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EDITIORAL

THE COMMONWEALTH, CLIMATE CHANGE AND THE LAW

One of the defining issues—if not the defining issue—of our present age is climate change. We cannot open our newspapers, glance at our digital newsfeeds, turn on our televisions, tune in our radios or talk to our children (and particularly our grandchildren) without the subject arising. Perhaps more important, evidence of the degradation of the biosphere by the insidious upward creep of atmospheric temperatures is not just reaching us through the media or through conversations with others; increasingly we are experiencing it first-hand in a myriad of ways wherever we may live.

The term ‘heat dome’ was barely known a year or two ago. The one that afflicted British Columbia, Canada, this past summer was responsible in part for the most severe and protracted season of wildfires in the province’s history. The inland village of Lytton, B.C. was razed—erased really, from the face of the earth—by a wildfire on a day where temperatures reached 49 degrees Celsius. Vancouver—British Columbia’s largest city—is situated a little more than three hours to the southwest of Lytton, perched on Canada’s western coastal mainland. The heat dome proper was at its peak in that city on 29th June and on that day alone, 232 Vancouverites lost their lives to the heat—a death rate just short of 10 per hour. Some 595 deaths in total—most of them seniors—have been attributed by the provincial coroners’ service specifically to the extraordinary temperatures in British Columbia between 8 June and 12 August. To put these numbers in perspective, the heat-related death toll in the province for that two-month period alone claimed a third as many lives as has COVID-19 from the pandemic’s inception to 30 June 2021 (1,754).

There are, of course, many stories like this unfolding around the world, many of them much worse.

The wildfires in Australia in recent years have been unprecedented in their destructiveness, both in terms of lives and property. Other countries in the Commonwealth which are situated closer to the equator (in Africa and the Caribbean, for example) have been experiencing deadly catastrophic effects at the hands of climate change for much longer.

Some small island nation states face truly existential threats owing to rising sea levels. In anticipation of the COP26 Summit in Glasgow this year, the Commonwealth Foundation had this to say in an article entitled ‘Small Island States and Climate Justice: Looking Ahead to COP26’:

The Commonwealth has an irreplaceable role to play. Small Island Developing States (SIDS) make up almost half of its total membership. Citizens of these vulnerable countries are literally on the frontlines of the fight against global warming. Nowhere else does the climate crisis feel more urgent or more real: rising sea levels and shifting weather patterns are already posing serious threats to the livelihoods of small island populations throughout the Commonwealth. The small island experience serves as a demonstration, and a warning, for what lies in store for the world—unless we act now.

As long ago as 1987, the then president of the Maldives, Maumoon Abdul Gayoom, famously delivered his ‘Death of a Nation’ speech to the CHOGM and the UN General Assembly, in which he stated (in part):

Today, the world is faced with risks of irreversible damage to the human environment that threaten the very life-support systems of the earth - the basis for man’s survival and progress. According to studies conducted by the UNEP, 35 percent of the earth’s land surface, an area larger than the African continent, and inhabited by more than 20 percent of the world’s population, is at risk from desertification. Up to a total of 20 million hectares of tropical forests, an area nearly the size of the United Kingdom, is estimated to be lost each year. And as much as from half a million to a million species of life on earth could be extinguished over the next two decades. These are all without precedent in human history. The words ‘environmental
trends’ have now come to embody a host of appalling global predicaments such as desertification, mass deforestation, loss of genetic resources, water pollution, toxic air emissions, hazardous wastes, acidification of the environment and world sea level rise.

The first International Panel on Climate Change (‘IPCC’) report followed some three years later in 1980. Many of the report’s dire predictions have come true in the intervening years and the most recent IPCC assessment, published earlier in 2021, is unstinting in its condemnation of where we now find ourselves. Quoting some highlights from the report’s ‘Summary for Policymakers’:

The scale of recent changes across the climate system as a whole – and the present state of many aspects of the climate system – are unprecedented over many centuries to many thousands of years...

Global surface temperature will continue to increase until at least mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO2 and other greenhouse gas emissions occur in the coming decades...

Continued global warming is projected to further intensify the global water cycle, including its variability, global monsoon precipitation and the severity of wet and dry events...

Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level...

No one, wherever situated—in the Commonwealth and beyond—is immune from the effects of anthropogenic climate change. That so little progress has been achieved in respect of a crisis-in-the-making that has been so clearly in plain view for so long must cause deep worry for all thoughtful citizens across the world.

The CMJA has been active in promoting determined action to address global warming and other environmental threats for many years. It has, for example, mounted educational programmes for judicial officers on environmental law topics since at least 2003 (when the CMJA cooperated with UNEP at the CMJA conference in Malawi). Similar training initiatives were undertaken in the Southern African Development Community region in 2007, in Jamaica in 2011, in St Lucia in 2012 and at the CMJA’s conferences including the virtual conference held in September 2021.

Encouragingly, if one visits the Commonwealth of Nations website and types the word ‘climate’ into the search box, hundreds of hits are returned. The challenges we face owing to the fragile global climate are plainly recognised by the Commonwealth and the organisation is confronting those challenges squarely and concretely.

One Commonwealth initiative which will be of special interest to members of the judiciary is The Law and Climate Change Toolkit—an online database which is being developed by a core partnership of the Commonwealth Secretariat, the United Nations Environment Programme and the United Nations Framework Convention on Climate Change Secretariat. The Toolkit’s stated purpose is to provide a global resource to assist countries to establish the legal frameworks necessary for effectively implementing, nationally, the Paris Agreement and their nationally determined contributions. Quoting from the Climate Law Toolkit website:

The Toolkit is designed for use by national governments, international organizations in the field of climate law and governance, and experts engaged in assisting countries to implement national climate change laws, as well as academia and research institutions that are undertaking analysis of the growing body of climate change-related legislation throughout the world. The key features of the Toolkit include functionalities to search existing climate change-related legislation and undertake an assessment of a selected country’s legislation to help users identify priority areas for climate law review and potential legislative or regulatory reform.

Space limitations permit only a few other Commonwealth climate-related initiatives to be mentioned here. They include:
• The Commonwealth Climate Finance Access Hub (the ‘CCFAH’) is a programme aimed at lesser developed and other Commonwealth nations whose experience of the deleterious effects of climate change is disproportionately severe. (Perversely—owing to their low greenhouse gas emissions, for example—those same nations have made a disproportionately small contribution to the climate crisis.) To quote the relevant website, through the CCFAH, ‘...small and vulnerable member states are assisted to bid for and gain increased access to climate finance. The process is achieved through supporting the development of grant proposals and project pipelines; building human and institutional capacity; providing technical advisory services; and facilitating cross-Commonwealth cooperation and sharing of experience and expertise by CCFAH advisers who are deployed and embedded in relevant government ministry departments’;

• The NDC Partnership–Climate Action Enhancement Package (the ‘CAEP’) is an initiative under which ‘...the Commonwealth Secretariat is supporting four member countries—Belize, Eswatini, Jamaica and Zambia—through in-country technical expertise, capacity building and targeted support, to fast-track the implementation of each country’s nationally determined contributions’;

• The Disaster Risk Finance Portal is a programme which ‘...helps member countries easily find the right type of financial support to prepare for, respond to and recover from natural disasters. Information on international funding earmarked for catastrophes is compiled, streamlined and made easy to navigate’;

• The Commonwealth Blue Charter is an agreement by all 54 Commonwealth countries to actively co-operate ‘...on a fair, inclusive and sustainable approach to ocean protection and economic development’. The objective is to facilitate the solution of ocean-related problems and the meeting of commitments for sustainable ocean development on the part of all Commonwealth countries;

• The Commonwealth Secretariat has, for 30 years, provided advice to Commonwealth countries with respect to responsible and sustainable energy and natural resource development and exploitation. That advice touches on subjects such as policy and strategy development; the development of legal, fiscal, environmental and institutional regulatory frameworks; and the provision of technical advice including assistance in the drafting of new laws, regulations and model agreements; and

• The Commonwealth Youth for Climate Action Blog Series features postings by youth from across the Commonwealth who are showing leadership potential on local climate action. These contributors are drawn from the Commonwealth Correspondents Network—young voices from the Caribbean to Africa, who recognise the need for swift action on the climate change agenda and who share the Commonwealth values of sustainable development, protection of the environment and promotion of peace and prosperity to improve the lives of all.

When a global problem has the disastrous potential that the current climate crisis has, then every state and every supranational body like the Commonwealth can, and always should, be expected to do more. With such disappointing progress having been made to date, there are no laurels that anyone can afford to rest on. But, that said, it is heartening to see the extent to which—using, *inter alia*, its onboard legal expertise—the Commonwealth is committing time, money and resources to fight global warming and the detrimental effects the climate crisis is inflicting on humankind across the world.

**CMJA Virtual Conference 2021: Post-Pandemic Innovations**

The COVID-19 pandemic has taught us many things; it has even spawned its own vocabulary. While it was of course known to us before, the word ‘pivot’ has certainly acquired new significance in our parlance since early 2020. Very few bodies and institutions had the luxury of carrying on as usual under pandemic conditions; rather, they were called upon to reorient, always rapidly and sometimes quite radically, so as to be able to continue to function under constraints, limitations and pressures that few ever imagined—to ‘pivot’ in other words.
The CMJA executed a seamless, Nijinski-like pivot from first planning its 2021 Conference as an in-person event in Accra, Ghana, to offering it online. The Association’s secretary general, Dr Karen Brewer—ably assisted—led the initiative into previously uncharted territory for the CMJA with splendid results. Thanks to that pivot, many presenters and registrants succeeded in convening virtually to exchange information and their accumulated learning about how court systems have themselves pivoted in various jurisdictions across the Commonwealth to accommodate pandemic-related disruptions. One is reminded of philosopher Marshall McLuhan’s reference to the medium being the message. The agility displayed by Commonwealth jurisdictions in adjusting in real time to COVID-19’s jealous demands—which was the conference’s main focus—was, to all accounts, mirrored by the nimble way the CMJA reconfigured its September conference to an online format to allow a full canvassing of that agility from all corners of the Commonwealth. CJJ readers may now look forward to reading, in future issues, articles based upon some of the papers presented at the virtual conference which will bring the pandemic’s legacy for court processes and justice system functioning into clearer focus.

WHAT AWAITS YOU IN THIS ISSUE

A rich variety of subject matter is addressed by CJJ contributors in the current issue. We have on offer continuations of two lengthy, two-part articles for which the first parts appeared in June 2020, and some new and interesting pieces as well.

- Mr Dennis W. Barr has contributed an article which explains recent steps that have been taken to enhance the quality of lay justice in Scotland through, *inter alia*, structured judicial training and development and more elaborate appraisal and accountability measures;

- Part II of the two-part article by Professor Joseph Weiler and Mr Mark Bakhet on Deferred Prosecution Agreements (sometimes referred to as Remediation Agreements) carries those authors’ analysis forward by providing a close review of recent Canadian experience with such alternatives to conventional prosecution—an experience that, as it happens, was a fraught one which led, ultimately, to the resignation of Canada’s then Attorney General from Cabinet;

- Part II of Judge Jennifer Oulton’s two-part reflection on the fragility of democracies in the present era concludes in this issue with a closer look at how, when charismatic populists exert their influence through social media at times of income inequality and other forms of inequality, democratic norms can be destabilised;

- Professor Luke Moffett offers an assessment of the somewhat disappointingly limited legal tools currently available to provide redress for those who have indirectly suffered losses and harms attributable to the historical slave trade. The notion that reparations for victims of historical wrongs of this kind might even be sought in the modern era is a controversial one and Professor Moffett’s thinking in this area will likely provoke a spectrum of responses. We may, perhaps, even see a letter to the editor or two in response to the Moffett article, which would be a good thing. (Hope does indeed spring eternal.);

- Professor Paul Bowden provides a fascinating survey of the UN Guiding Principles on Business and Human Rights, it now being 10 years since their endorsement by the UN Human Rights Council. His article describes, *inter alia*, the incorporation of the Guiding Principles into, and their modifying influence upon, existing human rights programmes, initiatives and business practices across the world; and

- Lady Justice Jacqueline Kamau of the High Court of Kenya provides a timely overview of the problem of human trafficking in Kenya and offers recommendations as to how control of the problem might be enhanced.

Apart from the foregoing substantive content, the December issue also presents the usual array of case notes taken from the Law Reports of the Commonwealth and reviews of books likely to be of interest to the CJJ’s readers.

Plenty of holiday reading!

On behalf of the editorial board of the CJJ, and the CMJA and its officers, we extend warm holiday season greetings to all.
CALL FOR SUBMISSIONS

The Commonwealth Judicial Journal (the ‘CJJ’) is the flagship publication of the Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) and has a readership of judges, magistrates and other legal practitioners from the Commonwealth and beyond. The CJJ invites submissions of manuscripts on various aspects of the law, in particular manuscripts focusing on the judicial function at the domestic, regional and/or international level. Essays, book reviews and related contributions are also encouraged.

Please read the following instructions carefully before submitting a manuscript or contribution.

CONTACT DETAILS

Manuscripts submitted by e-mail in Word format are preferred. They should be sent to CJJEditor@shaw.ca, with a copy to info@cmja.org. Alternatively, manuscripts in hard copy may be sent to CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, UK.

INFORMATION FOR AUTHORS

1. Manuscripts should ideally be submitted in Microsoft Word format.

2. Articles should include a 200-word (maximum) abstract.

3. Submissions should be accompanied by details as to whether the manuscript has been published, submitted, or accepted elsewhere.

4. Manuscripts should normally range from 2,000 to 3,500 words in length.

5. Any references and/or citations should be integrated in the main body of the manuscript, as footnotes/endnotes will normally be removed.

6. The CJJ encourages authors to refer to material from one or more jurisdictions across the Commonwealth.

7. All manuscripts received are evaluated by our Editor in consultation with the Editorial Board. Notification of acceptance, rejection or need for revision will generally be given within 12 weeks of receipt of the manuscript, although exceptions to this time frame may occur. Please note that our evaluation process takes account of several criteria, including the need for a balance of topics, the CJJ’s particular areas of interest which may change over time, etc., and this may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of a piece. The Editorial Board retains the discretion as to whether or not an article may or may not be published.

8. By submitting an article or other contribution for publication, you confirm that the piece is original and you are the author or co-author, and owner of the relevant copyright and other applicable rights over the article and/or contribution. You also confirm that you are the corresponding/submitting author and that the CJJ may retain your email address for the purpose of communicating with you about the article. You agree to notify CJJ immediately if your details change.

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The Impact of Training on the Transformation of Lay Justice in Scotland

Dennis W. Barr, B.A. (Hons), J.P.—Secretary, Scottish Justices Association

Abstract: In 2004 an independent review of summary justice in Scotland recommended the abolition of lay justice. A minority view however successfully argued for its retention, but with major changes. As a result, new Justice of the Peace (JP) Courts were established under the control of the then Scottish Courts Service, and new policies introduced for the recruitment, appraisal and, in particular, the training of JPs. The Judicial Institute for Scotland, which is responsible for all judicial training, has developed specific training courses and a National Curriculum for JPs. As a result, over the past 15 years the lay justice courts have handled increasingly complex cases, and whilst the total number of cases has not diminished, the number of JPs in Scotland has reduced.

Keywords: Lay Justice Service in Scotland – structured judicial training and development – recruitment and appraisal of lay justices

Introduction

There has been a long history of lay justice, through the role of Justice of the Peace (‘JP’) in the British Isles. The first JPs were introduced into Scotland at the end of the 16th Century, although the concept had its origins in England as far back as the 14th Century. Historically, the role was multi-faceted but by the second half of the 20th Century had evolved into a cadre of lay justiciars regularly presiding over local courts dealing primarily with relatively minor criminal offences. In Scotland the old Police and Burgh Courts merged in 1975 to become District Courts. Sitting either singly or on a Bench of three, the JP sat with a legally qualified clerk who advised on the law, procedure, and sentencing parameters in each case.

These District Courts were operated and managed by local government authorities, and as such were responsible for JP recruitment and training. JPs in Scotland were simply appointed by the local government authority, and it was frequently used as a reward to individuals for providing service to the community. The training provided varied in quality and quantity and although there was no requirement on a JP to undertake any formal training, JPs themselves formed a national body, the District Courts Association, which delivered some limited training tailored to the needs of JPs on court craft and criminal law.

The 21st Century Review of Summary Justice in Scotland

Early in the 21st Century the Scottish Executive commissioned an independent review, chaired by Sheriff Principal McInnes, into the operation of the summary justice system in Scotland. The remit of the committee was ‘to review the provision of summary justice in Scotland, including the structures and procedures of the Sheriff courts and District courts as they relate to summary business and the interaction between the two levels of courts and to make recommendations for the more efficient and effective delivery of summary justice in Scotland’. The resultant McInnes Report was published in 2004. This wide-ranging review recommended a number of changes and improvements, including, that the role of Justice of the Peace in Scotland be abolished; however a Note of Dissent included in the Report successfully argued for the retention of JPs. This Note of Dissent detailed benefits gained from lay Justices of the Peace within the legal system. It argued that ‘Lay justice is a powerful expression of community participation in the regulation of society. It seems inconsistent to retain it in the most serious cases—in which completely untrained juries make key decisions on the evidence—but to remove it in the content of summary justice.’ It also opined that Scottish Justices ‘have an important symbolic effect of lay participation in the criminal justice system which should not be undervalued. The existence of citizen participation across the country with a practical understanding of what the law is and how it works, is of great importance in a democracy’. It also maintained...
that retention of the lay justice system would provide a more balanced perspective with judgments from within the same peer group and could potentially provide greater efficiency by allowing professional judges to handle more serious cases.

The Note of Dissent recommended that major changes were required in a number of key areas including consistency of support and management, recruitment, training, and in the court estate. It also recommended that JPs should be subject to regular performance appraisals. Following extensive consultation, the Scottish Executive encapsulated the agreed reforms following the McInnes Report in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and the Justices of the Peace (Scotland) Order 2007. The role of Justice of the Peace which had evolved over 400 years was retained in Scotland but with significant reforms and it was recognised that the role of a JP is, and always has been, voluntary and unpaid.

**Recruitment of JPs After 2007**

Under the 2007 Act, Justice of the Peace Courts were established to replace District Courts and they were placed under the direct control, management and operation of the then Scottish Courts Service (‘SCS’). The JP Courts were allocated within the same six geographically aligned jurisdictions across Scotland as the Sheriff Courts. The number of JP Courts in each Sherifffdom varied to allow local access to these courts. In addition, JPs only hold jurisdiction in the Sherifffdom to which they are appointed, thereby enhancing local knowledge and appreciation of their area. The Act provided for the recruitment of new JPs and allowed existing JPs to transfer into the new system, but all were appointed for a period of five years, which is renewable by mutual agreement. The recruitment of new JPs was the responsibility of the appropriate local Sheriff Principal who was given the power to appoint members to a Justice of the Peace Advisory Committee (‘JPAC’), which included existing JPs, legal professionals and lay individuals. The JPAC has the responsibility to hold open competitive selection processes for new JPs for each individual Sherifffdom as the need arises.

**Sentencing Powers for JPs**

The sentencing powers of JPs were limited to a fine up to a maximum of £2,500, a custodial sentence of up to 60 days, and an unlimited period of driver disqualification dependent on the offence. These levels are lower than summary cases heard by a sheriff. The allocation of cases to the various levels of summary court is decided by the Crown Office and Procurator-Fiscal Service (‘COPFS’) which marks cases for prosecution in the appropriate court based on severity. Given the sentencing powers available to JPs it is inevitable that they deal with a range of less serious criminal cases including a range of motoring offences.

**Training Plans for JPs Following Introduction of the 2007 Act**

The 2007 Act gave specific prominence to the training and ongoing appraisal requirements for JPs in Scotland and details were given in the JP Order of 2007. Every newly selected prospective JP has to undertake a minimum 24 hours of training before being appointed to the bench and all existing JPs are required to complete a minimum of 12 hours of training each year. The training schedule was to be established separately for each Sherifffdom by a Justices Training Committee (‘JTC’), the Committee members of who were to be appointed by the appropriate Sheriff Principal and would include legal professionals and a number of local JPs.

Each Sherifffdom JTC embraced this opportunity. For prospective JPs an initial training course was developed and is still currently in operation. Whilst the initial training was tailored to the needs of the Sherifffdom, all covered an extensive list of topics, including a basic introduction to criminal law, legal processes and legal terminology; the Scottish Courts structure and respective roles and responsibilities; summary legal procedure in Scotland and the operation and individual roles within the JP Court, including working with the Legal Advisor. The training then reviewed specific legal concepts such as judicial independence, impartiality and ethics; sentencing options and consideration of reducing reoffending; and the rules governing evidence and trials procedure. In addition to this broad approach, the JTCs arranged
training on specific areas of offence which have a particular relevance in that Sheriffdom. All of the training was designed to hone the court craft skills of the new JPs and give them sufficient self-confidence in their initial sittings on the bench, knowing that experience and the support of the Legal Advisor would allow them to develop their expertise and capabilities. This was particularly important as the JP Courts were all being transitioned to a single JP bench.

The annual training plans for existing JPs tended to be a blend of reinforcing knowledge on particular facets of the law, including recent legal changes, combined with a broader appreciation and understanding of the legal community.

A critical consideration was that consistency of approach was necessary when the development of training programmes was disbursed to the six Sheriffdoms. Accordingly, each Sheriffdom was required to submit its Annual Training Plan to the Sheriff Principal and the Lord President, thereby ensuring that a competent and consistent approach was being adopted. In addition, the Convener of each of the Sheriffdom JTCs met at regular intervals, under the guidance of the Judicial Studies Committee (‘JSC’ - the body responsible for all Judicial Training in Scotland at that time), in order that training plans could be compared and ideas shared.

The final element in the training provision at this time was a residential training weekend organised by the JSC and open to all JPs from each of the Sheriffdoms.

**THE APPRAISAL PROCESS FOR JPS**

Simultaneous with the establishment of a JTC for each Sheriffdom was the creation of a Justice of the Peace Appraisal Committee (‘JAC’), which had the responsibility for the management of the appraisal process for JPs in that Sheriffdom. The JAC arranged for all JPs to be formally appraised twice during their five-year appointment. The appraisal process adopted was peer appraisal, and experienced JPs volunteered to undertake appraisal training which was provided by a specialist external company. The appraisal process is designed to focus on specific attributes of an effective JP, namely, effective communication and engagement in court; demonstrating effective control through focus and knowledge; being even-handed and clear in decision-making and being self-aware and recognising the need for continuous self-development.

The core element of the appraisal process is an Observation Day, in which the JP’s performance is watched and commented on in detail by the appraising JP. Prior to the Observation Day the appraising JP explains the process and the JP to be appraised must complete a self-appraisal form. After the Observation, a further interview is held to discuss the individual’s strengths and areas of development. Any agreed areas for improvement could then be included in an individual’s ongoing training. This appraisal process continues and is in essence unchanged since its inception.

**CREATION OF THE JUDICIAL INSTITUTE**

In January 2013 the JSC was replaced by the Judicial Institute for Scotland (‘JI’). The JI is the body charged by the Lord President, as head of the judiciary in Scotland, with overall responsibility for the creation and delivery of judicial training. The JI’s guiding philosophy is that judicial education is judge-led, judge-devised and judge-delivered. The JI develops and delivers training and education to address the needs of a modern judiciary in a changing environment, including induction training as well as annual training for all tiers of the Scottish judiciary.

The JI opened a specifically designed Learning Suite in Edinburgh which comprises bespoke mock court rooms and state of the art IT and electronic training facilities. Using these facilities, the JI developed a number of training courses for JPs across Scotland, all designed to promote and ensure a consistent approach. In particular it developed a range of courses specific to the needs of the JP Courts. All JPs were invited to attend these courses in the Edinburgh Learning Suite, however attendance at one of these courses did not necessarily form part of the JP’s annual training requirement.

In addition to courses, the JI publish a number of notes and briefing papers which are hosted on the Judicial Hub, a customised integrated online platform offering a one-stop-shop for collaboration and learning for the Scottish
judiciary. All JPs have access to the Judicial Hub which has a dedicated section to serve their specific needs.

**THE JUSTICES OF THE PEACE (TRAINING AND APPRAISAL) (SCOTLAND) ORDER 2016**

The value and benefits of these JI training courses were recognised by all JPs who attended. However, attendance was not mandatory. The Lord President did recognise that greater emphasis was required on the consistency and specialist development of JPs across Scotland and consequently The Justices of the Peace (Training and Appraisal) (Scotland) Order 2016 was implemented. The Order made it mandatory that every JP attend a JI provided course at least once every three years. Furthermore, the Order gave a new formalised structure to the various Committees charged with JP training and introduced a national training programme and national curriculum.

This National Curriculum for JPs in Scotland provides a framework and structure around which JP knowledge and understanding can be developed and provides a baseline for all training. The full document can be accessed online by typing ‘National Curriculum for Justices of the Peace’ into most browsers.

**EXTENSION OF JP TRAINING AND THE JP ROLE**

The effectiveness of the training provided to the JP community coupled with improved levels of competency has allowed COFPS to expand the range of cases to be heard in the JP Court. These cases include drink-driving offences and minor domestic abuse charges. In addition JPs were required to manage the handling of vulnerable witnesses in court situations. This has required additional specific training courses to be developed by the JI. These were provided by a mix of traditional lecture based training and electronic training courses which have been delivered online. Take-up of the electronic courses and progress through the various stages of training is remotely monitored by JI staff.

**IMPACT OF THE CORONAVIRUS PANDEMIC**

Inevitably, the Covid-19 pandemic has had a major impact, particularly in responding to the challenge presented in relation to the delivery of face-to-face training. Accordingly, the JI has had to adapt by designing, delivering and evaluating its online learning. This has required that courses are delivered through a blended approach of video exercises and live online workshops. All courses in 2021, and some in 2022 (it is anticipated), will be delivered remotely. In addition JPs across Scotland have also been able to access a range of internet-based information on the issues surrounding virtual courts using modern technology.

**THE IMPACT OF JP TRAINING**

The effort and skill of the training staff at both Sheriffdom and JI level, combined with improved competency levels of JPs resulting from a more rigorous recruitment process, has allowed JPs in Scotland to cover an increasing range of cases. Whilst there has been an increased use of fixed-penalty fines by both the Police and COPFS, the total number of cases referred to the JP Courts is broadly similar to the District Courts at the time of the McInnes Report. However, the complexity and range of the cases has increased. This is primarily due to the quality and depth of the training provided to all JPs across Scotland. Despite the declining number of JPs, who now number in the region of 250 (compared with 700 in 2004), it is evident that the JP community continues to provide a valuable and potentially expanding role in the Scottish legal system. Much of this can be attributed to the professional training services which are now provided to develop and focus the skills of JPs. It is also expected that JPs will continue to be a vital resource in managing the reduction of the backlog of summary criminal cases created by the Covid-19 pandemic and will therefore continue to be an essential judicial service into the future.
Abstract: This is Part II of a two-part article that explores the use of prosecutorial tools that operate as a form of diversion for corporations, primarily, who face charges for alleged criminal acts. These tools are known in a number of jurisdictions as ‘deferred prosecution agreements’ and in Canada as ‘remediation agreements’. In Part I, the authors defined what such agreements consist of and discussed the arguments that have been presented for and against their use, providing some detail of the regimes that govern them in the US, UK and France. Part II proceeds from there, providing further information regarding Canada’s recent foray into this realm. A significant controversy, styled by some as a constitutional crisis, developed in Canada during 2019 regarding the role that the remediation agreement should or should not have played in the prosecution of SNC-Lavalin, one of Canada’s flagship global corporations, for alleged criminal fraud and bribery in Libya from 2001-2011. The discussion then turns to the outcomes of this lengthy investigation and prosecution, which culminated in a plea bargain agreement reached in December of 2019 that, in the end, did not include an RA.

The Factual Setting in the SNC-Lavalin Case

With its headquarters in Montreal, Quebec, SNC-Lavalin—a complex grouping of corporations—is undeniably one of Canada’s flagship global engineering businesses. SNC-Lavalin employs approximately 50,000 employees worldwide, including almost 9,000 employees within Canada. The group’s services include providing capital investment, consulting, design, engineering and construction management, and operations and maintenance services.

The agreed facts included in the joint submission by SNC-Lavalin and the prosecution in the plea bargain reached in December 2019 with SNC-Lavalin subsidiary, SNC-Lavalin Construction Inc. (‘SLCI’), provide a brief summary of the wrongdoing in which SNC-Lavalin had engaged within Libya between 2001-2011. The key agreed facts are summarised as follows:

- SLCI is a subsidiary, part of the broader entity sometimes referred to as SNC-Lavalin or the SNC-Lavalin Group. Between 2001-2011, SLCI was engaged in various construction projects around...
Libya, ultimately generating almost $1.8 billion in revenues for SLCI resulting in over $235M in gross profits. (All dollar amounts in this article are expressed in Canadian dollars.)

- SLCI senior officer Ben Aissa (‘Aissa’) and his direct superior, Sami Bebawi (‘Bebawi’), recommended that SNC-Lavalin International Inc. (‘SLII’) enter into contracts with Duvel Securities Inc. (‘Duvel’) and Dinova International Inc. (‘Dinova’). Aissa was the sole beneficial owner of both corporations.

- With the knowledge and approval of Bebawi, monies received by Duvel and Dinova were ultimately redistributed to Aissa, Bebawi and Saadi Gaddafi (the son of former Libyan Leader, Muammar Gaddafi). Further, in 2008 and 2009, SLCI paid the expenses for two trips to Canada for Saadi Gaddafi, which included security services, hotel, training, personal expenses, and private parties and entertainment. SLCI further paid decoration expenses for a condominium purchased by Saadi Gaddafi in Toronto, Ontario.

- Pursuant to representation agreements, between 2001-2010, SLCI, through SLII, paid $118,571,386 to Duvel and $8,674,553 to Dinova. An arrangement was made whereby Duvel and Dinova would make payments to legal entities belonging to (and controlled by) Saadi Gaddafi for which he was the beneficial owner. In return for these payments, Gaddafi would use his influence as the son of the Libyan dictator to assist SLCI in securing contracts in Libya. SNC-Lavalin was ultimately successful in gaining a number of construction contracts, resulting in significant profits for the group.

### The Director of Public Prosecutions Declines to Invite SNC-Lavalin to Negotiate a Remediation Agreement

The SNC-Lavalin case study is the first instance where Canadian prosecutors considered utilising a RA. In the Fall of 2018, the then Director of Public Prosecutions for Canada (the ‘DPP’) exercised the discretion inherent in her position at the top of the federal prosecutorial hierarchy to decline to extend an invitation to SNC-Lavalin to negotiate a RA.

After learning of the DPP’s decision not to extend an invitation to negotiate a RA, SNC-Lavalin attempted to have the DPP’s decision reviewed by the Attorney General of Canada through both public and private appeals. Such lobbying efforts gave rise to a number of ongoing internal communications from senior officials in the Canadian government to the then Minister of Justice/Attorney General of Canada, Jody Wilson-Raybould. The Attorney General was encouraged (in her view, improperly ‘pressured’) by her colleagues and senior civil servants to review the facts of the SNC-Lavalin case and, if necessary, seek another outside interpretation regarding whether the DPP’s decision was consistent with the statutory purposes, conditions, and criteria set out in this new corporate criminal diversion regime (the ‘RA Regime’) in the Criminal Code. Ms. Wilson-Raybould ultimately declined to do so.

In January of 2019, Ms. Wilson-Raybould was reassigned from her position as the Minister of Justice/Attorney General to another cabinet position as the Minister of Veterans Affairs. The former Attorney General then publicly asserted that she had inappropriately been pressured by senior officials in the Prime Minister’s Office and the Privy Council Office to review the DPP’s decision not to invite SNC-Lavalin to negotiate a RA. As noted, Ms. Wilson-Raybould declined to yield to those urgings. The resulting allegations of wrongdoing and the application of inappropriate pressure gave rise to a controversy and it led, eventually, to Ms. Wilson-Raybould resigning from Cabinet. A fuller review of these developments and their constitutional law implications is presented in an article entitled ‘Constitutional or Political Crisis? Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair’ by K. Bezanson, published in the UBC L. Rev. in 2019 (accessible online).

Having exhausted both the available public and private lobbying options in order to receive an invitation to negotiate a RA, SNC-Lavalin changed forums and sought judicial review of the DPP’s decision. The judicial review motion was brought in the Federal Court of
Canada. In May of 2019, Judge Kane of the Federal Court denied SNC-Lavalin’s motion in a decision reported at *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FC 282 (T.D.). An Order requiring the matter to proceed to trial was accordingly made. Following Judge Kane’s Order to proceed to trial, SLCI (as noted, a subsidiary of SNC-Lavalin) ultimately entered a guilty plea in December of 2019.

The reasons why the DPP declined in the Fall of 2018 to invite SNC-Lavalin to negotiate a RA were not revealed until February 2020, after the company entered into a plea agreement through SLCI to resolve all outstanding charges against SNC-Lavalin. In an interview with journalist Robert Fife published on 20 February 2020 in the *Globe and Mail* (a national Canadian daily newspaper), the DPP of Canada, Ms. Kathleen Rousell, referred to key criteria to be considered in the administration of the RA Regime (criteria discussed in Part I of this article), stating:

> The factor that really weighed against a Remediation Agreement was really the severity and breadth of the offence. It was long in time – if you look at the hierarchy of the company, how high the scheme went in the hierarchy of the company. I think it is a pretty unprecedented offence in Canada and as a result of that, I didn’t feel it was in the public interest.

**OUTCOMES OF THE SNC-LAVALIN PROSECUTION: DID SNC-LAVALIN OBTAIN A KEY BENEFIT OF A REMEDIATION AGREEMENT ‘THROUGH THE BACK DOOR’?**

One of the primary incentives for an accused corporation to negotiate a RA is to avoid any debarment sanctions that would preclude doing business with governments or institutions alike. Under the ‘Government of Canada Integrity Regime’ followed by Public Works and Services Procurement Canada (‘PWSPC’), any company convicted of crimes on a specified list faces automatic debarment from engaging in public procurement business with the government of Canada for a fixed period of time.

Three named SNC-Lavalin companies were charged with one count of fraud under s. 380(1) of the Criminal Code, and one count of corruption under s. 3(1)(b) under the Corruption of Foreign Public Officials Act (the ‘CFPOA’). Under the PWSPC Integrity Regime, a conviction under s. 3(1)(b) of the CFPOA would lead to an automatic 10-year debarment period, with the opportunity to reduce the ineligibility period by up to five years through an administrative agreement. A conviction under s. 380(1) of the Criminal Code would lead to an indefinite debarment, but only for instances of fraud committed against ‘Her Majesty’ (defined as the government of Canada).

Ultimately, SLCI—which played a key role in securing the various relevant contracts within Libya—pleaded guilty to one count of fraud under s. 380(1) of the Criminal Code. However, as presiding Judge Leblond notes in his reasons regarding the matter, on one aspect of the matter (see *The Queen v. SNC-Lavalin International Inc.* (formerly Socodec Inc.), Montreal Registry No. 500-73-004261-158, 18 December 2019 (Cour de Québec)), any instances of fraud committed by SLCI were not against ‘Her Majesty’ (the government of Canada), but rather against stakeholders in Libya. Specifically, the statement of facts accepted by Judge Leblond named the victims of the fraud committed by SLCI to be the people of Libya, who presumably paid a higher price for the construction projects that were awarded to (and completed by) SLCI than would have reasonably been expected had an ethical, truly competitive bid tendering process occurred. Instead, the money used to bribe Gaddafi likely allowed SNC-Lavalin to secure more favourable contracts from the Libyan government, ultimately increasing profits for the company at the expense of the Libyan people. Though this tainted bid process may have caused significant financial harm to Libyan stakeholders, the perspective of the plea bargain agreement with SLCI was that ‘Her Majesty’ (the Government of Canada) did not ultimately suffer any adverse consequences.

Because no fraud was committed by SLCI against ‘Her Majesty’, as so defined by s. 380(1) of the *Criminal Code* (see also, *R. v. Shum*, 2018 ONSC 2981), SLCI’s conviction did not trigger any debarment sanctions for SNC-Lavalin under the provisions of the PWSPC’s Integrity Regime. As a result, SLCI
(and its affiliated SNC-Lavalin companies) were not subject to an automatic debarment period from engaging in public procurement projects financed by the government of Canada. This outcome was critically important to the continued financial viability of SNC-Lavalin. Being a major engineering player in the domestic infrastructure construction business, SNC-Lavalin would view the government of Canada as a prime client. In the result, the employees, shareholders, suppliers, and customers who relied heavily upon SNC-Lavalin group were protected from the consequences of SLCI’s criminal conviction by the ruling that debarment regarding federal procurement was not triggered by fraud that harmed Libyan, and not Canadian, interests.

The specific wording of the procurement integrity regimes at the various levels of government (federal, provincial and municipal) in Canada do, however, differ from one another. As a consequence of this lack of harmonisation of procurement/debarment regimes in Canada, the potential exists for companies to be debarred from doing business with some levels of government, while continuing to be eligible to do business with others (as will be discussed below).

OUTCOMES OF THE SNC-LAVALIN PLEA BARGAIN AGREEMENT

Following the joint submission by SLCI and the Public Prosecution Services of Canada (the ‘PPSC’), Judge Leblond ordered SLCI to pay a fine of $280M, to be paid in equal installments over a five-year period. Judge Leblond also imposed a three-year probation period on SLCI that required it, as a subsidiary, to police the compliance activities of its parent, the SNC-Lavalin Group. This entailed maintenance and strengthening of its compliance programme, record-keeping and internal control standards and procedures in accordance with the terms of the court’s order. It also required reporting in that regard to the court and the PPSC at no less than 12-month intervals.

Despite initial disagreements between SLCI and the PPSC regarding the amount of the accused company’s pre-tax net profit resulting from its impugned activity in Libya ($154M as according to the PPSC, compared to $103M as according to SLCI), both parties eventually submitted that the reasonable quantum of the fine should be around $280M (which is the amount of the fine ultimately ordered by Judge Leblond).

This $280M fine represents one of the largest financial penalties ever imposed on a Canadian company as a result of a conviction for criminal misconduct. This amount includes both the disgorgement of profits that could be attributed to SNC-Lavalin’s wrongdoing (sending the message that ‘crime does not pay’), as well as a hefty criminal penalty to serve as both a punishment and a deterrent of similar future conduct on the part of both SNC-Lavalin and other Canadian corporations. This kind of criminal misbehaviour, as evidenced by the harsh penalties imposed on SNC-Lavalin, should not attract lesser sanctions that could be considered just ‘the cost of doing business.’ Judge Leblond further ordered that Blake, Cassels & Graydon LLP, a leading national law firm in Canada, would act as an independent Monitor of SNC-Lavalin during the course of the three-year probation agreement (the ‘Monitor’), overseeing the execution of the terms of the plea bargain (specifically the implementation and strengthening of a corporate ethics and compliance programme for the SNC-Lavalin Group). The expenses of the Monitor were ordered to be paid by SLCI, as the SNC-Lavalin entity that entered into the plea agreement.

Interestingly, the SLCI plea bargain included a form of continued judicial oversight similar to what a RA might have reasonably been expected to provide. As noted above, under the terms of the plea bargain, Judge Leblond ordered that SLCI cause SNC-Lavalin to maintain and, as required, further strengthen its compliance programme, record keeping, and internal control standards and procedures. In order to achieve this goal, the Monitor is required to submit yearly reports over the three-year probation period to both the court and the PPSC, regarding the compliance programmes, internal controls, policies and procedures of SNC-Lavalin. Further, those reports are to be made publicly available and must be published on the SNC-Lavalin website. The Monitor’s initial and first follow-up reports were indeed published on the SNC-Lavalin website in April and December 2020 respectively; two further
follow-up reports are required to be published in December 2021 and December 2022.

The elements of the probation order imposed on SLCI in the accepted plea bargain closely resemble the terms in the probation order that had been agreed upon by the PPSC and Niko Resources (‘Niko’) in 2011. Niko was a Canadian oil and gas exploration and production services company that entered a guilty plea to foreign bribery charges under the CFPOA arising out of the company’s business activities in Bangladesh. In view of the fact that, in the context of SNC-Lavalin’s matter, no RA had yet been entered into within Canada to serve as a model for the sentencing of SLCI, the Niko plea deal may well have been utilised as a useful precedent for the key stakeholders in the SNC-Lavalin matter.

The overall purpose of the RA Regime is to provide a creative avenue to (on the one hand) balance the public interest in repudiating criminally corrupt conduct together with providing specific and general deterrence for similar conduct, while (on the other hand) simultaneously immunising innocent stakeholders—such as employees, shareholders, pension funds, etc.—from suffering harm that could arise from criminal conviction of the accused corporation.

As part of Niko’s sentencing agreement, the company was fined $8,260,000 plus a 15% victim fine surcharge ($1,239,000), for a total of $9,499,000. The sentencing judge in the Niko matter also imposed a probation order which placed Niko under the court’s supervision for a three-year period, ensuring audits were done to examine the company’s compliance with the CFPOA. Niko Resources agreed to retain and be monitored by PriceWaterhouseCoopers, a leading consulting company, to ensure that Niko developed and abided by a strict corporate ethics and compliance programme. Unlike SNC-Lavalin, Niko was not concerned about collateral potential debarment sanctions that it might face under the PWSPC Integrity Regime, due to Niko being an international extractive natural gas company (and therefore not typically in the business of providing products and/or services to the Government of Canada).

**Compensation of Victims in the SLCI Plea Agreement**

Judge Leblond identified the victims of SNC-Lavalin’s dealings in Libya as the ‘Great Socialist People’s Libyan Arab Jamahira’, the ‘Management and Implementation Authority of the Great Man Made River Project’ of Libya, the ‘General People’s Committee for Transport Civil Aviation Authority’ of Libya, Lican Drilling Co. Ltd., and the ‘Organization for the Development of Administrative Centers’ of Benghazi in Libya.

There was no attempt in the sentencing SLCI to require the SNC-Lavalin to directly compensate these governmental agencies and authorities, nor the people of Libya who are represented by them. Rather, as was the case with Niko, the $280M fine paid by SLCI was taken into ‘general revenue’ by the government of Canada.

As Judge Leblond notes in his reasoning, no restitution by SNC-Lavalin had been made to the Libyan government agencies nor the people of Libya at the time of trial, and ‘the Attorney General will not be bringing a motion to have [a restitution order] imposed’. Unlike the outcomes typically seen from the DPA regimes in the UK and France, the plea bargain of the SNC-Lavalin accused included no requirement that SNC-Lavalin companies ‘compensate victims of the offence, or donate money to a charity or other third party’. It should however be noted that SNC-Lavalin did settle a related civil class action suit brought by shareholders who alleged that its financial statements were false or misleading to the extent that they did not properly disclose the nature of the payments made by SNC-Lavalin to the Gadaffi family.

**Reputational Damage and Future Prospects of SNC-Lavalin to do Business with Governments in Canada**

As noted above, the surgical nature of the plea bargain reached by SNC-Lavalin through SLCI with the PPSC allowed the company to circumvent debarment sanctions that otherwise would have prevented it from bidding on public procurement projects involving the Government of Canada under the terms of the PWSPC Integrity Regime. Other bribery/
corruption charges against SNC-Lavalin under the CFPAO were stayed by the Crown, and SLCl’s guilty plea to the charge of fraud under s. 380(1) of the Criminal Code referred specifically to defrauding the people of Libya, rather than ‘Her Majesty’.

In contrast, the fact that SNC-Lavalin, through SLCl, was convicted of fraud under s. 380(1) automatically triggered the debarment provisions of the Integrity Act of the Province of Quebec. This resulted in an automatic order from the Autorité des Marchés Financiers, the financial regulator in Quebec, that the six key domestic SNC-Lavalin companies be debarred for five years (until January 2025) from doing business with the Government of Quebec.

CONCLUDING OBSERVATIONS

The SNC-Lavalin case study provides a number of important insights regarding the nature of the RA Regime within Canada. These lessons can be summarised as follows:

The Outcomes

The outcomes of the SNC-Lavalin plea bargain, through its subsidiary SLCl (including the fine and probation order), were very similar to what would have been reasonably expected under a RA. Ultimately, the key distinction between the guilty plea and what would be expected under a RA lies in SLCl’s conviction for the offence of fraud under s. 380(1) of the Criminal Code. Under a RA, a stay of proceedings would have likely been issued until such time as SNC-Lavalin had been shown to have fulfilled its obligations under the terms of the RA. With the exception of the conviction of SLCl, the terms of the plea bargain closely resemble the elements that would have been expected under a RA; SLCl acknowledged its criminal wrongdoing, paid a large fine ($280M, which represents inter alia the disgorgement of profits arising from and the denunciation of the conduct that formed the basis of the charge), and retained a Monitor for a three-year period at its own expense who will submit yearly reports to the court and the PPSC.

A critical feature of the terms of SLCl’s plea agreement was that SNC-Lavalin was not convicted of any offence which would trigger a debarment period from doing business with the government of Canada under the PWSPC Integrity Regime. Any concerns, therefore, regarding domestic job losses, and/or harm to employees, suppliers, investors, and pensioners (which the Criminal Code provisions outline as relevant factors to be considered under a RA) were specifically addressed in the plea bargain agreement. Not surprisingly, some media critics couched SNC-Lavalin’s December 2019 plea bargain as resembling a ‘DPA through the back door’. The fact that SNC-Lavalin was able to prorate its payments of the $280M fine over a five-year period also helped to preserve the economic viability of the company, thereby further supporting the ability of SNC-Lavalin to continue serving its customer base.

The terms of the SNC-Lavalin plea bargain agreement helped the company to avoid many of the undesirable ramifications that would typically be expected from an American-style DPA (where the parties largely avoid public scrutiny until the terms of the DPA are publicly announced). The transparency surrounding the elements of the plea bargain, along with the rigorous judicial oversight and commentary provided by Judge Leblond, allowed both SNC-Lavalin and the PPSC to avoid any appearance of insider advantages being afforded to SNC-Lavalin, or of SNC-Lavalin being seen as a proverbial ‘corporate crony’ of the government receiving a ‘get out of jail card’. The severity of the terms of the sentencing, along with the requirement for ongoing monitoring of SNC-Lavalin and its corporate ethics/compliance programme, bolstered the view that SNC-Lavalin will not likely be a recidivist corporate offender which will engage in future corrupt practices.

Plea Bargain vs. Remediation Agreement—Who Wins?

Why would the PPSC, who 14 months earlier refused to invite SNC-Lavalin to enter into negotiations for a RA, eventually agree to a plea bargain whose terms so closely resemble what might have been expected under a RA? Commentators have noted that the plea bargain/conviction of SLCl relieved the prosecution of two significant hurdles facing them in the SNC-Lavalin matter.
First, the PPSC would likely have had difficulty proving beyond a reasonable doubt that SNC-Lavalin, as a corporate accused, would be criminally liable under s. 22 of the Criminal Code for alleged bribery/fraudulent activity. In order to convict SNC-Lavalin, the prosecution would need to demonstrate beyond a reasonable doubt that the individuals involved in the alleged offences (Aissa and Bebawi, who the evidence clearly showed did personally profit from the misconduct they engaged in) were: (i) not acting outside their scope of authority as senior executives at SNC-Lavalin when they were engaged in these activities, and (ii) at least partially acting for the benefit of SNC-Lavalin. In accepting the plea bargain, Judge Leblond noted in his sentencing decision that SNC-Lavalin was, in certain significant respects, itself a victim, due to Aissa and Bebawi’s defrauding the company itself out of millions of dollars.

Second, the PPSC would likely have faced an issue as to whether it could fulfil its obligation to conduct a ‘speedy trial’ within the timelines prescribed by the decision of the Supreme Court of Canada in R. v. Jordan, [2016] 1 SCR 631, the leading authority in Canada on the issue of timely prosecution of offences. Charges were first laid against SNC-Lavalin regarding the company’s conduct in Libya in February of 2015. Under s. 11(b) of the Canadian Charter of Rights and Freedoms, the Supreme Court affirmed in Jordan that an accused has the right to be brought to trial within a reasonable period of time. The court defined an excessive time delay as more than 18 months if the trial is going to be heard in a lower court, and more than 30 months if the trial is to be heard in a superior court. When SNC-Lavalin entered into its plea bargain agreement in December of 2019, almost 58 months had already passed since the criminal charges had been laid in 2015. Prosecutors were thus facing significant ongoing pressure to expedite the trial process (at the risk that the charges could be stayed due to the delay exceeding constitutional limits), an issue that was finessed when the plea agreement was concluded.

The joint statement of facts submitted to the court, alongside the Joint Resolution of Corporate Criminal Liability for SLCI (and not the entire SNC-Lavalin Group), ultimately allowed the PPSC to circumvent the issues of timing and the required burden of proof. While the plea bargain agreement and sentencing that SNC-Lavalin received may undoubtedly be seen as favourable for the company, the prosecution also benefitted greatly from the plea agreement.

Remaining Questions About How Remediation Agreements Operate in Canada

While the SNC-Lavalin case study provides useful insights regarding the RA Regime in Canada, many questions still remain for prosecution and defence counsel regarding roles and expectations under the regime. On 23 January 2020, the Deskbook of the Public Prosecution Service of Canada (the ‘Deskbook’) published a new chapter (3.21) entitled ‘Remediation Agreements’. The Deskbook provides further clarification regarding the procedures involved in successfully completing a RA, and as well identifies the hierarchy of decision-making within the PPSC that is to be followed with respect to the RA Regime. However, because at the time of writing no RAs have yet been entered into in Canada, significant uncertainty remains regarding the real-world implications of RAs in corporate criminal prosecutions. Unlike the UK (where guidance has been provided by the Serious Fraud Office) and the US (where guidance has been provided by the Department of Justice), there is a comparative lack of authoritative guidance from Parliament that has left many more questions than answers surrounding the operation of the RA Regime in Canada.

Recent online commentary by University of Toronto Professor Kenneth Jull has raised several questions regarding RAs that speak to the need for greater clarity about how the RA Regime will operate in the Canadian context. They include:

- What level, and threshold, of alleged illegal behaviour needs to be attained for a company to realistically seek to secure a RA?
- How many ‘layers’ of senior officers must be involved in the matters which give rise to the charges before a corporation may be held criminally responsible for the acts of its employees?
• How soon must a corporation come forward to ‘come in from the cold’ by self-reporting wrongdoing when it has discovered, through its own investigative processes, that wrongdoing has occurred? What are the incentives and pre-qualifications that the new RA Regime provides that will encourage a company to self-report?

• Will the ongoing experience and outcomes of investigations and prosecutions of corporate wrongdoing provide sufficient incentives for companies to develop robust, well-funded internal ethics and compliance detection systems?

• Will law enforcement efforts ultimately benefit from incentivising voluntary reporting by corporations for internal corporate criminal wrongdoing, in particular by incentivising companies to identify those individuals within the company that are involved in such wrongdoing?

• How will the wording in the Criminal Code governing the new RA Regime be interpreted, reconciled, and applied in the ‘real world’, including the language in the Code that identifies the purposes, conditions, objectives, factors to be considered and not considered in sentencing?

CONCLUSION

The ‘Made in Canada’ Remediation Agreement regime is still in its infancy, and many details regarding how it will operate remain to be seen. With the SNC-Lavalin matter concluded, relevant stakeholders may now learn important lessons regarding the future of this regime in the Canadian criminal context. Prosecutors and defence counsel alike are now significantly better equipped to navigate the RA Regime in Canada, avoiding its pitfalls while embracing the many advantages that the regime provides.

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DEFENDING DEMOCRACY: THE PRICE OF LIBERTY IS ETERNAL VIGILANCE (PART II)

Judge Jennifer Oulton, Provincial Court of British Columbia, Vancouver, BC, Canada. This article is based upon a paper presented to the 20 Club, Vancouver, on 4 February 2021.

Abstract: The first part of this somewhat conversational two-part article began with the author’s personal reflections about democracy and ‘the price of freedom [being] eternal vigilance’. There, the author considered the challenges posed to America’s democratic institutions by the Donald Trump presidency, and identified those who were ‘upstanders’ rather than bystanders during those years. This second part of the article considers some of the broader forces that tend to erode democracy, again principally in the US, including the rise to power of charismatic populists and the effects of social media and income inequality as forces that both enable populism and destabilise democratic norms.

Keywords: Democracy, defence of – active promotion of democracy – forces and factors supportive of the perpetuation of democracy – forces and factors inimical to the perpetuation of democracy – populist political leaders and movements and their actual and potential effects upon democratic institutions – economic disparities as factors in the decline of democracy – autocracy as a prevailing norm historically

WHAT ERODES DEMOCRACY?

In the Harper Lecture delivered in February 2019 at the University of Chicago Law School entitled ‘How to Save a Constitutional Democracy’, Professors Aziz Huq and Tom Ginsburg considered the question of what forces and phenomena have the effect of eroding democracy. Many of the ideas and concepts mooted in that lecture are also discussed in their book of the same title, published by the University of Chicago Press in 2018.

Tom Ginsburg observed during the lecture that the way democracy ends these days is different from what is commonly expected. We are inclined to envision sudden coups when we ponder democratic collapse, but instead decline in modern times tends to be slow; death by a thousand cuts adds up to systemic degradation. This point echoes similar ones voiced by authors Steven Levitsky and Daniel Ziblatt in their 2018 title, How Democracies Die, of which mention was made in Part I.

Charismatic Populism and Partisan Degradation

Ginsburg identifies two different agents destructive of democracy: the charismatic populist, and partisan degradation.

Charismatic populists are leaders who claim to be the single voice of a single people. Of course, the ‘people’ always means some people and not others. Turkey’s Tayyip Erdogan and Hungary’s Viktor Orban are charismatic populists. So, of course, was the US’s Donald Trump. In her 2020 article entitled ‘The Rise of Populism: A Threat to Civil Society?’, published in the online journal E-International Relations, Portuguese law and politics scholar Lucie Calléja puts Indian Prime Minister Narendra Modi into the same category, noting that Modi’s ‘image [as] a charismatic populist leader’ was a factor in the election of his political party.

Charismatic populists claim a unique and direct bond with the people. Pesky democratic institutions interfere with that direct connection, so those institutions are mistrusted, targeted and undermined by the charismatic populist.

The Pernicious Effects of Social Media in Charismatic Populists’ Hands

Consider that Donald Trump had tweeted 57,000 times, and had 89 million followers, before Twitter permanently suspended his account on 8 January 2021. This was President Trump’s direct and unique access to his followers, the people.
Recall how Trump, during and in the immediate aftermath of the Capitol Hill riot on 8 January 2021, told his followers: ‘We love you. You are very special people. You are patriots.’ This is the way charismatic populists engender and maintain the support of their followers: by making the bond personal.

A charismatic populist with a social media account can erode democracy. The two factors together have a pernicious multiplier effect.

Others have spoken of the anti-democratic tendencies of late-stage monopoly capitalism with respect to the tech giants: Facebook, Google, Amazon and Apple. The internet is fast, reminding me of Mark Twain’s comment, ‘a lie has travelled half-way ’round the world, while the truth is still getting on its shoes’. Mark Zuckerberg, Facebook’s founder and CEO, for a long time proudly defended Facebook’s motto, to ‘move fast and break things’.

The internet’s reach is vast and, for the most part until recently, there has been almost no fact-checking of the content it disseminates. Conspiracy theories still flourish online. People like English councillor Simon Parkes (who claims to have had sexual relations with aliens) set themselves up as credible news sources and are received as such. To my surprise, I learned about Parkes because a neighbour forwarded a YouTube clip of him to me, believing that what he had to say about the assault on the Capitol on 6th January was informative and useful.

For years, social media platforms held firm: Just because a post was false didn’t mean it was their place to do anything about it. But 2020 changed their minds and practices, at least in the US, and 2021 cemented that reversal.

At the end of May 2020, for the first time Twitter labeled a tweet from Donald Trump as potentially misleading. After Trump falsely insisted that mail-in-voting would rig the November election, the platform added a message urging users to ‘get the facts’. Within a day, Zuckerberg appeared on Fox News to reassure its viewers that Facebook had a ‘different policy’ from that of Twitter and that he believed strongly that tech companies shouldn’t be arbiters of truth and what people say online. In other words, he purported on behalf of Facebook to defend the democratic value of freedom of expression.

But come November 2020—between the time the polls closed, and the race was called for Biden—much of Trump’s Facebook page, as well as more than a third of Trump’s Twitter feed, were plastered with warning labels and fact-check invitations. This presented a striking visual manifestation of the way that 2020 transformed the internet. In May, the first label on a Trump tweet was a watershed event. By the end of the year—as Evelyn Dinek aptly summed up in her article entitled ‘The Year That Changed the Internet’, published in the Atlantic in December 2020—such labels on Trump’s (and others’) tweets were unremarkable.

Then of course, following the events of 6 January 2021, Trump was suspended indefinitely from Twitter, Facebook, Instagram and YouTube by 8 January 8. Early the following week, the social media alternative platform, Parler, was also shut down.

It would appear that social media platforms sensed the danger late, and only when it impacted Americans.

Polarisation of Wealth

How does a charismatic populist come to power in the first place? The ‘elites’ have to be out of touch with the population. The message of disaffection and grievance has to resonate. The charismatic populist is not the cause of the problem but the result of it. Partisan degradation, the second agent of destruction identified by Ginsburg and Huq, has many causes, but increasing polarisation—in terms of race, religion, and socioeconomic status—are some of the most compelling. Polarisation of wealth in particular tends to erode democracy.

Aristotle’s definition of democracy envisioned government by the poor because the poor are always in the majority. America’s flawed democracy of today is not being led by the poor. Today’s US wealth inequality is vast and growing, and the result of four decades of tax cuts for the rich has been a massive redistribution of wealth to those at the top.
National Geographic photographer Andrea Bruce covered conflict zones around the world for two decades. She was brought up short by an Iraqi woman asking her what democracy meant. Flummoxed, she returned the question, ‘To us, democracy means money. When Americans say they are bringing us democracy, we understand they are telling us they will make us rich’.

Back in the US, chagrined that she was unable to answer such a seemingly simple question, Ms. Bruce set up a dozen town hall meetings in various small towns. When she asked the people who attended: ‘What does democracy mean to you?’, the answers surprised her. She discovered that, for people who are poor, people with no safety net, their view was that the government did not do anything for them, and that they had to do everything for themselves. ‘Democracy isn’t for us, it’s for people who have money,’ she was told. The division between rich and poor is the biggest division, she decided. (Bruce’s findings are fully outlined in her 3 November, 2020 podcast, ‘Documenting Democracy’, available online.)

The US faces the problem of oligarchy, ever more threatening as globalisation increases differences in wealth. The odd American idea, endorsed in the Supreme Court’s 2010 Citizens United decision, that giving money to political campaigns is free speech means that the very rich have far more speech, and so in effect far more voting power, than other citizens.

In the US in 2019, the top 1% of the population held one-third of the wealth. The next 9% controlled another 38%. Together they made up the top 10%—a small group with a very large slice (71%) of the wealth pie. This left less than one-third (29%) to the bottom 90% of the population.

Wealth, otherwise known as net worth, is an accounting of financial assets minus liabilities. The average family wealth of the top 1% in the US was $27.7 million in 2019, or 228 times the median wealth of the median family. The rich are getting richer as this ratio—which stood at 125 in 1962—steadily grows.

The global pandemic brought an end to the longest economic expansion on record in the US. For the many, the COVID-driven recession has caused enormous pain and struggle for millions of workers and businesses. For the few, it has been a boom-economy on steroids.

The cumulative wealth of the richest Americans on the Forbes 400 list was $2.96 trillion in 2019. The wealth held by these 400 equated to the total wealth held by the entire bottom 58% of families in the US. Heading up the list was Jeff Bezos of Amazon at $114 billion. Also on the list are seven Waltons, descendants of the founders of Walmart.

In 2020 the stocks of both Amazon and Walmart soared (up 92% and 43%, respectively). Both companies have resisted any attempts by their workers to unionise. Researchers at the Brookings Institution recently analyzed worker compensation against extraordinary profits since the pandemic began. The Brookings Institution’s report ‘Windfall Profits and Deadly Risks’ refers specifically to Walmart and Amazon. The Institution ranked both in ‘the least generous’ category. Enormous pandemic profits have added tens of billions to the wealth tally of such businesses; not so for their workers.

One might say that this distorted pattern of wealth distribution and power has created conditions that were ripe for the rise of charismatic populism in the US and the corresponding decline in democracy.

Against this backdrop, University of Berkeley economist Sylvia Allegretto has called, in her ‘Berkeley Blog’ entry for 15 December 2020, for the political will to pursue an Economic Bill of Rights, enumerating the right for all people to decent housing and wages, a good education, medical care and protection from the economic fears of old age, sickness, accident and unemployment.

It remains to be seen how the Biden presidency will address the many challenges it faces. Polarisation of wealth is only one of those many challenges.

The Future of Democracy

According to Timothy Snyder—author of On Tyranny, Twenty Lessons from the Twentieth Century (quoted liberally in Part I)—history does not repeat, but it does instruct. Aristotle
warned that inequality brought instability, while Plato believed that demagogues exploited free speech to install themselves as tyrants.

The history of modern democracy is one of decline and fall. European history has seen three major democratic moments: after the First World War in 1918, after the Second World War in 1945, and after the end of communism in 1989. Many of the democracies founded at these junctures failed. Democracy failed in Europe in the 1920s, 30s and 40s, and—again according to Snyder in On Tyranny—it is failing not only in much of Europe but in many parts of the world today.

Writer Adam Gopnik says, in an insightful article entitled ‘What We Get Wrong about America’s Crisis of Democracy’ published on 27 December 2020 in the New Yorker, that the interesting question is not what causes authoritarianism, but what has ever suspended it, noting that the default condition of humankind, traced across thousands of years of history, is some sort of autocracy.

I cannot conclude any better than Gopnik did: The temptation of anti-democratic cult politics is forever with us, and so is the work of fending off those politics. The rule of law, the protection of rights and the procedures of civil governance are not fixed foundations, shaken by events, but practices and habits, constantly threatened and frequently renewable.

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REPARRATIONS FOR SLAVERY: THE ROLE OF THE LAW, STATES AND CORPORATIONS IN REDRESSING PAST WRONGS

Dr Luke Moffett, Reader at the School of Law, Queen’s University, Belfast. An earlier version of this article appeared online in The Conversation on 19 June 2020.

Abstract: The transatlantic slave trade represents one of the most atrocious exploitations of people in the history of humanity. It witnessed the enslavement of millions of Africans to work in colonial economies, many of whom perished. Despite the transatlantic slave trade being abolished in law over 200 years ago, its practices continued for decades afterwards and racial prejudices linked to it continue to today. In the face of increasing violence by some police forces against African-Americans, calls for reparations for historic injustices globally have again come to the fore. Demands for reparations to redress the past face legal difficulties, given the passage of time and deaths of the direct victims and responsible actors. Despite this, there have been some efforts made by a few corporations and states to redress the legacy of slavery. In this article, the author outlines some of these issues and debates and argues that legal reparations comprise but one important way to redress and acknowledge historic injustices, noting that broader efforts to transform society and to tackle racism are also required.

Keywords: The transatlantic slave trade and its legacy – ties between the slave trade and injustices experienced by the descendants of slaves today – potential reparative remedies for slavery-related injustices, both legal and extra-legal – reparations claims against states and corporations (similarities and differences) – the need for acknowledgement of the roles played by legal system actors historically in relation to slavery – making the pursuit of reparations for slavery a priority

INTRODUCTION

The issue of reparations for the transatlantic slave trade and the continuing racism experienced by individuals and communities of African descent has again come to dominate political debates across the world. This is in response, in part, to the shocking, high-profile killings of unarmed African-Americans in the US at the hands of some local police officers. In response, in 2020 numerous countries saw large protests mobilise under the banner of the Black Lives Matter Movement. Those protests also involved the removal of statues of some former slave owners. Among them was the statue of slave trader Edward Colston, which protestors pulled down from its pedestal and dumped into the Bristol harbour. Subsequently, two major British businesses have said that they will make undisclosed payments to black and minority ethnic groups to atone for their past owners’ involvement in the transatlantic slave trade. Pub group Greene King and insurance broker Lloyd’s of London have both apologised for what they respectively call ‘inexcusable’ actions and ‘indefensible’ past wrongdoing.

This all came as the UN High Commissioner for Human Rights, Michelle Bachelet, called on member countries to confront their past involvement in colonialism and slavery and to make reparations for those still affected. In a subsequent report in 2021, the Commissioner appealed to states to redress past injustices that continue to fuel racism and prejudice in their societies. She called for truth-telling and historical clarification, memorialisation and reparations—responses which at their heart require states, businesses, religious orders, universities and individuals to acknowledge how they have profited from slavery and racially discriminatory policies and make amends. The Jesuit Order in the United States of America has committed a $100 million fund for slavery reparations to atone for the Catholic Church’s historical role in the slave trade.

The increasing international recognition that historical injustices associated with slavery require redress reflects the fact that—far from being relics of the past—prejudice, discrimination and racism against those of African descent continue to pervade many societies. Still, despite some important positive developments, the legal bases for redressing the
consequences of the pernicious slave trade are limited in their effectiveness.

**THE LEGAL CASE FOR REPARATIONS**

For centuries, reparations for slavery have been demanded for African-American, British-Caribbean and Caribbean peoples. In 2001, the UN Durban World Conference Against Racism recommended such reparations, but the momentum was lost as the debates were quickly overtaken by 9/11 and the resulting war on terror. Despite this, the calls for slavery to be characterised as a crime against humanity continue.

Since then, research has uncovered numerous individuals and companies that have benefited from slavery in the past. Besides Greene King and Lloyd’s of London, the UK banks HSBC, Barclays and Royal Bank of Scotland are all known to have had historical links to slavery. In the US the list includes JP Morgan, Bank of America and the clothing retailer Brooks Brothers. None have paid reparations, although, for example, in 2005 JP Morgan set up a scholarship fund and apologised for the involvement of its predecessor companies in slavery. A legal case seeking reparations from the bank and other insurance companies then collapsed in 2006. The payments that were made by Greene King and Lloyd’s of London were, however, not reparations in the legal sense of the term.

In the past few decades, increasing efforts have been made in the international law realm to ensure that effective remedies exist for those who have suffered human rights violations. Reparations are intended to vindicate victims’ rights, to reaffirm their dignity as human beings, and to reproach those responsible for their wrongdoing. In 2005 the United Nations General Assembly voted in favour of the UN Basic Principles on a Right to Remedy and Reparations, which set out many of the principles and forms of reparations necessary to redress gross violations of human rights, including slavery.

Encouragingly, in the last two decades, there have increasingly been reparations paid by corporations for their involvement in historic rights violations. These have mainly concerned claims arising from the Holocaust. For example, reparations have been paid by the French and Dutch corporate train operators which transported Jews to concentration camps. Reparations have also been paid by the Swiss banks that withheld accounts from Jewish survivors and heirs of survivors of the Holocaust, and by various German corporations, including Bayer and Volkswagen, which benefited from forced labour during the Second World War. Corporate and state responsibility for past violations has featured in recent efforts to obtain reparations in Argentina over Volkswagen’s alleged involvement and collusion in a military junta’s killing of trade unionists in the 1970s.

All of that said, the success of reparations litigation involving defendant corporations overall has been somewhat disappointing. However, it is important to remember that even if the legal claims brought against some corporations may be weak in law, those responsible may nevertheless be perceived as morally or politically obliged to consider making amends and then feel compelled to act on that sense of obligation.

Legal cases for reparations have tended to be more successful when survivors were still alive or where there was sufficient evidence to find a responsible actor to make reparations. The passage of time makes legal claims go stale. Because all the direct victims of the transatlantic slave trade (that is, the slaves themselves) are now long dead, it is particularly difficult legally to identify persons having standing to bring slavery reparations claims now. Similarly, unless evidence emerges that clearly implicates corporations for historically profiting from slavery (either themselves or through their predecessors), it is unlikely that many reparations cases against corporations will proceed successfully through the courts.

Reparation claims for non-slavery-related wrongs brought under domestic law in some jurisdictions have seen mixed success. For instance, in 2013 the British government settled claims of torture made by 5,228 survivors of the Mau Mau rebellion in British-governed colonial Kenya between 1952 and 1963. However, some claims for redress by many more such victims were rejected by the English courts in 2018 (see *Kimathi & Ors v The Foreign and Commonwealth Office* [2018] EWHC 2066). In 2020, in the *South Sulawesi* case, a court in the Hague ordered the
Dutch government to pay compensation for the killing of Indonesian civilians under Dutch colonial rule in the 1940s, despite the case having been brought outside the applicable limitation period. The key distinction between these cases and slavery claims is, again, the fact that direct victims or their successors were alive at the time proceedings were brought. Thus, while states and corporations (potential defendants) can persist as responsible legal entities and face potential liability, the fact that the natural persons who have suffered from slavery have long ago died means that such liability will seldom be assessed against the defendants for want of living plaintiffs.

There have been a few successful cases on reparations for slavery, most notably the American decision in *Wood v Ward*, given in 1878, involving a direct victim. But, as has been noted, litigation by descendants of direct victims has proved to be unsuccessful in the courts during the past two decades. While legislators and courts played an integral role in the complex architecture of the transatlantic slave trade historically, it is regrettable that there have been few efforts made in more recent times, through legislation or otherwise, to create means by which historical wrongs can be redressed today in the absence of living direct victims.

States, for present purposes, tend to be more permanent entities than corporations and they have different and more stringent international legal obligations. The 2011 UN Guiding Principles on Business and Human Rights speak somewhat weakly of corporations ‘respecting’ human rights by avoiding infringing them and addressing the ‘adverse human rights impacts’ of their activities. By contrast, states have clear obligations to offer reparations in such situations. The 2005 UN Basic Principles on the Right to Remedy and Reparations require states to ensure victims’ access to reparations for gross violations of human rights, including for acts or omissions of parties liable for harm where they are unable or unwilling to redress the harms they cause. Currently, a draft Business and Human Rights treaty explicitly recognises that:

...if a legal or natural person [including corporations] conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

While such a treaty will not apply retroactively to historical violations, it does at least reflect the increasing recognition of a responsibility of corporations to make reparations for their wrongdoing.

**Seeking Reparations Outside Court Systems: The CARICOM Example**

It ought not be forgotten that reparations can be framed and sought in other ways if legal avenues are closed. The Caribbean Community (‘CARICOM’) has for years been calling for collective and moral reparations from former European colonial powers to compensate its 15 member states for the continuing harms they experienced as a result of the transatlantic slave trade, colonialism and indigenous genocide. CARICOM’s ten-point plan focuses on collective measures, including an apology, repatriation to Africa for those seeking it, educational and research opportunities to rebuild cultural institutions, psychological rehabilitation and debt cancellation. These measures are intended to reflect the continuing ‘racial victimisation… of the descendants of slavery and genocide as the root cause of their suffering today…[and] as the primary cause of development failure in the Caribbean.’ However, no European power has yet made any effort to meet the demands. This includes the UK, which has declined even to apologise.

**Reparations: Perversely a Two-way Street**

Historically (and perversely), colonial powers did make reparations to slave owners for the loss of their captive source of labour. They also imposed reparations against freed slaves after their emancipation. France, for example, imposed a heavy reparation burden on Haiti in 1825 after the revolution in 1804, requiring it to repay the French government and slaveowners who lost property, plantations and slaves in the revolution to the tune of what would be $21 billion USD in today’s dollars. That obligation was only paid off in 1911.
France has rejected any suggestion that it now make reparations back to Haiti.

The British government paid compensation to slave owners to pave the way for slave emancipation, reflecting restitution in kind for slave owners’ loss of ‘property’ rather than providing redress to those victimised by slavery. This included the UK government compensating Greene-King £500,000 for surrendering two of its plantations in the Caribbean in 1833 and £400,000 to one of the founding members of Lloyd’s of London.

**MAKING REPARATIONS MORE THAN JUST SYMBOLIC**

Despite Greene-King and Lloyd’s of London having recognised that they were enriched by slavery, their efforts to make reparation were largely limited to an apology and efforts to include BAME (Black, Asian and minority ethnic) groups in charitable foundations. Thus, the ‘reparations’ announced by Lloyd’s and Greene King do not perfectly correspond to victim-centred reparations as understood under international human rights law. There is a risk that simply paying some money and apologising for past wrongdoing can be promoted by corporations as bringing complete absolution for that past wrongdoing. Entities which pursue that path however risk being seen as having engaged in self-serving public-relations exercises rather than genuine attempts to atone for and prevent such wrongs from happening again.

True international reparations would require that the victims participate, so that compensation can be as effective as possible and not be, or appear to be, mere charity. Victim participation would also avoid replicating benefactor and beneficiary power dynamics; rather, including victims in the reparations process would ensure that they are treated as rights-holders having agency.

Some substantive efforts at redressing the wrongs attributable to slavery have recently been made by the University of Glasgow which, after a report uncovered the fact that it benefited from significant financial support in the past from slaveowners, will raise £20 million to support awareness, research links and academic collaboration with universities in the West Indies. There will also be a plaque installed at the front of a key building acknowledging the University of Glasgow’s past associations with the slave trade.

How far can efforts to make over the past go? Perhaps in dealing with slavery and its pervasive effects today we need to revisit the 2001 Durban conference findings. This would involve states having a broader conversation about the continuing consequences of historical injustices, and about how their persisting effects can be identified and remedied. In the US Congress, Bill H.R. 40 is currently being scrutinised. That draft legislation proposes to establish a commission to study and consider a national apology and proposals for reparations for slavery-related wrongs. Already the US government has made some symbolic overtures, by (for example) officially recognising Juneteenth as a federal holiday to commemorate the emancipation of African-American slaves. While the official designation of Juneteenth is symbolic recognition of the historical injustice of slavery, it is also a means to build public awareness, understanding, and to vindicate the contention of generations of African-Americans that what happened to their ancestors was wrong, undeserved and must not be repeated.

**THE WAY FORWARD**

Reparations cannot provide a complete solution for historical wrongdoing. No amount of money, no number of memorials and no number of formal apologies, however sincere, can ever fully remedy the injustices of the past. Nonetheless, these actions constitute a way of acknowledging wrongdoing and victimhood, while seeking justice and social transformation so that such violations do not recur. Despite slaves having been exploited in centuries past, the descendants of those who suffered directly and those who benefited from slavery continue to live with its legacy—that is, inequalities in comparative power and economic prosperity.

For the legal community, dealing with historical injustice not only requires that the wrongs of the past be acknowledged, but also (a) recognition of the historical role played by the law, courts, judges and lawyers in those historical wrongs, and (b) acceptance that the law, courts, judges and lawyers have a part to play in ensuring that such wrongs are redressed in some way and not repeated.
THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: TAKING STOCK OF THEIR IMPACT AT TEN YEARS

Paul Bowden, Honorary Professor of Law, The Nottingham Law School, Nottingham Trent University, UK, and former member of two of the legal working teams which assisted Professor John Ruggie in the research which led to the UN Guiding Principles

Abstract: It is the tenth anniversary this year of the unanimous endorsement by the United Nations Human Rights Council of the United Nations Guiding Principles on Business and Human Rights (the ‘UNGPs’). The UNGPs—which are readily accessible online—express the desire of the international community for a new and more coherent approach to upholding human rights in an era of globalisation. This article explores the origins of the UNGPs and their structure, which unites the existing legal duties of states to protect human rights with the growing acceptance by business enterprises of their own responsibility to respect those rights in pursuit of sustainable economic development. The article goes on to chart the reception of the UNGPs by international institutions, national governments and business organisations. It notes their incorporation into, and modifying influence on, existing human rights programmes, initiatives and business practices. Finally, it offers some reflections on how the UNGPs have progressed over the past ten years into the realm of ‘hard law’ through the enactment of new national laws and by the tentative signs of judicial recognition in cases where remedy and compensation for human rights-related wrongs and harm are sought.


THE UN PRINCIPLES: ANNIVERSARY AND ORIGINS

This year has marked the tenth anniversary of the unanimous adoption by the United Nations Human Rights Council of the UN Guiding Principles on Business and Human Rights, UN HR/PUB/11/04, (the ‘UNGPs’). It has also seen the sad loss of Harvard Professor John Ruggie. The UNGPs were his vision and conception. The scope and depth of adherence to the UNGPs—across institutions at both international and nations levels during this past decade—owe much to him. Perhaps the greatest tribute to Professor Ruggie is the fact that the UNGPs are more often than not spoken of as the ‘Ruggie Principles’.

It was as a Special Representative of the UN Secretary General that Professor Ruggie examined the roles of both states and corporations in addressing the impacts of business on peoples’ personal rights and freedoms in a world that had become increasingly thought of as ‘globalised’. The realities of human trafficking forced labour and hazardous working conditions in global supply chains; the dispossession of land and environmental degradation occasioned by agriculture and commercial development; the supply of new technologies and services which could be used to suppress personal expression; and more, all touched on the rights and fundamental freedoms recognised in international law, not least the 1948 Universal Declaration of Human Rights.

In 2008 Professor Ruggie presented to the United Nations Human Rights Council an extensively researched and evidence-based intellectual framework and project for further action. It was titled Protect, Respect and Remedy: A Framework for Business and Human Rights. Unanimously accepted by the Council, Professor Ruggie’s mandate was enlarged. He was asked for concrete proposals on how his framework could be ‘operationalised’ and ‘promoted’. The result of this further endeavour was the UNGPs.
What are the UNGPs?

In presenting his Guiding Principles to the UN Human Rights Council on 30 May 2011, Professor Ruggie said:

The Guiding Principles’ normative contribution does not lie in the creation of new international legal obligations but elaborating the implementation of existing standards and practices for States and business, integrating them within a single, logically coherent and comprehensive template.

This ‘elaboration’ takes the form of a Statement of General Principles followed by 31 ‘foundational’ and ‘operational’ principles, spanning three chapters, or ‘pillars’, which correspond to the ‘protect’, ‘respect’ and ‘remedy’ trilogy of Professor Ruggie’s 2008 framework report. The UNGPs are addressed:

1. to states and to their existing obligations under international law to protect against human rights abuses within their jurisdiction by third parties, including business enterprises (Foundational Principle 1);

2. to business enterprises, as ‘specialised organs of society performing specialised functions’ and, as such, required to respect human rights (General Principles paragraph (b)) and

3. to both states and businesses, to provide effective remedies where protection or respect have failed and rights abuse and human-rights related harm have ensued (General Principles paragraph (c)).

While framed as guidance, the UNGPs read more like a well-crafted ‘principles-based’ regulation that one might find in national financial services or telecoms law. As with such regulatory schemes, the UNGPs have their own interpretative guide (The Corporate Responsibility to Respect Human Rights), published by the UN High Commissioner for Human Rights in 2012.

Business’s Responsibility to ‘Respect’

The UNGP Operational Principles 16-21 lay out the interlinked policies and processes that a business should have in place to meet its responsibilities to respect human rights. These start with a public policy commitment approved by the most senior level of corporate governance, accompanied by:

a. ongoing due diligence to identify and assess any adverse human rights impacts with which the business may be connected;

b. appropriate action to address such impacts;

c. evaluation of the business’s response; and

d. transparency and communication around these matters.

One significant, and potentially far-reaching, aspect of the UNGPs are the connected concepts of ‘direct linkage’ and ‘leverage’.

Foundational Principle 13 describes a business’s responsibility to respect human rights as:

a. avoiding causing or contributing to adverse human rights impacts through its own activities (and addressing such impacts); and

b. seeking to prevent or mitigate adverse human rights impacts that are directly linked to its operations, products or services by its business relationships with another entity, even if it has not itself contributed to those impacts.

UNGP Operational Principle 19 goes on to provide that preventing and mitigating human rights impacts requires business enterprises to ‘take appropriate action’.

The appropriate action will depend on whether the business has caused or contributed to the adverse impact or whether its involvement is solely because the impact is directly linked to its operations, products or services through third party relationships. In the latter situation, the required action may be the exercise of ‘leverage’ by the business over the relevant third party with which it has (or may intend to have) a business relationship.
In the 2012 interpretive guide referred to above, the concept of ‘leverage’ is further explained. Leverage is:

... an advantage that gives power to influence... it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact. [page 3]

The practical upshot of these two Principles is to impose a standard of incentivisation, inquiry and, potentially, of intervention upon all businesses in the formation and management of their corporate and commercial relationships—whether these are with suppliers, customers or consumers, lenders, borrowers, investors, joint venture partners or affiliates. To this extent, every business has responsibilities not only for its own behaviours but, to the extent possible, for the behaviour of others with whom it engages.

The interpretive guide gives illustrations of where leverage may be required: for example, in making loans for business activities that result in the eviction of communities contrary to established human rights standards, or where a business finds that the manufacture of its consumer products is subcontracted by its supplier to forced labour workers.

**WHAT HAS HAPPENED SINCE 2011?**

The UNGPs do not comprise an international legal instrument but their effects on the thinking and actions of governments and businesses have been widespread and profound.

**The Responses of International Institutions and National Governments**

In 2011 the Organisation for Economic Co-operation and Development (the ‘OECD’) introduced a new chapter in the OECD Guidelines for Multinational Enterprises (the ‘OECD Guidelines’), effectively incorporating the UNGPs into its own principles and standards for business conduct.

The International Labour Organisation in 2017 amended its Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the ‘MNE Declaration’) to reference and align the MNE Declaration with the UNGPs.

The G-7 Leaders’ Declaration at Schloss Elmau in 2015 expressed ‘strong support’ for the UNGPs, urging the private sector to take steps to implement them.

Over 50 countries, encouraged by the Office of the UN High Commissioner for Human Rights, have embarked on the publication of National Action Plans (‘NAPs’) to introduce the UNGPs into domestic laws and policy. To date, in the Commonwealth, NAPs have been produced by Kenya, Uganda and the United Kingdom. There are governmental commitments to bring forward such plans in Australia, India, Malaysia, Mozambique, Pakistan and Zambia. National human rights institutions are similarly engaged in a number of other Commonwealth member countries.

**The UNGPs as Legal Norms**

The past ten years have seen three particular developments. Each goes to the emerging legal status of the UNGPs in domestic law.

**The UNGPs and business standards**

The first of these developments is that the UNGPs, or their core elements, now appear in a range of business-related guidance and operating standards. Notably, the European Commission has published three sector guides on implementing the UNGPs. They address the oil and extractives, communications and technologies and employment and recruitment agencies sectors. A document entitled *The Commodity Trading Sector: Guidance on Implementing the UNGPs* has been produced on behalf of the Swiss federal government. Industry associations have taken their own, like initiatives in relation to the UNGPs. The 2014 *Know How Guide: Human Rights and the Hotel Industry* developed by the hospitality sector and published by the International Tourism Partnership is an example. In its early paragraphs, the *Know How Guide* states:

The starting point is the UN Guiding Principles on Business and Human Rights (UNGPs). Launched in 2011, the UNGPs
provide an authoritative global standard for addressing adverse impacts on human rights linked to business activity. [at pp. 3-4]

Individual corporations, in ‘policy commitments’ published voluntarily in response to UNGP Operational Principle 16 and in corporate and social responsibility and sustainability reports, often invoke the UNGPs. Statements in such reports that a corporate group strategy and approach to human rights compliance is ‘based on’, ‘aligned with’ or ‘guided by’ the UNGPs are not uncommon.

Some might suggest that UNGP Chapter II and its ‘respect’ principles—at least for multinational corporations in certain business sectors—is progressing towards being a recognised industry performance standard, if not, indeed, ‘standard business practice’.

The UNGPs and national legislation

The second development is the most conspicuous. Professor Ruggie was clear, in 2011, that the UNGPs were not intended to create any new international legal obligations. The effect has been the opposite at the individual state level. That is, there is a process underway through which the UNGPs are becoming ‘concretised’ into hard national laws.

This began well before the launching of the NAPs discussed earlier. Individual legislatures have passed laws which recite and attribute their object to the UNGPs and, in some cases, expressly implement elements of the UNGPs. The focus of this legislative activity has been on:

1. human rights due diligence in business value chains (see Operational Principles 17, 18 and 20); and

2. communication, transparency and public reporting of human rights issues (see Operational Principle 21).

Transparency and reporting were the first phase of law-making. The UK Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 required UK quoted companies to produce an annual strategic report that provided information about its policies on human rights issues (essentially the ‘policy commitment’ of Operational Principle 16) and on the effectiveness of those policies (see Operational Principle 21).

Broader mandatory reporting, including on human rights performance, was introduced for large public interest companies in the EU in 2014 under Directive 2014/95/EU (‘The Non-Financial Reporting Directive’), now implemented by all member states.

The next phase of national law-making addressed more explicitly human rights due diligence as well as reporting. Both aspects are found in section 54 of the UK’s Modern Slavery Act 2015, in Australia’s Modern Slavery Act 2018 and sections 24-28 of the New South Wales Modern Slavery Act of the same year. These three statutes were prefigured in the California Transparency in Supply Chains Act 2010, which itself anticipated the UNGPs. Bill S-216 (An Act to Enact the Modern Slavery Act and the Amendment of the Customs Tariff) is now before the Parliament of Canada and follows a model similar to that of the UK and Australian legislation.

Outside the Commonwealth, The Netherlands Child Labour Due Diligence Law of 2019 has taken legal duties of corporations further than due diligence and reporting. Under Article 5.1 of that statute, a business is required to establish an implement an ‘action plan’ if it has a reasonable suspicion that child labour exists in its value chain. The Dutch law connects with not only Operational Principles 17, 18, 20 and 21 on due diligence and reporting but also Foundational Principle 13 and Operational Principle 19, and with the concepts of ‘direct linkage’ and ‘leverage’ discussed above.

In June of this year Germany passed its ‘Law on Corporate Due Diligence in Supply Chains’. It was enacted as an openly stated response to what the federal government perceived to be inadequate action by German businesses under Chapter II of the UNGPs and the failure of the previous policy of the German NAP to secure commitments to the UNGPs on the part of businesses by voluntary means.
The UNGPs and legal remedies

The third stream of development concerns the role the UNGPs have to play, or may come to play, in the resolution of disputes and the provision of redress. There are two aspects to this: one of process and procedure, the other of substantive law. Both relate to the third (‘Remedy’) pillar of Professor Ruggie’s framework and Chapter III of the UNGPs. Here, states are reminded that their duty to protect against business-related human rights abuses requires them to provide means of effective remedy (Foundational Principle 25). Chapter III goes on to address three ‘mechanisms’ which states should provide or facilitate: state-based judicial mechanisms (Operational Principle 26); state-based non-judicial grievance mechanisms (Operational Principles 27 and 31); and non-state-based grievance mechanisms (Operational Principles 28 and 31).

Business enterprises have a responsibility under Operational Principle 22 to provide or to cooperate in the remediation of adverse human rights impacts that they have caused or to which they may have contributed. This must be achieved through ‘legitimate processes’. That is a reference to the three Chapter III mechanisms highlighted above.

The NCP process

There is one state-based non-judicial mechanism that has been in play in the field of human rights grievances since 2011, when the OECD Guidelines were aligned with the UNGPs. It is the OECD National Contact Points (‘NCP’) procedure. Complaints (called ‘specific instances’) can be made to NCPs which should be established under governmental auspices in each OECD member state.

Such complaints typically involve the alleged failure of a multinational enterprise to meet its responsibilities under the OECD Guidelines. A large number of NCP cases since 2011 have related to human rights. In several of these, direct reference to, and reliance upon, the UNGPs has been made.

There is broad standing for anyone—including a group or community or non-governmental organisation (an ‘NGO’)—who or which is an ‘interested party’ in the relevant multinational enterprises’ compliance with the OECD Guidelines. The NCP procedures are consensual and non-adversarial. An NCP has no power to make formal findings of fact or to issue an ‘award’. In each case, however, it is required to make a written report where there is a resolution or to issue a statement where there is no such agreement. Such statements will include a description of the issues raised, an explanation as to why the NCP considered the issues called for examination and, if appropriate, ‘recommendations’ on the implementation of the OECD Guidelines.

The human rights NCP cases have concerned a wide range of situations, including the treatment of refugees (Human Rights Law Centre & Ors v GS4 (a joint Australian/UK NCP case); worker safety and right to life (Canada Tibet Committee v China Gold International Resources (a Canadian NCP case)); transfers of surveillance technology and rights to privacy and freedom of expression (Privacy International & Ors v Gamma International (a UK NCP case)); and environmental impacts and right to property (Oselle Concerned Citizens v Shell PDC Nigeria (a Dutch NCP case)). While cases are not always resolved by the NCP, the process affords complainants and multinational enterprises an early opportunity to gain insights into each other’s views and positions and to test the issues which exist between them, even if the matter moves on to a further stage, including, possibly, resort to state-based judicial mechanisms.

The courts and the UNGPs

What exactly do the UNGPs have to say about judicial mechanisms? Operational Principle 26 requires states to (1) ensure that such mechanisms are effective in addressing business-related human rights abuses and (2) consider ways of removing legal, practical and other barriers that could deny access to remedies. The commentary to this Principle indicates that states may be required to make changes to their procedural laws (for example, in their legal cost recovery rules or the introduction of new collective action procedures) and also to their substantive law (such as their laws on jurisdiction and even their principles of legal liability and substantive rights of action where
these relate to human-rights related claims advanced against corporations and groups of companies).

France’s Corporate Duty of Vigilance Law of 2017 (Law No. 2017-399) (the ‘Duty of Vigilance Law’) has done exactly these things. It has changed rules governing procedure and legal standing and has introduced a new statutory right of action enabling courts to remedy impacts resulting from breaches of new statutory duties. This law was passed as a UNGP national ‘implementing measure’. In brief, France’s Duty of Vigilance Law:

1. introduces new legal duties for France-based companies of a certain size. The core of these duties is to identify and prevent adverse human rights impacts (as well as environmental and human health impacts) arising from such companies’ own business activities; the activities of their subsidiaries and other companies that they control; and, significantly, the activities of all the respective contractors and suppliers with whom the companies have established business relationships (mirroring Foundational Principle 13, including the concept of ‘direct linkage’);

2. requires subject companies, for this purpose, to prepare, publish and implement ‘vigilance plans’, with external stakeholder input. The plans must set out the steps the companies intend to take to map, and to conduct human rights due diligence on a regular basis, of all relevant supply and value chains, and to prevent or mitigate the serious risks of adverse impacts that they may identify. The vigilance plan scheme embodies Foundational Principles 13 and 15 and Operational Principles 17-20 and, in particular, imports the UNGP concept of ‘leverage’ into French law;

3. permits a broad class of persons and organisations who have ‘a legitimate interest’ to seek orders and directions from the French courts where companies fail to fulfil their legal duties with regard to the publication or implementation of vigilance plans; and

4. confers a right of action to seek civil damages upon those who can show that a company’s failure to establish or implement a plan (or to do so adequately) has caused preventable loss or harm (echoing Operational Principle 26 and the UNGP call to states to remove barriers to access to state-based judicial remedies).

The Duty of Vigilance Law is already the basis of several cases before the French courts. They mainly concern the overseas activities of French multinational companies and, so far, are focussed on challenging the adequacy of relevant vigilance plans, rather than pursuing claims for financial compensation (see, for example, ‘Les Amis de la Terre-France’ & Ors v Total S.A. (2019), Unión Hidalgo & Ors v EDF (2020) and Envol Vert & Ors v Casino (2021)).

Without specific UNGP-inspired legislation like France’s Duty of Corporate Vigilance Law, what role might the UNGPs play—indeed, what relevance might they have—in litigation before national courts?

Several recent and current cases in Commonwealth countries—Lungowe & Ors v Vedanta Resources plc & Anor (‘Vedanta’) and Okpabi & Ors v Royal Dutch Shell plc & Anor (‘RDS’) in the UK; and Choc v HudBay Minerals Inc & Ors, Caal & Ors v HudBay Minerals Inc.& Ors (‘HudBay’) and Araya & Ors v Nevsun Resources Ltd (‘Nevsun’) in Canada—prompt early reflections. They can all be described as ‘environmental’, ‘public welfare’ or ‘treatment of labour’ litigation. As with many other cases of their sort, they can also be characterised as ‘human rights claims’ in so far as their fact patterns include pleaded instances of conduct and harm which would constitute human rights abuses and adverse impacts in the sense used by the UNGPs.

However viewed or categorised, these cases could not, on conventional views, proceed before the national courts unsupported by a substantive theory of liability and an underlying right of action in law. In this type of litigation, delictual laws which correspond to the common law torts of negligence, nuisance, trespass, breach of a statutory duty and sometimes deceit or misrepresentation (with conspiracy as an overlay) may be in play. Such cases invariably involve multiple claimants (or ‘rights holders’ as seen through the lens of the
A fundamental question highlighted in the first three of these cases was whether the ‘anchor defendant’, a parent or holding company established or headquartered in the relevant jurisdiction (in these instances the UK and Canada), might owe a direct duty of care in the tort of negligence to the claimants/rights holders for the operations of, and harm alleged to have been caused by, its group affiliates outside the jurisdiction—in these cases, Zambia, Nigeria and Guatemala.

In Vedanta, RDS and HudBay, the claimants and intervenors relied on Chapter II of the UNGPs in arguing that a parent company could owe a tortious duty of care to those harmed by the operations of its foreign affiliate. In each case the court held that the existence of such a duty was sufficiently made out for the cases to go forward to trial of the issues on their merits. In none of these cases were the UNGPs explicitly referred to by the courts in arriving at their conclusions but the UNGPs were part of the framework of each case.

The UK Supreme Court in Vedanta and RDS held that the liability of parent companies in relation to the activities of subsidiaries is not, of itself, a distinct category of liability in common law negligence and that this is a question to be determined on ordinary general principles of the law of tort regarding the imposition of a duty of care. There was no special ‘parent company duty of care’ test. Whether or not there was a duty of care rested on the general test of foreseeability, proximity and reasonableness (Caparo Industries plc v Dickman [1990] 2AC 605) with specific reference to the way and extent to which one company had used its power to exercise control and direction over, or to advise on, the management of another company’s operations. In Vedanta and RDS, group reporting and authorisation through functional lines rather than corporate structures; the setting by the parent companies of group-wide strategies, policies and procedures; the technical support provided by the parent companies and public commitments made by those companies—all with regard to group-wide environmental standards and performance—were enough to make the case for a possible duty of care, without direct resort to the UNGPs.

In HudBay, the Ontario Superior Court of Justice approached the same question differently. It regarded the case as raising a novel duty of care, requiring the application of the test in Anns v Merton London Borough Council [1978] A.C. 728. Under the third limb of this test (the issue of public policy), it was argued that recognising parent company liability supported the Canadian government’s policy of encouraging Canadian companies to meet high standards of corporate responsibility overseas and that there were policy reasons for tort law to evolve to meet the effects of globalisation, in particular the right of local communities suffering adverse impacts to receive redress (HudBay, 2013 ONSC 1414 at 73-75). Accordingly, in HudBay the court looked more directly to the rationale, if not the express terms, of the UNGPs to accept the possibility of what it considered a new tortious duty of care.

Whether human rights-related tort claims involving group companies and affiliate relationships are based on novel duties of care (HudBay) or not (Vedanta and RDS), these three cases raise two particular thoughts.

The first thought is that the principles emerging from these cases are not just about parents and subsidiaries. They are equally applicable, for example, to a multinational retailer with strong contractual controls over the labour practices of its supplier or to a bank that holds the purse strings over the worker safety investments of one of its borrowers. Operational Principle 26 anticipates remedy through the courts across all aspects of a business enterprise’s operations and value chains and, effectively, recognises ‘key customer’ and ‘key lender’, as well as parent company, liability. These three cases point to this, as does, explicitly, the judgment of the Ontario Superior Court of Justice in Das v George Weston, 2017 ONSC 4128.

The second thought is that, regardless of whether the UNGPs have any assisting role in deciding whether or not a (tort of negligence) duty of care exists, they may come into play later at the trial stage when the court has to inquire as to the relevant standard of care.

The wide adoption of the UNGPs by governments, intergovernmental institutions and industry bodies and the public commitments
to the UNGPs made by individual corporations as described earlier must be amongst the matters that would be taken into judicial account in considering applicable standards of care under the rubrics of ‘common practice’ and ‘approved codes and guides’. (See Lord Dunedin in Morton v William Dixon Ltd 1909 S.C 907 at 809 and Ward v The Ritz Hotel (London) [1992] P.I.Q.R. P 315).

Human rights due diligence as provided for in Operational Principle 17, the use of independent external human rights experts and stakeholder consultation under Operational Principle 18 and, in appropriate cases, the use of ‘leverage’ under Operational Principle 19, are arguably now ‘standards of care’ that could be applied to multinationals operating in lines of business or in geographies known to carry high human rights risks.

These observations should be seen in the context of the judgment of the Supreme Court of Canada in Nevsun. This was not a parent company liability case. It was a claim of direct involvement by the defendant company in the human rights impacts arising from a foreign affiliate’s operations. It was concerned with the far-reaching proposition that any breach of major human rights under customary international law is actionable at common law and capable of direct remedy under Canadian law without the need for legislative action. The UNGPs were relied on extensively by the appellants, intervenors and, on certain issues, by the respondents in the briefing of this appeal.

The judgment of the majority in Nevsun was that this expansive argument had a prospect of success. The court also held that the specific human rights relied on were ‘...inherently different from existing torts’. (Nevsun 2020 SCC 5, at 124); and that the ‘...remedy of breaches of customary international law may demand an approach of a different character than a typical private law action in the nature of a tort claim’ (at 129) but that they could constitute their own species of private law action.

This approach, if followed in Canada and elsewhere in other cases, would transform the functioning of state-based judicial mechanisms consistent with, but also exceeding the expectations of, Operational Principle 26 of the UNGPs.

The high-water mark over the past ten years of the judicial endorsement of the UNGPs is not, however, a Commonwealth judgment nor a compensation claim. It was reached rather in the May 2021 judgment of the Hague District Court in the Netherlands in an action brought by NGOs and concerned individuals seeking what amounted to a declaration and injunctions challenging the plans of Royal Dutch Shell plc for reductions in the atmospheric CO2 emissions of its entire corporate group undertaking and those of its suppliers and end-users: see, Vereningin Milieudelfensie & Org v Royal Dutch Shell plc, Hague District Court C/09/571932/HA ZA 19-379.

The basis of this claim was the general ‘unwritten standard of care’ under Book 6, Section 162 of The Netherlands Civil Code which gives the court a broad competence to develop legal duties of care in the realm of social conduct in accordance not only with law but also with ‘generally accepted standards’. The UNGPs and the human rights risks arising from the consequences of global climate change were central to the arguments as to how this duty of care should be interpreted and applied. The court gave extensive consideration to the UNGPs. In the end it held that the UNGPs constituted:

...an authoritative and internationally endorsed ‘soft law’ instrument that set out the responsibilities of states and businesses in relation to human rights’ and ‘for this reason are suitable as a guideline for the unwritten standard of care. Due to the universally endorsed content of the UNGPs it is irrelevant to whether or not [the defendant] has committed itself to the UNGPs, although [the defendant] states on its website that it supports the UNGPs [at 4.4.11]

**Final Thoughts on the UNGPs**

The UNGPs were the result of a unique endeavour led by Professor Ruggie, undertaken for the United Nations, to gain insights into the role that multinational enterprises had to play, alongside states, in addressing the
human impacts of globalisation. It was not originally a legal project. Rather, it was an attempt to create a coherent and principled framework within which businesses could work and deliver the social ends to which they were already beginning to express voluntary commitments.

The schemata of corporate responsibilities in Chapter II of the UNGPs is a structured reflection, back to business, of what business itself was regarding as ‘good practice’ and what it had told Professor Ruggie and his team during his initial research phase.

The UNGPs appear to have exceeded these aims. Large sections of the international business community have embraced, and now treat as normative, the UNGPs. No less eagerly have intergovernmental institutions and individual national governments done so. The UNGPs are inspiring new national laws. They are being pleaded in lawsuits and are drawing judicial attention and interest. The UNGPs have become a legal project. How much further this project may have to go is the question for the next ten years.
TRAFFICKING OF PERSONS: A PERSPECTIVE FROM KENYA

Lady Justice Jacqueline Kamau, of the High Court of Kenya, Nairobi. This article is based in part upon presentations made in 2020 at a webinar on gender issues organised by the Institute for Judicial and Legal Studies, Mauritius, and in 2021 at a workshop on gender-based violence hosted by the Department of Public Prosecutions, Mauritius.

Abstract: Illicit human movement networks are active and growing in Kenya and have made Kenya a source, transit and destination country for victims of human trafficking. The international problem of trafficking, as it is manifest in Kenya, is analysed within the context of the applicable legislation in the country. The various motivations for human trafficking—including organ harvesting, forced labour, sexual exploitation and terrorism—are discussed, as are the challenges trafficking has posed for Kenyan justice system players, particularly during the COVID-19 pandemic. Recommendations as to how control of the problem of human trafficking in Kenya might be enhanced are provided.

Keywords: human trafficking – gender differences amongst victims of human trafficking – Kenyan legislation bearing upon human trafficking – economic and other factors that motivate trafficking in humans – progress in combating human trafficking in Kenya – further steps that are needed better to control human trafficking, both in Kenya and internationally – the need for better international cooperation to control human trafficking

INTRODUCTION

Kenya is considered a hub for domestic and transitional trafficking. The improved infrastructure between Kenya and Ethiopia particularly has made Northern Kenya a human trafficking smuggling hotspot. In addition, the country's porous borders have ensured easy passage of radicalised youth to Somalia. There has also been an increase in child sexual exploitation and child sex trafficking cases perpetuated and exacerbated by technology and sex tourism. Moreover, corruption has fuelled transnational human trafficking offences.

Trafficking in Kenya has thrived as a result of economic hardship and social, cultural and political factors. These factors have led to forced labour and sexual exploitation, both locally and internationally; demand for organs for transplants; terrorist activities or armed conflict by extremist groups influenced by radicalisation; forced marriages involving teenage girls as brides of terrorists; and early child marriages following female genital mutilation.

THE LEGAL FRAMEWORK IN KENYA

The UN International Covenant on Civil and Political Rights (the ‘ICCPR’) prohibits several practices directly linked to trafficking, including slavery and slave trade, servitude and forced labour. Laws must enhance the wellbeing of all persons and if there is no legal framework in place, laws must be enacted to ensure that every individual’s right to dignity is realised.

Article 28 of The Constitution of Kenya, 2010 recognises the importance of the right to dignity and stipulates that:

Every person has inherent dignity and the right to have that dignity respected and protected.

Further, Articles 30(1) and (2) of The Constitution of Kenya, 2010 provide that:

1. A person shall not be held in slavery or servitude;
2. A person shall not be required to perform forced labour.

Article 2(5) and (6) recognise that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of
the law of Kenya under its Constitution. Thus, the ICCPR forms part of Kenyan law. It has been given effect by the Counter-Trafficking in Persons Act, 2010 which received assent on 13 October 2010 following the promulgation of the Constitution on 27 August 2010, and became operational on 1 October 2012. The offence of human trafficking in Kenya is defined in section 3 of the Counter-Trafficking of Persons Act. That section stipulates that:

1. A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of—
   a. threat or use of force or other forms of coercion;
   b. abduction;
   c. fraud;
   d. deception;
   e. abuse of power or of position of vulnerability;
   f. giving payments or benefits to obtain the consent of the victim of trafficking in persons; or
   g. giving or receiving payments or benefits to obtain the consent of a person having control over another person.

2. The consent of a victim of trafficking in persons to the intended exploitation shall not be relevant where any of the means set out in subsection (1) have been used.

3. The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act.

4. An act of trafficking in persons may be committed internally within the borders of Kenya or internationally across the borders of Kenya.

5. A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.

6. A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.

‘Exploitation’ includes but is not limited to keeping a person in a state of slavery; subjecting a person to practices similar to slavery; involuntary servitude; forcible or fraudulent use of any human being for removal of organs or body parts; forcible or fraudulent use of any human being to take part in armed conflict; forced labour; child labour; sexual exploitation; child marriage and forced marriage: see section 2.

Section 4 of the Counter-Trafficking of Persons Act, which is headed ‘Acts that promote child trafficking’, provides that:

1. A person who for the purpose of trafficking in persons—
   a. adopts a child or offers a child for adoption;
   b. fosters a child or offers a child for fostering; or
   c. offers guardianship to a child or offers a child for guardianship, commits an offence.

2. A person who initiates or attempts to initiate adoption, fostering or guardianship proceedings for the purpose of subsection (1) commits an offence.

3. A person who commits an offence under this section is liable to imprisonment for a term of not less than thirty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.
REASONS FOR TRAFFICKING

Organ Harvesting

Children, especially new-born babies, are being stolen from hospitals for organ harvesting purposes. Organised child trafficking rings involving hospital staff and staff in children’s homes are active in Kenya. Children have been sold for as little as $400 (USD). Regardless of the government’s proposed plan to establish a multi-agency team to probe the child trafficking syndicate, this vice continues unabated. Not long ago the controversial Kenyan clergyman and self-styled bishop Gilbert Deya, together with his wife, Mary Deya, were convicted for child trafficking and child theft.

Whereas many domestic and international adoptions are intended to place children in families to give them normalcy in family life, there are also many of these adoptions that are being effected to traffic in children for exploitative purposes such as organ harvesting. The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, confirms that human trafficking encompasses removal of body organs amongst other illegal activities.

Due to the fact that many children have been trafficked by unscrupulous foreigners for the purpose of removing their organs after adoption, international adoption proceedings in Kenya have been made more stringent. This means that applicants in such proceedings must comply with very rigorous and strict procedures and conditions before orders for adoption can be granted.

Social media provides a forum where youth are lured for organ harvesting. Especially vulnerable are young university students. They tend to be targeted because of their virility and jobless circumstances. The average price of a kidney in the black market is 12.57 million Kenyan shillings (‘Ksh’) (equivalent to $115,321 USD), yet a donor may receive as little as Ksh 200,000 (equivalent to $1,834.86 USD) for a kidney.

Forced Labour

Trafficking—whether within Kenya, or cross-border/internationally—thrives for purposes of supplying the demand for domestic forced labour and domestic servitude. Young women taken to work in the Middle East lead a life of servitude as they repay the agencies that transported them to those countries. Furthermore, children are exploited for labour in carrying out domestic chores without pay, with the result that they are often found begging in streets and herding animals. There are many children living in such servitude in the Northern part of Kenya.

Sexual Exploitation

Human trafficking is also driven by motivations similar to those which drive slavery. Sexual exploitation is a major factor in both phenomena. Adults and children are trafficked for commercial sexual exploitation mainly through the use of force or deception. The exploitation may involve prostitution, acts of bestiality or the filming of pornographic videos published among the many other vices that can be found on the dark web. This kind of activity has in turn led to an increase in HIV infections and other crimes perpetrated against the victims of such social injustices.

Sexual exploitation of children was criminalised in the Kenyan Children Act, 2001 and Penal Code. In spite of the guarantees of the protection of children in the Constitution of Kenya, 2010, there has been an increase in cases of sexual exploitation of children particularly by trusted adults. For instance, in 2020, 61-year-old Gregory Dow, a missionary, pleaded guilty to several counts of sexual abuse of children in an orphanage. In addition, in the same year, a 71-year-old German national was charged for trafficking, defilement, indecent acts and child pornography.

Proceedings for international adoptions are now scrutinised closely as there have also been cases where children have been adopted for sexual exploitation in jurisdictions outside Kenya.

Terrorism

Both the young and older people are often duped, trafficked, kidnapped or forcibly recruited to join terrorist groups. They also
sometimes join these groups voluntarily, for economic reasons or because they crave a sense of identity. Such recruits are then radicalised to perpetrate terrorist activities. While young girls join these extremist groups for the aforementioned reasons, some also do so in order that they may be married as jihadi brides. Notably, the reasons for joining these terrorist groups are varied and not exhaustive.

**Status of Trafficking, Including During Covid-19 Period**

On 7 February 2021, the 2020 *Global Report on Trafficking in Persons* was released by the UN Office of Drugs and Crime (‘UNODC’). That report analysed ‘information concerning more than 50,000 offenders and victims of trafficking in persons officially identified by the State authorities of 155 countries and territories’. The aforementioned figure is double the number of cases of human trafficking that were reported to UNODC in 2016. Further, the report shows the most-reported victims of trafficking in Kenya were Ethiopians. Some 15% of reported Ugandan victims of trafficking said they were destined for Kenya.

The status of trafficking in Kenya reveals that Kenyans are currently being trafficked to the Maldives, Saudi Arabia and other Middle East states. Some 12 Kenyans were among the victims of trafficking in Saudi Arabia between 2017 and 2018. Although there is no formal report, it is expected that there will have been a reduction of cross-broader trafficking of persons during the Covid-19 pandemic due to closed borders. At Milimani Law Courts in Nairobi, only three cases of trafficking were registered in 2019. Further, from January to March 2021, only one case of trafficking has been lodged there. More people are thus at risk of becoming victims of human trafficking without detection and legal intervention due to the economic meltdown as a result of the Covid-19 pandemic.

**Challenges in the Fight Against Trafficking**

Despite its effort to fight human trafficking, Kenya has been accused of doing little to eliminate it. Conviction for trafficking of children attracts a term of imprisonment of not less than 30 years and a fine of not less than Kshs 20 million (USD 183,486.239) or both. In instances of a subsequent conviction one is liable to imprisonments for life. However, in spite of the heavy penalties, there have been concerns expressed that the courts have been opting to impose fines for such serious offences as opposed to imposing custodial sentences.

There has also been a decrease in investigations, prosecutions and convictions. Additionally, Kenya has been accused of treating victims of trafficking as criminals themselves for violating immigration and labour laws. Kenya’s *Citizenship & Immigration Act, 2011* has more lenient penalties for those who breach immigration laws. Since there sufficient efforts in eliminating trafficking were not noted, Kenya has remained in Tier 2 in the US Department of State Trafficking in Persons Reports for 2020 and 2021.

**Gains in Identification and Intervention**

Capacity-building within the police and collaboration with other agencies, together with other reasons, all contributed to an increase in identifying trafficking victims from 400 in 2018 to 853 in 2019. The latter-mentioned victims comprised 275 women, 351 girls and 227 boys. As can be seen, women and children are the most numerous among victims of human trafficking. A majority of these victims were subjected to forced labour and several non-governmental organisations successfully repatriated women victims from the Middle East and India. Whereas no men victims were identified in 2019, this could be attributable to non-reporting.

In the same year (2019), Kenya’s Director of Criminal Investigation’s Transnational Organised Crime Unit (‘TOCU’) identified 114 trafficking victims during raids and encounters with commercial sex establishments. In one such raid (of a restaurant in Mombasa), the media reported that TOCU identified 12 Nepali girls as victims of sex trafficking. Additionally, seven suspected traffickers—three Ethiopians and four Kenyans—were arrested along the Isiolo-Moyale highway. Although the provision of care for victims has remained low, safe houses have been established and some child victims continue to be taken to children’s homes.
The success in these raids can also be attributed to the opening of Kenya’s Anti-Human Trafficking and Child Protection Unit (‘AHTCPU’) in Mombasa. (This complements the AHTCPU’s office in Nairobi.) In addition, the AHTCPU has also opened a cyber-centre in Nairobi to increase the investigations of cases involving online child exploitation. Additionally, there has been increased cooperation between different agencies and the enactment of the Witness Protection Act, 2006 has gone a long way to protect the identity of whistle-blowers.

**CONTRIBUTION BY WOMEN JUDGES IN KENYA**

Many judges and judicial officers in Kenya have not been involved in the investigation, prosecution or adjudication of any internal, or cross-border, human trafficking cases. This is because such case are dealt with at the magistracy level and none have yet been brought on appeal. However, as can be seen from the foregoing, trafficking cases are generally few because most victims are, in fact, being charged for being in Kenya illegally.

The International Association of Women Judges, in partnership with the National Association Women Judges–Uganda, is currently implementing a new project: ‘Women Judges Leading Efforts to Improve Justice Sector Effectiveness in Combating Trafficking’. The project is to be funded by the US Department of State through a co-operation Agreement with the Global Fund to End Modern Day Slavery.

**RECOMMENDATIONS**

Illicit human movement has continued to thrive despite there being legislation enacted and efforts undertaken worldwide to curb the vice of human trafficking. The International Labour Organisation recently estimated that there are nearly 40.3 million victims of human trafficking worldwide. In its Transnational Crime and the Developing World Report of 2017, the Washington-based think tank, Global Financial Integrity, recently reported that human trafficking generates revenue of about $150.2 billion (USD) in profits annually. This means that trafficking will continue to be a particularly difficult problem to tackle as revenue generated is sufficient to enable perpetrators in some locations to corrupt some participants in the chain of administration of justice.

Oftentimes, the victims of human trafficking themselves do not themselves know that they are victims of very serious offences. Frequently, they become unwittingly involved in this illegality in the course of their efforts to find economic empowerment. More interventions therefore need to be undertaken to tackle this menace. There is a need to adopt a multi-pronged approach for all those involved in the chain of administration of justice. The need for the establishment of more safe houses for the victims and whistle-blowers as well cannot be understated. Victims and whistle-blowers face very real dangers and thus they require active protection.

Governments—and especially the government in Kenya—must strictly ensure the registration of all agencies placing Kenyans as employees in foreign countries, especially in the Middle East (where abuse is widely reported).

Capacity-building within the chain of administration of justice and the sensitisation of justice system participants to the offences of trafficking is critical if the practice of charging victims for being in countries illegally (instead of focusing on the illegal activities of their traffickers) is to be curtailed.

Further, it is critical that once identified, victims be escorted to the borders of their countries to avoid the pattern of their being re-arrested within the countries to which they have been brought illegally. Greater collaboration between and among neighbouring countries is essential.

In conclusion, it is strongly recommended that all countries do more to inhibit the largely transnational crimes of human trafficking that threatens the very fabric of our societies.
The Public Health and Wellbeing Act 2008 (Vic) (‘the Act’) empowered authorised officers of the Chief Health Officer to exercise emergency powers when a state of emergency had been declared. Emergency powers exercisable by the Chief Health Officer included the ability under s 200(1)(b) and (d) of the Act to ‘restrict the movement of any person or group of persons within the emergency area’. Since 16 March 2020, directions restricting the movement of people within Victoria (‘the Lockdown Directions’) were made from time to time. The first plaintiff was the owner of the second plaintiff which conducted a restaurant business in Melbourne. The plaintiffs alleged that the business suffered significant revenue loss by reason of the restriction on movement imposed by the Lockdown Directions. They commenced proceedings seeking declarations that s 200(1)(b) and (d) of the Act and the Directions made thereunder were invalid as an infringement of a guarantee of movement implicit in the constitution. The defendant, the state of Victoria, demurred to the plaintiffs’ claim on the ground that the constitution did not imply the freedom of movement contended for. With a view to determining the demurer, the parties agreed to present the court with the following question: ‘Does the Constitution provide for an implied freedom for the people in and of Australia, members of the Australian body politic, to move within the State where they reside from time to time, for the purpose of pursuing personal, recreational, commercial, and political endeavour or for any reason, free from arbitrary restriction of movement?’ The plaintiffs argued that the restriction on the legislative power of the Commonwealth and the states for which they contended arose from the fact that federation produced one people, one nation, where there had been several peoples and colonies. Freedom to move wherever and for whatever reason followed. The plaintiffs sought to argue that movement for any purpose amounted to political communication and as such was protected by the implied freedom of political communication. Alternatively, (i) that freedom of movement was necessary for the maintenance of the constitutional system of representative and responsible government as an aspect of the implied freedom of political communication; (ii) that freedom of movement was implicit in s 92 of the constitution (trade within the Commonwealth to be free) on the basis that intrastate movement was a necessary incident of the freedom of interstate intercourse it guaranteed.

HELD: Answering the question for determination against the plaintiffs and allowing the defendant’s demurrer.

(1) There was no basis in the text and structure of the constitution for the implication which the plaintiffs asserted. The question was not what was required by federation; it being settled law that what the constitution implied depended on what the terms and structure of the constitution prohibited, authorised or required. The legislative powers of the states as members of the federation established by the constitution were expressly preserved by s 106 and the proposition that those powers were necessarily limited by the freedom of movement drew no support in the text or structure of the constitution. To seek to discern, by a process of induction from the presence in the constitution of specific express restrictions upon legislative power, the existence of a broader limitation upon legislative power was distinctly inconsistent with the orthodox approach to constitutional interpretation (see [6], [9], [14], [15], [17]); Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 applied; McGraw-Hinds (Aust) Pty Ltd v Smith (1979) 144 CLR 633 considered; R v Smithers, ex p Benson (1912) 16 CLR 99 and Pioneer Express Pty Ltd v Hotchkiss (1958) 101 CLR 536 distinguished.
(2) While legislated limits on movement that burdened political communication might fall foul of this constitutional protection, limits on communication or movement which did not have a political character did not (see [24], [25]); *Levy v State of Victoria* (1997) 189 CLR 579 and *Brown v Tasmania* (2017) 261 CLR 328 considered.

(3) To accept the plaintiffs’ s 92 contentions, would be to accept an implied restriction on legislative power that was wider in its operation than the express terms of s 92. The express limitation on legislative power in respect of the specific subject matter, being interstate trade, commerce and intercourse, was not mere slavish adherence to the maxims expressio unius est exclusio alterius (the express mention of one thing is the exclusion of another thing) or expressum facit cessare tacitum (there is no room for an implication in the face of an express provision). Rather, it was to recognise that the legislative powers granted or preserved by the constitution were not to be confined by implications which were not necessary and which would undermine the application of the freedom of interstate intercourse in s 92 (see [28], [29], [35]); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 applied.

**ATTORNEY GENERAL OF MALAYSIA V MKINI DOTCOM SDN BHD AND ANOR**

19 February 2021
Malaysian Federal Court [2021] 3 LRC 380
Yusuf PCA, Mohamed CJM, Hashim CJSS, Salleh, Pathmanathan, Kiat and Sebli FCJJ
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The first respondent was an online news portal and the second respondent was its editor-in-chief. The first respondent published an article entitled ‘Musa Aman acquitted after prosecution applies to drop all charges’ pertaining to the acquittal of the former Chief Minister Musa Aman of a number of corruption and money laundering charges. The first respondent also published a press release by the Chief Justice announcing that all courts would be fully operational from 1 July 2020. Following publication of the press release, five third-party online subscribers posted comments on the first respondent’s website critical of the judiciary and courts. The Attorney General brought contempt proceedings against the respondents claiming that they had facilitated the publication of the impugned comments, and as such, s 114A of the Evidence Act came into play to presume that the respondents were under the law the publishers of the impugned comments. The respondents maintained that they could not be held liable for contempt because they were not the direct author or editor of the impugned comments and only became aware of the comments upon being alerted by the police.

**HELD:** Application granted in part (by a majority).

(Per Yusuf PCA (Mohamed CJM, Hashim CJSS, Salleh FCJ, Kiat FCJ and Sebli FCJ agreeing))

(1) The first respondent depicted itself as the host to the publication and by virtue of s 114A(1), it was presumed to have published the impugned comments and, therefore, the Attorney General had met the burden of imputing responsibility of the publication on the first respondent. Such presumption was, however, rebuttable, on a balance of probabilities (see [45], [46], [51]).

(2) It was a well-settled legal principle that knowledge was purely a matter of fact, and, as such, it could be deduced or inferred from the circumstances surrounding each particular event. Proof of knowledge was always a matter of inference. In inferring knowledge, the court might approach the matter in two stages: (i) where opportunities for knowledge in the part of the particular person were proved; (ii) where there was nothing to indicate that there were obstacles to that person acquiring
the relevant knowledge, and that there was some evidence from which the court could conclude that such person had knowledge. In order to avoid liability, the first respondent had to have had in place a system that was capable of detecting and rapidly removing offensive comments; it could not just wait to be alerted and it was not enough for it to merely rely on its terms and conditions to online subscribers. The postings were only made possible because the first respondent provided the platform for the subscribers to post the impugned comments. The first respondent facilitated the publication of the contemptuous comments. It designed and controlled its online platform in the way it chose, with full control of what was and was not publishable. It had to carry with it the risks that followed. Further, the first respondent had a structured, coordinated and well organised editorial team. It was inconceivable that in such a system, the first respondent had no notice of the impugned comments and it could not deny notice or knowledge of the existence of the postings. It would be expected for the respondents to foresee the kind of comments attracted by the publication of the article. It could not be said that the first respondent had no opportunity and only played a passive instrumental role in the publication process. Accordingly, the first respondent failed to rebut the presumption of publication on the ground that it had no knowledge of the impugned comments. Accordingly, a case of contempt beyond reasonable doubt had been made out against the first respondent (see [65], [71], [74], [76], [78], [81], [84], [86], [88], [110], [132]); Public Prosecutor v Kenneth Fook Mun Lee (No 2) [2003] 3 MLJ 581, Emmanuel Yaw Teiku v Public Prosecutor [2006] 5 MLJ 209, Chan Pean Leon v Public Prosecutor [1956] MLJ 237, Delfi AS v Estonia (App no 64569/09) (2015) 39 BHRC 151, Fairfax Media Publications v Voller [2020] NSWCA 102 and Murray v Wishart [2014] 3 NZLR 722 considered; Bunt v Tilley [2006] 3 All ER 336 applied.

(3) Section 114A(1) could not be made out against the second respondent. There was no evidence that the second respondent was at all material times named as the owner or the host or the editor on the online news portal owned by the first respondent; and that there was no evidence that he was the person who reserved the sole discretion to edit or completely remove any comments by a third party. The second respondent was not accordingly guilty of contempt (see [138], [140]).

(4) In deciding an appropriate sentence on the facts, foremost was public interest. An appropriate sentence served the public interest in two ways. It might deter others from the temptation to commit such crime where the punishment was negligible, or it might deter that particular criminal from repeating the same crime. Not only regarding each crime, but in regard to each criminal the court always had the right and duty to decide whether to be lenient or severe. In the instant case, the impugned comments which were facilitated to be published by the first respondent had besmirched the good name of the judiciary as a whole and had subverted the course of administration of justice, undermined public confidence, offended the dignity, integrity and impartiality of the judiciary. It was only right that the sentence was not too lenient and a deterrent sentence would be made. A fine of RM500,000.00 was appropriate (see [151], [152], [158]); Chung Onn v Wee Tian Peng [1996] 5 MLJ 521, A-G of Malaysia v Dato’ See Teow Chuan [2018] 3 CLJ 283 and Hoslan Hussin v Majlis Agama Islam Wilayah Persekutuan [2012] 4 CLJ 193 considered.

PLEASE DON’T FORGET TO PAY YOUR MEMBERSHIP DUES ON TIME.

Arrears in Membership dues adversely affects the work that the CMJA can undertake on behalf of its membership and the work that the CMJA does on promoting and protecting judicial independence across the Commonwealth. We would urge all Member Associations and Individual Members to pay their Membership on time.
Law in a Time of Crisis
Jonathan Sumption

Given that we are living in a time of near-obsession with conflicts of interest, I should start by saying that Jonathan Sumption and I have been friends for more than 50 years and that we were colleagues in the UK Supreme Court for five of those years: 2012-2017.

Over those five years, we agreed about many things and disagreed about a few, and when we agreed, his opinion was almost always more strongly held—or at least more strongly expressed—than mine. Sumption’s style of judgment-writing was oracular whereas mine was more discursive. So, anyone reading his judgments would conclude that only one conclusion was possible, or at least intellectually respectable, namely the conclusion he favoured. (It is only fair to add that this does not mean that Sumption was not prepared to change his mind after listening to or considering the arguments: on a number of occasions, he was and he did). The oracularity is equally apparent in all the chapters of this book (which are edited and updated versions of lectures he has given, mostly since retiring from the Supreme Court). Even when Sumption appears to accept that there are good arguments against his view, he expresses himself in a way which pretty strongly implies that there is only one rational conclusion—namely, his.

It is interesting to compare Sumption’s views on legal issues with his views on political issues. When it comes to legal issues—such as the interpretation of contracts or the basis on which Covid-19 rules should be brought into UK law—Sumption is uncompromising in his opinions: ‘it is time to reassert the primacy of language in the interpretation of contracts’ and the UK government had ‘a cavalier disregard for the limits of their legal powers’ when introducing Covid-19 rules. But, on political issues, his views are more nuanced: while he was anti-Brexit, those in favour were ‘not mad… not irrational and… not… deceived’, and although unimpressed with the points made in favour of Scottish independence, Sumption accepts that ‘arguments based on emotion and identity go with the grain of human nature’.

Underlying this dichotomy is, I think, a two-pronged philosophy to which Sumption strongly adheres. First, that legal issues should be determined according to clear principles, and lawmakers (including judges—at least in a common law system) should strive to ensure that the law is as principled and clear as possible, so that individuals and businesses know for sure what their public law and private law rights and duties are. Second, and by contrast, particularly in a pluralistic democratic society, political issues are to be sorted out by the give and take of negotiation and debate, aiming at outcomes which accord respect to different views and which are achievable, often resulting in what are in intellectual terms, messy compromises.

While I agree, I consider that Sumption may place too much weight on clarity, and risks undervaluing one of the most important features of the common law, namely the ability to adapt to allow for changes in society or even for an unanticipated set of facts. And, of course, that brings one to a familiar conflict: certainty versus fairness. Very few people would quarrel with the contention that both have a part to play in any judicial decision, and so the issue is ultimately a question of degree rather than principle, and I think that Sumption (like his adversary on the topic, Lord Hoffmann) may be guilty of underrating that point in his discussion on contractual interpretation.

Sumption’s quest for certainty also colours his views that the judicial role when it comes to human rights should be circumscribed (the subject of his previous book, Trials of State, based on his 2018 Reith Lectures) and that litigation is in many ways an evil. It would significantly undermine human rights if the judicial role was substantially reduced, and, while litigation should be regarded as a last resort, we should all be worried if ordinary citizens are prevented from going to court by the costs and delays of litigation coupled with the absence of legal aid, which is unfortunately
the situation in the UK today. According rights to individuals becomes a mockery if those rights are not accompanied by genuine access to justice, as the government will increasingly ignore those rights if they are unenforceable—and respect for the rule of law thereby becomes undermined.

I also consider that, while many of his criticisms are at least partly justified, Sumption is, in some respects, rather harsh on the UK government (and by implication the UK courts) when he criticises the way in which the Covid-19 rules were introduced. The circumstances were exceptional in their unpredictability, unexpectedness, and complexity, and I think he gives insufficient weight to the pragmatism and ‘fudge’ of the political dimension involved (which is ironic given his more nuanced approach to political issues generally). Nonetheless, Sumption makes out a telling case for serious concern as to how easy it is for our constitutional rights and principles to be lost or diluted—sometimes because an allegedly necessary repressive measure, for which it is debatable whether there was even a short-term need, becomes a permanent feature of our legislative landscape.

When dealing with current constitutional and political issues—such as Brexit, Scottish independence, diversity, and the UK constitution—Sumption’s unusual combination of qualifications as an outstanding professional historian and an outstanding lawyer (coupled with his more recent and controversial entry into the role of political commentator) ensures that his treatment is more broad-based and visionary than the great majority of treatments I have read. And, as anyone who has read the four published volumes of his impressive pentalogy on the Hundred Years War or who has listened to (or read) his 2018 Reith Lectures will know, when it comes to extra-judicial writing Sumption knows how to express himself authoritatively, engagingly and clearly. Similarly, as anyone who has listened to him perform as an advocate will know, he makes out his case very persuasively. Although he has relatively balanced views, as I have mentioned, his conclusions are clear and sensible—even if one does not agree with them all.

In many ways, the most interesting chapters are those concerned with history, perhaps because they are more unusual in their subject matter, and because he can speak with unusual authority. ‘The Historian as Judge’ includes a justified lament for our increasing neglect of history as a nation, and his essay on apologising for the past is a forensic demolition of a current practice. Similarly, his dispassionate analyses of Magna Carta and of the creation of the United Kingdom provide valuable and interesting analyses of how myths develop and ultimately become accepted facts, as well as of the true background facts.

In this short review, I cannot even touch on every topic discussed in this book, but almost all readers will find some of the twelve topics it covers of great interest, and I doubt that many readers would find any of the chapters dull. I would strongly recommend the book to anyone interested in the law, politics or history, although it is fair to mention in a magazine with an international readership that, unsurprisingly, it does have a UK bias.

Reviewed by Lord Neuberger of Abbotsbury, formerly the President of the UK Supreme Court

**Histories Written by International Courts and Tribunals: Developing a Responsible History Framework**

Aldo Zammit Borda

_The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me to be a contradiction in terms._

- F.W. Maitland, _Why the History of English Law is Not Written_ (1888)

Denial is a film about the libel suit brought by Holocaust denier David Irving against historian Deborah Lipstadt. In it, she and her legal defence team visit Auschwitz, where she becomes quite upset by the probing questions her barrister asks the historian who is guiding them. Later, she is even more disturbed by her team’s decision not to call her or any Auschwitz survivors to the witness stand. One of the lawyers assisting
in the case explains such decisions by saying, ‘This isn’t about memorialising. It is about forensics.’

That is a pretty good description of the two rather starkly opposed approaches to history writing by international criminal courts and tribunals that Dr Zammit Borda critiques in his comprehensive (and extensively footnoted) monograph. The origin of the forensic approach is often attributed to Hannah Arendt’s *Eichmann in Jerusalem: A Report on the Banality of Evil*. In it she states that ‘[t]he purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes… can only detract from the law’s main business: to weigh the charges against the accused, to render judgment, and to mete out punishment’. This is referred to as strict legality. Examples of this in Anglo-American evidence law would include the relevance requirement and more stringent rules such as those protecting solicitor/client communications and limiting hearsay and character evidence. In other words, rules that risk sacrificing truth to values deemed essential to due process.

At the other end of the spectrum is what Arendt was objecting to in her book on the Eichmann trial, i.e., the introduction of argument and evidence, including even ‘extraneous’ evidence, to increase the trial’s ‘pedagogic value’. In other words, evidence designed to memorialise the dead and teach a lesson to the living, or didactic legality. Dr Zammit Borda, who seeks in his book to mediate between these two approaches, also describes this binary as restrictive vs. expansive legality.

Before going any further, I should disclose that, although I have practised and taught criminal law, and have been involved with Aboriginal title law and litigation, I am a newcomer to international criminal law and procedure. So that should be taken into account in assessing what I have to say in this short review. I should also be clear that I learned a great deal from this clearly written (if somewhat overwritten) and well-organised book. There is far too much here to summarise.

Finding a middle ground between the rather stark alternatives of strict and didactic legality, as Dr Zammit Borda seeks to do, is not only laudable but, it seems to me, unavoidable. No legal process devoted to strict legality is so finely tuned that it can entirely avoid providing context that may occasionally exceed the bounds of relevance. And no process that is more expansive should be allowed to compromise fairness. As Ian Buruma has wisely cautioned in his book *The Wages of Guilt: Memories of War in Germany and Japan*: ‘when the court of law is used for history lessons, then the risk of show trials cannot be far off’. This is especially so when one considers that several studies on the judicial writing of history in war crimes cases have found that, as Dr Zammit Borda says, ‘the lessons of these histories are often lost on the populations at which they are aimed’. The challenge, of course, is to come up with what is promised in the subtitle of this book, i.e., a responsible framework for the judicial writing of history that avoids the extremes.

Before taking on this review I expected my experience with Aboriginal rights and title case law to be more relevant to the task than criminal law, because such cases often take years to try and history looms so large in them. And there are important similarities. These trials are awash in oral history testimony, historical documents and expert reports and testimony, and judges in them are unavoidably writers of history. Moreover, conferences have been held, judicial education courses have been developed and books have been published designed to address the challenges posed by what one collection of essays on the topic has called ‘History in Court’. By way of example: as Douglas Harris has shown, in 1996, reliance on documents that were submitted by an intervenor to the Supreme Court of Canada on appeal, but which had not been introduced at trial, led the court to conclude that British Columbia’s 19 th century Indian reserve commissions had not intended to allocate exclusive fisheries to First Nations—a conclusion that is demonstrably false. (See Dr Harris’s article in J McLaren *et al.*, eds, *Despotic Dominion: Property Rights in British Settler Societies*, commenting on R.
On reflection, however, I think an important difference between these cases and those decided by international criminal courts and tribunals is critical: the former are civil proceedings. The rules of evidence are therefore more flexibly applied, the burden of proof is the civil standard of the preponderance of evidence rather than beyond a reasonable doubt, and no one is marched off to jail at the end. Thus, in the trial of Maurice Papon for aiding and abetting crimes in France during WWII, historian H. Rousso refused to testify, partly because he felt it was wrong in principle to offer his historical opinion when someone’s freedom was at stake: see A. Wiffels, ed, History in Court: Historical Expertise and Methods in a Forensic Context.

In my view, therefore, when international criminal courts write history, as to some degree they must, they will occasionally and inevitably err; but when they do, they should err in favour of strict legality. In the effort to avoid both extremes, however, the framework suggested by Dr Zammit Borda appeals.

Stripped to its essence, this framework involves recognising the value of history writing in such cases; committing to both accuracy and sincerity in the search for truth; recognising the limitations inherent in history written by judges in such cases; and accepting that judges and lawyers do not necessarily have the last word on history.

A counsel of perfection? Almost certainly, in part because at the heart of the matter is a difference between law and history that R.G. Collingwood described three quarters of a century ago in The Idea of History. Unlike judges (and, I might add, book reviewers), ‘the historian is under no obligation to make up his mind within any stated time.’

Reviewed by Hamar Foster QC, Professor Emeritus at the Faculty of Law, University of Victoria, Victoria BC.
Part of the good organisation of the book includes an important three pages of abbreviations and acronyms. Keep it flagged—the sheer number of organisations, treaties, regulations, policies and technologies there listed is considerable.

While having something of an international reach, there is a strong emphasis on the United Kingdom (and even more so on England). For a New Zealand specialist environmental judge and academic, the focus on a very prescriptive and mainly administrative planning system, evokes memories of comparative writings of Professor Sir Malcolm Grant and Professor Richard Macrory in the UK about access to environmental justice, judicial checks and balances, and alternatives to prescriptivity.

In perhaps descending order of extent of discussion, there are descriptions of renewable energy systems and regulatory approaches in other parts of the UK, Europe (with one mention I found of the UK’s recent departure via Brexit), USA, China, India, South East Asian countries, the Middle East and small island nations. The latter content contains heartening discussions about international aid, and notably a brief but powerful mention in part 12.17 that Small Island Developing States (‘SIDS’) often rely heavily on imported (fossil) fuels for their electricity needs, while also sitting on the frontline of climate change, having done the least to cause it. SIDS also have to contend with sea level rise, acidification of oceans and ingress of salinity in freshwater. The plight of these tiny nations must be seen as quite dire.

Lest mention of the strong focus on the UK/England be seen as a criticism (it is not), the depth of analysis of the technologies and the regulatory systems there provides a good platform to guide the reader in deciding what to look for in other jurisdictions. As is said in the preface, the book is replete with ‘resources for a curious reader to explore further’.

The Law of Renewable Energy superbly conveys two powerful messages (among many): namely, that (a) climate change presents urgent problems for the planet, and (b) renewable energy is being enthusiastically pursued to deal with those problems. Honest appraisals are given of the downsides. These include the unreliability or at least uncertainty of performance of wind and solar systems in given climates; the occasional visual unsightliness of wind and solar installations in beautiful landscapes, with consequent related adverse economic impacts; adverse impacts on water quality and associated ecosystems caused by the harnessing of water flow or storage; to name just a few.

The depth of research by the authors is commendable, and one imagines the accuracy levels are also high. One small negative comes with mention of the landmark Netherlands Supreme Court climate change decision in 2015, Urgenda Foundation v The State of the Netherlands, in which the applicant is named as Uganda. (No doubt the curse of the dreaded spell-check).

Throughout the book are found some wonderful surprises. Did you know:

- That in England there is constructive and comprehensive advice available from the authorities about setting up small hydro schemes?
- That the same is available concerning installation of solar panels for domestic use, and the circumstances in which planning permission need not be sought?
- That in the Rhone Valley of France exists the largest project in Europe involving solar panels floating on the surface of a drinking water reservoir?
- Who owns geothermal heat in the UK? (A bit fraught)
- That the UK proposes planning law changes that could help mega-energy storage projects clear a significant current government consent hurdle?

Other interesting content includes:

Discussion of the benefits of crystalline solar cells in photovoltaics;

Discussion of planning for geothermal energy in Scotland, including suggested areas of focus;

The answers to many questions about the true
levels of sustainability of many renewable energy sources and the adverse environmental impacts to be considered; and

Details of a plethora of exciting emerging technologies.

All in all, this is a fascinating glimpse of the state and rate of progress with renewable technologies, and of the encouragement and regulation of them in 2020-21. The book is well organised and set out, making it extremely approachable. The authors have no doubt achieved their aim of encouraging interested readers to be curious and to explore the topic further. They have laid a superb foundation.

Reviewed by Judge Laurie Newhook, Retired Chief Environment Court Judge (New Zealand) and Acting Environment Judge, Environment Court of New Zealand

WHO KILLED COCK ROBIN: BRITISH FOLK SONGS OF CRIME AND PUNISHMENT

Stephen Sedley and Martin Carthy
Reaktion Books Limited and
The English Folk Dance and Song Society,

Neither the authors nor the publisher would have expected this book to be reviewed in the Commonwealth Judicial Journal. There are several excellent reasons for doing so.

Firstly, the names of the authors. Stephen Sedley was for many years a distinguished judge in England & Wales and is a well-known and stimulating writer on legal matters. Martin Carthy may be lesser known to our readers but has a high reputation as a singer, scholar and player in the folk-song world.

Secondly, the subject of the book, British folk songs of crime and punishment, is one that must be of interest to all of us who have made our careers in the courts and have from day to day had to face the grim realities of the crimes that people commit, and of the punishments that the state imposes for those crimes.

Finally, we should not ignore, and we may indulge, the wide musical interests of the members of the editorial board, who were immediately attracted to the topic.

The format of the book is worth mentioning. The sixteen different sections relate to topics familiar to those working in criminal courts in all parts of the world—for example, homicide, arson, sexual assault, abduction and, in respect of punishment, prison and the gallows. There are other sections on areas with perhaps less prominence today. These include poaching, piracy and transportation. Each section starts with a brief, but always interesting, commentary on the nature of the offence and the law's approach to its prosecution.

Each section also includes the text and, helpfully, simple musical notation, for a number of folk songs on the relevant topic. There are some helpful footnotes to explain the history of the songs themselves and some of the more arcane terms that may be used in them. For example, I never knew that to be ‘trepanned’ could mean to be ‘snared or trapped’; neither did I know some terms in this book which may be dialect (often Scottish dialect). The folk songs covered are all said to be ‘British’ (but excluding Welsh, for reasons that are somewhat unclear). Irish songs are omitted entirely. As the authors say, there are so many Irish songs that they would fill a book themselves. Indeed, I think a whole library of books of Irish songs would be needed, and a very good library it would be from my own limited knowledge of the rich variety of the Irish folk tradition.

Although (as noted) the songs in Who Killed Cock Robin are said to be British, the topics covered are certainly universal. It would be interesting to hear how traditional songs in other jurisdictions may compare. A topic for a future CMJA conference perhaps? One example illustrates this. False accusation is not unknown in any of our jurisdictions, with vengeful complainants framing an otherwise innocent man or woman or, perhaps more commonly, using the threat to do so to obtain some financial or other advantage. The song, ‘The Sheffield Apprentice’—sung as he goes to the gallows, wrongfully accused of stealing a gold ring from his wealthy mistress whose advances he’d refused—is a case in
point. His mistress’s reaction to his refusal of her affections (the apprentice was engaged to Sally, ‘her handsome chambermaid’) was somewhat extreme:

...so much perplexed in humour she could not be my wife
She swore she’d find a project to take away my life.

In this she was successful, planting a gold ring in his pocket, leading to his trial. He concludes his song on the way to the gallows:

All you that stand around me my cruel fate to see
Don’t glory in my downfall but rather pity me.
Believe me, I am innocent, I bid this world adieu
Farewell my dearest Sally, I die for love of you.

What will be of real interest to our readers are the succinct, but always stimulating, commentaries on both the topic, and on the songs selected to illustrate the topic. Stephen Sedley explains how the ‘arbitrary cruelty of the law’ meant that the Sheffield Apprentice went to the gallows because the ring he was accused of stealing was worth more than a shilling. If it had been of lesser value, the penalty may have been transportation.

Transportation is not a punishment inflicted today in any of our jurisdictions, but its consequences are part of many of our histories. This will make the section on transportation, with its especially poignant songs, of particular interest to many of our readers. I liked the one that relates the convict’s misery at being parted from his true love and his parents, to a fate of ‘cold chains and cold irons’. He dreams of escape on the wings of an eagle and of returning with great riches, crossing the salt seas without fear. But he starts and ends with this verse:

Here’s adieu to all judges and juries
Justice and Old Bailey too.
Seven years they’ve sent me from my true love
Seven years I’m transported, you know.

In many of the commentaries, Stephen Sedley’s own humanity, and at times anger at the inhumanity of so much of the operation of the criminal law, shines through. For example, he recounts how, until the early 19th century, accused on felony charges (except for treason) had no right to representation by counsel or even, prior to 1898, to give their own evidence. Prior to the 1830s, there was no presumption of innocence, and no requirement of proof beyond reasonable doubt, with informing becoming ‘a profitable racket’. Hard justice indeed.

Another feature of so many songs is the wry, often dark, humour of the singer, mirroring the dark humour that so many lawyers adopt in our professional lives, perhaps to help make some of the human misery we have to confront day by day more tolerable. This book is highly recommended.

As a footnote of my own, I have no doubt that such songs are still being written and indeed have a future. It wasn’t long ago that I tried a case involving an attempt by a local authority to stop a group of people committing what the authority regarded as a great public nuisance. Silly it was, but it was certainly no nuisance and the case was dismissed. A few days later my clerk alerted me to a YouTube clip of a song that had been composed about the ‘lovely day they’d all had in court’, accompanied by an elaborate dance. Doubtless it is still somewhere out there on the web, waiting to be collected and annotated one day.

Reviewed by Hon Keith Hollis, Member of the Editorial Board of the CJJ

MY STORY: JUSTICE IN THE WILDERNESS

Tommy Thomas
Strategic Information and Research Development Centre, 2021, 531 pp.

When Tommy Thomas was appointed the attorney general of Malaysia in mid-2018, the news was received with wide applause among the more progressively minded Malaysians who had but weeks ago voted in a new and supposedly more progressive government after having been ruled for more than half a century by the same party.
By unspoken tradition, the chief legal officer’s post, together with the posts of many other senior offices of state, had been presumed to be the exclusive province of the Malays who formed the majority of Malaysia’s population. Thomas was thus the first non-Malay and non-Muslim to become the country’s attorney general. Indeed, being of Syrian-Christian Indian ancestry, Thomas belonged to an even smaller minority within the minority Indian community in Malaysia.

Thomas’ appointment confirmed that the burgeoning nation was succeeding in nurturing its own judicial and legal talents. It disrupted a pattern dating back to the early days of the nation’s formation when British colonial holdovers in law were permissible (and indeed necessary).

Twenty months later, when Thomas abruptly resigned, the reaction was more subdued than the excitement that greeted his appointment as attorney general. Public attention was then more preoccupied with the imminent change of government. That change would see the return of the previous ruling bunch, this time openly touting itself as a ‘Malay-Muslim’ government, obviously oblivious to the multiracial outlook of contemporary Malaysian society.

Thomas spent the few months following his resignation writing his autobiography, My Story: Justice in the Wilderness. In it he recounts his winding pathway in law which culminated in the attorney general’s chambers. Albeit written from a personal perspective, the book surveys not only the legal landscape of modern Malaysia, but also its wider sociopolitical development.

Thomas was born into a middle-class Indian family in Kuala Lumpur. His parents were civil servants but they dissuaded Thomas from following a similar career path as they both encountered bottlenecks in career advancement for non-meritocratic reasons. He was determined to choose law as his calling from his early teens as he admired lawyers’ oratorical skills.

Thomas’ first substantive taste of the racial tension in Malaysian society also came during his teens, when the nation’s capital descended into racial riots following an election in which the ruling party, while having won, did not achieve its traditional two-third parliamentary majority. In the book, Thomas did not mince his words when he argued that the then deputy prime minister, Abdul Razak, was the main beneficiary of the tragedy. Razak was indeed soon thereafter able to wrest power and become prime minister. Thomas’ line of argument prompted a number of conservative Malays who revered the late Razak to accuse Thomas of sedition shortly after the book’s publication. Even Dr Mahathir Mohamad, who appointed Thomas attorney general though himself being Razak’s protégé, denounced Thomas’ contention. Yet Thomas was apparently unfazed.

Thomas did his law studies in the United Kingdom, where he cemented his liberal worldview. Upon his return to Malaysia, he was engaged by one of the premier law firms in the country, and was also active in the Malaysian Bar, which was often critical of the government’s increasingly draconian policies.

Thomas saw grave legal travesties up close during the Malaysian judicial crisis of 1988. Dr Mahathir, during his first term as prime minister, decided to dismiss the then Lord President (then Malaysia’s highest judicial officer), Salleh Abbas, disregarding the sacrosanct separation of powers. Thomas, by then a prominent lawyer, joined the legal team which represented Salleh in challenging the dismissal. When a panel of six appellate judges granted an injunction against the tribunal deliberating Salleh’s dismissal, those judges were in turn slated for dismissal. Eventually, two of them were indeed dismissed.

These episodes constituted perhaps the most direct and blatant assault to date by Malaysia’s executive against the independence of the country’s judiciary. Thomas was of the opinion that these sorry events not only cowed Malaysia’s judiciary for decades, but also affected the quality of judgments as judicial conduct deteriorated under sometimes-corrupt top judicial leadership. Ordinary Malaysians then became increasingly diffident about seeking fair and just redress from a judiciary replete with accusations of its own improprieties.
Therefore, upon becoming the first attorney general hailing from private practice and having neither a judicial nor a prosecutorial background, Thomas saw the importance of reforming the judiciary to restore public confidence in it. He persuaded Dr Mahathir, by then in his second and much shorter term as prime minister, to end the practice of extending the tenure of top judges. Thomas tried to split the judicial and legal service so that prosecutors and judges could not become too chummy with one another. This effort was to no avail. Thomas was however glad to see the appointment of a first non-Malay, non-Muslim Chief Justice and later a woman successor to the same (also a first in Malaysia).

Thomas also saw the opportunity for law reform during the term of a supposedly reformist government. He tried to push for the abolition of the death penalty, the restoration of judicial review for a large number of governmental decisions, as well as the separation of the role of attorney general as chief legal adviser to the government from that of public prosecutor. But, he was disappointed not to have seen those proposals through. Increasingly, there was a lack of political will within the then new government when it was faced with conservative criticism.

Thomas was also understandably dismayed at the racist and politically motivated attacks against him during his tenure, which he often had to fend off alone, without the overt support of politicians in the supposedly progressive government that had appointed him, a non-politician, in the first place.

In all, Thomas’ book skilfully puts together a colorful picture of how Malaysia’s judicial and legal institutions evolved in modern times, in tandem with the advancement of the nation’s sociopolitical ethos. And he did so with a rare mixture of both in-depth scoops as well as detached, methodical analysis. The book thus provides critical insights as to how the law interacts with and affects the lives of many, something which should reverberate in multicultural, developing nations across the Commonwealth. Justice, for Thomas, must not only be found in but retrieved from the wilderness, to be restored to its rightful and eminent position in nationhood.

Dr Ei Sun Oh, Senior Fellow of the Singapore Institute of International Affairs and Principal Adviser for the Pacific Research Center of Malaysia in Kuala Lumpur

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