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EDITORIAL

RETRIBUTION IN CRIMINAL SENTENCING

We live in a time when, regrettably, political discourse has become increasingly reductive. Political actors and commentators frequently seek to reduce complex subject matter to simple ‘sound bite’ propositions for easy digestion and adoption. Questions of security and crime are high on many political agendas and so it is not unusual to see politicians offering up campaign promises that include ‘tough on crime’ elements—promises which are frequently couched in unnuanced and even inaccurate portrayals of criminal law subject matter.

The calibre of the analysis reflected in discussions, in the political sphere, of criminal sentencing—a subject replete with subtlety and nuance—is often particularly disappointing. Some of the problem stems from muddled terminology.

Consider this example from Prof Jody Armour, published in an article in The Conversation in 2019:

…I’d argue that truly progressive prosecutors recognize that ‘hurt people hurt people’ and refuse to subordinate the values of restoration, rehabilitation and redemption to those of retribution, retaliation and revenge. [emphasis added].

There we see it, in a legal publication by a professor of law at a university in California, no less: the word ‘retribution’, recited in a kind of sinister trill together with the words, ‘retaliation’ and ‘revenge’, as though they are rough equivalents for criminal sentencing purposes. All three are set up together, standing in opposition to the more benign sentencing objectives of ‘restoration, rehabilitation and redemption’. This misuse and misunderstanding of the term ‘retribution’, in the criminal sentencing context, is widespread in everyday speech. Unfortunately, as the above example shows, it is all too common as well within the writings and commentary of some members of the legal profession and legal academe.

In common parlance, retribution is often (if not usually) equated with vengeance. Indeed, the Concise Oxford Dictionary includes the word ‘vengeance’ in its definition of retribution. The equation that is commonly asserted between retribution and vengeance is a plainly unsound equation for legal purposes, but its persistence obscures important concepts that jurists and moral philosophers have in mind when they use the term ‘retribution’ as it is meant in law.

Such confusion presents an obstacle to rational inquiry into the important question of whether the inclusion of retribution as an objective in criminal sentencing can be justified morally, legally, intellectually or otherwise.

When used properly in the criminal sentencing context, ‘retribution’ is in fact a legal and philosophical term of art. The distinction is an important one. The purpose of this editorial is to look closely at what does and does not constitute ‘retribution’ for criminal sentencing purposes.

In Canada at least, the question of whether retribution, properly conceived, is indeed a proper objective of criminal sentencing was answered, in the affirmative, by the Supreme Court of Canada in R v CAM [1996] 1 SCJ No 28. There, Lamer CJC, per curiam, sought to explain what the word ‘retribution’ means in the sentencing context:

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be ‘just and appropriate’ under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. [79]

And, continuing at para 80:

Retribution in a criminal context... represents an objective, reasoned and
measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

In philosophy, the concept of retribution is grounded in part in the notion of a prevailing moral balance. When the moral balance is disturbed or upset, some believe simply that there is a self-justifying moral imperative that the equilibrium be restored. As philosopher John Hospers stated in his text, Human Conduct: Problems of Ethics:

There is an injustice in allowing a person to inflict harm on others without the others (usually through the law) being able to inflict harm on him in return.

But this primitive approach to the righting of the moral balance is just that, primitive. It reflects the ancient nostrum of ‘an eye for an eye, a tooth for a tooth’ and is in no sense productive because (for, among other reasons) it is exclusively retrospective. Under such a regime, Hospers tells us:

Punishment is administered because of a past deed, and the justification given for the punishment is simply the fact that the past deed was committed. It is past-looking, not future-looking; because of, not in order that. If no good consequences were to result from the punishment, it should still be delivered. This view of punishment is apparently deeply rooted in human nature.

The chief objection to this arid ‘eye for an eye’ (or jus talionis) model, from a utilitarian point of view at least, is that it is not actuated by an intention to produce good. We think this is a fair objection. Utilitarian considerations are much in evidence in the modern approach to criminal sentencing, they are not the only factors at play (as is shown by the ongoing debate about the fiction of general deterrence). But the core utilitarian requirement that, if punishment is to be inflicted by the state, the fundamental purpose must be produce good, surely lies behind much of the reasoning that guides the passing of every criminal sentence in a civilised society.

We began by observing that the notion of retribution owes something to the concept of a moral balance, which it plainly does. But the simplistic ‘eye for an eye’ approach, which also strives to set right the moral balance but does no more that strike back at the wrongdoer is, indeed, purely vengeful and an unjustifiable response to the problem of criminal misbehaviour in a just and civilised society. ‘Retribution’ as the term is used in R. v CAM (and in all enlightened discussions of the concept in relation to sentencing) is a far less blunt instrument than the primitive jus talionis.

Retribution in the modern juridical sense can probably be traced back to the philosopher, Immanuel Kant. For him, the concept of a moral balance, upset by criminal misbehaviour and requiring reinstatement, also figures in the analysis. But Kant’s theory of criminal punishment is embedded in a kind of social contract, to which all members of society are necessarily privies. Jeffrey Murphy, in his text Retribution, Justice and Therapy, summarises Kant’s approach as follows:

[Kant] offers a theory of punishment which is based on his general view that political obligation is to be analysed, quasi-contractually, in terms of reciprocity. In order to enjoy the benefits that a legal system makes possible, each man must make certain sacrifices—e.g., the sacrifice of obeying the law even when he does not desire to do so. Each man calls on others to do this, and it is only just or fair that he bear a comparable burden when his turn comes. Now, if the system is to remain just, it is important to guarantee that those who disobey will not gain an unfair advantage over those who obey voluntarily. Criminal punishment thus attempts to maintain the proper balance between benefit and obedience by ensuring that there is no profit in wrongdoing. The criminal himself has no complaint, because he has rationally willed or consented to his own punishment. That
is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as a citizen. He would have chosen such rules for himself in an antecedent position of choice—what John Rawls calls ‘the original position’. And since he derives benefits from them, he owes obedience as a debt to his fellow citizens for their sacrifices in maintaining them. If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing sacrifice in another way—namely by paying the prescribed penalty. [emphasis in original]

Retribution in this Kantian sense—forming part of the social contract that depends, for its viability, upon reciprocity between and among citizens, and between citizens collectively and the state—is what we believe Lamer CJC had in mind when he gave judgment (for the court) in *R v C.AM*.

So how, then, does Kantian retribution truly differ from the mere vengeance with which it is so commonly confused?

Vengeance or the *jus talionis*, as Hospers has noted, is exclusively backward-looking. Vengeful punishment strikes back at the wrongdoer, symmetrically, because he has committed a wrong and for no other reason. There is no real thought given to a moral purpose for striking back, or even to its effect upon the propensity for the wrongdoer to do wrong again. In truth, apart from achieving a ‘fearful symmetry’, there is no justification offered for it. Vengeance is really no more than a simple-minded exercise in Old Testament accounting. Where an entry appears on one side of the ledger, it must be matched by one on the other, full stop. In a 1996 review published in the Times Literary Supplement, Philosopher Terry Eagleton characterised revenge in a rather colourful way:

> [Revenge is] a rigorous computation in which one quantity of blood hopes to erase another. In the surreal arithmetic of getting even, to double is to cancel, to compound is to nullify.

It is thus little wonder that vengeance does not belong in the calculus of criminal sentencing. In the words of Lamer CJC in *R v CAM*:

[emphasis in original]

Kantian retribution, by contrast, is coextensive with the social contract that it both affirms and upholds; the reciprocity that is such an essential element of our conceptions of justice and civilised social intercourse depends upon it. Thus, retribution is not merely backward-looking, aiming only to settle a score. Rather, when it comes into play in sentencing, Kantian retribution openly and visibly affirms and reinforces the value placed by society upon the subject matter of the rule or law that has been transgressed, and thereby (one hopes) strengthens the social contract itself. In this sense, unlike vengeance, Kantian retribution can be justified because, by affirming the fundamental values that underlie the social contract by which we are all bound, it is aimed at ‘producing good’.

The widely accepted precept that punishment must be calibrated to ‘fit the crime’ is an important part of the Kantian notion of retributive justice. A criminal sanction that is disproportionately harsh is manifestly a violation of the social contract because it violates the requirement of reciprocity. Vengeance, which consists of unproductive moral accounting and nothing more, lacks a progressive, values-affirming purpose. Neither is vengeance calibrated to ‘fit the crime’, using the values embodied in the social contract as the applicable scale. Vengeance involves only retaliation and rough symmetry. It is, thus, properly excluded from the decision-making involved in the passing of criminal sentences. Retribution, by contrast—which is measured with care to fit the crime and the moral culpability of the offender and, at the same time, affirms the values transgressed by the wrongdoer—is an important objective of criminal sentencing.

As was noted early on in this editorial, is sometimes observed that criminal justice systems have a ‘credibility problem’ with their citizenries. The issue arises, not infrequently, in the context of sentencing and the way it figures in public and political discourse. Some judges, it is said, are ‘too soft on crime’. Like most such criticisms, this one is often demonstrably
wrong and, occasionally, right. Having clarity in the ways in which these subjects are debated in public can only assist.

There can be no doubt that criminal misbehaviour unleashes vengeful impulses from many within the population. These are understandable but unworthy impulses, and ones to which judges must not yield. If the level of the public discussion of criminal sentencing is raised to reflect some of the nuances and subtleties of the subject in this regard, then perhaps those vengeful impulses might be curtailed. Fostering a better public understanding of the proper role and character of ‘retribution’, as the term is used in law, should assist in the pursuit of that goal.

**Judicial Independence Under Threat**

We continue to follow, with some considerable alarm, the developments unfolding in certain Commonwealth member states which imperil the independence of the judiciaries presiding in those countries. It is a sign of the degree to which matters have deteriorated that there is only space in this editorial to address one of several instances of state actions that, currently, are demonstrably inimical to judicial independence.

In Sri Lanka, elections of local authorities have thus far been effectively thwarted by the refusal of the Secretary of the Treasury to release funds previously allocated by Parliament to finance those elections. A deadline of 3 March 2023 for holding the elections has now passed. An application brought before Sri Lanka’s Supreme Court led to the making of an interim order by that Court requiring the Secretary of the Treasurer to cease withholding the funds. Now the three judges comprising the panel that heard the application and made the interim order have been referred to the Sri Lankan Parliamentary Committee on Ethics and Privileges for investigation—an apparent contravention of the Commonwealth (Latimer House) Principles on the Three Branches of Government, which are integral part of the Commonwealth Charter and to which Sri Lanka has agreed to abide. Those Principles state, in part, that:

> **Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.**

The initiating of investigatory proceedings against the Sri Lankan judges also appears to be a contravention of the UN Basic Principles on the Independence of the Judiciary which state, in part, ‘it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’ and ‘there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision’.

These actions of the Sri Lankan government have drawn formal objections from, among others, the CMJA, the CLA and the CLEA (in the form of a joint statement) and the Bar Council of the UK.

Where judicial independence is not rigorously defended and protected, the rule of law itself is placed in jeopardy. It is to be hoped that the initiatives currently on foot in Sri Lanka that appear to contravene well-established precepts regarding the independence of the judiciary in that country will be rethought and abandoned.

**The CMJA Conference in Cardiff**

The countdown is on; conference time in Cardiff is fast approaching. After a false start in 2020 owing to the pandemic, the enthusiasm of our Welsh colleagues to welcome their CMJA friends and delegates to their fair city is palpable. That enthusiasm is matched only by the enthusiasm that those planning to attend feel about travelling to Cardiff and participating in the CMJA conference there. It is certainly time now to register now to avoid disappointment. The conference takes place from 10-14 September. The 2023 conference theme is ‘Open Justice Today’.

**What Awaits You in This Issue**

A good deal of disparate ground is covered in the substantive articles assembled for this issue of the CJJ.

- Karl Laird of St Edmund’s Hall, Oxford, is taking forward the journal’s examination of Deferred Prosecution Agreements (‘DPAs’). Following on from an
examination of the Canadian experience, in his two-part article Mr Laird will survey how DPAs operate in England and Wales. The Part I article in the present issue analyses how DPAs operate in practice with reference to the relevant legislation;

• Foong Cheng Leong and Yew Pui Yi of the Malaysian Bar describe the steps taken in that jurisdiction to adjust the operations of the court system to the challenges posed by the recent COVID-19 pandemic and the legacy that has been left by the process of adaptation;

• Australian psychologist and lawyer Carly Schrever is one of a very few to conduct empirical research into the phenomena of judicial stress and burnout. Her findings provide a solid scientific foundation, and some helpful context, as we continue our exploration of judicial wellbeing and the steps being taken in Commonwealth jurisdictions to foster and facilitate it;

• Prof Neil Parpworth of de Mountfort University’s School of Law has contributed an article on separation of powers in South Africa and the role the Constitutional Court plays in overseeing that important dimension of the country’s democracy;

• has contributed an article that is concerned with the practice of witchcraft in Papua New Guinea, as seen through the broader lens of reconciling modern approaches to human rights and the criminalisation of harmful conduct with ancient customary practices; and

• Justice Dallas Miller of the Alberta Court of King’s Bench has written on identification evidence in the social media age, as seen in the context of the prevention of wrongful convictions in Canada.

Law Reports: An Update

We told you in the editorial for the December 2022 issue that we are revising the way we present the content in our Law Reports section. The process of arriving at a new format—one that is more compact but still provides our readers with the knowledge they need in order to know whether they wish to follow up and read decisions to which they may not otherwise have been alerted—is taking longer than anticipated. However, we expect to return to publishing our Law Reports section with its content in a revised format in December 2023. We thank you for your patience.

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.
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 sent by e-mail, as Word document attachments, are particularly encouraged. These should be sent to CJJEditor@shaw.ca with a copy to info@cmja.org. Alternatively, manuscripts may be sent by post to CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, UK, marked to the attention of the editor.

INFORMATION FOR AUTHORS

1. Manuscripts should 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. Hyperlinks should not be embedded in manuscripts submitted for publication.

7. Manuscripts should be purged of all ‘track changes’ notations before being submitted.

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

9. 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.

10. By submitting an article or other contribution for publication, you confirm that the piece is original and that 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.

Please note that the CMJA retains the copyright of any articles once these are published in the Journal but in the interests of the widest dissemination, the CMJA may authorise publication of the articles in other appropriate publications.
OBITUARIES

SHERIFF DOUGLAS ALLAN (RETD), OBE

Few CMJA members have made as important a contribution to the work of the Association in the 21st century as Sheriff Douglas Allan (Retd), OBE, who died in Edinburgh, Scotland, on 21 April 2023.

Douglas Allan was an active supporter and participant in the affairs of the CMJA, both while serving as a member of the Scottish judiciary and during his retirement. He was appointed to the Scottish bench, as a sheriff, in 1988, following a distinguished career in the Scottish prosecution service (the Crown Office and Procurator Fiscal Service). He was awarded the Order of the British Empire in 2006.

I first corresponded with Douglas Allan in the run up to the CMJA Triennial Conference in Edinburgh in 2000. At the time, as President of the Sheriffs’ Association, he was on the Local Organising Committee and was also in charge of the home hosting of delegates attending that Conference. This was an onerous and difficult task. Indeed, we both concurred afterward that this combination of responsibilities was too difficult for one person to manage.

Douglas was appointed as a CMJA Council member in 2000 and became Regional Vice-President for the Atlantic and Mediterranean Region in 2003, a position he held until 2009. His advice on CMJA constitutional issues and voting rights and responsibilities was invaluable, both to the region and to the Council in general.

In 2006, Douglas took up the chairmanship of the CMJA Steering Committee responsible for the organisation of the CMJA conferences. In the words of former President, Hon. Justice Charles Mkandawire, he became an expert, travelling with me and sometimes with Helen, his wife, to different countries to undertake fact-finding missions for the conferences. He participated in these visits with goodwill and good humour, as was evidenced when we were together persuaded to participate in the Opening of the Legal Year celebrations during our visit to Papua New Guinea. Douglas not only provided the CMJA Secretariat and Local Organising Committee with support during these fact-finding visits but also dealing with issues that arose from the Local Organising Committee meetings or during the conferences themselves.

But Douglas’s role at the CMJA was much wider. He held office (as noted) as a member of Council, and he also served as a member of the Executive Committee. He provided sound and wise advice on issues relating to judicial independence and the rule of law when they arose across the Commonwealth.

In 2020 Douglas handed over chairman’s reins to Sheriff Andrew Normand (Rtd). However, Douglas continued to be active on various committees and continued to provide valued support and advice throughout his long illness.

In 2022, following a recommendation from the Council, Douglas was made an Hon. Life Member of the CMJA. The distinction was conferred during the General Assembly of the CMJA and it recognised his longstanding contribution to the Association, including its educational conferences, and its efforts to promote the rule of law and the independence of the judiciary in Commonwealth member states. Also, in 2022, the Council announced the renaming of the CMJA’s Training Development Fund as the ‘Douglas Allan Training Development Fund’ in Douglas’s honour.
Council members have described Douglas as being calm, generous, level-headed, supportive and kind-hearted. He has also been referred to as a ‘happy smiler’. Former President, the Hon. Justice Charles Mkandawire, indicated that Douglas ‘was the fountain of wisdom. Whenever we reached crisis levels, I always looked forward to hearing from him.’

By Dr Karen Brewer, CMJA Secretary General

LIVES REMEMBERED

Justice Wilson Masalu Musene (Rtd)

Justice Wilson Musene (Rtd.), formerly of the Ugandan High Court, was buried on 16 April 2023. He served on the CMJA Council from 2000-2003 and from 2021-2015. He also held office as Regional Vice-President from 2003-2006. He was a great supporter of the CMJA, even in retirement.

Justice Musene was one of the longest serving past presidents of the Ugandan Judicial Officers Association (the ‘UJOA’). He commenced his judicial career as a Magistrate Grade One and spent his entire career in the judiciary.

As President of UJOA, Justice Musene he filed a constitutional petition which saw salaries of judicial officers ring-fenced from taxation to date: see Attorney General of the Republic of Uganda v Masalu Musene Wilson & Ors [2008] UGSC 13 (14 October 2008). This judgment is widely referenced in civil, tax and constitutional matters.

As many as 231 of Justice Musene’s written decisions have been published online via the ULII.org portal and his lower court judgments were seldom overturned.

By Dr Karen Brewer, CMJA Secretary General

Stanley Hackwell JP

We were saddened to hear that former Council Member Stan Hackwell JP of New Zealand passed away in November 2022 after a life of service as a Justice of the Peace. He completed 49 years in the role and only retired from active service in September 2022 at the age of 89. He served as Registrar of the Royal Federation of New Zealand Justices’ Associations from 1993-1998, becoming President of the Federation in 1998. As President, he was involved in many discussions on the role of JPs in New Zealand, and their professional skills and training requirements. Stanley was instrumental in the computerisation of the Registrar’s office in Wellington. He was elected to the CMJA Council in 1991 and served until 1994. Even after his retirement he kept up his interest in the activities of the CMJA and maintained his links with the Association until he passed away. Stanley greatly assisted his own Association in Canterbury, becoming President of the Association twice.
Abstract: This article is the first of two which will analyse how deferred prosecution agreements operate in England and Wales. Part I focuses on how DPAs operate in practice with reference to the relevant legislation, while Part II will examine the case law of the courts of England and Wales in which DPAs have been approved.

Keywords: Deferred prosecution agreements, or DPAs – Crime and Courts Act – comparisons and contrasts between DPA regimes in the UK and the USA – fairness – the ‘interests of justice’ test – procedure – incentives for entering into a DPA – transparency

The Role Played by the Court

Deferred prosecution agreements (‘DPAs’) were introduced into English and Welsh law by section 45 of the Crime and Courts Act 2013, which came into force on 24 February 2014. Section 45 introduces DPAs into English law with the following words: ‘Schedule 17 makes provision about deferred prosecution agreements.

What makes the DPA regime as it exists in English law distinct from that of other jurisdictions, such as the United States, is the role played by the Crown Court. Paragraph 7 of Schedule 17 requires the prosecutor, before the terms of the DPA are agreed, to apply to the Crown Court for a declaration that entering into the DPA is ‘likely to be’ in the interests of justice, and that the proposed terms are fair, reasonable, and proportionate. The Act requires the court to give reasons for the decision on whether or not to make such a declaration. These reasons, and the hearing of the application itself, are private. Once the terms are agreed, the prosecutor must make a second application to the court for a declaration that the DPA is in the interests of justice and that the terms are fair, reasonable, and proportionate. This application is only permitted if the court has made a declaration at the preliminary stage. Once the court makes the final declaration, the DPA will come into force. This application is also heard in private. However, if the court grants the final application, the declaration, and the reasons for it, must be given in open court.

The role played by the court is fundamental to the DPA regime as it operates in England and Wales. The court is not confined merely to reviewing the agreement reached between the prosecutor and the company to ensure, for example, that the correct procedure was followed. The court must reach its own conclusion on whether entering into a DPA would be in the interests of justice and whether its terms are fair, reasonable, and proportionate. The Government stated in its response to the consultation which preceded the introduction of DPAs that:

[I]t is important to be clear that the proposed role of the judge in the DPA process is to provide independent scrutiny of the process in order to instil certainty and public confidence to ensure the proposed terms suitable address the alleged wrongdoing. We intend to build this judicial scrutiny into the entirety of the DPA process.

In terms of how the court fulfils its role, there are no criteria in the legislation which the court must apply when it is considering whether a DPA ‘is likely to be in the interests of justice’. Some respondents to the Consultation Paper published by the Government suggested that this test was too vague and suggested that more guidance should be provided. The Government decided against this, however, on the basis that the ‘interests of justice’ test was one with which the Crown Court would be very familiar. Whilst it is true that the ‘interests of justice’ is a very familiar concept, the DPA regime requires the judge to apply it in unfamiliar circumstances and in ways which
are novel. The legislation makes clear that the judge should not merely act as a rubber stamp. So, in considering where the interests of justice lie, the judge will need to engage substantively with the case and understand, for example, the circumstances which led to the company’s offending coming to light. The judge may also want to know what difficulties there might be in obtaining admissible evidence, how easy it would be to obtain statements from witnesses (some of whom might be abroad), how long an investigation and prosecution of the company would likely take (and how much it might cost), and the financial consequences for the company were it to be convicted of a criminal offence. It is unheard of for a judge in criminal proceedings to enter the arena in this fashion, but that is what the legislation requires.

The DPA regime deviates from orthodox criminal proceedings in other ways. For example, by the time the judge comes to consider the application at the preliminary hearing, the proceedings will not be adversarial, as the defence and prosecution will be in agreement that the matter should be resolved by a DPA. In order to determine whether a DPA would be in the interests of justice, the judge may have to take a much more inquisitorial role than would ordinarily be appropriate in criminal proceedings. This is not a role a criminal judge would be expected to perform outside of the DPA context.

The judge’s decision on these matters would appear to be final. There is no express provision within the Crime and Courts Act 2013 for challenging or appealing the judge’s decision. Therefore, the only route by which to challenge decisions made by a judge in respect of DPAs is to commence judicial review proceedings.

**The DPA Process**

Underpinning the DPA process is the concept of voluntary cooperation between the company and the prosecutor. In exchange for avoiding the cost and reputational damage of a criminal prosecution, the company volunteers to comply with a range of potentially very onerous conditions to penalise the offending behaviour. The offences in respect of which a DPA may be entered are set out in Part 2 to Schedule 17 of the Crime and Courts Act 2013.

It is important to appreciate that in England and Wales the use of DPAs is governed not only by legislation, but also by the *Deferred Prosecution Agreements – Code of Practice* (Serious Fraud Office 2014) (the ‘DPA Code’). This provides guidance on the principles to be applied in determining whether a DPA is appropriate. A prosecutor must take into account the *DPA Code* when exercising functions under Schedule 17. The failure to do so could result in judicial review proceedings being commenced against the prosecutor.

A DPA may be agreed between ‘P’ (a person), defined by paragraph 4 as ‘a body corporate, a partnership, or an unincorporated association, but...not...an individual’ and a prosecutor (currently the Director of Public Prosecutions or the Director of the Serious Fraud Office). The agreement may be entered into in the name of the partnership or unincorporated association and not in the name of the partners or members. The money payable under the agreement must be paid from the funds of the partnership or unincorporated association.

A company cannot, of course, be compelled to negotiate a DPA. If a DPA is entered into, however, the company agrees to comply with the requirements imposed and the prosecutor agrees that, upon approval of the DPA by the court, proceedings against the defendant will be suspended. The suspension can only be lifted if the requirements of the DPA are breached. If there is no breach, then once the DPA has run its course the prosecutor must discontinue the proceedings and fresh criminal proceedings cannot be instituted against the defendant for the alleged offence.

A DPA must contain a statement of facts relating to the alleged offence, which may include admissions made by the defendant. The Act does not, however, specify that the facts must constitute an admission. On the contrary, the phrase ‘which may include admissions made by [the defendant]’ suggests that such admissions are not a necessary element of the facts. This is similar to the position in the United States, where it is commonplace for ‘neither admit nor deny’ clauses to be included in statements of facts. This is a practice which has been deprecated by, amongst others, Judge Rakoff (see *SEC v Vitesse Semiconductor Corp* 10 Civ 9239, SDNY Mar 21, 2011). The DPA
Code explicitly states that a formal admission of guilt will not be required by the prosecution, although it will need to admit ‘the contents and meaning of key documents referred to within the statement’. The position in England therefore appears to be similar to the one which pertains in the United States.

In addition to a statement of facts, the DPA will contain an expiry date (i.e., the date on which the agreement ceases to have effect) and the requirements imposed on the company. Schedule 17 provides a non-exhaustive list of the requirements that may be imposed including payment of a fine or compensation, payments to third parties including charities, and disgorgement of profits. In addition to these financial elements, the person may be required to implement a compliance programme and to cooperate in any investigation related to the alleged offence. In relation to the fine, the Act provides that it must be ‘broadly comparable’ to the fine that a court would have imposed following a guilty plea.

The DPA Code requires that the company should have sufficient information to ‘play an informed part in the negotiations’. Furthermore, the negotiations must be ‘fair’. The DPA Code places particular emphasis on ensuring that the prosecution does not overplay its hand. For example, the company must not be misled as to the strength of the prosecution’s case. This answers the concern voiced by some respondents to the Draft DPA Code that companies might be wrongly induced to enter into a DPA to avoid reputational risks of long criminal investigations. According to the DPA Code, material which ‘might’ undermine the factual basis of conclusions drawn by the company from material disclosed by it ought to be disclosed. Furthermore, the prosecutor must also continue to pursue reasonable lines of enquiry.

THE ATTRACTION OF A DPA

What would incentivise a company to comply with potentially very onerous requirements? In its response to the consultation on DPAs, the Government considered that the discount in the financial penalty was not the only incentive for an organisation to enter into the agreement. The most significant incentive and benefit was said to be the avoidance of prosecution and potential criminal conviction. This is why the Government proposed that the discount should not exceed the one-third available for a guilty plea.

There is another, potentially very important consideration, relating to the Public Contracts Regulations 2006. These provide that any company convicted of corruption or fraud must be excluded from participating in public contracts. For companies who rely on this sort of work, such as defence contractors, a conviction has the potential to devastate the economic viability of the company and may push it into insolvency. A DPA may be an attractive way of avoiding such a disastrous outcome.

It is important to appreciate that, if the prosecutor finds after the expiration of the DPA that the information provided by the company was incomplete, inaccurate, or misleading, and that the company new or ought to have known this was the case, the prohibition on subsequently commencing fresh proceedings under paragraph 11(2) of Schedule 17 is inapplicable. Unlike the other aspects of the DPA regime, this is not subject to the control of the Crown Court. The prosecutor, at face value at least, has extremely broad discretion in respect of this aspect of the regime.

TRANSPARENCY

The Government was alive to the criticisms which are often levelled at the DPA regime as it exists in the United States, namely that it lacks transparency. Accordingly, the introduction to the Government’s response to the consultation on DPAs made clear that it regarded public scrutiny of the process as important. This is hardly surprising, as it would be corrosive of public confidence in the criminal justice system if there was the perception that DPAs enabled companies to avoid the scrutiny inherent in a criminal trial and buy their way out of trouble. However, a balance does need to be struck between permitting the parties to engage with the court in as full and as frank a manner as possible and ensuring that there is no perception of deals being struck in private. Although the preliminary hearing must be heard in private, which seems relatively uncontroversial, once the DPA has been agreed, and the court has made the declarations, the prosecutor must
publish the DPA, the court's declaration and its reasons, as well as the fact of and reasons for the declaration. This would appear to strike the appropriate balance.

**CONCLUSION**

For a company eager to avoid a criminal prosecution, a DPA is likely to be a very attractive prospect indeed. It is also likely to be attractive for prosecuting agencies who are expected to do more on ever-diminishing budgets given the huge cost inherent in prosecuting very well-resourced companies. The DPA regime imposes a significant burden upon judges and, for the reasons given above, requires them to adopt an approach which is likely to be very counterintuitive. Part II of this article will examine how judges in England and Wales have discharged that burden.

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WAYS IN WHICH THE MALAYSIAN COURT SYSTEM HAS ADAPTED TO THE CHALLENGES POSED BY THE COVID-19 PANDEMIC

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Abstract: It has been more than two years since the appearance of the COVID-19 pandemic which forced all physical operations, including those of the courts, to a halt in Malaysia. This article provides an insight into pre-COVID judicial practices, the state of the country during lockdown, and coping measures during and after the height of COVID-19. As the world had to resort to technological innovations to ensure the continuity of access to justice, Malaysia began with a head start given its numerous efforts to integrate technology into the judicial system through existing services such as e-Filing and e-Review. As adoption of technology became necessary, new regulations were needed. Malaysian laws were amended, specifically the Courts of Judicature Act 1964 and Subordinate Courts Act 1948, to, among others, introduce the concept of ‘remote communication technology’ in conducting proceedings. This, however, is subject to certain conditions and the discretion of the judges to ensure that holding hearings virtually will serve the interest of justice. Order 33A rule 4 of the Rules of Court 2012 governs witnesses in the remote medium, and Practice Direction 1 of 2021: Management of Civil Case Proceedings Conducted by Long-Distance Communications Technology for all Courts in Malaysia sets out a guideline for courts in considering whether to conduct civil matters by way of remote communication technology. In recent times, courts are shown to have taken a more favourable attitude towards remote practice. Despite the convenience provided, the introduction of such new systems raises new issues for the courts which all governments should work on for new solutions together.

Keywords: COVID-19 pandemic – effects on court processes in Malaysia – innovation in the delivery of court services – law amendments to allow access to justice via remote communication – court administration – e-Justice – e-Courts

PRE-COVID PRACTICE

Efforts to introduce virtual sittings in matters presided over by the judiciary in Malaysia can be seen as early as 2006. Virtual court attendance was first reported in the case of Borneo United Sawmills Sdn Bhd v. Mui Continental Insurance Berhad [2006] 1 LNS 372. The Court in this case had set out the practice of electronic case management by way of e-mail which was unheard of at that time. However, this practice was confined to the courts in the states of Sabah and Sarawak and was not adopted in Peninsular Malaysia. Practitioners in Peninsular Malaysia were still required to physically file court documents and attend cases physically.

The electronic filing system was introduced in the year 2011. It enabled practitioners and litigants alike to file their documents and cause papers remotely through an online repository, removing the need to deliver hard-copy versions of the same. The practice started with the civil courts in Kuala Lumpur and gradually moved to cover the whole of Peninsular Malaysia. This service was spearheaded by former Chief Justice Tun Dato’ Seri Zaki Tun Azmi whose goal was to curb the lingering problem of case backlogs and missing physical files. Time taken for disposal of cases was substantially reduced as the system provides the advantage of recalling any document filed virtually. The backup feature with which the system is equipped prevents instances of lost files, be they due to genuine misplacement or actions based on malicious intentions; at the same time this prevents postponements due to the inability to locate certain files.

To ensure that everyone plays their part in the success of the system’s usage, Order 63A Rule 72 of the Rules of Court 2012 was introduced to make electronic filing of documents using the above-described system compulsory. In
Nur Ibrahim Masilami & Anor v Joseph Lopez [2013] CLJ 1202, the High Court held that physical filing of a document is not equivalent to the official (electronic) filing of a document, as physical files are only for the judge’s own reference, or as an alternative during occasions where the electronic case management system malfunctions. To assist members of the Bar, the court introduced the Service Bureau to help those who do not have e-filing facilities in place to e-file their documents. This service was later discontinued and remaining members who did not have such facilities have had to move forward with the times.

The court also introduced e-Review as a new function in the electronic filing system. This allows parties to conduct their case management virtually through the exchange of written messages for preliminary, interlocutory or procedural matters. E-review lessens the need for physical court attendances. Messages received will be visible to all parties and the court; they will be saved in the e-court system as ‘Notes of Proceeding’.

As has been noted, video conferencing was a rarity prior to the advent of the COVID-19 pandemic. There was no provision governing the testimony of witnesses by way of video conferencing. Online trials did not exist. Counsel and witnesses were required to attend court physically, even if they were outside Malaysia. Nevertheless, the courts slowly began accepting testimony by way of video conferencing as Internet speed and video conferencing software were improving. This can be seen in the case of Merck Sharp & Dohme Corp & Anor v. Hovid Bhd [2017] 1 LNS 53 where Justice Wong held that foreign expert witnesses could testify by way of Skype as both litigants had sensibly agreed to it. His Lordship added that with this approach, foreign witnesses were spared having to spend time and effort and incur expenses to travel to Malaysia solely to testify in court.

**The Lockdown**

Like the rest of the world, Malaysia was put into lockdown after the first appearance of COVID-19. In the Malaysian case, this was done in three phases:

**First Phase: The Movement Control Order**

In March 2020, travelling within and without the country was prohibited in Malaysia. All businesses except for those considered ‘essential services’ were not allowed to operate. Since the court system was not listed as an ‘essential service’, the judiciary was only able to exercise its role as an ‘essential service’ to the extent of hearing remand applications before the Magistrates’ Court for the temporary detention of suspects for police investigation purposes. Trials and hearings were postponed to future dates as many practitioners could not travel to access their files.

**Second Phase: The Conditional Movement Control Order**

In May 2020, restrictions were slightly relaxed. People were permitted to return to work, subject to compliance with strict operating procedures. However, court buildings remained closed to the general public.

**Third Phase: The Recovery Movement Control Order**

During the third phase, national operations and almost all businesses were allowed to resume activities but were still subject to strict adherence to pandemic management procedures. Starting from 1 July 2020, the courts restored full operations, but nationwide COVID-19 restrictions still remained.

**Steps Taken to Enable Access to Justice During the Pandemic**

As has been noted, the COVID-19 lockdown caused cases to pile up in court, as they were automatically postponed. When restrictions started to ease, the judiciary took measures to enable access to justice so that cases could start moving again. One of those measures was a move to have all civil cases heard virtually. The transition to virtual sittings was achieved very swiftly and smoothly as the court and many members of the Bar have all the facilities in place needed to enable them to hold civil trials virtually. They merely needed a virtual space and relevant legal provisions to conduct matters virtually.
However, the transition to virtual sittings was met with some resistance by some lawyers, notably senior lawyers. The Chief Justice commented that such lawyers preferred to have their matters postponed until physical attendance was allowed again. Due to this, many cases were pushed back until the fourth quarter of 2021. This went against the judiciary’s self-imposed requirement for cases to be completed within nine months. The courts were initially agreeable to such adjournments, but soon mandated all civil cases to be heard virtually.

**REMOTE COMMUNICATIONS TO PREVENT THE DELAY OF JUSTICE**

To have a more structured regulatory regime governing remote hearings, the Courts of Judicature Act 1964 and Subordinate Courts Act 1948 were amended by Parliament to, among others things, introduce the concept of ‘remote communication technology’ in court proceedings. This is defined as ‘a live video link, a live television link or any other electronic means of communication’. This definition includes the current e-Review system and third-party video conferencing platforms such as Zoom, Skype and Microsoft Teams. Counsel are free to share their computer screens with the parties. Recordings of the online proceedings are also shared with the participants after a matter has been heard. In certain courts, recordings of such proceedings are shared with practitioners. However, there have not been any instances yet where cases were conducted through instant messaging applications such as WhatsApp.

Section 15A of the Courts of Judicature Act enabled the use of remote communication technology in the High Court and appellate courts.

The Subordinate Courts Act 1948, which is applicable to the subordinate courts, was also amended to introduce a similar amendment, *i.e.*, section 101B, to allow the same for the Sessions Court and Magistrates’ Court.

Unlike the past where online hearings could only be conducted with the consent of all parties, it is now up to the court to decide if it is in the ‘interest of justice’ for a matter to be heard through remote communication technology. This provision applies to trials and even criminal proceedings. However, the use of online trials for criminal proceedings is rare because criminal cases involve the liberty of the subject and streamlining initiatives are therefore treated more warily. The judiciary still generally considers the physical presence of the accused at his or her trial to be necessary. As such, for the time being, the judiciary discourages online hearings for criminal matters.

The Rules of Court 2012, which govern civil proceedings in Malaysia, were also amended to introduce Order 33A. The provisions are similar to those found in section 28 of the Singapore COVID-19 (Temporary Measures) Act 2020.

Order 33A Rule 4 of the Rules of Court 2012 provides that the court may direct certain persons to attend or give evidence in court through remote communication technology. Such an application may be made by way of a notice of application supported by an affidavit in support.

Order 33A Rule 3 of the Rules of Court 2012 provides that:

> [A]ny person, witness or prisoner as witness or party to any proceedings is allowed to attend the court and/or give evidence in those proceedings by means of remote communication technology. In cases of a person attending, a witness giving evidence and a prisoner as a witness or a party, attending or giving evidence, the Court or Registrar shall be satisfied that sufficient administrative and technical facilities and arrangements are made.

Under both of these provisions (Rules 3 and 4), the court must be satisfied that the following conditions are met:

a. remote appearances must be at a specified location at a specified time using approved remote communication technology; and

b. sufficient administrative and technical facilities and arrangements are available at the place from which the person or witness is to make an appearance or to give evidence.
As for attendances or through remote communication technology in criminal proceedings, the court must be satisfied (in addition to the above) that:

a. the person so attending is a witness or a party; and

b. the parties and the Officer in Charge referred to under the Prison Act 1995 (Act 537) consent to the use of the remote communication technology.

Order 33A of the Rules of Court 2012 does not stipulate the particular requirements to be satisfied by an applicant seeking to have a witness testify by way of remote communication technology. The Order merely provides that the person shall use the remote communication technology and that sufficient administrative and technical facilities and arrangements are to be made at the place where the person or witness is to appear or to give evidence.

As many countries had closed their borders during the COVID-19 pandemic, many litigants wished to utilise remote technology communication to allow their witnesses to testify virtually. Therefore, the court had to formulate guidelines on when to allow witnesses to testify virtually or not.

In this regard, paragraph 5 of the Practice Direction 1 of 2021: Management of Civil Case Proceedings Conducted by Long-Distance Communications Technology for all Courts in Malaysia (‘Practice Direction 1’) sets out various factors for the court to consider when deciding whether to permit a civil matter to be conducted by way of remote communication technology. Paraphrasing and condensing Practice Direction 1, those considerations include:

a. the type and complexity of proceedings (running from case management hearings through to trials and appearances to receive a decision);

b. the duration of the proceedings;

c. the urgency of the proceedings;

d. any prescribed time limits set out in legislation, practice directions and the like;

e. the anticipated time to completion of the proceeding;

f. the anticipated time required to comply with court-ordered deadlines for document discovery, preparation of cross-indexed document briefs and the like;

g. the potential for adjournments and the possible prejudicial effects of the same;

h. the health and ability of witnesses to attend proceedings in person;

i. the question of whether any party to proceedings are represented by counsel;

j. the quality of available technological supports, including computer hardware and software, internet access speed, and the like;

k. any mobility restrictions affecting parties and witnesses involved in proceedings;

l. preservation of the parties’ rights to a fair trial;

m. any objections raised by any parties to proceeding by way of remote communications technology; and

n. such other considerations as the court thinks are right and proper.

After considering the above factors, the court will direct that the proceedings be conducted through:

a. remote communication technology;

b. physical (in-person) means; or

c. hybrid methods that combine the use of long-distance communication technology with physical (in-person) means.

Courts will determine the digital platform and designated location for remote proceedings and will issue any other relevant instructions.

In respect of the question of whether witnesses will testify through remote communication technology, the court may take into account further factors, some of which are listed below...
The ability to follow as closely as possible the usual rules that govern evidence given in proceedings in open court;

b. whether any party will be prejudiced if evidence is given through remote communication technology;

c. the level of control by the court over witnesses who are in a ‘remote location’ as compared to the control it has over witnesses who are physically present in court; and

d. whether the witness is in the country or abroad and, where abroad, the reason or reasons given for the witness’s inability to give evidence in Malaysia.

The use of supervising solicitors has also expanded to include monitoring of witnesses when they testify remotely. This is because there is a danger that a witness may (for example) be tampered with, may refer to documents beyond what is filed in court or may obtain answers from third parties when giving evidence through remote communication technology. Having a supervising solicitor present is one of the methods for reducing or even eliminating such risks.

POST LOCKDOWN

By January 2022, nationwide COVID-19 restrictions had been lifted in Malaysia. Notwithstanding the easing of restrictions, many lockdown have practices remained in place and have become entrenched into Malaysian practice. Many courts are still operating virtually, and trials are still being conducted virtually. The civil appellate courts by January 2022 were fully virtual and paperless.

Based on recent reported cases, the courts generally favour proceedings to be conducted by way of remote communication technology. In Pacific & Orient Insurance Co Berhad v Mohammad Hafizi Bahari & Anor, [2021] 1 LNS 647, Justice Liza Chan rejected the defendant’s argument that ‘the usage of remote communication technology in a trial where the demeanours of the witnesses are of utmost importance to be observed by the trial judge is limited’. Her Ladyship held that ‘[a] Zoom trial will still allow for observation’. In ING Bank N.V. v Anish Resources Sdn Bhd, [2022] 1 LNS 647—in deciding whether to grant a stay of proceedings on the ground of forum non conveniens—Justice Leong Wai Hong held that traditional factors favouring the grant of a stay of proceedings such as ‘convenience or expense and availability of witnesses’ are less compelling in view of the rules and facilities that enable courts to hear cases through remote communication technology.

In practice, it must be acknowledged that whether a court will allow a matter to be conducted by way of remote communication technology does largely depend on how the individual judge conducts his or her proceedings generally. There are judges who conduct their matters solely or largely by way of remote communication technology and others who do not. Hence, an order for a matter to be conducted by way of remote communication technology will normally be granted if that is the judge’s general preference. Another option is available, that being that a party may request that the trial be conducted in a hybrid manner, namely, with physical appearances of some counsel and witnesses in courtrooms combined with others appearing via remote communication technology.

Remote communication technology is now also a factor to be considered when deciding whether to transfer proceedings to another court at another location. In Liziz Plantation v. Liew Ah Yong [2020] 10 CLJ 94, Justice Su Tiang Joo held that with the experience gained in using remote communication technology in dealing with the Movement Control Order, Conditional Movement Control Order and the Recovery Movement Control Order and which were necessitated by the COVID-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court have become very much less important. The need for counsel, litigants and witnesses to physically travel to court for the hearing of their matters is thus diminishing. Hearings and meetings can now be done and, by reason of the COVID-19 pandemic, are encouraged to be done electronically via a variety of internet platforms such as Zoom or Skype; other platforms are available as well, including Google Duo, Google Hangouts, Microsoft Teams and
Adobe Connect. Given all of the above, the High Court held in *Lziz Plantation* that it would not be the interest of justice to allow the transfer application that was before it.

In an intellectual property dispute case styled *Muhammad Hafidz Bin Mohd Dusuki v. Hassan Bin Zulkifli* [2020] 1 LNS 1843, Justice Radzi Harun dismissed an application to transfer the proceeding to the Kota Bahru High Court, notwithstanding that, among others, one of the witnesses was of old age and would have had difficulty travelling due to the COVID-19 pandemic. His Lordship held that the court is cloaked with sufficient powers to allow flexibility in dealing with such witnesses by resorting to technology for his evidence taking.

As virtual proceedings are here to stay, the judiciary and the Malaysian Bar have jointly worked on a model protocol for civil matters. This model protocol was prepared to facilitate the conduct of trials, appeals and other hearings using remote communications technology. It covers practical aspects such as standards governing electronic document bundles, responsibilities of parties when calling witnesses and appointing supervising solicitors, steps to be taken before and during trial, and standards of transcribing and submitting audio or video recordings. As of the date of writing, the model protocol is pending final touches to be given to it by the judiciary and will be launched by the judiciary in due course.

**CONCLUDING OBSERVATIONS AND RECENT DEVELOPMENTS**

With the lockdown having been lifted, the Malaysian economy restarted its engines and many new cases, which were put on hold due to the pandemic, were filed in court. Newer and newer issues are coming up for the court to decide when dealing with virtual settings. A few examples of recent developments follow.

In *Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato’ Tajudin Bin Ramli*, [2022] 4 CLJ 381, the High Court was informed that a short video clip of its online court trial was being disseminated via WhatsApp. The video clip displayed four frames of three counsel and the High Court Judge. It was doctored to falsely portray that the learned judge had admonished one particular counsel in a loud voice during the trial for asking a question on contractual interpretation, and asking the court interpreter to record the time of the exchange so that he could lodge a complaint against that counsel to the Disciplinary Board. However, in actuality the learned Judge had addressed his admonition to a different counsel (whose video frame was deliberately omitted from the video clip). The learned judge was of the view that any reasonable person who had only watched the doctored video clip would form the view, opinion and/or belief that the court had unjustly dealt with the counsel by complaining to the Disciplinary Board about him, merely because he had asked the witness a question regarding the interpretation of a contractual provision. The learned High Court judge said that any person making such a video clip had breached the Court’s order not to make any recordings of the online court trial. Any person who had abetted or assisted in the commission of the said act may be liable for contempt of court. Conduct of this kind amounts to scandalising the court. His Lordship also expressed the view that the making of the video clip was a criminal offence under numerous provisions of Malaysia’s criminal law.

In the case of *Saw Shiuo Shyong @ Sonny Saw v. Pengarah Tanah Dan Galian Wilayah Persekutuan, Kuala Lumpur & Ors* [2022] 1 LNS 1325, the court had to consider whether it had the power to compel the other party to allow a supervising solicitor to be present when the other party’s witness testified outside of Malaysia. The court held that it is not compulsory to have a supervising solicitor and additional safeguards can be employed to ensure that there is no witness tampering.

One of the more pressing issues concerns the question of what happens when a foreign witness, who is testifying by way of remote communication technology, is caught lying? Being a foreign citizen, the long arm of Malaysian law may not be able to deal with him. What would happen to the benefits obtained through a judgment that is obtained due to the lie? This is a problem that is not unique to Malaysia; court systems across the world are now relying more and more on testimony given by witnesses from outside jurisdictions. International cooperation will be required to address this and other by-products of the increasing reliance being placed upon the giving of testimony remotely.
JUDICIAL STRESS, THE UNMENTIONABLE AND THE UNDENIABLE: A SUMMARY OF AUSTRALIA’S FIRST EMPIRICAL RESEARCH MEASURING STRESS IN JUDICIAL WORK

Carly Schrever, a lawyer, psychologist and judicial wellbeing researcher practising through the Human Ethos consultancy in Melbourne. Ms Schrever works in jurisdictions worldwide to promote healthy and sustainable work lives for judges and lawyers.

Abstract: Judicial work is complex and rewarding, but can also be isolating, relentless and at times emotionally draining. In recent years, the topic of judicial stress and wellbeing has become the focus of increasing discussion and contemplation the world over, within judicial conferences, judicial journals and even the mainstream media. Despite this broad and growing interest, the topic has historically received scant research attention. As such, in most Commonwealth jurisdictions many questions remain about the nature, prevalence, severity, and sources of judicial stress. The empirical landscape, however, is beginning to change. This article sets out the rationale for robust research into the psychological impact of judicial work, and then summarises the key findings from a recent large-scale study of judicial stress and wellbeing in Australia which served as the author’s doctoral project through the University of Melbourne.


INTRODUCTION

This short article summarises the key findings arising from my doctoral research on the psychological impact of judicial work in Australia. Specifically, the research project set out to empirically examine the nature, prevalence, sources and impacts of work-rated stress among Australian judges and magistrates, all with a view to understanding the extent of the problem and the best ways of responding to it. It was the first such research to be conducted in Australia, and among the first internationally.

A STORY FROM AUSTRALIA

It is important to acknowledge that the topic of judicial stress is one that only very recently became the subject of conversation, let alone empirical research. Historically, it was taboo. This is illustrated remarkably well by the story of how the public conversation on judicial stress first began in Australia.

It is the story of a battle waged by conference paper between two senior Australian judges in the mid-1990s: Justice Michael Kirby, then President of the New South Wales Court of Appeal, and Justice James Thomas of the Supreme Court of Queensland. At a superior court judges conference in 1995, Justice Kirby presented and then published a paper in the Australian Bar Review entitled ‘Judicial stress: An unmentionable topic’. In this paper, and a follow-up published in the Australian Law Journal in 1997 entitled ‘Judicial stress: An update’, he made the case for a more open conversation about stress in judicial work, citing several incidents of what he termed ‘judicial breakdown’. He then asked:

Are these and like cases evidence of a declining judiciary? Are they no more than judges who are human beings straying from traditional and exceptional standards? Or do these cases evidence a larger problem which can be summed up as the impacts of stress upon members of an over-stressed profession?

Vindicating Justice Kirby’s choice of title for this paper, Justice Thomas presented and then published a reply paper in the Australian Law Journal entitled ‘Get up off the ground’ in which he accused Justice Kirby of jumping on ‘the stress bandwagon’ which he said would ‘release howls of derision’ from the profession and the public. Justice Thomas went on to say...
that judges needed ‘adrenaline, or pressure, to produce [their] best work’ and that any lapses in judicial conduct were ‘more to do with character than stress’. He concluded by urging his fellow judges ‘not to treat this subject seriously’, warning that:

If we formalise the subject, stress management course will be thrust upon us. They will become the new compulsory major in continuing judicial education. Kirby J’s paper will run into its 15th edition. We will be taken to have admitted that we need outside assistance. Stress managers will be supplied. These will soak up much needed funds that we could use for something else. The less assistance that we invite or get from outsiders, particularly departmental bureaucrats, psychiatrists and management consultants, the better.

Justice Kirby, who, shall we say, was not one to let an opponent have the final word, published his own reply article in the same journal—‘Judicial stress: A reply’ in which he argued that Justice Thomas’ position proceeded from ‘denial of stress’ and then said:

Whilst it is true that some judges will cope with stress by denial, there will be others who actually may need assistance yet feel disinclined to talk about it, or are even perhaps unaware that they may have a serious problem.

With that, Justice Kirby, Justice Thomas, and the Australian judiciary generally, remained silent on the topic of judicial stress for the best part of 20 years.

To borrow a phrase from esteemed researcher of judicial emotion, Professor Terry Maroney, there has been, it seems across the world, a ‘persistent cultural script of judicial dispassion’ and invulnerability which has, until quite recently, silenced any discussion about the human dimension of judging. Certainly, when I started working with the Australian judiciary in 2007 this was not a conversation that was being had. Around 2015, however, when my doctoral project commenced, the conversation on judicial stress reopened in Australia, this time to a more welcoming reception. It has since become the focus of judicial speeches, conferences and media commentary—both in Australia and overseas. What was lacking, however, was empirical research to inform the discussion and to underpin any systemic responses that courts and governments might want to put in place. In Australia, as in most of the world and certainly most of the Commonwealth, there remained no psychologically grounded data on the nature, prevalence, sources and impacts of judicial stress.

What We Already Knew About Judicial Stress

Prior to specific empirical research being conducted, the existing literature pointed to four pertinent facts relevant to the question of judicial stress which together served to underscore the need for robust empirical research in this area.

Judicial Officers are Senior Members of a Stress-Prone Profession

Commencing in the United States in the 1950s, followed by Australia in 2005, and then by countries across the Commonwealth and the world, there are now scores of studies on lawyer stress putting beyond doubt the scale and magnitude of the problem globally. Two consistent findings warrant emphasis here:

- Three separate studies, each from different continents and spanning three decades, all reported that lawyers are more stressed than other professional groups; and

- Two studies from different continents have found that lawyers are three times more likely than the general population to experience depression.

The robustness of these two findings across time and geography, coupled with the dozens of additional studies reporting high rates of distress, anxiety, alcohol misuse, and disordered eating, within the profession, point to a pervasive and enduring issue of stress and mental illness among lawyers. In many countries, legal regulators and professional bodies have taken action to address this issue through systemic reform and regulation. The knowledge that the legal profession world-wide is grappling with this undeniable and alarming mental health problem, begs the question: to what extent does this problem extend to those at the pinnacle of the profession—the judiciary.
Many Aspects of Judicial Work are Inherently Demanding

The early discursive literature on judicial stress, written principally by retired and sitting judges (including Justice Kirby from Australia) and the professionals who worked with them, point to a number of aspects of judicial work that are likely to give rise to stress. The suggestions of these papers are summarised in Figure 1 below and constellate into three broad categories: stressors of workload, stressors of work type, and stressors of work culture.

**Stressors of Work Load:**
- Increasingly high caseload
- More documents
- More laws
- No designated time for writing judgement
- Extra duties of office
- Limited opportunity to delegate

**Stressors of Work Type:**
- Adversarial system – conflict and disagreement
- Highly emotional and tense
- Managing mental illness of court users
- Traumatic material
- Making decisions that significantly impact on people’s lives

**Stressors of Work Culture:**
- Isolation
- Media and appellate court scrutiny
- Public forum
- No feedback
- No management
- Stress denying culture
- Expression of emotion and opinion constrained
- Longevity of service

Figure 1: Sources of judicial stress discussed in the early discursive literature

Although these ideas are based on personal experience and anecdote, rather than empirical research, they plainly represent a highly demanding combination of work factors. To be faced everyday with very high and increasing workloads, high intensity work involving distressing subject matter and distressed individuals, high responsibility and high stakes in one’s decision making, and a working environment characterised by professional isolation, intense scrutiny, a stigmatisation of stress, and limited supportive feedback, amounts to a cocktail of risk factors for occupational stress. What this early writing suggests is that, even under the best of circumstances, judicial work is highly demanding and it would seem only natural that judges would be impacted by these demands from time to time. Furthermore, whether or not directly impacted by the work, it is nonetheless a very demanding role to be fulfilling if simultaneously dealing with a significant stress or crisis in one’s personal life.

Judicial Officers are not Immune to Stress, Struggle and Despair

In recent years, the theoretical literature on the demands of judicial work has been matched by judges and former judges speaking publicly about their own experiences of stress and vicarious trauma on the bench.

In 2017, two striking judicial testimonials came into circulation. The first was an account by a recently retired American judge, the trauma reaction she experienced when she was called up for jury service shortly after her retirement. In an article entitled ‘The price I paid for being a “good judge”,’ retired Judge Karen Adam writes in an article published on the US National Judicial College website:

**Vicarious trauma is real... Day after day and case after case, a judge is required to hear about terrible things that happen to people but cannot respond physically or emotionally in a naturally human way. However horrific the testimony and exhibits, a judge must remain dignified, calm, respectful. Emotions must be buried... Remaining stoic in the midst of this much trauma was incredibly difficult, but I did it. At a steep cost.**

Later in 2017, an experienced and still-sitting magistrate from New South Wales, David Heilpern, presented a public lecture for Australia’s peak body for lawyer wellbeing entitled ‘Lifting the judicial veil: Vicarious trauma, PTSD, and the judiciary – a personal
Magistrate Heilpern described his personal experience of post-traumatic stress disorder due to the cumulative exposure to traumatic case content in his many years at the court:

I dealt with over a dozen [child pornography] cases within a couple of months. I started dreaming of these children and the torment perpetrated upon them. I would wake up in the witching hour screaming, sweating and panicked. I thought it would pass but it did not... I began thrashing around in my sleep making it impossible for my wife to remain in bed for fear of being struck.

Not long after these accounts were published, Australia suffered the tragic loss of a Victorian magistrate to suicide. Devastatingly, over the following two years, her death would become the first of three judicial deaths by suicide in Australia. If there remained any lingering notion that judges are somehow above or immune to experiencing the full range of human emotion and experience while sitting, these accounts and tragedies must surely put it to rest.

Judicial Wellbeing Matters—and Not Just to Judicial Officers

As the above section of this article demonstrates, judicial wellbeing is important for individual judicial officers, because it is well established that stress undermines the psychological and physical health of the person who experiences it. This much is obvious. However, because of the position that judicial officers occupy in our legal system and society, their individual stress has the capacity to have a broader impact. In this regard, judicial wellbeing is also important for court users, including litigants, legal professionals and court staff, because—as decades of psychological research have demonstrated—stress undermines our capacities for emotional regulation and impulse control, making it more likely that we will behave in ways that we later regret.

Beyond the interpersonal effects of stress, judicial wellbeing is also potentially to more stereotypical and conservative decisions and decisions that preserve the status quo.

This final point is illustrated vividly by a study published in 2011 by Shal Danziger et al. in the Proceedings of the National Academy of Sciences entitled ‘Extraneous factors in judicial decisions’. These researchers looked at the decisions of parole officers in Israel over a 10-month period, and analysed them for two things: whether parole was granted or refused, and the ordinal position of the decision over the course of the working day. They found that parole was significantly more likely to be granted at the start of the working day, after morning tea, and after lunch—and the odds that parole would be granted declined linearly between snack breaks. As the parole officers became fatigued, rushed and depleted of blood sugar, they became predictably more likely to make the conservative and status quo-upholding decision of denying parole. If such everyday stressors can have such a marked effect on Israeli parole officers’ decisions, it is likely that similar factors may influence judicial decisions in other contexts.

What We Needed to Know

As can be seen, there was good reason to expect that judicial officers experience occupational stress, given the high rates of stress within legal practice and the inherently stressful nature of judicial work. There was also good reason to think this stress could have a negative impact on judges and the courts. What we did not have was empirical data on the nature, prevalence and severity of stress experienced by judicial officers in Australia, to inform the discussion and to underpin any organisational and systemic responses the courts might consider. It was to address this gap, that I undertook my doctoral research on the topic.

Australia’s First Research Measuring Judicial Stress

My doctoral research through the Melbourne School of Psychological Sciences at the University of Melbourne was the first empirical and psychologically grounded research on judicial stress and wellbeing in Australia, and among the first internationally.
Five Australian courts from summary to appellate levels participated in the project. One hundred and fifty-two judicial officers participated in a survey, and 60 went on to participate in in-depth interviews. The survey incorporated the use of a number of standardised and validated psychometric instruments for measuring different forms of stress—many of which has been used in earlier research on lawyer stress and population mental health studies.

Overall, the research project sought to answer four broad questions:

1. Are judicial officers stressed?
2. Which judicial officers are most stressed, and why?
3. What are the sources and impacts of judicial stress?
4. How could courts better respond?

These questions are answered across three studies – Studies 1 and 2 have been published, and Study 3 will be published soon.

Study 1: Are judicial officers stressed?

The project’s first study—published under the title ‘The psychological impact of judicial work’ by the author, Carol Hulbert and Tania Sourdin—appeared in 2019 in the Journal of Judicial Administration published in 2019. It sought to answer first research question above—Are judicial officers stressed?—by comparing judicial officers’ levels of stress (measured as non-specific psychological distress, mental ill-health, burnout, secondary traumatic stress, and alcohol misuse) with those of lawyers, other professionals, and the general Australian population.

The key findings of Study 1 were:

- On a standardised measure of ‘non-specific psychological distress’, 52.9 percent of judicial officers scored in the moderate to very high ranges (compared with 32.8 percent of the general population, and 62.6 percent of solicitors, and 68.5 percent of law students);
- Three-quarters (75.2 percent) of judicial officers had scores on at least one of the three burnout factors (exhaustion, cynicism, and reduced professional efficacy) that indicated some level of burnout risk, with 20 percent scoring over the cut-off for burnout;
- The overwhelming majority (83.6 percent) of judicial officers reported experiencing the negative effects of secondary traumatic stress (arousal, avoidance, intrusion) in the one week prior to completing the survey, with almost one-third (30.4 percent) scoring within the range for which formal assessment for post-traumatic stress disorder may be warranted—a rate similar to several groups of American social workers, but dramatically higher than the 12-month population prevalence of PTSD in Australia (4 percent);
- On the World Health Organisation’s ‘Alcohol Use Disorders Identification Test’, almost one-in-three (30.6 percent) judicial officers scored in the range indicating problematic alcohol use—putting them on par with the rest of the Australian legal profession (32 percent), but in markedly more worrying territory than the general population (18.8 percent);
- Despite this, judicial officers’ reported levels of mental health concerns were comparatively low. Their reported rates of ‘moderate to severe’ depressive and anxious symptoms were dramatically lower (approximately one third) than those reported by lawyers, and slightly lower also than those suggested for the general population; and
- In addition, 62 percent reported finding judicial office a little or much less stressful than their previous careers, and 76 percent reported experiencing personal wellbeing and satisfaction related to their work most or almost all of the time.

In a nutshell, Study 1 found that, yes, judicial officers are stressed at a level comparable to the general population; however, the pattern of judicial stress is different to that within the broader legal profession. It showed that judicial officers have a stress problem—
manifesting as elevated levels of psychological distress, burnout and secondary trauma—but, unlike the rest of the legal profession, this stress problem has not so far led to a widespread mental health problem among the Australian judiciary.

**Study 2: Which judicial officers are most stressed and why?**

The second study was published in 2021 by the same authors in the journal in *Psychiatry, Psychology and Law* under the title ‘Where stress presides: Predictors and correlates of stress among Australian judges and magistrates’. Having established that Australian judicial officers are stressed, Study 2 looked at the occupational and demographic drivers of judicial stress.

In particular, Study 2 considered the impact of ‘basic psychological needs satisfaction’ on judicial stress—that is, whether judges’ stress levels vary depending on how frequently and deeply they experience ‘autonomy’, ‘competence’, and ‘relatedness’ within their work. The notion of basic psychological needs satisfaction arises from a very well-established model of human motivation and wellbeing known as ‘Self-Determination Theory’, and has been found to better predict lawyer wellbeing than all demographic and life-style factors in a large-scale American study entitled ‘What makes lawyers happy: A data-driven prescription to redefine professional success’ published in the *George Washington Law Review* in 2015 by Lawrence and Kennon Sheldon.

The key findings of Study 2 were:

- Judicial stress in all forms and across jurisdictions was predicted by the extent to which judicial officers’ ‘basic psychological needs’ of autonomy, competence and relatedness were satisfied within their working environments. Relatedness satisfaction (i.e., the number and quality of authentic and trusting collegial relationships a judicial officer experiences) was the best predictor of judicial wellbeing;
- The only demographic factor that was robustly associated with levels of judicial stress was jurisdiction: judicial officers in the high-volume, lower courts (including magistrates) were significantly more stressed across a range of measures than judges sitting in the higher courts. The greatest disparity was in levels of burnout exhaustion. There were no differences in judicial stress levels according to age, gender, seniority, geographical location, or even area of legal practice;
- The higher stress experienced by lower-court judicial officers was almost entirely explained, statistically speaking, by their lower levels of basic psychological needs satisfaction—especially autonomy and relatedness; and
- Interestingly, alcohol use was not correlated with any other measure of stress—i.e., more stressed, burned-out, or traumatised judges were not more likely than their happier colleagues to be engaging in problematic levels of alcohol consumption. This suggests that alcohol misuse is not a widespread symptom of stress or a coping strategy among the Australian judiciary but is, rather, a cultural feature of the profession from which they are drawn.

Study 1 revealed a judiciary not yet in a mental health crisis, but under considerable stress. Study 2 showed unequivocally that it is judicial officers in the high-volume, lower courts that experience the most stress, and this appears to be due to fewer opportunities for them to experience autonomy and relatedness.

Among the questions that remain, perhaps the two most pressing are: How does stress impact judicial officers and their work?, and What can be done about it? These questions were explored in Study 3, which brings together the experiences and ideas expressed by judges and magistrates in their interviews.

**Study 3: What are the sources and impacts of stress, and how could courts respond?**

Sixty judicial officers spoke passionately and candidly about the human dimension of judging—the sources of stress, the sources of satisfaction, their strategies for coping,
and their ideas for how courts could better support judicial wellbeing. Their accounts were detailed, thoughtful, and at times deeply moving, describing in 60 different ways the rigors of reconciling the ideals of judicial office with the human reality.

Six overarching themes emerged from their words, which will be described in detail in the forthcoming report of Study 3:

- **Workload is an issue for almost everyone**—at every level of the court hierarchy, judicial officers described their workloads as relentless and unsustainable, whether due to crushing daily lists and frantic courtroom environments in the lower courts, or the scale and complexity of trials and the ceaseless build-up of reserve decisions in the higher courts;

- **Most judicial officers feel that the sources of stress are increasing**—due to dramatic up-ticks in case-loads, the pace of legislative change, case complexity, electronic evidence, and self-represented parties, as well as a growing climate of hostility towards the courts reflected in tabloid media commentary and occasional attacks from the executive arm of government;

- **Stressors of ‘injustice’ are felt most keenly**—both the pain of not seeing justice done in their courtrooms, and more personal feelings of injustice when the demands of the job are coupled with experiences of inequity or unfairness; and

- **Discussing stress and seeking support remains somewhat stigmatised**—many judicial officers expressed concern that sharing experiences of stress with colleagues or participating in wellbeing initiatives might be equated with weakness or unfitness; and

And yet:

- **Alongside stress, there is a deep sense of job satisfaction**—despite speaking frankly about the many pressures of the role, which at times can be overwhelming, almost all judicial officers also spoke of loving their jobs, and the privilege and professional pride they derive from it; and

- **Judicial officers sourcing the most enjoyment from the role are those who prioritise their own wellbeing**. A sizeable minority of judicial officers had developed deliberate practices and strategies to proactively manage stress, in most cases stemming from a conscious respect for the emotional dimension of the work and sober awareness of its capacity to impact wellbeing. These were the people who spoke most enthusiastically about their work.

There were also dozens of well-considered ideas for organisational and systemic responses to judicial stress which clustered around ways to better manage workflow and to promote engagement in proactive wellbeing initiatives. When judicial officers were asked to consider what it would take for these ideas to become reality, two overarching conditions for judicial wellbeing reform were identified:

1. **Judicial wellbeing requires judicial time**—enacting judicial wellbeing initiatives felt either impossible or like another source of stress while judicial workloads did not enable work time to be allocated for non-court activities. The thrust of this theme was that, within the many and complex demands of judicial work, there is an irreducible need for time, space, reflection and integration, so that the demands of the role may be experienced as meaningful challenges rather than as a crushing burden. The conclusion was that this may require a radical and systemic rethink of the legitimate expectations and activities of judicial office; and

2. **Judicial wellbeing requires committed leadership**—judicial officers wanted those with the formal and cultural power within the court system to take this matter seriously—to give it priority commensurate with that given to other court business—and to demonstrate the courage, curiosity and humility to challenge existing practices, the prevailing culture, and their own pre-conceptions around the human limits and impacts of judicial work.
Australia’s first empirical research measuring judicial stress has revealed a judicial system under considerable stress. Burnout and secondary trauma have been shown to be prominent features of the judicial stress experience. It has also been shown that courts in which judges have fewer opportunities to experience autonomy and relatedness—in Australia, the high-volume lower courts—are likely to be significantly more stressed than courts where judicial autonomy and collegial connection are stronger. The interview data provided a rich picture of the sources and impacts of judicial stress; that data also indicated some clear pathways for effective intervention to enhance judicial wellbeing. Chief among the questions that remain is the question of the extent to which these findings would hold in jurisdictions outside Australia. In recent years, similar research has been undertaken in several other Commonwealth countries; however, the great majority of jurisdictions are still in the dark about the psychological health of their serving judiciaries. It is hoped that the Australian research, and other studies that have followed, will pave the way for more regions to embark upon projects aimed at better understanding and responding to the stress in judicial work.

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A DEVELOPING DOCTRINE OF THE SEPARATION OF POWERS IN SOUTH AFRICA AND THE ROLE OF THE CONSTITUTIONAL COURT

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Abstract: Following the end of apartheid, a new legal order emerged in South Africa based on the supremacy of the Constitution rather than that of the legislature. Whilst it is not a ‘Westminster model’ constitution, South Africa’s supreme law has consistently been held to be based on an implicit separation of powers as between the legislative, executive and judicial branches of government. This article explores some of the leading cases heard by the Constitutional Court of South Africa in which the separation of powers has been considered and applied by the apex court. As will become apparent, the doctrine has featured heavily where it has been alleged that the President has breached the Constitution. Since the dominance of the legislature by one political party in the post-apartheid era has meant that South Africa has become something of an ‘elective dictatorship’, the article emphasises the importance of the Constitutional Court’s role as a guardian of the supreme law. It concludes by noting the willingness of the Court to eschew abstract theory in favour of a more pragmatic approach to the separation of powers grounded in the text of the Constitution itself.

Keywords: South Africa – democratic Constitution – apex status of the Constitutional Court – jurisdiction – the separation of powers – ‘Westminster model’ – implicit separation of powers in South Africa’s Constitution – a constitutional limit on the Court’s authority – the accountability of the President – ‘elective dictatorship’ – the need for an independent and impartial arbiter on constitutional matters.

SOUTH AFRICA’S CONSTITUTION AND THE ROLE OF THE CONSTITUTIONAL COURT

Recently, South Africa’s young democratic Constitution celebrated its 25th anniversary. Within its 14 chapters, 243 sections and seven schedules it provides for many things, including a Bill of Rights, a parliament, an executive, local government, the courts and administrative justice, and a national flag. Under the Constitution, the Constitutional Court is the highest court in the Republic: see s.167(3)(a). It is tasked with the role of deciding constitutional matters, as well as any other matter that raises an arguable point of law of general public importance: see s.167(3)(b)(i) and (ii). It therefore regards itself as being ‘the ultimate guardian of the Constitution and its values’: see President of South Africa and others v South African Rugby Football Union and others [1999] ZACC 9 [72]. Whilst the Court has the final say on whether a matter is within its jurisdiction (s.167(3)(c)), it is by no means uncommon for its judgments to directly address this matter, even where all the parties concerned accept that the proceedings relate to a constitutional matter. Thus, in the joined cases of Speaker of the National Assembly v Public Protector and others; Democratic Alliance v Public Protector and others [2022] ZACC 1, the Constitutional Court was required to consider whether it was permissible for a former judge to be appointed to a panel tasked with deciding whether there was a prima facie case for the removal from office of the Public Protector, one of the state institutions established under Chapter 9 the Constitution to support democracy in South Africa. Mhlantla J observed in relation to the jurisdictional point that a constitutional matter was involved since:

…the nature of the issues raised in this application goes to the heart of the separation of powers doctrine and invokes the constitutional values of accountability and rationality as well as the extent of the power of the National Assembly to regulate its own processes. [30]

THE SEPARATION OF POWERS

Generally

In the very recent Privy Council case of Chandler v State of Trinidad and Tobago [2022] UKPC 19, which centred on whether a mandatory death penalty for murder (as provided for in s.4 of the Offences Against the Person Act 1925) was contrary to the Constitution adopted by Trinidad and Tobago in 1976, Lord Hodge, the
Deputy President of the Supreme Court, quoted from the judgment of Lord Hope in Seepersad v Attorney General of Trinidad and Tobago [2013] 1 AC 659, where the latter had observed: ‘The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded’ [10]. Whether a constitution exhibits a separation of powers is essentially a matter to be determined according to the express words used, or by necessary implication. However, as Lord Hodge stressed in Chandler, ‘the separation of powers is not a free-standing, legally enforceable principle that exists independently of and above a Constitution’. Rather, ‘it is a principle that has informed the drafting of a Constitution and operates through the terms of a Constitution’ [81].

In South Africa

What Barendt described as a ‘central concept in modern constitutionalism’ (see Eric Barendt, ‘Separation of Powers and Constitutional Government’ [1995] PL 599 at 599) is not expressly referred to in South Africa’s Constitution, unlike the Rule of Law which is identified as being one of the founding values of the state: see s 1(c) of the Constitution. However, in President of the Republic of South Africa and others v South African Rugby Football Union and others [1998] ZACC 21, Chaskalson P stated:

> Our Constitution makes provision for the separation of powers and vests in the judiciary the power of declaring statutes and conduct of the highest organs of state inconsistent with the Constitution and thus invalid. It entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done. [29]

The requirement to which Chaskalson P referred—namely, that an order of invalidity made by either the Supreme Court, the High Court, or other court of similar status, must first be confirmed by the Constitutional Court before it has any force (see s.167(5) of the Constitution)—confirms the apex status of the Court. On occasion, it has declined to confirm an order made by a lower court: see, for example, The Voice of the Unborn Baby NPC and another v Minister of Home Affairs and another [2022] ZACC 20, where orders made by the High Court declaring ss.18(1) and (3) and 20 of the Births and Deaths Registration Act (51 of 1992) to be constitutionally invalid were not confirmed.

In Glenister v President of the Republic of South Africa [2008] ZACC 19, Langa CJ referred to the separation of powers as being ‘implicit’ in South Africa’s Constitution [28]. He then proceeded to discuss the doctrine as being a feature of the country’s constitutional order since it was ‘axiomatic’ that it had been part of the constitutional design. Thus, whilst the Constitution itself makes no mention of the doctrine, one of the principles which governed its drafting proclaimed:

> … [T]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. (Principle VI in Schedule 4 to the interim Constitution).

The language used here, in particular the reference to the three branches of government and the need for ‘checks and balances’ as between them, reminds us of the importance of the separation of powers to the constitutional arrangements of many democratic states, regardless of whether they are based on the Westminster model. It was in the landmark case of R v Hinds [1977] AC 195, 212 that Lord Diplock coined the phrase which he used, along with Viscount Dilhorne and Lord Fraser (in their dissenting judgment), on a number of occasions as a shorthand for constitutions:

> …drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten Constitution of the United Kingdom.

Whilst a functional separation between the branches of government is a key feature, in the later Privy Council decision in Ferguson v Attorney General of Trinidad and Tobago [2016] UKPC 2, Lord Sumption noted how ‘the “Westminster model” has never required an absolute institutional separation between the
three branches of the state’ [15]. In other words, it has favoured a partial as opposed to a pure separation of powers given that ‘a complete separation of powers is neither practicable nor desirable for effective government’ (see Abiola Ojo, ‘Separation of Powers in a Presidential System of Government’ [1981] PL 105, 105).

The Westminster Model Elsewhere

Since R v Hinds was decided, the constitutions of numerous countries—including Jamaica, Fiji, Singapore, Mauritius, Dominica, Bahamas, Barbados, Belize, Mauritius, St. Lucia, the Cook Islands and St. Christopher and Nevis (a number of which are Commonwealth realms since they recognise King Charles III as head of state)—have been described by the courts in various cases as following the Westminster model. Thus, in Tan Seng Kee v Attorney General and other appeals [2022] 3 LRC 463, for example, in delivering the judgment of the Singapore Court of Appeal, Menon CJ remarked that it was ‘incontrovertible that the doctrine of the separation of powers is part of the basic structure of the Westminster constitutional model that Singapore adopts’ and explained that constitutions based on this model incorporate ‘this doctrine so as to diffuse state power amongst different organs of state’ [11]. It should be noted, however, that in a contemporary comment on Hinds, the eminent constitutional lawyer, Professor Hood Phillips, remarked: ‘But one rubs one’s eyes when one reads that the concept of the separation of powers was developed in the unwritten constitution of the United Kingdom’ (see O. Hood Phillips, ‘A Constitutional Myth: Separation of Powers’ (1977) 93 LQR 11, 12).

Putting this disbelief to one side, it is patently not the case that the constitutions of Commonwealth countries necessarily reflect the Westminster model. Thus, in Sexius v Attorney General of Saint Lucia [2017] UKPC 26, whilst the St. Lucia Constitution was described by the appellants as following the Westminster model, Sir Ronald Weatherup noted how ‘other constitutions have of course different frameworks and particular attention has been given in these proceedings to the constitutions of Canada and South Africa’ (at 28).

The Constitutional Court and the Separation of Powers

In South Africa, the Constitutional Court has consistently and determinedly emphasised the importance of the separation of powers doctrine in its judgments. Thus, in one of the earliest cases which it heard, In re: Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26, the Court stated:

There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. [108]

Continuing on the same theme, the Court further remarked: ‘No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation’ (at 109). Throughout its relatively short lifetime, the Court has been acutely aware of the role which it performs as a guardian of the Constitution, along with other courts in the South African legal system. Thus, in Glenister for example, Langa CJ explained how the courts ‘not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so’: [2008] ZACC 19 [33]. This duty, however, does not permit the Court to disregard the constitutional limits of its authority. Accordingly, in Doctors for Life International v Speaker of the National Assembly and others [2006] ZACC 11, the Court recognised how ‘the constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings’ (at 37). Moreover, the principle has been invoked as the basis for refusing to grant the relief which was sought. Thus, in the recent joined cases of e.tv (Pty) Limited v Minister of Communications and Digital Technologies and others; Media Monitoring Africa and another v e.tv (Pty) Limited and others [2022] ZACC 22, even though the Court was of the view that the minister had acted unlawfully in announcing a date for the final switch-off of the analogue signal, and in imposing a deadline for registering for a set-top box to receive digital transmission, it was unwilling to grant an order in the terms requested. This was because to do so would in effect ‘prescribe the procedure that the Minister must follow before determining the analogue switch-off date’ [89]. As Mhlantla J explained:

This would be tantamount to substitution, which would not only be inappropriate under the circumstances of this matter but
would also go beyond the scope of justice and equity and would violate the principle of the separation of powers. [89]

Similarly, in United Democratic Movement v Speaker of the National Assembly and others [2017] ZACC 21, whilst the Constitutional Court set aside a decision of the Speaker to the effect that she did not have the power to prescribe that voting on a motion of no confidence in the President was to be conducted by secret ballot, it refrained from ordering the Speaker to conduct a secret ballot since to do so would ‘trench separation of powers’ (per Mogoeng CJ [93]). The operation of the separation of powers in South Africa may sometimes dictate, therefore, as it does in other jurisdictions, that the judicial branch of government is precluded from intervening where matters of policy or political judgment hold sway. Thus, in ensuring that the exercise of power by the legislative or executive branches of government occurs within the bounds of the Constitution, the Constitutional Court of South Africa has recognised that it must also observe the limits of its own powers. It is understandably wary, however, of the dangers of excessive self-restraint resulting in an erroneous conclusion that a matter is non-justiciable since, ‘the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility’ (per Cameron J in Mwelase v Director-General for the Department of Rural Development and Land Reform [2019] ZACC 30 [51]).

Making the President Accountable

The joined cases of Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others [2016] ZACC 11 concerned a voluminous report by the Public Protector into allegations of improper conduct or irregular expenditure relating to works undertaken at the then President Jacob Zuma’s private residence, and a failure by both the President and the National Assembly to undertake the prescribed remedial action. Whilst the Constitutional Court was ‘on high alert against impermissible encroachment on the powers of the other arms of government’ [93], it considered it ‘necessary to preserve the comity between the judicial branch and the executive and legislative branches of government’ (per Mogoeng CJ [19]). In other words, adherence to the doctrine of the separation of powers imposed reciprocal obligations on each branch of government such that on the facts of Economic Freedom Fighters, the attempt by the National Assembly to set aside the Public Protector’s findings and stated remedial action constituted the usurpation of the ‘authority vested only in the Judiciary’ (at 94). Additionally, it represented a failure to perform the legislature’s constitutional function of scrutinising and overseeing executive action: see s 42(3) of the Constitution.

It is significant that the Constitutional Court has been called upon on a number of occasions to decide cases relating to the acts or omissions of the President of South Africa, or of a former holder of that office: see, for example, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma [2021] ZACC 2. In separation of powers terms, its decisions reflect an independent and impartial judicial branch of government holding the executive branch to account by ensuring that it operates in accordance with the Constitution and not contrary to the Rule of Law. Under South Africa’s Constitution, the President may only be removed from office on one of three grounds: (i) a serious violation of the Constitution or of the law; (ii) serious misconduct; or (iii) an inability to perform the functions of office: see s 89 of the Constitution. However, for a removal to occur, the National Assembly must pass a resolution to that effect with a majority of at least two thirds of its members.

Following the decision in Economic Freedom Fighters, a motion for the removal of the President was moved in the National Assembly on the ground that he had committed a serious violation of the Constitution, contrary to s 89(1)(a). It was defeated, as were two motions of no confidence moved under s 102 of the Constitution. Opposition political parties therefore applied again to the Constitutional Court, on this occasion seeking orders that the Assembly had failed in its constitutional duty to hold the President to account for his failure to take the remedial action identified by the Public Protector, and directing the legislature to put processes in place to make the President accountable. For the majority of the Court,
s 89(1) implicitly imposed an obligation on the Assembly to make rules relating to an impeachment process. Its failure to do so had therefore breached s 89(1). Accordingly, the majority considered it just and equitable under s 172(1)(b) of the Constitution to order that the Assembly fulfil its constitutional obligation within a fixed period of time. In its judgment, such an order ‘cannot be described as trenching upon the separation of powers’: see Economic Freedom Fighters and others v Speaker of the National Assembly and another (No.2) [2017] ZACC 47 [217]. Significantly, however, views diverged in the Court on this issue. Thus, the Chief Justice went so far as describe the majority judgment as being ‘a textbook case of judicial overreach—a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament’ (per Mogoeng CJ [224]).

**Elective Dictatorship**

Whilst modern-day South Africa is a democratic state in which the Constitution proclaims itself to be the supreme law (see s 2), it is not unfair to suggest that since apartheid was finally swept aside and the franchise was extended to all, elections have produced a system of government which might be characterised as an ‘elective dictatorship’. Even though the phrase was once famously used by Lord Hailsham, the former Lord Chancellor, to describe the UK’s system of government whereby a working majority in the House of Commons allows a government to secure the passage of its legislation (see The Dilemma of Democracy: Diagnosis and Prescription (1978) Collins, p 126), it is also apposite in the South African context since one political party, the African National Congress (the ‘ANC’), has attained a position of near complete dominance as a result of successive electoral victories. Thus, at the time of writing, although there are 14 political parties with representatives in the National Assembly, the ANC has 230 out of the 400 seats. Since such dominance weakens the ability of the legislature to play its oversight role in relation to the executive as required under the Constitution (see ss 55(2) (a) and (2)(b)(i)), it is therefore imperative that the Constitutional Court stand firm when determining allegations that the President, or other members of government, have violated the Constitution or otherwise acted unlawfully.

**Final Thoughts on the Separation of Powers in South Africa**

As Dodin J noted in Ponoo v Attorney General [2010] SCCC 4, ‘Constitutions with a high degree of separation of powers are found worldwide’ (at 21). Whilst the South African Constitution does not employ the phrase, it is clear that ‘the principle of the separation of powers emanates from [its] wording and structure’ (see Justice Alliance of South Africa and others v President of the Republic of South Africa and others [2011] ZACC 23 [32]). It is a principle which has been jealously guarded and upheld by the Constitutional Court throughout its existence since:

... otherwise, the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measures against the Bill of Rights and other provisions of the Constitution, will be undermined. (per Chaskalson P in South African Association of Personal Injury Lawyers v Heath [2000] ZACC 22 [26]).

Writing in 2000, Professor Tribe remarked that: ‘What counts is not any abstract theory of separation of powers, but the actual separation of powers “operationally defined by the Constitution”’ (Lawrence Tribe, American Constitutional Law, Volume One (3rd edn, Foundation Press 2000)). These words have been referred to with approval by the Constitutional Court on several occasions: see, for example, S v Dodo [2011] ZACC 16 [17], and Van Rooyen and others v The State and others (General Council of the Bar of South Africa Intervening) [2022] ZACC 8 [34]. Thus far, the evidence suggests that the Court has eschewed abstract theory in favour of the text of the Constitution. To this end, it has made progress in developing what Ackerman J referred to as a ‘distinctly South African model of separation of powers’ (see De Lange v Smuts NO and others [1998] ZACC 6 [60], which remains faithful to the need for the judicial branch of government to check the abuse of power by either the legislative or executive branches, whilst recognising, but not always agreeing upon, the limits of its own power.
COMMUNITY VIOLENCE AGAINST SUSPECTED WITCHES: SORCERY ACCUSATION-RELATED VIOLENCE IN PAPUA NEW GUINEA

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Abstract: The persistence of witchcraft—and in particular, sorcery accusation-related violence (‘SARV’)—within developing countries poses a continuing challenge for law enforcement and criminal justice systems in those countries. Reconciling modern approaches to human rights and the criminalisation of harmful conduct with ancient customary practices like witchcraft has proven to be difficult in such countries, including Papua New Guinea. Some of the progress made in that regard in PNG is recounted, together with the obstacles that make such progress difficult to achieve.

Keywords: Witchcraft – sorcery accusation-related violence (‘SARV’) – human rights – criminal law – the criminalisation of SARV – law enforcement challenges

INTRODUCTION

This article discusses the phenomenon of community violence against suspected witches. The author will use Papua New Guinea (‘PNG’), the country where the author sits as a judge, as the context for his discussion of the phenomenon. The beliefs and practices of witchcraft are embedded in many societies, including the author’s home country of Botswana. The author’s home village, Bobonong, is alleged to have residents who are deft at practising witchcraft, although he has never been able to tell whether the accusation is factual or fictitious.

In Zambia, the Witchcraft Act defines witchcraft in the following terms:

‘Witchcraft’ includes the throwing of bones, the use of charms or any other means, process or device used in the practice of witchcraft or sorcery

The repealed Sorcery Act in PNG provided that:

...‘sorcery’ includes (without limiting the generality of that expression) what is known, in various languages and parts of the country as witchcraft, magic, enchantment... whether or not connected with or related to the supernatural.

The meaning and purpose of witchcraft varies across different PNG regions. Most link it to a ‘supernatural force’ used by witches to cause harm to others. Some regions like Milne Bay focus on ‘good witchcraft’, which is said to include witches healing pregnant women by providing knowledge of essential herbs or giving protection to the community via sorcery. However, it is usually the former type of witchcraft—witchcraft that is associated with sorcery accusation-related violence (‘SARV’)—that is of greatest concern. SARV is thus the focus of this article.

DEFINITIONS

Witchcraft is difficult to define with precision. In their Introduction to Henrietta L Moore and Todd Sanders (eds), Magical Interpretations and Material Realities: Modernity, Witchcraft and the Occult in Postcolonial Africa (Routledge 2001), scholars Sally F. Moore and Todd Sanders define witchcraft as:

...a set of discourses on morality, sociality and humanity. Far from being a set of irrational beliefs, they are a form of historical consciousness, a sort of social diagnostic.

Things can often take a turn for the worse when there is an unexplained calamity like sudden death, illness, or misfortune. Community members may be quick to associate a strange
event with the doings of a witch because, according to their belief system, only a witch can create unusual harm via magic. It follows that in such circumstances the community’s most vulnerable individuals can be blamed for practising witchcraft and consequently tortured, i.e., they become victims of SARV.

**Witchcraft in Papua New Guinea**

Currently, data show that currently, 12 people are killed, and 14 people suffer serious harm, due to SARV each month in PNG. The number is likely to be materially higher because many cases are not reported.

To put the issues of moment in sharp perspective, it is important to sketch, albeit briefly and in broad strokes, the profile of the country I refer to throughout this article by the acronym, PNG. PNG is a constitutional democracy, located in the Southwestern Pacific. It has one of the most progressive constitutions in the world. It is a country of immense cultural and biological diversity. PNG is a developing country grappling with socio-economic challenges of unemployment and poverty, like many other developing countries. In PNG, low levels of literacy are a critical challenge for the country’s development. According to some reports in 2016, about 37 percent of the population was considered illiterate, with the majority living in rural areas.

PNG is a predominantly Christian country and very diverse. (Its population speaks more than 800 languages.) Overall, there is much respect for traditional beliefs and the spiritual realm is very much part of PNG society. It may seem to many quite paradoxical that a Christian country such as PNG would have deeply embedded beliefs in witchcraft.

Hans Werner attempted to answer this paradox, in the context of Ghana, in his book *Witchcraft in Ghana: A Study on the Belief in Destructive Witches and its Effects on the Akan Tribes* (Presbyterian Book Depot 1961). According to Werner, although the Christian faith teaches against fear of evil spirits and immortality (since Christ sacrificed himself to conquer evil), ‘...the simple truth is that superstition and fear of evil spirits is as strong as ever today amongst Christians, literates and illiterates alike.’. The same may indeed be said of PNG.

**The Jacob Luke Incident: An Illustration**

The recent Jacob Luke incident provides a helpful illustration of the persistence of SARV in PNG society and the havoc it can wreak. According to media reports, the body of a prominent and successful businessman and chief, Jacob Luke, was discovered by workers on 21 July 2022. Luke had been bushwalking in Enga Province. His death was wholly unexpected. He had appeared fit and well up to the time of his disappearance. Luke’s tribe’s people attributed the death to witchcraft.

The following day, members of Luke’s tribe at Lakalolom village accused a group of nine women of secretly removing Luke’s heart and eating it—a practice called ‘kaikai lewa’.

Out of fear, one of the women ‘admitted’ the allegation. Petrol was splashed over the nine women, and they were set alight. From among the nine, five were selected for further torture that involved hot irons being applied to their genital areas whilst they were suspended naked between poles. While this was occurring, the local village men, families and children—including their own family members and children—looked on. The women were tortured from the morning through to midnight.

News of the torture spread through the province, and six policemen accompanied by a priest, headed to the village to rescue the women. On their first attempt to investigate and offer protection to the victims they were sent away by a crowd of hundreds of angry villagers. A second attempt to rescue the women the next day failed. Eventually the rescue party was able to retrieve the women, but by then only five of the original nine were still alive, and they were in a fearful state, having lost copious amounts of blood and body tissue.

This is just a recent event, and possibly not the last.

Given space limitations, this article will address two themes relating to community violence against suspected witches. These themes are: (1) that SARV is a violation of human rights; and (2) that SARV is a gendered phenomenon. Following that, I will discuss challenges raised by the problem of SARV and some possible solutions for it.
SARV is a Violation of Human Rights

As indicated earlier, Papua New Guinea is a constitutional democracy with a constitution more progressive than many that have been lauded as progressive. Fundamental human rights, such as the right to life, dignity, security of the person and liberty are entrenched. The National Court, the equivalent of the High Courts in many Commonwealth jurisdictions, has a Human Rights track dedicated to addressing litigation on human rights violations.

Yet there is still the clear sense that sorcery accusations are like ‘passing a death sentence’ against those so accused; the subjects of the accusations are often stripped of all semblances of human dignity and any real constitutional protection. As the Jacob Luke case demonstrates, suspects—mostly women—suffer physical violence of the worst kind, emotional trauma and mental distress. Rescue operations often fail. The taking of life in this way represents an abhorrent violation of human rights.

The level of brutality perpetrated on women infringes international human rights laws. When a SARV victim is murdered, there is a breach of their fundamental right to ‘life, liberty and security’ (Article 3, UN Declaration on Human Rights). The extremely humiliating and undignified treatments like ‘beatings, banishments, cutting off body parts, stoning and amputation of limbs’ contravene the right to be free from ‘cruel, inhuman or degrading treatment or punishment’ (Article 7, International Covenant on Civil and Political Rights). Public humiliation and accompanying social isolation after sorcery accusation without physical abuse may also constitute mental torture.

Sometimes, witch persecution may involve numerous sexual offences. The daughters of women accused of sorcery may be subjected to sex trafficking.

The question remains: how can such violations occur in a constitutional democracy with entrenched rights and a diverse community that ostensibly is sensitive to human rights violations.

To repeat, at the international level, SARV directly offends against the right to life, liberty, security of the person entrenched in the Universal Declaration of Human Rights and the robust international protections specifically provided for women, as reflected in the Convention on the Elimination of All Forms of Discrimination (‘CEDAW’), and its Optional Protocol, both of which have been ratified by many countries in which SARV is nevertheless prevalent.

SARV is a Gendered Phenomenon

It is important to note that SARV is highly gendered. The prevalence of SARV is relatively much higher amongst women. For example, Amnesty International identified that PNG women are six times more likely to be suspected of sorcery than men. Some subgroups like girls, older women, women with disabilities and women with albinism are especially at risk of being made the subjects of witchcraft accusations. A UN Independent Expert has noted that sorcery accusations might also be made against the mothers of people with albinism.

In other situations, villagers may assign a ‘witch’ status to a household and transfer the accusation from one female to another within it. This occurred in the gruesome case of a six-year-old girl who was kidnapped, stripped naked and brutally tortured by removing skin from her buttocks and back. The girl was singled out because her mother had previously been accused of sorcery and inevitably burnt alive some years earlier.

Such gender-based violence is further highlighted in recently reported SARV cases which showcase women as the accused and groups of males as the accusers:

• In April 2022, two women were accused of sorcery after a child unexpectedly fell ill and died. A mob bound them with ropes and they were physically beaten and abused with hot iron rods.

• In October 2021, a person was bedridden with symptoms like COVID-19. He stated that he saw a woman ‘doing something’ with sugarcane sprouts (implying sorcery). The woman was later beaten to death with a piece of timber.
• In October 2020, a dog attacked a child who later died. Seventeen women were suspected of witchcraft and were taken to an isolated place and tortured. They have still not been found.

• In August 2020, three women were blamed for performing magic on a person who fell unconscious. A group of men tortured the three women with iron rods and knives. Their belongings and houses were also burnt to ashes.

• Media reports after the Jacob Luke case accused the PNG government of having failed to end the evil SARV.

All of this raises the question of how governments can end community violence against suspected witches.

POSSIBLE SOLUTIONS TO THE PROBLEM OF SARV IN PNG

SARV Attracts Widespread Condemnation by International Bodies

Numerous human rights organisations have recognised the importance of state-led intervention to deal with the persistence of witchcraft, and SARV in particular, in some states. For example, in 2010, the Committee on the Elimination of Discrimination against Women concluded that the PNG government must ‘prosecute the perpetrators of such acts [to] prevent their recurrence in the future’ and ‘strengthen the enforcement of relevant legislation’. The UN’s Human Rights Council’s 2011 report added that PNG must ‘accelerate its review of the law on sorcery and related killings’. Similarly, NGOs like Amnesty International have highlighted the need for strong ‘legal intervention and reform’ in this area in PNG.

The international community perceives the state-led intervention as especially important because of SARV’s disproportionate effect on women and their children. CEDAW imposes a positive duty on the PNG government to address discrimination against women. This includes protecting women from gender-based violence, defined as:

...any act which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Similarly, the UN Convention on the Rights of the Child requires PNG to

...take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians or any other person who has the care of the child.

Steps Taken by the PNG Government in Attempting to End SARV

The Repeal of the Sorcery Act 1971

The Sorcery Act 1971 attempted to reflect PNG society by legitimising beliefs in witchcraft. It criminalised the use of sorcery, which was expressly defined as:

including what is known in various languages and parts of the country as witchcraft, magic, enchantment, puripuri, muramuradikana, vada, meamea, sanguma, or malikra, whether or not connected with or related to the supernatural.

The Sorcery Act was repealed in 2013 after some graphic images of two women being tortured went viral. Many international organisations criticised PNG for not adequately addressing the SARV issue. They focused on the Sorcery Act, saying that it provided no effective deterrent because it excused the attackers from liability by giving effect to defences such as provocation.

Some Relevant Jurisprudence

In 2007, long before the repeal of the Sorcery Act, the Supreme Court—including my brother judge Kandakasi J (as he then was)—held that sorcery is not grounded in fact, but only in belief. He noted that offenders claim belief in sorcery to evade the consequences of their actions. The court also held that acting on a belief in sorcery is repugnant to general principles of humanity
and that only in exceptional circumstance can that belief be regarded as a mitigating factor for sentencing purposes—and even then, only in cases where the offender acted in the spur of the moment and without preplanning.

A mitigating factor reduces the severity of the sentence for a convicted person. Previously the PNG courts considered the belief in sorcery a ‘special mitigating factor’, which would reduce a sentence by one-third. Courts have now moved away from this position and are using it merely as a ‘mitigating factor’. The degree to which a belief in sorcery may decrease a sentence depends on the facts of each case. If a defendant was motivated by fear or self-preservation and acted quickly, then belief will likely reduce the sentence: State v Dokal [2018] PGNC 364. However, if facts show that the offender had alternative remedies to self-help and the knowledge that violence is unacceptable, then belief in sorcery is unlikely to influence the sentence: Dokal, supra. Relevant facts may be the defendant’s educational level, availability of village councillors or courts, police, and other educational influences like radio, mobile phones and television.

It is important to note that in addition to such factors, courts must carefully examine the question of whether the defendant’s belief is genuine or merely a pretext. In the latter situation, there is no justification for it to be treated as a mitigating factor; rather, it should be seen to be an aggravating factor—one which increases the sentence: see State v Uma [2019] PGNC 214.

Some scholars have questioned whether belief in sorcery should be accepted as a mitigating factor. One such prominent scholar is Prof Miranda Forsyth, author of a chapter entitled ‘A Pluralist Response to the Regulation of Sorcery and Witchcraft in Melanesia’ in her book, co-edited with Richard Eves, Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia (ANU Press 2015). Prof Forsyth contends that the law must disregard the belief for public policy reasons because it can be seen as encouraging ‘vigilantism, payback killings, and giving a licence to attack suspected sorcerers’ (p 231). However, she acknowledges that other scholars have argued that if the belief is not considered, the criminal law would not properly reflect PNG societal values, raising the risk that the criminal law could be viewed as ‘illegitimate and a foreign imposition’ and overly harsh in individual cases (p 231). These two divergent arguments are difficult to reconcile.

The Criminal Code and the Criminal Justice System

The Criminal Code is legislation that defines and addresses the more severe criminal offences. It is not sorcery-specific legislation like the now-repealed Sorcery Act 1971. Instead, it includes many crimes relevant to SARV, such as wilful murder (s 299), murder (s 300), grievous bodily harm (s 319), wounding and similar act (s 322), common and serious assaults (s 335; s 340; s 341), rape (s 347), sexual assault (s 349), abduction (s 350) and threats to do any injury (s 359).

The Criminal Code was amended in February 2022 to include a provision that criminalises the activities of glasman/glasmeri and those who engage in their services in exchange for money. This is a crucial step because glasman/glasmeri—paid intermediaries who make accusations of sorcery and have been described as ‘con artists who destroy the lives, communities and the reputation of [PNG communities]’—can propagate sorcery accusations and indirectly benefit from the torture of innocent victims such as mothers and their children.

The Time Taken by the Criminal Justice Process and the Hurdles it Faces

Before a person is found guilty under any criminal code provision, he or she must go through the lengthy processes of PNG’s criminal justice system. First, a SARV victim submits a complaint against the alleged perpetrator(s) to the police. The police then investigate all facts, and when there is sufficient evidence, they will arrest and charge the abusers under the relevant law. Next, the matter goes to the magistrates’ court, which examines if there is enough evidence for the defendants to stand trial. If there is, then the issue goes to the Office of the Public Prosecutor (the ‘OPP’), who will act as the prosecutor at the National Court.

Criminal matters can proceed through the National Court either by trial or via a guilty
plea. If there is a trial, the prosecutors present all the evidence previously collected by the police in its initial investigations and any other relevant evidence. The defence may choose to call evidence and raise any counterargument it wishes to the claim. Then the court decides whether the defendant is guilty or not. If the accused is guilty, then the court prescribes a sentence. The court may take various aggravating and mitigating factors into account to increase or decrease the sentence.

The foregoing process is very time-consuming.

In March 2022, PNG presented to the UN Human Rights Council its responses to recommendations from its Third Universal Periodic Review (UPR) during the 39th session of the UPR Working Group. One of the key responses by the PNG government was its general affirmation combatting gender-based violence and SARV remains a high priority.

Many barriers prevent the criminal justice system in PNG from effectively dealing with SARV offenders. These are discussed below.

Particular Challenges Faced by PNG in its Efforts to Curtail SARV

Most SARV cases are not reported

Most SARV cases do not come to the attention of the police, the OPP or the courts, because victims do not report them. This is especially true if the victim is (as is usually the case) a woman. For example, the number of National Court cases on PACLi (the online legal database where PNG cases, among others, are published) showed that at the time of the 2022 CMJA Triennial Conference, 17 reported cases involve men as the victim, and three involve women as the victim. This implies that a matter will most likely go to court only if a male is a victim of SARV. In comparison, female deaths often go unnoticed or do not seem to warrant action against the preparator(s).

Most SARV cases never reach the National Court

SARV cases are predominantly dealt with by village courts, particularly those in distant rural areas where the sorcery concerns are the highest and often part of daily discussions: Melissa Demian, ‘Sorcery Cases in Papua New Guinea’s Village Courts: Legal Innovation Part IV’ [2015] ANU College of Asia & the Pacific In Brief, 1, 2. The Village Courts Act 1989 provides that these courts have both civil and criminal jurisdiction in relation to specifically identified offences, including ‘sorcery’. Magistrates instead deal with SARV under ‘customary law’ and have a great deal of discretion in SARV instances: Demian, supra, p 2.

Police response rate to SARV allegations is low

The Royal Papua New Guinea Constabulary (the ‘RPNGC’) must protect SARV victims and arrest the alleged perpetrators. However, current reports show that RPNGC is not meeting its obligations. (See, for example, Part I of the Inquiry into Gender Based Violence in Papua New Guinea—a report of a Special Parliamentary Committee on Gender Based Violence issued in August 2021). In many rural SARV cases, police officers cannot travel to the crime scene promptly because they simply do not have enough resources—that is, insufficient petrol and/or no available vehicle. When the police do arrive, offenders go into hiding. Such slow response rate decrease the number of SARV prosecutions. It also affects the police’s ability efficiently to obtain medical reports and material evidence used in courts to prove SARV against victims.

Furthermore, police are sometimes unwilling to cooperate with victims. Investigating officers may have similar sorcery suspicions regarding victims and encourage SARV rather than stop it. Police may also possess a lack of commitment to investigate violence cases against women and accordingly attempt to persuade victims to dismiss their claim or drop charges.

Police’s lack of response to SARV allegations is a symptom of their limited knowledge and skills in arresting accused persons and investigating SARV cases—particularly those where women are the alleged victims. They must be educated on such issues. The RPNGC has a gender violence curriculum taught to cadets and existing police officers. That curriculum is being updated and will include robust policing procedures for SARV. The Special Parliamentary Committee on Gender-Based Violence noted in its Report mentioned
that resources must be invested to ensure the curriculum’s proper roll-out. Perhaps, even before this stage, each cadet should be vetted so that only cadets with good character join the RPNGC. An officer with integrity is likely to abide by the procedures outlined in the curriculum and, as a result, improve the investigation of SARV cases. It can also enhance public confidence and trust in policing in PNG.

**Lack of admissible evidence in SARV cases**

Any SARV victim requires evidence to prove a particular cause of action or offence. The police do not specialise in such investigations and lack the forensic skills which are needed to obtain admissible evidence to prove physical assaults. Instead, the police rely on witness testimony to identify offenders. A surviving SARV woman victim can quickly identify her abusers because they are usually her family members. But, sometimes, victims may not speak up as there may be communal pressure or threats from offenders that secure their silence. Other village members may fear repercussions from the abusers or be unwilling to help the SARV victim because they also believe she is a sorcerer who harmed someone.

The situation becomes even more difficult when a SARV victim has died.

**CONCLUDING REFLECTIONS**

In conclusion, it may be apposite to indicate that belief in witchcraft is protected under the rubric of the freedom of conscience entrenched in the constitutions of many countries. As we all know, freedom of conscience entails the freedom of an individual to hold or consider a fact, viewpoint or thought, independent of other viewpoints. The belief is not the problem; it is the violence that can accompany the holding of a belief that is the problem.

The law and the courts of PNG have a role in addressing SARV. As for the law, it must manifest zero tolerance for any form of harmful violence and the courts are duty bound to enforce such law. Perhaps the bar might be set somewhat higher for judges, having regard to their role as leaders of society, so that they might play a more educative role through their judgments and in suggesting necessary reforms.

Law cannot be a panacea tasked to resolve all social ills. Even in countries that have criminalised witchcraft, the fact that alleged witches continue to face violence indicates that the problems associated with witchcraft may not be resolved solely by legal solutions. Of course, law properly formulated and implemented can help to control SARV. We need to reform the criminal justice system to make it easy for victims of SARV to report instances of it to the police and ensure that the police are properly trained and are available to assist.

Governments, lawyers and civil society groups need to formulate sustainable strategies that can address the root causes of SARV. Amongst the key strategies should be an appropriate public educational programme that acknowledges belief systems and their consequences and the ways those belief systems and consequences intersect with factors such as poverty, disability and gender.

The state as a duty bearer has a duty to do all it can to end SARV. This duty may include criminalisation of the practice of witchcraft. The state must establish effective witness protection schemes so that people are able to testify about the horrors they have seen or experienced. We need restorative justice in PNG to help offenders understand that SARV is wrong and to engage restored and reformed offenders to talk to members of the public about SARV. Measures must be put in place to work with victims of SARV to enable them to have a voice that can bring about essential change.
PREVENTING WRONGFUL CONVICTIONS: ASSESSING IDENTIFICATION EVIDENCE IN THE DIGITAL AGE

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Abstract: While wrongful convictions may have a higher profile in the USA (given, among other factors, that the death penalty is still prevalent in that country and so the consequences of wrongful convictions are more severe), they are a significant concern in Canada as well. Faulty identification evidence has been implicated in wrongful convictions in Canada and so the forensic science that explicates when such evidence is reliable and when it is not has general importance for the criminal justice system and particular importance in the prevention of wrongful convictions. In recent years, the introduction and growth of social media have added further contaminants potentially affecting identification evidence which have, increasingly, been recognised by the courts. However, the full implications of social media’s deleterious effects in this area are not yet fully understood. More forensic, scientific study of the impact of social media on the reliability of identification evidence is accordingly warranted.

Keywords: Wrongful convictions – identification evidence – identification evidence, weaknesses thereof – faulty identification evidence as a factor in wrongful convictions – eyewitness identification evidence – recognition evidence – sources of reliability and unreliability of identification evidence – potential deleterious effects of social media on the reliability of identification evidence

INTRODUCTION

As a leading member state of the Commonwealth of Nations and the northern neighbour of the USA, Canada prides itself in having a culture and identity separate and distinct from that of the United States. This is particularly so with regard to its justice system. For example, Canada has not executed any convicted offender in 60 years and, as of 1976, it abolished the death penalty altogether; the Canadian legal aid system is far better financed and accessible than that of the USA; the Supreme Court of Canada has imposed strict and expansive disclosure rules on all prosecutors; Canada’s Criminal Code is a federal statute covering the entire country; and Canada’s national police force, the Royal Canadian Mounted Police, has many fewer police officers per capita than does the USA. These factors, along with Canada’s practice of appointing judges and not electing them, and its commitment to strong prosecutorial independence, all point to safeguards in a legal system that should be free of all but the very occasional wrongful conviction.

Wrongful convictions in the USA are a serious problem. As a nation, the USA has one of the highest incarceration rates in the world. Some states routinely utilise the death penalty and this creates a significant justice challenge when wrongful convictions are brought into the equation.

Since the adoption and use of DNA technology in the early 1990s, almost 400 cases of wrongful conviction have been confirmed in the USA. These wrongful convictions have occurred as a result of police/prosecutor tunnel vision (confirmation bias), inadequate representation by defence counsel, false confessions, eyewitness misidentification and the like. Indeed, according to the Innocence Project, memory problems leading to eyewitness misidentification can amount to 70% of wrongful convictions.

Notwithstanding what appear to be greater safeguards in the Canadian system, smugness is in no way warranted. Canada has its own share of wrongful convictions. It is difficult to be precise, but since the advent and use of DNA forensic evidence in the early 1990s, it is estimated that courts in Canada have convicted at least 70 individuals wrongly. Canada’s population represents approximately one tenth of that of the USA and so, proportionally, Canada is faring worse.

The causes of wrongful convictions in Canada are similar to those in the USA. They include, as noted, tunnel vision on the part of police and prosecutors, false confessions and faulty eyewitness testimony. However, scholars with
the Government of Canada have concluded that the leading cause of wrongful convictions in Canada is faulty eyewitness testimony as a result of faulty memory. The advent of social media has introduced still further sources of potential unreliability in both eyewitness identification evidence and ‘recognition evidence’.

Given the problem of wrongful convictions in Canada and the prominence of identification evidence in such wrongful convictions, in this article the author takes a close look at identification evidence generally and, in particular, considers the deleterious effects that social media can have upon the reliability of that evidence.

**CORRECTING WRONGFUL CONVICTIONS IN CANADA**

Correcting wrongful convictions in Canada, as in other jurisdictions, is not a simple or straightforward process. Appellate review of trial decisions plays a role where error can be determined on the record; however, an appeal court is largely limited to the record at trial and is also mostly bound by the trial court’s findings of credibility. Therefore, appeal courts provide only a partial safeguard against wrongful convictions. Canada has however developed two other avenues for potential redress for victims of wrongful convictions.

**Federal Minister of Justice Review**

Uniquely Canadian are Criminal Code provisions which empower the Federal Minister of Justice to review potential wrongful convictions. Specifically, sections 696.1 to 696.6 of the Criminal Code allow a person convicted of an offence to apply to the Minister of Justice for review. If the Minister is satisfied that ‘there is a reasonable basis to conclude that a miscarriage of justice likely occurred’, then the Minister may direct a new trial or refer the matter to the appropriate provincial Court of Appeal for a hearing and determination pursuant to s. 696.3.

This process entails four stages: a preliminary assessment, an investigation, the preparation of an investigation report, and finally the decision of the Minister. Since 2009, it appears that the vast majority of applications do not get past the ‘preliminary assessment’ phase of the review and therefore do not reach the investigation phase. It is only after the investigation stage that a recommendation may be made to the Minister for review.

**Public Inquiries**

Arising sometimes from the Ministerial review process under the *Criminal Code* and at times independently of the trial process, public inquiries to deal with certain egregious, apparent wrongful convictions and public concerns arising from such cases have been initiated in some Canadian provinces. Scholars Emma Cunliffe and Gary Emond have succinctly summarised the history of these public inquiries:

Of the nine systemic reviews of criminal convictions that have been conducted in Canada to date, four have engaged extensively with the reliability of expert evidence. Three of these reports originate in Ontario and one in Manitoba. The Kaufman Report into the wrongful conviction of Guy Paul Morin was the first such report, published in 1998. Justice Kaufman explained in his report that the ‘reasons for the failure in the Morin case are set out in the pages which follow, and so are suggestions for change, designed to make similar failures less likely.’ In particular, the report contains ‘recommendations which might prevent the misuse of science in future criminal proceedings.’ Because inquiry mandates tend to extend to systemic factors that are implicated in wrongful convictions, the reports of these inquiries provide especially fertile sources for those who are interested in drawing generalizable lessons for the Canadian legal system. (Emma Cunliffe and Gary Edmond, ‘What Have We Learned? Lessons from Wrongful Convictions in Canada’ in Benjamin Berger, Emma Cunliffe and James Stribopoulos (eds), *To Ensure Justice is Done: Essays in Memory of Marc Rosenberg* (Thomson Reuters, Toronto 2017) at 133.

Two of the most significant and wide-ranging inquiries have focused on forensic pathology experts typically testifying on behalf of the prosecution. In 2008 the Province of Ontario released a report from its Inquiry into Pediatric Forensic Pathology in Ontario, headed by Justice Stephen Gouge of the Ontario Court
of Appeal (the ‘Goudge Inquiry Report’). The inquiry was established as a result of a review of the office of the Chief Coroner of Ontario in circumstances where forensic pathologist Dr Charles Smith performed autopsies, consulted or provided expert evidence on questionable cases. A systematic review and assessment of the policies, procedures and quality control measures over the period from 1981–2001 was conducted by the Gouge Inquiry. The inquiry found a failure of oversight at all levels, and that in 20 cases where Dr Smith was involved, he ‘had provided an opinion regarding cause of death that was not reasonably supported by the materials available for review’. This resulted in a determination that in 13 cases, criminal convictions were not supported by the evidence. The Goudge Inquiry Report also generated 169 recommendations to improve the pediatric forensic pathology system in Ontario. This had a direct impact on the level of scrutiny counsel and judges must now adopt concerning the witnesses qualified as experts in this area and the reports they write. Other inquiries dealt with the methodology of collecting and analyzing hair samples to establish illegal drug ingestion (the ‘Lang Review’), prosecutorial tunnel vision (the ‘Kaufman Report’), youthful accused and questionable police tactics (the ‘Milgaard Inquiry’) and problematic prosecution ethics and jailhouse informants (the ‘Driskell Inquiry’).

While faulty memory and eyewitness testimony play only a minor role in the above noted cases, they were the main problems in the infamous case involving the prosecution of Thomas Sophonow.

**INQUIRY REGARDING THOMAS SOPHONOW – REPORT OF JUSTICE PETER CORY 2001**

The prosecution of Thomas Sophonow for the murder of a young woman, Barbara Stoppel, in Winnipeg, Manitoba, resulted in three trials and a directed verdict of acquittal by the Manitoba Court of Appeal on the appeal of his last trial. The Chief of Police for the City of Winnipeg concluded that mistakes had been made and that Thomas Sophonow had no involvement in the subject crime. Upon receiving that report, the Attorney General for Manitoba ordered a public inquiry be conducted. The Honourable Peter C. Cory, a retired Justice of the Supreme Court of Canada, was appointed to conduct an investigation into the death of Barbara Stoppel, examine the circumstances surrounding the investigation and to make recommendations. Many valuable recommendations for investigators and prosecutors were made by Commissioner Cory. This section summarises the case and the key elements relating to eyewitness testimony resulting from the Inquiry.

**The Crime**

On December 23, 1981, 16-year-old Barbara Stoppel was alone, working the evening shift at The Ideal Donut Shop in Winnipeg, Manitoba. At about 8:30 pm she was strangled with a piece of nylon twine and died. Her attacker was seen inside the donut shop and leaving it by four eyewitnesses. Multiple police composite sketches were made and put in circulation, in and around Winnipeg. The sketches were composed using information from the eyewitnesses. There was considerable publicity and public sentiment about the case, and two months after the murder there had been no arrests. The next March, Thomas Sophonow was interviewed repeatedly in Vancouver by the Vancouver Police Department and later by two Winnipeg police officers. He became a suspect as a result of a tip received by the police that he resembled the person in the police composite sketch. Thomas Sophonow was arrested in Vancouver and brought back to Winnipeg in March of 1982 and charged with the murder of Barbara Stoppel.

**The Trials and Appeals**

The experience of Thomas Sophonow after his arrest is succinctly described as follows by authors R.J. Wolson and A.M. London in an article published in the Drake Law Review in 2004:

*Between his arrest in March 1982 and April 1986, Sophonow, while in custody throughout, underwent a preliminary inquiry and three trials. The trials resulted in a hung jury, followed by two convictions, two appeals to the Manitoba Court of Appeal (which found grounds for new trials in both instances, but given that the last appeal would have resulted in a fourth trial, entered an acquittal at the last appeal), and two leave applications to the Supreme Court of Canada (the former refused and the latter dismissed).*

Several problems had resulted in the wrongful conviction of Thomas Sophonow, with
misidentification and faulty eyewitness testimony being the most significant. The effects of these were compounded by police and prosecutorial tunnel vision. The line-up and photo gallery process led to severely tainted eyewitness testimony. Prior to the preliminary inquiry, the eyewitnesses were uncertain about whether Sophonow was the person at the donut shop that fateful night. In fact, one of the eyewitnesses had originally identified two other suspects. As time went on, the witnesses became more certain of their identification. The Manitoba Court of Appeal, in acquitting Sophonow, commented on the progressive certainty of the eyewitnesses by musing that ‘subsequent affirmation of an earlier qualified identification can arise from a subconscious wish by a witness to defend the identification originally made’ (R v Sophonow, [1986] 2 WWR 481 (Man CA)). This comment appears somewhat prescient as well as descriptive in that it identifies the lack of correlation between confidence and accuracy.

The Inquiry

Commissioner Cory was given over a year to conduct the inquiry (the ‘Sophonow Inquiry’ or the ‘Inquiry’). He granted standing to more than 10 parties and he heard from numerous witnesses, some of them experts in the field of memory and eyewitness testimony. The Inquiry report (the ‘Sophonow Inquiry Report’ or the ‘Report’) was published in 2001.

American psychologist Dr Elizabeth Loftus testified at the Inquiry and highlighted the lack of correlation notwithstanding that jurors ‘tend to find confidant witnesses more believable’.

Dr Loftus presented the science behind mistaken identification. As time passes, Dr Loftus explained, people not only forget but they also become more susceptible to forming false recollections when they hear of new information. These problems are only magnified when police with tunnel vision fail to use appropriate line-up and photo array presentations. A description of what happened with the prosecutor’s prime eyewitness illustrates the problem appears in an article by Sarah Harland-Logan, published on the Innocence Canada website:

In addition to these general frailties of eyewitness testimony, the police investigating Barbara’s murder used problematic techniques in their attempt to elicit evidence from the witnesses. The Crown’s most important witness was John Doerksen, the man who ran after the murderer and attempted to confront him . . . When Doerksen first attended a line-up that included Thomas (Sophonow), he did not identify anyone – including Thomas – as the killer whom he had pursued. Two days later, however, Mr. Doerksen coincidentally saw Thomas while they were both in the Public Safety Building. By that time, Mr. Doerksen had read a newspaper that contained Thomas’ picture. He came to believe that Thomas actually was the person he had seen fleeing the donut shop, even though his appearance was essentially the same as it had been during the line-up. At the Inquiry, Dr. Loftus explained that as time passes, people not only forget information – they also become more susceptible to forming false recollections as a result of new information.

The Sophonow Inquiry Report references Dr Loftus in saying that ‘often the main reason for someone’s change of testimony is a result of receiving or being supplied with new information from police officers’ (at 30). That is exactly what happened in this case. The line-up arranged by the police and the photo array, according to Justice Cory, resulted in Sophonow standing out to such an extent that, in the words of one academic writer, it ‘might just as well have carried a notation saying “here I am”’. The inquiry made several recommendations with respect to police and prosecutorial practices to avoid problems that led to Sophonow’s wrongful conviction. Justice Cory found the extensive use of unreliable jailhouse informants and inadequate consideration of the frailties of eyewitness identification to be problematic. A summary of recommendations relative to eyewitness testimony was presented in an article published in 2006 by B. Macfarlane published in the Manitoba Law Journal in entitled ‘Convicting the Innocent: A Triple Failure of the Justice System’. It states, in part:

Multiple witnesses who had participated in the preparation of a composite drawing of the suspect had had an opportunity to influence one another. Another witness, who had been placed under hypnosis, probably allowed her recalled memory to merge with conscious memory. Media photographs of Sophonow
which were published between the tentative identification given by witnesses during the investigation, and their certain identification at the trial, acted as post-event information, reinforcing the brief acquisition of memory used for the purposes of the original, tentative identification. One witness, who had seen the real killer in the doughnut shop, made a tentative identification of Sophonow. Afterward, an investigator reinforced his identification with the result that his eyewitness identification, which had been tentative, then became certain. Cory concluded: ‘Mistaken eyewitness identification played a significant role in the wrongful conviction of Thomas Sophonow, as it has in many other cases.

The Sophonow Inquiry had the benefit of having the testimony of experts, such as Dr Elizabeth Loftus, who painstakingly reviewed the evidence of the eyewitnesses and showed how the testimony of each was likely tainted. Problems such as police interview techniques, use of line-ups and photo gallery packs all needed to be addressed. Recommendations from Justice Cory became standard guidelines after they were issued in 2001. The recommendations covered police use of live line-ups, photo pack line-ups, and trial court instructions. Those recommendations are reproduced in Schedule A.

The eyewitness identification guidelines have since become part of the regular training of police and prosecutors. After 2001 they have been used by the Canadian Federal-Provincial-Territorial Heads of Prosecution Committee to educate prosecutors on how to avoid wrongful convictions. Detailed reports with guidelines have been issued in 2005, 2011 and 2018.

Some Cases Decided Since the Sophonow Inquiry

While the guidelines from the Sophonow Inquiry have been embedded in police and prosecutorial training over the past 20 years, the advent of social media has added a new element that can potentially taint eyewitness testimony. In 2001, only a small percentage of homes had internet access. Logging on to the internet was achieved through the use of slow, dial-up modems; smart phones and social media were nonexistent. Comparing the technology of 2001 to what we have 20+ years later necessitates a conversation, at the very least, about the ways this new technology may affect police, prosecutors, defence counsel and the courts in dealing with this area of the law. To determine whether changes must be made to the three-part list of recommendations regarding eyewitness identification issued by the Sophonow Inquiry, five relatively recent cases in which social media comes into play relating to eyewitness identification are discussed below.

R v Ryan William Leeds, 2013 NSSC 364

The accused, Ryan Leeds, was charged with manslaughter in connection with the death of Nathaniel Welsh, who died as a result of a subarachnoid hemorrhage after a blow to the head. Mr Welsh struck his head on the pavement at a New Year's Eve party on December 31, 2009. The prosecution’s entire case rested on the direct identification of eyewitness Britney Gautreau, the girlfriend of the deceased victim, plus circumstantial evidence of Mr Leeds’ presence at the party. The sole issue in the case was the identity of the perpetrator. After appropriately instructing himself on the dangers of this type of evidence, the trial judge scrutinised the evidence of Ms Gautreau. Eyewitness evidence regarding a complete stranger (which Mr Leeds was to Ms Gautreau) can be notoriously unreliable or, as one court has noted ‘inherently unreliable’. Ms Gautreau’s evidence was rejected by the trial judge:

I do not accept that Ms. Gautreau’s identification of the accused was truly her independent recollection of the person she saw. The different descriptions she gave to the first responding police officers: the fact that she was in a room at the hospital with family and friends of the deceased for several hours and discussed the identity of the assailant with them; the fact that the accused was unknown to her at the time of the incident but that she was nonetheless able to give the police a nickname and that she and another person who had been at the hospital attended the police station together and were kept together before viewing the photo lineup. These factors all speak to the reliability and independence of Ms. Gautreau’s recollection. [39]

However, a further reason was proffered by the trial judge relating to Ms Gautreau’s time viewing the photographic array at the police station. It was noted by Detective Fox that Ms Gautreau
‘had her cell phone in hand and appeared to be looking at it while being shown the photographs. Detective Fox had to ask the witness to put her phone away during this process’.

Much of our lives are now focused on our cell phones and there is a plethora of social media available to us instantaneously, accessible by a few swipes of the finger. The trial judge noted this, and it further buttressed his decision to reject Ms Gautreau’s testimony.

R v Ahmed Mohamed, 2014 ABCA 398

Ahmed Mohamed was convicted of second-degree murder by shooting. The sole issue before the Court of Appeal was whether the trial judge was correct in finding that the prosecution had proven the identity of the accused beyond a reasonable doubt. The identification evidence came from three sources: eyewitnesses, a photo posted on Facebook and security camera footage. None of the eyewitnesses knew the accused before the incident, nor could any identify him by name to the police. However, all could give a physical description in terms of height, weight, skin color, clothing and general characteristics.

The contentious issue argued by counsel for the accused was the trial judge’s admission of the evidence of one Elyas Eman, a man who was in the best position to observe the shooter and made a dock identification of Mr Mohamed. Mr Eman was at the front of the nightclub at the time of the shooting. He saw the shooter about five metres away and saw him reach under his belt buckle and pull out a gun. He recalled hearing the gun being ‘racked’ and he saw the deceased (a friend of Mr Eman) run away while being pursued by the shooter. Mr Eman saw his friend fall to the pavement and the shooter run away. While tending to the victim, Mr Eman called 911 and described the shooter as a black male, five feet, six inches to five feet seven inches in height and having braids. He had never seen the man before. He would further describe the shooter as appearing to be Ethiopian, having a goatee and loose cornrows braided towards the back of his head. The shooter was described as short and stocky and appeared to be in his mid-twenties. Mr Eman also described the shooter’s clothing.

Two days after the shooting, Mr Eman described the shooter to a friend who had been made aware of the shooter’s description from the local news. His friend suggested he might know the shooter and proceeded to show Mr Eman Facebook photos. There was no forensic evidence identifying the accused, Mr Mohamed, as the shooter, but from the photos Eman identified the shooter in two of them. That man was known to the friend of Eman:

The first photo was of six black males that the trial judge found were generally of the same description and size. From the six men in the photo, Mr. Eman selected Mr. Mohamed as the shooter. He also identified Mr. Mohamed from a second Facebook photograph of two men, taken subsequent to the wedding party photograph. [20]

An issue argued by defence on appeal was that the trial judge misapprehended the Facebook identification. The trial judge had concluded that the Facebook process of identification was entitled to ‘significant weight’:

The trial judge concluded that this process of identification was entitled to ‘significant weight’, it being ‘critical and important… because, in part, it demonstrates the consciously serious and spontaneous nature of the identification of the accused from a group of men, all similar in description with similar physical features’. He observed that this photographic ‘lineup’ had many similar characteristics to a police lineup and that he was aware of the caution with respect to the nature and use of police lineups. [21]

The three concerns of the defence on appeal were as follows:

1. The Facebook photographic identification was tainted by witness contamination. Someone told Mr. Eman to expect to see the shooter in the photographs while at the same time pointing out Mr. Mohamed in the photo as the possible shooter before he was identified.

2. Further tainting of the evidence occurred by Mr. Eman being told there was a dispute or quarrel between the accused person and the deceased.

3. By giving the Facebook evidence significant weight, the trial judge misapprehended its reliability by equating it to that of a police
line-up. The trial judge did not expressly caution himself as to its likely unreliability given the absence of various markers that are required.

It is contended here, with respect, that it may be that the Alberta Court of Appeal may have mistakenly affirmed the trial judge’s approach in this case by equating the Facebook identification to a police line-up, notwithstanding the fact that this ‘real life identification’ arose spontaneously from a discussion of a group of friends of the deceased. This type of tainting of evidence is harmful whether it is done by police officers with tunnel vision or with friends of the victim of a crime. The procedure for identification in this case does not conform with the recommendations of the Sophonow Inquiry.

R v Jobe, Joyce & Kipper, 2016 NSSC 282

Three accused persons were acquitted of armed robbery when the only crown witness’s evidence was found to be unreliable and untrustworthy. Relevant portions of the trial decision are worth noting:

I have decided not to recount all of Z.S.’s testimony in this area. In any event, I found that throughout her direct examination, Z.S.’s description of the men varied. The difficulty with these varying descriptions became compounded when Z.S. allowed that some of her recollections were based upon social media and other exchanges in the roughly one year since the robbery. In this regard, I accept Defence Counsel’s submissions that this area of Z.S.’s testimony, which they term crowd-sourced, is full of hearsay and must be disregarded. [20]

The fact that Z.S.’s description of these individuals became more detailed over time is a concern. It speaks of the tainting which occurred as a result of her social media and other exchanges about the possible identities of the robbers. At the end of the day, when I consider all of Z.S.’s evidence, I am persuaded by the Defence characterization of this witness as someone who did not take the Court proceeding seriously. Her flippant approach on top of everything else I have said about Z.S. causes me to conclude she is completely unreliable and untrustworthy witness. [24]

Similar to the case of Sophonow, the prosecution witness’s evidence seems to have gotten ‘more detailed over time’. This happened due to use of social media and other ‘technology exchanges’ leading this witness to identify the robbers.

R v Assefa, 2018 ABCA 6

Bareket Assefa was convicted of aggravated assault after a trial where identification was the main issue. On appeal the accused argued that the trial judge erred on two points. First, it was contended that it was an error to rely on the evidence of witness JB, whose evidence was described by the prosecution as ‘weak’ and did not prove identification. The second argument was that the trial judge, in finding that the identity of the accused had been proven beyond a reasonable doubt, failed to appreciate the frailties of identification evidence and also failed to appreciate that the identification was not one of ‘recognition’.

The appeal court reminded itself in this case that appeals involving eyewitness testimony and concerns around identification are taken very seriously. Indeed, the court characterised this case as one involving ‘recognition evidence’, which is a subcategory of identification evidence. Recognition evidence can actually assist the trier of fact in the area of eyewitness identification. The trial judge did not only rely on the victim’s in court dock identification; instead, she linked the identification to the witness’ recognition:

When he was first slapped in the face and then assaulted with the wine glass, Gardner says the image of the... assailant accused was imprinted on his brain. I do find that Gardner had the opportunity to familiarize himself with the accused through the association with a person known to him, not by name initially, but known to him as a basketball player from SAIT during the party and then during the two assaults that he sustained at the hands of the accused.

This was much more than a fleeting glimpse of his assailant. I would categorize this type of identification as recognition identification... [21]

The trial judge then took all the surrounding circumstances into account. The Court of
Appeal affirmed this approach:

The trial judge here took all of the circumstances surrounding the encounter and Gardner’s identification of the assailant into account. When Gardner reviewed Edgar’s Instagram photos, he was looking for the face of a person he had seen and recognized throughout the evening in the company of Edgar, a man he knew and had spoken to on previous occasions. The trial judge found that his was not a fleeting glance case, but one of recognition. She noted that Gardner’s identification is not precisely the same as that of a witness who has known a suspect over a lengthy period of time, but found that Gardner’s eyewitness account nevertheless did not suffer from all the frailties of the identification of a fleeting glance of a stranger. It was the task of the trial judge to take the circumstances of the identification into account and assess the weight to be accorded to it. We see no reviewable error in the trial judge’s assessment of Gardner’s identification evidence and in her reliance on that evidence to convict the appellant. [23]

R v Pearce, 2017 ONCJ 743

The accused was charged with one count of ‘invitation to sexual touching’, contrary to section 152 of the Criminal Code. The prosecution had only one witness, the 15-year-old complainant, who testified as to the identity of the person who had approached her. She initially gave police a description of white male, skinny, 6 feet tall with a shaved head and goatee. Weeks later the complainant found a photo of the accused on Facebook and saved the photo and informed the police. The court had no concerns about the witness’ credibility or sincerity, but acquitted the accused due to the fact that the witness may not have been reliable:

I confirm that the description of the man in question, as given by the complainant, is consistent with the appearance of the defendant and that the latter is the man in the Facebook photograph.

The complainant is a keen observer. Her depiction is a detailed one that there are few distinguishing features; he is white, tall and skinny, with a shaved head and goatee and dressed in black clothing. This account is based on a one-minute interaction with a stranger. The link to the defendant is the result of a Facebook search 11 to 18 days later after the complainant overheard her father mention Richard Pearce as the suspect. In these circumstances, I could not conclude with the requisite certainty that the defendant is the guilty party.

The Crown points to confirmatory evidence to bolster the identification by the complainant; that is, the defendant lives in the building that the culprit pointed to as his residence. However, having regard to the number of units in the building, this additional evidence is not sufficiently compelling to resolve my doubt about the matter of identity. The charge is dismissed. (at paras 19-21)

The trial court in Pearce was of the view that when considering all of the required safeguards in reviewing the identification by a witness of someone they did not know, that there ‘is the problem of a mistake by a convinced and convincing witness’.

CONCLUSIONS

A review of the above-noted cases shows how, in the last several years, technology has gained wider use and has had an impact on witnesses’ memory, eyewitness testimony and how trial judges assess such evidence. It is the author’s view that the time has come for some very specific research to be done along the lines of the pioneering research of Dr Elizabeth Loftus in the 1970s. This research needs to focus on the impact of social media on peoples’ memories and recall, and how recourse to social media can affect the reliability of eyewitness identification. It would be helpful if prosecutors and defence lawyers, and the forensic scientific community, were to press for more scientific study in this area.

Until such research is completed, the standard principles and recommendations included in Schedule A relating to ‘live line-up’ and ‘photo pack line up’ should be viewed without interruption, use or reference to social media, and access to personal computers or cell phones should not be permitted during these viewings or observations. Further, the Sophonow
Inquiry recommendations should be updated to reference the dangers of witnesses’ use of social media in the period between the time of the event in controversy and the giving of testimony in court touching on the issue of identification. Finally, ‘recognition evidence’—a subcategory of eyewitness identification evidence—calls for more thoroughly examination and explanation, extending beyond what is already addressed in the Sophonow Inquiry recommendations in Schedule A.

Further, trial judges, when instructing jurors, need to be mindful of the circumstances and descriptions given by eyewitnesses, but in assessing their identification evidence, judges must also be aware of the potential impact of social media contact and its ability to degrade the reliability of identification evidence. Until the forensic science community has generated reputable studies to alleviate the presumed risks in this area, prosecutors, defence counsel and judges need proceed with greater caution when considering eyewitness identification and recognition evidence.

**Schedule A**

**Sophonow Inquiry Recommendations**

**Eyewitness Identification**

**Live line-up**

- The third officer who is present with the prospective eyewitness should have no knowledge of the case or whether the suspect is contained in the line-up.

- The officer in the room should advise the witness that he does not know if the suspect is in the line-up or, if he is, who he is. The office should emphasize to the witness that the suspect may not be in the line-up.

- All proceedings in the witness room while the line-up is being watched should be recorded, preferably by videotape but, if not, by audiotape.

- All statements of the witness on reviewing the line-up must be both noted and recorded verbatim and signed by the witness.

- When the line-up is completed, the witness should be escorted from the police premises. This will eliminate any possibility of contamination of that witness by other officers, particularly those involved in the investigation of the crime itself.

- The fillers in the line-up should match as closely as possible the descriptions given by the eyewitnesses at the time of the event. It is only if that is impossible, that the fillers should resemble the suspect as closely as possible.

- At the conclusion of the line-up, if there has been any identification, there should be a question posed to the witness as to the degree of certainty of identification. The question and answer must be both noted and recorded verbatim and signed by the witness. It is important to have this report on record before there is any possibility of contamination or reinforcement of the witness.

- The line-up should contain a minimum of 10 persons. The greater the number of persons in the line-up, the less likelihood there is of a wrong identification.

**Photo Pack line-up**

- The photo pack should contain at least 10 subjects.

- The photos should resemble as closely as possible the eyewitnesses’ description. If that is not possible, the photos should be as close as possible to the suspect.

- Everything should be recorded on video or audiotape from the time that the officer meets the witness, before the photographs are shown through until the completion of the interview. Once again, it is essential that an officer who does not know who the suspect is and who is not involved in the investigation conducts the photo pack line-up.

- Before showing of the photo pack, the officer conducting the line-up should confirm that he does not know who the suspect is or whether his photo is contained in the line-up. In addition, before showing
the photo pack to a witness, the officer should advise the witness that it is just as important to clear the innocent as it is to identify the suspect. The photo pack should be presented by the officer to each witness separately.

- The photo pack must be presented sequentially and not as a package.

- In addition to the videotape, if possible, or, as a minimum alternative, the audiotape, there should be a form provided for setting out in writing and for a signature the comments of both the officer conducting the line-up and the witness. All comments of each witness must be noted and recorded verbatim and signed by the witness.

- Police officers should not speak to eyewitnesses after the line-ups regarding their identification or their inability to identify anyone. This can only cast suspicion on any identification made and raise concerns that it was reinforced.

- It was suggested that, because of the importance of eyewitness evidence and the high risk of contaminating it, a police force other than the one conducting the investigation of the crime should conduct the interviews and the line-ups with the eyewitnesses. Ideal as that procedure might be, I think that it would unduly complicate the investigation, add to its cost and increase the time required. At some point, there must be reasonable degree of trust placed in the police. The interviews of eyewitnesses and the line-up may be conducted by the same force as that investigating the crime, provided that the officers dealing with the eyewitnesses are not involved in the investigation of the crime and do not know the suspect or whether his photo forms part of the one-up. If this were done and the other recommendations complied with, that would prove adequate protection of the process.

**Trial Instructions**

- There must be strong and clear directions given by the Trial Judge to the jury emphasising the frailties of eyewitness identification. The jury should as well be instructed that the apparent confidence of a witness as to his or her identification is not a criteria of the accuracy of the identification. In this case, the evidence of Mr. Janower provides a classic example of misplaced but absolute confidence that Thomas Sophonow was the man whom he saw at the donut shop.

- The Trial Judge should stress that tragedies have occurred as a result of mistakes made by honest, right-thinking eyewitnesses. It should be explained that the vast majority of the wrongful convictions of innocent persons have arisen as a result of faulty eyewitness identification. These instructions should be given in addition to the standard direction regarding the difficulties inherent in eyewitness identification.

- Further, I would recommend that judges consider favourably and readily admit properly qualified expert evidence pertaining to eyewitness identifications. Jurors would benefit from the studies and learning of experts in this field. Meticulous studies of human memory and eyewitness identification have been conducted. The empirical evidence has been compiled. The tragic consequences of mistaken eyewitness identification in cases have been chronicled and jurors and Trial Judges should have the benefit of expert evidence on this important subject. The expert witness can explain the process of memory and its frailties and dispel myths, such as that which assesses the accuracy of identification by the certainty of a witness. The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial.

- The Trial Judge must instruct and caution the jury with regard to an identification which has apparently progressed from tentative to certain and to consider what may have bought about that change.

- During the instructions, the Trial Judge should advise the jury that mistaken eyewitness identification has been a significant factor in wrongful convictions of accused in the United States and in Canada, with a possible reference to the Thomas Sophonow case.
Artificial Intelligence (‘AI’) systems are increasingly being adopted across society, including in business and government, for an array of purposes. However, the novelty of these technologies raises concerns for many. AI systems are capable of acting autonomously and emergently, and of influencing, shaping, changing and indeed damaging accepted social processes and norms. AI systems can generate dangers at a speed and scale otherwise impossible for manual processes undertaken by humans—in often opaque and unexplainable ways.

These concerns have been most gravely expressed in the inquest of Molly Russel in the UK, who took her own life after being repeatedly exposed to online content relating to self-harm that had been autonomously suggested by algorithms on platforms including Pinterest and Instagram. This emergent risk had not been expected, nor safeguarded against, by the platforms in question, whereby algorithms designed to keep users interested and ‘hooked’ to a platform, had done so by inducing a child to ‘binge’ on harmful content. Though the algorithms were found to have had a ‘more than minimal’ contribution to Molly’s death—precisely what this means for understandings of the safeguarding responsibility of online platforms (and conversely, potential liabilities) is unclear, with the inquest incapable of setting or defining liability rules.

Similar dangers have been used by some to demand greater regulation of AI technologies and liability rules relating to their use. However, for lawyers, this clearly begs the questions: regulation of what kind? Regulation in response to what specific risks or dangers? Are existing laws fit for the challenge of responding to these novel dangers and risks?

The bread and butter of legal practitioners, and scholars alike, is in identifying these precise details—a task that Anna Beckers and Gunther Teubner have enthusiastically undertaken within this book. Using the cover artwork as an analogue (Figure ambigue by Max Ernst), they open by describing the radical ambivalence of AI’s ‘machine automatons’ towards humanity—and the absurdity, irrationality, and brutality (‘undreamt-of hazards’) that can arise where such machines are left to act in opaque and uncontrollable ways.

The authors seek to answer the following question: how should the law address the ‘responsibility gap’ that exists where emergent action is taken by software agents, in socio-technical contexts, that generates harm or loss—to which responsibility cannot be immediately and directly assigned to a specific or singular human or legal entity? To answer this question, they present three useful, novel and thought-provoking, liability ‘regimes’ through which to find solutions to emergent and unpredictable liability risks that AI technologies can generate. They separate these liability risks into three categories: (1) Autonomy risk, i.e., risks arising from autonomous decisions taken by algorithmic systems; (2) Association risk, i.e., risks arising from the close co-operation between humans and algorithmic systems (forming socio-technical ‘hybrids’); and (3) Interconnectivity risk, i.e., risks arising from multiple algorithmic systems acting as a ‘collective.’

The authors use this tripartite typology of risks to build out solutions in the aforementioned form of liability ‘regimes’ constructed around each risk, so as to reduce such risks in a proactive manner ex ante, and to resolve legal disputes ex post: (1) ‘limited legal personhood’ for algorithms that autonomously generate liability risk, which gives rise to vicarious liability to those ‘users’ who decide to put the algorithm into action and thus benefit from its use; (2) enterprise liability for socio-technical hybrids, whereby responsibility is allocated to the ‘network share’, or pro-rata liability, of the human and algorithmic actors that form part of the hybrid; and (3) collective fund liability on a ‘no-fault’ basis, or ‘socialised’ risk pooling, for connected algorithmic crowds that give rise to interconnectivity risk (i.e., systems of multiple algorithms capable of action, and in communication with one another).
In setting out their solutions, Beckers and Teubner reject calls that we should either view AI systems as extant in society, or that AI systems should be ascribed legal personhood. Rather, they argue that we should view AI systems as ‘mindless machines’ that become ‘members of society’ when ‘attribution of action to them is firmly institutionalised in a social field’. In other words, AI systems must not be viewed merely as technical instruments, but as elements of socio-digital institutions to which actor status and meaning is ascribed by institutional contexts and cultures for specific purposes. Within this view, algorithms must be understood as ‘message chains’ or ‘decision chains,’ rather than fully actualised actors in their own right, thus requiring new and context-sensitive conceptualisations of liability that recognise the complexity of algorithmic processes and institutional goals.

The solutions presented by the authors are indeed novel and sometimes theoretically complex—drawing from a wide variety of disciplines, including science and technology studies (‘STS’) and the work of Bruno Latour. Yet they are entirely sensible once the reader grasps their full extent, with the authors overcoming a tremendous challenge by making these complex theoretical concepts work for the functions and purposes of the law in ways that are capable of offering practical clarity to legal scholars and practitioners alike.

There are nonetheless questions that remain regarding the implementation and adoption of these ‘regimes’ within existing legal processes, with more work required in this regard. In particular, which specific procedural adjustments will the law require in order to successfully implement Beckers and Teubner’s vision? For example, no definitive answers are given as to how collective ‘funds’ should be established for interconnected AI systems. How successful will the solutions be when required to operate at scale? Can they be implemented, or indeed re-formulated, for specific sectors or contexts where necessary, and at the requisite speed through which to which to tackle algorithmic risks? How will they interact other existing regulations, such as the EU’s AI Act, and can this interaction be harmonious? Can these regimes generate new forms of conflict or tensions between and among existing legal principles?

These are however practical challenges that can be overcome, and Beckers and Teubner have laid significant groundwork from which the law can build to appropriately tackle liability risks arising from the adoption and use of AI systems. This book presents an intellectual challenge for readers—leading to often satisfying solutions—and thus, I would certainly encourage others to read and engage with its ideas.

Reviewed by Prof Adam Harkens, Lecturer in Public Law, University of Strathclyde, Glasgow

THE GALILEE BELL: FROM SANCTUARY TO ASYLUM AND BACK—THE ROLE OF THE CHURCH

Geoffrey Care
Balboa Press, 2023, 145 pp., £11.95 (pbk)

In 2023, there can be few subjects more present to the minds of the socially and politically engaged than that of immigration. Like many topics in our increasingly polarised (nay, tribal) world, opinions about how to respond to refugees, asylum seekers and economic migrants are deeply divided. There is, to be sure, considerable public support for government policies and legislation that have lately been developed to address the challenges raised by increasing numbers of persons displaced from their homelands seeking safety and security in the UK and elsewhere. But such policies and legislation have nevertheless come under heavy fire from their opponents. Normally somewhat restrained in the language of its commentary on political matters, the Guardian has lately run incendiary headlines such as ‘Suella Braverman’s small boats crackdown is performative cruelty at its worst’ and ‘Senior Conservatives hit out at Suella Braverman’s “racist rhetoric”’. There is much talk of morality, criminality and societal norms in the current public and political discourse regarding the ‘inflow’ of migrants to the UK. Unsubstantiated assertions that those arriving on Britain’s shores seeking safe haven display ‘heightened levels of criminality… related to the people who’ve come on boats related to drug dealing, exploitation, prostitution’ have only fueled the angry and often uninformed rhetoric. When the Home Secretary recently stated, without...
evidence, that ‘I think that the people coming here illegally do possess values which are at odds with our country’, the pushback was immediate and forceful. The contrary views of opponents of such thinking and the policies and legislation it spawns are neatly captured by the words of the Archbishop of Canterbury in December 2022 when he stated, in the House of Lords, that politicians and the public should reject:

...shrill narratives that all who come to us for help should be treated as liars, scroungers or less than fully human.

At times like these it is well for us to be reminded of the responses that asylum seekers drew from Britain’s churches over the span of its history. Few could be better qualified to enlighten us in this regard than Geoffrey Care, a retired Deputy Chief Adjudicator of the Immigration Appellate Authority (and, as well, a former judge of the High Court of Zambia, a founder of the International Association of Refugee and Migration Judges; and a member of the editorial board of this journal). Geoffrey Care has, in the past, written authoritative texts on the role played by courts, tribunals and the law in these matters. Chief among these is his Migrants and the Courts: A Century of Trial and Error (Routledge 2016). In his just-published title, The Galilee Bell: From Sanctuary and Asylum and Back – the Role of the Church—the subject of this review—he shifts focus, addressing the history, covering ancient times when it was the churches who responded (in Justin Welby’s words) to those ‘who come to us for help’.

The Galilee Bell is a consummately fascinating and well-written account of a time in history when the conditions of daily living could be especially harsh and unforgiving. And yet, ancient church traditions surrounding the practice of granting asylum in Britain show us that the humanity that informed the practice in those long-ago times compares very favourably to what is on display in contemporary law and policy regarding refugees, asylum seekers and economic migrants. As the author explains, in those earlier times ‘the guarantor of security [for those claiming sanctuary] was the church’, but with the state’s sometimes explicit and sometimes tacit consent. He continues:

What is central to the concept of sanctuary, then and now, is that the church supplies the Christian qualities of mercy and compassion when they are absent from the administration of justice... [Sanctuary provided by the church] was in fact complementary to the administration of justice, as it could be today.

The author expresses regret that sanctuary no longer survives today, ‘at least in the same form’. From there he moves on to provide rich and colourful, flesh-and-bones accounts of twenty vulnerable men and women (‘grithmen’ or seekers of sanctuary) who sought safe haven in the town of Beverley in the East Riding of Yorkshire. Beverley’s Minster played a key (indeed, inspiring) role in the history of church-based sanctuary in England.

Geoffrey Care’s research for The Galilee Bell began with skeletal church records of the lives of these grithmen, and then proceeded to plumb and probe other sources to round out the accounts of those lives in a most compelling way. He has woven a rich tapestry of both human misery and the compassion and fellow-feeling that it then triggered. It is, alas, beyond the scope of this review to summarise more than one of those individual accounts.

‘The Wheelwright’s Tale’ (chapter 5) describes the plight of one George Hopper—a man whose family was decimated by the Great Plague. Only he (at seven years) and two younger sisters (five and two) survived it. They were taken in and fed, temporarily, by a cousin who also soon died as a result of the Plague. George (like some other orphaned children) gathered up stray animals—in his case, three cows and a donkey—to avoid starvation for himself and his sisters. These creatures were formerly the property of other citizens lost to the plague and wandered freely, untended and uncared-for.

George Hopper and his sisters fed off the milk of the cows and the food that could be purchased when some of the cows’ milk was sold. Revenues increased when a purchaser for the donkey was found. Thus, they limped along until George, aged 10, was offered work with a smithy. In time he was apprenticed, learned the skills of a wheelwright and eventually acquired his master’s business.
George Hopper later took on his own apprentice—an ungrateful boy who stole George’s property and attempted to molest his sister. So began a slow unravelling. The apprentice turned out to be a rogue who eventually injured himself fatally while using George’s tools without permission. While he did not believe the accident was attributable to any fault of his own, it did occur while he was functioning under George’s care and supervision and George knew that any constable who learned of the death would take him into custody. Thus, he buried the apprentice secretly in a nearby wood and concealed the fact of the boy’s death, saying that he had sacked him and that the boy had run off.

George’s conscience grew more and more troubled as time passed. Seven years later, after his sisters had married, his remorse got the better of him and he closed his workshop and house and sought sanctuary at Beverley Minster. He made a confession regarding the boy’s death, remitted the appropriate payments and made an oath of fealty to the abbot. Knowing that his sanctuary in the church would be limited to 40 days, he anticipated that, upon leaving it, he would likely be gaoled for years awaiting trial for the crime (a precursor of criminal negligence causing death, perhaps) to which he had confessed. Before his 40 days had run out, George thereupon sought God’s forgiveness in the presence of three canons of the church and undertook to undergo whatever penance was required of him. After conferring with the canons and the coroner, the Prior confirmed that God’s forgiveness had been given to him and decreed that George must give the rest of his life to the church. Thus, redeemed in the eyes of God and the church, George Hopper spent the rest of his days safely in the Minster, using his wheelwright’s skills to assist in repairing church equipment and otherwise living contentedly.

Chapter 5 of The Galilee Bell is complemented by 19 other chapters which are similarly vivid in their descriptions of the life circumstances of the sorry souls who came to Beverley Minster seeking the church’s mercy and received it. The writing is as compelling as its subject matter; those chapters bring to life the grotesque conditions under which many lived in the 13th C. and onward and the exemplary way in which the most vulnerable were afforded succor and protection by the church when they were in need of it.

Chapter 21 of The Galilee Bell ties together many of the strands developed earlier in Geoffrey Care’s fine book; it seeks to situate the modern predicament in which Britain and other countries find themselves regarding the flow of refugees, asylum seekers and economic migrants across their respective borders in its historical context. There is discussion of the various cities around the world which, in light of the calamities faced by so many in recent times and the hostile actions of some governments, have admirably declared themselves cities of refuge. The author then offers this summary:

...[N]ational attitudes toward control of the movement of people across their borders have had a poor record of success even when they become draconian. They lead to unnecessary suffering by the vulnerable—intentionally and unintentionally. Globally, when cooperation should be the watchword, there is conflict and confrontation; when the focus should be on burden-sharing, there is only myopic self-interest. On the domestic scene, this situation inevitably leads to the absence of harmony between church and state, where cooperation would be humane and in the long run should be cheaper and more effective.

The most recent policies and legislation highlight the gulf between views on control of borders between states as well as differences within a country.

The story of sanctuary is not dead. It continues to resonate every day in the lives of those ‘whose background is forced displacement’ in every part of the world.

It will be recalled that in 1996, confronted by restrictive provisions in immigration laws that had then been introduced (but which are far less restrictive than those now in place in the UK), Lord Justice Simon Brown courageously said the following in R v. Secretary of State for Social Security ex parte B and Joint Council for the Welfare of Immigrants, [1996] EWCA Civ 1293:

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I for my part regard the Regulations now in force as so uncompromisingly draconian in effect that they must indeed be held ultra vires. I would found my decision not on the narrow ground of constructive refoulement envisaged by the UNHCR and rejected by the Divisional Court, but rather on the wider ground that rights necessarily implicit in the 1993 Act are now inevitably being overborne. Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.

Refugees, asylum seekers and economic migrants today in the UK (and, indeed, in many other parts of the world) find themselves ‘impaled’ on the horns of an even more impossible dilemma than they did in 1996 when Lord Justice Simon Brown declared less draconian reforms to immigration laws ultra vires. Policymakers and legislators today would surely benefit from reading Geoffrey Care’s captivating account, in The Galilee Bell, of the history of asylum in the UK and the principles and human qualities of mercy and compassion that informed it in kinder and gentler times.

When faced with incontrovertible evidence of their own missteps, politicians are sometimes wont to say, ‘We can do better’. When it comes to the topic of refugees, asylum seekers and economic migrants and the immigration laws and policies by which they are sought to be governed, it is plain that an appropriate admission would be, ‘In the past, we did better’. As Geoffrey Care notes in The Galilee Bell, the churches’ robust historical treatment of asylum seekers in Britain enjoyed the sometimes explicit, and sometimes tacit, support of the state. How, then, do we find ourselves where we are today? In a sense, liberal democracies—whose politicians so often invoke nostalgic tropes to support their agendas—should consider a return to the past when fashioning the immigration policies of the future.

Reviewed by Judge Thomas S. Woods (ret), Editor-in-Chief of the Commonwealth Judicial Journal and, inter alia, a former judge of the Provincial Court of British Columbia

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