-bu.pdf (accessed 29 Oct 2019). Even in the Burmese version the word Parliament was transliterated (not translated) as 'Parliament'. In contrast the English translation of the 2008 Myanmar Constitution does not use the word 'Parliament at all but uses the transliterated term Pyindaungsu Hluttaw ('Union Legislature') to denote the joint sessions of both houses of Legislature and Pyithu Hluttaw (for what in informal parlance could be called the 'Lower House' of the Legislature) and Amyotha Hluttaw (what in informal terms could be described as 'Upper House of the Legislature'). Also, in its earlier editions in mentioning the two Legislatures at the 'Union level' the semi-official The Global New Light of Myanmar, till about 2016 referred to the transliterated terms indicated above but later on and till currently used the term 'Parliament' in referring to the Union Legislatures. The author would submit that among Burma's neighbours it would be appropriate (legalistically, formally) for the Legislatures at the Central level to be called as 'Parliament' (e.g. India, Malaysia, Singapore and Japan). Hence in this article the author would not use that term to refer to the Myanmar legislature.

15 'Report on the current work of the government: political, economic and social development, and the peace process' *The Global New Light of Myanmar*, 20 Sep 2018, cover page, quotation at page 5. The context of the translated speech of Minister U Kyaw Tint Swe reads: 'The Myanmar police force, which plays a vital role in upholding the role of law [sic – is it 'the rule of law' or 'role of law'?] has been enhanced to improve law enforcement. Arms and weapons have been updated, and training schools have been upgraded together with international institutions. Updates were also made to the forensics and DNA lab facilities. Communication equipment has been upgraded. It is understood that for nations going through transition it takes an average of 10 years for the rule of law to take firm hold'. ibid, for the translated speech reproduced above. The Minister, arguably, appeared to be conflating or mixing the terms 'role of law', 'law enforcement' (by the police force) and 'rule of law'.

16 Aung San Suu Kyi, 'Empowerment for a Culture of Peace and Development' presented to the World Commission on Culture and Development on her behalf by the late Corazon Aquino of the Philippines on 21 Nov 1994. *www.birmaniademocracy.org* (accessed 29 Oct 2019).

slowly" is sometimes used to give backwardness the appearance of measured progress. But in a fast developing world too much emphasis on "slowly" can be a recipe for disaster.[17]

To paraphrase Daw Aung San Suu Kyi's statement of 1994 the developing countries need not repeat the mistakes the developed democracies have made. Our time to implement and practice democracy need not be that long.

Progress since the 'transition'

Briefly, when did the 'transition' in Burma start? Was it on 30 March 2011 when then new President U Thein Sein in his 'inaugural speech' spoke (using, in addition to Burmese phrases, some English phrases) about 'clean government' and 'good governance'?[18] Or was it on 1 April 2016 after the arguably peaceful transfer or power from one 'mixed' civilian government to another?[19]

Be that as it may, with a few caveats, since March 2011 Myanmar is no longer under a 'naked military dictatorship' and the transition – with occasional, if not set-backs, 'bumps' – has been ongoing for more than 9 years (as of March 2020). The following is only a summary of what this author considers to be progress or in any case positive developments. One 'infelicitous' development post-March 2016 in the field of rule of law would also have to be mentioned lest this article becomes an unstinting paean.

In her opening address at the conference on 'Justice Sector Coordination for Rule of Law' held at Naypyidaw on 7 March 2018 Aung San Suu Kyi, among others, underlined, in effect, the need to have 'fair laws'.[20] About 29 years earlier, around April 1989, she had made a statement that in Christian thought also there are philosophical discussions and practical advice as to the nature of just and unjust laws.[21]

As a person in the audience (not in 1989 or thereabouts but on 7 March 2018) even before the State Counsellor spoke I recall that 7 March 2018 was the 734th anniversary of passing away of the Christian philosopher St Thomas Aquinas (1225-1274) who has discoursed on the nature of just and unjust laws. On this particular 'Thomist' anniversary on 7 March 2018 the State Counsellor also spoke about 'fair laws' and 'fair application of laws'.

To its credit soon after the National League for Democracy (NLD) took office, a few pieces of legislation of the unhappy past have been repealed. This is a good development. One such is the menacingly titled 1975 'Law Protecting the State from Hostile, Subversive Elements' promulgated by then one-party Burma Socialist Programme Party regime's Pyithu Hluttaw. Until it was repealed in May 2016 by the current Legislature,[22] at least a few thousand persons had been unjustly detained under this pernicious law.

Constraints of space restrict the author to a mention of only this unjust law which has now been repealed. But there are a few other laws, including laws which have been enacted during the British colonial government, which are still being used and which need reconsideration by the honourable members of the two Hluttaws with a view to fully or partially repeal, amend, or restrict their application. Such laws include (but are not limited to) those made in the colonial era,[23] as well as the Revolutionary Council (in the form of decrees),[24] the Burma Socialist Programme Party (BSPP),[25] the State Law and Order Restoration Council (SLORC)[26] and State Peace and Development Council (SPDC) eras.[27]

Unjust application of laws

That there have been unjust laws, including legislation and customary laws, barely needs elucidation. There were unjust laws (legislation) in Nazi Germany; there were unjust laws in colonial India where Mahatma Gandhi was an icon for peaceful resistance to many of them; there were unjust laws in Burma; and there were unjust laws in the United States, to name but a few countries. By way of random example emanating from the United States, until a unanimous decision of that country's Supreme Court

17 Ibid, at para 32.

18 A translation of then new President's speech can be read in the 31 March 2011 issue of the government newspaper *New Light of Myanmar* (not yet *The Global New Light of Myanmar*) and can probably be searched in the archives of *The Global New Light of Myanmar*.

19 Information about the transfer of power from the President Thein Sein's administration to then President Htin Kyaw can be read in the archives of *The Global New Light of Myanmar*, 31 Mar 2016, 1 Apr 2016 and 2 Apr 2016.

20 The opening speech of Aung San Suu Kyi given in Burmese with simultaneous English translation is reported in *The Global Newlight of Myanmar* of 8 Mar 2018.

21 The author recalls seeing excerpts from a speech in Burmese language of Aung San Suu Kyi around 1989 but cannot locate the sources. For a brief biography of Thomas Aquinas (1225-1274) see G K Chesterton The Dumb Ox (first published 1933, Reissued by Image Classics, 1974). For a select few of the books on legal philosophy where Aquinas's views on law are discussed see, Jonathan Crowe, *Legal Theory*, (Law Book Company, 2009) pp. 24-28, Margaret Davies, *Asking the Law Question: Dissolution of Legal Theory* (3rd edition, Law Book Company, 2008), pp. 84-88, Marett Leiboff & Mark Thomas, *Legal Theory, Contexts and Practices*, (Law Book Company, 2009) pp. 138-141, Wayne Morrison, *Jurisprudence: from the Greeks to post-modernism* (Cavendish Publishing, 1997), pp. 66-69.

22 Htoo Thant, '*Hluttaws* revoke oppressive State protection law', *Myanmar Times*, 26 May 2016. *www.mmtimes.com/national-news/nay-pyi-taw/20512-hluttaws-revoke-oppressive-state-protection-law.html* (accessed 1 Nov 2019).

23 For example the 1923 Official Secrets Act, which is still in force and enforced in recent years.

24 During the period of 2 Mar 1962 to 2 Mar 1974.

25 During the period of 2 Mar 1974 to 18 Sep 1988.

26 During the period of 18 Sep 1988 to 15 Nov 1997.

27 During the period of 15 Nov 1997 to 31 Mar 2011.

28 388 US 1.

invalidated it in the case of *Loving v Virginiain*[28] in 1967, it was a criminal offence in the state of Virginia for 'negroes' (as they were then called, now 'blacks' or African-Americans) and white persons to marry each other.[29]

But there can also be unjust application of the laws which cannot per se be considered unjust. And it is worth noting that during the BSPP regime in Burma, the judiciary was not only not independent it was entirely subservient to the ruling single Party.[30]

Almost (albeit not quite) in the obverse starting several years back rhetoric and an over-extended application of the hallowed phrase 'independence of the judiciary' has become fashionable again. Apparently to 'safe guard' the 'independence of the judiciary' charges and convictions for contempt of court were used with abandon especially in the SLORC/SPDC era to prosecute, if not persecute (through the unjust application of laws), the political opponents of those regimes. Those political opponents were painted as 'enemies of the State/people'.

Independence of judiciary means that judges should make decisions based only on what they interpret to be the law without fear, favour or interference from extraneous sources, whether it be a political party (eg BSPP) or segments of the military.

Independence of judiciary does not generally mean that no critique of particular court decisions can be made. Citizens can or should be able to express their views, give comments or even criticise the decisions of courts or express their views on forthcoming decisions of courts without the 'sword of Damocles' hanging over them lest good faith critiques land them into political and legal trouble.

As a member of Rule of Law and Justice Centre's Coordinating Body of Myanmar, the author can report (since this is not an official secret) that every State and Division has a local 'chapter', so to speak, of State Co-ordinating Bodies to, among others, liaise with the Division and Township courts as well as Government Law Offices in their respective States and Divisions. Some feedback which this author has received is that in a few cases the judicial and law enforcement personnel (not necessarily the judges) were un-cooperative stating that some of the work of the State Co-ordinating body 'interferes' with, or even amounts to 'supervising', their work.

Such extremes of the judiciary being made subservient to the ruling party or taking instructions from the top executive of the country and at times misuse of the Contempt of Courts Act is an unwholesome legacy which needs to be eschewed in the implementation of a genuine rule of law.[31]

Four cases and outcomes in Malaysia, Pakistan and Myanmar juxtaposed

(a) The two cases against Datuk Seri Anwar Ibrahim (Malaysia) contrasted with the Wa Lone and Kyaw Soe Oo case (Myanmar)

On 11 August 2009 Daw Aung San Suu Kyi was sentenced to 'three years imprisonment with hard labour' for allegedly breaching the terms of her house arrest.[32] Immediately after the sentence, a military personnel entered the court room and read a proclamation (or was it an order?) from the 'Senior General' Than Shwe that due to Aung San Suu Kyi being 'the daughter of independence hero General Aung San' her sentence was 'commuted' to 'house arrest of 18 months'.[33] The query is how is it that the Senior General knew, obviously in advance, that the court will convict Aung San Suu Kyi?

If not a contrast, then a juxtaposition, could be made concerning two cases involving a member of the Malaysian Parliament, Dato Seri Anwar Ibrahim, who has been widely seen as a potential Prime Minister of Malaysia.[34] After his first sodomy ('carnal intercourse against the order of nature') conviction in 1999, Anwar Ibrahim, appealed his conviction to Malaysia's highest court, the Federal Court of Malaysia. In September 2004 by a majority decision the Federal Court acquitted him of the charge of sodomy.[35] At that time former Prime Minister Mahathir

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29 *Racial Integrity Act of 1924*, State Legislature of Virginia.

30 See for eg among many others Nick Cheesman, *Opposing the Rule of Law: How Myanmar Court Makes Law and Order* (Cambridge University Press, 2015). For earlier works of the present author see, Myint Zan, 'Law and Legal Culture' supra n 10 esp at pp 227-253. See also Myint Zan, 'Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects' in (Special Issue ed by Myint Zan & Sam Garkawe 'Restoring the Rule of Law in Burma' (2000) 4 *Southern Cross University Law Review*, pp. 21-33).

31 For the situation which prevailed in the State Law and Order Restoration Council (SLORC) and State Peace and Development Council (SPDC) era, see *Legal Issues in Burma Journal* (No. 2, June 1998), accessible at *www.ibiblio.org/obl/docs/LIOB_02.pdf*.

32 For a contemporaneous report just before the sentencing of Aung San Suu Kyi see 'Burma – A sentence to Daw Aung San Suu Kyi is a sentence to democracy' 29 July 2009, *Asian Forum for Human Rights and Development*, accessible at *www.forumasia.org* (accessed 1 Nov 2019).

33 See the long-winded and pompous heading 'Chairman of the State Peace and Development Council Issues Directive dated 10 August 2009 for [sic] Ministry of Home Affairs stating upon Court pronouncing sentence to Daw Aung San Suu Kyi, sentence to be served by her under Criminal Procedure Code be amended to be remitted and suspended if she displays good conduct and pardon be granted accordingly', *The New Light of Myanmar*, Vol XVII, No 118, 12 Aug 2009, cover page, accessible at *www.burmalibrary.org/docs/07/NLM2009-08-12/pdf* (accessed 1 Nov 2019).

34 The world's oldest Prime Minister Mahathir Mohamad (born 10 July 1925 was on 9 May 2018 elected as Prime Minister of Malaysia after he led the *Pakatan Harapan* ('Alliance of Hope') on the understanding that he would hand over power to Anwar Ibrahim, one time Deputy Prime Minister and one time Opposition leader, in two years' time. A contemporaneous report however indicated that this may (not) occur, See Tarshny Sukumaran, 'Doubts over Mahathir's handover to Anwar strain Malaysia's ruling Pakatan Harapan coalition' *South China Morning Post*, 31 Oct 2019.

35 *Dato Ser Anwar Ibrahim v PP and another*, Federal Court Putra Jaya, [2004] 3 *Current Law Journal* 737. The judgment delivered on 2 September 2004 was by majority vote of the Federal Court.

Mohamad said proudly that he had been said to 'interfere' with the judiciary and there was now proof that the Malaysian judiciary was independent of the executive (Mahathir who retired on 31 October 2003, only to come back again as Prime Minister in May 2018; he was, in September 2004, by the time of Anwar Ibrahim's acquittal, no longer Head of the Malaysian executive).[36]

Fast forward to 2012. Anwar Ibrahim was initially acquitted of a second sodomy charge by a single judge following a trial.[37] The Malaysian Attorney-General's Office (the prosecution) appealed against the acquittal. The Court of Appeal (the second highest court) reversed the verdict.[38] Anwar appealed this decision to the Federal Court (the highest court in Malaysia).

The Federal Court of Malaysia in a unanimous decision in February 2015 upheld the Court of Appeal's decision[39] and Anwar Ibrahim was sent to jail again. The Prime Minister's Office (under Prime Minister Najib Razak) immediately issued a statement (in English) commenting on the Federal Court's decision affirming the conviction of Anwar. When queried about the alacrity of this response, the PMO stated that it had prepared two letters in advance, one of which was to be issued in the case of acquittal and the other in the case of conviction. Statements were thus prepared for both scenarios, noted the PMO.

The writer believes that then Malaysian Prime Ministers' Office did not know in advance what the decision of the Courts will be in both the 2004 acquittal of Anwar Ibrahim in the first sodomy case (at that time the Malaysian Prime Minister was Abdullah Ahmad Badawi) and the 2015 conviction by the highest court of the land in the second sodomy case.[40]

Neither would the executive authorities, nay, even the then reigning monarchs of Malaysia at the time when the cases were before the Courts have directly or indirectly instructed the Malaysian judiciary what to decide. As stated above and to be more specific the executive authorities including up to His Majesties the Malaysian monarchs would not have known in advance, in the view of this author, the decision of the Courts in those cases.

By contrast in the (American) John Yettaw case[41] and Daw Aung San Suu Kyi's own trial in 2009, it was clear that the Aba Gyi (meaning 'big Uncle') Senior General Than Shwe had known in advance about their outcomes.

Fast forward to 2019. In 2018, two Reuter journalists Wa Lone and Kyaw Soe U were found guilty of breaching the colonial era 1923 Official Secrets Act and sentenced to seven years in prison.[42] The State Counsellor Daw Aung San Suu Kyi stated in a foreign TV interview that the convicted defendants can appeal.[43] Indeed, they could and they did. In January 2019, the Yangon Division High Court rejected their appeal.[44] And on 22 April 2019 the Union Supreme Court the highest court in Myanmar

36 The author is unable to retrieve the exact quote of Dr Mahathir Mohamad, during his first stint as Prime Minister, that Anwar's acquittal in a sense 'proves' that he does not interfere with the judiciary and the judiciary, in Malaysia, is independent of the executive, issued in the immediate aftermath of Anwar's acquittal by the Federal Court of Malaysia in September 2004 but the author clearly recalls reading something to that effect. Tun Dr Mahathir's memoirs, *A Doctor in the House*, first published in 2011 do include his observations on the first *Anwar* 'sodomy' case. However in the 2012 *initial* acquittal of Anwar Ibrahim in the *second sodomy* case, Mahathir did refute the criticism that 'the government is cruel to the point that it manipulates the judges.' Instead, stated Mahathir, 'This has never happened' – 'Dr M: Acquittal Proves No Conspiracy Against Anwar' *The Malaysian Insider*, 9 Jan 2012.

37 'Malaysian Court finds Anwar Ibrahim not gullty of sodomy' BBC News Asia, 10 Jan 2012. (retrieved from *www.bbcnews.com*)

38 'Malaysia: Anwar Ibrahim sodomy acquittal overturned', BBC News Asia (retrieved from *www.bbcnews.com*).

39 *Dato Seri Anwar Ibrahim v PP and Another Appeal*, Federal Court, [2015] *Current Law Journal*) JT_ 3.

40 After the dismissal of Anwar's appeal in what is known as the 'Sodomy II' case, the Malaysian government issued this statement: 'The judges will have reached their verdict only after considering all the evidence in a balanced and objective manner. Malaysia has an independent judiciary, and there have been many rulings against senior government figures' ('Malaysian Government Statement on Conviction of Anwar Ibrahim', *Bernama*, 10 Feb 2015 (accessed 1 Nov 2019). The judgment, written in English, was unanimous.

41 For details of this case, see, eg Justin McCurry, 'Concerns for John Yettaw after Burma conviction', *The Guardian* (London), 11 Aug 2009, accessible at *www.theguardian.com/world/2009/aug/11/john-yettaw-burma-sentence* (accessed 06 Apr 2020).

42 For the brief facts and encapsulation of events regarding the two fairly well-known Reuters reporters (Mr) Walone and (Mr) Kyaw Soe Oo case see, among, many others, Wa Lone and Kyaw Soe Oo – Pen America's report at *https://pen.org.advocacy-case.wa-lone-kyaw-soe-oo* (accessed 3 Nov 2019).

43 For a contemporaneous report after the release of Wa Lone and Kyaw Soe Oo by a Presidential pardon and not – unlike in the first sodomy case of Anwar Ibrahim – by the highest court in the land and especially as to the ostensible or attributed attitude of Daw Aung San Suu Kyi towards the case and the now pardoned two reporters, see Richard C Paddock, Saw Nang and Edward Wang, 'Who Was Most Opposed to Freeing Two Reporters in Myanmar? Aung San Suu Kyi' *New York Times*, 10 May 2019. For an earlier account of the views of Aung San Suu Kyi, see 'Exclusive: Interview with Aung San Suu Kyi' *https://www3.nhk.or.jp/nhkworld/en/news/editors/1/exclusiveaungsansuukyi/index.html* (accessed 3 Nov 2019). See also 'Myanmar leader Suu Kyi defends journalists' imprisonment', www.aljazeera.com (accessed 3 Nov 2019).

44 Thu Thu Aung, Poppy McPherson, 'Myanmar court rejects appeal by jailed Reuters reporters' *https://www.reuters.com/article/us-myanmar-journalists/myanmar-court-rejects-appeal-by-jailed-reuters-reporters-idUSKCN1P50HL* (accessed 3 Nov 2019).

also rejected their appeal.[45] On 7 May 2019 President Win Myint, in a Presidential amnesty, freed Wa Lone and Kyaw Soe Oo along with 6518 other prisoners.[46]

The above examples indicate that, in high profile cases, the working of the appellate Malaysian judiciary is at least arguably independent from the executive.

It is to be noted that despite the quite different nature of the charges brought against Anwar Ibrahim in Malaysia ('Sodomy I' and 'Sodomy II') and against Wa Lone and Kyaw Soe Oo (alleged breach of the 1923 Official Secrets Act) in Myanmar there have been allegations that both cases and charges were politically motivated and perhaps in both case there were allegations of 'tampered evidence'[47] and specifically in the case of Wa Lone and Kyaw Soe Oo also of entrapment.[48] Notwithstanding that in both the Anwar Ibrahim Sodomy I and Sodomy II cases there was disagreement between the lower and higher level Malaysian courts whereas in the Wa Lone and Kyaw So Oo case all the Myanmar courts (trial court, Yangon High Court and Union Supreme Court) were unanimous in their view of the guilt of the two defendants – not, it may be added, dissimilar to the outcome of case against Aung San Suu Kyi herself in the case brought against her nearly ten years earlier in 2009.

(b) A case from Pakistan

In November 2018, and also later in January 2019, Pakistani Supreme Court judges, despite alleged death threats against them, bravely ruled and reaffirmed their view that a Pakistani Christian woman who had spent about eight years in jail on contrived and unsubstantiated charges based on Pakistan's notorious 'blasphemy' laws enacted during the regime of the late dictatorial president Zia-ul-huq, should be set free.[49] The Pakistani Supreme Court boldly overruled the decisions of the two lower courts in this highly controversial case. These proceedings also stood in stark contrast with the approach adopted by the courts in Myanmar.

The confrontation or brush with unjust laws or unjust application of laws does occur in various countries and in varying political and legal cultures. Hence genuine rule of law concepts need to be infused primarily but by no means solely to judicial and legal personnel. This is a task that needs to be implemented assiduously not only in Myanmar but also in other countries as well.

The cases from Malaysia (the two Anwar cases), Pakistan's blasphemy case of Asia Bibi and the Wa Lone and Kyaw Soe Oo' case in Myanmar as briefly juxtaposed here indicate the

45 Shoon Naing, Simon Lewis, 'Myanmar's top court rejects final appeal by jailed Reuters journalists', *www.reuters.com/article/us-myanmar-journalists/myanmars-top-court-rejects-final-appeal-by-jailed-reuters-journalists-idUSKCN1RZ06O* (accessed 3 Nov 2019). Writing in early April 2019 the present author has written: 'But to 'rush' where angels fear to tread albeit with considerable trepidation the writer would like to 'moot', 'tout' or 'query' whether or not – like in Malaysia – the Union Supreme Court would differ with the trial court and Yangon Divisional Court and if not release, then reduce, the sentences of these two journalists or not?'. All three courts, the trial court, the Yangon Division Court and the Union Supreme Court came to the same verdict. Since the verdict of the Supreme Court was issued in the Burmese language in April 2019, the author has tried through phone conversations with one of the lead lawyers of Wa Lone and Kyaw Soe Oo, U Khin Maung Zaw to obtain a copy of the ruling, but without success. U Khin Maung Zaw informed me in early November 2019 that the judgment is being translated by some Burmese translators and the translation has been sent to some attorneys from the United States who had participated as advisers to the defendants for verification and refinement of the translation.

46 Simon Lewis, Shoon Naing, 'Two Reuters reporters freed after spending more than 500 days in prison', *www.reuters.com/article/us-myanmar-journalists/two-reuters-reporters-freed-in-myanmar-after-more-than-500-days-in-jail-idUSKCN1*.

47 For a day-to-day summary of the 'Sodomy II' trial of Anwar Ibrahim, see 'A Chronology of Anwar Ibrahim's second sodomy case', *The Malay Mail*, 9 Feb 2015 where allegations of, among others, tampering of DNA evidence by the prosecution was made. *www.malaymail.com>Malaysia>2016/02/09/a chronology* (accessed 5 November 2019).

48 'Myanmar Policeman Testifies Arrested Reporters Were Set Up', *VOA Associated Press*. 20 Apr 2018 (accessed 5 Nov 2019).

49 The judgment, written in English and delivered then Chief Justice Mian Saqib Nisar, in Criminal Appeal No 39L of 2015 can be accessed on the Pakistan Supreme Court website *www.supremecourt.gov.pk* (accessed 6 Nov 2019). See also Kathy Gannon, 'Pakistan upholds acquittal of women in blasphemy case', 30 Jan 2019, Associated Press Archives (accessed 5 May 2019). In the news item it was stated that, 'Bibi, her lawyer and the Supreme Court judges who eventually freed her have all received death threats from radical Islamists, and a small army of police and paramilitary Rangers was on hand to guard the courthouse and surrounding area'.

considerable difficulties some people in various countries have to grapple with in the face of the attitudes of the top courts when it comes to sensitive cases.[50]

Positive developments

As alluded to above (and space considerations mean that only the most prominent cases are briefly discussed) there have been some positive developments concerning the rule of law since March 2016 since the (military-NLD) power-shared government took office in Myanmar. Indeed to give partial credit to the previous government, starting in March 2011 certain positive movements were made in the right direction. The formation of the Rule of Law Centres and training centres resourced by both local and foreign personnel, the willingness to seek, and indeed the actual seeking of, foreign assistance, training etc., an abandonment of the isolationist, xenophobic rhetoric and practices of the BSPP, SLORC and SPDC eras are especially noteworthy. This 'retreat' from those attitudes and practices since 2011 and particularly after 2016 deserves special recognition.

More so than many other transitions from dictatorships to some semblance of democracy and achievement of rule of law objectives, Myanmar has had to face, and continues to face, considerably more entrenched, structural constraints. In his Thingyan Burmese New Year address to the nation in April 2017 former President U Htin Kyaw (openly) stated in effect that 'reforms have to be done with great care'.[51]

Donald Trump had, prior to his election in November 2016, proclaimed to the American electorate that if he won the presidency he would 'drain the swamp'.[52] Imagine Trump saying in his a subsequent State of the Union address that he and his administration are 'draining the swamp' with 'extra care'! But Burma/Myanmar is, of course, not America and perhaps 'national reconciliation' which may, at times, arguably 'trump' – pun intended – the rule of law is, in many ways, the order of the day.

During the Watergate crisis which erupted in the Spring and Summer of 1973 in the United States, the late President Richard Nixon addressed the nation on radio and television on 30 April 1973. The next morning the New York Times editorialised that Nixon's 'explanation' of the Watergate imbroglio is tantamount to stating or admitting 'all that was inevitable but not all that is necessary'.[53]

The National League for Democracy has, as of March 2020, shared power in Myanmar for four years. During that time in matters concerning the rule of law, it has initiated in some aspects reforms which are more than what was 'inevitable'. Admittedly, 'all that is necessary' has not been fully initiated, far less accomplished. This may partly be due – to quote this time from The System of Correlation between Man and His Environment issued by the then Revolutionary Council regime simultaneously in both Burmese and English languages on 17

50 In the Asia Bibi case, even after the reaffirmation of Pakistan's Supreme Court to free Asia Bibi it took another three months before she was actually freed and allowed to leave Pakistan for Canada – after extensive negotiations with the Pakistani executive that she be finally allowed to exit the country – see, eg 'Asia Bibi arrives in Canada after leaving Pakistan: Christian woman freed last year after spending eight years on death row', *The Guardian* (London), 8 May 2019, accessible at *www.theguardian.com/world/2019/may/08/asia-bibi-arrives-in-canada-after-leaving-pakistan* (accessed on 6 Apr 2020). In the Anwar Ibrahim *Sodomy II* case in Malaysia an appellate court (Court of Appeal) and the Federal Court reversed the trial's Court judgment of acquittal. It was the Malaysian King who pardoned Anwar Ibrahim following which he was released from prison in May 2018 – see, eg Channel News Asia, 'Anwar Ibrahim freed from prison after royal pardon from Malaysian king', *www.channelnewsasia.com/news/asia/anwar-ibrahim-freed-from-prison-royal-pardon-malaysia-10237840* (accessed 5 Nov 2019). In the *Wa Lone and Kyaw Soe Oo* breach of Official Secrets Act case in Myanmar, the trial Court sentenced the duo to seven years imprisonment, the Yangon High Court and the Union Supreme Court affirmed their convictions and their sentences but they were released through an amnesty along with over 6000 other prisoners – see, Simon Lewis and Shoon Naing, 'Two Reuters reporters freed after spending more than 500 days in prison', *supra*. Though the author was able to find official references to the rulings (written in English) of the Malaysian Federal Court in the 'Sodomy II' case of Anwar Ibrahim and the judgment of the Supreme Court of Pakistan (written in English) in the Asia Bibi case from web sources, the author has so far been unable to obtain any such references to the judgments in the *Wa Lone and Kyaw Soe Oo* case.

51 The English translation of the speech given on Myanmar's New Year day 2017 (18 April 2017) can be read on the Myanmar President's Office website, *www.president-office.gov.mm>news>2017/04/18* (accessed 5 Nov 2019).

52 The then Presidential candidate Donald Trump gave his 'drain the swamp' speech virtually six months to the day before then Myanmar President U Htin Kyaw announced on 18 Apr 2017 that his administration has to work with ' extra care'. For a reportage of Trump's speech see 'Trump calls to "drain the swamp"' USA *Today*, 18 Oct 2016, *https://www.usatoday.com>story>news>politics?>elections>2016/10/18* (accessed 5 Nov 2019).

53 'A Partial Beginning', *New York Times*, 1 May 1973, accessible at *https://www.nytimes.com>1973/06/01-archives/a=partial-beginning* The first line of the Editorial reads 'in his comments and actions on the Watergate scandal yesterday, President Nixon did all that was inevitable —but not all that is necessary'.

January 1963 – to 'the peculiar and powerful circumstances of history'.[54] Indeed in current day Myanmar not only have 'the peculiar and powerful circumstances of history' but also the prevailing conditions imposed considerable and genuine constraints from implementing all that is necessary and right in relation to the 'rule of law'.

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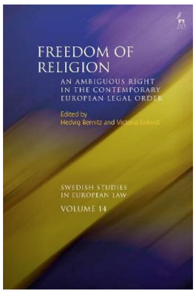
54 To briefly compare Burma/Myanmar's 'peculiar and powerful circumstances' with only two countries Malaysia and Pakistan where decisions given by the apex courts have been discussed in comparison, here are some facts. Burma, Malaysia and Pakistan were former British colonies. Malaysia since *Merdeka* ('Independence') in Aug 1957 still maintains its constitutional monarchy and Parliamentary democracy. It has never had military rule and it was never a one-party state (in the sense that only a single party was formally, constitutionally allowed to operate as in Burma between 1962 and 1988). Since Independence in Aug 1947 Pakistan was never by either enacted laws or Constitutional fiat a one-party State. It is true that Pakistan has had several military regimes, including under the late General Ayub Khan and the late General Yahya Khan from about 1958 to 1971, and further stints of military rule under the late General Zia-Ul-Haq from 1997 to 1988 and under General Parvez Musharraf from 1999 to 2008 (a total of about 33 years (as of March 2020) in the 72 years since independence – see 'A Brief History of Military Rule in Pakistan: Autocratic Governance: Decades of Military Rule', accessible at *www.dandc.edu>article>-a-brief-histoy-of-military-rule* (accessed 6 Nov 2019). By contrast, Burma/Myanmar, since independence in January 1948, has been under military and one-party regimes from 1962 to 2011, for about 49 years out of 72 years since independence. As to the nature of the military-cum-one-party rule from 1962 to 1988 and the naked military dictatorship from 1988 to 2011 in Burma/Myanmar, see above. And none of the heads of the judiciary in Malaysia since independence in 1957 has been military officers. Even in Pakistan which was under military regimes for about thirty years, a quick check at the website of the Supreme Court of Pakistan, *www.supremecout.hob.pk* (accessed 6 Nov 2019), indicates that the none of the Supreme Court judges (albeit all male) came from military. In contrast in the current Myanmar Supreme Court 3 out of the 9 Supreme Court judges hail from the Judge Advocate-General's Office and were former full-fledged military officials. In addition, among 11 Chief Justices or head of the judicial branch of government in Burma three were full-fledged officers from the military: the Chairman of the Council of People's Justices (the nomenclature for then highest post in the Judiciary) from March 1974 to November 1981, the late *Thura* (military title) U Aung Pe was a full Colonel. His successor, former Brigadier Moung Moung Kyaw Win was the Chairman of the Council People's Justices from November 1981 until his death in July 1982. The 'Union Chief Justice' U Htun Htun Oo from March 31, 2011 to the present is a former Lt Colonel. Hence compared to Malaysia and Pakistan the influence of the military was and is larger in Burma/Myanmar, contributing to the peculiar and powerful circumstances of history which do impact on the Rule of Law.

* The author would like to add an explanatory note about the background to this article. It was initially written without foot notes or other annotations and in journalistic style, for a general audience, sometime in November 2018 at the urging of two 'intermediaries' of State Counsellor Daw Aung San Suu Kyi. A person with connections to the State Counsellor who is interested in Rule of Law matters reportedly suggested to her that this author be asked to write an article on the subject of 'Rule of Law since the Transition' and the State Counsellor apparently agreed to the idea. The author agreed to undertake the task on condition that he would be frank in his assessments about the current status of the rule of law in Myanmar. The contact agreed to that condition and gave a verbal undertaking that the article will be published without any substantive excisions by the Myanmar authorities even if they considered any of its contents to be unpalatable to them. Around October or November 2018 the author sent his article to the contact person. It was apparently forwarded to the relevant people for possible publication, perhaps as a two-part article in The Global New Light of Myanmar. Months passed, and the contact informed the author that the State Counsellor had initialled a copy of my article, adding that the contact's other 'contacts' had stated the State Counsellor's initialling did not mean she approved of the article. Eventually, more than three months after the author had forwarded the article to the contact, he decided to send it directly to the acting Editor in Chief of The Global New Light of Myanmar who in turn forwarded it to either the Deputy Minister of Information or the Managing Director of the Ministry of Information who is a former military officer. In February 2019 after more than 3 months of waiting, the Managing Director informed the author in a telephone conversation that since the case of Wa Lone and Kyaw Soe Oo had been mentioned in the article, it was not 'suitable' for publication in the newspaper (this conversation took place before Wa Lone and Kyaw Soe Oo's final appeal had been rejected by the Union Supreme Court in April 2019 and before the duo, along with 6000 other prisoners, were released under a Presidential amnesty in May 2019). And this despite at least verbal assurances that the author was at liberty to express his views freely. The author would add that in both the journalistic article (without foot notes sent but not published in The Global New Light of Myanmar) and in this article the author has been as mild as possible in his comments. In this expanded article the author has elaborated on the theme and the arguments initially written at the suggestion (or tacit agreement as informed by the 'intermediaries') of the State Counsellor around November 2018.

Book Reviews

FREEDOM OF RELIGION
by Hedvig Bernitz and Victoria Enkvist (eds), Bloomsbury, Oxford, 2020, pp xx + 204, £80 (hbk), ISBN: 978-1-5099-3586-4.



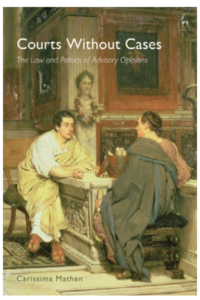
This is a collection of essays exploring the diverse and changing interpretations given to freedom of religion within Europe. The impetus for the book, say the editors, is that "interest in religious legal issues and the relationship between religion and law has increased over the past few years". They correctly identify immigration as a key reason for that development (without explicitly stating that much of the debate centres around the challenges being posed by Islam more than any other religion – although discussion of those challenges abounds in the essays themselves).

With one exception, all the contributors – at least in terms of their academic affiliation – are from mainland Europe, and that too from the Nordic countries. Consequently, common law perspectives on religious freedom are scant. There are copious references to the European Convention on Human Rights, as can be expected of a work of this nature.

Not surprisingly, the application of the principle of 'margin of appreciation', which is a salient – and, many would argue, inescapable – feature of trans-national systems of human rights protection such as the ECHR, comes in for a good deal of criticism on the grounds that, when widely applied, it favours the status quo ante and works against religious minorities. "Great consideration is taken," notes one of the contributors, "concerning the culture and traditions of the majority. From a democratic and majority ruling perspective this is self-evident. In that sense, democracy and human rights clash due to the wide margin of appreciation. The majority almost always prevails in Article 9 [right to freedom of religion] cases."

Among the issues addressed by the book are: the debate over the Islamic headscarf; the significance of religion in Swedish labour and social legislation; the appropriateness or otherwise of faith-based schools; the dilemmas posed by religion-based refusals in healthcare matters; and the position of freedom of religion vis-à-vis other human rights. For the most part, the discussion remains at a practical level, though there are occasional incursions into the realm of philosophy.

COURTS WITHOUT CASES
by Carissima Mathen, Hart, Oxford, 2019, pp xxii + 253, £60 (hbk), ISBN: 978-1-5099-2249-9.



The title of this book may be somewhat misleading, but its theme is as worthy of study as it is interesting. The book deals with the advisory jurisdiction of Canadian courts, ie the power of the courts to render opinions de hors an active case. Such a jurisdiction is not unknown in other countries, especially in the common law world, but what is – at least slightly – unusual about Canada is that the jurisdiction can be exercised not only by the country's apex court, but by other courts in the judicial hierarchy.

Arguably, the most important question that arises with advisory opinions is: do such opinions have the binding force of law – in the same way that judgments do? The answer is not, by any means, quite as straightforward as it may seem, and the author of this book helpfully devotes considerable attention and space to the issue. She veers to the view that they are binding:

> I argue that advisory opinions have become part of the broader set of rulings that make up the common law. As such, they are subject to the force of stare decisis – a powerful norm that undergrids how the courts engage with the law. It is that feature that best explains why advisory opinions generally are indistinguishable from rulings in live cases.

Other reasons pressed into service by the author for her view is that advisory opinions are listed by the courts under the heading of 'Cases', they have actually been followed by courts in a number of cases (furthermore, "when considering the opportunity to depart from a prior advisory opinion, or to distinguish its precedential weight from prior case law, courts simply do not do so"), and they are treated exactly like cases even where they emanate from divided panels.

There is one significant difference, though, between live cases and requests for advisory opinions ('references'), namely that the court can, in relation to the latter, refuse to entertain them at all. The author recognises this important point and acknowledges that the Canadian Supreme Court has exercised that option "on numerous occasions". Such refusals, notes Mathen, "represent a considerable assertion of juridical power." There then follows an interesting discussion of the various considerations that can apply in this area.

All in all, this book is a very welcome contribution to our understanding of the roles and workings of courts and of the dynamics between law and politics, especially in common law settings.

PERMANENT RECORD by Edward Snowden, Macmillan, London, 2019, pp x + 340, £20 (hbk), ISBN: 978-1-52903-565-0.

Concerns around mass surveillance of individuals by governments have been the subject of much public comment in recent years, not only from activist groups but also from academic and other sources. Against that backdrop, the appearance of a full-length book by a prominent actor involved in the handling of sensitive intelligence material on behalf of the world's most powerful democracy cannot but attract international attention, as this memoir by Edward Snowden has done.

Snowden was an information technologist employed by the Central Intelligence Agency (CIA) and the National Security Agency (NSA) of the United States of America at various locations for some seven years during which period, he says rather dramatically, he "helped make it technologically feasible for a single government to collect all the world's digital communications, store them for ages, and search them at will." His rise within the two agencies was meteoric: despite not having even a basic university degree and still only in his early twenties, he received clearance to undertake some of the most sensitive tasks and had "practically unlimited access to the communications of nearly every man, woman, and child on earth who'd ever dialled a phone or touched a computer." For part of his time in the intelligence community he worked as an employee of Dell, a prominent private information technology company which had been sub-contracted to carry out work for the NSA.

In this book Snowden tries to justify his decision to spill the beans on what the American government was up to in its intelligence-gathering operations. One of the drivers for this decision was, he says, a sudden realisation on his part that the internet had changed from being a medium that was "creative and cooperative" to one which was "commercial and competitive". "That," he concluded, "was the beginning of surveillance capitalism, and the end of the Internet as I knew it."

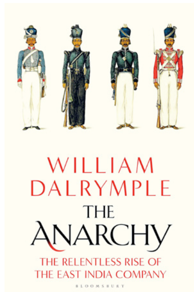
This Damascene conversion led him to purloin a massive quantity of extremely sensitive documents from his workplace and, in a blatant breach of the confidence that had been imposed on him, hand them over to ideologically-kindred journalists who subsequently saw them splashed across the front pages of *The Guardian, The Washington Post* and other newspapers, much to the chagrin of Washington and its allies.

Snowden, of course, sees this as an act of public service. He couches his defence in the language of high constitutional principle, asserting that had he not done what he did, "there would be no hope of restoring a balance of power between citizens and their governance" in the United States. Painting himself as a selfless whistleblower, he is at great pains to deny any allegations of 'leaking' that may be levelled against him (the act of leaking, he argues, is an act of self-interest, "something closer to a 'plant', or an incidence of 'propaganda-seeding'"). What he has done is, by contrast, an act of 'restoration':

> [I]t marks the disclosure [of classified information] not as a radical act of dissent or resistance, but a conventional act of return – signalling the ship to return back to port, where it'll be stripped, refitted, and patched of its leaks before being given the chance to start over.

Clearly, there will be many who will buy this argument, just as there will be many others who will see it as little more than self-serving or grandstanding. However one views Snowden's justifications, the book does offer some food for thought. Discerning readers will, however, find the absence of a back index irritating.

THE ANARCHY by William Dalrymple, Bloomsbury, London, 2019, pp xxxvi + 526, £30 (hbk), ISBN: 978-1-4088-6437-1.



Corporate Governance is a fashionable term in pursuit of which much time, energy and money has been expended in recent years. Had the concept been in vogue in 1765 it is arguable that the history of the world – certainly that of Britain – would have been radically different. Because in that year, a modest commercial enterprise begun by merchants in London in 1599, overpowered a Mughal ruler in India and seized administrative control of his richest provinces, thus laying the foundations for the mighty British Raj which held sway over the subcontinent until 1947. Compared to the Empire, the East India Company (EIC, which held sway until 1858 when it was replaced by the British Crown as the formal sovereign power) has received less attention.

This book goes a long way in redressing that balance. A work of considerable and substantial research (the endnotes alone occupy well over a hundred pages), it explains the rise, glory and fall of the EIC in language that is as entertaining as it is illuminating. Dalrymple frames his mission in rather modest terms: the book is, he says, "an attempt to answer the question of how a single business operation, based in one London office complex, managed to replace the mighty Mughal Empire as masters of the vast subcontinent between the years 1756 and 1803".

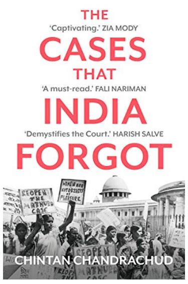
Formidable though the task must have been, Dalrymple's research was aided by the existence of huge volumes of the company's records in the British Library and the National Archives of India, including some in the Persian language. He brings an acuteness of perception to his writing which will be acknowledged even by those may not always agree with his views. He is scathing not just about the inequities of British rule in India but also about what he considers the conscious indifference of the Victorians to the immoral nature of the Raj. "They liked to think of the empire as a mission civilisatrice: a benign national transfer of knowledge, railways and the arts of civilisation from West to East, and there was a calculated and deliberate amnesia about the corporate looting that opened British rule in India."

A particular target of his censure is Robert Clive, who had started his career in India as a petty accountant but who rose to become the Governor of Bengal and one of the chief architects of the Raj. According to Dalrymple, Clive developed "a profound hatred for India which never left him." It was Clive's thwarted ambition to become a politician and his "particular qualities of extreme aggression and devil-may-care audacity" which, Dalrymple believes, "directly led to one of the oddest events in world history: a trading company based in one small building in the City of London defeating, usurping and seizing power from the once-mighty Mughal Empire."

Considering the focus of the book, no one should be surprised at the author's lack of enthusiasm for companies and corporations. That feeling of disfavour is a constant theme of the work and it rears its head repeatedly. Dalrymple concentrates his ire in an Epilogue, which is full of fire and brimstone and which tries to draw parallels between the EIC and today's corporations. Sample this passage:

> The East India Company remains today history's most ominous warning about the potential for the abuse of corporate power – and the insidious means by which the interests of shareholders can seemingly become those of the state. For as recent American adventures in Iraq have shown, our world is far from post-imperial, and quite probably never will be. Instead Empire is transforming itself into forms of global power that use campaign contributions and commercial lobbying, multinational finance systems and global markets, corporate influence and the predictive data harvesting of the new surveillance-capitalism rather than – or sometimes alongside – overt military conquest, occupation or direct economic domination to effect its ends.

THE CASES THAT INDIA FORGOT by Chintan Chandrachud, Juggernaut, New Delhi, 2019, pp xiv + 229, Rs 599 (hbk), ISBN: 978-93-5345-082-3.



Explaining complex legal decisions to lay audiences poses challenges which are often more arduous than those encountered by advocates trying to make their court submissions intelligible to judges of limited intellectual capacity. This is all the more so where, as in India, judgments of the superior courts frequently run into scores, if not hundreds, of pages and are written in language that is dense, fractured, sketchy or otherwise impenetrable. Viewed through that prism, the author of this slim volume has taken on a Herculean task – his mission being to identify ten cases which "involved important legal issues" whose "significance transcended the legal questions that arose for the courts' consideration" and explain them in terms that would be both understandable and interesting to people untrained in the law.

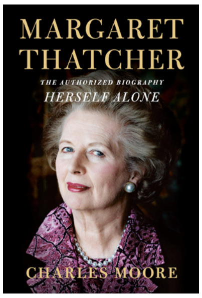
The challenge does not, of course, end there. As the title of the book indicates, the cases selected must also qualify as 'forgotten' ones – which the author defines simply as "cases that are not in the public memory, but should be" (why, has not been explained). Realising that the task of selection itself is fraught with risks – and would expose those undertaking it to criticism – the author enters a mea culpa at the outset: "I do not," he says, "make any claims of scientific precision." He does not, alas, address another question that an enterprise of this kind might also invite: "Why ten cases? Why not five or a hundred – or any number in-between?"). So much for process.

Moving on to substance, the cases that have been included are arranged under four broad themes – politics, gender, religion and national security. The earliest one was decided in 1951 and the latest in 2011. All but one are decisions of the Supreme Court of India.

It is to the credit of Chandrachud that he sets out the contexts of the cases – as well as a summary of their factual matrices – in an engaging style. The avoidance of hyperbole, embellishments or stilted language – a bane of many Indian commentaries – is particularly noteworthy. Most entries begin with a short paragraph of comment on the nature or the importance of the case being discussed, as seen by the author (eg "heady combination of high political drama and significant questions of constitutional law", "a colossal failure of public institutions", "the culmination of a legal process that was neither swift nor easy", "a judgment … that continues to exert a significant influence on religion and personal law", "another example of the Supreme Court abdicating its responsibility to protect fundamental rights"). The author offers some concluding observations in an all-too-brief postscript which is, alas, likely to leave many readers unsatiated. There are also some 20 pages of notes which provide references to the sources cited in the body of the work which enhances the value of the work. Missing, however, is a back index (a common enough shortcoming in books published in India and usually attributable to short-sightedness and/or tight-fistedness on the part of publishers). Another minor quibble would be the lack of a listing of citations for the cases discussed (whether at trial court level or appellate level), although a trawl through the endnotes does allow the reader to ferret out this information.

Books such as these are not without value, especially in a country where lack of public awareness and understanding of how the courts work – or fail to work – is widespread. They could even serve a more basic purpose: of educating many of the hundreds of thousands of semi-literate law graduates who have, for over half a century, been let loose in the courts up and down the country to offer their services as advocates and solicitors to unsuspecting clients without proper training or quality assurance safeguards from professional bodies. More discerning readers will hope that Chandrachud will deploy his considerable talents – and his obvious enthusiasm for the law – in producing more substantial works which will expose the many ills of omission and commission that can be laid at the doors of the Indian courts and to which he has made useful and timely references in this book.

MARGARET THATCHER by Charles Moore, Allen Lane, London, 2019, pp xl + 1008, £35 (hbk), ISBN: 978-0-241-32474-5.



To some followers of politics and public affairs at least, this the third and final volume of Charles Moore's authorised biography of Margaret Thatcher would be of greater interest than its two predecessors. It charts, with the same perspicacity, meticulousness and expressive elegance that has characterised this magisterial project from its very beginning, the final stage of the former prime minister's remarkable journey in public life and explains the factors that made her the legendary figure that she was. Of particular value in this volume is Moore's excellent retelling of the drama that accompanied Mrs Thatcher's tragic exit from the political arena.

This volume has been in gestation for longer than the other two. Moore says, contrary to what may be expected, that, at the end of what must be an exhausting few years of hard labour, he found himself "sorry to lay down my pen and part company with the remarkable woman whose thought, word and deed I have tried to record and understand."

Quite clearly, the greatest advantage that Moore seems to have had in writing the trilogy was the authorisation that Mrs Thatcher granted him to access all her papers, official and personal; the only condition that she imposed on the project was that the book would not be published in her lifetime and that she would not read any manuscript that may be ready while she continued to be alive. The authorisation also led many important people who may not have otherwise been willing to talk to Moore – "world leaders, close family members, civil servants normally bound by rules of confidentiality, people acquainted with matters of security and intelligence" – to open up to him (he interviewed some 300 persons for this volume alone).

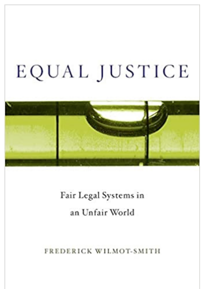
Of the period covered by this book, Moore notes that

> Mrs Thatcher's last four years in government were even busier than her previous seven. This is partly because of her success and partly because of her failure. Contrary to later myth, her last years in office did encompass substantial reforms, many in the areas of social policy which she felt she had previously postponed because of economic pressures, such as inner cities, health and schools.

This period also saw huge disappointments, including the breakdown of her relationships with senior colleagues such as Nigel Lawson and Geoffrey Howe, an increasing isolation in the power-centres of Europe, and the electoral setbacks of some of her domestic policies such as the 'poll tax'. These were followed by the approaching political end-game, culminating in her political assassination by a coterie of Cabinet ministers. More poignant still was what followed: the death of her dear husband Denis, her slide into dementia and the 'long sunset' which reduced her to a pathetic shadow of her former self. Moore deals with each of these phases – and with the drama that accompanied them – with exquisite judgment and just the right tone.

His overall verdict? "She was unique. She did it her way … For her, politics was a mission, not a game. This meant that she sometimes made the grave error of confusing her own fate with the interests of the nation. It was part of her messianic quality which many disliked. But it also meant that she achieved something much more striking than any other peacetime British politician in the twentieth century – a record of change, a collection of beliefs named after her and a personal example of leadership which will last."

EQUAL JUSTICE by Frederick Wilmot-Smith, Harvard University Press, Cambridge (USA), 2019, pp 256, US$39.95 (hbk), ISBN: 978-0-674-23756-8.



As a plea for socialism in the justice sector, this book will have few competitors. In the words of the accompanying blurb, it asks us to rethink the centrality of the market to legal systems. "Markets in legal resources entrench pre-existing inequalities, allocate injustice to those without means, and enable the rich to escape the law's demands. None of this can be justified." Few will quarrel with that proposition. Where the disagreements will emerge are in both the author's analysis of the problem and the solutions that he has proposed.

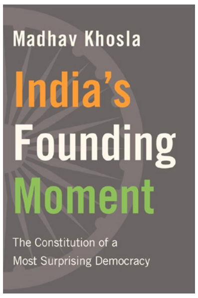
For a start, there can be a serious divergence of views on what causes inequality. While unjust or hostile discrimination is one factor – which would call for immediate and possibly coercive corrective measures – there can be other factors at play, some of which may raise questions that are considered too sensitive to be discussed openly in today's milieu, involving as they do people's lifestyle choices or personal conduct.

For another, radical measures of redistributive justice often clash with widely accepted notions of freedom of choice and action, including freedom of contract, which are much valued especially in the open societies of the West. At a practical level, such measures are resisted on the grounds that they almost inevitably lead to shortages of goods and services.

Interestingly, the author does not accept what he calls "the rallying cry of legal aid activists worldwide", namely that justice should not be rationed. The problem, he says, is not that legal systems ration justice, but that "they are rationing it according to unsound norms." He calls for a radical restructuring of legal systems. In this restructured world, there would, among other things, be "an equal distribution of lawyers between all in society". There will, furthermore, be a "fixed fee regime" which will disincentivise private practice among lawyers. There should also, ideally, be a proscription of alternative methods of dispute resolution, such as arbitration (which the author sees as favouring rich litigants), or at least the imposition of a tax on all arbitral awards, the proceeds from which can then be "shared with the jurisdictions that would otherwise have been the natural forum for hearing a dispute", ie the courts.

The author dismisses all objections that would be raised to his proposals on grounds of liberty. Whether his arguments are likely to command universal acceptance is highly debatable. In the second half of the book, he moves on to address a string of other questions, such as: "Should claims of justice be dealt with in public courts? Would anything be lost if claims were resolved through an online dispute resolution process? What powers should judges have, when they decide cases? And who should pay for whatever procedures we do establish?"

INDIA'S FOUNDING MOMENT by Madhav Khosla, Harvard University Press, Cambridge (USA), 2020, pp 219, US$45 (hbk), ISBN: 978-0-674-98087-7.



Given that serious works of scholarship on Indian constitutional law and history have been few and far between, the appearance this book – which, at least in headline terms, seeks to explain the motivations, strategies and determination of those who wrote the country's constitution – cannot but be welcomed. The work is, however, so suffused with an ideological fervour – of rabid anti-colonialism – that many will consider it as a bit of a rant dressed in academic respectability. It also attempts to address such a range of disparate – and behemothic themes – within the compass of around 160 pages (excluding endnotes) that the reader can be excused for being left with a feeling that it promises more than it can reasonably deliver.

Among the ideas that the book purports to engage with are, in the words of the author himself, the following: "the centrality of imperial ideology to wider questions in the nineteenth century; the connection between liberalism and empire; the relationship between Western categories of understanding and non-Western forms of experience; the nature and meaning of universalism; and the assortment of reasons and justifications given for European expansion."

The one salient issue which the book addresses at length and competently – and which, arguably, forms its centrepiece – is that of universal suffrage and the courageous manner in which the constitutional draftsmen embraced that idea despite a tsunami of warnings from all sides about its unsuitability for pre-independence India (and despite some internal opposition in the constituent assembly itself). The idea was pushed through eventually and, as the author notes, the debate moved on to the challenge of resolving the problems posed by universal franchise. "The outstanding feature of India's constitutional founding is the seriousness with which this challenge was acknowledged."

A related issue which looms large in Khosla's analysis is what he calls a snubbing of India's "constitutional moment" and the neglect, in the history of political ideas, of the country's "democratic origins". He is particularly dismissive of the view, expressed in numerous documents and adumbrated by a succession of historians, that the constitution adopted in 1950 drew heavily from the Government of India Act of 1935 passed by the Westminster parliament. Such a view, he asserts, "rests on an impoverished reading of legal documents".

> In legal documents, all words do not have the same value – some matter more than others. Regardless of the number of words that were taken from the 1935 Act, democratisation signified a major break from the past. From 1858 until 1920, when the Government of India Act 1919 came into force, India's constitutional scheme had no form of executive responsibility to the legislature. The changes introduced by the 1919 Act were severely limited … What bears emphasising is that even if specific measures introduced into the colonial structure over time had enabled the government to become minimally representative, that government was in no way a responsible government.

Fair enough, but does that detract from the general validity of the argument that the Indian constitution drew heavily from the 1935 Act? Most people will think not, and so Khosla probably protests too much.

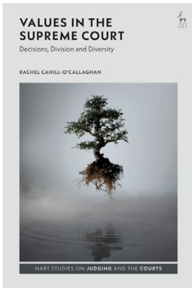
The bulk of the book deals with three key themes – codification, centralisation and representation – which the author identifies as the answers provided by India's constitution-makers to the vexing question facing them of how to constitute democracy in an inhospitable environment.

> Codification could serve an educative role in a country without established constitutional conventions; centralisation could liberate a society seized by local antidemocratic sentiments; and a theory of representation unmediated by forced identities could meet the challenges of difference.

No objective observer will deny that when India got independence from the British in 1947, it faced many challenges and quite a few dilemmas as well. It would be fair to argue, too, the founding of the Indian republic was a watershed moment. However, to contend that the British did everything within its power, in a pre-meditated and diabolical manner, to sabotage self-rule in India, as this book suggests, is risible.

More briefly…

VALUES IN THE SUPREME COURT by Rachel Cahill-O'Callaghan, Bloomsbury, Oxford, 2020, pp xvii + 207, £64.80 (hbk), ISBN: 978-1-5099-2185-0.

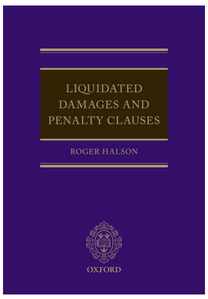


The UK Supreme Court is far too new an institution for any meaningful long-term research to be carried out yet. That has, however, not stopped academics from writing about the court, its judges and its verdicts with a view to discerning trends or drawing broad conclusions at an institutional level. The book under review attempts to offer some insights into the personal values that permeate judicial decision-making in the Supreme Court.

It is not a light read. As the author explains in a Prologue, the arguments advanced "draw on theories and techniques from law, social science and psychology." They traverse a wide field, and cover such things as: the psychology of dissent, the role of the individual in judicial decisions; tacit diversity in judicial decision-making; shared value priorities and agreement in hard cases; and the crucial role played by judicial discretion.

In terms of a broad conclusion, all that can be said, in the words of the author is that "in hard cases, where the law is uncertain, Supreme Court Justices reach decisions which align with their values." Some would find that rather tepid. Wouldn't it be interesting, incidentally, for some research to be undertaken on the extent to which, if at all, political correctness plays any role in judicial decision-making at the level of the Supreme Court?

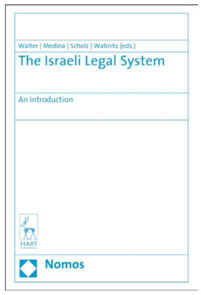
LIQUIDATED DAMAGES AND PENALTY CLAUSES by Roger Halson, Oxford University Press, Oxford, 2018, pp xxvi + 212, £137.50 (hbk), ISBN: 978-0-19-878513-2.



Few could have missed the symbolism in the fact that the UK Supreme Court delivered its landmark judgment in Cavendish Square Holding v Makdessi (2015) exactly a century after its predecessor, the House of Lords, had handed down the previous watershed ruling on penalty clauses in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*. This slim but illuminating book, the first major work of scholarship on an aspect of contract law which has enormous practical significance, will be embraced by practitioners and academics alike very warmly.

It not only explains the 'penalty' doctrine and jurisprudence with clarity, going back a considerable distance in history to set the discussion in perspective, but looks at the implications of the Cavendish judgment for contemporary business contracts with a critical eye. There is some comparative material woven into the treatment of the subject, including from jurisdictions outside the common law world, and this can only add value to the book.

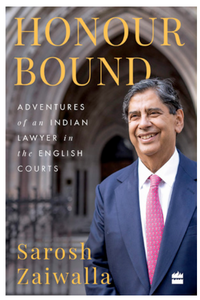
THE ISRAELI LEGAL SYSTEM by Christian Walter, Barak Medina, Lothar Scholz and Heinz-Bernd Wabnitz (eds), Hart, Oxford, 2019, pp 294, £70 (hbk), ISBN: 978-1-5099-3173-6.



Though not a member of the Commonwealth, Israel has a legal system which has proved to be of more than passing interest to common law lawyers. Even in formal terms, a deep connection can be traced between that system and the English legal system – going back to the British Mandate in Palestine and lasting for several decades. Despite having a mixed legal system since independence, the British influence is still quite strong. As Aharon Barak, the Chief Justice of the Israeli Supreme Court between 1995 and 2006, once observed, "We are much closer to the common law tradition than to the civil law tradition."

This book offers a compact overview of the Israeli legal system in its current form. It comprises 17 chapters, arranged under five broad heads covering, respectively: Foundations; Civil Law; Commercial and Economic Law; Criminal Law and Procedure; and International Law and International Relations. The contributors are all academics. The volume is the result of collaboration between Israeli and German lawyers, and it has been published simultaneously in both English and German languages.

HONOUR BOUND by Sarosh Zaiwalla, HarperCollins India, Noida, 2020, pp xxii + 265, Rs 699 (hbk), ISBN: 978-93-5357-353-9.

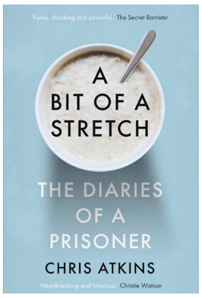


Autobiographies are often self-serving and boastful – this one takes the cake. Written by a not overly modest Indian lawyer based in London whose life has seen its fair share of controversies, it offers a heady fare: conceited accounts of successes achieved in impossible circumstances, meetings with 'the cream of London society', claims of closeness with prime ministers and other bigwigs; boasts about networking skills, 'straight talking', "a high standard of" personal and professional integrity; and is peppered with endless name-dropping.

A flavour of the book can be had from the claim made by the author that his attempt at stopping the second Gulf War had been thrown away by the then British Prime Minister, Anthony Blair, who did not accept his offer to mediate with the government of Saddam Hussein. "A settlement could have been reached, with Saddam Hussein seeking asylum in a third country and the million lives said to be lost in the war saved," he says. The author's letter to the Prime Minister elicited a short and curt reply from an official in Downing Street which the author says, "is a source of huge personal regret" to him.

No one reading this offering can fail to appreciate the truth in what John Steinbeck once said: "Perhaps the less we have, the more we are required to boast". The sale and distribution of this book has, incidentally, been subjected to an interim injunction in the author's native India after a prominent lawyer there brought an action for defamation. It remains to be seen how that litigation will develop.

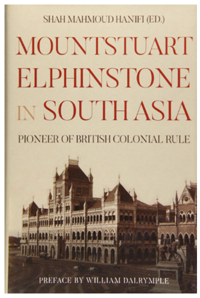
A BIT OF A STRETCH by Chris Atkins, Atlantic Books, London, 2020, pp 327, £16.99 (hbk), ISBN: 978-1-83895-015-6.



The past few years have seen a number of high profile, usually middle class, individuals finding themselves at the receiving end of British justice and ending up as involuntary guests of Her Majesty, usually for white collar crimes. One such recent jailbird is Chris Atkins, a critically acclaimed documentary maker who was sentenced to five years' imprisonment after being found guilty of participating in a tax avoidance scheme which fell foul of laws designed to close existing loopholes. This gripping book, based on his prison diaries, offers a stark and powerful account of the goings-on at HMP Wandsworth, which has, over the years, acquired notoriety as a highly dysfunctional jail.

Atkins, a former public schoolboy who studied physics at Oxford, expectedly found himself in a bit of a shock when he first entered the portals of Wandsworth, but was able to adjust very quickly to his new environs which included rubbing shoulders with some of the most hardened criminals, dealing with a mind-numbingly unresponsive prison administration, and brown-nosing his way to preferential treatment, but also trying to help his less privileged compatriots along the way. The candour, incisiveness and humour which permeates his narrative makes this book a compelling read.

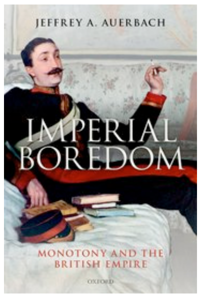
MOUNTSTUART ELPHINSTONE IN SOUTH ASIA by Shah Mahmoud Hanifi (ed), Hurst, London, 2019, pp xxxviii + 418, £45 (hbk), ISBN: 978-1-84904-836-1.



Though known more for his pioneering work in and on Afghanistan, the Scottish traveller, diplomat and public servant Mountstuart Elphinstone left an enduring legacy in India as well, notably as Resident of Poona and Governor of Bombay in the early-nineteenth century. This collection of essays celebrates his work in the subcontinent, including its effects in the former Soviet Union.

The book is envisaged as part of a larger scholarly project "designed to bridge the gap between Elphinstone's career and legacy in British India and Afghanistan" and that, in turn, is contemplated as the first steps towards establishing a "domain of global Afghanistan studies". The 14 essays comprising the volume are arranged under three parts dealing, respectively, with Elphinstone's magnum opus, An Account of the Kingdom of Caubul, his contemporaries, and his legacy. There is an absorbing Preface by the popular historian William Dalrymple and an Introduction by the editor of the volume which sets the work in context. Overall, this is a welcome addition to literature on a part of the world which can still do with all the attention it is able to get.

IMPERIAL BOREDOM by Jeffrey A Auerbach, Oxford University Press, Oxford, 2018, pp xvi + 298, £35 (hbk), ISBN: 978-0-19-882737-5.

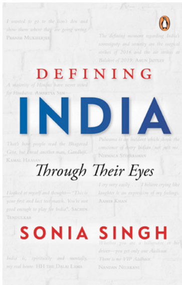


Boredom as a key feature of the imperial experience is a novel thesis which this book expatiates on. Boredom was, argues Auerbach, an American academic, "neither peripheral nor incidental to the experience of empire; it was central to it, perhaps even the defining characteristic of it." The accounts of glory, adventure, heroism and excitement traditionally associated with Empire should, if Auerbach's view is correct, fade into the background.

The author fairly admits that not everyone found the imperial project boring. "Life in the colonies was not by definition boring. There were exciting moments, and travelling around the empire offered brushes with the unfamiliar – just not, it seems, as many or as often as the British would have liked."

Among the questions explored in the book are: "Who was bored and who was not? What places and situations were travellers likely to find boring, and was imperial travel different from other forms of travel, such as the European Grand Tour? When and why did boredom emerge as a characteristic of the imperial experience, and was there something uniquely boring about the empire, or was boredom such a common emotion (or affectation) for men and women of a certain social class at a particular time and place that anything might be boring? To what extent was boredom linked to the shift from an eighteenth-century empire of Nabobs to a more virtuous empire in the nineteenth century?"

A quirky but fascinating enterprise.

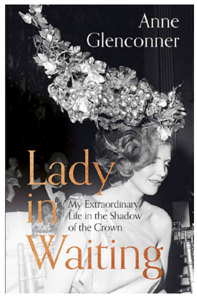


DEFINING INDIA THROUGH THEIR EYES by Sonia Singh, Penugin, Gurgaon (India), 2019, pp xiv + 216, Rs 599 (hbk), ISBN: 978-0-670-09193-5.

As India tries to re-establish its place on the world stage after years of self-enforced insularity, the need for inspirational and motivational literature for its teeming youth could not be greater. This book, a collection of interviews conducted by a television journalist, seeks to prise out words of wisdom from fifteen prominent Indians who have been in the public eye in fields as disparate as politics, economics, sports, the law, industry, Bollywood, religion and human rights activism.

Some of the stories are more inspirational than others. The one about the founding of a leading biotech company which is pioneering the treatment of cancer in India describes the accident of circumstances that led its founder, Kiran Mazumdar-Shaw, to venture into this highly sophisticated field of activity after she had failed to get a place in medical school. Another details the story of Kailash Satyarthi, a middle-aged child-rights campaigner who won the Nobel Prize for Peace in 2014 and who has campaigned relentlessly for the betterment of the conditions under which millions of children live in the subcontinent. There is much to be learnt as well from the reflections of the architect of India's first universal identity card project, Nandan Nilekani, whose exertions have sometimes invited more criticism than praise. "Reforms in India," laments Nilekani, "don't happen in a linear fashion. It is a two-step-forward-one-step-backward process … When there's a window of high activity, you get as much done as possible. When it goes into inaction, then you bide your time." He was articulating, albeit in diplomatic terms, the frustrations that anyone who has to deal or work with the Indian bureaucracy inevitably faces, the claims to a liberalised regulatory and economic environment notwithstanding.

The pronouncements of some of the other personalities included in the volume are less impressive. A few seem to have been chosen simply on the basis of the baubles they have received from national or international bodies. But given the pulling power of such baubles among the masses – a prime consideration for anyone wanting to sell books! – the choice is understandable even if it is not necessarily justified.

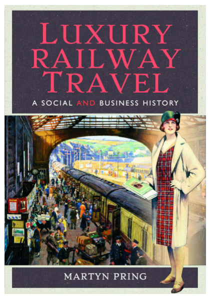


LADY IN WAITING by Anne Glenconner, Hodder & Stoughton, London, 2019, pp viii + 326, £20 (hbk), ISBN: 978-1-529-35906-0.

Memoirs by royal aides and courtiers are rare. This one, written by a Lady in Waiting to the British monarch's sister, Princess Margaret, tells an enchanting story. The trigger for the book, says the octogenarian author, were visits she had not so long ago from two of the actresses of the popular Netflix series The Crown who had been commissioned to play her and the Queen's younger sister and who wanted some tips from her for essaying their roles.

Lady Glenconner's life is a mix of royal rituals, madcap romps and personal tragedies. Two of her sons died young while a third spent months in a coma after being involved in a motorcycle accident; when her husband of 54 years died in 2010, he left all his assets to an employee, which came as a bolt from the blue to her ("It was such a terrible humiliation…" she writes, "I despaired. Going against everything my mother had always taught me, I let emotion take over and I screamed and screamed and screamed into the pitch-black night.").

The book tells much fortitude through tragedy. But it is also an amusing and witty read.



LUXURY RAILWAY TRAVEL by Martyn Pring, Pen & Sword Transport, Yorkshire (UK), 2019, pp 366, £35 (hbk), ISBN: 978-1-5267-1324-7.

"Simply watching the Arctic winder glide by from the comfort of a domed observation car is one of life's great adventures," says the author of this delectable recent addition to the literature on luxury rail travel. The book is the result of extensive and painstaking research involving historical and contemporary sources, and it is a veritable treat for railway buffs and travel historians alike.

Comprised of six substantive chapters, four appendices (which occupy nearly a half of this richly illustrated volume) and a cornucopia of practically useful facts, Pring's work captures the world of luxury rail travel with an enthusiasm that is unmissable. The book should, he says, "entice readers into a serious and intelligent conversation surrounding the many dimensions explored, coupled to a framework of understanding how modern luxury travel industries have evolved over the past century and a half."

The chapters divide up the period into distinct phases of that evolution: 1860-1900 (Victorian Expansion); 1901-1920 (Edwardian Elegance); 1921-1945 (Golden Age and Austerity); 1946-1975 (Second Golden Age and New World Change); 1976-2000 (Preservation and Restoration); and 2000-present (Era of New Luxury). The narration is interspersed with social commentary, economic trends and references to the effects of globalisation. A highly enjoyable read.

News and Announcements

SINGAPORE: Measures to offer contract relief to businesses and individuals

The Ministry of Law ("MinLaw"), Government of Singapore, has announced its intention to introduce a COVID-19 (Temporary Measures) Bill in Parliament. The Bill seeks to offer temporary relief to businesses and individuals who are unable to fulfil their contractual obligations because of COVID-19.

The Bill provides temporary and targeted protection for businesses and individuals who are unable to fulfil certain contractual obligations because of COVID-19. It will, in that way, seek to provide temporary cash-flow relief for these businesses and individuals, who may otherwise have to pay damages or risk having their deposits or assets forfeited.

The Bill also increases the monetary thresholds and time limits for bankruptcy and insolvency. This will help individuals and businesses in a very difficult environment.

The measures will cover relevant contractual obligations that are to be performed on or after 1 February 2020, for contracts that were entered into or renewed before 25 March 2020. The measures will be in place for a prescribed period, which will be six months from the commencement of the Act at first instance. Subsequently, it may be extended, for up to a year from the commencement of the Act.

The Bill will cover the following contracts:

- Leases or licences for non-residential immovable property (e.g. lease for factory premises);
- Construction contract or supply contract (e.g. contract for the supply of materials);
- Contracts for the provision of goods and services (e.g. venue, catering) for events (e.g. weddings, business meetings);
- Certain contracts for goods or services for visitors to Singapore, domestic tourists or outbound tourists, or promotion of tourism (e.g. cruises, hotel accommodation bookings); and
- Certain loan facilities granted by a bank or a finance company to SMEs3.
- The Bill will prohibit a contracting party from taking the following legal actions against a non-performing party:
- Court and insolvency proceedings;
- Enforcement of security over immovable property as well as movable property that is used for the purposes of business or trade;
- Call on a performance bond given pursuant to a construction contract; and
- Termination of leases of non-residential premises.

In addition, there will be additional relief in respect of forfeiture of deposits for events and tourism-related contracts. For example, if a person who booked a venue for an event postpones the event because of COVID-19 restrictions, the venue provider cannot forfeit the person's deposit unless the provider obtains a determination from an assessor that it would be just and equitable to forfeit either the whole deposit or a part of it (e.g. if the person cancels the booking entirely).

In the case of construction and supply contracts, a contractor will be relieved from liability for non-performance if this was caused to a material extent by COVID-19.

As a safeguard against unfair outcomes, assessors will be appointed by the Minister for Law to resolve disputes arising from the application of the Act. They will decide if the inability to perform contractual obligations was due to COVID-19 and will have the powers to grant relief that is just and equitable in the circumstances. The process will be affordable, fast, and simple. Parties will not be allowed to be represented by lawyers, and there will be no costs orders. Assessors' decisions will be final and not appealable. Details of the application process will be released in due course.

[Source: Ministry of Law, Singapore, press release, 1 Apr 2020]

ENGLAND AND WALES: Guidance on jury service

Her Majesty's Courts and Tribunals Service (HMCTS) has issued guidance on jury service during the pendency of the COVID-19 outbreak. This follows an announcement made by the Lord Chief Justice on 23 March 2020 on jury trials and the need to make sure that everyone in courts can be kept safe, particularly regarding social distancing. All new trials will be postponed for a short time both to allow for new arrangements to be made and for more space being given to manage existing trials.

Wherever possible, trials which are already underway will continue until they reach a conclusion. This means that if a person currently serving on a jury and has already been selected for a trial, he will be expected to attend as normal unless the court where he are serving as a juror has asked him not to.

If someone has already started their jury service but has not yet been selected for a trial, or if they are due to start jury service in the week of the announcement or any time thereafter, they not attend court unless they have been contacted by HMCTS.

However, no one is expected to start or complete their jury service if:

- they have symptoms of coronavirus (COVID-19), or have been diagnosed with a coronavirus (COVID-19) infection;
- official Government advice says they need to self-isolate;

- they are over 70 years of age, have a weakened immune system, an underlying health condition, or are pregnant; or
- there is another reason why they cannot attend.

Those wishing to speak to someone about their personal circumstance in respect of their jury service in light of the coronavirus (COVID-19) outbreak have been asked to contact the Jury Central Summoning Bureau.

[Source: HMCTS Guidance, 13 Mar 2020 updated on 3 Apr 2020]

AUSTRALIA: Lawsuit by Information Commissioner against Facebook

The Australian Information Commissioner has lodged proceedings against Facebook in the country's Federal Court, alleging the social media platform has committed serious and/or repeated interferences with privacy in contravention of Australian privacy law.

The Commissioner alleges that the personal information of Australian Facebook users was disclosed to the This is Your Digital Life app for a purpose other than the purpose for which the information was collected, in breach of the Privacy Act 1988.

The information was exposed to the risk of being disclosed to Cambridge Analytica and used for political profiling purposes, and to other third parties.

"All entities operating in Australia must be transparent and accountable in the way they handle personal information, in accordance with their obligations under Australian privacy law," Australian Information Commissioner and Privacy Commissioner Angelene Falk said.

"We consider the design of the Facebook platform meant that users were unable to exercise reasonable choice and control about how their personal information was disclosed.

"Facebook's default settings facilitated the disclosure of personal information, including sensitive information, at the expense of privacy.

"We claim these actions left the personal data of around 311,127 Australian Facebook users exposed to be sold and used for purposes including political profiling, well outside users' expectations."

The statement of claim lodged in the Federal Court today alleges that, from March 2014 to May 2015, Facebook disclosed the personal information of Australian Facebook users to This Is Your Digital Life, in breach of Australian Privacy Principle 6. Most of those users did not install the app themselves, and their personal information was disclosed via their friends' use of the app.

The statement of claim also alleges that Facebook did not take reasonable steps during this period to protect its users' personal information from unauthorised disclosure, in breach of Australian Privacy Principle 11.

Commissioner Falk considers that these were systemic failures to comply with Australian privacy laws by one of the world's largest technology companies.

[Source: OAIC media release, 9 Mar 2020]

INDIA: Outrage over appointment of outgoing Chief Justice to parliament

The nomination, on 16 March 2020, of the recently retired Chief Justice of India (CJI), Mr Ranjan Gogoi, to the upper house of the Indian parliament, the Rajya Sabha, by the Prime Minister Narendra Modi's government has sparked off huge protests from lawyers, former judges and political leaders. Mr Gogoi had stepped down as the country's top judge as recently as 17 November 2019 and the government's action, which has no precedent for the swiftness with which it was executed, has been seen as detrimental to the independence of the judiciary. Among other things, it led to a walkout by certain opposition members of parliament and an attempt – which in the event proved unsuccessful – to challenge the appointment in the country's Supreme Court.

One news website (The Telegraph, India, 17 Mar 2020) noted that "[a]s CJI, Justice Gogoi often attracted, not always baseless, the charge that he was currying favour with the Modi government, using his power as master of the roster to ensure that the government arguments always managed to prevail in politically-sensitive cases.

"Since his retirement, there were enough indications to suggest he wanted a post-retirement job. His decision to shift base to Assam – his home-state – after retirement was always viewed with a bucketful of suspicion. However, Justice Gogoi isn't the first judge or retired CJI to curry favour with the government of the day with an eye on a cushioned, post-retirement job."

A prominent lawyer and member of the opposition Congress Party, Abhishek Manu Singhvi, reacted to the appointment thus: "The Supreme Court, as indeed all courts, function on faith, trust and perception. Each has taken a bad beating today. It is not about Ranjan Gogoi. Much larger and much more vital concept of independence of judiciary [are involved]."

Similar sentiments were echoed by a recently retired judge and colleague of Gogoi, Madan Lokur, who took a slightly longer view: public faith in the judiciary, he lamented, "has been shaken by events of the last couple of years and unless we are rescued from the quicksand through very quick corrective measures, all of us will find ourselves in the sinkhole" (Outlook magazine, 13 Jan 2020).

Ranjan Gogoi's controversial stint as chief justice included allegations of sexual harassment from a member of his own staff. Many commentators also accused him of not allowing those allegations to be properly investigated and for getting himself exonerated without any due process being followed. At least two legal professional associations passed resolutions condemning the manner in which Gogoi dealt with the allegations.

There is speculation that Gogoi may be rewarded with a ministerial job now that he is a member of parliament. The implications of any such development were outlined by a lawyer, Rajeev Dhavan, writing for an online publication (The Wire, 25 Mar 2020) in the following words: "Does the Modi government really need him so badly as to destroy the institution of the judiciary by compromising it? Or will he be the government's 'hit' man or even advisor, formal and informal? This would be detestable, casting a shadow on his past and present and on the very relationship between the executive and judiciary."

[Source: various news reports, March/April 2020]

MALAYSIA: Use of artificial intelligence in sentencing

The Malaysian judiciary made history by employing Artificial Intelligence (AI) in sentencing in two drug cases – but not without objection from the defence.

Counsel Hamid Ismail objected before Magistrate Jessica Ombou Kakayun in defence of his client Denis Modili who was charged under the Dangerous Drugs Act 1952 with possession of 0.01gm of methamphetamine at Kampung Kobusak in Penampang on Dec 16, 2019.

"The Court should confine its mind to materials available in the court. Although the court has discretion to decide whether to use AI or not, I fear it might affect the court's thinking in sentencing," he said.

The magistrate replied that the use of AI would aid in decision-making, using data based on arguments advanced by the defence and prosecution.

She said that the AI would analyse a database of cases between 2014 and 2019 in Sabah and Sarawak before delivering recommendations to the court.

Denis, a 43-year-old father of seven, received 12 months' jail, to run concurrently with an 8-month jail sentence he is currently serving for another drug case.

Earlier Jessica also sentenced another accused, Christopher Divingson Mainol, 26, to nine months' jail, also for a case of drug possession. He had 0.16 gm of methamphetamine at Kampung Cenderamata in Likas on Oct 22, 2-19.

AI had recommended 10 months' jail to Denis and 9 months' jail to Christopher after parameters such as the sections under which they are charged, age, employment, and socio-economic data were entered into the system.

During the court proceedings Chief Judge of Sabah and Sarawak Tan Sri David Wong was present in court.

Later at a press conference Wong said he was satisfied with the process and had expected objections to be made against the use of AI in the judicial system. "When we launched it, we expected it to be challenged but we have to take it as it comes. The lawyers are entitled to make objections. It (AI) is a new tool for the court. Unless it is tested in the court, we will not know whether it is constitutional or not," he said.

Wong said those who are charged would also have the chance to change their plea, upon being informed on the possible sentences shown by the AI before a decision was reached by the judge.

He also said the AI, which would be used in Sabah and Sarawak courts, would help to save the judge's time in referring to past cases manually. The system is expected to provide improved analysis and consistent recommendations.

As of now, the AI system is used for cases of drug possession under Section 12 of the Dangerous Drugs Act and rape under Section 376 of the Penal Code.

"We are in the process of doing it for civil cases related to motor accidents on awarding damages for injuries, hopefully in three to six months. It is a useful tool for the judiciary. Before going to trial, both sides will be able to know the award of damages, thus lawyers can negotiate to achieve settlements before they come to court, added Wong"

The Chief Justice of Malaysia, Tan Sri Tengku Maimun Tuan Mat was also present at the press conference.

[Source: New Straits Times, 4 Apr 2020]

BANGLADESH: Concern over arrest and detention of singer

A top Bangladeshi Sufi folk singer has been arrested under a controversial internet law that critics say is used to stifle free speech after alleged anti-Islam comments triggered protests, police said.

Shariat Sarker, 40, was arrested under the Digital Security Act for "hurting the religious sentiment of Muslims" in Mirzapur city on Saturday, according to local police chief Saidur Rahman.

An Islamic scholar had filed a case against Sarker over comments made at a show in December, Rahman said, adding that a local court on Sunday remanded him to three days' custody. "We arrested him after Islamic cleric Maulana Faridul Islam filed a case against him," said Rahman.

The previous week hundreds of people had protested in Mymensingh and Mirzapur cities to demand the singer's arrest.

Rahman said a 59-minute video of the show uploaded on YouTube has also been removed.

Sarker could face up to 10 years in prison if found guilty at the trial.

Journalists and rights activists say the Digital Security Act passed in 2018 is a serious threat to freedom of expression in the nation of 168 million people. Under the Act, anyone can face a life jail term for "propaganda" against the nation and up to 10 years for digital content that "hurts religious sentiments" or "creates unrest".

In May 2019, poet Henry Swapan was arrested in the southern city of Barishal under the Act for hurting religious sentiments. He was later granted bail. Odhikar, a rights group, reported at least 29 arrests in 2019 under the stringent law.

Sarker is well known among the tens of millions of Sufi followers in rural Bangladesh.

Nikhil Das, president of Charan Cultural Centre, a platform for folk singers in Bangladesh, demanded the unconditional release of Sarkar. "He only said [the] Quran did not prohibit the practice of music," Das told Al Jazeera, adding that the singer was targeted for being vocal against using religion as a political tool.

"We, the folk singers, want our freedom to exercise our cultural practices. Sarkar's arrest has created fear amongst us," added Das.

Music expert Saymon Zakaria said folk singers regularly take liberties when interpreting Islamic legends in a way that may not reflect the official version. "There should not be literal interpretations of what is said during a performance. Folk singers must have freedom of expression," Zakaria said.

Despite holding a prominent place in Bangladesh's history, more than a dozen Sufi leaders and followers have been killed in recent years by Islamist groups who consider them heretics.

[Source: Al Jazeera and news agencies, 13 Jan 2020]

KENYA: Controversy over biometric national population identity scheme

The Kenyan government has signalled its intention to forge ahead with its plans on implementing a new personal identification digital platform known as Huduma Namba. Despite concerns on data security, infringement of the right to privacy and discrimination being cited as key concerns surrounding the National Integrated Identity System (Niims), the government had said that it now has the leeway to proceed with its plans following a court decision.

"The government now has the legal mandate and backing to continue providing dignified services to Kenyans in a timely, improved and effective manner," said Dr Karanja Kibicho, an official spokesman.

Earlier, High Court judges Pauline Nyamweya, Mumbi Ngugi and Weldon Korir ruled that the process must be done within proper legislation. However, according to lawyer Waikwa Wanyoike, the court's decision was not satisfactory on the concerns touching on data security, infringement on the right to privacy and discrimination. "[T]he court should have done more to ensure there is judicial supervision on the government," Mr Wanyoike said, adding: "[W]e feel there are issues which the court failed to appreciate like how important it is to develop solid legislation on such a technical issue. Utility will not outweigh negative implications."

When the programme first came into the limelight last year and even before it was officially launched, there were various concerns on whether Huduma Namba was directly linked to 'satanic code' 666. Some, Christians included, opted not to be registered because of fear of linking themselves to satanism while others just chose to keep away from that which was perceived to be a mere government ploy that involved use of taxpayers' money 'unnecessarily'.

But President Kenyatta came out to clear the air while explaining that there was no connection between biblical references indicated in Revelations 13:18 and Huduma Namba.

Mr Shafi Ali Hussein, chairman of the Nubian Rights Forum says his problem with Niims is that Nubians and other minority communities will be left out. "The issue of discrimination should be addressed so that I do not have to feel locked out by the government," he said.

Nubians told court that they have often been subjected to more serious vetting as compared to other Kenyans when applying for national identification cards and that they also eventually tend to end up not getting the cards. All they wanted from the court therefore was to be shielded from this kind of discrimination even as the government plans to roll out Huduma Namba system.

Those who support Niims say it is a positive step towards fighting crime, managing personal data and weeding out ghost workers besides speeding up the government's plan to make it easier for Kenyans to access necessary documents as well as services.

The petitioners in the case had claimed that, whilst digitisation of records can improve efficiencies in registration and increase data quality, the country does not have legislation or policy on data protection.

They told court that there would be a breach to the right to privacy as information relating to family or private affairs may be required to be revealed. They claimed that the legislation of Huduma Number systems does not provide for a transition mechanism from the existing identification regime and hence taxpayers could easily find themselves exposed to inconvenience.

[Source: Daily Nation, Nairobi, 1 Feb 2020]

Events

KYIV, UKRAINE: Conference on IT Law

The Ukrainian Bar Association in collaboration with the International Bar Association is organising a Conference on IT Law in Kyiv, Ukraine. Originally scheduled for 29 May 2020, the conference will be held at the Hilton Hotel, 30 Tarasa Shevchenka Blvd, Kyiv. It has been rescheduled to autumn 2020 on account of coronavirus outbreak and a new date will be announced in due course.

The topics included in the programme are:

- cybersecurity as a responsibility and an obligation
- does IT need a special business environment?
- e-government – Cloud initiative & Cloud-first strategy
- e-government – Smart-city legal issues
- ESOPs of MNCs: corporate and tax issues
- M&A in the Technology
- tech giants' policies as laws of the new world
- UDRP

The working language of the conference will be English, but there will be simultaneous translation (English/Ukrainian).

For additional information on the event and partnership opportunities, please contact the UBA Secretariat at tel.: +380 (44) 492-88-48, e-mail: forum@uba.ua. Contact person – Victoriia Dotsenko.

[Source: https://uba.ua/eng/events/3539/]

MELBOURNE & SYDNEY, AUSTRALIA: Drugs & Alcohol in the Workplace Conference

The Thomson Reuters Drugs & Alcohol in the Workplace Conference series is being organised in Melbourne and Sydney. Originally scheduled for 23 & 24 June 2020 respectively, it is now subject to a decision being taken about new dates. The conference will cover the evolving legal justifications for drug and alcohol management, how to provide a safe work environment and best practices in preventive strategies.

The conference aims to balance legal and practical viewpoints and aims to provide attendees with pragmatic advice on a range of issues such as:

- the impact of drugs and alcohol on the workplace;
- WHS & Employment Laws and policies in relation to drugs and alcohol in the workforce;
- developing a drug and alcohol workplace policy;
- contentious issues in drugs and alcohol testing;
- after-hours work functions and drugs and alcohol;
- disciplinary options including dismissal and the risk of adverse actions;
- fit-for-work, rehabilitation and managing addiction in the workplace; and
- legal and prescribed drug use in the workplace

For any enquiries, please email: eventsanz@thomsonreuters.com.

[Source: https://legal.thomsonreuters.com.au/events/drugs-and-alcohol-in-the-workplace-conference/]

22nd Commonwealth Law Conference, 2021

The venue and dates for the next Commonwealth Law Conference have been finalised. The event will be held on 5-9 September 2021 at the Baha Mar Grand Hyatt in Nassau, The Bahamas, and it promises to be one of the most prestigious events on the global legal calendar.

Commonwealth
Law Conference 2021

Set against the spectacular backdrop of crystal seas, picturesque cays,soft-sand beaches and dramatic sunsets, Nassau will play host to legal practitioners from all over the world to debate current issues in the profession, exchange views and share experiences with colleagues, all underpinned by the conference theme, Sustainable Justice – the Future Role of The Law.

Super early-bird registration is already open, and for a transferrable deposit of only $150 you can avail of a discounted rate for attendance. You can also choose your accommodation concurrently with registering for the conference (subject to payment of full registration fees). Special rates are being offered for attendees from developing countries, with a further discount for members of the CLA and for young lawyers.

The conference also offers partnership possibilities. For sponsors, this is a unique opportunity to co nect and network with an international audience of senior lawyers and law firms who are at the forefront of their fields of expertise. As a CLC partner, you will gain significant visibility and demonstrate your support for the Commonwealth Law Association in achieving its objectives.

Further information can be obtained from the conference website, *https://www.commonwealthlawyers.com/clc-2021/*.

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