

University of New South Wales Law Research Series

**SPEAKING NOTES: LAUNCH OF THE
FOUNDATIONS OF THE COMMON LAW
LIBRARY (1215-1914), IALS, UNIVERSITY OF
LONDON, 3 OCTOBER 2018**

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Speaking Notes: Launch of the Foundations of the Common Law Library (1215-1914), IALS, University of London, 3 October 2018

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These notes are the basis of our presentation and demonstration of the Prototype of the Foundations of the Common Law Library (1215-1914) <<http://www.commonlii.org/int/special/foundations/>> when it was opened for free access at an event at the Institute of Advanced Legal Studies (IALS), University of London, 3 October 2018.

Contents

The long history of the common law.....	2
Linking the past and the present.....	3
The common law world.....	3
What LIIs can offer for researching common law comparative history.....	4
Australasian Colonial Legal History Library.....	4
Foundations of the Common Law project: Grant and collaborations.....	5
The Foundations project prototype.....	5
The Library interface.....	5
Imprisonment for debt – an illustrative search of the Library.....	6
Examples of new databases added to CommonLII.....	7
Requirements for full development of the Foundations Library.....	7
The Common Law as World Heritage.....	9
References and acknowledgments.....	10

Tonight we will open for free access a project which is located on the Commonwealth Legal Information Institute (CommonLII). It is appropriate to do so here, because the Institute of Advanced Legal Studies has been the ‘London base’ of CommonLII, since AustLII launched CommonLII at the Commonwealth Law Conference in 2005. IALS is now one of our key partners in the digitisation of content for the ‘Foundations of the Common Law’ project. It is also appropriate because IALS provides host facilities for BAILII, which is the most central ‘partner LII’ of the many legal information institutes across the common law world that are collaborating with us on this project. We are not legal historians. We are lawyers, and technologists, guided by a project team of leading legal historians. So please be tolerant of our comments on legal history.

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The long history of the common law

It is now more than 800 years since the Magna Carta of 1215, soon after which English law started to document its history, including in the case law collections that form what we now call the *English Reports*. In some ex-colonies of the British Empire, the common law has been **part** of their legal history for over 200 years, and its local history is usually relatively well-documented.

This project is founded on the premise that the courts (and other legal institutions) of common law jurisdictions were more interdependent than is commonly thought. There were two main elements of this interdependence.

First is the theory of common law reception, that each colony accepted the bulk of English common law and statute law either on the date of settlement or when reception legislation was passed, subject to its local suitability. The traditional view is that there was a gradual divergence from the English parent, but deference lingered on. Modern legal historians who have studied reception of law in practice have often found that this official story of deference to the English parent was not entirely accurate. Colonies sometimes influenced one another, assisted by the mobility of British imperial officials.

Second is of course the doctrine of precedent and the unusual role of cases in the common law. The traditional view stressed the binding authority of the common law received in each colony, and the hierarchical supremacy of the Privy Council (the vertical effect of precedent). This was supplemented by the persuasive authority of decisions of superior courts in other parts of the common law world (a horizontal effect), but this played a distinctly inferior role.

On either traditional or modern views there was a high degree of **interdependence** of legal developments across the common law world, particularly during colonial periods, but also after independence. These inter-relationships are still relevant in today's law.

Modern legal historians research many aspects of this inter-dependence, such as:

1. Is the 'UK reception plus gradual divergence' model sound?
2. How did horizontal influences between colonies occur?
3. How did legal variation (innovation) spread?
4. Did colonial variations return to influence the UK?
5. What is the longevity of case law influences?

Other historians ask different types of comparative law questions, such as how did the legal position of slavery differ across colonies?

There is a strongly growing body of work in legal history which seeks to move beyond a single jurisdiction (or direct comparisons) to trace the ways laws moved around the Empire (particularly the 'settler' colonies), drawing on studies in the networks of influence across the Empire, comparative legal histories and cross-jurisdictional transplants of legal institutions and practices. Scholars have begun tracing the influence of less formal connections between people and ideas on case law and legislation.


The project we are launching this evening will provide research infrastructure to allow these important questions to be explored by researchers on a much larger scale. Such research relies heavily on the availability of materials from multiple jurisdictions in order to show how the law moved, took root in new circumstances and adapted. The comparative materials

needed for such research include case law, statutes, gazettes, scholarship, citation data and more.





Linking the past and the present

It is clearly essential to the idea of the common law that the past is never really past, because modern cases in all common law countries continue to cite and apply decisions in past cases, going back as far as the Magna Carta. The past is just waiting to be re-discovered and cited.

Although the Foundations project is based on creating new pre-1915 databases, in fact making these links between present and past more visible than before, and doing so across the whole common law world, is one of its major aims. This can be illustrated with *Heydon's Case* [1584] EngR 9, the origins of the 'mischief rule' in statutory interpretation. The LawCite <<http://www.austlii.edu.au/lawcite/>> citation record for the case starts as follows:

Heydon's Case  **182** 
 [1584] EngR 9; (1584) 3 Co Rep 7; 76 ELR 637; 76 ER 637
 King's Bench
 United Kingdom

Cases Referring to this Case

Case Name	Citation(s)	Court	Jurisdiction	Date †	Full Text	
Old Mutual Plc, Re	[2018] EWHC 873 (Ch)	High Court of England and Wales	United Kingdom - England and Wales	20 Apr 2018	BAILII	
Newman v Commissioner of Police, NSW Police Force	[2018] NSWCATAD 17	New South Wales Civil and Administrative Tribunal - Administrative and Equal Opportunity Division	Australia - New South Wales	22 Jan 2018	AustLI	
Ainley	[2017] VSC 790	Supreme Court of Victoria	Australia - Victoria	21 Dec 2017	AustLI	
FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd	[2017] QSC 322	Supreme Court of Queensland	Australia - Queensland	20 Dec 2017	AustLI	

This 1584 case has been cited in both the UK and Australia in 2018 – and in 180 earlier cases known to LawCite. The rest of the citation record for *Heydon's Case*¹ shows that it was first cited in 1675, and has since then been cited by courts in every Australian and UK jurisdiction, in Canada, the Cook Islands, Fiji, Hong Kong, India (many jurisdictions), New Zealand, the Eastern Caribbean Supreme Court, Nigeria, PNG, the Republic of Ireland, Samoa, Singapore, South Africa, Sri Lanka, Tonga, Trinidad and Tobago, Vanuatu and the USA. Over 20 law journal articles refer to the case, and three law reform reports.

The common law world

The scope of the common law world, more than 60 jurisdictions, is best seen from the table of contents of CommonLII.

¹ Go to LawCite <<http://www.austlii.edu.au/lawcite/>> and search for 'Heydon' in the 'Parties' field. Select 'Heydon's Case' from the result list.

Commonwealth Countries			
Antigua & Barbuda	Australia	The Bahamas	Bangladesh
Barbados	Belize	Botswana	Brunei
Cameroon	Canada	Cyprus	Dominica
Fiji Islands	The Gambia	Ghana	Grenada
Guyana	India	Jamaica	Kenya
Kiribati	Lesotho	Malawi	Malaysia
Maldives	Malta	Mauritius	Mozambique
Namibia	Nauru	New Zealand	Nigeria
Pakistan	Papua New Guinea	Rwanda	Samoa
Seychelles	Sierra Leone	Singapore	Solomon Islands
South Africa	Sri Lanka	St Kitts & Nevis	St Lucia
St Vincent & Grenadines	Swaziland	Tanzania	Tonga
Trinidad & Tobago	Tuvalu	Uganda	United Kingdom
Vanuatu	Zambia		

External Territories & Dependencies:			
Bermuda	Cook Islands	Montserrat	Niue
Norfolk Island	Pitcairn Islands	Tokelau	Other External Territories & Dependencies...

Common Law Jurisdictions			
Hong Kong	Ireland	Myanmar	Other Common Law Jurisdictions...

Common law jurisdictions are found in all continents, with even a small representation in Latin America. In that sense, there is a 'global common law'.

What LIIs can offer for researching common law comparative history

There are numerous high quality resources available online for aspects of common law history, ranging from commercial providers (for example, Gale's *The Making of Modern Law*), to non-profit but not free access providers (for example, the *LLMC Digital* consortium of law libraries), to specialist free access providers (for example, *Proceedings of the Old Bailey, 1674-1913*). However, (i) none are common-law wide; (ii) few provide individually searchable historical cases/statutes; and (iii) few link historical sources and current citations.

Legal Information Institutes (LIIs) are capable of overcoming all three of these limitations, are based on free access, and could provide collaboration and sustainability. Their potential combined strengths are the basis of this project.

Australasian Colonial Legal History Library

AustLII's first attempt at an alternative approach to legal history research infrastructure started in 2011, with the development of the *Australasian Colonial Legal History Library (1788-1900)* <<http://www8.austlii.edu.au/au/special/colonialhistory/>>. This Library now provides near-comprehensive coverage of the main sources of law of the seven Australasian colonies (including New Zealand) to 1900. It includes 55 databases, containing 345,000 searchable items (20,000 cases; 14,000 Acts; 300,000 Gazettes; and 1,000 other items, mainly scholarship), all located on AustLII or NZLII. The project was funded primarily by grants from the Australian Research Council (ARC).

The inclusion of 26 New Zealand databases provided an early example of LII cooperation in a project such as this, in that they have been built jointly by NZLII and AustLII, funded by the ARC grant to AustLII. They are located on NZLII, but also accessible via AustLII (for the Australasian Library) and via CommonLII (for the Foundations Library).

This was a successful experiment, in many respects. First, the comprehensiveness of the result, involving digitising almost every annual Act and reported case in Australasia, 1788-1900, showed that significant historical Libraries were demonstrably 'do-able' by LIIs. Second, the Library is of high use, with 2.3M page accesses in its first year of operation (2015), including over 180,000 accesses to cases. Third, there was a high level of support

from legal historians and Universities with AUD\$400,000 being contributed to the Stage 2 grant application from fifteen Universities, and an equal number of eminent legal historians being Chief Investigators on the project. Finally, the relevance of the Library's content to current law is shown by high levels of citation of pre-1900 cases in recent case law. The existence of the Library may not be a cause of these citations occurring, but it nevertheless creates greater accessibility of those 19th century cases that continue to be cited.

Foundations of the Common Law project: Grant and collaborations

The success of the Australasian Library was a stimulus to the development of a historical Library for the whole common law world. In 2017 eleven Australian universities applied successfully to obtain an Australian Research Council infrastructure (LIEF) grant for 2018-19 with an AUD\$1,100,000 budget. Fifteen Chief Investigators, legal historians and technologists, guide the project <<http://classic.austlii.edu.au/austlii/research/2018/lief/>>. AustLII is responsible for implementation.

Thirteen free access common law LIIs (legal information institutes) have agreed to collaborate to provide access to their content, via CommonLII, for the Library: **AustLII** (Australia); **BAILII** (all UK jurisdictions and territories, and Ireland); **CanLII** (Canada); **CyLaw** (Cyprus); **NZLII** (New Zealand); **PacLII** (Pacific Island jurisdictions and PNG); **LII of India** (India); **HKLII** (Hong Kong); **SamLII** (Samoa); **Jersey Law** (Jersey); **SAFLII** (southern and eastern Africa); **IALS Digital**; and **CommonLII** (for jurisdictions not otherwise covered).



The Foundations project prototype

We describe the version of the Library opened for access tonight as a prototype, because work on digitization of new content specifically for the Library only commenced in August 2018 (due to delayed availability of ARC funding). Most of the collaborating LIIs have until now focused on recent legislation and case-law, and not historical materials. However, inspection of the content of these LIIs showed that there are already many databases containing valuable pre-1915 content on most of them, sufficient to provide a valuable resource for historical research when aggregated. With the addition of a handful of new databases developed for the project through cooperation between AustLII and IALS Digital, these combined existing and new content have become the Prototype of the Foundations Library.

As of 3 October 2018, the Prototype Library includes 100 databases containing over 500,000 searchable items, from 1220-1914. There are 179,000 cases; 24,000 legislation items; 300,000 gazettes; and 3,000 other items, primarily legal scholarship but also some treaties. There is substantial content from 32 pre-1915 jurisdictions. The largest databases are multi-jurisdictional common-law-wide databases (*English Reports*; *Privy Council*; *Colonial and Consular Courts*).

The Library interface

The default option of the Library is to search all databases. Options are also provided to search only cases, legislation, or scholarship.



Foundations of the Common Law Library (1215-1914) [Prototype]

You are here: [CommonLII](#) >> [Resources](#) >> Foundations of the Common Law Library (1215-1914)

On this page: [About this Library](#) | [Databases](#) | [Catalog & Websearch](#) | [Acknowledgements](#)

[\[Search Help\]](#)
[\[Advanced Search\]](#)

Search: Databases
 Catalog & Websearch
 Law on Google
 [\[LawCite\]](#)

Last updated: 3 October 2018

A selection of the databases in the Library is shown below. Databases planned for inclusion in the first tranche of development are marked 'being sourced', with no links, to indicate the intention to start with at least some databases from each region of the common law world.

Asia, East and South-East

Hong Kong

- [Historical Laws of Hong Kong 1890-](#) (HKLII)

Straits Settlements (now Singapore and Malaysia)

- [Kyshe's Reports \(Straits Settlements\) 1885-1890](#) (CommonLII)

Asia, South

Burma

- [The Burma Code 1839-1951](#) (AsianLII)
- [Myanmar Laws 1872-](#) (AsianLII)
- [All India Reporter - Lower Burma 1907-](#) (AsianLII)
- [All India Reporter - Upper Burma 1913-](#) (AsianLII)

India

- [The Indian Code \(Annual Acts\) 1836-](#) (AsianLII)
- [All India Reporter - Oudh 1907-](#) (AsianLII)
- [All India Reporter - Calcutta 1869-](#) (AsianLII)
- [All India Reporter - Madras 1900-](#) (AsianLII)
- [All India Reporter - Nagpur 1910-](#) (AsianLII)
- [All India Reporter - Allahabad 1910-](#) (AsianLII)

Pakistan

- [All India Reporter - Sind 1913-](#) (AsianLII)

Sri Lanka

- [Balasingham Reports 1884-1906](#) (CommonLII)
- [Supreme Court of Ceylon - Appeal Reports 1858-1859](#) (CommonLII)

- [New Zealand Jurist Reports 1859-1879](#) (NZLII)
- [Fenton's Important Judgments \(New Zealand\) 1866-1878](#) (NZLII)
- [Macassey's Reports \(New Zealand\) 1859-1872](#) (NZLII)
- [Ollivier, Bell, & Fitzgerald's Reports \(New Zealand\) 1878-1880](#) (NZLII)
- [New Zealand Magistrates' Court Reports 1898-](#) (NZLII)
- [New Zealand Native Appellate Court 1894-](#) (NZLII)
- [New Zealand Native Land Court 1869-](#) (NZLII)

Caribbean

Bahamas

- Bahamas Law Reports 1900-1906 (Being sourced)

Barbados

- [Barbados Law Reports 1694-1903](#) (CommonLII)

British Guiana

- Law Reports of British Guiana (New Series) 1890- (Being sourced)
- Law Reports of British Guiana (Old Series) 1855-1858 (Being sourced)

Jamaica

- Supreme Court of Jamaica 1774- (Being processed)

Trinidad and Tobago

- [Supreme Court of Trinidad and Tobago Reports 1893-1910](#) (CommonLII)

Windward Islands

- [Windward Islands Court of Appeal 1866-1904](#) (CommonLII)

Imprisonment for debt – an illustrative search of the Library

A frequent occurrence in 19th century colonial laws was imprisonment for debt. A comparative search across all common law jurisdictions is as follows:

(debt or debtor) near (prison or imprisonment)

This search gives 3,801 results (more than double the 1,557 results found in the Australasian Library). Items found include all content types: cases (reported & 'recovered'), Acts, gazettes and scholarship. Different aspects of the results can be displayed using display options other than the default 'By Relevance' option:

CommonLII Databases - Documents found: 3801 for ((debt or debtor) /-50,50/ (prison or imprisonment))

By Citation Frequency	By Database	By Date	By Relevance	By Title
Collapse Multi-sections	Show All Sections	Earliest First Latest First		

- ◆ **'By date'** – The 'Earliest First' displays results starting with cases from 1220, of which twenty date prior to 1600. The 14th case listed, *The Case of Sutton's Hospital* [1572] EngR 401, was most recently cited in 2018 ([\[2018\] EWCA Civ 2026](#)).
- ◆ **'By Database'** – This display shows that search results come from 55 databases in 20 jurisdictions, allowing each jurisdiction to be considered separately if desired.
- ◆ **'By Citation Frequency'** – This display ranks the results by their frequency of citations in other cases, law reform reports and scholarship (articles, books etc). The most frequently cited case, *Scott & Anor v Scott* [1913] UKHL 2 has 665 citations known, from 28 jurisdictions, 13 of which were in 2018. The five most recent citations were from Victoria, South Africa, New Zealand, Victoria again, and England and Wales. The second most frequently cited case, *Savile vers Roberts* (1792) EngR 2096 has 49 citations, from 10 countries, up to December 2016.

Examples of new databases added to CommonLII

Some examples of databases which have been digitised expressly for this project include:

- ◆ [Colonial and Consular Courts 1555-](#) – This database contains 1370 'recovered cases' extracted by Kercher and Bullock from newspapers, consular records and other sources in 80 jurisdictions, many of which were not common law countries but were jurisdictions where British consulates (or the like) were entitled to adjudicate disputes concerning British subjects, often applying a mix of common law and local law.
- ◆ [Common Law Scholarship](#) – This database has been commenced with Plucknett's [Concise History of the Common Law](#) (1956), searchable by chapter.
- ◆ From the Straits Settlements (Singapore & Malaysia), [Kyshe's Reports 1885-1890](#) are among the earliest available case law.
- ◆ There are over 5,000 pre-1915 Indian cases from the *All India Reports*, including databases from [Allahabad](#), [Calcutta](#), Oudh, Madas and Nagpur, as well as [The Indian Code \(Annual Acts\) 1836-](#).
- ◆ Other case law databases from South Asia include those from Sind (Pakistan), Ceylon (Sri Lanka), and Burma (Myanmar), plus [The Burma Code 1839-](#).
- ◆ Small databases of Caribbean cases include the [Barbados Reports 1694-1903](#) ; [Trinidad and Tobago SC 1893-1910](#) ; and [Windward Islands CA 1866-1904](#).

Requirements for full development of the Foundations Library

This Prototype is to be developed fully over the next two years. Five elements are essential for successful completion.

1. LII cooperation

The Library depends on LII cooperation more than any other factor. Collaborating LIIs allow searching of pre-1915 data held on their LII from the Library's interface on CommonLII, and on the inclusion in LawCite of citation data extracted from their content. Where it is possible for them to do so, digitisation of 'new' pre-1915 content by these LIIs is essential to expansion

of content. AustLII will cooperate with these LII partners, where feasible, on their digitisation of content only available locally, and will also assist LII partners to provide access to databases digitised by AustLII, relevant to them, via their own services.

2. Data acquisition

Locating paper copies of pre-1915 content from across the common law world to digitise is often very difficult, particularly from Australia where the 'tyranny of distance' is one of the main problems historical researchers need to overcome. Potential copyright issues are low when the original publications are more than a century old, although care is sometimes needed with 'published edition' copyrights.

A variety of strategies make the problem of sourcing data manageable. Cooperation with IALS is a major asset, due to its very large international library. Other academic libraries also often assist with sourcing print copies, as has already occurred in Australia, New Zealand, Singapore, Hong Kong, and Malta. Other libraries will be contacted in due course. Some scanned volumes of cases or legislation are also available via the Internet Archive, under licences allowing re-use. 'Swaps' of digitized data with non-LII publishers may also become possible.

3. Funding

Current Australian ARC LIEF funding for the Foundations Library is AUD\$1.1M for 2018-19. This will build the first stage of the Library, and (if successful) further ARC funding applications may be possible in future years. AustLII is likely to obtain smaller grants for specific historical digitisation projects from Australian and international sources, as has already occurred with data from Burma and India, and that content then also becomes part of the Library. We encourage other LIIs to apply for funding historical digitisation projects. AustLII will collaborate where requested on joint funding applications, some of which are already under development.

The digitization of historical materials is a 'one off' task, unlike the continuing maintenance and updating required of current case law or legislation databases. Once built, such databases only require that the infrastructure that provides access to them is maintained. AustLII Foundation Ltd provides AustLII's core technical infrastructure and maintenance, and this indirectly provides for the continued availability of CommonLII and the Foundations Library.

4. Comprehensive digitisation procedures and facilities

Digitisation for the Foundations Library differs from many historical scanning projects, but is common to the approach generally adopted by LIIs. It involves the following steps:

1. Whole paper volumes (cases, legislation, journals) are **scanned**, and **images** (facsimiles) obtained.
2. The image volumes are then processed by optical character recognition (**OCR'd**) to create searchable 'shadow' **text**.
3. Both the image volumes and text volumes are **split** into individual cases, Acts, articles etc.
4. The **metadata** for each searchable item (case, Act etc) is extracted from the texts, so as to create titles for search result and citator entry.
5. **Databases** of the separate text and image items are then constructed and made searchable, thus enabling searching of individual cases, Acts etc.
6. LawCite's software then **data mines** each text item for citations, and the LawCite software aggregates **parallel citations**, and then creates **citation tables** of cases, Acts, articles etc.
7. These parallel citations are **inserted** into the texts which cite those cases, with **links** to the cited cases.

To achieve these results, sophisticated digitisation equipment is needed. AustLII's infrastructure supports three types of digitisation, which are in order of preference:

- (i) *Destructive digitization* – A guillotine removes the spines of volumes of law reports, legislation etc. The resulting loose pages are fed through a 300ppm duplex scanner. The scanned images are then processed by steps (2)-(6) above. Such destructive processes require libraries or other sources to donate 'sacrifices' to the good of public access. This is not always possible, so a non-destructive approach must be taken to borrowed texts.
- (ii) *Non-destructive digitization* – Where necessary for rare copies of texts, or texts otherwise not available for destructive digitization, a Treventus Scan Robot is used for non-destructive digitization. This achieves a very high quality scan rate of over 1000 pages/hour, which is very satisfactory but much slower than destructive digitisation. The equipment is much more expensive than normal scanners, at over AUD\$100,000.
- (iii) *Microform digitization* – If paper copies of sources are unavailable, microform copies may sometimes be available. AustLII's equipment semi-automates the scanning of all types of microforms (film, fiche etc). This is the 'last resort' method of digitization, because the quality of the resulting scans is rarely as good a quality as from paper.

The digitisation equipment available to the Foundations project, primarily acquired through previous infrastructure grants, therefore allows a comprehensive approach to digitisation.

5. Digitisation priorities/strategy

What should be the priorities for digitisation of pre-1915 content across the common law world, given that it is not possible to digitize everything relevant? We concluded that we should take these seven factors into account (not necessarily in this order of priority):

- 1 Priorities of funding sources, Investigators and partner LIIs;
- 2 Opportunity: Availability of paper texts for digitisation (preferably destructive);
- 3 Scope: Some coverage of all common law regions/countries is required;
- 4 Decisions of the highest courts;
- 5 Decisions of the most cited courts;
- 6 The earliest reported decisions in each jurisdiction;
- 7 Decisions which are the most difficult to find.

In the current table of contents for the Library, the databases listed as 'being sourced' reflect factors 3, 6 and 2: the earliest case law from a representative selection of jurisdictions across the common law world, when texts are available to us. The more general implication of these factors is that progress in development of the Library will not be linear, but will rather be incremental and multi-fronted. In addition, what data becomes available from collaborating LIIs will be at least as important as any digitisation priority of AustLII.

The Common Law as World Heritage

The Common Law is part of humanity's intangible cultural heritage. Its history spans at least 800 years, and as a joint international enterprise it has included jurisprudential contributions from many countries for well over 200 years. Globally, it is one major pillar of the rule of law and human rights, with many of its oppressive colonial aspects diminishing over time and continuing to diminish.

The common law is a possible nominee for UNESCO's classification and support as [Intangible Cultural Heritage of Humanity](#). Its nomination would probably best be framed as a 'cultural practice' involving transmission of special knowledge and skills. Multiple countries can nominate a practice to UNESCO for inclusion.

Providing free online access to common law history gives strong support for such a classification because it makes the common law accessible to all of humanity in a way that the commercial provision of such information does not. Free access Legal Information Institutes should therefore have a leading role to play in the advocacy of UNESCO classification of the common law as world heritage. Individual LIIs, and the Free Access to Law Movement (FALM) could become NGOs accredited under the article 91 of the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*. They have experience in safeguarding this cultural practice, through providing free access to its materials. LIIs are acting as 'custodians' of the common law.

When we have completed this stage of the Foundations of the Common Law Library in 2020, it will be a good opportunity to assess what more needs to be done before working for the nomination of the common law as part of the intangible cultural heritage of mankind.

References and acknowledgments

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