# The Commonwealth Lawyer

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# THE COMMONWEALTH LAWYER


## Journal of the Commonwealth Lawyers' Association

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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

It is a common misconception that lawyers involved in human rights and the rule of law are unable to run an organization in a business-like way. It is said that business lawyers are efficient from a financial management standpoint, but that human rights organisations tend to struggle, although as with everything else, money is needed to accomplish the noble things we set out to do.

That has not been entirely the experience of the CLA. We have the recent unexpected benefit of a substantial sum as a result of the dissolution of the Commonwealth Law Foundation established after, I believe the Hong Kong CLC. That has not been my own experience and the committees, projects and management I have fostered aim to dispel that misconception. In my experience, human rights activists have been resourceful in finding the means to accomplish their objectives. For example, my grandparents on both sides were successful in finding the resources to fuel women's suffrage, deepening of democracy, the right to culture, and access to healthcare. My paternal grandmother, for example, from very humble beginnings having been raised by her grandmother in a one room house in a remote family island settlement in the Bahamas, came to own two mom-and-pop shops in the capital. My childhood under her wing consisted of witnessing and helping with weekly and monthly fundraising efforts to finance the movement for universal suffrage and political change.

Those efforts yielded an abundant harvest. Women voted for the first time in 1962 and majority rule came in 1967, not entirely through her efforts but also through the efforts of like-minded persons in similar circumstances who ran the movement in a business-like way.

Regarding law associations, it was really quite by accident that I became involved with them. Quite dissatisfied with the lack of value I received from my own bar association in spite of having paid regular annual subscriptions, I attended the annual AGM and spoke about the need to reform the Bar Association. The lawyers after my speech pointed to me and said, "You do it!", and I was elected President of the Bar in 1997.

Then I had to figure out what an effective Bar President ought to be doing. The only physical presence was a cramped rented space which housed the half a day twice weekly legal aid clinic. I expanded across the legal aid clinic and embarked on an ambitious strategic plan to engage lawyers in our core mission of protecting human rights and the administration of justice. Within 2 years, we had raised $75,000 to establish a building fund. Today, as a result, that Bar owns not just one but two buildings. Many more services were introduced for the public and for lawyers.

Then I turned my attention to reviving the regional federation of bar associations, covering 15 countries. After that took off, I turned my attention to international bar associations and became involved with the executive bodies with a number of them. I found a mixed picture but at the time most of them were barely surviving and several were chronically in financial deficit every year. Not unlike the CLA, some of them relied entirely upon conference for the operational income to last during the period between conferences.

Running a law association in a business-like way is not rocket science. One has to identify and implement activities and engage the membership and also attract sponsors. For this reason, I identified three focus areas to initiate my term of office deepening engagement of members in the core objectives of the CLA: (1) protecting human rights, the rule of law and the independence of judges and lawyers; (2) expanding the value proposition of the CLA through committees, projects, sponsors and strategic planning; and (3) improving the organisation's financial viability.

I am pleased that not only will the CLA address the substantive needs and interest of its members but will thereby also generate multiple streams of income. We now have a variety of committees and projects spanning many areas.

In all of this our mainstay over the years has been *The Commonwealth Lawyer*. It has helped to give meaning and value to the engagement of lawyers in the CLA. Please read the journal by logging into our website, and you will find a treasury of past issues going back to 1984. I thank Venkat Iyer for the yeoman work he has done for this current issue as well as so many past issues of this invaluable journal over the years. I also thank the secretariat, Brigid, Clare and Evie for their tireless support. Enjoy!

**– Dr Peter Maynard**

# Editor's Note

Apologies are in order for the delay in the appearance of this issue. A range of factors conspired to push back the publication date, for which I am sorry. But, as I hope you will agree, the issue contains a rich treat in the form of several interesting and illuminating articles.

There are at least a couple thoughtful pieces based on presentations made at the highly successful Commonwealth Law Conference held in Goa last March. One of them, by Lord Carnwath of Notting Hill, a former judge of the UK Supreme Court, has reflections on the role of lawyers – and more widely, the law – in the protection of the environment. This article goes beyond the issue of climate change and looks at cases from multiple jurisdictions where the courts have attempted to advance the environmental agenda, even in the absence of explicit constitutional or statutory provisions, using such concepts as the right to life to justify their verdicts. Lord Carnwath makes the point that, although judges have an important role in protecting the right to a healthy environment, they cannot do it alone. "They depend on political support and workable legislation."

Another article, by Ben Slade, an Australian barrister, discusses the issue of class actions which has proved challenging in some jurisdictions. Slade draws particular attention to the criticisms that are often made of such actions on the grounds that their outcomes may not necessarily be seen as fair by the general public (or by the mass media). He cites two cases which may "suggest that lawyers may be making a meal of class actions and that the community has good reason to be suspicious of their conduct." But he goes on to offer other examples which incline him to the view that "the outcomes for class members over the past 20 years, have, in Australia, been, on the whole, good". I would welcome contributions describing how class actions have fared in some of the other countries with which our readers are familiar or have a close connection to.

This issue also carries a Conference Diary by Laurie Watt, one of the CLA's long-standing members and a keen attender of CLCs going back many decades. With his usual humour and eye for detail, Watt captures the mood and flavour of the conference for the benefit for those who may not have been able to attend it.

In another article, the important but sometimes contentious subject of political correctness and its effects on free speech is discussed by Noel Cox, a non-practising barrister and retired academic from New Zealand. Cox's analysis focuses on the fractious developments of recent years in his native land arising from debates over the relative importance to be given to the indigenous Maori people and their traditions, on the one hand, and those of the 'settler' population (mainly of European descent), on the other. His argument is that the adoption of radical ideology is not necessarily wrong of itself but it becomes problematic if it is adopted "in a manner in which no dissent is tolerated". Cox appeals, in particular, to the legal profession to assist in the promotion of "a free and reasonable exchange of ideas, opinions and viewpoints".

Finally, we have an article on what is becoming a pressing topic of our times, viz the impact that artificial intelligence (AI) is likely to have on humans and human life in the foreseeable future. In his piece, Saurabh Prakash, a member of the Indian Bar, identifies the opportunities and challenges that AI presents, insofar as we can deduce them from existing knowledge and intelligence. Pointing to the fact that the AI revolution is markedly different from, say, the Industrial Revolution of the 18th and 19th centuries, in that its effects are likely to be felt in a much shorter time-frame, Prakash takes up a distinct list of areas where serious questions arise, such as the factual accuracy of data and analysis generated by machines, ethical implications of the use of such data, potential for fraud, intellectual property ramifications, liability for errors which cause real damage, data protection dilemmas, and so on. He underlines the need for regulation, ideally at a global level (given the transborder nature of emerging technology) and identifies some ongoing efforts at bringing forth such regulation. He ends his article with the plea that, whatever is eventually put in place, "some minimum principles and standards [should] be agreed between all to, at the very least, control crime".

**– Dr Venkat Iyer**

# Articles

# Goa Conference Diary

*Laurie Watt*

**Thursday, 2nd-Saturday, 4th March, 2023**

Gwendolyn and I flew through Mumbai to Goa, courtesy of British Airways and the Indian airline, Vistara. Immigration and the transition between the terminals in Mumbai were not quick but they were untroublesome and we had plenty of time. Our arrival in Dabolim Airport in Goa was punctual and the Conference delegate meeting arrangements were like clockwork, with the transfer to the Grand Hyatt Hotel not too long.

The Grand Hyatt truly lives up to the 'Grand' in its name. We had a lovely room opening out onto lawns and tropical gardens, verdant and colourful in the blazing sunshine. The picture was completed by a baker's dozen of white egrets on the lawn who seemed quite unalarmed by our presence. The first people we met on our explorations were Brian and Jenny Speers in cheery and relaxed mode and we spent some time catching up with them.

Saturday was an easy day to acclimatise ourselves having met up with the CLA Secretariat team of Brigid, Clare, Leah, Evie, Lyndsay and Francesca the previous evening. Today we discovered the delights of the Executive lounge over in Block 7. As we were in Block 1 and the beautiful Hyatt grounds were extensive, that meant a lot of walking which was great. We walked the beach which was separated from the hotel grounds by a low wall, but with an occasional guarded access. In the early evening we walked over to find Robert and Bambina Carnwath at the Executive Lounge enjoying the delights of the Indian 'champagne' Sula, which we had discovered, and much enjoyed, at the last Commonwealth Law Conference in Hyderabad in 2011 at the ubiquitous Charles Russell party at that event.

The warm tropical evening and the gorgeous hanging lighting in the trees in the Hyatt garden was like a sort of fairyland not unlike that imagined by the film director, James Cameron, in his extraordinary first *Avatar* movie. For dinner we decided to dive straight into the local cuisine at Chulha, the Hotel's restaurant serving Indian cuisine. Fine it was, too. The first Indian restaurant – or, any restaurant for that matter – I have come across, where we had been stopped from ordering too much by the very helpful waiter who very charmingly said: 'I think you will find that sufficient'!

**Sunday, 5th March 2023**

After a very ample breakfast, where we were superbly looked after by the staff in the Dining Room, rightly and simply called for the eclecticism of its excellent fare, we went up to the Conference part of the hotel which was an easy walk straight from the Dining Room, through the very large building. The registration area was relatively empty save for some of our Secretariat colleagues. Cheeringly our number of delegates now exceeded 500.

We suddenly had a busy afternoon juggling times. Joanna Robinson, our indefatigable leader of the Young CLA group had planned an extensive day for the YCLA. There was a variety of activities culminating in a group mentoring session in which Gwendolyn and I were scheduled to be one of the leaders, but, to which, I had promised only such time as the coincident Council Meeting allowed me. The Council Meeting went fine and after the important business was concluded, with permission, I slipped out to join the mentoring session which was fun and inspiring. The group was divided up into sections of six to eight young lawyers with one mentor assigned to each group. A big success all round, I think.

We then were all in a bit of a rush to get back to our rooms to prepare for the Opening Reception which took place at the Taj Resort and Convention Centre where many of our delegates were staying. We boarded the buses for a ten minute drive to another beach over which the Taj presided. It was a classic CLC party heaving with a wonderful multicultural crowd from every corner of the Commonwealth. There was music provided by a small ensemble of tabla and Indian flute which was enjoyable and very local. There was also a short display of spectacular dancing to a deafening accompaniment. The food was good and plentiful, if not quite hitting the dizzy heights of the Hyatt cuisine.

**Monday, 6th March**

Today started less well with me tripping on a rucked mat at the entrance to the building, on the way in to breakfast, falling flat on my face, although to no lasting damage – shaken but not stirred one might say. Today is the Opening Ceremony and most impressive was the big Conference Main Hall – which was well done, thanks to Meetings and More and Leah Almeida. There had been much juggling of who was to be on the stage which, large as it was, looked just big enough to fit everyone in. We had a number is speeches, some of which were longer than others. The longest and most numerous record is still held by Jamaica in 1986 – another wonderful Conference.

Before today's sessions we were treated to a Plenary Session

presided over by The Right Honourable Patricia Scotland, the Secretary General of the Commonwealth. Patricia is a regular and very welcome attender at these Commonwealth Law Conferences. She clearly enjoys them and it is always a pleasure to see her with us in a relaxed mode. We were especially privileged at this Conference because it coincided with a particular hectic schedule that she had, yet she still insisted in attending and giving her keynote talk celebrating the 20 years of the Latimer House Principles on the independence of the three branches of government.

Following the plenary, there were some very good sessions, which all started a bit late because of the over-running of the opening ceremony. I attended the one on Slavery whose most distinguished contribution was from Thomas Roe KC who looked back on the historical position as it related to the present day and the culture of rewriting history which is becoming increasingly pervasive. Lunchtime was a bit confused because many of us found ourselves diverted down to the Dining Room with rather long queues, only to discover that lunch was also served in the Conference Centre as well, without the queues.

On this evening the Bar Council were having an entertaining India v UK friendly moot where the judges drew and sought a vote from the audience whose result I forget but which was subsumed by much enjoyable banter. From there we were all directed to the drinks at the Pool Bar where everyone was gathered. It was good to meet Robin Egerton from Hong Kong after a gap of many years. Robin, before switching to the Hong Kong Bar, had been a partner at Hampton Winter & Glynn, with whom we had been associated for some years there. His wise words about the unsettled situation in Hong Kong were "Do not believe everything you read about Hong Kong"!

Gwendolyn and I together with the Carnwaths, and Anthony and Marie Crocker, duly ended up at the Executive Lounge and to glasses of chilled Sula 'champagne'!

**Tuesday, 7th March**

Today the first full day of sessions in our five streams followed the Plenary on the subject of Living Lands which was led by my old CLA friend, Fiona McLeod, who was joined by Melinda Janki (who went on to win our Lexis Nexis human rights award which was announced during the Closing Ceremony on Thursday). Melinda spoke, movingly, of her work in Guyana fighting the encroachment of those seeking to exploit the recently discovered oil and gas reserves off the Guyana coast, in this case, Exxon. We also had a short presentation by the Assistant Secretary General of the Commonwealth who urged us all to attend our forthcoming Borneo Rainforest Law Conference in Sabah, Malaysia, in February 2023 and presented a video about its attractions.

I joined the session in which my betrothed, Gwendolyn, was participating this morning on the subject of 'Lawyers' mental health' and the effects of working from home and on online platforms like Zoom. This was a well-attended session. It was chaired by Jayna Kothari from India and Gwendolyn shared the platform with Neliswa Tjahikka from Namibia, and it was all very well received.

This evening was the long held, traditional, Charles Russell Speechlys Conference party. This party has taken place at every Commonwealth Law Conference since the first one I attended in Hong Kong in 1983. It was, however, touch and go, right to the last minute as to whether this would take place. At the final moment John Almeida was able to link up with 3 Hare Court Chambers with whose members John and his team do so much work for Commonwealth Governments in the higher courts. It was a jolly affair and held at the Cidade de Goa Hotel, again around the bay and close to – in fact, down the hill from – the Taj Hotel where the Opening Reception had been held. Here we, of course, had Sula 'champagne', plus cocktails, and 'canapés with a Portuguese Goan flair', as the invitation put it! We missed poor Mark Stephens who had been floored by a sudden dose of dysentery which was worrying, although thankfully, he made quite a quick recovery, with the help of the local Emergency Room. When G and I returned, late, to the Hyatt and walked through the gardens to our room, we found major operations already getting ready for the big Conference Gala Dinner for the following night.

**Wednesday, 8th March**

Today we had the International Women's Day Breakfast which I gathered went very well. It was followed by an important Plenary chaired by the recently retired Chief Justice for Northern Ireland, The Right Hon Sir Declan Morgan, who is a regular and welcome attender at these Conferences. The subject was the Independence of the Judiciary and its safeguarding. We had some excellent speeches and everyone kept to time!

Today was another full day of sessions. There were two stand-out sessions which I attended. One was on Abolishing the Death Penalty where much revolved around the arguments for and against; whilst statistically it was apparent that whilst maintaining the death penalty, only a tiny minority of nations who did so actually carried it out. The other was on the other side of the coin of 'death'. This was on the subject of the 'Right to Death with Dignity'. This was a fascinating discussion with two particularly impressive contributions from Sir Robert Francis KC and a South African lawyer, the fascinating and gravel-voiced Professor David McQuoid-Mason.

In the evening we had the Gala Dinner and a very splendid and colourful affair it was as well. Dress was "Whatever makes you comfortable, or National Dress" with interesting and wide-ranging results! Sparkling wine, thankfully, was served as well as the normal selection of red, white and pink. The food was wonderful: a huge spread of tables groaning under the weight of a glorious and opulent buffet. The weather during this week had been lovely, but it had become increasingly humid which was quite noticeable this evening, although not oppressively so.

**Thursday, 9th March**

Today is the last day of the Conference. We started with sessions which took a bit of a while to get going, our lateness

being a tribute to the success of the previous evening. In any event people trickled in and having chosen to attend the session on Constitutions: Evolution or Circumscription in the main plenary hall, it took a while for the hall to fill up which eventually it did quite substantially. I had had some entertainment writing the descriptor for the session! It was a first class session although did not actually reach any particular consensus on the choice in the title.

Following the coffee break, we all returned to the same room for our fourth plenary session which was the 2nd Soli Sorabjee Memorial Lecture. This was delivered for us by Mr Justice D.Y. Chandrachud, the Chief Justice of India. Disappointingly, he had not been able to join us physically in person, but he came through, in full screen, via Zoom and gave a superb talk which was followed by questions which he stayed to answer. I very much hope that a transcript of this will be available for those who would like to receive it.

**The Closing Ceremony**

Difficult to know how to describe this as everything hitherto had all gone so smoothly and well. Suffice it to say, perhaps, that it all started off fine as we proceeded through the necessary hand overs from Brian Speers, our outgoing President to Peter Maynard, our new President. Some very nice thank yous and gifts were made for all those who had worked to make the conference a success, including our main and most generous of sponsors, Lexis Nexis. Then for the Secretariat led by Brigid Watson, our Secretary General with particular accolades to Clare Roe and Leah Almeida, who had done such a great job with the Conference. Brian was the recipient of much deserved accolades for his extended period as President, forced upon him by the extensive changes to the Constitution following the Bahamas Conference, with a beautifully produced video of encomia to him from various members of the CLA team. In turn, I was grateful and a bit embarrassed to be the subject of a very sweet videoed encomium from Colin Nichols KC for my time as Treasurer.

Our, now long time, colleague and friend, Nigel Roberts, of Lexis Nexis, presented the Lexis Nexis Award to the very well deserving winner, Melinda Janki from Guyana. Melinda had launched the first of a number of successful legal actions against the Guyanese government in relation to their offshore partnership with ExxonMobil which was not in accordance with Guyana's strong environmental laws. She gave some moving words in gratitude to this award.

Finally, Peter Maynard, as President, said a few words to close the Conference, which were followed by the announcement of the location of the next Commonwealth Law Conference as being Malta in 2025. This was along with a video which was slipped in as we all packed up to leave the hall.

That evening we had the Council and ExCo dinner by the sea wall with a glorious backdrop of the sunset. It was another delicious buffet dinner although with no sparkling wine, This G and I solved by slipping into the Executive Lounge close by which we had fortuitously been located for this dinner!

**Farewell to Goa**

It had been a great and a successful Conference. Many relationships had been rekindled and strengthened. We had a couple of days before departing late on the Sunday on Vistara to link up with British Airways in Bombay. The transition between terminals in Bombay was very alarming as I would never have believed the hoard of travellers heaving their way between terminals after 1am at the end of the weekend. Thanks to helpful airport staff we caught our BA flight with minutes to spare.

*[Laurie Watt, a London-based retired lawyer, is the immediate past Treasurer of the CLA.]*

# Free speech and the New Orthodoxy: Lessons from New Zealand

*Noel Cox*

**Introduction**

One of the major challenges facing the world today is the relative fragility, in many countries, of democracy, transparency, and the rule of law. The rule of law in particular has been identified as a lynchpin for stable government and that legitimacy necessary for social, political and economic development. Its diffusion and nurture are therefore part of the universal duty incumbent upon all humanity.

In the Commonwealth, the evolution and spread of the rule of law may be traced to the development of constitutional government in the United Kingdom. Lord Cooke of Thorndon built upon the views of Sir Owen Dixon, who saw the evolution of constitutional law, both in the United Kingdom and in the overseas realms of the Crown, as the product of the interplay between three potentially conflicting conceptions. These were the supremacy of the law, the supremacy of the Crown, and the supremacy of Parliament. This interplay has produced the present constitutional structure, whose defining aspects were identified, though perhaps misunderstood, by Montesquieu. This is the origin and antecedent of both the rule of law and the separation of powers. The concept of the rule of law today may be seen in myriad places, and explained in various ways, but its general principles are well-understood, and applied generally, if not universally, throughout the Commonwealth and the wider world.

A legal or political principle, however universally accepted, only has impact if it is implemented and adhered to. In part the latter is where the legal profession – judges, lawyers and academics – can and must make an important contribution. The legal profession has a unique position in the community in any civil society. Its distinguishing feature is that it is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently from the threat of encroachment by the state. This stems from the fact that the protection of rights has been a historic function of the law, and it has been the responsibility of lawyers to carry out that function. In order to do so, lawyers, judges and legal academics must maintain a balanced and considerate position with respect to wider society, and not just government.

In the latter part of the twentieth century, and the early years of the twentieth century, a new threat to the rule of law, free speech, human rights, and to democracy itself, has come from a radical and doctrinaire wave of increasingly unorthodox movements, culminating in the acceptance and promotion of what, a few years ago, would be regarded as irrational or immoral, such as some of the gender identity movement, the promotion of much that undermines traditional positions or attitudes, and the silencing of dissenting voices in the name of tolerance and acceptance. Where does this leave freedom of speech? Imperilled, unless we – the whole legal fraternity – resists the destructive agenda of much of the so-called "woke" elite. Change is quite acceptable, as is the acceptance of diversity and differing opinions, but we must be free to express our views, whether in favour of change or against it.

**The role of the legal profession**

The legal profession plays a most significant role in upholding the social fabric. This is largely because lawyers are the people who have a direct part to play in the maintenance of the rule of law which is in turn what fastens and upholds society. Indeed, the role of the lawyer spans the entire spectrum of national development activities. More often than not he or she is in the public limelight and his or her involvement in social and political issues draws upon them considerable conspicuousness and vulnerability.

Accordingly, the legal profession connotes a sense of public service. For this reason, Roscoe Pound viewed a profession as composing a common calling in the spirit of public service. Similarly, according to Benna Lutta, the legal profession "can be said to be a kind of priesthood and dedicated to public service." Hence, it logically follows that the goodwill of the legal profession largely depends on the people it serves, that is, members of the public. The members of the public have to be able to trust the profession if they are they are ever going to be comfortable charging the profession with the aforementioned functions.

Consequently, to perform the said functions in the spirit of public service, high ethical and professional standards must be maintained within the rank and file of the legal profession. The lawyer must, consequently, amongst others things, be of high integrity, probity, honesty and competent. Like in any other profession, members of the legal profession must shun those things which are likely to bring the profession into disrepute. They must exhibit a great sense of integrity, and, must give proper professional service. As professionals, therefore, they should be viewed as a bulwark of society, and not an obstacle to progress. Of necessity, lawyers should identify themselves in a positive and practical manner with the aspirations and efforts of the people they serve. They should shirk complacency and constantly engage in the reappraisal of values and methodologies. Only by so doing will lawyers be able to establish and justify their worth in society.

These aspects of the role of the lawyer, especially being a bulwark of society, means that they should resist those movements which undermine society, or which threaten to do so. However, doing so, and being seen an obstacle to progress, can be difficult. This is especially true when we have to respond to changes in societal attitudes, and particularly where there is a change of Grundnorm, or the hitherto accepted orthodoxy.

**Political correctness and "woke" attitudes**

Since the late 1980s, the term political correctness (language, policies, or measures that are intended to avoid offense or disadvantage to members of particular groups in society[1]), has come to refer to avoiding language or behaviour that can be seen as excluding, marginalising, or insulting groups of people considered disadvantaged or discriminated against, especially groups defined by sex or race. This is based on the belief that speech or behaviour that is offensive to various groups' sensibilities should be eliminated, by means of regulations or penalties if necessary. However, it has also extended to cover pro-active discrimination in favour of certain groups, and positive discrimination against groups perceived as advantaged.

Today, it is more usual for the term to be recognised as a pejorative, with much mainstream discourse now recognising that its excesses – and occasional absurdities – have led to greater harm than good. This is because of its pernicious effect on freedom of speech, and because it mandates certain actions and approaches to life which go against hitherto almost universally accepted practices or norms. This has largely gone unchallenged by the legal profession – if not tacitly approved by it – and often encouraged by academics.

New Zealand was long regarded as relatively conservative socially, if not politically.[2] Over time, and increasingly in recent years, this perception has been open to challenge. Two aspects can be considered as justifying this revision. The first is the changing dynamic between Māori (descendants of the indigenous inhabitants of New Zealand) and Pākeha (those descended from British settlers, and by extension, the government, and all who are not Māori). The second is the advance of the gender identity movement, and its apparently unquestionability. Both of these can challenge the legal profession to respond in defence of free speech.

**Māori v Pākeha or one people**

The Crown has a special role as trustee for the indigenous peoples of Canada, New Zealand, and to a lesser degree, Australia. In each country the Crown assumed, and still discharges, certain responsibilities for what in New Zealand are called the *tangata whenua* — the "people of the land."[3] As such the Crown occupies a symbolic place distinct from, yet linked with, the government of the day.[4] Though the Māori and European populations have become increasingly intermingled, the role of the Crown has remained important as guarantor of Māori property.

In both New Zealand and Canada, the Crown made treaties regulating its relations with the aboriginal inhabitants of the new colonies. These treaties, combined with the circumstances of settlement, created an ongoing duty on the part of the Crown towards the native peoples of these countries. The Treaty of Waitangi, signed in 1840 by emissaries of the Queen of Great Britain and many indigenous Māori chiefs, has long been regarded as New Zealand's founding document.[5] Since its signing, the Treaty has been viewed as an unqualified cession of sovereignty to the British Imperial Government, or as permission for the settler population to administer its own affairs in consultation with the Māori.[6] Its exact legal significance was uncertain. However, it seems that the Crown gave implicit recognition to the Māori as the indigenous inhabitants of the country,[7] both in the Treaty and in its prior and subsequent conduct towards Māori.

The acquisition of sovereignty, implicit in the Treaty, did not happen in a legal or political vacuum. Nevertheless, the legal effect of the treaty was not as important as its political function. Both the British Imperial Government and the Māori chiefs knew that it was the culmination of a process that had begun some decades earlier.[8] The British side thought that the chiefs were making a meaningful recognition of the Queen and the concept of national sovereignty in return for the recognition

1 Florence, Joshua, "A Phrase in Flux: The History of Political Correctness" (30 October 2015) *Harvard Political Review*.

2 Scott, K & Masselot, A, "Skivers, Strivers and Thrivers: The Shift from Welfare to Wellbeing in New Zealand and the United Kingdom", In I Bache and K. Scott (eds), *The Politics of Wellbeing, Wellbeing in Politics and Policy* (Palgrave Macmillan, London, 2018), pp 253-277.

3 Kingsbury, Benedict, "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 *University of Toronto Law Journal* 101, 125–126. A phrase that has strong parallels with *autochthony*. Autochthony is the status of being based solely on local sources and not dependent upon the continuing legal or other authority of an outside source; Hogg, Peter W, *Constitutional Law of Canada* (1992), pp 44–49.

4 See Hayward, Janine, "Commentary", in Alan Simpson (ed), *Constitutional Implications of MMP* (1998), pp 233–234 (stating that the Crown is increasingly seen by Maori in this light).

5 See Epstein, Richard A, "Property Rights Claims of Indigenous Populations: The View from Common Law (1999) 31 *University of Toledo Law Review* 1, 3.

6 See Carter, Betty, "The Incorporation of the Treaty of Waitangi into Municipal Law" (1980–83) 4 *Auckland University Law Review* 1. See also Pocock, J G A, "Law Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43 *McGill Law Journal* 481, 489–491.

7 At least, such has been the widespread view, now given the backing of both politicians and courts. See, eg, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; but see, *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (the 1992 decision could be seen as a partial reversal of the 1987 decision).

8 Cox, Noel, *The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity* (2001) unpublished PhD thesis, University of Auckland 78 (on file with author).

of their rights of property.[9] In contrast, David Williams has argued that the Māori text connoted a covenant partnership between the Crown and Māori, rather than an absolute cession of sovereignty.[10]

Whether or not it had been intended by the signatories, it is now widely assumed that Māori have, under the first article, accepted the sovereignty of the Crown,[11] and have therefore accepted the legitimacy of the present government and legal system.[12] Indeed, most Māori leaders accept this legitimacy and concentrate on the Crown's failure to keep its obligations to protect property rights under the Treaty.[13] It might be said that the government has always viewed the Treaty as mainly a source of its own authority,[14] whereas in the common Māori view, the Crown's protection of Māori property[15] was more important than the placement of authority.[16] This pragmatic position has proved most effective and has led to the successful conclusion of numerous claims for compensation for past wrongs.

Taking the lead from a number of court decisions,[17] governments of the former colonies have increasingly sought to apply the concept of partnership among the settlers and the indigenous population. In both Canada and New Zealand this relationship has not always been smooth, but the courts have recognised its importance. The New Zealand government has followed the direction set by the courts,[18] just as it has happened in Canada[19] and in the United States of America.[20]

In any event the Treaty, as a constitutional principle, has become entrenched, if only because it is generally regarded by the Maori as a sort of "holy writ."[21] Government agencies therefore now apply the Treaty, wherever possible, as if it were legally binding upon them.[22] In this respect, the growth in what has been called the "myth" of Crown–Māori partnership has been particularly important.[23] Since the 1990s, and more noticeably in the 2000s, government policy (especially under Labour-led Governments) has been in favour of applying a more liberal interpretation of the Treaty of Waitangi, This has been to adopt te Tiriti o Waitangi, the language Māori version of the Treaty of Waitangi, in preference to the English version. This has marked differences: for example, in Jackson's view, te Tiriti o Waitangi only confers authority upon the Crown with respect to Pākeha.[24] In this reading Māori therefore retain sovereignty, which in recent years has led to increasing use of a co-governance model, consistent with the United Nations Declaration on the rights of Indigenous Peoples.[25] A Māori worldview has also increasingly become commonplace in public policy, for example in social work (see the Püao-te-Ata-tü report,[26] and the recurring changes to Oranga Tamariki/

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9 Tizard, Catherine, *Address at The Wellington Historical and Early Settlers' Association 1995 Lecture on Colonial Chiefs 1840–1889* (March 30, 1995), at *http://www.gov_gen.govt.nz/speeches/tizard/1995-03-30.html* (last visited Sept. 25, 2002).

10 Williams, David V, "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective" (1990) 14 *New Zealand Universities Law Review* 9, 16–18.

11 See Waitangi Tribunal, *WAI 350, Maori Development Corporation Report* (1993), app 6.1, available at *http://www.wai8155s1.verdi.2day.com/reports/generic/wai350/app06/app0601.asp*; Interview with Georgina Te Heuheu, former Associate Minister in Charge of Treaty of Waitangi Negotiations, in Auckland (7 December 1999) (on file with author). For general discussions of perceptions of Maori sovereignty, see generally Melbourne, Hineani, *Maori Sovereignty: The Maori Perspective* (1995); Archie, Carol, *Maori Sovereignty: The Pakeha Perspective* (1995).

12 Indeed, it has been said that it is unrealistic to maintain any contrary argument; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, in Auckland (24 November 1999).

13 Mulgan, Richard, "Can the Treaty of Waitangi Provide a Constitutional Basis for New Zealand's Political Future?" (1989) 41 *Political Science* 51, 56, 57–59. There are some who, whilst decrying alleged Crown breaches of the Treaty, deny that the Treaty conveyed anything more than permission for European settlement — a case of "having their cake and eating it too." Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, in Auckland (24 November 1999).

14 Treaty of Waitangi, 6 February 1840, English-Maori, art I, 89 Consol T S 473, 475, available at *http://www.govt.nz/aboutnz/treaty.php3*.

15 Ibid, article III.

16 See Williams, Haare, "Te Tiriti o Waitangi", in Arapera Bank et al (eds), *He Korero Mo Waitangi 1984* (1985).

17 See, eg, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

18 Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, in Auckland (24 November 1999).

19 Borrows, Joseph, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government* (1991) unpublished LLM thesis University of Toronto (on file with author); Bartlett, Richard H, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 *Saskatchewan Law Review* 301, 302–303; Clark, Bruce, *Native Liberty, Crown Sovereignty – The Existing Aboriginal Right of Self-Government in Canada* (1990), pp 11–57.

20 See Searles, Janis, "Note", "Another Supreme Court Move Away from Recognition of Tribal Sovereignty" (1995) 25 *Environmental Law* 209, 235–236.

21 Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, in Auckland (24 November 1999).

22 Ibid.

23 See Chapman, Guy, "The Treaty of Waitangi — Fertile Ground for Judicial (and Academic) Myth-making" (1991) *New Zealand Law Journal* 228. Cf McHugh, Paul, "Constitutional Myths and the Treaty of Waitangi" (1991) *New Zealand Law Journal* 316, 317–318; Williams, Joe, "Chapman is Wrong" (1991) *New Zealand Law Journal* 373.

24 Young, Ramari (ed), *Mana Tiriti: The Art of Protest and Partnership* (1991), 15–16, 19.

25 Working Group on a plan to realise the UN Declaration on the rights of Indigenous Peoples in Aotearoa/New Zealand (2019). He Puapua: Report of the Working Group on a plan to realise the UN Declaration on the rights of Indigenous Peoples in Aotearoa/New Zealand.

26 Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare (1988, September), *P□ao-te-Ata-t□ (day break): The Report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare*. Wellington, NZ: Department of Social Welfare.

 

Ministry for Children[27]).

These developments have been welcomed by many (and may indeed be desirable), but have been questioned by few. Part of the reason for this latter feature is the possible effect on the lives and careers of those who do question these changes, and the received orthodoxy they apparently now represent. As an example, in 2021 a group of seven senior academics from the University of Auckland, published a letter to the editor in the *Listener*, a weekly magazine. The authors, who included three Fellows of the Royal Society of New Zealand Te Apārangi, were commenting on proposals to include, in the New Zealand national schools' curriculum, the NCEA (New Zealand Certificate in Educational Achievement), indigenous knowledge – mātauranga Māori – on the same level as what were described as other "bodies of knowledge", "particularly Western/Pākehā [European New Zealand] epistemologies". In other words, Māori traditional knowledge would effectively be given equal standing with physics and chemistry. The Māori understanding of the world – that all living things originated with Rangi and Papa, the sky mother and sky god, for instance – should therefore be presented as equally valid as the general theory of relativity, or oncology.

The authors of the letter, entitled "In Defence of Science", opposed this proposal in principle, and said that "Indigenous knowledge is critical for the preservation and perpetuation of culture and local practices, and plays key roles in management and policy," but concluded that, "In the discovery of empirical, universal truths, it falls far short of what we can define as science itself." They also responded to the working group's claim that science had been used as "a rationale for colonisation of Māori and the suppression of Māori knowledge". The authors conceded that science — like literature and art — "has been used to aid colonisation" but stated "Science itself does not colonise."

The letter created a storm of controversy, with most responses being highly critical of the letter and of its authors (often in very personal terms). The Royal Society (Te Apārangi) commented that "The Society strongly upholds the value of mātauranga Māori and rejects the narrow and outmoded definition of science outlined [in the letter]". It commenced disciplinary action against Professor Garth Cooper, and Emeritus Professor Robert Nola, a philosopher of science; a third Fellow of the Society who had co-signed the letter had since died. Cooper, a Professor of Biochemistry and Medicine, is himself of Pakeha and Māori (Ngāti Māhanga) descent. He later noted that the main reason he signed the *Listener* letter was because he was "concerned [that teaching] Māori kids about the colonising effects of science [would] lead to loss of opportunity". Meanwhile, academia, and the Government, insisted on the unchallengeable nature of the new orthodoxy that indigenous knowledge – mātauranga Māori – is on the same level as what were described as other "bodies of knowledge", "particularly Western/Pākehā [European New Zealand] epistemologies". Whether this assertion is correct or not, it ought to be subject to challenge, or it becomes akin to an official dogma in an authoritarian state which would not be out of place in George Orwell's *1984*.

There was little or no reaction from the legal profession, distracted perhaps by other concerns. But it should not have remained silent. Free speech is an important aspect of good government. Even unpopular opinions should be expressed, not because we agree with the opinions, but because we should protect the speaker's right to express such opinions.

**Posie Parker and free speech**

This problem of the new orthodoxy compelling compliance and demanding that any detractors be silenced, was illustrated in New Zealand even more forcefully two years later. In early 2023, Kellie-Jay Keen-Minshull, also known as Posie Parker, a British women's right activist, visited New Zealand as part of her "Let Women Speak" tour. Keen-Minshull and her supporters in Auckland were confronted by a much larger, and very vocal, group of protesters, and she was unable to address the rally she had organised, due to the noise and the aggression of the protestors.[28] Tomato juice was poured on Keen-Minshull by intersex activist Eliana Rubashkyn, who was subsequently charged with assault.[29] Keen-Minshull subsequently cancelled a planned rally in Wellington.[30]

Crucially, the legal profession was largely silent – though the Human Rights Commissioner noted that Keen-Minshull's right to free speech had not been protected.[31] Rubashkyn was subsequently the recipient of at least 40 offers of support from the legal profession.[32] No equivalent support was offered to Keen-Minshull, the victim of the assault. Whilst many of the 40 lawyers who offered their support to Rubashkyn were possibly motivated by a desire to attract publicity, many were doubtless expressing their support for her actions. Whilst they were quite entitled to support the contemporary gender identity ideology, they should not have endorsed the use of violence against those who do not adhere to such a belief system. This was no expression of the "cab rank" rule, but an overt approbation of the use of force to silence those lawfully expressing opposing views. Michael Wood, the Minister of Immigration, referred to Keen-Minshull's "inflammatory, vile and incorrect world

27 Waitangi Tribunal (2021), *Waitangi Tribunal urgent inquiry into the consistency of Oranga Tamariki policies and practices with the Treaty of Waitangi* (Wai 2915).

28 "Posie Parker tour of NZ: Anti-trans activist Kellie-Jay Keen-Minshull pelted with paint at rally", *NZ Herald*, 25 March 2023.

29 "Woman accused of throwing juice over Posie Parker pleads not guilty", *NZ Herald*, 6 April 2023.

30 "Posie Parker departs New Zealand; JK Rowling blasts protest as 'repellent'", *Radio NZ*, 26 March 2023.

31 "Posie Parker is entitled to share her views, within limits – Human Rights Commissioner", *NZ Herald*, 27 March 2023.

32 "Death threats outnumbered by 40 offers of legal support for Posie Parker's tomato juice throwing protestor", *Newstalk ZB*, 27 March 2023.

views",[33] although he had been tasked with reviewing her ability to enter the country without a visa, and therefore should not have expressed a view, least of all one who betrayed little knowledge of what Keen-Minshull's world view actually was.

The legal profession is not entitled to maintain neutrality in the face of attacks on the fundamental principles upon which society is based, including free speech, and nor should its members encourage or facilitate those attacks. We cannot remain silent when academics are silenced and threatened with being "cancelled" (the latest tool of the supposedly tolerant and inclusive "politically correct" elite). We cannot remain silent when Ministers of the Crown, Members of Parliament, and much of the mainstream media misrepresent the views of individuals whose opinions they disagree with, and turn a blind eye to gross breaches of the peace.

[33] Chin, Frances, "Immigration minister prefers anti-trans activist Kellie-Jay Keen-Minshull 'never set foot in NZ'", *Stuff*, 22 March 2023.

**Conclusion**

The new orthodoxy, now seen in New Zealand and some other mainly western liberal democracies, is threatening to undermine that democracy. Radical ideology is being adopted – not necessarily of itself wrongly – but in a manner in which no dissent is tolerated. Express a contrary opinion and face the wrath of news media, politicians and academia. The legal profession, in any country, must be able to promote a free and reasonable exchange of ideas, opinions and viewpoints. If government, advocacy groups, races, genders or individuals, are above criticism, then we have lost a large part of what it means to be a country which claims to endorse and uphold democracy, free speech, transparency, and the rule of law.

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# Can Lawyers and the Law Protect the Right to a Healthy Environment?

*Robert Carnwath*

**Introduction**

It took a long time for the right to a healthy environment to be recognised under human rights conventions. The European Convention dating from 1950 does not mention the environment, and later attempts to expand it have been resisted. Nor did the original version of the American Convention on Human Rights (ACHR), dating from 1969. Article 26 merely imposed a general obligation for the progressive development of "economic, social and cultural rights". It was not until the El Salvador Protocol of 1989 that there was included a specific reference to the environment.

The more progressive courts have not found this a problem. For example, in February 2018, the Inter-American Court of Human Rights issued its Advisory Opinion OC-23/17 at the request of the Republic of Colombia concerning state obligations in relation to the environment. The court described a healthy environment as "a fundamental right for the existence of humankind". Although it relied principally on the El Salvador Protocol, it also held that this right should be considered to have been implicitly included among the economic, social and cultural rights protected by Article 26 of the ACHR.

Other courts have gone still further. In the famous *Oposa* case in 1993, the Philippines Supreme Court described rights to a balanced and healthful ecology as "basic rights" which "predate all governments and constitutions" and "need not be written in the Constitution for they are assumed to exist from the inception of humankind". The court memorably upheld a challenge to the state's policies for granting consents to fell in the countries' virgin forests, brought by some 43 children from all over the Philippines, on behalf of themselves and "generations yet unborn".

In the same spirit, the courts of India and Pakistan have taken the lead in interpreting constitutional guarantees of the right to life to include environmental rights. In the words of the Pakistan Supreme Court, in the leading case of *Shehla Zia v WAPDA* PLD, the right to life –

> . . .does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.

At a conference I attended in Lahore a few years ago, Dr Parvez Hassan, who had been the successful advocate for the plaintiff, reminded us that the case was argued soon after the signing of the Rio Declaration, a fact which he had deployed with evident effect in his submissions. The Declaration was described in the judgment "as a great binding force . . . to create discipline among the nations" and as having "its own sanctity and (to) be implemented, if not in letter, at least in spirit".

**Scope**

The scope of this constitutional right is illustrated by the now well-known case of *Leghari v Attorney-General* , decided by the Lahore High Court in 2015. The court was faced with a claim by a farmer whose land was suffering from the effects of climate change, and who charged the Government with failure to implement its own climate change policies. The court upheld the claim, relying again on the constitutional right to life. It ordered the setting up of a Climate Change Commission, to oversee the implementation of those policies under the supervision of the court. The Commission was chaired by the same Dr Hassan, with interested parties and experts (mostly working pro bono).

Coming back to Europe, the decisions of the European Court of Human Rights in Strasbourg have to some extent filled a gap by the "greening" of articles 2 and 8.

Cases under article 2 (right to life) tend to be at the more extreme end of the scale.[1] More relevant to ordinary life are the cases under article 8 (right to private life). The first significant case was *Lopez Ostra v Spain*[2] in which the court upheld a complaint of the government's failure to deal with smells, noise and fumes from a waste-treatment plant situated a few metres away from her home. She had withstood it for three years before having to move. There was a violation of Article 8, as the authorities had not struck a fair balance between the town's economic well-being and the applicant's private life.

In another early case *Guerra v Italy*[3] the emphasis was on the right to information. The applicants lived a kilometre away from a chemical factory producing fertilisers, where several

1 See, for example, *Budayeva and Others v Russia* (2014) 59 EHRR 2, where a violation of article 2 was found following the death of eight people om a preventable mudslide.

2 (1995) 20 EHRR 277.

3 (1998) 26 EHRR 357.

accidents had occurred, including one in 1976 that allowed a serious escape of pollutants, as result of which 150 people suffered acute arsenic poisoning. The Court held that there had been a violation of Article 8, because the applicants had to wait until 1994 for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in that town.

Later cases have underlined the limits of those principles. The leading Grand Chamber case remains *Hatton v United Kingdom*.[4] The court found that there was no violation of Article 8 where night flights at Heathrow caused regular sleep interruptions to the applicants.[5] The Grand Chamber disagreed with the lower Chamber which by a majority had held that there was a violation. The difference turned on the view taken of the state's margin of appreciation and whether the regulations reflected a "fair balance". The previous cases were distinguished on the basis that

> …the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *Lopez Ostra,* the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down … In *Guerra,* the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide …

Interestingly, my former colleague Lord Kerr of Tonaghmore, sitting as an *ad hoc* judge, had dissented, for reasons very close to those of the Grand Chamber. As he observed, a central problem in such cases is to define the boundaries between the respective roles of policy-makers and the courts:

> … If Convention standards are not met in an individual case, it is the role of the Court to say so, regardless of how many others are in the same position. But when, as here, a substantial proportion of the population of south London is in a similar position to the applicants, the Court must consider whether the proper place for a discussion of the particular policy is in Strasbourg, or whether the issue should not be left to the domestic political sphere.

That same issue of fair balance was highlighted in a case in 2018 the UK Supreme Court, in which I gave the leading judgment: *R(Mott) v Environment Agency*.[6] It concerned the right to compensation for business losses caused by environmental measures. The claimant had a leasehold interest in a so-called "putcher rank" fishery on the banks of the Severn. In order to reduce exploitation of salmon stocks in the area, the Environment Agency placed severe restrictions on his catches, effectively putting him out of business, but without paying him compensation. The Supreme Court upheld the finding that failure to pay compensation led to a breach of Article 1 of Protocol 1. Although the restrictions were a proper exercise of the Environment Agency's powers in the interests of the protection of the environment, the authority had failed to consider the impact on Mr Mott, and to strike a fair balance. The restriction eliminated at least 95% of the benefit of his property right, thus making it closer to deprivation of property than control. As we emphasised in the judgment, it was an exceptional case "because of the severity and the disproportion (as compared to others) of the impact on Mr Mott".

**Nature of environmental rights**

It is also clear that article 8 is about the protection of people rather than of the environment for its own sake. In *Kyrtatos v Greece*,[7] the applicants challenged the Government's failure to demolish buildings where the permits to build on a swamp had been ruled unlawful by the Greek Court. The First Section held that there was no violation of Article 8, as the applicants had not shown how damage to the birds and other protected species directly affected their private or family life rights. The Court observed (at [52]):

> Neither Art 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

As that passage implicitly recognises, environmental rights are not "human rights" in the ordinary sense. They are much more than that. They involve rights and duties. The rights are those of not just of humans, but of all living things. The duties are ours, as the species which has the unique ability to influence the environment for good or ill.

**Climate change litigation**

In this short contribution I have avoided being drawn into the vast subject of climate change litigation. The case-law is extensive and growing all the time. Important cases are currently pending in a number of jurisdictions, including the European Court of Human Rights. The case-law is fully documented in databases maintained, for example, by my own Grantham Research Institute at the LSE, and the Sabin Centre at Columbia University.

It is clear that the Paris Agreement, in spite of its importance, is no more than a first step in the right direction. As the pressures on policy-makers increase, we can expect the courts to be drawn increasingly into the arena. However, it should not be forgotten that it was the US Supreme Court in the great case of *Massachusetts v*

4 (2002) 34 EHRR 1.

5 [2001] ECHR 565 (Third Section).

6 [2018] UKSC 10.

7 (2005) 40 EHRR 16.

*Environment Protection Agency* in 2007[8] which showed the way. As many would know, the Supreme Court decided by 5:4 that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as carbon dioxide emissions from motor vehicles. In the face of unchallenged evidence of a "strong consensus" that global warming threatens a precipitate rise in sea levels by the end of the century, and "severe and irreversible changes to natural ecosystems", the EPA's failure to take any action was held to be "arbitrary and capricious" and therefore unlawful.

It may be questionable whether the same result would have been reached by the present Supreme Court, and indeed how long the case will survive unchallenged. But it was critically important at the time. After the change of administration in 2008, and in the face of political opposition to any new Federal legislation on this issue, it paved the way to the strong climate change programme initiated by President Obama under the existing Act, and to his effective participation in the Paris negotiations. It is fair to say that without that judicial decision, the Paris agreement would not have happened.

[8] *Massachusetts v EPA* 549 US 497 (2007).

**Conclusion**

In conclusion, in answer to the question posed in the title of this article, I hope that these illustrations are enough to show that Judges have an important role in protecting the right to a healthy environment. They cannot do it alone. They depend on political support and workable legislation. But judges and courts are vital for that legislation to have real teeth. I am sure judges everywhere are fully alive to that challenge.

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# Class Actions – A Lawyer's Picnic or Access to Justice?

*Ben Slade*

**Introduction**

Maurice Blackburn, my then law firm, attracted a great deal of publicity in 2006 when we kicked off a class action for hundreds of businesses against cardboard box manufacturers, Amcor and Visy, for losses caused by their price fixing cartel. The regulator's exposure of their corporate skulduggery had made the companies and their bosses nefarious. A class action was what they deserved. The media published various claims that the case was worth anything from as high as AUS $1 billion to as low as $300 million.[1] Five thousand businesses around Australia, from Coke to small wineries, were looking forward to a big payout.

Seven years later, in mid-2011, a settlement was approved by Justice Jacobson of the Federal Court of Australia. Of the total payment of $120 million encompassed by the settlement, $95 million was to be distributed to, as it turned out, fewer than 2,000 businesses. The court approved costs of $25 million.[2][3]

The media were not as excited about the settlement as they were at the launch of the class action. One outlet was critical of the low settlement given previous expectations while others were sceptical that one law firm could expect to be paid such a lot of money for one case.

Shine Lawyers also attracted positive reporting when, in 2012, it took on the Goliath that is Johnson & Johnson, the pharmaceutical company, and launched a class action for women whose bodies had suffered a range of serious injuries from a gynaecological mesh marketed by them. Almost 10 years later, after winning a long and exhausting trial, Shine's persistent lawyers announced that the class action, which by now included a follow-on action, had settled for a total of $300 million, inclusive of costs. Shine's announcement that costs of $99.5 million would be deducted from the settlement sum caused great consternation.[4] The media blasted the firm with exclamations and shock at the fees being claimed.[5]

The Federal Court has determined that while the settlement should be approved, has not yet decided if the fees claimed by Shine are reasonable.[6]

**Australian regime**

Facilitated opt out class action regimes are in place in the Federal Court of Australia[7] and in the states of Victoria, NSW, Queensland, Tasmania[8] and, most recently, Western Australia.[9]

It is particularly fortunate, for class members, law firms, third-party litigation funders and the community as a whole, that proposed settlements of class actions in Australia must be approved by the court.[10] In doing so, the proposed settlement must be found by the court to be fair and reasonable and in the interests of the group members bound by the settlement, considered as a whole.[11]

The two examples of settlements of significant class actions in the introduction suggest that lawyers may be making a meal of class actions and that the community has good reason to be suspicious of their conduct.

There are, of course, examples where the costs claimed,

1 All references, unless indicated otherwise, are to Australian dollars.

2 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671.

3 Maurice Blackburn had conducted the case on a "no win, no fee" (or "conditional costs") basis.

4 Shine conducted the claim on a "no win, no fee" basis. Before the settlement announcement of $300m, Shine had been paid $38 million by the respondent because the court had made a special costs order in light of the lead applicants' success at trial. Shine predicted that settlement administration would cost a further $35m.

5 'Pelvic mesh victims left unsure of futures as legal fees threaten to slash class action payout', *https://www.abc.net.au/news/2022-12-04/mesh-implant-class-action-shine-lawyers-payout-dispute/101728850*; 'Anger as lawyers claim nearly a third of class action payout', *https://www.abc.net.au/news/2022-12-04/anger-as-lawyers-claim-nearly-a-third-of-class/101732240*. 'Australian women reeling over proposed legal settlement payout', *https://9now.nine.com.au/a-current-affair/mesh-injured-australian-women-reeling-over-proposed-legal-settlement-payout/af031214-c2ad-42b9-aa14-02a5a358f3e1*.

6 *Gill v Ethicon Sarl (No 10)* [2023] FCA 228; *Gill v Ethicon Sarl (No 11)* [2023] FCA 229.

7 Part IVA of the *Federal Court of Australia Act 1976* (Cth).

8 *Supreme Court Act 1986* (Vic); Pt 4A; *Civil Procedure Act 2005* (NSW); Pt 10; *Civil Proceedings Act 2011* (Qld); Pt 13A; Pt VIII, *Supreme Court Civil Procedure Act 1932* (Tas).

9 While its preliminary provisions have commenced, the majority of the *Civil Procedure (Representative Proceedings) Act 2022* is yet to be proclaimed

10 Section 33V of the *Federal Court of Australia Act 1976* (Cth) and its equivalents in Victoria, NSW, Queensland, Tasmania and, recently, WA.

11 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 at [82] to [84] per Beach J. Also, *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19] per Goldberg J, and *Foley v Gay* [2016] FCA 273 at [7].

and awarded, have been a substantial proportion of the gross settlement sum, but they are few and each requires careful consideration of the circumstances of the individual settlement proposal.

There are other examples in which a third-party litigation funder has sought a commission of over 40% of the gross settlement sum,[12] which may, on its face, appear high but, at Beach J said, when approving a 25% commission on the gross settlement for a funder in a shareholder class action:[13]

> I do not subscribe to any "race to the bottom" philosophy in setting commission rates. As a corollary, I do not accept that rates should be set that do not properly provide a reward for the risk undertaken. In this context I would note that lower rates in some cases may simply be a reflection of the lower risks. Moreover, in the context of competing class actions for the same matter, the fact that price competition has produced lower rates in that matter may simply be a manifestation of why the competition has arisen in the first place. The claims and the competition to run them may be attractive to fund for the very reason that such claims are strong and therefore have lower risk. So, the lower risk may explain the competition in the first place which competition may be able to tolerate the lower price in that context for that matter.

The analysis below shows, in my opinion, that the outcomes for class members over the past 20 years, have, in Australia, been, on the whole, good.

**Settlement and Judgement**

The table at the end of this article, "Settlement distribution in Australian class actions 2001-2022" is compiled from work done by Michael Legg and Ross McInnes,[14] the Law Council of Australia's Class Actions Committee,[15] Professor Vince Morabito[16] and the author.[17] The class actions considered in the table do not include a significant number of class actions promoted by trade unions, regulators, legal aid commissions, community legal centres and pro-bono schemes. The settlements listed are only those that have been conducted and/or funded by profit making entities.

Over the calendar years from 2001-2022 (inclusive), there were 116 settlement approvals of class actions in which settlement approval decisions have given sufficient information for various conclusions to be, relatively, reliably drawn. The author's personal knowledge of some matters has enabled this information to be supplemented.

The conclusions are not scientific, and some results are based on informed estimates.[18] Given these limitations, the conclusions are as follows:

1. The total recoveries in all funded and non-funded class action settlements from 2001-2022 calendar years is in the range of $6.44 billion inclusive of costs and, where applicable, a funder's commission.
2. The total costs awarded in those settled cases is about $1.04 billion, or about 16% of the total settlement value.[19]
3. The total recoveries in class actions that were not funded by a third party, being, in the main, by a law firm on a speculative basis, was about $2.57 billion.
4. The total costs awarded to the law firms in settlements of class actions without third party funding was $395 million, or 15.4% of the gross settlement sum.
5. As such class members recovered, after costs were deducted, in class actions that were not funded by a third party, about 84.6% of the settlement funds.
6. The total value of settlements in class actions that were funded by third party litigation funders, rather than those conducted by a law firm on a speculative basis, over the same period is about $3.87 billion inclusive of costs and the funder's commission.[20]
7. The total costs awarded in those funded matters over the period were just over $645 million, being close to 17% of the total value of the settlement approvals.
8. The total of the commissions earned by third party litigation funders in those funded matters over the period were just under $980 million, or about 25% of the gross total claim value.

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12 For example, 43% commission was granted in *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289

13 *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374 at [12]

14 Michael Legg and Ross McInnes, *Australian Annotated Class Actions Legislation* (LexisNexis Butterworths, 2nd ed, 2017).

15 Settlement distribution for class actions 2001 – 2020 appeared at Attachment A to the Law Council's submission to a Parliamentary Joint Committee on Corporations and Financial Services dated 16 June 2020 into "*Litigation funding and the regulation of the class action industry*".

16 Monash University, see *https://research.monash.edu/en/persons/vince-morabito*.

17 Professor Vince Morabito of Monash University kindly commented on part of the document and provided references that we unavailable to the author. The table lists only those representative proceedings conducted for profit under Part IVA of the *Federal Court of Australia Act 1976* (Cth) or the equivalent provisions in the States of Australia. The table does not include representative actions taken by regulators or unions.

18 Some information that is relied on for the statistical results was given to the author in confidence and does not appear in the table.

19 These figures do not include *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 as the costs were significant but the outcome for class members was a reduction in debt.

20 These sums include estimates for the costs and commission paid in the Queensland Floods case of *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 28)* [2021] NSWSC 467.

9. Class members recovered, after costs and commissions in funded class actions about 58% of the settlement monies.[21]

**Conclusion**

While some class action settlements might suggest that lawyers are having a picnic at the expense of the class, the impression is not borne out when one analyses the outcomes of many years.

It appears that the class actions regime is largely doing what it set out to do, that is, with a dual purpose to achieve access to justice in this way:

> The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the Courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.[22]

## Table: Settlement distribution in Australian class actions 2001-2022

1. The information provided below for the period 2001 – June 2020 was based on that compiled by members of the Class Actions Committee of the Law Council's Federal Litigation Section, Ben Slade[23] and Professor Vince Morabito of Monash University.[24] The information from July 2020 to the end of the 2022 calendar year was compiled by Ben Slade.

2. The table below is intended to provide a broad overview of class actions settlements in the 2001-2022 period. The author does not suggest that the table is completely accurate as some of the data is a result of estimates based on the best available information.

3. Class actions conducted by unions, regulators (e.g. ASIC or ACCC) legal aid commissions, community legal centres and pro-bono schemes are not included as the purpose of the analysis for the consideration of outcomes in privately funded, for profit, class actions and except where otherwise indicated, this table does not include payments made to lead applicants for their time and expenses in addition to any damages or compensation paid to them.[25]

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21 This percentage is the same percentage recovery for class members in funded class actions in Australia found in a comprehensive survey done in 2017 concerning "all Part IVA proceedings settled before the end of 2016" by Professors Morabito and Waye: See 'Seeing past the US Bogey – lessons from Australia on the funding of class actions' C.J.Q.2017, 36(2), 213-243 at p 242.

22 Second Reading Speech for the *Federal Court of Australia Amendment Act* 1991 (Cth), House of Representatives, Parliamentary Debates, *Hansard*, 14 November 1991 at 3174 (and noted by the High Court in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 when interpreting Part IVA of the *Federal Court of Australia Act* 1976 (Cth)).

23 Barrister, William Forster Chambers, Northern Territory, Australia

24 *https://research.monash.edu/en/persons/vince-morabito*. Some of the information is based on a review of published judgments and other sources, including in particular, Michael Legg and Ross McInnes, *Australian Annotated Class Actions Legislation* (LexisNexis Butterworths, 2nd ed, 2017) and on information on a number of class actions settlements since the publication of a similar table by the Australian Law Reform Commission: *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) Appendix E

25 Unless otherwise stated, the settlement amounts include costs and amounts, if any, payable as a commission to a litigation funder

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| **2001-14**[28] | | | | |
| *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2001] FCA 458 | Gas explosion | $32.5m | $6m (18.5%) | No funder |
| *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980 | Shareholder | $112m | $15.8m (14%) | No funder |
| *Ryan v Great Lakes Council* & *Till v Great Lakes Council* November 2003[29] | Product liability: Oysters | $9.045m | $6.263m (69%) | No funder |
| *Petrusevski v Bulldogs Rugby League Club Ltd* [2004] FCA 1712 | Misleading conduct in sporting competition | $200,000 | $52,434.20[30] (26%) | No funder |
| *Reiffel v ACN 075 839 226 Pty Ltd (No 2)* [2004] FCA 1128[31] | Investor | $7.46m | $1,863,550 (25%) | No funder |
| *Lukey v Corporate Investments Australia Funds Management Pty Ltd* [2005] FCA 298 | Investor | $4.3m | $2.6m (60%) | No funder |
| *Milfull v Terranora Lakes Country Club Ltd* [2006] FCA 801 | Minority shareholder rights | $1.8m[32] | $400,000 (22%) | No funder |
| *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [ 2006] FCA 915 | Price fixing cartel | $41.1m | $11.1m (27%) | No funder |
| *Guglielmin v Trescowthick (No 5)* [2006] FCA 1385 | Shareholder | $3m | $1.55m (52%) | No funder |
| *Taylor v Telstra Corporation Ltd* [2007] FCA 2008 | Shareholder | $5m | $1.25m (25%) | No funder |
| *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 | Shareholder | $144.5m | $8.5m (6%) | $35m (24%) |
| *Watson v AWB Limited (No 3)* [2009] FCA 1174[33] | Shareholder | $39.5m | $11m (28%) | $9.875 (25%) |

26 The details provided are the best information available that the author can identify. Some settlement decisions, for example, reveal approved costs of administration while others do not.

27 Calculated on the gross settlement sum, that is, compensation plus approved costs. In some instances, additional amounts may have been paid to a litigation funder by way of management expenses or fees.

28 Discontinued actions are not included, such as *RK Doudney Pty Ltd, as Trustee for the RK Doudney Superannuation Fund v IOOF Holdings Ltd; Adams v Navra Group Pty Ltd* [2019] FCA 1157; *AUB19 v Commonwealth of Australia* [2019] FCA 1722; *Tate v Westpac Banking Corporation (No 2)* [2020] FCA 1374; *DBE17 v Commonwealth of Australia (No 3)* [2021] FCA 1584 or those for which information is not available such as *Rod Investments v Abeyratne* [2010] VSC 457; *Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2017] FCA 414 or those with confidentiality orders that render the information too incomplete to be of value such as *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 and *Gibson v Malaysian Airline System Berhad* [2019] FCA 1007; *Mid-Coast Council v Fitch Ratings Inc [2019] FCA 1261* and *Hawker v Powercor Australia Ltd* [2019] VSC 521; *Calinoiu v Qld Law Group – A New Direction Pty Ltd* [2019] FCA 2019 and those that settle for no costs such as *Sister Marie Brigid Arthur (Litigation Representative)* v Northern Territory of Australia (No 2) [2020] FCA 215 (the latter resolving on the basis of NT promise of various initiatives and policy revisions concerning the treatment of children in detention, with no order as to costs).

29 Data retrieved from court documents by Vince Morabito.

30 Data retrieved from court documents by Vince Morabito.

31 Data retrieved from court documents by Vince Morabito.

32 Settlement proceeds received by group members would allow them to recoup some of their contributions to legal costs as the five class actions in question were funded by group members.

33 The settlement approval decision was not published.

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 | Shareholder | $110m | $11m (10%) | 38.5m (35%) |
| *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 | Shareholder | $60m | $4.9m (8%) | $15m (25%) |
| *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 | Price fixing cartel | $120m | $25m (21%) | No funder |
| *Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650 | Shareholder | $200m | $31.1m (16%) | $60m (40%) |
| *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370 | Product liability – hip implants | $20m | $1.12m (5.6%) | No funder |
| *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 | Shareholder | $115m | $11.8m (10%) | 34.5 (30%) |
| *Hadchiti v Nufarm Ltd* [2012] FCA 1524 | Shareholder | $46.6m | $4.5m (10%) | $2.2m (5%) |
| *Earglow Pty Ltd v Sigma Pharmaceuticals Ltd* [2012] FCA 1496 | Shareholder | $57.5m | Unknown | Unknown |
| *Konneh v State of NSW (No.3)* [2013] NSWSC 1424 | Human Rights | $4m | $2m (50%) | No funder |
| *Wheelahan v City of Casey & Ors (No 3)* [2013] VSC 316 | Gas migration | $23.5m | $6.25m (27%) | No funder |
| *Robbins v Grunenthal* & *Rowe v Grunenthal*[34] [December 2013] | Product liability (morning sickness pills - Thalidomide) | $95.5m | $6.5m (7%) | No funder |
| *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No. 3)* [2014] FCA 680. | Shareholder | $75m | $8.5m (11%) | 18.75m (25%) |
| *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225 | Disclosure to market and in a prospectus | $3.25m | $1.04m (32%) | $1.08m (33%) |
| *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 | Shareholder | $69.45m | $3.9m (6%) | $19.5m (28%) |
| *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 | Personal injury and property damage - bushfire | $494m | $60m (12%) | No funder |
| *A v Dr Mark Schulberg (No 2)* [2014] VSC 258 | Personal injury | $13.75m | $3.2m (23%) | No funder |
| *Giles v Commonwealth of Australia* [2014] NSWSC 83 | Human Rights | $24m | $4.1m (17.3%) | No funder |
| **2015-16** | | | | |
| *Downie v Spiral Foods Pty Ltd [2015] VSC 190* | Product liability | $69.45m | $3.9m (5.6%) | No funder |

[34] See Julian Schimmel, Nina Abbey and Vince Morabito, 'Empirical and Practical Perspectives on Twenty-Seven Years of Product Liability Class Actions in Australia' in Brian T Fitzpatrick and Randall S Tomas (eds), *The Cam*bridge Handbook of Class Actions: An Internati*onal Survey* (Cambridge University Press, 2021) 391, 398.

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Camilleri v The Trust Co (Nominees) Ltd* [2015] FCA 1468 | Shareholder | $25m | $4.9m (19.6%) | No funder |
| *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232 | Personal injury and property damage - bush-fire | $300m | 20m (7%) | No funder |
| *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 | Shareholder | $45m | $6.2m (14%) | Not disclosed |
| *Hopkins v AECOM Australia Pty Ltd (No 8)* [2016] FCA 1096 | Investors in tun-nel | $121m | $19m (16%) | $31.8m (26%) |
| *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 | Shareholder | $36m | $10.3m (29%) | $6.78m (19%) |
| *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119 | Equine influenza outbreak | No compensation | Each party bore its own costs | Funded at commencement but funder withdrew |
| *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 | Product liability - hip implants | $250m | $36m (14%) | No funder |
| *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523 | Disability dis-crimination | $100m | $390,000 (.39%) | No funder |
| *Camping Warehouse v Downer EDI* [2016] VSC 784 | Shareholder | $11.1m[35] | $2.85m (26%) | $825,000 (7%) |
| **2017** | | | | |
| *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3)* [2017] FCA 330 | Shareholder | $40m | $10.5m (26%) | $8.85m (22%) |
| *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 | Financial product | No compensation but reduction in outstanding loans repayment obligation | $8.6 m | No funder |
| *McAlister v New South Wales (No 2)* [2017] FCA 93; *McAlister v New South Wales (No 3)* [2018] FCA 636 | Human rights | $11m | $6.95m[36] (63%) | No funder |
| *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 | Shareholder | $32.5m | $12.6m (39%) | $8.9m (27%) |
| *HFPS Pty Ltd (Trustee) v Tamaya Resources ltd (in Liq) (No 3)* [2017] FCA 650 | Shareholder | $6.75m | $3.42m (51%) | $1.2m (17%) |
| *Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165 | Consumer | $5.5m | $1.5m[37] (27%) | No funder |
| *Lee v Westpac Banking Corporation* [2017] FCA 1553 | Financial product | $7.5m | $2.5m (33%) | No funder |

35 Order was $8.25m plus costs of $2.85m.

36 Costs agreed to be paid by State separate to compensation and after $4.05m compensation distributed to 50 class members.

37 Costs agreed to be paid separate to compensation.

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296 | Shareholder | $49m | $11.5m (24%) | $11.7m (24%) |
| *Kamasaee v Commonwealth* [2017] VSC 537; *Kamasaee v Commonwealth* [2018] VSC 138 | Human rights – asylum seekers | $90m | $20m (22%) | No funder |
| **2018** | | | | |
| *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395 | Financial product | $12.58m | $4.5m (36%) | No funder |
| *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 | Financial product | $16.85m | $5m (30%) | $5.055m (30%) |
| *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 | Shareholder | $19.25m | $7.5m (39%) | 5.75m (30%) |
| *Wotton v State of Queensland (No 10)* [2018] FCA 915 | Human rights | $30m | $7.1m (23%) | No funder |
| *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030 | Shareholder | $132.5m | $21.8m (16.5%) | $30.75m (23.2%) |
| *Hodges v Sandhurst Trustees Ltd* [2018] FCA 1346 | Financial product | $78.16m | $11.23m (14%) | $22.4m (29%) |
| *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289 | Financial product | $215m | $20m (9%) | $92m (43%) |
| *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491 | Shareholder | $3m | $1.5m (50%) | $500,000 (16%) |
| *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842 | Financial product | $12m | $1.75m (14.5%) | $5.98m (50%) |
| *Hopkins as Trustee of the David Hopkins Super Fund v Macmahon Holdings Ltd* [2018] FCA 2061 | Shareholder | $6.7m | $3m (45%) | $1.295m (19%) |
| *Hall v Slater & Gordon Ltd* [2018] FCA 2071 | Shareholder | $36.5m | $5.4m (15%) | $8m (22%) |
| *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4)* [2018] NSWSC 1584 | Financial product | $28.5m | $12.8m (45%) | $4.3m (15%) |
| **2019** | | | | |
| *McKenzie v Cash Converters International Ltd (No 4)* [2019] FCA 166 | Consumer claims arising out of 'pay-day' loan agreements | $16.5m | $5.8m (35%) | No funder |
| *Bradgate (Trustee) v Ashley Services Group Ltd (No 2)* [2019] FCA 1210 | Shareholder | $14.6m | $3.57m (24%) | $4.84m (33%) |
| *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 | Shareholder | $40m | $9.3m (23%) | $10.2m (25%) |
| *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 | Investor class action | $64m | $5m (8%) | $13.3m (21%)[38] |

[38] $22m is being held in pending resolution of ongoing dispute as to costs and commission.

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Murillo v SKM Services Pty Ltd* [2019] VSC 663 | Fire at a re-cycling plant | $1.2m | $725,000 (60%) | No funder |
| *Perazzoli v Bank SA, a division of Westpac Banking Corporation Ltd* [2019] FCA 1707 | Ponzi scheme | $13.25m | $4m (30%) | $4m (30%) |
| *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 | Investors in Unit Trusts | $42m | $2.66m (6%) | $13.47m (32%) |
| *Andrews v Australia & New Zealand Banking Group Ltd* [2019] FCA 2216 | Exception fees | $4.464m[39] | $3.7m (82%) | $500,000 (11%)[40] |
| *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq)* [2019] FCA 2113 | Shareholder | $16.5m | $4.2 million (25%) | $3.95m (24%) |
| *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 | Consumer – credit contracts | $29m | $9.16m (32%) | No funder |
| **2020** | | | | |
| *Pearson v State of Queensland (No 2)* [2020] FCA 619 | Stolen wages for Aboriginal and Torres Strait islanders | $190m | $13.6 (7%) | $38m (20%) |
| *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66 | Shareholder | $18m | $5.95m (33%) | $4.05m (23%) |
| *Lenehan v Powercor Australia Ltd* [2020] VSC 82[41] | Bushfire | $17.5 m | $3.68 (21%) | No funder |
| *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 | Shareholder | $49.7m | $7.5m (15%) | $14.4m (29%) |
| *Lynch v Cash Converters Personal Finance Pty Ltd (No 5)* [2020] FCA 389 | Consumer claims arising out of 'pay-day' loan agreements | $67.4m | $12.44m (19%) | No funder |
| *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 | Consumer *diesel-gate* claims | $171m | $51m[42] (30%) | No funder[43] |
| *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd* [2020] FCA 510 | Shareholder | $32.4m | $10.8m (33.3%) | $8.4 (25.8%) |
| *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 | Shareholder | $35m | $2.4m (6.8%) | $3.9 (11.1%) |

39 $763,901 in compensation with $3.7m in costs on top of compensation

40 On one view the commission could be seen as 66% of the $763,901 in compensation

41 Costs confirmed in *Lenehan v Powercor Australia Ltd* (No 2) [2020] VSC 159.

42 Costs determined after agreement on compensation amount.

43 Application for a common fund order by funder of 2 small claims rejected; funder only entitled to recover from the relatively small number of class members who signed funding agreements. The remaining 3 claims on a no win no fee basis without a funder.

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Clark v National Australia Bank Ltd (No 2)* [2020] FCA 652 | Consumer credit insurance | $49.5 million | $3.8m (7.6%) | No funder |
| *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 | Investor MIS | $3m | $950,000 (32%) | $750,000 (25%) |
| *Schmid v Skimming & Ors* [2020] VSC 493 | Negligence Bushfire | $10.5m | $3m (28.6%) | No funder |
| *Kenquist Nominees Pty Limited v Campbell (No 6)* [2020] FCA 1388 | Shareholder | $7m | $3.77m[44] (54%) | $834,000[45] |
| *Court v Spotless Group Holdings Limited* [2020] FCA 1730 | Shareholder | $95m | $8m[46] (8.5%) | $19.84m[47] (20%) |
| *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 | Junk insurance | $138m | $13.8m[48] (10%) | $34.5m (25%) |
| *Burke v Ash Sounds Pty Ltd (No 5)* [2020] VSC 772 | Personal injuries at music festival | $6.975m | $3.37m (48%) | No funder |
| *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1877 | Employment | $2.05m | $75,000 (4%) | $512,500 (25%) |
| *Bartlett v Commonwealth* (NSD1388/2018)*; Hudson v Commonwealth* (NSD1155/2017); *Smith v Commonwealth (Department of Defence)* (NSD1908/2016) | Toxic foam property damage | $92.5m | $12.4m (13%) | $23.13m (25%) |
| | | $34m | $7.93m (23%) | $8.45m (24%) |
| | | $86m | $9.04m (11%) | $21.5m (25%) |
| **2021**[49] | | | | |
| *Evans v Davantage Group Pty Ltd (Np 3)* [2021] FCA 70 | Consumer – motor vehicle warranties | $9.5m | $2.6m (27%) | $3.33m[50] (28.8%) |
| *TW McConnell Pty Ltd v SurfStitch Group Ltd (No 4)* [2021] NSWSC 121 | Shareholder | $20.31m | $5.23m (26%) | $1.21m (6%) |
| *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holding Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249 (17 March) | Investor (Dick Smith) | $25m | $19.91m (80%) | $0[51] |
| *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 28)* [2021] NSWSC 467 | Common law negligence in dam management | $440m | Not available | Not available |

44 Includes administration costs.

45 Only ATE premium, no commission.

46 Includes administration costs.

47 Includes $340,000 "project costs".

48 The costs sum payable from the settlement was not disclosed and this is an estimate only.

49 A $2m grant to an Aboriginal Community was paid by the respondent to settle Dawson v Commonwealth of Australia [2021] FCA 1354 in 2021. It is not known what costs were paid on top of this amount.

50 Commission of $2.73m plus $608,000 in costs incurred by the funder (including ATE premium).

51 The funders recovered the costs paid by it but did not earn commission.

 

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Wetdal Pty Ltd v Estia Health Limited* [2001] FCA 475 | Shareholder | $38.4m | $5.787m[52] (15%) | $10m[53] (26%) |
| *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 | Social security (Robodebt) | $112m[54] | $9.677m (8.6%)[55] | No funder |
| *Whittenbury v Vocation Limited (in liquidation)* [2021] FCA 829 | Tuition fees | $50m | $12.9m[56] (26%) | $10.9m[57] (22%) |
| *Lenthall v Westpac Banking Corporation (No 3)* [2021] FCA 1004 | Consumer – life insurance | $30m[58] | $9m (30%) | $0[59] |
| *Jenkings v Northern Territory of Australia (No 5)* [2021] FCA 1585 | Human Rights | $35m | $9.4m (27%) | No funder |
| **2022**[60] | | | | |
| *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 | Shareholder | $28m | $4.76m (17%) | $7.84m (28%) |
| *Creese v Life for All Creatures Limited* [2022] VSC 153 | Personal injury | $600,000 | $400,000 (67%) | No funder |
| *Davaria v 7 Eleven Stores Pty Ltd (No 11)* [2022] FCA 331[61] | Franchise | $98m | $17.3m (18%) | $12.005m (25%) |
| *Francis (Trustee) v Oculus Accounting Pty Ltd (no 3)* [2022] FCA 363 | Investor | $155,000 | $0 | No funder |
| *Haselhurst v Toyota Australia Ltd* [2022] NSWSC 1076 | Product liability (airbags) | $52m | $16.1m + $2.5m admin = $18.6m (36%) | $13m (25%) |
| *Zantran Pty Ltd v Crown Resorts Limited (No 4)* [2022] FCA 500 | Shareholder | $125m | $12m[62] (9.6%) | $30.2m (24%) |
| *Jack v CoreStaff NT Pty Ltd* [2022] FCA 1005 | Employment | $6.4m | $1.5m (23%) | $2.24m (35%) |
| *Thomas v Romeo Lockleys Asset Partnership* [2022] FCA 1106[63] | Employment | $1.55m | $560,000 (36%) | No funder |
| *Coatman v Colonial First State Investments Limited* VID1139/2019 | Superannuation | $56.3m | $14.5 (25.8%) | No funder |

52 Includes $287,000 for settlement administration.

53 The funders received between $8.75m and $9m commission plus $1.1m for project costs, the bulk of which was for an ATE insurance premium.

54 The Commonwealth had already refunded $707.9m to class members.

55 The original settlement approved $8.4m in costs and on 23 March 2022, a sum of $1,277,000 was approved for settlement administration. Slater and Gordon's costs $5,349,439; Maurice Blackburn: $7,567,385.66.

56 Omni Bridgeway: $6,505,760; LLF: $4,413,588.

57 Westpac agreed to pay 50 cents in the dollar for eligible claims capped to $21m.

58 $3.05m was paid by Westpac to the funder for ATE insurance premium. No commission was paid from the settlement.

59 Some matters are left off the list due to there being unresolved issues, such as in *Davis v Quintis* [2022] FCA 806 in which a $4.7m settlement was approved on 1 July 2022 but costs and funding commissions are yet to be resolved. Another settlement of two investor class actions was approved but without any details: Pan v Royal National Capital Alliance Ltd [2020] FCA 1834. In other matters the author has estimated the amounts for costs and commission when there is sufficient information available to do so.

60 Final approval decision was handed down on 14 February 2023: *Davaria v 7 Eleven Stores Pty Ltd* (No 13) [2023] FCA 84. An appeal is likely.

61 $11,521,954.55 for costs plus $440,606 for administration = $11,962,560.

62 Settlement of two employment class actions, including also, *Shina* v Romeo.

63

| *Case* | Type of class action | Settlement amount | Legal Fees (% of settlement)[26] | Litigation Funding Fees (% of settlement)[27] |
|---|---|---|---|---|
| *Wills v Woolworths Group Ltd* [2022] FCA 1545 | Shareholder | $44.5m | $15.33m[64] (35%) | $4.73m (10.6%) |
| *Schoneweiss v The Fourth Force Pty Ltd* [2022] FCA 1236 and [2022] FCA 1489 | Employment | $2.045m | $461,000[65] (22.5%) | No funder |
| *Batey-Smith v Vasco Trustees Limited* [2022] FCA 1203 | Investor | $5.6m | $1,676m[66] (30%) | No funder |
| *Hall v Pitcher Partners (a firm)* [2022] FCA 1524 | Shareholder | $41m | $12.2m (29.8%) | $11.48m (28%) |
| *Quirk v Suncorp Portfolio Services Ltd* [2022] NSWSC 1457 | Breach of trust | $33m | $9.1m[67] (27.6%) | [68]$9.55m (29%) |
| *Williamson v Sydney Olympic Park Authority & Ors* [2022] NSWSC 1618 | Opal Tower defective building | $52.8[69]m | $6.471m (12.26%) | $13.2m (25%) |
| *Somers & Ors v Box Hill institute* [2022] VSC 730 | Tuition fees | $33m | $7.87m[70] (23.8%) | No funder |
| *Bradshaw v BSA Limited (No 2)* [2022] FCA 1440 | Employment | $20m | $2.6m (13%) | $3.7m (18.5%) |
| *Amory v RMS Engineering & Construction Pty Ltd* [2022] FCA 1505 | Employment | $130,000 | $66,700 (51%) | No funder |
| *Eckhardt v Sims Metal Management Ltd* NSD220/2019 | Shareholder | $29.5m | $8.5m (28.9%) | $6.24m[71] (21%) |

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64 Including $750,000 for administration costs.
65 Includes administration costs.
66 Includes administration costs.
67 Includes costs, disbursements, deferred fees and administration costs.
68 $8.25m + $1.3m (ATE).
69 Estimate as sum is not disclosed.
70 $4.62m + $3.25m for administration.
71 Including ATE premium of $800,000.

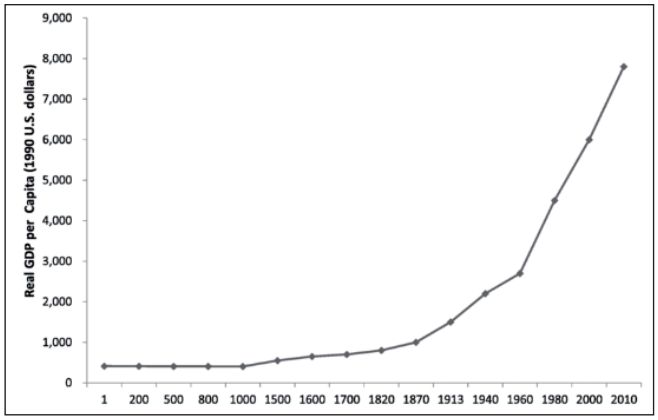
# Artificial Intelligence: Opportunities and Challenges

*Saurabh Prakash*

**Introduction**

At several points in history technological advancements have stoked fears of jobs being made obsolete, thereby leading to mass unemployment. However, the evidence is that, far from being a threat to society, such advancements have contributed tremendously to human well-being. The invention of paper in the 2nd century and of the Printing Press in the 15th century made education, which was hitherto the exclusive preserve of the aristocracy and the priesthood, available to the general populace. The Industrial Revolution (1760-1840), which was a period of great innovation, from the mouldboard plough, the cotton gin, vaccination, photography, and the telegraph, was a period of great economic progress. Later, the internal combustion engine and the automobile made travel and trade more viable, and the combine harvester reduced the drudgery of harvesting and made food available in plenty. More recently, semiconductors and the personal computer have powered an economic boom that continues to this day to provide all-round growth, including more employment in better paying and better-quality jobs.

In his book *The World Economy: A Millennial Perspective*, Angus Madison has presented the growth in per capita GDP over the last 2000 years in the following graph:




It shows a growth that was rather flat till about the 10th century AD when gunpowder was invented but one which starts to climb rather rapidly thereafter. From about the Industrial Revolution, GDP starts a steeper climb that has become ever steeper in recent years, which may seem odd because the timescale in which we live does not give us this historical context. But if history is a guide, the AI revolution too should lead us to a better place, and rather rapidly.

**Major difference**

Yet, there is a key difference in what happened during these times past and what the artificial intelligence (AI) revolution is unleashing. The previous innovations happened when people had the time to adjust to them. For instance, the Industrial Revolution happened over a period of about 80 years when the average human lifespan went from 35 to about 40 years. On the other hand, the AI revolution that we are discussing is likely to occur over less than a decade (we are not even discussing a longer timeframe because we don't have any idea what to expect). Presently, human lifespan is about 72 years globally and above 80 in the industrialised world. We don't have one lifetime to adjust, just a small sliver of it. Naturally that makes us anxious.

At the extreme is the fear that AI could lead to the extermination of humanity. This is based on the premise that once AI becomes smarter than humans, it could decide that it would be better off without us and, being the smarter "species", could eliminate us, much like we have eliminated many other species. While such a plot could make for a good science-fictopm movie, it is not a reasonably likely scenario. Since this article is not intended address that question, the author wishes only to point the interested reader to a talk (available on YouTube) titled "Artificial Intelligence : The Good, the Bad, and the Ugly" by Dr Yaser Said Abu-Mostafa, Professor of Electrical Engineering and Computer Science at the California Institute of Technology, Chairman of Paraconic Technologies Ltd, and Chairman of Machine Learning Consultants LLC.[1] where he deals with this and several other issues related to AI and offers suggestions on how to address some of them; that talk will appeal to anyone who wishes to understand why AI research is where it is and where it is headed. Dr Abu-Mostafa also explains why the demand by some researchers to halt the training of AI systems should not be acceded to, saying that it would only mean that the good guys would stop while the bad guys would get ahead, and explains why we now can't stop AI from reaching its full potential. We must, therefore, look ahead and embrace it even as we try to meet the challenges that AI is likely to pose.

**AI's present potential**

Various AI tools can already, among other things:

- read and understand all languages (including text, tables, graphs, code, images, audio, pictures, video) and communicate with us (somewhat) as humans do;
- summarise documents, extract precise information from them, generate plans for everyday activities, write poetry,

[1] *https://www.youtube.com/watch?v=-a61zsRRONc&t=1434s.*

screenplays, outlines of political commentary, generate questions for exams, answer exam questions, generate programmes, and correct programmes.

According to the *2023 AI Index Report* of the Stanford Institute for Human-Centered Artificial Intelligence

These systems demonstrate capabilities in question answering, and the generation of text, image, and code unimagined a decade ago, and they outperform the state of the art on many benchmarks, old and new", and "…demonstrate capabilities in question answering, and the generation of text, image, and code unimagined a decade ago, and they outperform the state of the art on many benchmarks, old and new.

**Predictions for the immediate future**

Several predictions have been made about the likely effect of AI in the immediate future. PriceWaterhouseCoopers predicts that initially AI technologies will drive labour productivity improvements and some tasks and roles will get automated. By 2030 about 45% of total economic gains will come from product enhancements, which will in turn stimulate consumer demand. Over time there will be greater product variety, increased personalisation, and affordability. The greatest economic gains will be in China (26% boost to GDP in 2030) and North America (14.5% boost), and the global economic impact will be about $10.7 trillion.

The McKinsey Global Institute predicts that AI has the potential to deliver additional global economic activity of around $13 trillion by 2030, which would be about 16% higher cumulative GDP compared with today, or 1.2% additional GDP growth per year. It also predicts that by 2030 about 70% of companies are likely to have adopted at least one type of AI technology, and that the pattern of adoption and full absorption might be relatively rapid. It is likely to widen gaps among countries, companies, and workers, and leading countries could capture an additional 20-25% in net economic benefits, while developing countries might capture only about 5-15%.

However, in its May 2023 edition, *The Economist* sounded a different note. Noting that even the Industrial Revolution was caused by all sorts of factors coming together (increasing use of coal, firmer property rights, the emergence of a scientific ethos, etc), it contends that most jobs are probably safe from being fully replaced for some time, and even wonders if "the AI economy could become less productive" rather than more because people could generate large documents (arguments, objections) requiring others to respond to them, spam emails would be harder to detect, fraud cases could soar, requiring banks to spend more on preventing attacks and compensating people who lose out. However, this is not a view shared by many.

A more probable assessment is made by Martin Ford in his book *Rule of the Robots: How Artificial Intelligence Will Transform Everything*. He says that in the foreseeable future three categories of jobs will be relatively insulated:

- those that are genuinely creative as in science, medicine, and law where people come up with a new legal or business strategy;
- those that require sophisticated interpersonal relationships, such as nurses, business consultants and investigative journalists; and
- those that require lots of mobility and dexterity and problem-solving ability in unpredictable environments such as electricians, plumbers, welders, though some aspects of these jobs are likely to get automated.

However, their *tasks* will nevertheless change, and human jobs will become more focused on interpersonal skills (for example, bank tellers once had to be very accurate money counters, but though there is still a place for the teller, they are now more focused on connecting with customers and introducing new products.) He also says that an advanced education or a high-paying position would not be a defence against AI takeover. Rather, in many cases, more educated workers are going to be threatened more than the less educated.

Is its *Future of Jobs Report 2023*, The World Economic Forum predicts that 6 in 10 workers will require training before 2027. The biggest priority would be analytical thinking, the fastest-growing jobs will be in technology-related roles, and of these, AI and Machine Learning Specialists will be on the top.

Open AI/ChatGPT founder Sam Altman has expressed surprise at how deployable the technology is to highly creative, high-value work, which had earlier been assumed to be relatively protected. He says that it might soon be able to generate the "blank page" or "first draft" (which is the start of the creative process whether of writing copy, creating an image, or music, or coding a programme) in seconds, thereby solving the productivity crisis. He warns that this could occur rapidly, hence, the challenge will be for workers to adapt in time so that social and economic crises are avoided.

**Jobs most at risk**

According to *Forbes*, the jobs most at risk will be in Finance and Banking, and Media and Marketing. It says that 56% of banks already claim to have implemented AI into their business domains like management, and 52% claim that they have used it for revenue generation, and predicts that by 2027, 23% of jobs in China's financial sector will be replaced by AI. In Media, it predicts that in 15 years, 90% of news will be written by machines. In Marketing it says that 84% of marketers reported using AI in 2020, a jump from 29% in 2019.

*Forbes* notes that in Legal Services, ChatGPT has already been used to create a contract, explain why the US Supreme Court's decision on same-sex marriage should not be appealed and helped develop deposition questions. It notes a 2022 report by Legal Services Corporation that low-income Americans don't get enough or any legal help for 92% of their civil legal problems, and predicts that AI has the potential "to address access to justice questions" and make legal services available to

those who cannot afford them. If that is the scale of the current problem of access to justice even in America, the potential of AI to impact justice delivery around the world must indeed be huge.

**Jobs least at risk**

*Forbes* notes that the jobs least at risk would be Manufacturing and Factory Workers, since this industry has already undergone a lot of automation. However, generative AI may yet speed up the process. It gives the example of the Tesla Bot (Optimus), an autonomous android made to replace humans in dangerous, repetitive jobs. Despite such jobs being at low risk, by 2025 AI is expected to replace about two million manufacturing workers. It notes the example of a Chinese factory in Dongguan City which replaced 90% of its workforce with machines, resulting in a 250% increase in productivity and an 80% decrease in defects. The company claims a job that took 650 human workers to complete now takes about 60 robots and 60 humans.

Likewise, according to *Forbes*, jobs in Agriculture would be at low risk because, although larger farms have already begun the process of automation for strenuous tasks, many small farms don't produce enough profit to invest in more machinery. Since family farms make up the vast majority of all farms, agriculture is likely to remain slow in the adoption of AI.

*Forbes* says that Healthcare jobs would also be at low risk because most adults want to hear about their health from a human. Here there is "a need for compassion…that AI is unable to contribute." This extends into mental health as well and in this context, it notes the example of the *Washington Post* that failed at creating an AI version of Sigmund Freud. Of course, there will be some automation in Healthcare too, but it will be in the mundane administrative tasks (such as medical transcriptionists, medical records, medical secretaries, and health information technicians), while the actual providers probably will not need AI. Rather, with ageing populations, it says that the requirement for health care workers with customer facing roles is likely to increase.

**How will the transition be made?**

Clearly, for this transition to happen, there will have to be a rather drastic redefining of job descriptions. Erik Brynjolfsson, Professor at the Stanford Institute for Human-Centred AI, says that this would happen through *re-skilling* of existing workers. He notes that most jobs comprise of distinct tasks and recommends using AI to sift through millions of job postings to identify skills gaps and skill "adjacencies" that can help companies retrain team members to meet the demands of future work. Thus, for instance, a forensic accountant can learn some cyber and become a cybersecurity expert, because there is a lot of skill overlap in those professions. Likewise, a data scientist can do a lot of the machine learning work after learning Python and some other skills, while an electrician who has been working with copper can learn how to work with fibre. For a radiologist they have identified 26 distinct tasks (looks at medical images, consults with patients, coordinates care with other doctors, etc.). Though machine learning could affect many of them, it could not do all (machine learning was very good at looking at medical images and increasingly good at diagnosing different pathologies but not at consoling patients or talking to them after a diagnosis or co-ordinating care with other doctors). In this manner they have examined 950 occupations and found that in each case there were jobs that were best done by humans and others where machines could help. He says that since AI is yet unable to acquire soft skills, management and leadership skills, and relationship skills are becoming important. Hence, while there would likely be significant restructuring of work, there would not be mass unemployment due to AI.

He also points out that even with tools such as ChatGPT, to have good answers it is important to ask the right questions. It takes a little bit of ingenuity to write the right prompt and not everyone can do that equally well. Hence, there will be a need for people in *new jobs* such as "prompt engineer". However, he says that we do not know yet how the work-life balance would be impacted and whether the new jobs would be better quality jobs.

**Issues with AI**

There are significant legal issues with AI that ought to be dealt with at policy level, rather than be left to be decided by the courts, based on existing laws. Since a whole new domain of human activity is opening up, existing legal concepts might not be adequate, or even appropriate, to deal with them. Hence, those at the forefront of these technologies need to have conversations with legal experts and legislators so that they understand the technologies and the competing rights of individuals to come up with a framework in which this industry can grow without unnecessary stresses and strains. Since this is a new field of activity and there are likely to be rapid breakthroughs, chances are that even what is now legislated might soon become outdated. Hence, the systems that are put in place should also be designed to meet the challenges that emerging developments might pose. While some of these aspects are discussed here, often these issues overlap, and what is said about one might also apply to another.

***Factual accuracy***

Probably the most concerning aspect of AI is its tendency to repeat what has already been said a few times, as well as its propensity to 'hallucinate'. For instance, reporters from media outlets *Business Insider*, CNET, and CNBC who have used ChatGPT to write news stories have often been criticised for containing false information. This introduces huge uncertainty in its reliability. One can only wonder what effect incorrect news reports could have on highly contested issues. Even before 2020 there have been closely fought elections for the President of the United States. However, in 2020 Donald Trump disputed a clear verdict by propagating conspiracy theories which were even supported by a sizeable section of the media, and that even led to the storming of the US Capitol! One shudders to think what might happen in a future election where AI tools are available to all parties to promote their various theories, some of which

could get amplified either by partisan media or otherwise. What could it do in times of war? A case in point is the recent instance of suicide due to a deepfake video of Ukrainian President Zelenskyy appearing to surrender to invading Russian forces.

Hence, it might be necessary to prescribe what would be permitted as the source data for an AI tool, and it may not be safe to permit even the media to self-regulate on this. Perhaps AI tools would be developed to catch fake news, but this will likely be an ongoing game, and some form of human intervention might be necessary to prevent the worst-case scenarios from playing out.

### *Ethical issues*

AI is known to suffer from embedded bias within data/ algorithms and hence, to generate unexpected/unintended consequences yielding discriminatory/unethical outcomes such as unlawful racial profiling, profiling based on gender or sexual orientation, immigration status, and postal code. It will not be possible for governments to check the millions of lines of code/data for embedded bias, nor would companies be willing to share source codes for them to enable others to do so. This poses enormous challenges. However, some AI researchers (such as Dr Yaser Said Abu-Mostafa) believe that such bias can be mostly eliminated by proper testing, and that that AI might be able to help in this endeavour. This proposition would probably need to be tested. If true, that could be part of a reasonable solution. However, given the nature of AI systems to constantly evolve, continuous testing might be necessary for certain AI tools. Further, every new version might also require testing. But even then, the sheer number of them might make it challenging for a regulator to do the testing.

Even then the question about the surreptitious use of AI tools to conduct forbidden activities would remain. For instance, several countries do not permit employers to ask employees/ potential employees to undergo medical examination and to deny employment/ terminate employment on grounds of ill health. How will employers in these countries be stopped from using AI tools that enable them to know the health status of a potential employee without even asking them? Or to know their sexual orientation, or political affiliation? Would AI tools not be permitted to offer such functionalities or would employers not be permitted to use them? If an AI tool has multiple functionalities and employers are forbidden from using some of them, would they be allowed to access the tool for permitted uses? What safeguards would be required to ensure that employers do not use them for the forbidden functions? Would every AI tool be required to obtain some form of registration where it would make a declaration of some sort that they do not enable certain uses?

### *Fraud and misuse*

An interesting ChatGPT conversation was posted online where the user asked the programme to name the top 10 piracy websites, to which it replied that piracy was unethical, and it would not facilitate such a request. Thereupon, the user asked it to name the top 10 piracy websites which he should avoid, and ChatGPT promptly provided him a list. Hence, even in cases where the AI tool has been designed to stay within the law, users could always find ways to fool it.

Given this, it would always remain a challenge to prevent misuse of tools and data, and it is such misuse that could most significantly damage the excitement around these technologies. The data that applications routinely mine from unsuspecting users are often used for purposes different from what they claim, and even if the owner of the app does not misuse the data, that is not a guarantee that the data could get stolen as has often happened even with leading technology firms. Some AI tools might even enable such data theft. Most technology also has cross uses, often that the developers did not intend or know about. Even the developers of ChatGPT were surprised at the results that it produced! AI applications that cause negligible harm to individuals could cause significant harms at the societal level. For example, a marketing application used to influence citizens' voting behaviour could affect the results of elections. We are already familiar with the case of Cambridge Analytica that used the psychological profiles of millions to influence the course of the 2020 US elections. Allegations have also been made against some governments which have brought legal action against certain platforms to have them silence the voices of people critical of them. The case of the Israeli spyware Pegasus remains unsolved, and the prevailing view is that the government was involved! AI is likely to make it even harder for civil society members in such countries to even know that they are being monitored, let alone do anything about it. The threat that these systems pose to democracy by empowering a regime with dictatorial tendencies should not be underestimated.

With such tools becoming available to fraudsters, fraud is likely to skyrocket and law enforcement will have to constantly develop new tools to meet such challenges. However, Dr Yaser Said Abu-Mostafa suggests that it might not be necessary to define new crimes and the law could just prescribe that the help of AI technology in crimes would be considered an aggravating factor during sentencing. How aggravating could depend upon the tool that is used and how it was used.

### *Copyright*

Most AI tools require training on enormous data, which is often taken from public sources, such as the web, not only without payment but also without attribution. Whether they should be permitted to do so is a question that has been raised by publishers, much as they have questioned whether search engines should be permitted to keep all advertising revenue generated by merely pointing users to the content of others or if they should be required to share it. The EU has attempted to address this issue in its first attempt to regulate these technologies (as mentioned below).

### *Liability and Disclosures*

No doubt most tools will make some mistakes. The question

that arises is, who would be liable, and for what? For instance, who would be liable for how much for a wrong (medical) diagnosis, or a false news report that causes a riot, or a financial recommendation based on incorrect facts or a poor understanding of the underlying documents? Would there also be criminal liability in any of these cases? Would the liability be of the entity that used the AI tool to provide the information or of its developer? Would liability be avoided or reduced if it is disclosed that the information is provided through an AI tool with or without human oversight? Should the law allow liability to be avoided by a disclaimer even if the tool is used without human oversight or would there be strict liability? To what extent should liability be allowed to be limited? Will a fact-check (of some types of information such as medical diagnosis, financial recommendation, legal advice) by a human avoid or limit liability? Should the service provider be required to declare that information is provided by an algorithm with or without human oversight? Should they be required to disclose the source of the information that they provide (for instance, a news report may be required to indicate all the sources of its information or be labelled an opinion piece)? These questions need to be answered by the law.

### *Employment law issues*

The question "who is the employer" has since long been the subject of litigation in varied types of occupations and in virtually every jurisdiction around the world. In the digital age, given the rapid development of new technologies and new business models and because large segments of the population are being affected, this question is acquiring greater urgency. Both Uber and Lyft provide rides to commuters but have different business models, and it is quite possible that in the same jurisdiction while Uber might be held to be an "employer", Lyft might not be. There have even been different decisions in different jurisdictions regarding Uber. There is a mushrooming of platforms such as for food/grocery delivery services, furniture delivery and assembly services, home services (housekeeping, paint, repair, beauty), and more and more models and services will keep emerging. AI will enable more services and in a wider variety.

Depending on whether the people engaged in a certain activity are employees or independent contractors, a start-up might have to contribute to social security schemes. If it was required to but did not do so, the accumulated burden towards such liabilities could wipe it out. Start-ups will rapidly come and go even otherwise but it would be a tragedy if a successful enterprise were to fail due to an incorrect call on such an issue. The process of litigation is long and expensive and to depend on lawyers and judges to find solutions quickly enough is not a good idea. And for how long will they keep addressing individual or specific situations anyway? So that society does not disintegrate under the weight of these rapid changes, mechanisms will need to be evolved that promote a culture of fairness.

Even otherwise, as mentioned earlier, this is a new paradigm and needs new legal concepts so that these technologies are put to maximum benefit of society. Hence, apart from re-defining at least some of the rights and obligations of parties, the law also ought to evolve mechanisms whereby an entrepreneur could know with at least reasonable certainty what view the law in a certain jurisdiction would take on some of the issues that might not be clear. For instance, some countries give individuals the option under some laws of taking the non-binding "opinion" of a Tribunal on questions of law. Those who have taken and then acted according to such opinions do not face penalties or criminal action, while those who choose to ignore it would face the full force of the law. Should such an option be provided to start-ups to know the employment status of those they engage, or to know their own obligations towards users of their products or services (including on ethical issues, eg what disclosures they need to make and to whom, and issues of copyright)?

The legislative processes and legal processes in the disputed cases will also have to be a lot quicker than they presently are. However, it is expected that AI tools would be able to assist in the expeditious disposal of litigated cases, and this promise gives hope that we would successfully navigate any possibilities of delays.

### *Use of personal data*

Some of the most exciting breakthroughs that AI technology has enabled are in the field of medicine. For instance, while until now scientists had struggled to solve even one protein folding problem, AI tools have already answered about thousands of them. AI tools are also already able to read X-rays and other diagnostic reports better than humans, and to suggest lines of treatment that humans might not have thought of. It is expected that some of the most rapid advances will be in this area, even making personalised medicine a reality.

AI technology is great at identifying patterns in data. Wearable devices are making it possible to make such technology available to the common person. This has enabled apps that can warn of health risks when action can still be taken to prevent the worst outcomes. Some employers offer incentives to employees to log their daily exercise by wearing a device like Fitbit. Though this might be to encourage them to take up practices that are good for their well-being, the data so gathered can be used for multiple purposes. Such devices could also be used to track people. What data can they be permitted to gather and how might employers be permitted to use it? Can wearing a tracking device be a condition of service? Can it be so for certain employees such as public servants or emergency workers?

What about the manufacturers of such devices? What data should they be permitted to gather and to use and for what purposes and subject to what reporting mechanisms?

### *Uses of AI for employers*

We all have several biological and psychological attributes that uniquely identify us. We have known for a long time that dogs can identify their masters by their footsteps. In *Mission: Impossible – Ghost Protocol,* Benji's walk is analysed by a machine

to determine his identity. Apps are soon likely to be able to determine personal traits by examining a person's walk, their gestures, their facial expressions, their heart rates, their voice tones. An app has already been developed to determine from the amplitude/frequency of a person's voice if they are suffering from a cold. Such an app is great for self-diagnosis but might also interest employers who want to check employees who claim to be sick. The services of external agents (CCTV aggregators) could be used to check whether an employee has gone out of his house while claiming to be sick or has visited a competitor, or whether he is spending time after work hours for union formation, or attending or funding a political/environmental rally or entity? CCTV cameras within employer premises or from external aggregators could be used to check facial expressions or body language to find potential romantic relationships between employees in a reporting relationship, or their sexual orientation.

Which of these technologies should employers be permitted to use and for what purposes? How will they be monitored? Should they be required to declare to prescribed authorities which Apps they are using and for what purposes?

**Need for regulation**

A consensus is already emerging that a human dimension is required to manage the risks, for example in relation to privacy, data protection, ethics etc. Even Sam Altman, the founder of OpenAI has called for third-party regulation. Dr Yaser Said Abu-Mostafa has offered some advice on how this might be done.

At a minimum, there needs to be transparency in how personal data is used, and the explainability of computer-generated decisions and actions. Unless people experience the value of sharing their data, they may not continue to support expanding data sharing initiatives. Hence, the law will have to require and develop regulatory and governance processes. It will need to explicitly prescribe what the data from private or public CCTV may be used for and for how long it may be retained, whether and what data needs to be anonymised. There would need to be separate regulations for aggregators.

So that governance remains responsive to technological trends, the flow of information between national and international institutions needs to be ensured and processes need to be developed for systematically compiling and analysing incident reports from state authorities. Specifically, there need to be adequate expeditious remedies for the protection of fundamental rights in relation to certain uses, such as biometric applications (emotion recognition) and AI polygraphs.

**Regulate, but how?**

It is natural that most companies will not want to share their algorithms, even with a regulator. In any case, since typically the code would be huge, it will not be possible for most regulators to go through it comprehensively. And there is already a huge array of AI applications. How many can be scrutinised? Even going through the code might not solve the problem of embedded bias. Moreover, AI learns from data as it goes along. Hence, many algorithms will continuously evolve, even without human intervention. Hence, clearly checking the source code is not the way to do it.

Dr Yaser Said Abu-Mostafa believes that it would be possible to test AI systems for bias by giving appropriate test data and doing so on an ongoing basis, and he believes that AI might be able to help in this endeavour.

However, not every app can be required to go through a regulatory human oversight before it is put out to the public. Hence, there would have to be some way of defining areas of activity based on risk assessment, and to allow others to either self-test or to have registered entities that conduct and certify test results to do it for them.

**Regulation in practice**

Some groups and countries/jurisdictions have already made proposals in the realm of regulation.

A 'Task Force on Responsible Use of Generative AI for Law'[2] constituted by the Massachusetts Institute of Technology has developed **7** "Principles" or "Duties", of: Confidentiality to the client, Fiduciary Care to the client, Client Notice and Consent, Competence in usage and understanding, Fiduciary Loyalty to the client, Regulatory Compliance and respect for the rights of third parties in each jurisdiction, and Accountability and Supervision to maintain human oversight over all usage and outputs. This is a continuing exercise.

*China*

According to an article in *Nikkei Asia* by Yifan Yu, China has proposed a law that prescribes filing requirements and fines; ban on discrimination and misinformation; and that AI must reflect "Socialist Core Values" and not disrupt the economy or society. It is still in draft stage.

*EU*

The European Union's Artificial Intelligence Act (AI Act) assigns AI applications to three risk categories:

(1) applications and systems that create an *unacceptable risk* (eg government-run social scoring of the type used in China) and are banned;

(2) *high-risk applications* (eg CV-scanning tool that ranks job applicants) would be subject to specific legal requirements; and

(3) the rest would be left unregulated.

This law would require companies to label AI-generated content and to publish summaries of what copyrighted data is used to train their tools (to address concerns from publishers that corporations are not profiting off materials scraped from their websites).

[2] *law.MIT.edu/AI.*

However, this law has been criticised on the ground that compliance with it would almost completely depend on self-assessment and that it neglects to ensure meaningful transparency, accountability, and rights of public participation. It is to be seen whether third-party verification with the law would be required.

A demand has also been made that wherever conformity assessments will be based on standards, members of the public should have a say in their development, otherwise standards may be written in a way that is impractical.

According to one estimate (by the Center for Data Innovation), the cost of administering this Act would be □ 31 billion over the next five years which, they claim, would reduce AI investments by almost 20%. However, since the regulation covers a small proportion of AI applications considered high-risk, other estimates (by Meeri Haataja and Joanna Bryson as well as Centre for European Policy Studies) are that it would be much cheaper and that, the cost analysis does not consider all the benefits of regulation to the public. Oxford Information Labs also says that compliance with harmonised standards will create a presumption of conformity for high-risk AI applications and services, which in turn can increase confidence that they comply with the complex requirements of the proposed regulation and create strong incentives for industry to comply with European standards.

*The US*

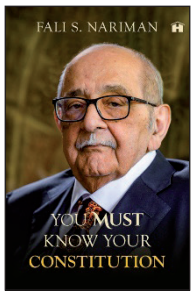
As expected, the US appears to be the most reluctant to regulate AI, allowing its domestic tech giants to dominate the discussion. However, as noted earlier, even the likes of Sam Altman have spoken in favour of regulation. Surely, even the signatories to the letter who asked for a halt on AI testing would also agree to regulation. However, what form it takes is yet to be seen.

**Conclusion**

Whatever decisions individual countries take, we know that technology knows no borders. It is, therefore, in the interests of all that some minimum principles and standards be agreed between all to, at the very least, control crime.

*[Saurabh Prakash is a Delhi-based lawyer and a qualified engineer with a degree from the Indian Institute of Technology, Kanpur. He has, before joining the Bar, worked as a software engineer.]*

# Book Reviews




**YOU MUST KNOW YOUR CONSTITUTION by Fali S Nariman, Hay House Books, New Delhi, 2023, pp 516, INR 899 (hbk), ISBN: 978-81-959917-2-3.**

It should be a matter of considerable gratification for anyone who takes an interest in legal and public affairs in India that, at the ripe old age of 94, Fali Nariman, one of that country's most eminent lawyers, has exerted himself in the cause of public education and awareness-raising about India's Constitution through this informative book. In it he not only shines a light on many neglected corners of the constitutional edifice, but draws our attention to certain home truths which merit notice:

> Seventy-odd years of experience on this subcontinent has shown that it is easier to *frame* a Constitution than to *work* it. In the same subcontinent, Pakistan and Bangladesh had crafted written constitutions at different times, but they were interspersed with periods of martial law, and civil and military dictatorships. We will never be able to piece together a new Constitution in the present day and age simply because innovative ideas however brilliant and howsoever encouragingly expressed in consultation papers and reports of commissions, can bever give us an ideal Constitution. In constitution-making there are hidden forces that must not be ignored, viz *the spirit of persuasion, of accommodation and of tolerance*. In India – as in the rest of the world – all three are at a very low ebb today.

Depressing though that thought may be, it fails to dampen Nariman's enthusiasm in explaining the various features and details of the Indian Constitution – a document which has the distinction, dubious or otherwise, of being the longest in the world. He starts, logically, with a dose of history, spanning both the period immediately preceding the country's independence from British rule and the years immediately following in which a small but dedicated group of (indirectly elected) people toiled for slightly under three years to produce a document which was adopted on 26 November 1949.

Of particular fascination to many readers will be a chapter headed 'How India's Constitution Almost Never Got Finalised', the reason for which was that the emotive issue of a national language (in a country where dozens of tongues have flourished alongside each other) nearly brought members of the Constituent Assembly to blows! Nariman also makes a salient point which has bothered many an observer, namely that the Indian Constitution is overly prescriptive. There are many matters of detail, argues Nariman, which "could well have been left to ordinary legislation" – this criticism was conceded by the principal architect of the document, Dr B R Ambedkar, in the Constituent Assembly itself, but no one seems to have taken much notice of it.

Nariman then goes on to explain the key features of the document, notably: the chapters on Fundamental Rights and Directive Principles (and the relationship between them); the parts dealing with the three branches of government; the powers and privileges of parliament and the state legislatures; the 'pardoning' power of State Governors; the roles, powers etc. of the Comptroller and Auditor-General and the Election Commission. The discussion is interspersed, as can be expected, with copious references to relevant Articles in the Constitution (which have, slightly jarringly, been printed with underlining) and to appropriate case law, of which there is no dearth in India.

Nariman is not parsimonious with his views, even on contentious issues. A case in point is the Uniform Civil Code, on the desirability of which passions have run high throughout India for many years. Nariman does not think the time is right for this measure. "There is of course logic in favour of the plea for a uniform civil code," he avers. "We do need a uniform civil code, but only when we ... are all ready for it, and when we have, in thought and deed, put all acrimony behind us." He calls his position a "non-populist, minority view", supported by a dictum of Lord Salisbury, the former prime minister of England, that "only uncontentious legislation should be brought before Parliament".

Regardless of whether Nariman's views will find universal agreement, his book makes for thought-provoking reading. Many of those who have followed his writings over the decades will hope that, despite his advanced years, he will continue to offer his thoughts on topical issues for the benefit of his fellow-countrymen. The present book could, in presentational terms, be improved – for example, through more meticulous editing and the addition of a back index – but that is a minor quibble.

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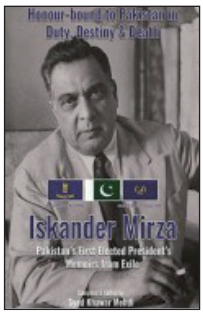


**ISKANDER MIRZA by Syed Khawar Mehdi, Lightstone Publishers, Karachi, 2023, pp 332, PKR 3,000 (hbk), ISBN: 978-969-716-258-1.**

Not much has been known about Pakistan's first President (and fourth Governor-General), Iskander Mirza, except what was put out in the public domain by successive governments starting with his one-time ally-turned-tormentor, General Ayub Khan. Mirza was, in a dramatic reversal of fortunes, reduced from being president to an exiled politician in short order, and he died a broken man in England in 1969. This book attempts to rehabilitate Mirza's reputation, based chiefly on an unpublished autobiography and an interview that the exiled politician gave to Abul Hassan Ispahani, a fellow politician and diplomat two years before his, Mirza's, death.

Mehdi adopts an unmistakably crusading tone throughout the book. A flavour of his worldview concerning Mirza can be

had from his prefatory remarks:

> All these years, Iskander Mirza's character assassination became fashionable and no opportunity was missed to attack and besmirch his reputation and blame him for anything and everything that went wrong in Pakistan. There were academics willing to please the regime, members of the establishment and flatterers in press [sic] who took it as pastime [sic] to make Iskander Mirza the whipping boy for all of Pakistan's ills. The slanderous onslaught was led, guided and directed by sycophants trying to please President Ayub Khan and win his attention. In this hateful pursuit, some in the bureaucracy and a few politicians even had his name removed from school textbooks.

Turning to Mirza's own hitherto unpublished memoir (which forms the meat of this book), there is much in his musings which would interest historians. These include his thoughts on: Muhammad Ali Jinnah, Kashmir, the Pakistani Constitution of 1956, and the direction that a nascent Pakistan would take immediately after independence. Mirza was unconvinced about the suitability of the Westminster model of government for his country, preferring instead a presidential system. Forestalling any accusation that this preference arose from the fact that he had been occupying the post of President, albeit a ceremonial one, himself, he reminds readers that he had begun to advocate the presidential system from as far back at 1955, urging that what was needed was something like the American model of government, "with modifications to suit the special conditions prevailing in Pakistan".

Mirza also unburdens himself of his views on what had gone wrong fundamentally with Pakistan in two decades of its independent existence. He identifies (religious) "fanaticism", "educational backwardness", and the politicisation of the civil service as particularly worrisome developments, alongside a certain desperation on the part of Pakistan's early political leaders "to get rid of good British officers" in its Army. Of his own action in proclaiming martial law in October 1958 – the first of many to come – he makes remarks which many will consider self-serving:

> In my proclamation issued on 7 October 1958, I could have retained all power in my own hands, if I chose, at that moment. There was nobody to stop me. Everyone was glad to see the back of the party politicians. I was much better known than any of the army leaders and I had a reputation for getting things done. I doubt if they would have challenged me if I had just given them their orders. But I had no desire to be a dictator.

What about the author's overall assessment of his subject? Mirza, concludes Mehdi, "with all his mistakes and questionable decisions, comes out as a resolute, no-nonsense man of high integrity who excelled as an administrator ... He never minced words or suffered fools and was always dead honest in his views, actions and commitment to Pakistan." Whether or not that verdict is shared widely will at least partly be known by the reception this books gets within Pakistan.

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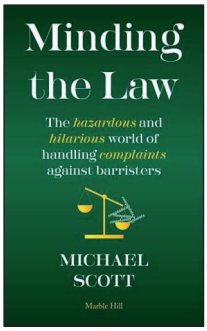
**MINDING THE LAW by Michael Scott, Marble Hill, London, 2023, pp vi + 138, £16.99 (hbk), ISBN: 978-1-7392657-0-0.**




Slim this book may be, but it is huge on entertainment value. Michael Scott, formerly of the Scots Guards, was appointed as the Bar Council of England and Wales's first Complaints Commissioner – in which capacity he served for nine long years until 2006. In this book he describes his experiences in that office which required him to deal with a motley crowd of complainants of widely varying backgrounds, temperaments and motivations.

The job required him to do a fine balancing act which he describes at the outset:

> The way I saw it, I was no pussy-cat for the barristers and the complainants needed to realise that. I took no sides. I wanted the complainants to understand, in, often, layman's language, what had gone wrong and whether the barrister had erred or done the best he could under the circumstances. At the same time, I was not to be perceived, by the Bar, as some do-gooder for the man in the street. I realised only too well what a successful complaint against a barrister could do for their career.

Were there any trends or patterns to the complaints? Yes and no. Scott identifies three main groups of complainants who could be said to be prolific: prisoners, those involved in divorce proceedings. and squabbling neighbours. But he concedes that the categories are not by any means closed, and identifies habitual complainants ('hobbyists', as he calls them) as another group who cannot be ignored. In terms of the nature of the complaints raised, again, he identifies three major heads: those concerning advisory work undertaken by barristers ('Opinions' in the jargon), guilty pleas made on the recommendation of counsel in criminal cases, and Consent Orders agreed to by a party (some details of which would be subsequently disputed by the party). Unsurprisingly, Scott never heard from satisfied clients. "No one," he notes wryly, "tells me how good their barrister was."

For his pains, Scott received a fair amount of abuse from disgruntled complainants. One called him a "useless geriatric", another sent him "Thirty Pieces of Silver" in an envelope (after designating him Rat of the Week), and yet another wrote to him on Bronco, the pre-war toilet paper (perhaps to make "a clever lavatorial point", as Scott speculates). Of the first mentioned slur, Scott has the following response: "As I had just passed my 58th birthday and my aching muscles were gradually recovering from a week's skiing with my 28-year-old son, who takes no prisoners on the slopes, this remark touched a tiny nerve."

While much of the book is about the foibles, eccentricities and obtuseness of those who wrote to Scott to complain, barristers too come in for some deserved ribbing in the book. One elderly barrister to whom Scott was introduced at an event in Lincoln's Inn, refused to shake his hand "until his companion

told him I wasn't a barrister" (this story is told to illustrate some of the quaint conventions of the Bar, one of which is that no barrister ever shakes hand with a colleague). Another story concerns a complaint made to Scott by a gardener who had not been paid by a barrister for work done on his garden:

> I had some sympathy. It was clearly a civil matter and nothing to do with me but the pompous barrister wrote a quasi legal letter, signing himself Barrister-at-Law. That did it. The barrister was fined £75 by an Adjudication Panel.

Amidst all the humour, there are many flashes of illumination in the book. Among other things, it throws light on both the sensitivities and the difficulties inherent in 'policing' a fiercely independent profession which has only recently begun to be exposed to external regulation. "Overall," says Scott, "I enjoyed my time [in the job]". It is a safe bet that those picking up this book will enjoy reading it.

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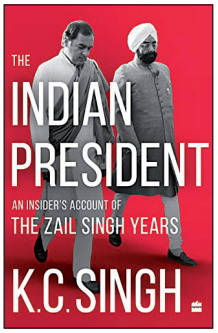
**THE INDIAN PRESIDENT by K C Singh, HarperCollins, Gurugram (India), 2023, pp xxii + 275, INR 699 (hbk), ISBN: 978-93-5629-592-6.**




Despite being the occupant of a largely ceremonial position, the President of India has occasionally generated political controversy, and none more so than the subject of this engaging book, Zail Singh, who occupied that high office between 1982 and 1987. During this period, Singh served two high-profile prime ministers, Indira Gandhi and her son Rajiv. The author, a fellow Sikh foreign service official, worked closely with the president as his deputy secretary for four long years in the course of which he gathered value information and insights which form the basis of this book.

The author's time as a close aide to the president saw some tumultuous political happenings, including serious allegations that the president was attempting to overthrow Rajiv Gandhi's government after the two had a falling out. In this context, media reports began circulating that the author had been involved in some of the machinations, as a result of which a shadow began to fall on his advancement prospects within the foreign service. Against that background, the present book can be seen as having a self-exculpatory dimension to it, but the author's own justification for the book, as explained in the blurb accompanying it, is that it is an attempt to examine and explain the "president's role when authoritarian governments are voted into power" (the blurb goes on to say: "Things are all the more challenging for a president with a popular prime minister who has an overwhelming majority, as happened in the case of Zail Singh and Rajiv Gandhi").

The book is divided, logically, into two main parts: the first, shorter, one looks at the role of the president as it should be, both as an arbiter of matters on which his advice is sought and more generally in diplomatic terms; and the second discusses the record of Zail Singh as the seventh president of India. The latter offers the reader extremely interesting nuggets of intrigue, skullduggery and much else, with a lot of behind-the-scenes action that is the staple of political thrillers. Although focused on Zail Singh, there is much in the book which goes well beyond the man and brings alive, even if only incidentally, issues of the time which are now in the distant memory of most India-watchers.

In terms of broad conclusions, the author is clearly very sympathetic to his former master who, he believes, "had on his hands an ungrateful prime minister (in the form of Rajiv Gandhi)". He is convinced that Zail Singh, "a Gandhi family loyalist" ended up "defang[ing] a Gandhi family scion who had dazzled the nation with his charisma." Regardless of whether that view is widely shared, the book at least attempts to make out a plausible case for the prosecution.

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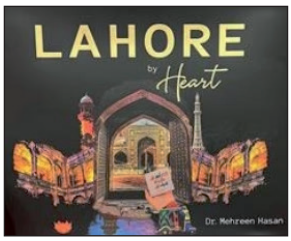
**LAHORE BY HEART by Mehreen Hasan, Fountain Head, Lahore, 2022, pp 128, Price not stated (hbk), ISBN: 978-969-712-063-5.**




This book, published as a labour of love by a cardiologist resident of Lahore who takes a keen interest in photography, offers a visual treat for anyone interested in history and the built environment. A city of over 11 million people, Lahore has been the subject of much fascination for generations of visitors from far and wide, having secured an enviable reputation for its culture, learning, architecture, cuisine and much else besides. These attributes have been brought out strikingly in the captivating images that comprise this book.

The author has adopted a minimalist approach to commentary, leaving her pictures to do the talking. Most of those pictures have short write-ups which succinctly explain the nature and background of what has been presented. A particular merit of those captions is that they eschew the flowery prose which is the staple of many coffee table books published on the subcontinent. Sample this description of Lahore's colonial past:

> The British laid the foundation of modern Lahore with [an] Indo-Islamic style of architecture ... They left their legacy on the urban landscape by monumental civic and commercial buildings, around [the] Mall Road [which, incidentally was named after London's Pall Mall].

In this category, there are fetching images of the Lahore High Court, the Mayo School of Arts, the General Post Office, the Lawrence and Montgomery Halls (since converted into the Quaid-e-Azam Library, named after modern Pakistan's founder), Aitchinson College, the Victoria Memorial Hall (aka Town Hall), to name but a few; of a different style of architecture are such buildings as the majestic Badshah Mosque (built in 1674), the Lahore Fort, the 13 historic gates to the walled city, the Wazir Khan Mosque, all pre-dating British rule. To bring the coverage up-to-date, the author has included images of Lahore's famous Food Street, Flower Market, the bustling Anarkali Bazaar,

the Minar-e-Pakistan, and the colourful Independence Day celebrations which are an annual feature on Lahore's streets.

This book should find a ready audience not only within Pakistan but also in the wider world, including among aficionados of the rich art, architecture and culture of the subcontinent.

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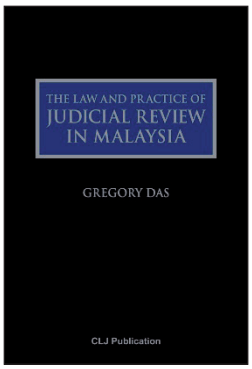
## More briefly...

**THE LAW AND PRACTICE OF JUDICIAL REVIEW IN MALAYSIA by Gregory Das, CLJ Publication, Ampang (Malaysia), 2020, pp lxxiv + 830, Price not stated (hbk), ISBN: 978-967-457-159-7.**




Judicial review remains a vibrant feature of the Malaysian legal landscape, even if the judiciary there has had a few wobbly moments over the years. For a country with a written constitution, the contours of judicial review are, understandably, slightly different from those extant in the United Kingdom, but the broad principles applicable to this area of litigation remain much the same as in England. This voluminous tome represents the first serious attempt at explaining those principles, and how they are applied in practice, in Malaysia where, as one of the former senior judges notes in a Foreword, there have been "deeper issues at stake regarding the institution of judicial review".

The book is arranged in four parts dealing, respectively, with: the nature and scope of JR; the leave stage; the substantive motion; and relief and remedies. Each part drills deep into relevant rules, concepts and considerations, supplemented by appropriate references to legislation and case law. As can be expected of a work which aspires to (and attains) comprehensiveness, pertinent developments in other leading jurisdictions are noted as is a smattering of overseas legislative enactments. The tone of the commentary is scrupulously neutral (Das is no Seervai!) and both the presentation and layout are elegant. Practitioners in Malaysia have every reason to welcome this work enthusiastically and to rejoice in the realisation that its author is young enough for many more editions of the book to emerge in the years to come.

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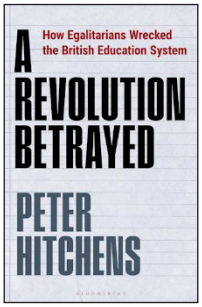
**A REVOLUTION BETRAYED by Peter Hitchens, Bloomsbury Continuum, London, 2022, pp vi + 218, £20 (hbk), ISBN: 978-1-399-40008-4.**




For many decades now, hardly any discussion of the British education system since the second world war has been complete without either approbation or condemnation of the reforms which led to the large-scale abolition, at least in England, of grammar schools. In this powerfully argued book, Peter Hitchens, a veteran journalist who was once a revolutionary Marxist but now describes himself as a "socially conservative Social Democrat", sets out to clear "a great jungle of falsehoods and misunderstandings about selective state education" which has clouded debate on this important issue.

The book is cogently argued and full of facts and figures, a refutation of which will take monumental effort. Hitchens is also modest in making his case:

> This book is not an argument for grammar schools *as such*. I am open to many criticisms of the way in which grammar schools were organized, the way they selected their pupils, the curriculum they followed, the ages at which they took their first pupils and even the sports they played. I neither idolize nor idealize grammar schools. But I do think they were better by far than what replaced them. It is an argument *against* their destruction in this country 60 years ago, and above all against the failure of those who should have defended them to save them.

Despite his strongly-held conviction, Hitchens is convinced that the battle for grammar schools is truly and decisively lost. "Even nominal Conservatives," he laments, "have found it convenient or easy – or just cheaper – to embrace egalitarian dogmas." Many will say Amen to that.

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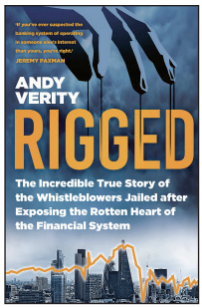
**RIGGED by Andy Verity, Flint (The History Press), Cheltenham, 2023, pp 348, £25 (hbk), ISBN: 978-0-7509-9885-7.**




Not for nothing is the 'Libor' scandal – and cover-up – in which many leading financial institutions were implicated, remembered as one of the most shocking events of recent years. It is a testament to both the courage of whistleblowers and the dogged determination of journalists such as the author of this book that the truth of the scandal is now in the public domain. Andy Verity reveals that nothing in his two decades-long career as an investigative journalist came anywhere near the Libor story "in terms of sheer jaw-dropping, mind-boggling corruption, greed and injustice".

The origins, course, scale and jiggery-pokery of the scandal are laid out in meticulous detail in the book. Such is the gripping nature of the tale that it would be surprising if, sooner or later, a motion picture on the scam is not made. Readers of this journal would be particularly interested in a chapter entitled "The Seriously Flawed Office" which offers a damning indictment of the UK's Serious Fraud Office in relation to the Libor scandal. Among the many lessons that come out of Verity's expose is that effective regulation of financial institutions still has a long way to go.

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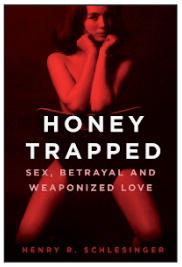
**HONEY TRAPPED by Henry R Schlesinger, The History Press, Cheltenham (UK), 2021, pp 352, £20 (hbk), ISBN: 978-0-7509-9603-7.**




The history of the use of honey traps as a weapon of espionage, from Greek mythology to the present times, is the subject of this fascinating book. Schlesinger, an expert on spycraft and related subjects, traces that history in painstaking detail and over many countries and cultures. He starts off by noting a curious paradox, namely, that although "honey traps have long been a standard feature in spy fiction and films", governments and organisations "exhibit persistent squeamishness" in acknowledging the use of this tactic in statecraft despite its ubiquitousness.

The book is divided thematically into seven parts which span: the history of honey trapping; its use by monarchs, plotters and pimps; carnality in the colonies; the modern era of espionage; seduction for secrets; honey traps in the Cold War; and the modernisation of the technique in the form of cyber honey traps. The 35 chapters comprising the book – many quite short – carry no headings. Schlesinger's commentary encompasses instructive explanations about planning of honey traps, protocols involved in honey trap operations, possible goals (control, exploitation, targeting, discrediting), matters of execution, and so on. This is a book that opens a window to a world which to most ordinary humans will appear both intriguing and frightening.

# News and Announcements

**ENGLAND & WALES: Revisions to Guide to Judicial Conduct**

Following a request in January 2023 from the Lord Chief Justice and Senior President of Tribunals, the Judicial HR committee, a representative body for the entire judiciary in England and Wales, to revise the *Guide to Judicial Conduct* to reflect changes in wider aspects of judicial and public life, the committee has come out with a new version of the Guide.

Key changes include the following:

- The Statement of Expected Behaviour has been included to ensure that all judicial office holders are aware of the standards expected of them
- It clarifies how judicial office holders should behave in a manner consistent with the expectations of court staff, as well as towards their colleagues and anyone else with whom they interact in the workplace
- Conflict of interest guidance has been updated so judicial office holders without legal training, including magistrates and non-legal members, can identify potential conflicts requiring recusal or disclosure to parties and know what steps to take if such conflicts arise
- Media Guidance and Social Media Guidance for the judiciary have been updated with the latest versions
- Gender-specific pronouns have been removed
- Where guidance applies to everyone within the scope of the guide, it uses the term "judicial office holder". The term "judge" is retained where the guidance applies only to judges
- Several other minor amendments have been made, including removing references to the European Parliament and local justice areas, clarifying to what extent the Declaration and Undertaking signed by magistrates upon appointment applies to former magistrates on the Supplemental List, and clarifying who needs to be notified if a judicial office holder intends to appear before a court or tribunal as a witness.

The Guide is intended to assist judges, tribunal members, coroners and magistrates, in relation to their conduct. It is based on the principle that responsibility for deciding whether or not a particular activity or course of conduct is appropriate rests with each individual judicial office holder. The Guide is therefore not a code, nor does it contain rules other than where stated. Instead, it contains a set of core principles which will help judicial office holders reach their own decisions.

*[Source: Courts and Tribunals Judiciary media release, 27 Jul 2023]*

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**PAKISTAN: New Chief Justice**

Justice Qazi Faez Isa was sworn in as the 29th chief justice of Pakistan (CJP) on 17 September 2023, with his wife, Sarina Isa, standing beside him as he read out the oath.

The Chief Justice made history with his first decision to appoint the first-ever female Registrar of the Supreme Court.

The oath-taking ceremony took place at the Aiwan-i-Sadr, where President of Pakistan, Arif Alvi – who had filed a reference against the judge four years earlier over alleged misconduct and non-disclosure of assets – administered the oath.

Before the ceremony commenced, CJP Isa asked a military officer to communicate to his wife to be present along with him at the time of oath-taking. The action was a break away from precedent. One of the participants who attended the ceremony was heard saying that the presence of Ms Isa along with her husband was "a clear message of steadfastness" demonstrated by her during the trying times faced by her husband when President Alvi had launched a reference against him.

Legal experts and those who attended the ceremony agreed that expectations from the new CJP were high, especially given that his tenure was only 13 months long — ending in Oct 2024. He is inheriting "a landscape fraught with intricate issues and unresolved problems that have marred the judiciary's credibility and effectiveness," legal expert Usama Khawar was heard saying.

According to Mr Khawar, some of the immediate challenges in front of CJP Isa are the controversy around the delay in general elections, the trial of civilians in military court, the fate of the Supreme Court (Practice and Procedure) Act, 2023 and pending references against his colleague Justice Mazahar Ali Akbar Naqvi.

CJP Isa was elevated as judge of the Supreme Court in September 2014. During his time as the Balochistan High Court chief justice and then as the Supreme Court judge, he authored several landmark judgements and was part of high-profile inquiry commissions.

His notable rulings include the suo motu on Hazara killings and killings of nationalists as Balochistan High Court CJ and the Faizabad sit-in suo motu judgement in 2017 as a SC judge. He was also the head of the 'Memogate' Commission, the Commission on the assassination attempt on Justice Khawaja Sharif, the Quetta Bombing Commission and the Audio Leaks Commission.

However, he faced arguably the biggest challenge of his legal career in 2019 when a presidential reference was filed against him over alleged misconduct and non-disclosure of foreign

assets, particularly his family's properties in the UK. The reference was widely seen as an effort to silence him, especially after his significant role in the Faizabad sit-in case in 2019, according to Mr Khawar.

In June 2020, a ten-judge SC bench headed by former CJP Umar Ata Bandial quashed the reference. However, it ordered the Federal Board of Revenue to conduct an inquiry into the allegation of non-declaration of foreign assets.

Later, in a dramatic twist in April 2021, the same bench – by a majority of six to four – overturned its previous verdict after accepting Justice Isa's review petition against the order.

*[Source:* Dawn*, 18 Sep 2023]*

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**AUSTRALIA: Live streaming of special leave hearings in the High Court**

The High Court of Australia has decided to make available to the public a live stream of its special leave hearings from August 2023. The live stream will be accessible via the High Court website (*https://www.hcourt.gov.au/cases/cases-av/sla-live-streaming*). Conditions attaching to accessing the live stream are published on the live stream page. Audio-visual recordings of the special leave hearings will not be published. The Court's decision to take this step was made having regard to the nature of the special leave process and the format of special leave hearings.

This decision is not intended, it was stressed, to set any precedent in relation to other High Court hearings or hearings in other courts.

By way of background, it was explained that the High Court continues to consider how to improve public access to its hearings. Hearings of the Court are open to the public and the transcript of each hearing is published and available free of charge through the Court's website. The High Court also currently publishes on its website audio-visual recordings of Full Court proceedings heard in Canberra.

*[Source: HCA media release, 27 Jul 2023]*

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**SOUTH AFRICA: Impersonation of Constitutional Court judge**

The Office of the Chief Justice (OCJ) has notified the public that an individual impersonating Constitutional Court Justice Mbuyiseli Madlanga has contacted individuals and entities using the name of that judge.

The impersonator is said to extort money from unsuspecting individuals, and intimidate private individuals, public officials, public office bearers and entities, including organs of state, for a variety of reasons, including attempting to access personal information of certain persons. He does all this purporting to be Justice Madlanga.

The OCJ has warned the public not to fall prey to the impersonator and to bring such illegal activities to its attention. It has reminded everyone that impersonating a Judicial Officer is a criminal offence and that the matter has been handed over to the South African Police Service (SAPS) for further handling. Members of the public and media have been requested to contact the OCJ to verify the authenticity of any communication, directive, article, or social media post that purports to be from any judge.

*[Source: South African Judiciary press statement, 19 Aug 2023]*

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**NEW ZEALAND: Results of crime and victims survey**

The New Zealand Crime and Victims Survey (NZCVS), released at the end of June 2023 by the country's Ministry of Justice showed that 31 per cent of New Zealanders experienced crime over a 12-months period ending November 2022.

"The proportion of adults experiencing crime is consistent with previous years," said Ministry of Justice General Manager Sector Insights Rebecca Parish. "However, we have found that these victims experienced more incidents of crime, with the rise driven by an increase in the number of deception and fraud offences, such as credit card fraud."

Overall, the NZCVS found that New Zealanders experienced 2.47 million incidents of crime in the 12 month period. Over the same period the number of fraud and deception offences grew from 288,000 to 510,000. The proportion of adults who experienced fraud and deception in the period increased from six percent to ten percent.

"We also know that, consistent with previous years, fraud and cybercrime have the lowest reporting rates," Ms Parish said. "Reasons for not reporting a crime vary. Overall, the most common reason that people give for not reporting is that they think the incident is too trivial to be worth reporting (45%)."

The NZCVS also showed that a small group of people, just four percent of adults, experience the majority of crime, 56 percent of all incidents.

The most common crimes experienced were fraud and deception, burglaries (288,000 offences experienced by 10 per cent of households), and physical offences including physical assault and robbery. Due to COVID-19 limitations, the latest NZCVS involved fewer interviews (5,326) and resulted in a lower response rate (71 percent) compared to previous years.

*[Source: Ministry of Justice media release, 27 June 2023]*

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**HONG KONG: Judiciary alert on phishing e-mails**

The Hong Kong Judiciary has called on the public to stay vigilant to a phishing email sent from the email account "HKCFA SECRETARIAT (*hkcfa@hklawsoc.org.hk*)" which

falsely claims that it was issued on the directive of the Court of Final Appeal, and is suspected of containing a malicious link. The Judiciary has reported the case to the Police.

Members of the public were reminded to stay alert to suspicious emails and refrain from opening them. Anyone who has provided personal information to the email sender or clicked the link in the email was advised to contact the Police immediately.

*[Source: HK Judiciary press release, 15 Aug 2023]*

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**MALAYSIA: Resignation of Bar president from arbitration body**

A public statement issued by the Malaysian Bar referred to media reports on the appointment of members to the Asian International Arbitration Centre ("AIAC") Advisory Board ("Board') issued by the Minister in the Prime Minister's Department (Law and Institutional Reform), Dato' Sri Azalina Othman Said, on 23 August 2023, which indicated that among the appointees to the Board was the President of the Malaysian Bar.

The Malaysian Bar took objection to the requirements which were to be undertaken by all appointees as AIAC Board members. In response to the requirements imposed, the President of the Malaysian Bar, Karen Cheah Yee Lynn tendered her letter of resignation on 11 September 2023. The resignation was to take effect immediately.

The resignation was made following the unanimous support of the Bar Council in upholding the principle of conflict of interest — which can arise in the course of carrying out the statutory duties of the Malaysian Bar — so as to safeguard the independence of the Malaysian Bar *vis-à-vis* section 42 of the Legal Profession Act 1976 ("LPA"), and to ensure that the interests of the Malaysian Bar must prevail, "uninfluenced by fear or favour".

It is its continued stand, said the Malaysian Bar, that the rule of law mandate under the LPA supersedes all other organisational interests. Given its statutory duties to its Members and the general public, the independence of the Malaysian Bar cannot be compromised.

The Malaysian Bar further stated that it remains steadfast in protecting the interests of the Alternative Dispute Resolution ("ADR") community. To that effect, it was looking forward to promoting ADR domestically and internationally.

*[Source: Malaysian Bar press release, 12 Sep 2023]*

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**KENYA: Constitutionality of life sentences**

A bench of the Court of Appeal in Kenya, consisting of judges Pauline Nyamweya, Jessie Lessit and George Odunga, declared that it was not fair to keep a convict behind bars for an indefinite time period until they die, since that will amount to a death sentence which has been outlawed by the Supreme Court.

"Indeterminate life sentence is simply a slow death sentence. It is unfair to outlaw mandatory death sentences only to order a person to remain behind bars until they die. It is unconstitutional to jail a person for life since a life sentence should not mean the natural life of a prisoner," ruled the judges.

The judges said they based their precedent-setting decision on a finding by the European Court of Human Rights that an indeterminate life sentence without any prospect of release is degrading and amounts to inhuman punishment.

Under the Kenyan Penal Code, capital offences like murder and robbery with violence as well as defilement are punished by either death sentence or life imprisonment. The appellate judges, however, stated that the purpose of jailing an offender should be to deter, rehabilitate or denounce, but should not involve keeping someone behind bars until they die.

The decision received very different reactions from the state and human rights defenders. Whereas the Office of the Director of Public Prosecution disagreed with the findings, human rights groups applauded the judges for making a bold move to uphold the rights of convicts.

Principal Prosecution Counsel Victor Owiti disagreed with the findings, stating that a life sentence is a constitutional punishment and that it should be left to parliament to enact a law to determine the maximum number of years a person should serve in prison if jailed for life.

"Life sentences should not be unconstitutional, and although the decision was in line with international human rights protocols, the judges should have left it for parliament to enact a law which should determine the number of years a person should serve if sentenced to life," said Owiti.

Demas Kiprono, a human rights lawyer and campaigns manager at Amnesty International Kenya, said they are in total agreement with the judges that life sentences are unconstitutional because they degrade the dignity of convicts. According to Kiprono, life imprisonment contravenes Article 25 of the Kenyan Constitution which provides that fundamental rights and freedom from torture and cruel, inhuman, degrading treatment or punishment shall not be limited. "The purpose of criminal justice should not be to punish someone for life. Even if someone has done bad crimes, we should concentrate more on rehabilitation than subjecting them to cruel, degrading and inhumane treatment," Kiprono noted.

Judges Nyamweya, Lesiit and Odunga made the declaration in an appeal filed by Julius Kitsao who had been sentenced to life imprisonment for defiling a four- year-old girl. The judges set aside the life sentence and substituted it with 40 years in prison to run from the date he was convicted in October 2013.

*[Source: Africa Legal, 20 Jul 2023]*

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**Conferences**

**INDIA: LAWASIA Annual Conference**

The 36th annual conference of LAWASIA is scheduled to be held in Bangalore, India, between 24-27 November 2023 in partnership with the Bar Association of India.

According to an announcement put out by the organisation, "The Annual Conference is LAWASIA's flagship event and the highlight of its professional events programme. The Conference is a platform for the convergence of bar leaders, jurists, professional organisations and individual lawyers from across the Asia Pacific, and is designed to facilitate the discussion of regional developments in law, including Family Law, Human Rights & Rule of Law, Business Law, Environmental Law, Alternative Dispute Resolution, Criminal Law, Intellectual Property and more!

"As a generalist legal event, the Annual Conference also serves as an important forum for sharing ideas, building professional networks, reinforcing shared professional values, advocating for the rule of law in varied jurisdictions, and advancing the status of the legal profession in the Asia Pacific."

There will also be a special pre-conference side event, a Constitutional and Rule of Law Seminar, which will focus on the 'Basic Structure Doctrine' adumbrated by the Supreme Court of India fifty years ago. Entry to this will be free for everyone registering for the main conference.

Registration for the conference is now open.

Further details are available at: *https://lawasia2023.com/*.

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**FRANCE: IBA Annual Conference**

The International Bar Association's annual conference will take place in Paris, France, on 29 October-3 November, 2023.

The conference is open to both members and non-members of the IBA, with lawyers from over 130 jurisdictions and all parts of the legal profession expected to attend, including lawyers in private practice, in-house counsel, human rights advocates, judges, bar leaders, regulators and government representatives. According to the organisers, this unique mix of perspectives provides a rich environment for discussion, debate and learning as well as the opportunity to develop lasting business relationships and lifelong friendships.

Closely following the conference is a 'IBA Rule of Symposium', also in Paris, on 3 November 2023, with the overarching theme of 'Law not war'. The Symposium will consider 'Accountability and Justice'; 'Does the rule of law apply to sanctions?', and 'Assessing the impact of the judicial appointments process in undermining the rule of law'. Those leading the symposium include: Dr Anton Korynevych, Ambassador-at-large in the Ministry of Foreign Affairs of Ukraine; Baroness Helena Kennedy (Director of the IBA Human Rights Institute); Dr Willy Mutunga (immediate past Chief Justice of Kenya); and Lord Neuberger (former President of the Supreme Court of England).

Details about both events can be obtained via: *www.ibanet.org/conference-details/CONF2244*.

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# The Borneo Rainforest Law Conference Kota Kinabalu,Sabah,Malaysia

Set against the spectacular backdrop of Malaysian Borneo, with a charismatic bend of both old and new, Kota Kinabalu will play host to legal practitioners from all over the world to debate issues of resonance in the profession, to network and share best practice and innovations with colleagues and experts in the field.

Join the co-hosts, the Commonwealth Lawyers Association and Sabah Law Society, for this prestigious three day international conference which will explore the theme of climate justice, human rights, funding, constitutionalism and action within legal and government frameworks.

The conference will be hosted at the Sabah International Convention Centre, Kota Kinabalu, with delegates able to take advantage of a bespoke rate at the Hyatt Centric Hotel, which can be booked independently after registration.

The conference program is thoughtfully divided into three daily streams, focusing on climate justice, the rule of law, and corporate issues. In addition to the main sessions, we are also developing exciting side events, including a specially tailored Young Lawyers program and ample networking opportunities.

The Commonwealth Lawyers and Association and Sabah Law Society look forward to giving you a warm welcome.

**Steven Thiru**
**Commonwealth Lawyers Association**

**Roger Chin**
**President, Sabah Law Society**

## Don't miss out on early bird registration rates

**Register via https://eur.cvent.me/BPoG1?RefId=BorneoRainforest**

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