SYDNEY UNIVERSITY LAW SOCIETY

2021

MOSAIC

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CLAYTON UTZ

Many thanks to everyone who made the production and publication of the 2021 Sydney University Law Society MOSAIC Journal possible. In particular, we would like to thank the Sydney Law School and the University of Sydney Union for their continued support of SULS and its publications.

We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon, the Gadigal People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

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Contents

Editor-In-Chief's Foreword

Amir Elsaidy

Much has been written about the so-called sophomore slump. Acclaimed novelists often struggle to echo the flair of their debuts, athletes have difficulty replicating the strengths of their first seasons, and the enthusiasm of students begins to noticeably wane after their first year. One thing is certain - MOSAIC has not been beset by this affliction. The second edition of what is perhaps the most complex publication in the Sydney University Law Society (SULS) oeuvre is a remarkably bold collection of prose, poetry and art that builds upon its predecessor and encapsulates what can be achieved when diverse perspectives are empowered.

I do not make this observation lightly. MOSAIC's complexity lies in the fact that it not only has a broad ambit, covering racial, ethnic, cultural, linguistic, and religious diversity within the legal sphere, but a broad mandate as well, championing the historically marginalised voices of those within Black, Indigenous and People of Colour (BIPOC) communities. As such, the journal serves as a nurturing cradle for budding academics and legal scholars, a canvas for creative expression, and a loom that weaves together the threads of countless beings, with endless stories to tell.

The significance of these multifaceted functions cannot be overstated. Although a quiet optimism is brewing as we inch towards a post-COVID way of life, one must be conscious of the fact that there remains much to be sceptical about. Across the seas we can clearly discern the continued rise of anti-Asian hate and the ongoing need for the Black Lives Matter movement. More locally, we must grapple with the arguably disproportionate policing of Western and South Western Sydney, unexplained Indigenous deaths in custody, toxic corporate cultures, and fundamentally unrepresentative political representation in our most vulnerable communities. These are difficult questions that must be answered, and our contributors have diligently heeded the call.

In an attempt to distil this complexity into a simultaneously accessible and authentic body of work, this year's contributions have been arranged into five thematically distinct chapters, each embodying a facet of the BIPOC experience that has been 'othered'. In a deliberate subversion of Australia's heavy monolingualism, each chapter has been given a title from a community language proudly spoken by one of the journal's editors. We invite you to surrender to, and engage wholeheartedly with the rich narratives contained within to organically uncover the meaning of each chapter.

It seems fitting here to mention that the journal would not have been possible without the passion and dedication of the brilliant editorial team constituted by Soo Choi, Sharyn Budiarto, Nishta Gupta and Angela Xu. While I have yet to have the pleasure of meeting these four incredible women in person, their radiant talent was not dulled by our unfortunate relegation to the virtual medium. Each has volunteered their time, effort, and counsel over one of the more difficult years in recent memory, and I am greatly indebted to them.

On behalf of the MOSAIC editorial team, I would also like to extend my gratitude to the SULS Publications Director, Justin Lai, whose knowledge and approachability has been indispensable to the success of this project, as well as the SULS Design Director, Arasa Hardie, and his team for their unrivalled creative prowess. I am also personally thankful for the mentorship and faith placed in me by the SULS Ethnocultural Officer, Mahmoud Al Rifai, who preceded me as Editor-in-Chief.

Finally, utmost thanks go to the contributors whose pieces challenged us to critique our institutions and systems, consider the need for legal and political reform, and reflect on the lived experiences of diverse individuals. In particular, I would like to thank our academic and professional contributors, Professor Simon Bronitt, Dr Louise Boon-Kuo, Dr Ghena Krayem, and Miriam Makki for their astute observations and insightful commentary. Special mention must also be made of Clayton Utz, whose generous support of this journal we immensely appreciate.

On that note, I welcome you to the 2021 edition of MOSAIC - a sophomore truly on the rise.

PART ONE

举目无亲
[jǔ mù wú qīn]
To raise your eyes and see nothing dear

Many of us feel like strangers in strange lands, surrounded by foreign faces, names, and cultures, nothing and no one that we hold dear. Whether by force or by choice, in the past or at this very moment, our world has seen people traverse mountains, navigate oceans, and endure through deserts to reach foreign lands. It has seen millions dispersed to build new nations, communities seeking better lives, and individuals embarking on solitary adventures. Such movement creates the humming heartbeat of human life on earth, facilitating creation and destruction alike.

Seyfo: The Wound that Never Healed

Nora Takriti

I laid bare all the catastrophes which had befallen my people [...]

I felt as if I had delivered my speech to statues carved from stone.

— Archbishop Ephrem Barsoum (1887-1957)[1]

Victimised by the crime, but redeemed by the law he named, Polish-Jewish jurist Raphael Lemkin (1900-1959) combined the Greek *genos* with the root of the Latin *cidere* to label the coordinated annihilation of a nation or ethnic group as a *genocide*—a crime unlike any other, distinguished by its intentionality, target and degree.[2] However, Lemkin's conceptualisation of genocide predates WWII and the United Nations Convention on the *Prevention and Punishment of the Crime of Genocide* (1948) (hereinafter, the Genocide Convention or Convention), as he prepared several documents highlighting an earlier case, when the Ottoman Empire deported and massacred its Assyrian, Armenian and Greek populace. Although, in *The Man Who Invented Genocide*, James Martin admits that the public memory of this tragedy is 'so obscure... that even historians could be counted on not to know what [Lemkin] was talking about.'[3]

Today, the plight of Assyrians remains on the periphery of genocide scholarship and international awareness.[4] Accordingly, this article seeks to examine the phenomenon of hidden and forgotten genocides, with reference to *Seyfo*—the neo-Aramaic word for 'scimitar,' mentioned in oral tradition to denote the Assyrian genocide between 1895-1923. As with the Armenian and Greek genocide, the official attitude of Turkey, the successor State of the Ottoman Empire, has been to reject that anything criminal ever befell the Assyrians.[5] Nonetheless, their survival has been compounded by uninterrupted waves of persecution, including the recent ravages of the so-called Islamic State (ISIS) from 2014. This adds significant ballast to the argument that there exists a psychohistorical dynamic in which unacknowledged genocide begets new genocide, or at the very least makes it possible for such heinous crimes to develop.[6] To make this case clear, I will firstly provide historical background and incorporate *Seyfo* into the legal considerations pertaining to the *Genocide Convention*. Indeed, the application of this treaty is imperative to enact the *erga omnes* duty to prevent genocide.[7] However, its qualification remains contentious in international law, since the term was developed decades later. Against this framework, I will examine enduring genocidal patterns and the spatial dynamics of genocide recognition. If 'never again' was the fervent desire of Lemkin and the *Genocide Convention*, then it has failed due to the impunity of perpetrators, the selective morality of legal enterprises, and the complicity of international actors. Thus, returning to 'hidden' antecedents can illuminate how non-recognition engenders future atrocities and urgently signals the foundation for genuine redress.

I. The Year of the Sword —1915

Assyrian people are Indigenous to a homeland stretched across four modern states, comprising the Nineveh Plains of Iraq, the Hakkari and Tur Abdin regions of Turkey, Urmia in Iran, and the Khabour river and Aleppo regions of Syria.[8] Following the nineteenth century, the Assyrian plight of statelessness and persecution became more dire, as Kurdish auxiliary forces were mobilised as part of the Ottoman 'divide-and-rule' strategy.[9] Consequently, the first instance of mass violence occurred between 1843-1846, when the Kurdish chieftain Bedr Khan Bey invaded the Hakkari mountains, leading to 10,000 deaths.[10] Between 1894-1896, further mass violence ensued, particularly in the Diyarbekir Vilayet where approximately 25,000 Assyrians were slaughtered under the Hamīdiyye regiments formed by Sultan Abdul Hamid II (1876–1909).[11] In assessing the motivation behind this Turkish-Kurdish alliance against Assyrians, Fırat Aydınkaya (Kurdish lawyer and scholar) references Christian resistance against the *Dhimmi* system,[12] Ottoman 'plunder militarism,' 'booty economy,' and ultimately 'genocide bureaucracy.'[13] This ongoing violence ultimately materialised into official government policy on October 11, 1914, as the Young Turk government and its Committee of Union and Progress declared *Jihad* ('holy war').[14] As the US ambassador to Turkey, Henry Morgenthau stated: 'Their [The Young Turks] passion for Turkifying the nation seemed to demand the extermination of all Christians—Greeks, Syrians, and Armenians.'[15] When the campaign reached its climax in 1915, its genocidal proportions became clear; in April, the German imperial chancellor was informed that the Assyrians of the eastern Ottoman Empire were 'exterminated.'[16] While the *Armistice of Mudros* (1918) dismantled the Ottoman Empire and signalled post-war peace, Assyrians were ushered into a new period of uncertainty. Forces loyal to Mustafa Kemal Atatürk, the founding father of the Turkish republic, slaughtered Assyrians without foreign protection, trafficked women into harem slavery, and exiled an additional 8,000 Christians from Mesopotamia into Turkey's interior.[17] Although there is uncertainty as to the precise number of victims, there is a general consensus that between half to two-thirds of Assyrians perished in a genocide between 1895 and 1923.[18]

II. The Genocide Convention: A Legal Framework

While forms of genocide were recognised under customary international law and multilateral treaties by the end of the nineteenth century,[19] its illegality is most notably enshrined in Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948),[20] which provides a stringent definition for the 'crime of all crimes.'[21]

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

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

This treaty entered into force on 12 January 1951, and 'invites analysis under two headings: the prohibited underlying acts [corresponding to Article II of the

Convention], and the specific genocidal intent or *dolus specialis*' to deliberately target and physically destroy the group beyond reasonable doubt.[22] As discussed in the previous section, historical and contemporary sources are replete with evidence attesting to the intentional destruction of the Assyrian population, within the scope of Article II. Therefore, if such heinous abuse including the deportation, methodical planning and large-scale massacres, are not regarded as meeting the definition beyond reasonable doubt, then it is difficult to imagine what will.[23] Whilst a comprehensive analysis of the *mens rea* and *actus reus* requirements are beyond the scope of this paper, in 2007 the International Association of Genocide Scholars (IAGS) issued a consensus resolution confirming that 'the Ottoman campaign against Christian minorities of the Empire between 1914 and 1923 constituted genocide against Armenians, Assyrians, and Pontic and Anatolian Greeks.' Subsequently, the IAGS demanded 'the government of Turkey to acknowledge the genocides against these populations, to issue a formal apology, and to take prompt and meaningful steps toward restitution.'[24] However, as this paper will elucidate, the conceptual complexities and political connotations of the 'g-word' have limited the recognition of *Seyfo* to a large extent.

A. Nullum crimen sine lege: Whether the Genocide Convention can be applied retroactively?

Article 28 of the Vienna Convention on the Law of Treaties ('VCLT') regulates that 'unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'[25] Indeed, the ICJ has held that 'the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.'[26] Thus, if the argument is accepted that the *Genocide Convention* cannot function retroactively—prior to its effective date, then the classification of 'genocide' appears problematic in the context of *Seyfo* and other atrocities that occurred before 1951, including the Holocaust. This conclusion would appear absurd, considering that the *Genocide Convention* was born from the memory of those inconceivable tragedies. The issue of its application therefore demands a more precise analysis of Article 28 of the VCLT. Article 28 seems to suggest that the very objective of the treaty in question should be considered as an exception to the legal principle. As a result, the *Genocide Convention* may have a retroactive character, if the parties to the treaty intended to give it a retroactive effect.[27]

According to Article 31 of the VCLT, a treaty shall be interpreted in light of its object and purpose—in this case, the prevention and the punishment of genocide. The ICJ further elaborated on this position in its advisory opinion, stating that on one hand, the object of the *Genocide Convention* 'is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.'[28] Therefore, by applying the Genocide Convention retroactively in order to recognise earlier acts of genocide, its foundations in natural law are upheld, and the preventive purpose is enforced.[29] This position has been reaffirmed by the ICJ, which held that the prohibition against genocide has a *jus cogens* character.[30] Although Article 4 of the VCLT prohibits the retroactive application of the treaty itself, it has been applied retroactively by earlier tribunals, under the pretence that its provisions are declarative of customary international law. In a similar vein, states including Israel, Lithuania and Latvia have enabled the punishment of genocide retrospectively, in accordance with national legislation.[31] Therefore, in cases of extreme human rights violations, the principle of non-retroactivity may not be appropriate, because such crimes are inconsistent with the 'essence of law.'[32]

Even if scholars insist that the principle of non-retroactivity bars legal action in the context of *Seyfo*, this does not preclude the fact that genocide may have been committed prior to the *Genocide Convention*.[33] In fact, its preamble acknowledges that 'at all periods of history, genocide has inflicted great losses on humanity.'[34] It is undoubtedly a crime as old as humanity, and yet it is unfortunate that the world has long been negligent in legally pursuing its perpetrators.[35] While formal retribution is unattainable today, international recognition is still significant to ensure that the descendants of genocide victims and survivors can 'return [...] in safety and dignity' to their indigenous homeland, not precluding their right to restitution and compensation.[36]

III. The Final Stage of Genocide—Denial[37]

Whilst the Armenian tragedy is referred to as 'the forgotten genocide,' the same tragedy that befell the Assyrians became known as 'the obliterated genocide.'[38] Their destiny has become denied by states concerned with international trade and geopolitical alliances. In particular, Turkey has invoked historical negationism and state sovereignty as shields to deliberately impede investigations, and further its nationalist thesis. The invariable use of the phrase *sözde soykırım* ('so-called genocide') acts as a testament to this denial and Turkish aspirations to join the European Union have given renewed agency to this agenda since 1999.[39] As Kuper substantiates, 'The United Nations remains highly protective of state sovereignty, even where there is overwhelming evidence... of widespread murder and genocidal massacre.'[40] Ergo, recognition and restitution is considered practically futile, because to enforce such provisions would depend chiefly upon the moral suasion of international organisations, and the support of the offending state. Since self-incrimination is not within natural reason, the UN General Assembly is ultimately limited to recommendation rather than enforcement. Schwarzenberger foreshadowed these constraints, arguing that the 'whole Convention is based on the assumption of virtuous governments and criminal individuals. It is unnecessary where it can be applied and inapplicable where it may be necessary.'[41] Hence, while one may argue that the 152 signatories to the Genocide Convention have—de facto though not de jure—recognised *Seyfo*,[42] formal acknowledgment has not yet been served entirely due to the global processes that render states sovereign. International law can therefore be regarded as both the 'culprit and the remedy' of an imperialistic order based on centres and peripheries.[43]

Furthermore, Turkey's ontological (in) security encourages denial as to the reality of these genocidal atrocities.[44] This is because acknowledging genocide would constitute a 'reformulation of state identity' — from a nation incapable of the worst crime, to one both capable and apologetic about it.[45] Denialist Mehmet Çelik reinforced this narrative, claiming that during the deportation, the Interior Minister Talât Pasha informed provincial governors: 'Be very careful, not to bleed the nose of a single Süryani [Assyrian].'[46] This outlandish assertion is a stark contrast to the publications of chief ideologues in the Ottoman Archives, such as Dr. Behaeddin Sakir who declared in 1911 that Assyrians are 'akin to foreign and harmful weeds that must be uprooted.'[47] In accordance with symbolic politics theory, this rhetoric acts as a euphemism for genocide and cannot repress the upheaval of 1915. A comparable political context ensued in the decades following the genocide, as Assyrian people became the target of de jure and/or de facto discrimination including assimilation,

ethnic cleansing, petty persecution and intimidation. While the 'outdated' provisions of the *Treaty of Lausanne* (1923) accorded 'non-Muslims' certain rights, protection has only been limited to Greek Orthodox Christians, Armenian Apostolic Orthodox Christians and Jewish religious minorities.[48] Thus, Assyrian people are regarded as an invisible minority—excluded from any legal status. As a coalition of American aid organisations reaffirmed, the Treaty of Lausanne (1923) is 'morally indefensible,' as it lacked 'guarantees . . . to the remnants of Christians in Turkey.'[49]

Among these discriminatory policies was the 1934 Surname Law which forbids Turkish citizens from adopting the names of 'foreign races and nations' per Article 3.[50] This position was affirmed in a lawsuit filed by Favlus Ay, a Turkish citizen of Syriac [Assyrian] origin, who appealed to the Constitutional Court in 2011 to change his name to Paulus Bartuma.[51] His lawyer submitted that Article 3 of the Surname Law contravenes Article 10 of the Turkish Constitution, which held that 'state organs and administrative authorities should act in compliance with the principle of equality before the law.'[52] However, the Constitutional Court rejected his appeal, citing that the contested phrase functioned to create 'national unity and wholeness among citizens.'[53] Furthermore, the court limited the interpretation of Article 10 to juridical equality, stating that some communities may be subject to different rules 'depending on their situation.'[54] These state efforts to annul the identity of a minority arguably constitute calculated genocidal tactics that seek to murder the dignity of survivors.[55] The 'teleological interpretation' of the majority also highlights that the law is a site in which state identity is manufactured, authorised, and challenged.[56] Thus, genocide acknowledgement would compel states to not only confront their institutional structures, but also the existential questions that have been 'bracketed out.'[57] In previous cases where Assyrian people have made reference to *Seyfo*, they were accused of 'provoking hatred' and labelled as treasonous.[58] Indeed, genocide acknowledgement is a national process that would naturally generate profound anxiety and ontological insecurity, i.e. 'the rupture of a formed framework including its established meanings, practices and routines.'[59] However, it is essential: ontological insecurity and dissonance have been recognised as elements that prevent the effective 'culmination of peace processes' toward minority groups.[60] Hence, as Berktay expresses, 'the endless repetition that no such incident occurred [...] forms a sweet lullaby for our public opinion. This lullaby is not putting the rest of the world to sleep, but it is putting Turkey to sleep.'[61]

In contrast to Berktay's assertion, it seems the rest of the world has fallen asleep. For example, despite ample evidence of genocidal intent, the 'Institute for Turkish Studies' enlisted British and American scholars to propagate the denial of an Ottoman genocide against Christians.[62] The former director of Middle East Studies at the University of California and New York University confirmed this tactic, highlighting that 'through the investment of time and money, and institutionalisation of its efforts, [Turkey] has managed to project its views.'[63] It should also be noted that the substantive attempt to rationalise genocide by claiming that massacres and deportations cannot be genocidal in conditions of international war, civil war, or insurgency are futile against Article I of the *Genocide Convention* which states that 'the Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law...' (emphasis added).[64] Since a majority of victims were also non-combatants, women and children, it is clear that WWI was used merely as a pretext for exploiting martial law without foreign intervention.[65] Hence, where states employ sovereignty to deny genocide, they are lending considerable authority to the acceptance of genocide, and inviting repetition.

Moreover, without a state or autonomous region, Assyrians have been unable to mobilise adequate awareness to the same extent as Armenians and Greeks. This uneven power dynamic has reduced *Seyfo* to the periphery of genocide scholarship and demonstrates the interplay between state structures and legitimisation. Thus, formal recognition by elected international officials and academics is imperative to acknowledge the historicity of *Seyfo*, and to assist in the relief of the Assyrian remnant.[66] Although New South Wales (1997, 2013, 2014) and South Australian (2009) resolutions acknowledged the Assyrian genocide, Turkish officials have labelled this as 'hate-speech' and threatened to deny visas to MPs that wish to make the pilgrimage to Gallipoli and Çanakkale.[67] Subsequently, it is difficult for federal legislatures to pass motions, as they may threaten bilateral relations or may create multilateral tension within the UN, G20 and MIKTA. Hence, while the Armenian genocide can be acknowledged by other states through the prism of EU interests and trade relations, Assyrians lack sufficient bargaining power. Consequently, states have denied genocide and subordinated the principles of international law and human rights for economic and political expediency. As a result, while non-recognition is prudently based on diplomatic strategy, the selective morality of international actors imprisons the descendants of victims into a reduced mode of being, and negates international standards.

IV. 'Never Again'

Since the turn of the 21st century, the destiny of Assyrians has remained largely precarious due to the ongoing deprivation of land rights, the US-led invasion of Iraq in 2003, and persecution by ISIS — which a group of analysts have declared 'genocidal by self-proclamation, ideology, and actions.' Indeed, the crimes of ISIS are among the most repugnant in modern history, including the destruction of cultural heritage sites, ethnic cleansing and the forced displacement of Assyrians and other indigenous minorities such as Yezidi's. This highlights a sinister parallel between the Young Turks' telegram to the governors of Mosul in June 1915 ('We should not let them return to their homelands'),[69] and ISIS' invasion of Mosul in June 2014 which exiled more than ten thousand Assyrians.[70] Thus, international actors and legal scholars must ask themselves: How do we expect to bring present perpetrators to justice and prevent future atrocities, when we are negating their roots in the past?

Today, while Turkey is at the gates of Europe, Assyrians remain caught in a 'ring of fire' as one community leader described it.[71] The resurgence of conflict between Turkey and the militant Kurdistan Workers' Party (PKK) along the Iraqi-Turkish border has endangered vulnerable civilian minorities. Although Assyrians do not participate in the attacks, they become caught in the crossfire, ultimately reigniting past traumas.[72] Indeed, the intergenerational trauma rooted in persecution has left a significant imprint on the modern Assyrian collective. Recognising Seyfo would be the first step to reviving the wound that never healed and to mitigating such risk in the future. As Henry Theriault argues, 'Deniers operate as agents of the original perpetrators [of the genocide], pursuing and hounding victims through time.'[73] Therefore, the aftermath of genocide is not merely a discursive matter concerned with paying lip service. It is rooted in preventing and responding to future atrocities within broader diplomatic and legal contexts.

The Pravasi and their Perpetual State of Temporariness

Vishnu Narayanan

As early as the fifth century, Ancient Greek historian Thucydides contrasted the stoic and self-controlling traits of the Spartans with the more indulgent and free-thinking Athenians, observing how the environment shapes oneself.[1] Today, unique mannerisms and traits are still ingrained in certain cultures,[2] hence 'where we are from?' is one of the most common introductory questions. Our answers reflect how we identify ourselves, being a sum of our experiences in specific locations. Law plays a crucial role in validating these experiences through statutory frameworks such as citizenship, which define our membership in the polity.[3] Consequently, our perception of identity and citizenship gets conflated. However, for many, including myself, it's the exclusion from citizenship and the incapacity of such frameworks to validate experiences that shape our identity.

At age 3, my family migrated to the city-emirate of Dubai in the United Arab Emirates (UAE) from Kerala, a state on the southern tip of India. Having spent most of my life there, it felt right to say I am 'from' Dubai. It is an answer that would usually be returned with one of two common preconceptions of Dubai: excessive wealth, with skyscrapers that stretch beyond the sky, or as a city built upon the exploitation of migrant workers from less developed countries. These were both aspects of the city that I had witnessed first-hand: Dubai did have its exuberant side, but the exploitation of migrant blue-collar workers is a painful reality that persists today.[4]

However, this binary perception of Dubai stems from an explicit exclusion of lived human experiences – it is reminiscent of European Orientalist perspectives, that essentialise Eastern society, by only focusing on its extremes, and, as Edward Said notes, 'are neither interested in nor capable of discussing individuals; instead artificial entities'.[5] The 'migrant labourer slave' trope used to describe South Asians in the Gulf Cooperation Council (GCC) ('Gulf') countries relies on specific erasures that overlook the complexity of people's lives in the Gulf. Little is said or written about the intricacies surrounding the migrant experiences in the Gulf and their constant impermanence, which consequently shapes their identity. This essay aims to capture the complexities of this experience, exhibiting how the lack of statutory validation of identity has instead created an identity that is unique to the Pravasi.

Pravasi

In Kerala, *Pravasi* is a phrase that is commonly used to classify Indians who are economic migrants to the Gulf countries such as the UAE. The word '*Pravasi*' translates to 'migrant' in various South Asian languages, including Malayalam, the primary language spoken in Kerala.[7] Such migration, of course, is a key basis of globalisation today, with almost 3.5 percent of the global population identifying as residents of a nation other than their official nationality.[8] As a developing nation with an exponentially growing supply of labour, one would expect India to be no exception to such an outflow of migrants. However, social and economic inequalities that have been heavily influenced by historical caste hierarchies have often meant that migration, especially to Western nations, is infeasible for large sections of Indian society.[9]

The *Pravasi* experience began in the early 20th century when the discovery and eventual commercialisation of oil in the Gulf caused a rise in demand for labour to build these economies.[10] By 2020, an estimated 8.5 million *Pravasis* were living and working in the Gulf, making it the second-largest migration corridor in the world. Of those 8.5

million, 3.4 million reside in the UAE.[11] But, unlike their counterparts who have migrated to the West, the Pravasi has no pathway to citizenship or any security of permanent residence available to them, irrespective of the length of their stay.

Legal Frameworks

To make sense of such a rigid and harsh immigration policy, one must first understand the historical and legal frameworks that underpin it. Unified and established in 1971, the UAE is a federation of seven monarchies ('Emirates'), including Dubai & Abu Dhabi – the latter also serving as the nation's capital. It follows a civil law system and has an approximate population of 9.2 million people. However, only 11% of this population are recognised as national citizens.[12] The underlying cause of this phenomenon is the *Federal Law* (UAE) No 17 of 1972, which requires that, in order to enjoy full citizenship rights, one must hold a document issued by the federal government called *Khulasat Al-Qaid*, also known as the 'Family Book'.[13] This document can prove that its holder had ancestry in the UAE before 1925, prior to the discovery of oil, thus barring subsequent economic immigrants from citizenship.[14]

For the remaining 89% of the population living in the UAE, which constitutes expatriates from around the world such as the Pravasi, the residence is generally dependent on the Kafala (sponsor) system of contractual labour. The system, governed by *Federal Law* (UAE) No 6 of 1973, requires all foreign workers to have their visas sponsored by their employers, which is also conditional on their employment contracts.[15] In practice, this means that the *Pravasi*, regardless of how long they stay, will one day have no choice but to return to where they came from. And it is this thought of inevitable departure, a by-product of this transactional life they live, that is the source of their perpetual state of transience.

Impossible Citizens

The UAE is only a 3-hour flight away from most parts of India. This proximity to home, coupled with wages that could be up to three times what they can earn at home and other economic opportunities, are the reasons that have made Dubai such an appealing destination to work for the *Pravasi*.[16] Despite the *Kafala* system, the UAE still accounts for the largest diasporic Indian population globally, and in 2017, it was the nation with the highest remittances sent back to India.[17]

Unfortunately, the academic, human rights and international press narrative surrounding Dubai portrays the city not with respect to its middle classes, but rather centres on wealthy Arab and Western expatriates, and exploited South Asian labourers.[18] Little to no focus is given to how the *Pravasi* constitute the largest demographic group in Dubai or how they are key to its economy and are instrumental in all workforce sectors. The *Pravasi* have played a monumental part in creating the cornerstone industries such as education, healthcare and retail.[19] And despite the diverse lives they might be living, it is their shared ephemerality that cuts through all differences among the *Pravasi*, irrespective of their collar of work.

Under the *Kafala* system, life is always precarious for the *Pravasi*, as termination of employment also results in the termination of their residence status. As non-citizens, *Pravasis* are also ineligible for welfare support from the UAE government. Hence, healthcare, children's education and personal retirement funds must all be planned according to the month's paycheck. This, coupled with the added pressure of insecure living statuses, the risk of having to uproot and return to India is what encompasses the complex set of experiences that sets the *Pravasi* apart as an anxious diaspora.

Such anxieties are amplified during global recessions, such as the massive global economic ramifications of the COVID-19 pandemic. A further difficulty is posed by the *Federal Law* (UAE) No 8 of 1980, which governs employment, but does not have any statutory requirements or regulations concerning redundancies.[20] In such a legal context, it would not be wrong to assume that employers tend to have full discretion when it comes to redundancies, as there is no legal guidance on what even constitutes a 'fair dismissal'.[21] The remarkable feature of this emigrant life, then, is the *Pravasi's* awareness of this impermanence, marked by anxiety and vulnerability, as they continue working to improve the quality of their lives each day. To the outside world, Dubai might appear to be a luxurious supercar, but for the Pravasi, Dubai is essentially an airconditioned bus that they will have to get off at some point, albeit one that promises a better standard of life for as long as they are still on it.

Conclusion

Perhaps what the experiences of the *Pravasi* tells us most is the extent to which the complexity of human experiences can be overlooked when we perceive citizenship through the legal citizen-alien binary. When we use that binary through an administrative law lens, we tend to tie the alien/non-citizen to their home countries permanently. Aliens, or perpetual aliens such as the *Pravasi*, through these representations, can easily be dismissed as unimportant to the fundamental functioning of their 'host' countries, like the UAE. Furthermore, this binary assumes that the primacy of the alien's migration choices, life chances, and attachments, are always economic and transient. What it overlooks are the other social domains that characterise the daily existence of transnational populations such as the *Pravasi*.

Having to spend the entire COVID-19 pandemic away from home thus far is difficult for anyone. These are agonising times given the uncertainty surrounding our inability to move through place and time, fostering our very own sense of liminality. However, by being a *Pravasi*, whose existence has always been intertwined with the blurriness of what the future looks like, the pandemic parallels the uncertainty my family and I have experienced our whole life. After all, Thucydides was right, the places we come from shape who we become in numerous ways. For the *Pravasi*, it is possibly our perpetual state of temporariness that causes us to always see challenges, people or even life, for what they always are — temporary.

Dr Louise Boon-Kuo on Policing Movement and Migration Policy

Conducted and transcribed by Angela Xu

Can you tell us a bit about yourself, your career and your research interests?

My name is Louise Boon-Kuo. I work as a senior lecturer at Sydney Law School. I teach Civil & Criminal Procedure in the LLB and JD, and Race & the Law which is an elective unit that I established in 2018. Teaching is important to me because I believe that the ways we make sense of the operation of law and legal practices can contribute towards making a more just future. As bell hooks has argued, education can be the practice of freedom. hooks saw the classroom as a place where students and teachers alike learn to think critically, to transgress, and collectively work towards freedom. This might sound very general, but it is highly grounded. The reality is that we are living in a time and place of great injustice, but oftentimes many of us need to do considerable work to see this. It seems to me that our collective survival and flourishing depends at least partly on how law graduates conceive of the need to act in relation to First Nations calls and visions for justice, as well as on issues of climate change, racial justice, economic inequality and more.

My research focuses primarily on the intersections between criminal and immigration law, the racial dimensions of border enforcement, and policing practices more generally. Some of the research work I have undertaken has focused on how the law constructs responsibility, or irresponsibility, for border violence experienced by undocumented migrants in Australia. I have worked with colleagues on investigating the impact of global counter terrorism regimes on peacebuilding work. Over the last year I have also been exploring the practice of COVID policing, as well as researching the airport as a legal space of difference making. These might seem like diverse areas of focus but what they have in common is that the legal practices involved are characterised by high levels of discretion and a great deal of operational secrecy. Thus, a key component of my work is to bring to the surface how these laws are policed and experienced, as well as theorising why laws are practiced in this way. Another important part of my overall research agenda is to undertake projects that are relevant to and meet the needs of people most directly affected by the border and by policing.

Your book, Policing Undocumented Migrants *discusses the flaws of Australian immigration law and the way it is policed. How do you suggest that we reform the system to become more humane, while simultaneously protecting Australia's national interests?*

I would suggest as a starting point that we need to think more about what we mean by Australia's 'national interests' and unpack why this is often automatically counterposed against humanitarian interests. It's never as simple as this in an interdependent world. The past actions of states, taken on a view of national interest at a particular time, might invoke moral if not necessarily strictly legal

obligations later down the track, as in the current humanitarian crisis in Afghanistan. Or consider the impacts of what the Intergovernmental Panel on Climate Change has confirmed as human-caused climate change. Should any Australian policy towards the immigration of people displaced from disappearing small islands, who are the least responsible for carbon dioxide emissions, be regarded as humanitarian action or simply Australia taking responsibility for its part in climate change?

A key and necessary reform is the abolition of mandatory immigration detention in Australia. It has become so normalised here, yet mandatory immigration detention only commenced in 1992. It is deeply out of step with international expectations – it breaches the right not to be arbitrarily detained under the *International Covenant on Civil and Political Rights*. In the present moment, we also need reform to ameliorate some of the worst dangers and risks posed by and related to immigration detention, including the release of all in immigration detention to protect from COVID-19 transmission risk, the provision of liveable income support to refugee applicants awaiting decisions in the community, and grant of permanent protection to those refugees medically evacuated from Nauru and Manus Island. Considering the Taliban recently taking hold of Kabul, as Action for Afghanistan has argued, Australia needs to live up to its promises to the people of Afghanistan and at the very least commit to an additional humanitarian intake of at least 20,000. Australia needs to grant permanent protection visas to the more than 5,100 Afghan refugees in Australia; these refugees are primarily of the persecuted Hazara ethnic group and currently on temporary protection visas which prevent them from sponsoring family to move to safety.

Your research has also focused on immigration and criminalisation. What is the significance of the way that they intersect with one another?

There are many points of intersection between immigration and criminalisation practices. One concerning way they intersect is through administrative powers operating to expand carceral power but without the same protections granted, in principle, by criminal law and procedure. Indefinite immigration detention is a good example of this. Non-citizens are detained without any requirement for a finding of criminal guilt, as in the criminal legal system. But it goes further than immigration detention. Australian Border Force officers hold powers that are just as intrusive but with less judicial oversight than those held by police. For non-citizens living on precarious bridging visas, strict conditions can operate as a form of metaphysical prison in the community but escape notice as such.

The interplay between immigration law and criminal law also challenges the legitimacy of criminal law principles. For example, additional immigration consequences for non-citizens convicted of criminal offences arguably constitute an additional punishment and thus offend the rule against double jeopardy. Laws passed in 2014 which mandate the cancellation of visas held by non-citizens who have been sentenced to 12 months or more imprisonment have vastly increased the number of people facing the additional consequences of visa cancellation and removal. The Department of Home Affairs reported an initial increase in visa cancellations by over 1,400 per cent in the period 2013–14 to 2016–17! While immigration and criminal law remain separate, there has been judicial acknowledgment in some jurisdictions (notably Victoria, Queensland and the ACT) that losing the opportunity of settling permanently in Australia may well be viewed as a punishing consequence of the offending.

Recently, police were deployed to Southwest Sydney to control the COVID-19 outbreak, but when the outbreak was concentrated in Bondi, no such actions were taken. You were also involved in authoring Policing biosecurity: police enforcement of special measures in New South Wales and Victoria during the COVID-19 pandemic, *which looked at how socio-economic and racial factors impacted an individual's likelihood of being subjected to police powers during the pandemic.*

What impact do you think COVID policing will have on future criminalisation and policing trends?

What we have seen in terms of COVID policing trends in NSW is the military deployed alongside police in COVID hotspots, a public order enforcement approach to issuing fines, and increases to fines themselves. Yet the legitimacy of this approach depends on whether policing is indeed the best way to address public health objectives to prevent or limit transmission of the virus. Our research showed that COVID policing instead appears to rely on conventional public order policing – stop and search and the issue of fines – to the usual suspects, which runs the risk of amplifying the criminalisation of those subject to this policing.

One of the main findings from our research was that even though fines have gained media attention, fines are merely one way that police have used their powers during the pandemic. We obtained select data from NSW Police which indicated that from 15 March to 15 June 2020, the most common police action was to search those stopped. Although the public health relevance of conducting a search is unclear, police searched 45% of all people stopped for a COVID-related incident.
We also found that, in NSW, Aboriginal or Torres Strait Islander peoples comprised 9% of the stop incidents in which Indigenous or non-Indigenous status was recorded. Aboriginal and Torres Strait Islander people were even more disproportionately subject to coercive police powers following a stop, making up 15% of arrests and 10% of people searched in the incidents where status was recorded. This suggests that COVID policing is contributing to the longer-standing experience of over-policing of Aboriginal and Torres Strait Islander peoples.

For the second wave of COVID-19 in NSW in 2021, NSW Police have reported they issued about 18,000 fines over six weeks of enforcement. What is concerning about fines is that they have hidden punitive effects and can create pathways to further criminalisation. This is because people who don't pay fines can face consequences such as driver's licence suspensions and motor vehicle registration cancellations, and if that person drives, this can lead to criminal prosecution. There are many reasons why people drive without a license, for example, because they are reliant on a car to get to work or to do work. The way that COVID-related fines might generate criminalisation pathways is especially concerning because there is the possibility that fines might be issued without lawful basis, but unless a fine is challenged,

the courts won't have the chance to develop a jurisprudence on an issue that potentially affects many. We need detailed breakdowns of the LGAs in which fines were issued in 2021, as well as other demographics, to better evaluate what has occurred.

How can the law be used to prevent such discriminatory policies from being put in place? Are anti-discrimination laws and regulations sufficient or is it a matter of social change?

As the Public Interest Advocacy Centre has recently reminded in their report 'From Leader to Laggard', the NSW *Anti-Discrimination Act* is out of date and in need of a comprehensive overhaul. But even so, class-based discrimination has not been factored into anti-discrimination legislation, which is part of what makes it insufficient to address the impact of fines.

The conversation needs to take account of evidence showing that increasing fines does not increase compliance, and that fines generate cumulative impacts on people in lower socio-economic groups. Instead of a coercive policing and enforcement approach to COVID-19, we need to move towards a community-focused, collaborative, public health approach. This is an approach that recognises people need individual financial assistance as well as investment in health and welfare services so as to enable communities to reduce circulation, promote vaccination and testing, and to stay safe.

The Armenian Genocide & Biden's Recognition: A symbolic victory, or a step towards justice?

Axel Melkonian

Late in the evening of 23 April 1915, hundreds of Armenian intellectuals and community leaders were rounded up across the Ottoman Empire and deported to government detention centres.[1] In what can only be described as a "decapitation strike" ordered by Talaat Pasha—leader of the Committee of Union and Progress (CUP)—to deprive the Armenian population of leadership to resist the carnage to come, hundreds of distinguished physicians, lawyers, journalists and teachers disappeared overnight.[2] What followed would be two years of relentless atrocities committed against the Armenian people, leading to the eventual murder of 1.2 million victims.[3]

President Biden's recognition of these events as a 'genocide' 106 years later was long-awaited by the Armenian people.[4] For over a century, survivors and their descendants have struggled to achieve justice for Turkey's crimes in an international system which, until recently, cowered in the face of Turkish sanctions and political ramifications.[5] As the first sitting US President to officially designate Turkey's acts as being of a nature comparable to those committed by the Nazis against the Jews, Biden's statement was of significant importance to the global Armenian community. Nonetheless, the question must be asked, was this purely a symbolic victory, or does this recognition have tangible legal effects for future international and domestic proceedings concerning the genocide?

This article will first discuss the issues plaintiffs have experienced in bringing proceedings concerning the genocide to international courts, specifically the International Court of Justice (ICJ) and the European Court of Human Rights (ECHR). In relation to domestic proceedings, this article will confine its analysis to claims within US Courts, as a substantial amount of domestic legal action concerning the genocide occurs within the US legal system. Overall, this article will demonstrate that while its impact is limited, Biden's recognition may affect future legal proceedings relating to the Armenian Genocide.

I. General Overview of the Genocide

The Genocide

By the eve of the Great War, animosity towards the Armenian population had already developed within the Ottoman Empire. The series of conflicts the Empire experienced in the Balkan region— many of which involved Christian rebels supported by the Great Powers—led to a belief in "Christian Treachery" wherein Ottoman Christians would disintegrate the Empire from within.[6] The CUP, a far-right political group predominantly consisting of Turks, gradually transitioned the Empire's core ideology into an interpretation of Islam which promoted Turkish nationalism by stressing the need to protect the predominantly Muslim Turkish people against Christian threats.[7] In particular, there were fears the Armenian population in Eastern Anatolia would join forces with the Russians in case of war. The Russian invasion of the Empire exacerbated these anxieties, motivating Talaat Pasha—leader of the CUP—and other party members to homogenise Eastern Anatolia through genocide.[8] After deporting many Armenian intellectuals on 24 April 1915, the Ottomans then commenced the systematic deportation of millions of Armenians to concentration camps in Syria. Most were forced to embark on death marches where rape, murder and starvation were commonplace. Upon reaching these Syrian camps, they were then left to die in terrible conditions.[9] Those who were not deported were frequently executed on the spot by Ottoman soldiers. By the end of 1917, over 1.2 million Armenians were murdered.[10]

Roots of Turkish Denialism

Even during the genocide, the CUP attempted to cover up the existence of the mass killings. This largely was motivated by desires to maintain American neutrality and German support during World War One.[11] After the establishment of the Republic of Turkey in 1923, the new government adopted the ideology of Kemalism, which glorified leaders such as Talaat Pasha as the "founding fathers" of Turkey through its aggressive adoration of Turkishness.[12] Indeed, Pasha became immortalised as a martyr following his assassination by Soghomon Tehlirian, an Armenian nationalist acting in revenge for the genocide.[13] Even a century later, Kemalism remains an influential political ideology within the Republic of Turkey. Most notably, in 2005, Turkey introduced Article 301 to its Penal Code,[14] making it a criminal offence to insult the Turkish nation, including criticising its founding fathers.[15]

Overall, the combination of a largely ethnoculturally homogenous State whose political ideology is dominated by ethnic-religious nationalism and the clear link between its national heroes and acts which are universally condemned, have culminated in a State which is adamant in denying such acts are genocidal, or that they even occurred in the first place.

II. International Proceedings

Armenia has long sought to hold Turkey accountable for breaches of international law caused by the genocide. Unfortunately, the International Criminal Court can only prosecute individuals for crimes after 1 July 2002, meaning recourse to other international tribunals is necessary.[16] As will be discussed, while the ICJ is normally the conventional body for such claims to be heard, various procedural issues make it difficult for proceedings to commence. Instead, the ECHR has become the court where international action seems most likely to occur due to Turkey's consent to jurisdiction. Nonetheless, there still are substantial issues the plaintiff State would need to overcome. Unfortunately, the apolitical nature of these issues means Biden's recognition will likely have a limited impact in resolving them.

International Court of Justice

The two primary issues preventing proceedings being commenced in the ICJ are the absence of Turkey's consent to jurisdiction, and the lack of a State who is both capable of invoking Turkey's international responsibility, and is interested in commencing proceedings.

For ICJ jurisdiction to be established, a State must either make an optional clause statement granting jurisdiction,[17] agree to refer a specific dispute to the ICJ,[18] or be party to a treaty with a compromissory clause.[19] Considering Turkey's adamant denial of the genocide, the first two methods will likely never be available. Instead, it is probable the only way jurisdiction could be founded is through Article IX of the 1948 Genocide Convention,[20] of which Turkey acceded to in 1950.[21] This is a compromissory clause enabling disputes concerning the interpretation, application, or fulfilment of the Convention to be submitted to the ICJ.[22]

While Article IX on face value appears to be a solution, there are issues making its usefulness improbable; in particular, the unlikelihood of the Genocide Convention itself applying retroactively. Unless the parties which formed it intended retroactivity, there is a presumption the Convention is not.[23] As evidenced in the Convention's minutes, many State delegates emphasised the purpose of the Convention was to punish acts of genocide *in future*, meaning an intent contrary to the

presumption is unfounded.[24] Nonetheless, the Armenian Genocide breached the customary prohibition on genocidal acts which arguably existed at the time.[25] If a court is satisfied the Convention was merely a codification of this custom, then perhaps a claim could still be brought? Unfortunately, evidence such as the aforementioned delegates' intentions have meant courts have treated the Convention and the supposedly older customary norm as separate prohibitions.[26] This makes it very unlikely the genocide falls within the scope of the Convention, hence preventing Article IX from being relied upon.

Jurisdiction aside, the second barrier to commencing proceedings being commenced regards the capacity for states to invoke Turkey's responsibility. Applying the findings of the International Law Commission (ILC), this occurs where Turkey breached an obligation owed to a State and this State is injured, or where an obligation with another State is breached and this obligation was established on the basis of a collective interest.[27] The absence of an Armenian State at the time of the genocide is problematic as arguably Turkey did not breach an obligation *with another State*. Depending on how strictly the ILC's findings are applied, it is likely only States which existed during the genocide are capable of invoking Turkey's responsibility.

Overall, significant procedural barriers exist before a claim concerning the genocide can be brought before the ICJ, meaning future proceedings will likely occur in other international tribunals.

European Court of Human Rights

As the only international courts' jurisdiction which Turkey has consented to, the ECHR is the most promising tribunal for international proceedings. Established under Article 19 of the 1953 European Convention on Human Rights,[28] the Court hears disputes concerning breaches of human rights enumerated in the Convention.[29] As Article 19 is a compromissory clause, Armenia as a party can bring Turkey before the Court without the latter's consent. However, issues arise as to what claim could be made against Turkey. While the genocide clearly breached the human rights of the Armenian people, the European Convention does not have retroactive application.[30] This necessitates that a claim be formulated on the basis of Turkey's denial amounting to a violation of the right of a person not to be subject to inhuman or degrading treatment, which is founded on the premise such denial concerns the negation of crimes that significantly affect Armenians.[31] Whether the ECHR would accept such a construction of the European Convention is unclear. In the infamous *Perinçek v Switzerland* decision made by the Grand Chamber of the ECHR,[32] which considered whether criminalising Armenian Genocide denial breached freedom of speech, the Court briefly touched on this argument. While it found it was plausible, the Court concluded it did not entitle Switzerland's criminalisation of genocide denial.[33] As such, even if the ECHR finds Turkey is in breach of this right, it is likely very little in the form of compensation would be provided to the plaintiff State.

III. Domestic Proceedings

The barriers in commencing international claims have made domestic action a necessary alternative. While recently there have been successful movements towards criminalisation of denial in States such as Switzerland and France, these laws have often been overturned, meaning the domestic sphere is still largely confined to civil proceedings.[34] Unfortunately, through various pieces of carefully orchestrated legislation, most property owned by the victims has successfully been transferred to the Turkish State, and hence is no longer claimable.[35] This has necessitated that different legal avenues be used by plaintiffs, such as claiming life insurance benefits or monetary assets deposited by victims.[36] For reasons including its significant Armenian diaspora populace and reasonably well-regarded legal system, such lawsuits are often heard in US courts.[37] As will be discussed, this is advantageous as it allows Biden's recognition to potentially have as quantifiable legal impact.

Insurance Claims

Prior to their murders, thousands of Armenians purchased life insurance through various companies such as New York Life Insurance and Equitable Life Assurance Society.[38] However, in the decades after the genocide, very few of the victims' heirs were able to successfully claim these policies. This was due to these companies—capitalising on the discrete nature of the atrocity—requiring certificates of proof of death. Furthermore, New York Life and Equitable later took steps to recover the few payments which were made to any claimants, after suffering huge financial losses in the 1920's and 30's.[39] The short statute of limitations period afforded to insurance claimants in the US also prevented legal action being commenced against these insurance companies for refusing to provide policies.[40]

In 2000, §354.4 was introduced into the *California Civil Procedure Code*,[41] bestowing Californian courts with jurisdiction over claims arising out of insurance policies held by 'Armenian Genocide Victims', with the statute of limitations for such claims being extended.[42] In 2003, Vazken Movsesian commenced proceedings in the Californian District Court for the Ninth Circuit against various insurance companies for damages arising out of their refusal to award Armenian life insurance policies. These companies responded by challenging the constitutionality of §354.4 as being pre-empted under the Foreign Affairs Doctrine: this prevents US States from passing legislation that impermissibly infringes on the Federal Government's foreign affairs powers.[43] Deciding upon the dispute in 2009, the District Court found §354.4 was unconstitutional under the Doctrine as it infringed upon express federal policy against the legislative recognition of the genocide. This was based on a series of statements by former Presidents: for example, George W. Bush's request that the House of Representatives not pass House Resolution 106 recognising the Armenian Genocide in 2007.[44] Movsesian successfully appealed against this decision, with the court finding there was no express federal policy against recognition: every expression by the executive against recognition was counterbalanced by statements in support of such recognition.[45] Nonetheless, this finding was then also appealed, with the *Movsesian* dispute reaching the US Court of Appeal for the Ninth District. Here, the Court found §354.4 as unconstitutional for imposing the politically charged term "genocide" into its legislation. However, the Court applied a different construction of the Foreign Affairs Doctrine which hinged on whether a State law involved a 'highly contested foreign affairs issue'. According to their judgement, Turkey's commitment in its denial and the US's desire to maintain diplomatic relations meant the Armenian Genocide was a highly contested international issue. The court found the term 'genocide' tied the federal government's hands in its relations with Turkey, meaning §354.4 was pre-empted.[46]

The significance of Biden's recognition depends on which construction of the Foreign Affairs Doctrine is applied by courts. In the event the District Court's construction of "express federal policy" is applied, Biden's statement could be significant for clearly signalling the executive's support in recognising the event. However, if the Court of Appeal's reasoning is applied, Biden's recognition will largely be irrelevant, as it did not change the fact the Armenian Genocide is a highly contested foreign affairs issue

for States wishing to engage in diplomacy with Turkey. Unfortunately, the ambiguity surrounding the Foreign Affairs Doctrine means a Supreme Court decision is required before any possible influence of Biden's recognition can be conclusively assessed.

Bank Claims

Prior to and during the genocide, thousands of Armenians placed their financial assets in various Ottoman and international banks. In 2010, a group of survivors' heirs sued Deutsche Bank AG and Dresdner Bank AG for concealing and preventing the recovery of deposited assets.[47] The Californian District Court granted summary judgement in favour of the banks, finding that as it concerned funds originating from Turkey, the Turkish statute of repose governed the suit.[48] As the allowable period of time had passed, the plaintiff's lawsuit was thereby time-barred.[49] That same year, another claim was made against Turkish banks for unjust enrichment. Unfortunately, this lawsuit was dismissed on the basis of the banks being a separate entity, and hence entitled to State immunities.[50] As these issues are entirely procedural and concern foreign or international laws, Biden's statement would have no impact in resolving them.

IV. Conclusion

To say that Biden's recognition has a significant impact on proceedings concerning the Armenian Genocide is likely a misreading of the situation. As I have outlined, there are significant barriers to success on both the international and national plane—many of which involve ambiguous areas of law—that have prevented justice from being achieved for over a century. Nonetheless, while Biden's statement likely has little tangible impact on international claims, it could affect the US domestic sphere. Moreover, one can hope that a statement expressly describing Turkey's actions as genocidal from the leader of the free world will give other States the courage to finally challenge Turkey's disgraceful actions, fulfilling a universal obligation to condemn what is evil and destructive.

PART TWO

الأصل
[Al’Asl]
The Origin

We each possess an origin; a rich tapestry woven with the threads of our culture, our family, the food we eat, the tongue we speak, or the colour of our skin, hair and eyes. An origin that cannot be adequately understood with an inquiry as superficial as ‘where are you from?’. These are complex narratives known by all, but definable by you alone.

Portrait of Mother

Nishta Gupta

Table

Soo Choi

I. fish eye

atop my rice bowl
a crown jewel at the peak
of a dewy white mountain

loose gelatinous mass
embracing, suspending
a glorious
styrofoam pearl

I know how it will
burst
under the weight of my molar
squelching satisfaction
giving way to the
tender

motion of a father's chopsticks
on a pilgrimage to the mountain
once again
with the cheek meat

maybe his own, if I asked.

II. a simple recipe for 국 [guk][1] / gook[2]

1 A group of soup dishes in Korean cuisine.
2 The derogatory term 'gook' is thought to have originated during the American occupation of South Korea, from the Korean word for America: 'mi-guk', misheard by American troops as 'me gook'.[3]

1. Slit me in the name of servitude – chin, sternum,
a fish hook into my navel
2. Listen to me carefully as you remove my ribs, my spine
rinse them of the stench of shame
follow me: 'mi-guk'
3. Open me up, a shallow grave for your misunderstandings
discard them as you do my innards
4. Simmer me in all the words for han rage anger despair sorrow pain pain pain
until my flesh falls from soft bones
until my tears season the broth
5. Serve hot a nourishing bowl of gook

III. son-mat[4]

4 literal translation: 'hand-taste', referring to culinary excellence, but often used to describe the taste of a mother's food, imbued with love and labour.

Feed me
with your red-stained fingertips
gripping the frosted rim
of a clay pot
for seasons on end

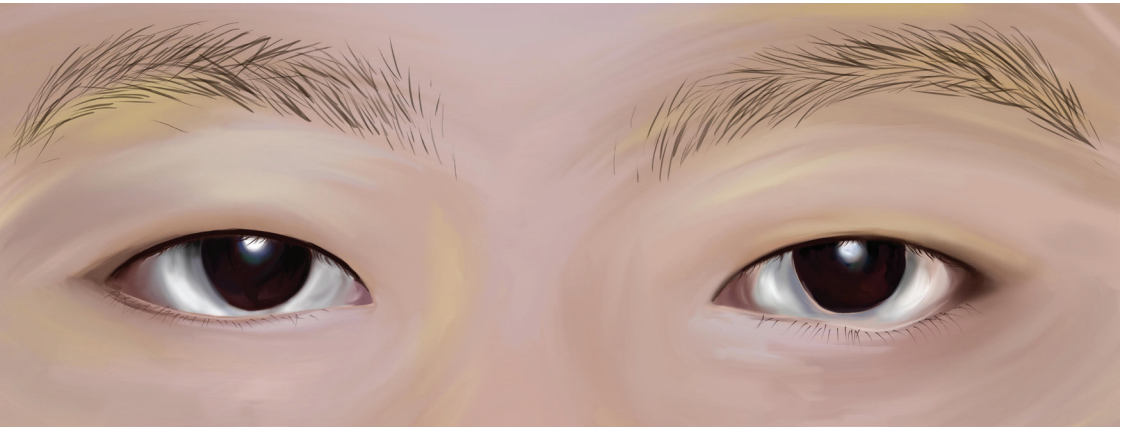
Feed me
so that my soul swells
with debt
nurtured over many moons
of curved spines and hoarse voices

Feed me
and I shall repay you with
beheaded fruits
apples the size of my own head
levelled clean

Feed me
so that I too may find my place
buried in that cool clay pot
in the ground
to wait for spring

Slit

Angela Xu



Monolid eyes have historically been described by Westerners as ‘slanted’ or ‘slits’, while being associated with traits such as deceitfulness.[1] Americans in the Korean War, driven by the desire to make Asian eyes more palatable to the Western gaze, popularised the procedure to transform monolids into ‘double eyelids’.[2] The procedure was eventually brought to the Western world as Korean women travelled with their American husbands back to the US after the war and sought cosmetic surgery to assimilate.[3] While double eyelid surgery is now chosen as a means to adhering to contemporary Asian beauty standards and even to reaping economic benefits, the perception of monolid eyes, by Asian themselves and by outsiders, has felt a damaging and enduring effect.

A Professional Masquerade

Ashmita Senthilatiban

I'm a big fan of routines. I love having a mental checklist for each day, and the sense of accomplishment that comes with completing my tasks. That being said, there is one part of my routine that frustrates me – the dressing up. I'm not talking about enhancing my appearance for my own self-confidence, rather, the masking of my true self in the name of professionalism.

This is what the routine really looks like for many in the BIPOC (Black, Indigenous and People of Colour) community. I'm talking about the persona that we painstakingly curate to align with professional standards in the workplace. This practice comes so naturally to most Black, Indigenous and People of Colour, that we never question why we develop two completely separate identities. Instead, code-switching becomes a part of the immigrant experience growing up in a predominantly white society.

It took me years to understand that it wasn't normal to mask my accent when speaking, just to be taken seriously. That it wasn't normal to grow accustomed to a nickname that was more digestible than my noticeably elaborate ethnic name. That it wasn't normal to spend a large chunk of my time willingly straightening out my natural curls to look 'neat'. None of this was normal, unless you're a Person of Colour like me.

I only started to acknowledge that this was a problem when I realised the connotations associated with professionalism. The first image that pops up in your mind as soon as you read that word is probably a stock photo of a white person in a plain coloured suit, either of a clean-shaven male with short hair or a woman with straight blonde or brown hair. Given that standards of professionalism function to maintain the integrity and quality required when engaging in business and commerce, we would expect that they would be centered around the skills and performance of an employee. While professional standards today may appear to reflect these concerns, the satisfaction of these depends largely on first impressions and appearances. The dilemma arises as first impressions are often based in fallacy, and reflective of standards favoring the dominant white culture.

As a South Asian immigrant growing up in Australia, having to conform to Eurocentric beauty standards was not new to me. For as long as I can remember, I despised my thick black frizzy hair. There was not a product or chemical treatment that was spared in my efforts to permanently remove any traces of my inherently ethnic feature. Yes, this is often an expensive, time consuming and often painful process. None of this would be an issue if I were doing this for myself. However, for many fitting into accepted beauty standards is necessary to present one's 'best self' in a professional setting. This is a direct consequence of People Of Colour being fed the narrative that curly or textured hair is unprofessional and messy, just because it does not conform with dominant beauty standards. Based on a survey of US-based senior leaders, being polished and groomed is a top aspect of professional appearance, and unkempt hair is noted as a key female appearance blunder behind poorly maintained clothing.[1]

Hair stylisation is a form of self-expression and the decision to embrace our natural hair is one that signifies acceptance and self-love. How are People Of Colour expected to be confident if they are constantly made to fear the outcome that may result when they are their true selves? To appear as one's authentic self, both internal experiences such as feelings and thoughts, and external experiences such as attire and grooming, must align. Having to put up a façade at work leads to inauthenticity that results in stress, anxiety, identity conflict and low self-esteem.

Hairstyling can also be a sign of dominance in the workplace based on the Optimal Distinctiveness Theory (ODT), which suggests that people maintain a balance between the need for belongingness and the need for uniqueness.[2] To achieve this balance, they selectively choose and activate social identities they perceive as appropriate in the professional context. Therefore, it is routine that to protect and maintain a professional image that is more likeable, individuals may opt to downplay or conceal visible marginal identity traits such as hairstyles.

Hairstyles are also often used to determine one's racial identity. This, along with underlying stereotypes of certain races being more dominant than others automatically colours our perception of others in the workplace. For example, dominance is a stereotype sometimes associated with Black people, and therefore Afrocentric hair may result in the individual being perceived as forceful and therefore less professional than their counterparts with Eurocentric hairstyles.[3] Unlike other phenotypic traits like skin colour, nose width and lip size, hair texture is one that is readily mutable. This makes the decision of an individual to present themselves with a visible racial characteristic significant, since it reflects an authenticity to one's identity that would otherwise be concealed.

It is important to recognise that marginalised social groups are often reluctant to express these visible racial traits. Due to the negative stereotypes associated with these traits, in-group members may penalise one another for displaying these traits. Consequently, this minimises the group members' willingness to express these features, which hinder marginalised individuals as a whole from appearing as their true selves. Therefore, focusing on making workplaces more accepting of marginalised groups may not be efficient if there are underlying conflicts within such groups.

In the widely diverse society we live in today, firms claim that they are understanding and respectful of differences in culture, sometimes even going so far as to say that these differences are embraced. However, organisations need to reevaluate the notions of professionalism and the double standards that they carry as they may be detrimental in the long term. Since these biases are often implicit, this change cannot be expected to occur overnight, requiring long term commitments instead.

Individuals who adopt a separate identity in the workplace maintain lower commitment to their organisation.[4] This translates to less motivation to complete tasks, lower efficiency and a decline in the quality of work produced. Feeling alienated and bearing heavy emotional and cognitive burdens result from the constant need to manage how they are perceived by others. As a whole, the organisation is impacted when the unique identities of its employees are discouraged as it deprives them of the richness that results from diversity in thought.

The effect that stereotypes and underlying connotations can have on our perspective is also evident in a comparison between ethnic textured hair and wigs in the courtroom. Wigs were traditionally worn by barristers and judges, along with robes. This was a tradition adopted from England as a former colony that remains to this day. While its texture and heavily coiled features are similar, it does not attract the same criticism as ethnic hair. Instead due to its origins from the English legal system and the status of lawyers who wore them being highly educated and knowledgeable, it is a respected symbol. In fact it is often interpreted as a marker of a more influential part of society. That is in contrast with the connotations of curly ethic hair like mine, which is regarded as messy, and used to categorise individuals. The polarity in responses to these traits only confirms the fact that responses to unique traits depend largely on their connotations and the stereotypes associated with them.

In terms of how diversity may be encouraged in courts, we can look to New Zealand which has adopted a more inclusive dressing policy. In May this year, a Taonga, a decorative item of special Maori cultural significance that is worn around the neck, was recognised as appropriate business attire to be worn in courtrooms across New Zealand, in place of a conventional necktie. Recognising that there are lawyers who come from different cultures and providing them the option to wear something of such cultural significance is a big step in the right direction towards creating a more inclusive environment in courtrooms.

With all these factors levelled against People of Colour before we even have a chance to demonstrate our abilities at an interview, it comes as no surprise that many have resorted to manifesting dual personalities in the workplace. This is far from the workplace being a safe space that embraces the differences in its staff. Creating a comfortable workplace where people of all cultures can show up as their authentic selves requires much more than incorporating diversity policies. Professionalism as a concept has to be redefined and it has to begin with those that benefit from standards that continue to be rooted in white supremacy and our colonial history.

While it is understandable that standards of professionalism are an attempt to enforce uniformity and consistency, there is nothing 'standard' about modern day Australia, with almost 30% of our population born overseas. In fact, the need for uniformity is almost dispensable given the many ways implicit bias affects every part of our lives as People Of Colour. Instead of aiming for one unified standard that denigrates people from other cultures and renders them invisible, we need to adopt a flexible system that harnesses the diversity in our workforce.

PART THREE

Topeng
[tò-péng]
Mask

Directly translating to ‘mask’, the word *topeng* refers to a rich cultural history of Indonesian dance-dramas, where actors don elaborate wooden face coverings representing various characters. Most topeng masks are fashioned to cover an actor’s entire face, impeding their ability to speak. As a result, they are required to rely on qualities of physical expressiveness, such as gracefulness and agility, to successfully communicate to audiences. For many of us navigating worlds where success is contingent upon the adoption of values, practices and mannerisms that are not our own, performance and identity-shifting are not merely a foreign cultural practice, but a necessary skill.

Professor Simon Bronitt on Diversity at Sydney Law School

Conducted and transcribed by Soo Choi and Sharyn Budiarto

Professor Bronitt, would you mind introducing yourself and how you came to work in legal education?

Well, I was born and educated in London – I grew up in North London with two sisters. We were a fairly middle-class family, not highly-educated or professional; I was the only one to go beyond age 16 at school. My father was a brilliant tailor – his family had heralded from Belarus and fled in the 1890s, settling in the East End of London as many Jewish families did. My mother came from quite a different background, she was Irish Catholic and grew up in Belfast during the war, but left at age 18 and converted when she met my father. Given my parents' stories, it's hardly surprising that we are a family of migrants; one of my sisters emigrated to Spain, one emigrated to Israel and then America, so we are very much a family in diaspora.

Around 30 years ago, after studying at Bristol and Cambridge, I came to Australia as a young lawyer knowing absolutely nothing about the country – I didn't even know it was a Federation! But I knew I wanted a bit of adventure, so, in 1990 I accepted a job at ANU.

Because of my background, I am very passionate about the power of education and equality of opportunity. Particularly at a law school like ours, it is crucial to me that we are doing more in the space of building and recognising the many pathways into our institution. It's so important to recognise that everyone is shaped by how they come to be and who their influences are. I had a very different family life than my sons, who are both now university students with a great understanding of what goes on in universities and professional lives. So I think it's very important to guide students, especially those who are first-in-family, by trying to put myself in the shoes of my 18 year old self, and thinking about how little I knew of the legal profession or how to move forward.

Prior to serving as the Dean of Sydney Law School, you worked in other higher education institutions, such as ANU, as you mentioned. Given your experience, what do you personally view as the primary role of the Dean? And in your view, has the student experience or atmosphere of law schools changed over the years?

Yes, there has definitely been a shift in law school atmospheres. 30 years ago, when I arrived at ANU, there was a sense in Australia that we, as institutions, did not owe pastoral responsibilities to our students. I remember being quite shocked by that, coming from the UK. Since then, the world has really changed. Australian universities are putting a lot of effort into both caring for their students and showing that they care. I have to say, that's fantastic and a huge transformation, especially on the mental health and wellbeing front.

On the other hand, I would also say that it's far more competitive now than 30 years ago. Having said that, I should assure you that graduate outcomes for our law school are extraordinarily high! But, I do see that there is a lot of anxiety to pursue certain careers. I think this pressure can limit your choices and I really want to tell students: don't narrow your horizons. For me, I did not end up taking my articles in my graduating year and went on to do postgraduate study, and I'm so glad I did, as that's how I developed my academic interests in research and public policy. We're more interested as an institution now in creating programs that expose students to a range of different career options, both inside and outside the law. A law degree is really a fantastic pathway to many different careers. You'll move around and do different things

at different times, and while that's scary and uncertain, it's also very exciting.

That's definitely very encouraging to hear. Thinking about the changing nature of the law school, how has Sydney Law School's approach to issues of diversity and inclusion changed over the last few years?

Creating as many scholarships as we can has definitely been a priority, as has been reaching out to schools. SULS has definitely been doing a lot of work in the latter space, and we are certainly very keen to engage with more schools out West and out in rural and regional communities. In certain parts of Sydney, there is definitely a cultural barrier to looking beyond your local universities, to exploring a full range of options tied to your potential. I think giving exposure to those students is really important – like getting teachers who come from diverse backgrounds out into classrooms in areas where they may have grown up to talk about their experiences of studying, doing postgraduate work, being a lecturer at Sydney Uni for example, or whatever their story is. We want those students to see people they can relate to, who may be first-in-family, first-generation immigrant Australians, or English-as-a-second-language speakers, achieving these goals. As much as we can implement formal equality and say 'we open our doors to everybody', that equality is illusory unless we enable students to overcome those cultural and often, financial, barriers. So, I think that widening of participation is really key to creating an inclusive law school.

Following on from your response there, what do you think has been different in those efforts made by the Law School under your leadership?

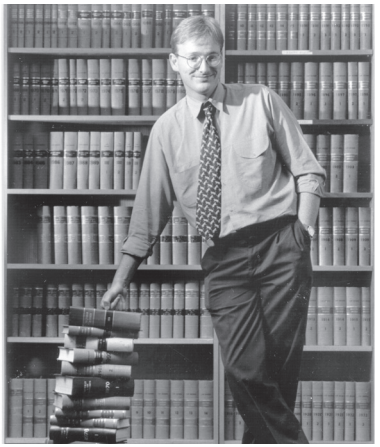
Well, some of these programs, like the Widening Participation and E-12 schemes, are longstanding. I think these schemes exist and we have committed to them because we, as an institution, have a desire to uphold those values. But there is definitely a cultural narrative around Sydney University generally, as opposed to UTS or UNSW, and one of my ambitions is to change that. For example, you probably don't know of Alice Tay, but she was our Challis Professor of Jurisprudence appointed in 1974. She was a Singaporean woman, working at a time when the professoriate of Australian law schools were essentially Anglo-Saxon-men; in fact, there are some great photos of her, a very stylish woman, sitting in the staff common room at ANU where she did her PhD, looking incredibly glamorous and formidable amongst all these men. Alice's story is a part of the Sydney Law School DNA that is sometimes forgotten, and what I am determined to do is to celebrate all of these pioneers that form a part of our history.

Another example is the fact that Sydney Law School created, funded and established the Marrickville Legal Centre. The then-Dean in the early 70s funded the first supervising solicitors to run it. Today, there is no sense of that origin story. So I do think that is part of our strategic plan, to reimagine Sydney Law School – it's not necessarily about making up or disowning the past, but retrieving it and giving it more meaning, relating it to the challenges of today. So much of our institutional history is relevant to the exclusion, discrimination and harassment ongoing today. And yes, there are definitely some horrendous chapters alongside those good stories, but I aim to tell them all to help us build a more inclusive space.

I think the fact that I am not an alumnus of this institution, that I had no connections to Sydney, has been an absolute advantage. Unlike someone who can assume they don't need to know the history of this institution because they've lived it, I have read everything that has ever been written about Sydney Law School. I think it's really incumbent on any leader coming into this institution, and this applies to our new Vice-Chancellor as well, to really understand where this institution came from, and not to just say 'this is what we've always stood for'. History is quite a powerful tool to counter narratives that really resist transformation.

Given the history and prestige around the Law School that you've mentioned, do you think the institution has a more onerous role in championing diversity given its association with the legal industry, which has, at times, a reputation for being conservative and elitist?

The role of the modern law school is certainly an interesting one – nowadays there is explicit discussion of values, missions, strategies. These debates around social justice, for example, were considered quite radical 30 years ago; now, all the big firms and law schools have their social justice programs. I think colleagues like Professor Simon Rice are doing really great work in this space. He's played such an important role in putting social justice on the curriculum and ensuring that our students see it as a core aspect of the legal profession. So I certainly think we have a responsibility not to just train technically proficient lawyers, which we do to a high standard, but to socialise our young



lawyers to the fullest. There is a lot to show that our students are engaged with issues of inequality, diversity, inclusion – we just need to make sure our curriculum and co-curriculum supports that. Certainly we have made a really positive transformation towards ensuring gender, ethnicity, race, power are more centrally located in legal scholarship, legal education and legal practice.

Speaking of the legal profession, how do you think the legal industry has changed for students of diverse backgrounds?

There's definitely more visibility, which I think is important. There still remain many barriers – we haven't *removed* discrimination. I think there are firms that are more inclusive than others. We know that often the idea of 'merit' means that people are just drawn to recruiting people that remind them of themselves, which leads to self-replicating institutions. So, while some may claim they have diversity programs, their range of partners, or their profiles might tell you a different story. Similarly to the gender discourse in the 90s, there's a growing consciousness, you know, of putting these issues on the agenda of the profession. While cultures can be resistant and hostile to transformation, there will be pockets of the profession that enthusiastically congregate to pursue diversity agendas.

Given that your areas of research are human rights and criminal justice, which obviously intersect with issues of racial and cultural diversity, are there ways in which your academic background has affected how you view the law school's role in supporting students from diverse backgrounds?

My book with colleague Stephen Bottomley, *Law in Context*, really set out in the early 90s to provide a wider perspective on the law for first year students. It's now in its 5th edition, but what we wanted right from the outset was for this book to be a resource for students to ask: why is the law like this? What is it protecting? What is it ignoring? We wanted to create deeper, more thoughtful reflection on those core concepts, like the rule of law, fairness, and justice, that are often insufficiently unpacked and mean different things in different contexts. I think it is an important responsibility of good law teaching to not only teach the rules, but to probe deeper as to the policy underlying them, the way in which they operate in practice. Law in context prioritises the law as it is experienced; in the courtrooms, police stations, on the streets, does the rhetoric of law live up to the reality? I hope that a law school like ours arms students not only with a powerful legal knowledge, but also the tools to critique the law. I want to encourage students to think creatively about the law and legal institutions to question the role that they play in hindering or supporting diversity.

Do you think this same critical lens has helped you, as someone who is not a person of colour, in reflecting on your role in leading diversity efforts? And has the politically tumultuous nature of the last year, with Black Lives Matter and the anti-Asian hate movement contributed in any way?

I understand that to many, I embody the merit man, the concept of white privilege. There are limitations to what someone like me, with my background and life experiences, can do empathetically – being empathetic is one thing, creating opportunities is another. So I think it's incumbent on everyone to listen empathetically and to not make assumptions. In order to bring about better equality of access, and now I'm going to sound like I'm speaking on brand, we need to have leadership for good. What we are trying to do in this institution is not just to produce technically brilliant lawyers, or engineers, or medics, but to bring about leadership for the good of our society. We want to equip you to be able to engage in those national, regional, and global debates really effectively, and a lot of that is about having empathy and perspective. I think that if we can deliver that to a wider group of students, that my job, as a dean, will be a job I consider well-done.

Speaking of understanding life stories, within the law school, students experience a range of hardships – in particular, international students can experience a multitude of challenges moving to a new country to undertake studies at Sydney Law. What are some of the ways in which the Law School, and broadly, the University, has sought to support these students?

I think we are doing a few things. For example, we run a program through which students, particularly those overseas, can be put in touch with academics who meet with them throughout the semester. It's very pastoral care-focused, not working on skills development, but tuning in and having an authentic conversation about your experiences and challenges. There is a degree of vulnerability to that – for those purposes, I'm not the Dean, I'm Simon, who has been a law student, who knows those fears and anxieties. I feel for these students, some who, throughout their entire 18 months of studying, have never set foot in our law school. And while they're all giving it their best, some are really struggling and need help. We are doing more to help, particularly for those students who sought to study here for an immersive English-language experience. There are University programs focused on aiding students with reading and writing in English, and we are using tools to identify students that may need that support. The Legal Writing and Language Club has been hugely popular with students, so continuing to do as much as we can in this space is definitely a key priority.

We are also thinking of how we can adapt activities, like legal hackathons, to work online. You can't have that experience of staying up for three days and living off pizza over Zoom, but it is incumbent on all of us to think of innovative ways to remain connected. Not just doing things for credit, but doing things for fun, because this is not a fun time to be a law student! We need to redouble our efforts to show that there is an amazing group of people who care for each other. Doing these activities, like the Summer Innovation Program, hackathons, Mosaic, can lead to lifelong friendships and that is really how you get your full law school experience.

Coloured Bodies of Law: What Anthropology has to Offer to Corporate Legal Culture

Alexander Ishac

The legal profession revolves around the art of representation. It is a world in which appearances wield as much gravity as the intricacies of a 300-page contract. Take for instance the consummate barrister, champion of the pinstripe three-piece, donning coloured ties as fetching as their incessant eyebrow articulation. Nothing here matters more than a lasting impression. What, then, does a lawyer who is most 'fit and proper' for the job look like in their own community? In the words of my Legal Ethics tutor, "firms want to hire those who would look most like their clientele." It must then follow that "clients *must* want to select lawyers that look most like them." Now it could very well be this mentality that keeps statisticians at bay when it comes to producing consistent data on ethnic diversity in the legal profession. After all, according to this logic, every community in Australia must have access to lawyers that 'look just like them', talk 'just like them' and provide access to the same quality of legal services as the next Australian. Yet, in reality, there remains an embarrassing scarcity of information pertaining to diverse representation in the legal industry. As an Anthropology major, I am intrigued as to how Anthropological theories, as a study of corporate legal culture, may shape our understanding of the form that the Australian legal industry has taken. We take for granted that multicultural Australia still dwells within the space of its colonial shell, casting a shadow over people of colour by socio-legal machinations through the ages. Racial profiling, as a species of nonverbal prejudice, is catalysed by corporeal signifiers; the human body acting as the site of reproduction of perceived class and status. By exploring the collective experience of people of colour in the legal industry, it becomes clear that the body's capacity to communicate tradition, heritage, and subsequently class-demarcated rituals is invariably perceived with prejudice. Through an anthropological advancement of corporate legal culture, I hope to piece together a broader mosaic of a profession that revolves around the art of representation.

Statistics and Race in the Legal Profession

'Race' and 'representation'; a pair of words brought closer together during an age of fast-paced international consumption of Western film and television. An increasing dialogue around which races are visible, or *ought* to be brought to the centerstage has inevitably been the flavour of discussions surrounding the production of widely-enjoyed media from Hollywood films, Australian television series to binge-worthy Netflix soaps. It should be no question, then, that in an industry with individuals' freedoms, powers and futures at stake, representation matters. We are speaking of an industry that not only revolves around the representation of opposing sides – from plaintiff to defendant – but also the defence of the very rights, principles and ideas that we defend in Constitutional Law.

Institutional understandings on racial diversity in the Australian legal industry, as well as critical data and statistical information, are far from where they need to be. There is currently no central authority in New South Wales for the collection of data on ethnic, racial or religious diversity in the legal profession. Despite being home to one of the most ethnically diverse societies globally, we are a far cry from international demography standards. The Solicitor's Regulatory Authority of the United Kingdom, for instance, surveys a vast cross-section of the legal industry, broken down in as much detail as seniority per ethnic group - from partner to junior practitioner. The Law Society of NSW on the other hand, provides us with little more than a one-page national 'diversity charter'[1] and a 2017 glossy leaflet titled 'Diversity

and Inclusion in the Legal Profession: The Business Case'.[2] The only racial statistic referenced in 'The Business Case' is a dated ANU study from 2009 comparing job interview prospects, across all industries, of an applicant with an 'Anglo-Saxon name' versus those with other names such as 'Indigenous' and 'Italian.' Representation of an ethnically diverse community is far more than a 'business case' to be framed in terms of profitability or outreach, and it is in phrasing like this that we may understand how an ethical issue may be undermined.

The 2016 Census identified that 49 percent of the Australian population were born overseas or have a parent born overseas.[3] Many in the legal industry would appreciate, without statistics, that these numbers are not reflected in positions of seniority in Australian law firms. We know that 95 percent of senior leaders in Australia have an Anglo-Celtic or European background across all industries, not just the legal sector, according the Australian Human Rights Diversity Commission.[4] One noteworthy private organisation leading the way is the Asian Australian Lawyers Association (AALA). While Asian Australians comprise 16.3 percent of the population, a 2015 snapshot from the AALA highlights that Asian Australians comprise 3.1% of partners in law firms, 1.6% of barristers and 0.8% of the judiciary.[5]

While 'The Big Six' and Upper Mid-Tiers have found their groove in appealing to issues of diversity and ticking quotas across the field, accountability is still lacking for smaller, traditional firms that prioritise efficiency and predictability over a work-culture revamp. One striking finding of the AALA report is that there exist 5 large firms with no Asian Australian partners, and a jarring 44 medium sized firms with no Asian Australian partners. The legal profession is a conservative one: by its institutions, hierarchical structure and an incessant unwillingness to move with the times. From firms that relentlessly resist going 'paperless' or lawyers that work solely by the guide of pro formas, adapting to the 21st century is not a priority for conventional small and medium sized law firms who are not held to the same public scrutiny that their larger counterparts are. A lack of accountability ensues for these sized firms as a result of being out of the public eye and hence out of reach; amounting to a collection of firms that are resoundingly out of touch.

The Body as a Site for Cultural Reproduction

The legal profession provides a unique insight into post-colonial understandings of the body as a vessel for measuring adherence to an Anglo-Australian heritage: a body of ideals that best reveals itself in our legal culture. It is an industry that fosters a unique type of profiling. This reality owes itself to a two-fold origin: that the law always looks backwards, as well as the jurisprudential history of Western law dictating who 'ought' to be governed.[6] At the structural level, the universal characteristics[7] of the legacy of the British Colonial Empire – replete with standards of beauty and behaviour, masculinity and femininity, progress and regression – are far from dissolved in post-colonial Australia. I contend that it is in the traditionalist legal profession that we may find these homological legacies at their strongest.

While the significance of race and representation in the legal profession speaks to a homology of corporate culture at large, the adversarial nature of the profession bodes particular exercise and restraint of corporeal function; from style to speech, gait to gestures. There has been a wealth of academic interest in the transmission of race bias via nonverbal behaviour in the media.[8] Racial bias is a silent but fatal plague in an industry where an upstanding image makes all the difference.

Structural Anthropology provides for an insightful way to explore an industry that ties history, tradition and ideals. Structural anthropology is a disciplinary school which argues for the existence of systemically embedded structures in all cultures and it is in observing such structures that we find meaningful relationships between cultural phenomena, as well as homologies with other cultures. Lawyers are, much like legislation, creatures of culture, acting as a vessel of philosophies and values from bygone epochs and empires. Claude Lévi-Strauss, the founding father of Structural Anthropology, provides an understanding of immutable, deeply embedded structures that exist in all types of culture. The Western legal tradition does not escape this structural reality. A structuralist conception of Anthropology fosters an understanding of the ways in which employees of the legal profession are made subject to the processes of distinct categorisation on the physical plane by bodily signifiers of status and hierarchy as they have traditionally existed.[9] Racially demarcated categories emerge in an industry where profiling, indexing and efficiency are a golden ticket to efficiency and results.

Class-Demarcated Bodies: From Classroom to Boardroom

It was French sociologist-anthropologist Bourdieu who championed the concept of what came to be known as the *habitus* in Anthropology, the physical embodiment of cultural capital that is socially ingrained and ritualistic. According to Anthropologist Marcel Mauss, *habitus*[10] speaks to the ways in which techniques of the body are not only socially informed, but manifest understandings of social stratification; complete with rules in articulate gesturing, posture and manner. Prominent Anthropologist Mary Douglas postulates that natural expression is culturally determined: the human body is perpetually perceived as a manifestation of social processes. Social processes occur on a localised level as well as at large; encompassing dimensions of historical empires, waves of migration and globalisation. The body serves as a politicised map unto the histories of conquest, philosophies, the exchange of ideas and doctrines and does very little in the way of concealing its own salience. Ultimately, race, class and privilege – to the extent of which they may be observed physically – are measured by such parameters, no matter how archaic, in a desperate attempt to keep what is a noble and traditional career pursuit just that: uniformly pristine.

The legal profession is a conservative one, with intimations of xenophobia for those even one step away from being privately-educated, ex-rugby-playing, inner-city citizens. Legal doctrines and principles, while esoteric, are often paraded as reflections of a social milieu that endlessly pays homage to Great Britain by virtue of Australia's firm position as the last outpost in the Commonwealth. A progression ultimately ensues: from the halls of private schools, to the sandstone gates of law schools, to the marble floors of the courthouse. The Centre for Policy Development reports that a deep ethnic divide exists between Sydney's private schools and public schools, and it is in metrics such as the Index of Community Socio-Educational Advantage (ICSEA) that the pernicious effects of this are demonstrated.[11] This is an issue which has received some press for quite some time,[12] and is a widening gulf of inequality which has been demonstrated to have been catalysed with relevant social milieus and global affairs. For instance, the Centre for Policy Development effectively demonstrates a tie between a post September 11 climate and an increased degree of not only ostracism but too inequality facing Arab-Australian students.[13] These evolving social realities are something that we must investigate deeper in colouring the legal profession, and the type of culture that is dragged into the industry.

The male private school system in Australia, colonially modelled on antiquated British ideals, demonstrates a reproduction of manhood with certain attributes at the forefront. It is a model of 'excellence' and superiority predicated on success in very particular activities, sports and pursuits.[14] It goes without saying that cultural ideals inevitably vary amongst communities of Sydney: a patchwork of enclaves weaving together their own standards from near and afar. It is no secret that amongst privately-educated communities, the issue of discrimination has been rife.[15] Discrimination ensues for those who do not fit the status quo. The Australia Institute brought these sentiments to a summit when it found that Private Schools have, for the most part, found ways to circumvent anti-discrimination laws.[16] In the New South Wales's *Anti-Discrimination Act* 1977, private schools are exempt from many anti-discrimination grounds pertaining to certain minority groups (e.g. by disability, sexuality, pregnancy and transgender grounds)[17] with potential grounds to legislate on racial exclusion,[18] while the Victorian *Equal Opportunity Act* 1995 allows for the same grounds of discrimination plus the addition of racial and religious discrimination by the *Equal Opportunity Act*.[19] While in actual practice many schools refrain from such discrimination, there exists limited legal protection if they so do. The broader message nonetheless remains; what does it mean for our society if our most impressive schools are some of the least tolerant? Ideals of a bygone era will remain in circulation so long as they are bolstered by financing, influence and prestige.

The *Habitus*

The body acts as a vessel to understanding Australian values and morals at their highest and 'purest' form: those put through the character and fitness test of their ancestors. Pierre Bourdieu implores us to consider that the body is the central site of this type of cultural reproduction.[20] The body is a medium of expression in which class, gender, skilled dexterity and other parameters are trained into the *habitus* of the body: a site of cultural reproduction.

This habitus is an embodiment of social history, and a signifier of a particular social subset. Playing Rugby Union, for instance, is a demonstration of cultural capital as an age-honoured Anglo-Australian tradition.[22] By the time individuals reach adulthood, it is far too late to be indoctrinated into a habitus of ritualised sporting and morning exercises that imitate those of bygone school days. This circadian rhythm engenders a cycle of class stratification whereby the upper echelons of Sydneysider society live in certain suburbs, manifest certain attributes, and develop techniques of the body that propagate a particular understanding of class. A morning swim at Mosman or Bondi simply is not a reality for those from landlocked ethnic enclaves. The Barassi Line, as a geographical indication of where Rugby Union and Rugby League are most enjoyed across Australia, finds itself microcosmically apparent in Sydney's suburbs as a reminder of class, ethnicity and social status. We know that for people of colour, the most visible neighbourhoods in Sydney of the postcard variety are not where they live. This, we have statistics for.[23] This we know is not always an area of common ground for a person of colour entering the corporate legal world. It could be the simpler things, such as the camaraderie that is virtue of commonalities amongst colleagues, or higher stake situations such as a candidate's performance in a final job interview, yet ultimately such divides manage to surface more overtly than small talk could ever suffice.

A Word on Intersectionality

Discussing race is incomplete without a word on gender. While female lawyers are admitted in increased amounts annually,[24] we do not have the requisite data to know if this trajectory is felt equally across all communities. We know that female barristers make up a shocking sliver of the speciality profession and their presence in partnership roles across all industries is not where it should be.[25] Amongst these same privately-educated, elite athletes-turned-lawyers, the individual is measured not only by their legal competence, but by their fitness for class and gender-demarcated sports, manner and behaviours.

Within the single-sex school system, gender salience has been demonstrated to exist at an exacerbated level[26] whereby students are not only trained in the routine exercise of the *habitus*, but dually restrained by what constitutes the polarities of gender norms.[27] This reality exhibits itself most overtly in law firm partnerships dominated by men, supported by subordinately ranked positions such as secretaries and paralegals which are invariably held by women, donning their respective uniform in an industry that is steeped in traditional expectations of parade dress. Ultimately, polarities of corporeal masculinity-femininity play out off the Rugby field and into the courtroom in the legal industry,[28] bolstered by traditional understandings of bodily capital.[29] By drawing on Bourdieu,[30] we conclude that this phenomenon is the social qualification of bodily movements, constituted as practical equivalences among different divisions of the legal playing field including sex, class, and divergently occupied positions in the industry. Understanding the ways in which race intersects both class and gender would enhance the direction of diversity protocols in the legal industry in meaningful ways.

Personal Experience

It has also not been that uncommon, for myself personally, to encounter the type of profiling that I have spent the duration of this article discussing in traditionalist corporate legal circles. As a second-generation Lebanese-Australian hoping to practise law, particularly distressing social events by the likes of the Skaf trials and Cronulla Riots remain magnitudinous reminders of cultural tensions for Sydneysiders in particular – particularly in light of socio-legal concerns about law and order. We may combine this sociohistorical context with what the Centre For Policy Development describes as the 'dumb Leb' stereotype, citing the anthroplogical research of Poyntin and others which further explores a type of 'protest masculinity.' This communal 'protest masculinity' is an embodied response to the pain felt by racism and prejudicial media slander:[31] no doubt a far cry from aforementioned Anglo-Australian ideals of manhood. It is no wonder then that certain assumptions about my interests, family and culture are made by my law school peers, and colleagues within the legal and broader corporate industries. This was particularly overt during my presidency of the Young Australian Lebanese Association (YALA), where the assumption was often drawn that I must be the highest exemplar of all possible stereotypes. Instances include being asked where Bankstown Courthouse is, despite not being from the area, being told that a colleague crosses "to my side of the bridge" to buy spices (along with other culinary-based reductions of my culture), or assumptions about holding a conservative outlook on social issues. Generally, I find myself on the receiving end of prejudicial slander for the mere fact that I do not immediately exhibit stereotypical attributes associated with my community; as though prejudicial stereotypes would be of no offence if they 'did not apply to me.' At this point, I am no longer the individual I set out to be, but am a product of profiling. I know that I am not alone in this experience, and is a sentiment held by many people of colour in such contexts.

I feel most alienated when I come to face the same institutions as my peers and leave with

a different sentiment. I first noticed this in the change rooms of a gentlemen's social and sports club that a senior colleague had once invited me to: a locker room environment that would be no foreign space for those that have walked the hallways of Sydney's male private schools, boarding houses and rugby clubs. From age 20-70 – paralegals to judges – it felt as if these individuals were more in their skin than many others could be afforded. It is as though, despite being right in the heart of the central business district, these men of all ages have trained a habitus that I never will. In such circles, it is not uncommon to hear the same first names, surnames and school names. It is ultimately this reality that we need to see shift in order to better reflect the mosaic that has come to be Australian society.

Conclusion

The legal profession often is, at least for downtown firms, a manifest hierarchy: a ladder to scale not only by the knack of statutory knowledge and oratory flair, but by the means in which reputation and appearances are stratified hallmarks of rank. Despite the multicultural masses of incoming law graduates, the inevitable 'character and fitness' test of the legal profession echoes times of a bygone era; these traditions are manifested in the educational bodies, institutional bodies, corporate bodies and ultimately the body of the individual. For people of colour, we rely on the threads of our own experiences and stories of those around us to weave together a broader tapestry of a larger issue.

Miriam Makki on Her Advocacy in the Legal Profession

Conducted and transcribed by Amir Elsaidy

Could you introduce yourself and elaborate on your professional background?

I guess the story has to start at home. Both of my parents came to Australia in the 1970s as young teenagers. Like many migrants from Lebanon at the time, they didn't speak any English, and both of them share stories of navigating their separate school yards in South and South-Western Sydney, struggling to understand what was going on in class.

My mother had very little access to education in Lebanon, as she spent most of her childhood hiding in bomb shelters and basements in Beirut. Dad came to Australia after spending much of his younger life in an orphanage with his brother in Beirut, after his mother died when he was 4. He knew a bit of French when he arrived in Australia and told me stories of how he would follow the French languages teacher around the school yard, dependent on her to help him communicate in the new world he had found himself in. All in all, neither of them had the privileges afforded to most of us, but did their best to access what was available to them at the time.

Because of their own experiences and barriers to obtain an education themselves, my parents decided to send me to a private school which, truthfully, they couldn't afford. My brother, their second child, didn't get this privilege, because they couldn't afford to send two kids to a private school.

My dad was a train driver by day and a cab driver by night, and my mum worked anywhere she could - sometimes she was a kitchen hand at the local Lebanese sweet shop amongst other things, and eventually worked her way up to be a pharmacist's assistant. I witnessed my parents work incredibly hard to put me through private school, and I was very conscious of the fact that we didn't have the luxuries that other students around me had, like a fancy house or a good car, and my parents certainly weren't doctors or lawyers who knew doctors and lawyers. Because I was cognizant of my parent's sacrifices, I made sure I went to school every single day whether I was sick or not, and I sat right at the front of the classroom soaking it all up. I think I got the full attendance award almost every year at school.

Much like my father, growing up, I was particularly interested in politics and social justice. Dad worked night shifts so he would wake me up every morning before school and we would do a walking lap around the local park because he wouldn't be home when we finished school. This was our time to talk about the endless possibilities ahead of me and plan for whatever I wanted to do when I grew up. I went from wanting to be an Olympian thanks to the Sydney 2000 games, a humanitarian and eventually the first female prime minister of Australia. That last one really stuck.

When high school came along, I googled "what did John Howard study" and my search found that he had studied law. I concluded that if I wanted to be at those decision tables one day, I too had to study law.

How did your journey in advocacy start? Did you feel you had an obligation to give back to the community, or is it something that you wanted to do voluntarily?

While growing up, I experienced disparity across social classes that plagued the private school hallways I attended, only to return to my grandparents' housing commission after school in south-Sydney while my parents were working overtime in their respective jobs.

My kind and nurturing grandmother was illiterate and watching her use my primary school books to learn, as well as reading to her, reminded me of how lucky I was. Like many first-generation Australians, because of the realities of those so close to me, I grew up extremely conscious of privilege. I feel a really strong obligation to make sure that the obstacles faced by disenfranchised groups in our country are understood and that conversations around policy are truly reflective of the diverse and complex society we operate in. Democracy thrives on adequate representation, and I want to be involved in working towards achieving that.

Can you tell us about the work of the Muslim Legal Network? What is it attempting to achieve for Muslims in the legal community?

I initially joined the Muslim Legal Network as an executive committee member in 2018 as I was looking for like-minded people in the legal profession and seeking mentorship. I didn't actually know any lawyers while I was at university, and this group provided me with that access. Once I became a practicing solicitor with a greater ability to give back, I felt it worthwhile to continue my work with the Network and I was elected Vice-President in 2019, and President in 2020.

The Network is about creating groups and establishing professional networks, so it facilitates opportunities for legal professionals to meet, and also mentoring opportunities for law students. Apart from this, we also organise information sessions for the community when certain legal updates are required. Over the years, myself and others on the executive committee have had meetings with police, various commissioners, politicians and judges about many social, political, and policy issues. We seek to provide a voice on behalf of Muslim legal practitioners, and dialogues such as these are particularly helpful. We also provide submissions to Parliament for bills that are being introduced and engage in law reform and advocacy work.

Earlier this year the Muslim Legal Network hosted a Ramadan Iftar dinner (the meal with which Muslims break their fast), which was attended by prominent members of the legal profession and the judiciary. How have noteworthy non-Muslim members of the legal community contributed to the organisation's capacity for advocacy?

Our goal at events such as the Ramadan Iftar dinner is to reach out and build relationships with lawmakers and senior members of the profession. We want diverse people like Muslims to be able to participate in new opportunities and make their mark, and facilitating access to these very wonderful, bright legal minds is a way to do that. It's a way, for instance, to create avenues for there to be Diverse Judges associates, and hopefully in the future Supreme and High Court Judges. These are roles that are traditionally not diverse and relatively inaccessible, which is something that we hope to influence through these engagement opportunities. Engaging with prominent members of the legal community is a way to break ceilings and bridge gaps.

What role do you think law firms have to play in enabling their people to be open and transparent?

The idea of diversity of thought in any group

is really valuable and exciting, and I think the legal institution, which is historically non-diverse, needs to embrace this concept. I've had a very supportive experience at Clayton Utz where I work, enjoying positive engagement with my initiatives. I've been able to manage my workload in commercial litigation with extracurricular advocacy and it's never been looked down upon. It's always celebrated and supported, and I think that the firm reaps the benefits of having diverse people among its ranks. What makes for a good team and good client relationships is the ability to draw on people from different backgrounds and experiences. Clayton Utz is really passionate about diversity in all its forms, which is perhaps not an approach you'd assume a traditional top-tier law firm to have. Refreshingly, many organisations are catching on to the benefits of diversity and the need to embrace it to create a culture where it can be positively utilised.

On your point about assumptions, the legal profession is sometimes perceived to be exclusive, elitist or conservative. Has your experience reflected this sentiment?

It's obvious wherever you go as a person from a diverse background in a very conservative field that you're different. In my case, I don't live on the North Shore, I don't have a prestigious legal family history, and I'm not going to have an alcoholic drink at the bar after work. While there are many things about me that are different, what I really believe has served me, and what I would invite everyone to do, is to be true to themselves and unapologetic about that. If you care about something, run with it and find an environment that will support you, because that's where you'll be able to grow and make a unique and valuable contribution.

In saying that, I remember in my early years studying at university, I really wanted to gain legal experience. I had maintained retail and assistant office jobs up until then to pay for those expensive textbooks, but none of it was legal. My parents didn't really know any lawyers, so I had difficulty securing any opportunities which might have come easily to others through their networks. I created a CV to the best of my ability based on a free online template and took the train to Martin Place after class one day. I remember walking into Wentworth Chambers with my one and only business shirt on. Like many law students passionate about social justice and advocacy, I admired Justice Kirby, and I found out that he had a nephew who was a barrister at those chambers. I walked up to the clerk of the Chambers and asked to meet with Mr Kirby. He very kindly met with me, even though he appeared confused about this student turning up when no job had been advertised. I said that I just wanted some experience, and that if he would let me shadow him around court and give me some work, that I would be so grateful and do it for free. At this point, I had handed out my very basic CV to every law firm and had no success. He told me he was headed to court but left me in his office with a folder of documents and an unresolved question on trusts to consider. Despite feeling like I had put myself in a terribly embarrassing situation and thinking of leaving, I sat on his chair, used his computer and answered the question to the best of my ability. When he returned to his office, he read my research and offered me a job, which he insisted should be paid. That opportunity gave me the confidence that I needed as well as relevant experience.

It wasn't smooth sailing after that, though. I still had to work extra hard to get noticed because I didn't fit the recruitment mould when I was trying to land a graduate role after completing my law degree. At the time, I really wanted to work for Maurice Blackburn, as I felt it represented what I had long been about – fighting for the little guy. I put a lot of work into my application but was heartbroken when I didn't get an interview. Committed to landing a job there, I reached out to a mentor of mine who I had met through a government funded youth program and he was able to put me in touch with none other than the Chairman who arranged for a partner at the firm to meet with me. We finally arranged to meet at a café in Town Hall one morning.

I remember this partner telling me that Maurice Blackburn did not normally hire students outside of a clerkship or graduate program. This was a surprise to me because I didn't appreciate the significance of a clerkship program at the time, and I believe I'm not the only person to go through university not knowing about these traditional avenues. I didn't use excuses though because I still felt so privileged. I just emphasised my commitment and said that I wanted an opportunity to work in a big firm. I suppose the partner must have been impressed by my determination or the fact that I managed to reach the Chairman who I had never met, and I was offered a full-time paralegal position. Although in that year, I was technically eligible to be a graduate lawyer, I was so thrilled about the fact that I got to work in the city, in a tall tower, in a big firm and on large matters. I found myself reporting to a cohort of graduates that I should have been a part of, but I still felt so proud that I got there. I got the coffees, I printed stuff, I turned up on weekends, I did all the tasks that no one else had the time for, and I did my best. I even helped start the NSW Cultural Diversity Committee at the firm, and co-chaired it as a paralegal, where I had the ears of partners and senior lawyers listening to my ideas and giving me large budgets to plan events. I finally met the Chairman and he too became my champion.

I proved to myself and people at the firm, that despite not going to the best University, not having a high distinction average, and not completing a clerkship, that I was a capable hard-working person that could make an important contribution. The following year I got into that graduate program at Maurice Blackburn and I was elated.

Although this is my story, I don't want this story to be understood as normalising the need to grind that hard, or that alternative pathways are the only way for diverse people to get their foot in the door. But that's my truth, and that's my story and I'm sure that many diverse people have stories similar to mine where they had to work extra hard to get to where they are. What I would take from this story is, find your champions and build your own social capital if you don't have it.

What advice would you give law students?

Be bold, be you. Don't be apologetic about your diversity and you'll be surprised about how many good human beings there are out there willing to support you. Yes, there are times where you'll find yourself experiencing macroaggressions of racism and a sensation of otherness, but you will find your champions. If you are true to yourself, you'll attract them, and you'll also feel empowered to seek them out. There are organisations like the Muslim Legal Network and other diverse initiatives around that provide mentorship and understand, so use them. The times are changing, and little by little increased diversity at decision tables is improving the culture and accessibility of historically white professions.

Once you get there, wherever you want to go in your career, please don't forget to use your learned advocacy skills to speak up about issues that are important to you; your critical thinking skills to challenge the status quo; and your problem-solving skills help resolve some of the long standing structural issues we face in society.

PART FOUR

संस्कृति

[Sænskrɪt / Sanskriti]

Refinement

Sanskriti is the practice of tradition and art that uplifts one's connection to spirituality. Just as the ancient language of Sanskrit meditates on philosophy, Sanskriti is a vehicle for community and spiritual expression. It is not attached to worldly desires of greed or a single practice; rather, it is an evolving understanding of the essence of being.

A Lawyer Goes to Work

Justin Lai

My piece, titled ‘A Lawyer Goes to Work’ is an oil painting depicting a central Buddha figure hovering against an multicoloured interpretation of the Sydney cityscape. This work is inspired by, and pastiches the Tibetan Buddhist *thangka*, a painting depicting a particular deity, or scenario. The *thangka* has a strong history of use in religious didacticism; it is often used to instruct the viewer towards enlightenment, devotion, or knowledge. It is through this framework that ‘A Lawyer Goes to Work’ operates, playing off the dissonance between title, and visual representation. In this sense, it challenges the normative understanding of the modern legal sphere and its practitioners through a Western lens, and directly advocates for a spiritual, and Eastern relationship with the discipline. By connoting the law – a typically doctrinal, fact-based set of concerns – with Buddhist visions and symbols, ‘A Lawyer Goes to Work’ subverts the expectations of Enlightenment rationalism, replacing them instead with the emotional sublime. Therefore, it is an exercise in displaying a diverse, but placed perception of the modern legal profession, championing an interaction with the world on different cultural, religious, and philosophical tenets.

Hip-Hop: The Soundtrack of Black Empowerment - A lyrical analysis of 'Blood on the Leaves'

Ashna Amit Govil

I. Introduction

In 1973, hip-hop was born at a party in The Bronx, New York; but beyond that night, hip-hop was born against the backdrop of economic inequality, racial segregation, joblessness, and mass incarceration.[1] This iconic musical sub-culture is rooted in the historic struggle of Black and Brown populations, 'forgotten by a system that ignored conditions of racism and hardships of urban poverty.'[2] The rap element of hip-hop (the prominent other three are breakdancing, DJing, and graffiti) is a 'form of rhymed storytelling accompanied by highly rhythmic, electronically based music' that has developed into a musical genre that centres and reflects many elements of Black experiences in a post-Civil Rights era.[3]

Broadly speaking, hip-hop enabled youth to create their own cultural space that countered the alienation surrounding them on a daily basis.[4] Disenfranchised inner-city youth of the 1980s used hip-hop as a vehicle to communicate the disparities that plagued their communities, prominent in songs like 'The Message'[5] by Grandmaster Flash and the Furious Five. The 1990s saw the emergence of 'gangsta rap', which heavily featured the use of first-person narrative voice to showcase the everyday effects of conservative social and economic policies on young Black men in the Reagan-Bush Era.[6]

Common themes in 90s rap songs included unapologetic profanity, raw responses to police brutality, and the surface-level glorification of violence.[7] Figureheads such as Snoop Dog and Ice Cube 'were instrumental in crafting a distinct West Coast sound and subgenre known for its "rich descriptive storytelling laid over heavy funk samples."'[8] In the early 2000s, hip-hop began to venture into pop culture, resulting in the additional considerations of appealing to the masses, as well as increasingly white audiences. Due to the scrutiny of entertainment channels such as MTV and B.E.T., record companies limited explicitly political messaging, in consideration that such themes may not resonate well with large audiences.[9] 'Yo! MTV Raps' influenced a monumental shift as music videos became a significant factor in hip-hop culture. Airing music videos on MTV led hip-hop artists' image to expand the genre's audience base, an ever-growing white market, with young, suburban white men consuming around 60-80 per cent of hip-hop music.[10] Though growing commercial pressures have been a concern for some, with Nas musing, 'everybody sounds the same, commercialize the game,'[11] hip-hop today largely continues its rich history of employing socially conscious narratives in music.

As a non-black woman of colour, it is important for me as an American to acknowledge the systemic injustices that continue to plague Black Americans and to stand up and support the creation of positive reform within the Black community. With this view, I seek to look at how the enduring technical aspects of hip-hop contribute to its political messaging by analysing the specific example of the lynching narrative prominent in modern-day hip-hop songs.

II. Sampling Throughout History

In his book *Rhymin' and Stealin'*, Justin A Williams highlights intertextuality as a central

feature of hip-hop's aesthetic, arguing that hip-hop, compared to other genres of music, uses borrowing to interact with other elements of history and culture.[12] Sampling is a notable example of this, allowing artists to borrow pre-existing auditory material and repurpose them in new ways in their works.[13] With this tool, artists can revive and reinterpret past historical and cultural touchpoints, thereby transporting the listener back to specific moments in Black history and refashioning them to fit modern beats and meanings.[14] Sampling as an art form faced challenges in the 1991 US District Court case, *Grand Upright Music Ltd v Warner Bros. Records*,[15] which required future music samples to be approved by the original copyright laws. Despite this, hip-hop producers and DJs continue to innovate new ways to carry on this creative tradition by using royalty-free hip-hop samples and 'safe sampling', where a sample is mutated beyond recognition, either by altering the pitch, reversing it, or adding FX (effects).[16] Thus, sampling continues to be an integral element for modern-day rappers, who have embraced the legal landscape and utilised the tool to further their political commentary. One such example includes the use of Abel Meeropol's 1937 poem 'Strange Fruit', which has been repurposed within hip-hop and R&B throughout the years, seeing its original lynching narrative reimagined into a modern context.

III. The History of 'Strange Fruit'

Meeropol's 'Strange Fruit' was written in response to a horrifying photo of the lynching of Thomas Shipp and Abram Smith, taken by Leonard Beitler in 1930.[17] The poem describes the lynching of Black Americans by vividly comparing their bodies to 'strange fruit hanging from the poplar trees' which fall to the ground 'for the crows to pluck, for the rain to gather, for the wind to suck'.[18] Two years later, Harlem Renaissance singer Billie Holiday used the poem as the lyrical base for one of America's earliest protest songs, drawing attention to the countless acts of racism against Black people in the country's history.[19] The visceral nature of the narrative is elaborated on in Holiday's version, which adds the following lines:

"Scent of magnolias, sweet and fresh
Then the sudden smell of burning flesh"[20]

Here, Holiday contrasts the purity of magnolias with burning flesh, using olfactory imagery to heighten the jarring effect of white southerners' beautifully kept flowers disturbed by gruesome racial violence. In 1965, Holiday's song was covered and featured by musician and civil rights activist Nina Simone on her album *Pastel Blues*. Simone's emotionally laden voice is accompanied only by a soft piano, foregrounding her vocals and forcing listeners to sit with the heavy imagery of deceased Black bodies rotting in the sun. The reproduction of Simone's cover of 'Strange Fruit' continues to work its way throughout history, presenting Black death as a continued burden throughout the continued struggle for Black civil rights.[21] Countless artists, specifically hip-hop artists, have either covered or sampled the track.

IV. Kanye West's 'Blood on the Leaves'

One such example includes Kanye West's 'Blood on the Leaves', which appeared on his 2013 album Yeezus. The very title 'Blood on the Leaves' is taken from the imagery in Meeropol's poem, where corpses of Black people change trees into bloodstained instruments.[22] In Kanye's song, he begins with Simone's stripped back vocals and piano:

"Strange fruit, hanging, from the poplar trees"

At the 18-second mark, Kanye uses a pitched-up sample of Simone's line 'Breeze!', disrupting his lyricism and drawing attention to his explicit manipulation of Simone's voice. As the song progresses, 'Breeze!' becomes a repeated motif, inserted almost like an interjection, highlighting the centrality of this sample and the lynching narrative to the themes in Kanye's lyrics. 47 seconds into the song, Kanye raps over Nina's line:

"Black bodies swinging in the southern breeze "

At 1:07, a sustained beat begins, and Simone's haunting refrain gives way to futuristic production and heavy autotune. Kanye begins rapping about materialism and conspicuous consumption rampant in the 21st century, drawing on images of gold diggers and ruined relationships, with the ghost of Nina Simone's voice subtly behind him.

"...We could've been somebody
'Stead you had to tell somebody
Let's take it back to the first party
...Before the limelight tore ya'
Before the limelight stole ya'
Remember we were so young
When I would hold you
Before the blood on the leaves"

In the above lyrics, Kanye describes a 'first party' he went to with someone before 'the limelight stole [them],' suggesting that Kanye's fame negatively impacted the genuineness of his relationships. Rather than attacking the original era of slavery, Kanye criticises the 'limelight' and hedonistic and consumerist culture by claiming that in this generation, the overtaking of bodies occurs not through explicit slavery but by excessive consumption, where the limelight 'tears' you. Through this reimagining of America's slave history, Kanye may be depicting a class of 'new slaves' who are being 'lynched' by big corporations, the media, and the promise of wealth.

It should be noted that 'New Slaves' is another song on Yeezus that similarly criticises present-day racism and consumerism. Within this context, Kanye reflects upon the struggles of being a Black man in America, where institutional racism stems from the legacy of slavery, intersecting with capitalism and fame. In 'New Slaves', Kanye raps, 'I know that we the new slaves, I see the blood on the leaves.'[23] Here, Kanye suggests that the 'blood on the leaves' makes him aware of his position as a Black man, using the same death and lynching imagery to express himself as an enslaved subject.[24] Considering these two songs together, it appears that, for Kanye, although Black Americans can accumulate wealth and commercial success, they are still made to sell their bodies, questioning the appearance of freedom as it still results in the same end of 'blood on the leaves.'

Though Black Americans are 'free', they remain captured in the 'neo-liberal entanglements of poverty, servitude, and corporatism.'[25] This concept of 'modern-day slaves' is congruent with the view of Elon Rutberg, one of the writers of 'Blood on the Leaves.' In an interview with Rolling Stone, he discusses framing Black basketball players as modern slaves, being subjects in an industry that buys and sells their bodies. Rutberg says, '[these] players have everything, but they do not have the freedom they are longing for.'[26] Additionally, Rhymefest, the co-writer of 'New Slaves,' suggests that the song acts as 'a historical recollection and sociological analysis of the problems confronting the Black community to understand the failure of many in the academy as well as society to comprehend the gravity of "new slavery."'[27]

Whilst Kanye does not expressly use the word lynching, through sampling, his narrative relates loss from a system of hedonism to loss occurring through systemic violence. Kanye mixes history and present-day anger to force his listeners to examine themselves and their surroundings. In the outro, his autotuned warble of the phrase 'now waiting for the summer rose' may refer to another poem, 'The

Last Rose of the summer' by Thomas Moore, which is a contemplative and mourning reflection on the thoughts of a man whose love is dying.[28] This may reflect Kanye's sadness and yearning for someone to save him from his loneliness. At the song's end, Kanye states the lyrics, 'and live,' underscored by Nina Simone's voice 'Breeze!' and 'blood on the leaves.' During that verse, listeners can feel his loneliness and lost identity, as if he is one of the nameless bodies swinging in the breeze. By sampling Simone's rendition, particularly in the context of her widely known activism, Kanye draws on the rich narrative history and many iterations of 'Strange Fruit'. In doing so, he applies Simone's original solemn tone in a new context to keep the voices of prominent Black figures alive, while simultaneously feeding back to Meeropol's legacy.

V. Rapsody's 'Nina' on Womanhood and Strange Fruit

Following Kanye, Nina Simone's version of 'Strange Fruit' was sampled by Rapsody in her 2019 song 'Nina,' released on the album *Eve*. *Eve* features songs named after influential black women, including Michelle Obama, Oprah Winfrey, Myrlie Evers, Aaliyah, and of course Nina Simone herself. Rapsody uses each of them to tell her own story while narrating from the centre of the pain, power, and pride of Black womanhood in all its glowed-up essence.[29] She states in the song 'I am Nina and Roberta,' and in an interview with NPR, she explained, 'I had a concept: I want to make an album and name every song after a black woman because I'm an extension of every black woman.'[30] In 'Nina', Rapsody channels Nina Simone, by sonically enunciating her energy and singing to other Black women that they are not alone in the context of shared struggle. She opens the song similarly to Kanye, reciting the poem's first five lines. Simone's minimalist vocals play behind her voice, creating an eerie and chilling effect. Unlike Kanye, Rapsody begins her rap with reference to racial violence in the lyrics:

"Emit light, rap, or Emmett Till"

Here, Rapsody highlights the story of Emmett Till, a 14-year-old Black boy lynched in 1944 by two white men after being accused of offending a white woman at her family's grocery store. Rapsody's play on words highlights her choice between 'emitting light' by spreading awareness through her raps, or passively facing the same consequences as Till in being victim to a system of racial violence. The song continues:

"As we lay these edges down, brown women, we so perfect
*Went from field n**** to still n****, being cropped out the picture*
But we all know who got the juice, my sisters
Imitating us in all the Hollywood pictures
And still, they'll never be us"

Like Kanye, Rapsody's lyricism describes the ongoing effects of slavery, as manifested in the media, to emphasise the persistence of discrimination. Her lyrics work to appeal to Black women and in her first line, she speaks to Black women by highlighting their perfection and importance to society and culture. The double meaning of 'cropped' references both field 'crops' on slave plantations whilst pointing to the many non-Black people who exploit Black culture for profit without proper recognition. Her following line, referring to 'Hollywood pictures,' references the practices of cultural appropriation and 'blackfishing', a term coined by journalist Wanna Thompson, which refers to 'someone who uses things like hairstyling and makeup to create and enhance certain features to make it appear as if they have black heritage or are racially ambiguous.'[31] In this way, it seems that for modern Black women, physical lynching gives way to the lynching of identity, where the bodies of Black women are expropriated for cultural value and left unrecognised and forgotten. Through linking cultural appropriation to slave plantations, Rapsody characterises this new system as not separate from, but a mere continuation of slavery. In this way, Rapsody uses 'Strange Fruit' to draw on ideas about the intersection between racial violence, the use of Black bodies, and womanhood, reimagined in a cultural setting that steals from Black culture without recognition.

VI. Comparing Kanye's 'Blood on the Leaves' to Rapsody's 'Nina''

Interestingly, Kanye's 'Blood on the Leaves' received a lot of criticism for juxtaposing a poem about lynched slaves with a story about fame and a deteriorated relationship.[32] For many, Kanye's status as an affluent musician raises the question of the validity of critiquing a system of which he is a major beneficiary, with the *Yeezus* tour hitting #2 on the year's highest-grossing runs, making $25 million across 18 dates.[33] Yet, it can be argued that Kanye works to invert that argument by using himself as an example of how commerciality still results in the dehumanisation and ownership over Black bodies. In 'New Slaves', he explains the two different perspectives of racism directed towards the poor, and racism directed towards the rich. In his lyrics, he raps:

*"You see it's broke n**** racism, that's that don't touch anything in the store*
*And it's rich n**** racism, that's that come in, please buy more"*

Through these lines, Kayne depicts the stereotyped treatment of Black men, where the incorporation of 'please' may indicate how attitudes change from hostile to welcoming based on the amount stores believe they can receive from Black men.[34] Kayne directly links capitalism to the status and suffering of Black Americans, where only through the ability and desire to spend money on high-cost items typically associated with success do Black people hold any value.[35] This furthers Kayne's argument in 'Blood on the Leaves' by proving that to be a Black man means to suffer at the hands of the dominant white culture: then and now.

'Nina', on the other hand, bears more traditional congruence with Nina Simone's message. Rapsody's version is an exemplary portrayal of the heart and soul of the genre, with its euphonic female vocals flowing alongside a melancholy tone. Through 'Nina,' Rapsody tells a story of the discrimination of black women and the cultural disputes that she feels she embodies with them. Like the rest of the songs on her album, it takes a political standpoint on Black women in pop culture. She takes a more explicitly traceable step in the history of Black female empowerment by using Nina's legacy as a springboard to explore broader themes of Black struggle, self-belief, and success. Her album Eve will soon be taught at The Ohio State University and UNC-Chapel Hill in English courses focusing on womanist philosophy.[36]

All in all, both applications of Simone's rendition are valuable and are a testament to the creative possibilities of sampling. Both artists apply 'Strange Fruit' in distinct yet interrelated ways. Srija Reddy notes that 'Strange Fruit' 'helped introduce the Civil Rights Movement to the music scene and inspired other artists to voice dissent in their lyrics.'[37] Jaisir X, a Pittsburgh-based rapper and activist who remixed 'Blood on the Leaves' in 2013, sums up the importance of the message in the following:

"I chose to remix Kanye's song "Blood on the Leaves" because I felt like
the sample he used from Billie Holiday's "Strange Fruit" is even more
relevant today. Whether it's the over 500 murders last year in Chicago
or the 313 Black people killed last year by

the police, security guards,
and people like Zimmerman. Our blood is
on the leaves, and it seems
like it's in the best interest of America and
these corporations."[38]

Through their sampling, Nina Simone, Kanye West and Rapsody, Jaisir X and many more hip-hop artists are connected.

VII. Conclusion

While hip-hop started as a political movement, it has also 'pursued an increasingly intimate relationship with business.'[39] The grasp of capitalism has taken hip-hop from outsider status right to America's core by reaching white audiences with its chest-thumping beat, catchy lyrics, and dance styles. However, the lyrical discourse about hip-hop music is a complex and significant issue that should not go unnoticed. Though we do not necessarily witness 'black bodies swinging in the southern breeze,' Black people continue to die at the hands of the police. As I write this, we are at another momentous turning point in light of the Black Lives Matter Movement. General awareness of the plight suffered by Black and Brown communities is at an all-time high, and hip-hop artists have been integral in contributing to this narrative.

The significance of hip-hop's commercial success still proves that Black cultural production and the radical imagination from which it springs act as an umbrella that encapsulates the intricacies of Black existence in America. White audiences may otherwise forget that within the coded language of the lyrics are the conditions, frustrations, and challenges of systemic racism felt by Black communities. It should therefore be no surprise that hip-hop music continues to be the soundtrack of Black empowerment.

Structural and socio-political boundaries to racial diversity and equitable representation in Australian television

Kiran Gupta

Australian television has always been known to be monolithic and white. In fact, around the world, the perception of Australian television as non-representative and reprobate has only increased. Whilst there has been greater focus on equality of gender and LGBTQIA+ representation, there has been little improvement in representation of marginalised racial backgrounds (especially on mainstream free-to-air channels).[1] This is both reflective of and exacerbates structural and socio-political boundaries to racial diversity and equitable representation in Australian television. Understanding these structural and socio-political boundaries is vital to a holistic understanding of the hegemonic structures of racism and whiteness on Australian television that is seldom addressed, either in media or mainstream popular culture.[2] This lack of attention is in part due to the hegemonic structures of power which have socialised poor representation into contemporary Australian media culture and in part due to vested financial and social interests in maintaining the status quo.

This essay will discuss problems with the representation of race on Australian television and interrogate the hegemonic structures that underpin this representation. In analysing the socio-political, legal and commercial aspects to this problem, this essay will identify the issues at hand and propose several solutions in order to further promote cultural change and positive representation in the future.

Often, when confronting issues such as this, a wholly legal framework is unsatisfactory. A legal scholar will interpret an issue according to a completely separate framework for analysis, dictated by legal standards and thought.[3] However, this may fail to address other important issues such as 'critical race theory' or 'lived experience,' which are often overlooked in a purely legal analysis. In an increasingly 'postnormal' world where socially complex issues such as discussion of race draw a polarising response, a legal perspective cannot address the issue holistically and other perspectives must be considered.[4] This essay will aim to address some of the structural issues of representation and then demonstrate the flaws of a wholly legal framework.

I. Contextualising Diversity

Broadly speaking, non-white Australians have been significantly underrepresented on mainstream television. Screen Australia's *Seeing Ourselves* report revealed that, between 2011-2015, only 6% of characters on television drama shows were of non-European (such as Asian, African or Middle-Eastern) heritage.[5] Similarly, First Nations Australians only made up 5% of characters cast.[6] However, Screen Australia also found that 83% of programs had no Indigenous representation and 62% had no non-white representation.[7] This demonstrates how diversity is largely concentrated in a small number of programs, which means that Australian drama does not reflect Australian multiculturalism.[8] The trend is also evident in television news and reality television, with the latter receiving significant recent media attention. According to ex-contestant Carlos Fang, *The Bachelor* franchise often exacerbates stereotypes which would 'be a disadvantage for [minorities in] the final outcome of the show'.[9] Further, the first three eliminated contestants on *Big Brother 2020* were the only three non-White contestants on the show. *Sydney Morning Herald* Cultural Editor, Michael Idato notes that issues of diversity often originate in casting before shows even air, suggesting that Allan Liang, an Asian contestant, was villainised and 'disliked... intensely'.[10] This affirms the perspective that 'Australia is about 20 years behind the US in terms of being more open [and] "colour-blind"'.[11] In this context, 'signs' and 'signifiers' are often used in media in order to convey meaning to the audience. These 'signs' and 'signifiers' are often ideologically driven which means that, in critical media theory, representation can clearly be analysed through the use of semiotics.[12] This means that terms such as 'white' and 'Asian' in this context are likely to signify a much greater ideology than simply what is represented on the screen which is often 'difficult to translate'.[13]

This reflects the degree to which these ideologies have been 'socialised' into contemporary Australian media culture. Socialisation can take the form of messages, either through discourse or through media, which convey a certain message, to the point that it becomes ingrained in the cultural fabric of a nation.[14] Often, socialisation is viewed positively as a means of shaping cultural assumptions and norms that build the foundations of societal knowledge and discourse. However, socialisation can have negative consequences as when those foundations are built on hegemonic structures of whiteness, they can prevent awareness and the proposal of solution-oriented outcomes, which in turn, limits epistemological progress. Here, casting a person of minority background as the 'villain' is consistent with a long-standing trope of 'othering' minorities in a media landscape positioned as a space of hegemonic dominance, where the majority has dominant and controlling voice in the public sphere.[15] Consequently, this warrants additional consideration of the factors behind the lack of representation rather than simply the representational issues themselves.

When considering 'othering', negative representation can act as a symbolic marker of the 'deviance' of 'The Other'.[16] 'The Other' is a mediated entity which is constructed to create an 'us vs them' dichotomy between the empowered majority and the marginalised minority.[17] It is necessary to view 'Othering' as a tool by which the media can construct meaning, and not simply reflect social reality.[18] This therefore considers the broader implications, both in terms of acceptance and negative stereotypes, which is important as it avoids superficial analysis and allows for the depth of contextualisation required to meaningfully interrogate complex issues such as race and representation.[19]

The consideration of stereotypes and more meaningful analysis has allowed for more recognition of representational issues in Australia and allowed for more positive representation as a whole. In the television soap *Neighbours*, the Kapoor family was written off in 2011 because of viewer backlash to the inclusion of a diverse family.[20] Lead actor Sachin Joab described this as 'beyond insulting'.[21] However, a clear understanding of stereotypes within a context of 'othering' and structural discrimination is valuable as it encourages a much broader perspective, which may have less regard to the immediate commercial concerns of diverse casting.[22] Thus, this understanding is valuable as it promotes broader comprehension of structural discrimination beyond a superficial level, which is beneficial for future improvements. When considering representation from one perspective, it is also very easy to view representation as a singular, isolated concept.[23] However, combined with regard for the structural and socio-political concerns in Australian society, representation as a concept is no longer distinct from history but rather, is based upon structures of racism which constitute 'new racism' and can result in more subtle discrimination such as micro-aggressions.[24] Negative or insufficient representation of minorities can also be termed a form of 'new racism.' This means that it is distinct from 'old racism' such as segregationist policies but is also impactful.[25]

Contemporary race theorists have stated that racism in Australia today largely encompasses 'new racism' as it is 'marked by subtle and covert forms'.[26] We are better placed to find solutions if we understand the crux of such racism. As media is such a future-driven

industry, past mistakes can occasionally be neglected with such an extreme focus on the present and the future.[27] However, as demonstrated through representation, Australia's nationhood is inextricably linked to structures of whiteness and the lingering impact of the White Australia Policy.[28] Professor Ghassan Hage's term 'White multiculturalism' describes the consequences as a modern phenomenon, saying that multiculturalism in Australia can only be tolerated to the extent that it is palatable to the white gaze (i.e. through limited representation or tokenism).[29] Therefore, in order to combat issues of representation in Australian television, it is necessary to have regard for the serious structural and socio-political issues that underpin Australia's contemporary media culture.

II. The Inadequacy of Legal Frameworks to Combat Representation Discrimination

The consideration of legal perspectives in media representation is currently useful to some degree and has the potential to be incredibly valuable insofar as it provides a differing and concrete framework for epistemological analysis. However, the rigidity and occasionally reductive nature of law can diminish complex issues of representation which must be taken into account for a holistic understanding of lived experience. Law tends to consider issues in terms of strict statutory interpretation and there are often significant gaps between the law and lived experience which must be reconciled or at least, accounted for when dealing with issues of this stature and magnitude.[30]

The problem with a purely legislative approach is that discrimination cannot easily be quantified or categorised, and legislation can be reductive as it fails to encompass the lived experience and holistic circumstances of each individual case. This then has the potential to deny the experiences that cannot be litigated as illegitimate or not discriminatory. Critical race theorist, Professor Gail Mason, and solicitor, Natalie Czapski, address the issues with defining racism and/or discrimination in a statutory context, saying with regard to the *Racial Discrimination Act 1975* (Cth) '…it is unlikely that any legal standard will completely resolve this question which… calls for a combination of legal and non-legal responses'.[31] In identifying this, it is evident that legal discussion around race-based representation must include clear regard for structural and socio-political issues that the law does not directly address.

It is virtually impossible to prove that poor representation is definitively race-based under Australian law.[32] In the first three years that the Federal Court heard discrimination complaints under the *Racial Discrimination Act 1975* (Cth) (hereafter 'RDA'), only three complaints were upheld and they all concerned racial vilification.[33] This is because the complainant has the entire burden of proof (a process that Public Interest Advoacy Centre CEO Jonathon Hunyor describes as 'unnecessarily restrictive') and in cases of race-based representation, the discrimination is almost never explicit or in writing but rather, an implicit directive or convention.[34]

Second, although the *RDA* states that it is unlawful to discriminate on the basis of race, it provides a number of exemptions that television executives could use if discrimination was proven.[35] For example, s 18D of the *RDA* provides an exemption for the 'performance, exhibition or distribution of an artistic work'. It could be very reasonably argued that all forms of television (even news and reality television) constitute an artistic work to some degree and companies would therefore, potentially be able to utilise this exemption.

Third, entertainment is a notoriously hard area to clearly ascertain merit as often tertiary qualifications are less relevant than practical experience or fit for the role. The decision in *Department of Health v Arumugam* (1986)[36] demonstrates that even in fields where merit can be objectively proven, the court is incredibly reluctant to classify it as racial discrimination.[37] In this decision, Fullagar J said, 'The fact that the occurrence of racial discrimination may often be difficult to prove cannot justify 'convicting' on something less than proof'.[38] This demonstrates the difficulty in proving discriminatory representation in a purely legal sense as the law often ignores or does not encompass 'lived experience'. This is important to note as arguably, the law should act as a protective mechanism, which is fundamentally impossible without adequate comprehension of 'lived experience'. Hence, whilst a legal perspective is somewhat useful in issues of representation, it must be qualified with much broader analysis.

III. The Potential Benefits of Commercialising Diversity

To some degree, the commercialisation of diversity should ring alarm bells. After all, the blind commercialisation of 'lived experience' and a form of active discrimination should be treated with the utmost caution. In addition, if the only means of solving representational issues in Australian television is by mere commercialisation, then this paints a very bleak picture of the problem to be resolved. However, although research is somewhat scant in this area at present, there is overwhelming suggestion that diversity of representation on Australian television could commercially benefit Australian television networks.[39] Given the increasing focus on commercialisation and financial gain in television, if the commercial benefits of positive representation are meaningfully considered, long-term strategies promoting diversity are more likely to be realised.

When justifying negative representation, media practitioners often take the narrow-minded view that it would not suit their demographics, and therefore, they cannot generate sufficient advertising revenue.[40] However, commercial perspectives have shown that targeting different demographics is an effective long-term strategy for ensuring continuing commercial viability.[41] For example, Channel 10 has long been a leader in diversity on free-to-air television with shows such as *The Project* and *Masterchef Australia*, featuring comparatively diverse casting.[42] A consequence of this has been that Channel 10 has gained a 'youth-oriented demographic' which has been to their benefit.[43] Commercial analysts suggest that this has increased advertising opportunities and opens up a new market for television, which is of great financial benefit.[44] Therefore, addressing the representational issues on Australian television will positively benefit television networks as well as performers and presenters of diverse backgrounds on Australian television.

Whilst significant strides have been made over the last few decades, Australian television remains largely monolithic and white. This is reflective of the socio-political culture in Australia at present as well as the structural issues in an Australian media culture that is founded on colonial ideas. Comprehension of these issues and active participation in addressing these issues from all members of Australian society and media will go a long way to ensuring that these issues slowly resolve over time. However, even combined with the added commercial benefit of diversity, this will likely be insufficient to effect meaningful change. When issues like this are so deep-rooted in hegemony and Australia's cultural and media heritage, it is almost impossible for these issues to be wholly resolved. To do so would require a complete uprooting of the foundations of

Australian media culture. If successfully mobilised, legal structures do have the power to protect against discrimination and potentially uproot Australian media culture. However, at present, legal reform seems a long way off and anything less than this will likely only result in superficial change.

Games of the World – the Unique Interaction Between Sport and Culture

Ryan Chan

I. Introduction

No matter the rules, format or grounds of play, sport is a universal language. Sport can be a central pillar of cultures, capturing the traditions that are practiced within certain communities. It can invite global celebration and foster relationships between groups, and via its popularity, provide a global platform for advocacy. As protectors of their respective games, sports governing bodies have a responsibility to ensure that their games encapsulate the global community, as opposed to being manipulated for political or commercial reasons.

II. Sport carries cultural significance and persuasion

Japan

Sport has a raw power to encapsulate the identity of communities and is a medium of communicating cultural traditions to later generations. For example, the Japanese national sport of sumo wrestling embodies centuries-old Shinto Buddhist traditions and celebrates a founding pillar of Japanese culture. Indeed, professional sumo wrestlers (*rikishi*) are of high public significance and status, similar to their samurai warrior predecessors. Ceremonial aspects of the sport, such as the *dohyo-iri* (ring entrance ceremony), *mawashi* (wrestler's belt) and salt throwing, remain central to the sport's identity.[1]

Afghanistan

The sport of Buzkashi has a similarly strong cultural significance. Buzkashi is a sport played in Central Asian countries such as Afghanistan, Tajikistan, Kyrgyzstan (where it is known as *kok boru*) and Kazakhstan (*kokpar*). The sport originated as a game in which nomadic tribes would defend the fruits of their hunts by picking up running wolves whilst on horseback.[2] Although rules vary in different geographic regions, the premise is the same: teams of horsemen will attempt to throw a carcass (goat, cattle or sheep) into the opposing team's scoring circle. In Afghanistan, the sport even resurrected despite a prohibition imposed by the Taliban, making clear the significance of sport to cultural identity.[3]

III. Commercialisation – The tokenism of political activism

United States of America

For many, sport is a business. The multimillion dollar contracts, the sponsorship, the exclusive broadcasting rights. As such, league organisers are quick to shut down any behaviour which may dissuade potential consumers or markets. An example is the reaction and response of the National Basketball Association (NBA) when the chairman of one of their teams, the Houston Rockets, tweeted negatively about China-Hong Kong relations.[4] The NBA was quick to distance itself from the comments so as to avoid the commercial backlash of a boycott from its Chinese fanbase and audience.

United Kingdom

On the other hand, the commercialisation of sport has compelled certain clubs and organisations to respond to political events and uphold principles of corporate social responsibility. Whilst this is beneficial in generating initial awareness, such actions can often be ineffective in enacting real change or addressing the issues they set out to face. An example is the response of the English Football Association, which adopted the practice of players and referees symbolically kneeling before games in cognisance of racial inequality, abuse and the Black Lives Matter movement in 2020. Whilst this initially garnered positive reception, by February 2021 prominent Black footballers such as Wilfried Zaha were critical of the gesture, commenting that it was 'degrading' and merely an act designed to 'tick boxes'.[5] Indeed, the initiative has not seemed to prevent a wave of online racial abuse at players on social media, which has continued in 2021, with Bukayo Saka being attacked after missing a penalty at the European Championships.[6] This reveals the failure of sports governance in creating tangible change through their initiatives.

IV. Sportswashing – the use of sport to conceal mistreatment

Sports diplomacy is not a new concept and is a means of soft power used to improve a country's branding on the global stage. An example is the effectiveness of Russian-owned resources company Gazprom in the sponsorship of various sporting teams and organisations to ultimately gain brand familiarity, resulting in them securing a vital gas line in Europe.[8]

Azerbaijan

Azerbaijan has also seen instances of sportswashing significantly improving its public perception. Azerbaijan has been criticised for restricting media freedom,[9] repressing religious organisations, and oppressing political dissidents and activists, such as the wrongful arrest and imprisonment of Ilgar Mammadov, which was condemned by the European Court of Human Rights.[10] Despite this, the country has expanded significantly to develop infrastructure in order to host global sporting events, including the Azerbaijan Grand Prix in 2017. They have also hosted prominently televised football matches, such as the 2019 Europa League Final played between two English football teams and the European Championships in 2021. The international coverage of such significant sporting events in the country generated positive publicity and marketed the country as a tourist destination, overshadowing the oppression of human rights.

Switzerland

Ingrained in sportswashing is corrupt governance, as evidently examined in previous iterations of football's governing body, FIFA. In the early to mid-2010s, Swiss-headquartered FIFA came under heavy criticism, both within its internal ethics committee and externally. In 2012, then-New York Court of Appeals Associate Judge Michael Garcia was commissioned to deliver a report on corruption by bidding nations in the 2010 bidding process for the 2018 and 2022 World Cups, which were granted to Russia and Qatar in 2010, respectively. However, the report never came to fruition, instead being whitewashed in 2014 and its contents, which documented the systemic bribery in place, were not made publicly available until 2018.[11] Following internal investigations, the body dismissed and handed down lifetime bans to President Sepp Blatter, numerous Vice Presidents and holders of power in an attempt to purge corruption. FIFA's 2010 tribulations indicate that whilst sport has an inherent capacity to unite people from different backgrounds, more work is required to ensure that, from a governance standpoint, the integrity of sport is maintained and not perverted for commercial or political incentive.

V. The global body of sport is a platform for advocacy

Qatar

Flowing on from the corruption that marred FIFA's choice of 2018 and 2022 world cup hosts, Qatar has been criticised for its treatment of migrant workers involved in the construction of eight new stadiums for the event. Advocacy organisations such as Amnesty International have documented the exploitation of such workers, including abysmal living conditions, under-payment, confiscation of passports, threats and forced labour. A significant proportion of this maltreatment can be attributed to Qatar's Kafala sponsorship system of management for migrant workers, which grants employers significant power and control over the livelihood of migrants.[12] Widespread global outrage ensued, shedding light onto the deaths of over 6,500 migrant workers in Qatar since construction of the stadiums began.[13] As a result of the global response, Qatar undertook significant labour reform in 2016 by first abolishing the Kafala system, then by removing the requirement of exit visas in 2020. While this indicates how the significance of global sports media coverage can pave the path for advocacy, more is required to ensure that these changes are enforced. For example, Amnesty International uncovered in 2020 that a majority of construction workers for the Al Bayt Stadium had worked for seven months without pay under the new labour system.[14]

Bahrain

The public nature of sport grants an ideal platform for the advocacy – one only need to look to the recent Tokyo 2020 Olympics to find positive and beneficial discourse on mental health, humanitarian asylum and recognising the rights of non-binary individuals.

Hakeem Al-Araibi was a former Bahraini football talent, who fled Bahrain due to the persecution of athletes by authorities during the Arab Spring crackdowns.[15] He eventually settled in Australia as an asylum seeker in 2014 and was granted a permanent protection visa in late 2017. He integrated into his local community in Victoria, continuing his football career at local club Pascoe Vale.

Whilst travelling to Thailand on his honeymoon, Hakeem was arrested by Thai officials on the basis of a wrongful Interpol Red Notice, initially issued by Bahrain and mistakenly affirmed by the Australian government. He was detained by Thai authorities for a total of 77 days.[16]

Key to his liberation were the efforts of the wider sporting community. Beginning with officials within Pascoe Vale, awareness of his plight grew as a result of the efforts of individuals such as celebrated Australian football player Craig Foster, as well as bodies such as Professional Footballers Australia and the World Players Association. The social media campaign #saveHakeem reached over 30 million people worldwide. The efforts of the sporting community generated significant political attention, eventually reaching the soon-to-be crowned King of Thailand.[17]

The story of Hakeem Al-Araibi illustrates the power of sport, as a common ground between all creeds, classes and ethnicity, and as a platform to advocate for human rights.

VI. Shining light – role of NGOs in utilising the wider sports community for advocacy

A benefit of growing commercialisation is the increasing capital of the true guardians of sport – its players. As a result of this newfound capital, non-governmental organisations and charities have emerged, partnering with players to drive real social impact by giving back to their communities. An example is the NGO known as Common Goal, whereby football players and personalities can pledge to donate 1% of their salaries to the organisation.[18] Common Goal has thus far successfully implemented eight collective projects, targeting important social issues such as women's hygiene in India and East Africa, LGBTQ+ community training, as well as directing funds to underfunded community organisations. One of its primary objectives is the Social Enterprise Assist project, which helps Football for Good organisations with effective governance and financial aid.[19] Common Goal is just one of the many NGOs which utilise sport to improve the livelihoods of marginalised communities.[20]

VII. Personal background

I am a male-identifying student of Cantonese descent. In 2001, I migrated to Australia from Hong Kong, where I spoke my first word – 'bor' (in Cantonese, translating to ball). Since then, I have been engaged in various sports, most significantly football, which I have played since the age of six. I am enthused by the community and atmosphere that sport can generate, having had the fortune to experience first-hand the breathtaking crowds in the stands of Liverpool Football Club's Anfield Stadium and the Toronto Raptor's Scotiabank Arena. For me, sport forms the backbone of my identity, as a way of making friends, a point of conversation with overseas family members, and as a release from my studies. At a local level, my football club gave me the opportunity and platform to develop my own identity and share my culture with others. I am happy that I have played with, and against, people of different backgrounds - it has opened up my own world view and enjoyment of sport.

PART FIVE

정
[*jeong*]
Connection

Even within Korean culture, *jeong* evades strict definition, ranging between fate, love, suffering, and servitude. *Jeong*, a symptom of collectivism, may manifest between mother and child at birth, between an individual and their hometown, between a group of people experiencing shared hardship. When our hardships extend beyond cultures and nations, how can we harness our *jeong* to build community out of our atomised, yet collective, suffering?

The Economics of Recognition: Limitations of Diversity Initiatives Inscribed Within Profitability

Sharyn Budiarto

I. Introduction

In answering its titular question 'Why Diversity Matters,' a 2015 article published by McKinsey and Co labels diversity as a 'competitive differentiator that shifts market share,' encouraging the corporate world to embrace inclusivity initiatives through the promise of financial return.[1] For racialised subjects - tho se whose ethnic identity shapes their experience of being 'othered' - the McKinsey article and wider 'business case for diversity' are significant in acknowledging the structural barriers that exist in commercial practice. And yet, without detracting from this significance, there remains an unsettling requirement to frame the importance of racial inclusion within terms of profit maximisation. This emphasis on capital return is not limited to the treatment of racialised labour within corporate firms, but is symptomatic of the wider valuation of racialised subjects within a neo-colonial, capitalist structure.

In this essay, I seek to explore a key intersection between race and capital; namely, the phenomena of progressive inclusion initiatives that adopt a diversity-focused rhetoric, yet articulate the value of racialised subjects in largely economic terms. Drawing on Nancy Leong's framework of 'racial capitalism', which traces the expropriation of non-white identity as a commodity,[2] I explore the ways in which recent diversity initiatives fall victim to devaluing people of colour through their stringent adherence to the packaging of racialised subjects in consumable and profitable forms. In doing so, they fail to truly dismantle oppressive and racist structures, and instead, merely reframe racialised subjects' articulation within it. These initiatives subsequently suffer from a number of limitations, including susceptibility to tokenism, the commodification and loss of identity, and the failure to displace white, oppressive values. Further, the contingency of recognition upon profitability carries grave implications for those who are unable, limited, or unwilling to expropriate racial identity into a tool for capital. Thus, within a capitalist system where valuation and recognition of racialised subjects occurs strictly within the limits of profitability, the foregrounding of voices of colour merely functions as a rearticulation of capitalist values through racial bodies, as opposed to a genuine acceptance and recognition of diverse identity and experiences.

II. The Relationship Between Race and Capital

In her essay 'Racial Capitalism,' Leong traces the process by which capitalist ideology expropriates racial identity into a 'commodity to be pursued, captured, possessed and use[d].'[3] She defines this as 'racial capitalism'; 'the process of deriving social or economic value' from a non-white, racial identity,[4] noting that 'in a society preoccupied with diversity ... [and] founded on capitalism, it is unsurprising that the commodity of non-whiteness is exploited for its market value.'[5] Whilst race has always had a complex relationship with property, traditional power structures have focused on ideas of whiteness as economically beneficial, with Cheryl Harris going so far as to liken it to property by way of rights and entitlements conferred.[6] Certainly, this proved to be the case during American segregation, where in *Plessy v Ferguson*,[7] whiteness was described as a 'most valuable sort of property ... the master-key that unlocks the golden doors of opportunity.'[8] For Iyko Day, whiteness and its accompanying capital ownership governs the historical hierarchy of other racial groups, whose nature of oppression stems from their differing levels of conduciveness to the colonial-capitalist agenda.[9] Day contrasts the various policies of Indigenous elimination, in response to their opposition to colonial land claims, with varied policies of exclusion applied to racialised economic migrants who function

as labour inputs.[10] This broad category of economic migrants includes Blackness, shaped by a history of slavery, and skilled immigrants seeking greater opportunities in a Western-colonial state, whose differing degrees of exclusion correlates to the level of agency required to enhance profitability.[11] In this way, racialised groups' varying levels of socioeconomic standing broadly reflect their historical valuation by the production process.

Whilst such frameworks help to explore the complicated relationship between race and capital, Leong's theory distinguishes itself by accounting for the emergence of a growing social consciousness that ascribes value to diversity and attempts to reject its history of Eurocentricity. In building from these past frameworks, Leong's concept of racial capitalism contends that as a result of the 'legal and social preoccupation with diversity,'[12] positive association and cross-cultural competency functions as an 'investment in social relations with expected returns in the marketplace.'[13] Such returns may be both directly economic, such as greater access to human capital or market share, or social, such as non-racist brand association becoming increasingly important for politically and racially conscious consumers. Examples Leong provides include George Bush's casual reference to 'Black friends' in a speech to the NAACP, and a scandal involving the University of Wisconsin photoshopping a Black athlete onto a brochure.[14] In both cases, Blackness as an image is exploited to indicate friendliness and cross-cultural understanding to the benefit of white subjects wielding power.[15] Whilst these instances show racial capitalism at its most obvious and anti-discrimination at its least substantial, the following discussion will explore the ways in which even altruistic efforts ultimately fail racialised subjects by reinforcing the oppressive standards they attempt to oppose.

III. Shortcomings of Diversity Initiatives

In a shift from its historical position, the cultural marketplace places non-whiteness as a source of value,[16] with its desirability reflected through an increased market for diversity and inclusion services. Within the last two years, the international diversity, inclusion, equity and belonging tech market has seen its value triple from $100 million to $313 million, with the number of vendors increasing by 87%.[17] In its marketing, Diversity and Inclusion firm Symmetra touts that they turn 'diversity into a competitive advantage,'[18] echoing McKinsey's report which uses the same lens of competitivity to label it 'a virtuous cycle of increasing returns.'[19] Whilst such measures have been important in advocating for the implementation of anti-discrimination initiatives to conservative, profit-driven firms, the express framing of the desirability of racialised subjects within the bounds of financial return commodifies and dehumanises diverse identities and experiences. By framing racialised experiences as opportunities to expand and acquire further capital, the altruism of diversity initiatives gives way to its larger and more forceful argument of profitability. Racialised subjects thus become tools for corporations to grow quantifiable value, through increased access to wider pools of labour, skill, and experience, cultural capital, or positive brand imaging.[20] Such is highlighted by McKinsey, who in finding firms with wider ethnic backgrounds performed better financially by about 35% when compared to their national industry medians, advertised the following reasons:

i) Winning the war for talent;
ii) Strengthened consumer orientation;
iii) Increased employee satisfaction;
iv) Improved decision making; and
v) Enhancement of company image.[21]

Further to the dehumanisation of racialised subjects into figures of promised financial return, the business case for diversity is inherently limited as it hinges upon commercial gains, thereby inscribing diversity initiatives within the bounds of profitability. In doing so, commercially focused initiatives may work to preclude the implementation of more substantive and expensive strategies, whose costs may not outstrip the purported benefit, whilst maintaining an image of inclusivity. Thus, racial capitalism detracts from more meaningful anti-discrimination goals by privileging inclusivity at its most cost-efficient, that being at its 'thinnest and most tokenistic.'[22] This issue has been echoed by McKinsey's 2020 iteration of its Diversity Report, which broadened the study to qualitative indicators to attempt to assess anti-discrimination efforts more accurately. In surveying company culture, the report found that there were high levels of negative sentiment towards equality and fairness of opportunity, at about 63%-80% across industries analysed, despite increases in numerical diversity indicators.[23] Leong notes the way in which racial capitalism entrenches diversity initiatives at their most bare through not only prioritising the least costly alternatives, but also by largely shielding companies who engage in unsatisfactory diversity strategies from allegations of racism. By promoting an inclusive image, predominantly white institutions are conceived as being 'non-racist.' As Leong notes, this surface-level 'non-racist' association acts as a proxy for making an independent judgment that substantively assesses a firm's real-life culture and values.[24] In this way, businesses are often discharged from more onerous inclusivity measures through practices of showcasing and racial imaging, which transforms bodies of colour into 'passive emblems' signalling the disinclination to engage in openly discriminatory employment.[25] Thus, diversity initiatives framed through the focus on profitability and cost-efficiency prove self-limiting and can act as barriers to more meaningful diversity efforts.

Similar phenomena can be seen in the fashion industry, where The State of Fashion 2020 joint report by the Business of Fashion and McKinsey found 'Inclusive Culture' as one of the definitive industry trends for the year.[26] The report noted the increase of models of colour on the runway from 17% to 40% from Spring 2015 to Autumn 2019, with 'token nods to diversity … beginning to give way to more meaningful change in the workforce.'[27] A 2021 New York Times survey and report ascribed the shift to the 2020 Black Lives Matter Movement, which extended to brands taking responsibility for lack of opportunities for people of colour, toxic workplace culture, and cultural appropriation.[28] Whilst such efforts are by no means unwelcome, the growth in representation corresponds to a heightened social climate which foregrounds the importance of a non-racist identity in securing and maintaining market share. This suggests companies' use of racial bodies to enhance cross-cultural credibility and align themselves with the dominant values systems of its target consumer base over other altruistic motivations.[29] The McKinsey report itself highlights the same, saying 'this [shift] is motivated by consumers demanding that companies' values reflect their own … [where] almost two-thirds of consumers are self-proclaimed "belief driven buyers" who will choose, switch, avoid or boycott a brand based on its stand on societal issues.'[30]

This profit priority is mirrored in the Times' survey, where brands frequently use commercial diction in their explanations of vague commitments to diversity. In each, equity efforts are qualified by pecuniary consideration, with Italian fashion house Brunello Cucinelli describing the requirement for 'harmony between profit and giving back to the community,' and Tapestry, parent company of Coach and Kate Spade, balancing 'talent, culture, community, and marketplace.[31] For Antoine Gregory, stylist, director, and founder of Black Fashion Fair, the recent proliferation of bodies of colour

within fashion functions as the industry's 'band-aid' to more substantive inclusion. This sentiment is echoed by African-American model T-Agé Anadi who says, 'to be inclusive is not just to have a Black model, but also a makeup artist that doesn't make you look ashy, or a hairstylist that knows how to deal with thick, curly hair, or a photographer that knows what lighting looks good on your skin.'[32] Here, Anadi points to the industry's readiness to capitalise on images of Blackness through using Black models without adequately accommodating to their racially distinct needs. Gregory labels these recent efforts as largely tokenistic and a 'pacifier'[33] which foregrounds the use of marketable images to escape responsibility and prevent a comprehensive dismantling of a fiercely Eurocentric industry.

In addition to issues of tokenism, the fashion industry reflects Leong's critique of racial capitalism as damaging the 'integrity of individual identity' and demanding 'certain types of identity performance' that align with consumer demand.[34] Particularly in an industry based on imaging, racialised subjects are divorced from their rich and varied experiences, and instead are used as symbols of non-conformity, images of the exotic, or as an aesthetic commodification of non-white culture as a particular 'style'.[35] Douglas Holt labels this process as 'coat-tailing on cultural epicentres,'[36] where racialised subjects become aesthetically essentialised into a set of fixed traits, severing their non-white images from the lived experiences which have shaped them.[37] The goal of this, of course, is the transformation of racial identity into a removable, tradable, and exploitable accessory, valued as surface-level indicators of non-whiteness. Rather than acknowledging the complicated process of interpellation as a racialised subject and its continual transformation, racial capitalism ironically simplifies diversity into a homogenous image of 'the other' for easy incorporation into a visual message strategy that appeals to consumer demand. In contrast, Stuart Hall notes that 'far from being eternally fixed in some essentialised form, [cultural identities] are subject to the continuous "play" between history, culture and power,'[38] which often results in one that is complex, contradictory, and formed against a multiplicity of oppressions.[39] Companies thereby exploit racialised subjects as commodities by reaping the benefits of non-white imaging, including protection from alienating an increasingly progressive consumer base, whilst failing to undertake the full cost of employment or represent racialised images beyond the simplified role of signalling non-white value.

IV. Further Implications of the Profit-Model

Despite the capacity for real-world change, insofar as the aforementioned initiatives fail to break from their profit-focus, they remain inherently regressive and fail to fully satisfy the demands of racialised subjects by entrenching the oppressive structures and standards they attempt to challenge. This is because racial capitalism celebrates the achievement of white success through a diverse body, rather than challenging prevailing values which are, as bell hooks notes, 'created and sustained by white supremacist capitalist patriarchy.'[40] In Day's consideration of the heterogeneity of settler-colonial relations, she uses the example of Hawai'i as a 'lesson' in 'formerly exploited migrant population[s] acheiv[ing] structural dominance,' whereby Asian labourers have overcome oppression by white colonisers only to 'reproduce the logics of colonial dispossession' over the Island's Indigenous people.[41] In a similar way, profit motives and the default capitalist system requires people of colour who overcome oppression to bolster the same profit-led, oppressive systems which initially excluded them. This occurs because success is attained not through a genuine valuing of racial identity, but through racial achievement or advancement of white standards or agendas. As Leong writes:

The value assigned to non-whiteness is not analogous to the value assigned to whiteness. Rather, whiteness resides at the top of the racial hierarchy, and the value assigned to non-whiteness is a highly specific and contingent from value that is defined in relation to the higher status of whiteness, ultimately leaving the baseline values of whiteness untouched.[42]

Such is the natural result of the commodification of racial identity, as the marketplace it is consumed in remains 'still largely measured by worth to white people and predominantly white institutions.'[43] Progressive initiatives thereby fail to dismantle colonial systems and remain regressive in that they merely redefine racialised subjects within the same bounds of neo-colonial capitalist valuation. In doing so, it rearticulates its same oppressive values, rather than opposing the system itself to allow for a genuine acceptance of racialised identity and experiences that is not qualified by financial benefit.

In addition to a failure to properly challenge oppressive standards, representation contingent on profitability results in a system that detrimentally excludes those who are either unable or unwilling to expropriate their racial identity as capital. Building on Hannah Arendt's characterisation of stateless people as a class deprived of citizenship and human rights,[44] refugees represent those with the most impeded ability to create value within a capitalist economic structure. Using this lens, their notoriously poor treatment within Australia's domestic policy reflects the limitations of altruism for profit-led diversity. In 2021-2022, Australia's humanitarian intake was capped at a meagre 13,750, conservatively referred to as a 'ceiling not a target,'[45] and a further reduction from the pre-COVID number of 18,762 in 2018-19.[46] In contrast, skilled migrants represent Australia's largest category of immigrants, with 79,600 places allocated in 2021-22 (representing about half the total intake);[47] a figure has been even larger in past years, comprising 69.5% of the migration intake in 2019-20[48] and 69.8% in 2018-2019.[49] Melbourne University professor Roger Wilkins states, 'over the longer run, high-skilled migration intake is much more beneficial for us. Low-skilled migration is not in our long-term economic interest.'[50] This rationale is one that is well-accepted within developed countries, reflecting the exclusion of those who are unable to articulate themselves in terms of capital return. Thus, the profit-centric model in the marketplace for labour is exercised particularly harmfully in relation to migration, challenging the purportedly 'equal value' placed on non-white subjects in today's social climate.

V. Conclusion

For William Sales Jr, 'the present anti-racist stance of the ruling class is motivated not by altruism, but by their own self-interested recognition that racism and discrimination in the labor market is no longer profitable.'[51] Certainly in viewing diversity initiatives, even those that have resulted in benefit for racialised subjects, it becomes clear that in a capitalist society, racialised subjects will always be made to articulate themselves in terms of financial return. Diversity initiatives that necessarily occur through strict adherence to capitalist values cast a dark cloud on their progressive front, not only resulting in such cost-bound, unsatisfactory initiatives, but also additionally damaging individual identity through the separation of experiences from a profitable, racialised image. Further, acquiescence to a system of racial capitalism entrenches oppressive colonialist structures as opposed to displacing them, whilst leaving an ominous fate for those who are unable, or refuse, to commodify themselves. Thus, the present structure of a system which articulates racial worth by way of profitability is sure to fail its subjects, limiting recognition and diversity to ways that uphold neocolonial, capitalist systems of oppression.

A Case of Epistemic Violence: the Australian legal system was designed to fail its Indigenous population

Ameena Barhoum

Preface: I would like to first acknowledge and pay respects to the traditional owners of this land on which we reside, by whom sovereignty was never ceded.

I. Introduction

During a trip up the coast last year with my friends, an ad for scabies medication aired during the movie that was playing. We watched as the cartoon displayed a group of Indigenous people, sitting in a park, barely clothed, scratching themselves. A white male doctor then emerged, handing them scabies medication and the Indigenous people cheered and thanked him.

Once home, I recounted the ad to my Indigenous stepfather, wanting to hear his perspective on such a paternalistic portrayal of Aboriginal communities.

To my great surprise, he laughed. *'What more can you expect from this country? They've been writing our story in whatever way benefits them, right from the very beginning.'*

It was unnerving to see how entrenched and commonplace this racial discrimination had become, especially in my stepfather's own worldview – just another addition in the warped tale of the coloniser.

As a Muslim woman who has continually struggled to consolidate her own cultural roots, the plight of the First Nations peoples remains one close to my heart, a mark on my own complex understanding of what it means to truly be an 'Australian'. I want to clarify that I am not an Indigenous Australian myself, so I cannot speak to the deep loss and intergenerational trauma felt by our First Nations people. Growing up in Australia however, it is impossible to ignore the unspeakable tragedies experienced by our Indigenous population, and I am personally privy to such intergenerational trauma in my own household.

Australian history showcases a ruthless pattern of colonial dominance. After all, the very foundation of this country is built on our Indigenous population being brutally written out of the legal narrative through the unlawful doctrine of *terra nullius*, meaning 'land belonging to no one'. This act of sanctioned, epistemological violence against our First Nations people initiated a pervasive partnership with colonialism that evidently persists today. Our First Nation peoples were not even legally recognised until the relatively recent overturning of terra nullius in *Mabo v Queensland (No 2)* in 1992.[1] Whilst the doctrine has been officially 'overturned', the British common law system still prevails over Indigenous sovereignty, thus codifying the colonial legacy in our legal instruments.[2]

II. What is 'Epistemic Violence'?

The term 'epistemic violence' was introduced into postcolonial academia by Gayatri Chakravorty Spivak, referring to violence inflicted through 'thought, speech, and writing, rather than actual physical harm'.[3] The colonial narrative perpetuated by the Australian legal system is a form of epistemic violence, in which the voices of the Indigenous population are silenced and limited in favour of relying on paternalistic attitudes of 'improving' First Nations communities.

As a third-year student, I cannot count the number of times that I have heard people complain about the 'extra benefits' awarded to Indigenous peoples. Of course, despite this 'reconciliation' rhetoric, conditions for Indigenous peoples have largely not

improved. The Overcoming Indigenous Disadvantage 2020 Report shows regression in nutrition, access to healthcare, overall mental health, drug and substance abuse, child abuse, imprisonment rates, youth detention, with the list continuing.[4] While the results of these 'efforts' are yet to be seen, some find it ludicrous that government money is being used to provide additional support to Indigenous peoples, believing reconciliation has already been achieved in Australian society.

In 2020, I attended the Black Lives Matter protests and had the fortune of hearing several beautiful Indigenous speakers and activists share their stories. I listened to Paul Silva, a proud Dunghutti man, talk about his uncle, David Dungay Jr, who died in police custody in 2015 after being restrained for eating a packet of biscuits in his cell. He died saying that he couldn't breathe, repeating the phrase over 12 times before losing consciousness.[5]

His murder was ruled an accident.[6]

The pain of the Indigenous people is incomprehensible to those outside the community. It has deep roots, tracing all the way to the beginning of this country. However, it has also seen an ongoing resilience in the face of constant violence, an effort of awe-inspiring heroism that words cannot express. While I stood there in tears, Paul Silva shared his story and recounted his family's continued fight to obtain justice, with David Dungay Jr's death still yet to be investigated.

After the protest, I attended a public parliamentary hearing, where a select council was holding an inquest on the 'high level of First Nations Peoples in custody'.[7] Feeling deeply moved by the speakers, I wished to see the law in work, to see the practical changes that could offer some justice to Indigenous families.

Though the purposes of the select council may have been honourable, I sat there for an hour listening to various white men in high-ranked offices deny that any misconduct had occurred. It was an eerie and disturbing contrast between listening to the horrific details of the Aboriginal deaths in custody and watching police officials make blanket denials. Any mention of creating a separate Indigenous investigation body was refused, with a constant insistence that the police could handle it internally.

The justice system's dedication to the colonial narrative is so strong that the death of David Dungay Jr, among others, was not deemed suspicious enough to warrant even an adequate investigation, let alone a trial. In this way, the structure of the legal system protects itself from the conviction of murder. Shielded by technical legality, this modernised paternalism creates a paradox in which contemporary colonisers are not made to face the brutality of their actions.

Since starting this piece in May 2021, six more Indigenous people have died in custody in NSW alone. An Indigenous inquiry still does not exist. The police continue to conduct 'internal investigations' but no one has been held publicly accountable.

The available methods of recovery for Indigenous peoples are hollow. They exist to preserve an ongoing cultural displacement rather than to secure any sort of Indigenous empowerment.

In June this year, David Dungay Jr's family made a complaint to the UN Human Rights Commission to encourage reform through international pressure and to hold the Australian Government responsible for its inaction in the face of human rights abuses.[8] Their aim is for the 339 recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody to finally be implemented, to provide at least some avenues of support for First Nations peoples.[9]

To witness the tragedy of David Dungay Jr is to acknowledge that the legal system is inherently broken, made only to sustain the colonial powers that constructed it. The continuous denial of the traumatic effects of current frameworks adds another layer to the violence endured by the Indigenous peoples, as they must constantly work against popularised narratives to prove their suffering. Epistemic violence therefore flourishes, making it difficult for Indigenous peoples to become vocal in political and legal spaces, let alone to fight for justice and practically realise their goals.

The interests of the colonial elite at the apex of the state will always come first at the cost of countless lives and the continuation of intergenerational trauma for First Nations people. This begs the question: how can Indigenous people possibly seek justice when the colonial system continually prevents them?

III. Paternalistic Benevolence and The Northern Territory Emergency Response

The Northern Territory Emergency Response ('NTER') is the poster child for a recent example of epistemic violence in practice. A radical governmental initiative in 2007, the NTER followed the A*mpe Akelyernemane Meke Mekarle: Little Children are Sacred Report*,[10] which investigated child sexual abuse in the Northern Territory. The report was specifically focused on implementing mechanisms to support the mental and physical wellbeing of Aboriginal children, who were disproportionately represented in instances of violence.

The report consistently emphasised the need for joint Indigenous and governmental effort, advocating for the safety of the children to be prioritised and for First Nations peoples to be consulted in designing appropriate responses.[11] Instead, the Howard Government declared a 'national emergency', using it as a launchpad to rapidly pass a series of paternalistic measures.

Firstly, legislation was passed suspending the *Racial Discrimination Act 1975* (Cth) for affected Indigenous communities, as the NTER was deemed a 'special measure'.[12] This allowed for the introduction of Indigenous specific laws, including purchase limitations on alcohol and pornography. Harsher penalties were exclusively imposed on Indigenous people for breaking these laws. To enforce this, policing in selected Aboriginal communities also increased.[13]

The few existing Indigenous cultural rights were also removed. There was an elimination of customary law and Indigenous cultural practices from bail applications and sentencing in criminal trials. The Community Development Employment Projects scheme, which provided funds to help rural Indigenous communities with employment and skill development, was abolished. The permit system for gaining access to traditional Aboriginal land was removed. Townships legally acquired under the *Native Title Act 1993* (Cth) were seized by the government through the introduction of five-year leases, which gave them unfettered access to Indigenous land. Over sixty-five Aboriginal communities were affected by this, an act that cannot be described as anything less than a colonial conquest.[14]

The day-to-day lifestyle of the Indigenous population was also greatly impacted. The government implemented a 50% control measure over welfare payments from individuals living in certain remote Indigenous communities. Government school attendance was enforced as these family

welfare payments would be suspended if attendance was low, subjecting Aboriginal children to learn in English for the majority of the school day.[15]

These extraordinary measures created communities that were entirely monitored and controlled by forceful interventionist policies, a brutal form of assimilation.

Yet, neither 'child' nor 'children' appeared once in the entire *Northern Territory Emergency Response Act* (Cth).[16]

In their speeches to Parliament, both John Howard and Malcolm Brough, the Minister for Indigenous Affairs at the time, painted this intervention as the only way to protect Indigenous children. The language used was intense and dramatic, with Brough infamously silencing critics by saying that anyone who opposed them was either 'not a parent or doesn't have a soul'.[17] This rhetoric created a false binary that manipulated the public into agreeing with the reforms in record time.

There was little to no consultation with Indigenous elders and leaders during this process. Elder Raymattja Marika-Mununggiritj states there was no discussion or agreement reached with the government, with the NTER policies automatically overriding the governance and law of the traditional Yolgnu peoples.[18] Any attempts to convey the incoming policy changes to the Indigenous peoples was done in English, which was often the third or fourth language for individuals living in these communities.[19] These thinly veiled colonial policies, composed in the violent tongue of the enforcer, were thus enacted.

Although legislation such as the *Racial Discrimination Act 1975* exists specifically to prevent initiatives like this from being implemented, its suspension emphasises how the law privileges a perceived colonial benevolence over the actual needs of the Indigenous population. In the poem 'beneviolence', Gomeroi scholar and poet Allison Whittaker describes how she was struck by the overt paternalism of the NTER:

*"THIS IS **GOOD** FOR YOU!*
*THIS IS FOR **YOUR** GOOD. YOUR OWN GOOD. THIS IS FOR **YOU**."*[20]

As Spivak outlines, colonial forces are 'at their worst when they are most benevolent',[21] for this is precisely when colonial actions become codified, entrenching themselves in history as beneficial and compassionate acts. Consequently, this violence is erased from the popularised narrative.

The power of the law, in many ways, comes with its ability to carry normative messages. An important element of the colonial fantasy is to consolidate paternalistic power around moral discourses, especially during crises. The law does this remarkably well.[22] The ends are portrayed to justify the means and the white saviour concept is immortalised: the government protects the natives from themselves, just as the colonial legend dictates.[23]

Modern colonisers are reluctant to admit that their actions are violent and immoral, justifying them instead with legality, like in the case of the NTER.[24] To admit that this piece of legislation is vicious and discriminatory is to admit that the system that enacted it is as well. This is an admission that damages the very structural foundation on which the settler fantasy is built, yet one that must be made.

IV. Conclusion

The violent silences faced by the Indigenous peoples through the perpetration of the colonial agenda are overwhelming and overt, and continue to be embedded within the legal system. By controlling the narrative, colonialists have presented the notion that their motives are positive, with centuries of Indigenous suffering ignored by countless paternalistic measures.

It is unsettling to be confronted by the complicity of the law in preserving oppression. However, recognising First Nations peoples as both a cultural and sovereign body remains the only way that reconciliation can ever be attainable. The way forward is the same way that has been presented by Indigenous communities since the very beginning: give First Nations peoples autonomy and dismantle the colonial narrative and the structures that maintain it. Admitting to its undeniable malevolence is the first step.
In the words of the Indigenous actor and activist Ernie Dingo, 'Reconciliation is not for Aboriginal people. Reconcile the injustices that your forefathers have done, sit down, think about it, talk about it, get it out of the way and we'll acknowledge your apology and move on. You want to bridge the gap? Try it from our angle.'[25]

Associate Professor Krayem on Cultural Competency in the Law

Conducted and transcribed by Soo Choi and Nishta Gupta

Associate Professor Krayem, would you mind introducing your research areas of focus?

As an academic I have taught Foundations of Law, Family Law, Public Law, Constitutional Law and The Legal Profession. In a research capacity, following my PhD in 2000 in family law, I've focused more broadly on the accommodation of cultural diversity, in particular of Muslim communities, within common law countries including Australia, Canada, and the United States. My recent book *Understanding Shariah Processes; Women's Experiences of Family Disputes* examines the formal and informal experiences of Muslim women through divorce proceedings. More recently I have been researching family violence, attempting to understand the lived experiences of victims and survivors in order to inform how communities respond to these issues. A related project I am also currently working on is understanding the models of service provisions to Muslim women and families affected by family violence.

Given your academic background, what are some ways that you perceive the Australian legal system fails to accommodate the needs of culturally or religiously diverse individuals?

Before we even begin discussing individuals, I think we have to acknowledge that there is a context of avoiding these conversations. People tend to be quite alarmist when cultural or religious accommodation is raised as a topic; I say this as someone who has received death threats, not because of any activism but simply because of my research. This sets the tone for the kind of conversations we can have, and limits opportunities to raise these questions in the first place. Without acknowledging this environment, it is difficult to pinpoint exactly where we might think the legal system falls short.

Specifically in family law, there are many legal aspects that really closely relate to cultural and religious norms and values. In religious communities, you may find that individuals will comply with two sets of customs so they are married according to religious principles but also satisfying Australian law. I use the word 'law' broadly here, as anything that guides the actions of people and how they resolve their disputes. If we have no accommodation and recognition for how people resolve their disputes based on their 'laws', perhaps we are not ensuring that the most vulnerable groups are being protected, or empowered. We are missing opportunities for this dynamic and organic process that could be transformational for both the diverse groups within our society and our unitary legal system.

In your writing you have touched on the key role of the judiciary in mediating the relationship between common law legal systems and diverse groups. Could you elaborate upon the importance of the judiciary in that process, as opposed to other branches of government?

I'd like to make two points – firstly, the executive and legislative arms of the government are heavily influenced by the harsh public debate and discourse on this topic. When Prime Minister Abbott was in office, a public discussion arose regarding Muslim women with face coverings visiting Federal Parliament. Despite this being an entirely hypothetical scenario, a plan was then formulated that Muslim women would be placed in the upstairs gallery, behind glass, effectively segregated from other visitors. The fact that segregation was agreed upon as a solution by leaders of both Houses was appalling, and goes to show how these politicians fall sway to these hyper-sensationalised debates.

In contrast, the judiciary is by and large focused on the specific task at hand and the individuals before them, and so are more immune to this public discourse. However, the judiciary do not act on their own, but are applying common law tradition. In my research alongside my colleague, Associate Professor Salim Farrar, we looked at how judges in common law countries handle cases with Muslim individuals. Of course, the issues varied, but we found that the beauty and strength of the common law is its ability to adapt and respond to the needs of the community in all of its diversity. While this is not without its challenges, it is promising that the common law, by responding to the individual needs of a case, has that accommodation.

The concept of 'cultural competency' has become established in administrative law following Minister for Home Affairs v Omar. *That case not only involved points of cultural diversity, but required the consideration of the applicant's mental health. Is there a need for cultural recognition to also encompass non-cultural and non-religious factors for a more holistic assessment of the facts?*

Absolutely. In an ideal world, we would expect that the law always responds to people in a holistic way, but we know we don't live in that ideal world - aspects of the legal system are applied by generalising and categorising, by putting people in boxes. But I think this discussion does depend on which area of the law we're talking about; I mean, if it's a traffic fine, there's less of a need to consider all of these factors, but if we're talking about returning someone to a country where they may very well be persecuted, there is an obligation on the legal system and those decision-makers to actually have an understanding of that complete person to the extent that is possible and practical. Unfortunately, I think sometimes we fail to recognise that, because efficiency and ignorance play a role. It's really important that we recognise the need for that holistic approach, and after that, then we can talk about what might be the best or most efficient way to achieve that.

There are no affirmative action proposals regarding racial diversity for Australian magistrates and judges at this time. Do you believe that the concepts of cultural recognition or competence are truly effective, even when employed by someone who is not of the relevant background?

Yes, I do think so – for various reasons, we can't cordon off disputes and say that only people from a certain background can deal with certain litigants or accused individuals. Firstly, that's not practical, resource-wise. Secondly, this would require us to make assumptions about people by elevating one aspect of that person's identity, and imposing a huge burden on them to represent all of their cultural or religious group. Even just reflecting on the diversity of the Muslim community, I could not speak on behalf of all Muslims, not all Muslim women, not even on behalf of all Muslim women in Sydney. So, we need to invest in ways in which cultural competency is addressed across the board.

Of course, the other problem is that if the solution is dependent on individuals, it's going to fail with individuals. We would avoid addressing the systemic racism, burdens, challenges, and barriers that do currently exist in our system. So I think we need to not just focus on individuals, and address these challenging barriers in an effective way across the board.

Having said that, can I also say that it is equally important that the judiciary are representative of the community? I'm not necessarily talking about quotas here, but I'm reflecting on the fact that the nature of the legal profession is changing, and I really hope that the judiciary comes to reflect the diversity of the community.

To some extent, judicial systems have attempted to recognise community-specific circumstances. For example, the NSW court system runs the 'Circle Sentencing Program' which aims to consider the circumstances of Aboriginal offenders, and to involve their communities through a restorative justice process. How do you view the importance of community in recognising diverse cultural and religious backgrounds?

Firstly, I want to acknowledge that the experience of the Indigenous community cannot be conflated with the experiences of other multicultural communities within Australia – we are effectively on land that has not been ceded by this community and their experiences cannot be understood by other people in the same way. While the needs of the Indigenous community are not my area of expertise, I respect that these issues need to be recognised and prioritised.

More generally, in regards to cultural diversity, it's important for communities to have a voice, but I can understand how difficult it is to bring that within the legal system. In researching cases where Muslim litigants experienced legal issues with religious aspects, I found that experts would be introduced to provide evidence in trials and, it was very hit and miss. Firstly, determining who is an expert in this space is really quite fraught. Secondly, the danger is that this then shapes the decision-makers' views of certain cultural or religious practices, which can set a precedent for future cases. So, it's easy for us to say there should be this recognition, or accommodation, or understanding, but in the court-room, it's difficult to know how to introduce that.

I think a lot rests in the need to respect the autonomy and interpretations of the parties. Many people say it's hard to recognise or accommodate cultural norms or values because they are so diverse, and have multiple interpretations. While that's difficult, it's not impossible – what do we do in law except sort through different interpretations? It's what we teach you at law school and it's what the judiciary is trained to do. So, I think we have to allow the parties to introduce their own understandings and interpretations. We have to accept that judges may make mistakes, but I think there needs to be a balance – we would take away so much autonomy from individuals and their experiences by having an overriding authority that lays down a single interpretation.

Do you think some of those difficulties come down to the form of some systems of law? In some communities there are non-written legal systems that differ from the Australian common law legal system – does that affect how these interpretations are accepted in the court-room?

Yes, undoubtedly, and I think that's a very good point. We are limited in the ways that we think about what we can accommodate and introduce. When people come from legal systems that are based on traditions or means that differ from what we have learned and studied in the common law context, it does pose challenges. What is really interesting, of

course, is that the common law exists in really diverse parts of the world. In our research we focused on the UK, Canada, and US because of their similarities to Australia, but we could have looked at Singapore, India, or Malaysia. The common law has a history of interacting with what one could deem a 'foreign legal system', so it's not like we'd be reinventing the wheel. There is established precedent within those contexts where these systems have sat side by side.

What are steps that you believe can be taken beyond the judiciary to recognise the backgrounds of participants in the legal system?

I think we should actually return to where we started our conversation – I think the issue is not so much about how the judiciary can recognise this diversity at an individual case level. What I have observed in my research is that the judiciary has the capacity to be influenced by an acceptance of the need for greater cultural and religious understanding. While that all heads us in the right direction, you can't escape that this issue sits within the broader framework I mentioned earlier – if we, as a society, are not celebrating diversity, are not appreciating its contribution to society, then this discussion we are having today will fall on deaf ears.

The judiciary alone cannot deal with this issue, and until we have leadership who will step through the sensationalised discourse on these topics, we can never truly address these problems. It takes the other arms of government to be on board, to be prepared to recognise how diversity enriches our society in all aspects, rather than as something to be feared. This is the starting point, and without it, we are never going to be able to make meaningful strides towards how to get greater representation, greater diversity, better ways of understanding culture – which is happening in fantastic ways across the board.

Politicians use labels all the time – how many times have you heard people talk about the success of Australia as a multicultural nation? It is, it really is – I don't mean to be facetious with that – but we also need to have honest discussions about our reluctance to want to talk about cultural or religious accommodation. Maybe this is the thing I'd end on: I'd love to see a society where we have courageous and brave leadership that allows us to have these discussions in an honest way.

A Fair Welcome

Angela Xu

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Seyfo: The Wound that Never Healed

Nora Takriti

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Hip-Hop: The Soundtrack of Black Empowerment - A Lyrical Analysis of 'Blood on the Leaves'

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Structural and socio-political boundaries to racial diversity and equitable representation in Australian television

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The Economics of Recognition: Limitations of Diversity Initiatives Inscribed Within Profitability

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A Case of Epistemic Violence: the Australian legal system was designed to fail its Indigenous population

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