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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.
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Message from the President

I extend a warm welcome to you in this issue of *The Commonwealth Lawyer* through this, my first Message as President of the Commonwealth Lawyers' Association (CLA). It is with a sense of privilege, optimism and humility that I undertake the responsibilities of this office, at a time when the CLA is going through quite a transformation. The first Presidential editorial note in 1984 foreshadowed that this journal would not only sustain the interests of lawyers but also promote a wider exchange of experience in the interests of the people of the Commonwealth. Therefore, I believe the CLA transformation will positively impact the journal.

Now is the time to become more engaged in the CLA. The seats around the Council table are open to all fifty-six countries of the Commonwealth. This diversity was reflected in the attendance by more than five hundred colleagues from across the Commonwealth in Goa, India, for the 23rd Commonwealth Law Conference (CLC) in March 2023, and in the excellent content during that week of five simultaneous streams of topics, as well as keynote speeches, a Bar Leaders Forum, the Goa Declaration, and a Young CLA programme. There is little doubt from the positive feedback over the years that the biennial CLC is quite possibly the leading conference on the law calendar. We look forward with great anticipation to CLC Malta in 2025.

However, in the meantime, three short- to medium-term objectives are being implemented: (1) deepen the engagement of CLA members in the protection of human rights, the rule of law, and the independence of judges and lawyers; (2) expand the value proposition of the CLA for members through active networking, committees, projects, and training opportunities; and (3) improve the financial viability of the CLA. It is necessary to move away from the model of overreliance on the CLC for operational revenue for the following two years.

Therefore, a focus of my travel so far to India, Singapore, Ghana, the UK and other countries was to engage and attract lawyers, firms, corporate members and institutional sponsors who may join, and inject revenue into, the CLA.

Strong membership and expanded value go hand in hand. Each reinforces the other. Therefore, the aim, by the end of the second quarter of 2023, is to fully activate the Hubs and Committees, which are all member driven. The four regional Hubs – Africa, the Americas, Australasia and Europe – have been asked to formalise a programme including in-person events. Likewise, the YCLA and seven CLA Committees are expected each to have exciting activities. The Committees are ADR, Climate Justice, Corporate and Commercial, Human Rights and Rule of Law, Law Tech, Family Law and Public and Administrative Law.

The projects include the CLA Online Institute and E-Library, Pro Bono Advice and Assistance Panel, Women Lawyers Initiative, Rapid Response Mechanism, Affinity Card, Risk Audit and Finance, and Strategic Planning. For example, I am pleased that the first Women Lawyers Initiative event takes place through the Africa Hub in Livingstone, Zambia, in early July 2023. The other Hubs are expected to follow, and the Initiative will culminate in a global event.

Therefore, I anticipate that my travels over the next several months will take me to the Gambia, Malta, Papua New Guinea, Guyana, Kenya, and Nigeria before the Bar AGM in Abuja in August, and South Africa before the BRICS meeting in December.

Much is to be accomplished, thanks in anticipation to the Vice Presidents, namely Linda Kasonde (Africa), Laurie Pawlitza (Americas), Hasan Khan (Australasia), Mark Stephens (Europe), and Treasurer Maria Mbeneka, as well as the Committee and Project co-conveners, and the Secretariat, including Brigid Watson, Clare Roe and Evie Wilson.

This journal, under the leadership of the Editor, Dr Venkat Iyer, carries out the mission evoked in the first editorial note of 1984 exceedingly well. Few realise the prodigious work that goes into the publication of each issue. Therefore, I express special thanks to Dr Iyer who has done an outstanding job with the journal and who I believe especially now will find the CLA to be a rich practically inexhaustible resource and a very attentive audience.

– Peter Maynard KC

Editor's Note

This issue follows in the wake of a very successful Commonwealth Law Conference (CLC) held in Goa, India, on 5-9 March 2023. That event also saw printed copies of this journal being made available to attendees, after the Commonwealth Lawyers' Association (CLA) was able to attract sponsorship from a commercial publisher based in Delhi. The feedback received from readers was very positive and encouraging. It is to be hoped that other sponsors will come forward in the near future to make the production and mailing of printed copies a regular feature as was the case until a few years ago.

The Goa conference also saw a new leadership team at the CLA, headed by Dr Peter Maynard KC as President, elected to office. Peter has written his first Message to readers of this journal, which is published alongside.

There is a rich fare on offer in this issue, starting with a thoughtful article by Michael Beloff KC on the 'cab rank' rule followed by barristers for generations but which appears to be under threat from activist lawyers who have signalled their intentions to refuse to act for companies supporting new fossil fuel projects or to prosecute peaceful climate change protesters. Beloff explains the origins and the scope of the cab rank rule, noting that it is "not just an English legal anachronism", and he arrives at an unambiguous conclusion:

> Hard cases can indeed make good law when barristers adhere to the commandments of their profession, whatever odium they may, in so doing, unjustifiably incur. The cab rank rule for barristers has been likened to the still older Hippocratic oath which bind medical practitioners, obliging them to treat impartially activists and oligarchs alike.

This is a subject on which opinion is sharply divided. I would welcome reactions to Beloff's article – or, indeed, new perspectives on the subject – from readers, so that a healthy debate ensues.

Another article in this issue deals with a topic that has elicited enthusiasm and apprehensions in equal measure, viz the likely impact of artificial intelligence (AI) on the legal profession (and, indeed, the wider world). Justine Collins, a practising lawyer from Jamaica, examines this issue at length and offers a useful insights, including the benefits and challenges that AI presents. Few will disagree with her view that "international coordination in the response [to this emerging development] is critical to managing the risks".

Judicial review is the subject of a further contribution to this issue, this time from India. Here, V Sudhish Pai, a Bangalore-based lawyer and legal academic, undertakes a sweeping examination of the nature of judicial review, which has been hailed as "a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law". The challenge, however, has been to reconcile judicial review with democratic accountability which is also prized in most societies. As Pai notes, "There is an anti-majoritarian implication in the very idea of judicial review [namely] that a handful of non-representative, non-elected persons, howsoever high they might be, should have the power to undo the majority." But he goes on to explain that, for all its shortcomings, judicial review remains essential for limited government and as a bulwark against the erosion of fundamental rights.

Sir Robert Francis KC also writes for this issue, on the sensitive – and to many, controversial – subject of the right to die. His wide-ranging analysis encompasses such matters as the legal consideration of measures that might be taken in association with a person's death, suicide and its decriminalisation, the withholding or withdrawal of medical treatment which results in death, euthanasia or mercy killing, and the implications of the Human Rights Act in the United Kingdom. Francis's article also looks briefly at developments in India in this area, where there has been significant judicial intervention against the backdrop of a complex web of legislative provisions. He concludes that "The court setting is not the arena in which the merits of the ethical case for or against any particular measure [relating to non-natural death] can be determined, if, indeed they are capable of final determination at all."

As always, I would love to receive comments from you, the reader, on these and other issues of interest.

– Dr Venkat Iyer

Articles

Climate Change and the Cab Rank Rule

Michael J Beloff KC

Introduction

On 24 March more than 120 UK lawyers[2] organised by a group called Lawyers Are Responsible (LAR) handed a 'Barristers' Declaration of Conscience' to the Bar Standards Board (BSB) which stated:

> We declare, in accordance with our consciences, that we will withhold our services in respect of: (i) supporting new fossil fuel projects; and (ii) action against climate protesters exercising their democratic right of peaceful protest.

This announcement did not spring spontaneously out of nowhere, already fully grown like Botticelli's Venus. Like so many modern cultural trends its origins lay across the Atlantic. As a latter day Pliny might have put it, "Ex America semper aliquid novi".

Law Students for Climate Accountability (LSCA) a campus-led non-profit making organisation, established in October 2020, has a scorecard for the extent of their fossil fuel work as a benchmark for judging law firms. It seeks a pledge from such firms not to acquire new fossil fuel clients and to give up existing ones by 2025. Both in the USA and the UK it is, unsurprisingly, the top ranked firms which house the largest number of fossil fuel specialists. Money speaks loud to lawyers.

In the UK there are current campaigns ,taking various forms, designed to persuade professional services providers – not only lawyers but also advertising, marketing, and consultancy firms – to cease any work they undertake for carbon intensive industries.

What marks out the barristers[3] declaration of conscience as distinctive is that, if acted upon it will put the barristers in breach of a professional requirement – the cab rank rule, applicable to all barristers in England and Wales. The LAR foreclosed any argument on this issue by putting out a statement that '"The barristers now face the prospect of disciplinary action for breach of professional regulations (such as the cab rank rule) which require them to take any case within their competence'.' Some of the barristers have indeed courted martyrdom by self-reporting to the BSB, which is responsible for the administration of such discipline.

Cab rank rule

The cab rank rule, the core, if not the detail, of which is captured in LAR's statement has a substantial pedigree. The duty to take any case within one's sphere of proficiency and on suitable terms – irrespective of the nature of the client's character, case or cause, or any views Counsel may have on any of them – has, since at least the time of Henry VII[4] been part of the professional creed and ethos of the profession. It is set out in rules C29 to C30 of the current Code of Conduct for Barristers.[5] The exceptions listed in C30, concerned mainly

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1 The author's memoir *MJBQC - a Life Within and Without the Law* (London: Hart/Bloomsbury, 2022) considers the cab rank rule and his own experience of it as a practising barrister at pp 258-260 and 265. See also his David Williams lecture at the University of Cambridge (accessible at *www.youtube.com/watch?v=AHJEggl1rsM*, also published in [2011] 1 *Denning Law Journal* at pp 7-10 and his response, with Pushpinder (now Mr Justice) Saini KC, on behalf of Gray's Inn to the Report by Professor Flood and Professor Hviid for the Legal Services Board ("the LSB") entitled "The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market", which suggested that the rule had passed its sell by date.

2 I shall omit the adjective 'top' used by the media on this as on other occasions in accordance with hallowed tradition by the media to describe any lawyer who has done anything reportable; and the adjective 'woke' over which the *Daily Mail* headline writers have quasi-copyright.

3 The signatories to the Declaration are an eclectic mix of barristers, solicitors, academics and others. One is Tim Herschel-Burns, co-founder of the LSCA.

4 The address of the then Chief Justice to the new sergeants–atlaw included the exhortation "*Ye shall refuse to take no man under the protection of Your good counsel*".

5 Rule C29. If you receive instructions from a professional client, and you are: (1) a self-employed barrister instructed by a professional client; or (2) an authorised individual working within a BSB entity; or (3) a BSB entity and the instructions seek the services of a named authorised individual working for you, and the instructions are appropriate taking into account the experience, seniority and/or field of practice of yourself or (as appropriate) of the named authorised individual, you must, subject to Rule rC30 below, accept the instructions addressed specifically to you, irrespective of: (a) the identity of the client; (b) the nature of the case to which the instructions relate; (c) whether the client is paying privately or is publicly funded; and (d) any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

with credit risk, do not undermine the fundamental principle.[6]

A summary of the importance of the rule was provided by Lord Hobhouse of Woodborough in *Arthur JS Hall & Co v Simons*[7] where the House of Lords in removing one ancient element of a barrister's practice reinforced another one. He articulated it in this way:

> This is a duty accepted by the independent bar. No one shall be left without representation. It is often taken for granted and derided and regrettably not all barristers observe it even though such failure involves a breach of their professional code. It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such right. It is also vital to the independence of the advocate since it negates the identification of the advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimisation. The principle is important and should not be devalued…

The rule is not just an English legal anachronism. As observed, no less eloquently by Brennan J, in the High Court of Australia:

> Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.[8]

The rule does not apply to other providers of legal services who can lawfully refuse to represent someone on any grounds other than those which would amount to unlawful discrimination of any kind; nor is it followed by the legal profession in the USA. Nonetheless, the question whether it is in the public interest for a member of the Bar to refuse to act for a client who seeks representation in an area of counsel's professed expertise and who can meet counsel's financial terms and conditions of retention can, in my view, admit of only one answer. In a democracy subject to the Rule of Law, it is no business of counsel to judge his client. That is the role of the Court. It is this critical division of responsibilities which is the historic and contemporary underpinning of the rule.

Commenting on the Declaration, the BSB's director-general, Mark Neale, noted that the cab rank rule was "designed to ensure that everyone can have access to legal advice". In another statement the chair of the Bar Council, Nick Vineall KC, said the cab rank rule "prevents discrimination and improves access to justice" and re-emphasised its importance during an address in a service in Temple Church

Response

How have the signatories responded to this argument ?

They focus on the special nature of the threat posed by climate change. A report of the Intergovernmental Panel on Climate Change, published a week before the Declaration, was launched in dramatic language by the UN Secretary-General, Antonio Guterres: "The human time bomb is ticking. Humanity is on thin ice and it is melting fast". Against this background one signatory, Declan Owens, a non-practising solicitor with the Ecojustice Legal Action Centre said, "I have an inherent disdain for laws implemented in the interests of Capital and the unconscionable harms they cause to the poorest and most vulnerable in our societies, especially in the Global South. Similarly, I have a healthy disregard for ethical rules, which enable lawyers acting on behalf of Fossil Capital to facilitate the destruction of human life on the planet and to accelerate the climate and ecological crises". Paul Powlesland, another signatory and a barrister, in protest at Vineall's Temple Church address held up a sign pithily reading: 'How many deaths does 'cab rank' justify'?

So future lives are said to trump the present rule.

The signatories are entitled to express their views as to how to balance the needs of the present generation with those of its successors in terms of available energy sources. Jolyon Maugham KC, another signatory and director of the Good Law Project, went further saying that lawyers should not be "forced to work for the law's wrongful ends by helping deliver new fossil fuel projects", nor be "forced to prosecute our brave friends whose conduct, protesting against the destruction of the planet, the law wrongly criminalises". But implicit in that *cri de coeur* is a recognition that what he objects to is the present state of the law, whose reform he is, like any other citizen, free to pursue .

The issue, which at the same time he avoids, is whether he, as a barrister, is entitled to give priority to his sincere beliefs above those of the principle fidelity to which his chosen profession mandates.

It is obviously no answer that the barrister signatories are represent only a small minority of a profession which numbers now more than 16,500. Nick Vineall asked: "Should a barrister be allowed to refuse to defend a climate change activist because they happen to disagree with that activist's style of protest?" and (correctly) responded to the question he had posed himself: "'I don't think so." What's sauce for the radical gander must be sauce for the conservative goose.

Picking and choosing

Nor is it any answer that. the signatories' own proposed

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6 Nor can those of C21 which require a barrister to refuse to accept the instructions for such obvious reasons as where the client seeks to curtail the barrister's authority in the conduct of proceedings in court so potentially jeopardising the superior duty owed to the Court, conflict of interest or breach of, confidentiality:

7 [2002] 1 AC 615 (HL) at 639.

8 *Giannarelli v Wraith* (1988) 165 CLR 543 at 58.

abstinence from the rule is so limited in its scope. In relation to the cab rank rule one cannot pick and choose or be, as it were. demi-vierge.

Finally it is no answer that the signatories, who have made so public a proclamation of views hostile to fossil fuels, are in consequence unlikely to be instructed to prosecute members of Stop Oil or to defend directors of Shell or that there are many others who would be prepared, even happy, to accept such briefs. It is breach of the principle itself, not its practical outcome that is the concern.

It might be argued that a refusal to prosecute activists who share a barrister's beliefs gives rise to a less disquiet than a refusal to represent clients who do not, especially when proposed changes to public order legislation will, whatever their merits or demerits, indisputably curb the right to protest[9]. But that argument cannot be sustained. The law is the law. If it is to be enforced, prosecution, subject to the usual caveats, is the necessary default option. Criminal trials inherently require two to tango. Prosecutions require prosecutors who have a duty to ensure that a trial is fair but not to procure a conviction at all costs.

The signatories to the declaration must confront the wider implications of their adopted stance. There is a perceptible and growing tendency to seek to dissuade lawyers from representing persons who excite public hostility. *The Times* itself has moved with the times, commenting in an editorial of 27 January 2023, entitled Slapp Down, on a libel action by a Russian so called "gangster" that it is "shameful" for barristers and solicitors to act for "dubious clients" and that they should take more notice of our "wider ethical obligations to society". Lord Pannick KC, Boris Johnson's lead lawyer, retorted in a letter published the next day: "The primary ethical obligation of lawyers is to the rule of law, which requires that all persons, however "dubious", have access to legal advice and representation. This applies to alleged murderers, rapists, paedophiles and also to Russians. There are exceptions to this professional obligation, and rightly so, in particular that we may not assist litigation which we believe to have no reasonable basis or which is being pursued to harass others. But in general, judges, not lawyers, decide whether litigation by clients is well founded. A hard case should not be allowed to undermine these fundamental principles". He is clearly right.

Hard cases can indeed make good law when barristers adhere to the commandments of their profession, whatever odium they may, in so doing, unjustifiably incur. The cab rank rule for barristers has been likened to the still older Hippocratic oath which bind medical practitioners, obliging them to treat impartially activists and oligarchs alike.

Disciplining the activists ?

Whether and how the BSB chooses to discipline the barrister signatories is, at the time of writing unknown.[10] It is possible that unless and until the barristers accompany their words with deeds by actually refusing instructions proffered for the reasons they have given, BSB will for the moment stay its hand. What is crucial is that the profession's representatives continue both to take appropriate action and to speak out so as to prevent any dilution of the Bar's DNA. I recall and adapt Pastor Niemoller's warning about the Nazis:[11] "First they came for the socialists, and I did not speak out – because I was not a socialist. Then they came for the trade unionists, and I did not speak out – because I was not a trade unionist. Then they came for the Jews, and I did not speak out – because I was not a Jew. Then they came for me – and there was no one left to speak for me." There is a need to avoid salami slicing of the rule by those who may ask why if X is entitled to breach it, why not Y, and, if Y, why not Z etc *ad infinitum*. The rule cannot admit of any exceptions. It must always apply to all barristers. Otherwise, it will lose its virtue and the public interest if serves will be irreparably wounded.

Conclusion

It is useful, in this fraught atmosphere,: to recall the words of Lord Bingham:

It is required of lawyers in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness..... A profession's most valuable asset is its collective reputation and the confidence which that inspires..... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.[12]

Public confidence in the legal profession, depends upon lawyers, certainly no less, and arguably even more than others, obeying, until it is changed, the law of the land and upon barristers universally respecting their profession's singular and primary precept.

[Michael Beloff KC is a member of Blackstone Chambers, Temple, London and a former President of Trinity College, Oxford.]

9 The Public Order Bill introduced in 2022 envisages, inter alia, *serious disruption prevention orders*.

10 The BSB handbook identifies possible circumstances of breach of the rule and their consequences in terms of starting point as follows:

Possible circumstances	Starting point
Breach of cab-rank rule (financial motive)	Reprimand and medium level fine
Breach of cab-rank rule (discriminatory motive)	Reprimand and short suspension

Aggravating factors: Actions of the barrister adversely affected the course of the proceedings; *Mitigating factors*: Immediate apology.

11 With whom, for the avoidance of any conceivable doubt, I do not equate the signatories.

12 Sir Thomas Bingham MR, *Bolton v. Law Society* (1994) 1 WLR 512 at para 15.

Artificial Intelligence: Regulatory Approaches and Implications for the Legal Profession

Justine A Collins

Introduction

Artificial intelligence ("AI") has[1] become a part of our everyday lives. From Siri to Alexa, we have grown accustomed to technology at our fingertips, improving our lives. AI, however, is not a new phenomenon, as the term 'artificial intelligence' was coined as early as 1956. Specifically, AI describes any technique that enables computers to mimic human intelligence,[2] using logic, if-then rules, decision trees and machine learning.

While AI is not new, the recent advances have been made possible by a subset of AI techniques popularly known as deep learning, or deep neural networks/nets, which permits software to train itself to perform tasks after locating large amounts of data.[3] The emergence of services designed to generate works, or generative AI, like Chat GPT, Dall-E and Stable Diffusion has the potential to disrupt various industries. ChatGPT is a chatbot developed by OpenAI. It was launched in November 2022 and has been dominating headlines since then. It is built on top of OpenAI's GPT-3 family of large language models and has been fine-tuned using both supervised and reinforcement learning techniques. The service allows the user to input a question, which the bot then uses to generate output tailored to the question.

ChatGPT represents the promise of AI. In fact, this writer has relied on ChatGPT for several portions of this paper. When prompted for guidance on how ChatGPT should be credited, its response was:

> As an AI language model, I cannot be credited as an author of a scholarly article. However, if you have used my responses or information obtained through me in your research, you can acknowledge my contribution in the following ways… through in-text citation…or references...[4]

The writer was then provided with the in-text citation listed at footnote 4 for use in referencing.

Concerns have been raised by the education sector regarding students potentially plagiarising and passing off as their own work output produced by ChatGPT, raising concerns about copyright laws and intellectual property concerns. The legal profession has not been immune to such concerns. Recently, a judge in Colombia caused a bit of a stir by admitting that he used ChatGPT when deciding whether an autistic child's insurance should cover all the costs of his medical treatment.[5]

AI, and other emerging technologies, are therefore no longer[6] in the distant future, as the creators of the Jetsons thought, but are certainly here now, and will only develop and improve in years to come.

This paper seeks to examine the benefits and challenges of artificial intelligence systems on regulation, the practice of law and the judiciary. Specifically, it examines some of the potential risks of the integration of artificial intelligence in the practice of law of which practitioners ought to be aware, including an examination of copyright implications, regulatory concerns and privacy risks. The paper concludes by providing suggestions for the management of such risks and identifying solutions for attorneys, regulators and judges.

Duty of technological competency

Disruption in the legal profession

In 1998, a noted scholar Richard Susskind predicted that the internet was about to precipitate huge changes in legal practice and the administration of justice. He theorised that the disruptions caused by the world wide web and the 'dot-com boom' would create a shift within the legal profession, and that attorneys would have to package and sell their expertise in innovative ways for a very different market for legal knowledge and expertise.[7] Susskind envisioned the emergence of virtual legal libraries, the rise of multimedia and proposed that electronic mail would evolve to become the primary means of client communication. Such predictions drew the ire of several practitioners, who could not conceive of the replacement of the written letter with e-mails.

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1 Siri and Alexa are virtual assistants offered by Apple and Amazon respectively, which use speech-recognition technology to enable users to interact with their devices using voice instruction.

2 'Artificial Intelligence: The Future of Humankind' *Time Magazine* (29 September 2017) 7

3 Ibid.

4 ChatGPT. "*What are the benefits and challenges of using AI in the legal profession*?" (2023, February 16). Retrieved from *https://github.com/chatGPT/chatGPT*.

5 Luke Taylor, 'Colombian judge says he used ChatGPT in ruling', *The Guardian*, 3 February 2023, *www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling*, accessed on 16 February 2023.

6 The Jetsons is a cartoon television programme from the 1960s which envisioned life in the future with video calls, automated homes and other advances.

7 Richard Susskind, *The Future of Law* (Oxford: Clarendon Press Publication, 1998).

In 2023, having grappled with the disruption caused by the pandemic of the last couple years, we know that the embrace of technology is critical for the survival of the legal profession and the administration of justice. In his latest edition of his book, *Tomorrow's Lawyers,* Susskind acknowledged that telework arrangements and remote court hearings have resulted in the deployment of some of the technologies he envisioned. However, he asserted that a seismic transformation in the delivery of legal services, fuelled by automation and AI is still imminent, and it needs to be embraced by the profession in order to survive, given technological advances and potential displacement of legal services. In his view, "the pandemic accelerated automation and decelerated innovation in the world of law".[8] These observations require practitioners to consider the implications of disruptive technology and how to integrate them into their practice.

Is there an ethical duty for legal practitioners to be technologically competent?

The American Bar Association ("ABA") appears to place the observations of Susskind to a higher standard. Under the *ABA Model Rules of Professional Conduct* ("ABA Model Rules") Rule 1.1, there is an acknowledgment that the duty of attorneys to provide competent representation requires attorneys to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology..."[9] There is a clear recognition of an ethical duty for attorneys to be technologically competent, as the ABA is of the view that the duty of competence requires attorneys to not only stay informed about the changes in the substantive law, but it also requires attorneys to maintain a knowledge and awareness about technological changes that could impact the legal profession.

While the *ABA Model Rules* do not bind our jurisdictions, it may be useful to examine the rules of other jurisdictions to see whether a similar duty exists. In the United Kingdom, the Solicitors Regulatory Authority[10] recognises the requirement for solicitors to provide competent representation under the Code of Conduct, but the rule does not extend specifically to requiring that solicitors be technologically competent. Similarly, under the *Bar Council of India Rules*, in Chapter II, which deals with Standards of Professional Conduct and Etiquette, there is no analogous duty of competence, but a duty for an advocate fearlessly to uphold the interests of his client.

In Jamaica, under *Canons of Professional Ethics* which governs the conduct of attorneys, Canon IV provides that an attorney shall "act in the best interest of his client and represent him honestly, competently and zealously within the bounds of the law. He shall preserve the confidence of his client and avoid conflicts of interest." While there is no specific duty of technological competence, Canon VIII (b) can be considered to address this scenario and provide guidance. It provides: "Where in any particular matter explicit ethical guidance does not exist, an Attorney shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

This writer is of the view that, in adopting Canon VIII(b)'s guidance, an attorney has a duty to keep abreast of advances and changes in technology, as the efficiency of the legal system and profession requires such a mandate. The pandemic has certainly demonstrated that attorneys can no longer "bury their heads in the sand" and need to be aware of the benefits and challenges of disruptive technologies, such as AI.

Benefits of AI implementation

Efficiency

AI can automate many routine tasks, such as document review and legal research, saving time and improving efficiency in the legal profession. For example, AI can assist in contract drafting and other documentation.[11] *Luminance* is a legaltech service which offers this possibility. Recently, Allen & Overy announced that they have partnered with *Harvey*, an innovative AI platform that uses the same model as ChatGPT but with enhancements for legal work. Harvey operates in "multiple languages" and can automate legal work with "unmatched efficiency, quality and intelligence." According to a press release from Allen & Overy, "Whilst the output needs careful review by an A&O [Allen & Overy] lawyer, Harvey can help generate insights, recommendations and predictions based on large volumes of data, enabling lawyers to deliver faster, smarter and more cost-effective solutions to their clients."[12]

From the perspective of the judiciary, there is the potential for automated filings and automated decision making. In Estonia, for example, the automation of small contract disputes is being actively pursued in order to assist in clearing backlogs of cases, which is a common problem for most judicial systems. This, in turn, ought to reduce turn-around times for adjudications, and increase access to justice.

Improved accuracy

AI can help reduce errors in legal analysis and decision-making,[13] resulting in more accurate and consistent outcomes, to a certain extent. The AI system would have access to a wider range of case law precedents on which to make certain decisions, and be able to rapidly identify trends and patterns and apply them to the factual situation in the case before it. In this manner, AI, should be able to make a more likely prediction of the outcomes of cases.

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8 Richard Susskind, *Tomorrow's Lawyers* (Oxford: Oxford University Press, 3rd ed, 2023).

9 Comment 8 to Rule 1.1, *American Bar Association Model Rules*, *www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/*, accessed 16 February 2023.

10 Rule 3.3, SRA Code of Conduct for Solicitors, RELs and RFLs, *www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/*, accessed 16 February 2023.

11 ChatGPT. 'What are the benefits and challenges of using AI in the legal profession?', searched on 16 February 2023, results retrieved from *https://github.com/chatGPT/chatGPT*.

12 *abovethelaw.com/2023/02/hello-harvey-this-elite-biglaw-firm-is-the-first-to-partner-with-game-changing-ai-chatbot/*, accessed 19 February 2023.

13 ChatGPT. 'What are the benefits and challenges of using AI in the legal profession?', searched on 16 February 2023, results retrieved from *https://github.com/chatGPT/chatGPTIbid*.

Data-driven decision making

Similarly, AI can analyse large amounts of data and identify patterns and trends that may not be apparent to human lawyers, providing more objective and data-driven decision-making.[14] There has been speculation that AI has the potential to remove judges from an adjudicative function altogether, with the advent of AI judges which automate the judicial function.[15] An increasing use of predictive coding can be used to adjudicate on certain matters, and can be used to run evaluative, advisory and determinative processes.

Cost savings

By automating routine tasks, AI can help reduce costs in the legal profession, making legal services more accessible to individuals and small businesses who may not have had the resources to pursue legal action in the past.[16] Integrating AI into routine tasks may assist in reducing legal time spent on matters, and therefore reduce the legal fees chargeable on matters. This can likely lead to a reconceptualisation of how to measure the value of legal work, and as Susskind posits, to a shift from legal services as an advisory service with time-based billing, to an information service with commodity pricing.[17]

Risks and challenges of AI implementation

The benefits of AI integration can certainly lead to certain efficiencies in the delivery of legal services and justice. However, as with any new disruptive technology, there are risks of which we ought to be aware in the adoption of AI.

Notably, there are ethical challenges and substantive legal issues, including those relating to copyright and other legal liability, which need to be considered.

(A) Ethical challenges

Data privacy risks

Recently, ChatGPT has brought data privacy issues to the fore within AI systems. ChatGPT is underpinned by a large language model which requires massive amounts of data to function and improve.[18] OpenAI, the company behind ChatGPT, provided the tool with 300 billion words which were systematically scraped from the internet, without consent from the data subjects.[19] The platform requires datasets to be provided and then trains itself to generate content.

This raises questions of data ownership and accountability within AI systems. Even if the data is publicly available, and therefore may not necessarily require the data subject's consent or other lawful basis for processing personal data, the issue of contextual integrity arises, which is a fundamental principle in the legal discussions of privacy.[20] This refers to a situation where an individual's information is (mis)used outside the context in which it was originally produced or intended to be disseminated.

Other cases of personal data misuse include the emergence of 'deepfakes' which are messages or information in which an existing image or video is replaced with someone's likeness, making it appear as if the information originally emanated from that person.

With the availability of vast amounts of personal data to AI systems, the enforcement of certain fundamental data protection principles, such as fair and lawful processing and purpose limitation, becomes harder to navigate for the data subject. Scholars have observed that as the internal logic of machine-learning algorithms is typically opaque, the absence of a right to explanation to automated decision-making, a common right within most data protection legislation, can weaken an individual's ability to challenge such decisions.[21]

Bias

There have been increasing incidents of bias in AI systems. This occurs when there is algorithmic AI bias, where the algorithms are trained using biased data sets, or societal AI bias, where our assumptions and norms as a society cause us to have blind spots or certain expectations in our thinking, which translates into the AI systems themselves.[22] For example, PortraitAI art generator allows users to feed a selfie and the AI draws on understandings of Renaissance portraits to render you in the image of the masters of the period.[23] However, most of these paintings during this time in history are of primarily white Europeans, and therefore the depictions rendered tend to create less than optimal results for persons of colour. AI systems may be biased if they are trained on biased data or if they are not designed to account for biases that exist in the legal system. This could lead to discriminatory outcomes.

Regulators, in particular, need to be mindful of the potential for discriminatory outcomes when considering AI-integrated technologies such as predictive policing algorithms, which have come under recent scrutiny. Location-based algorithms rely on connections between places, events and historical crime rates to predict where and when crimes are more likely to happen before the crimes occur, leading to possibly discriminatory outcomes where particular neighbourhoods of persons are targeted by police.[24] The underlying human rights issues of freedom from discrimination and the presumption of innocence may be compromised by the inherent biases these types of algorithms may perpetuate.

14 Ibid.
15 Ibid.
16 Ibid.
17 Richard Susskind, *Tomorrow's Lawyers,* supra note 8.
18 *https://theconversation.com/chatgpt-is-a-data-privacy-nightmare-if-youve-ever-posted-online-you-ought-to-be-concerned-199283*, accessed on 2 March 2023.
19 Ibid.
20 Ibid.
21 Joshua Gacutan, 'A statutory right to explanation for decisions generated using artificial intelligence' (2020) 28 (3) Int J Law Info Tech 293.
22 *www.lexanalytics.com/blog/bias-in-machine-learning/*, accessed 1 March 2023.
23 Ibid.
24 *https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/*, accessed 1 March 2023.

Nuances in judgment

It has been stated that AI systems can create more data-driven decision-making in judgments, by relying on a wide range of data from the internet to create a well-reasoned decision, in relation to both legal opinions and court judgments.

However, there are several occasions, especially within the context of the administration of justice, that a judgment is not based merely on extensive data-analysis, precedents and legal principles. Justice requires more than the slavish application of judicial precedent, divorced from the realities of the case. There continues to be a human element in the decision-making of some judges, although not necessarily divorced from the legal context within which a case is decided. Especially in matters where the tribunal may not necessarily be a judge, but rather a jury of the accused's peers, it is likely that, emotions and instinct may sway in favour of one outcome or another. AI systems may not necessarily be able to replicate the nuanced reasoning and judgment of human lawyers or judges, particularly in complex legal cases.[25]

Lack of transparency and accuracy

Some AI systems are 'black boxes,' meaning that it is not clear how they arrive at their decisions. This lack of transparency can make it difficult to assess the accuracy and fairness of AI-driven decisions.

In recent years, academics and practitioners alike have called for greater transparency into the inner workings of artificial intelligence models, and for many good reasons.[26] Transparency can help mitigate issues of fairness, discrimination, and trust — all of which have received increased attention.[27]

However, greater transparency is not without its risks, as disclosures can be subject to hacks, releasing additional information may make AI more vulnerable to attacks, and disclosures can make companies more susceptible to lawsuits or regulatory action. This creates a sort of 'transparency paradox' which requires users of AI to think seriously about how they will manage the risks of AI from the perspective of transparency and obtaining accurate results.[28]

(B) Legal challenges

The use of AI also raises certain substantive legal issues, with which attorneys and regulators must grapple as the technology advances, including questions about copyright and the legal personality of AI systems.

Copyright challenges

While attorneys may be using AI within their legal practices or be advising clients regarding AI, copyright issues may arise. Specifically, attorneys need to consider whether copyright subsists in opinions or documentation which is drafted using AI technology, or likewise, whether copyright subsists with a client who uses generative AI to create a new work.

Recently, the growing popularity of ChatGPT has been a challenge for university administrators, who expressed concerns about recent cases of students using ChatGPT to plagiarise and passing off work as their own.

Given the rapid development of generative AI and its potential to create new works, the three central questions which arise are, whether the results being generated are:

i) An outcome of the technology's own "intelligence" and therefore entitles the technology itself to be the holder of copyright;

ii) A result of the user's instructions or commands, and therefore any copyright subsists with the user; or

iii) An outcome of the developer's programming, and therefore any copyright subsists with the original developer of the AI-enabled programme.

By its nature, generative AI challenges pre-conceived notions of originality and authorship which are central to the entitlement of a person to copyright, which pre-date the computer dates and asks if this lack of "authorship" should equate to lack of protection.[29]

Copyright is the legal right granted to the author of an original work. For a grant of copyright, there are certain legal requirements which need to be satisfied, generally: the work must emanate from the author, involving some sort of independent skill of the author and it must be original, and not substantially copy the work of another.[30]

It is important to also consider the economic incentive principle that justifies the creation of intellectual property rights. It is that an individual ought to receive recognition for the creation of an original work, and possibly be able to receive financial compensation, ie remuneration, whether through royalties or otherwise, for the intellectual property.

Consequent to the developer's increased distance from the works being created, AI has challenged "authorship" and who should be considered the author of the works created, compared to traditional artistic works, where the author of a book, for example, holds the copyright.

In some jurisdictions, copyright legislation has evolved to acknowledge the UK reforms of recent decades to copyright. The Copyright, Designs and Patents Act 1988 of the UK ("the CDPA") recognises "computer-generated" works as being eligible for copyright protection. Section 178 of the CDPA defines "computer-generated" as "in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work."[31] AI can be

25 ChatGPT. 'What are the benefits and challenges of using AI in the legal profession?', searched on 16 February 2023, results retrieved from *https://github.com/chatGPT/chatGPT*.

26 *https://hbr.org/2019/12/the-ai-transparency-paradox*, accessed 1 March 2023.

27 Ibid.

28 Ibid.

29 Kanchana Kariyawasam, 'Artificial Intelligence and challenges for copyright law' (2020) 28 (4) Int J Law Info Tech 279.

30 Ibid.

31 Copyright, Designs and Patents Act, (UK) s. 178.

considered to be computer-generated work, by its very nature. Further, the CDPA goes further to state that in relation to the authorship of computer-generated work, "the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken".[32] This definition has been adopted by a handful of Commonwealth jurisdictions, like India[33] and Jamaica[34], and which reflects the test for film authorship already embedded within the copyright legislation. However, this definition is not present in the EU, US or Australia. Many EU countries, like France, only permit natural persons to hold copyright. Similarly, the Berne Convention, one of the most important international agreements governing copyright law, does not have this definition,[35] but requires signatories thereto to offer an adequate level of copyright protection to nationals of other parties to the Convention.[36]

The test proposed in the CDPA is inherently vague, and appears to be intentionally so, to accommodate the complex nature of authorship of AI and other computer-generated works. In 1986, the UK Government published a White Paper, *Intellectual Property and Innovation*, which argued that "[t]he responses to the 1981 Green Paper have shown, however, that circumstances vary so much in practice that a general solution would not be fair in all cases. It appears that no practical problems arise from the absence of a specific authorship in this area. The Government has therefore concluded that no specific provisions should be made to determine this question."[37]

Based on the position of the UK Government, it appears that the 'necessary arrangements' test was designed to be sufficiently flexible for authorship to be determined on a 'case by case' basis, acknowledging that with the innovations in AI and computer-generated works, there could be no 'one-size-fits-all' type of determination, as with other traditional forms of artistic works. Depending on the nature of the content generated and level of input of the user, it could be the developer or the user of the AI or computer-generated work who is deemed to be the author.

There is a dearth of case law considering the 'necessary arrangements' test. The test reasonably contemplates that either:

1. A programmer/developer would have contemplated a number of possible outcomes and designed the AI system to produce particular computer-generated work; or

2. Alternatively, a user may have envisioned output, given necessary instructions, made necessary input and undertaken labour and produced something that the programmer may not have contemplated.[38]

It is submitted that the necessary arrangements test ought to be interpreted as the proximity of the developer or user to the output which ought to determine the authorship. However, the more developed and complex a generative AI system becomes, the less straightforward it may become to determine the person that made the necessary arrangements.

Legal personality of AI systems

Increasingly, there are some academics who argue for the recognition of legal personality of AI systems. Abbott makes an interesting argument that the current definition of computer-generated works within certain Commonwealth jurisdictions "fails to take into account the fact that computers independently should qualify for authorship and inventorship, even when contributing to jointly authored works with natural persons."[39]

He proposes that computers may be considered to be joint authors of intermediate works, and proposes the definition of 'computer-generated work' be amended to mean work "generated by a computer in circumstances such that the computer, if a natural person, would meet authorship requirements."[40] He proposes that a collaborative approach be taken between natural persons and computers; and that computers and AI systems be recognised as legal persons capable of holding copyright. Abbott's proposal for the recognition of AI systems as legal persons is not as radical as it appears, as in 2017, Saudi Arabia conferred citizenship on a humanoid robot, Sophia. Proponents argue that if AI systems are not granted copyright protection, then no one will have rights to the work and it will fall into the public domain, disincentivising creators.[41]

Furthermore, the proposal is contextualised with the broader discussion regarding liability for other AI-enabled matters, such as autonomous-driving vehicles, and whether the system itself should be held liable for any potential fatal accidents rather than its developer.

ChatGPT appears to have reconciled the legal conundrum within their Terms and Conditions, which may not necessarily be a comfort to university educators. The presumption, based on the Terms and Conditions is that OpenAI, the developer, is the original author, and to provide legal clarity, any copyright in the output is assigned to the user of ChatGPT:

"3. Content

(a) Your Content. You may provide input to the Services ("Input"), and receive output generated and returned by the Services based on the Input ("Output"). Input and Output are collectively "Content." As between the parties and to the extent permitted by applicable law, you own all Input, and subject to your compliance with these Terms, OpenAI hereby assigns to you all its right, title and interest in and to Output. OpenAI may use Content as necessary to provide and maintain the Services,

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32 Ibid, s. 9.

33 The Copyright Act, (India), s. 2.

34 The Copyright Act, (Jamaica), s. 2.

35 Art 10 of the Agreement for Trade Related Aspects of Intellectual Property Rights ("TRIPS") however, requires computer programs to be protected as literary works.

36 Art 5 of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

37 *Intellectual Property and Innovation* (Cmnd 9712; HMSO, Ch 9, paras 9.6-8) as quoted by Ryan Abbott 'Artificial intelligence, Big data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom' (2017), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064213*, accessed 3 March 2023.

38 Ibid.

39 Ryan Abbott, supra note 37.

40 Ibid.

41 Kanchana Kariyawasam, supra note 29.

comply with applicable law, and enforce our policies. You are responsible for Content, including for ensuring that it does not violate any applicable law or these Terms."[42]

Certainly regulators, attorneys and judges may need to consider how they will treat copyright authorship as more advances are made in AI systems. While this writer does not believe it may be the time for legal personality of AI systems, there certainly needs to be some clarity provided with the 'necessary arrangements' test, with a view to providing developers and users with greater guidance on how to approach the development of their content.

Recommendations for a future with AI

Given the above risks and challenges with AI systems, the following recommendations are made in respect of attorneys and judges, and thereafter, for regulators.

(1) Recommendations for attorneys and judges

Stay in the know

It is imperative that attorneys and judges keep abreast of developments in technology and the potential impact it may have. As this writer has explored above, attorneys and judges ought to be technologically competent, and be aware of the risks and benefits of emerging technologies. As law must evolve to meet the demands of an ever-changing society, so too must the legal profession and judiciary "stay in the know". Susskind's warnings remind us that the practice of law and delivery of justice must be fit for purpose, and address the demands of an information society, which may require legal services and delivery of justice to integrate technology, such as AI, and adapt in order to survive.

Keeping abreast of changes also requires legal practitioners to ensure that they are kept aware of any new risks which may arise in any AI which they adopt in their practice.

Conduct data protection impact assessments

As required under Article 35 of the General Data Protection Regulation, a data protection impact assessment ("DPIA") should be used before the deployment of innovative technological solutions and for automated decision-making or profiling. The use of AI for processing personal data by attorneys and judges will therefore usually meet the legal requirement for completing a DPIA.

The DPIA should be done at the earliest stages of development, and prior to implementation, and should examine the data flows and stages when AI processes and automated decisions may produce effects on individuals.[43] Integral to the conduct of any DPIA is the assessment of the AI system's necessity and proportionality in relation to the fulfilment of the purpose. It may be discerned from this assessment that the risk or detriment to data subjects from the possibility of bias or an inaccuracy may be greater than the benefits of such implementation.[44]

Especially when it relates to automated decision-making, users of AI systems ought to be mindful of the additional rights which data subjects retain in explaining the logic behind decision-making, which is present in most data protection laws. The more complex the AI system appears to be, it may create greater operational challenges in recognizing this right of data subjects.

Review terms and conditions of any new service

As discussed above, the terms and conditions of ChatGPT provide useful guidance regarding the assignment of copyright to the user, in cases where there is no international consensus on the status of copyright subsistence in computer-generated work produced by AI.

While it is commendable that the developers of ChatGPT have recognised legal challenges which have arisen on the platform and are consistently re-configuring to refine any challenges, it is evident that the terms and conditions of any technical solution an attorney is seeking to use in his/her practice is an important starting point in determining the scope of: any liability when using the platform; any indemnification for loss; and, importantly, whether copyright subsists in the works created by the AI.

(2) Recommendations for regulators

Regulatory approach

Generally, when regulators are approaching emerging technologies, like AI, they tend to face a number of challenges, ranging from:

- failing to take sensible precautionary measures relative to the risks presented by emerging technologies;[45] to
- the regulatory intervention being ineffective and not fully fit for purpose, leading to a series of unintended consequences.[46]

Regulators ought to approach regulating AI using a multidisciplinary approach, acknowledging that legal, policy, technical and cyber-security experts are integral to creating a workable solution to regulating any new technology.

There are three criteria which ought to be considered by regulators in approaching any emerging technology, such as AI systems.

a. *Regulatory prudence and precaution*

In many cases, the emergence of a new technology creates uncertainty, and may precipitate suspicion and mistrust regarding the risks. While it is certainly practical to exercise a level of restraint and scepticism, a "knee-jerk" reaction by

42 *https://openai.com/policies/terms-of-use*, accessed 3 March 2023.

43 *https://ico.org.uk/about-the-ico/media-centre/ai-blog-data-protection-impact-assessments-and-ai/*, accessed on 1 March 2023.

44 Ibid.

45 Roger Brownsword and Morag Goodwin, *Law and the Technologies of the Twenty-First Century,* (Cambridge: Cambridge University Press, 2012).

46 Ibid.

imposing a blanket prohibition on the emerging technology or moratorium to regulating it[47] may stifle innovation and advances within the digital economy. It is important that regulators exercise prudence and precaution by doing a harm-benefit analysis on the new technology, in particular, examining whether more weight ought to be given to the probability of harm occurring or the seriousness of the harm. As Brownsword and Goodwin state: "…it is one thing for regulators to carry out a harm benefit calculation and make their best prudential judgment and quite another for regulators to mechanically to apply a precautionary prohibition."[48]

For example, given the data privacy risks raised above with bias, it may seem precautionary for an outright ban to be placed on AI integration in predictive policing, however, there might be a way in which data minimization techniques can be embedded within the system to address the concerns. Regulatory precaution ought to consider both risks and benefits of emerging technologies, being mindful of the need for innovation to occur.

b. *Regulatory legitimacy*

Regulatory legitimacy in this sense seeks to examine whether the regulators have operated in a transparent and accountable manner which invites public participation; whether the regulators have the requisite authorisation to regulate that specific matter; and whether the regulatory instrument is relevant and appropriate to the matter it seeks to regulate[49]

Importantly, engagement with the regulatees is important in legitimizing the regulatory intervention that is sought. Public consultation may enrichen the dialogue regarding the emerging technology and cause regulators to consider other factors which may not necessarily be considered before.

Regulatory legitimacy may also involve an investigation on which authority is most appropriate to regulate the new technology. This was the case when cryptocurrencies emerged, and the question of whether this digital asset could be categorised as a security pursuant to the *Howey test*[50] in the United States or a commodity would determine whether the Securities and Exchange Commission or the Commodity Futures Trading Commission would regulate it. It has now been settled by the federal courts that digital assets fall within the jurisdiction of the Commodity Futures Trading Commission as a commodity under US law.[51] However, this ongoing discussion shows that the regulatory intervention may have been viewed as illegitimate by the regulatees if the emerging technology was misclassified and unintended consequences may have occurred.

Finally, if the instrument of regulation is deemed to be inappropriate, it may be viewed as illegitimate. There may be scenarios where the regulatees deem the type of regulatory intervention to not be commensurate with the risks. The regulators will need to consider whether, based on their harm-benefit analysis, the emerging technology is best suited to be backed by legal sanctions, or whether a guidance document is more appropriate. There are instances of regulators engaging in regulatory sandboxes to allow new innovations to grow and develop while being supervised by the regulator, subject to the relevant approvals and examinations of the new technology occurring. It is also important that regulators adopt a technology-neutral stance if regulating by legal sanction, as the law may need to be sufficiently flexible ("light-touch") and not overly prescriptive to permit new advances in technology to be accommodated, without the need to pass new laws to regulate advances in one technology.

c. *Regulatory effectiveness*

Regulatory effectiveness refers to the regulatory intervention having the intended effect so as to be fit for purpose. The regulators need to provide the regulatees with clear guidance so that they know what is required for compliance, and how to comply with the guidance.[52] It is critical for regulatory effectiveness that the regulatees respond in the desired way. Rules ought not to be overly complex, they ought to be clearly published and articulated and not constantly subject to revision.[53] The evidence of the effectiveness of any regulatory intervention is whether the anticipated consequences of the regulation are achieved.

For example, a regulation which is aimed at encouraging banks and non-banks to participate in mobile banking, but fails to provide adequate guidance to non-banks on how to comply with regulations which are skewed in favour of banks may have the unintended consequence of discouraging competition and innovation in the mobile banking space, despite the regulation stating its intention to be inclusive.

International coordination in regulation

Regulators ought to adopt an international consensus on how to regulate these emerging technologies such as AI. The challenges faced by regulators are not jurisdiction-specific, but rather may be common to various jurisdictions.

The OECD has recently adopted responsible AI principles Recommendation on Artificial Intelligence (AI) , which is the

47 Ibid.

48 Ibid.

49 Ibid.

50 The Howey Test refers to the U.S. Supreme Court case for determining whether a transaction qualifies as an "investment contract," and therefore would be considered a security and subject to disclosure and registration requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934. Under the Howey Test, an investment contract exists if there is an "investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others." *SEC v WJ Howey Co* 328 US 293 (1946).

51 In 2018, federal courts affirmed the Commodity Futures Trading Commission's jurisdiction over digital assets in two cases, *CFTC v McDonnell*, 287 F Supp 3d 213 (EDNY. 2018) and *CFTC v My Big Coin Pay, Inc.* et al., 334 F Supp 3d 492 (D Mass 2018).

52 Ibid.

53 Ibid.

first intergovernmental standard on AI on 22 May 2019.[54]

In particular, the Recommendation identifies five complementary values-based principles for the responsible stewardship of trustworthy AI and calls on AI actors to promote and implement them:

- *Inclusive growth, sustainable development and well-being*: this principle highlights the potential for trustworthy AI to contribute to overall growth for all;
- *Human-centred values and fairness*: AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity and should include appropriate safeguards to ensure a fair and just society;
- *Transparency and explainability*: This principle is about transparency and responsible disclosure around AI systems to ensure that people understand when they are engaging with them and can challenge outcomes.
- *Robustness, security and safety:* AI systems must function in a robust, secure and safe way throughout their lifetimes and potential risks should be continually assessed and managed; and
- *Accountability*: organisations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the OECD's values-based principles for AI.[55]

Consistent with these value-based principles, the Recommendation also provides five recommendations to policy-makers pertaining to national policies and international co-operation for trustworthy AI, namely:

- investing in AI research and development;
- fostering a digital ecosystem for AI;
- shaping an enabling policy environment for AI;
- building human capacity and preparing for labour market transformation;
- and international co-operation for trustworthy AI.[56]

By adopting these recommendations, regulators can approach the regulation of AI in a coordinated manner, and be mindful of the risks and benefits of AI-enabled technologies.

Recently, the EU has proposed a draft Act on Artificial Intelligence in 2021,[57] the first far-reaching regulation within the domain of AI, and aimed at supporting the digital single market in the EU. It proposes to regulate the providers or users of AI, proposes risk categorisation[58] of AI systems,[59] and has extra-territorial scope on providers, which is not unusual for regulations emanating from the EU.

However, the draft AI Act is not without its criticisms, as some scholars have observed certain deficiencies such as the failure to consider the liability of AI systems itself and whether legal personhood can be conferred thereon, which has been previously considered above. There is also a requirement that training and testing datasets for AI systems required under Article 10 (3) must be "free of errors", which experts state may be utopian,[60] at best as an error-free data set is not a guaranteed outcome.

Nevertheless, the attempt to regulate AI, despite its deficiencies, signals a step in the right direction, and with proper public consultation and regulatory prudence and precaution, it is hoped that the regulators in the EU will cure some of the challenges and aim to promote innovation within a safe environment.

Conclusion

The advances in big data and AI systems are happening each day and it requires regulators, attorneys and judges to critically examine how it will affect their practices, the delivery of justice and the economy.

It remains to be seen whether the challenges raised herein will be addressed immediately, but understanding the challenges and international coordination in the response is critical to managing the risks.

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54 *https://oecd/ai/en/ai-principles*, accessed 2 March 2023.

55 Ibid.

56 Ibid.

57 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts.

58 Ibid Art 6.

59 Ibid Recital 10, Art 2.

60 Vera Lucia Raposo, 'Ex machina: preliminary critical assessment of the European Draft Act on artificial intelligence' (2022) 30 (1) Int J Law Info Tech 88.

Freedom of Religion in India

Jaideep Gupta

Introduction

Throughout India's history religion has been an important part of the country's culture. The Indian sub-continent is the birth place of four of the world's major religions: Hinduism, Buddhism, Jainism and Sikhism. For this reason, Swami Vivekananda, who is considered by many to be the person responsible for propagating modern Hinduism across the world, used to emphasise that spirituality (and hence religion) is the very backbone of India, He was fond of stating that every nation has a particular ideal running through its whole existence, forming its very background. Vivekananda said that India has religion and religion alone for its backbone, for the bedrock upon which the whole building of its life has been built.

In 1947 just after Independence and partition, India had over 330 million inhabitants. Out of this, followers of the Hindu religion numbered approximately 280 million, followers of the Islamic faith accounted for approximately 30 million inhabitants, Christians accounted for 7.6 million and Sikhs numbered approximately 6.25 million. There were also 2.3 million Buddhists and 1.3 million Jains in India

Since the Constitution of India was a document which was designed to provide the principles which would govern the participation of different citizens in their lives, the constitution-makers believed that the only option before them was to provide a secular constitution. This they did by incorporating Articles 25 to 30. Out of those provisions, Articles 25 to 28 are expressly bunched together under the heading 'Right to Freedom and Religion' and Articles 29 and 30 are listed under the heading 'Cultural and Educational Rights'. Without going into the details, the Constitution stated that all persons were equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

Basic structure

In the landmark judgement of the Supreme Court of India in *Kesavananda Bharati v State of Kerala*,[1] the Supreme Court in 1973 held that there were certain basic features of the Indian Constitution which could not be removed by way of amendment of the Constitution. By way of example it noted that by enacting Articles 25 to 30, the Constitution had already indicated that secularism was a basic feature of the Indian Constitution. In 1976 the preamble of the Constitution was amended to specifically state that India is a secular republic. This only emphasises what had already been held by the Supreme Court that the Constitution from its inception was a secular constitution which expressly allowed all persons the freedom to practise their religion.

The right to practice one's faith is, therefore, irrevocably guaranteed by the highest law in the country namely the Constitution of India.

Like all rights, however, such a right too cannot be completely unfettered.

Therefore, the right to practise one's faith is subject to various heads of restrictions, such as public order, morality, and health. It is also subject to other fundamental rights recognised by the Constitution. And, in a multicultural, multi-ethnic nation, the exercise of one person's freedom to practise his religion must necessarily be subject to another person's right to practise his religion.

In order to minimise conflict arising out of the practice of different religions, two crucial aspects of this right have been emphasised by the Supreme Court in different judgments from the very outset.

Firstly, that the *concept of religion* is not confined to a doctrinaire beliefs. It is not even theistic. This is because there are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. These religions comprise of a core of ethical rules for their followers which may include diverse practices such as rituals, ceremonies and modes of worship and could extend even to matters of food and drugs. This stand which was first adopted in the 1954 judgment in *Commissioner, Hindu Religious Endowment Madras v Lakshmindra Thirtha Swamiyar of Shri Shirur Mutt*[2] by a bench of seven judges, making it the seminal judgment on the fundamental right to practise one's faith.

The other significant aspect also emphasised in the *Shirur Mutt* case and followed since then is that what is protected under the Indian Constitution is the *essential part of the religion* and not each and every part of its practice. Elaborating further it had been held that what constitutes the essential part of a religion is primarily to the ascertained with reference to the doctrine of that religion itself.

The Indian Constitution then goes on to make a critical distinction which is crucial for many purposes between *religious practices* and *secular activity associated with religious practice*. This emerges from Article 25(2)(a) which protects the operation of any existing law (law existing at the time the Constitution came into force) or allows the State to make any law regulating or restricting economic, financial, political and other secular activities associated with religious practice.

To illustrate this distinction, one may refer to the case of *Pannalal Bansilal Pitti v State of Andhra Pradesh*,[3] a 1996 decision where the Supreme Court held that the administration of a religious institution or endowment is a secular activity and is not an essential part of a religion and, therefore, the legislature is

[1] AIR 1973 SC 1461,

[2] AIR 1954 SC 282.

[3] AIR 1996 SC 1023.

competent to enact laws regulating the administration and governance of religious or charitable institutions or endowment. Therefore, a law which seeks to supersede the hereditary trustee of an institution does not violate a person's right to practise his or her religion.

This distinction is important as we have in India very rich and old religious institutions to which people contribute a substantial portion of their wealth and which plays an important role in the life of the population of India. If, as has been found from time to time, corrupt or unhealthy practices are adopted by the management of such institutions, the State must be in a position to intervene in the public interest.. This has led from time to time to legislation to regulate the administration of religious institutions which have been found to be run in a manner inimical to the public good. Such state action has now come under criticism from religious organisations which believes that the State should not interfere with the administration of religious institutions at all. But given the spiritual nature of the Indian population which has resulted in development of massive religious institutions which affect the public interest, a proposition that the State must stay passive when the interest of the public is affected by maladministration of religious institutions surely cannot be countenanced.

Faith based discrimination in employment, accommodation etc

By and large the Constitution has expressly provided that there cannot be any faith-based discrimination in employment, accommodation or other services except education.

To this end Article 14 of the Constitution provides equality before law in general and states that States shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

It then goes on, in Article 15, to prohibit discrimination inter-alia on the ground of religion. It specifies that no citizen shall, on the ground only of religion, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out State funds or dedicated to the use of general public.

It further goes on, in Article 16, to expressly provide that there will be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and that no citizen shall, on the ground only of religion, be ineligible for or discriminated against in respect of any employment or office under the State. Therefore, faith based discrimination is in general completely prohibited at least as far as the public sector is concerned in India. The only area in which a certain amount of positive discrimination is permitted is in the area of education.

For this, we have to refer to two Articles, firstly Article 26 of the Constitution which confers the right to every "religious denomination" to establish and maintain institutions for religious and charitable parties.

The second is the right granted under Article 30 to minorities to establish and administer educational institutions of their choice.

This confers upon two groups, namely religious denominations of any religion and minorities, limited protection against State interference with educational institutions run by them. I do not wish to enter into a discussion of how a religious denomination has been defined or identified as it involves details which are beyond the scope of this article. It is, however, important to point out that, by virtue of a series of judgments, the extent of protection has slightly been limited, for instance, in regulation which deals with educational standards which are to be maintained by educational institutions. Though in general such institutions are allowed to choose teachers and students, merit cannot be ignored completely and a certain amount of regulation is permissible.

Gender etc

This brings us to the important question as to what happens when the religion or religious institutions themselves make a distinction between their followers on the basis of gender identity, sexual orientation or some other characteristics.

Without meaning any disrespect to any particular religion it is well known that for reasons which may appeal to some and not to others, various religions have made rules and practices which might differentiate between their followers. Examples which have arisen for debate in the courts include the practice of exclusion of certain members of the community from worshipping in a particular temple. This was a matter of enormous importance at the time of independence since, by and large, among Hindus there was a rigid caste system which led to the exclusion of lower caste people from entering certain places of worship.

The Indian Constitution was not just a charter of rules but was also a document that was reformative and forward looking in nature. While granting freedom to practise religion to everyone, it could not tolerate widespread discrimination which would result in large parts of the population being excluded access from significant places of worship. It sought to do this in a variety of ways.

An overriding provision which deals with this situation is Article 17 of the Constitution which totally abolishes 'untouchability' and makes the practice of untouchability in any form an offence punishable in accordance with law. Since the practice of untouchability was one of the main grounds on which entry into temple was prohibited for large section of Indian population, the abolition and criminalisation of such a practice has no doubt on its own had the effect of removing an obnoxious method of excluding people from the right to worship.

Secondly, it provided in Article 25(2)(b) that the right to freedom of religion would not affect the operation of any existing law or prevent the State from making any law providing for social welfare and reform or the throwing opening of Hindu religious institutions to all classes and sections of Hindus. The significant explanation to this sub-article stipulates that the

reference to Hindus shall be construed as including reference to persons professing Sikhism, Jainism or Buddhist religion

This sub-article is of enormous importance and demonstrates the reformatory and forward-looking nature of the Indian Constitution which envisages legislation to achieve the object of social welfare and reforms against existing religious practices.

Following the enactment of the Constitution almost every State in the country has enacted legislation to make it obligatory for religious institutions of a public character to throw open their doors to all classes and sections of the concerned religion. The Supreme Court of India has, from the the very beginning, supported the throwing open of public temples to people hitherto excluded from such institutions. An early example of this can be found in the celebrated 1958 judgment in *Venkatarama Devaru v State of Mysore*.[4]

The same question has arisen in the case of the Sabarimala temple in the State of Kerala which, for religious doctrinaire reasons, excludes women between the ages of 10 and 60 from entering the hilltop temple of Lord Ayyappa at Sabarimala. The question which has been raised is whether in the light of the fact that from the early 1950s the State of Kerala has enacted a law in line with Article 25(2) (b) which stipulates that all Hindu temples of a public character in the State of Kerala shall allow all classes and sections of Hindus into the temple for worship, women between the ages of 10 and 60 (who are undoubtedly a section or a class of Hindus) can be excluded from entry into the temple. The question is still awaiting adjudication.

A third aspect is found in Article 15(2)(b) which prevents any discrimination in the use of wells, tanks, bathing ghats and roads and places of public resort which are dedicated to the use of general public. Many places of worship in India include wells, tanks and bathing ghats and places of public resort.

Another provision of the Constitution which has a bearing on this aspect is Article 13 of the Constitution which states that all laws in force which are inconsistent with the provisions of the Chapter on fundamental rights would, to the extent of such inconsistency, be void and 'law' includes any custom or usage having the force of law in the territory of India. The custom of excluding women from the Sabarimala Temple has been challenged on the ground that it is a custom inconsistent with Articles 13 and 14 of the Constitution (as well as other constitutional provisions) and that challenge is currently pending adjudication.

Finally, it must be pointed out that these reformatory provisions in the Indian Constitution do not, prima facie, apply to the followers of Islam. Indeed women are excluded from worship in many places of worship associated with that religion. In some such institution the followers of the faith have voluntarily removed such restriction; but whether either through legislation or by the application of constitutional principles such institutions can also be thrown open to women is a matter that is pending decision before the Supreme Court of India.

Conclusion

If there is any truth in the idea that India is the spiritual heart of the world then it must follow that we should be able to lead world thought on how to protect everybody's right to practise their faith and to minimise conflict arising between different faiths and denominations. In the opinion of this author, the Indian Constitution – and the interpretation given to it by Indian Courts – is one viable model for achieving this goal.

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[4] AIR 1958 SC 255.

The Right to Die with Dignity: a Basic Human Right?

Robert Francis

Introduction

"In this world, nothing is certain except death and taxes", said Benjamin Franklin. When he wrote that death was indeed a phenomenon that was ever present and potentially imminent, Franklin himself died some five months later at what was then an exceptional age of 84.[1] What may have turned out to be less certain in modern times has been the length and quality of life leading up to death. Medical advances have had the positive result of substantially increasing life expectancy. Less positively, this has led to an increasing population suffering from multiple co-morbidities dependent on a decreasing proportion of the economically active and healthy. In an increasingly secular world, the solace of an afterlife, coupled with a recognition of an absolute sanctity accorded to God-given life, offered in religion, is faced with a growing acceptance of the concepts of personal autonomy and choice with regard to the manner of living and, perhaps the means and timing of death.

There are few more sensitive subjects to confront a legal system than its treatment of the end of life. Most legal systems recognise the importance of human life and the need to protect and respect it. The roots of such recognition lie in the religious, cultural and instinctive respect for life as a supreme or superior value in itself. The extent to which what is often called the sanctity of life is accorded an absolute priority varies. Thus there remains acceptance in some countries, though perhaps a decreasing number, of a judicially imposed death penalty for serious crime. At the other end of the scale deliberate killing of another is universally outlawed unless this is for a legally recognised justification, such as lawful execution or self-defence.

While death remains an inevitability, its timing may be influenced. Medical science now offers the choice of an increasing range of treatments which are capable of prolonging life, either by curing or mitigating previously fatal disease, but also of reducing the pain and distress caused by illness. Sometimes interventions designed to reduce pain and suffering come at the cost of side effects which reduce life expectancy. Such options inevitably give rise to the contrary choices of not offering life-prolonging treatments or of increasing the intensity of pain relief, which, whether or not intentionally, may result in an acceleration of death. These developments also offer choices with regard to the quality of life that may be available: these inevitably raise questions about what is and what is not intolerable suffering. In the background to a discussion of these issues lies the availability – throughout the history of man and womankind – of substances capable of bringing about an immediate end of life. Some of these can be self-administered, others cannot.

Legal consideration of measures

In discussing this ethically and morally challenging field it is helpful to divide legal consideration of measures that might be taken in association with a person's death into categories. One way of expressing such measures was provided in the Supreme Court of India by DY Chandrachud J,[2] as he then was, in *Common Cause v Union of India*:

- Involuntary euthanasia refers to the termination of life against the will of the person killed
- Non-voluntary euthanasia refers to the termination of life without the consent or opposition of the person killed.
- Voluntary euthanasia refers to the termination of life at the request of the person killed
- Active euthanasia refers to a positive contribution to the acceleration of death
- Passive euthanasia refers to the omission of steps which might otherwise sustain life.

However, for the purpose of this article, four measures are identified which need to be distinguished in the context of the wish of many to have a dignified, peaceful and pain-free death, and, for some, at a time of their choosing. While the public debate often confuses or merges these measures each brings different legal factors into play. They are:

- *Suicide* – death caused by an act of person intending to kill themselves;
- *Withholding or withdrawal of treatment resulting in death* – withholding or ceasing treatment with the intention of allowing an underlying condition to cause death;
- *Assisted suicide* – providing to a person to means for them to kill themselves; and
- *Active euthanasia* - a positive act by a third party intending to cause the death of a third person in order to bring their suffering to an end.

These interventions will be examined principally from the perspective of the law – both judge-made and statutory – of England and Wales, but reference will also be made to the law and practice in some other jurisdictions. However an article of this length cannot aspire to more than a cursory examination of examples of different approaches.

[1] *https://www.snopes.com/fact-check/death-and-taxes-quote/* - from a letter written by Benjamin Franklin to Jean-Baptiste Le Roy on 13 November 1789. The full quotation is: *"Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes."*

[2] 2018 SCC 1; [2018] AIR 1665, 1800 para 368. Dr Chandrachud is now Chief Justice of India.

Suicide

At common law prior to the intervention of statute, the killing, whether of another or of oneself was recognised as a crime. The intellectual basis of this was based on religious concepts and the acceptance of an almost absolute priority to be given to the sanctity of human life. Suicide at common law was explained by Blackstone as having two dimensions:

> one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.[3]

Thus in discussing the justification for capital punishment and the need for caution in imposing it, Blackstone stated:[4]

> To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority : for life is the immediate gift of God to man; which neither he can resign, nor can resign, nor can it be taken from him, unless by the command or permission of him who gave it ; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

In discussing homicide Blackstone observed:[5]

> Of crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great creator; and which therefore no man can be entitled to deprive himself or another of, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation

So it followed that killing oneself was a serious crime:[6]

> SELF-MURDER, … the law of England wifely and religiously confiders, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest, crimes, making it a peculiar species of felony, a felony committed on oneself. A felo de se therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death… The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all…

Obviously, punishment for this offence could not be inflicted directly on the offender, although Blackstone refers to the driving of a stake through their body, but their property could be forfeited and returned to the Crown. Thus the somewhat illogical position at unbridled common law is that a failed suicide gives rise to liability, a punishment which a successful suicide cannot.

Decriminalisation

In modern times suicide has been decriminalised by statute the UK,[7] and in many other jurisdictions.[8] For example, the European Court on Human Rights, in upholding the Swiss Federal Court in a decision accepting the legitimacy of rules restricting the prescription of lethal medication to an intending suicide, started from the premise that[9]

> an individual's right to decide by what means and at what point in his or her life will end, provided he or she is freely reaching a decision on this question is one of the aspects of private life within the meaning of Article 8 of the Convention.

The issue was whether, assuming that there was an obligation on the State to facilitate suicide with dignity, the legal restrictions were an interference with this right which was, as required by Article 8(2), proportionate and in accordance with law and took appropriate account of Article 2. The Court held that the Swiss restrictions were, having regard to the wide margin of appreciation appropriate in this field, of such a character.

Thus a person who is legally competent to take their own decisions and is not incapacitated by a suicidal mental illness can take their own life without assistance. That is not to say that there are no consequences for the estate of a person who has killed themselves. Life insurance companies tend to impose conditions which restrict entitlement to the benefits available on death by suicide, particularly if no mental disorder is involved and if the death occurs soon after the commencement of the policy.[10]

The fact that an act has been decriminalised does not necessarily mean there is an absolute right to commit it. Thus first responders who attend an attempted suicide are likely to be justified in intervening to sustain life – at least to the point where the individual recovers sufficient capacity to consent to or refuse further treatment. In the case referred to in the previous paragraph the ECHR held that a right to choose when

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3 Blackstone, *Commentaries* (1765-1770), Book 4, Ch 14, p 189.

4 Ibid, Book 4 p 11, *https://avalon.law.yale.edu/18th_century/blackstone_bk4ch1.asp*.

5 Ibid, Book 4 Ch 14 p 177, *https://avalon.law.yale.edu/18th_century/blackstone_bk4ch14.asp*.

6 Ibid, Ch 14 p 189, *https://avalon.law.yale.edu/18th_century/blackstone_bk4ch14.asp*.

7 Suicide Act 1961 s 1.

8 For what purports to be an extensive list of the legal position throughout the world [unverified by the writer] see *https://en.wikipedia.org/wiki/Suicide_legislation*.

9 *Haas v Switzerland* ECHR Appln No 31322/07 paras 50-61 20 January 2011, *https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-102940%22]%7D*.

10 In India there is a regulatory requirement for a clause In life insurance contracts addressing the issue *https://life.futuregenerali.in/life-insurance-made-simple/life-insurance/does-life-insurance-policy-cover-suicidal-death/*.

and how to commit suicide does not mean there is a "right to die",[11] a point considered further below. Indeed Article 2 of the ECHR imposes an operational duty on the state, when caring for a mentally ill patient who is in real and immediate danger of committing suicide, to take reasonable steps to prevent this, whether or not the patient has been formally detained in hospital under mental health legislation.[12]

Withholding or withdrawal of treatment resulting in death

In the law of England and Wales withholding or withdrawing life sustaining treatment is not necessarily unlawful and essentially depends on, firstly, whether this requires an act or an omission to terminate treatment, and secondly whether it would be unlawful to provide or continue treatment. The authority to give or stop treatment at all depends on the existence of either the decision of a mentally competent patient, or, in the case of the mentally incompetent, on the decision of a duly authorised third party or court. Essentially it is lawful to withhold or discontinue treatment either where this is "futile" or where the mentally competent patient withholds or withdraws consent, even if the result is likely to be the death of the patient.

An act or an omission?

In the case of medical treatment a distinction must be drawn between what the law regards as a positive act causing death on the one hand, and an omission to act, followed by death from an underlying cause, on the other. For example the administration by a doctor of a lethal injection with the intention of causing death is unlawful homicide, whereas an omission to continue treatment which has no prospect of producing a recovery in a persistent vegetative state (PVS) patient, such as stopping the supply of nutrition via a naso-gastric tube may be lawful. Thus in *Airedale NHS Trust v Bland*[13] Lord Goff of Chievely put it this way:

> I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition; and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient.

Lord Goff distinguished the withdrawal of, say artificial ventilation by a doctor, from the switching off of the machine by an "interloper" because the latter was an active intervention in the doctor's intended prolongation of life:[14]

> Although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission.

In the end for Lord Goff the distinction was founded in a proper understanding of the doctor's duty of care to their patient. They may be under a duty to offer effective treatment, where it is available, but there is no duty to continue treatment beyond what was clinically effective. This has to be distinguished from the deliberate administration of a lethal injection designed to end life:[15]

> whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony.

It can be argued that this distinction between acts and omissions is artificial,[16] and that the better distinction is between care for the patient, the principal intention of which is the benign one of the alleviation of pain, or the cessation of treatment which is reasonably considered to be futile, and an act or omission the principal intention of which is to bring the patient's life to an end. Such an approach would apply what is known as the doctrine of double effect to both acts and omissions. Where the intention behind the act or omission is the alleviation of suffering, that would be regarded as a lawful act, even if the doctor is aware that the likely result will be the shortening of life, but that it would be unlawful to bring a life to an end, whether by an act or omission, as the only [or even best] means of alleviating suffering. In simpler terms this could be described as the difference between trying to alleviate suffering and trying to end the life of the patient. An even better approach which avoids concern as to whether there has been an act or omission at all is that advocated by Lady Hale in *Aintree University Hospitals NHS Foundation Trust v James*,[17] considering why the provisions of the 2005 Act refer to "acts" not "omission":

> The reason for this, in my view, is that the fundamental question is whether it is lawful to give the treatment, not whether it is lawful to withhold it.

The adult patient with mental decision-making capacity

The common law is clear that an adult with the capacity to make a decision about medical treatment is entitled to refuse medical treatment even if the treatment is capable of being

11 See *Haas* para 52.

12 *Savage v South Essex Partnership NHS Trust [2008] UKHL 74*; *Rabone v Pennine Care NHS Trust* [2012] UKSC 2. The author appeared as counsel for the deceased patient's parents in *Rabone* at first instance.

13 [1993] AC 789, 866.

14 Ibid.

15 Ibid.

16 Indeed Lord Lowry in the same case voiced his disagreement with the approach of Lord Goff and the rest of the majority on this point [ibid, at p 875]. For other speeches agreeing with the Goff approach see Lord Keith of Kinkel [ibid] page 859], Lord Browne-Wilkinson [ibid at p 881-882], Lord Mustill [ibid at p 893, 898].

17 [2013] UKSC 67; [2014] AC 591 para 20.

effective, and even if the result is likely or even certain to be death. As Lord Goff said in *Bland*:[18]

> … it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so.

Therefore it is unlawful for treatment to be imposed on a competent patient who refuses such treatment and in many cases such an intrusion on their autonomy will be an assault and a breach of their human rights – in the case of the ECHR, Article 8. Thus where a young patient in her 20s with full capacity who was completely paralysed and dependent on artificial ventilation for life following a serious spinal malformation, the hospital whose staff had refused to remove the ventilation was held vicariously liable to her for an assault and breach of her rights and damages were awarded. This was so even though the treating clinical staff believed that the patient would be able to enjoy a reasonable quality of life at home with portable ventilation equipment and nursing care and that she could not appreciate the benefits of such interventions unless she had tried them. The patient profoundly disagreed with this assessment and asserted her right to judge such matters for herself. The court had no hesitation in upholding her right to refuse and ruled that the hospital's duty in these circumstances was to transfer her to the care of clinical staff who were willing to respect the patient's autonomy. Damages were awarded for the assault and breach of Article 8.[19]

Some ethicists, while conceding the clarity of the law, question whether it is right always to give primacy to the principle of autonomy over that of beneficence.[20] However the law is clear as can be seen from the authorities cited by the judge: the choice of the competent takes priority over other considerations, whether given at the time treatment is offered or being provided or in advance. See for example:

Lord Reid in *S v McC; W v W*:[21]

> … English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.

Lord Goff of Chievely in *In re F (Mental Patient: sterilisation)*:[22]

> I start with the fundamental principle, now long established, that every person's body is inviolate.

Lord Donaldson of Lymington in *re T (Adult: refusal of medical treatment)*:[23]

> … the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent.

Butler-Sloss P in the same case, citing a Canadian case:[24]

> The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority.

In *re MB (Medical Treatment)* she said:[25]

> A mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death.

Lord Keith of Kinkel in *Airedale NHS Trust v Bland*:[26]

> ... the principle of the sanctity of life, which it is the concern of the state, and the judiciary as one of the arms of the state, … is not an absolute one. It does not compel a medical practitioner on pain of criminal sanctions to treat a patient, who will die if he does not, contrary to the express wishes of the patient.

Lady Black in *An NHS Trust v Y*:[27]

> … it is unlawful to administer medical treatment to an adult who is conscious and of sound mind, without his consent; to do so is both a tort and the crime of battery. Such an adult is at liberty to decline treatment even if that will result in his death, and the same applies where a person, in anticipation of entering into a condition such as PVS, has given clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive.

It is important to emphasise that in such a case the death of a patient with decision making capacity following a refusal of life sustaining treatment is not suicide:[28]

> … in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient

18 [1993] AC 789, 864.

19 [19.] *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) [2002] 1 FLR 1090, [2002] Lloyds Rep Med 265. Butler-Sloss P. The author appeared as counsel for the hospital trust.

20 See for example Huxtable, *Re B (Consent to Treatment: Capacity) A right to die or is it right to die?* Heinonline *https://heinonline.org/HOL/LandingPage?handle=hein.journals/chilflq14&div=32&id=&page=*.

21 [1972] AC 25, 42.

22 [1990] 2 AC 1, 72.

23 [1993] Fam 95, 113.

24 Ibid, at 116; the Canadian case was *Malette v Schulman* 67 DLR (4th) 321, 336.

25 [1997] 2 FLR 426; for a Canadian case similar to MB's *see Nancy B v Hôtel-Dieu de Québec et al.* (1992) 86 DLR (4th) 385,. The author appeared in *MB* as counsel for the patient.

26 [1993] AC 789, 839; see also Lord Goff of Chievely at 864, Lord Mustill at 891, 1062.

27 [2018] UKSC 46 July 2018 para 21i.

28 Ibid at 864, per Lord Goff of Chievely.

has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

Children and adults without decision-making capacity

Where the patient is a child or an adult lacking the relevant mental decision-making capacity, withholding or withdrawal of treatment is lawful if this is in accordance with responsible medical practice and is in the best interests of the patient. Where the patient lacks the capacity to consent to treatment and the treatment to be withdrawn consists of artificial nutrition or hydration or where there is a dispute about the patient's best interests, the issue of whether continued treatment is in the patient's best interests can be determined by the court. In *Bland* the House of Lords gave guidance that generally proposals to withdraw artificial nutrition and hydration should be referred to the court, but more recently that guidance has been rescinded by the Supreme Court, so long as the provisions of the Mental Capacity Act 2005 [which of course had not been in place at the time of the *Bland* case] and good medical practice had been followed and there was no dispute with the patient's family or other interested persons, or other cause for doubt.[29]

In England and Wales the Mental Capacity Act 2005 follows the common law in defining capacity: a person lacks the mental capacity to make decisions of any kind, including those concerning medical treatment if they are unable by reason of an impairment or disturbance of the mind or brain:[30]

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

Every adult and every child of appropriate maturity is presumed to have the relevant capacity which the abilities of which must be tested against the actual decision to be made rather than as a matter of generality. Where capacity to make the relevant decision is lacking profound moral, legal and ethical issues arise when decisions have to be made about life sustaining treatment. The legal answer in England and Wales is that where a patient lacks capacity treatment may *only* be provided where it is in the best interests of the patient to receive it.[31] Thus where life sustaining treatment ceases to be in the patient's best interests it should be withheld or withdrawn as the case may be. Treatment will not be in the patient's best interests where it is futile and where no recovery will occur.

Proposals to withdraw artificial nutrition and hydration from patients suffering from a permanent vegetative state have been regarded as particularly sensitive, if not controversial, and until recently good practice in England and Wales have required judicial approval of them. Since *Bland* which introduced the practice the cases in which the court has been prepared to authorise such withdrawal have expanded from strict diagnosis of a permanent vegetative state to patients in a minimally conscious state, collectively known as "prolonged disorder of consciousness". The Supreme Court has decided that, since the passing of the Mental Capacity Act 2005, the associated code of practice and other guidance provided a sufficient protective framework in law and practice, it was no longer justifiable to require the court's permission to be obtained for withdrawal, although the court was available in cases of uncertainty or dispute.[32] It should be noted that in the Court's opinion in these cases[33]

> the fundamental question facing a doctor, or a court, considering treatment of a patient who is not able to make his or her own decision is not whether it is lawful to withdraw or withhold treatment, but whether it is lawful to give it. It is lawful to give treatment only if it is in the patient's best interests. Accordingly, if the treatment would not be in the patient's best interests, then it would be unlawful to give it, and therefore lawful, and not a breach of any duty to the patient, to withhold or withdraw it.

It is clear from the judgment of the court that they saw no distinction to be drawn in this regard between withdrawal of treatment from cases of prolonged disorders of consciousness (PDOC) or others with a degenerative neurological condition or other critical illness.[34] There has been some criticism of this decision on the ground that it heralds a return to "medical paternalism" when in other areas, such as that of informed consent, or the standard of care, the direction of travel had been away from leaving decisions in the hands of the medical profession without the external judicial scrutiny of what is reasonable or responsible.[35]

The other major procedural development since *Bland* has been the expansion of the role of the Court of Protection

29 *An NHS Trust v Y* [2018] UKSC 46, July 2018.

30 *Mental Capacity Act 2005* ss 2, 3(1); for the common law see *re C {Adult)(Refusal of Treatment)* [1994] 1 WLR 290, 295; *re MB (Medical treatment)* [supra]; *Cruzan v Director, Missouri Department of Health* [1990] 110 S Ct 2841, US Supreme Court.

31 The factors that can and cannot be taken into account are defined in the Mental Capacity Act 2005 section 4. In brief summary age, appearance and anything leading to "unjustified assumptions" should be disregarded. Relevant factors include, the permanence or otherwise of the incapacity, the present and past wishes expressed by the patient, their beliefs and values and other factors the patient would be likely to consider if able to do so, the views of those close to the patient as to what the patient's wishes might have been if able to express them. A decision to withdraw life sustaining treatment must not be motivated by a desire to bring about the patient's death.

32 *An NHS Trust v Y* [2018] UKSC 46, distinguishing *In re F (Mental Patient: Sterilisation)* and *Airedale NHS Trust v Bland* (above), not approving *In re M (Adult Patient) (Minimally Conscious State: Withdrawal of Treatment)* [2011] EWHC 2443 (Fam), [2012] 1 WLR 1653; approving *R v (Burke v General Medical Council* [2006] QB 273, *In re Briggs (Incapacitated Person)* [2018] Fam 62, *In re M (Incapacitated Person: Withdrawal of Treatment)* [2017] EWCOP 18, [2018] 1 WLR 465 and following the European Court of Human Rights in *Burke v UK* (Application No 19807/0) 11 July 2006, *Lambert v France* (2016) 62 EHRR 2.

33 *An NHS Trust v Y* at para 92.

34 Ibid, para 119.

35 Foster, *The rebirth of medical paternalism: AN NHS Trust v Y* (2018) 45 JME issue 1 page 3 *https://jme.bmj.com/content/45/1/3*.

by the Mental Capacity Act 2005 to give it jurisdiction over the health and welfare of persons lacking capacity, thus replacing the inherent parens patriae jurisdiction. The Court is expressly empowered[36] to make decisions on behalf of an incapacitated person, thus, in many cases avoiding the need to make declarations as opposed to directly deciding on a patient's behalf whether or not to authorise treatment. The Act also provides a regime for the making and registration of lasting powers of attorney under which a person of sound mind may a appoint an attorney to make treatment and other decisions if the donor is incapacitated from doing so.

The position of parents

Unfortunately the cases which have most troubled to courts in recent times have been those concerning proposals to withdraw treatment from children. While the test to be applied is superficially simple, namely what is in the best interests of the child, profound challenges can arise where a proposal to stop life sustaining treatment of a small seriously ill child is opposed by their parents. Two cases in particular have been played out in the media over lengthy periods of time, those concerning Charlie Gard and Archie Evans. Space does not allow for a full analysis of the legal processes but a brief description demonstrates the challenge.

The case of Charlie Gard[37] raised these issues in stark form. Charlie suffered from an extremely rare and incurable mitochondrial DNA depletion syndrome which had led to paralysis and an inability to breathe without artificial ventilation. The treating doctors, supported by the hospital's ethics committee, considered that his quality of life was and would remain so poor that he should not be subjected to long term ventilation, which would have required a tracheostomy. Charlie's parents disagreed, believing that a treatment offered in the USA might assist him. The attending medical team considered this treatment would be futile. An application was made to the Family Court where Francis J [no relation] ruled that it would be in Charlie's best interests for treatment to be discontinued in spite of the parent's wishes. The parents' appeal to the Court of Appeal was dismissed and the Supreme Court refused permission to appeal to it. The parents then approached the ECHR which also dismissed their appeal.

The legal process did not quieten the public furore that had now developed. Support was voiced by Pope Francis and President Donald Trump. Further medical experts came forward to support the treatment offered in the USA. As a result, the hospital returned to Francis J to allow him to consider this new evidence. At a four-day hearing at which the parents were legally represented on a pro bono bias, the judge was not persuaded to change his order. Further examinations and tests were ordered. Following a multi-disciplinary meeting involving this wider group of experts the parents withdrew their appeal having accepted that further treatment would not assist Charlie. The case had involved multiple legal hearings, conducted in the full glare of the media and considerable pressure on the legal system, not to mention the demands on the resources of the hospital and the stress and distress of the parents.[38]

Another patient, Archie Evans, developed a neurogenerative brain disorder of unknown cause which led quickly to the total disintegration of the substance of his brain. He lost the capacity for sight, hearing, taste, sense of touch and thought. The unanimous medical opinion was that the condition was irreversible. The treating doctors view was that it was in Archie's best interests to withdraw artificial ventilation, hydration and fluid on which his continued life depended. Although his parents vehemently opposed this proposal, the court approved withdrawal as being in his best interests, and,[39] after multiple proceedings in domestic and European courts, that decision was upheld. The alternative offers of treatment put forward in the Vatican and in Germany did not hold out any prospect of reversing the condition or do more than offering some chance of extending a vegetative or semi-vegetative condition, even if it was arguably unlikely that such care would actually cause any harm – apart from the infliction of futile treatment itself. Throughout proceedings the courts were clear what while the parents' opposition had to be taken into account and respected, in the end it was the assessment of best interests that prevailed.

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36 Mental Capacity Act 2005 s 16.

37 Without purporting to be a full list of hearings and judgments in the case the following may be noted: 11 April 2017 *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWHC 972 (Fam) Francis J (granting application for withdrawal of treatment). 23 May 2017 *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* Court of Appeal [2017] EWCA Civ 410; 2017] MedLR 417. 8 June 2018 Supreme Court refuses permission: not arguable that UK courts lacked jurisdiction to make order or that it should not be made by reference to best interests. *https://www.supremecourt.uk/news/permission-to-appeal-hearing-in-the-matter-of-charlie-gard.html*. 13 June 2017 *Gard and others v UK App* Application 39793/17 [2017] ECHR 559 (interim measures granted pending decision). 19 June 2017 Supreme Court "with considerable hesitation" direct further stay pending ECHR proceedings, *https://www.supremecourt.uk/cases/docs/charlie-gard-190617.pdf*. 27 June 2017 *Gard v UK (Admissibility)* (2017) 65 EHRR SE9; [2017] 2 FLR 773 (ruled that complaint manifestly ill-founded. 10 July 2017 *Re Gard* [2017] 7 WLUK 179 (application for judge to recuse himself on ground of bias refused. 24 July 2017 *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates (no 2)* [2017] EWHC 1909 (Fam) [2017] 4 WLR 131 Francis J (application to affirm order of 11 April 2017 granted after 4 day hearing of application).

38 For a very detailed ethical critique of this case see: Wilkinson, Savulascu *Ethics, conflict and medical treatment for children: from disagreement to dissensus* (2018) Elsevier, London *https://www.ncbi.nlm.nih.gov/books/NBK537987/*.

39 The hearings and judgments in the public domain were: 20 Feb 2018 2018 EWHC 308 (Fam) Hayden J 06 Mar 2018 2018 EWCA Civ 550 King, McFarlane, McCombe LJJ 20 Mar 2018 Supreme Court (refusal of permission) *https://www.supremecourt.uk/cases/docs/alfie-evans-order-200318.pdf*, Lady Hale, Lord Kerr, Lord Wilson 28 Mar 2018 2018 ECHR 297 (14238/18) 11 Apr 2018 2018 EWHC 818 (Fam) Hayden J 16 Apr 2018 2018 EWCA Civ 805 Davis, King, Moylan LJJ 20 Apr 2018 Supreme Court: In the matter of Alfie Evans No 2 *https://www.supremecourt.uk/docs/in-the-matter-of-alfie-evans-court-order.pdf*, Lady Hale, Lord Kerr, Lord Wilson 23 Apr 2018 2018 ECHR 357 (188770/18) 24 Apr 2018 2018 EWHC 953 (Fam) Hayden J 25 Apr 2018 2018 EWCA Civ 984 McFarlane, King, Coulson LJJ

This was succinctly summed up by the Supreme Court in refusing permission to appeal:[40]

> 16. …Doctors need to know what the law requires of them. The founding rule is that it is not lawful for them (or any other medical team) to give treatment to Alfie which is not in his interests. A decision that, although not in his best interests, Alfie's continued ventilation can lawfully continue because (perhaps) it is not causing him significant harm would be inconsistent with the founding rule
>
> 17. We are satisfied that the current law of England and Wales is that decisions about the medical treatment of children, like those about the medical treatment of adults, are governed by what is in their best interests. We are also satisfied that this does not discriminate against the parents of children such as Alfie in the enjoyment of their right to respect for their family life because their situation is not comparable with that of the parents of children who are taken away from them by the state to be brought up elsewhere

This raises the question whether it is indeed right for the parents' bona fide and understandable views as to their child's best interests should be capable of being overridden in this way, particularly if little or no harm in terms of suffering was likely to result from following them. The opposite view might be that even without inflicting pain to impose futile treatment would in itself be an interference with the patient's dignity. Ethicists have pointed to the dangers in describing treatment as "futile" as what this means may depend on the beholders ethical standpoint and values.

Medically assisted suicide

Medically assisted suicide can be described as the provision to a patient of the means to end their own life. In an attempt to clarify the terminology in what is often a heated debate, the British Medical Association has proposed two definitions to cover different types of assistance:[41]

- Assisted dying: *prescribing life ending drugs for terminally ill, mentally competent adults to administer themselves after meeting legal safeguards*
- Assisted suicide: *giving assistance to die to people with long term progressive conditions and other people who are not dying, in addition to patients with a terminal illness*

Without legislation the common law would regard either of these as assisting suicide. In England and Wales this is unlawful by virtue of statute and in punishable by up to 14 years imprisonment.[42] Prosecutions can only be brought with the consent of the Director of Public Prosecutions, which while emphasising that assisting suicide is not decriminalised – that is a matter for Parliament - a discretion not to prosecute may be exercised where the public interest factors against a prosecution outweigh those in favour of it. The factors which will make a prosecution less likely are:

- the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
- the suspect was wholly motivated by compassion;
- the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
- the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
- the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
- the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.[43]

Since that policy came into force the number of cases forwarded for prosecution has been relatively small. Between April 2009 and March 2022, 174 cases of alleged assisted suicide were referred to the CPS by the police. Of these 148 were not proceeded with by the CPS or withdrawn by the police. The report does not describe what happened in the balance of cases but the CPS report of April 2022 stated that four cases had been "successfully" prosecuted, one case ended with an acquittal in March 2015, and eight were referred for prosecution for homicide or other serious crime.[44]

This position has been heavily criticised because of the uncertainty and distress this causes well intentioned family members who wish to support their gravely ill loved ones in the wish to end their suffering.[45] This has not infrequently come to the fore as an issue for relatives who have assisted, or have wished to assist relatives to travel to Switzerland to take advantage of the services of Dignitas.[46] Those services, if provided in England and Wales, would be unlikely to attract a favourable exercise of the prosecutor's discretion for those involved in assessing the applicant, and providing the relevant prescription. Those in favour of legalising assisted suicide point to the illogicality of "forcing those who wish to obtain such assistance to go tote expense, and stress or travelling to Switzerland. The Swiss Criminal code only criminalises assistance of suicide where the

40 *https://www.supremecourt.uk/cases/docs/alfie-evans-order-200318.pdf.*

41 *Assisted dying*: British Medical Journal https://www.bmj.com/assisted-dying . They offer a third definition: voluntary euthanasia: *a doctor directly administering life ending drugs to a patient who has given consent*. In law this is homicide and is addressed above.

42 Suicide Act 1961 section 2

43 *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* Crown Prosecution Service February 2010, updated October 2014 *https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide.*

44 *Assisted Suicide* April 2022, Director of Public Prosecutions *https://www.cps.gov.uk/publication/assisted-suicide.*

45 See for example *https://www.theguardian.com/uk-news/2013/aug/18/two-arrested-assisted-suicide-dignitas* Observer 18 August 2013.

46 For a description of the way Dignitas operates see its online brochure at *http://www.dignitas.ch/images/stories/pdf/so-funktioniert-dignitas-e.pdf.*

assistance is provided for "selfish motives".[47] However that does not extend to a right to assistance with suicide from either the State or an individual.

Assisted dying [as defined by the BMJ, see above] is also legal in certain states of the USA: California, Colorado, Hawaii, Montana, Oregon, Vermont, Washington, and in Washington, DC, and also the state of Victoria, Australia. Assisted suicide is legal in Switzerland.

As an example, Oregon's Death with Dignity Act[48] came into effect in 1997 after considerable public and legal debate. It applies only to adults who have been diagnosed as terminally ill to whom it makes assisted suicide available. There is no requirement of unbearable suffering. What it permits is the issue of a prescription of life terminating drugs which the patient takes for themselves.

In England and Wales various attempts have been made in Parliament to introduce legislation to legalise assisted suicide: the Assisted Dying Bill,[49] a private members Bill was before Parliament in 2021. Such Bills have each been met with detailed and impressive debate about the ethics and practicalities of the measures proposed but in each case the Bill has failed to complete a passage through Parliament.[50]

Euthanasia or mercy killing

Euthanasia in this sense is causing the death of another with the intention of relieving their [at least implicitly, intolerable] suffering. In Belgium statute defines euthanasia as an act carried out by a third party which intentionally ends the life of an individual at their request.[51] Without legislation in the common law world, the benign motive is no defence – taking of the life of another with the intention of doing so or of causing serious harm is unlawful homicide and almost invariably murder as euthanasia involves a deliberate act performed with the intention of ending life. Euthanasia is now permitted under various conditions by statute in the Netherlands, Belgium, Luxembourg and Canada, in the latter case for patients whose death is "reasonably foreseeable".

In the United Kingdom the common law remains in force. Repeated attempts by parliamentarians to legislate in favour of assisted suicide have failed,[52] but all such Bills, including the recent Assisted Dying Bill[53] would have retained the prohibition on a health professional administering medicine with the intention of causing the patient's death.[54] Nonetheless the DPP is conducting a public consultation in relation to the guidance given to prosecutors in this type of case.[55] The DPP has defined "mercy killing" for this purpose as "*any killing in which the suspect believes they are acting wholly out of compassion for the deceased*". It includes cases where the "victim" is seriously physically unwell and unable to undertake thee act to cause death themselves and may have asked the suspect to do it. The DPP's overarching test for deciding whether to prosecute is a two stage one: firstly to decide whether there is sufficient evidence to provide a realistic prospect of a conviction; secondly whether it is in the public interest to prosecute. The proposed new guidance sets out non exhaustive lists of public interest factors in favour tending in favour and against prosecution. Those in favour of prosecution include mattes such as the victim's youth, absence of capacity or a settled and informed decision to end their life, pressure, absence of close relationship, use of excessive force. The final such factor is that:

> the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care. [This

47 Art 115 of the Swiss Criminal Code. It is also notable that the Code provides for a relatively low penalty in the case of a mercy killing: Article 114 provides "*Any person who for commendable motives, and in particular out of compassion, causes the death of a person at that person's own genuine and insistent request shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.*"

48 This description is gratefully taken from the House of Lords report on the Assisted Dying for the Terminally Ill Bill [see below].

49 Introduced by Baroness Meacher in the House of Lords 8 October 2021: see *https://lordslibrary.parliament.uk/assisted-dying-bill-hl/* ; 2nd reading debate 22 October 2021 at which the Bill was committed to a committee of the whole House, but the Bill fell on the end of the parliamentary session. A similar fate earlier befell the Assisted Dying for the Terminally Ill Bill 2004- 2005. This was proposed by Lord Joffe, *https://publications.parliament.uk/pa/ld/ldasdy.htm* but not before a House of Lords Select Committee had published a very thorough report on the legal and ethical issues. The Bill would have legalised both assisted suicide and voluntary euthanasia. The Committee's report on the Bill *https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/8602.htm* included an observation that remains constantly relevant: *While opinion has often been divided within our Committee on both the principles underlying the ADTI Bill and on its practical effects, there has been unanimity on one point at least—that, while the most careful account must be taken of expert evidence, at the end of the day the acceptability of assisted suicide or voluntary euthanasia is an issue for society to decide through its legislators in Parliament.* Report § 11

50 For the very helpful briefings published by the UK Parliamentary authorities see Lipscombe et al *The Law on assisted suicide* House of Commons Library 1 July 2022, *https://researchbriefings.files.parliament.uk/documents/SN04857/SN04857.pdf* ; Gajjar & Hobbs *Assisted dying* UK Parliament POSTbrief 26 September 2022, *https://researchbriefings.files.parliament.uk/documents/POST-PB-0047/POST-PB-0047.pdf.*

51 S 2 of the Law of 28 May 2002: the requirements are that a person (a) "does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) [the] act was intended to encourage or assist suicide or an attempt at suicide".

52 See above cl 4(5).

53 The Assisted Dying Bill 2014 introduced in the House of Lords by Lord Falconer (lapsed) The Assisted Dying (no 2) Bill 2015 *https://publications.parliament.uk/pa/bills/cbill/2015-2016/0007/16007.pdf* (rejected on a vote in the House of Commons) *https://www.theguardian.com/society/2015/sep/11/mps-begin-debate-assisted-dying-bill.*

54 *Consultation on public interest guidance for suicide pact and 'mercy killing' type cases*, 14 January 2022 *https://www.cps.gov.uk/consultation/consultation-public-interest-guidance-suicide-pact-and-mercy-killing-type-cases/*. The consultation is closed but no further guidance has as yet been issued.

55 *Proposed changes to 'Homicide: Murder and Manslaughter Guidance'* CPS, *https://www.cps.gov.uk/proposed-changes-homicide-murder-and-manslaughter-guidance.*

factor does not apply merely because someone was acting in a capacity described within it: it applies only where there was, in addition, a relationship of care between the suspect and the victims such that it will be necessary to consider whether the suspect may have exerted some influence on the victim.]

Suggested factors tending against prosecution include:

- the victim had reached a voluntary, clear, settled and informed decision to end their life;
- the suspect was wholly motivated by compassion;
- the victim was seriously physically unwell and unable to undertake the act;
- the actions of the suspect may be characterised as reluctant, in the face of a determined wish on the part of the victim to end their life;
- the suspect attempted to take their own life at the same time, in pursuance of a suicide pact;
- the suspect reported the death to the police and fully assisted them in their enquiries into the circumstances and their part in it.

In the meantime prosecutions for so-called mercy killings continue. For example Graham Mansfield was charged with murder convicted of the manslaughter of his wife before attempting to kill himself, presumably on the basis that this was a suicide pact.[56] He was sentenced to two years imprisonment, suspended for two years, in what the judge called "an unusual case" in which he was satisfied the defendant had "acted out of love" for his wife.[57] She was suffering from stage 4 lung cancer but a nurse or paramedic thought she had not reached the 'point of her last days'. The husband claimed his wife had reached the point where she was so ill that she had told him she just wanted to die. He killed her by cutting her throat. These facts,[58] taken mainly from the CPS own press release about the case raise a number of issues. In particular, the case illustrates the reason why a more structured and transparent approach to prosecution decisions is to be welcomed.

It must be a moot point whether it is appropriate to prosecute a person in these circumstances at all, if the result is likely to be a non-custodial sentence. The whole process indicates an ambivalent view towards the intrinsic value of human life, which does little to serve the public interest in protecting it or in supporting autonomy and freedom from interference in private choices. In considering the public interest it is appropriate to have regard not only to the proportionality of the process but also the impact on the defendant, their family, and others who are under pressure to relieve loved ones from suffering by helping them to die. On the other hand there is a clear need to protect the vulnerable from oppression, abuse and unwarranted invasion of their autonomy or best interests.

Developments in India

As in many countries India's Constitution places great importance on the right to life which is guaranteed under its written constitution:[59]

> Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

This is reinforced by the Indian Penal Code which makes attempted suicide an offence and the abetment of suicide offences punishable by imprisonment and a fine.[60] The apparent starkness of these provisions is, however, modified by the Mental Health Act 2017 which prohibits trial and punishment for the offence of a person who has "*severe stress*",[61] which they will be presumed to have unless proved otherwise.

The Indian Medical Council Regulations proscribe euthanasia as unethical, but permit the withdrawal of *supporting devices to sustain cardio-pulmonary function even after brain death* only by a team of doctors.[62] The phrasing suggests that "euthanasia" is here intended to cover withdrawal of life sustaining treatment and, if so, does not allow for the withdrawal of artificial nutrition or hydration.

Various initiatives proposing statutory reform of the law have been made:

- In 1971 the Law Commission of India recommended the repeal of section 309 of the Penal Code.[63]
- In 1994 *Rathinam v Union of India*[64] a two-judge bench

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56 Under the Homicide Act 19757 section 4 a killing in pursuance of a suicide pact is manslaughter not murder.

57 *https://www.bbc.co.uk/news/uk-england-manchester-62250733*, 21 July 2022.

58 *https://www.cps.gov.uk/north-west/news/greater-manchester-man-found-guilty-killing-his-terminally-ill-wife*, 21 July 2022.

59 Constitution of India, Art 21, *https://legislative.gov.in/sites/default/files/COI_English.pdf*.

60 Indian Penal Code:
306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."
309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year 3 [or with fine, or with both. (*https://legislative.gov.in/sites/default/files/A1860-45.pdf*).

61 Mental Health Act 2017 s 115(1): *Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said code.*

62 The Indian Medical Council Regulations 2002 (11 March 2002 Ch 6 reg 6.7: *Practicing euthanasia shall constitute unethical conduct. However on specific occasion, the question of withdrawing supporting devices to sustain cardio-pulmonary function even after brain death, shall be decided only by a team of doctors and not merely by the treating physician alone. A team of doctors shall declare withdrawal of support system. Such team shall consist of the doctor in charge of the patient, Chief Medical Officer / Medical Officer in charge of the hospital and a doctor nominated by the in-charge of the hospital from the hospital staff or in accordance with the provisions of the Transplantation of Human Organ Act, 1994. https://www.cgmedicalcouncil.org/act_imc_reg5.html.*

63 *Indian Penal Code* Report No 42 Law Commission of India June 1971, *https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081095.pdf*.

64 (1994) 3 SCC 394.

of the Supreme Court ruled that Section 309 of the Penal Code was ultra vires the Constitution.

- In 1996 the Supreme Court of India in *Gian Kaur v State of Punjab*[65] recognised (without deciding) that withdrawal of life support or premature extinction of life might be allowed in the case of a dying person in spite of the Penal Code provisions mentioned above, which were confirmed to be constitutional, overruling *Rathinam*.[66] The Court said that a right to a dignified life up to the point of death might include the right to die with dignity, but this was not to be confused with "*a right to die an unnatural death curtailing the natural span of life*".

- In 2006 the Law Commission of India accepted that [active] euthanasia and assisted suicide should continue to be offences, but proposed a Bill legitimising passive euthanasia, and the right of competent patients, and in the case of the incompetent patient, doctors, to decide that treatment should be withdrawn, relying on the English case of *Airedale NHS Trust v Bland*.[67] The Commission. The issue of active euthanasia was a matter for legislation. The government opposed the Bill on a number of grounds, including that:

- The Hippocratic oath was against intentional killing of patients;
- Medical progress in pain relief, which is advancing constantly, would be set back;
- A wish to die might not be permanent and caused by a transient depression;
- Suffering is a perception which varies between individuals;
- A wish to die or be killed by a mentally ill person may be treatable;
- Suffering cannot be quantified;
- There is a difficulty in identifying appropriate definitions; and
- There is a risk of pressure being applied to doctors.[68]

- In 2008 the Commission again recommended repeal of section 309 of the Penal Code.[69]

- In 2011 the Supreme Court of India in *Aruna Ramachandran Shanbaug v Union of India*,[70] also following *Bland*, considered the issue of passive euthanasia/ withdrawal of treatment in the case of an incompetent patient in a persistent vegetative state. It held that while this could be lawful, permission was required from the High Court, under its parens patriae jurisdiction, supported by evidence from a medical panel.[71] Doctors could not be accused on an offence where he was under a common law duty to obey a refusal of a competent patient or to act in the best interests of an incompetent patient. The court observed that section 309 ought to be repealed as it was "*anachronistic*". However in the later *Common Cause* case the Supreme Court ruled that the court here had proceeded on an erroneous understanding of *Gian Kaur*.[72]

- In 2012 the Law Commission of India again reported on the topic, repeating the previous recommendation, but altering the required procedure to align with the *Shanbaug* decision of the Supreme Court of India in recommending that the courts should be empowered to permit withholding of life support from patients in irreversible coma or persistent vegetative state. It endorsed the recommendation for the repeal of section 309.[73]. With regard to the incompetent patient[74]

[i]t would be unjust and inhumane to thrust on him the invasive treatment of infructuous nature knowing fully well that the end is near and certain. He shall not be placed on a worse footing than a patient who can exercise his volition and express his wish to die peacefully and with dignity. Had he been alive, what he would have in all probability decided as a rational human being? Would it be in his best interests that he should be allowed to die in natural course? These decisions have to be taken by the High Court as parens patriae and this will be a statutory safeguard against arbitrary or uninformed decisions.

The report included a proposed Bill including its recommendations. Again this was considered by the Government which sought expert advice but apparently no conclusion had been reached before the *Common Cause* case.[75]

- A Bill was introduced in the Lok Sabha (the lower house of parliament) in 2016 for the protection of patients and doctors assisting a suicide or withholding/ withdrawing medical treatment including life support of terminally ill patients.[76] The Bill sought to recognise and

65 As explained in the *Common Cause* case, paras 21, 23.

66 *Gian Kaur v State of Punjab* (1996) 2 SCC 648.

67 Report No 196; The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill 2006.

68 A summary of the points recorded in the *Common Cause* case [para 9].

69 *Humanization and Decriminalization of Attempt to Suicide*: Report No 210 Law Commission of India October 2008, *https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081095.pdf*.

70 (2011) 4 SCC 454.

71 Ibid, para 125: The Court considered court approval was required because "*there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialisation and corruption, we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money*?

In *Bland* it was determined that the parens patriae jurisdiction had been abrogated, but in this case the court's power was found to be located in Article 226 of the Constitution .

72 *Common Cause case* para 42.

73 *Passive Euthanasia – A Relook*, August 2012 report No 241 Law Commission of India *https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081061-1.pdf*.

74 Report no 241 para 11.9.

75 See *Common Cause* para 10.

76 Bill no 2016 of 2016: The Treatment of Terminally Ill Patients 2016 *http://164.100.47.4/billstexts/lsbilltexts/asintroduced/2656.pdf*.

enforce a patient's right to decide and express a desire to an attending doctor to withhold medical treatment or to intentionally assist him to commit suicide, subject to certain precautionary conditions. In the case of a mentally incompetent patient or one who has not taken an informed decision it was proposed that the doctor cold take the relevant decision if they consider that the treatment should be withheld, or they suggests suicide with a humane and dignified death, the decision is supported by a panel of three independent doctors, and the High Court has given permission.

- In 2018 a five judge bench[77] of the Supreme Court in *Common Cause v Union of India* ruled in a monumental judgment that the right to life in Article 21 of the Indian constitution had to be construed as a right to "life with human dignity". That must include a right to dignity up to the end of natural life and the point of death. In the case of a terminally ill person or one in a persistent vegetative state, when death due to termination of natural life is certain, that right included a right to die with dignity. It was ruled that a terminally ill, dying person could make a choice of "premature extinction of life" as a facet of Article 21, subject to regulatory safeguards. Such a choice was limited to passive euthanasia, as in the withdrawal of treatment, and did not extend to the active termination of life through "positive steps". Dignity implied a right to be free of unwanted physical interference, including medical treatment. Where a terminally ill person is incapable of making treatment decisions, they should not be deprived of their Article 21 rights as described, but those rights can be respected by decisions being taken by others on the basis of the patient's best interests. The court ruled that such decisions should be made by the medical experts having regard to the views of close family and all relevant circumstances.

To enhance the rights of those who have become incompetent to make treatment decisions the Court approved the mechanism of advance directives, made by the patient while competent as a means of exercising their choice. The Court laid down extremely detailed safeguards under which an advanced directive could be valid. In addition to various procedural requirements these included[78]

- The patient has to be of sound mind and able to communicate, relate and comprehend the purposes of the document
- It must be voluntarily executed and free from coercion
- It should be in writing clearly stating that treatment may be withdrawn or specifying that no treatment should be given which only delays the process or death which might otherwise cause pain, anguish, or suffering and further put them in a state of indignity.

The case was considered further this year by the Court and the guidelines in the original decision have been modified in the face of reported practical difficulties.[79]

It is of interest that after painstaking consideration and the application of very sophisticated jurisprudence and taking account of the multiple social and religious contexts of India that the Supreme Court has adopted a relatively similar approach to that adopted in the UK by its highest court before the arrival of legislation, in both countries the courts have been, possibly reluctantly, compelled to develop the law through common law techniques, while clearly considering that the complex social and cultural issues involved require parliamentary intervention.

Human rights law

There is a spectrum of law and practice in this field among countries which endorse the recognised principles of human rights, ranging from outright prohibition through to cautious recognition of choice and autonomy. While there are many potentially relevant international instruments, an examination of European human rights law suggests that in the absence of an international consensus as to the right approach in this area a wide margin of appreciation is accorded to member states

As already seen there is no international consistency in the law governing this area either in the common law world or elsewhere. While all jurisdictions outlaw intentional or, in various ways, involuntary homicide in general, various approaches are taken to either causing or assisting in the death of a person for the purpose of alleviating suffering. Thus in the Netherlands, [and the state of Oregon] active termination of life is permitted under certain strict conditions. Switzerland permits assisting a person to commit suicide, again under specified conditions.

The starting point in the European Convention on Human Rights (ECHR), analogous to the position in India, is the imposition on states of an obligation to respect and protect the right to life. The principle of the sanctity of life is recognised in many human rights conventions. Article 2 of the ECHR requires states to protect everyone's right to life and not to deprive anyone of their life intentionally except in very limited circumstances:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

Further exceptions or defences are provided for self-defence and lawful arrest:

> *2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

77 (2018) 5 SCC 1 *https://main.sci.gov.in/supremecourt/2005/9123/9123_2005_Judgement_09-Mar-2018.pdf*; [2018] AIR 1565. The summary of this decision is largely derived from the helpful headnote in the All India Reports. The judgements extend to 534 pages and will repay detailed reading, but a detailed analysis of each judgment is beyond the scope of this article.

78 Ibid, judgment of Dipak Misra CJI and AM Khanwilkar J, para 189.

79 *Common Cause v Union of India* Order 24 January 2023, *https://main.sci.gov.in/supremecourt/2019/25360/25360_2019_3_504_41295_Judgement_24-Jan-2023.pdf.*

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

There is no consensus between the parties to the ECHR in relation to the legality of ceasing treatment artificially sustaining life, although the majority of states do permit this. However there was nonetheless a consensus as to the *"role primordial de la volonte du patient dans la prise de decision"*[80]

This consideration involves Article 8:

(1) Everyone has the right to respect for his private and family life…

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Article 2 does not explicitly refer to euthanasia, assisted suicide or withholding/withdrawal of treatment, but the European Court of Human Rights has had occasion to examine each of these issues. A common thread through the judgments is that in considering the application of Article 2 account must be taken of the rights to privacy and autonomy under Article 8 and vice versa, and, that, in the absence of a consensus between signatory states, a wide margin of appreciation can be recognised.[81]

Balance of Articles 2 and 8 rights required

There is no "right to die".[82] A complaint that the refusal of the Director of Public Prosecution in England and Wales to undertake not to prosecute the complainant's husband if he were to assist her to end her life was held to be a breach of her Article 2 and 8 rights. The Court in *Pretty v UK* noted that Article 2 covered not only intentional killing but also situations where the lawful application of force left to an unintended outcome of death. The state's obligations extended beyond refraining from intentional and unlawful killing to a requirement to take appropriate steps to safeguard the lives of those within its jurisdiction.[83] The Court held that:[84]

> 39. …..Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.
>
> 40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.

It went on the state that even if, which they were not deciding, it was possible for a state to permit assisted suicide without infringing article 2, that did not mean it was an infringement for another state not do so.[85] The Court in *Pretty* rejected the complainant's argument that a blanket ban on assisted suicide was a breach of her Article 8 [right to a private life] rights. They accepted that her Article 8 rights had been interfered with because:[86]

> In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity was engaged.
>
> And referring to an analogous Canadian case,
>
> The prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice.

However the interference could be justified under Article 2 because states are entitled to regulate through the criminal law activities which are detrimental to the life and safety of other individuals.

- The more serious the harm involved the most heavily will public health and safety considerations weigh in the balance against the principle of personal autonomy.
- The law against assisting suicide was designed to protect the weak and vulnerable and in particular those not able to make informed decisions against acts intended to end or assisting in ending life. Such a ban was not disproportionate[87] There had to be a margin of appreciation:

> Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.

By way of comment the Court in *Pretty* did not in fact treat the English law, when taken with the procedure adopted by the DPP, as being a blanket ban in any event. They recognised and implicitly approved of[88]

> a system of enforcement and adjudication which allows due

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80 *Mortier v Belgium* – see below.

81 *Haas v Switzerland* [below] para 54, 148; *Lambert v France* [above] para 142.

82 *Pretty v United Kingdom* Application no 2346/02 4th Section 29 July 2002.

83 Ibid §38; *Osman v United Kingdom* 28 October 1998, Reports 1998-VIII 3159 §115; *Keenan v United Kingdom* Application 2722/95 ECHR 2001-III [protection of prisoner from suicide].

84 *Pretty* Ibid §39-40.

85 Ibid §41.

86 *Pretty* §65; see also *Rodriguez v Attorney-General of* Canada [1994] 2 Can LR 136 Supreme Court of Canada.

87 Ibid § 74, 76.

88 Ibid §76-78.

> regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.

No right to die

That there is no right to die was confirmed recently in *Mortier v Belgium* the first case in which the ECHR has been asked to consider the conformity of a domestic law authorising euthanasia with the Convention:[89]

> En particulier, la Cour a estimé qu'il n'est pas possible de déduire de l'article 2 un droit de mourir, que ce soit de la main d'un tiers ou avec l'assistance d'une autorité publique.

On the other hand the right to autonomy and respect for private life includes the right to choose the manner and moment of one's death if the choice is free:[90]

> Le droit pour une personne de choisir la manière et le moment de la fin de sa vie, pourvu qu'elle soit en mesure de former librement sa volonté à ce propos et d'agir en conséquence, est l'un des aspects du droit au respect de sa vie privée au sens de l'article 8 de la Convention

Active euthanasia not incompatible with the Convention

Most recently the Court has accepted that active euthanasia is potentially compatible with the Convention. Many would consider that euthanasia, the intentional causing of the death of a person by a third party to alleviate suffering, as the most extreme of the three measures we are considering. The Court accepted that it had to determine whether an act authorised by the Belgian law could occur in conformity with the Convention; it was not asked to decide whether there was a right to euthanasia.[91] It held that the right to life under Article 2 was not necessarily incompatible with a conditional decriminalisation of euthanasia. The Belgian law was a recognition of the individual\s right under Article 8 to choose how to avoid what to them was unbearable suffering, and an undignified and distressing end of their life. However to be compatible with Article 2 the law had to provide adequate protection against abuse and thus to ensure respect for life.[92] The Court noted that the United Nations Rights of Man indicated that euthanasia did not constitute a breach of the right to life if it was surrounded by

> solides garanties legales et institutionelles permettant de verifier que les professionels de la medicine appliquent une decision explicite, non ambigue, libre et eclairee de leur patient

so that all patients were protected against pressure and abuse. There was a margin of appreciation accorded to states although this was not without limit..[93] On the Court's analysis of the protections required by the Belgian law to be applied in advance of the act of euthanasia it ruled that in principle it assured the protection of the right to life of patients required by Article 2.[94] The ingredients of the law which allowed the Court to come to this conclusion were that

- a doctor is not permitted to proceed to euthanasia if the patient, being an adult or a competent child is aware of the request;
- the request is voluntary, considered, and repeated and not the result of external pressure;
- the patient must also be in a medical condition without cure, and which causes physical or mental suffering which is constant, intolerable and cannot be ameliorated.[95]

It was not a breach of a near relative's Article 8 rights not to have been consulted before the euthanasia where not have done so would have been contrary to the patient's wishes.

However the Court found that a system of review *after* the death that permitted the doctor who had led the decision-making process and administered the lethal injection to be a member of the review panel was an inadequate safeguard for the purpose of Article 2.

Article 8 engaged by prevention of assisted suicide but not necessarily unlawful

Prevention by law of an exercise of choice to seek her husband's assistance to commit suicide to avoid an undignified and distressing end to life has been held to be a possible interference with the right to respect for her private life under Article 8.[96] A law restricting access to lethal drugs for the purpose of committing suicide was not necessarily a breach of Article 8, but an individual's right to decide the manner and timing of their end of life was an aspect of their private life.[97] It was the ECHR's opinion that the regulations in place requiring a prescription before provision of a lethal drug pursue the legitimate aim of "protecting everybody from hasty decisions and preventing abuse, and, in particular, ensuring that a patient lacking discernment does not obtain a lethal dose of sodium pentobarbital…" Such regulations were all the more necessary in respect of a country such as Switzerland, where the legislation and practice allow for relatively easy access to assisted suicide.

The facts in the case cited demonstrate graphically why safeguards are required. A person suffering from a serious bipolar affective disorder had approached Dignitas for assistance in ending his life but several psychiatrists to whom he was ferred to obtain the necessary lethal substance refused. He approached several official bodies seeking permission to

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89 *Mortier v Belgium* ECHR Third Section Appln 78017/17 4 October 2022 § 119. The judgment has only been published in French.

90 *Mortier* §124; see also *Pretty* §67.

91 *Mortier* §§ 125-127.

92 *Mortier* §139.

93 *Mortier* §143.

94 *Mortier* §155.

95 §150 in French reads: *l'article 3 de la loi relative à l'euthanasie ne permet à un médecin de procéder à l'euthanasie que si le patient majeur ou mineur émancipé est conscient au moment de sa demande, que sa demande est formulée de manière volontaire, réfléchie et répétée, et qu'elle ne résulte pas d'une pression extérieure. De plus, l'euthanasie n'est autorisée que si le patient se trouve dans une situation médicale sans issue et qu'il fait état d'une souffrance physique ou psychique constante et insupportable qui ne peut être apaisée et qui résulte d'une affection accidentelle ou pathologique grave et incurable.*

96 *Pretty v UK* Application no. 2346/02 4th Section 29 July 2002.

97 *Haas v Switzerland* Application no 31322/07 ECHR First Section 20 January 2011 para 51.

obtain the substance without a prescription but was refused. A subsequent letter to 170 psychiatrists also failed to identify anyone prepared to prescribe the drug.

Withdrawal of artificial nutrition and hydration may be compatible with Convention

The Article 2 and 8 rights of a patient suffering degenerative brain disease were not infringed by official guidance or legislation permitting in certain circumstances the withdrawal of artificial nutrition and hydration;[98] On the other hand, the administration of potentially lethal dose diamorphine to a sick child without the parents' consent and the making of a "do not resuscitate" order was not a breach of Article 2, given the absence of an intention to kill the child or to hasten death.[99]

Is the law capable of resolving the ethical issues involvcd?

A short list of issues which inevitably arise in the debate about life shortening measures is offered below.

- Sanctity of life v autonomy – which prevails?
- Acts v omissions – a real distinction?
- Patient's right to choose v protection of vulnerable – are they compatible?
- Personal benefit v society's interest – does society have right to interfere?
- Personal suffering v social benefits – effect on advances of palliative and curative care?
- Who decides – patient, relatives, guardian's doctors, court?
- Patient's choice of outcome or doctor's right to refuse?
- Necessity v benefit – from whose point of view?
- Personal solution v slippery slope?

When courts and legislators are asked to rule on euthanasia and related matters it is inevitable that they have regard to prevailing ethics.

A useful analysis of such issues was offered by the House of Lords committee which considered Lord Joffe's 2005 Assisted Dying for the Terminally Ill Bill. They observed that those supporting the Bill started from the ethical principle of autonomy and freedom of choice whereas those opposing it laid overarching emphasis on the sanctity of life. It was pointed out that while the principle of sanctity of life was commonly advocated on the basis of religious principles, religious beliefs was not a necessary foundation for it. It was quite possible to identify a secular basis for the importance of life and its protection. Both sides accepted that each principle was valid and important, but differed on which principle should prevail over the other in the circumstances of suffering at the end of life. The committee addressed the suggested inconsistency between applying the sanctity of life principle to prevent the actions of euthanasia or assisted suicide to alleviate suffering and allowing the omission to keep a patient alive in withholding/withdrawal of life sustaining treatment. While they accepted that the result of both an act to cause death and an omission to keep alive were very similar from the patient's point of view, there was a significant difference from the doctor's: most people did not consider that withholding futile treatment actually caused the death of the patient, whereas the action of providing or administering the means of death does.

With regard to autonomy those supporting the Bill argued that autonomy embraced a right to choose the manner and means of their death and that the Bill contained sufficient provisions to protect the vulnerable and mentally incapacitated. Others took the view that respect for autonomy could not extend to requiring a third party to assist or provide the means of causing death and also raised fears about the limited proposals in the Bill being a "slippery slope" to a wider and even more controversial circumstances such as where individuals felt, rightly or wrong pressurised to end their lives to ease the burden they represented to others.

It is clear from these and similar debates that the common law is unlikely to find answers to these fraught issues without legislative intervention. Lawyers and judges can only look for legal answers within the framework of law in which they work. Different societies, with their various social cultural religious and historical contexts are likely to land on different solutions, and as contexts change, so may their answers.

It is notable that judges have on occasion referred to literary and philosophical sources for guidance in this challenging area, perhaps none more so than the justices of the Supreme Court of India in the *Common Cause* case.

For example the judgment of AK Sikri J included the following quotations:[100]

"I am the master of my fate; I am the captain of my soul" - William Ernest Henley

"Death is our friend … he delivers us from agony. I do not want to die of a creeping paralysis of my faculties – a defeated man."- Mahatma Gandhi

"When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when possess or sees in prospect a majority of contrary, it is appropriate for him to depart from life." - Marcus Tullius Cicero

"Every person in this world comes crying. However, that person who leaves the world laughing/smiling will be the luckiest of all" (Hindi Film – Muqaddar Ka Sikandar)

'I do not want to achieve immortality through my work. I want to achieve it through not dying' – Woody Allen

Conclusion

It is suggested that neither the lawyer nor the judge is qualified to decide on the balance to be drawn between these and other ethical factors in this area, certainly not without the assistance of the parliamentary guardians of the public interest. The court setting is not the arena in which the merits of the ethical case

98 *Burke v UK* Appln no 19807/06 July 2006;. *Lambert v France*.

99 *Glass v UK* Appln no 61827/00 March 2003.

100 See paras 46-50, judgment of AK Sikri J pp 38 of 112 et seq.

for or against any particular measure can be determined, if, indeed they are capable of final determination at all. It is only because of the absence of legislation and notable reluctance of politicians to grapple with these issues that the common law is required to intervene to provide solutions in everyday life – and death.

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Managing Judicial Review within the Democratic Framework

V Sudhish Pai

Introduction

The aspiration to make power impersonal and its exercise accountable is the motivation for constitutions and constitutionalism. Constitutionalism is an attempt to establish the supremacy of law. The essence of constitutional adjudication is to enforce constitutional law *vis-a vis* all authority. Judicial review is the exercise of power by the superior courts to test the legality of any governmental or State action. In a sense, judicial review is the very life blood of the constitution of a vibrant working constitutional democracy. The purpose of public law is to discipline the exercise of power. Judicial review is the means of achieving that objective. It is designed to prevent the excess and abuse of power and the neglect of duty by public authorities. Public law, in modern times, may be said to have advanced from a culture of authority to a culture of justification.

As Wade & Forsyth point out, judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.[1] It is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. For, it is a cardinal axiom that every power has legal limits. Speaking of the value and significance of judicial review deSmith says that judicial review provides a set of legal standards enforced through a process of litigation to enable people to challenge the lawfulness of decisions made by public bodies and others exercising public functions.[2] The Israeli Supreme Court aptly said, "...Judicial review is the soul of the Constitution itself; the majority of enlightened democratic States have judicial review … The twentieth century is the century of judicial review."[3] The present century is no less. Judicial review is accepted as an inherent characteristic of the constitutional state. But the range and depth of judicial review vary from jurisdiction to jurisdiction.-

A study conducted by the Princeton University a few years ago regarding Theories of Judicial Review posed some significant questions and summed up the position: The practice of judicial review has become an important problem for democratic and liberal theory and for descriptive political science in the 20th century. But, of course, it began as an assertion by a judicial body of a legal power under the written Constitution (in the United States). The legality of that initial assertion has itself been controversial there. Was the power of judicial review implicit in the Constitution or was it the creation of the Marshall Court? Is *Marbury v. Madison*[4] an instance of careful legal judgment or early judicial activism? Is judicial review a legal doctrine or a political power or both? It is perhaps both. The central issue in academic constitutional theory concerns the proper scope and legitimacy of judicial review.

Judicial review: anti-majoritarian implications

There has always been a debate and opposing views have been expressed about the ideas of judicial review. The Constitution creates three branches of government each supreme in its own sphere. Is it not anti-democratic that one of the wings, viz, the judiciary assumes the power to undo what the other branches do within their respective areas? There is an anti-majoritarian implication in the very idea of judicial review that a handful of non-representative, non-elected persons, howsoever high they might be, should have the power to undo the majority. This view based on the ground of separation of powers has been voiced from time to time in all systems of government and effectively repulsed by courts and scholars. Even so, the issue of managing judicial review within the democratic framework is live and challenging. The contours and nuances of judicial review are also interesting and not amenable to a strict formulation.

Chief Justice Coke confronting his King repudiated government under man in favour of government under law. Rule of law which is a prime principle in our way of life is regarded as the cornerstone of a democratic polity. Rule of law is protected and upheld by judicial review. That is the exercise of a constitutional power which the rule of law requires. Edward Corwin, in his paper; 'The Higher Law Background of American Constitutional Law'[5] to which all later writers are indebted and in his lecture: 'The Debt of American Constitutional Law to Natural Law Concepts',[6] explains the great contribution of the common law tradition to the ultimate development of judicial review in America.[7] The dictum of Coke, CJ in *Bonham's* case that "that the common law would control Acts of Parliament and the court could declare an Act of Parliament void – if it was against common right and reason or repugnant or impossible to be performed", though it did not survive long in Britain, had immense influence across the ocean in the US. It became in Corwin's words 'the most important single source of the notion of judicial review'. The principle is that all laws are to be tested on the touchstone of a higher law which in earlier times

1 William Wade and Christopher Forsyth, *Administrative Law* (Oxford: OUP, 11th ed, 2014) p 26.

2 DeSmith's *Judicial Review* (Sweet and Maxwell, 8th ed, 2018) by Harry Woolf, Jeffery Jowell, Catherine Donnathy, Ivan Hare, p 1.

3 *United Mizrahi Bank Ltd. v Migdal Village*, HCJ, 6821/93, excerpts in English in 31 *Israeli Law Review* 754 (1997).

4 5 US 137 (1803).

5 *Harv L Rev* XLII (1928-29) 149.

6 Originally delivered as an address at the Third Annual Natural Law Institute, College of Law, University of Notre Dame, December 9, 1949.

7 (1608) 8 Co Rep 107: 77 ER 638.

was the Natural Law and the Common Law and whose role is today ordinarily filled by a constitutional document. The idea of judicial review is anterior to a written constitution.

After *Calder v Bull*[8] in 1798, in 1803, Chief Justice Marshall said in *Marbury v Madison*: "It is the duty of courts when confronted with a conflict between an act (i.e., a statute) of the mere agents of the people (i.e., of the ordinary legislature) and the act of the people themselves (to wit, the Constitution) to prefer the latter."[9] The nature of judicial review has been the subject of debate. Court watchers typically characterize the debate in terms of judicial behaviour manifesting either self-restraint or activism. The more important enquiry centres on the judicial creativity and its posture towards the text of the constitution.

Limited government: judicial review as a necessary concomitant

Today, in countries with a written constitution and an entrenched, justiciable Bill of Rights, and all the more in a federal polity, this judicial power is recognized as a necessary concomitant. What really obtains under a written constitution which is justiciable is a limited government, i.e., a government of enumerated powers with the judiciary constituted as the guardian of the constitution and the arbiter of the functions of all organs of State as grantees under the constitution. As Dicey says, "This system (referring to the American), which makes the judge the guardian of the constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation."[10] The guardianship of the judiciary in enforcing the constitution, expands when there is constitutional division of powers not only between the three branches – executive, legislature and judiciary, but the State itself is divided into two units, national and state, with a consequential distribution of powers between the two units i.e., the constitution is federal. The special functions of a federal judiciary are: maintaining the supremacy of the constitution; determining controversies between parties to the Federation; securing uniformity in the interpretation and application of the constitution as amongst the states. As the umpire or arbiter in the federal system, the judiciary's function of acting as the guardian of the constitution is known as judicial review. The power of judicial review to maintain the supremacy of the constitution is vested generally in the highest federal court. As the final interpreter of the constitution, its interpretation is binding on all organs of the State.

Our Constitution, as many other constitutions, envisages the establishment of a democratic republic. Democracy, in the ultimate analysis, means the rule of the majority. Forgetting mere words which Tennyson said: 'Like Nature, half reveal and half conceal the Soul within',[11] the substance of the matter is the rule of the majority. The only alternative to this is either despotism or anarchy, the tyranny of the individual or of the mob. But the majority is not necessarily right or wise.

In his First Inaugural Address in 1801, Jefferson qualifying the majority principle, insightfully remarked thus, "All too will bear in mind this sacred principle that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable, that the majority possess their equal rights which equal law must protect and to violate it would be oppression." We see the practical operation of this reflected in the limitation in Art 13(2) which forbids the passing of a law taking away or abridging fundamental rights.

There are thus two institutions which seem to be fundamentally contradictory. There is first the institutionalization of the principle that the will of the majority must prevail and that government must conform to its will as per the democratic principle. As against that is the institutionalisation of the principle that powers of government are limited, that there are things which even a majority cannot do as they are beyond the ambit of the legislature and the executive.

The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principles of majority rule. The second is that in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and between the State and individuals. Where tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a democracy to delegate to an impartial and independent judiciary this adjudicative function. Only such a judiciary acting in accordance with principles of institutional integrity and aided by a free and courageous legal profession, practicing and academic, can carry out this task, notably in the field of fundamental rights and freedoms. Only such a judiciary has democratic legitimacy. The judiciary owes allegiance to nothing but the constitutional duty of reaching through reasoned debate the best attainable judgments in accordance with justice and law. This is its role in the democratic governance of countries. At the root of it is the struggle by fallible judges with imperfect insights for government under law and not under man.[12]

'Judicial review' is an adjunct of 'limited government'. If a constitution is to operate as a legal limitation there must be some agency to enforce it through the legal process. That is the judiciary. As Marshall C.J. said the only agency capable of discharging this function is a court of law which interprets and applies all laws to enforce legal rights and duties and to settle legal disputes through the legal process of litigation. In the United States the Constitution does not specifically vest in the judiciary the power to declare laws unconstitutional. This power has been deduced by the Supreme Court. In India it is specifically conferred by the Constitution- Arts 13, 32,136, 226, 227. There are also Articles 141(law declared by the Supreme Court is binding on all) and 144 (all authorities shall act in aid of the Supreme Court).

It may be said that the concept of limited government and judicial review constitute the essence of our constitutional system and it involves three main elements: A written

8 3 US 386 (1798).

9 Supra, note 4.

10 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (ELBS-Macmillan, 10th ed 1959) p 137.

11 *In Memoriam AHH.*

12 cf Lord Steyn, *Democracy Through Law,* The First Robin Cooke Lecture, (2002) Victoria University of Wellington.

constitution setting up and limiting the various organs of government; the constitution functioning as a superior law or standard by which the conduct of all organs of government is to be judged; a sanction by means of which any violation of the superior law by any of the organs of government may be prevented or restrained and, if necessary, annulled. This sanction, in the modern constitutional world, is 'judicial review' which means that a court of competent jurisdiction has the power to invalidate the act of any governmental agency, including the legislature on the ground that it is repugnant to the Constitution.[13] As observed by the Supreme Court borrowing the language of Lord Steyn, judicial review is justified by combination of "the principle of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review."[14]

The supremacy of the constitution in that sense means the constitution as interpreted by the Supreme Court. Hughes, CJ before he came to the Supreme Court said (in 1907) 'the Constitution is what the Judges say it is'.[15] But the historian of the U S Supreme Court, Charles Warren stated, "However the court interprets the provisions of the Constitution it is still the Constitution which is the law and not the decision of the court."[16] Our Supreme Court observed that judges have to solemnly remind themselves of this. Moreover, the pronouncement of Hughes, CJ himself later in *Carter* v. *Carter Coal Co.*[17] clarified and stated that it is not the function of the court to amend the constitution by judicial decisions. And in *Graves v New York*[18] Justice Frankfurter observed that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Equally profound is what Justice Black said, "The public welfare demands that constitutional cases must be decided according to the terms of the Constitution itself and not according to judges' view of fairness, reasonableness or justice. I have no fear of constitutional amendments properly adopted, but I do fear the rewriting of the Constitution by judges under the guise of interpretation." Justice Bhagwati warned in the *First Judges* case[19] that the judges mending the language of the constitution to their will would be rewriting the constitution in the guise of interpretation.

What emerges is that in a limited government under a written constitution all organs of the State are creatures of the constitution and have to act and function under the constitution and in consonance therewith. What is, therefore, supreme is the constitution and what obtains is constitutional supremacy, the judiciary having the last word in the interpretation of the constitution and constituted as its monitor, defender and protector. While the judiciary enforces the legal limitations imposed by the constitution, is it not bound by any such limitations? The constitution operates as a limitation on all organs which includes the judiciary, for, otherwise the judiciary would stand outside and independent of the constitution instead of being a creature of the constitution. And what is the sanction to keep the judiciary also within the bounds of its powers? It is, in a large measure, the judges' own sense of self restraint. Constitutional scholars now would be increasingly reluctant to use catch phrases like supremacy of Parliament or answer current issues by appeal to some doctrine of sovereignty.

Problems of exercise of judicial power -issues and challenges for judicial review

But all this is not self-executing. The power of judicial review is exercised through the agency of courts. The court is no doubt an institution, but it is composed of persons who with all their diversities of outlook, talent and experience determine the course of its destiny. If most judges are more law abiding than kings were, it is, perhaps, because the appellate process achieves what it is supposed to achieve. But what of those at the judicial summit whose decisions are not subject to appellate review and correction? We cannot forget Justice Jackson's profound observation, "We are not final because we are infallible, but we are infallible because we are final."[20]

Law including constitutional law cannot and does not provide for every contingency and the vagaries and varieties of human conduct. Many times it is open ended. The majestic vagueness of the Constitution, remarked Learned Hand, leaves room for doubt and disagreement. It is therefore said by critics and scholars that this also leaves room for, and so invites, government by judges- especially those who are free not only of appellate review, but of elections as well and have an assured tenure.

In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State/national security, environment and development, socio-economic rights of particularly the weaker sections of society and development; the whole and its parts, the letter and the spirit. "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs."[21]

All this throws up matters of great moment and in a way summarises the contemporary issues and challenges for judicial review. These challenges and issues have always been there but they have acquired new dimensions and poignancy. Imbuing all acts of all authorities with constitutionalism and constitutional culture, entrenching the constitutional vision of justice -making it real and meaningful for the people, vitalising democracy and

13 cf Durga Das Basu, Tagore Law Lecture, *Limited Government and Judicial Review* (SC Sarkar & Sons, Calcutta, 1972).

14 *Subrata Chattoraj v Union of India* (2014) 8 SCC 768.

15 Speech before the Chamber of Commerce, Elmira, New York on 3 May 1907, published in *Addresses and Papers of Charles Evans Hughes, Governor of New York* (1906-1908) p 139.

16 *The Supreme Court in United States History*, 3 Vols, (Boston: Little Brown & Co, 1922-1924); Vol III, pp 470-471.

17 298 US 238 (1936).

18 306 US 466 (1939).

19 *SP Gupta v Union of India*, AIR1982 SC149.

20 *Brown v Allen,* 344 US 443, 540 (1953).

21 Mathew J in *Indira Gandhi v Raj Narain* 1975 Supp SCC 1 at p 131, para 318.

achieving all this within the framework of separation of powers and democratic functioning is the real challenge for and the goal of judicial review in a constitutional democracy.

Judicial review: constitutional interpretation

All judicial review is rooted in constitutional interpretation. Most legal scholars and critics are agreed in their acceptance of modern judicial review which assumes that judges exercise what is fundamentally a legislative power, but they represent very different approaches. Ronald Dworkin, an unrepentant activist explains judicial review in terms which accord judges an extraordinary breadth of power with little or no concern about its anti-majoritarian character. John Hart Ely is perhaps the most disturbed about the potential anti-democratic character of judicial review and therefore elaborates a theoretical basis for its exercise which is the most restrictive in theory, if not in practice. Jesse Chopper is probably the closest to the mainstream of contemporary legal commentary, absolutely committed to a very broad judicial role in the area of individual rights but with enough sensitivity to anti majoritarian implications of judicial review to establish strong principled limits to it in other areas. It may be said that in the idea of interpretative judicial review, the very foundation of judicial review is constitutional interpretation; judicial review can be described as a by-product of the judges' duty to interpret the constitution. But Thomas Grey argues that most constitutional law cannot be defended as interpretation of the constitution but only as the result of non-interpretative judicial review.

Despite the anti-majoritarian character of judicial review the court must exercise this power to protect individual rights not adequately represented in the political process; but the court should also decline to exercise judicial review in other areas to minimize the tension between judicial review and democracy and to conserve its resources for institutional prestige. Judges and lawyers are not free to legislate any moral theory. They are constrained to some extent by the material with which they work-constitution, statutes, common law principles. The judge's power is not for imposing his own morality but acting on the basis of his sense of what community morality provides. The Warren Court era approach to judicial review seemed to be "let's be pragmatic and simply do justice instead of worrying about theoretical niceties." That seems inadequate for deep rooted desire for coherent legal principles or potential political threats to the judiciary.

Constitutional interpretation is essentially a question of original intent. But reliance on original intent does not make the whole process simple and uncomplicated. The meaning of the document is contained in the principles which it embodies. Further even after the sometimes difficult task of establishing clearly the principles of a provision it is necessary to apply the principle to new circumstances which can require considerable prudence. Even if the interpretation is agreed upon there may still remain issues regarding exercise of judicial review. Moreover, the constitution itself contains open textured provisions- quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the Constitution or the debates that led up to it. Hence what is needed is a principled approach to judicial enforcement of the constitution's open ended provisions – one that is not hopelessly inconsistent with the nation's commitment to representative democracy.

Constitutional interpretation which is at the heart of judicial review is a necessary condition for it but it may not be sufficient. Some constitutional provisions may be ambiguous, some may not themselves be ambiguous but may be so general that application of their principles to concrete situations is not clear. Then, perhaps, there is no reason for the preferred judicial interpretation to take precedence over that of political branches. The different theories of judicial review either confine judges to exercising judgment or they encourage them to exercise will. The choice between those positions is fundamental and unavoidable. Legal realists would deny that a truly different approach is possible. All judges legislate and only the content of their legislation differs.

The judiciary has proved to be neither the 'least dangerous' branch nor quiescent under the 'chains of the Constitution.' Professor Alexander Bickel believed that we can profit from judicial review in a democracy so long as we understand the limits of decisional law. "Many actions of the government have two aspects: their immediate, necessarily intended practical effects and their perhaps unintended and unappreciated bearing on values we hold to have more general and permanent interest…. Such values do not present themselves readymade. They have a past always, but they must be continuously derived, enunciated and seen in relevant application and the court is the institution of our government best equipped to be the pronouncer and guardian of such values."[22]

Reconciliation of judicial review with democratic governance

In theory and in practice it is not easy to reconcile amicably judicial review with democratic governance. "The task of accommodating judicial review with democratic governance is inherently problematic … Within a system of free government the Court fulfils an important though limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excesses of majoritarian democracy. Judicial review becomes controversial only when the Court thwarts popular will or goes too far and too fast with its construction of the Constitution. Judicial aggression in constitutional politics is lamentable and objectionable. Yet far from being antithetical judicial review is essential to the promise and performance of free government."[23]

The power of judicial review extends over a broad range of public issues. The court touches many aspects of public life. But as has been said it would be intolerable for the court finally to govern all that it touches, for, that would turn us into a Platonic kingdom contrary to the morality of self-government. A simplistic and inaccurate enunciation of judicial review is that it is the power to construe and apply the constitution

22 Alexander M Bickel, *The Least Dangerous Branch* (Yale University Press, 2nd ed, 1986) pp 24, 31, 261.

23 David M O'Brien, 'Judicial Review and Constitutional Politics: Theory and Practice' in *Univ of Chicago L Rev*, Vol 48, No 4 (1981) 1052, at p 1093.

in matters of the greatest moment against the wishes of a legislative majority which is in turn helpless to affect the judicial decisions. There are issues of the utmost importance which the court may pick, define and decide in fulfilment of its role as the constitutional authority of last resort.

It is very often by judicial interpretation that you enliven and make purposeful the constitution or the law. The court's allegiance to the constitution ensures its own subordination. But creativity and allegiance are not necessarily antagonistic; they may with true discernment augment each other. Done wisely and with necessary circumspection, judicial law making within limits is both laudable and legitimate.

Range and nuances of judicial review

Different standards and tests are applied in adjudging the legality of different actions. The range, intensity and depth of judicial review are also different. Judicial review is about decisions too, not only the decision making process. It is loosely stated and chanted as an incantation that judicial review is concerned not with the decision but with the decision making process. This proposition in *Chief Constable of North Wales Police v Evans*[24] is to be understood and appreciated in its setting and context. It will not be correct or relevant in all cases, like for example, where human rights and fundamental freedoms are engaged or testing the reasonableness of restrictions on fundamental rights (Art 19 of the Constitution of India) or testing a law-plenary or subordinate-for substantive ultra vires or the validity of a constitutional amendment on the touchstone of the basic structure. These are not matters of process, but of substance. In those areas the court evaluates and reviews the decision, not the decision making process.

It may also be noted that now even in the UK, particularly after the advent of the Human Rights Act, as deSmith mentions, judicial review is not merely about the way decisions are reached but also about their substance, the thrust of public law having now shifted to justification.[25] "The issue is … whether the power under which the decision maker acts … has been improperly exercised or insufficiently justified. The court therefore engages in the review of the *substance* of the decision or its *justification*."[26] Wade also says that 'acting fairly' is a phrase of such wide implications that it may ultimately extend beyond the sphere of procedure.[27] That apart, it is clear from a reading of the judgment in *Evans* that the proposition is confined to cases of judicial review on the ground of non-observance of rules of natural justice.[28] Indeed, Lord Brightman expressly says that other considerations arise when the attack is on other grounds. The proposition is thus unsupportable both on principle and authority. But one sentence from the judgment taken out of context appears to have enchanted Indian courts and become part of the judicial jargon. It is 'both deceptive and mischievous', to adopt the language of Lord Diplock in a somewhat similar context. It is not a general legal proposition and must advisedly be confined to its factual setting and context.

Judicial review is to test the legality of an action and keep public authorities within the limits of their power. Power is indeed a function and its exercise is really performance of official duty. For, all power is a trust. The question is whether the impugned action is lawful or unlawful; there is no examination of merits, the issue is not whether the action is right or wrong. The difference between judicial review in administrative law and constitutional law is one of degree. The difference between judicial review and appeal is one of kind. An appeal is a creature of statute- the appellate power being circumscribed by the statutory provisions conferring the power. "Where a question arises as to the scope of an appellate jurisdiction, the statute by which the jurisdiction is conferred must ordinarily be the court's first port of call; and will very often be the last."[29] In exercising appellate power the court is concerned with the merits- whether the decision is right or wrong. The court independently examines the matter and comes to its conclusion often times substituting its views for those of the authorities or the court appealed from. The distinctions are well known and real though the exercise of both the powers may sometimes yield the same result.

Judicial response to different fact situations varies and it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the judges' value preferences respond to the multi-dimensional problems of the day. An awareness of history is an integral part of those preferences. Thus the evaluation of diverse, sometimes elusive factors, inevitably brings into the judicial verdict the judge's own values and preferences. In that sense, to a limited extent, the difference of kind between judicial review and appeal may imperceptibly collapse. The simple truth is that the jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind. But as Mathew J pointed out they are not too elusive for judicial perception; great judges are those who are most capable of discerning which of the gradations make genuine difference.[30]

It is important to bear in mind that unconstitutionality and not unwisdom is the narrow area of judicial review. For the removal of unwise laws appeal lies to the ballot box and the process of democratic government. Any doubt regarding the validity of a law must be resolved in favour of its constitutionality. The limited task of the court is to interpret the constitution as it is, not to venture starry eyed proposal for reform. What the constitution should contain is not for the courts to decide that is a question of high policy and the courts are concerned with interpretation of laws, not with the wisdom of policy underlying them. A commitment to the legality of laws and their enforcement for public good is to be realised. The court must always be careful in maintaining the right balance between the different wings of government. Mistrust of government is violative of comity between instrumentalities. Courts must be tempered by the thought that while compromise on principle is unprincipled, applied Administrative Law in modern

24 (1982) 3 All ER 141: (1982)1 WLR 1155, per Lord Brightman.
25 Supra note 2, at pp 592-93.
26 Ibid, p 544.
27 Supra note 1, at p 419.
28 Supra note 24, see, pp 1173-75 of WLR.
29 *Huang v Secretary of State for the Home Dept* (2005) 3 All ER 435 (CA).
30 *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, para 1696 at 875.

complexities of government must be realistic. There must be a sensible approximation, there must be elasticity of judgment in response to the practical necessities of government which cannot foresee today the developments of tomorrow in their nearly infinite variety.

In an eloquent passage, Justice Powell reminded us of the basic notions of the role of courts in a democracy: "The irreplaceable value of the power(of judicial review) articulated by Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous, general supervision of the … government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of counter-majoritarian implications of judicial review and the democratic principles on which our federal government in the final analysis rests."[31] How appropriate is Justice Frankfurter's felicitous remark, 'The court is the brake on other men's actions, the judge of other men's decisions. The successful exercise of such judicial power calls for a rare intellectual disinterestedness and penetration, lest limitations in personal experience and imagination operate as limitations of the Constitution'.[32]

One cannot forget or overlook the criticism that judicial activism will sometimes result in democratic debilitation. When a society leaves all or its important decisions to the judiciary it is a weak society which misses the excitement of democracy and of sorting out things by the democratic process. The exact limits of the adjudicative methods cannot be fixed and rigid. But if they are totally forsaken the judge loses credibility as a judge. The courts' activism nurtures great hopes and arouses great expectations which may remain unfulfilled and engender a critical sense of disenchantment and desperation. When a people despair of their institutions, force may get ahead masquerading as ideology.

The power of judicial review is an integral part of the process of our constitutional government. The court has the duty of interpreting the constitution in many of its most important aspects, and especially in those which concern the relations of the individual and the State. The political idea and justification of the power is that there are some aspects and phases of national life which should be beyond the reach of any majority or the outcome of any election. They are permanent values which it is for the court to uphold and protect.

Judicial review: not undemocratic

Dean Eugene Rostow proffers that this way of policing the Constitution is not undemocratic; democracies need not elect all who exercise crucial authority; the task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed. "For judges deciding ordinary litigation, the ultimate responsibility of the electorate has a special meaning. It is the responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for their decisions in particular cases."[33]

The criticism that judicial review is undemocratic or anti majoritarian is answered by him: "Where the judges are carrying out the function of judicial review the final responsibility of the people is appropriately guaranteed by the provisions for amendment of the Constitution itself and the benign influence of time which changes the personnel of courts. Given the possibility of constitutional amendments there is nothing undemocratic in having responsible and independent judges act as important constitutional mediators. …their great task is to help maintain a pluralist equilibrium in society."[34] In one sense safeguards against the abuse of the power of judicial review can be found also in the transparency of the judicial process which allows the public to assess the merits of a judicial decision and in the judges' own desire to maintain a strong judicial reputation. As the Supreme Court said recently, "A judge is judged every day by the lawyers, litigants and the public, as the courts are open and the judges speak by giving reasons in writing for their decisions."[35]

It is not true that a society is not to considered democratic unless it has a government of unlimited powers, nor can it be said that a government is not democratic unless its legislature has unlimited powers, as Dean Rostow points out. Constitutional review by an independent judiciary indeed, in a way, fosters democracy. For, pluralism is the soul of democracy; judicial review as constitutionally envisaged facilitates the quest for an open society with widely dispersed powers. Particularly in a vast country with such great diversities of religion, language, race and culture and largely different regional problems, such an organization of society is the assured foundation for the realization of democratic yearnings.

As the great Cardozo so neatly and discerningly elucidated this: "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or unconscious influence, the presence of the restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of independence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honoured

31 *US v Richardson* 418 US 166, 191 (1974).

32 Felix Frankfurter, *Justice Holmes Defines the Constitution*, *The Atlantic*, October 1938

33 Eugene V Rostow, *The Democratic Character of Judicial Review*, (1952) 66 *Har L Rev* 193, at p 197.

34 Ibid.

35 *Anna Mathews v Supreme Court of India* WP (C) No 148 of 2023 decided on 10 February 2023.

often with lip- service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might be otherwise silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."[36]

It is inevitable that the legislatures tend primarily to reflect immediate interests. But it is important and essential that long term interests and values be given due consideration. Until the legislatures do so, the judiciary seems to inherit the assignment by default; and if the assignment is judiciously performed in the manner indicated by great judges, 'the court can be regarded,' to quote Prof. Robert McCloskey, 'not as an adversary, but as an auxiliary to democracy'.[37] Or as Justice Mathew put it, paradoxical though it may appear, the judiciary is both an ally of majoritarianism and its critic and censor.[38]

Learned Hand defended entrusting the construction of the constitution insofar as it is 'an instrument to distribute political power' to an independent judiciary. Conflicts over authority are inevitable in a system of divided power. It is 'a daring expedient' to have them settled by "judges deliberately put beyond the reach of popular pressure. … independent judges are most likely to do the job well."[39]

It has been observed by some scholars that the reciprocal relation between the court and the community in the formation of policy may be a paradox to those who believe that there is something undemocratic in the power of judicial review. But the work of the court can have, and when wisely exercised does have, the effect of not inhibiting but of releasing and encouraging the dominantly democratic forces. For, in a democracy life in all its aspects is an attempt to express and to fulfil a far reaching moral code.

There is no doubt that "in the exercise of their powers of judicial review, courts should be as wise and statesmanlike as their capacities and temperaments permit- wise as judges, wise in their concern for the effectiveness of their interventions into public affairs, and wise too in adapting the constitution to changing conditions…."[40] Justice Stone's admonition-"the only check upon our own exercise of power is our own sense of self-restraint"[41] bears constant recall. But he made clear that self-restraint is not an excuse for inaction; it is rooted in a respect for the dignity and high purpose of the other branches of government and a sympathetic understanding of the problems they must try to resolve.

But really there is no contradiction between democracy and judicial review. It is arguable that the substantive law of judicial review represents the greatest contribution of the common law in the last century. As Lord Bingham famously remarked in the *Belmarsh c*ase[42] the enforcement of law by an independent judiciary is now regarded as a cornerstone of a democratic society. The purpose of judicial review primarily is to give effect to Parliament's will. The function of the court of judicial review is to ensure that all authorities act within the confines of their power. 'The maintenance of the rule of law is in every way as important in a free society as the democratic franchise.' The link between judicial review and rule of law is that judicial review is the exercise of a constitutional power which the rule of law requires.

What is the accountability of judges in a democracy must be properly understood and appreciated. Judges are accountable not in the same sense in which politicians are. Democracy and majoritarianism are not synonymous. In the context of governance or politics, democracy is the process and government by the majority is the outcome. In the context of human rights or fundamental rights, democracy means the rights of individuals where the majority has little, if any, place. Judicial accountability in a rights–democracy context does not mean political accountability to effectuate the majority will or accountability to the majority. It really means the assurance to each individual that the process of determining the individual rights is transparent, impartial and objective. It is trite that there is no principle more basic to our system than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review.

In order to be protected by the rule of law we must follow the law even when we disagree with it. A realisation that all our liberties depend upon compliance with law is something that runs deeper in the whole system and is more enduring. "Constitutionalism works, our liberties are protected and our society is free because….people as a whole realize that liberty for the weak depends upon the rule of law and the rule of law depends upon voluntary compliance."[43] This is the all-important but fragile faith which every generation needs to cherish, nurture and carry forward.

Democracy involves reconciliation of tensions and resolution of conflicts. Law is coeval with society and the court adapts and moulds it to meet the felt needs and aspirations. A proper balance is maintained between the need for change and for preservation. All this facilitates the working of democracy and making it meaningful. In the Indian context the contributing role of the judiciary in vitalizing democracy is borne out by its various judgments. Democracy accepts differences and dissent. The right to freedom of speech and expression – to disseminate

36 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale Univ Press, 1921) pp 92-94.

37 Robert G McCloskey, *Essays in Constitutional Law* (Alfred A Knopf, 1957).

38 KK Mathew, *Democracy, Equality & Freedom* (Eastern Book Company, Lucknow, 1978) p 26.

39 Learned Hand, 'The Contribution of an Independent Judiciary to Civilization' in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, Hamish Hamilton, London (1954) 155, at pp 159-160.

40 Elliot Richardson, 'Freedom of Expression and the Function of Courts' in (1951) 65 *Harv L Rev* 1.

41 *United States v Butler*, 297 US 1, 79 (1936).

42 *A and Ors v Secretary of State for the Home Department* [2005] 2 AC 68.

43 Archibald Cox, *The Court and the Constitution* (Asian Books Pvt. Ltd. 2nd Indian Reprint,1992) p 15.

information and to know, the right to question, scrutinise and dissent which enables an informed citizenry- the governed to rein in the government- all so vital in a democracy – have been protected and advanced. Judicial review has brought about important changes, it has resulted in significant limits on the actions of other bodies and on the ways in which we lead our lives. The exercise of all power has been tempered with constitutionalism and made accountable. All this is a fillip for democratic values and democratic functioning and is achieved by exercise of the power of judicial review. As Justice Stephen Breyer (of the US Supreme Court) says in his eminently readable and enlightening book *Making Our Democracy Work – A Judge's View*,[44] "To exercise a power that seeks to ensure a well-functioning democracy is not anomalously undemocratic."

This contest and reconciliation between conflicting principles and goals is not limited to law. "When in any field of human observation, two truths appear in conflict, it is wiser to assume that neither is exclusive, and that their contradiction though it may be hard to bear, is part of the mystery of things."[45] But as Justice Frankfurter points out judges cannot leave such contradictions as part of the mystery of things, they have to adjudicate and if the conflict cannot be resolved, they have to arrive at an accommodation of the contending claims. This is the great challenge for a judge and "the agony of his duty."[46]

Limits of judicial review

Constitutional choices have to be made, so also policy initiatives and choices and legislation consequential to or supportive thereof. Whose right is it to choose and experiment and may be err? Should judges exercise the 'sovereign prerogative of choice'? That should belong to and be exercised by the executive and legislative branches of government. Only in case of illegality or unconstitutionality should the court intervene, ie, only in cases that leave no room for reasonable doubt. The constitution outlines principles rather than engraving details and offers a wide range for legislative discretion and choice. And whatever choice is rational and not forbidden is constitutional. Governmental power to experiment and meet the changing needs of society must be recognized. To stay experimentation may be fraught with adverse consequences. In the exercise of the high power of judicial review, judges must ever be on the guard not to elevate their prejudices and predilections into legal principles and constitutional doctrines.

If judicial modesty and restraint are not accepted and if judicial activism or aggression is to be the rule in matters of policy and law making, some basic issues remain. Is government by judges legitimate? Democratic processes envisage a 'wide margin of considerations which address themselves only to the practical judgment' of a legislative body representing a gamut of needs and aspirations. The legislative process, it is trite, is a major ingredient of freedom under government. The legislative process does not seek the final truth, but an acceptable balance of community interests. To intrude upon such pragmatic adjustments by judicial fiat may frustrate our chief instrument of social peace and political stability. If the court is to be the ultimate policy making body, that would indeed be judicial imperialism without political accountability. The inputs that the judiciary can get would be inadequate and not reflecting the diversity of interests and "inadequate or misleading information invites unsound decisions." Moreover, such a system will train and produce citizens to look not to themselves for the solution to their problems but to a small and most elite group of lawyers who are neither representative nor accountable. This cannot be the democracy or the rule of law to which we are wedded. Maybe it is not unrealistic to doubt or despise the political processes and it may also be that the people cannot be fully trusted with self-government. But it would be naïve to believe that guardianship is synonymous with democracy.

It is accepted that Chief Justice Marshall's greatness lay in his recognition of the practical needs of government and the need for statecraft in constitutional adjudication. The court must also be conscious that democratic result can be achieved only by its disbelief in ultimate answers to social and economic issues and that legislative judgment on these matters is largely conditioned by time and circumstances and that there are hardly any scientifically correct and certain criteria of policy and legislation.

The art and craft of constitutional interpretation demands that opinions of the courts are intellectually convincing and internally consistent in their reasoning, both as regards the case on hand as also for the broader principles that give coherence and consistency to constitutional jurisprudence. It is rightly said that informed judicial review elevates political conflict to the level of constitutional intelligibility by bringing political controversies within the language, structure and spirit of the constitution. This is dependent on the individuals who are called upon to exercise this power and they must show political wisdom and statesmanship, legal craftsmanship and a sensitivity to the awesome responsibility imposed on them under our system of government. They must have "a breadth of outlook and an invincible disinterestedness rooted in temperament and confirmed by discipline."[47] The function of judicial review calls for balancing different values and principles. Striking the balance implies the exercise of judgment, as Frankfurter, J. said, and he went on to say that as far as it lies within human limitations, it must be an impersonal judgment, must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed.[48] And to recall the wise admonition of Breyer J the court must help maintain public acceptance of its own legitimacy which is best done by ensuring that the Constitution remains 'workable' in a broad sense; and this requires applying constant constitutional principles to changing circumstances. In making difficult decisions the judiciary must recognize and respect the roles of other governmental institutions and reckon their experience and expertise.[49]

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44 Vintage Books, New York, 2011, p 5.

45 'Literature and Dogma', *Times Literary Supplement* (London) Jan 22, 1954, p 51.

46 *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 Proceedings of the American Philosophical Society, 233 (1954).

47 Felix Frankfurter, 'John Marshall and the Judicial Function' in *Harv L Rev* Vol 69 No 2 Dec 1955 p 217.

48 *Sweezy v New Hampshire*, 354 US 234 (1957).

49 Supra note 44, at p 73.

In the process of interpretation and in deciding matters judges make law, but only interstitially. Law is moulded and sometimes changed by this process which is quite legitimate. However this is subject to legislative oversight, amenable to being overruled by the legislature by enacting a new law. It is thus subject to correction by popular sovereignty- the people who elect the legislators can influence and have the law changed. That is the theory in any case. It is, however, not uncommon now for the court to exercise full-fledged legislative and executive power and travel into realms not its own. In this process of legislating or issuing directions touching matters of law and policy many constitutional limitations are breached. Legislative and executive actions are tested and corrected by the judiciary. But judicial action which partakes of both executive and legislative nature leaves one aghast and remediless. If the salt has lost its savour wherewith can it be salted?

The philosophy of judicial review is rooted in the principle that the constitution is the fundamental law. The constitution has established three coordinate and independent wings or organs of government. The constitutional scheme, at least in theory, is so designed that each organ is a sentinel on the *qui vive* against the other two lest any of them become too powerful or autocratic. The doctrine of judicial review postulates that the judiciary is the interpreter of the constitution with the power to prescribe rules for the others and is the arbiter of the limits of authority of the different wings. There is also the view that judicial review is a deliberate check upon democracy through an organ of government not subject to popular control. Again, political theory and the theory of the constitution hypothesize that given the possibility of legislative oversight and constitutional amendment, there is nothing undemocratic in responsible, independent judges acting as constitutional mediators.

Expansion of judicial review and the constitutional balance

However, we need to caution ourselves that the doctrine of basic structure [enunciated in India in *Kesavananda Bharati's* case[50] and in some other jurisdictions] upsets this theory and fine balance. With even Constitution amendments being susceptible to a challenge as destroying the basic features and violating the basic structure of the Constitution, the basic structure theory raises the issue of the democratic character of judicial review in its most acute form. In limiting the amending power, the doctrine in effect stifles democracy, a basic feature. It upsets the delicate balance between the different wings. The basic major premise of the Constitution is that what obtains is limited government. Checks and balances of powers in the constitutional scheme is perhaps the most fundamental feature of democratic constitutions. Is that basic feature not breached by the basic structure doctrine? If constitutional government is limited government, one of its enemies is absolutism of any kind. The *Kesavananda* doctrine is indeed judicial absolutism or imperialism. There is no doubt that *Kesavananda* salvaged something precious. But desirability is not the test of power. One cannot test or justify the juristic foundation of a concept based on the result, however beneficial or alluring.

It is not for the court in the guise of expounding the constitution to take a lead in matters of reform and assign to itself a reformatory role. That is something for the people and their representatives to evolve. Judicial review cannot be of anything and everything. Judicial proceedings and pronouncements must be informed "by the great verity that the broad sweep of human history is guided by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety."[51] The court must be conscious of its own remoteness and lack of familiarity with many issues which it is ill equipped to deal with and pronounce upon. Grounding judgments in concepts like 'constitutional morality' and 'manifest arbitrariness' to annul a law is treading on ice. These are totally subjective without any objective standard or criterion and would themselves be arbitrary. In one sense it is simply the court's inclination to intervene. In a democratic society issues confronting the people must be resolved through public deliberation, discourse and the engagement of citizens with their representatives and the constitution.

> A judgment seeking to reconcile different conflicting interests in society has to be made by the dominant opinion in the community. For a judge to serve as a communal mentor, as Learned Hand said, appears to be a very dubious addition to his duties and one apt to interfere with their proper discharge. The court is not the organ intended or expected to light the way to a saner world, for in a democracy that province is the choice of the political branch-the representatives of the people, striving, however blindly or inarticulately, towards their conception of the Good Life."[52]

There are judgments that clearly go against the language and intendment of the Constitution and the Constitutional scheme. "In law, the moment of temptation is the moment of choice….. To give in to temptation … solves an urgent human problem, and a faint crack develops in the foundation."[53] When that happens, judicial review may turn out to be anti-democratic.

Any support or justification for constitutional adjudication and even more for judicial legislation will have to be premised on sound legal reasoning. It cannot be sought to be justified for the reason that it produces welcome and desirable results. If that is done, law will cease to be what Justice Holmes named it, the calling for thinkers, and become merely the province of emoters and sensitives.[54] Then naturally there are no rules, only passions. Legal reasoning rooted in a concern for legitimate process rather than desired results restricts judges to their proper role in a constitutional democracy. That marks off the line between judicial power and legislative power.

The summons to a better understanding of these issues presses for an answer.

Desideratum

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50 *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225.

51 *Indira Gandhi v Raj Narain*, (1975) 2 SCC 159.

52 Mathew J in *Kesavananda Bharati*, supra note 50, para 1712, p 880.

53 Robert H Bork, *The Tempting of America- The Political Seduction of the Law* (The Free Press, 1990) p 1.

54 Oliver Wendell Holmes, *The Profession of Law*, reprinted in Speeches by Oliver Wendell Holmes (1913), p 22.

Nature abhors a vacuum and the inaction of the legislative and executive wings creates pressures for judicial action which is quite tempting. Such judicial action may also win public acclaim and acceptance. But something more precious and vital is at stake. It is the survival of the fundamental constitutional system. Neither popular acclaim nor criticism can answer the long term issue of the appropriate legislative role of the judiciary and the desirable limits on the scope of such power and action. More paramount considerations must be decisive. It is a fact that courts work and apply the law not in the vacuum of intellectual dexterity, but to the hard and mundane realities. The hydraulic pressure of great events do not pass judges idly by. Even so there is the desideratum that all judicial actions and decisions should have visible legal support and rest on sound jurisprudential basis.

The judiciary fulfils an important role acting as an auxiliary precaution against the abuse of governmental power and excesses of majoritarian democracy. Judicial review provides the sober second thought of the community – that firm base on which all law should rest. But there is need to recognise that judicial power and process also have their limitations. "The courts' deference to those who have the affirmative responsibility of making laws and to those whose function is to implement them has great relevance in the context and when to this is added the number of times that judges have been over ruled by events, self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. The attitude of judicial humility and restraint is not an abdication of the judicial function; it is a due observance of its limits."[55] The courts will have to win public acceptability and esteem by exacting high standards of professional competence and moral integrity. As Justice Holmes believed, the courts like every other human institution must earn reverence through the test of truth.

The judiciary has done many excellent things. The difficulty with proposals to respond to the judiciary when it behaves unconstitutionally is that it would create a power to destroy the courts' essential work as well. The best and complete answer to such situations is the self-imposed discipline of enlightened judicial restraint. The rarest kind of power in our troubled world, it is said, is one recognised but not exercised. Yet that is the sort of example we have a right to expect from the organ of the State that must define the limits of all organs including its own.

As Mauro Cappelletti observes, Judges have become the trustees of a new conception of 'limited' government—limited, that is, by constitutional and also by transnational mandates. At the same time, they have also become the trustees of an 'enlarged' government—enlarged, that is, to fulfil the new goals of the social state.[56] The standards of fiduciary conduct set by Cardozo for even an ordinary trustee is that "he is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is the standard of behaviour."[57] What then to say of a constitutional trust at once so lofty and so noble!

It would be appropriate for courts to adhere fastidiously to the solemn counsel of one of the profoundest judicial minds: "Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same."[58] As Frankfurter J cautioned, "… the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment."[59] The sage observation of Blackmun, J. tellingly portrays the temptation that judges may often face and may sometimes yield to. "A judge would be unimaginative indeed if he could come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation and thereby enable himself to vote to strike legislation down."[60]

Survival of judicial review

Power is of an encroaching nature, wrote Madison in *The Federalist*. Judicial power is no exception to this truism. One has to be on the guard always because many a time everything remains seemingly unchanged; and it is then that you must beware of the changes, however slight, lest you are unwittingly overtaken by the imperceptible change. Public law ought in principle to respect conventional limitations on judicial activism, they are critical to the functioning of a democratic state.

Judicial review has survived and triumphed with some adjustments in its outlook, approach and functioning. All attempts to curb the courts' powers proved futile. The reason is not far to seek. True democratic polities revere the constitution and an independent court that applies its provisions. It must be remembered that our system of democratic government is majoritarian democracy but with boundaries set by our constitutional structure and culture, the rights conferred and the limitations imposed by the constitution even against the majority's desires. Lord Bingham in his acutely illuminating and extremely readable book, *The Rule of Law*[61] admirably sets down some of these principles: "For although the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply, and it falls to the executive….to carry these laws into effect, nothing…authorizes the executive to act otherwise than in strict accordance with the laws. The process by which courts enforce compliance by public authorities with the law has come to be known as judicial review. Judges are reviewing the lawfulness of

55 Frankfurter J in *West Virginia v Barnette*, 319 US 624 (1943).

56 Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press, 1989).

57 *Meinhard v Salmon*, 249 NY 458 (1928).

58 Holmes J in *Blodgett v Holden* (1927) 275 US 142, 148.

59 *Trop v Dulles* (1958) 356 US 86.

60 *Illinois Elections Board v Socialist Workers Party* (1979) 440 US 173.

61 Tom Bingham, *The Rule of Law*, (Allen Lane, London, 2010) at pp 60-61.

the actions of others which is an appropriate judicial function for which they have the professional expertise. But they are not independent decision makers, and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less."

The future success of judicial review, as Professor Cox perceptively observes, probably depends in good measure on which belief prevails-whether law is only policy made by courts or that judges are truly bound by law both as a confining force and as an ideal search for reasoned justice detached as far as humanly possible from the interests and predilections of the individual judge.[62] The heavily policy oriented view not only carries the dangers of the 'despotism of the oligarchy 'of which Jefferson spoke, it cuts off the taproots of judicial independence and legitimacy.

"In its creative aspects wise constitutional adjudication seems to draw additional legitimacy from, and is limited by, a delicate symbiotic relationship. While the opinions of the Court can sometimes be the voice of the spirit reminding us of our better selves, the roots of such decisions must already be in the people ... The legitimacy of the great creative decisions of the past flowed in a large measure from the accuracy of the Court's perception of the common will and from the court's ability, by expressing the perception, to strike a responsive chord equivalent to the consent of the governed. To go further –to impose the Court's own wiser choice is illegitimate."[63]

Symbiotic relationship

The Constitution is no doubt a legal document, but it is also a social testament and a political instrument. The relation between the institutions, particularly the legislature and the executive, is more political. One cannot also overlook the relationship between the legal and the political processes which are intermixed. Constitutional adjudication, therefore, at least to some extent, is political. The politics of constitutional adjudication are clearly different from parliamentary, governmental and electoral politics. It involves rational justification and legal foundation, but constitutional review can nevertheless not claim to be innocent of politics.

In this background some tension between the various wings of government is both inevitable and desirable. It shows that democracy is alive and working and constitutional institutions are vibrant and functional. It is some kind of a dialogue between the judiciary on the one hand and the legislature and the executive on the other. But bonhomie or cordiality between the judiciary and the other wings, (the relationship between whom is expected to be correct and nothing more) more often than not, may herald the demise of democracy and constitutionalism. The court is not accountable to the legislature or the nation in the way a legislator is. It is accountable to the constitution and its values. That is the personal and institutional independence of the judge. Judicial review of the constitutionality of State action indeed realizes democracy.

In one sense constitutional adjudication is, and must be, a dynamic interaction – a 'democratic dialogue' among the wings of the government. "Courts remind legislature of the values that might otherwise be neglected and legislatures respond by expanding or refining the terms of the debate."[64] Public law must in principle respect conventional limitations on judicial power. They are crucial to the functioning of a democratic state. To remember that there can be no legal solubility to every problem and that the judicial process has its inherent limitations is wisdom and acknowledgment of a stark reality. The court is not a 'one stop solution to resolve complicated issues of policy and society.'

Professor Dieter Grimm, former Justice of the Federal Constitutional Court of Germany mentions that while amendments are an external corrective to the power of courts, there is also an internal corrective. "Even if it is true that, what is legally acceptable and what is not, can only be defined in the legal system, it is never defined once and for all and judges are not the only actors to take part in the ongoing discussion. It is therefore extremely important that constitutional courts are embedded in a lively discourse in which the division of functions between the political and juridical branches of government, the acceptability of legal methods and the soundness of interpretations are constantly evaluated and readjusted. Judicial independence is not in danger when judges pay attention to the reaction their decisions find in society."[65]

We hear the same idea echoed and expatiated on in a recent judgment of the Supreme Court of India in *Gujarat Ujra Vikas Nigam v Amit Gupta*[66] where Dhananjaya Chandrachud J speaking for the Court observed profoundly: The core of constitutional dialogue is that the different wings-judiciary and legislature- engage in a conversation about constitutional meaning in which both actors should listen to learn from each other's perspectives which can lead to modifying their own views accordingly. The court is, at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. That is a matter within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, the court cannot sit with folded hands and simply pass the buck onto the legislature. In such an event the court can adopt an interpretation-a workable formula-that furthers the broad goals of the legislation concerned while leaving it to the legislature to formulate a comprehensive and well considered solution to the underlying problem. To aid the legislature in its exercise the court can put forth its best thinking

62 Archibald Cox, *The Court and the Constitution* (Asian Books Pvt Ltd. 2nd Indian Reprint, 1992) p 377.

63 Ibid.

64 Kent Roach, *The Supreme Court on Trial-Judicial Activism or Democratic Dialogue* (Toronto, Irwin Law, 2001) p 250; see also, Peter Hogg & Allison Bushell, 'The Charter Dialogue between Courts and Legislatures' in (1997) 35 *Osgoode Hall LJ* 75; and *Vriend* v *Alberta(Attorney General)* [1998] 1 SCR 493 paras 138, 139 per Iacobucci, J. All this is with particular reference to certain provisions in the Canadian Charter, but the idea is not wholly inapposite as regards constitutional adjudication under other constitutions.

65 Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' in (2011) 4 *NUJS L Rev* (2011) 15 at pp 28-29.

66 (2021) 7 SCC 209.

as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalised in a nuanced fashion. It is in this way that the court can tread the middle path between abdication and usurpation.

If it is accepted that courts are constantly remaking the law, which indeed they do, then it is of the greatest social importance that the law should be made in conformity with the best available inputs from other disciplines. An appreciation of what Holmes called 'the secret root from which the law draws all the juices of life' by which he meant 'considerations of what is expedient for the community concerned'[67] furnishes a more viable point of departure for a jurisprudence of the age of the positive State. Can it not be said that the judiciary may legitimately serve as part of an 'aristocracy of talent', to use Carlyle's phrase[68], in helping to build that jurisprudence?

Judicial review and its limits

As Cardozo said, "You may say that there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfil their functions as judges, it could hardly be lodged elsewhere. Their conclusions must, indeed, be subject to constant testing and retesting, revision and adjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom."[69] This captures the quintessence of judicial review in a democratic framework.

There may be no unanimity on the scope and limit of judicial power but there is no gain saying that it is essential as long as it does not breach its embankments. That judicial review is legitimate does not mean it is unconfined. The genius is to find the limits. In the art of creativity, in the delicate balancing between creativity and fidelity, in choosing where to draw the line which makes it possible to find just that compromise between the letter and the spirit and guide him to safety lies the wisdom and genius of the judge, a quality which is God's gift as Learned Hand said but which can also be acquired by experience, dedication and application.

Few constitutional issues, it is said, can be presented in black and white. They are not matters of icy certainty. In law, particularly constitutional law, there are no absolutes. Differences of degree imperceptibly merge into differences of kind. But a trained judicial perception would be capable of discerning the nuances and which of the gradations make genuine difference. That alone is the real assurance for proper use of the judicial power. Constitutional law is the intersection of law and politics and constitutional adjudication is, and has to be, an act of statesmanship.

Judicial humility and deference are as much necessary and important concomitants of constitutionalism as the robust exercise of judicial power. Constitutional adjudication and the exercise of the power of judicial review is a delicate task requiring balancing of different principles and values calling for vision and statesmanship, something which requires a measure of activism and a measure of self-restraint. To the legislature no less than to the judiciary is committed the guardianship of cherished liberties and values. Judicial power also has its limitations, it is not a panacea for the ills of society and the failure of the other branches of government. Losing sight of this profound truth may be dangerous and an invitation to judicial despotism.

Conclusion

Professor Friedmann perceptively remarks that in the modern democratic society the judge must steer his way between the Scylla of subservience to Government and the Charybdis of remoteness from constantly changing social pressures and economic needs.[70] The genius of constitutionalism which supports the rule of law lies in the constitution – its resilience which provides ample opportunity for both continuity and change, in the method of interpretation and in the wisdom and ability with which the judges, in spite of a few bad mistakes 'have steered between the horns of their dilemma'.[71]

It is no doubt true that judicial review is recognized and even ordained by the constitution. Yet judicial review operates in a democratic set up and its counter majoritarian character is reconciled with democratic majoritarian principles on certain well known and recognized basic assumptions. We cannot but accept that judicial review is essential in a government with limited powers and as a bulwark for the protection of individual rights and liberties.

In this subject we necessarily hear undertones of the perplexities of reconciling apparent contradictions. One need not, perhaps, be too disconcerted by the various pulls and pressures tending to upset what one believes to be an ideal constitutional balance. "The basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution – the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity – lies the clue to creativity that will endure."[72]

If the judiciary, particularly the Supreme Court, is to be the guardian of our liberties and of a correct interpretation of the Constitution and the laws, the unpleasant, painful but inescapable duty of pointing out the errors falls on academic and/or practising lawyers. Prof. Glanville Williams' question

67 Oliver Wendell Holmes, *The Common Law* (1881), Little Brown & Co, ed by Mark DeWolfe Howe (1963) Belknap Press, p 32.

68 Thomas Carlyle, *Past & Present*, Everyman Edn (1941), p 29.

69 Benjamin N Cardozo, supra note 36 pp 135-136.

70 W Friedmann, *Law in a Changing Society*, (Stevens & Sons Ltd, London, 1959) pp 65-66.

71 Archibald Cox, *The Court and the Constitution* (Asian Books Pvt Ltd, 2nd Indian Reprint, 1992) p 27.

72 Paul A Freund, *On Law and Justice*, Cambridge, Mass (1968) p 23.

Quis Custodiet Ipsos Custodes[73] (who watches the watchmen) was answered by Prof Atiyah in his Hamlyn Lectures (1987) on *Pragmatism and Theory in English Law,* by saying that the answer clearly was, "Prof Glanville Williams or in default, some other academic lawyer of equal calibre."[74]

One is fortified by what Justice Holmes said: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism…I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law and especially our system of law, as one of the vastest products of the human mind…But one may criticize even what one reveres. Law is the business to which my life is devoted and I should show less than devotion if I did not do what in me lies to improve it."[75] And he spoke of "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought."[76] It is in this spirit of enquiry and humility that I have placed my thoughts before you.-

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73 'The Lords and Impossible Attempts or *Quis Custodiet Ipsos Custodes*' (1986) 45 *Cambridge LJ* 33.

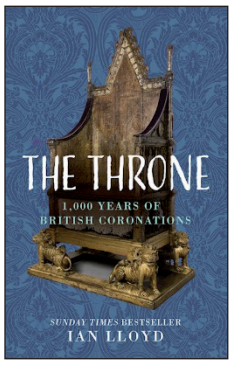
74 London: Stevens (1987) pp 182-83.

75 *The Path of the Law*, Collected Legal Papers, (Harcourt, Brace & Howe, 1920) 167 at p 194.

76 Speech at Harvard in 1885 on 'The Profession of the Law'.

Book Reviews

THE THRONE by Ian Lloyd, The History Press, Cheltenham (UK), 2023, pp 244, £16.99 (hbk), ISBN: 978-1-80399-286-0.



Coronations are rare events, peculiar to the dwindling number of monarchies around the world, but when they do happen they attract intense attention, as was seen in the media coverage of King Charles III ascension to the British throne recently. Coincidentally or otherwise, this book, by a veteran royal correspondent and photographer, makes an opportune appearance.

In just under 250 pages it offers a wealth of information about coronations past and present, and it does so in an engrossing way. The earliest of these events can, says the author, be traced back to Pentecost 973 when King Edgar was enthroned in Bath Abbey. The book itself covers 40 coronations, relating to eight royal houses, starting with the Normans and ending with the House of Windsor.

Against the background of frequent exhortations to 'modernise' the rituals of the monarchy, it is sobering to note that, apart from the format of the coronation ceremony itself (which has five essential elements: The Recognition; The Oath; The Anointing; The Investing; and The Crowning), few things associated with the event have remained constant or set in stone. So, explains Lloyd, the length of the service has varied from, say, three to five hours; the procession has not always taken a fixed route (even the location of the service was not fixed before 1066); the gap between the monarch's accession and his or her coronation has sometimes been as short as less than a day (William the Conqueror) or as long as sixteen months (Elizabeth II). Perhaps the biggest change of all has been in the media coverage of the coronation: from allowing a photographer (George V) to agreeing to live radio coverage (George VI), we now have a full live televising of the service (since Elizabeth II).

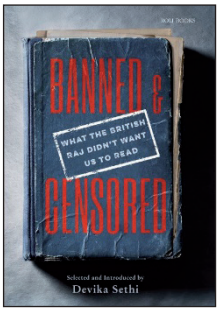
The book is full of charming anecdotes. Sample this from the coronation of William I which combined Anglo-Saxon rites with those of the Normans, recited in English and French respectively, leading to a bilingual service. When the time came for the assemblage to acknowledge William as king, the chorus that ensued involved simultaneous shouting in two languages which led the Norman guard standing outside the hall to fear that a riot had broken out. The guard promptly began torching nearby buildings to create a distraction and quell the imagined riot. Pandemonium ensued and it led to a mass exodus of the congregation and it saw the king "trembling from head to foot", in the words of a contemporary chronicler. The same chronicler added: "The English, after hearing of the perpetration of such misdeeds, never again trusted the Normans who seemed to have betrayed them, but nursed their anger, and bided their time for revenge."

There are also stories of mishaps, gaucheries, indiscretions, slip-ups and so on. Richard II, after being enthroned, lost one of his consecrated shoes while being carried the shoulders of a friend back to Westminster Hall, and this was considered a bad omen; to atone for it, the king "sent a pair of red-painted velvet slippers, blessed by Pope Urban VI, to the abbey authorities to be placed with the other pieces of his regalia". James VI & I, says Lloyd, as part of his coronation festivities, indulged in "a bit of gay flirting during the homage", never concealing "his fondness for male courtiers, particularly the Duke of Buckingham". George I had many of royal mistresses attending his coronation, and Lloyd's account of what transpired on the occasion is bound to raise a laugh:

> When, following tradition, the Archbishop of Canterbury presented the king to all four sides of the abbey, asking the people if they were prepared to recognise him as their sovereign, Lady Dorchester, one of James II's mistresses, loudly retorted: 'Does the old Fool think that anybody will say no with so many drawn swords?' Later on, Lady D caught up with the Duchess of Portsmouth (one of Charles II's surviving squeezes) and Lady Orkney (mistress to William III) and cheerily observed: 'Good God! Who would have thought we three whores would have met together here!"

Amusement aside, this book is a huge source of information. The style is attractive and the tone sober. There are fetching illustrations accompanying the text which offer visual diversion from time to time. A bibliography which lists further material, including some academic texts, brings up the rear. All in all, an absorbing read.

BANNED & CENSORED by Devika Sethi (ed), Roli Books, New Delhi, 2023, pp 352, Rs 1,295 (hbk), ISBN: 978-93-9213-0649.



At a time when the 'cancel' culture, 'no-platforming' etc are the subject of increasing concern in certain corners of the world, it is interesting to be reminded that censorship of the written – and sometimes the spoken – word is not a new phenomenon. Perhaps a major difference between bygone years and now is that acts of censorship then were carried out almost exclusively by the state (and with official sanction) whereas that role is now assumed by 'big tech' acting at the instigation of, and pressure from, certain societal groups. This fascinating book brings together a selection of items which were banned by the British rulers of India over a period of several decades.

The scale of colonial censorship, if the editor of this volume is to be believed, is staggering:

> [t]he only scholar to have attempted a calculation estimates that between 8,000-10,000 individual titles were banned in the last forty years of colonial rule in India, and about 2,000 newspapers were subject to some kind of legal restraint. Over 1,000 individual items were banned by name during the First World War (1914-1918) alone, for instance. In one year (1930), as many as 150 collections of nationalist poetry were banned and over 1,000 items were banned in the four years between 1931 and 1935. The Customs department prevented (multiple copies of) 450 individual titles from entering India between 1935 and 1938.

What, then, were the material which the British rulers found so threatening? The repertoire is huge: newspaper articles (including in the vernacular press), letters, books, book excerpts, book covers, leaflets, pictures, exhortations by nationalist leaders, poems, posters, transcripts of broadcasts, circulars, skits, and so on. Liberal use was made of the law of sedition – which, incidentally, continues to be deployed just as wantonly and indiscriminately today without sufficient scrutiny by the courts and in the face of strong constitutional guarantees against denial of free speech rights in an independent India.

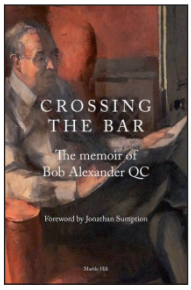
The motivations behind the imposition of such sweeping attempts to suppress criticism or dissent is explained by Sethi thus:

> Colonial officials soon recognized that the printed and spoken word could influence Indian students and also silence moderate or pro-British Indian opinion by giving vent to extremist and anti-British ideas, which they thought to be held by a minority. Many officials believed that display of weakness in dealing with provocations in print would make it difficult to India; undecided or neutral Indians could yet abandon their loyalty t the Raj. To the colonial state, certain kinds of publications were simultaneously 'a symptom and cause of unrest'.

The documents included in this book span just under fifty years, and they are arranged chronologically under five parts, each covering roughly a decade, starting with 1900 and ending with the departure of the British from India. It needs to be remembered that this is only a sample of what exists – as Sethi explains, "For the historian of censorship in colonial India, the problem (in terms of locating primary source material) is not of paucity but of plenty." Unfortunately, the cataloguing of such material is far from comprehensive, which makes the task of the historian immensely difficult.

That being said, it is to the credit of Sethi that she has been able to ferret out these gems and present them in the form of this highly readable volume. Roli Books too deserves kudos for ensuring exceptionally high production standards for the book. The layout and get-up are strikingly attractive, and the editing flawless. Some readers would have wished that the book had a back index, but that is a minor cavil.

CROSSING THE BAR by Bob Alexander, Marble Hill, London, 2023, pp vi + 298, £25 (hbk), ISBN: 978-1-8383036-6-2.



The popular perception about the Bar being a profession in which only those born to privilege are likely to succeed remains as entrenched as ever. While there may be some truth to that perception, individuals emerge from time to time who, despite coming from modest backgrounds, scale the heights of success and reach the very top of the professional tree with dazzling ease. One such is the author of this posthumous memoir, Robert Alexander, who remained, in the words of another leading barrister of his generation, Jonathan Sumption, "the undisputed King of the English bar for some 15 years..."

The memoir is an incomplete one (Alexander died, aged 69, while still writing it), but no less enjoyable for that. It is written in an easily readable style, and not only describes some of the major legal battles of the 1970s and 1980s in which Alexander was involved, but takes readers back to an era in which the English Bar followed traditions and practices which are unrecognisable today. An agreeable aspect of the book is that Alexander does not shy away from giving his views on those traditions and practices, even if they sometimes go against the grain of emerging thought. For example, he never warmed up to the idea of a fused profession or multi-disciplinary partnerships in the practice of law, noting that he found it hard to

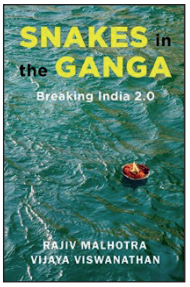
> understand ... the cry that goes up from time to time that there should be a fusion between the two branches of the profession. The US experience does not suggest that this leads to more skilled, effective or less costly advocacy. The availability of an independent Bar, prepared to represent popular and unpopular cases alike, acting sometimes for the government or public authorities and sometimes vigorously asserting the rights of the individual against those same authorities, is for me one of the bastions of our system of justice. This is sometimes ill-understood outside the profession, by theorists who would try to press the Bar to practise in partnership or even organisations called multi-discipline partnerships.

Alexander also comes through as a stickler for principles such as natural justice. Discussing, at some length, the travails of the novelist Jeffrey Archer – whom he represented in his famous defamation case against *The Daily Star* newspaper – Alexander expresses his distaste for the attempts made by the Lord Chancellor to have Archer expelled from the House of Lords after he had been convicted of perjury and had served time for it, noting that it was "untenable" for an "extra penalty" to be imposed retrospectively. He does, however, acknowledge that he felt that "Archer had hidden some key areas of the truth from me" in relation to that famous case. "[B]arristers should," he adds philosophically, "take this in their stride because they are paid to put forward the defence advanced by the client and not to judge that defence. But for all that I felt a bit let down."

It is worth remembering that Alexander had, after dominating the Bar, enjoyed a second career, this time in banking. He was approached to become chairman of NatWest Bank in 1989 after being recruited on the basis of the old-style 'tap on the shoulder' by one of the then grandees, Lord Boardman (a similar procedure saw him being appointed in 1987 to the part-time position of chairman of the Takeover Panel – Alexander describes it as "the very pragmatic way in which jobs were offered in the days when they did not have to be advertised, and before Nolan procedures and the ever increasing plethora of rules about corporate government [sic]"). His time at NatWest was eventful, not least because he had to deal with the aftermath of the Blue Arrow incident and a dramatic reduction in profits in the early 1990s. When he stepped down ten years later, he assessed his record as both positive ("I helped to move the bank from a weak and dispirited state to a confident outlook with the right foundations for a profitable future") and negative ("I had not managed to make a sufficient change in the culture of the bank").

More interesting stories follow, drawing on Alexander's presidentship of the Marylebone Cricket Club (MCC), chairmanship of the Royal Shakespeare Company (RSC), and chancellorship of Exeter University (he also served the chairman of the human rights and law reform advocacy group, JUSTICE, and as a member of the government's Panel on Sustainable Development). Had his life not been cut short at as young an age it was, this book would have been enriched with more interesting anecdotes and reflections. It is nonetheless a highly entertaining and instructive volume. The proof-reading and the editing could have been a bit more meticulous, but those are slight blemishes.

SNAKES IN THE GANGA by Rajiv Malhotra and Vijaya Viswanathan, BluOne Ink LLP, Noida (India), 2022, Pp lii + 812, Rs 895 (hbk), I SBN: 978-93-922090-93.



This is a work of penetrating incisiveness, magisterial sweep and exacting thoroughness. It is all the more remarkable for being presented in language that is both accessible and arresting. The book deals with the highly topical, but controversial, subject of the forces that are, in the view of the authors, ranged implacably and dangerously against the world's largest democracy as it stands poised to become a global superpower.

For those who are intrigued by the title of the book, Malhotra and Viswanathan are at hand to offer an explanation. "Snakes in the Ganga," they note in their introduction, "is a metaphor for some foreign institutions that are mapping ideas of Wokeism to India, thereby undermining India's ancient civilisational fabric." Consequently, the book discusses such matters as: critical race theory; cancel culture; attacks on meritocracy; the pros and cons of the caste system; history of Indian social organisation; the treatment of India by Western academia; rising Hinduphobia and much else besides. The authors are convinced that the cumulative effect of the multi-pronged attacks on Indian civilisational values amount to nothing less than an existential threat to a country which is, after years of colonisation and self-isolation, only just beginning to assert its place under the sun.

The wide-ranging discussion is premised on four 'Big Stories', viz the Americanisation of Marxism, the Indianisation of Critical Race Theory, the baneful effect of institutions such as Harvard University on Indian society and its values, and the efforts of a 'new elite' to break India. The country is, argue the authors, particularly vulnerable to insidious attacks from within and outside at the present time – a theme which also finds expression in a thoughtful Foreword written by an American academic, Peter Boghossian, who refers to the dangers that the burgeoning US-inspired activism pose to India:

> While this activism is dangerous for any country to which it is exported, it creates perhaps the greatest threat to a country like India that comprises a significant diversity of identifies and hence, the greatest scope for social disruption. Genuinely open-minded and liberal Indian intellectuals must, therefore, be brought closer to their American counterparts in addressing the global threat.

In terms of specifics, the book tackles head on a number of 'hot button' issues which have been dominating the news in recent times and which have generated increasing friction in Indian society. They include: the strident attempts by some activists, especially in the West Coast of the US, to legislatively criminalise all actions which may be seen as being sympathetic to the caste system and to equate higher caste American-Indians with white racists; the traducing of institutions of educational excellence in India such as the Indian Institutes of Technology (which have, among other things, supplied the tech industry in Silicon Valley with manpower of enviable quality over the years) for their emphasis on merit; the relentless encouragement of victimhood among various classes of the Indian population, coupled with implied incitements to revolt against societal institutions; the double standards of billionaires who fund radical causes without either believing in them or caring to understand their long-term implications for the stability of communities; and the capture, by certain elites, of universities such as Harvard to promote fashionable agendas of a destructive nature.

The authors are unsparing, in their criticisms, of Indians themselves, including those in positions of power or influence, for promoting or cheerleading this unhelpful trend. The targets include academics (eg the well-known humanities professor Homi Bhabha, who they believe "is pursuing a cunning and deliberate strategy to throw up a lot of rubbish using Harvard's clout, causing cognitive dissonance in the reader's mind"), industrialists (eg Arvind Mahindra, who donated ten million dollars to Harvard to set up a centre for the humanities in his family name, and who, despite being a "straightforward and non-controversial man", has allowed, probably unwittingly, the dilution of "India's position as one of the oldest living traditions in the world and therefore worthy of being studied in its own right"), and the government in New Delhi (for an act of omission, of not seeking accountability for the 'industry' that has sprung up in the West under Indian patronage to study

India, and which now comprises "several thousand full-time scholars from various disciplines – religious studies, history, anthropology, sociology, political science, human rights, and women's studies, among others").

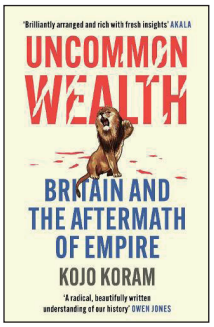
Malhotra and Viswanathan are particularly scathing of the weak and ineffectual responses from 'Hindu activists' to the threats posed by the tendentious activities of many ideologically biased India experts in the West. "They have failed to understand the deeper mechanisms at work. One doesn't fight a patient's ailment by holding placards and shouting slogans against the germs!". What about the rich Indians who freely open their purse strings to universities abroad for suspect causes? Here, the authors offer an analysis which is unlikely to endear themselves to many of their fellow countrymen:

> The lure to become known at Harvard and dine with the who's who of the White American establishment is too powerful for most Indians to resist. The real success for most wealthy Indians is when they are recognized and given a seat at the high table alongside White elites. Having studies Indian culture for centuries, this weakness is what the West knows and exploits well.

By contrast, say Malhotra and Viswanathan, the Chinese are more circumspect when it comes to dealing with Western blandishments. As well as using strategy and skill to ensure that academic programmes in the West are aligned towards China's best interests, both the Chinese government and the country's billionaires have drawn certain lines in the sand which universities like Harvard can only cross at their peril. "China's human rights abuses are seldom studied and have in fact been covered up. But Harvard regularly chides India on such issues." More alarmingly, Malhotra and Viswanathan suggest that "China's inroads into Harvard are also a gateway for it to penetrate India with influence and subversion" – something that should cause alarm in New Delhi.

For all the depressing predictions made in the book (including that "there will be a large-scale destruction of civilizations" through a combination of Woke ideology and the rise of a new techno-elite), the authors also offer policy prescriptions for many of the ills they identify. Whether or not their diagnosis is accurate and their remedies workable will remain debatable. This book certainly offers a good basis for any such debate.

UNCOMMON WEALTH by Kojo Koram, John Murray, London, 2022, pp 298, £20 (hbk), ISBN: 978-1-529-33862-1.



This is a book written with a huge amount of passion and possibly some anger. At one level it is a critique of Britain and her empire, and at another level it is an excoriation of global capitalism. Consequently, the discussion encompasses such matters as Britain's transition from an empire state to a nation state, the legacy of Enoch Powell, the evils of outsourcing, Britain's role in 1950s Iran, immigration policy in the UK, the New International Economic Order, third world debt, capital flight, and so on, taking swipes along the way at many institutions and people.

The book asks some pertinent questions, though there will be no universal agreement on the answers to those questions:

> [W]hy did cities like Mogadishu or Kampala or Lagos, all part of the British Empire just a few decades ago, become bywords for chaos? Why were we happy to tolerate the 'chaos' in these cities, all still supposedly part of our great Commonwealth? Why does this 'chaos' now feel like its [sic] drifting towards Britain and across the West?

These questions cannot, according to the author, "be answered by clinging on to ideas of a natural order and hierarchy across the globe; the belief that the world is divided into places where crises should happen and places where they should not." Instead, there must, he argues, be an examination of Empire and its effects.

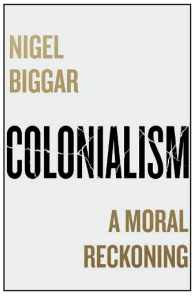
Unsurprisingly, race features significantly in the discussion. A central point Koram makes is that "racism grew out of colonisation, not the other way round." But there is, he adds, a larger point which needs to be reckoned with, viz that the legacy of Empire was not cultural and racial, but economic. And that legacy, Koram's thesis runs, continues to drive our world through the "legal and economic structures put in place to facilitate the imperial system of wealth transfer". What follows is a sustained attack on multinational corporations, the City, and the free market system itself.

Koram's analysis does not spare legal institutions either. He cites the Judicial Committee of the Privy Council as "another example of the authority that Britain still wields over jurisdictions like Bermuda, the British Virgin Islands and the Cayman Islands..." and calls the Privy Council "[p]erhaps the most shadowy body within Britain's complex constitutional network...". Ouch!

In terms of solutions, the author calls for a radical rethink on the economic front:

> If we really want to confront the ways in which capitalism has led us to a new age of great divergence, we need to dismantle the protective casing in which the global financial system was placed to protect it from popular democracy after decolonisation. And we must dare to imagine a world where the security of human life is valued above the securities traded by creditors across the globe.

COLONIALISM by Nigel Biggar, William Collins, London, 2023, pp xvi + 480, £25 (hbk), ISBN: 978-0-00-851163-0.



As far as controversies go, few books in recent times can claim as striking a back story as this one. Originally accepted for publication by Bloomsbury, it became the victim of the 'cancel' culture now so

much in vogue in the Western world, with that publishing house indicating to the author, at a very advanced stage and without specifying any reasons, that "conditions are not currently favourable to publication". Mercifully, William Collins came to Biggar's rescue and agreed to bring out what most readers will agree is a momentous work of great relevance to our day and age.

Biggar's justification for the book is fairly simple and straightforward, although it is unlikely to appeal to those at the forefront of the anti-colonial campaign which seems to have gained considerable traction in recent years. There is, he says:

> [a] more historically accurate, fairer, more positive story to be told about the British Empire than the anti-colonialists want us to hear. And the importance of that story is not just past but present, not just historical but political. What is at stake is not merely the pedantic truth about yesterday, but the self-perception and self-confidence of the British today, and the way they conduct themselves in the world tomorrow. What is also at stake, therefore, is the very integrity of the United Kingdom and the security of the West.

A point that Biggar makes at the outset is that he is an ethicist, not a historian – and that, consequently, the book offers a *moral* assessment of the British Empire, which he is fully qualified to carry out. He is also not shy in admitting that, as a "Christian by conviction and a theologian by profession", his ethics are shaped "first and foremost, by Christian principles and tradition". A number of consequences flow from these fundamental admissions without whose understanding it would be difficult to make sense of Biggar's arguments.

One of those arguments relates to the equality of competing cultures. All cultures are not, he maintains, equal and he illustrates his viewpoint thus:

> A culture that can write is superior *in that technical respect* to one that cannot. A culture that knows that the earth is round is superior *in that intellectual respect* to one that does not. A culture that abhors human sacrifice to the gods and female infanticide is superior *in that moral respect* to one that practises them. [emphasis supplied by the author]

One can see immediately why Biggar's views will be a red rag to the wokeist bull. Add to this his belief that social hierarchies are not immoral or that pacifism is not always justified, and it wouldn't require too much imagination to visualise many liberals foaming in the mouth. But it is his central theses about the rights and wrongs of colonialism – which forms the meat of this book – that is guaranteed to raise the hackles.

Put simply, Biggar refuses to accept that colonialism – especially of the British variety – was pure, undiluted evil. There are, he contends, both a credit side and a debit side to the ledger of colonialism. He lists, at length, each of those sides, and asserts that it is impossible to work out whether the British Empire did more good than evil, or vice versa:

> This is because the goods and evils that the empire caused, intentionally or not, are of such different kinds that they cannot be measured against one another. They are incommensurable. How much chalk is worth so much cheese? How much racism is worth so much immunisation against disease? How many unjustly killed people are worth the blessings of imperially imposed peace? How much humanitarian anti-slavery would make up for the evils of slavery? To ask these questions is immediately to expose their absurdity.

Consequently, Biggar is not sympathetic to the calls made with increasing frequency – and stridency – for reparations. With the passage of time, he argues, it has become impossible to quantify any compensation that can, even if it were possible, be made. "The riotous jungle of history overgrows and obscures the causal pathways." Also, he asks, why focus only on slavery, and British slavery? What about the slave-traders of Africa and Arabia whose activities were no less blameworthy? Biggar offers a long and meticulous refutation of the case mounted by Hilary Beckles for reparations which, he says, is "riddled with problems".

Regardless of whether one agrees with Biggar or not, it would be churlish to ignore or dismiss his views. Instead, fair-minded participants in the debate over colonialism would do well to recognise that this book offers much food for thought.

More briefly...

EXECUTIVE POWER by Robert Hazell and Timothy Foot, Hart, 2022, pp xiv + 330, £85 (hbk), ISBN: 978-1-5099-5144-4.

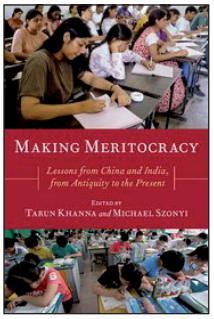
Among the many enigmatic aspects of the United Kingdom's constitutional arrangements is the royal prerogative. Essentially, the prerogative power is the residue of a fast dwindling bundle of powers which has traditionally rested with the Crown. Those powers are therefore not subject to control by parliament and have in modern times been exercised by the government. A typical example would be going to war (although governments in recent years have allowed debates and votes on the subject in parliament, eg during the Iraq war, and that has been seen as setting a precedent).

Prerogative powers, of course, loomed large in the fractious debates over Brexit. This book, unsurprisingly, starts with a reference to that controversy. "How is it in a modern democracy," ask the authors, reflecting public sentiment at the time, "that Parliament can be closed down by the monarch on the advice of the Prime Minister?" But that is not the only prerogative power that the government holds, and the book examines – and explains – many others, including those personal to the monarch (appointing and dismissing ministers; summoning, dissolving and proroguing parliament; giving Royal Assent to Bills) and those vested in the executive (making war; entering into treaties; regulating the civil service; making public appointments; granting pardons to those convicted of offences; issuing passports; conferring honours; conducting public inquiries).

The book also looks at the prerogative in comparative terms,

taking the experiences of Australia, Canada and New Zealand as examples, and throwing light on an analogous regime in certain other, non-Commonwealth, countries (eg the United States, Norway, Japan, Germany, Denmark and France) whose written constitutions have 'reserve' powers which allow the executive autonomy of action unconstrained by the legislature. A substantial part of the book is taken up by a discussion of possible reform of the prerogative, which has been the subject of endless debates over the years. A sobering conclusion that the authors come to is that "Although further codification is required, complete codification of the prerogative is unachievable."

MAKING MERITOCRACY by Tarun Khanna and Michael Szonyi (eds), Oxford University Press, New York, 2023 reprint, pp xii + 382, Rs 695 (pbk), ISBN: 978-0-19-775149-7.

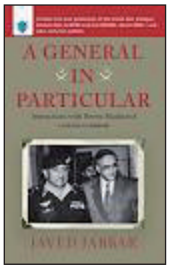


The concept of merit, much valued over centuries, has suddenly come under attack in certain parts of the Western world. However, it still remains fairly deeply rooted in two of the world's largest countries, India and China, and this book examines the ways in which those countries have dealt with merit historically, philosophically and in practice. The importance of understanding this is foregrounded as follows by the editors of this useful new contribution to knowledge in this area:

> How China and India conceive and operationalize meritocracy has enormous implications, not only for the two countries themselves but for the world as a whole ... China's and India's choices about merit are consequential not only because of their absolute scale but also because of their inward and outward flows in today's globalized education market. Huge numbers of students from those two countries travel abroad for education, and the two countries also present opportunities to students and workers in the rest of the world.

Arranged under four broad heads (philosophical, historical, contemporary and prospective), the essays in the volume cover a range of issues. These include: affirmative action; political meritocracy; the national college entrance examination in China; caste-related challenges in India; meritocracy as practised in Singapore; the impact of technology; and the effects of social cognition on the merit debate. In terms of broad conclusions, few would disagree with the editors' characterisation of the state of play as very much a "work in progress"; their plea that "it makes sense not to shy away from the difficult work of making meritocracy but to look for ways to maximise its potential while attending to its risks and downsides" will also be seen as reasonable.

A GENERAL IN PARTICULAR by Javed Jabbar, Paramount Books, Karachi, 2022, pp xxii + 303, Pak Rs 1,495 (hbk), ISBN: 978-969-210-621-4.



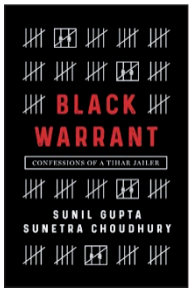
This book makes a timely appearance. The recent death of Pakistan's former strongman, General Pervez Musharraf, has generated renewed interest in this controversial personage whose political legacy is still being debated. Javed Jabbar, who knew the general well and served in his Cabinet before becoming disillusioned, provides valuable insights into the man's personality, motivations and political instincts. Jabbar comes with considerable experience and expertise, both within and outside the political arena.

As can be expected, there are few dull moments in Pakistani politics. The period covered in this memoir is packed with drama, crises, tumults, arresting back stories, and other exciting tidbits. By way of an exclusive, the book offers a nearly verbatim transcript, hitherto unpublished, of the meeting that Musharraf had with the US President Bill Clinton in March 2000 – with the author's comment that the Pakistani president devoted no attention or space to this significant encounter in his autobiography, because he was "so concerned with the immediacy of conditions just before, during and after 2001 and his then-new friendship with President George Bush [who followed Clinton]".

Jabbar is, on the whole, sympathetic to Musharraf. He accepts the strongman's faults (eg "the utterly non-credible referendum he held in April 2002 to legitimize and to extend his rule") but believes that he was, nonetheless, "a fairly democratic-minded individual". The General comes in for particular praise in an area in which Jabbar has had a long-standing interest and involvement, viz media freedom. It remains, he argues, a "hard, verifiable fact that virtually all print media were able to publish all their critical opinions about military rule without let or hindrance during most of Musharraf's rule as [Chief Executive] and as President for nine years. The only exception was the brief period of about five weeks in November-December 2007 when [an] Emergency was imposed."

As well as detailing his noteworthy experiences, Jabbar offers some valuable reflections on the political scene in his country which repay study. He is utterly convinced that the 'first-past-the-post' electoral system which Pakistan inherited from the British is not fit for purpose; instead, he proposes a proportional representation system coupled with compulsory voting for all adult citizens. He is also of the view that Pakistan should move away from its reliance on the Westminster model of parliamentary democracy and look at alternatives such as the Swiss system. He also advocates a "need for citizens to significantly expand and intensify their own political activism" – a prescription few will disagree with.

BLACK WARRANT by Sunil Gupta and Sunetra Choudhury, Roli Books, New Delhi, 5th impression, 2022, pp xxx + 178, Rs 395 (pbk), ISBN: 978-81-942068-5-9.



Given the notoriety of Indian prisons, any insight into the closed world in which the largest of them, Tihar Jail in Delhi, resides would be welcomed by a broad spectrum of people, including penal reformers, sociologists, lawyers, policy-makers, journalists, and just about anyone else with more-than-average curiosity about crime and justice. This slim book, a collaborative venture between a journalist and a former prison officer, opens a wide window into that world.

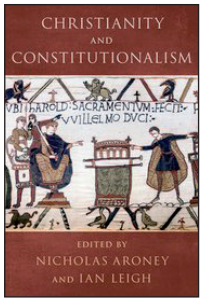
It describes, at one level, the nature of India's penal system and its complexities, horrors and imperfections, and, at another level, the compelling stories of individual prisoners, many of them with high profiles, acquired as a result either of their personal make-up or of the crimes they had been convicted of. The primary author, Sunil Gupta, was, by all accounts, both reformist-minded and sincere in his mission ("Gupta," says his co-author, "had not been tainted by any scandal despite working in Tihar for so many years" – a statement which alone tells much about the image that is associated in most people's minds with Asia's largest prison). The picture he paints – through Choudhury's words – is a vivid one.

Among the prisoners who cases are discussed are those involved in the assassination of the former prime minister of India, Indira Gandhi, the notorious international serial killer and fraudster Charles Sobhraj (who enjoyed outrageous levels of power and influence within Tihar jail after bribing prison officials on a large scale), the Kashmiri separatist Afzal Guru who aided Jaish-e-Mohammad terrorists in their brazen, but unsuccessful, attack on the Indian parliament, Ram Singh, one of the six men who brutally raped a young physiotherapy intern in a south-west Delhi suburb and who committed suicide by hanging in Tihar jail where he had been lodged as an undertrial, and the tycoon Subrata Roy, who had failed to return large sums of money to investors in companies floated by him and was subsequently imprisoned, albeit under conditions which were described as scandalously luxurious, within Tihar jail. The last mentioned prisoner caused huge personal trouble for Gupta after Gupta had complained to his political masters about the preferential treatment being accorded to Roy.

What then is Gupta's overall assessment? Not cheering, to say the least:

> I would like to claim that by the time I left Tihar it was cleaner and less corrupt than when I had joined. That after 35 years, the jungle raj I had encountered in 1981 was now civilized and that there were measures in place t stop the blatant disregard for prison rules. But I would be lying if I said this. The truth is that things remained the sae. My colleagues, save a few notable exceptions, were abettors who when faced with someone unwilling to join them in their misconduct, would try to find ways to negate their work. I watched their modes of operation with both fascination and disgust.

CHRISTIANITY AND CONSTITUTIONALISM by Nicholas Aroney and Ian Leigh (eds), Oxford University Press, New York, 2022, pp xii + 494, £81 (pbk), ISBN: 9780197587256.



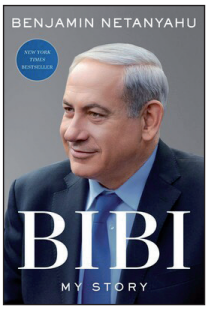
The relationship between religious thought and constitutionalism is the focus of this book. The 22 essays comprising the volume deal with diverse aspects of this challenging subject, including historical influences, the implications of theological doctrines, and Christian explanations for such constitutional concepts as the rule of law, separation of powers and federalism.

The editors start with an acknowledgement that "the notion of constitutionalism is contested, to say the least". They lay out the design of the book as being intended to

> illuminate the influence of Christian thinking on these various controversies: whether constitutions should be understood in normative terms (based on reason and the promotion of the common good) or merely as guides to the normal methods for the exercise of political power; the place of questions of legitimacy, authority, and consent concerning the division of power; and the contestable nature of rights and of judicial review. And underlying all these issues is the deeper question about whether modern constitutional law can adequately be understood or properly assessed in purely secular, nonreligious terms.

These controversies receive extensive treatment with a lot of inter-disciplinarity thrown in. Some fine distinctions are analysed, eg between freedom of conscience and religious freedom, on which an essay by Ian Leigh makes some pertinent points, such as why some contemporary conscience claims are so controversial (Leigh ascribes this to a certain form of historical amnesia). Though the book may not be easy reading for some people, the contribution it makes to an understanding of the important connections between religion, specifically Christianity, and constitutionalism, are worthy of attention.

BIBI by Benjamin Netanyahu, Threshold Editions, New York, 2022, pp x + 724, US$35 (hbk), ISBN: 978-1-6880-0844-7.



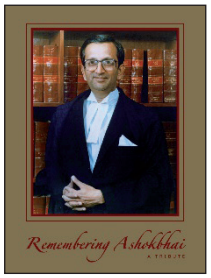
Even going only by what is in the public domain, the life story of Israel's longest-tenured prime minister, Benjamin Netanyahu, has been an eventful and fascinating one. He has now decided to tell that story himself in this weighty tome. The blurb to the volume states that he gives "colourful, detailed and revealing accounts of his often turbulent relationships and negotiations with [US] Presidents Clinton, Obama, and Trump", which he of course does. But there is much more in this memoir, especially about domestic Israeli politics which is lively at the best of times.

Many readers will find the passages dealing with Netanyahu's reflections on the various investigations launched into his and his controversial wife Sara's actions over the years of particular interest (some of those investigations, indeed criminal cases, are still ongoing). As can be expected, Netanyahu is combative in dealing with the accusations. Most of them are, he maintains, without foundation and the handiwork of disgruntled left-wing opponents who are frustrated at not being able to defeat him electorally. But he also, remarkably, brings in the class factor as part of his defence:

> To many in the ruling elites I had betrayed my social class. Educated and politically influential, I led the "plebians" to power. Worse, I led them in the wrong direction. The elites believed that if not for me, vast parts of the public would have acquiesced to far-reaching territorial withdrawals, the redevision of Jerusalem and other central items on the left's agenda. This patronising attitude didn't consider the possibility that my supporters and I shared the same views.

This memoir does not give us Netanyahu's ruminations on the most recent troubles that have beset him, viz the sharp public reactions to his attempts to curb judicial activism. But there are plenty of references to the law, justice, legal processes etc. which will pique the interest of the legal fraternity. The bulk of the book is, understandably, about politics – and a very rich fare is on offer. An engrossing read.

REMEMBERING ASHOKBHAI, published by the Desai family, Bombay, 2022, pp 175, no ISBN stated.



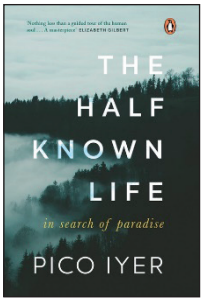
The effusion of tributes which followed the demise of Ashok Desai, one of India's leading lawyers, in April 2020 reflected not only the high esteem in which he was held both within his country and abroad, but also the emotions associated with the passing of an era of which he could be said to be one of the last representatives. This elegantly designed coffee-table book, brought out in his memory by his family, is a mix of reminiscences and tributes.

Desai's prowess as an advocate remains legendary. Possessed of a sharp mind and quick wit, he used strategy very skilfully in court. As one of the contributors to this volume, a retired judge of the Supreme Court, reminisces, Desai "was an extremely wily and dangerous opponent as a lawyer. He knew which facts to place before which Judge and was always on the Judge's wavelength, thereby having a large success rate as a lawyer." Those who worked alongside him had nothing but admiration for both his professionalism and generosity of spirit. "Working with him and preparing [for] a [case] was," says a solicitor colleague, "an educational experience and pleasure. When struggling on some issue, he would ease the mood with his anecdotes. Legal conundrums and pressure of work could not diminish his tremendous sense of humour. He was a great storyteller."

His human qualities stood out at all times. As one of his oldest friends, a fellow member of the profession points out, "Ashok was a rare combination of a bright mind and a warm heart" who radiated "nobility and humility". Steeped in Buddhist teachings and with more than a passing interest in other religions, he had an eclectic range of interests outside the law. Another, younger, colleague of his draws attention to the remarkable balance that Desai struck between "life and law rather like that between the ying and yang of Taoist philosophy".

Books such as these not only serve as reminders of the values and traditions that are fast disappearing in the world of law across the Commonwealth, but also as an inspiration to newer members of the legal profession, especially in countries like India where Ashok Desai loomed large for over half a century.

THE HALF KNOWN LIFE by Pico Iyer, Penguin, Gurugram (India), 2023, pp 225, Rs 599 (hbk), ISBN: 978-0-670-09829-3.



'Thoughtful', 'reflective', 'penetrating' and suchlike are epithets that invariably attach to the works of Pico Iyer who has, for over three decades, been criss-crossing the world and writing about cultures, global dislocation, the monastic life, and so on with wit and wisdom. In this, his latest offering, he explores a subject, viz man's eternal quest for an elusive paradise, where his acute sense of observation and deep awareness of the human condition combine to bring insights that are as profound as they are amusing.

Iyer's travels for this book take him to as diverse lands as Israel, Sri Lanka, Iran, India, Australia, Northern Ireland, as well as Japan where he has made his home – albeit on a tourist visa – for much of the second half of his life so far. He meets interesting people, asks percipient questions (without making his interlocutors feel overwhelmed or intimidated in any way) and, as in his previous books, zooms in on the many overlooked, but highly revealing, aspects of travel.

Those looking for any homilies on the theme of the book will be disappointed. Iyer does, however, occasionally offer his thoughts on the subject, almost *sotto voce*: "A true paradise has meaning only after one has outgrown all notions of perfection and taken the measure of the fallen world"; "[P]aradise gardens are a flood of colour and fertility in a world of dust and heat"; Jerusalem is, notoriously, "a riot of views of paradise overlapping at crooked angles till one was left with the sorrow of six different Christian orders sharing the same space, and lashing out at one another with brooms"; "In almost half a century of talking to the Dalai Lama, I'd never really heard him speak about Paradise (or Nirvana); such ideas could only be a distraction from the possibilities of real life"; "The notion of an external paradise is one of the main illusions and projections we have to sweep aside, as might a sand mandala"; "Paradise ... is regained by finding the wonder within the moment", and so on.

The book ends with an evocative chapter of Iyer's experiences in Varanasi, perhaps the holiest of pilgrimage sites for

Hindus where devotion and prayer meet death and mourning. "Varanasi," says Iyer, "transfixed me as only a cataclysm can." He describes the "shock therapy" the city administered on him; having ignored strong entreaties from his Indian relatives not to venture into the place of "stench and crooks and dirt", he appears to have stumbled upon many treasures which he describes with vividity and feeling.

News and Announcements

UNITED KINGDOM: New Supreme Court Judge sought

The process to appoint a new Justice to sit in the UK Supreme Court began on 28 April 2023. As a result of the retirement of Lord Kitchin, applications are being sought for the appointment of a new Justice, to take effect later this year

A page on the Supreme Court website has been created to explain the role, detail the application process and how to apply. It also has interviews with existing Justices about what to expect in the role.

The UK Supreme Court and Judicial Committee of the Privy Council hear a wide range of very complex and high-profile legal cases, which can have a considerable impact across the United Kingdom and beyond.

The selection commission is looking for candidates who can show an ability to contribute to the collegiate decision-making of the Court, a sensitivity to the needs of different communities and groups and an ability and willingness to engage in the wider representational and leadership role of a Justice. The Supreme Court is required by statute to have judges with a knowledge of, and experience of practice in, the law of each part of the United Kingdom.

"The cases dealt with by the Supreme Court and the Judicial Committee of the Privy Council involve complex points of law of general public importance," said Lord Reed, President of the Supreme Court. "Candidates require a deep level of legal knowledge and understanding, combined with high intellectual capacity and an understanding of the social context in which these issues arise and of the communities in which the law is there to serve.

"They will need to demonstrate exceptional legal ability, maturity of judgment, an ability to work within a system of collegiate decision-making, an understanding of the constitutional context in which the Court operates, and a willingness to engage in wider outreach activities."

Eligible candidates from any part of the United Kingdom can apply. The closing date for applications is 5pm on 22 May 2023.

[Source: UK Supreme Court website announcement, 28 April 2023]

GHANA: Advice to new magistrates

The Chief Justice of Ghana, Justice Anin Yeboah, has cautioned family and friends of judges and magistrates not to interfere with their work but rather guard and protect them from undue pressures and influences.

Justice Anin Yeboah was speaking at a Swearing-in of eight magistrates at the Supreme Court in Accra.

"On this memorable occasion, I would like to send out a very simple message to your families and friends herein gathered to leave you alone to discharge your duties in accordance with the oaths you have sworn. Distinguished ladies and gentlemen, it would be remiss on my part if I do not draw attention to the possible future attempt by litigating parties, either acting by themselves or through other agents, to exploit your relationship with our new magistrates to their selfish ends. So I urge you to be on your guard and quick to take up the challenge of fiercely protecting your kith and kin from undue pressures or influences. Proud as you are as families and friends to these new Judicial Officers we do honour today, you have a patriotic duty and moral obligation to assist them to protect the sanctity of the office they occupy", he said.

Justice Anin Yeboah advised the magistrates to maintain high standards of integrity to strengthen the confidence reposed in the judiciary.

[Source: Ghana Judiciary news release, 20 March 2023]

NEW ZEALAND: Projections about prison population

The projected future prison population of New Zealand has dropped compared to earlier estimates, newly released data has revealed.

The Ministry of Justice has collaborated with its Justice Sector partners including the Department of Corrections and NZ Police to produce the latest Justice Sector Projections.

This year's report released today projects the prison population in 2032 will increase to 9,400. While the remand population is projected to increase from 3,500 in November 2022 to 4,700 by June 2032, the sentenced prison population is projected to remain largely stable at around 4,700.

While the overall prison population is projected to increase, it is much lower than what was projected five years ago. In 2018, the prison population was 10,800 and was projected to be 14,400 by 2027.

The reduction in the projected prison population between 2018 and 2022 has been due to a steady decrease in the sentenced population with an increase in non-custodial sentences.

The projected increase in the total prison population over the next ten years is due to underlying trends in the remand population, explained Ministry of Justice General Manager for Sector Insights, Rebecca Parish.

"The remand population is projected to grow in the long-

term as people spend longer in remand. This is due in part to cases taking longer to be resolved in court as more events are adjourned and defendants plead guilty later and electing jury trials at a higher rate," Parish said.

She added: "The Criminal Process Improvement Programme (CPIP) initiative is also designed to establish better ways of working within the court system and improve timely access to justice to reduce people's time on remand."

[Source: NZ Ministry of Justice media release, 27 March 2023]

ZAMBIA: Investigation into dubious release of prisoners

Following a news item on a television channel, Prime Television, that some suspects at the Kasempa Correctional Facility had been dubiously released from prison, the Zambian judiciary had sent a team to Kasempa and Solwezi to investigate the matter. The preliminary findings of the investigation have been said to be of great concern to the judiciary, according to Kalumba Chishambisha Slavin, its Public Relations Officer.

The PRO reported that certain judicial and administrative steps have been taken based on the preliminary findings, including that:

- Sandras Samakayi, the Magistrate at Kasempa, and Kunda Joseph Malabo, the Resident Magistrate at Solwezi, have been placed on suspension pending further investigation and action;
- the Judge-in-Charge of the North-Western Province has called for the records to ascertain the propriety of various relevant proceedings; and
- the judiciary has indicated its intention to engage relevant institutions to address the lapses that have been noted.

The PRO has also stated that the judiciary wished to thank Prime Television for bringing the matter to its attention, and is encouraging the general population to take "a positive active role in ensuring that they hold to account those [to] whom they have delegated their judicial authority".

[Source: Judiciary of Zambia press statement, 5 May 2023]

HONG KONG: Protection of judicial independence

In response to media enquiries about a recent report of the United States Congressional-Executive Commission on China, a spokesman for the Hong Kong Judiciary made a statement affirming its support for judicial independence

The Judiciary, noted the statement, "strongly condemns any attempt to exert improper pressure (including any suggestion to impose sanctions) on Judges and Judicial Officers (JJOs), including Designated Judges under the Hong Kong National Security Law. Any such attempt is a flagrant and direct affront to the rule of law and judicial independence in Hong Kong, as well as the JJOs concerned, which is totally unacceptable.

"The rule of law and judicial independence in Hong Kong are guaranteed under the Basic Law. Articles 2, 19 and 85 of the Basic Law specifically provide that the judicial power, including that of final adjudication, vested with the Hong Kong Special Administrative Region under the Basic Law, is to be exercised by the Judiciary independently, free from any interference

"All JJOs (including Designated Judges) must abide by the Judicial Oath to administer justice in full accordance with the law, without fear or favour, self-interest or deceit. Their constitutional duty is to exercise their judicial power independently and professionally in every case (including cases relating to national security) strictly on the basis of the law and evidence, and nothing else.

"JJOs do not control what cases are brought before them but once a case is brought before the court, it must be dealt with by the court strictly in accordance with law. All JJOs will continue to abide by the Judicial Oath and firmly discharge their duty in the administration of justice."

[Source: Hong Kong Judiciary press release, 12 May 2023]

PAKISTAN: Denial of scuffle between judges

Referring to a news report which alleged that there had been an altercation and a scuffle between judges of Pakistan's Supreme Court during a walk undertaken by them in the Judges' Colony Park on the evening of 13 April 2023, the Public Relations Officer of the Court issued a denial.

"The report is hereby refuted in the strongest terms. It is false, mischievous and malicious. No such incident took place. The fake reporting about the Judges of the Supreme Court of Pakistan is a serious violation of the law and represents an effort by disaffected elements to diminish the dignity of the Court and its Hon'ble members," said the PRO, Hina Firdous.

The PRO also categorised the report as "utterly false news" while acknowledging that it had been "carried and highlighted through various social media platforms".

[Source: Supreme Court of Pakistan, 14 April 2023]

Events

FRANCE: Anti-Corruption conference

The International Bar Association's 19th annual Anti-Corruption conference will be held in Paris, France, on 13-14 June 2023.

Topics to be covered include:

- Compliance due diligence in Mergers and Acquisitions (M&A): anti-corruption, Environment Social and

Governance (ESG), and beyond

- Cooperation and coordination of foreign bribery resolutions: the way forward following the 2021 Anti-Bribery Recommendation
- Compliance and the rise of machines
- A practical outlook on corporate monitorships
- Non-trial resolutions: an update on project rollout
- ESG: evolving regulation and new enforcement
- Whistleblowing in the digital age: navigating emerging challenges
- Minding the gap: increasing interlinkages between international sanctions and the fight against corruption
- Lawyers as enablers or gatekeepers?: planning the IBA's work in the sphere of legal ethics and anti-corruption

The event will be held in the OECD Conference Centre and there are speaker opportunities available. Further details about the conference are available at: *www.ibanet.org/conference-details/CONF2335*.

LONDON: Medico-Legal conference

The Medico-Legal Conference, bringing together industry experts, professionals, and suppliers, will be held in London on 20 June 2023.

It will discuss the latest medico-legal developments, reforms and issues. Participants can hear from lawyers involved in some of the most high-profile recent cases and learn about the increasing role of mediation in settling medico-legal claims. Attendees can also earn 6 CPD points.

The draft programme includes speakers such as: Professor Dominic Regan, City Law School, London; Frenkel Topping, legal Speaker, writer and broadcaster; Justice Pepperall, High Court Judge; Dr Chris Danbury, Consultant in Intensive Care Medicine at University Hospital, Southampton; Clare Stapleton, Medico-Legal Consultant, Medical Protection Society; Simon Hammond, Director of Claims Management, NHS Resolution; Isabel Bathurst, Solicitor, Georgina Parkin; Andrew Unwin, Consultant Orthopaedic Surgeon; and Andrew J Parker, Consultant in Ear Nose and Throat Surgery, Peak Medical Practice.

More information about the event can be obtained at: *www.eventbrite.co.uk/e/medico-legal-conference-2023-tickets-529175637577*.

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