Special Conference Issue

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Commonwealth Lawyers Association

THE COMMONWEALTH LAWYER

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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 Outgoing President



Our mission of human rights, rule of law, access to justice, sustainable development, climate justice and peace, has never been more necessary – or more challenged.

The world is a chaotic and hostile place. Exploitation, to a large extent poverty, famine, hunger abuse of children, women and men, genocide, senseless wars, subjugation, deprivation, arbitrary incarceration, and mass deportations, are hallmarks of global life today. The good news is that each of us can make a difference by changing our mindsets, influencing the policy makers, promoting sustainable development and justice (notably climate justice and ending poverty), and upholding the rule of law.

During my term as President, I focused on three things: (1) Deepening our engagement in human rights, access to justice and the independence of judges and lawyers; (2) Increasing the value proposition of the CLA – value for members and value for the public – by developing a powerful infrastructure within the CLA, consisting not only of the four regional hubs but also proactive external and internal committees and projects described below; and (3) Improving the financial viability of the CLA so that resources are readily available to carry out the CLA's mission.

The four CLA geographical Hubs are generating activities under their respective leaders. These are: Africa (Linda Kasonde); Americas (Laurie Pawlitza); Australasia (Hasan Khan); Europe (Mark Stephens). Our Committees include: Alternative Dispute Resolution (R Santhanakrishnan and René Baptiste); Climate Justice (Fiona Ey and Hasan Khan); Corporate & Commercial (Renée St Rose and Muddasir Hossain); Human Rights and Rule of Law (Sophie Stanbrook and David Greene); Law Tech and Ethics (Amirali Nasir and Maria Mbeneka); Family Law (Laurie Pawlitza and Mark Woods); Public and Administrative Law (Ron Heinrich and Trudi Pye); Young CLA (YCLA) (Hadassah Igoche and Siddharth Sijoria).

The projects that I mentioned above include: CLA Online Training Institute & E-library (Justice John Carey); Affinity Card Committee (Secretariat); Pro Bono Advice and Assistance Panel (John Almeida); Women Lawyers Initiative (Hub VPs); Strategic Plan (Hubs, Committees, Secretariat); Rapid Response Mechanism (Brian Speers, Steven Thiru, Linda Kasonde, Salieu Taal, Ruggles Ferguson KC, René Baptiste); Risk Audit & Finance Committee (RAF) (Maria Mbeneka, Sophie Stanbrook, Mark Woods, Secretariat); Constitutional Review (Ron Heinrich, John McKendrick KC, Boma Alabi SAN, Julien Kavarunganda, Ruggles Ferguson KC).

I believe the foundation has been laid and considerable progress on the structure has been made. But this makeover is still a work in progress, which I hope the new administration will take to greater heights.

Good Governance includes the following attributes: accountable, transparent, responsive, equitable – diverse and inclusive, consensus-oriented, participatory or democratic, effective and efficient, not corrupt, consultative, and resourceful. During my term I tried to improve or implement all these features and I expect to deal with them in my forthcoming book on Good Governance.

I warmly congratulate Steven Thiru, the New CLA President and the new executive team, VP Africa Julien Kavaruganda, VP Americas Sophie Stanbrook, VP Australasia Hasan Irfan Khan, VP Europe Mark Stephens CBE and treasurer Maria Mbeneka. I also profoundly thank the executive team during my term of office VP Africa Julien Kavaruganda, VP Americas Sophie Stanbrook, VP Australasia Hasan Irfan Khan, VP Europe Mark Stephens CBE and treasurer Maria Mbeneka as well as the secretariat Brigid Watson, Clare Roe and Evie Wilson and all other people who provide their unwavering support in contributing to the collective success of the CLA and all the other people who assisted including Brigid Watson, Clare Roe and Evie Wilson.

In addition, it has been a great pleasure to work with Venkat Iyer who continues to do such an outstanding painstaking, and superlative job in producing The Commonwealth Lawyer as is evidenced by this special issue.

– Dr Peter D Maynard KC
(President, 2023-2025)

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Message from the Incoming President

Honouring our Past, Forging our Future: A Glimpse into 70 Years of the Commonwealth Law Conference



Steven Thiru

We eagerly anticipate the 24th Commonwealth Law Conference ("CLC"), the CLA's flagship event, which is but five weeks away. It will take place at the Hilton Portomaso, in St Julian's, Malta, from 6 to 10 April 2025.

As we look ahead to that occasion, let us take a moment to honour our rich institutional history, which serves as our bedrock and our strength. The deep roots of our past have shaped us into who we are today and must continue to be our guide as we chart the path ahead. I hope that this reflection on our 70-year journey will not only remind us of the CLA's enduring legacy but also ignite our collective vision, passion, and commitment to forging an even brighter future.

The early origins and activities of the CLA are captured in a series of articles[1] authored by Colin Nicholls KC (CLA President, 2003 to 2005; and now an Honorary Life President) in the CLA's journal, *The Commonwealth Lawyer*. The CLA is deeply indebted to him for his invaluable labour of love and his commitment in researching and documenting the CLA's history.

We are also profoundly grateful to Dr Venkat Iyer, Editor of *The Commonwealth Lawyer* since 2000. It is thanks to his tireless and unwavering dedication that the pages of the CLA's journal preserve inestimable and treasured insights from the past, many of which are referenced here.

The Commonwealth and Empire Law Conferences

The first Commonwealth and Empire Law Conference was held 70 years ago in 1955 in London, organised by a committee consisting of representatives from seven Commonwealth law associations. Its aim was modest — to form closer associations between bar councils and law societies across the Commonwealth.

The second Commonwealth and Empire Law Conference was held in Ottawa, Canada in 1960, and by the time of its third iteration in Sydney, Australia in 1965, the conference was enlarged to embrace not only the lawyers delegated by the professional associations, but all lawyers, including judges, law offices, and law teachers.

Even during these formative years, the rule of law was already of paramount concern for Commonwealth lawyers. As observed by Rodney Hansen CNZM KC (CLA President, 1996 to 1999):

> [T]he CLA occupies a special place among international professional organisations. It is not concerned with the pursuit of narrow sectional interests. From the outset its goal was to advance the interests of the peoples of the Commonwealth by fostering the Rule of Law and promoting a strong and independent legal profession.[2]

The CLC

The fourth Commonwealth and Empire Law Conference occurred in New Delhi, India in 1971; this saw a transitioning from a five-year to a three-year conference cycle and a renaming of the conference as the "Commonwealth Law Conference" (CLC). In 1977, the fifth CLC took place in Edinburgh, Scotland while the sixth CLC was held in Lagos, Nigeria in 1980.

The first edition of *The Commonwealth Lawyer* was published in 1984, carrying an address delivered by Sir Shridath Ramphal, Commonwealth Secretary-General, at the opening ceremony of the seventh CLC in Hong Kong in the preceding year. Reflecting on the common heritage that unites Commonwealth nations while also emphasising the distinctive potential for growth and evolution within this shared tradition, he said:

> The golden thread of the Common Law has proved a most enduring bond. These occasions of the co-mingling of Commonwealth lawyers are the very best testimony of the unifying quality of the common law and the strength of the Commonwealth connection.[3]

At the 1983 CLC, Lawrence Henry Southwick QC from New Zealand was appointed interim President until the

[1] Colin Nicholls, 'The CLA: A Brief History' (2008) 17:2 *The Commonwealth Lawyer* 74; Colin Nicholls, 'The Commonwealth Law Conference: An Updated Brief History' (2016) 25:3 *The Commonwealth Lawyer* 74; and Colin Nicholls, 'The Commonwealth Law Conferences: A Brief History'. (2019) 29:1 The Commonwealth Lawyer 6.

[2] Rodney Hansen, 'Recollections' (2008) 17:2 *The Commonwealth Lawyer* 65.

[3] Shridath Ramphal, 'The reach beyond Runnymede' (1984) 1:1 *The Commonwealth Lawyer,* 1.

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Eighth CLC in Ochos Rios, Jamaica, in 1986, at which the CLA's constitution was adopted. Lt Col Hurlstone St Clair ("Hurley") Whitehorne OD MBE, President of the Jamaican Bar Association, was elected as the CLA's first President, and Lawrence Southwick QC was appointed as the CLA's first Honorary Life President.

In 1990, at the Ninth CLC in Auckland, New Zealand, Dr Rodger Chongwe SC of Zambia was elected. Human rights was a core, unwavering priority for the organisation.

The Commonwealth Human Rights Initiative, a coalition founded in 1987 by the CLA and several Commonwealth non-governmental organisations,[4] published a report titled *Put Our World to Rights* in 1991, which outlined a framework for a Commonwealth human rights policy. This report was influential in shaping the strong declaration on fundamental human rights made by the Commonwealth Heads of Government at their meeting in Harare in October 1991 — now accepted as the Harare Declaration of 1991.

This marked a powerful clarion call, that "[t]he clock on Human Rights has moved on; it will not be lightly reversed in the Commonwealth".[5]

The Tenth CLC was held in Nicosia, Cyprus in 1993, featuring three major themes in anticipation of the new millennium: "The Legal Profession by the Year 2000"; "Democracy and Human Rights in the Commonwealth"; and "The Global Dimension — Lessons and Opportunities", which addressed environmental issues and commercial crime. The conference also marked the first-ever gathering of Commonwealth lawyers working in, or having an interest in, the public sector, with an address by the Attorney-General of Jamaica, Carl Rattray, on the role of lawyers in promoting sound public administration.

As is customary, the CLC saw a broad range of participants, including Chief Justices, Solicitors-General, national law societies and bar associations, law reform commissioners, public sector lawyers and military lawyers, each of which groups, during the course of the event, held specialist meetings amongst themselves.

Additionally, Commonwealth members had the opportunity to share their needs, highlighting issues faced in their countries. Thus, the conferences were seen as playing an "invaluable role in strengthening the mutual resolve of lawyers from all jurisdictions and from all spheres of legal activity — law officers, practitioners and judges, and academics"[6] to work together.

Paul Fraser QC from Canada took the helm as the next President of the CLA.

The 11th CLC was held in Vancouver, Canada in 1996, and featured a broad range of themes designed to address concerns of both the legal community and society at large: "Business Across Borders"; "Human Rights in the Commonwealth"; "Public Law and Private Rights"; "The Legal Profession: Towards 2000"; and "Law Practice Management". It was attended by approximately 2,500 delegates: 1,900 from Canada and 600 from other Commonwealth countries.[7]

Following this, Rodney Hansen CNZM QC from New Zealand assumed the role of President.

A landmark event for the CLA was the colloquium on Parliament Supremacy and the Independence of the Judiciary in the Commonwealth that it organised in June 1998, in conjunction with the Commonwealth Parliamentary Association ("CPA"), the Commonwealth Magistrates and Judges Association ("CMJA"), and the Commonwealth Legal Education Association ("CLEA").

Held at Latimer House, Buckinghamshire, the colloquium led to the birth of the guidelines that were agreed and officially published in 2003; it now bears the name the *Commonwealth (Latimer House) Principles on the Three Branches of Government* ("Latimer House Principles") and today serves as a model for Commonwealth nations in safeguarding judicial independence.

The 12th CLC took place in Kuala Lumpur, Malaysia in 1999, and Dato' Dr Cyrus Das from Malaysia assumed the Presidency.

The turn of the millennium was a challenging and tumultuous period, marked by a complex interplay of global and regional conflicts, terrorism, socio-economic upheavals, genocide, and human rights struggles. During this period of profound transformation, Dr Das urged lawyers to step forward as guardians of justice and equality, and to hold the fort against growing threats to these fundamental principles:

> In a changing world of impending war and rumours of war, the legal profession cannot closet itself and function like a trade union or a guild house. It has to reach out to the wider community and address those issues that the present difficulties bring forth especially where they impinge upon the rights of the people.[8]

Against this backdrop, the 13th CLC was held in Melbourne, Australia in 2003, attended by over 1,500 delegates from across the Commonwealth, with terrorism and its impact on human rights featuring prominently on

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4 Commonwealth Legal Education Association, Commonwealth Medical Association, Commonwealth Journalists Association, and Commonwealth Trade Union Council.

5 James Lemkin, 'The New Winds of Change — The Commonwealth Human Rights Initiative' (1992) 4:1 *The Commonwealth Lawyer* 11.

6 Peter Slinn, 'Editorial' (1993) 5:1 *The Commonwealth Lawyer* 4.

7 Malcolm Wallis, Malcolm. (1996, November). 'Commonwealth Law Conference' (1996) 9:2 009(2) *Consultus 102, accessible at www.gcbsa.co.za/law-journals/1996/november/1996-november-vol009-no2-pp102-103.pdf.*

8 Cyrus Das, 'Message from the President' (2003) 12:1 *The Commonwealth Lawyer* 4.

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the agenda. Threats to the rule of law, difficulties of access to justice, poverty, and attacks on the independence and strength of the legal profession were discussed at the Forum of Bar Leaders.

Colin Nicholls QC from England & Wales assumed the CLA Presidency.

The rule of law in the aftermath of terrorism, and the delicate balance between ensuring public safety and protecting individual rights — particularly in the context of the Guantanamo Bay case — remained central issues addressed during Mr Nicholls' term. In 2003, the CLA filed an *amicus* brief in the US Supreme Court, in the appeal of *Rasul v Bush*, against a decision of the Court of Appeals for the District of Columbia Circuit, denying a writ of *habeas corpus* to Commonwealth detainees. Colin Nicholls QC was part of the team that authored further briefs in 2004 and 2006.

The 14th CLC — the Golden Jubilee of CLCs, which spanned 50 years — was celebrated in 2005, back in London, with a simple but aptly titled theme: "Developing Law & Justice". Graeme Mew from Canada took office as the next CLA President.

The 15th CLC was held in Nairobi, Kenya in 2007, with Ron Heinrich AM from Australia commencing his tenure as the CLA President, while the 16th CLC took place in Hong Kong in 2009. During these years, various rule of law issues, particularly in Pakistan, Fiji, and Zimbabwe, remained a prominent concern. The CLA, in conjunction with CLEA, CMJA and CPA, organised a colloquium in Edinburgh in July 2008, to review the awareness and implementation of the Latimer House Principles. The Edinburgh Plan of Action for the Commonwealth was drafted and adopted at the colloquium, an effort Ron Heinrich described thus:

> [O]ne of the most important rule of law initiatives that the CLA has been associated with to date. . . . The ability of citizens to hold their governments to account, in addition to an independent and efficient executive, parliament and judiciary reduces the prevalence of corruption and has a considerable impact on overall transparency and improved governance in any country.[9]

Colin Nicholls QC and Dato Dr Cyrus Das were made Honorary Life Presidents in 2007 and 2009, respectively, in recognition of their outstanding service and contribution to the CLA over numerous years.

Mohamed Husain from South Africa was elected as the CLA President in 2009.

Subsequently, the 17th CLC was held in Hyderabad, India in 2011; the 18th CLC in Cape Town, South Africa in 2013; and the 19th CLC in Glasgow, Scotland in 2015.

The respective CLA Presidents during this time were: Boma Ozobia OON, SAN from Nigeria; Mark Stephens CBE from England & Wales, and Alex Ward AM from Australia.

In a fragmented world, the CLA continued to address various issues impacting the rule of law and human rights across the Commonwealth.

Chief among these concerns was what lawyers faced on the front line of justice, exemplified by the case of a human rights lawyer and an NGO worker who had been subjected to mistreatment by Ugandan authorities when attempting to assist detained Kenyans. This was highlighted in a paper presented at the conference in Hyderabad, at which the CLA passed a resolution condemning the arrest and continued detention of Al-Amin Kamathi by the Ugandan authorities.[10]

These incidents underscore the perilous conditions under which legal professionals operate in certain regions, even today — often at great personal risk to themselves. Thus, the independence and protection of lawyers remains an enduring concern.

The CLA also voiced its disquiet over the decision of the High Court of Fiji, which found a local non-profit organisation, Citizens' Constitutional Forum, guilty of contempt of court for publishing an article titled 'Fiji — the Rule of Law Lost'. As Mark Stephens CBE saliently pointed out:

> [T]he decision in this case raised the wider issue of the increasing abuse of contempt of court proceedings by governments in order to restrict freedom of expression in a number of Commonwealth and other jurisdictions.[11]

In January 2014, the CLA filed an application to intervene in the appeal, in the Judicial Committee of the Privy Council, in the case of *Dhooharika v DPP of Mauritius*, against Dhooharika's contempt conviction for scandalising the court, in an effort to provide much-needed legal clarity on that issue across the Commonwealth.

At the CLA's general meeting in Glasgow in 2015, the late Soli Sorabjee from India was made an Honorary Life President, and his lifetime commitment to the legal profession and defence of the rule of law were unanimously acknowledged.

In the ensuing years, the 20th CLC was held in Melbourne, Australia in 2017; the 21st CLC in Livingstone, Zambia, in 2019; the 22nd CLC in Nassau, the Bahamas, in 2021; and, most recently, the 23rd CLC in Goa, India, in 2023.

During that period, the CLA Presidents were: R

[9] Ron Heinrich, 'Message from the President' (2008) 17:2 *The Commonwealth Lawyer* 4.

[10] Pheroze Nowrojee, 'The CLA Resolution and the Release of Mr Al-Amin Kimathi' (2011) 20:3 *The Commonwealth Lawyer* 38.

[11] Mark Stephens, 'Message from the President' (2013) 22:2 *The Commonwealth Lawyer* 4.

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Santhanakrishnan from India, Brian Speers from Northern Ireland (for a four-year term), and Dr Peter Maynard KC from the Bahamas. In 2019, Ron Heinrich AM was made an Honorary Life President in recognition of his outstanding service and contribution to the organisation over several years.

Among the notable initiatives of the CLA during this period was the project on children's rights, in which Brian Speers was extensively involved. This effort culminated in a comprehensive report titled *The Role of the Law in Eliminating Child Marriage in the Commonwealth*. Subsequently, the CLA partnered with a charitable organisation, It's a Penalty, to produce a report titled *Child Sexual Exploitation and Abuse within the Commonwealth*.

In 2023, R Santhanakrishnan was made an Honorary Life President in recognition of his commitment to the organisation and his tireless efforts to promote engagement throughout the Commonwealth, evident in his following remark:

> The Commonwealth is, of course, present on every continent and in every geographical region of the world. We have every conceivable religion, race, culture and class represented within this grouping. For more than two years I have been traversing across this geographical spread with my "Mission Commonwealth Connect". My first-hand experience tells me that there is a thin and common thread which passes through all societies across the Commonwealth, a craving for the promotion of Democracy, Good Governance, Human Rights, and, above all, the Rule of Law.[12]

This serves as a compelling reflection of the uniqueness and diversity of our constituency, while highlighting our unity as a collective body that represents the legal profession across the Commonwealth.

My immediate predecessor, Dr Peter Maynard KC, has been instrumental in harnessing this collective expertise by establishing committees[13] within the CLA, drawing in numerous experts to serve and contribute in various areas of law.

At the conference in Goa, India, that carried the theme "Common Challenges in Uncommon Times", the Rt Hon Patricia Scotland QC, Commonwealth Secretary-General, presciently noted:

> As lawyers, we can change the world if we choose. We are jointly charged to deliver justice, particularly for the poor, the marginalised, the silenced and the vulnerable …

We must use the law as our weapon against injustice and wield it with skill and determination whilst teaching the next generation to do the same.[14]

This timely message serves as a compelling and enduring reminder of our vital duty as Commonwealth lawyers.

At this juncture, it would be remiss of me not to recognise the Secretary Generals of the CLA, whose immense dedication and diligence in heading the Secretariat have been essential to the organisation's administration and success: Claire Martin, who first joined as an Executive Secretary and was subsequently appointed as the CLA's first Secretary General (2003 to 2013); Katherine Eden-Haig (from 2015 to 2018); and our current Secretary General (since 2018), Brigid Watson, whose tireless efforts have been pivotal in propelling progress and advancing our organisational goals.

The upcoming 24th CLC in Malta

This brings me to the *24th CLC* in Malta, which will take place from 6 to 10 April. The theme, "Commonwealth Lawyers — Fit for the Future", challenges us to reflect on our evolving role in upholding the rule of law amid the rapid geopolitical, technological and societal changes that we are witnessing today. Mark Woods, Chairman of the Papers Committee, has put together an impressive programme featuring a line-up of distinguished speakers.

As our history visibly illustrates, the CLC is more than just a casual, occasional gathering — it is a catalyst for transformation. Time and again, past conferences have empowered practitioners with knowledge, forged lasting connections, and inspired change that extended far beyond the event itself. Here, we will deepen friendships, nurture new bonds, and ultimately affirm our shared vision and purpose: to advance the administration of justice throughout the Commonwealth; champion the rule of law, defend human rights; safeguard access to justice, and uphold constitutionalism. Together, we honour our legacy while shaping a future guided by these enduring principles.

I hope to see many of you in person in Malta where, between the spectacular backdrop of the Mediterranean Sea — with its crystal-clear waters and stunning vistas — and the thought-provoking discussions and stimulating interactions to be had, you will not be disappointed.

Looking forward to an inspiring and engaging conference with all of you, and with best regards,

– Steven Thiru

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12 R Santhanakrishnan, 'Message from the President' (2019) 29:1 *The Commonwealth Lawyer* 4.

13 The committees are: Alternative Dispute Resolution, Climate Justice, Corporate and Commercial, Family Law, Human Rights and Rule of Law, Legal Tech and Innovation, Public and Administrative Law, Anti-Corruption Sub-Committee, and Government & Public Sector Lawyers Sub-Committee. Further information is available on the CLA's website, *www.commonwealthlawyers.com*.

14 The Commonwealth (2023) 'As lawyers, we can change the world if we choose,' says Commonwealth Secretary-General accessible at *https://thecommonwealth.org/news/lawyers-we-can-change-world-if-we-choose-says-commonwealth-secretary-general*.

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Editor's Note



This special issue of *The Commonwealth Lawyer* is being published to coincide with the 24th Commonwealth Law Conference scheduled to be held in Malta on 6-10 April 2025. Thanks to generous sponsorship from Mohan Law House, Delhi, we are able to provide printed copies of the journal to all the delegates attending the conference. Consequently, if you happen to be in Malta for the event, you should have found this copy in your conference bag.

We have an interesting mix of articles spanning a range of subjects, from Genocide to Pre-Nuptial Agreements, and from the Role of the Judiciary in a Constitutional Democracy to the prospects of Mediation after the Singapore Convention. I hope you will enjoy reading this fare.

Justice Cobb of the English Court of Appeal offers a fascinating survey of developments in relation to the administration of justice since the landmark case of *R v Sussex Justices* which produced the famous aphorism that 'Justice must not only be done but must be seen to be done' (per Lord Hewart). That case celebrates its centenary in the present year, and it is therefore entirely fitting that we take a retrospective look at its effects and its importance. "What is clear," notes the author, "is that the constitutional principle of justice being done, and being *seen* to be done, in its many forms, remains the most significant constituent in ensuring the protection and operation of the Rule of Law in our twenty-first century society."

In another article, Michael Beloff KC, a distinguished member of the English Bar, veteran arbitrator of disputes in the sporting world, and former President of Trinity College, Oxford, analyses the meaning of 'genocide' and argues that it has not always been properly understood. He refers particularly to the use of that word in the context of the ongoing conflict in the Middle East and concludes that, while the actions of Israel in Gaza should not be beyond criticism, it would not be proper to "ignore or misrepresent the law on so sensitive an issue as the meaning of genocide". Beloff's analysis put huge emphasis on the importance of *intent* in arriving at decisions on whether any alleged act or acts amount to genocide.

Sudhish Pai, a lawyer from India, offers his reflections on the place of judges in constitutional democracies, especially those with written constitutions containing bills of rights. Among other things, his exegesis tackles head on the tensions that frequently arise between 'majoritarianism' and judicial review, and argues that those concepts are not mutually irreconcilable, provided some restraints are observed:

> Despite the seemingly anti-majoritarian character of judicial review the court must exercise this power to protect individual rights not adequately represented in the political process; but the court should also decline to exercise judicial review in other areas to minimise the tension between judicial review and democracy and to conserve its resources for institutional prestige.

This line of argument can, of course, lead to a discussion on the pros and cons of judicial activism (or, as it is sometimes called, 'judicial overreach'), which is a subject of much controversy in jurisdictions like India. I would welcome a debate on that subject and would encourage articles from readers.

On a completely different subject, we have an article on pre- and post-nuptial agreements and how they have been treated by the courts. Justice James Edelman of the High Court of Australia provides a panoramic view of this topic, analysing case law from his own country, with comparative references to decisions rendered in the United Kingdom. Justice Edelman hangs his article on a rather amusing peg, the television entertainment serial *Succession* (which has been seen by many as reflecting the happenings in the media mogul Murdoch's family) but his purposes are, of course, more serious. I would welcome readers' reactions to the piece.

We also have an article by Lord Justice Bernard McCloskey of the Court of Appeal of Northern Ireland and a frequent contributor to this journal which discusses the subject of human dignity. In the judge's view, "The right to human dignity, a cornerstone of every civilised society for many centuries, has had an unexpected recent renaissance in a small corner of the Commonwealth in Western Europe." This article explains how the concept has evolved since its origins in Roman Law to the present day.

– Dr Venkat Iyer

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Articles

'Justice must be seen to be done': One Hundred Years since *R v Sussex Justices* [1924]

Stephen Cobb

Introduction

The phrase 'Justice must be seen to be done' was crafted by Lord Hewart and featured in his judgment in the case of *R v Sussex Justices ex parte McCarthy*,[1] decided one hundred years ago. Rather like the cases which concerned the ineffective Carbolic Smoke Ball as a cure for flu,[2] and the decomposing snail in the bottle of ginger beer,[3] *Sussex Justices* is a case of little factual consequence; it concerned a £10 fine for dangerous driving. But, like those other claims to which I have just made mention, initiated (respectively) by the disgruntled Louisa Carlill and May Donoghue, *Sussex Justices* has acquired considerable standing in the law; its point of significance, as I shall explain, related to the due administration of justice, and specifically the appearance of improper influence upon a bench of magistrates after they had retired to consider their decision.

Over the years, the phrase (i.e. 'justice must be seen to be done') has come to embody much more than alleged procedural impropriety, judicial bias or improper influence, or the *appearance* of bias. The phrase now encompasses, and perhaps is most strongly associated with, openness and transparency in the due administration of justice, tying in directly with the citizen's right to a 'fair and *public* hearing' which is enshrined in Article 6 of the European Convention on Human Rights.

In this article I will focus not only on how the phrase is now widely understood, and why it is important, but on the collective and individual responsibility of the judiciary to give the fullest effect to it.

The *Sussex Justices* case

Let me recap briefly what this case was all about. In the summer of 1923, Mr McCarthy was riding his motorcycle through Sussex when he collided with another motorcycle and sidecar; this second motorcycle was driven by a Mr Whitworth, with his poor wife precariously seated in the sidecar. The collision resulted in Mr McCarthy's prosecution for dangerous driving which was listed before the Sussex Justices. Unknown to Mr McCarthy and his solicitor at the Magistrates Court, the deputy clerk to the justices on the day of the trial, Mr E.H. Langham,[4] was a partner of the firm of solicitors (Langham, Son & Douglas) which was instructed by Mr and Mrs Whitworth in the civil claim against Mr McCarthy arising out of the collision that had given rise to the prosecution. At the conclusion of the evidence and submissions, Mr Langham, the deputy clerk, left the courtroom to retire with the justices; the justices considered their verdict and then returned to convict Mr McCarthy. On learning later of the deputy clerk's employment with the law firm, Mr McCarthy applied to have the conviction quashed. The justices swore affidavits stating that they had reached their decision to convict the defendant without consulting Mr Langham.

The Lord Chief Justice of the day, Lord Hewart – as it happens, a former Northern Circuiteer when he had been at the Bar – delivered the lead judgment which included these famous words…

> It is said, and, no doubt, truly, that when that gentleman [Mr Langham] retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is *of fundamental importance* that justice should not only be done, *but should manifestly and undoubtedly be seen to be done.*

Adding later:

> Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

1 [1924] 1 KB 256, [1923] All ER Rep 233

2 *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256

3 Donoghue v Stevenson [1932] AC 562

4 Brother of the Mr F.G. Langham who was the usual clerk to the justices also a partner of the same firm.

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Lord Hewart's phrase, stripped of its adverbial adornments, has been cited probably more often than any other in legal discourse over the last 100 years. Indeed with the assistance of digital search software, I can see very easily that the *Sussex Justices* case was relied even within the last few weeks[5] in judgments delivered in the long-running *Greensill* litigation[6] in the Insolvency and Companies Court.

And what is the reason for its durability? It is surely because procedural propriety in the administration of justice is sacred; it is the bedrock of the judicial oath which has been taken by judges for centuries[7] and requires them to try cases without "fear or favour, affection or ill-will", a phrase which reinforces the impartiality and independence of the judiciary, and the obligation on judges to conduct themselves and their business free from any interference.

It is, I hope, obvious that if a judge has an *actual* interest in the outcome of a case (financial or otherwise) they cannot hear it, and should recuse themselves. Justice would not, *could* not, in those circumstances be seen to be done. Moreover, if the judge's conduct or behaviour gives rise to a suspicion – objectively assessed by the "fair-minded and informed observer" – that they are not, or would not be, impartial in hearing a particular case, then again the judge must disqualify themselves from hearing that case[8]. For justice to be done and to be seen to be done this rule has to be scrupulously observed; as Lord Justice Mummery observed in *Morrison*:

> … the paramount concern of the legal system is to administer justice, which must be, *and must be seen by the litigants and fair-minded members of the public to be*, fair and impartial. Anything less is not worth having[9].

This reinforces what Lord Hope of Craighead had earlier said in the *Pinochet (No 2)*[10] case, one of the most memorable recusal cases in modern times:

> Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He *must be seen to be impartial*.

While no further illustration is required, I trust that you will indulge one further reference (given its current notoriety, and the quality of the judgment dealing with the issue) and that is to *Bates v The Post Office*,[11] in which the Post Office unsuccessfully sought the recusal of Mr Justice Fraser (as he then was) part-way through his trial on the issues concerning the Horizon software; the case was presented on the basis that in an earlier judgment (Judgment no 3 on 'common issues') he had made findings critical of the Post Office. The application was robustly refused. The rest is history.

Individual judges must be aware of their own potential biases, they must prioritise impartiality; if a judge feels that they cannot be objective, stepping aside is the appropriate course of action. Thus, the responsibility for ensuring that actual or apparent bias does not contaminate the administration of justice, and that justice is done and seen to be done, is primarily a matter for the judge, who should take the initiative. This important point was made by the Court of Appeal in *Locabail*[12] (probably the leading case in this area):

> …judges routinely take care *to disqualify themselves*, in advance of any hearing, in any case where a personal interest *could be thought to arise*.
>
> And in doing so, the judge will have considered whether:
>
> … on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias[13].
>
> This is the first responsibility on the judiciary to ensure that 'justice is seen to be done'.

Wider application of the principle

The maxim 'justice must be seen to be done' is now used much more widely than merely to describe adherence to procedural propriety; perhaps its dominant meaning has, in current usage, come to be the importance of transparency and openness in the administration of justice.

It is a general principle of our constitutional law,

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5 *Secretary of State for Business and Trade v Greensill* [2024] EWHC 1803 (Ch) (28 June 2024) (bailii.org) at para 11.

6 For example, see para 30 of the judgment of ICC (Insolvency and Companies Court) Judge Mullen disposing of a disclosure application within the extensive litigation following the collapse of Greensill Capital and the disqualification of Alexander Greensill: *BCC Trade Credit Pty Limited, Tokio Marine Management Australasia Pty Limited, Tokio Marine & Nichido Fire Insurance Company Limited v The Secretary of State for Business and Trade, Mr Alexander David Greensill* [2024] EWHC 2039 (Ch) (18 July 2024).

7 Traceable to a statute enacted during the reign of Edward III in 1346.

8 See Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at 103: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

9 *Morrison v AWG Group Ltd* [2006] EWCA Civ 6 at para 29; an appeal against the decision of Evans-Lombe J.

10 *R v Bow Street Magistrate, ex p Pinochet (No. 2)* [1999] 2 WLR 272, 290.

11 Per Fraser J in 'Judgment No 4': [2019] EWHC 871 (QB).

12 *Locabail (UK) Ltd v Bayfield Properties Ltd and Locabail (UK) Ltd v Waldorf Investment Corp* [1999] EWCA Civ 3004 at [16].

13 *Locabail* at [16].

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and in the upholding of the Rule of Law, that justice is administered by the courts in public, and is therefore open to public scrutiny:

> In a democracy, where the exercise of public authority depends on the consent of the people governed, *the answer must lie in the openness of the courts to public scrutiny.*[14]

The 1913 House of Lords appeal in *Scott v Scott*[15] is widely and rightly regarded as the starting point for any discussion on this particular topic, and is notable for the trenchant manner in which the Appellate Committee condemned the private hearing at first instance, and in which it identified only a narrow range of exceptions to the open justice principle. *Scott v Scott*, as you probably all know, was a nullity case which had been heard 'in camera' by Sir William McCardie at first instance, a course which troubled greatly all the members of the Appellate Committee. In his speech in the appeal, Lord Shaw referred to "publicity in the administration of justice" as "one of the surest guarantees of our liberties"; he described the private nature of the nullity hearing in the court below as a form of tyranny, akin to "the genius and practice of despotism". Strong words indeed.

Perhaps coincidentally, perhaps not, on the other side of the Atlantic, in the same year as the appeal in *Scott v Scott*, Louis Brandeis (the American lawyer who went on to serve as an associate justice on the Supreme Court of the United States) contributed to this discussion with his famous phrase[16]: "sunlight is said to be the best of disinfectants", a phrase which (as I shall illustrate shortly) has found echoes in judicial and academic work on openness and transparency in the courts here ever since.

When Lord Reed considered the principle of openness in *A v British Broadcasting Corporation* in 2014[17] he followed *Scott v Scott* in identifying the main exceptions to the general rule of openness[18]:

- Wardship and children proceedings;
- Court of Protection proceedings under what is now the Mental Capacity Act 2005;
- Where publicity might destroy the subject matter of the case (e.g. a commercial secret), and
- Matters of national security.

Even then, in 2014, steps were being taken to change the regime in respect of the first two of these excepted categories. Going back a little in time, I remember well attending the launch of the then Labour Government's initiative to open up family court proceedings in 2006, which they entitled *Confidence and Confidentiality*[19] – reflecting the balance of the *confidence* which the public must have in family courts, and the *confidentiality* required to safeguard the privacy of children and family members. Did no one spot the irony of holding the launch event for this initiative in the Cabinet War Rooms in Central London, possibly one of the least accessible and most secret of all venues in the country? During my own career at the Bar and on the Bench there has been a growing momentum to achieve greater levels of openness and transparency in the Family Court, in the High Court exercising its wardship jurisdiction, and in the Court of Protection, galvanised from time to time by specific media attention and public interest. The upshot is that proceedings concerning children in the Family Court, and the incapacitous in the Court of Protection (i.e., the first two of those three categories) are now considerably more transparent than they were even 10 years ago.

The drive for greater transparency in the Family Court and Court of Protection was accelerated by Sir James Munby when, as President of both courts, he published his Practice Guidance documents (in 2014) in each of those jurisdictions. His initiative in these and aligned respects drove further developments in transparency over the next few years, including (but by no means limited to) the wider publication of judgments (as to which I shall say something more later) and the grant of permission for legal bloggers to report on matters in the Family Court (2018). His successor as President, Sir Andrew McFarlane, launched a full scale consultation in 2020 on transparency, bearing again the label 'Confidence and Confidentiality'.

Building on the experiences (and the successes) in the Court of Protection, which since 2016 had by default now sat in public,[20] and the results of the consultation to which I have referred, a Reporting Pilot was launched in the Family Court in 2023, operating initially in three Family Courts in the country but now extended, since early 2024, to approximately one-half of the Family Courts including in Liverpool. Under the pilot, accredited journalists and legal bloggers are enabled to report on what they see and hear in court under the 'transparency principle', all achieved with the support and encouragement of the Family Court judiciary, who on a case-by-case basis make 'Transparency Orders', which set out the rules of what can and cannot be reported.

These are significant and positive developments. Reporting proceedings in the Family Courts and the Court of Protection by journalists, and/or by bloggers on social media, offers an opportunity to improve the public's understanding of the work of the Family Courts

14 *A v British Broadcasting Corporation* [2014] UKSC 25; [2015] AC 588 at [23].

15 Scott v Scott [1913] UKHL 2, [1913] AC 417.

16 In a 1913 Harper's Weekly article.

17 *A v British Broadcasting Corporation* supra note 14.

18 ibid at [29].

19 12 October 2006.

20 Subject to 'Transparency Orders' limiting the reporting of identifying features of the case.

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which for many years suffered (and perhaps in some quarter continues to suffer although to a lesser extent) the canard of the 'Secret Court'. The report of the pilot shows that it has been largely successful,[21] and the main concern around confidentiality (potential jigsaw identification of the relevant children and/or families) has not in fact come to pass.

Why is it important that justice is seen to be done?

I touched a moment ago on the importance of openness. Let me expand on that, for openness and transparency within the justice system is not just important, it is fundamental to what we do.

First, we must keep the public *informed* about what we do day-by-day. Public attitudes towards the judiciary and the justice system — whether positive or negative — may well stem from ignorance of how the judges and the justice system works. There is surely no better way to inform the public of what we do than to *show* them what we do. I fear that many citizens grow up in relative ignorance about what the justice system involves, and what it does; for example, the differences between a civil court and a criminal court, the role of juries, the status of magistrates, are I fear little understood. To promote greater understanding of justice, the public should be enabled to discover in any given case what the issues are, what the evidence is, and how the decision is reached.[22] Citizens and businesses alike need to know that they will be able to enforce their rights if they need to do so; they need to know that if they fail to meet their obligations, there is likely to be a remedy against them.[23]

Secondly, openness and transparency hold the judges to *account* for the decisions they make, and should vest in all members of society confidence that judges are doing their job properly; we are, after all, judges in public service – *for* the people, and fulfilling our judicial roles day by day in their name. Accountability has at least two components: accountability in judicial decision-making, and accountability in relation to judicial conduct. As for accountability in decision-making, I borrow from the judgment of Lord Judge, who as the then Lord Chief Justice, said in *R (Binyan Mohammed) v Secretary of State for Foreign and Commonwealth Affairs*:[24]

> The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited.

This phrase "every judge sitting in judgment is on trial" is unmistakeably borrowed from the eighteenth century jurist, Jeremy Bentham, who it will be remembered proclaimed that: "publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial".[25] Bentham famously further pronounced that:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.

The 'darkness of secrecy' in that quotation naturally brings back to mind Brandeis' reference to the disinfectant of sunlight; indeed, just as Lord Judge may well have been inspired by Bentham, so Lord Toulson echoed Brandeis in *Kennedy v The Charity Commission*:[26]

> Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence.

Openness of the justice system has inevitably and rightly facilitated a developing accountability for judicial *conduct*. Since 2006,[27] there has been, and is, a fully functioning statute-based judicial disciplinary system, the Judicial Conduct Investigations Office (JCIO),[28] which, although based in the Judicial Office, operates independently of it. The work of the JCIO is underpinned by an expectation on all sides that allegations of judicial misconduct are dealt with efficiently, fairly and proportionately, in order to maintain and enhance public confidence in the independence, impartiality, integrity,[29] and good standing of the judiciary[30]. The work of the JCIO is itself reviewed by the independent Judicial Appointments and Conduct Ombudsman (JACO). While there are some who call for greater transparency of its processes, the open publication of findings of judicial misconduct by the JCIO,[31] on its public website, serves, I hope at least to some extent, to reinforce to the citizens we serve that for those very few judges whose conduct falls below the standard which is expected of them, they are appropriately sanctioned. This is all a far cry from the arrangements which pre-dated the Constitutional Reform Act 2005, when complaints about judicial office holders would be dealt with (not on any statutory footing) by anonymous civil servants within the Ministry of Justice.

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21 'Natcen Report on the Transparency Implementation Group's Family Court Reporting Pilot' (www.judiciary.uk), July 2024.

22 See Baroness Hale in *Dring v Cape and Intermediate Holdings Ltd* [2019] UKSC 38 at [43].

23 *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51 at [72] (Lord Reed).

24 *R (Binyan Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

25 'Draught For The Organization Of Judicial Establishments, Compared With That Of The National Assembly, With A Commentary On The Same' (1790).

26 *Kennedy v The Charity Commission* [2014] UKSC 20 at [110].

27 Constitutional Reform Act 2005.

28 As defined in reg 2 and reg 4(2) of the Judicial Discipline (Prescribed Procedures) Regulations 2023.

29 A distillation of the six fundamental values set out in the Bangalore Principles of Judicial Conduct.

30 JCIO Annual Report 2022-23, *www.judicialconduct.gov.uk*.

31 Disciplinary Statements – Customer Self-Service, *www.judicialconduct.gov.uk*.

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Thirdly, open justice is important to instil and as appropriate reinforce public *confidence* in the justice system. For that system to operate effectively, it needs to create relationships of confidence with the society it serves; confidence is imperilled where processes are opaque, or worse still, unseen. It is vital in our democracy that victims of crime or civil wrongs feel confident to come forward, that witnesses will contribute freely to the administration of justice, that those who are found to have wronged others, or offended against the law, can accept the inherent fairness of the process. We judges, key players in the justice system, need to demonstrate, individually and collectively, that we can and do offer protection, adjustments and accommodations where necessary to meet the vulnerabilities of those who seek access to the courts in whatever form. If parties and witnesses are deterred from coming to justice through a lack of confidence in its processes, the proper and effective administration of justice will be defeated.

Fourth and finally, open justice underlines and reinforces the *Rule of Law*. Greater transparency of our processes surely supports and strengthens two important messages: (1) that no person or body is above the law; and (2) that the judiciary operates independently of the executive and the legislature, making non-political judgments and decisions. The independence of the judiciary from government has been powerfully demonstrated in recent times by many judgments issued the courts; most notable among them have been the Supreme Court's decision in 2019, that the prorogation of Parliament was unlawful,[32] and in 2023[33] its decision that the Secretary of State's plan to transport asylum seekers to Rwanda was unlawful. The public's interest in these moments of legal history is reflected by the half-a-million or more YouTube clicks on the recording of the announcement of the 2019 decision[34] – an interest unlikely to have been entirely sparked by viewers' fascination with the President's spider brooch.

On a serious note, there is I suspect still much to be done to underline for the public the constitutional distinctions between the three arms of state in the UK: the executive, the legislature, and the judiciary. Etched in judicial memories is the 'Enemies of the People' headline in the *Daily Mail* in November 2016 referring to the three senior judges who had ruled that the UK Government would require the consent of Parliament to give notice of Brexit – perhaps one of the most egregious lapses of responsible reporting of the justice system in recent times through its failure to acknowledge its independence. The President of the Supreme Court, Lord Reed, in an interview for *The Times* (London) on 5 October 2024 referenced again this headline, and emphasised the importance of the public's understanding of the distinct roles of the court and government thus: "When we hear cases... we are not trying to decide what social policy ought to be. That is not our function. What we are trying to do... is to interpret a particular statute or provision. … For the court to have to say sometimes that the government (of whatever complexion) has overstepped the mark, is perfectly normal".

What is the judiciary doing to achieve greater levels of transparency?

Having, I hope, established why openness is fundamental to the administration of justice in our democratic society, let me turn to the ways in which the judiciary is working to develop the transparency of its processes.

First, broadcasting. The Supreme Court has been live-streaming its hearings for nearly ten years. For over five years, most cases listed in the Court of Appeal (Civil Division) are also live-streamed on the judiciary's YouTube channel. Over the last two years, live broadcasting of sentencing remarks in the Crown Court in some significant cases has enabled the public to observe criminal justice being dispensed, in real (or almost real[35]) time. I believe that broadcasting goes a very long way to helping the public better to understand the complex decisions which judges make; in relation to Crown Court sentencing, I hope that seeing judges actually deliver the sentences reassures the public that when defendants are found guilty of crimes, their punishments are carefully considered, determined by reference to current sentencing guidelines, and adapted to the particular circumstances of the individual defendant and their crime.

It is, I suggest, extremely powerful to bring justice into people's homes and their lives through the televising of these dramatic moments in the criminal court, and I venture to suggest that by putting this material graphically onto people's TV and laptop screens, it may well in itself provide one of the most powerful deterrents against unlawful behaviour. In late-July/early-August 2024 in Liverpool, the Recorder, HHJ Menary KC, was televised passing sentence on those who had been involved in what he described as the "deplorable mass

[32] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41: the specific issue was whether "… the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful. It arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off"." ([1] of the judgment).

[33] *AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department* [2023] UKSC 42 (15 November 2023) (bailii.org).

[34] Approximately 500,000 views on YouTube at the time of writing.

[35] There is usually a built-in delay of seconds/minutes.

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public disorder"[36] which had taken place in Southport and Liverpool only a few days earlier. That this public delivery of justice was achieved so quickly after the events in question meant that the public could (consciously or unconsciously) make the 'cause and effect' link between crime and punishment so easily. The Judge emphasised in his sentencing remarks that "every decent member of the community affected by these events will have been appalled, horrified, and deeply disturbed by what has taken place in their neighbourhoods"; doubtless his words will have resonated with the public both locally and nationally, I hope offering reassurance to citizens in the communities in which these acts of senseless violence had occurred that the justice system understood their pain, and could swiftly bring the perpetrators to justice.

Should the scope of broadcasting be extended? The Lady Chief Justice has spoken recently of the potential for the "careful expansion of broadcasting hearings"[37] – "careful" so as to consider the effect that any extension of the current broadcasting arrangements may have on parties to proceedings, and witnesses. More extensive broadcasting cannot be allowed adversely to affect the administration of justice, nor should it serve to erode public trust, or diminish the public's confidence and willingness to come to court.

Secondly, Judgments. There is now much more prolific publishing of judgments in all Divisions of the High Court, and at lower levels of the court and in tribunals, thereby providing explanation and account of the reasoning for judicial decisions. This is particularly important in the Family Division which sits in many cases in private (subject to the transparency arrangements discussed earlier). But even in that jurisdiction it is worth noting how things have changed over 20 years: in the first six months of 2004, the Family Division judges published altogether 21 judgments on Bailii; in the same six months of 2024, the figure was 121. Some judgments are now not even anonymised given the drive towards greater transparency, although the decision to publish and/or anonymise in each case will always engage "the familiar balancing of the competing advantages of privacy (Article 8) and freedom of expression (Article 10) as applied to the individual circumstances".[38]

Publication of judgments in clear and accessible language allows the public and the media to know how a decision has been reached, and gives judges the opportunity to explain the challenges of decision-making. Indulge me reference to two recent examples in the Family Division. Earlier this year a family judge authorised the withdrawal of life-sustaining treatment for a then 3-year old boy, born with severe disabilities and life-limiting health conditions including a significant brain malformation; judgments explaining the decision to withdraw treatment were delivered in January 2024[39] and April 2024.[40] It was the expectation of all the medical witnesses who gave evidence, including an expert instructed by [the child's] parents, and of course the Judge, that the child would die shortly thereafter. Last month, following extubation, and after a wholly unpredicted and remarkable turnaround of the child's physical health, the court's decision was reversed and the authorisations were withdrawn.[41] A judgment explaining this reversal of arrangements was published. This suite of published judgments (three in all) should help the public and the media to see: (i) the immense care which is brought by judges to bear in making these exquisitely difficult decisions, (ii) the willingness of the court to respond to changing circumstances, and perhaps most pertinently for this article (iii) the transparency of the decision-making.

Secondly, I reference the recent decisions of HHJ Parker, the Designated Family Judge in Liverpool, in proceedings involving the deprivation of liberty of young people; specifically, he drew attention to the scarcity and the 'breathtaking' cost of the provision of specialist care for damaged youngsters including one who was being criminally and sexually exploited.[42] In a carefully and powerfully worded *ex tempore* judgment, Judge Parker specifically acknowledged the crucial distinction between his role and the government's role, before adding helpfully, plainly and publicly in his judgment: "It is a matter for the government and the Houses of Parliament to decide policy and to enact legislation. … What I can do … is to set out in this judgment how it feels and how it looks on the front line in the family justice system".

Thirdly, aligned with my comments above about the importance of the published judgment, is the increasing practice of the senior courts, and the invariable practice of the Supreme Court, to publish media releases

36 See *R v O'Malley and another* – Sentencing Remarks, *www.judiciary.uk*.

37 Keynote speech by the Lady Chief Justice at the Society of Editors 25th anniversary conference – accessible via the Courts and Tribunals Judiciary website.

38 Peter Jackson LJ in *T, Re (Children: Publication of Judgment)* [2024] EWCA Civ 697 (21 June 2024) (bailii.org) at [25].

39 *NR, Re (A Child: Withholding CPR)* [2024] EWHC 61 (Fam) (17 January 2024) (bailii.org)

40 *NR (A Child: Withdrawal of Life Sustaining Treatment)*, Re [2024] EWHC 910 (Fam) (23 April 2024) (bailii.org)

41 *NR (A Child: Ceilings of Treatment after Survival of Withdrawal of Life Sustaining Treatment), Re* [2024] EWHC 2400 (Fam) (18 September 2024) (bailii.org)

42 *The Local Authority v A*, and *The Local Authority v B*, available via the Courts and Tribunals Judiciary, esp. at [13] and [28]: "…time and time again, children and young people wrapped up in the pernicious activities of organised criminals, who seek to exploit children for their own selfish financial gain and are prepared to expose those children to a risk of the most grave of outcomes, catastrophic injury or even death".

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alongside judgments of importance. Accessible and concise explanation of sometimes complex litigation increases the transparency of the decision, and is widely welcomed by the media and by the public alike.

Fourthly, I would like to reference the Lady Chief Justice's initiative for achieving consistency in transparency across the justice system by the creation of a dedicated judicial-led Transparency and Open Justice Board. The aim of the Board is to examine and modernise the judiciary's approach to open justice, not least to ensure that we take proper account of wider societal changes, as well as those being effected by the courts. The new Board will "… lead and coordinate the promotion of transparency and open justice across the Courts and Tribunals in England & Wales" and will set objectives in that regard, focussing on timely and effective access in terms of listing, documents and public hearings. The evolving transparency pilot in the Family Court will doubtless help significantly in informing the work of the newly created Board. Assurances have I know been given that this Board will engage with the public and interested parties to make sure that these objectives properly reflect what should be delivered by a modern justice system.

Finally, Publicity and Public relations. For the last twenty years or so, notably since the Constitutional Reform Act 2005,[43] the Lord Chief Justices, and most recently the Lady Chief Justice, have held annual press conferences; for many years before and since, our senior leadership judges have given evidence to Parliamentary select committees. It is vital, in my view, that our most senior leadership judiciary should engage effectively with the media and with Parliament in order to ensure that the judicial viewpoint is accurately represented and that its profile is maintained. Not only can this help to increase public understanding of judges and the justice system, it can also help the judiciary to highlight areas where it may well wish to engage constructively with the executive. Public statements by the senior judiciary – promulgated also by the Judicial Communications team, through social and other media – have played a valuable part in putting the judiciary's concerns about the support it receives (or does not receive) in the public eye.

Impediments to openness?

There is an argument that the greatest current threat to transparency and openness within the justice system lies in our unthinking lapses in providing timely and effective access to the courts by reason of our incoherent court lists, limited access to documents and patchy judicial observance of the expectation to hold hearings in public. This is particularly problematic in what is sometimes described as 'soft-copy' hearings – where the evidence and arguments are presented in electronic or digital documents in civil and family cases and in the tribunals – particularly for hearings which are then conducted by remote video-link.

The welcome development of IT for the justice system, and its increasing use by both judges and litigants, provides many benefits in expediting the administration of justice. But digital justice can impact adversely the publicness of the court process: the circulation of written material in advance of a trial, particularly electronically, denies the citizen in the public gallery the chance to see or hear for themselves what the case is about, and what is at stake. It used to be commonplace for documents to be read out in court. No more. Recognising the threat of reduced openness to civil court process, practical steps are now being taken by the Civil Procedure Rules committee and the Civil Executive Team to ensure hereafter greater press and public access to proceedings in the County Court[44] most recently – and specifically – with their published guide to 'Open Justice in the County Court'.[45] This is a welcome development.

Of course, and paradoxically, while soft-copy remote access justice can limit openness in the way I have just described, remote video-link hearings and digital filing has the potential to offer far *greater* levels of openness; the digisphere can render justice more (rather than less) accessible. Thus, the member of public can, somewhat more than theoretically even now, sit in their kitchen in Kettering and watch remotely a boundary dispute trial in Bristol and can, or should be able to, access the documents at the press of a button; a journalist can sit in Fleet Street (except I don't think that any of them do any more) and observe or monitor multiple hearings in a single day. Non-participants of proceedings (such as the media and the public) now have a statutory right to such access,[46] but I am sure you will agree that more needs to be done to make online public attendance at hearings easier in order to maximise the transparency of civil processes.

"Warts 'n' all"

Portrait painting in the seventeenth century was the indulgence of the wealthy and powerful, used to convey their social standing and influence; one subject, Oliver Cromwell, (pertinently, it may be thought, given his apparent commitment to the rule of law, in spite of his dubious policies of enforcement), nonetheless apparently urged his portrait painter[47] to paint him with 'pimples, warts and all'.

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43 In 2005, Lord Phillips was the first LCJ to hold a press conference.

44 Rule 5.4C CPR 1998.

45 'Open Justice in the County Court', accessible via *www.judiciary.uk*.

46 Police, Crime, Sentencing and Courts Act 2022, implemented by the Remote Observation and Recording (Courts and Tribunals) Regulations 2022, and supported by Practice Guidance issued by the LCJ and SPT.

47 Sir Peter Lely.

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Greater transparency of the justice system inevitably means that the press and the public see it, as Cromwell suggested, with 'pimples, warts n' all'. In a recent speech, the Lady Chief Justice gave this a more contemporary gloss in acknowledging that there can be "no shying away from press discussion of the good, the bad, and the ugly where the justice system is concerned. Its democratic accountability depends upon it" (homage duly paid to the iconic spaghetti western of that name).[48]

I do not dwell on the 'pimples and warts' here; they are visible now, and will continue to be visible in the future – likely, indeed, in sharper relief: among the 'pimples and warts' you may well now find are: a continuing low level of true diversity within the judiciary;[49] the dismal disrepair of some of the court estate; the backlogs of cases in crime and family in particular, coupled with the rising demand on the courts; the lack of judicial and other capacity; symptoms of long-term underinvestment in the justice system and its partners more widely. These cannot and should not be hidden from view: our democratic accountability depends upon them being seen, acknowledged, understood and discussed.

[48] Keynote speech by the Lady Chief Justice at the Society of Editors 25th anniversary conference, supra note 37

[49] 'Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2022 Statistics – GOV.UK, accessible via *www.gov.uk*.

Conclusion

While many years have passed since the doubtful conviction of Mr McCarthy and the plight of poor Mr and Mrs Whitworth in the *Sussex Justices* case, the central message from Lord Hewart's judgment holds firm. Indeed, as I hope I have shown, the phrase 'justice must be seen to be done' has grown in scope, stature and significance. Our collective and individual judicial responsibility is, I suggest, greater than ever to ensure openness and transparency of our work, in our courtrooms day-by-day, and beyond the courtrooms across a wider horizon, to build and maintain true engagement between the justice system and the society that it serves, that *we* as judges serve. What is clear is that the constitutional principle of justice being done, and being *seen* to be done, in its many forms, remains the most significant constituent in ensuring the protection and operation of the Rule of Law in our twenty-first century society.

[The Honourable Mr Justice Stephen Cobb is a High Court Judge (Family Division). In 2024, he was appointed as a Lord Justice of Appeal and will take his place in the Court of Appeal in 2025. This article is a slightly edited version of the Conkerton Memorial Lecture delivered by him in Liverpool on 10 October 2024.]

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A Renaissance of Human Dignity?

Bernard McCloskey

Introduction

The right to human dignity, a cornerstone of every civilised society for many centuries, has had an unexpected recent renaissance in a small corner of the Commonwealth in Western Europe.

The evolution of the concept of human dignity is highly instructive.[1] The admonition to scholars, judges and practitioners alike is ignore this at one's peril. Human dignity can be traced to Roman law and has attracted attention in the writings of many philosophers and religious scholars, particularly from the 12th century.[2]

The right to human dignity is of lengthy and impeccable lineage. Properly understood, it is the foundation of human rights. The Preamble to the Universal Declaration of Human Rights (UDHR) states:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

In 1937 the (first) Irish Constitution was the first human rights text to specifically identify the dignity and freedom of the individual:

> Seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured.

Professor McCrudden's valuable contribution to this subject3 argues that for many dignity is a fact, a metaphysical or ontological status, as well as a moral entitlement. It reflects a view of human rights as essential for the promotion of the common good rather than the espousal of radical ethical individualism. Simultaneously, human dignity was considered antithetical to both Nazi and Communist ideology and practice. The concept of human dignity is also central in the determination of what is considered to be degrading treatment proscribed by Article 3 of the European Convention of Human Rights (ECHR) and kindred international human rights instruments.

The right to human dignity has much untapped potential in the practice of the law and judicial adjudication. I would expect most judges and practitioners to agree with this. Human rights adjudication generally can be enriched by increased deployment of this most basic right. Those involved in the complex and challenging field of adoption may benefit from some reflection on Professor McCrudden's statement that this right provides

> … a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualisation of rights and the generation of new or more extensive rights.

The Lisbon Charter

The Lisbon Charter (The Charter of Fundamental Rights of the European Union) is no ordinary international convention. Its status is equal to that of the EU Treaties. It is, therefore, an instrument of supreme importance in the global legal order. While it was in many respects a consolidating measure of the EU institutions it also contained some surprises and novelties. As the Preamble confirms, this measure was specifically designed –

> … to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a charter.

In other words, there was an identified pressing need to bring the law up to date. A second striking feature of the Preamble is its emphasis on the balance between individual enjoyment of the protected rights and simultaneous responsibilities to others:

> Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

When one delves into the content of the Lisbon Charter, one is immediately struck by the title of its opening chapter. Title 1, with commendable concision, is "Dignity". Article 1, appropriately, is entitled "Human dignity" and provides:

> Human dignity is inviolable. It must be respected and protected.

No punches pulled, no unnecessary complexity and no distracting surplusage. The Charter, in this way, is off to a great start, the right to human dignity sitting proudly at the apex of its provisions. The stature and importance of the right to human dignity are informed

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1 See, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19:4 *Eur J of Int'l L*, 655-724, accessible at *http://ejil.org/pdfs/19/4/1658.pdf*.

2 See the erudite review in Michael Tugendhat, *Liberty Intact* (Oxford: OUP, 2017), at p 215-17.

3 McCrudden, supra note 1.

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by the assorted other rights which compromise Title 1. These are the right to life, the right to integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery or forced labour.

Consideration of Title 1 in its totality gives rise to the proposition that the right to human dignity is one of the fundamental rights in the modern world. Finally, in the relevant "Explanations" provision of the Charter, it is stated:

> The dignity of the human person is not only a fundamental right in itself, but constitutes the real basis of fundamental rights. (…) [T]he dignity of the human person is part of the substance of the rights laid down in this Charter.
>
> … none of the rights laid down in this Charter may be used to harm the dignity of another person …
>
> Human dignity must therefore be respected, even where a right is restricted.

At first blush, the Brexit legislative arrangements veritably detonated the Lisbon Charter. Section 5(4) of the EU Withdrawal Act 2018 reflects a policy choice by the government then in power to single out the Charter for special, hostile statutory treatment. In this way the Charter emerged as one of the perceived chief mischiefs which Brexit was designed to address. How ironic, some might think, in a country espousing the common law which, as it evolved, was nothing if not the champion of developing and protecting the rights of the individual against the State.

The Government's intention was abundantly clear. But have the elaborate and complex Brexit arrangements had their desired effects? The short answer is "no" because, in very concise summary:[4]

(i) Certain transitional provisions give the Lisbon Charter a limited degree of prospective effect subsequent to "Exit Day";

(ii) By virtue of the "retained EU law" statutory provisions, certain of the rights codified under the Lisbon Charter (eg anti-discrimination rights) will remain in full force unless and until repeal occurs;

(iii) Thus, the Charter would remain in prevention in the interpretation of all aspects of retained EU law which it affects and all retained CJEU jurisprudence in which it features;

(iv) Courts and tribunals remain at liberty to *have regard to* and give effect to post-exit day CJEU judgments which do not depart from pre-exit day judgments;

(v) And, finally, given that the relationship between the Charter and the "fundamental rights" jurisprudence of the CJEU derives from EU general principles, a potentially rich harvest of possibilities for continuing Charter influence exists.

(The above list is not exhaustive.)

Council of Europe

Bearing in mind that the right to human dignity is enshrined in the Lisbon Charter (and is arguably one of its most important provisions) it is appropriate to reflect briefly on a different international organisation, namely the Council of Europe. Though frequently overlooked, the ECHR belongs to and emanates from this organisation. The United Kingdom remains a member. And the United Kingdom has acceded to the ECHR, a CoE instrument. In this context the increasing alignment of the CJEU and the ECtHR is of some significance. These two international courts have, commendably, developed an ever increasing and fruitful dialogue. This has unfolded in a context where the EU *en bloc* remains committed to acceding to the ECHR. In their jurisprudence, each of these courts repeatedly subscribes to the recognition of the constitutional traditions common to the Member States and the rule of law.

This process of cross-pollination is unsurprising and seems merely logical given the strong association linking ECHR rights, the Lisbon Charter and the general principles of EU law. Both the Charter and the general principles of EU law have been absorbed within the ECHR jurisprudence. The indirect influence which this may predictably have on the UK legal system is at one and the same time recognisable and unpredictable. Crucially, it means that there will be scope for the Lisbon Charter to influence the development of the common law by judges.

Sometimes the right to human dignity is also recognisable as a matter of black letter law in the judgment of a court. It is interesting to reflect on how the foundations of a decent society have found expression in certain landmark judicial decisions. Simultaneously the Judaeo-Christian tradition[5] is readily identifiable. So too are the basic tenets of Islam.[6] There is nothing sanctimonious in this kind of reflection. Thus, for example, in what is surely the most important judicial decision on the law of negligence, the House of Lords resolved the issue of

[4] See McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge: CUP, 2022) p 161ff.

[5] Drawn from the judgment of Brooke LJ in *The Conjoined Twins* case: "There can, of course, be no doubt that our common law judges were steeped in the Judaeo-Christian tradition and in the moral principles identified by the Archbishop* when they were developing our criminal law over the centuries up to the time when Parliament took over the task. There can also be no doubt that it was these principles, shared as they were by the other founder members of the Council of Europe 50 years ago, which underlay the formulation of Article 2 of the European Convention on Human Rights." [*being Archbishop Murphy – O'Connor, then Roman Catholic Prelate of E&W.]

[6] See The Quran, verses 25.72 and 2.273.

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whether a legal duty was owed to the consumer damaged by the presence of a snail in his ginger beer drink by recalling the parable of the Good Samaritan and drawing on the language of the First Commandment ("Love thy neighbour") in determining who one's neighbour is in legal terms.[7]

In passing, in today's secular society it seems unlikely that the judgment of a court would be expressed in terms of this kind. If it were thus formulated, attack from certain quarters would seem likely. In Northern Ireland, a judgment of the High Court in an equality of treatment case[8] containing a fleeting Biblical reference prompted a sarcastic and scornful commentary in one local newspaper.[9]

Four decades later, a similar philosophy and the concept of human dignity are readily discernible in another landmark decision of the House of Lords, on this occasion formulating the duty owed by an occupier of premises to a trespasser as *the duty of common humanity*.

A third, and final, illustration of this approach is provided by another headline decision, that of the English Court of Appeal determining whether the life of one of two conjoined twins should be ended to enable the other to live, in preference to permitting the two lives to continue with the certainty of the deaths of both. In short, each of these decisions has the indelible stamp of the dignity of the human person.[10]

There is another aspect of the black letter law compartment of the theme of the dignity of the person, namely the corresponding judicial duty – see, especially, *Re McFarland*, paras 2-4, 16 & 31;[11] and, to like effect, *Serafin v Malkiewicz*.[12] Each is a striking illustration of a senior court judicial condemnation of a lower court's treatment of a litigant. It is that dark and doleful place where no self- respecting judge wishes to find themselves, albeit one where, while respect for *their* dignity might not shine brightly in the eyes of some, their right to be treated with human dignity is incontestable.

Recent Northern Ireland contribution

As a result of the judgment of the recent Northern Ireland Court of Appeal in *Re Dillon and Others*[13] individual rights are, once again, in the legal headlines in this jurisdiction – and further afield. It is easy to overlook that there is nothing novel about this. Individual rights have been a prominent feature of the legal landscape of Northern Ireland (NI) for several decades. In the heaving sands of the last 25 years, beginning with the peace settlement in 1998, the rights protection legislation which was a stand-out feature of the Northern Ireland of the 1970s could be easily forgotten.

In a sentence, the intense statutory activity of the 1970s which, notably, unfolded in Westminster and not Stormont as a result of the prorogation of the NI legislature and executive, was fundamentally designed to address, and rectify, perceived inequalities in NI society. This marked the beginning of a period during which the senior courts of this jurisdiction found themselves at the interface between the citizen and the State in a way and with a prominence which would not have been foreseen during just a few years beforehand. There were major statutory reforms in the fields of employment, housing, education, the prosecution system and discrimination in particular. Independent and impartial judicial adjudication shone brightly as a constant of three decades of upheaval and destruction. A quick glance at the NI Law Reports reminds the reader of landmark rights cases and novel statutory measures which may have faded from the memory.

The Good Friday/Belfast Agreement (GFA/BA, 1998) represented a self-evidently major legal milestone. One of its salient features was its tailor-made chapter on human rights and equality, which has now emerged as arguably its most important feature.

Fast forward 20 years. Incontestably, to the forefront of the careful and complex engineering of the EU/UK Withdrawal Agreement (WA) and the Ireland/Northern Ireland Protocol was the conferral on the human rights and equality chapter of BA of a legal status which it did not previously enjoy.

The BA contained no mechanisms for dispute settlement or enforcement. This *lacuna* was substantially filled by new domestic legislation, above all the Northern Ireland Act 1998, the Human Rights Act 1998 and the Fair Employment and Treatment (NI) Order 1998. These measures were not, however, comprehensive, with the result that certain rights specified in the human rights and equality chapter were not legally enforceable and depended for their enforceability on human trust and political goodwill.

Chronologically, the next significant milestone was marked by the Brexit arrangements and, specifically, Article 2 of the Ireland/NI Protocol. Once again one finds a declaration, in this instance an undertaking by the UK government to "… ensure that no diminution of rights, safeguards and equality of opportunity as set out" in the human rights and equality chapter of the 1998 Agreement would result from the UK exit from the EU. Article 2 has several striking features: the mechanism was

7 *Donoghue v Stevenson* [1932] AC 562.

8 *XY v Facebook Ireland* [2012] NIQB 96, para [13]

9 The comments in question were published in *The Irish News* (date not available).

10 *Donoghue v Stevenson* [1932] AC 562; *Herrington v British Railways Board* [1972] AC 877; and *Re The Conjoined Twins* [2001] 2 WLR 480.

11 [2004] UKHL 17.

12 [2020] UKSC 23.

13 [2024] NI 59.

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one of preserving the *substance* of the specified rights (underpinned by EU law) rather than the underlying EU measures; Article 2 stands out in the Protocol as a device imposing obligations of result rather than of conduct; and it obliges the UK to safeguard the rights in question, albeit within the tolerance of the narrow discretion.

The human rights and social equality ("RSE") chapter of the BA forms an unmistakably significant part of the genealogy of the WF and its outworkings. The Protocol was an integral element of a suite of UK EU withdrawal arrangements partaking of both international law and domestic NI law. In this way the human rights and equality chapter of BA, in contrast with its earlier status, is now subsumed within domestic NI law.

Thus, in the manner outlined, the legal status of the human rights and equality chapter of BA was reshaped dramatically.[14] The chapter itself has not been altered by either the Protocol or the Windsor Framework (WF). Article 2 of the former has simply become Article 2 of the latter.

Article 2 (1) of the Windsor Framework is a UK Government commitment that no diminution of rights, safeguards or equality of opportunity, as set out in the relevant part of the BA, will result from the UK's withdrawal from the European Union. The text is as follows:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

Judicial responses

Enter the courts. It was inevitable that, sooner or later, the senior courts of NI would have to adjudicate on aspects of the Brexit withdrawal arrangements. Unprecedented issues of acute legal and constitutional complexity have had to be judicially resolved, as evidenced most clearly by *Re Allister and Others' Applications for Judicial Review*.[15] The dismissal by the High Court of this judicial review challenge was affirmed by both the Northern Ireland Court of Appeal ("NICA") and the United Kingdom Supreme Court.[16]

More recently, in *Re Dillon and Others v SoS NI*[17] the target of the challenge was the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the '2003 Act'), which enshrines the controversial arrangements devised by the Westminster Government for dealing with the legacy of the NI Troubles. The claimants were family members of people who had lost their lives. Each was recognised as being directly affected by the extinguishment of inquests and civil actions, together with the potential grant of immunity from prosecution to the perpetrators of killings.

At first instance, in the High Court, Colton J rehearsed the claimants' arguments based on the Windsor Framework,[18] having found that certain provisions of the new statute contravene Articles 2, 3 and 6 ECHR. Article 4(1) of WA was of pivotal importance in this context, providing that those provisions of EU law "made applicable by this Agreement" –

> … shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States …
>
> Legal or natural persons shall in particular be able to rely directly on [those] which meet the conditions for direct effect under Union law ….. [these provisions] shall be interpreted and applied in accordance with the methods and general principles of Union law …. [and] …. in their implementation and application be interpreted in conformity with the relevant case law of the [CJEU] handed down before the end of the transition period."

The obligation assumed by the UK government under Article 4(2) WA was discharged by inserting a new section 7A to the EUWA 2018.[19] Drawing on *Allister*[20] the judge held that any provision of the 2023 Act in breach of the WF must be disapplied.[21] Next, having drawn on the Victims Directive (VD), the judge made the specific conclusion that Articles 11 and 16 thereof were engaged and that the "civil rights" protected by Article 2 WF *included* the right of access to a court_*and* the right to dignity.[22]

Colton J next concluded that via a combination of Article 82(2)(b) TFEU, Article 13(2) WF and Articles 2, 4 and 47 of The Charter of Fundamental Rights of the European Union (CFR) relevant provisions of EU law – specifically the Victims Directive and the CFR – had direct effect in NI before the end of the transition period.[23] Specifically, the rights in play were Articles 1, 2, 4 and 47 CFR and Articles 2, 3, 6 and 14, Victims Directive.[24]

14 Subject of course to further judicial interpretation and determination.
15 [2022] NICA 15.
16 [2023] UKSC 5.
17 [2024] NICA 59.
18 At [518]-[625].
19 Via the European Union (Withdrawal) Act 2020.
20 [2023] 2 WLR 457, paras [66] – [68].
21 At [527].
22 At [561].
23 At [562]-[565].
24 At [570].

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The judge's further conclusion, namely that NI law giving effect to relevant BA rights was "underpinned by" EU law prior to 31 December 2020 followed naturally.[25] The judge based this conclusion on a series of provisions of the Victims Directive and Articles 1, 2, 4 and 47 CFR.[26]

The further conclusion, namely that of a diminution in the claimant's rights under Articles 2, 4 and 47 CFR, also followed logically, given the court's preceding analysis of breach of ECHR rights (Articles 2, 3 and 6). The final issue addressed was that of any diminution of the rights in Article 1 CFR and Article 11 VD. The court pronounced itself "… unable to find a substantive breach of Article 1 CFR as a standalone right in the 2023 Act".[27] This conclusion was driven by "… the absence of a universally accepted legal definition of human dignity and a clear, exacting standard of how the right may be applied in this context …". The court, however, concluded that Article 11 VD was violated by the extinguishment of the possibility of prosecution effected by the 2023 Act.[28]

The overarching conclusion of the court on the WF challenge was that sections 8, 19, 20, 21, 22, 39, 41 and 42(1) of the 2023 Act must be disapplied as they result in a diminution in certain of the rights specified in the equality and human rights chapter of the BA.

Dillon, inevitably, made its way to the NICA. The outcome was as follows:

(a) Article 2(1) Windsor Framework has direct effect. Although it was unfortunate that article 2(1)'s direct effect was not raised at first instance, this was not fatal to the trial judge's ensuing analysis.

(b) Article 11 of the Victims' Directive affords victims of crime the right to request a review of a decision not to prosecute. That is a clear, precise and unconditional minimum standard set by the EU. Insofar as necessary, article 11 is found to be directly effective.

(c) The stripping away of the criminal process necessarily offends article 11 of the Victims' Directive. There has been a diminution of that right following the test set out in *Re SPUC*.[29]

(d) In agreement with the trial judge we find that the correct remedy shall be disapplication in relation to the conditional immunity provisions as these are covered by the Victims' Directive.

NICA further decided:

(i) The five-year time limit on requesting reviews cannot at present be said to violate Convention rights.

(ii) While the ICRIR's determination to conduct its affairs in a Conventioncompliant manner was not doubted, the 2023 Act violates Art 2 ECHR by reason of insufficient effective next of kin participation, and the role of SOSNI in relation to disclosure in cases where, previously, an inquest would have been required to discharge the state's Art 2 ECHR obligations.

(iii) The restriction on civil actions breaches Arts 2 and 6 ECHR.

NICA's conclusions on the Rights, Safeguards and Equality of Opportunity (RSE) chapter of BA/GFA are of particular interest in the present context. The Court considered it clear that the commitment to rights and safeguards encompassed within this chapter was intended to extend much further than those rights specifically listed in para 1 thereof. The RSE chapter established a broad suite of rights which had been recognised by the participants in the pre-BA settlement negotiations which were to be given further effect in the mechanisms to be established pursuant to the BA, such as the incorporation into Northern Ireland law of the ECHR. This suite of rights would provide a baseline for individual rights protection in the new arrangements for the governance of Northern Ireland to follow. These arrangements were to be founded on the protection of citizens' rights. The broad language of the RSE chapter was to be construed restrictively.[30]

In summary, the NICA affirmed the High Court's remedy of disapplication of specified provisions of the 2023 Act on the basis of Article 2 WF incompatibility, together with the declaration of incompatibility with ECHR rights in respect of specified provisions of the new statute;[31] and found further ECHR incompatibility defects in the new legislation.[32] The remedy of disapplication of certain provisions of primary legislation derives from the decision in *Factortame*,[33] where An Act of Parliament was disapplied by the courts for the first time in the UK's constitutional history.

Meaning of 'civil rights'

Specifically, NICA held that the sentence in which the concept of 'civil rights' is included should not be quietly brushed aside, as the Secretary of State had argued. This leads to the following question: what, exactly, does 'civil rights' encompass? And, more specifically, how does the right to human dignity, protected by Article 1 CFR,[34]

25 At [571]-[572].
26 At [573]-[582].
27 At [602].
28 At [603]-[610].
29 [2023] NICA 35.
30 See [2024] NICA 59, [310]-[312].
31 See [161]-[162].
32 There is pending an application to the UKSC for leave to appeal, which was refused by NICA. All issues, with the exception of Colton J's human rights findings, are open in the grounds of appeal. Expedition has been requested.
33 *R v SOS for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.
34 Para [28] infra

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emerge from the judgment of the NICA?

At first instance, in the High Court, there had been some significant debate as to the meaning of "civil rights". It is here that one finds the genesis of the human dignity debate in this litigation. The Equality Commission for Northern Ireland (ECNI) in particular sought to interpret "civil rights" through the lens of "dignity", suggesting that the term "civil rights" should be interpreted taking into account the aims and purposes of both Article 2 WF and the rights provisions of the GFA. In the case of the Protocol, the context was all-important. And what is the core of this European human rights and equality mainstream?

ECNI argued that the CFR and the ECHR provide the answer, as central to both is the concept of dignity. Human Dignity belongs to the DNA of the ECHR. In *Pretty v UK*,[35] the European Court of Human Rights (ECtHR) stated "The very essence of the Convention is respect for human dignity and human freedom." The CFR Explanations attached to Article 1 were also invoked.[36]

> The dignity of the human person is not only a fundamental right in itself, but constitutes the real basis of fundamental rights. (…) [T]he dignity of the human person is part of the substance of the rights laid down in this Charter.

Human dignity provided the basis for the American civil rights movement which, in turn, had animated claims for 'civil rights' in Northern Ireland. In both these contexts, dignity provided the unifying principle because it appealed to the inherent value of the human person – a universal principle. The roots of the BA equality and human rights provisions and European human rights and equality law (both ECHR and CJEU) are the same: human dignity. Fundamentally, it was contended that what "civil rights" encompassed should be understood through the lens of dignity.

Some reflection on this line of argument, at one and the same time skillful and intriguing, is appropriate. It leads to another point of reference, namely EU law and, further, draws attention to the continuing influence of EU law post-Brexit in NI. To the extent that EU law seeks to protect and promote human dignity it serves as an underpinning of the BA RSE chapter. Dignity provides the golden thread that seamlessly links together Article 2 WF, relevant measures of EU law, the HRA/ECHR rights and the BA RSE chapter. The further notable component of the ECNI argument was that Article 1 CFR establishes a stand-alone right that could be enforced through Article 2 of the Protocol/WF.[37]

The effect of this argument is to mould together into a single unit the material individual rights belonging to the four sources just noted, all of them (in the present context) derived from Art 2 WF, and to weld them together with a single link, namely human dignity.

Just how far did the ECNI argument travel in the *Dillon* judgments? Has a runaway human dignity train been unleashed? While judicial nervousness about the right to human dignity is detectable in certain cases,[38] the sober reality is that uncontrolled trains and bursting floodgates have been a rarity in the evolution of the common law. Warnings and expectations of this kind have seldom been fulfilled. The excellent judgment of Colton J is couched in orthodox and far from radical terms, while the judgment of the NICA on this issue is unlikely to be viewed by future generations as revolutionary, as appears from the following passage. NICA, having agreed with the High Court's treatment of CFR Article 1, made the following discrete conclusion:

> The trial judge rightly (and in our view correctly) [found] that the CFR right to human dignity contained within article 1 was too imprecise to be justiciable in its own right. We will not add to an already lengthy judgment by examining this question of the content of CFR rights any further … However, it is necessary to state our conclusion that to say that the CFR provides a freestanding justiciable right in this way goes too far. Rather, we adopt the position that the CFR acts as an aid to interpretation of relevant EU law provisions.[39]

It will predictably be highlighted in arguments advanced in future cases and academic commentaries alike that this passage is couched in conclusionary terms and, further, does not address the meaning of "civil rights" in Article 2 WF. It is a fact that there is in existence a cohort of pending cases,[40] one of which is the NIHRC challenge to the Illegal Immigration Act. Thus, the answer to my hypothetical "Quo vadis?" question will foreseeably, as so often, be provided incrementally on a case-by-case basis.

Conclusion

The right to human dignity is tantalisingly elusive, refreshingly undefined, potentially virile and incontestably responsive to changing societal conditions: just the recipe for development by judges in a common law jurisdiction, one might think. As a result of a carefully chosen intervention by ECNI in a landmark Northern Ireland case[41] and the ensuing skilful arguments of its counsel, a fundamental and universally recognised right

35 [2002] 35 EHRR1, at [35]

36 See para [30] infra

37 This para contains a summary of the submissions of Professor Christopher McCrudden, counsel for ECNI

38 For example, in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307, [177]-[179].

39 At [137].

40 There are some 22 cases in the NI court system (not including tribunal appeals) raising WF issues.

41 *Dillon*, supra note 17.

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of impeccable lineage and credentials has veritably been resurrected. There is surely ample scope for its development in both our local legal system and further afield. The Windsor Framework, faithful to the law of unintended consequences, might inadvertently have unleashed a slumbering human rights giant.

The following is particularly clear. Roman law, the UDHR, the CFR and other international instruments combine to imbue the right to human dignity with an unrivalled and unquestionable pedigree. A renewed recognition and exposition globally of this venerable right is overdue.

[The Rt Hon Lord Justice Bernard McCloskey PC is a Lord Justice of Appeal in the Court of Judicature of Northern Ireland, Chairman of the Northern Ireland Judicial Studies Board, and Chairman of the NILCJ Sentencing Advisory Group.]

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Genocide: Not a Word to be Bandied About Loosely

Michael J Beloff

Introduction

In a case[1] involving the threatened removal of gypsy caravans from a vacant site, the property of Manchester Corporation, a young Stephen Sedley, then junior barrister, later a senior Lord Justice of Appeal, raised three arguments, all of which were summarily dismissed by Lord Justice (later Lord) Diplock.

Of the latter two, he said:

> ''The first was that it was suggested that the Manchester Corporation were in breach of their duty under the Education Act, 1944, because to remove these families from the site would deprive the children of the opportunity to attend local schools—which it would appear on the evidence they do not attend anyway.
>
> For good measure he added the Genocide Act 1969. I will say no more about these defences than that they appear to be even more startling than the defence of necessity''

choosing not to dignify the genocide argument with any elaborate exegesis, indeed with any exegesis at all.

Genocide in law

The dictum itself, in the context which provoked it, is more apt for an anthology of legal anecdotes than for academic analysis; but the meaning of genocide has achieved significant salience in the debate over the legality of the actions of the Israeli Defence Force in Gaza in response to the Hamas incursion into Israel, the killing of more than 1,000 Israeli citizens, and the taking of several hundred hostages which took place on 7 October 2023.

On November 28 2024, a motion in the Oxford Union,[2] a prestigious debating society, the cradle of many prominent politicians, both from the United Kingdom and from countries in Asia[3] and the Caribbean,[4] including five British Prime Ministers,[5] that "This house believes Israel is an apartheid state responsible for genocide,'' was carried by 278 votes to 59.

It does not appear from the record of the debate that any attention was paid to the legal meaning of genocide as set out in the Genocide Convention in 1948, an instrument of international law which codified the crime for the first time and was transposed into domestic law by the Genocide Act 1969 and also by the International Criminal Court Act 2001

Under the Convention, genocide would mean any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group; or

(e) forcibly transferring children of the group to another group.

A prosecutor of the crime of genocide must therefore establish three things: (i) An act which falls within one or more of the categories set out, (ii) carried out against a protected group as such, and (iii) with the requisite intent.[6] Intent is a *sine qua non* – 'the heart of the definition.[7] War Crimes, which include violation of the laws and customs of war and crimes against humanity are treated separately both in statute[8] and in the commentary [9] In the hierarchy of international crime, genocide ranks

1 *Manchester Corporation v Connolly* [1970] 1 Ch 420 at p 470..

2 Which has just celebrated its bicentenary

3 Eg S.W.R.D Bandarainike, Lalith Athulathmudali, Lakshman Kadirgamar, Benazir Bhutto, Tyronne Fernando

4 Eg Eric Abrahams

5 Wiliam Gladstone, Lord Salisbury, Harold Macmillan, Edward Heath, Boris Johnson.

6 Zahar and Sluiter, *International Criminal Law*, p.173.

7 Shaw International Law, 9th ed, p 362-369, as vouchsafed for by inter alia, *Congo v Rwanda* ICJ Reps 2006 pp 31-32; *Application of the Geneva Convention* ICJ Reps 2007 pp 161-167.

8 Eg War Crimes Act 1991.

9 Eg Shaw op cit note 6, at p 369ff. Notably on 21 Nov 2024, the International Criminal Court (ICC), following a request made by ICC Prosecutor Karim Khan KC in May 2024, controversially issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and his former defence minister, Yoav Gallant, in respect of war crimes and crimes against humanity alleged to have been committed in Palestine in response to the Hamas attack. but not in respect of genocide.

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higher than war crimes; it is truly *sui generis*.[10]

It is a matter of historical record that as a deliberate policy during the second world war t the United Kingdom carried out area bombing, not merely to target military installations, but to undermine German morale; and, as a calculated result, huge numbers of civilians were killed in cities such as Berlin, Hamburg and Cologne. The most significant example was the bombing of Dresden in 1945 by which time the Allied victory was already inevitable. The policy caused concern in the United Kingdom even at the time.[11] Churchill himself wrote: "The destruction of Dresden remains a serious query against the conduct of allied bombing"[12]

There has never been any suggestion that the policy, whatever its wisdom or indeed (arguably) legality, amounted to genocide, and the United Kingdom subscribed to the 1948 Convention without qualms.

Israeli action in Gaza

The question of the classification of the Israeli action in Gaza prior to the ceasefire, (whatever views may be held as to its justifiability or lack of it), namely whether it reached the threshold of genocide excited a much publicised interchange last year between two groups, each containing lawyers of the highest distinction,[13] over whether an interim judgement of the International Court of Justice in a case brought by South Africa against Israel meant that the court had concluded that the claim that Israel was committing genocide in Gaza was "plausible" so that selling arms to Israel made the United Kingdom complicit in it.

This prompted Joan Donoghue, the President of the ICJ at the time of that ruling, in a highly unusual step – since judgments are expected to speak or themselves – publicly to disavow that interpretation. She said that the purpose of the ruling was to declare that Palestinians had "plausible rights to protection from genocide" without making any finding at that interim stage that those rights had been infringed

Conclusion

I would reject the suggestion of any equivalence between the setting up of concentration camps by Hitler's Nazi Germany and the actions of the Israel army in Gaza, not only because of the differences in scale in scale of the dead[14] but because, as I have sought to show, whether killings are genocide depends crucially on the motive behind the killing.[15]

The key question must always be whether the deaths, however numerous and regrettable, and even if arguably amounting to some form of war crime, are the by-product of an effort to *defeat* a perceived enemy (as was the area bombing policy in World War II) or are actually intended to *destroy* an ethnic or other protected group or a part thereof group. This is not a matter of mere semantics but of real significance. If the concept of genocide is in any way diluted and becomes merely a convenient shorthand political slogan, so too must be the special importance attached to the Holocaust itself which the International Community has endorsed by Resolution A/RES/60/7 adopted by the General Assembly of the United Nations on 1 November 2005 to establish 27 January as International Holocaust Remembrance Day.

No government , Israeli or other, can be immune from criticism, given the value freedom of expression as recognised in so many postwar instruments; but it is no proper exercise of that fundamental right to ignore or misrepresent the law on so sensitive an issue as the meaning of genocide.[16]

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10 Though the Genocide Convention was designed to ensure that acts akin to the Holocaust could "never again" occur, that hope was not fulfilled – see the recent television documentary, 'The Corridors of Power', instancing Rwanda Bosnia, Kurdistan and Darfur.

11 See eg in recent books on Churchill: N Rose, *Churchill An Unruly Life*, pp 274-275; J Havardi, *The Greatest Britain*, pp 249-250; R Blake and RW Louis (ed), *Churchill*, pp 367-368; R Jenkins, *Churchill*, pp778. See also Max Hastings, *Armageddon*, pp 350-353, 386-388.

12 Quoted in Jenkins ibid.

13 Baroness Hale on one side, Lord Dyson on the other.

14 In Gaza, measured in thousands out of a total population of 2.2 million; in Nazi-occupied Europe, measured as 6 million Jews – a third of the entire Jewish population.

15 The Amnesty International Report of 5 Dec 2024 did assert that "Israel has carried out acts prohibited under the Genocide Convention, with the specific intent to destroy Palestinians in Gaza". This bypassed, as a matter of law, the significance of the words in the definition "as such" and, as a matter of fact whether Israel's specific – and proclaimed – intent was not rather to destroy Hamas, the perpetrator of the events of 7 Oct 2023. The issue of whether the Hamas Covenant of 1988, modified in 2017 (Hamas Charter), shows Hamas itself to be a body with genocidal intent against Jews is beyond the scope of this article.

16 This Article has its origins in a talk that the author gave on Holocaust Memorial Day 2025 at the invitation of the Warden of New College, Oxford.

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Pre- and Post-Nuptial Agreements, Vitiating Factors, and the Role of a Trial Judge

James Edelman

Introduction

This article concerns the role and status of the nuptial agreement in Australian law and the way that it is treated in the courts. I will describe the agreements by the historic label "nuptial agreement" rather than the contemporary label of "financial agreement" used in the Family Law Act 1975 (Cth) because my coverage is not limited to financial matters. The purpose of this article is to show how the historical context of these agreements and their treatment in the courts illuminates the way that they are understood today.

This paper is not concerned with the underlying policy concerning nuptial agreements. There has long been debate about this. On one view, the regulation of marital obligations should be the exclusive role of the state with the consequences of the institution of marriage a matter for the State, once that institution is chosen by individuals. This view underpinned the approach taken to prenuptial agreements by Lady Hale of the Supreme Court of the United Kingdom in *Granatino v Radmacher*.[1] On another view, the intervention of the State in the regulation of private relationships is an inappropriate intrusion into domestic life. Cass Sunstein and Richard Thaler have thus advocated for the "privatisation" of marriage and the regulation of personal domestic relationships by the agreement of individuals.[2] On this view, marriage would exist only because of the nuptial agreement, and the obligations of marriage would only be enforceable through that agreement.

Succession (The television show, not the concept)

In season one of *Succession*, we are given brief insights into the fraught pre-nuptial negotiations between Shiv Roy, the daughter of media mogul Logan Roy, and her loyal fiancé, Tom Wambsgans. At one point, Tom queries the lack of what he describes as an "infidelity clause" in the pre-nuptial agreement. The two eventually agree, perhaps ambitiously, that infidelity is "not gonna happen". Tom's lawyer, who also happens to be his mother, says that the agreement is "a little unconscionable". Despite, or perhaps because of, his mother's advice on the potential application of equitable doctrine, Tom signs the agreement.

While the series' main focus is the future of the Roy media empire, some may have stayed as viewers of the series solely for the answer to the question: was the Roy-Wambsgans prenup valid? I will return to that question at the end of this paper.

History and Importance of Separation Agreements

Before the Reformation, marriage had quite different legal effects from today. Two historical features of the marital relationship are important for understanding the history and development of modern nuptial agreements. The first is the concept of coverture by which a husband and wife were said to become "one person in law".[3] The legal personhood of women was in part suspended during the marriage. This meant, at least in theory, that women lost the ability to own property, enter into contracts, or to bring a lawsuit.[4] The reality of coverture was different. Married women did many things characteristic of legal personhood: they bought and sold goods, ran businesses, possessed and controlled property as if it were theirs, and were the beneficiaries of trusts. Nevertheless, coverture imposed significant restraints. Coverture was only formally extinguished by the Married Women's Property Act 1870 (UK).

Another significant feature of marriage in the early 16th century was that divorce was virtually impossible without an annulment from the Pope.[5] The Ecclesiastical Court viewed marriage as a "contract of the highest possible religious obligation".[6] Even as late as 1820, when voluntary separation occurred more often, the Ecclesiastical Court referred to "separation as an illegal contract, implying a renunciation of stipulated duties".[7] Such agreements to separate were viewed as a dereliction of a contract

1 [2011] 1 AC 534.

2 Sunstein and Thaler, 'Privatizing Marriage' (2008) 91 *The Monist* 377.

3 Blackstone, *Commentaries on the Laws of England* (1765), Bk 1, Ch 15 at 430.

4 See Stretton and Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (2013) at 7-8.

5 Stone, *Road to Divorce: England 1530-1987* (1990) at 1.

6 *Hunt v Hunt* (1862) 4 De G F & J 221 at 226-228 [45 ER 1168 at 1171].

7 *Mortimer v Mortimer* (1820) 2 Hag Con 308 at 318 [161 ER 753 at 756].

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made "in sight of God".[8] But from the secularisation that followed the Reformation, ecclesiastical law also underwent a process of secularisation.[9] Legislative reforms subordinated the rulings of the ecclesiastical courts to common law and equity.[10] By the mid nineteenth century, the ecclesiastical jurisdiction over marriage was removed entirely.[11] These developments set the scene for the courts of common law and equity to assume oversight of marital relations.

Over the course of the eighteenth and nineteenth centuries, the courts of common law and equity slowly reflected society's greater tolerance for marital separation and private agreement. The courts of equity, particularly the Court of Chancery, recognised the enforceability of arrangements settling property on trust for the wife prior to marriage.[12] This also protected the property from the husband's creditors.[13] The courts of equity thus provided a forum for overcoming the rigidity of coverture by allowing a married woman to benefit from a trust. Trust powers could be included to allow a wife to devise property in a substantially similar manner as if she were the legal owner such as by appointing a person to receive trust property.[14]

The common law developed greater tolerance for marital separation and private agreement by gradually recognising the validity of "separation agreements" or "separation deeds". Separation agreements did not bring about the termination of the marriage. They were, instead, private agreements "to live separate and apart from each other".[15] Apart from that common feature, separation agreements took a variety of forms. In some cases, the agreement could be as simple as the husband promising not to disturb his wife or not to compel her to live with him.[16] In other cases they involved agreements about the wife's possession or use of property,[17] the husband's promise to pay maintenance of the wife or children either regularly or in lump sum,[18] or the custody of children.[19]

The most comprehensive judicial discussion of separation agreements is set out in *SZOXP v Minister for Immigration and Border Protection*.[20] As the Full Court of the Federal Court of Australia there explained, separation agreements began as a controversial practice which was gradually, and begrudgingly, accepted by the common law courts. One report of the 1758 case of *R v Mead* records that a husband and wife had entered into "articles of separation" by which the husband agreed "never to disturb her or any person with whom she should live".[21] The husband later attempted to enforce his wife's duty of cohabitation by issuing a writ of habeas corpus. But the Court held the husband to the agreement and denied him what was claimed to be his "marital right to seize her".[22]

Despite having developed techniques to soften the effects of coverture, progress in the courts of equity was much slower in the 19th century. This reflected the general stasis of equity in that period. The approach of the Court of Chancery to marriage is a good example of the caution that must be exercised when reading laudatory and misleading histories of equity as a species of conscience that forced the development of the regressive common law. In 1805, Lord Eldon denounced the refusal of habeas corpus in *R v Mead*, and expressed his dismay that such a ruling had "fall[en] from great men" because it "st[ood] upon no principle consistent with the law of the land".[23] Only in 1862 did Lord Westbury acknowledge that separation agreements had been recognised for "a very considerable period".[24]

In 1929, in *Hyman v Hyman*, Lord Atkin described the separation agreement as having a "chequered career at law" — enforced by the common law and eventually, but reluctantly, by equity.[25] Lord Atkin insisted that separation agreements were "to be enforced on precisely the same principles as any respectable commercial agreement".[26] That had been the widely accepted view since at least the middle of the nineteenth century, as confirmed by cases such as *Hunt v Hunt*.[27]

8 *Mortimer v Mortimer* (1820) 2 Hag Con 308 at 318 [161 ER 753 at 756].

9 See Dickey, *Family Law*, 6th ed (2014) at 3 [1.20]-5 [1.40]; see also *Mackonochie v Lord Penzance* (1881) 6 App Cas 424.

10 See discussion in *Hunt v Hunt* (1862) 4 De G F & J 221 at 227 [45 ER 1168 at 1171].

11 See discussion in *Clibbery v Allan* [2002] Fam 261 at 274 [29].

12 See, eg, agreement made before marriage in *Fletcher v Fletcher* (1788) 2 Cox 99 [30 ER 46].

13 Stretton and Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (2013) at 221; see also *SZOXP v Minister for Immigration and Border Protection* (2015) 231 FCR 1 at 10 [45].

14 See, eg, *Holiday v Overton* (1852) 14 Beav 467 [51 ER 366]; *Morris v Howes* (1845) 2 Holt Eq 299 [71 ER 885]; *Archer v Kelly* (1860) 1 DR & SM 300 [62 ER 394].

15 *Sullivan v Sullivan* (1824) 2 Addams 299 at 300 [162 ER 303 at 304].

16 *R v Mead* (1758) 1 Bur 542; *Davies v Davies* (1919) 26 CLR 348.

17 *Wilson v Wilson* (1848) 1 HLC 538 at 541-542 [9 ER 870 at 871-872].

18 *Fletcher v Fletcher* (1788) 2 Cox 99 at 100 [30 ER 46 at 46]; *Sullivan v Sullivan* (1824) 2 Addams 299 at 300 [162 ER 303 at 304]; *Crouch v Waller* (1859) 4 De G & J 301 [45 ER 117]; *Davies v Davies* (1919) 26 CLR 348.

19 *St John v St John* (1805) 11 Ves Jen 525 [32 ER 1192].

20 (2015) 231 FCR 1 at 10 [44]-[45].

21 *R v Mead* (1758) 1 Bur 542.

22 ibid.

23 *St. John v. St. John* supra note 19 at 529 [32 ER 1192 at 1194].

24 *Hunt v Hunt* (1862) 4 De G F & J 221 at 228 [45 ER 1168 at 1171].

25 *Hyman v Hyman* [1929] AC 601 at 625-626.

26 ibid.

27 *Hunt v Hunt* supra note 24 at 227 [45 ER 1168 at 1171].

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History and importance of maintenance legislation

A concurrent and parallel development with the law concerning separation agreements was the introduction of legislation conferring powers on courts to make orders for maintenance. "Maintenance" is a very broad term capable of embracing various forms of material provision to enable a person, including a child, to live properly, particularly in the event of marital separation or divorce.[28]

Prior to the introduction of "maintenance" by legislatures, the ecclesiastic, common law, and equitable jurisdictions provided only limited and flawed material provision for a wife. One highly flawed approach adopted by the Ecclesiastical Court, and later the courts of common law, involved an attempt to secure material provision for a wife by enforcing a duty of cohabitation. Thus a wife who, in the language of the common law, had been deserted by her husband could compel her husband to return — a remedy referred to as the restitution of conjugal rights.[29]

In England, in around the middle of the twentieth century, some judges also recognised a controversial doctrine that was described as a "deserted wife's equity". In the 1952 case of *Bendall v McWhirter*,[30] a husband had left his wife, telling her she could have the house and furniture. She later resisted an action by his trustee in bankruptcy to recover possession of the house. Denning LJ recognised that the wife had a right against her husband to stay in the matrimonial home, unless an order was made against her pursuant to legislation. Critically, that right was said to be binding on all successors in title, except a purchaser for value without notice. Denning LJ ruled that "[a] wife is no longer her husband's chattel" and was to be regarded "as a partner in all affairs which are their common concern", and thus had "as much right as he to stay there even though the house does stand in his name".[31] The basis for this "right", described by Denning LJ as a "licence", was an "irrevocable authority which the husband is presumed in law to have conferred on her".[32]

The so-called "deserted wife's equity" was short-lived. Its core component — the fact that it was enforceable against third parties — was rejected in *National Provincial Bank Ltd v Ainsworth*.[33] In that case, the House of Lords unanimously held that the rights of a deserted wife were of their nature personal rights, and could not be treated as a "clog" on property or as running with land, such that they could be enforced against third parties.[34] Lord Wilberforce observed that "the doctrine of the 'deserted wife's equity' has been evolved by the courts ... in an attempt to mitigate some effects of the housing shortage which has persisted since" the Second World War.[35] Australia largely avoided this discussion, as courts generally refused to recognise rights of a deserted wife against third parties.[36]

The limited and flawed avenues through common law and equity to provide maintenance demonstrates the significance of legislative intervention in this area. The progress came in the 19th century from legislatures which required forms of maintenance that allowed women to live more independently. The nineteenth century maintenance legislation had its roots in the so-called "poor laws" of the Elizabethan era.[37] Drawing from this legislation, maintenance laws which were more specifically aimed at spouses were introduced in the United Kingdom in 1857, along with the creation of a new and specialised Court for Divorce and Matrimonial Causes.[38] In Australia, early colonial statutes providing for maintenance of "deserted wives and children" were enacted in Tasmania in 1837,[39] and in New South Wales in 1840.[40] The focus of these early laws was the maintenance of financially dependent women and children who had been, in the language of the legislation, "deserted" by the husband.

The scope of legislative interventions to provide for maintenance raised important questions: to what extent can spouses independently decide how to materially provide for one another after separation? And once the legislature had intervened, what room remained for separation agreements?

The answer is complex. As I explained earlier, separation agreements were flexible and there was no requirement that they even provide for maintenance. Their essence was an agreement to live "separately and apart". There was, accordingly, no *inherent* contradiction between a separation agreement and the provision of maintenance by legislation. But conflict often did arise where separation agreements contained clauses which covered the same subject matter as maintenance legislation. This

28 See discussion in Dickey, *Family Law*, 6th ed (2014) at Ch 27.

29 See, eg, *Hope v Hope* (1858) 1 SW & TR 94 [164 ER 644] in which a wife brought suit for restitution of conjugal rights "from absolute necessity, with a view to obtain a maintenance from her husband".

30 [1952] 2 QB 466.

31 *Bendall v McWhirter* [1952] 2 QB 466 at 475.

32 ibid at 477.

33 [1965] AC 1175.

34 *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1177.

35 ibid at 1241.

36 See *Brennan v Thomas* [1953] VLR 111; *Maio v Piro* [1956] SASR 233; *Dickson v McWhinnie* [1958] SR (NSW) 179.

37 See *An Act for the Relief of the Poore & Impotent 1572* (14 Eliz c 4, 5); *An Act for the setting of the Poore on Worke 1576* (18 Eliz c 2, 3); *The Poor Relief Act 1601* (43 Eliz c 2).

38 *Matrimonial Causes Act 1857* (UK); see also *Granatino v Radmacher* supra note 1 at 545 [17].

39 *Maintenance Act 1837* (Tas).

40 *Deserted Wives and Children Act 1840* (NSW).

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development is critical to understanding the history of nuptial agreements because the interventions of legislatures, and the principles of family and child welfare embedded in those interventions, shaped how the general law could treat private agreements that otherwise purported to divide property.

In 1929, the issue arose in the House of Lords in *Hyman v Hyman*.[41] That case dealt with statutory provisions which were effectively re-enactments of the original 1857 maintenance legislation, and which empowered a court to order a husband to "secure to the wife such gross sum of money" as it "deem[ed] to be reasonable".[42] *Hyman v Hyman* involved a shift from treating a separation agreement as a *contract* to treating it as a *relevant fact* in the discharge of a statutory maintenance power. As Lord Hailsham said:[43]

> In my opinion, the fact that the deed of separation has been entered into by both parties, the fact that it was executed by the wife voluntarily and upon independent legal advice, the fact that the wife was prepared to accept the provision then made as adequate at the time ... all form part of that conduct of the parties which by the express terms of the statute is to be taken into account by the Court in determining what it thinks reasonable.

The holding in *Hyman v Hyman* was that a "wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction".[44] In 1969, the High Court of Australia approved *Hyman v Hyman* in *Brooks v Burns Philp Trustee Co Ltd*.[45] The High Court found by majority that a covenant by a wife to her husband that purported to oust the jurisdiction of the Court to award more than the amount agreed by way of settlement was void as against public policy. Although Menzies J and Windeyer J dissented on the construction of the deed in question, it was accepted that a promise by a wife not to invoke the jurisdiction of the courts was either void or otherwise could not be enforced.[46] But despite some differences in reasoning, most members of the Court also appeared to accept that a separation agreement could be given some degree of evidentiary weight in the determination of an application for spousal maintenance.[47]

Maintenance laws were modernised in the United Kingdom in the 1960s and 1970s in parallel with the shift towards no fault divorce. Courts were granted broad powers to order a spouse — that is, not just a husband — to make payments to the other spouse, or for the benefit of children, among other things.[48] At around the same time, in Australia, the Commonwealth Parliament was in the process of assuming control over, and consolidating, the law of spousal maintenance in Australia. This was achieved in part by the Matrimonial Causes Act 1959 (Cth) and, eventually, by the Family Law Act, after which spousal maintenance became almost exclusively a matter of Commonwealth law. An important part of these reforms was the conferral of power on courts to approve separation agreements in lieu of an order for maintenance.

The takeaway from this history is that separation agreements have had a complex life in the eyes of the law and that their role and influence have been shaped in significant part by statutory developments. Though they were initially treated just like any other contract, the overlay of spousal maintenance legislation largely relegated separation agreements to one of potentially many factual circumstances which informed the exercise of the court's discretion. The weight to be attributed to a separation agreement depended on a range of factors, such as the conduct of the parties, the presence of exploitation, and the availability and quality of legal advice, among other things.[49] The facts and circumstances were crucial. That core element has remained the essence of the informing interpretive principle.

Recognition of pre-nuptial agreements in the United Kingdom and Australia

The history discussed so far is that of *post*-nuptial separation agreements. The idea of a *pre*-nuptial agreement was, until relatively recently, far more controversial. In England, until very recently, agreements providing for the division of property in the event of a future separation of a married couple were considered void as contrary to public policy.[50] They could only be given evidentiary weight in subsequent proceedings for divorce or for the determination of ancillary relief, but even then were given little weight.[51] The same was true of Australian law.[52] More recently, however, both English and Australian law have recognised pre-nuptial agreements, albeit in different ways.

In England, the greater recognition of pre-nuptial

41 [1929] AC 601.

42 *Supreme Court of Judicature (Consolidation) Act 1925* (UK), s 190; see *Hyman v Hyman* [1929] AC 601 at 607.

43 *Hyman v Hyman* supra note 25 at 608-609.

44 ibid at 614. See also at 629.

45 (1969) 121 CLR 432.

46 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 445-446, 459.

47 ibid at 441-442, 446, 460, 479.

48 See *Granatino v Radmacher* supra note 1 at [19]-[20].

49 See, eg, *Edgar v Edgar* [1980] 1 WLR 1410 at 1417, discussed in *Granatino v Radmacher* [2011] 1 AC 534 at 551 [37].

50 See Dickey, *Family Law*, 6th ed (2014) at 685.

51 See discussion in *Granatino v Radmacher* supra note 1 at 553-555.

52 See *Wallace v Stelzer* [2013] FamCAFC 199 at [22], citing *Fender v St John-Mildmay* [1938] AC 1 at 44. See also Fehlberg and Smyth, "Pre-nuptial agreements for Australia: why not?" (2000) 14 *Australian Journal of Family Law* 80 at 82-83.

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agreements came with the famous 2010 case of *Granatino v Radmacher*.[53] In that case, a French investment banker and his German partner decided to marry. At the time, the investment banker was earning around £120,000 a year at JP Morgan, and his German partner was from an extremely wealthy family from which she derived "substantial unearned income".[54] At the insistence of her father, and upon the threat that she would not receive any further family assets if she failed to do so, the couple were encouraged to enter into a pre-nuptial agreement. By that agreement, the two agreed to renounce any interest in the property of the other during the marriage or in the event of its termination. The agreement was prepared by a notary in Germany, and the husband did not obtain independent legal advice before signing it.

The husband later became disillusioned with investment banking. A few years into the marriage, following the birth of their two daughters, he abandoned his banking career and pursued doctoral studies at Oxford in biotechnology.[55] When the couple divorced a few years later, the husband sought ancillary relief in the courts. At first instance, the judge considered that the pre-nuptial agreement was very one-sided, and awarded the husband almost £5 million in lump sum payments. But a majority of the Supreme Court of the United Kingdom held the husband to the agreement, subject only to an order that the wife make provision for the needs of the children while they resided with him. The majority considered the old rule, by which pre-nuptial agreements were considered void as against public policy, was "obsolete".[56] While the Court would retain final say over any grant of ancillary relief, the effect of the decision was to significantly restrain the role of courts in second-guessing pre-nuptial agreements.

The majority of the Supreme Court ruled that a pre-nuptial agreement may carry decisive weight where the parties enter into it of their own free will, free of undue influence or pressure, and fully informed of its implications.[57] This was unless, in all the circumstances, it was found to be unfair to hold the parties to the agreement. The Court considered that the differential treatment between pre- and post-nuptial agreements, by which the latter were far more readily accepted, was no longer tenable. The majority reasoned that it should make no difference to the legal status of, or weight to be given to, an agreement whether it is entered into a day before, or a day after, the marriage.[58]

Lady Hale, at the time the only woman on the Supreme Court of the United Kingdom, delivered a strong dissent. For Lady Hale, the question of the enforceability or weight to be attached to pre-nuptial agreements raised "profound questions about the nature of marriage in the modern law". It required the law to identify the "irreducible minimum" of the marriage relationship from which individual couples were not free to depart by agreement. That minimum was, in Lady Hale's view, the mutual duty of support for one another and children. The differing roles in a marriage — which often split along gendered lines — ought to be afforded equal esteem.[59] Her Ladyship made no secret of the role of gender, stating that "there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman".[60] If the legal treatment of pre-nuptial agreements were to change, she said, this ought to be done through the democratic process.[61]

Legislative reform in Australia

By the time Lady Hale criticised her colleagues for judicial overreach in rewriting the laws of nuptial agreements, Australia had already taken her proposed pathway through the introduction of legislation. Throughout the 1980s and 1990s, there were various calls to make pre-nuptial agreements legally binding, including by the Australian Law Reform Commission and a parliamentary committee.[62]

These recommendations were generally said to be informed by notions of freedom of contract, equality, and the importance of finality and certainty in marital relations.[63] Whether the recognition of pre-nuptial agreements achieves these ends, particularly that of equality, is a matter of ongoing debate. Research conducted in the United States suggests that there is often a significant imbalance in the bargaining power of parties to pre-nuptial agreements, and that husbands who are parties to these agreements often have significantly more wealth than wives.[64] Other research conducted in Australia suggests that pre-nuptial agreements find favour with those who seek to protect their own or their family's wealth, as well as those who are entering a second or later marriage and who may want to protect their assets for the benefit of their children.[65]

53 [2011] 1 AC 534.

54 *Granatino v Radmacher* supra note 1 at 544 [13].

55 ibid at 568 [93].

56 ibid at 558 [52].

57 ibid at 561-562 [68].

58 ibid at 559 [57].

59 ibid at 575-576 [132].

60 ibid at 577 [137].

61 ibid at 576-577 [134]-[135].

62 Australian Law Reform Commission, *Matrimonial Property Report* (1987); Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975* (Cth), *The Family Law Act 1975 Aspects of its Operation and Interpretation* (1992).

63 Sarmas and Fehlberg, 'Equity, the Free Market and Financial Agreements in Family Law: *Thorne v Kennedy*' (2019) 8 *Family Law Review* 16 at 28-29:

64 Leeson et al, 'Prenups' (2016) 45(2) *Journal of Legal Studies* 367.

65 Kaye et al, 'Prenuptial agreements – What's happening?' (2023) 36 *Australian Journal of Family Law* 38 at 47.

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In any case, calls for reforms culminated in amendments to the Family Law Act in 2000[66] which recognised the validity of nuptial financial agreements subject to conditions.[67] As the Commonwealth Attorney-General said at the time, the reforms were intended to give married couples autonomy over their affairs in the event of a marital breakdown.[68]

The centrepiece of these reforms was the introduction and recognition of "financial agreements" under what is now Part VIIIA of the Family Law Act. Financial agreements are broadly defined as agreements made before, during, or after marriage, which stipulate how property or financial resources of either or both parties are to be dealt with in the event of separation. A financial agreement may also deal with the maintenance of either party during or after marriage, and any "other matters".[69]

One key provision of Part VIIIA, s 90G, provides that a financial agreement is binding on the parties to it, provided five conditions are met. Those conditions are as follows: (1) the agreement is signed by all parties; (2) each party has received independent legal advice; (3) each parties' solicitor has provided a signed statement stating that the advice was provided; (4) a copy of that statement is exchanged between the parties; and (5) the agreement has not otherwise been terminated or set aside by a court.[70] In the event that the parties fail to satisfy any of the requirements relating to the provision of legal advice, a court may still order that the agreement is binding if satisfied that it would be unjust and inequitable not to hold the spouse parties to the agreement.[71]

However, there remain a broad range of circumstances in which a court may set aside a financial agreement, or otherwise render it unenforceable. These include instances of fraud, the impracticability of carrying out the agreement, material changes of circumstances leading to hardship to a spouse party, among others. And the Family Law Act preserves the jurisdiction of common law and equity to invalidate, refuse to enforce, or render ineffective, the financial agreement.[72]

The provisions of Part VIIIA of the Family Law Act significantly changed the legal treatment of nuptial agreements. Under the general *Hyman v Hyman* approach, it was the courts that retained ultimate say over the division of property in the exercise of their statutory powers and nuptial agreements had a largely evidentiary role which, in the case of pre-nuptial agreements, had historically been given very little weight. But the financial agreements scheme in the *Family Law Act* means that such agreements are legally binding in their own right, provided the relevant statutory criteria are met. The focus of the inquiry thus changes: where disputes arise, the focus is not so much on the weight to be attributed to the agreement, but rather whether the agreement can be set aside.

Avoiding agreements in common law and equity

As alluded to above, Part VIIIA of the Family Law Act provides a number of statutory bases upon which a financial agreement may be set aside. It also preserves the operation of common law and equitable doctrines. Section 90KA provides, in effect, that the question of whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in the law of contracts. Two important equitable grounds, which were considered by the High Court of Australia in 2017, are undue influence and unconscionability. I will focus on those two grounds and the case which considered them solely as an illustration of how financial agreements might be set aside.

Undue influence

Perhaps the most important thing to understand about the doctrine of undue influence is that it is not concerned with wrongdoing. It is a doctrine that focuses upon the state of the plaintiff's mind, involving a serious vitiation of the ability to make decisions, rather than upon whether the defendant has acted in any way wrongfully. An example is the classic case of *Allcard v Skinner*[73] in which a novice nun donated all of her belongings to the sisterhood. There was no suggestion that the Mother Superior had acted, in any way, wrongfully. Another illustration is the case of *Bridgeman v Green*.[74] In that case, Bridgeman, as a result of the undue influence of his butler, made gifts to people including the butler, the butler's brother, and the butler's wife. There was no suggestion that the butler's wife or brother, who were defendants to Mr Bridgeman's action for restitution of the gifts, had any undue influence over Mr Bridgeman. But they could not retain the gifts.[75] Putting to one side issues concerning the presumptions in this area, with its focus on the mind of the plaintiff, undue influence essentially requires the proof of only two things. First, that the plaintiff was under excessive influence in the sense that the plaintiff's will is subordinated to that of another person. Secondly, that the subordination caused or contributed to the transaction about which the plaintiff complains.

As to the first element, the excessive influence that

66 Family Law Amendment Act 2000 (Cth).

67 See Sifris et al, *Family Law in Australia* (10th ed, 2021) at [16.8].

68 Australia, House of Representatives (Hansard), 22 Sep 1999 at 10151.

69 Family Law Act 1975 (Cth), ss 90B-90D.

70 ibid s 90G(1).

71 ibid s 90G(1A)(c).

72 ibid s 90KA.

73 (1887) 36 Ch D 145.

74 (1757) Wilm 58 [97 ER 22].

75 (1757) Wilm 58 at 65 [97 ER 22 at 25].

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involves subordination of the will in relation to a particular transaction may be inferred from the history of a relationship with a track record of excessive influence. An example of proof of undue influence by the history of a particular relationship is the decision of the English Court of Appeal in *Bank of Credit and Commerce International v Aboody*.[76] In that case the question was whether a guarantee could be enforced by the bank against Mrs Aboody who had, upon request by her husband who was acting as the agent of the bank, guaranteed Mr Aboody's debts. The English Court of Appeal found that the history of their relationship was such that Mrs Aboody had acted as "a mere channel through which the will of [Mr Aboody] operated".[77]

As to the second element required for proof of undue influence, that the excessive influence caused or contributed to the entry into the transaction, the phrase "caused or contributed to" is deliberately ambiguous because it avoids any expression of a view as to the required causal link for undue influence to be established. Let me give an example to illustrate the point. In *Bank of Credit and Commerce International v Aboody*, the English Court of Appeal held that Mrs Aboody was subject to the undue influence of her husband. However, the Court of Appeal held that the transaction would not be set aside for undue influence because, *but for* the undue influence, Mrs Aboody would have signed the guarantee anyway. In other words, the undue influence did not cause her entry into the guarantee even though it was a contributing factor to her decision.[78] By contrast, other English decisions have held that it is enough that the undue influence is a contributing factor to the decision to enter the transaction. It need not be a causal or "but for" reason. Australian law is not yet settled on the answer to this question. It was adverted to in the recent case of *Thorne v Kennedy*,[79] to which I will turn shortly, but not resolved.

Unconscionable conduct

Another example of when equity will set aside an agreement is the doctrine of unconscionable conduct. Where the doctrine of undue influence looks to the subordination of one person's decision-making capacity to another person's will, the equitable doctrine of unconscionable conduct looks to the conduct of the stronger party in attempting to retain the benefit of a dealing with a person under a special disability.[80]

The principles of unconscionable conduct were set out by the High Court in *Commercial Bank of Australia Ltd v Amadio*.[81] In that case, two elderly Italian migrants who had difficulties understanding written English were asked by their son to execute a mortgage over land they owned in favour of a bank, so that the son could secure an overdraft for his company. The couple executed the deed thinking that it was limited to a $50,000 cap and a six month duration. But what they did not know was that the deed also contained a guarantee securing all amounts owed by the company or which might become owed for an unlimited period. The bank manager was present when the deed was signed and was aware that the couple had been seriously misinformed as to the nature of their liabilities. The company later went into liquidation owing the bank $239,000, which the bank demanded the parents pay under the guarantee.

A majority of the High Court held that the instrument should be set aside on the basis of the bank's unconscionable conduct. Justice Deane, with whom Mason and Wilson **JJ** concurred, stated that an agreement may be set aside where (1) a party to a transaction is under a "special disability" in dealing with the other, such that there was no "reasonable degree of equality between them"; and (2) that the disability was sufficiently evident to the other party, such that it would be prima facie unfair or "unconscientious" that the other party procure or accept the weaker party's agreement.[82]

Thorne v Kennedy

The latest and most detailed consideration of undue influence and unconscionable conduct in relation to financial agreements in the High Court is the decision in 2017 in *Thorne v Kennedy*.[83] Ms Thorne, a pseudonym, was a 36-year-old divorcee from Eastern Europe who was living in the Middle East. She spoke Greek and only a little English. She had no substantial assets. She placed an advertisement on a website for prospective brides saying that she wished to marry and to have a good life.

Mr Kennedy, also a pseudonym, was a 67-year-old, wealthy property developer with assets of around $20 million. He met Ms Thorne online and travelled to the Middle East to meet her. He told her that if he liked her that he would marry her. He took her on an extended holiday around Europe and met her family. He bought her expensive jewellery. Ms Thorne had a strong desire to get married and to have a child with Mr Kennedy. But Mr Kennedy said that his money was for his children so if she married him then she would have to sign a paper. He did not say anything about what such a prenuptial agreement might include.

Mr Kennedy and Ms Thorne moved to Australia and lived in Mr Kennedy's expensive penthouse for seven

76 [1990] 1 QB 923.

77 *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 at 940.

78 ibid at 970-971.

79 (2017) 263 CLR 85.

80 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474.

81 (1983) 151 CLR 447.

82 *Commercial Bank of Australia v Amadio* supra note 80 at 474.

83 (2013) 263 CLR 85.

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months. They planned a wedding. Eleven days before the wedding, Mr Kennedy told Ms Thorne that he was taking her to a solicitor's office for the signing of an agreement. Ms Thorne asked Mr Kennedy whether he required her to sign the agreement. He replied that the wedding would not proceed unless she signed it. The next day, Mr Kennedy drove Ms Thorne to see an independent solicitor. The solicitor told Ms Thorne not to sign the agreement. The solicitor gave oral advice which Ms Thorne understood to mean that it was the worst agreement that the solicitor had ever seen.

Broadly speaking, the agreement contained provisions including a monthly allowance of $4,000 for Ms Thorne during the marriage. But if they separated during the first three years then that allowance would cease and Ms Thorne would be evicted from the penthouse where they lived and would get nothing. She would be unable to support herself. If they separated after 3 years, then she would get what her solicitor described as a "piteously small" amount. Ms Thorne ignored the solicitor's strong advice and signed the agreement. She also signed a substantially identical post-nuptial agreement but the trial and appeals were conducted on the basis that the same considerations applied to both.

At around 4 years after marriage, Mr Kennedy separated from Ms Thorne. Mr Kennedy died a few years later. Ms Thorne sought to rescind the pre-nuptial and post-nuptial agreements under the Family Law Act. Ms Thorne alleged that the pre-nuptial agreement should be avoided for (i) unconscionable conduct, (ii) duress, or (iii) undue influence. The primary judge held that the agreements should be set aside for duress or undue influence, treating the two vitiating factors as functionally identical under a heading "Matters of Duress or Undue Influence". The Full Court of the Family Court of Australia reversed this decision. The High Court reinstated it.[84] The High Court did not reach a conclusion on duress. The difficulty for the submissions concerning duress was that there had been very little argument about the correctness of a decision of the NSW Court of Appeal[85] that duress required threatened or actual unlawful conduct. There was no finding that anything that Mr Kennedy had done was unlawful.[86]

The joint judgment of five members of the Court held that what was required for undue influence was, in short, a sufficient absence of free will. In other words, the issue is whether a claimant was under such influence from another as to allow the other person substantially to make the claimant's choices.[87] The claimant need not have been reduced to the status of an automaton but there needs to have been a substantial degree of subordination of their own choices to those of the influencer. The joint judgment made a further point about how influence might arise and, in particular, how undue influence is not wholly independent of pressure.[88]

Ms Thorne's argument was that in the particular circumstances of the pre-nuptial agreement and with the pressure on her, it was open to the trial judge to conclude that she had been the subject of the undue influence of Mr Kennedy. The joint judgment accepted that argument. There were several key findings by the trial judge which assisted the conclusion that the finding made was one that was open. First, the only conversation in evidence between Ms Thorne and Mr Kennedy about the pre-nuptial agreement was that Ms Thorne had asked Mr Kennedy whether she would have to sign the agreement, to which he responded that she would have to, otherwise the wedding would be called off.[89] Secondly, Ms Thorne had no assets in Australia, she did not own the house in which she lived, she had no community in Australia and the trial judge found that Ms Thorne was reliant on Mr Kennedy for all things.[90] Thirdly, the trial judge also found that Ms Thorne did not even consider the consequences of the agreement, including the effect of it, if Mr Kennedy left her. She simply signed. She was told by her solicitor that it was the worst agreement that the solicitor had ever seen. But she paid no attention to that advice because, as the trial judge found, she did not exercise any real choice about whether or not to sign the agreement.[91]

As to unconscionable conduct, the joint judgment also concluded that the findings of fact by the primary judge had satisfied the requirements of the equitable doctrine of unconscionable conduct. Ms Thorne's vulnerability was her powerlessness in the circumstances. That vulnerability, as found by the trial judge, was known to Mr Kennedy and had been found to have been created by him, including with the urgency with which he had required the pre-nuptial agreement to be signed.[92] The gross inequality of the agreement involved a taking advantage by Mr Kennedy of Ms Thorne's special disadvantage.

The role of the trial judge

I now turn to the role of the trial judge, which is critical for an understanding of the operation of the principles in this area. Each of the vitiating factors I have just outlined depend heavily on findings of fact about circumstances and states of mind. The facts of undue influence cases, for example, are inescapably tied up in matters of human relationships, which are infinitely various and

84 *Thorne v Kennedy* (2017) 263 CLR 85 at 90-91.
85 *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 at 168 [66].
86 See *Thorne v Kennedy* supra note 84 at 97-99.
87 ibid at 99-102.
88 ibid at 99 [30].
89 ibid at [48].
90 ibid at [91].
91 ibid at [97].
92 ibid at 112 [65].

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are not amenable to the application of cold logic. That is essentially why the resolution of such cases depends upon, as Lord Scarman said in *National Westminster Bank v Morgan*,[93] a "meticulous examination of the facts" by the trial judge.

What this means is that, where a transaction appears suspicious, it can be very hard to predict in advance how the story will play out in a courtroom. Most importantly, as I will explain, when it does play out, the decision of the trial judge will be very difficult to overturn. The trial judge has the best vantage point from which to assess the dynamic of the relationship between the parties and to evaluate whether the will of one party was so subordinated to the other that undue influence was at play. The trial judge alone can observe the demeanour of the witnesses first-hand to judge their credibility and gain an impression of the nuances of the circumstances as between the parties, in a way that no appellate court could. This reality is often forgotten or ignored when critics assail the outcomes of undue influence cases.

The leading example is *Louth v Diprose*.[94] Mr Diprose had met Ms Louth in Tasmania in 1981. They became friends. Mr Diprose was infatuated with Ms Louth. He proposed marriage but was rejected. Ms Louth was in financial straits, so she moved to Adelaide to live with her sister and brother-in-law. Mr Diprose followed her there. Mr Diprose paid many of her bills and showered her with gifts. Ms Louth manipulated Mr Diprose by manufacturing what Deane J described as an atmosphere of crisis. She lied to Mr Diprose and said that she was going to be evicted. She also told Mr Diprose that she would commit suicide if she had to leave the home. So Mr Diprose, who had very little money of his own, spent $58,000 – which was a large part of his entire net worth – on buying a house in the name of Ms Louth. A few years later, he and Ms Louth fell out. Mr Diprose asked Ms Louth to transfer the house back to him. She refused. He claimed that she held the land on trust for him. The trial judge held that the transaction was so improvident from Mr Diprose's perspective that it was explicable only on the basis that he was so emotionally dependent upon Ms Louth that he was prepared entirely to disregard his own interests. His Honour decided the case as one involving unconscionable conduct but also said that it could equally be supported on the basis of undue influence. An appeal to the Full Court of the Supreme Court of South Australia and a further appeal to the High Court of Australia were dismissed.[95]

When I was a student at Oxford, this case was held up as an example of undue influence being taken too far. It was pointed out that Mr Louth was a solicitor. It was said that if lovesickness amounted to undue influence then transactions could be set aside as a consequence of many of the ordinary incidents of everyday life. The problem with this criticism is that it misunderstands the advantages and wide discretion of the trial judge. Putting to one side the fact that the focus of the argument and the decision of the High Court was upon the ground of unconscionable conduct, the High Court was right to assume that Mr Diprose would also have succeeded on the ground of undue influence. On this point, Deane J (with whom Mason CJ agreed) emphasised the great reluctance that appellate courts have before disturbing finding of facts made by a trial judge, particularly where that finding is based upon evidence that is given by the parties. This reluctance is given particular weight where ultimate appellate courts, such as the High Court, are asked to disturb concurrent findings of fact or evaluative inferences made by a trial judge and affirmed by an appellate court below.

Several reasons contribute to this reluctance. First, the trial judge has a feeling of the case, based upon hearing and seeing the witnesses, that cannot be replicated by reading a transcript. Secondly, the appellate court is almost never taken to the whole of the transcript. It will never see the entire picture of the case. Thirdly, an appeal is always heard over a much shorter period than a trial and usually involves a shorter period of reflection. Fourthly, to quote from a point made in *Louth v Diprose* by Deane J, reiterating a point his Honour made in an earlier case:[96]

> In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal.

Each of these reasons for appellate reluctance to overturn the exercise of a trial judge's evaluative judgement also explains why it is difficult to predict in advance whether a transaction which is not usual will be one which, when all the evidence is seen and heard, is found to be the product of undue influence.

The same is true of *Thorne v Kennedy*. You will recall, from my earlier summary, just how fact-dependent the ultimate finding of undue influence was. The presence of this sort of degree of evaluation emphasises the latitude that a trial judge has in making decisions in this area. As was observed in the joint judgment in the High

[93] [1985] AC 686 at 709.

[94] (1992) 175 CLR 621.

[95] *Louth v Diprose* (1992) 175 CLR 621 at 633.

[96] ibid at 634.

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Court, "[a]n assessment of the will-power of a person is not an exercise of mathematical precision".[97] The trial judge must assess, evaluate, and characterise all of the circumstances before reaching a conclusion as to the presence or absence of undue influence. The trial judge had done so, and with all the advantages of the trial, she had concluded that undue influence was present. Hence, it was held in the High Court that the Full Court of the Family Court were wrong to overturn that conclusion.[98]

Conclusions

In conclusion, it is necessary to return to the burning question of the validity of the Roy-Wambsgans prenup in the HBO series *Succession*. More specifically, if the prenup had been made in Australia, and in the (not unforeseeable) event that Shiv and Tom's marriage did not survive the constant corporate intrigue to which *Succession's* writers subject the Roy family, would the prenup be binding under the Family Law Act?

As a starting point, it might be assumed that the Roy family's high-flying lawyers would have ensured that the relevant formalities, such as those in s 90G of the Family Law Act, were met. In light of the comments by Tom's lawyer, his mother, concerning the unconscionable nature of the agreement, Tom might seek to have the agreement set aside on the basis of undue influence or unconscionable conduct. Tom might argue by analogy to *Louth v Diprose* that his devotion to Shiv was so strong that his will was subordinated to hers at the time of signing the prenup for the purposes of the equitable doctrine of undue influence or that he was suffering from a special disability for the purposes of the doctrine of unconscionable conduct. Or Tom might contend, by analogy to *Thorne v Kennedy*, that he had no choice in signing the agreement, as Shiv was unwilling to negotiate and that, by the time of the agreement, his livelihood and career had become so intertwined with the fortunes of the Roy family that he had no choice but to accept Shiv's terms.

Both of Tom's arguments might be thought to involve a difficult hurdle for Tom as a well-educated, well-connected businessman, presented as a conniving and manipulative man with good career prospects, even absent Logan Roy's patronage. Nevertheless, a diligent trial judge would have to carefully examine the evidence of the surrounding circumstances and carefully consider the oral testimony of Tom and Shiv explaining their conduct at the time of entering into the agreement. The trial judge would have to make findings of fact based on that evidence, including findings as to Tom's state of mind at the time of the signing of the agreement. What is the answer, then, to the question of whether the agreement would be valid?

The disappointing truth is that the answer would depend on the precise evidence led at trial and the findings of fact made by the trial judge.

[The Hon James Edelman is a Justice of the High Court of Australia. This article is based on the Peter Nygh Memorial Lecture delivered by him at the 20th National Family Law Conference held in Perth on 1 November 2024. The author wishes to thank Andrew Foster, Julian O'Donnell, and Jack Townsend for their assistance.]

97 *Thorne v Kennedy* supra note 84 at 111.

98 ibid at 112-113.

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Courts in a Constitutional Democracy

V Sudhish Pai

Introduction

Democracy essentially means the rule of the majority. As YV Chandrachud J observed in the 1975 *Prime Minister's Election* case,[1] "Forgetting mere words which Tennyson said: 'Like Nature, half reveal and half conceal the soul within', the substance of the matter (democracy) is the rule of the majority and the manner of ascertaining the will of the majority is through the process of elections." Constitutional democracy is one where the majority 'will' and rule is controlled and directed by constitutional principles or constitutionalism. While the consent of the governed is a basic value in a democracy, constitutional democracy cannot exist in any real sense without the rule of law. While rule of law has many different facets and meanings, one of its most essential elements is that every executive action, if it is to operate against or to the prejudice of any person, must have legislative backing-legislative authority to support it. But in countries like India with a written, justiciable constitution and a bill of rights, the legislature is also subordinate to constitutional rights, values and limitations. That is the concept of the absolute reign of law: the legislative power too is subject to constitutional limitations. Thus in India, there is not only the rule of law, but also the absolute reign of law.

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

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

Two strands

The democratic ideal involves two strands.[2] First, that the people entrust power to the government in accordance with the principles of majority rule. Second, that in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and between the State and individuals. Where tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a democracy to delegate the adjudicative function to an impartial and independent judiciary. Only a judiciary acting in accordance with principles of institutional integrity and aided by a free and courageous legal profession, practising and academic, can carry out this task, notably in the field of fundamental rights and freedoms. Only such a judiciary has constitutional and popular legitimacy. The judiciary owes allegiance to nothing but the constitutional duty of reaching through reasoned debate the best attainable solutions to problems in accordance with justice and law. This is its role in the democratic governance of countries. At the root of it is the struggle by fallible judges with imperfect insights for government under law and not under man.

Benjamin Cardozo, the American lawyer and jurist, so neatly and discerningly elucidated the essential judicial function and the judge's role in a constitutional democracy: "The great ideals of liberty and equality are preserved, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or unconscious influence, the presence of the restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. … we find its chief worth in making vocal and audible the ideals that might be otherwise silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."[3]

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1 *Indira Gandhi* v *Raj Narain*, AIR 1975 SC 2299 at para 675.

2 See, eg Lord Steyn, *Democracy through Law* (London: Routledge, 2018).

3 *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at p. …

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Democracy is essentially a balance between constitutional rights and public interests. It is for the courts to maintain this delicate balance. What prevails in a constitutional democracy is constitutional supremacy – all organs being controlled and regulated by the Constitution and functioning within the confines of their powers, with the judiciary constituted the arbiter. The guardianship of the judiciary in enforcing the constitution expands when there is constitutional division of powers not only between the three branches – executive, legislature and judiciary – but where the State itself is divided into two units, national and provincial, with a consequential distribution of powers between the two units, making the constitution a federal one. The special functions of a federal judiciary are: maintaining the supremacy of the constitution; determining controversies between parties to the federation; securing uniformity in the interpretation and application of the constitution's provisions as amongst the states.

As the umpire or arbiter in the federal system, the judiciary's function of acting as the guardian of the constitution is known as judicial review. The power of judicial review to maintain the supremacy of the constitution is vested generally in the highest federal court. As the final interpreter of the constitution, its interpretation is binding on all organs of the State. Constitutional supremacy is limited government under a fundamental law with the judiciary constituted as its monitor, defender and protector. As the Supreme Court of India has said, it is for the court to protect rights and liberties, to uphold constitutional values, and enforce constitutional limitations by acting as a sentinel on the *qui vive*. This is the judge's primary role: protecting the constitution and upholding the rule of law.

Judicial review

'Judicial review' is an adjunct of 'limited government'. If a constitution is to operate as a legal 'brake', there must be some agency to enforce it through the legal process. That is the judiciary. In India that power is specifically conferred by the Constitution: Arts 13, 32, 136, 226, and 227. There is also Articles 141 (which makes the law declared by the Supreme Court binding on all) and 144 (under which all authorities shall act in aid of the Supreme Court).

It may be said that the concept of limited government and judicial review constitute the essence of the Indian constitutional system and it involves three main elements: a written constitution setting up and limiting the various organs of government; the constitution functioning as a superior law or standard by which the conduct of all organs of government is to be judged; a mechanism by means of which any violation of the superior law by any of the organs of government may be prevented or restrained and, if necessary, annulled and punished. This mechanism, in the modern constitutional world, is 'judicial review' which means that a court of competent jurisdiction has the power to invalidate the act of any governmental agency, including the legislature, on the ground that it is repugnant to the Constitution.[4]

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

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

Challenges

In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State interests such as national security, environment and development, socio-economic rights of particularly the weaker sections of society and development of the whole and its parts, the letter and the spirit. "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and the

[4] See, eg Durga Das Basu, *Limited Government and Judicial Review* (Tagore Law Lectures, published by SC Sarkar & Sons, Calcutta, 1972).

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difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs."[5]

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

Despite the seemingly anti-majoritarian character of judicial review the court must exercise this power to protect individual rights not adequately represented in the political process; but the court should also decline to exercise judicial review in other areas to minimise the tension between judicial review and democracy and to conserve its resources for institutional prestige. Judges and lawyers are not free to legislate any moral theory.

In theory and in practice it is not easy to reconcile amicably judicial review with democratic governance. "The task of accommodating judicial review with democratic governance is inherently problematic … Within a system of free government the Court fulfils an important though limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excesses of majoritarian democracy. Judicial review becomes controversial only when the Court thwarts popular will or goes too far and too fast with its construction of the Constitution. Judicial aggression in constitutional politics is lamentable and objectionable. Yet far from being antithetical judicial review is essential to the promise and performance of free government."[6]

The power of judicial review extends over a broad range of public issues. The court touches many aspects of public life. But as has been said it would be intolerable for the court finally to govern all that it touches, for, that would turn us into a Platonic kingdom contrary to the morality of self-government. A simplistic and inaccurate enunciation of judicial review is that it is the power to construe and apply the constitution in matters of the greatest moment against the wishes of a legislative majority which is in turn helpless to affect the judicial decisions. There are issues of the utmost importance which the court may pick, define and decide in fulfilment of its role as the constitutional authority of last resort.

It is very often by judicial interpretation that you enliven and make purposeful the constitution or the law. The court's allegiance to the constitution ensures its own subordination. But creativity and allegiance are not necessarily antagonistic; they may with true discernment augment each other. Done wisely and with necessary circumspection, judicial law making within limits is both laudable and legitimate. The judicial response to different fact situations varies and it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the judges' value preferences respond to the multi-dimensional problems of the day. An awareness of history is an integral part of those preferences. Thus the evaluation of diverse, sometimes elusive factors, inevitably brings into the judicial verdict the judge's own values and preferences. The simple truth is that the jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind. But as Mathew, J pointed out they are not too elusive for judicial perception; great judges are those who are most capable of discerning which of the gradations make genuine difference.

It is important to bear in mind that unconstitutionality and not unwisdom is the narrow area of judicial review. For the removal of unwise laws appeal lies to the ballot box and the process of democratic government. Any doubt regarding the validity of a law must be resolved in favour of its constitutionality. The limited task of the court is to interpret the constitution as it is, not to venture starry-eyed proposals for reform. What the constitution should contain is not for the courts to decide: that is a question of high policy. The courts are concerned with the interpretation of laws, not with the wisdom of policy underlying them. A commitment to the legality of laws and their enforcement for public good is to be realised. The court must always be careful to maintain the right balance between the different wings of government. Mistrust of government is violative of comity between instrumentalities. Courts must be tempered by the thought that while compromise on principle is unprincipled, Administrative Law, as applied in modern complexities of government, must be realistic. There must be a sensible approximation, and there must be elasticity of judgment in response to the practical necessities of government which cannot foresee today the developments of tomorrow in their almost infinite variety.

One cannot forget or overlook the criticism that judicial activism will sometimes result in democratic debilitation. When a society leaves all or its important

[5] *Indira Gandhi* v *Raj Narain* supra note 1 (per KK Mathew J).

[6] O'Brien, David M. (1981) 'Judicial Review and Constitutional Politics: Theory and Practice', *University of Chicago Law Rev* Vol 48 No 4 1052 at 1093.

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

The power of judicial review is an integral part of the process of our constitutional government. The court has the duty of interpreting the constitution in many of its most important aspects, and especially in those which concern the relations of the individual and the State. The political idea and justification of the power is that there are some aspects and phases of national life which should be beyond the reach of any majority or the outcome of any election. They are permanent values which it is for the court to uphold and protect. Constitutional review by an independent judiciary does indeed, in a way, foster democracy. For, pluralism is the soul of democracy; judicial review as constitutionally envisaged facilitates the quest for an open society with widely dispersed powers. Particularly in a vast country with such great diversities of religion, language, race and culture and largely different regional problems, such an organisation of society is the assured foundation for the realisation of democratic yearnings.

Long-term interests

It is inevitable that the legislatures tend primarily to reflect immediate interests. But it is important and essential that long term interests and values be given due consideration. Until the legislatures do so, the judiciary seems to inherit the assignment by default; and if the assignment is judiciously performed in the manner indicated by great judges, 'the court can be regarded,' to quote Prof. Robert McCloskey, 'not as an adversary, but as an auxiliary to democracy'.[7] Or as Justice Mathew put it, paradoxical though it may appear, the judiciary is both an ally of majoritarianism and its critic and censor.[8]

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

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

In one sense safeguards against the abuse of the power of judicial review can be found also in the transparency of the judicial process which allows the public to assess the merits of a judicial decision and in the judges' own desire to maintain a strong judicial reputation. As the Supreme Court said recently, "A judge is judged every day by the lawyers, litigants and the public, as the courts are open and the judges speak by giving reasons in writing for their decisions."[9]

There is no doubt that "in the exercise of their powers of judicial review, courts should be as wise and statesmanlike as their capacities and temperaments permit – wise as judges, wise in their concern for the effectiveness of their interventions into public affairs, and wise too in adapting the constitution to changing conditions…."[10] Justice Stone's admonition:[11] "the only check upon our own exercise of power is our own sense of self-restraint" bears constant recall. But he made clear that self-restraint is not an excuse for inaction; it is rooted in a respect for the dignity and high purpose of the other branches of government and a sympathetic understanding of the problems they must try to resolve.

But really there is no contradiction between democracy and judicial review. It is arguable that the substantive law of judicial review represents the greatest contribution of the common law in the last century. As Lord Bingham famously remarked in the *Belmarsh* case,[12] the enforcement of law by an independent judiciary is now regarded as a cornerstone of a democratic society. The purpose of judicial review primarily is to give effect to Parliament's will. The function of the court of judicial review is to ensure that all authorities act within the confines of their power. 'The maintenance of the rule of law is in every way as important in a free society as the democratic franchise.'[13] The link between judicial review and rule of law is that judicial review is the exercise of a

7 R Mc Closkey, *Essays in Constitutional Law* (New York, Knopf, 1957) at p. …

8 KK Mathew, 'Democracy and Judicial Review' in Democracy, Equality and Freedom (Lucknow: Eastern Book Company, 1978), at p 26.

9 *Anna Mathews* v *Supreme Court of India* WP (C) No.148 of 2023 decided on 10 Feb 2023 (unreported).

10 See, Elliot Richardson, 'Freedom of Expression and the Function of Courts', (1951) 65 Harvard L Rev at p. [this quotation needs to be checked – I couldn't find it in the article above]

11 *US v Butler*, 297 US 1, 79 (1936).

12 *A & Ors* v *Secy of State for the Home Dept* [2004] UKHL 56.

13 Lord Bridge of Harwich in *X v Morgan-Grampian Ltd* [1991] AC 1 at 48.

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constitutional power which the rule of law requires.

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

In order to be protected by the rule of law we must follow the law even when we disagree with it. A realisation that all our liberties depend upon compliance with law is something that runs deeper in the whole system and is more enduring. "Constitutionalism works, our liberties are protected and our society is free because…people as a whole realise that liberty for the weak depends upon the rule of law and the rule of law depends upon voluntary compliance."[14] This is the all-important but fragile faith which every generation needs to cherish, nurture and carry forward.

This contest and reconciliation between conflicting principles and goals is not limited to law. "When in any field of human observation, two truths appear in conflict, it is wiser to assume that neither is exclusive, and that their contradiction though it may be hard to bear, is part of the mystery of things."[15] But as Justice Frankfurter points out judges cannot leave such contradictions as part of the mystery of things, they have to adjudicate and if the conflict cannot be resolved, they have to arrive at an accommodation of the contending claims. This is the great challenge for a judge and "the agony of his duty."[16]

Constitutional choices

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

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

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

The philosophy of judicial review is rooted in the principle that the constitution is the fundamental law.

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14 Archibald Cox, *The Court and the Constitution* (Boston: Houghton Mifflin, 1987) p.15.

15 'Literature and Dogma', Times Literary Supplement (London), January 22, 1954, p.51

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

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

As Mauro Cappelletti observes, judges have become the trustees of a new conception of 'limited' government—limited, that is, by constitutional and also by transnational mandates. At the same time, they have also become the trustees of an 'enlarged' government—enlarged, that is, to fulfil the new goals of the social state.[17] The standards of fiduciary conduct set by Cardozo for even an ordinary trustee is that "he is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is the standard of behaviour".[18] What then to say of a constitutional trust at once so lofty and so noble!

The rights and values envisaged by the Constitution are not merely material. Constitutionalism implies limited government. Its history has been the movement from a culture of authority to one of justification where power and its exercise is made answerable. The judiciary, particularly the Supreme Court, as a vital institution of democratic governance has helped to inculcate and foster a constitutional culture and infuse all State actions with constitutional ethos. All seemingly wide and unfettered powers of the State are tempered by constitutional limitations to be exercised in accordance with public law principles and subject to judicial review and correction depending on the nature of the function. This may be said to be of the very essence of the protection of civil and political liberties. But that is not all. The Court has been equally solicitous of the socio-economic rights. In India the scheme for the realisation of the socio economic agenda comprises both the justiciable Fundamental Rights and the non-justiciable Directive Principles. The judicial contribution to their synthesis and integration has been crucial to the realisation of the goals set out in Part IV both as a means to effectuate the rights guaranteed under Part III and also as a source of law for a welfare State. The Supreme Court, particularly after the first two decades, harmoniously interpreted Parts III and IV. The judiciary has much to be proud of.

As trustees of limited government the judges have protected and upheld individual rights, enforced constitutional limitations, disciplined the exercise of power, held government and public authorities accountable. As trustees of an enlarged government they have endeavoured to synthesise and balance individual rights with the greater societal good, to translate human rights rhetoric to action. To the extent judges are able to ensure all this, they would have fulfilled the obligations of the trust that their position entails.

Check on public power

The great theme in the history of Indian Constitutional law is the concept of law as a check upon public power. That idea has been given practical reality in the decisions of the Supreme Court. Those decisions are, to paraphrase Justice Holmes, a virtual magic mirror in which we see reflected our whole constitutional development and all that it has meant to the nation.

Realising the constitutional vision of justice is really good governance. The consummation of the Constitution is when justice reaches out to everyone, everywhere as contemplated and mandated by the Constitution. The Indian nation-state has been striving to entrench the constitutional vision of justice and achieve the constitution's goals. Constitutionalism facilitates a democratic political system by creating an orderly framework within which decisions are made. A constitutional democracy can work only under institutional safeguards. A cultivated respect for law and enduring institutions are therefore important. An unfailing index to the maturity of a democracy is the degree of its respect for unwritten conventions. What is left unsaid in a constitution is as important as what is said; and the constitutional equilibrium can be preserved only by Obedience to the Unenforceable. The realisation of all this depends upon the recognition that constitutional morality is no less essential than constitutional legality.

The role of institutions in making democracy meaningful and successful is vital. No institution is an abstraction. The working of all constitutional institutions is influenced and determined by those who man them. An institution is, however, much more than the sum total of all who compose it.—

A constitutional democracy implies that deliberative forces prevail over the arbitrary. The right to question, to scrutinise and to dissent is of the very essence. The cardinal feature of the Indian system of government is the requirement that the executive enjoys the confidence of and is accountable to the legislature and ultimately to the people. The political theory behind representative democracy is that the legislature must reflect the opinion of the electorate. Parliament is a pivotal institution in a

[17] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) at xx.

[18] *Meinhard* v *Salmon*, 249 NY 458 (1928).

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democracy. Its twin primary objectives are law making and holding the executive to account.

It is imperative that there is free and fair discussion and exchange of ideas in the House. Indeed the Indian Constitution confers such freedom to enable members to discharge their duties and functions freely and effectively. It is equally important that the level of political discourse and parliamentary debates is maintained at a high level and there is mutual respect and courtesy. The whole idea is that in a legislature you talk and deliberate, try to persuade and take decisions through discussion and persuasion. The volatile nature of raw public opinion should be refined through a process that gives elected representatives the opportunity to deliberate and exercise their judgments free from factional interests or majority intolerance. While we may have some exceptional good debates, there is certainly a sharp general fall. In this behalf the importance of wit and humour cannot be overlooked. Humour raises the level of debate and discussion, it also relieves the stress and tension. It is a great vehicle for getting a message across. It is rightly said that humour can make the wonderful moments of life truly glorious and tragic moments bearable.

The reality is that the Constitution contains a mélange of powers. No single institution is even remotely supreme. This is as it should be and will probably always be so. Some struggle and tensions do occasionally arise. Reciprocal influence is a continuing process. In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey in *An Introduction to The Study of The Law of the Constitution*[19] likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has, or should have, for the others. In *British Railways Board* v *Pickin*,[20] Lord Reid observed that for a century or more both Parliament and the Courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past.[21] This is the profound truth and is equally relevant everywhere!

Constitutional culture

There are dangers against which a constitutional state and the people have always to be on their guard. It is necessary to build, nurture and cherish a constitutional culture or constitutionalism which is not merely regard for and adherence to form and letter but a commitment to substance which is respect for and adherence to the rule of law which is the tribute paid by power to reason, disciplining the exercise of all power and subjecting it to constitutional limitations. This indeed is constitutional morality. There has to be an unremitting endeavour to realising this.

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

Against this background, some tension between the various wings of government is both inevitable and desirable. It shows that democracy is alive and working and constitutional institutions are vibrant and functional. It is some kind of a dialogue between the judiciary on the one hand and the legislature and the executive on the other.

In one sense constitutional adjudication is, and must be, a dynamic interaction – a 'democratic dialogue' within the wings of the government. "Courts remind legislatures of the values that might otherwise be neglected and legislatures respond by expanding or refining the terms of the debate."[22] Public law must in principle respect conventional limitations on judicial power. They are crucial to the functioning of a democratic state. To remember that there can be no legal solubility to every problem and that the judicial process has its inherent limitations is wisdom and acknowledgment of a stark reality. The court is not a 'one stop solution to resolve complicated issues of policy and society.'[23]

Prof. Dieter Grimm, former Justice of the Federal Constitutional Court of Germany mentions that while amendments are an external corrective to the power of courts, there is also an internal corrective. "Even if it is true that, what is legally acceptable and what is not, can only be defined in the legal system, it is never defined once and for all and judges are not the only actors to take part in the ongoing discussion. It is therefore extremely important that constitutional courts are embedded in a lively discourse in which the division

19 10th ed, (London: Palgrave Macmillan, 1979) p 3.

20 [1974] 1 All ER 609 (618),

21 See, *R (Jackson) v. AG* [2005] 4 All ER 1253 (1293)

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

23 DY Chandrachud, speech at King's College London, 22 Jun 2022, accessible via *www.kcl.ac.uk/news/indian-supreme-court-judge-addresses-courts-role-in-protecting-human-rights-civil-liberties-law-india.*

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of functions between the political and juridical branches of government, the acceptability of legal methods and the soundness of interpretations are constantly evaluated and readjusted".[24]

We hear the same idea echoed and expatiated on in a recent judgment of the Supreme Court in *Gujarat Urja Vikas Nigam v Amit Gupta*[25] where Chandrachud J, speaking for the Court, observed profoundly: "The core of constitutional dialogue is that the different wings- judiciary and legislature- engage in a conversation about constitutional meaning in which both actors should listen to learn from each other's perspectives which can lead to modifying their own views accordingly. The court is, at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. That is a matter within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, the court cannot sit with folded hands and simply pass the buck onto the legislature. In such an event the court can adopt an interpretation-a workable formula- that furthers the broad goals of the legislation concerned while leaving it to the legislature to formulate a comprehensive and well considered solution to the underlying problem. To aid the legislature in its exercise the court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalised in a nuanced fashion. It is in this way that the court can tread the middle path between abdication and usurpation."[26]

One cannot also forget what Professor Laurence Tribe perspicaciously observes, "Such passing finality as judicial pronouncements possess is an essential compromise between constitutional order and chaos. The Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. This process cannot be the special province of any single entity."[27]

Relationship between judiciary and other wings

But the relationship between the judiciary and the other wings of government is expected to be correct and nothing more. Bonhomie or cordiality, more often than not, may herald the demise of democracy and constitutionalism. The court is not accountable to the legislature or the nation in the way a legislator is. It is accountable to the constitution and its values. That is the personal and institutional independence of the judge.

If it is accepted that courts are constantly remaking the law, which indeed they do, then it is of the greatest social importance that the law should be made in conformity with the best available inputs from other disciplines. An appreciation of what Holmes called 'the secret root from which the law draws all the juices of life' by which he meant 'considerations of what is expedient for the community concerned'[28] furnishes a more viable point of departure for a jurisprudence of the age of the positive State. Can it not be said that the judiciary may legitimately serve as part of an 'aristocracy of talent', to use Carlyle's phrase,[29] in helping to build that jurisprudence?

As Cardozo said, "You may say that there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfil their functions as judges, it could hardly be lodged elsewhere. Their conclusions must, indeed, be subject to constant testing and retesting, revision and adjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom."[30] This captures the quintessence of the judicial role and power in a democratic framework.

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

Professor Wolfgang Friedmann perceptively remarks that in the modern democratic society the judge must steer between the Scylla of subservience to Government and the Charybdis of remoteness from constantly

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24 Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' 4 NUJS Law Review (2011) 15, 28-29.

25 (2021) 7 SCC 209.

26 Chandrachud J, citing Anne Meuwese and Marnix Snel, 'Constitutional Dialogue: An Overview', (2013) 9:2 *Utrecht L R*, p 128.

27 L Tribe, American Constitutional Law (New York: Foundation Press, 1978), Preface to the First Edition.

28 Oliver Wendell Holmes, *The Common Law* (1881), Mark DeWolfe Howe (ed) (1963) Belknap Press of Harvard University Press, p 32.

29 Thomas Carlyle, *Past & Present*, Everyman Edition (London: Dutton Books, 1941), p 29.

30 Benjamin N Cardozo, *The Nature of the Judicial Process*, (Yale University Press, 1921) pp 135-136.

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changing social pressures and economic needs.[31] The genius of constitutionalism which supports the rule of law lies in the constitution – its resilience which provides ample opportunity for both continuity and change, in the method of interpretation and in the wisdom and ability with which the judges, in spite of a few bad mistakes "have steered between the horns of their dilemma".[32]

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

In this subject we necessarily hear undertones of the perplexities of reconciling apparent contradictions. One need not, perhaps, be too disconcerted by the various pulls and pressures tending to upset what one believes to be an ideal constitutional balance. "The basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution – the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity – lies the clue to creativity that will endure."[33]

Constitutions may be easily copied, temperaments are not. Therefore, constitutional values and aspirations will have to be internalised in the psyche of the nation. We need to develop and always have a decorous regard for and play by the rules of the constitutional game. What is necessary and important is character, both individual and national. It is the weight of public opinion that will have to prevent any perversion of the system and ensure its smooth working. This seems to be a distant hope and goal, but for its attainment there should be ceaseless striving. That depends on the citizenry as a whole. For, democracy is a beckoning goal, not a safe harbour, freedom is an unremitting endeavour, never a final achievement and no office in the land is more important than that of a citizen. Therefore it is that we need to constantly remind ourselves that the Constitution- our treasured inheritance which we have to cherish- is presently in our keeping and that we at once its servants and its masters renew and maintain our allegiance to the fundamental charter.

Conclusion

More than sixty years ago Lord MacDermott in his Hamlyn Lectures of 1957[34] spoke of law as a protection from power. In these decades that have gone by public law has grown by leaps and bounds, its tools have been innovated, sharpened and refined. The contours of judicial review have been drawn with sharper edges. It effectively serves as a shield against the onslaughts of power of different genres.

The march of science and technology and the interplay of economics and social sciences and law and the influence of all this on the existing political and legal institutions cannot be overlooked. All this throws up newer challenges and offers more creative possibilities for judicial review. This calls for a robust and balanced exercise of the power of judicial review in fulfilling the obligation of trustees of an enlarged government. The Constitution has to be judiciously and wisely worked in order to realize the constitutional vision of justice and to ensure that it remains workable in a broad sense. This requires applying unchanging constitutional principles to changing circumstances 'to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs'.

"'Whatever pleases the Emperor has the force of law' is not an article of democratic faith," observed YV Chandrachud, J perceptively in the *Prime Minister's Election* case (a reference to which appears at the top of this article).[35] Would Holmes's famous aphorisms pointing in the direction that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community and that he had, for example, no "practical" criterion to go on except "what the crowd wanted"[36] always hold good? Are there not situations where judicial review and activism become a duty? These are issues for which one can provide no straight and simple answers. They would certainly trigger a debate on the potency, validity and limits of judicial review. Whether judicial review *should* address these matters is a question that I have not discussed here, whether it *will,* and if so *how,* is a question for another day.

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

32 Archibald Cox, *The Court and the Constitution* (New Delhi: Asian Books, 2nd Indian Reprint, 1992) p 27.

33 Paul A Freund: *On Law and Justice* (Cambridge, Mass: Harvard Univ Press, 1967) p 23.

34 *Protection from Power under English Law* (London: Stevens & Sons, London 1957).

35 *Indira Gandhi v Raj Narain*, AIR 1975 SC 2299 at para 690.

36 See, eg Harold R McKinnon, 'The Secret of Justice Holmes: An Analysis' (1950) 36 Am Bar Assn Jl 261 at 343.

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Democratic Defences of Federalism

Maximilian Taylor

Introduction

Federalism – a political system of a union of autonomous states wherein power is split between the national and provincial governments – is typically incorporated into constitutions whose polity is composed of multiple peoples (defined by civic or ethnic distinctions), such as those in Australia and India. Such incorporation is often defended as a compromise between representative democracy and national unity,[1] because federations tend to apportion greater power to smaller provinces. While practical, this defence tacitly undermines federalism to the extent that it disregards democratic principles. I argue that a federation is better defended as a mixed government of two forms of democracy (hereinafter referred to as 'mixed democracy'): self-government by a people (the conventional definition of democracy), hereinafter referred to as 'monodemocracy'; and self-government by multiple peoples, hereinafter referred to as 'polydemocracy'.

Federations differ greatly, even within the Commonwealth, so my aim is not to systematise federal jurisprudence at large or in particular. Instead, I will highlight federal constitutional law that illustrates how mixed democratic legitimacy can be conferred upon the institutions and procedures of multipopular polities. For clarity, 'province' will be used hereinafter in order to describe the constituent states of federations, except where other, more specific, terminology is applied.

Bifurcated Self-Determination and Mixed Democracy

International law recognises that 'all peoples have the right of self-determination'[2] – a right which is fundamental to democracy, because its exercise constitutes the organs of self-government. The general rule is that a distinct people within a state is entitled to exercise self-determination internally within that state.[3]

Internal self-determination splits decision-making between internal and external affairs, thus enabling a people to govern itself within the territory in which it is a majority. Democratic legitimacy might nevertheless be diluted in relation to a people's external affairs, if it is a minority vis-à-vis the national population, because it is liable to be outvoted by the more numerous other people(s). English Members of Parliament usually dominate the British House of Commons, for example, because its 650 seats[4] are apportioned as follows: 543 seats are English;[5] 57 are Scottish;[6] 32 are Welsh;[7] and 18 are Northern Irish.[8]

Federalism can resolve this bifurcation with bicameralism, as the two chambers of the legislature can be constituted upon different democratic bases. In Australia and the USA, the House of Representatives is monodemocratic, because it represents each State in proportion to its population,[9] whereas the Senate is polydemocratic, because it represents each State equally.[10] This composition is justified – to the extent that federal law has direct effect upon individuals and is proportionate to conducting interprovincial and extraprovincial affairs – because ordinarily requiring the support of majorities of both individual and State representatives is a means of obtaining the consent of the governed. Mixed democracy does not necessarily mean an equal mixture of mono- and poly-democracy though, because federations often invest more power in the monodemocratic chamber. For instance, Appropriation and Tax Bills must originate in the Australian House of Representatives and cannot be amended by the Senate.[11] Moreover, disagreements between these two Houses of Parliament can ultimately be resolved by a joint session thereof[12] – which favours the former, because it is more numerous so it can outvote its counterpart.[13]

Mixed democracy can also apply to the executive and judicial branches of the federal government, because the electoral or appointive system can be degressively proportional. The President of the USA is elected by a college which is composed of State delegations equal to its combined Congressional delegations[14] and federal

1 Cf Ralph Ketcham (ed), *The Anti-Federalist Papers and the Constitutional Convention Debates* (first published 1986, Signet Classics 2003), Part I, pp 93-98.

2 Cf Declaration on the Granting of Independence to Colonial Countries and Peoples, Art 2; and International Covenant on Civil and Political Rights, Arts 1(1) and 1(3).

3 *Reference re Secession of Quebec* [1998] 2 SCR 217 [126].

4 Sch 2, rule 1, to Parliamentary Constituencies Act 1986.

5 Sch 1 to the Parliamentary Constituencies Order 2023.

6 Sch 3 to ibid.

7 Sch 4 to ibid.

8 Sch 2 to ibid.

9 Cf Constitution of Commonwealth of Australia, Ch I, Pt III, s 24; and Constitution of the USA, Art 1, s 2.

10 Cf Constitution of Commonwealth of Australia, Ch I, Pt II, s 7; and Constitution of the USA, Art 1, s 3.

11 Constitution of the Commonwealth of Australia, Ch I, Pt V, s 53.

12 Ibid, Ch I, Pt V, s 57.

13 Ibid, Ch I, Pt III, s 24.

14 Constitution of the USA, Art II, s 1 and Amendment XXIII, s 1.

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judges are appointed by the President '…by and with the advice and consent of the Senate…'.[15] Seats on the federal bench can also be specifically allocated by province, as with Quebecer judges on the Canadian Supreme Court.[16]

Equal Provincial Autonomy

Normally, federal provinces are equally autonomous. Equal autonomy is polydemocratic, because people are intrinsically equal and free so the peoples into which they compound and achieve provincehood must be too. Equality can be achieved by uniformly enumerating the powers of the federal government regarding the provinces;[17] and mutually recognising both provincial laws etc[18] and the rights of their residents.[19] A practical problem to which asymmetric autonomy can give rise is referred to in the British Isles as the West Lothian Question.[20] Unlike Scotland, Wales and Northern Ireland – England lacks a devolved parliament. Therefore, non-English MPs can vote on English affairs in the British House of Commons, but not vice-versa. Scottish Labour MPs were instrumental in the vote to raise English tuition fees to £9,000 per year,[21] for example, despite the fact that this hike would not apply to Scotland. Accordingly, the internal self-determination of peoples who enjoy less autonomy than their counterparts can be frustrated.

Provinces are vertically autonomous, because the federal legislature will overwhelmingly, if not totally, lack the power to alter, much less repeal, their constitutions.[22] One of the few examples in Australia is that the Commonwealth Parliament can only amend the territorial limits of a State with the consent of a majority in the State Parliament and a majority of the State's voters in a referendum.[23] Moreover, a provincial parliament's exclusive legislative competence is entrenched by general or special procedures. For example, the Australian Parliament can only legislate on a matter reserved to a State upon referral by the State Parliament (such legislation only extending to referring States unless otherwise adopted).[24] Conversely, the constitutive and legislative boundaries of the devolved parliaments' jurisdiction, in the UK, are enforced by surmountable safeguards. Firstly, Welsh and Scottish devolution and Northern Irish incorporation within the UK can only be rescinded with consenting referenda by Welsh, Scottish and Northern Irish voters, respectively.[25] Therefore, the British Parliament can subvert the parliaments of those peoples in order to abolish them. Secondly, the Sewel convention is that the British Parliament will not normally legislate on a devolved matter without the consent of the relevant devolved parliament(s). This convention has been flouted, for example in the passage of the UK Internal Market Act 2020 without legislative consent from either the Scottish,[26] Welsh[27] or Northern Irish[28] parliaments.

Provinces are also horizontally autonomous, because the branches of the respective provincial governments are separate and their jurisdiction is contained therein.[29] Conversely, England and Wales share a judiciary,[30] despite having separate parliaments, so the extent to which English and Welsh law can separately develop is questionable. There is also diagonal dependence, because the British Parliament – not the Welsh Parliament – is authorised to address the Crown to remove senior Welsh judges from office for misbehaviour.[31] Furthermore, as in Australia and the USA, federal courts can have original jurisdiction in disputes between residents of different States.[32] So, unlike the UK which lacks a unified legal system, litigants in different provinces can appear before a neutral federal judge instead of a seemingly partial provincial one.

The exception which proves the rule of equal provincial autonomy is that it is polydemocratic for there to be an enclave for the seat of federal government, under the direct rule thereof, because it equalises the

15 Ibid, Art II, s 2.

16 [Canadian] Supreme Court Act, s 6.

17 Cf Constitution of the Commonwealth of Australia, Ch I, Pt V, ss 51-52; Constitution of the USA, Art I, s 8 and Amendment X; Sch 5 to Scotland Act 1998; Sch 7A to Government of Wales Act 2006; and Schs 2-3 to Northern Ireland Act 1998.

18 Cf Constitution of the Commonwealth of Australia, Ch V, s 118; and Constitution of the USA, Art IV, s 1.

19 Cf Constitution of the Commonwealth of Australia, Ch V, s 117; and Constitution of the USA, Art IV, s 2.

20 HC Deb 14 Nov 1977, Vol 939, c 123.

21 'Scots MPs attacked over fees vote' (*BBC News*, 27 Jan 2004), *http://news.bbc.co.uk/1/hi/scotland/3432767.stm*, accessed 6 Feb 2025.

22 Eg, Constitution of the Commonwealth of Australia, Pt VI, s 106.

23 Constitution of the Commonwealth of Australia, Ch VI, s 123.

24 Constitution of the Commonwealth of Australia, Ch 1, Pt V, s 51(xxxvii).

25 Scotland Act 1998, Pt 2A, s 63A; Government of Wales Act 2006, Pt A1, s A1; and Northern Ireland Act 1998, Pt 1, s 1.

26 Letter from the Clerk and Chief Executive of the Scottish Parliament to the Clerk of the House of Commons (8 Oct 2020).

27 Letter from the Chief Executive and Clerk of the Senedd to the Clerks of the Parliaments and House of Commons (9 Dec 2020).

28 Northern Ireland Assembly Committee on Procedures, *Inquiry into Legislative Consent Motions* (NIA 179/17-22, 2022) pp 42-43, para 109.

29 Eg, [New South Wales] Constitution Act 1902, Pt 2, s 5.

30 Eg, [England and Wales] Senior Courts Act 1981, s 1.

31 Cf [England Wales] Senior Courts Act 1981, s 11(3); and [New South Wales] Constitution Act 1902, Pt 9, s 53.

32 Cf Constitution of the Commonwealth of Australia, Pt III, s 75; and Constitution of the USA, Art III, s 2.

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assets and liabilities associated with hosting it among the provinces.[33] On the one hand, the host province may prejudice the others by leveraging its position as the provider of security or infrastructure to the seat of federal government in order to extract concessions therefrom. On the other hand, the host province may be uniquely prejudiced by the burdens of administering the same. This exception can nonetheless be monodemocratic, as demonstrated by the Australian Capital Territory,[34] because the citizens of the enclave can both enjoy municipal self-government[35] and be enfranchised in the federal House of Representatives.[36] The caveat is that municipal autonomy is circumscribed in proportion to the purpose of the enclave, both substantively[37] and procedurally,[38] and so it may be unrepresented or minimally represented[39] in the Senate.

Federal Reconstitution

Federal constitutive procedures exhibit mixed democratic legitimacy where constitutional amendments must be ratified by some combination of the people and peoples, since the legitimacy of representative democracy depends upon the consent of the governed. Therefore, both must consent to any change in the terms by which they are governed.

In Australia, constitutional amendments must be ratified, in a referendum, by a majority of voters in a majority of States.[40] The Canadian Constitution almost inverts that procedure, as it generally requires that amendments be ratified by at least two thirds of provincial parliaments which together represent at least half of the national population.[41] As with legislation, the absence of this procedural safeguard can allow more numerous peoples within multipopular polities to make national constitutional changes without the consent of less numerous peoples. For example, the British Parliament enacted that the UK's membership of the European Union would be decided by a national referendum[42] and, in 2016, 52% of voters opted for the UK to leave.[43] Withdrawal therefrom formally occurred, on 31 January 2020, despite majorities of voters in Scotland, Northern Ireland and Gibraltar (a British Overseas Territory, then within the EU, to which the referendum was extended)[44] voting for the UK to remain therein.[45]

Intermediary Role of Provincial Legislatures

A secondary aspect of mixed democracy is that federations sometimes enrol provincial legislatures as intermediaries in federal governance. The Council of States of the Indian Parliament is mostly elected by the State parliaments,[46] for instance, whereas the House of the People is directly elected.[47] I defend this intermediate role in terms of Burke's[48] trustee model of representative democracy, because federations have two constituents – the people and the peoples – and such intermediation supplements the immediate relationship between the federation and its citizens. Provincial legislators are entrusted to act within each province for the benefit of their constituents. Federal legislation and reconstitution each affect the peoples of the several provinces, because they each determine inter- and extraprovincial affairs and changes in the law by which the provinces are governed. Therefore, provincial legislators should also be entrusted with approving that legislative and constitutive power exercised between and without each province is to the benefit of their constituents.

Conclusion

Federations create dual constituents by both splitting governance into internal and external tiers and having both an immediate and intermediate relationship with its citizens. Federalism thereby mono- and polydemocratises multipopular polities, because a framework is constituted for obtaining the consent of both the people and the peoples which federations govern. On the one hand, provincehood allows each people to govern their internal and exclusive affairs, irrespective of its size, without interference from the others. On the other hand, dual majoritarianism and its associated modes of representation allow the people and peoples of a federation to govern their external and inclusive affairs by agreement. Therefore, it is unfair to characterise federalism as merely departing from the principle of 'one person, one vote' or needing remedy or avoidance. If federalism can add polydemocratic legitimacy to otherwise monodemocratic constitutions, it has a stronger foundation for being maintained, expanded or adopted within multipopular polities in order for them to reap its principled and practical benefits.

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33 James Madison et al, *The Federalist Papers* (first published 1788, Penguin Books 1987), No XLIII, pp 279-280.

34 Constitution of the Commonwealth of Australia, Ch I, Pt V, s 52(i).

35 Australian Capital Territory (Self-Government) Act 1988, Pt II, s 7.

36 [Australian] Commonwealth Electoral Act 1918, Part VII, s 97.

37 Australian Capital Territory (Self-Government) Act 1988, Pt IV, s 23.

38 Ibid, s 35.

39 Cf Constitution of the Commonwealth of Australia, Ch I, Pt II, s 13; and [Australian] Senate (Representation of Territories) Act 1973, s 4.

40 Constitution of the Commonwealth of Australia, Ch VIII, s 128.

41 [Canadian] Constitution Act 1982, Pt V, s 38(1).

42 [British] European Union Referendum Act 2015.

43 'EU Referendum Results' (*BBC News*), *https://www.bbc.co.uk/news/politics/eu_referendum/results*, accessed 18 Jan 2025.

44 [British] European Union Referendum Act 2015.

45 'EU Referendum Results' (*BBC News*), *https://www.bbc.co.uk/news/politics/eu_referendum/results*, accessed 18 Jan 2025.

46 Constitution of India, Pt V, Ch II, s 80.

47 Constitution of India, Pt V, Ch II, s 81.

48 Edmund Burke, 'Speech to the Electors of Bristol' (3 Nov 1774, *The University of Chicago Press*), *https://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html*, accessed 4 Feb 2025.

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The Trump Revolution and its Implications

Munir Majid

Introduction

The American people chose Donald Trump as the 47th President of the United States on a clear mandate. 'Make America Great Again' (MAGA) and 'America First' are not just slogans. There are policies backing up those ends, however misguided some commentators may think, which the vast majority of voters fully supported. Now Trump is implementing those policies with alacrity.

At the domestic level the Trump administration is draining the 'Washington Swamp' as promised, getting rid of departments, agencies and people. There is no dodging the DOGE Department of Government Efficiency driven by Elon Musk. The efficiency part has fangs which claw into people deemed anti-Trump or not on the same page.

Executive orders on expelling immigrants are being executed without let or hindrance. Laws and regulations are being trampled on in the stampede. Court orders to challenge some of the executive decisions are ignored. Federal judges are being picked out as political opponents and corrupt. It will not be too long before D-Day comes against the Supreme Court and the US Constitution. Trump, apart from mutterings about a prohibited third term, has been heard to say like Napoleon, before the latter made himself Emperor of France: "What is good for the State is not illegal."

Rule of law

The rule of law and separation of powers in the US political system are at risk and will be severely tested in the months and years to come. In the election of Donald Trump, the US did not just go through a change of President. It went through something akin to a revolution. To the victors the triumph of the Downtrodden Majority, hitherto dominated and force-fed by the elite Woke Minority, was like winning the war in the unending strife, struggle and civil conflict in American society. In this context, the rule of law, the separation of powers, even the American Constitution are nothing but the construct of a liberal elite. It will be upended just as its purveyors have been overthrown. As in many revolutions in the past, riding on the crest of this surge of raw power in this famous victory is a new elite, however unrepresentative of the class they represent. Think Lenin, Trotsky and the Bolshevik revolution in Russia.

While all this may seem over-stated and even allegorical, there is no gainsaying the American political system is under the severest test in living memory.

To the world outside, however stressed well-wishers may be, America has made a choice with which its body politic must live. Nevertheless, when what is sweeping the US is taken outside its borders, the world has a vote.

To begin with, if ever it truly had, America has not now any right to lecture to the world about democracy, rule of law and human rights. Or to effect regime change on that pretext. Not that the Trump administration would be predisposed to do so on that pretence. Such sophistry is not part of Trump's diplomatic vocabulary. Trump is not interested in soft power.

America First, removal of the velvet glove and show of the iron fist, are his preferred modus operandi. No false call on shared values. America First is America Only. Whether it is Monroe Doctrine type threats against Panama for alleged complicity with China in management of the canal, or a Reaganite security-driven attempt to buy Greenland, Trump will better all that have gone on before in US foreign policy by a blustering use of raw power - just as he is embarked on domestically.

Morality

Morality has no place in his foreign policy, as demonstrated by his plan to evict Palestinians from Gaza to develop land he does not own into a "Riviera of the Middle East", with Israel's Netanyahu as his property agent. He does not think of peace and justice. He does not care one bit that the foundation of his development will be the crushed skulls and bones of tens of thousands of dead Palestinians annihilated by American bombs from Israeli jets. He does not even think about how long the buildings will stand as long as he can profit from a valuable short lease, the longer term future not being his concern. Terror will come in the region and the world. The terrorists will be condemned for a Palestinian cause not addressed. Whether or not the plan is a gambit to get other, primarily Arab, plans moving, the defining feature of Trump's Middle East policy is clear: use of raw power from a position of unassailable military superiority with Israel to attain objectives and benefits which totally ignore Palestinian rights.

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While the US and Israel may have a stranglehold on the Middle East, history has shown that there will be violent twists and turns for as long as the Palestinian rights are not recognised. But for now, it cannot be disputed that the Americans and Israelis are right on top. Trump however is not a statesman who will use this opportunity to broker anything close to settlement of the Palestinian issue.

Away from the Middle East, the centrepiece of Trump's foreign policy is the use of tariffs to extract concessions and as punishment. This will only work against the less powerful. Even so, US interests will be damaged as victimised states will become estranged from America and move into a different orbit.

With the powerful, such as China, the objectives of the first Trump administration's tariffs in 2018 were not fulfilled. In 2024 US-China trade increased by 8 per cent against 2018, with an increase in China's trade surplus by 13 per cent (although the share of US-China in China's total trade dropped to 11 per cent from 14 per cent in 2018 – reflecting a decreasing importance of the US market to China). This time Trump has, for now, imposed a 10 per cent tariff on Chinese goods, in addition to the around 20 per cent already in place. China has retaliated with four countermeasures: a 15 per cent tariff on US coal and LNG and a 10 per cent tariff on crude oil, agricultural machinery, large displacement vehicles and pickup trucks; export controls on rare earth elements such as tungsten and tellurium; placing PVH Group and Innolux on its unreliable entities list; and antitrust investigation into Google.

China is resilient, and it can take targeted and precise countermeasures. Whatever its immediate problems it is a huge economy with vast resources and capabilities. China has surged to technological self-sufficiency as a result of US technology restrictions. Huawei, for example, achieved full self-sufficiency in chip production despite severe attempts to decapitate the company. China is no easy meat. It is not surprising therefore that Trump is talking about a possible trade deal with Beijing.

The EU too, if only it would strike out on its own more commandingly, could be a centre of power beyond American machinations. Perhaps, after having been left in the lurch by Trump on Ukraine it would have learned its lesson on not being a supplicant to America. The European Commission had set up a dedicated team of officials to prepare for Trump's potential return to the White House, but now that the die is cast – Trump has already imposed tariffs on steel and aluminium which affect Europe too – it remains to be seen how the EU will respond. There will be more to come as Trump has promised wide-ranging tariffs against Europe for its perceived protectionism against the US. If there was a trade deal with China, it is likely Trump will launch a full-scale tariff war against Europe.

In Southeast Asia there is no evidence of an Asean-wide preparation against US tariffs. However individual members states have shown their concern. First in the firing line could be Vietnam which has a huge trade surplus of around $100 billion with the US. American companies manufacturing in Vietnam are already talking about layoffs should tariffs be imposed on the country which could furthermore be classified as a non-market economy. Malaysia is not likely to be spared either, not because it has such a huge surplus with the US but because Trump may not be too enamoured of its foreign policy. Singapore, on the other hand, has quickly announced that the US enjoys a huge surplus with it.

Obviously there is grave concern among states in the grouping over US tariffs against them. They are trade dependent. They have also thrived economically based on the stability provided by US-China cooperation. A trade war, or worse, between the two will obviously undermine that stability on which their prosperity is based.

Even with just a trade war, as exports to the US dry up, they could be inundated with cheap Chinese goods looking for alternative markets. For all the talk about relocation of investments from China, they might not find much respite as the Trump administration will look at the nationality of goods coming into US markets, not just where they are coming from.

Challenging times

These are challenging times for Asean which cannot continue to operate on a business-as-usual basis. The world order was already changing. Now it is going fast forward – or backward – with Trump. Asean must develop a strategy, not only on trade but also on the geopolitics and the geoeconomics, in the face of acute US-China rivalry and the shake-up in global order which has been caused by MAGA, America First and US-initiated tariff war.

This applies to all regions and states of course. No doubt many will become estranged from the US, with others losing faith in American reliability, not just during Trump's next four years – but beyond. There may be American over-reach and miscalculation, as it is a more multipolar world now, but the US is still hugely powerful to cause serious damage to the world. It could become a lesser, bifurcated world, with many states gravitating towards China, perhaps as the centre of a reworked global order.

Within a month of returning to the White House, Trump has disrupted the world, already on shaky ground with conflicts in Gaza and Ukraine as well as deteriorating China-US relations. Unjust and uneasy peace in the Middle East and Europe, which he may accomplish, will not solve the underlying issues which can still rear their

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ugly heads. Relations with China are key. The kind of Heritage Foundation Project 2025 attitude that China is a threat not a competitor, if carried into US-China relations, will not bode well for the world.

What more will come in April after American auto-interpretation of which countries owes the US some because of their protectionism remains to be seen. The use of tariffs, if it becomes extensive, widespread and sustained, is another danger to the world. At its worst, we should be reminded, as a commentator has done, of the 1930s when the US raised around 900 tariffs by 40-60 per cent. This prolonged the Great Depression. By 1934 world trade had contracted by a huge 66 per cent.

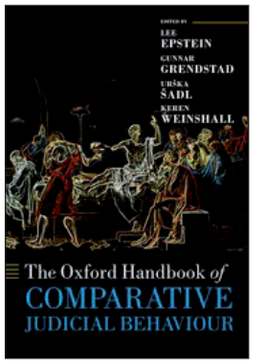
There is a lot at stake for Americans at home. For the world at large, much damage will be done.

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Book Reviews

THE OXFORD HANDBOOK OF COMPARATIVE JUDICIAL BEHAVIOUR by Lee Epstein, Gunnar Grendstad, Urska Sadl and Keren Weinshall (eds), Oxford University Press, Oxford, 2024, pp xxii + 1005, £175 (hbk), ISBN: 978-0-19-289857-9.



Why do judges behave the way they do while carrying out their judicial functions? This is a question which has been posed time and time again, and in various jurisdictions. Fascinating and important as the question is, there is no single answer to it. But it is a subject which deserves to be investigated, and that is precisely what this weighty tome attempts to do.

The editors of the volume have refined the central question to ask "how and why judges make the choices they do and the consequences of their choices for society". The 42 chapters in the book have been organised around the parts dealing, respectively, with: Fundamentals; Approaches to Judging; Data, Methods and Technologies; Staffing the Courts; Advocacy, Litigation, and Appellate Review; Opinions; Relations within, between and among Courts; Judicial Independence; Courts and Society; and On the Frontiers of Comparative Judicial Behaviour. The contributors are all drawn from academia, albeit from multiple disciplines including law, political science, social data analytics, data science, and public policy and administration. The book eschews a country- or region-specific approach; instead it focuses on particular themes. There is a heavy emphasis on, and strong engagement with, scholarly writing on the various themes dealt with in the collection.

One captivating theme, which has enormous practical relevance and which is also a source of political contention in many countries, is the expansion of judicial power, often at the cost of legislative or executive power (a phenomenon which manifests itself as judicial activism – or judicial overreach, as it is sometimes called). Ran Hirschl, a noted commentator on this subject, offers some valuable thoughts in an essay which many readers will find particularly interesting. "Not a week goes by," he says, "without a national high court or international tribunal somewhere in the world releasing a landmark judgment concerning core moral predicaments, the scope of fundamental rights and liberties, key policy-making challenges, and contentious political questions that define and divide entire nations." He points to several factors which have contributed to this trend: the post-Second World War democratization process in South Europe, Latin America, Asia, and the former Soviet bloc; the spread of "so-called global constitutionalism"; the proliferation of regional and international courts and tribunals, particularly in aftermath of the Cold War; and certain broad sociological and demographic trends (e.g. the expansion of the regulatory state).

The relevance of expanding judicial power cannot be overstated. Connecting it to the present book, Hirschl avers that

> From epistemological and methodological standpoints, this expansion provides endless opportunities for developing and testing arguments concerning judicial behaviour across time and place. The rise of law, courts, and judges as critical forces in comparative and world politics further suggests that politics and law are becoming increasingly intertwined domains, affecting each other in intricate ways that are seldom acknowledged by doctrinal analyses. Consequently, traditional disciplinary boundaries between the study of law and politics become increasing difficult to sustain.

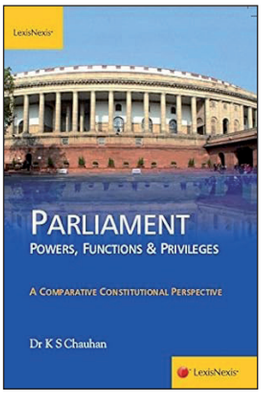
Another contribution to this volume which has pressing practical implications in diverse societies is judicial independence and its protection. Alex Schwartz, a senior lecturer at the University of Glasgow, addresses this subject, covering such aspects of it as 'court curbing', 'court packing'. 'court purging' etc. He provides useful insights into, on the one hand, the factors that motivate politicians' attempts to clip the courts' wings and, on the other, the factors which discourage such attempts. Contrary to what some may think, he says that public opinion may not be a bulwark against threats to judicial independence. But Schwartz make a wider point which deserves attention:

> Courts that might seem powerful and independent as a matter of formal constitutional law can, in practice, turn out to be little more than rubber stamps for the policies of governing elites; courts that do attempt to check the power of governments and legislatures can, nevertheless, be defied; and courts that might have once been independent and powerful can be reined in – manipulated, captured or debilitated – by the political branches.

Other essays in the volume are just as illuminating. As befits a work published under the *Handbook* rubric, this tome is very wide-ranging in its coverage of the subject. OUP deserves credit for encouraging such works.

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PARLIAMENT: POWERS, FUNCTIONS & PRIVILEGES by K S Chauhan, Mohan Law House, New Delhi, 2nd ed, 2024, 2 vols, pp 3207 + indices etc, Rs 7,888 (hbk), ISBN: 978-81-961700-8-0.



In the 78 years that have passed since independence from British rule, India has established a good track record, albeit with some blemishes, of parliamentary democracy. There have been 18 general elections to the lower house of the Indian parliament (the Lok Sabha), all of them fairly clean and held under the supervision of an Election Commission whose independence is constitutionally guaranteed. Complaints of irregularities, vote-rigging or booth-capture have been few and far between, and the courts have, generally speaking, been vigilant guardians of democracy, although a systemic challenge, at least since the 1970s, has been the escalating arrears of cases at all levels of the judiciary which has resulted in significant delays in the resolution of disputes.

In institutional terms, the bicameral system followed by the legislative branch of the Indian government at the federal level – and in many of the provinces (called 'states') – inherited rules of procedure and traditions from the country's colonial rulers and those rules and traditions have, by and large, continued to remain in place, with some local adaptations. The relevance, in this context, of Erskine May's well-known treatise on *Parliamentary Practice* remains unchallenged, although a number of local works on the subject have appeared over the years. The book under review is the latest of those works and it aims to be a comprehensive exposition of current law and practice in this area.

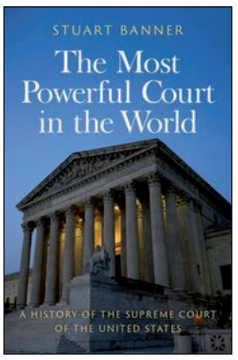
The two volumes of the present work comprise 16 chapters whose organisation follows a thematic structure for the most part, although there are some aspects of the organisation which discerning readers may not entirely agree with. Comparative references are weaved into the commentary at various places (notably to signpost the equivalent law and practice in the United Kingdom), but there are also two stand-alone chapters dealing, respectively, with the European Parliament and the Constitution of the United States (with a specific focus in relation to the latter on its provisions relating to constitutional amendments). Other countries which find mention in the book include Australia, Canada, Singapore, Brazil, Paraguay, South Africa, Japan, China, Russia, Switzerland, Belize, Malaysia and Uganda. The choice of some of those jurisdictions will remain a matter of debate.

An issue of particular contention in India has been floor-crossing – or 'defection' as it is called in the subcontinent – which has been seen as both been a stain on Indian democracy and a scourge for which legal solutions have not always proved adequate. Unsurprisingly, this issue occupies a prominent place in the present commentary, finding discussion in one of the longest chapters of the first volume. The relevant law is contained in a constitutional amendment which was introduced by the parliament of India in 1985 and which has been the subject of extensive debate ever since. That amendment has, predictably, spawned numerous decisions from the courts, which are scrutinised in the book.

Other major topics covered include the evolution and development of the Indian parliament, elections, the extent of the legislative power and its relationship with the powers of the other branches of government, disqualification of MPs, parliamentary committees and their work, the privileges of parliament, and the powers of parliament vis-à-vis the mass media.

There is no doubt that works of reference in this genre provide invaluable service for lawyers, parliamentary officials, legislators, judges and many others interested in, or concerned with, the working of the legislative branch of government, especially in a country of India's size and importance. This book goes some way in providing that service, with limitations. The editing could have been both tighter and presentationally more reader-friendly: large chunks of text occupy whole pages without any breaks, which are bound to strain the eyes of many readers. Proof-reading, too, has not been as meticulous as it might have been. Many readers, especially outside India (at whom also the book is targeted) will be disappointed by the quality of English used: grammatical, spelling, punctuation and syntaxial errors abound. It is hoped that future editions of the work will be free of such blemishes.

THE MOST POWERFUL COURT IN THE WORLD by Stuart Banner, Oxford University Press, Oxford, 2024, pp vii + 658, £30.99 (hbk), ISBN: 978-0-19-778035-0.



The Supreme Court of the United States is seldom out of the news. Whether it be for some controversial judgement or some provocative statement by one of the judges – or simply speculation about a contentious executive policy being taken to judicial review – there is no dearth of public comment or media spotlight on the court. Many books have already been written on this august institution, and the present one is merely the latest in the series.

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What distinguishes it from its predecessors, suggests the author, is that it "focuses on *understanding* the Supreme Court rather than on praising or criticizing it". The book is also organised differently from others in the genre. For one, it covers more than the court's decisions; in the words of Banner, it is "a history of the Court itself – a history of the sorts of people who become justices and the methods by which they are chosen, a history of the Court's physical environment, a history of how the Court does it work, and a history of the relationship between the Court and other parts of the government." For another, "the book proceeds thematically rather than in strict chronological order".

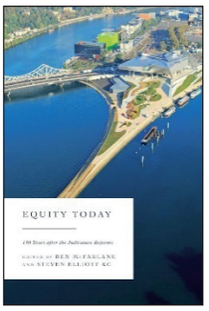
Among the themes covered – in no particular order – are: the origins of the court, judicial reinforcement of the power of the federal government, the interpretation of the Commerce Clause, the court's role in establishing the constitutional structure undergirding the American economy, resolution of disputes involving the ownership of slaves, fugitive slaves, interstate slave trade and the rights of native Indians, the impact of the Civil War on the court, religious diversity in the court, the politics behind judicial appointments, the working methods of justices before the court had its own building in 1935, the changing nature of case reporting, the "court-packing" plan of President Franklin Roosevelt and its effects, the impact of the Second World War and the Cold War on the court, animosities within the bench, the recruitment and conduct of law clerks, the desegregation cases, the court's liberal phase between the late-1950s and early-1970s, the caseload of the court, and the court and the 'culture wars' of the 21st century. There are also excellent pen-portraits of the judges and chief justices who occupied the court's bench in its 236-year history.

Viewed through the lens of contemporary standards, some of the happenings in the Supreme Court of yore, described by Banner, are simply astounding. Take, for example, the court's highly controversial decision in the case of *Dred Scott* (1856), affirming the legality of slavery. Chief Justice Roger Taney, who wrote the lead opinion, behaved most extraordinarily after rendering his decision:

> Normally, once the justices read their opinions orally from the bench, the opinions were filed with the Court's clerk, to be printed and made available to the press. After the announcement of *Dred Scott*, however, Taney refused to file his opinion with the clerk. The other justices duly filed their opinions, but Taney kept his. He spent the next few weeks adding a great deal of new material to it, in response to the dissents of [Justices] Curtis and McLean. Most of the justices, including Curtis, had left Washington to attend to their circuit obligations. Curtis wrote to the Court's clerk, requesting a copy of Taney's revised opinion when it had been printed, but Taney ordered the clerk not to let anyone see the opinion until it had been published in the Court's official reports. When Curtis asked Taney for a copy, Taney sent an angry reply in which he accused Curtis of seeking to use the opinion for improper political purposes. A vituperative series of letters between the two justices followed, culminating in Curtis's resignation from the Court.
>
> Does Banner have any general conclusion? Yes, and it is both a fair and an anodyne one:

The Court's history has consisted of two parallel stories – on one [sic] hand, the oft-told tale of occasional celebrated cases raising contested political questions, and on the other, a lesser-known account of a small institution that has steadily cranked out decisions in a much larger number of obscure cases, year after year. The first story is what accounts for the Court's centrality in American life, but the second is closer to the justices' lived experience. If one wants to understand the Court, both are important.

EQUITY TODAY by Ben McFarlane and Steven Elliott (eds), Hart, Oxford, 2023, pp lii + 410, £90 (hbk), ISBN: 978-1-5099-6007-1.



Lord Diplock, one of England's famous judges, made an oft-quoted observation about the fusion of common law and equity in the 1978 case of *United Scientific Holdings Ltd v Burnley BC* which involved a reference to the confluence of the Rhone and Saone rivers in Lyon. "The extent to which the metaphorical waters of common law and equity can be distinguished today," notes the blurb to this instructive book, "is a matter of real controversy and is one of the key issues addressed in this volume."

The book brings together 20 essays which look at the state of equity today through an examination of equitable principles, maxims and doctrines as they have evolved over the 150 years that have passed since the reforms which were introduced by the Supreme Court of Judicature Act 1873 in England and Wales. The contributors include a mix of academics, judges and legal practitioners, and the essays cover as broad a spectrum as is possible within the confines of a work of this nature.

A noticeable feature of the book is the looming presence, in the background, of one of the pre-eminent commentaries on the subject, Edmund Snell's *The Principles of Equity*. The present book essentially follows the structure of Snell's work. It also includes comparative analysis in the form of five essays arranged under a section entitled 'International Perspectives'.

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A flavour of the thought-provoking nature of the contributions can be had from an entertaining essay by Professor William Swadling on 'The Mischief of Maxims' in which the continued use of maxims in equity is questioned. Swadling argues that, far from being harmless rhetorical flourishes, they can be "pernicious" and may "lead judges into errors of reasoning or provide an excuse to give no reasons at all". By way of example, he cites the well-known maxim 'Equity Looks Upon as Done that which Ought to be Done'. There are, he says, three stages in the life of that maxim:

> It began as a perfectly sensible rule concerned with the performance of substantive duties affecting the devolution of estates. It then became a maxim and applied so that the availability of a specific remedy for failure to perform a substantive duty, a procedural issue, had the illogical effect of altering substantive rights. Finally, it became divorced from those primary duties altogether.

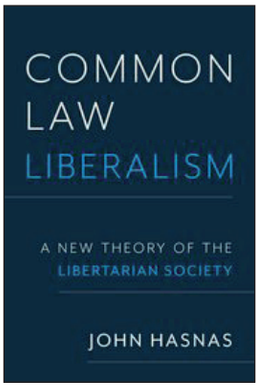
Swadling asks: "On the Sesquicentenary of the Judicature Acts, is it not time that equity followed the law and eschewed the use of maxims altogether?"

Another stimulating essay, by Alexandra Popovici and Lionel Smith, makes the case for a distinction to be drawn between 'equity' and 'Equity'. They explain the reasons why:

> Many jurists in the common law tradition equate Equity with equity: they may unconsciously assume that all equity comes from Equity, that everything that comes from Equity is equity, or both. On that view, the Judicature Act reform could have serious and possibly grievous effects on equity. We do not hold that view … Our aim is to understand an equity that is not exclusively tied to Equity (although it is certainly related to it): it is found in the common law and in the civil law.

Other essays in the volume deal with such matters as: the lessons that can be drawn on the persistence of Equity from the Trust; Equity's gloss on Authority; Equitable damages; the basic structure of rescission; specific performance and the Reflective Loss rule; Equity in codified secured transactions law; and Certainty of Loss of Chance in Equity. Taken as a whole, the book is a valuable contribution to a subject whose relevance cannot be underestimated.

COMMON LAW LIBERALISM by John Hasnas, Oxford University Press, Oxford, 2024, pp x + 316, £59 (hbk), ISBN: 978-0-19-778460-0.



In terms of advocacy of the common law, few recent writings can match this compact book. John Hasnas, a professor of ethics based in the United States, argues that "the common law can provide all rules necessary to sustain a peaceful, prosperous, liberal society – without intervention by politically created legislation and the exploitation and oppression it so often engenders".

The book is divided into three sections dealing, respectively, with questioning assumptions, applications, and anarchy. Hasnan's central thesis, which may startle many, is that "people would be better off without government". By way of substantiation, he advances two major propositions: first, "that good public policy requires a comparative assessment of the effectiveness of common law and legislation as regulatory mechanisms"; and second, that "a good society does not require the existence of a state". He concedes at the outset that there is a tension between these two propositions, but explains that he is only temporarily relying on the first proposition before he eventually challenges it.

A particularly salient discussion that Hasnas embarks on concerns freedom of speech, the "proper scope of which" he argues is "a perennial controversy in the United States". Through a brilliant analysis of how the dynamics of free speech protection has developed over two hundred years, including through the First Amendment to the US Constitution (1791) and cases such as *Schenck v United States* (1919), *Abrams v United States* (1919), *Gitlow v New York* (1925), *Terminiello v Chicago* (1949), *New York Times v Sullivan* (1964) and *Curtis Publishing Co v Butts* (1967), Hasnis shows that

> over the course of a century, [Justice] Holmes's non-sequitur [in the *Schenck* case, where he opened the door for the 'clear and present danger' test1`
>] transformed the First Amendment from an absolute ban on the regulation of speech by the federal government into an exception-laden bar to the regulation of speech by both the federal and state legislatures and state common law. By opening the door to the political regulation of speech, it turned the scope of freedom of speech into a political football that theorists would struggle to move up or down the ideological field…

Earlier, Hasnis makes the important point that

> it is difficult to suppress speech through common law.

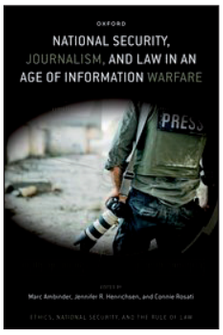
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To recover damages, there must be a plaintiff who can prove by a preponderance of the evidence that the speech in question caused him or her legally cognizable harm. And to impose a prior restraint on speech – to get an injunction – the plaintiff must demonstrate that the speech presents a high probability of irreparable harm. The requirement to establish both harm and causation significantly limits the power to supress speech through the common law.

Hasnis favours the common law approach, arguing that "under common law, people would be able to speak freely, but would be required to speak responsibly, using reasonable care not to harm others by what they say". He blames Supreme Court judges as much as political theorists for not recognising that "in the real world, speech is regulated by ethics, custom, and common law and free speech is correctly understood as speech free from *political* regulation."

This is a real *tour de force* of a book.

NATIONAL SECURITY, JOURNALISM, AND LAW IN AN AGE OF INFORMATION WARFARE BY Marc Ambinder, Jennifer R Henrichsen and Connie Rosati (eds), Oxford University Press, Oxford, 2024, pp xxxii + 329, £71(hbk), ISBN: 978-0-19-775662-1.



This book, which deals with a sensitive and controversial subject, is premised on the existence of 'information disorder' in contemporary society. It is particularly concerned with the spread of 'disinformation' through social media. Against that background, the contributors to the volume attempt to find their way through the myriad challenges that journalists who aim to inform the public on matters of national security face and who are having to fight a constant battle with those who are charged with keeping secrets (mostly, but not exclusively, for the state).

A sizeable number of people believe that historical norms in this area are no longer what they used to be. In the words of Gordon Stables, an academic who has written a Foreword to this volume:

> For the professionals working at the intersection of national security, journalism, and the rule of law, these norms have been inverted; where there was a need to know, there is now a presumption that what is not known is being kept secret for nefarious reasons; where invisible statecraft was seen as the key to efficient statecraft, it is now an indicator that the system is irreversibly perverted by private interests.

The dilemmas facing reporters and other media personnel are many and complex. For a start, what is 'responsible' coverage of issues that have national security implications (eg the activities of terrorists)? Secondly, what credence can be placed on, and what verification techniques can be applied to, information which emanate from non-traditional sources (eg leaks)? Related to this is the dilemma of handling 'fake' news (or disinformation) which may have the potential to subvert democracy. A separate set of challenges faced by journalists relates to their personal safety and well-being, viz physical threats, online harassment, etc., not to mention harm arising from the 'cancel culture' that is taking deep hold in many societies.

The contributors to this collection of essays address many of these concerns, from a variety of angles. There are three baskets under which the essays have been organised: the rights and duties of journalists and news organisations; government pushback and governmental duties to journalists and news organisations; and national security, journalism, and the digital media ecosystem.

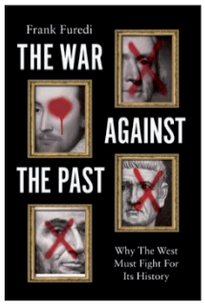
Take, for example, digital surveillance and its impact on media freedom. Five of the contributors address this issue in an essay, examining such threats as hacking, bulk surveillance of communications, forcible attempts by government agencies to obtain information in the possession of journalists on national security grounds, and so on. There is a helpful discussion of protections available, including under the First Amendment to the Constitution, state "shield" laws, and administrative regulations such as those promulgated by the Department of Justice, but such has been the growth of the law in this area that making sense of them, especially by those who are not legally trained, is difficult to say the least. As the authors note:

> The wide array of legal mechanisms available [to the state] to obtain information regarding communications can be overwhelming. Unfortunately, the overlapping and complex legal architecture for communications surveillance, coupled with widespread secrecy about government policies and capabilities, make it difficult to understand how and under what circumstances the government can use its authority.

Despite its major focus on US law and practices, this book will nevertheless be useful to journalists and their legal advisers in other comparable jurisdictions.

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THE WAR AGAINST THE PAST
by Frank Furedi, Polity Press, Cambridge (UK), 2024,
pp viii + 260, £25 (hbk),
ISBN: 9781509561254



That it requires a high degree of courage to swim against the tide of political correctness which is sweeping large parts of the Western world at the moment cannot be gainsaid. Frank Furedi, an emeritus professor sociology, has taken on the challenge – and with gusto – in this combative book which sets its face firmly against the forces that are determined to erase certain aspects of the past in the name of 'decolonisation'. This is a war which, Furedi insists, needs to be fought unwaveringly.

How did we get to our present state? In Furedi's view,

> hostility towards the past evolved slowly, and then all at once, its intensification occurring haphazardly without any serious long-term thought. The use of the term 'war' to account for the systematic pursuit of historical disinheritance is not simply metaphorical. In effect, this war leads to the diminishing of the authority of the past, to the discrediting of its legacy, and to the killing of the soul of communities whose way of life remains underpinned by European culture.

Predictably, the book contains many uncomfortable truths. "One of the most striking and fascinating features of the War Against the Past is the relative lack of resistance to it. In the UK over the last couple of decades, successive regimes – the majority of them *Conservative* – have refused to respond to the assault on Britain's heritage." He calls this reluctance "a veritable act of cultural betrayal".

Polemical the book may be, but it is couched in temperate language and marked by a clarity of thought and expression which should appeal to all but those with hopelessly closed minds. Furedi calls out the spite, duplicity and mean-spiritedness of the activists involved in this divisive campaign. For a start, he says that some honesty about the terminology used in descriptions of the crusade would not go amiss: what is being attempted in the name of 'scrutiny' of history, he notes, is actually nothing less than an 'immense condescension of posterity', to adapt a phrase coined by the historian E P Thompson.

The issue of language more generally and its forced distortion by the social justice warriors forms a centrepiece of this book. Furedi explains, patiently and lucidly, the effects that the call to eradicate 'outdated' terms have had on ordinary communication. Sample this passage:

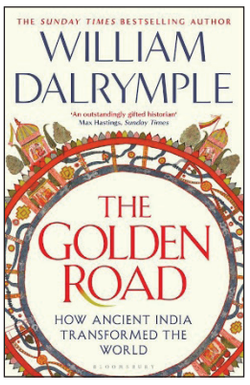
> The assault against traditional language usage encourages people to gradually abandon the language with which they grew up; one which was habitually used by their ancestors. So-called 'language reform' in combination with the practice of outdating serves to distort people's capacity to remember the past. When subjected to the process of re-engineering, language which historically served as a medium of communication between generations ceased to play that role. Moreover, language that has become detached from pre-existing tradition has no interest in conducting intergenerational conversation. Its main interest is to draw a self-flattering contrast between itself and its outdated opposite.

The book is a storehouse of information – and insights – on how the War Against the Past has evolved, how it is leading to a loss of the authority of the past, how the impulse to exact revenge on the past threatens to destroy civilisation as we know it, how there has been a progressive weakening of consciousness of historical continuity, especially in Western societies, since the Second World War, and how corrosive phenomena like the 'cancel culture' which have caught on in recent years are. There is even a section in the book which deals with the effect some of these trends have had on the judiciary.

Furedi is careful to remind readers that he is no backward-looking antiquarian. "I am not recommending an uncritical embrace of tradition," he says, "or the association of the past with a golden age. Instead, we must recognize that when we appreciate and understand tradition, we see how future possibilities might be grasped."

A measured and reasonable *cri de coeur*, many would say.

THE GOLDEN ROAD
by William Dalrymple, Bloomsbury Publishing, London, 2024, pp 485, £30 (hbk),
ISBN: 978-1-4088-6441-8.



Post-independence India has often suffered from a lack of self-esteem and this has manifested itself in many ways. In recent years there has been a concerted attempt by the more nationalistically-minded Indians, who have drawn sustenance from the government of prime minister Narendra Modi, to celebrate some of the glories of the country's ancient past and to argue that, for all its modern-day weaknesses, India remains, historically, a great global superpower. Reinforcement for that message comes from an unlikely source: this authoritative work by the historian William Dalrymple who is not new to writings on the subcontinent..

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As the author explains in his Introduction,

> The Golden Road aims to highlight India's often forgotten position as a crucial economic fulcrum, and civilisational engine, at the heart of the ancient and early medieval worlds and as one of the main motors of global trade and cultural transmission in early world history, fully on a par with and equal to China.

Starting with the birth of Buddhism in the fifth century BC and its consolidation as a pan-Indian religion under the Emperor Ashoka, the book describes how Theravada Buddhism became the dominant religion of the merchant class and then the ordinary people of much of South-east Asia around the same time. But, explains Dalrymple, Hinduism and the Indic religions continued to spread from Afghanistan in the west to Japan in the east and from Sumatra in the south to Siberia in the north. "The process culminated in the building of the greatest and most philosophically complex Buddhist structure in the world at Borobudur in Java, and the largest of all Hindu temples, not in India but at Angkor Wat in Cambodia. Fascinating stuff, indeed.

What about the level of scientific knowledge in the region? That, says Dalrymple, was no less impressive: "Only the ancient Hellenic world equalled it as a powerhouse of new concepts in mathematics and astronomy. By the time of the great fifth-century mathematician Aryabhata (476-550 CE), Indian astronomers had correctly proposed a spherical earth that rotated on its own axis, while using the decimal system and calculating the length of the solar year to an accuracy of seven decimal points."

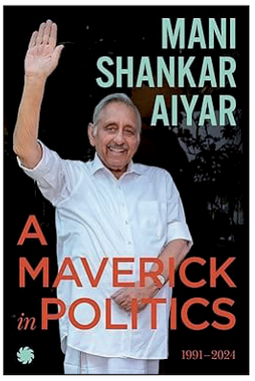
A very pertinent question which arises in the context of those developments is: why did India not receive the attention and the accolades that it deserved for its remarkable achievements? Partly because, says Dalrymple, Victorian Indology "undermined, misrepresented and devalued Indian history, culture, science and knowledge from the period of Macaulay onwards," and partly because of a "tendency today to study this story as separate disciplines, each focusing on different regions and each the preserve of different groups of scholars with different regional specialisations who go to different conferences, and whose objects are then curated in different museum departments."

The book ends on an optimistic note, though not without some homilies which are unlikely to please the cheerleaders from the present day's nationalist camp:

> Today, more than three-quarters of a century after independence from Britain, many believe that India's moment has come again, and that is now returning to its traditional place at the centre of world affairs, bridging east and west and acting as a crossroads of civilisations. It is now more united and centralised than it has ever been in its entire history. Its economy has quadrupled in size in a single generation.

A noteworthy feature of this weighty tome – in terms of sheer size – is that nearly half of its bulk can be attributed to the very elaborate notes that have been appended, along with several photographs. Bloomsbury don't appear to have been persuaded by the emerging fashion of providing access to notes and photographs via a QR code and thus save substantially on paper.

A MAVERICK IN POLITICS
by Mani Shankar Aiyar,
Juggernaut Books, New Delhi, 2024, pp xii + 411,
Rs 899 (pbk),
ISBN: 978-93-5345-767-9.



Enoch Powell's famous dictum that all political careers end in failure could not find greater resonance than in the life of Mani Shankar Aiyar, a self-proclaimed maverick in Indian politics. In this, the third and final volume of his hugely entertaining memoirs, he details the highs and lows of his career between 1991 and 2024, offering dollops of wit, wisdom, irreverence, punditry and much more, all delivered in fluent and sparkling prose of a kind that is becoming rare in books coming out of the Indian subcontinent. Remarkably, he does not shy away from admitting to the truth of Powell's aphorism as it applies to his own career:

> At the present time, when I am at my political journey's end, I realize one factor that I had not quite taken account of earlier – there might come a moment of such total rejection by your own party and political patrons that you are left staring at darkness with no light at the end of any tunnel, 'unwept, unhonoured and unsung'. That is not the fate that overtakes everybody in politics, but only those, like me, who are non-conformists, those who are mavericks, those whose lives are so long as to outlive their usefulness. Writing my memoirs in nearly a thousand printed pages has been my way of reconciling myself to loss and despair. It has been a form of mental and emotional therapy.

The book is full of anecdotes, cutting observations, jibes, solemn reflections, and unvarnished assessments of people, including some in high places, whom Aiyar has had occasion to deal with in the 30-odd years that this volume covers. There is also the unrepentant reaffirmation of his political and ideological predilections, including an almost slavish admiration for Jawaharlal Nehru and a visceral loathing of Narendra Modi, which has formed the leitmotif of many of his writings over the years.

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A perplexing aspect of Aiyar's personality, which comes through in this book as well, is that while he is brutally honest and disarmingly frank about his failures and setbacks, he seems unable to check a certain measure of pomposity and self-importance, perhaps even a sense of entitlement, from time to time. He explains away his gaffes – of which there have been many, and which have landed him in serious trouble with his political masters – by attributing them to his felicity with words, his sense of humour, a quick repartee, an inability to be a team player, and a "cutting edge to my tongue".

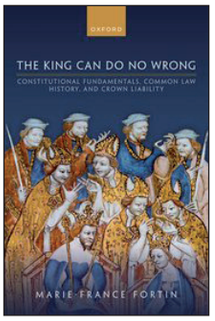
For a person of such superior intelligence, some of his actions are not easy to understand, eg his complete and unblushing subservience to the Gandhi family (despite the many rebuffs he has received from members of that family) or his insistence that the Gandhis alone can ensure the survival of the Congress party (despite the series of electoral defeats that the party has suffered under their stewardship). On one occasion, after being cast out in the cold by Rahul Gandhi – and, to add insult to injury, being denied an audience with him – Aiyar took the desperate step of writing a craven letter asking for his rehabilitation in the party. So supine was this effort that his wife is reported to have chided him with the remark "Don't you have any self-respect? Why are you cringing like this?" That did not, however, stop Aiyar from sending the letter, albeit with modifications, and waiting for weeks to get a reply; when the reply came, it was nothing more than a "routine letter of thanks" for the birthday greetings that Aiyar's missive had also contained.

An air of defiance permeates some of Aiyar's utterances. In one place, he even quotes Edith Piaf's famous line '*Je ne regrette rien*'. But regrets there certainly are; in the penultimate chapter, for example, he muses thus:

> I should perhaps have realized earlier than I did that the party found me a liability and so I should have either changed track or just put 'finis' in my mind to any further return to active politics. Because I did neither, I underwent some of the worst years of my life, hoping desperately for rehabilitation while it dawned on me slowly but insistently that I was no longer wanted or valued by my party.

His faults notwithstanding, Aiyar has provided his readers with a large measure of entertainment – and some edification – through the three volumes of his memoirs. Those volumes also go a long way in offering valuable insights into the twists and turns of Indian politics over a period of more than half a century. For that even his enemies – at least the fair-minded among them – will thank him.

More briefly…



THE KING CAN DO NO WRONG by Marie-France Fortin, Oxford University Press, Oxford, 2024, pp xxviii + 317, £110 (hbk), ISBN: 978-0-19-888691-4.

Clarity on the meaning of the well-worn phrase "The King Can Do No Wrong" under common law has become elusive in recent years. The confusion surrounding the phrase has led to many practical difficulties, including, avers the author of this interesting monograph, in elaborating a notion of the 'crown', "due in part to the perceived need to conceive of the crown as a corporation sole to limit the scope of the immunities generated by the concept". This has, among other things, rendered the notion of the crown different in the realm of judicial review from that of crown liability.

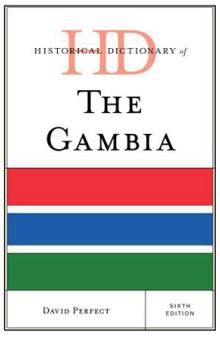
Based as the book is on a doctoral dissertation, it adopts an academic structure and tone. The six chapters comprising the volume (in addition to an Introduction) carry the following titles: Understandings of *The King Can Do No Wrong* in Legal Thinking and Heuristic Model of Crown Liability Derived from Them; *The King Can Do No Wrong* in The Late Medieval and Tudor Periods; *The King Can Do No Wrong* During The Constitutional Struggles of the Seventeenth Century; *The King Can Do No Wrong* in Legal Thinking in the Eighteenth and Nineteenth Centuries; Revisiting and Understanding Crown Liability from a Historical Constitutional Perspective; and *The King Can Do No Wrong*'s Travels and Travails Across the Common Law World. Understandably, the focus of the discussion remains England, but there are comparative references to the United States, Ireland and Australia, with case law from Canada and New Zealand included for good measure.

Fortin's broad conclusions will find resonance in anyone who has more than a passing familiarity with this fascinating subject:

> *The king can do no wrong* is not a medieval maxim, but it has a uniquely long history in common law legal thinking. Digging through layers of its history results in a core sample of the evolution of crown liability in English legal thinking. The study of its travels and travails across the common law world also allows for an enriching analysis of the transplant of *the king can do no wrong* in different legal soils, where its different understandings have withered or adapted depending on the constitutional text and context. Perhaps the less on the story *the king can do no wrong* teaches us is best told in the words of the monarchs who answered petitions of right themselves: *que droit soit fait.* Let right be done.

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HISTORICAL DICTIONARY OF THE GAMBIA by David Perfect, Rowman & Littlefield, Lanham (US), 6h ed, 2024, pp lxii + 707, £192 (hbk), ISBN: 978-1-5381-7812-6.

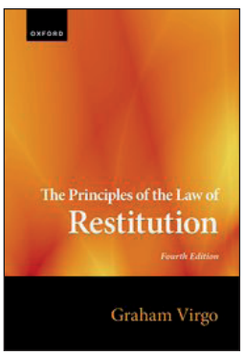


The Gambia, continental Africa's smallest nation, has not perhaps received as much international attention as some of the other countries in its neighbourhood, except during periods of crisis such as an attempted coup in 1981 (when the then President, Sir Dawda Jawara, was attending the wedding of Prince Charles and Lady Diana in London) and a second coup in 1994 led by Yahya Jammeh which led to a period of military rule when allegations of serious human rights abuses began surfacing. The Gambia had left the Commonwealth in 2013, but rejoined the organisation in 2018 after the restoration of full democratic rule in 2016 under President Adama Barrow.

This book is encyclopaedic in scope and it covers a range of subjects, personalities, entities, publications, governmental structures, legal arrangements, and domestic and international developments concerning the Gambia going back to at least the 18th century (a chronology at the beginning traces the country's history from 750 AD onwards). The entries, arranged alphabetically, vary in length, from a couple of lines to over a page, depending on the issue being discussed. There is an enormous amount of detail – and good cross-referencing – which researchers will find heartening. The commentary adopts a fairly neutral tone. Five appendices bringing up the rear deal, respectively, with Chief Executives, 1829-2024; results of parliamentary elections, 1960-2022; results of presidential elections, 1972-2021; results of referenda; and the ethnic distribution of the population. There is also a nearly 100-page bibliography arranged subject-wise, with a good index at the beginning of it.

All in all, this will be a valuable resource for those scholars and practitioners alike who wish to look up facts and figures about a somewhat neglected corner of Africa.

THE PRINCIPLES OF THE LAW OF RESTITUTION by Graham Virgo, Oxford University Press, Oxford, 4th ed, 2024, pp xlviii + 864, £140 (hbk), ISBN: 978-0-19-888532-0.

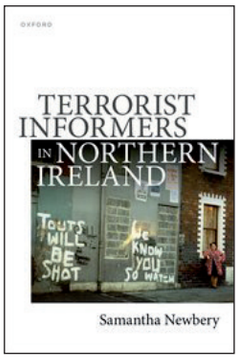


This is a book which has gone from strength to strength. Now in its fourth edition, it expounds the law of restitution with clarity, comprehensiveness and authority. The author signals in his Preface significant changes have been made since publication of the last edition in 2015: "[T]he rapid development of the law …, the sophisticated analysis of commentators (some of whom are highly critical of what has become the orthodox analysis of the law), and the development of my own thinking have meant that every single chapter of the book has had to be substantially rewritten." There are also some new chapters.

The five Parts of the book deal, respectively, with: the fundamental principles of the law of restitution; unjust enrichment; restitution for wrongs; proprietary restitutionary claims; and general defences to restitutionary claims. First principles are clearly explained, as are the policy objectives underlying the rules which have evolved. The author likens the law of restitution to a mountain: "From a distance, it may appear somewhat insignificant; indeed, some have dismissed it as a hill, a minor bump on the legal landscape. A few have considered it to be a mirage which disappears on closer inspection you approach it. But it is definitely a mountain: it is big and complex, and it is very easy to get lost on its slopes."

Those relying on this work are unlikely to meet that fate. On a lighter note, the more keen-eyed reader may be forgiven for thinking that Virgo takes a subtle dig at another distinguished writer on the subject, the late Professor Peter Birks, in some extended remarks in his Preface. After expressing the view that Birks, "created theories of restitution which are inconsistent with the cases", but noting that "his analysis of the subject was elegant and pure", offers this waspish critique: "But the Law of Restitution is not a work of art, something to be looked at and admired. It is a body of law which must operate in the real world. Elegance and function do not always go together."

TERRORIST INFORMERS IN NORTHERN IRELAND by Samantha Newbery, Oxford University Press, Oxford, 2024, pp xii + 315, £99 (hbk), ISBN: 978-0-19-288583-8.



The Belfast Agreement of 1998 has been seen by many as marking the end of the 'Troubles' in Northern Ireland which began in the late-1960s and which claimed some 3,500 lives. Those decades saw intense intelligence activity on both sides of the conflict in which informers were used on a large scale to keep the combatants supplied with information. The legal and ethical implications of the use of informers are, of course, as enormous as they are complex. This book

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throws a spotlight on the tensions between intelligence gathering and the law and argues that those tensions can be successfully navigated.

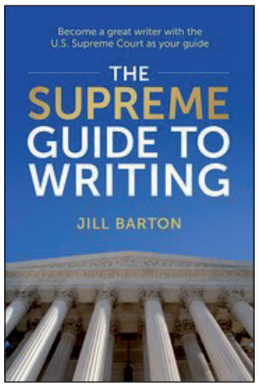
The book's focus is on informers run by the security and intelligence services – essentially those who had access to information from terrorist groups such as the Irish Republican Army (IRA) and from their 'loyalist' counterparts. Newbery clears up some terminological matters at the outset:

> 'Terrorist informer' is the term adopted for this analysis of informers who provide intelligence on terrorist groups. They are not necessarily members of a terrorist group but might commit terrorism-related offences. Further, informers are not only used for counter-terrorism. Other informers provide intelligence to help prevent 'ordinary' crime, such as organised crime.

The sensitivities arising in this area are illustrated through a number of case studies involving well-known individuals who were outed as informers. The dilemma for the authorities relate, essentially, to decisions on whether these individuals ought to be prosecuted and, if so, at what point of time. As for the law, Newbery has this to say:

> [T]he law regulates intelligence work, though there can be aspects of intelligence practice that are barely, or inadequately, covered by law at times. Given that the collection and use of intelligence in counter-terrorism aims to prevent attacks on a tactical level and to quell a terrorist movement at the strategic level, this is undeniably a worthwhile activity.

THE SUPREME GUIDE TO WRITING by Jill Barton, Oxford University Press, Oxford, 2024, pp xx + 215, £18.99 (pbk), ISBN: 978-0-19-775436-8.



Very few books offer pointed, nuts-and-bolts guidance – as opposed to general advice – on legal writing. This book does. It is directed mainly at an US audience, but there may be tips that those wishing to improve their writing styles may profit from.

The author is clearly very enthusiastic about what she sets out to do. That enthusiasm shows itself occasionally in a certain breathless tone, and she comes through a bit like a motivational speaker spurring on her flock. Sample this passage from the Introduction: "This book strives to … show you how to be a great writer, even as great writing is a moving target. It takes a deep dive into studying the best: the nine esteemed justices sitting on the U.S. Supreme Court. The Justices shape the law, employing language that often sings."

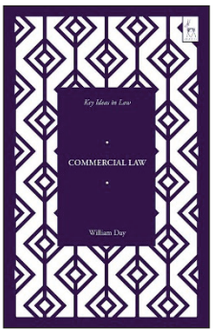
Nearly a third of the book is devoted to tackling punctuation marks (apostrophes, brackets, colons, commas, ellipses, em-dashes, en-dashes, emoticons and emojis, exclamation marks, hyphens, parentheses, periods, question marks, quotation marks, semicolons, spaces) while the other two-thirds deals with words (adjectives and adverbs, because v since, conjunctions, modifiers, names and titles, negatives, numbers, prepositions, qualifiers and intensifiers, relative pronouns, short words, split infinitives, transitions, verbs). As comprehensive a list as you can get.

The perils of shoddy writing, especially in the legal realm, are not far to seek. The author explains:

> Careless writing … can cause misfortune. A hyphen mishap in a tax law once cost the U.S. government $40 million. A realtor who forgot an apostrophe in a social media post faces a defamation lawsuit and a $180,000 legal bill for the trial alone. And a 12-year-old was arrested after using a few emojis that school officials deemed threatening.

Hopefully, such misfortunes can be averted through having this delightful book ready to hand.

COMMERCIAL LAW by William Day, Hart, Oxford, 2023, pp vv + 168, £12.99 (pbk), ISBN: 978-1-5099-4422-4.



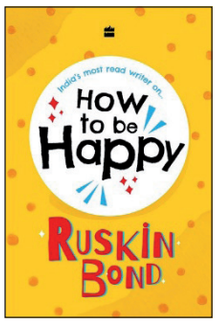
Commercial law remains one of the fastest-growing areas of legal study and practice. An indication of its popularity can be had from the proliferation of Master's degree courses on the subject, especially in the United Kingdom. Consequently, commentaries on commercial law are always on demand. This slim volume, published as part of Hart's 'Key Ideas in Law' series, should appeal to students who wish to dip their toes into this interesting but complex branch of the law (Sir David Foxton, the Judge in Charge of the Commercial Court in England and Wales, who has written a Foreword to the volume, thinks that practitioners too will benefit, as they are likely to "find nuanced and insightful articulations of their stock-in-trade".

There are only six short chapters in the book. These deal with: context and concepts; trade; transacting; title; performance risk; and credit risk, all of which are closely connected with and part of the universe of commercial law. As Day explains at the outset, commercial law, unlike say contract law, is an example of a contextual

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subject because "it does not focus on a particular legal concept but is a label for the collection of rules and principles that apply to dealings between parties acting in the course of business." Those rules and principles are explained well and in language that is both lucid and accessible.

HOW TO BE HAPPY by Ruskin Bond, HarperCollins, Gurugram (India), 2024, pp 132, Rs 499 (hbk), ISBN: 978-93-6213-605-3.

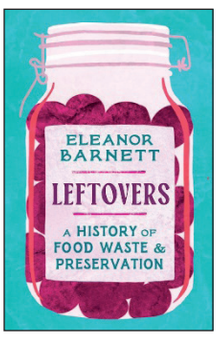


This slightly quirky but inspiring book comes from one of India's best known writers whose short-story collections, poetry, novels, essays, memoirs and journals, edited anthologies and books for children have received both popular and critical acclaim over many decades. Now in his ninetieth year, Bond has decided to unburden himself of his thoughts on happiness which, he says, "will come your way if you don't run after it. Chase a butterfly and it will fly away. Stay still, and it may settle on your hand."

The book consists of practical advice, delivered in simple language and in bite-sized chunks. Bond delivers many bon mots along the way – e.g. "A dog that wags its tail is more likely to survive than a dog with its tail between its legs"; "Build castles in the air, but put foundations under them"; "Like plants, we need shelter, and just the right amount of sun and shade to be happy"; "Nature goes about its business quietly, with that wonderful skill which millions of years have perfected"; "Try loving your enemies. If nothing else, you will confuse them!"; and "A love of books is the best insurance against old age".

This is a book which can be dipped into by anyone, young or old, in times of happiness and in times of sorrow. It distils into pithy passages profound life lessons which only come with a well lived life.

LEFTOVERS by Eleanor Barnett, Head of Zeus, London, 2024, pp 375, £27.99 (hbk), ISBN: 978-1-80-328157-5.

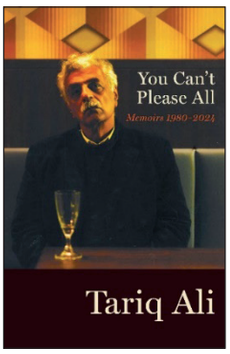


While climate change has gained huge traction as a subject of discussion and policy-making in recent years, comparatively less attention – or at least less publicity – has been given to another issue whose relevance to the protection of the environment cannot be underestimated, viz food wastage. It is estimated that a third of all the food produced in the world is wasted. This is one of the statistics cited in this thought-provoking book which also tells us that "wasted food guzzles up 25 per cent of the world's fresh water and 10 per cent of global energy consumption in total, while the area of land needed to grow it is the size of China". If that doesn't make socially-concerned citizens sit up and take notice, not much else will.

The author is a historian whose passion for the subject shines through every page of this book. She discusses both 'avoidable' and 'unavoidable' waste and also a category in-between, viz 'potentially avoidable' waste (eg potato skins, bread crusts). She takes the reader through a fascinating journey which covers thrifty recipes during periods of scarcity, the seasonal booms and busts of the Earth's provisions, the advent of artificial refrigeration, early cookbooks, the discovery and exploitation of preservatives, the invention of the tin can, the fate of food during rationing, the 'Dig for Victory' during the Second World War, the influence that the plucky Mrs Beeton had on middle class housewives, the emergence of fast food, the New Environmental Movement (there is even a brief discussion of the McLibel defamation case of 1990), and food waste in the time of coronavirus.

Is she gloomy about the future of food waste? Not really. Alongside an enumeration of legal measures taken by the government as well as private actors such as supermarkets, especially in the United Kingdom, Barnett notes that new and varied technologies are being developed to reduce the amount of food waste being produced. Simultaneously, there appear to be welcome changes in public attitudes to recycling, composting food scraps and eating sustainably grown foodstuffs. "Whether we will see a meaningful change in our wasteful food culture," she concludes, "is left up to the future, dependent as it is on the accumulative power of individual actions alongside governmental regulation."

YOU CAN'T PLEASE ALL by Tariq Ali, Verso, London, 2024, pp xiv + 799, £35 (hbk), ISBN: 978-1-80429-090-3.



Tariq Ali has been described as, among other things, an "intellectual bomb-thrower". This Pakistan-born activist, film-maker, journalist and writer who has lived in England since the 1960s, has made a name for himself as an influential figure on the left, and has been at the forefront of many campaigns over the past six decades. In 1987 he published the first volume of his memoirs, *Street Fighting Years*, which attracted much attention and which reportedly inspired a famous song by the English

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rock band, The Rolling Stones. Now, nearly 40 years later, he has come up with a sequel covering the period 1980-2024. It is a door-stopper of a book and a very informative read.

The book is more than a conventional autobiography; although many of the earlier chapters deal with events in Ali's life, picking up from where the previous volume had left off, much of the work is the nature of Ali's reflections on events, meetings with key figures, interviews, and so on – what he has described as sketching "a constellation of encounters and engagements that have marked an active life". There are also extracts from published and unpublished works, including diaries and blogs.

Topics covered include: Pakistan; India; cricket; the *New Left Review*; casteism; kings and queens; the case against Tony Blair; travels to places like Havana, Pyongyang and Tripoli; and the debasement of the Nobel Peace Prize. As for personalities, a veritable who's who of global icons of the left pass through the book's pages: Oliver Stone; Hugo Chavez; Edward Said; Ho Chi Minh, to name but a few; to these must be added some outside that charmed circle, but no less famous: the Bhuttos of Larkana; Satyajit Ray; Derek Jarman; the Milibands. Bringing up the rear, under the heading of 'Epilogue', is an essay on Gaza where, true to his beliefs, he lambasts US, UK and EU politicians for "watch[ing] and defend[ing] the genocidal war being waged by the most far-right Zionist gang in Israel without lifting a finger".

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News and Announcements

ENGLAND AND WALES: New reporting provisions for family courts

New open reporting provisions now apply in all family courts in England and Wales under which, from 27 January 2025, journalists and legal bloggers will be able to report on what they see and hear whilst attending any family court, if a transparency order is granted.

Journalists and legal bloggers can also request documents and speak to, and quote, people involved in proceedings. The open reporting provisions mean that there is a presumption that a transparency order, protecting the anonymity of the children and their families, is granted, unless there is a legitimate reason not to.

The new provisions follow the success of the Family Court Reporting Pilot, which started in January 2023, and was progressively rolled out over the next two years. At the end of 2024 the Family Procedure Rule Committee approved the extension to all family courts and made the required changes to the Family Procedure Rules and issued new practice directions.

President of the Family Division Sir Andrew McFarlane said: "The establishment of the open reporting provisions in all family courts in England and Wales is a watershed moment for family justice.

"Improving public understanding and confidence in the Family Court is of fundamental importance. Over the last two years there has been a presumption that journalists and legal bloggers can report what they see and hear from pilot courts in England and Wales. The reporting that we have seen has been significant, and includes coverage of issues affecting some of the most vulnerable people in our society, such as: children subject to Deprivation of Liberty Orders; the need to limit parental rights for convicted paedophiles and cases of child neglect or abandonment.

"There have been no known breaches of anonymity of children, and the aims of the pilot, to increase public understanding and awareness of the Family Court, are being realised. I am grateful to all in the court system who have supported the pilot, but I would particularly like to thank all of the journalists and legal bloggers who have engaged with the pilot over the last two years and would like to urge them and others to continue to report on these complex and vitally important issues."

The extension of the open reporting provisions to the remaining family courts in England and Wales will follow stepped arrangements, as in the pilot, starting with public law cases, then private law cases and finally magistrates.

[Source: Courts and Tribunals Judiciary website media release, 27 Jan 2025]

AUSTRALIA: Judge's immunity from suit reaffirmed

A judge who wrongly jailed a man during routine divorce proceedings should be protected from any personal consequences for his actions, the High Court of Australia has ruled, despite the episode being described as an "affront to justice" and a "parody".

The high court's ruling on 12 February 2025 restores broad-based protections to all federal judges and shields them from being sued for wrong decisions, and overturns a 2023 decision that shook Australia's legal fraternity and prompted urgent calls for reform.

In a landmark decision in August 2023, sitting federal circuit court judge Salvatore Vasta was successfully sued by a man he had wrongly imprisoned during a relatively minor divorce case to carve up a couple's former assets.

Vasta repeatedly threatened to jail Stradford – not his real name – during the proceedings because he believed he had not divulged all of his financial information. Stradford, who did not have a lawyer supporting him, was at one point told he would be jailed if he kept speaking over the judge and was warned to comply with Vasta's disclosure orders or "bring your toothbrush".

Vasta later jailed him for 12 months for contempt of court, to be suspended after six months, and Stradford spent seven days in custody before another court intervened to free him, saying that allowing the imprisonment order to stand would be an "affront to justice".

Stradford has described his time in prison as harrowing, saying he was subjected to a rape threat, assault, and suffered suicidal ideation. He later sued Vasta personally in the federal court for false imprisonment.

Judges are typically protected from civil action for what they do on the bench, a concept known as judicial immunity. But the federal court found that Vasta had made a series of basic errors, exceeded his jurisdiction, and engaged in a "gross and obvious irregularity of procedure".

It found Vasta, as a judge in the federal circuit court, which is considered an "inferior" court in the Commonwealth system, was not entitled to judicial immunity and awarded Stradford $309,450 in damages.

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The decision shocked the nation's peak legal groups. The Australian Bar Association and Law Society called for urgent reform and the attorney general, Mark Dreyfus, quickly introduced legislation to ensure all federal judges were properly protected from personal liability for their conduct on the bench.

The case was also appealed to the high court, which delivered judgment on 12 February. It agreed the court hearing in which Vasta jailed Stradford was a "parody" and that his order to jail the man was invalid. But it also found he was entitled to judicial immunity, regardless of his status as an inferior court judge.

Judges like Vasta, the high court said, "are immune from civil suit arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity".

"As Judge Vasta purported to perform such a function in convicting and sentencing Mr Stradford, he is not liable to Mr Stradford for false imprisonment," the court said in a summary of its judgment.

It also found the guards and security officers who executed Vasta's order to imprison Vasta were not liable.

[Source: *The Guardian*, 12 Feb 2025]

MALAYSIA: Renewed debate on judicial appointments

Chief Justice Tengku Maimun Tuan Mat has reminded Prime Minister Anwar Ibrahim of his past assertions as opposition leader that the premier should not have ultimate discretion in appointing judges, even as Malaysia's judiciary heads into a crucial crossroads.

The remarks by the country's top judge – who also warned against external interference in the selection process on Jan 8 during her opening speech of the legal year – come on the back of controversial judicial appointments in 2024.

These developments are being watched closely by the local legal fraternity and wider investment community as 2025 will see a slew of important vacancies. Three quarters of the 12-strong Federal Court, including the Chief Justice, are due for mandatory retirement at age 66.

In her speech, Tun Maimun referred to then opposition leader Anwar's view when debating the Judicial Appointments Commission Act (Jaca) in Parliament in 2008 that the proposed law "was not enough to restore the independence" of the judiciary.

"He went on to observe that there is a perception that persons who had decided in favour of the government were promoted," she said in her last officiating speech for the legal year before retiring in July.

According to the parliamentary Hansard, Datuk Seri Anwar had argued then that the "power to appoint and remove is so rigidly and tightly handed to the prime minister's discretion" – a position taken by other critics of the Jaca, including the Bar Council, which leads the Malaysian Bar of more than 20,000 lawyers.

Much of the controversy over judicial appointments in 2024 revolved around the nearly nine-month-long vacancy for Chief Judge of Malaya (CJM), the third-highest office in the judiciary.

Under the Malaysian judiciary system, the Chief Justice is the highest position in the land, followed by the president of the Court of Appeal, the CJM, and the Chief Judge of Sabah and Sarawak.

This was despite at least three candidates from the Federal Court recommended by the JAC – made up of the four top-ranking judges, and five other persons selected by the PM – to Mr Anwar, legal sources confirmed.

They also told The Straits Times that the delay in appointing a CJM derailed a succession plan to allow one of the apex court judges to gain the needed administrative and leadership experience to eventually fill Madam Maimun's shoes.

Since taking office in November 2022, Mr Anwar has repeatedly insisted that he would not interfere in the judiciary.

Noting how Malaysia's rankings in rule of law indexes have improved since 2016, Madam Maimun said at the opening of the legal year that "they denote the reality of how the country is viewed for purposes of investment, and are requisites for economic and social progress".

Her speech echoed the sentiments of senior members of the legal fraternity in recent months, including Malaysian Bar chairman Ezri Abdul Wahab and many of his predecessors.

The Kuala Lumpur Bar also issued an immediate expression of support on Jan 8, saying the top judge "rightly highlighted the dangers posed by any perceived encroachment of the executive into the judiciary's domain".

"The consolidation of appointment powers in a single office undermines this independence and risks politicising a process that must remain impartial and merit-based.

"In this context, the Kuala Lumpur Bar reminds Prime Minister Anwar Ibrahim of his past commitments and assurances, given as leader of the opposition at the time and now as prime minister, to uphold judicial independence," it added in a statement.

[Source: *The Straits Times*, 10 Jan 2025]

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SOUTH AFRICA: Legal challenge to controversial land law

A legal challenge against a controversial new land seizure law at the centre of a row with US President Donald Trump has been filed by the Democratic Alliance (DA), which is part of South Africa's coalition government.

The Expropriation Act **allows for private land to be seized by the government without compensation in certain cases**.

The ANC was forced into a power-sharing deal **last year after losing its parliamentary majority, for the first time in three decades, in** last May's general election.

The DA, which is the coalition's second largest party, has called the Expropriation Act unconstitutional, arguing that no democratic government should be given powers to seize property without compensation. The party said that South Africa's President Cyril Ramaphosa signed it into law against its advice.

Land ownership has long been a contentious issue in South Africa, with most private farmland owned by white people 30 years after the end of the racist system of apartheid. There have been continuous calls for the government to address land reform and deal with the past injustices of racial segregation.

But in its argument against the Expropriation Act, the majority-white DA has said that the apartheid government used similar powers to remove native communities from their land and added that it wants to protect property rights for all South Africans. "This history teaches us that true redress requires protecting property rights, ensuring that no government is ever given unchecked expropriation powers ever again," the party said in a statement.

The ANC said no land has been seized without compensation and added this would only happen in exceptional circumstances, such as if land was needed for public use and all other avenues to acquire the land had been exhausted.

President Ramaphosa has said he will send envoys to various countries to explain the government's recent policy changes, including the Expropriation Act.

[Source: BBC News, 10 Feb 2025]

CANADA: 150th anniversary celebrations of Supreme Court

2025 marks the Supreme Court of Canada's 150th anniversary. Since 1875, this court has played a significant role in defining the country's legal landscape and Canadian society.

The Court has also evolved over 150 years to reflect Canadian society. Key milestones, such as the coming into force of the *Canadian Charter of Rights and Freedoms* **in 1982, signalled big changes for the Court. The diversity of the judges on the bench, the use of technology, and the protection of judicial independence have all contributed to the evolution of this important Canadian institution.**

"There would be no democracy in Canada without the judicial branch of government," said Chief Justice Richard Wagner. "The Supreme Court of Canada has helped shape our country for 150 years. Every day, we work to uphold that tradition in service of the rule of law and the protection of Canadians' rights and freedoms."

Over the course of 2025, there will be many opportunities for Canadians to reflect on their history, understand how the Court has evolved over the years and look towards the future, and it hoped that everyone – the legal community, academia, visitors, students and people from across the country – will participate in the commemorative events that have been planned.

The Supreme Court's new website will help facilitate that participation, with information about the 150th anniversary, history and several new features that were launched recently.

[Source: News release, Supreme Court of Canada, 27 Jan 2025]

GUYANA: Increase in strength of Court of Appeal

The People's Progressive Party/Civic (PPP/C) is moving to amend the law to allow for 11 Court of Appeal judges up from the nine it had proposed in 2022, Attorney General (AG) Anil Nandlall has said, noting that there was a backlog.

"A further amendment to the Court of Appeal Act will be tabled and in that amendment the complement of judges of that court will be increased from nine to 11. You would recall we made an amendment increasing it from five to nine, based upon recommendations received from the judiciary, we are increasing it from nine to 11. There is a large backlog [of cases]," Nandlall announced on Tuesday last during his "Issues in the News" programme on his Facebook page.

He also said, "A complement of 11 was thought to be a satisfactory number and that Bill will be tabled in the National Assembly on Monday coming."

[Source: Stabroek News*, 17 Feb 2025]*

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Conferences

WARSAW: Building the Law Firm of the Future

The Law Firm Management Committee of the International Bar Association is organising its next Building the Law Firm of the Future in Central and Eastern Europe (CEE) Conference in Warsaw on 14–15 May 2025.

Those attending are promised "hearing some great advice which will enable you to plan the future of your law firm" and being able to "meet and network with many leaders from the Law Firm Management community". Speakers will include a range of law firm leaders and acknowledged experts from across the globe providing practical advice for law firms of all sizes.

The topics scheduled to be covered include:

- Law firm future readiness – what do you need to do now?
- Margin squeeze – how to avoid it
- How do we attract and retain talent now and in the future?
- What is the future for the 'mid-market' firm
- AI is not the only way forward
- What do the clients think about the future of law firms?
- How the geopolitical situation, national security and the technological/AI shifts are impacting law firms

Further details are available at *www.ibanet.org/conference-details/CONF2609*.

LONDON: Competition Law

The Law Society (of England and Wales) is organising its 2025 Competition Conference on 25 June 2025 at its historic main office at 113 Chancery Lane, London, WC2A 1PL.

The conference is designed to tackle the vertical slices of competition law that impacts lawyers' daily practice. Participants will have the opportunity to engage with leading international authorities, join interactive workshops and collaborate with experts on dynamic panels to tackle the latest global trends and challenges shaping competition law, according to information put out by the organisers.

Among the topics to be covered are: merger remedies, cartels, FDI, NSIA, and abuse of dominance. Keynote speeches are scheduled to be delivered by leading authorities and international enforcers. Those likely to benefit include: competition and antitrust practitioners; competition authorities; economists; enforcers; in-house practitioners; international firms; private practitioners; and those with a general interest in competition law and policy updates.

More information on the event can be obtained via *www.lawsociety.org.uk/events/products/law-society-competition-conference-2025*.

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