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THE COMMONWEALTH LAWYER

Journal of the Commonwealth Lawyers' Association

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The Commonwealth Lawyers' Association exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.
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(Vol 35, No 2)

August 2025

President's Message

As I reflected in the April 2025 issue of *The Commonwealth Lawyer*, the Commonwealth Law Conference ("CLC") has stood as the flagship event of the CLA for over seven decades. In keeping with those achievements, the 24th CLC in Malta was a resounding success. The Conference drew 535 delegates from 56 jurisdictions. Feedback was overwhelmingly positive. Attendees spoke highly of the calibre of speakers and relevance of the sessions, which were intellectually rigorous and deeply responsive to contemporary issues.

I wish to pay tribute to the stupendous and tireless efforts of our Secretariat team of Brigid Watson, Claire Roe and Evie Wilson ,Chair of the Organising Committee , Dr. Peter Maynard KC, Chair of the Papers Committee, Mark Woods and all CLA members.

The Malta CLC has markedly elevated the profile of the CLA and set a formidable benchmark for the conference. As we turn our attention to the next CLC in Darwin, we recognise the high expectations and embrace the challenge with full commitment.

Alongside our Secretary General, Brigid Watson, Office Bearers and Council members , I engaged in a series of meetings on the sidelines of the Malta CLC with our institutional members and key stakeholders. These discussions were multi-faceted and constructive. Our principal aim was to gain insight into how the CLA can best continue to be relevant and meaningful not only to our institutional members but also to individual legal practitioners across the Commonwealth.

Let me now turn to the road ahead.

Since assuming office just over five months ago, I have prioritised reconnecting with our institutional heritage, and honouring the history and the leadership that have shaped the CLA. Central to this has been a reaffirmation of our foundational objectives which are the defence of the independence of the legal profession and the Judiciary.

We are currently developing our Strategic Plan 2025-2027, which will provide a blueprint for our activities over the next two years. Key focus areas include:

Governance and structure: A review of internal governance in our Constitution, electoral practices and the effectiveness of our Hubs and Committees.

Membership: A biennial membership review by our Secretariat to ensure that we are maximising opportunities for growth and providing valuable benefits to members.

Capacity building: Upcoming initiatives include an 'AI in the Law' programme in collaboration with LexisNexis, an advocacy training programme with The Honourable Society of the Inner Temple and CPD programmes aimed at Young Lawyers.

Regulation of the profession: We are initiating a project to examine disciplinary processes across jurisdictions, and to identify and promote best practices.

Independence of the legal profession and the Judiciary: In light of the Council of Europe's adoption of the Convention for the Protection of the Profession of Lawyers we will advocate for its adoption across Commonwealth jurisdictions.

Indigenous rights project: In the lead-up to the Darwin CLC, we will undertake an initiative focusing on indigenous rights, consistent with our commitment to equity, justice, and inclusion.

These initiatives are to be dynamic , reflecting the evolving priorities of our members and the broader legal community.

I had the privilege of meeting the Commonwealth Secretary-General, Shirley Botchwey, in London on 12 June 2025. Our exchange was candid and fruitful, encompassing the CLA's ongoing activities and opportunities for enhanced collaboration with the Commonwealth Secretariat.

The work ahead is significant as is the momentum we have built together. In the words of Nelson Mandela, *"It always seems impossible until it is done."* Let us press forward and deepen CLA's impact across the world.

– Steven Thiru

Editor's Note

In this issue we have articles on a wide range of subjects. Some of them are based on papers presented at the very successful Commonwealth Law Conference held in Malta last April. There are many more such papers submitted for publication and I am hoping to be able to carry suitable ones progressively over the next couple of issues.

We start off with an important discussion on how the concept of fairness has been dealt with by the courts in the United Kingdom in recent years. This is a topic of far-reaching importance given how central fairness is to the lives of people. Richard Clayton KC explains the approaches that British judges have been taking, not least in the area of procedural fairness which features prominently in administrative law cases. He makes the seminal point that "the content of the duty of fairness depends on the context and particular facts of each case" and notes that the law is now clear about the principle of bias extending to international arbitrators as well.

Another issue of continuing topicality is how clashes between individual human rights and the collective rights of indigenous or tribal communities which flare up in certain societies can be resolved. Daniel Pole, a lawyer based in Canada, tackles this question head on using the example of Zambia where the matter has come up before the courts on more than one occasion. His article analyses two groundbreaking decisions of the High Court where freedom of conscience, thought, and worship had to be balanced against African traditional or tribal customs. In both cases, notes Pole, the court unequivocally affirmed the supremacy of the country's Constitution which contains strong guarantees in favour of individual rights. In his view, "Courts should preserve and protect internationally recognised fundamental human rights. Customary law must be respected, but it is subordinate to the Constitution and international human rights instruments." He believes that decisions such as these will be valuable not only on the African continent but globally.

A third noteworthy article in this issue deals with the reconciliation efforts underway in Australia between the majority population and the minority indigenous groups. Ron Heinrich and Saxon Quick trace the evolution of these efforts and explain the various milestones that have been reached. They strike an optimistic note in their assessment:

> Australia's efforts towards reparations and reconciliation have progressed significantly over the last 30 years. More crucially, they are continuing to progress into the future. While indigenous Australians have undoubtedly faced setbacks, including legislative restrictions on native title and the failure of the Voice referendum, on the whole we are seeing a net improvement in the rights and cultural protections for this population.

In addition to these, we carry a short piece by Sean Xue, an undergraduate student, on what he calls the eroding legitimacy of law in the polarised age we are living under. He is concerned about the future of the rule of law, and avers that: "The real battle is not in courtrooms, but in the public square – in the stories we tell about the law, and the faith we place in its fairness." Xue's essay won the International Law Book Facility's student essay competition 2025.

There are a couple of other articles which also, I hope, will interest you. These address the role of in-house counsel in ensuring compliance with anti-money-laundering measures in the gambling industry in Africa, and the war on financial crime in the legal sector in Nigeria.

On a slightly lighter note, we have an engaging piece by the CLA's Honorary Life Treasurer, Laurie Watt, describing the highlights of, and mood at, the recently concluded Commonwealth Law Conference. Laurie is an inveterate attender of CLCs and has, moreover, for nearly a decade now, been contributing a Diary which, among other things, always succeeds in bringing out the flavour of the event to those who may not have been lucky enough to be there in person. Readers will, I am sure, find Laurie's descriptions of the festivities in Malta thoroughly enjoyable.

Here's wishing you a pleasant summer!

– Dr Venkat Iyer

Articles

Conference Diary

Laurie Watt

This is a personal account of Gwendolyn's and my visit to Malta and our attendance at the Commonwealth Law Conference held there between 5-11 April this year. Of course, the lifeblood of our Conferences is our delegates, and close behind that are the sessions into which so much work has been devoted. I have provided a broad picture of the whole event but have only discussed the Plenaries and sessions which I attended but I am sure that further details of the Plenary Sessions and many of the general run of sessions throughout the Conference are available to download either through the CLA office or the speakers directly.

Gwendolyn and I decided to take a few days' holiday at both the beginning and the end of our time in Malta. This was very much a first visit for the two of us. We left from Gatwick Airport, our departure being blessedly trouble-free compared to a previous holiday which started and nearly stopped there.

First impressions, on arrival in Malta, was blazing sunshine on a small, rocky island with roads overground and underground, single carriageways, dual carriageways, all around and about like the marble runs we used to have in our desks at school. Thus, we managed to drive a long way to get not very far in pure distance terms once in the environs of Valletta, around and under which, we were driven, to reach the Malta Hilton in the coastal, inner suburb of St Julien. This hotel was superbly appointed on and above the sea, being built into a cliff along with multi-storied accommodation – from Reception the elevators all went all the way down to our rooms. At the lower levels were the bars and restaurants. We were certainly not going to run out of places to eat here.

We were checked in by welcoming Reception staff and delivered to our impressive room, the view from the window being sea and wall-to-wall sunshine. On the small balcony the heat was relieved by a slightly cool breeze. We spent the first couple of days exploring and walking everywhere, and, on the first evening, sampling the Hilton's very fine Thai restaurant, The Blue Elephant, to which we were to return in due course. Fine food and great service.

At risk of repetition, the staff here at the Hilton are just lovely and this remained so despite the pressures of over 500 delegates crowding the place out at times.

Friday

On the Friday afternoon the troops were gradually gathering. That afternoon Ron Heinrich called us in the room and invited us to join him in the Executive Lounge for a cup of tea. He was at the Conference with his son, Andrew, but not his wife Jeannie this year; we missed her. Wonderful to see him after a couple of years since we were all in Goa and we had a good catch-up. After we parted, I called Brigid to see if we could have access to the Executive Lounge as we had had to such good congregational effect with the Executive Lounge at the hotel in Goa. Dear Brigid came straight back to say 'yes' although I am not sure quite how she managed that. That evening we had the first of our long walks with the aim of investigating how long it would take to get to Sliema, another inner suburb on the way to Valletta.

We did a huge exploratory circle walking around the St Julian bay in the direction of Sliema. The road down from the hotel was very busy and quite steep but at the roundabout at the bottom the road carried on around the bay where there was the choice of what was called Main Street, clearly very old and very steep. This time it was too hot to follow that so we took the easy route by the water which took us round to Balluta Bay where we stopped for a coffee at one of the many cafés along the road. As we were sitting there I was looking up and around and I spotted a sign for what looked, once I had gone up some stairs to investigate, a rather attractive first floor restaurant, which I noted for a visit for the Saturday evening after the Conference had finished. That done we continued with our walk down a long Brighton-style esplanade to a beachside restaurant called Surfside on Tower Road, right over the rocky beach, and where we had a pleasant light lunch before returning to the hotel.

I caught up with many, many old friends during the day. Too many to name here but it is always good to be able to spend time with Mark Stephens, a long time CLA colleague and a former CLA President. It was great to see Steven Thiru, from Malaysia, who was elected President of the CLA back in February. It was also good to see his predecessor, Peter Maynard, from the Bahamas, who although having handed over the presidential baton remains Chair of this Conference. Peter, like R Santhanakrishnan, before him had devoted a huge amount of time and his own resources to being a wonderful ambassador for the CLA through a hugely diverse selection of Commonwealth countries, attending all the major Commonwealth Meetings including those like CHOGM – the Commonwealth Heads of Government Meeting which during his presidency had been held first in Kigali (Rwanda), and then in the deep south Pacific in Apia (Samoa).

Saturday

Today is the Family Law Symposium, the first such to be held linked to a Commonwealth Law Conference. My old colleague and business partner, William Longrigg, from Charles Russell Speechlys was there, which was a bonus for us. I am so glad that the Family Law side has been achieving much more interest in the CLA. It is such an important arena these days with multinational family disputes, particularly involving the issues arising when children become an international weapon in family disputes and divorce.

Steven Thiru invited me to attend the CLA Council Meeting today despite the fact that I am not yet back on the Council. I felt that it was a bit presumptive for me to do so, although I was happy to join them for the Council dinner. I was, however, persuaded that I should attend so I did.

To put my reluctance into context, the previous year, I had retired as the CLA Treasurer which was a position I had occupied since 2008. One of the curious features at the time was that the Treasurer also chaired the Executive Committee. The reason for this was that video conferencing was in its infancy. With Presidents living in parts of the world and in time zones which made it not only hard to attend meeting sometimes but, in particular to chair them, it, accordingly, fell to the Treasurer to do so. This practice continued well into the period of Brian Speers' Presidency which was extended as a result of the COVID crisis. During this troubled time, of necessity, as so often, technology advanced and 'Zoom calling' vastly improved the whole process of having multi-person/multinational conferences online. It came to a point in 2021 when I told Brian that now that it all worked so efficiently, it was about time he, as President, should be chairing the Executive Committee! This duly came to pass and with it I felt strongly that, having been Treasurer for nearly 15 years, it was also time for someone younger to take over that role. So I told Brian that I wished to retire from that as well. We now have a wonderful successor, Maria Mbeneka, from Kenya!

Time passed and a new CLA Constitution was passed which included a rather charming clause that created the role of Honorary Life Treasurer to which position, in due course, I came to be elected at this Conference.

The Council Meeting affirmed the decision and I was formally inducted into my new role! Dinner that night took place at the Blue Mountain Restaurant where Gwendolyn and I had much enjoyed our meal earlier that week. Everything was wonderfully cordial and it was so very good to see so many usually 'virtual' friends. It was great to catch up Amirali Nasir from Hong Kong, Sophie Stanbrook from Turks and Caicos, whose late father was an old friend and colleague and a devoted attender of these conferences.

Sunday

Slightly earlier breakfast today. The Executive Lounge does breakfast, of course, but we decide that the breakfast at the Oceana Restaurant is far too good to miss, and, anyway, there was a much wider choice there.

Today was the big day for the Young Lawyers, run, superbly as ever, by Joanna Robinson. I was held in reserve for the 'speed mentoring' session due at the end of the day but was not in the end needed.

No exciting CLA events for the rest of the day so G and I split up, she to stay and work in the hotel to do some client work, that she had brought with her, and me to reprise more of the walk to Sliema. This time I decided to walk by myself, up the narrow, misnamed, Main Street – long steps for quite a while, rather than walk the coast road which we had 'done'. I wound my way through the attractive classic Maltese houses and shops and back down to the shore road at Balluta Bay continuing along the coast road before having walked enough and returning round the coast road back to the hotel.

Back at the hotel, G and I readied ourselves for the throng of the Welcome Reception that evening. It was a big space at the Hilton, again, well put together with plenty of great food. After the Reception G and I joined Mark Woods and his wife, together with Graeme Mew and his wife and Andrew Mackenzie for a light dinner in the Oceana Restaurant at the hotel.

Monday

The weather has closed down a bit today, which does not matter really as we have sessions all day and little opportunity to explore outside. G and I had a slightly rushed breakfast to get to the Opening Ceremony. What a huge and impressive Ceremonial Hall with space age Information screens. All this lasted for about half an hour before a total power cut plunged us all into complete darkness. For a short while there were various attempts to get it up and running which after about 20 minutes they did! We wondered whether it would be an inauspicious start. As you will soon gather, it, thankfully, proved not to be .

Once we got under way, a passably good singer, a tenor, got up and sung a few songs and then, in a stentorian and stirring voice launched into the Maltese National Anthem. At this point I was a bit mystified, as we had been led to expect a performance by a singer called Fatima, and this very male artist clearly wasn't her. We never had an explanation for this. The opening then continued with the usual speeches and appropriate bowings and scraping.

The Opening was followed by the first Plenary Session on 'Democrats and Despots – Does Consensus Work?'. The main topic was the Commonwealth Charter and its record of supporting and encouraging inclusion and consensus. The discussion was all right and articulate but I would have liked to have heard more on the very contemporary low hanging fruit of power plays being horrifically exercised in various parts of the world today, against which the Commonwealth should be such a bulwark.

My first session, 'Parliament and the Judiciary', started with a great and well-structured speech by Lord Justice James Dingemans KC, with excellent contributions from the Australian

Dr Hugh McDermott MP and Dr Elizabeth Macharia of the Commonwealth Secretariat. Their contributions related to the necessity of the provision of sufficient financial resource and organisation so that, for example, if you provide a number of courts suitable for a particular part of the country you must make sure that they work before you put the people in! To put it at its most stark, it was Lord Philips who stated that 'the very independence of the Courts was threatened by the funding arrangements currently in place' for the courts in the UK. We also looked at the role of the Government lawyers and the degree of their responsibility and to whom it was directed.

We then had our first big Conference lunch. I do not normally in these diaries take particular note of the delegate meals. However, the catering here by the hotel was quite exceptional. There were vast quantities of food provided in great variety with a large number of hotel catering staff standing by to attend to our requirements. Wonderful.

After lunch we had Ron Heinrich's session on 'Slavery and the Commonwealth' which he and I had discussed before today. The big issue was the legal ramifications in relation to the reparations that are increasingly being demanded for the harms done by the transatlantic enslavement of Africans in previous centuries. We were also reminded that this was not an old problem and modern slavery was rife, equally in the Commonwealth, as everywhere else! Ron read his first-class paper on this subject. In addition we had excellent contributions from Peter Maynard, Efua Ghartley from Ghana and the formidable and impressive Jacqueline McKenzie of Leigh Day in the UK.

However, I hope I will be forgiven, after the last fine session, for saying that the standout session for me, this afternoon, was the following 'Silent Intruders: Navigating the Intersection of Modern Spyware Tools and Fundamental Rights'. The elephant in the room, which was not ignored, was the ubiquitously used and abused Pegasus spyware, and the revelations in relation thereto. I understood that the Israeli army had developed this as a silent intruder which was effectively unbreakable once it had broken through the entry barriers on any iPhone. We had three speakers, Stella Wutete, Geraldine Noel who were all good but it was Shyam Divan from India whose flawless advocacy showed us, as it has done before at these Conferences, what a truly great speaker he is.

The day concluded with the Moot which is a long standing feature of Commonwealth Law Conferences although I think it didn't happen at the last Conference in Goa. This event, here, was, to give it its formal title: the Bar Council of England and Wales International Law Moot, the subject for which was 'Common Law – Different Approaches'. There was presented what, in my view, was a somewhat over complicated scenario, particularly having in mind the quite short time frame for the moot, on "international child abduction, involving conflict in the application of the International Hague Convention 1980". This was to be argued between a team from the Commonwealth and one from the Bar Council of E&W. It was well chaired by a Judge from Northern Ireland, Bernard McCloskey.

The moot was followed by a party hosted by the Bar Council of England & Wales. We drank an Italian spumante which I had not tasted before but was quite good and which I hoped it might be possible to persuade the Charles Russell Speechlys/3 Pump Court team to serve at their party tomorrow evening.

Tuesday

Today is Gwendolyn's day so helping her, I missed the Plenary on Judicial Independence which was a pity as I gathered that it had been good. I have been particularly concerned in recent years, and even before, about the extent, always denied, that the old House of Lords, now the Supreme Court, might be taking positions, in some cases, more palatable to the government than justice might dictate. I think, in particular, of the proroguing of Parliament issues back when Boris Johnson was Prime Minister. Must get hold of the recording of this session.

Gwendolyn was chairing her session, 'Health and Wellbeing in the Law'. She had three excellent panellists, all of whom were very impressive. They were: Ngosa Simachela, Dominic Wilcox from Australia, and the Mariam Gagi, from Ontario. They were all outstanding and if Mariam stood out, she did have the delegates eating out of her hands. The speakers explored the business pressures, the judicial and case management pressures, the increasingly stressful nature of client issues and, lastly, the inherent risk of vicarious trauma which featured quite strongly in the session.

There was only a small number of delegates attending at the beginning which was disappointing, but, when we were well into the session, I turned round to see whether this had improved and was delighted that the room was packed with standing room only.

G was able to join me for lunch, where again there was a huge quantity of food all very well spread around the room such that there were very few queues and where there were, they were fast moving.

I stepped into the 13.45pm session on 'Corporations and Corruption' where it was fascinating to learn how much corruption infiltrates into the interstices of corporate life. I stayed long enough to hear Mark Fenhalls KC who is an excellent speaker. The other speakers were Donovan Walker and Juliana Walker.

I slipped out thereafter, as I really needed some more exercise with all this wonderful food on offer at all the meals. I did my mountain goat course up Main Street over the far side of Saint Julian and back in time to get ready for the Charles Russell Speechlys/3 Pump Court party this evening. It went well, especially as I had persuaded them to serve some sparkling wine which had not been their earlier intention! The party was lovely and I was pleased to be there but it was not the same, foodwise, and we left quite hungry!

Accordingly, G and I stepped into a nearby restaurant called Zeri's which we had previously discovered and noted when investigating some extensive steps going down, from the

roundabout just below the hotel, to the Marina. There were 5 different restaurants all branching straight off these long steps! Although we were late, Zeri's proved excellent with delightful service.

Wednesday

Today the Plenary was 'Watch out – Lawyers are at Risk Right Now', for which I managed to connect for most of the session. I was keen to hear Mark Stephens who was eloquent as ever but even more particularly, the wonderful Faith Odhiambo, President of the Law Society of Kenya, of whom more in due course. She was a particularly impressive speaker about the tribulations that the legal profession in Kenya are currently experiencing, including threats to her own self. So tragic, as I thought they were the one jurisdiction which had finally laid low these challenging issues.

After the morning break for coffee, I went to the session on 'Tackling Transnational Corruption: From Theory to Practice, Measuring Commonwealth Progress', which was led by Adam Riley, Counsel from 3 Hare Court, Temple, in London, a set which was here very much in force at the Conference. He was supported by Ruggles Ferguson KC from Trinidad and Stephen Baker from Jersey. What I caught up with was fascinating and well presented, with the main emphasis on the implementation of the UN Convention Against Corruption. I am hoping to be able to obtain a recording of the whole session.

After a short visit to the lunch where we were again presented with a vast quantity of excellent food, we had a meeting of the CLA Legal Technology Committee in the main auditorium, during which the chief area of discussion was the launch of our CLA Declaration on the Use of Artificial Intelligence. This was an interesting discussion, in person, on such a key subject, which hitherto had all been conducted on Zoom. Wonderful technology but no substitute really for being in person as a group, especially as we were debating among other smaller areas, the extent to which the human element should appear in such a declaration. I had suggested that we should be adapting and incorporating the essence of the great science fiction writer Isaac Asimov's "Three Rules of Robotics" which he formulated in 1942 as a set of regulations to protect the sanctity of human life. We had some discussion on this and agreed that its essence should be there within the broader picture and as something fundamental.

This was suitably followed by a session on 'AI regulations; Concept and Governance', where the descriptor of the session quoted Elon Musk, of all people, who with surprising eloquence said "I'm increasingly inclined to think that there should be some regulatory oversight over AI at the national and international level, just to make sure that we don't do something very foolish. I mean with artificial intelligence we're summoning the demon".

This evening, we have the GALA DINNER! For the first time in my memory we have been asked to wear 'black tie' or equivalent or National Dress. G and I suitably attired, joined the crowd as we were all required to be at the hotel entrance at 5pm sharp. So, we were, and, without further ado, we climbed onto the first bus – of three – which left reasonably promptly, hoping that we might get there first and avoid the queues the other end. I was, however, puzzled, but not troubled – oh well, he is local and knows where he is going – that the driver took us on the coastal road, full of heavy traffic and other buses, that G and I had been walking all week. I, on my lone exploratory walk, yesterday, had by chance been there (going the wrong way, taking me up to the dual carriageway into Valletta which was no fun as a walk and so forcing me to retrace my steps to start again!) so I knew that the route we were now traversing was slow and much longer than the direct route I had discovered.

When we finally arrived at our destination, after driving for nearly an hour we found the other two coaches, there ahead of us, having already discharged their cargoes of delegates! They, of course, had taken the direct route. Thus we joined the end of the long queue to get into the Mediterranean Conference Centre – or more properly – *La Sacra Infermeria*, where we were to have our Conference Dinner. This amazing building was built as a hospital in the 16th century by the Order of St John, and it was known as the Sacra Infermeria or the Holy Infirmary. At one point during the brief French occupation of the Islands, it was known as the 'Hopital Grand' and served the same purpose during the last War. Amazing that Napoleon succeeded in invading Malta when the might of the Ottoman Empire had failed to do so following the Great Siege of 1585.

The Conference Dinner was a great success. The very long building accommodated our numbers easily and the food and drink were excellent. I remember a particularly fine risotto, although the most handsome looking steaks on offer for the main course did give the jaw muscles a bit of a workout.

On our table we had Kahlil Parker KC from The Bahamas, Lorraine Reeves, Anthony and Marie Crocker from Perth Western Australia, Sir James and Janet Dingemans LJ and Mark Fenhalls KC from London. Unsurprisingly, taking the coach back by the direct route took 20 minutes.

Thursday

The Plenary for today was 'AI and Justice – Sprinting Towards a Vanishing Finishing Line'. The presentation for this was by Lexis Nexis's Ian McDougall and Richard Susskind, the latter, I recall giving a presentation to my firm before anyone had thought of or coined the expression AI, and, not only that but I also recalled his lecture on more or less the same subject but in very different times at our Commonwealth Law Conference in New Zealand, thirty five years earlier in 1990! Both Ian's and Richard's presentations were superb and I hope that they were recorded for posterity and the next time we look at that subject in 35 years' time.

Following the coffee break, we had the 4th Annual Sorabjee Memorial Lecture. This is in memory of the great Indian Jurist, former Indian Attorney General, former CLA President and Jazz lover, Soli Sorabjee, whom I had the pleasure of knowing in the last decade or so of his very long life. The lecture was presented by Geoffrey Robertson KC. The best I can say is that it was inimitable, respectful to Soli's memory and entertaining

and will be available to download. He was supported by Mark Stephens, our Vice President Europe, and R Santhanakrishnan, one of our Hon Life Presidents.

We then had the last session that I attended which was on 'AI in the Workplace' chaired by Maria Mbeneka, CLA Treasurer and Chair of our Legal Technology Committee, who was joined by Anurag Bana from the UK and Alison Holt from Papua New Guinea. Two key concepts were discussed, among others: the lack of any explicit laws in many jurisdictions governing the use of AI in the workplace and, critically, the concept outlined so succinctly by Pete Cashmore CEO of Mashable: 'Privacy is dead, and social media holds the smoking gun!

The Closing Ceremony

The Closing Ceremony was much later today than traditionally, thus enabling us to have nearly a full day of sessions and events.

The proceedings commenced with some Maltese dancers from the Paul Curmi Dance Studio strutting their stuff with traditional dances to get everyone in the mood. I had still never discovered what had become of the lovely Fatima.

We then had the usual series of speeches from our President, Steven Thiru, our Conference Chair, Peter Maynard, and other local and international notables.

This was followed by the presentation of the Lexis Nexis 'Rule of Law Award' to the previously mentioned Faith Odhiambo, President of the Law Society of Kenya. I had been fortunate to be involved in putting together, from a long list of thirteen recommendations, a short list of three notable candidates for this award to present to the CLA Executive Committee for their choice. My preference was for Faith because she showed the extent to which she had the considerable courage to stick her head 'over the parapet' and risk her life and safety in upholding the best standards of the Rule of Law in the fast deteriorating situation in Kenya. She gave a short impassioned, heartfelt and most gracious speech of thanks.

My appointment as Honorary Treasurer for Life was mentioned by Steve Thiru which I was not expecting but it was nice that he did and I was relieved that I did not have to say anything.

The proceedings concluded with a short video and the much anticipated announcement of the location of the 2027 Commonwealth Law Conference in Darwin, in the Northern Territory in Australia, although it had become quite an open secret by this time.

I cannot conclude my Conference diary without mentioning the superb, so professional, and experienced Master of Ceremonies, Mark Woods ('Woodsy'), our Council member from Melbourne and Chair of our Access to Justice Committee, who did such a wonderful job as ever.

The day was not finished as we had been invited by the British High Commissioner, Mrs Victoria Busby, OBE, to a cocktail party at the British High Commission residence, where she and her husband lived, which was in Naxxar, about a half hour coach ride from the Hilton in St Julian. We were given a lovely and generous cocktail reception replete with excellent food and drink. Mrs Busby also gave a most warm and welcoming address to us all.

For this Correspondent, this was the end of what had been a magnificent Conference. One of the best and with a wonderfully broad representation of delegates from all over the Commonwealth. Gwendolyn and I stayed on at the hotel and explored Malta more widely for another three days before returning home.

[Laurie Watt is Hon Life Treasurer of the Commonwealth Lawyers' Association.]

The Developing Duty of Fairness in the UK Courts

Richard Clayton

Introduction

In this article I shall discuss a few important recent UK authorities on the nature of fairness in public law cases. Some of these cases lay down new legal principles or suggest new approaches to the application of existing principles whilst others confirm longstanding legal standards.

However, the cases I propose to address concern the public law principle of fairness covering:

- the purpose of procedural fairness;
- the idea that the duty of fairness does not include "substantive fairness", but is limited to procedural fairness;
- the principle that the content of the duty of fairness depends on the context and particular facts of each case; and
- the view that bias principles apply to arbitrators as well as judges.

Purpose of procedural fairness

In *R (Osborn) v Parole Board* [1] the UK Supreme Court recast the rationale requiring decision-makers to adhere to the common law duty to act fairly. A number of prisoners (including prisoners serving life sentences) applied for an oral hearing before the Parole Board so they could be released from prison. The context concerned deprivation of liberty which required the duty of fairness to be rigorous in the context of making a decision which could consider a wide range of issues.

The Supreme Court held that, although it was impossible to define exhaustively the circumstances in which an oral hearing would be necessary, they would include cases where:

- important facts were in dispute, or significant explanations or mitigations were advanced, which needed to be heard orally in order fairly to determine their credibility;
- the board could not otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed;
- a face-to-face encounter with the board, or questioning of those who had dealt with the prisoner, was necessary to enable the prisoner's case to be put effectively or tested;
- in the light of the prisoner's representations, it would be unfair for a paper decision made by a single member panel to become final without an oral hearing;
- the purpose of holding an oral hearing was not only to assist in the board's decision-making but also to reflect the prisoner's *legitimate interest* in being able *to participate in a decision* with important implications for him, where he had something useful to contribute; or
- the question of whether fairness required a prisoner to be given an oral hearing was *different* from that as to whether his application was likely to succeed and could *not* be answered by assessing that likelihood.

The Court addressed three general issues. First, *the Court's role when considering whether a fair procedure* was followed by a decision-making body. The court held that the approach of asking whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* rational grounds is not correct. The court must determine *for itself whether a fair procedure was followed.*[2] Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.

Secondly, *the purpose of procedural fairness*. No doubt that one of the virtues of procedurally fair decision-making is that it is liable to make better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. But, as Lord Hoffmann observed in *Secretary of State for the Home Department v AF (No 3)*,[3] the purpose of a fair hearing is *not merely to improve the chances of the tribunal reaching the right decision*, but that at least two other important values are also engaged. Justice requires a procedure which pays due respect to people whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions**.** Respect entails that such people ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.

This point can be illustrated by Byles J's observation in *Cooper v Wandsworth Board of Works*,[4] citing a dictum of Fortescue J in *Dr Bentley's Case (R v Chancellor, Master and Scholars of the University of Cambridge*)[5]:

> The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, on such an occasion, that even God himself did not pass sentence on Adam before he was called on to make his defence.

1 [2014] AC 1115.

2 *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, para 6, per Lord Hope of Craighead.

3 [2010] 2 AC 269, para 72.

4 (1863) 14 CBNS 180, 195.

5 (1723) 2 Ld Raym 1334.

The second value is *the rule of law*. Procedural requirements that decision-makers should listen to people who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions.

The third matter to be clarified concerns *the cost of oral hearings*. The easy assumption that it is cheaper to decide matters without having to spend time listening to what the persons affected may have to say begs a number of questions. In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not), procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear.

What fairness requires depends on the circumstances. It is impossible to lay down rules of universal application. Nonetheless, the Supreme Court gave some general guidance. Generally speaking, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case. The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

Issues which are considered by the board are not in practice confined to the question whether the prisoner should or should not be released or transferred. As I have explained, the statutory directions given to the board require it to consider numerous matters. The board's findings in relation to these matters may in practice affect the prisoner's future progress in prison, for example in relation to the courses which he is required to undertake and his future reviews.

An oral hearing is required when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted.

An oral hearing is also necessary when for other reasons the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed.

Whether a prisoner's right to a fair hearing requires the holding of an oral hearing does not depend on his establishing that his application for release or transfer stands any particular chance of success: that approach would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success, and thus involves circular reasoning.

Fundamental to procedural fairness is that the board must be, and must appear to be, independent and impartial. The board should therefore have no predisposition to favour the official version of events, or the official risk assessment, over the case advanced by the prisoner.

Procedural v substantive fairness

In *R(Gallaher Group Ltd) v Competition and Markets Authority*[6] the regulator investigated potential breaches of competition law by manufacturers and retailers of tobacco. It concluded that anti-competition law was infringed. The regulatory body then reached early resolution agreements with companies so that any admission of liability and co-operation would receive substantial reductions in the level of financial penalties anticipated. However, anyone who reached an early resolution agreement could appeal against the final decision, but would then become liable to an increased penalty. The regulator told a third party retailer that, if it did not appeal, it would, nevertheless, be given the benefit of any successful appeal against regulator's decision.

No other party was told of or given those assurances, and the claimants ultimately sought judicial review on the ground that that they were entitled to the same benefits of settlement as the third party retailer which had been given an assurance – which the regulator refused to give.

The Supreme Court rejected the submission that the regulator had breached any principle of equal treatment[7] and also rejected that claim that the regulator breached its duty of fairness. *Simple* unfairness as such, it said, is *not* a ground for judicial review. As Lord Diplock stressed in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd*:[8]

[J]udicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise …

Procedural fairness or propriety is of course well-established. For instance, *R v National Lottery Commission, Ex p Camelot Group plc*[9] concerned unequal treatment between two rival bidders for the lottery, one of whom was given an unfair procedural advantage over the other.

However, a *broader* concept of "unfairness amounting to excess or abuse of power" emerged in the 1980s, influenced principally of Lord Scarman. In the *National Federation* case[10] he had been

6 [2019] A.C. 96.

7 The Supreme Court decided that English law did not recognise equal treatment as a distinct principle of administrative law and that these questions had to be judged by reference to ordinary principles of judicial review, such as legitimate expectation and irrationality; t

8 [1982] AC 617, 637.

9 [2001] EMLR 3.

10 [1982] AC 617, 652–653.

alone in holding that "a legal duty of fairness (was) owed by the revenue to the general body of taxpayers". Furthermore, in *R v Inland Revenue Comrs, Ex p Preston*,[11] in which Lord Scarman had presided, Lord Templeman (who gave the leading speech), said that Lord Scarman developed the idea of a duty of fairness to an individual taxpayer, arising from a written assurance given by the Revenue as to his tax treatment.

Lord Templeman adopted the words of Lord Scarman about the revenue's general duty of fairness (without noting that it had been a *minority* view) to state that there was a duty of fairness owed to each individual taxpayer, but subject to the caveat that the Court could not "in the absence of exceptional circumstances" decide that the tax authorities would be acting unfairly – the tax authorities would be acting unfairly if the Court was satisfied that "'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercise of powers an abuse of power by the commissioners".[12]

Lord Templeman cited various authorities, saying that judicial review could be granted on the grounds of "'unfairness' amounting to abuse of power", either due to "some proven element of improper motive",[13] or due to "an error of law whereby the Price Commission misconstrued the code they were intending to enforce",[14] whereby the tax authorities would be guilty of "'unfairness' amounting to an abuse of power" – provided that their conduct would in a private context entitle the appellant to "an injunction or damages based on breach of contract or estoppel by representation". However, Lord Carnwath has pointed out this part of Lord Templeman's speech was *obiter*.

Lord Carnwath, overruling this approach, noted that, with hindsight, *Preston* is best understood by reference to the principles of legitimate expectation derived from an express or implied promise.[15] He pointed out that *Preston* had not been argued on legitimate expectation basis, perhaps because at the time it was uncertain whether legitimate expectation applied to substantive[16] rather than procedural benefits.[17]

Lord Carnwath then discussed the Court of Appeal decision in *R v IRC, Ex p Unilever plc*[18] where the Court of Appeal held that the revenue should not be permitted without warning to apply a strict time limit for submission of claims to loss relief, when to do so departed from a practice accepted by them without objection for some 20 years.

Despite the *Unilever* decision, Lord Carnwath concluded that, whereas procedural unfairness is well-established and well-understood, substantive unfairness on the other hand – or, in Lord Dyson MR's words, "whether there has been unfairness on the part of the authority having regard to all the circumstances"[19] – this idea of substantive unfairness is not a *distinct legal criterion*. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, like irrationality and legitimate expectation and these are the principles that the Courts must apply.

Contextual nature of the duty of fairness

The broad principles of fairness are of course well known. However, the Court of Appeal in *R(Taj) v Secretary of State for the Home Department*[20] underlined the importance of context when considering whether the duty of fairness has been breached.

11 [1985] AC 835.

12 ibid p 864G.

13 Citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

14 Citing *HTV Ltd v Price Commission* [1976] ICR 170

15 See, *De Smith's Judicial Review*, para 12-019; *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 61.

16 In *Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 A.C. 453 [60] Lord Hoffman stated that "a claim to a legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see, *Bingham LJ in* R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd *[1990] 1 WLR 1545, 1569*. "It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field"*: see, R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131. There have been a few Privy Council decisions which address substantive legitimate expectation. In *United Policyholders Group v AG of Trinidad* [2016] 1 W.L.R. 3383 the Privy Council decided that the principle of legitimate expectation was based on the proposition that, where a public body had stated clearly, unambiguously and without relevant qualification that it would or would not do something, a person who had reasonably relied on that statement would, in the absence of good reasons, be entitled to rely on it and to enforce it through the courts, at least where the statement was as to the procedure to be adopted in a particular context. In *Paponette v AG of Trinidad* [2012] 1 A.C. 1 it held that where a public body created a substantive legitimate expectation, unless it provided evidence to explain why it had acted in breach of a representation or promise made to an applicant, it was unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation.

17 See, the Privy Council decision in *United Policy Holders Group v Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383, para 83.

18 [1996] STC 681.

19 [2016] Bus LR 1200, para 53.

20 [2021] 1 W.L.R. 1850.

The Claimant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system under the Immigration Rules. The Claimant's application was in three stages, comprising consideration of his written application, an interview and a site visit to the claimant's business premises.

The Secretary of State refused the claimant's application because of concerns about the viability and genuineness of his business. The claimant claimed that the procedure adopted by the Secretary of State was unfair since the claimant had not been given a fair opportunity to know the case that was being made against him and therefore he had not had a fair chance to advance his case.

The Court of Appeal held that, although the common law principles of procedural fairness, including the right of a person affected by a decision to make representations to the decision-maker before the decision was taken and the right to know the gist of the case that he had to answer, applied to decisions taken under the points-based system, the *application* of those principles was *fact- and context-sensitive*; in the context of an application for leave to remain under the points-based system, it was not unfair, systemically, that the points-based system did not incorporate, as part of its system, a requirement on the decision-maker to put the applicant on notice of concerns entertained as to the genuineness of the application and the business in question, whether or not those concerns related to the truthfulness of the applicant's account; that it *was not procedurally unfair on the facts of the case* if the decision-maker failed to put the claimant on notice of his concerns. Neither the points-based system itself nor the Secretary of State's decision to refuse the claimant's application for leave to remain were procedurally unfair.

Bias principles and arbitrators

The principles of apparent bias are firmly settled in the UK Courts. In *Porter v Magill*,[21] based on the case law established by the European Convention of Human Rights under the Human Rights Act 1998, the House of Lords rejecting the restrictive approach taken in *R v Gough*,[22] decided that the test for apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased. In *Halliburton Co v Chubb Bermuda Insurance*[23] the Supreme Court decided that this principle of bias extended to international arbitrators.

Unless the parties to an arbitration otherwise agreed, arbitrators had a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias. The fact that an arbitrator had accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party was a matter which might have to be disclosed, depending upon the customs and practice in the relevant field. More generally, the Supreme Court decided that the requirements of apparent bias impose a limited duty of disclosure on those who decide bias applications.

The Supreme Court held that an arbitrator's duty of impartiality enshrined in s 33 of the Arbitration Act 1996,[24] applied to all arbitrators, whether appointed by the parties, by an arbitral institution or by the Court. There was no difference between the test in s 24(1)(a) of the 1996 Act, which involved the existence of circumstances that gave rise to justifiable doubts as to an arbitrator's impartiality, and the common law test for apparent bias, which asked whether the fair-minded and informed observer would conclude that there was a real possibility of bias. Therefore, on an application for an order for the removal of an arbitrator under s 24(1)(a), the Court would apply the objective test of the fair-minded and informed observer, having regard to the realities of international arbitration and the customs and practices of the relevant field of arbitration; and there might be circumstances in which an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party might reasonably cause the objective observer to conclude that there was a real possibility of bias. Whether the objective observer would reach that conclusion would depend on the facts of the particular case and especially on the custom and practice in the relevant field of arbitration

As a result, the Supreme Court decided that an arbitrator's duty under s 33 of the 1996 Act to act impartially gave rise to an implied term in the contract between the arbitrator and the parties that the arbitrator would, on his or her appointment, act fairly and impartially. The implied term would not be complied with if the arbitrator, at and from the date of his or her appointment, had knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render

21 [2002] 2 A.C. 357.

22 As Lord Goff stated in *R v Gough* [1993] AC 646, 670: "... I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

23 [2021] A.C. 1083.

24 S 33(2) states "The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it".

him or her liable to be removed under s 24 of the 1996 Act.[25] Therefore, an arbitrator was under a legal duty in English law *to disclose facts and circumstances* known to him or her which would or might reasonably lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased. In the context of a Bermuda Form arbitration, that duty would require the arbitrator to disclose appointments in multiple references concerning the same or overlapping subject matter with only one common party, unless the parties to the arbitration had agreed otherwise

The Supreme Court went on to conclude that where the information which ought to be disclosed was subject to an arbitrator's duty of privacy and confidentiality, disclosure could only be made if the parties to whom the obligations were owed had given their consent; if such consent were not obtained the arbitrator would have to decline the second appointment. Consent to the disclosure of private and confidential information could be express or inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field; and in a Bermuda Form arbitration the consent of the common party to multiple appointments of the same arbitrator could be inferred from its action in seeking to nominate (or appoint) that arbitrator, so that express consent would not be required.

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[25] S 24 of the 1996 Act states:

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

that he does not possess the qualifications required by the arbitration agreement;

(b) that he does not possess the qualifications required by the arbitration agreement

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) `that he has refused or failed-

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Tackling Financial Crime in Nigeria's Legal Sector

Juliet Ibekaku-Nwagwu, Hadassah Esther Igoche-Agbaje, and Benjamin Dina

Introduction

Following Nigeria's placement on the Financial Action Task Force (FATF) grey list and the enactment by the country's parliament of the Money Laundering (Prohibition and Prevention) Act 2022, it became crucial to implement effective Anti-Money Laundering (AML) measures across all sectors. Recognised as a Self-Regulatory Organisation (SRO), the Nigerian Bar Association (NBA) took proactive steps to address the money laundering and terrorist financing (ML/TF) risks identified within the legal sector.

To this end, the NBA amended the Rules of Professional Conduct for Legal Practitioners (RPC), introducing new rules under Chapter Two (Rules 55 to 72). These amendments integrate AML/CFT obligations for legal practitioners, establish the duties of the NBA Anti-Money Laundering Committee (NBA-AMLC), and promote a risk-based approach in combating AML/CFT within the profession.

In addition, the NBA adopted the Appointment and Examination Rules and Protocols, 2024, to guide the NBA-AMLC in fulfilling its mandate. The NBA-AMLC's primary responsibilities include:

- Assessing legal practitioners' compliance with AML/CFT regulations;
- Ensuring integrity in the examination process;
- Providing insights and recommendations on AML/CFT issues to the NBA; and
- Overseeing and managing transactions conducted by legal practitioners and law firms.

The recent NBA Legal Sector Risk Assessment Report 2024 published by the Nigerian Bar Association Anti-Money Laundering Committee underscores the critical need for enhanced anti-money laundering and combating the financing of terrorism measures within Nigeria's legal profession. That comprehensive report provides a roadmap for addressing vulnerabilities and strengthening compliance frameworks, to ensure that legal practitioners in Nigeria align with international best practices.

Regulatory landscape and challenges

Nigeria's legal profession operates within a complex regulatory environment that demands strict adherence to AML/CFT protocols. The Financial Action Task Force has designated lawyers as gatekeepers, requiring them to implement client due diligence (CDD) and report suspicious transactions. Despite these mandates, Nigeria has struggled with compliance, highlighted by its partial ratings in FATF's mutual evaluation reports and recent grey listing due to insufficient AML/CFT oversight.

The NBA, through its Rules of Professional Conduct, has embraced a self-regulatory approach. This includes the establishment of the NBA-AMLC, which is tasked with ensuring that legal practitioners adhere to AML/CFT requirements. However, balancing the profession's ethical obligations, such as client confidentiality, with these regulatory demands remains a significant challenge.

Key findings from the Risk Assessment Survey

The NBA-AMLC's risk assessment survey, which included 562 legal professionals from various regions, revealed several critical insights:

1. *Awareness and Perception of Risk*: A significant majority (75%) of respondents recognised the potential for money laundering (ML) and terrorist financing (TF) within their practice, particularly in high-risk areas like real estate and client asset management. However, there remains a notable gap in awareness and formal compliance structures, especially among smaller firms.
2. *Compliance Infrastructure*: Only 33.7% of firms reported having formal AML/CFT policies. Furthermore, many of these policies have not been reviewed since their adoption, indicating a need for more dynamic and responsive compliance frameworks. Enhanced due diligence (EDD) practices are inconsistently applied, with only 51.4% of respondents adopting EDD in high-risk scenarios.
3. *Client Confidentiality v Compliance*: While client confidentiality remains a core value, with 56.1% of respondents emphasising its importance, this principle often conflicts with the need for transparency and regulatory compliance. This tension underscores the need for clear guidelines that reconcile these professional obligations with AML/CFT requirements.
4. *Training and Capacity Building*: Most firms (83.9%) conduct annual AML/CFT training, yet there is a significant delay in training new staff. Moreover, 59.2% of sole proprietorships lack a designated compliance officer, highlighting the need for better resource allocation and capacity building across the sector.
5. *Vulnerabilities in Practice Areas*: The survey identified real estate transactions and client asset management as high-risk

areas. This aligns with findings from Nigeria's National Inherent Risk Assessment (NIRA), which pinpointed these sectors as particularly susceptible to ML/TF activities.

Recommendations

To address these findings, the report outlines several recommendations aimed at enhancing the NBA-AMLC's regulatory capabilities and the legal sector's compliance framework:

1. *Preventive Measures*: Implement mandatory AML/CFT training for all legal practitioners, including incorporating these topics into the Nigerian Law School curriculum. This will close knowledge gaps and ensure that new lawyers are equipped to handle AML/CFT challenges from the onset of their careers.
2. *Enhanced Supervision*: The NBA-AMLC should adopt risk-based supervision, including regular audits and assessments to identify and mitigate risks associated with different legal services. Leveraging new technologies for monitoring and reporting can improve compliance and oversight.
3. *Client Due Diligence*: Strengthen CDD and Enhanced Due Diligence (EDD) practices, particularly for high-risk clients and transactions. Legal practitioners must be trained to identify and report suspicious activities promptly, balancing the need for client confidentiality with regulatory obligations.
4. *Resource Allocation*: Address disparities in compliance resources, particularly in smaller firms. This includes providing financial and technical support to help these firms implement effective AML/CFT measures.
5. *Transparency and Accountability*: Enhance transparency in trust and company service providers (TCSPs) by requiring detailed disclosures of beneficial ownership. This information should be accessible to relevant authorities to aid in AML/CFT efforts.

Conclusion

The NBA's proactive approach, as evidenced by the recent legal sector risk assessment and subsequent recommendations, is a significant step towards bolstering Nigeria's legal profession against ML/TF risks. By adopting a multi-faceted regulatory strategy that balances ethical standards with compliance demands, the NBA can enhance the integrity of the legal profession and contribute to national and global efforts to combat financial crimes. The implementation of these measures will not only safeguard the profession's reputation but also reinforce its role as a defender of justice and lawful conduct.

[The authors are lawyers attached to BJ Attorneys, Abuja, Nigeria. One of them, Hadassah Esther Igoche-Agbaje, co-chairs the Young Commonwealth Lawyers Association.]

Trust on Trial: The Eroding Legitimacy of Law in a Polarised Age

Sean Xue

Introduction

At the heart of any functioning democracy lies a tacit promise: that those who wield power will do so within legal and moral bounds, and that those bounds will be fairly enforced, even against the powerful. This is what distinguishes rule of law from the mere rule by law. As Justice Neil Gorsuch of the US Supreme Court once noted, the rule of law is that 'remarkable fact' that a lone citizen may bring a claim against the most powerful institutions in the world and still be heard on equal terms.[1] But this vision, for all its elegance, is not self-executing. It depends on a public belief that the courts are neutral, that governments can be held accountable, and that justice is not an ornament but a safeguard. It is this belief – quiet, often unconscious, but utterly foundational – that is now under siege.

The crisis, then, is not one of legal architecture, but of collective belief. It is not that courts have suddenly abandoned their principles, nor that statutes have been stripped of their force. Rather, it is that a growing segment of the public no longer sees these mechanisms as impartial, nor the outcomes as just. The age of polarisation has recast the judiciary – not as a deliberative guardian of fairness, but as a political actor cloaked in robes. When each judgement is filtered through partisan lenses, when outcomes are pre-emptively dismissed as the product of ideology rather than principle, even the most meticulously reasoned decision begins to look suspect. This erosion of confidence is neither abrupt nor evenly felt. It gathers slowly, often under the weight of emotionally charged cases – those involving immigration, protest, or the rights of marginalised groups.[2]

Unease around judicial neutrality

Consider the United Kingdom. The growing unease around judicial neutrality is not simply a result of controversial rulings but of how political actors have chosen to frame them. In the aftermath of the UK Supreme Court's decision on the Illegal Migration Act 2023 and its restrictions on asylum appeals,[3] for instance, ministers did not engage with the substance of the Court's reasoning, which raised serious concerns about access to justice and human rights obligations. Instead, they cast the judiciary as an obstacle to the democratic will – an unelected elite frustrating popular mandate.[4] Here, the rule of law is subtly reimagined: no longer a constraint on power, but an inconvenience to be circumvented. When Parliament passes legislation that explicitly limits the scope of judicial review or instructs courts to interpret facts in line with government declarations – as it did by designating Rwanda a 'safe' country by statute, it transforms the law into an extension of political will. The principle of legal accountability, once central to the British constitutional tradition, begins to erode under the weight of expedience.

This pattern is not confined to the UK. Across liberal democracies, there is a growing tendency to interpret the rule of law not as a check on power, but as a tool to be wielded or discarded depending on partisan interests. A particularly stark example came in recently, when the United States Supreme Court issued a temporary freeze on the deportation of Venezuelan detainees.[5] Rather than acknowledging the Court's constitutional role in reviewing the legality of Executive Action, President Trump publicly condemned the decision, framing it as a politically motivated obstruction of his agenda.[6] More troubling, he went on to say that the United States 'cannot give everyone a trial,'[7] a direct rejection of the constitutional principle of due process and the ancient legal guarantee of habeas corpus.

When such sentiments come from the highest office in the land, they do more than cast doubt on a particular decision; they degrade the very reason why people obey the law in the first place. Legal philosophers have long understood that

1 Harvard Law School, 'A Conversation with Six Justices of the U.S. Supreme Court' (27 Oct 2017), accessible at *https://www.youtube.com/watch?v=_EeU6Lo_i7I&ab_channel=HarvardLawSchool*, accessed on 10 Apr 2025.

2 Peter Aspinall and Charles Watters, 'Refugees and Asylum Seekers: A Review from an Equality and Human Rights Perspective' (2010) 52 Equality and Human Rights Commission, accessible at *https://www.equalityhumanrights.com/sites/default/files/refugees_and_asylum_seekers_research_report.pdf*, accessed on 10 Apr 2025.

3 *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)* [2023] UKSC 42.

4 See, Dominic Cassiani, 'Rwanda: Civil Servants Mount Court Challenge Over New Law' *BBC News* (London, 1 May 2024), accessible at *https://www.bbc.co.uk/news/uk-politics-68934480*, accessed on 12 Apr 2025.

5 *Donald J Trump, President of the United States, et al v JGG et al* US 604 (2025).

6 Rebecca Beitsch and Brett Samuels, 'Trump Blasts Supreme Court While Arguing Trials for Migrants "Not Possible"', *The Hill* (London, 21 Apr 2025), accessible at *https://thehill.com/homenews/administration/5259657-trump-courts-migrant-deportations/*, accessed on 21 Apr 2025.

7 ibid.

compliance with the law is not achieved solely through coercion or punishment.[8] People obey the law because they perceive it as legitimate – because they believe that the legal system is fair, that rules are applied impartially, and that justice is accessible.[9] This belief, however, is fragile. It is sustained not just by the text of statutes or the rituals of courtrooms, but by the sense that the system reflects and respects a shared moral order.

What happens, then, when that belief breaks down? When courts are portrayed as political actors, when judges are attacked for interpreting rather than executing the will of the executive, and when legal protections are dismissed as luxuries rather than bulwarks – trust in the system dissolves. People no longer comply out of respect but resist out of suspicion. They do not see the law as an impartial standard, but as a weapon wielded by whichever party holds power. This is the heart of modern polarisation: the loss of a shared framework for legitimacy.[10] When each side believes the system is rigged against them, the rule of law becomes not a neutral ground, but a battlefield. In an era where information spreads instantly and often without scrutiny, politicians help shape public opinion, acting as intermediaries between the legal system and the public.[11] How they speak about the law profoundly affects whether it is seen as fair—or fatally compromised.

Conclusion

The greatest challenges to the rule of law in the next twenty years, then, will stem from the corrosion of public trust in legal institutions. In an age of polarisation and misinformation, where narrative often eclipses nuance, the survival of the rule of law will hinge on whether the public can still believe in its impartiality. The real battle is not in courtrooms, but in the public square – in the stories we tell about the law, and the faith we place in its fairness. Without that belief, the rule of law ceases to function as safeguard of liberty and becomes instead a contested fiction – respected only when convenient and abandoned when inconvenient. Rebuilding that faith is not merely a legal task; it is a democratic imperative.

[Sean Xue is an undergraduate student at the University of York, England. This is an edited version of his prize-winning entry to the International Law Book Facility's student essay competition 2025.]

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8 Lucas Mioto, Guiherme, F C F Almeida, and Noel Struchiner, 'Law, Coercion and Folk Institutions' (2023) 43 (1) Legal Studies, accessible at *https://doi.org/10.1093/ojls/gqac014*, accessed on 21 Apr 2025.

9 Tom R Tyler, *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 1990) 3-7.

10 Jennifer McCoy, Tahmina Rahman, and Murat Somer, 'Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities' (2018) 62 (1) *American Behavioral Scientist*, accessible at https://journals.sagepub.com/doi/10.1177/0002764218759576, accessed on 18 Apr 2025.

11 Michael Rosenfeld, 'Law as Discourse: Bridging the Gap Between Democracy and Rights' (1995) 108 (1163) Harvard Law Review, accessible at *https://heinonline.org/HOL/LandingPage?handle=hein.journals/hlr108&div=65&id=&page*, accessed on 17 Apr 2025.

Grappling with Slavery and Genocide: An update on reconciliation in Australia

Ron Heinrich and Saxon Quick

Introduction

Slavery has never been legal under the laws of Australia.

This can be seen in the instructions of King George III to Captain Arthur Phillip before embarking on the establishment of Australia's first British colony in New South Wales. Phillip was instructed to protect the indigenous population and establish friendly relations, yet no concrete protections or rights were conferred on the indigenous population, and particularly there was no recognition of their right to or use of the land.[1]

The treatment of indigenous Australians following colonisation has been categorised as a genocide.

Holocaust survivor Elie Wiesel once said of victims of genocide, "Let us remember, what hurts the victim most is not the cruelty of the oppressor but the silence of the bystander."[2]

In this, Australia's legal system has played the role of both oppressor and bystander. Such a dichotomy can be seen in the King's instructions to Captain Phillip.

Hence, indigenous Australians experienced violence, abuse and cultural suppression almost from the outset of colonisation in Australia. A project at the University of Newcastle, led by the late Professor Lyndall Ryan, has tracked over 400 massacre events against indigenous people occurring in Australia from 1788 to 1930.[3]

Moreover, they experienced what can be uncontroversially characterised as indentured servitude and what is commonly called 'blackbirding', whereby indigenous Australians and South Pacific Islanders were removed from their ancestral homelands, families and communities, often by force, coercion or deception, and forced to work either in domestic roles or in harsh farming or mining labouring. Particularly, the booming sugar plantation trade meant countless indigenous Australians and South Pacific Islanders were forced into servitude between the period of 1863 and 1904.

In 2020, the then Prime Minister Scott Morrison made a statement that there was "no slavery in this country."[4] He quickly tried to walk back this claim without going as far as classing the abovementioned practices as slavery. While it is true that Australia was not a 'slave state' comparable to the American South, it is undeniable that indigenous Australians were coercively and forcibly controlled in a manner akin to ownership. The Chief Protector in the Northern Territory in 1927 was recorded as noting that pastoral workers were "kept in a servitude that is nothing short of slavery."[5]

The genocide of indigenous Australians continued actively within the legal system, as the Aborigines Protection Act 1915 absolved the judiciary of their oversight of the government's treatment of indigenous Australians. This left governmental and non-governmental actors unsanctioned in their removal of indigenous children from their families. This active attempt to extinguish indigenous Australians and their culture occurred between 1910 and 1970 and is known in Australia as the Stolen Generation. Not only were children removed from their families, but they often went on to experience severe abuse, including physical and sexual abuse in government facilities, religious organisations and adoptive households, the repercussions of which are still felt by many in the indigenous community today.

From turning a blind eye to settler violence against Indigenous Australians, to actively allowing abuse and cultural suppression, the Australian legal system has been both an active oppressor and an inactive bystander, both of which established a genocide of indigenous Australians that spanned nearly two centuries, and some argue is continuing today.

In many ways, the Australian Parliament, the executive and the judiciary have come to terms with this and are taking active steps to suppress discrimination and uplift indigenous communities from the oppression of their past and present. Within this, there appears to be acknowledgement that it is not merely enough to remove the active oppression of indigenous Australians, but that the government must take an active role and protect indigenous Australians from abuse and discrimination in all aspects of Australian life.

Each of the following, viz the 1967 referendum (in which 91% of Australians voted to recognise Indigenous Australians under

1 Governor Phillip's Instructions 25 Apr 1787 (UK) – see, 'Documenting Democracy' (undated), accessible at *https://www.foundingdocs.gov.au/item-did-35.html* (accessed on 28 Mar 2025).

2 'Rescue of Jews during the Holocaust' (undated) Yad Vashem, The World Holocaust Remembrance Center, accessible at: *https://www.yadvashem.org/holocaust/about/rescue.html* (Accessed on 28 Mar 2025).

3 'Colonial Frontier Massacres in Australia, 1788-1930' (undated) Centre For 21st Century Humanities, accessible at *https://c21ch.newcastle.edu.au/colonialmassacres/* (Accessed: 28 Mar 2025).

4 'Scott Morrison sorry for 'no slavery in Australia' claim and acknowledges 'hideous practices" (2020) *The Guardian*, accessible at: *https://www.theguardian.com/australia-news/2020/jun/12/scott-morrison-sorry-for-no-slavery-in-australia-claim-and-acknowledges-hideous-practices* (accessed on 28 Mar 2025).

5 'Report - Unfinished Business: Indigenous stolen wages' (undated), Standing Committee on Legal and Constitutional Affairs, accessible at *https://www.aph.gov.au/-/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/stolen_wages/report/report_pdf.ashx* (accessed on 28 Mar 2025).

the constitution), the 1992 *Mabo* decision (which acknowledged indigenous rights to land as existing prior to colonisation),[6] and the 2007 apology by the federal Prime Minister to victims of the Stolen Generation, lay the groundwork for efforts towards reconciliation, and importantly reparations. This article examines current and recent efforts by all three of the branches of government – the legislature, the executive and the judiciary – to build on these efforts. It also aims to provide a snapshot of the current state of play for indigenous Australians today.

Legislative progress – towards treaties

While the federal referendum to enshrine an indigenous voice to the federal parliament of Australia in the Constitution failed in 2023, efforts continue towards better legislative recognition of indigenous Australians throughout the state legislatures. Efforts to create state-based voices to parliament will be discussed in the following section titled Self-Represented Advocacy, but a key and more widespread legislative effort has been made across state parliament to enact *treaties*.

Generally, these treaties would agree to:

1. acknowledge the existence of a distinct indigenous people that owned, occupied and governed the continent before colonisation, thus also recognising the injustices caused by colonisation against these people and their pre-established societal structures;
2. initiate a fair process of negotiation between *equals*, as opposed to conqueror and subjugated; and
3. work towards a commitment to responsibilities, promises and principles that bind the parties in ongoing relations moving forward.

Other benefits such as financial compensation, return of land and historic recognition of wrongs may flow from or occur within such treaties.

While Australia is seeing a move towards establishing such treaties, there are detractors who propose treaties as dangerous and divisive. Yet, in contrast, treaties have been described by many as a marriage not a divorce. Indigenous Australians are often ignored and subjugated within a legal regime that was not created for nor by them, and under which they often suffer due to cultural incongruences and the continuation of past injustices. A treaty would acknowledge this occurrence and allow a better relationship between indigenous Australians and the governments that govern them.

The following states have engaged distinct processes towards establishing treaties:

- Victoria;
- Queensland;
- the Northern Territory; and
- the Australian Capital Territory.

In Victoria, the Advancing the Treaty Process with Aboriginal Victorians Act 2018 established a framework for negotiating treaties, and a First Peoples' Assembly of Victoria was created to represent indigenous communities within these.

Negotiations commenced in 2024 with a focus on reparations, land rights and governance, and the Victorian government aims for treaty legislation to be passed before 2026.

In 2019, the Queensland government launched a programme called *Path to Treaty*, with the Path to Treaty Act 2023 passed to establish a framework for negotiations. The legislation included provision for a 'Truth-Telling and Healing Enquiry' to document historical injustices and focus on recognising indigenous sovereignty and improve governance structures. However, following a change of government in Queensland, the 2023 Act has been repealed.

In the Northern Territory, which has the largest indigenous population per capita of any Australian state or territory, the 'Barunga Agreement' was signed in 2018 by the Northern Territory Government and indigenous leaders. Again, a change of government in the Northern Territory has dismantled the treaty process, but a renewed focus has been given to restoring local control to remote community councils.

In the Australian Capital Territory, the ACT Aboriginal and Torres Strait Islander Agreement 2019-2028 committed the territory government to begin conversations and negotiations relating to treaty.

Separately, New South Wales, South Australia and Tasmania have each expressed intentions towards the establishment of treaties. In NSW, 'Treaty Commissioners' have even commenced a 12-month consultation period aimed at exploring pathways to the conclusion of treaties. Western Australia is the only jurisdiction that has not begun a process towards treaty or even expressed an intention to do so.

Self-represented advocacy

The proposition of an Indigenous Voice to Parliament first garnered steam in the 2017 Uluru Statement from the Heart, which is a petition to the people of Australia written by Aboriginal and Torres Strait Islander leaders selected as delegates to the First Nations National Constitutional Convention. Federally, this led to the 2023 Voice to Parliament referendum, which put it to the Australian people for a body to be enshrined in the constitution that would make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander people. However, the referendum failed with only one Territory of the 8 Australian States and Territories, the Australian Capital Territory attaining a majority in support.

That has not however dissuaded efforts by state governments to establish voices to their parliaments. South Australia has become the first Australian state to establish a voice body in March 2023. South Australia has established two levels of advocacy, being 6 voice bodies at the local level and one parliament-adjacent body at the state level. More than 110 candidates were nominated for the First Nations Voice across the state and the inaugural First Nations Voice election was held on 16 March 2024. Aboriginal and Torres Strait Islander people living in South Australia were able to vote for their Local First Nations Voice representative. This has been a strong and important step towards legislated advocacy for indigenous Australians.

[6] *Mabo and Ors v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

Similarly, a permanent state voice has also been included in the above-mentioned treaty negotiations in Victoria. In the Australian Capital Territory, there are two non-government bodies that work directly with the ACT government on issues of policy, heritage and land conservation. Both the Aboriginal and Torres Strait Islander Elected Body, and the United Ngunnawal Elders Council have become integrated into much of the decision making of the ACT government, allowing advocacy for indigenous Australians on a range of issues.

Specialised indigenous courts

White Australians have the benefit of engaging with a court system that directly reflect the cultural principles among which they have been raised. Indigenous Australians do not, and the courts often pose a completely foreign dispute resolution regime that is antithetical to their culture and lived experience. Many courts in states and territories across Australia have sought to make their systems fairer for indigenous Australians and incorporate indigenous cultural practices and principles in the adjudication of judicial decisions.

Indigenous-specific courts began emerging in the early 2000s, with Victoria establishing the first Koori Court in 2002. Similar indigenous-specific courts have emerged in other states, such as the Murri Courts in Queensland, Circle Sentencing in New South Wales, Nunga Courts in South Australia, the Galamby Court in the Australian Capital Territory, and the Barndimalgu Court in Western Australia. While there are slight variations between the states, these courts are generally available to indigenous offenders who plead guilty. In this way, the determination of a crime is not altered in any way, however the court in its sentencing takes a more holistic approach to ensure that a fair and effective sentence is handed down. Elders are often involved in advising on cultural context to ensure a better understanding of the individual's circumstances before delivering a sentence. In doing this, the goal is not to decrease punishment for indigenous Australians, but rather to make justice processes more culturally appropriate, reduce reoffending, and increase community involvement in the judicial decision-making process.

The Northern Territory and Tasmania are the only states that do not have specific, indigenous focused courts established. However, since indigenous Australians make up only 3.8% of the Australian population but make up over 36% of the incarcerated population,[7] it is important that all Australia's judicial jurisdictions attempt to achieve more effective sentencing of indigenous Australians, especially to prevent reoffending.

Land rights cases

The 1992 *Mabo* decision was a pivotal case in the progression of indigenous rights in Australia. The case rejected the notion that the continent existed *terra nullius* prior to colonisation (namely, that the land was unowned and unoccupied) and moreover acknowledged that indigenous Australians still held rights to the land by virtue of traditional customs and laws, and these rights had not been extinguished by the mere act of colonisation by the British. This allowed indigenous Australians the ability to obtain rights to land where they could establish title via custom such as stewardship, that was unbroken by colonisation.

Unsurprisingly, the operation of such a historically broad principle has taken significant judicial review to become an operable principle, a process which continues today. It also saw heavy backlash from various groups, who feared the possible commercial and social impacts.

However, these hurdles have not prevented native title from becoming a distinct legal principle in Australia, and we have seen some very promising cases recently. While not termed as *reparations*, these cases offer restitution for the colonial wrongs of the past; the acknowledgment that the cultural rights of indigenous Australians still exist today offers some remedy to the extinguishment of rights that may have occurred in the past.

A landmark case has come from the *Ngaliwurru* and *Nungali* peoples' claim against the Northern Territory government. The *Ngaliwurru* and *Nungali* peoples were awarded $2.53 million in compensation for the loss of native title rights in Timber Creek, Northern Territory. This was arguably the most-significant development to native title since *Mabo*, as it was determined that an extinguishment of title event had occurred, but the indigenous population were nonetheless still entitled to compensation for this loss – it should be noted that it was determined that *some* title remained, just not exclusive title. Additionally, it was significant in its acknowledgement of *both* cultural and economic losses resulting from colonisation.

In 2023, the *Widi* people achieved a significant agreement with mining giant *BHP*. The agreement commits to employment, training and contracting opportunities for the Widi people and improved education outcomes through annual bursary scholarships. The agreement also includes plans for indigenous land use and cultural heritage management. While not a court case, the deal shows the power conferred on indigenous peoples by the progression of land rights, allowing groups to more independently engage in commercial negotiations and dealings.

In 2024, 210 hectares of land in Toobeah, Queensland were awarded to the *Bigambul Native Title Aboriginal Corporation*. This grant was significant as the land was conferred entirely freehold, meaning the aboriginal corporation would be able to engage with the property in the same manner as any other legal entity, thus allowing not only cultural and spiritual use but also economic profit.

Worthy of note is a recent High Court decision in favour of the Gumatj people of the Gove Peninsula where the Federal Court had previously found that native title rights and interest constituted property, with any extinguishment amounting to an acquisition. The Federal Court had ruled that Gumatj clan's land was not acquired "on just terms" before it was leased to the mining consortium Nabalco. The High Court upheld the decision of the Federal Court. The matter has been referred back to the Federal Court to assess compensation which it has been estimated could be up to $700 million. This decision will

[7] 'Prisoners in Australia 2024' (undated), Australian Bureau of Statistics accessible at *https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2024#data-downloads* (accessed on 28 Mar 2025). Relevant section excerpted at Annexure A to this article.

likely have significant implications for the Commonwealth, particularly in relation to compensation claims from native title claimant groups for acts occurring prior to 1993 which had the effect of extinguishing native title and which would otherwise be recognised at common law.[8]

Finally, an ongoing litigation is the *Gia and Ngaro Peoples'* native title claim in the area covering Airlie Beach, the Whitsunday Islands and the surrounding maritime areas. This case, if successful, would cover both land and sea, and would provide title to engage in commercial fishing and tourism, as well as their cultural practices. Moreover, the case would be significant as, if successful, it would engage indigenous leaders in indigenous-led environmental management of marine parks and protected areas. Being an area significantly impacted by environmental threats including coral bleaching, this case would offer an opportunity to directly confer title for environmental management on an indigenous community.

Conclusion

In conclusion, Australia's efforts towards reparations and reconciliation have progressed significantly over the last 30 years. More crucially, they are continuing to progress into the future. While indigenous Australians have undoubtedly faced setbacks, including legislative restrictions on native title and the failure of the Voice referendum, on the whole we are seeing a net improvement in the rights and cultural protections for this population. While the matters mentioned above are all important start-points, they are only that – a starting point – and Australia's legislatures, judiciaries and executive branches (at both federal and state levels) must all remember the significant path ahead to achieve equality, reconciliation and restitution.

In the words of the great Australian band Midnight Oil:

How can we dance when our earth is turnin'?

How do we sleep while our beds are burnin'?

And how can we move forward when we know that the foundation of Australia, our indigenous population, are being left behind?

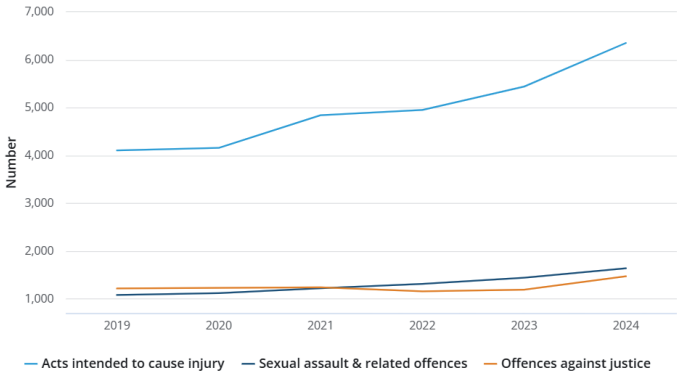
[Ron Heinrich AM is Honorary Life President of the Commonwealth Lawyers' Association and Saxon Quick is a solicitor with HWL Ebsworth Lawyers, a pan-Australian legal practice.]

[8] *Commonwealth of Australia v Yunupingu (On behalf of the Gumatj clam or Estate Group) & Ors* [2025] HCA 6.

Annexure A

Aboriginal and Torres Strait Islander prisoners

Aboriginal and Torres Strait Islander prisoners by selected most serious offence/charge(a), 2019 to 2024



(a) For a definition of most serious offence/charge, see Methodology, Most serious offence/charge section.

From 30 June 2023 to 30 June 2024, Aboriginal and Torres Strait Islander prisoners increased by 15% (2,019) to 15,871. The largest numerical changes by most serious offence/charge were:

- acts intended to cause injury, up 17% (911) to 6,352
- offences against justice, up 23% (279) to 1,471
- sexual assault and related offences, up 14% (198) to 1,639

The age-standardised imprisonment rate increased from 2,266 to 2,559 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population.

At 30 June 2024:

- Aboriginal and Torres Strait Islander prisoners accounted for 36% of all prisoners
- 90% (14,270) of Aboriginal and Torres Strait Islander prisoners were male, 10% (1,605) were female
- the median age was 33.6 years
- 76% (12,120) had experienced prior adult imprisonment

Anti-Money Laundering Compliance in the Gambling Industry in Africa: the Role of In-House Counsel

Irene Kariuki

Introduction

The gambling industry in Africa has seen tremendous development in the recent past, thanks to increased access to the internet, enabling gadgets such as smartphones, and diverse and more accessible payment methods such as online payments. Africa has also seen a steady growth in online casinos, which, unlike the land-based casinos, are more accessible to a larger population.

Historically, gambling and betting have been practised in Africa over the years, dating back to the pre-colonial period. While there is limited literature on the methods of gambling practised in Africa during those periods, a few games are particularly popular in the literature reviewed. *Abbia*, a West African game, involved "the game master tossing multiple wood chips made from nut shells, decoratively carved with images such as animals, weapons and human figures. The gamblers would then predict how the chips would fall."[1] *Mancala* games were also common across the various African countries, known by different names in each country. The games were played "between two people on a wooden board, or a 'board' improvised or carved into the ground, and involved moving a series of small beads, beans or stones between cups in a strategic way to capture an opponent's pieces".[2] Card games are traced back to the slave trade era, while sports betting, which mostly involved animals, gained popularity during the colonial period. The digital era has seen diversification of gambling products and a race among gaming providers to capture the greatest number of punters.

Traditionally, cash-intensive and complex platforms often attract criminals looking to launder and conceal illegally obtained funds. Casinos, especially land-based ones, allow punters to easily transact using large amounts of cash. On the other hand, in addition to the significant disparities in the regulation of online gambling globally, online casinos offer increased levels of anonymity and multiplicity of accounts, which are major incentives for criminals to launder illicitly obtained money.[3] Therefore, and undoubtedly, the gambling sector is most vulnerable to money laundering and terrorism financing, which explains why casinos (both online and land-based) were added to the list of institutions subject to reporting requirements by the Financial Action Task Force (FATF), under a category known as 'designated non-financial businesses and professions' (DNFBPs).

This article seeks to examine the unique challenges faced by Anti-Money Laundering (AML) compliance professionals in Africa's gambling sector, outlining the essential steps that in-house counsel should take to stay ahead in this rapidly evolving industry.

Legal Landscape of AML Compliance

AML compliance refers to the measures and procedures that institutions implement to detect and prevent money laundering and terrorist financing activities. This entails the development and implementation of organisational policies, procedures, processes, and controls to ensure compliance with relevant legal framework.[4]

The AML legal framework comprises of national, regional and international instruments, aimed at combatting money laundering, terrorism and proliferation financing. Given the extensive and convoluted nature of money laundering, collaboration among countries and sectors within countries is extremely necessary. As such, the G7 countries established the FATF to "set up and promote internationally recognised standards to fight money laundering" (the "FATF Recommendations"), which are recognised as the global AML and Combating the Financing of Terrorism (CFT) standards.

In addition to the FATF Recommendations, regional instruments also form part of the AML legal framework. While Africa does not have a common legal instrument to prevent money laundering, some regions such as the European Union ("EU") have developed regional frameworks to prevent money laundering and terrorism financing. In 2018, the EU's Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing amending the Directive 2015/849 became law. At the national level, countries have also developed their domestic legislation for prevention of money laundering and terrorism financing.

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1 Byron KY Bitanihirwe et al, 'Gambling in Sub-Saharan Africa: Traditional Forms and Emerging Technologies' (2022) 9 *Current Addiction Reports* 373.

2 ibid.

3 Sarah Cameron, 'Money Laundering through Online Gambling' (*ComplyAdvantage*, 10 Jun 2024), *https://complyadvantage.com/insights/online-gambling-money-laundering/*, accessed 30 Jan 2025.

4 Editor, 'Corporate Governance and AML Compliance: Best Practices for Boards' (*Michael Edwards | Commercial Corporate Solicitor*, 13 May 2022), *https://michaeledwards.uk/corporate-governance-and-aml-compliance-best-practices-for-boards/*, accessed 20 Jan 2025.

The AML institutional framework, on the other hand, comprises of national, regional and international bodies which oversee the compliance of entities, sectors and nations, within the AML legal framework. At the international level, the FATF, as an independent inter-governmental body, develops and promotes policies for the protection of the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. It also regularly reviews money laundering and terrorist financing techniques and updates its standards accordingly, to tackle new risks. Further, the FATF monitors countries through mutual evaluation reviews to ensure that they implement the FATF Recommendations and seeks accountability from the countries that fail to comply. At the national level, countries have their respective Financial Intelligence Units (FIU), law enforcement authorities, and statutorily established agencies to oversee and implement compliance with AML/CFT laws and policies.

Money laundering remains a global menace, especially in Africa, partly due to the gaps and weak legal frameworks and systems, which gaps are exploited by the criminals seeking to conceal their illegal proceeds. It is however notable that there has been a surge in the enactment of legislation, establishment of institutions and implementation of reforms to address AML/CFT gaps among African countries, effectively improving the continent's status at the global level. Part of the incentives that have contributed towards this development is the continued vigilance by the FATF which has left some countries publicly listed (the grey and black lists) for having weak[5] measures to combat money laundering and terrorist financing.

In addition to the national legislation, there are organised intergovernmental regional bodies that significantly guide African countries on compliance with FATF Recommendations, such as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA). These bodies promote cooperation, capacity building and exchange of information among their member countries.

Industry-Specific Challenges

The vulnerability of the gambling sector to money laundering is primarily linked to the unique characteristics of gambling operations including on online gambling facilities. There are multiple examples of cases where gambling firms were reported for non-compliance with AML/CFT laws and regulations. In 2022, the Australian Transaction Reports and Analysis Centre instituted legal proceedings against that country's largest casino operator, Crown Resorts, for alleged serious and systemic non-compliance with the country's AML/CTF laws. In the same year, Star Entertainment, a casino operator, was slapped with a fine of USD 100 million for among other things, "allowing gamblers to move money through non-transparent channels."[6]

According to a report by MONEYVAL, a permanent monitoring body of the Council of Europe, some of the vulnerabilities affecting online gambling include: (1) the cross-border nature of online gambling; (2) the rapidity and cross-border nature of transactions; (3) the non-face-to-face nature of online gambling; (4) the low number of investigations and prosecutions of ML/FT cases; (5) use of multiple accounts; and 6) vulnerabilities related to the methods of payment.[7]

Gambling operators are required to undertake specific measures intended to reduce their exposure to money laundering activities, and to identify any money laundering activities undertaken using their systems by criminals. These measures include:

Know Your Customer (KYC) processes: these are intended to verify the identity of customers and to detect suspicious activities.

Customer Due Diligence (CDD): operators are required to undertake both simplified and enhanced due diligence in low risk and high-risk scenarios respectively.

Record Keeping: operators are also required to maintain records, especially for financial transactions, customer interactions, and any compliance actions taken.

Suspicious Activity Reporting (SAR): these concern suspicious activities include transactions, attempted transactions which are suspicious, or funds which are suspected to be proceeds of criminal activity or related to terrorist financing. Operators are required to report, in a timely manner, suspicious transactions and activities to the relevant authorities, such as the FIU, in their respective countries.

Role of In-House Counsel in AML Compliance

The in-house counsel is instrumental in the creation, implementation, and oversight of an effective AML compliance programme within an organisation through their expertise and ability to foster inter-departmental collaboration. The case of the Star Pty Ltd ("Star Casino") discussed below stresses the significance of in-house counsel in AML compliance.

The role of in-house counsel entails advising the gambling firm on compliance strategy and developing and maintaining the firm's AML compliance framework programme. This includes establishing internal policies and procedures, and ensuring training for employees and board members. In order to identify potential vulnerabilities, by developing and adopting a risk-based approach towards AML compliance, the in-house counsel plays a significant role through conducting regular risk assessments. Liaising with regulators and responding to inquiries or audits is another measure that the in-house counsel should implement to encourage a compliance culture within the firm.

As simple as it may seem at first glance, there exists more complexities in the corporate hierarchy that may hinder the in-house counsel's efforts towards AML compliance. Collaboration

[5] To access the current data on blacklisted and grey-listed countries, see *https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html*.

[6] The particulars of this case are discussed later in this article.

[7] MONEYVAL, 'The Use of Online Gambling for Money Laundering and the Financing of Terrorism Purposes' (Council of Europe).

with senior management and board of directors is key. In-house counsel should always ensure that senior management is fully informed about AML risks facing the gambling firm, as well as about the required compliance steps, stressing the potential legal and financial consequences of non-compliance.

In-house counsel can also help place AML compliance as a strategic priority for senior management and the company's board of directors. This ensures that AML compliance becomes part of the firm's culture, not just as a legal obligation, and indeed as a means of protecting the firm's reputation and ensuring longevity.

The Star Pty Ltd ("Star Casino") Case

This case is a good example for demonstrating the significance of in-house counsel in AML compliance, as it highlights some of the major shortcomings associated with the Casino's in-house counsel in AML compliance.

Following claims of money laundering, the New South Wales Liquor and Gaming Authority launched an inquiry into the Star Casino's suitability to hold a casino licence in New South Wales, and the Casino was required to have programmes and procedures in place for compliance with AML/CTF laws. To achieve this, the Casino sought the services of an independent consultant, KPMG, who after assessment, issued a report that noted "serious shortcomings" in the Casino's AML/CTF programme. Part of the findings of the report were that there was "…unsatisfactory understanding of the circumstances in which legal professional privilege should be claimed among Star Entertainment's most senior in-house lawyers...", since "inappropriate claims for privilege increase the likelihood that documents will not be produced to regulators and others, when they should instead be disclosed."[8]

There was also a concern regarding the role of the Chief Legal Officer, who held two other onerous roles, that of Company Secretary and Chief Risk Officer. The report stressed that it was difficult to understand how any one person could adequately discharge the multiple and onerous responsibilities all at the same time.[9]

Questions on the independence, avoidance of conflicts of interest and transparency by in-house counsel regarding the reports made to the board of directors was also highlighted. In particular, the in-house counsel was faulted for failing to disclose to the board information about the links that one of the Casino's biggest customers, Suncity, had with organised crime.

Impact of Non-Compliance with AML Regulations

AML non-compliance, just like any other form of non-compliance, can have dire consequences on both the gambling firm and the in-house counsel. Financial penalties and fines are potential consequences, which have been seen before as in the Star Entertainment case. Rarely do firms survive such hefty fines, and even if they do, the ripple effects are seen in downsizing with multiple job losses.

Reputation risks are also significant risks associated with non-compliance with AML laws. Loss of reputation would significantly affect the firm's customer and business partners' base. The in-house counsel also stands to suffer reputational damage from being associated with AML non-compliance and unprofessional conduct as seen in the Star Casino case.

Above and beyond financial and reputational loses, the risk of legal liability is also significant. This includes lawsuits, criminal charges, regulatory investigations, and loss of operating licences.

Conclusion

The gambling industry is expected to continue growing, and the regulatory framework in African countries will continue changing. Unique and novel circumstances like pandemics, as was seen with the COVID-19 pandemic, will also contribute significantly to the changes in the industry's evolution, and gambling operators are expected to align accordingly. When it is all said and done, the role of the in-house counsel in the gambling sector will gain more significance with these developments. As a result, in-house counsel and legal professionals in the gambling industry must continuously enhance their skills and stay informed about the evolving developments and regulatory changes in the sector in order to remain valuable to their clients.

To accomplish this, legal professionals must implement best practices for AML compliance. This may involve adopting a comprehensive compliance programme that addresses all aspects of the gambling firm's operations, from customer onboarding and ongoing monitoring to payouts and account closures. Technology can also play a key role in enhancing AML compliance. Gambling firms should leverage technology for transaction monitoring, CDD, KYC documentation verification, and the identification and reporting of suspicious transactions and activities within their platforms.

This article is intended to serve as a call for action for in-house counsel (and external lawyers) engaged by companies in the gambling sector to review their companies' AML compliance practices and consider necessary improvements to stay ahead of evolving regulatory and risk challenges.

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8 Michael Legg, 'Inhouse Counsel, the Future of the Legal Profession and Legal Education' (2024) 58 *The Law Teacher* 280.

9 ibid.

Rights of Minorities in Tribal Communities in Zambia

Daniel Pole

Introduction

Both the law of Zambia and international jurisprudence uphold individual fundamental rights, including freedom of religion. What should the courts do when these fundamental human rights conflict with tribal customary law? How can the collective rights of indigenous or tribal communities coexist with the individual rights of minorities or other individuals within the community? These are some of the issues which have faced the Zambia courts. This article examines how the High Court of Justice in Zambia has endeavoured to find a delicate balance, addressing both the rights of minorities in the tribal communities and the collective rights of indigenous communities.

Human rights context

The High Court of Zambia rendered two groundbreaking decisions regarding freedom of conscience, thought, and worship in the face of African traditional or tribal customs—*Fungwe and Others v Muntanga (Chief Nyawa IV)*[1] and *Banda and Mwale v Lemmy Phiri*.[2] These decisions will be valuable not only on the African continent but also globally, as they reflect a judicial harmonising of culture and traditions with respect for national constitutions and internationally recognised human rights. The Zambia courts faced a dilemma that is common worldwide: how can the collective rights of indigenous or tribal communities coexist with the individual rights of minorities or individuals in the community? Both collective and minority rights deserve protection and preservation. The judicial decisions under analysis are consistent with an international trend towards providing standards to guide courts in resolving conflicting rights.

The Constitution of Zambia acknowledges the existence and the rights of indigenous communities and tribes, including a degree of autonomy for institutions like the chiefdom, their customary law, and their cultural values. But at the same time, it protects individual freedom of conscience and religion. These guarantees have found similar expression in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights (Banjul Charter), all of which Zambia has ratified.[3] The importance of these ratifications was particularly noted by the High Court of Zambia in *Fungwe and Others v Muntanga (Chief Nyawa IV),*[4] which we shall consider first.

Overview of *Fungwe and Others v Muntanga*

In *Fungwe and Others v Muntanga,* the petitioners were Jehovah's Witnesses, living in the Musuba village of the Kazungula District in Southern Province, Zambia. The respondent was the traditional chief of the Tonga-speaking people of the Kazungula District in Southern Province, Zambia, the chiefdom under which the petitioners resided. The Tonga-speaking people form part of the people of the Bantu group.[5] Their livelihood is centred around herding cattle and growing crops.[6] The Tonga were originally organised in independent family units. In time the colonial administration made appointments of chiefs among them. This resulted in a chieftainship arrangement that has now become a part of the Tonga traditional way of life.[7] As is true with many tribes in Zambia, the Tonga are known for holding annual traditional ceremonies, the main one being the Lwiindi Gonde ceremony, which is a thanksgiving ceremony to celebrate the first harvest and to thank the ancestors for the good harvest.[8] It is this ceremony that led up to the events that culminated in the matter requiring a judicial determination by the courts.

The respondent dissolved the petitioners' village because the petitioners did not contribute to or take part in the Lwiindi traditional ceremony. He then formed three new villages in the place of the dissolved one. The petitioners explained that they refused to participate in the ceremony because it conflicted with their personally held religious beliefs. They were ordered to join the newly formed Mantanyani village on the condition that they would agree to support and participate in the Lwiindi traditional ceremony. They refused and appealed to the High Court of Zambia, submitting that their right to freedom of religion and other inalienable rights accruing to them as citizens of Zambia had been violated by the chief's order. The respondent neither appeared in court nor did he file any arguments to defend the petition. On October 31, 2017, the High Court of Zambia issued a judgment in favour of the petitioners.

The court recognised the constitutional and legal protection

1 *Fungwe & Others v Muntanga (Chief Nyawa IV)* (Oct 31, 2017) 2013/HP/1778 (High Court of Zambia).

2 *Banda & Mwale v Phiri* (May 16, 2018), 2014 HP/218 (High Court of Zambia).

3 Zambia ratified the ICCPR on April 10, 1984 and the Banjul Charter on Jan 10, 1984.

4 *Fungwe & Others v Muntanga* supra note 1.

5 Australia: Refugee Review Tribunal "Country Advice Zambia" (Nov 24, 2010) *Refworld*, available at: *https://www.refworld.org/docid/4d9997312.html* (last accessed Jul 27, 2023).

6 S Brown "Zambian Cultural Heritage – The Tonga People – Their Traditions and Customs" (June 8, 2009) *Ezine Articles*, available at *http://EzineArticles.com/2448636* (last accessed Jul 27, 2023).

7 Australia: Refugee Review Tribunal "Country Advice Zambia", above at note 3.

8 I Malambo "The Zambian Tonga People" (Jul 20, 2021) *The Heritage Call*, available at *https://theheritagecall.com/the-zambian-tonga-people/* (last accessed Jul 27, 2023).

that chiefs, customary law, and cultural traditions enjoy.[9] Nevertheless, it also held that the actions of the respondent contravened both article 19 of the Constitution and Zambia's international human rights obligations. The petitioners had been denied their freedom of conscience, and the respondent did not have the authority to compel the petitioners to take part in the Lwiindi ceremony or to make this a condition precedent for their continued residence in his chiefdom. The court observed that the respondent erred in inflicting hardship on the petitioners by disbanding their village, as this made it difficult for them to obtain documents such as licenses, national registration cards, and passports, all of which require an address, the name of the chief, and the name of the village.

The court recognised that by ratifying a treaty, Zambia accepted the solemn responsibility to apply the obligations embodied in the treaty and to make national laws compatible with its treaty duties. The court accepted that Zambia must not act in a manner inconsistent with its international treaty obligations. Although not referred to in the decision, this finding is consistent with article 18 of the Vienna Convention on the Law of Treaties, which Zambia signed but did not formally ratify. It also respects the recognized principle of international law *pacta sunt servanda* (agreements must be kept).[10] The relevant provisions in the international treaties are similar in wording to that of the Constitution of Zambia, and therefore, the respondent's actions conflicted with both the Constitution and international obligations. The court appropriately elevated freedom of conscience, belief, and religion by recognising that these rights are internationally protected and not limited to only domestic guarantees by the State of Zambia.

The court left no doubt that the right to freedom of conscience, belief, religion, and opinion are fundamental rights guaranteed to the minority within the tribe by the State of Zambia and that the respondent, in his capacity as a tribal chief, had no lawful authority to limit these.

Overview of *Banda and Mwale v Lemmy Phiri*[11]

The second case under discussion is *Banda and Mwale v Lemmy Phiri*. The petitioners and the respondent belong to the Chewa-speaking people of Eastern Province, Zambia. Like the Tonga, the Chewa also form part of the people of the Bantu group. In Zambia, they mostly occupy the eastern region of the country.[12] The Chewa are also found in Malawi and Mozambique. Although separated by national boundaries, the Chewa people of Zambia, Malawi, and Mozambique have one paramount chief, or king, who is known as Kalonga Gawa Undi.[13]

The Chewa are typically organised into villages headed by a village headman or woman, with an advisory council of elders.[14] The headmen are supervised by regional chiefs, or subchiefs, who are answerable to the paramount chief, Kalonga Gawa Undi. The Chewa living in traditional societies make their living through farming, although they are also known for their skills in different arts and crafts, hunting, and fishing.[15]

In the case under review, the petitioners, who coincidentally are also Jehovah's Witnesses, were attending a religious service at the same time a funeral was being held in their village. The village headman consequently sent six men to stop their religious meeting, but the congregants continued their religious programme and indicated that they would visit the village headman once the programme ended. The headman informed the petitioners that they had committed an offence by attending religious activities when a funeral was going on and that this would be dealt with by an *induna* (councillor).[16]

The *induna* fined the petitioners. They declined to pay the fine, as they believed they were acting within their legal rights and had broken no law, secular or customary. The *induna* reported this to the chief (respondent), who convened a council of 30 headmen. After the hearing, the respondent ruled that the land allocated for the petitioners' religious worship would be repossessed and that the petitioners would be banned from holding religious services. He ordered that if congregants did not cooperate with the 30 headmen under his chiefdom, they would be expelled from their villages. Furthermore, he revoked the ownership rights on the religious property. Any headman who allowed Jehovah's Witnesses to congregate for religious worship would jeopardise his position as headman. The petitioners were forced to meet in private homes because of the hostile environment that prevailed.

The petitioners moved the High Court of Zambia, seeking, *inter alia,* a declaration that the acts of the respondent chief violated their freedom of conscience, belief, and religion. The petitioners relied on articles 11(b) and 19 of the Constitution of Zambia. The Court considered the powers and functions of a chief pursuant to the Zambian Chiefs Act[17] as prescribed under section 10, and found that any functions he exercised under African customary law are subject to the Constitution and any

9 As defined in the Constitution of Zambia 1991, as amended by Act 2 of 2016. See also "Zambia, Customary Law, Gender and Land Rights Database", *Food and Agriculture Organization of the United Nations*, available at: *https://www.fao.org/gender-landrights-database/country-profiles/countries-list/customary-law/en/?country_iso3=ZMB* (last accessed Jul 27, 2023).

10 Zambia signed but did not formally ratify the Vienna Convention on the Law of Treaties on May 23, 1969 which entered into force on Jan 27, 1980 (United Nations Treaty Series, vol 1155, at 331).

11 *Banda & Mwale v Phiri* (May 16, 2018), 2014 HP/218 (High Court of Zambia).

12 Britannica, The Editors of Encyclopaedia "Chewa" (Jun 1, 2017) *Encyclopaedia Britannica*, available at *https://www.britannica.com/topic/Chewa-people* (last accessed Jul 27, 2023).

13 M Katona, 'An Introduction to Malawi's Chewa People' (May 12, 2018) *The Culture Trip*, available at *https://theculturetrip.com/africa/malawi/articles/an-introduction-to-malawis-chewa-people/* (last accessed Jul 27, 2023).

14 Britannica, The Editors of Encyclopaedia, 'Chewa', supra note 12.

15 S Brown, 'Zambian Cultural Heritage - Chewa People - Their History and Culture' (Jun 11, 2009) *Ezine Articles*, available at *http://EzineArticles.com/2464568* (last accessed Jul 27, 2023).

16 Regarding the structure of villages within Zambia, see The Registration and Development of Villages Act, Ch 289, The Laws of Zambia.

17 The Laws of Zambia, Ch 287.

other written law, natural justice, and morality.[18]

As a result, the court found that the respondent's actions contravened the Constitution. The court acknowledged that freedom of conscience and religion are not absolute rights; they are subject to limitations clearly outlined under article 19(5). Although section 11 of the Chiefs Act empowers chiefs to maintain public order, there was no evidence that the petitioners' religious worship caused any breach of peace under the limitations in article 19(5). Further, the court ruled that the *induna*'s action in fining the petitioners was *ultra vires* of any statutory or constitutional authority. The court directed that the respondent chief refrain from interfering with the petitioners' religious activities and that the congregants' right to build a place of worship on the land they had been allocated be respected.

Law and conventions

In these decisions, the High Court of Zambia addressed the interplay between traditional, or customary, law and internationally recognised constitutional human rights. In doing so, the court harmonised its decisions with the most recent decisions of the highest courts of other countries that are facing similar conflict of law issues, as will be seen below.[19] As a result, the rulings shed light on how to preserve the co-existence of minorities within minorities in the same community when groups have divergent beliefs.

In both cases, the court began with the constitutional foundation of freedom of worship. The Constitution of Zambia identifies this right in articles 11 and 19. The highest courts of most countries have recognised the need to create a wall of judicial protection of this fundamental human right. In spite of this, freedom of religion is frequently under attack, as is evident from the two cases under discussion. When this occurs, courts are entitled to rely on the Constitution as well as on international human rights instruments ratified by their country, such as the UDHR, the ICCPR, and the Banjul Charter.[20] That is what the two courts did in the cases under discussion.

Analysis

In *Fungwe,* the court specifically referred to the UDHR, the ICCPR, and the Banjul Charter, noting that fundamental constitutional rights may not be hindered by anyone, save for the limited exceptions provided for in law. An individual has the right to freely practise the religion of his or her choice and should not be compelled to alter or conceal such choice because of any external factors in society.

In *Banda,* the court stated that freedom of religion and belief is subject only to limitations designed to ensure that the enjoyment of the said rights and freedoms does not prejudice the rights of others. The limitation is not in respect to the belief but, rather, to the manifestation of the belief, which is the second facet of this right. This two-faceted aspect of the right to freedom of religion makes its enforcement and protection one that requires judicial flexibility.

The common denominator in both rulings is that although local community authorities have an expansive autonomy pursuant to regulations and customary law, it is not unlimited. They may not trespass upon the fundamental human rights of those living within their territories. This is no different from the obligations of the State itself, which is obligated to protect human rights, both constitutionally and by international treaty. To take an extreme hypothetical example, regardless of how valuable a customary law or tradition is, it would never be allowed to countenance human sacrifice.

Courts in Africa are frequently challenged to balance the collective rights of tribal communities with constitutionally guaranteed rights of individual citizens. Such judicial protection is imperative when conflict of law issues arise in jurisdictions such as Zambia, where chiefs wield extensive control and power over their subjects. The Constitution is the supreme law in Zambia (see article 7). Part XII of the Constitution guarantees the institution of chieftaincy, and article 169(5) details the functions of chiefs. In *Banda,* the court also considered the functions and powers of the chiefs under sections 10 and 11 of the Chiefs Act. The court concluded, albeit in *obiter*, that the chiefs are constrained to their statutorily assigned roles and are subordinate to the overriding constitutional rights of those in their charge. This determination places the powers and functions of chiefs firmly under, and therefore subject to, the Constitution of Zambia.[21]

Will this ruling have a practical effect on the chiefs? The argument as to whether judicial sanctions deter wrongful conduct is as old as the judicial system itself; it is a well-worn axiom that no punishment has ever possessed enough power of deterrence to prevent the commission of crimes. While this may be true with respect to criminal conduct, it should not apply in noncriminal situations where freedom of religion is interfered with by the wrongdoer. Unlike criminals, persons who routinely disregard freedom of religion are those with petty authority. This threat was eloquently expressed in the well-known dictum of US Supreme Court Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[22] A criminal usually does not consider in advance whether his next action is a crime, but the local chief or government official

[18] For an explanation generally on the interaction of customary law and property rights, see M Ndulo, 'African customary law, customs and women's rights' (2011) 18:1 *Indiana Journal of Global Legal Studies* at 87.

[19] Discrepancies/gaps between statutory and customary laws. For a discussion on the discrepancy, see *Zambia, Customary Law, Gender and Land Rights Database*, supra note 9.

[20] UDHR, art 18.

[21] The Mexican Supreme Court of the Nation recently reached the same conclusion in *Chino & Others v Tuxpan de Bolanos* (Jul 8, 2020), Amparo en Revision 1041/2019. See discussion of this important decision in Cisano, Ortiz & Tapia, 'The obligation of indigenous communities to subject their self-determination to the Mexican Constitution' (2022) 14:31 *Praxis de la Justicia Fiscal y Administrativa* at 26.

[22] *West Virginia State Board of Education v Barnette* (Jun 14, 1943), 319 US 624.

who interferes with religious freedom has the ability to obtain advice and, by virtue of his position, is presumed to know what constitutes unlawful action. Judicial findings can therefore provide strong and compelling deterrence.

The power of courts to make consequential orders[23] is also vital in giving strength to court findings and orders. While judicial restraint may be urged and ought to be exercised in cases addressing contractual rights, greater leeway should be given to courts where fundamental human rights are in issue. *Fungwe* provides an example of a court that could have made a consequential order even when not sought by the petitioners. The court found that the respondent had revoked the citizenship of the petitioners and made it difficult for them to obtain documents such as licences, national registration cards, and passports, which require an address, the name of the chief, and the name of the village. They were stripped of their landholding and ostracised by members of the community, who were afraid to talk to them.

In addition to declaratory orders, the interests of justice would have been better served had an order been made that reconstituted the disbanded village, reinstated the petitioners as members of that village, granted them back their citizenship rights to identification documents by all agencies, and restored their landholdings. A declaratory order means a ruling that is explanatory in purpose. It is designed to clarify what before was uncertain or doubtful, and it constitutes a declaration of rights between parties to a dispute, binding them as to both present and future rights.[24] An order restraining the chief from further interference with the petitioners' freedom of worship could have repaired the infringement on their rights and made them feel safe to return to and reintegrate into the community.

These consequential powers were available to the court in *Fungwe*, under article 28(1) of the Constitution.[25] The Supreme Court of Zambia affirmed the wide powers of the High Court to make consequential orders for breach of the provisions contained in articles 11 to 26 of the Constitution.[26]

Role of international law

In *Fungwe,* the High Court observed that "when a State ratifies one of the covenants (and Zambia has ratified a number) it accepts a solemn responsibility to apply each of the obligations embodied therein to ensure the compatibility of their national laws with their international duties in a spirit of good faith."[27]

The Ratification of International Agreements Act 34 of 2016 came into force on June 6, 2016, codifying the procedure for ratification and domestication of international treaties by Zambia. The Supreme Court of Zambia has noted that treaties Zambia has signed are merely persuasive unless formally adopted in domestic law. Prior to the enactment of Act 34 of 2016, the process of confirming domestication was not clearly codified, and the customary process of domestication ought to have been followed.[28] Zambia, being a dualist country, has domesticated the treaties that have a spirit and content similar to those of its Constitution. International treaties, cited in the decisions under discussion, can be said to be binding and not just persuasive in nature in determining common questions of law.

The wording of the High Court lends itself to a purposive interpretation of the Constitution and its provisions. The court rejected a cloistered reading of the law in favour of an expansive and interrelated acknowledgement of the pluralistic nature of the global discourse on human rights. By ignoring any technical omission in the process for domesticating international treaties, the court properly recognised that Zambia assumed an obligation to respect ratified treaties by incorporating the principles and wording in its Constitution. The Constitution of Zambia was enacted long after the UDHR was adopted in 1948, and clearly reflects its influence.

No state ought to conduct itself in a way that is inconsistent with, or undermines, the purpose of a treaty it has signed.[29] The signing of a treaty is a clear indication before the comity of nations of the willingness of a State to apply the principles set out therein. Any delay between the signing and ratification of a treaty ought not to be construed as abandonment of the treaty but, rather, as the result of formal requirements for ratification and domestic political realities. Thus, even without ratification of human rights treaties, Zambia should respect and enforce the rights protected by the treaties. Indeed, such local enactments that heavily borrow the wording of international instruments can be described as tacit, or indirect, treaty ratification.

The application of international human rights laws in resolving a dispute between tribal or customary laws is not unique to the African continent, as was recently shown in two cases decided by the highest courts of Mexico and Ecuador, whose facts are similar in principle to *Fungwe* and *Banda*. The courts reiterated the need to balance the collective rights of indigenous communities with the rights of minority groups within the indigenous communities. In each case, the minorities were indigenous Jehovah's Witnesses. The American courts reached the same conclusion as the Zambia courts, employing the same balancing principles.

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23 A consequential order is an order that gives effect to a judgment. It gives meaning to a judgment. It is traceable or flowing from the judgment prayed for and made consequent upon reliefs claimed by the plaintiff. See, 'On The Nature And Purpose Of A Consequential Order' *Lawyers Online (Legal Principles).*

24 E Suwilanji, L Linyama, M Chileshe, M Undi, 'Litigation & Dispute Resolution Laws and Regulations Zambia' (Feb 10, 2022) *ICLG*, available at *https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/zambia* (last accessed Jul 27, 2023).

25 Zambia Constitution, art 28(1), as amended by Act 18 of 1996.

26 *Resident Doctors Association of Zambia and Others v The Attorney General* (Sep 26, 2002 and Oct 28, 2003), Judgment 12 (Supreme Court of Zambia).

27 *Fungwe v Muntanga,* above at note 1 at 35. See the Vienna Convention on the Law of Treaties and the principle of international law *pacta sunt servanda* (agreements must be kept) as to the applicability of international treaties in the domestic context, above at note 10.

28 *The Attorney General v Clarke* (Jan 23, 2008), Appeal 96A/2004 (Supreme Court of Zambia).

29 *Fungwe v Muntanga*, supra note 1.

In *Chino v Jalisco,*[30] appellant Jehovah's Witnesses were forcibly evicted from their homes, their children expelled from school, and their property destroyed for not participating in certain indigenous religious celebrations. The appellants brought an action against indigenous authorities and both federal and state officials for failing to protect them. In its judgment, the Supreme Court of the Nation (Mexico) balanced the indigenous community's right to autonomy with the rights of the indigenous minority of Jehovah's Witnesses to continue to enjoy their rights and status as indigenous persons. It found that the human rights of the petitioners to due process, personal integrity, protection of the best interests of their children, along with their entitlement to indigenous sustenance and education, had been violated. The court stated:

In conclusion, we find unconstitutional the traditional rule that states that 'when a person in the community ceases to be a community member for reasons in connection with refusing to participate in the religion and customs of the community, pursuant to the Community's Charter, that person may be evicted from the community and the territory it occupies.' The traditional authorities should have chosen the alternative of relocating the persons within the community's territory, thus accomplishing the objective of protecting the community's right to self-determination and survival, while not jeopardizing Petitioners' right to a minimum level of subsistence.[31]

Significantly, the court applied international human rights treaties, ratified by the federal State of Mexico, within indigenous communities. It ruled that if the indigenous authorities failed to protect the rights of the indigenous minority within the community, the minority is entitled to the protection of the State regardless of any indigenous, tribal, traditional, or customary law. This ruling significantly advanced the law protecting the minority in the indigenous community. It is anticipated that if there is any further litigation on this issue, the court is now poised to reconsider whether the enforcement of the *Chino* decision could itself occasion further human rights violations. This is because the court unfortunately directed as a remedy the relocation of these victims, who were therefore compelled to abandon their homes and to move to other areas of the territory merely for having beliefs not held by the majority. Fortunately, another Latin American court addressed the issue more fully.

In *Ilumen,*[32] the Constitutional Court of Ecuador considered the constitutional issues raised by a group of indigenous Jehovah's Witnesses. The community authorities had stopped the building of a place of worship that had received all the necessary construction permits. The court based its conclusion on the constitutional guarantees of "the right to practice, maintain, change, profess, in public or private, their religion or beliefs, and to disseminate them, individually or collectively, subject to any restrictions required by respect for rights."[33]

The court concluded that preventing the construction of a place of worship infringed "the Witnesses' ability to profess their religion in public or private, and to preach their beliefs, within the private property they had designated for that purpose."[34] Preventing construction of their place of worship constituted religiously based discrimination, which is expressly prohibited under the Constitution of Ecuador.

The court directly addressed the need to balance the collective religious freedom of indigenous communities with the individual religious rights of minorities within indigenous communities. Collective rights must be exercised in a way that respects individual religious rights. A means to coexistence should be established in the midst of various religions, beliefs, and cultures. This mirrors the decisions in Zambia and Mexico, but goes beyond both by affirming that indigenous communities must respect the rights of minorities within them; if they fail to do so, the courts can act to protect the vulnerable minority.

Conclusion

Fungwe and *Banda* set important precedents, which now form part of the law of Zambia. Decisions of the Zambian superior courts of record bind lower courts, while decisions of other courts are only persuasive, although they may be referred to in formulating judgments. The *Fungwe* and *Banda* cases may be cited in similar jurisdictions for their persuasive value.[35] Courts should preserve and protect internationally recognised fundamental human rights. Customary law must be respected, but it is subordinate to the Constitution and international human rights instruments. Although European courts are not bound by precedent in the same way as common-law jurisdictions, such as Zambia, they have for many years recognised the necessity of analysing State action in the light of binding human rights conventions.[36] The recent cases (referred to above) in the highest courts of the Americas, also show the universality of human rights and the importance of balancing the exercise of tribal and cultural customs with internationally recognised human rights, such as the rights to freedom of religion and conscience. The Zambian courts are to be commended for taking the lead on the African continent by their decisions balancing customary law with upholding fundamental rights. The need to make consequential orders by courts for the enforcement of the fundamental rights of minorities, where appropriate, remains.

[Daniel Pole is a lawyer based in Ontario, Canada. This article is based on a presented made by him at the 24th Commonwealth Law Conference held in Malta on 6-10 March 2025.]

30 *Chino & Others v Tuxpan de Bolanos*, supra note 21. For a full discussion of this decision, see Cisano, Ortiz, & Tapia *The obligation of indigenous communities to subject their self-determination to the Mexican Constitution*, supra note 21.

31 *Chino & Others v Tuxpan de Bolanos*, supra note 19 at 80.

32 *Religious Freedom and Collective Rights Decision* (Aug 11, 2021) 1229-14-EP/21 (Constitutional Court of Ecuador).

33 ibid at 23 para 90.

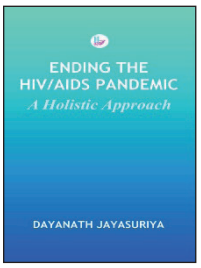
34 ibid at 25 para 104.

35 AS Magagula "The law and legal research in Zambia" (October 2009) *Hauser Global Law School Program*, available at: https://www.nyulawglobal.org/globalex/Zambia.html (last accessed July 27, 2023).

36 *Kokkinakis v Greece* ECHR (May 25, 1993), Ser A 260-A, §31; *Dimitras & Others v Greece* ECHR (June 3, 2010), 42837/06 and 4 others; *Association for Solidarity with Jehovah's Witnesses and Others v Turkey* ECHR (May 24, 2016), 36915/10 and 8606/13.

Book Reviews

ENDING THE HIV/AIDS PANDEMIC – A HOLISTIC APPROACH by Dayanath Jayasuriya, Har-Anand Publications Pvt Ltd, New Delhi, 2025, pp 136, INR500 (pbk), ISBN: 978-81-19798-66-7.



This slim volume is the latest publication from Dr Dayanath Jayasuriya, the eminent Sri Lankan lawyer, scholar and public servant. As the title suggests, the book seeks to promote what it terms a 'holistic approach' to the treatment of the HIV/Aids pandemic and one rooted in adherence to human rights. It offers a blend of personal memoir, reflection and anecdote, with a timeline of developments in the fight against the virus. The evident affection and respect with which Jayasuriya was regarded by so many of those with whom he engaged closely over many years, as well as others familiar with his work, is captured in some of the letters of appreciation he received, as reproduced in the book (pages 25-27). In some ways, too, the book observes how the virus and its impact has served a driver of social progress, especially in terms of the rights of women, as well as members of the LGBTQ community. Broadly, the story is one of modest success in driving down mortality and morbidity rates relating to the virus, not least thanks to the sustained and focussed efforts of medics and other health care professionals, as well as national governments and international cooperation. However, this progress is tempered with reversals, more often than not occasioned by cultural barriers and resistance to necessary attitudinal change and societal reform.

The book comprises some 136 pages, of which pages 13-75 represent the substantive portion devoted to the author's arguments, presented over five chapters. Seriatim, these are 'A New Tragedy Unfolds Itself', 'A Personal Odyssey', 'Equity as a Guiding Principle', 'Overview of Selected Legal Interventions', and, 'A 'Win-Win' Situation'. Jayasuriya advocates the adoption of a multi- and indeed inter-disciplinary- (what he terms 'holistic') approach that views HIV/AIDS as both a medical emergency and one that requires social, economic, cultural and indeed moral imperatives, above all those concerning human rights, to be accorded a core role in public policy to addressing the challenge.

For many if not most of us in the advanced industrialised world, the impact of HIV, still less of AIDS, has been minimalised to the point of a minor inconvenience, thanks to a daily pill for those infected to keep well. Consequently, the resultant dramatic improvement in life expectancy (to more or less normal and comparable with society at large) and indeed in quality of life, has served to render HIV as 'just another' condition to be managed through regular anti-retroviral medication, made available at low or no cost from national health care systems. Attitudes have changed accordingly, though with the perhaps inevitable blasé approach creeping in about how the condition is viewed, along with the risks associated with it. The contrast with those in less fortunate situations across many low- and middle-income countries of the world could not be greater.

Thus, is there a complacency in the medical establishment, and perhaps among other elites, too? Jayasuriya believes so, reminding us of the depressing statistic that one person dies of HIV/AIDS every minute and that, for all the success in mitigating the baleful impacts of the virus in the West, progress elsewhere remains insufficient, retarded by a host of factors. Indeed, in much of the world, HIV infections are rising. He pulls few punches in offering both a trenchant critique of key aspects of the global effort to date to secure reduction in, if sadly not the eradication of, nor cure for, the virus, as well as a comparably enthusiastic and compelling articulation of his stance around a comprehensive approach to combatting the virus.

Vignettes are relatively few. However, he noted the internal wrangling within the World Health Organisation, and the particular shortcomings of its former Director-General, Hiroshi Nakajima, in his inter-organisational tussles with Jonathan Mann, founder of SIDA and later, the WHO's Global Programme for AIDS (GPA), and whose credentials were impeccable by contrast. Mann believed Nakajima was more interested in empire-building than aiding the GPA in its quest. Its message on 'safe sex' appeared to "personally upset Nakajima whose weakness for the opposite sex was not a closely guarded secret and left much to be desired". Sadly, we are unable to approach either party for their own take on the situation: Mann died in a plane crash in 1998, while Nakajima, who died in 2013, had long previously relinquished his often-controversial tenure after a stewardship that could charitably be described as inauspicious. Nonetheless, this delicious anecdote perhaps captures the frustration Jayasuriya still harbours about the WHO's approach, while demonstrating the deficiencies of a body beset with intra-organisational political jockeying and a clash of personalities. Were these flaws not so serious for their implications on HIV/AIDS programme efficacy, they could almost be dismissed as laughable. Nonetheless, for all the criticisms one could level at the WHO, Jayasuriya's sympathies lay clearly with Mann. In similar vein, he is also at pains to acknowledge and extol the prescience, dedication and tenacity of other leading figures such as Peter Piot and Winnie Byanyima and their own contribution to the titanic effort involved in combatting HIV/AIDS. Indeed, in some ways, the book is a homage to such individuals who have prevailed against the odds in their shared endeavour.

Pages 76-126 encompass seven annexures (A-G). These are entitled thus: A – 'HIV and Aids: Key Facts'; B – 'Joint UN Statement Calling for Sexual and Reproductive Health and Rights for All (April 2024)'; C – 'Remarks of Winnie Byanyima, UNAIDS Executive Director on Sustaining the Gains of Global HIV Response to 2030 and Beyond (June 2024)'; D – 'Decriminalization of LGBTQ+ People Saves Lives Joint Statement by UN High Commissioners for Human Rights Volker Turk and UNAIDS Executive Director (19 July 2024)';

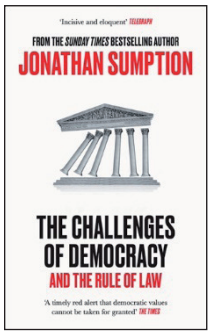
E- 'HIV/AIDS in India'; F – 'Rio de Janeiro Declaration of the G20 Health Ministers, October 31 (2024)'; G – 'UNAIDS Reference Group on HIV and Human Rights Narrative Report of the 2023 in Person Meeting of UNAIDS Reference Group on HIV and Human Rights' (sic). In particular, the first annexe (A) provides a sobering reminder of the global scale and scope of HIV and Aids. Annexe C records how costs of debt service are thrice those of health spending in much of sub-Saharan Africa. The capacity for criminalising LGBTQ+ people/activities to blight and take lives, literally, is noted in Annexe D – a rare bright spot being the steady process of decriminalisation serving as a welcome corrective to ill-informed vindictive oppression of such minorities. There is a useful case study exploration of the situation obtaining within India provided in Annexe E. In Annexe F, the declaration reproduced highlights how global instability serves to push HIV/AIDS down the priority list of the world's key stakeholders, rather as did COVID, but, more positively, focusses also on the opportunities afforded by digital health.

A bibliography is included (pages 127-136) though this is essentially a compilation of 'relevant publications' previously prepared by the author: either books (listed earlier, on the inside first page), sole-edited collections, joint editor, other monographs, chapters in books, or journal articles.

While the writing is lucid, in keeping with its author's reputation for concise, engaging observations on the matter at hand, it is not immediately clear as to what constitutes the target audience for this publication, or indeed its wider purpose. The inclusion of extensive additional material in the various annexes, together with little citation of research produced by other academic writers, does little to dispel this uncertainty around the intended readership or purpose. In some ways, it is more of a tract, with an accompanying clarion call for a renewed resolve to finish the job regarding the struggle to mitigate then eliminate HIV/AIDS. That in itself might be adjudged justification enough. Nevertheless, for those interested in the topic, it serves as a source of timely reflections and insights into a matter of often acute personal human interest, general medical fascination and lasting socio-economic and cultural impact.

[The above review was contributed by Paul Carmichael, who is a Professor of Public Policy at Ulster University, Northern Ireland.]

THE CHALLENGES OF DEMOCRACY by Jonathan Sumption, Profile Books, London, 2025, pp xiv + 226, £18.99 (hbk), ISBN: 978-1-80522-250-7.



Regardless of whether one agrees with him or not, Jonathan Sumption can be relied upon to provide thought-provoking analyses of contemporary and historical events and issues. This latest contribution from him – in the form of a slim but powerfully-argued volume on the ills that plague democracies in various corners of the world – will be welcomed by lawyers and laymen alike.

A flavour of the book can be had from some of the questions he poses at the outset: "What are the conditions in which democracy can exist? What part does law play in creating those conditions, or perhaps in extinguishing them? Can democracy survive an age of polarised opinion and hostility to dissent?" Specifically in relation to the United Kingdom, he asks, rather apocalyptically, "Will Britain still be a democracy in fifty years' time?" Even if there are no cut-and-dried answers to those questions, Sumption's ruminations offer much food for thought.

The book is arranged along four themes: politics and the state; law in our lives; the international dimension of law; and freedom of speech. Relevant arguments and talking points on these diverse but interconnected subjects are presented in twelve cogently articulated chapters. The introduction to the volume makes it clear that these chapters emerged, not as a single grand narrative, but from lectures delivered to a variety of audiences.

As is well known, Sumption is unafraid to comment on controversial topics, and this book is no exception. Take Hong Kong, for instance. There is an entire chapter titled 'Hong Kong: A Modern Tragedy' in which he sets out his views on the disturbing developments in that territory – developments which led him to resign as a non-permanent judge of Hong Kong's Court of Final Appeal in June 2024. He explains the reasons for that decision at length in the book and notes trenchantly that:

> The current political atmosphere [in Hong Kong] makes it exceptionally difficult for judges to do their job independently of government policy. In areas of direct concern to the government, the rule of law is therefore seriously compromised. The result in Hong Kong has been a string of administrative and judicial decisions that are characteristic of totalitarian states like mainland China.

The same candour characterises Sumption's assessment of the European Court of Human Rights. That court's "inventive approach to the interpretation of the [European Convention of Human Rights] is," in his view, "difficult to reconcile with the rule of law", which is a damning indictment of an institution which continues to have many defenders in the UK. He is convinced that reform of the ECHR system is no longer an option and that the UK would do well to leave the Council of Europe, the parent body responsible for the Convention and the Court. "Defenders of the Convention system rarely address its implications for our constitution and our domestic law," he notes ruefully, adding that he is not among those who advocate leaving a vacuum after withdrawal from the CoE. Britain should, he says, "incorporate [the Convention] into its statute law, adding such additional protections as seem desirable. This would enable us to defend all the same basic rights without submitting to the overbearing regulatory instincts of the Strasbourg Court."

Sumption buttresses his case by giving many telling examples of the "mission creep" which has typified Strasbourg's approach to the interpretation of the ECHR. Talking of Article 6, which deals with an individual's right to a fair trial, he demonstrates that the European Court has altered the principles of civil liability "in ways that are practically incapable of amendment or repeal by national legislatures" – a purpose it was never intended

to pursue, let alone achieve. Lest it be thought that Sumption is a little Englander or a closet isolationalist, he categorically distances himself from the result of the Brexit referendum, averring that "it was a serious mistake" (although he considers it "[a] facile view that the vote was due to xenophobia, post-imperial nostalgia, lies written on the side of campaign buses or other such non-sense explanations".

The closing section of the book deals with another controversial but extremely important issue, viz freedom of speech. Here, too, Sumption delivers some hard-hitting home-truths. He dwells on many contemporary campaigns which militate against freedom of inquiry, the pursuit of knowledge and truth, and a rational approach to empirical research. The result, he says, is that there is a lot of "tendentious selection, exaggeration and intolerance of dissent" in the world of academia. But he also points to an uncomfortable truth, viz. the limits of the law in dealing with many of these problems:

> The courts are impotent to protect people against the worst threats to free speech: the howling trollers of the internet, the addictive outrage of the street protesters, or the oppressive self-censorship of publishers, journalists and academics. These things can only be addressed y a profound cultural change that is beyond the power of law to bring about. Changing this culture depends on you, me, on every one of us. The only reason that activists try to disrupt and suppress unwelcome opinions is that experience shows that it works.

This is a book which has the potential to open people's eyes and minds and which therefore deserves all the publicity it can get.

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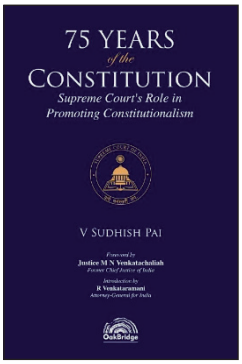
75 YEARS OF THE CONSTITUTION by V Sudhish Pai, Oakbridge Publishing Pvt Ltd, Gurugram, India, 2025, pp xxviii + 295, INR995 (HBK), ISBN: 978-81-972883-3-3.



2025 marks the diamond jubilee of the promulgation of the Constitution of India. That document, which had the reputation – some would say, notoriety – of being the longest written constitution in the world when it burst forth on the national stage on 26 November 1949, was brought into force on 26 January 1950 – two years and five months after the country got its independence from British rule. Unsurprisingly, 2025 has seen a profusion of celebrations throughout the subcontinent, and it has also seen the publication of a number of books commemorating the jubilee. This is one of the earliest in the genre to get off the starting blocks.

Authored by a Bangalore-based lawyer who takes a particular interest in constitutional law, the book traverses a vast stretch of ground. It is divided into two parts: the first begins with some general reflections on constitutions, constitutional law and constitutionalism and goes on to explain the history and dynamics of how the 1950 document came into being. This part also offers an overview of the constitution and explains such matters as the role of courts in a constitutional democracy and the principles of constitutional interpretation.

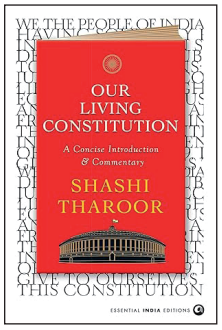
The second part, which constitutes the bulk of the book, lists key cases decided by the Supreme Court of India over a period of seven decades with short summaries of each of those cases. Such is the sweep of jurisprudence connected to the Indian constitution that many foreign observers will be awe-struck even by a glance at the index to those cases. The subjects covered include: the nature and contours of the constituent power; legal control of executive actions; the running of parliament; the appointment of judges and other constitutional functionaries; the implementation of federalism; state liability for tortious acts; the role and powers of the Election Commission; the scope and application of judicial review; the protection of fundamental rights; and the operation of criminal law (including the somewhat thorny issue of the use of capital punishment which is not barred by the Indian Constitution). A final part, consisting of no more than 10 pages, retells some anecdotes and trivia associated with some of the leading constitutional cases heard in the hallowed portals of the Supreme Court of India.

Pai's justification for the book is, essentially, to bring to public notice both the wide sweep of decisions rendered by the Indian courts over the past seven decades and to show "how they have touched the lives of the people, protected individual rights, implemented legal control of government, and fostered a constitutional culture…" He believes that the "concept of law as a check upon public power" has been translated into reality by the superior courts of India – a no mean feat considering not only the vastness of the country, the diversity of its population, and the low level of literacy prevailing at the time of independence, but also the economic and other challenges that have seen India occupy a quite low place in many global developmental indices.

Pai is even-handed in his assessment of the overall record:

> There are … many decisions which are commendable and trail-blazing – carrying the law forward, translating constitutional phrases into reality making it [sic] more meaningful to the people, enforcing the checks and balances in the constitutional scheme and legal control of government and public authorities. Public law has moved from a culture of authority to a culture of justification … However, there are also decisions which have not brought glory to the [Supreme] court, some palpably misconceived and calling for a revisit and some which can be described only as a self-inflicted wound and a disservice to itself and the nation.

Taken as a whole, this book will be seen by many as a welcome addition to the growing body of writings on the Indian Constitution as the country celebrates another milestone in its history and advances rapidly towards its centenary. Pai deserves praise for keeping the flame of constitutional scholarship alive.



OUR LIVING CONSTITUTION by Shashi Tharoor, Aleph Book Co, New Delhi, 2025, pp xiv +111, INR499 (hbk),
ISBN: 978-93-6523-372-8.

To those who may cavil at the appearance of yet another primer on the Indian Constitution – which the book under review indisputably is – it can be argued that there is still room for such publications, especially if they are written in such polished prose as to make them stand out in a market that is largely dominated by mediocre offerings. In keeping with his reputation for elegant writing, Shashi Tharoor has put out this attractive tract, albeit with an admittedly limited purpose:

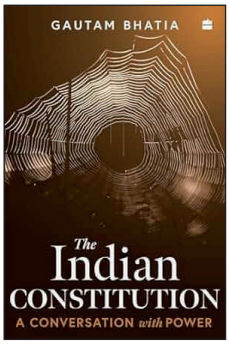
> Mine is a thinking citizen's modest contribution to reviewing our experience, analysing our practice and developing an understanding of how our Constitution has worked out for the people of the world's largest democracy. It does not seek to be a comprehensive or authoritative account of the Constitution, but rather an introductory commentary that might whet the readers' appetite for deeper study of this remarkable document and its significance for the lives of all Indians.

The book fulfils that purpose admirably. It crams within its 100-odd pages nine chapters titled, self-explanatorily: An Extraordinary Document; the Vision of the Founders; The Constitution and Indian Nationhood; Elements of the Constitution; A Living Document; Moving Beyond the Provisions; An Alternative Idea of India; A Challenge to the Constitution: Whither Secularism and Pluralism; and A Union of States. Those familiar with Tharoor's speeches and writings will easily recognise the tone and tenor of the book: left-liberal, even wokeish, with predictable nods towards political correctness. There is also the inescapable underlining of Tharoor's commitment to 'civic nationalism' as opposed to what he revels in calling the 'ethnic nationalism' of his political opponents (a point he has brought up frequently, though it remains to be seen if there might be a toning down of that rhetoric as he appears to move closer to the ruling Bharatiya Janata Party of prime minister Narendra Modi and away from his own Congress party).

The book also contains the usual peans of praise for Jawaharlal Nehru and potshots at the likes of Churchill (though how Tharoor can reconcile his statement that Nehru "went to great lengths to limit [his] own power" as prime minister with the fact that, within months of the Constitution coming into force he enacted amendments which severely curtailed freedom of speech and property rights is not explained). Tharoor's blind devotion to Nehru also prevents him from criticising the former prime minister for the unpardonable consequences of the his economic policy which led India to near bankruptcy until it was rescued by liberalisation in the early 1990s; "For Nehru," he says without irony, "the establishment of a free and democratic India required the substitution of the economic power of a few rich individuals by a form of state control that could end poverty, reduce unemployment and improve material conditions" – none of the latter, of course, happened).

Tharoor is on much stronger ground in his analysis of how federalism in India has been skewed and distorted over the years, including by a number of questionable policies adopted by the current BJP government. There is much force, too, in his criticism of other controversial measures emanating from the Modi administration, including the efforts to foist Hindi against the will of the southern states, the misuse of investigative agencies of the state against political opponents, and the abrupt change to the constitutional status of Jammu and Kashmir in 2019. The broad thrust of his argument that there has been too much centralisation of power in the executive branch of the central government and that the "sinews" of democracy – "our Parliament, legislatures, judiciary, news media, civil society, public universities, and watchdog agencies" – are either hollowed out or hijacked" will find a resonance among many readers.

The book could be improved in some respects. On the substantive side, to cite but one example, there is not as much discussion about the perilous state of the Indian judiciary – which remains both the ultimate protector of the individual's rights and the keeper of constitutional integrity – as it is reasonable to expect in a work of this kind. On the presentational side, referencing is at best patchy (many statements which require footnotes pointing to sources remain unsupported) and the bibliography exposes not only an ideological bias but a degree of shallowness which is striking (there is, for instance, not a single reference to, say, Nani Palkhivala or AG Noorani, both of whom have written extensively – and for lay audiences – on the Constitution).



THE INDIAN CONSTITUTION by Gautam Bhatia, HarperCollins, Gurugram (India), 2025, pp xxvi + 348, INR599 (pbk),
IISBN: 978-93-6569-375-1.

Contestations around constitutional principles or provisions frequently involve a quest for power by rival camps vying for dominance or supremacy. Many of these battles play out in the courts and they have the potential to lead to sparkling, if sometimes fractious, debates within and outside the courtroom. In the end, however, politics often trumps the law, especially in jurisdictions where the balance of power favours an assertive executive, especially one which commands an unassailable majority in the legislature. Sometimes, as this book points out, many of those battles are fought even before a constitution is promulgated, ie in the body charged with making the constitution, as happened in India shortly after it threw off the yoke of colonialism in 1947.

In the words of the blurb to the book, the Indian constitution

> has been a battleground upon which different visions of power have contested for supremacy. For the most part, this

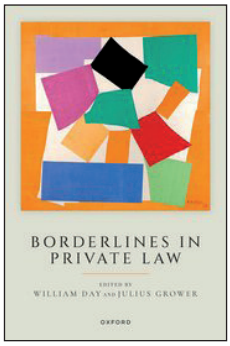
contest has been marked by a centralizing drift: that is, a drift towards a concentration of power within the union executive. Elements of this are embedded within the Constitution's design, but the drift has also been accelerated, at crucial historical moments, by Supreme Court judgements.

The book chooses a narrow time frame in the 75-year history of the nation to examine the dynamics involved in what the author calls "constitutional bodyline-bowling": 2019-2024. This was the period when, among other things: the constitutional status of Jammu and Kashmir was changed (with members of the political Opposition in the territory being put in administrative detention and a comprehensive internet shutdown imposed, making normal communications impossible); a law was passed which reversed a Supreme Court judgement that had resolved a long-running tussle between the Delhi and central governments about the distribution of legislative and executive power in favour of the former; three state governments under the control of political parties in opposition to the ruling party at the centre were toppled mid-term; and a constitutional amendment was passed to nullify a Supreme Court decision that weakened the central executive's power to determine the composition of the (supposedly) independent Election Commission. As if these were not enough, this five-year period also saw a serious weakening of statutory protections in favour of personal liberty.

The author argues that these developments were not separate and isolated incidents. "I believe," he says:

> … that there is something deeper that connects them, going beyond the actions of a particular dominant central executive. These instances all constitute interconnected strands within a web of power relations that is created and sustained by the Constitution. Furthermore, we are better off understanding the actions of the central executive not as tearing the web or even seeking to substantially remake it. Rather, … these actions and the constitutional challenges that ensued, along with their judicial outcomes, help illuminate the design of the web and the manner in which its overlapping strands constitute its architecture.

The discussion that follows involves examining the constitution as a 'power map'. That discussion is set on a wider canvas than the five-year period indicated above. It encompasses four broad themes: colonial continuity; 'Frankenconstitution' (which involves a reinforcement and entrenchment of the constitution's centralising drift across the many axes of power around which public power is organised and channelled); constitutional common sense; and the relationship between constitutional law and politics. That discussion, maintains the author, is necessary to "attain a better understanding of the Indian Constitution as a conversation with power", as flagged up by the sub-title of this book.



BORDERLINES IN PRIVATE LAW by William Day and Julius Grower (eds), Oxford University Press, Oxford, 2024, pp xxvi + 294, £90 (hbk), ISBN: 978-0-19-888871-0.

Is it possible to draw sharp dividing lines between the different constituencies of private law? Is it even desirable to do so? These are questions on which consensus may be difficult to reach. Many will consider them to be of more academic than practical value. But it remains a fascinating subject, and this book undertakes an exploration of it with a rich variety of examples spanning contract, tort, equity, unjust enrichment, and property, with the analyses ranging from doctrinal viewpoints to philosophical arguments.

It is a collection of essays – seventeen in all – written by academics and judges (with one of the academic contributors also being to be a practising barrister). The essays grew out of a conference held in Cambridge in 2023, with the resulting papers being edited into shape by Day and Grower.

Identifying borderlines inescapably involves the idea of taxonomy. But does taxonomy matter? This is a question posed in the opening chapter by Lord Sales, a judge of the UK Supreme Court. He answers the question in the affirmative and cites three reasons for holding so:

> First, it is an axiom of justice that like cases should be treated alike … Secondly, lawyers need to be trained. It is through taxonomy that lawyers are trained to think as lawyers … Thirdly, … as a judge you are very conscious that when writing a judgment you are yourself potentially reproducing or modifying the taxonomy which the legal system will use. You need to have a good understanding of the law's taxonomy in order to do that consciously and with a proper appreciation of the effects you may be producing.

Some borderlines are, relatively speaking, easier to identify. There can also, of course, be overlaps. An example is where concurrent duties in contract and tort apply in a given situation. Many of these cases lead to little difficulty (e.g. claims for personal injury), but situations do arise when a solution is not entirely straightforward. As one of the contributors to this volume points out, "[i]n claims for pure economic loss, concurrent liability in tort is available for some negligent breaches of contract but not others." That is an example of an "contested, unprincipled borderline".

Unjust enrichment is another tricky area. At least five chapters are devoted to this topic and its relationship with tort, contract, equity and property. As Justice Foxton notes in his own general treatment of the topic:

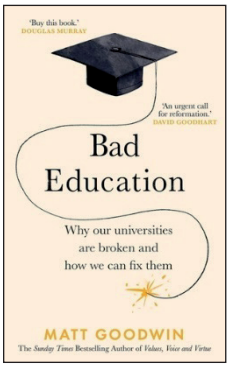
> Mapping the borderlines of the law of unjust enrichment presents a particularly challenging exercise in juridical cartography. Unjust enrichment is a newly emergent, and unstable, legal state, which took six hundred years to gain

conceptual independence from the dominant categories of contract (in particular), but also tort and equity.

Another contributor, Robert Stevens, calls unjust enrichment "the joker in the pack, or perhaps more accurately the cuckoo in the nest", and argues that to conceive of cases conventionally grouped under that head and "usefully understood as governed by any such omnibus principle is, to say the least, very doubtful."

Readers with a predisposition towards intellectual curiosity and an enjoyment of jousting with ideas will find this book a treat.

BAD EDUCATION by Matt Goodwin, Bantam, London, 2025, pp 248, £20 (hbk), ISBN: 978-1-787-63524-1.



For those worried by the declining state of British universities, this book will be both a source of illumination and some consolation that the issue is not going entirely unnoticed. Written by an academic who spent two decades in the higher education sector in England before quitting in disgust, it shines a torch on the causes and consequences of the rapid decline in standards and reputation of UK universities. The stark message the book conveys is:

> Our universities are broken … They are utterly and completely broken. They are no longer fit for purpose. They have lost sight of their original mission. And they are now setting up an entire generation of young people to fail, weakening our society and democracy along the way.

There are, says Goodwin, numerous reasons for the fall. The book breaks up the analysis into chapters which, starting with some general observations, deal with how the collapse has impacted on scholars, students and the system as a whole. For good measure, it also offers some solutions.

A fundamental problem is, in Goodwin's view, that British universities have been captured by a 'new dominant ideology'. "It's a belief system," he explains, "that has little if any serious interest in the things universities are meant to defend and which they used to promote – free speech and academic freedom, objective scientific evidence, reason, logic, tolerance, debating in good faith, and the exposure of students to a diverse range of ideas and opinions…" The result? Universities are being transformed into "openly political, biased and activist institutions that no longer even try to pretend to be neutral, independent and politically balanced".

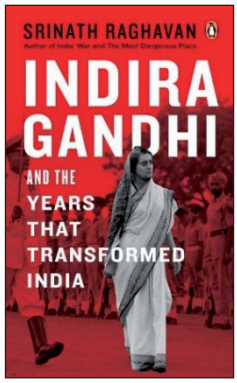
Goodwin's analysis covers much ground, including: the effects of the runaway expansion of higher education since the 1990s which has led to a glut of graduates who are unfit for the labour market; the growth of illiberal ideologies which militantly discourages academic enquiry and punishes those seeking objective knowledge; the 'cancel culture' and 'no-platforming' policies which deny students exposure to a wide range of views; the widening chasm between the 'university class' and broader society; the prioritisation of the political goal of 'social justice' over the time-tested goal of pursuing truth; the overdependence of British universities on foreign students which often leads to a lowering of admission requirements; the reluctance of university academics and administrators to allow criticism of certain foreign governments, such as China, for fear of losing financial subventions from such governments; the encouragement of a 'victimhood' culture among students which produces an unacceptably low tolerance for discomfort and difficulty of any sort; the increasing tendency to treat students as 'customers' rather than prospective scholars, which allows them to make unreasonable demands on university authorities; a burgeoning 'bureaucratisation' of the higher education sector leading to administrators and other personnel far outstripping academic staff; and unconscionable pay rises for vice-chancellors even in circumstances where universities were facing a financial crunch (Goodwin notes that "170 vice-chancellors in Britain today earn more than the [Prime Minister]".

What then can be done about all this? Goodwin is sceptical of the 'defensive' strategy which argues that the way to defeat illiberalism is to double down on liberalism and make a more vocal and spirited case for reform. "I don't think," he says, "this defensive strategy comes close to meeting the sheer scale of the challenge…" Instead, he prefers a more "interventionist" route:

> The only way to fix universities is to use government to enshrine in law the protection and promotion of free speech and academic freedom … Seen from this perspective, only government action and new legislation, or pressure from outside universities, can change the incentive structures on campus. This means adopting a proactive rather than a passive strategy, making it clear that the individual freedom of scholars and students is, ultimately, more important than the freedom or autonomy of the university.

It remains to be seen if the requisite will and resources to make such a strategy work is anywhere on the horizon.

INDIRA GANDHI by Srinath Raghavan, Penguin Random House India Pvt Ltd, Gurugram (India), 2025, pp xx + 367, INR899 (hbk), ISBN: 978-0-670-08612-2.



Fifty years ago, on 26 June 1975, an event occurred in India which many at the time feared would spell the end of the country's short-lived experiment with democracy and pave the way for dictatorship. The event was the imposition, by the then prime minister Indira Gandhi, of a state of emergency, followed by large-scale suppression of civil liberties and a suspension of constitutional government. The emergency had been a cynical move on Gandhi's part to save her political career which had been derailed by a judgement of the Allahabad High Court that found her guilty of corrupt electoral practices in a preceding parliamentary election. Despite the darkness into which the country was plunged by the emergency, democracy and the lost freedoms were reclaimed some two years

later after Gandhi herself, perhaps to burnish her image on the world stage, called for fresh elections in which she and her party got a spectacular drubbing.

The story of the 1975-77 emergency has been told many times; it is the subject of numerous books, academic papers, broadcasts, and journalistic commentary – some illuminating, others less so. So why a new tome on the subject? Srinath Raghavan, a historian and specialist in international affairs, provides the following justification:

> Indira Gandhi's wider political career has not elicited [as much] attention [as the Emergency itself] in recent times. Shelves continue to heave under the cumulative weight of older biographies, memoirs, and contemporary accounts – none of which were based on documentary sources. These remain, for the most part, exercises in condemnation or condonation. Explanation and understanding, archival scholarship and cool interpretation remain at something of a discount … Still missing is a book that charts and explains the entire arc of Indira Gandhi's political career: from her ascent to power in January 1966 to her assassination in October 1984.

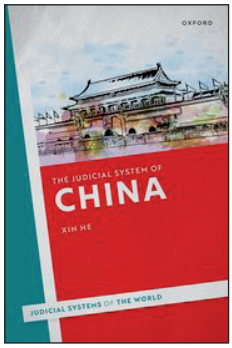
Raghavan's ambitions are wider still. "This book," he says, "is a political history of India in the Indira Gandhi years." Whether it lives up to those expectations – and whether his claims to the uniqueness of his enterprise – will remain a moot point. But that the book offers much food for thought cannot be denied.

There is, predictably, an abundance of detail about political events preceding and surrounding Indira Gandhi's ascent to power. Research for the book has been carried out on an extensive scale, with many archives, both within and outside India, being consulted, along with a plethora of official publications, memoirs, autobiographies, letters, diaries, books, articles and book chapters. The narration has an easy flow and the treatment is both fair and cogent. Raghavan pulls no punches in articulating his assessments; referring, for example, to the unseemly haste with which Gandhi's son Rajiv was sworn in when she was assassinated by her own bodyguards on 31 October 1984, he says:

> Indira Gandhi had decisively reduced the Congress to a servile rump of a purged party. The acolytes who packed her cabinet and ruled the states ensured that her plan of dynastic succession was at once implemented. Such was their disdain for established procedure that they wanted the vice president of India immediately to anoint Rajiv Gandhi – on a recommendation from the party leadership – for they were unsure whether President Zail Singh would fall in line with this idea.

Such judgements are scattered throughout the book. His overall assessment of his subject (against the backdrop of Karl Marx's observation that Louis Bonaparte was a grotesque mediocrity who played a hero's part) is that "Gandhi was no mediocrity; nor did she perform a heroic role. Yet the historical changes wrought in her time certainly paved the way for some grotesque mediocrities to rule India". Many would say 'Amen' to that.

More briefly…



THE JUDICIAL SYSTEM OF CHINA by Xin He, Oxford University Press, Oxford, 2025, pp xiii + 269, £24.99 (pbk), ISBN: 978-0-19-892777-8.

Interest in China's judicial system has been ignited in recent years by, among other things, growing concerns over the Sinification of law and justice in Hong Kong. Those wanting to gain an understanding of how the mainland's courts and other legal institutions work would do well to turn to this book authored by a professor of law attached to the University of Hong Kong.

That awareness of law in China is increasing is in no doubt, says Xin He:

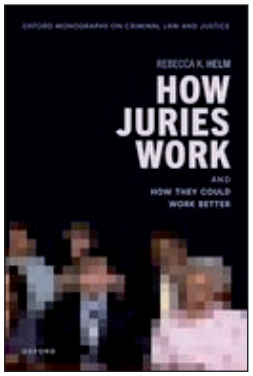
> [T]he laws in China have evolved beyond mere window dressing. In the past 40 years, numerous laws, statutes, ordinances, and amendments have been churned out. The proliferation of law schools and the increasing number of graduates entering the legal field may suggest that the law produces the largest share of college graduates, and the number of lawyers has soared. Legal discourse is evident in official rhetoric and everyday conversations. The state encourages people to use the law as a weapon, and many are heeding this advice.

The statistics are impressive: to take but two, 45 million cases are being processed annually, with 126,000 judges to resolve them. But are the courts genuinely independent? That is a question which continues to worry many observers of China's legal scene. "Ensuring social stability," avers Xin, "is a primary policy objective; rules play a prominent role, but can be applied flexibly." Xin also offers a more direct – and chilling – answer:

> All rank-and-file judges are required to align with the [Communist] Party's line, and loyalty to the Party is embedded in the system. When the regime's interests are at risk, judges know what to do. Chinese judges do not have life tenure, and they can be removed, demoted, disciplined, or even criminalized at *any* time.

The coverage of the book is as comprehensive as it is lucid. Among the matters explained are: the historical background and judicial reforms under Xi Jinping; the role, work conditions, income etc. of judges and what influences they are subject to; the organisation of the legal profession; litigants' views of the courts; alternative dispute resolution methods; and the functioning of the civil, criminal and administrative justice systems. An extensive bibliography and a Quick Guide bring up the rear of the work.

HOW JURIES WORK by Rebecca K Helm, Oxford University Press, Oxford, 2024, pp xxiv + 209, £90 (hbk),
ISBN: 978-0-19-285729-3.

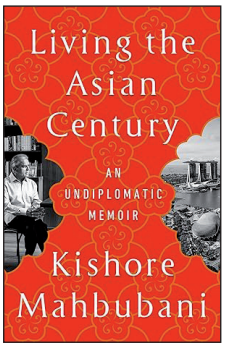


Juries have been a prominent feature of justice administration in the common law world for centuries, although their popularity in some former British colonies has diminished over the years. Even within the United Kingdom there has been an attenuation of jury trials: they are, for example, no longer the norm in civil actions for defamation. With advances in technology new challenges have arisen about keeping jurors away from information which they are traditionally forbidden from accessing before or during a trial, and these have led to enhanced academic research into whether and how juries can still be kept fit for purpose. This book can be considered an addition to that genre of literature.

In ten chapters, the book covers such matters as: the changing regulation and function of juries; jury systems worldwide; the role of the modern jury; jury decision-making models; juror characteristics; case-level characteristics; legal standards and procedure; jury deliberations; improving juror decisions; and improving deliberations and utilising other decision-makers.

An argument that the author makes is that "The jury needs to evolve again, into a more sophisticated legal instrument … [T]he philosophical and political assumptions on which the current jury system is based are relatively opaque, and that procedure can be result of historical artefact and 'common-sense' principles rather than careful planning." She calls for a "more precise science" behind aspirations for the jury.

LIVING IN THE ASIAN CENTURY by Kishore Mahbubani, Public Affairs, New York, 2024, pp xii + 324, US$21.99 (pbk),
ISBN: 978-1-5417-0304-9.



Kishore Mahbubani is a familiar figure in the diplomatic world. A former senior foreign service officer of Singapore who occupied many prominent positions at home and abroad, he is an evangelist for Asia and, some would say, an unyielding champion for China in recent years. As well as being articulate, Mahbubani's public persona is characterised by a combativeness in debate which is rare among diplomats. Not surprisingly, he has chosen to call this latest book of his "An Undiplomatic Memoir".

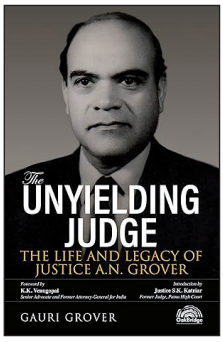
It is very undiplomatic indeed, but thoroughly enjoyable for it. Many of those who have followed his career will be surprised that he has condensed his eventful life into just over 300 pages – surely, there's room for at least another volume of that length.

At one level, Mahbubani's combativeness is not hard to understand. The memoir describes the grinding poverty in which he grew up, with a violent father who was frequently in debt, prone to drinking, and who suffered the indignity of going to jail for criminal breach of trust when his son was merely 14 years old. But he had a loving mother who stood like a rock, running the household in the midst of so much adversity. The young Kishore was also very hardy and optimistic in his outlook. "Looking back now," he says, "it's clear that while I lived with material deprivation, I was absorbing cultural richness. Unknowingly and unwittingly, I was inhaling the vapours of three of the most dynamic and resilient Asian civilisations: Indian, Islamic and Chinese. This was an extraordinary privilege."

His brilliance, aided by government scholarships, saw him through university. Given that Singapore is an intrinsically meritocratic society, nothing could stop his ascent to great heights. The rest, as they say, is history. His belief in the strength of Asia remains undimmed:

> It has been my joy to live the Asian dream and perhaps contribute a little to the realisation of the Asian century. It is truly heartening to realise that the path I have trodden from poverty to plenty, from ignorance to education and intellectual curiosity, will now be replicated by millions, if not billions, of fellow Asians. To have been a pioneer in this great Asian renaissance has been one of the greatest privileges, and fulfilments, of my life.

THE UNYIELDING JUDGE by Gauri Grover, Oakbridge Publishing Pvt Ltd, Gurugram (India), 2025, pp xxii + 220, INR795 (hbk),
ISBN: 978-93-89176-91-9.

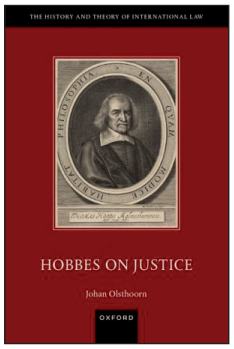


In the annals of Indian judicial history, an event which occupies a less-than-glorious spot is the passing over of three senior judges of the Supreme Court for the chief justiceship of India when that post fell vacant in 1973. Defying a long-prevailing tradition under which that high office would be filled on the basis of seniority, the then prime minister Indira Gandhi, in a show of spite, 'superseded' Justices J.M. Shelat, K.S. Hegde and A.N. Grover. These three judges had a few weeks previously ruled against the government in a keenly-fought constitutional case and this attracted Mrs Gandhi's ire.

Justice Grover, the juniormost of the trio, immediately tendered his resignation and withdrew into a graceful retired life, becoming for a short while chairman of the Press Council of India. He was a respected judge and a well-liked man whose career was marked by integrity, scholarship and compassion. This book, penned by his grand-daughter, herself a practising lawyer, traces Grover's childhood, education and later life, recalling many notable moments of triumphs and tribulations. What comes through is a grand-daughter's genuine affection

and admiration for a man from who will always be remembered as a victim of executive vengefulness.

HOBBES ON JUSTICE by Johan Olsthoorn, Oxford University Press, Oxford, 2024, pp xix + 292, £100 (hbk),
ISBN: 978-0-19-886798-2.

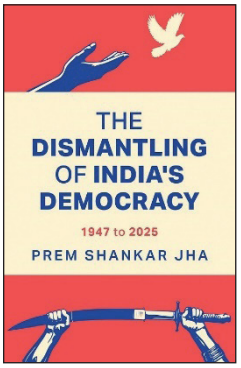


This book claims to be "the first book-length analysis of [Thomas] Hobbes' ideas of justice". Those ideas, it must be remembered, were rather controversial at the time they were laid out (the blurb to this book refers, for example, to Hobbes' "idiosyncratic glosses on notions like justice, rights, injury, obligation, and law") . The book is therefore likely to have a significant appeal to legal philosophers as well as to scholars of politics and history.

Olsthoorn states that Hobbes' "notoriety rests in part on a series of bold claims he defends about justice. Norms of justice do not apply prior to and outside of the state (including in the international arena). All that justice requires is performing one's covenants – including foremost the original covenant that sets up government. For citizens, the civil law is the sole authoritative standard of justice and injustice of actions. Sovereign rulers cannot commit injustices; let alone be accused of injustice." Olsthoorn's enquiry focuses on "which conceptions of justice were these startling claims premised? And what reasons did Hobbes give for favouring those conceptions?"

The book is comprised of five parts, dealing respectively with: an introduction; basic moral concepts; justice within the state; justice outside the state; and a review and conclusion. It is not exactly light reading!

THE DISMANTLING OF INDIA'S DEMOCRACY by Prem Shankar Jha, Speaking Tiger Books LLP, Shahpur Pat (India), 2025, pp 372, INR599 (pbk),
ISBN: 978-93-5447-750-8.



This elegantly produced and well-written book will serve as an effective antidote to the saccharine messaging which comes out every so often from the growing band of cheerleaders for India. The author, a veteran journalist who has covered Indian politics for six decades, is less than upbeat about the country's immediate future. The burden of his song is that

> after a spectacular initial success in nation building, India's democracy has increasingly failed to meet the political and economic aspirations of its people. This has opened the doors for the emergence of an alternative, authoritarian model for India's future, loosely labelled *Hindutva* [Hinduness, used pejoratively].

No prizes, then, for guessing where Jha stands in relation to prime minister Narendra Modi. But, in fairness, he is no starry-eyed admirer of those who went before him, including Jawaharlal Nehru. "Democracy began to lose its shine," laments the author, "when the governments formed under the aegis of the Constitution failed to provide India's citizens with the three requirements of good governance they needed most. These were economic security, the rule of law, and speedy, affordable justice." Specifically, "[t]he single most serious failure of 'Nehruvian' democracy has been its inability to provide secure employment for the youth of the country. As of the date of writing, 83 per cent of the youth in the labour force – those between fifteen and thirty – have no employment whatever."

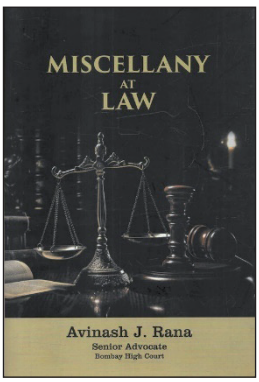
Jha also identifies a number of other failings: a "completely broken down" legal system; a police force that is "stretched to breaking point"; an infrastructure of roads, power supply and power distribution lines which is "still poorer than that of Kenya's"; unspeakable levels of environmental pollution; and all-pervasive and inescapable corruption which has left the citizenry at the mercy of "an extortionist petty bureaucracy and an unaccountable police force".

There is a lot of analysis and commentary on how things came to such a pass. This takes in many of the events which started with Nehru's ascension to power in 1947 and which continued under successive prime ministers. But the bulk of Jha's excoriation is reserved for Modi and his ruling Bharatiya Janata Party in relation to which the word 'fascism' is bandied about quite freely. An entire chapter is devoted to describing how Modi "has worked diligently to complete the conversion of India into a fascist nation-state". Ouch!

Does Jha think that democracy in India can still be saved? In a concluding chapter ('Epilogue') which carries that title, he leaves little room for doubt about his thoughts on that subject: "The answer to this question is short and dismal. Indian democracy is on its last legs."

"We shall see," some might say.

MISCELLANY AT LAW by Avinash J Rana, Sathya Sai Books & Publications Trust, Bombay, 2004, pp 138, INR300 (hbk), No ISBN cited.



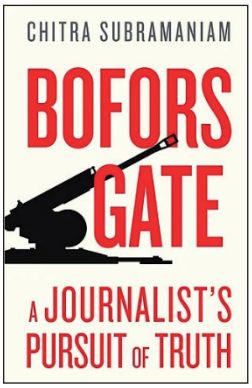
The Bombay High Court, established under Letters Patent granted by Queen Victoria in 1862, has a glorious history. It is one of only four chartered high courts in India and has, over a century and a half, sought to preserve some of the best traditions of the bar and bench. The author of this slim volume, Avinash Rana, has the distinction of having practised in that court for some seven decades and has now, at the age of

97, decided to share his recollections of many of the eminent lawyers and judges who passed through its portals during that time.

The book is a treasure trove of anecdotes and delightful trivia. At one level it is entertaining, at another hugely inspirational. Besides carrying biographical sketches of some of the giants of the Bombay bar (all Indian – the book does not include the likes of John Duncan Inverarity who were also legendary), it retells incidents in court and outside which show the brilliance, the humanity and the strength of character of those men (they were all men). The book also brings out the flavour and the ambience of a bygone era which is unlikely to return.

Readers of this book – especially young members of the legal profession – will be in Rana's debt for undertaking this labour of love. His memory remains quite sharp even as he approaches the centenary of his birth.

BOFORS GATE by Chitra Subramaniam, Juggernaut Books, New Delhi, 2025, pp xxvi + 291, INR899 (hbk), ISBN: 978-93-5345-509-5.



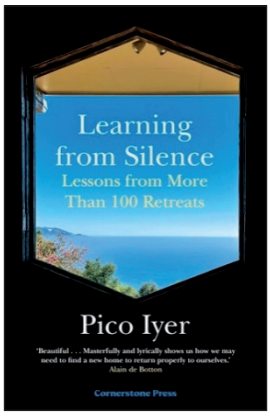
Of the many corruption scandals which overshadowed politics in India in recent decades, few received as much attention in the mass media as the one involving alleged kickbacks by the manufacturers of the Swedish 155mm field howitzer gun when the government of India decided to buy some 410 of those guns. The scandal acquired particular traction because one of the suspected beneficiaries of the kickbacks was the then prime minister, Rajiv Gandhi and/or some of his associates. It led to the fall of the Congress government led by Gandhi and to serious questions being raised about his integrity which had hitherto been beyond reproach.

An aspect of the scandal which continues to trouble many observers and anti-corruption campaigners is that, despite considerable evidence, no one has yet been prosecuted during the 40 years that have passed since the Howitzer deal was finalised (unsurprisingly, many of those implicated in the affair have since died). A key figure in exposing the scandal was a Switzerland-based Indian journalist, Chitra Subramaniam, who worked successfully with *The Hindu* and *The Statesman* newspapers on this long-running story. Subramaniam pursued the matter doggedly and has now documented her travails in this book which also sets out the details of the Bofors saga at great length.

"Writing this book," she says, "has been a long and difficult process. It has meant facing demons inside me." She is particularly angry that a box containing information about the secret Swiss bank accounts of some of the recipients of bribes has been lying unopened in the custody of the Indian government for nearly 30 years. "Over the years, politicians have told me that the closed box serves them better than if it was opened. I find these arguments shocking because they strike at the very core of what my country is."

The book is noteworthy not only for exposing the discreditable behaviour of the bribe-takers but also for the questionable actions of certain other figures, including in the investigative agencies and the media itself.

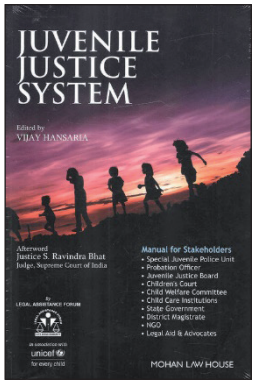
LEARNING FROM SILENCE by Pico Iyer, Cornerstone Press, London, 2025, pp 222, £16.99 (hbk), ISBN: 978-1-529-94411-2.



Given how much importance is being accorded nowadays to mindfulness and mental wellbeing, especially for those in high-stress occupations, there is much in this slim book which would be of interest and potential benefit to lawyers. In it, Pico Iyer, renowned for contemplative essays and enchanting travel books, shares his thoughts on "how solitude can be a training in community and companionship".

"This book," he says, "is about the beauty – you could say, the sanctity – of clarity and silence. It's also about how something of such treasure are available to us in many settings, not always monastic." Within 200-odd pages he distils the essence of his experiences of over a hundred retreats undertaken in a hermitage high above the sea in California. A pleasurable read.

JUVENILE JUSTICE SYSTEM by Vijay Hansaria (ed), Mohan Law House, New Delhi, 3rd ed, 2022, pp xxxii + 742, INR1,275 (pbk), ISBN: 978-81-951446-9-3.



Legislation on juvenile justice in India is of relatively recent origin. The first statute of nation-wide application, the Juvenile Justice Act 1986, is less than 40 years old. It was superseded by the Juvenile Justice (Care and Protection of Children) Act 2000 – a law which was designed to ensure compliance with India's commitments and obligations under the United Nations Convention on the Rights of the Child. That statute was further updated in 2015. A number of related statutory enactments have also been put in place over the years and under these, collectively, various institutions such as the Children's Court, Child Care Homes, and Child Welfare Committees have been put in place.

This book offers a comprehensive overview of the juvenile justice regime currently in place. Unsurprisingly, it is voluminous, not least because it also contains summaries of

leading cases, the full texts of subsidiary legislation etc. But are legislative provisions enough? The answer is provided in a thoughtful Afterword to the book by a recently retired judge of the Supreme Court of India:

The challenges that confront our juvenile justice institutions are many in number, the most pressing of which is the gap between protections offered in the black letter of the law and the approach and implementation by the varied stakeholders necessitating training of relevant personnel.

It is to be hoped that those challenges can be met with expedition so that those who come in contact with the juvenile justice system get the service they deserve.

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News and Announcements

ENGLAND AND WALES: Report on litigation funding

The Civil Justice Council's Litigation Funding Working Party, co-chaired by Dr John Sorabji and Mr Justice Simon Picken, published its Final Report on 2 June 2025.

The Council established this review in April 2024, at the request of the then Lord Chancellor.

The CJC's function is to help make civil justice more accessible, fair, and efficient. The review sets out the current position of litigation funding, including that of third-party funding, and considers access to justice, its effectiveness, and regulatory options.

Sir Geoffrey Vos, Master of the Rolls, Head of Civil Justice, and Chair of the Civil Justice Council, said: "I welcome the publication of the CJC's final report on litigation funding and the recommendations made by the Working Party.

"This landmark piece of work epitomises the *raison d'être* of the CJC: promoting effective access to justice for all. Litigation funding and its impact on access to justice has long been a priority for the Council. This report provides a comprehensive and balanced package of reforms that will ensure that third party funding continues to support access to justice. It recommends the introduction of appropriate and proportionate regulation. The recommendations will improve the effectiveness and accessibility of the overall litigation funding landscape."

The full text of the report can be accessed at *https://www.judiciary.uk/wp-content/uploads/2025/06/CJC-Review-of-Litigation-Funding-Final-Report-2.pdf.*

[Source: Courts and Tribunals Judiciary news release, 2 Jun 2025]

MALAYSIA: Senior judicial appointments

The Malaysian Bar welcomed the appointments of Justice Dato' Wan Ahmad Farid bin Wan Salleh as the new Chief Justice of Malaysia, Justice Dato' Abu Bakar Jais as the President of the Court of Appeal, and Justice Datuk Azizah Nawawi as the Chief Judge of Sabah and Sarawak.

In a statement today, Malaysian Bar President Mohamad Ezri Abdul Wahab said the legal fraternity is relieved and encouraged by the announcements, which come after months of uncertainty surrounding the nation's top judicial positions.

"We extend our congratulations and wish them every success in leading the Judiciary with distinction, courage, and unwavering commitment to justice," Ezri said.

The Bar highlighted Justice Wan Ahmad Farid's notable judicial conduct in 2022, when, as a High Court judge, he recused himself from hearing a high-profile application involving Queen's Counsel Jonathan Laidlaw in the case of former Prime Minister Dato' Sri Najib Razak. In his recusal, he emphasised the importance of preserving public confidence in the judiciary, stating that "an independent judiciary is a precious gift to any society. Once it is lost, anarchy reigns."

"These statements reflect a deep appreciation for the Judiciary's role in upholding the rule of law," Ezri said, adding that he hoped the newly appointed judicial leadership would continue to embody and uphold the highest standards of independence, integrity, and public service.

Despite welcoming the appointments, the Malaysian Bar also expressed concern over several key judicial vacancies that remain unfilled at the Federal Court, Court of Appeal, and High Court levels.

"We remain hopeful that these remaining vacancies will be filled promptly and transparently, in a manner that reinforces public confidence in the Judiciary and strengthens the administration of justice," the statement concluded.

[Source: Nabulu News*, 18 Jul 2025]*

GHANA: Media-related contempt case

The Supreme Court of Ghana set aside an arrest warrant previously issued against a social commentator, Kelvin Taylor, in a 4-1 majority decision.

The Supreme Court panel, which determined the case today, July 22, was presided over by Justice Imoro Amadu Tanko. Others on the panel were: Justice Senyo Dzamefe, Justice Gbiel Simon Suurbaareh, Justice Philip Bright Mensah and Justice Ernest Gaewu (the only judge who dissented).

Mr Taylor, known for his often controversial and outspoken commentary on Ghanaian political and social issues, primarily through his online platform 'With All Due Respect', has been a prominent, albeit polarising, figure in public discourse.

The quashed arrest warrant stems from a contempt of court charge initiated against him, notably by Justice Eric Kyei-Baffour of the High Court. The High Court had issued the warrant for Taylor's arrest in January 2020, citing "extremely scandalous" and contemptuous statements he allegedly made against the court and the Ghanaian judicial administration. Justice Kyei-Baffour had specifically accused Taylor of scandalising the court by alleging that his promotion was linked to doing the bidding of the then-government in an ongoing case involving the National Communications Authority.

The judge at the time had stated, "As a judge of impeccable

integrity and utmost honesty, I find it necessary to invoke the powers vested in me under the constitution to proceed and cite him for contempt."

Given Taylor's domicile outside Ghana, the High Court had directed the Ghana Police Service and other security agencies to apprehend him and bring him before the court.

Taylor, who has frequently used his platform to criticise various political figures and institutions, had publicly dared Ghanaian judges following the issuance of the warrant, insisting his comments were based on available facts.

Taylor made an application to the apex court on July 2, 2025, to have the warrant cancelled, citing the failure of the High Court to provide him an opportunity to answer the charges.

The Supreme Court's 4-1 decision to set aside the warrant suggests a division among the justices regarding its legality or appropriateness, particularly given the implications for freedom of expression and the procedures for contempt proceedings against individuals outside the court's physical jurisdiction.

[Source: MyJoy Online*, 22 Jul 2025]*

SRI LANKA: Court ruling in freedom of religion case

The Supreme Court of Sri Lanka on 21 May 2025 issued a landmark ruling which represents a significant milestone for religious freedom in the country. After 11 years of deliberations and legal proceedings, the Court ruled that local authorities had violated the right of four sisters of the Jehovah's Witness community to express their faith peacefully. This positive ruling is seen as a significant legal victory for Jehovah's Witness followers in Sri Lanka for several reasons. Among other things, it affirms the constitutional right of Jehovah's Witnesses to share their faith with others peacefully. It also serves as an example of respect for religious freedom for the entire South Asia region.

In October 2014, the four sisters were preaching in the village of Kirama in southern Sri Lanka. Suddenly, a hostile crowd confronted the Witnesses. When the police arrived, they unlawfully detained the four women instead of dispersing the mob. The authorities held the sisters overnight in prison without filing any charges, placing them in separate cells alongside violent criminals. They were released the following day.

One month later, in November 2014, the local magistrate dismissed their case. However, convinced that their human rights had been violated, the four sisters decided to file a complaint with the Human Rights Commission and the Supreme Court of Sri Lanka. After a lengthy delay, in May 2025, the Court ruled that the authorities had indeed violated the sisters' rights during the incident and ordered the local police chief and the State to financially compensate each of them. Following the Supreme Court's decision, Sister Malkanthi commented: "This ruling was not merely a win for the four of us. Really, this victory reaffirmed the right of all our brothers and sisters in Sri Lanka to worship peacefully."

[Source: JW.org *news release, 18 Jul 2025]*

SINGAPORE: Judicial condemnation of arbitrator plagiarism

The Court of Appeal of Singapore has upheld a decision to set aside an international arbitration award handed down by a former Chief Justice of India, Dipak Misra, after determining that almost half of it had been directly lifted from previous awards he authored. In its judgment delivered on 8 April, the court found that 47% of the award – 212 out of 451 paragraphs – had been copied verbatim from earlier decisions penned by Justice Misra in separate arbitral proceedings.

Chief Justice Sundaresh Menon and Justice Steven Chong, delivering the Court of Appeal's judgment, stated that the tribunal's extensive use of "copy-paste" methods undermined the fundamental principles of natural justice. The judges noted that the final award had been constructed using the prior awards "as templates to a very substantial degree" and failed to account for differences in factual context, contractual terms and the arguments presented in the current dispute.

In its detailed, 40-page judgment, the Court of Appeal identified three major breaches of natural justice. The first, and most egregious, was the apparent prejudgment of the dispute, with the tribunal's failure to engage independently with the facts and arguments of the case creating a legitimate perception of bias. "A fair-minded observer […] would reasonably suspect that the tribunal had approached the arbitration with a closed mind," the Court stated.

The judges also raised the issue of cognitive biases, highlighting "anchoring bias" – the undue influence of earlier decisions – and "confirmation bias", which concerns seeking information that aligns with preconceived conclusions. Moreover, the court found that the sheer scale of copying suggested that the tribunal had not adequately considered the matter on its own merits. "We are amply satisfied that a fair-minded observer […] would have concluded that the integrity of the decision-making process had been compromised," the court concluded.

The second flaw centred on the tribunal's reliance on material from prior arbitrations without disclosing this to the parties involved. This copied content included factual assumptions and legal reasoning that had never been presented in the current proceedings, denying the parties the opportunity to address them. "The patently substantial material derived from the Parallel Arbitrations were extraneous considerations that had not been raised to the parties' attention... The Award could not be prepared by such a process," the judgment read, signalling a clear breach of the right to a fair hearing.

A third and equally serious cause for concern was the imbalance it created among the arbitrators themselves. While Justice Misra

had authored the earlier awards and was therefore familiar with the recycled content, his fellow arbitrators had not participated in those previous proceedings. This, the court said, placed them in an "unequal position", forcing them to endorse an award that they could not fully contextualise. "The expectation of equality as between the arbitrators was compromised. […] They would thus have had no direct access to any material or knowledge derived from those proceedings, but which appeared to have significantly influenced the outcome," the ruling observed.

While the Court of Appeal declined to attribute any deliberate misconduct or bad faith to Justice Misra or his fellow arbitrators, it stressed that the procedural shortcuts taken had critically undermined the integrity of the arbitral process. On those grounds, the award was deemed unsustainable and has been definitively set aside.

[Source: iclg.com *report, 10 Apr 2025]*

FIJI: Leadership vacuum at heart of legal system

The Government of Fiji is reportedly facing a leadership vacuum at the heart of its legal system, with Prime Minister Sitiveni Rabuka confirming there is currently no constitutionally qualified Attorney General in his coalition government.

The issue stems from ongoing investigations into Acting A-G Siromi Turaga, whose future now lies in the hands of the Constitutional Offices Commission.

Speaking on Radio Fiji One's programme 'Na Noda Paraiminisita', Rabuka said no one within the current coalition meets the constitutional criteria to serve as A-G.

"There is currently no one in government right now or the coalition government that was voted in by Fijians that has the constitutional approval and qualification to take up the AG position," Rabuka signalled a rare openness to reaching across the floor. He is even reported to have reached out to the Opposition to volunteer a candidate, "[b]ut if there is none, then this will force us to get someone from outside that is approved by [the] law and constitution."

The AG role is key to legal governance and constitutional compliance and filling it may now require bipartisan co-operation or an external appointment.

[Source: FBC News, 21 Jul 2025]

Events

SINGAPORE: Conference on Next Gen Arbitration

The Arb40 Sub-Committee of the International Bar Association (IBA) Arbitration Committee, the IBA Asia Pacific Regional Forum and the IBA Young Lawyers' Committee are jointly organising a conference on 'Next Gen Arbitration in Asia Pacific: Innovation, Access, and Legacy' on 25 August 2025 in Maxwell Chambers, Singapore.

The event will be co-chaired by: David Anthony, Corrs Chambers Westgarth, Sydney, Australia; Zeina Obeid, Obeid & Partners, Dubai; and Hyojung Kelly Shin, Soma Law Group, Seoul. Among the topics scheduled to be covered are 'The associate's dilemma: how to build an arbitration practice in a billable-hour world' and 'From assistant to arbitrator: reflections on the changing arbitration landscape'.

Further details can be obtained via *https://www.ibanet.org/conference-details/CONF2731*.

CAMBRIDGE (UK): Property Law Conference

The Cambridge Centre for Property Law – in association with the Cambridge Private Law Centre – will host a conference 'Celebrating 100 Years of the 1925 Property Legislation', on 8 and 9 September 2025 at Selwyn College, Cambridge.

The context to this event is explained by the organisers as follows: "In the period 1922 to 1925, a series of groundbreaking legislative enactments reframed English property law in terms favourable to alienation and a market in land, providing the basis on which much of the relevant modern law rests. The Law of Property Act, Trustee Act, Settled Land Act, Administration of Estates Act, Land Registration Act, and the Land Charges Act 1925 together set out a new vision for how rights in land, trusts, inheritance, and land registration would work. Whilst much of that legislation has now been repealed, updated, or superseded, the Law of Property Act 1925 remains the key statute for land law in England and Wales. Elsewhere, the legacies of 1925 have shaped the development of subsequent legislation, case law, and reform."

The conference will celebrate and examine the impact of the 1925 legislation and papers presented will consider the history, drafting, policy, and legacies of that legislation 100 years from their enactment.

More information can be had from *https://www.landecon.cam.ac.uk/news/2025-conference-celebrating-100-years-1925-property-legislation.*

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