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Upholding the rule of law

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CLA President with Chief Justice of Rwanda

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The Commonwealth Lawyers' Association exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.
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[Cover photo: R. Santhanakrishnan, President of the CLA, with Sam Rugege, Chief Justice of Rwanda]

Message from the President

The Opening of the Legal Year in London at the beginning of the October 2017 was an opportunity to meet Bar Leaders from across various Commonwealth jurisdictions. The formal discussions and informal interactions centred around issues concerning the legal fraternity, including the topics like gender, appointment of judges, independence of the judiciary etc.

Meeting the President of Pan African Lawyers Union and the representatives of the Law Society of England and Wales during the event led to my visit to Commonwealth jurisdictions in East Africa later in October and subsequently in November.

I had fruitful interactions with the Presidents of the Law Societies in Kenya and Uganda, as also the President of the Rwanda Bar Association and the CEO of the Tanganyika Law Society. The rule of law is an issue of concern in these jurisdictions, inasmuch as the verdict of the Supreme Court of Kenya in regard to election to the post of President of the country faced rough weather from the executive wing of the State. Earlier the CLA had issued a statement expressing its concern since such acts affects the independence of the Judiciary. I met the Chief Justice of Kenya during my visit and expressed our support while reiterating the contents of our statement.

At a Nairobi hospital, the President of the Law Society of Tanzania, Tinda Lissu (who is also a Member of Parliament), was recovering from bullet injuries he received during an attack on him when he reached home from Parliament one day. Along with the President of the Law Society of Kenya, I met Mr Lissu at the hospital and expressed our anguish about the incident. Later on I spoke to the Press condemning such an act and about the squeezing of the democratic space in Tanzania.

I visited Entebbe, Uganda, in middle of November to attend the Annual Conference of the East Africa Law Society. "Future Proofing of the Legal Profession in East Africa" was the theme of the three-day conference. An interesting feature of the conference was to see young lawyers, women lawyers and lawyers representing law firms from across East Africa who were meeting separately to discuss issues affecting them, under the umbrella of EALS. This conference was another opportunity for a good interaction with the legal fraternity from across the jurisdictions of East Africa.

During the last week of November I attended the 20th Annual Conference of the Rwanda Bar Association. Inaugurating the conference, the Law Minister of Rwanda traced the history of the Bar, post the 1994 genocide. The Bar Leaders of yesteryears were felicitated for their contribution in shaping the profession.

There was formal acknowledgement of my presence as President of the CLA at the beginning of both these conferences.

What came out at the meeting with the Chief Justice of Rwanda was an action-oriented programme that had been put in place for a campaign against corruption and an expression of happiness about the support for this from the Bar.

Lawyers in all the four jurisdictions of East Africa are active not only in relation to the affairs of the legal profession and independence of the judiciary, but they are also no less concerned with issues of rule of law. What I also got to see was the proactive participation of a number of women lawyers. I found lawyers espousing the regional aspirations of East Africa. They also wanted the political class to play a proactive role. There is, besides, a statutory flavour to the concept of the region called Africa, inasmuch as issues concerning human rights in the region are being dealt with by a Regional Court located at Arusha, Tanzania, where the headquarters of both East Africa Law Society & Pan African Lawyers Union are located.

- R Santhanakrishnan

Editor's Note

The keener-eyed among readers will have noticed that this journal is returning after a lengthy hiatus. This is because we had to, for pressing reasons, skip our last (April 2017) issue. I am sorry as well that the current issue is also making a late appearance. It will be my endeavour to resume the journal's normal production cycle soon. We appreciate the understanding and forbearance of our readers.

That said, there is much in this issue that I hope you will find interesting and instructive. We carry a thoughtful article by the Chief Justice of Singapore, Sundaresh Menon, on the importance of mediation to the rule of law. Menon argues that access to justice (which mediation as a method of dispute resolution promotes) is an aspect of the rule of law which has not been given the attention it deserves. He believes that changing times call for a wider focus and he expresses the hope that, "having regard to our evolving social, economic and political circumstances, we might subject the conventional theory of the Rule of Law, which places the adjudicative process in the centre of attention, to renewed scrutiny so that the centre-stage might also be shared by other non-adjudicative processes." His remarks are likely to have a deep resonance in many Commonwealth jurisdictions where access to justice for ordinary people remains a major challenge.

We are also fortunate in getting a contribution on another topical issue, namely the implications of the United Kingdom's proposed exit from the Europe (Brexit) on asylum law. This has become quite controversial, for reasons which are not difficult to understand. As many readers will know, one of the major triggers for the 'Leave' vote in the referendum held in June 2016 was widespread concern among huge sections of the British people over immigration (which was, rightly or wrongly, linked to asylum). Bernard McCloskey, a sitting High Court judge in Northern Ireland, who was, until recently, President of the Upper Tribunal (Immigration and Asylum Chamber), offers the view that Brexit is likely to increase pressures on the judiciary from the asylum cases, mainly through "a proliferation of legal challenges, by judicial review applications, to the exercise of Ministerial powers focussing in particular on issues of compatibility with protected human rights … and common law protections". Whether this prediction will come to pass remains to be seen, but the article is a valuable contribution to a debate whose importance cannot be underestimated.

By coincidence, this issue also features a brief but powerfully argued article which refers to a decision made by Mr Justice McCloskey, sitting as the senior judicial review judge, in the High Court in Belfast. The decision concerned an application for recusal made under particularly contentious circumstances and which has generated strong views from diverse quarters. Austen Morgan, a London-based practising barrister with close links to Northern Ireland, looks at the circumstances under which a judge should recuse himself, and argues that decisions such as the one involving Mr Justice McCloskey should also be looked at from a more important perspective, namely the risk of politicisation of the judiciary which, in jurisdictions like Ulster, is ever present.

Moving away from domestic concerns, we carry an abridged version of a paper adopted recently by the International Bar Association on the legality of armed drones as viewed through an international law lens. This paper offers much food for thought on a subject which has polarised opinions in many countries and which will continue to be debated for a long time to come.

Finally, as this issue was about to go to press, the Federal Court in Malaysia delivered a landmark judgment on the relative positions occupied by the secular courts and the Shariah courts within the constitutional scheme of that country. The context in which the case arose was the highly fractious issue of religious conversions. Arun Kasi, a senior practitioner from Kuala Lumpur, offers a comprehensive analysis of this important issue.

As always, your feedback on any of these matters is very welcome.

– Dr Venkat Iyer

Articles

Mediation and the Rule of Law

Sundaresh Menon

Introduction

Over the last three decades, Singapore's dispute resolution landscape has witnessed an extraordinary transformation. Among the most notable aspects of this, has been the emergence of mediation as a crucial component of that landscape. Mediation challenges the conventional wisdom that "cheap" and "good" are mutually exclusive; and its allure lies in its recognition of the increasingly felt desire of disputants for a less costly and adversarial method of dispute resolution and for autonomy in resolving their disputes.[1] Recognising this reality, we have reworked our legislation and our policies and reconceived the role of our legal institutions and stakeholders in order to accommodate it.

But as our dispute resolution framework moves away from one in which adjudication alone forms its mainstay, we must be mindful of the possible implications this might hold for our understanding of the Rule of Law. After all, at least in general terms, the adjudicative process, in publicly providing authoritative statements of what the law is, who has what rights and how those rights are to be vindicated, represents the essence of the Rule of Law.[2] Indeed, because of this, some would go so far as to contend that the informal and private nature of mediation is inconsistent with the Rule of Law.[3] In my respectful view, any perceived inconsistency between mediation and the Rule of Law may be seen fundamentally as a semantic issue,[4] which is premised on an unduly restricted conception of the Rule of Law.

I wish to identify a broader vision of the Rule of Law – one in which access to justice is an essential ingredient. The idea that access to justice is a core principle of the Rule of Law seems intuitively obvious. An inevitable consequence of the inability to access and enforce one's legal rights is that it reduces confidence in the legal system and this in turn erodes the vitality of the Rule of Law, rendering it little more than a theoretical construct. Yet the relationship between access to justice and the Rule of Law has received comparatively little attention. In my remarks today, I set out to explore this conception of the Rule of Law and reflect on the promise which mediation brings to it.

A broader vision of the Rule of Law

When we think of the Rule of Law, Lord Bingham's view of it is what most often comes to mind. For Lord Bingham, the core of the Rule of Law is the idea that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, prospectively promulgated and publicly administered in the courts.[5] Lord Bingham's Rule of Law therefore speaks of formal legality, in terms of how laws are to be made, published and applied; and also in terms of making the state subject to the law. Under this conception, the Rule of Law imposes a number of formal requirements, while it also stipulates certain procedural principles which together address how a community will be governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society.[6] The procedural principles concern the processes by which these norms are administered, and the institutions that their administration requires.[7]

But any conception of the Rule of Law must be assessed with due regard for the socio-political and historical context from which it emerged; and in this respect, the roots of Lord Bingham's Rule of Law can be found in the English political tradition.[8] The immediate inspiration behind it was

1 See, eg, Dorcas Quek and Seah Chi-Ling, "Finding the Appropriate Mode of Dispute Resolution: Introducing Neutral Evaluation in the Subordinate Courts", Singapore Law Gazette (November 2011) at 21, 22; Adrian Loke, "Mediation in the Singapore Family Court", (1999) 11 SAcLJ 189 at 194.

2 See, eg, Lon Fuller and Kenneth Winston, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353 at 372.

3 Dame Hazel Genn, "Why the Privatisation of Civil Justice is a Rule of Law Issue" (36th F A Mann Lecture, Lincoln's Inn, 19 November 2012) at pp15-17.

4 Jean R Sternlight, "Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad" (2006-2007) 56 DePaul Law Review 569 at 590.

5 Thomas Bingham, "The Sixth Sir David Williams Lecture: The Rule of Law" (16 November 2006), Cambridge University: Centre for Public Law at 5.

6 Jeremy Waldron, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N Zalta (ed), available at: https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/.

7 Jeremy Waldron, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N Zalta (ed), available at: https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/.

8 See, eg, Francis Neate, "The Meaning and Importance of the Rule of Law", in Francis Neate (gen ed), *The Rule of Law: Perspectives from around the Globe* (UK: LexisNexis, 2009) 55 at 55.

not the preservation of individual liberty, but the restraint of government tyranny.[9] The preoccupation was to ensure that government should be constituted in such a manner that "power should be a check to power" in order to prevent abuse.[10] Because the judiciary was seen as the point of the most direct confrontation between the state, the law and the individual, it was thought that it, therefore, would serve as the best protection against lawless governmental actions.[11]

On this basis, the adjudicative process has been regarded as the preserve, and even as the very manifestation, of the Rule of Law.[12] Thus, the Rule of Law is given expression when affected citizens have their "day in court" against governmental action that is challenged as being arbitrary or unlawful.[13] The nature of rules has been of paramount significance to this Rule of Law ideal, because it is through rules, which are, at least in part, articulated through the court process that the institutional arrangements across the separate branches of government are defined and the limits of their respective powers set.[14]

Inevitably, the Rule of Law later came to recognise the central role of the courts in preventing the abuse of private power as well. Claimants in litigation would invoke the coercive power of the court system to protect themselves against wrongs committed by other private actors. The Rule of Law values evolved in tandem with these changes, and the function of rules under this ideal was recast to serve as general guides of behaviour for both public and private actors in society.

To be sure, Lord Bingham's conception captures vital facets of the Rule of Law and it emphasises the critical role that the courts play in upholding it. Indeed, the Rule of Law as formal legality has come to be the dominant understanding among legal theorists.[15] And the adjudicative process, which exemplifies the values of formal legality, has come to be so closely identified with a legal system's legitimacy that, as one writer has observed, "[some] disputants feel that real justice is denied them unless a bewigged judge, symbolising the majesty of the law, hands down a ruling firmly based on the ruling in a past case".[16]

It is not my purpose to suggest that this conception of the Rule of Law has outlived its usefulness. Rather, I suggest that because the content of the Rule of Law should be understood in the light of the particular context in which it is situated, its content needs to be periodically re-evaluated against changing realities. And, more specifically, having regard to our evolving social, economic and political circumstances, we might subject the conventional theory of the Rule of Law, which places the adjudicative process in the centre of attention, to renewed scrutiny so that the centre-stage might also be shared by other non-adjudicative processes.

Some might argue against the wisdom of any attempt to refine our thinking on the Rule of Law on the ground that this might open the way to abuse. But the venture might be more palatable if we recognised that, at its core, our conception of the Rule of Law offers us a means for thinking about the function of law in society.[17] Consistent with this, the long history of the Rule of Law shows that it has been held to mean different things at different times and in different contexts.[18] In the 20th century, for example, there emerged a growing recognition that the Rule of Law as an essentially procedural concept, which governed the relationship between the government, the people and the law, was deeply unsatisfying.[19] This came about in response to a number of significant historical events, the most prominent of which were the atrocities committed by the Nazi regime in Germany ostensibly in accordance with what was passed off for the law; and the legal institutionalisation of apartheid in South Africa.[20]

In this light, strict or procedural legality came to be seen as a necessary but by no means sufficient condition for the protection of human rights, and this prompted the emergence of "thicker" definitions of the Rule of Law that sought to prescribe the contents of the rules themselves.[21] I do not propose to go further into a historical analysis of these and other interpretations and transformations of the Rule of Law today. But the point I want to emphasise is that the Rule of Law's normative content is capable of multiple incarnations.[22]

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9 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (USA: Cambridge University Press, 2004) at 115.

10 Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harvard Law Review 1685 at 1685.

11 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (USA: Cambridge University Press, 2004) at 52.

12 See, eg, Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353; Julian Gruin, "The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent" (2008) 19 ADRJ 206.

13 Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353 at 400.

14 See, eg, Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (USA: Cambridge University Press, 2004) at 52-53, 96-97.

15 Ibid at 119.

16 Margaret Thornton, "Mediation Policy and the State" (1993) 4 ADRJ 230 at 235.

17 See, eg, Justice Kenneth Hayne, "Dispute Resolution and the Rule of Law" (Sino-Australian Seminar, Beijing, 20-22 November 2002) available at: http://www.hcourt.gov.au/assets/publications/speeches/current- justices/haynej/haynej_DisputeResolutionBeijing.htm) at p2.

18 Gianluigi Palombella, "The Rule of Law as an Institutional Ideal," in Gianluigi Palombella and Leonardo Morlino (eds), *Rule of Law and Democracy: Internal and External Issues* (Leiden: Brill, 2010) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148135) at p1; Pekka Hallberg, *Prospects of the Rule of Law* (Helsinki: Tekija ja Edita Publishing Oy, 2005) at 4.

19 Francis Neate, "Introduction: A Brief History of the Development of the Concept of the Rule of Law", in Francis Neate (gen ed), *The Rule of Law: Perspectives from around the Globe* (UK: LexisNexis, 2009) 1 at 5-6.

20 Ibid.

21 Ibid.

22 See, eg, Gianluigi Palombella, "The Rule of Law as an Institutional

While the common thread which runs through the variations revolves around the ascendancy of law and of legal institutions in a system of governance,[23] its principles are constantly tested, evaluated, rethought and readjusted in the light of changing circumstances.[24]

Against that backdrop, I suggest that if we consider the range of developments which have transpired in our legal landscape, then it will become apparent that the Rule of Law notion which is rooted in a fundamentally, if not exclusively, adjudicative setting is no longer sufficient to capture the ideals of a modern system for the resolution of disputes.

And so, accepting this need to refine our vision of the Rule of Law in order to match the demands of today, the next question which we then confront is: How should the Rule of Law be reconceived? I suggest that we should start from the objectives that we would like to see accomplished.

In this regard, one begins with certain realities: the restricted amounts of court time, technicality of procedures, court formalities, the rising and often unaffordable cost of litigation, the professional domination of the system and the delays that often plague court proceedings are all inevitably seen as posing barriers for the individual user of the legal process.[25] In such a context, the legitimacy of the legal system and of the Rule of Law ideal becomes intimately connected with access to justice. Disputants desire a more "user-friendly" framework of dispute resolution which facilitates greater autonomy over the process and is cheaper, less formal, procedurally simpler, less convoluted by technical language and available with minimal delay.[26]

For access to justice to be seen as a necessary complement to the traditional underpinnings of the Rule of Law, we must engage with the conceptual basis for this extension and I suggest that it is tied to the needs, rights and interests of the disputant. In this conception, the disputant is at the centre of our consideration. What follows from this is the realisation that we need to overlay a more user-centric approach on top of the institutional values which have defined the ideals of our legal system. Building on these considerations, which have since inspired access to justice initiatives in our system, I wish to draw out the core attributes of such a user-centric approach that are essential to maintaining the robustness of the Rule of Law ideal today. These may be broadly crystallised into five, sometimes overlapping, ideals surrounding the legal process. These are: affordability, efficiency, accessibility, flexibility and effectiveness.

The role of mediation in promoting the Rule of Law

I turn to consider how far mediation meets these ideals and whether it succeeds in promoting this broader vision of the Rule of Law. By appreciating the attributes which mediation brings to dispute resolution, and for this, I am grateful to the work of Laurence Boulle, whose writings I have cited in this connection, I suggest we will see that mediation has proved its great value in helping to address access to justice considerations, but yet in a way that is compatible with and supportive of the traditional Rule of Law values associated with adjudication.

Affordability

Having risen to prominence as a response to "access to justice" concerns in the 1990s,[27] mediation as a method of dispute resolution exemplifies many of the ideals of a user-centric approach. Prime among these is the fact that mediation has the great benefit of being much more cost-effective and affordable than most other modes of dispute resolution. The transaction costs of mediation, in terms of expenditures on preparation, lawyers, experts and other outgoings, are generally much lower than those for litigation.[28] Mediation is not burdened with the procedural formalities in litigation which can protract the resolution of a case. It is also relatively easy to set up and conduct mediation within short periods of time. With the opportunity to resolve their dispute in a manner which is sensitive to the particularities of their own case, parties are also more likely to accept the outcome of the dispute. They will generally achieve closure much more quickly than in litigation, which can take years to reach the highest appellate court and achieve finality. The much quicker turnaround for cases which settle in mediation means that disputants pay less money over a shorter period of time.[29]

Efficiency

The reductions in the time, financial outlays, professional charges and opportunity costs for parties in dealing with their disputes are also tied to mediation's efficiency objectives. While I have spoken of efficiency from the user's standpoint,

Ideal," in Gianluigi Palombella and Leonardo Morlino (eds), *Rule of Law and Democracy: Internal and External Issues* (Leiden: Brill, 2010) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148135) at p27.

[23] Jeremy Waldron, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N Zalta (ed), available at: https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/.

[24] See, eg, Gianluigi Palombella, "The Rule of Law as an Institutional Ideal," in Gianluigi Palombella and Leonardo Morlino (eds), *Rule of Law and Democracy: Internal and External Issues* (Leiden: Brill, 2010) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148135) at p27.

[25] See, eg, Laurence Boulle, *Mediation: Principles, Process, Practice* (Australia: LexisNexis Butterworths, 3rd ed, 2011) at [6.15].

[26] Ibid at [6.15].

[27] Ibid at [6.15]. See also Jean R Sternlight, "Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad" (2006-2007) 56 DePaul Law Review 569 at 570.

[28] See, eg, Laurence Boulle, *Mediation: Principles, Process, Practice* (Australia: LexisNexis Butterworths, 3rd ed, 2011) at [3.53].

[29] Ibid at [3.51].

efficiency can also be viewed from other perspectives.[30] From the perspective of courts and tribunals providing dispute resolution services, efficiency relates to the cost-effective use of finite public resources, the timely management of case loads and a proportional allocation of resources to different disputes, with the devolution of some of the service costs to users.[31] And from the community's perspective, efficiency relates to societal allocations of financial and human resources in cost-effective ways. From that vantage point, there is much to be said for minimising the economic and social disruptions caused by disputes and increasing the ability of citizens to manage conflicts themselves.[32]

In this light, I suggest that the value that mediation brings to our legal system lies not just in making a more diversified range of dispute resolution options available, but more importantly in helping actors at different levels achieve a spectrum of efficiency objectives.

Accessibility

The third point that I wish to touch on is accessibility. In comparison with competing systems, mediation has the advantage of providing an accessible dispute resolution service. Whereas there are financial, procedural and structural obstacles for individuals seeking their "day in court", mediation provides relative ease of access with few technical or legalistic requirements that might otherwise restrict the parties from participating in the system.[33] Mediation is also a much more accessible system in terms of the individual disputants' abilities to understand the process and even to represent themselves in the procedure.[34] It is relatively devoid of formality, technicality and jargon, and disputants can participate in it with ease. Furthermore, by shifting the dispute resolution process from one of assuming adversarial positions to one which is focused on problem-solving and the needs and interests of the parties, mediation is widely recognised for its capacity to provide a much less alienating experience.[35]

Flexibility

The accessibility of the mediation process is closely linked to another of its key advantages, which is flexibility. Mediation enables the parties to explore a multitude of issues and concerns arising out of a transaction or a relationship, without regard to formal constraints such as those imposed by the rules of pleading and even without being limited to matters that might strictly be considered legal in nature. The flat structure of mediation, with a neutral facilitator rather than an adjudicator, is also conducive to the parties settling their disputes privately and amicably. The process allows them to directly interact with each other in the effort to find a mutually acceptable solution, and importantly, it enables them to determine the outcomes of their dispute instead of having a tribunal do so.

Effectiveness

These characteristics bear on the final value I have spoken of, which is the effectiveness of mediation as a method of dispute resolution. Indeed the statistics paint an encouraging picture of mediation's success in our legal system. Since the establishment of the Singapore Mediation Centre, which deals primarily with private commercial matters, more than 2,300 matters have been mediated with an overall settlement rate of 75%.[36] In the Supreme Court, the rate of settlement for cases which proceeded to mediation in recent years has ranged between 66% and 81%.[37] Even at the Court of Appeal level, cases which have been referred to the Singapore Mediation Centre for mediation have enjoyed settlement rates in excess of 50%.[38] It also bears noting that settlement in these cases was achieved within a year of the referral.[39] This is particularly impressive because there is often less impetus for parties to an appeal to reach a settlement since one party would have already "won" on the merits at first instance.

Critiques and Responses

The benefits of mediation, which I have outlined, combine to provide a method of dispute resolution which is very much "user-centred", and one which is rightly recognised as being among the more successful methods of bridging access to justice gaps. The growth of mediation has, however, sparked some critiques by those concerned with the privatisation and informalisation of dispute resolution,[40] and who see mediation as heralding the "loss of law".[41] This refers to the loss of precedents and the absence of the public, norm-setting functions both of which are inherent in the nature of mediation.[42] I note parenthetically that the same could equally be, but is less frequently, said about arbitration.

But aside from this, and with great respect, I suggest that such a view rests on the fallacy that mediation necessarily exists in competition with adjudication. Instead of viewing mediation and adjudication as diametrically opposed systems, perhaps the better view is that the two are complementary methods

30 Ibid at [3.53].
31 Ibid at [3.53].
32 Ibid at [3.53].
33 Ibid at [3.51].
34 Ibid at [3.51].
35 Ibid at [3.51].

36 Statistical information provided by the Singapore Mediation Centre.
37 Ibid.
38 Ibid.
39 Ibid.
40 Jean R Sternlight, "Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad" (2006-2007) 56 DePaul Law Review 569 at 570.
41 See Bryan Clark, *Lawyers and Mediation* (Springer, 2012) at Ch 5.
42 Ibid.

of dispute resolution that go together in our justice system. Court-connected mediation, for example, currently exists as an adjunct to the adjudicatory system. Judges can order disputes in litigation to be mediated and failing a settlement, those disputes will return to the courts for adjudication.

On top of this, the emergence of mediation may even be said to have a "revitalising effect"[43] on the adjudicatory process, and to this extent to complement the traditional Rule of Law values which the latter espouses. It simply does not follow from the growth of mediation, that the role of the courts in developing the law must diminish; nor, for that matter, will the value of established legal norms be undermined by the growth of mediation. In fact, parties in mediation inevitably operate with some understanding of their established legal rights and obligations and with an expectation of how the dispute might otherwise be resolved through adjudication.[44]

More importantly, with recourse to different methods of dispute resolution, the great benefit is that parties may now consider the strengths and weaknesses of each approach in order to determine the appropriate mode of dispute resolution that is best-suited to their needs. Developing a more diversified suite of dispute resolution options therefore enhances the ability of the legal system to deliver justice that is customised to the particularities of each case and has the effect of reinforcing the overall legitimacy of the dispute resolution framework. This, in turn, has the potential to foster stronger respect for the norms set within the adjudicative process.

In this regard, while there is an absence of direct studies on the precise relationship between mediation and adjudication, evidence from some other jurisdictions suggests that the use of mediation processes has increased satisfaction with adjudication[45] and this is broadly supportive of these observations. Locally, the continuing improvement in the State Courts' user satisfaction rates since the presumption of alternative dispute resolution ("ADR") was introduced, from 92% in 2013 to 96% in 2015,[46] is in keeping with these trends. Rather than necessarily undermining the system of adjudication and the traditional Rule of Law values it exemplifies, mediation is therefore more accurately seen as an essential element in our dispute resolution toolkit, which helps maintain and support the Rule of Law and which brings our justice system a step closer to delivering fair and appropriate outcomes for its disputants.

Family Justice in Singapore: A Case Study

The family justice system in Singapore provides a notable illustration of this, in that it offers a practical example of how mediation may be combined with adjudication in optimal ways to avail appropriate dispute resolution models that meet our society's evolving needs. In response to the rising number of divorce cases, many of which involve parties who are self-represented, as well as the need in family cases to preserve relationships which must endure beyond the court process, we have for many years sought to redesign family court proceedings from a structure that was fundamentally adversarial in nature to one that embraces a more conciliatory architecture. Perhaps the most dramatic moves in this direction can be traced to 2014. Amongst other reforms, mediation became mandatory as part of divorce proceedings for parties with children under the age of 21, and judges of the Family Justice Courts were empowered to order mediation as part of the court process.

Since then, mediation has proved to be an invaluable part of the toolkit for the Family Justice Courts. By offering a safe and supportive environment in which parties can communicate openly and explore mutually acceptable solutions, it has provided a powerful means of encouraging parties in family proceedings to compromise and of promoting adherence to settlements that have been reached by consensus. In this context, mediation is emerging as an essential tool in helping disputants exit the court proceedings without further deterioration in their relationships. I see the continuing growth of like-minded initiatives in family justice as evidence of mediation's attractiveness as a vital complementary method of dispute resolution.

Promoting access to justice under the Rule of Law: the evolving field of mediation in Singapore

Continuing efforts to enhance Singapore's network of mediation services will thus only serve to strengthen our dispute resolution "eco-system" and benefit disputants, and it is heartening to observe the significant advances we have already made. Since the 1990s, we have seen the introduction of mediation in the State Courts as a parallel process to court litigation, the development of Community Mediation Centres to help relatives and neighbours resolve community disputes, and the emergence of the Singapore Mediation Centre which not only provides commercial mediation services but also serves as a leading training body for mediators. The success of mediation in the context of civil claims has led to its extension in other significant areas and we have been able to nurture a pool of trained and experienced mediators in tandem with these developments.

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[43] Laurence Boulle, *Mediation: Principles, Process, Practice* (Australia: LexisNexis Butterworths, 3rd ed, 2011) at [6.7].

[44] Ibid at [6.6].

[45] Tania Sourdin and Tania Matruglio, "Evaluating Mediation – NSW Settlement Scheme 2002" (2002) 61-64, cited in Laurence Boulle, *Mediation: Principles, Process, Practice* (Australia: LexisNexis Butterworths, 3rd ed, 2011) at [6.7].

[46] State Courts' Bi-annual Court-Users Survey 2015.

Recent Trends

Today, our stakeholders continue to work tirelessly to introduce a slew of initiatives that contribute to the continued development of mediation so as to ensure that it is responsive to the needs of its users. Recently, this led us to two major developments: (i) the establishment of the Singapore International Mediation Centre ("SIMC"), which caters to the dispute resolution needs of international businesses; and (ii) the Singapore International Mediation Institute ("SIMI"), which accredits and regulates mediators in an effort to develop and promote a recognised and regulated profession marked by a commitment to high standards.

In addition to building strong mediation institutions, Singapore has sought to develop a rules-based framework to strengthen and entrench mediation in our dispute resolution landscape. I touched on the presumption of ADR earlier, which was introduced in the State Courts for all civil disputes in 2012. Under this initiative, civil cases in the State Courts are automatically referred to the most suitable mode of ADR – whether it is mediation, neutral evaluation or arbitration under the Law Society Arbitration Scheme – unless the parties choose to opt out of the ADR process.[47] And in January this year, the Mediation Act was passed to establish a sound legislative framework for mediation. The Act will strengthen the enforceability of mediated settlements and provide greater clarity and certainty for parties on issues such as the confidentiality of communications in mediation.[48]

This combination of efforts on the part of diverse stakeholders has contributed to a robust network of mediation programmes in Singapore, and one that continues to evolve with the needs of our users. The spike in mediation in recent years, with the number of mediation cases filed in the Singapore Mediation Centre hitting a record high last year,[49] bears testament to the attractiveness of mediation as a dispute resolution option and the rising demand for mediation services in Singapore today.

The Law Society Mediation Scheme

The establishment of the Law Society Mediation Scheme (LSMS) is thus a welcome step towards addressing the growing demand for mediation services in Singapore, and a worthwhile initiative that will help realise the aspirational ideals of mediation and yield tangible results in time.

With mediation gaining traction, the low-cost scheme which the LSMS seeks to provide will have the salutary effect of significantly widening the reach of dispute resolution services in Singapore. A notable feature of the LSMS is that its mediation services are available for all types of civil disputes and do not impose a monetary limit on the value of a dispute before the scheme may apply.[50] Further, members of the public need not be legally represented for mediation under the scheme.

Consistent with mediation's objectives to provide a much more flexible and efficient method of dispute resolution, the LSMS seeks to make it convenient for parties to submit to mediation. Under the Law Society Mediation Rules ("the Rules"), the system of mediation is structured in a manner which is quick and user-friendly. The procedures for parties to commence the mediation process (whether or not they have a prior agreement to mediate) are simple[51] and highly accessible to the individual disputant. The LSMS also complements the existing Law Society Arbitration Scheme (LSAS) by providing parties with the option of having disputes referred to mediation before or after LSAS proceedings have been commenced.[52]

In addition, the way in which mediation is envisaged under the Rules reflects a desire to strike an appropriate balance between flexibility on the one hand and the need to narrow down issues of contention on the other, in order to bring about productive communications about the dispute at hand. The default position under the Rules, for example, requires parties to provide the mediator a brief written statement of their case defining the issues to be resolved.[53] However, the parties are free to opt out of this arrangement and to agree on the precise form in which they will present their case to the mediator.[54]

Similarly, the mediator operates with a high degree of flexibility.[55] The ability of the mediator to tailor his approach to the distinctive facts of each case will afford the latitude to cut through irrelevant issues and unproductive tactics, and focus on matters of real concern to the parties. Should the mediation appear to be no longer justified in cost-benefit terms, the mediator may also rely on his professional judgment to terminate the process.[56] Parties are then at liberty to initiate or continue judicial or arbitral proceedings.[57]

Last but not least, the high professional standards to which the LSMS holds its mediators under the programme will not only promote and sustain the quality of the mediation services on offer, but will also go towards strengthening public trust and confidence in the practice of mediation. In this regard, those seeking to be appointed to the LSMS Panel of Mediators must be experienced practitioners who have met the criteria of mediator accreditation and experience set by the Law Society.[58]

[47] State Courts Practice Directions, paragraph 25.
[48] Office of Public Affairs, "Mediation Moves: A Note from Indranee Rajah, SC, Senior Minister of State for Law" (31 January 2017).
[49] KC Vijayan, "Number of mediation cases filed hits record high", *Straits Times* (Singapore), January 28, 2017.
[50] The Law Society Mediation Scheme Handbook 2017 at p29.
[51] See The Law Society Mediation Rules Articles 2 and 3.
[52] The Law Society Mediation Scheme Handbook 2017 at p1.
[53] The Law Society Mediation Rules Article 5.2.
[54] Ibid, Article 5.1.
[55] Ibid Article 6.3.
[56] Ibid Article 8(c).
[57] Ibid Article 10.
[58] The Law Society Mediation Scheme Handbook 2017 at p28.

Furthermore, the LSMS also prescribes a rigorous Code of Conduct ("the Code") for its mediators which I see as serving at least two functions: (i) from the practitioners' perspective, the Code will help guide them as they develop a sense of their basic commitments and responsibilities; and (ii) from the users' perspective, the Code can foster an understanding of the principles and standards which guide the practice of mediation, thereby creating realistic expectations of the mediators and developing public confidence in the mediation process.

Conclusion

Let me conclude by commending the Law Society for an initiative which promises to contribute to Singapore's rich tapestry of dispute resolution services in significant ways. I am confident that, with the ongoing support of key stakeholders in the industry, the continuing development of our dispute resolution framework will advance us further towards the ideal system of justice that can accommodate the constantly evolving needs of our society and deliver fair outcomes for its disputants.

[The Hon'ble Sundaresh Menon is the Chief Justice of Singapore. A version of this article was first delivered by the Chief Justice as a keynote address to the Law Society Mediation Forum on 10 March 2017 and it will be published in a forthcoming edition of the Asian Journal on Mediation.]

Asma Jahangir (1952-2018)

A Tribute from the Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) described Asma Jahangir, the courageous Pakistani human rights defender, who passed away on 11 February 2018, as a "conscience keeper for the whole of South Asia", recalling her struggle for "principle and policy changes" but also her efforts to support the most vulnerable.

Pro-democracy activist and an outspoken critic of military interference in politics, Asma Jehangir inspired campaigns for democracy, rule of law, freedom of assembly and expression, as well as good relations with India.

Wajahat Habibullah, Chair of the CHRI's India Executive Committee, described her as a "conscience keeper for the whole of South Asia, [who] will be sorely missed", he added.

Maja Daruwala, Senior Adviser, CHRI, spoke of her as "a woman of conviction who became not only an icon for courage and principle in her own country but also an example for all of us working for better access to justice across South Asia". Mrs Daruwala added: "She battled for principle and policy changes at the highest level as well as constantly assisted the most vulnerable individuals to get to their remedies. It was an honour for me to know and work with her."

"Her loss to the South Asian family has an impact beyond borders, it is felt across the Commonwealth and the world," said Sanjoy Hazarika, International Director of CHRI. "We reaffirm our commitment to the causes she held dear, to rights and also [to] building goodwill and good relations across South Asia."

Jahangir was renowned for her staunch advocacy for the rights of the most marginalised: women, children and religious minorities, who were the targets of blasphemy laws and 'honour killings'. This, however, earned her enemies and she received many death threats. Asma Jahangir was imprisoned several times, eg in 1983 for her critique of Zia-ul-Haq's military rule and her participation in the Movement for the Restoration of Democracy, and was also placed under house arrest in 2007 for her active role in a lawyers' protest movement, which was instrumental in Pervez Musharraf's stepping down from power.

She was the first female president of Pakistan's Supreme Court Bar Association, and she also co-founded and served as chairperson of the Human Rights Commission of Pakistan. Asma Jahangir was appointed UN Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran in 2016, and Special Rapporteur on Freedom of Religion in 2004. She was also a member of the Commonwealth Observer team for the 1994 South African 'freedom' elections.

[This is a slightly edited version of a Statement issued by CHRI on 12 February 2018.]

Brexit and Asylum Law

Bernard McCloskey

Introduction

I begin by recalling the writings of the German philosopher Hannah Arendt published some seven decades ago. The title of her work is *We refugees*. This is a remarkable, evocative short essay, published in the dark days of the Second World War. The author, intriguingly, describes the fate of refugees as that of human beings who, unprotected by any specific political convention, suffer from the plight of being nothing but human beings: simple but profound words. Having been exposed to unspeakable horrors and sufferings, the only clearly identifiable trait common to each of them was their human nature. Hannah Arendt was a refugee from Germany who was interned in a camp in France before seeking asylum in the United States. Later, she expanded the themes of her powerful 1943 essay in her seminal book "The Origins of Totalitarianism". Sadly, the reflections in Hannah Arendt's writings have ample currency and potency in the contemporary world.

I take as my second reflection the words of the President of Ireland spoken some five years ago on the occasion of the 20th anniversary of the Irish Refugee Council, a small charitable organisation which operates in the Republic of Ireland. The President exhorted this admirable NGO in the following terms:

> "*To continue to shake up societal disregard and indifference, to go on pushing discussions that challenge the faulty categories through which our society, and Europeans in general, grasp the contemporary realities of migration and asylum.*"

The President also highlighted the "profoundly debilitating experience" suffered by those who are excluded from full participation in society and the political community. He described the support and solidarity provided by the Refugee Council as "of the utmost importance".

Notably, President Higgins recognised that the qualities required for this daunting mission include that of **courage**. This, I believe, must embrace several types of courage, including in particular those of the moral, political and intellectual varieties. The Europe-wide events of the past three years in particular invite reflection on one of the aims of the stated mission of the Council, viz "[T]o promote and enhance the lives of refugees in Ireland."

Simple, but profound, words indeed.

In January 2014, in a published paper, I wrote the following:

> Today, the refugee crisis described in such gripping terms by Hannah Arendt in the throes of the worst global armed conflict in the history of the world scales unprecedented heights is arguably just as acute as it was in the dark days of 1943. Politicians are elected to make laws and they do so at both domestic and EU levels. Every law is the product of some form of political compromise. One is prompted to ask whether, in the particular field of asylum and immigration law, there is any glimmer of hope that the hundreds of thousands of exiled and/or stateless human beings in our world have access to stronger and more effective protection than previously?

Some two years later, the Upper Tribunal of the United Kingdom (Immigration and Asylum Chamber) – which is the final court of appeal in over 95% of all immigration and asylum cases - stated in the course of a landmark judgment:

> The spotlight in these proceedings is on an area just across the English Channel from Dover. It has become known colloquially as 'The Jungle'. This is a bleak and desolate place adjacent to Calais on the coast of northern France. It attracts this appellation not without good reason. Unlike other jungles, this place is inhabited by human beings, not animals ….
>
> The description of The Jungle in some parts of the evidence as a camp, or settlement, is misleading …. Descriptions such as 'a living hell' abound …
>
> In summary, the conditions prevailing in this desolate part of the earth are about as deplorable as any citizen of the developed nations could imagine.
>
> The Court made the further observation that the case raised:
>
> … issues of the keenest difficulty for the determination of individual rights against the background of the rule of law and for the exercise of a jurisdiction that is, at the same time, humanitarian and alive to the national and international regulatory context.

The Jungle, the demolition of The Jungle and its continuing aftermath, which includes the omnipresent phenomenon of third country nationals based in Northern France, Italy and Greece still pursuing legal remedies in the United Kingdom courts, while others risk their lives to reach these shores, have raised profound questions of law, morality and conscience.

Brexit

To summarise, the writings of Hanna Arendt, the words

of the President of Ireland, the daily toil of the Irish Refugee Council and the continuing reality of third country nationals barely surviving in northern France and risking their lives in order to cross the Channel to the United Kingdom provide vivid illustrations of the *context* in which the Brexit debate continues to dominate our news media daily. One hugely significant element of this context is the future content of asylum laws in the United Kingdom and the possible fate of the multiple EU asylum laws in the longer term.

When Britain acceded to the EU in 1972 measures such as the Dublin Regulation, the Return Directive, the Qualification Directive and the Charter of Fundamental Rights of the European Union did not exist. Indeed, the Common European Asylum System ("CEAS") had not been born. All of these measures, of major significance EU wide, were the product of political and legislative developments which began in earnest some two decades later and witnessed a bold and extensive reconfiguration of the international organisation to which all EU Member States belong.

Another two decades have passed and the last three years have borne witness to the refugee crisis which, by some distance, has become the most important phenomenon in the history of the EU. Some of the statistics are startling. By November 2015, it was estimated that some 700,000 people had travelled the so-called "Western Balkans" route from north Africa or the western frontiers of the EU territory through Greece to central Europe, involving (to take one isolated example) daily arrivals in Serbia at the rate of 10,000 in October 2015. The crisis has involved the movement of over one million people from third countries into and throughout the EU. Neither political responses nor legal devices and, more specifically, the regime of the Dublin Regulation (*infra*) provided sufficient coping mechanisms. The bold vision of the Schengen Area quickly began to fade, as border controls were reintroduced and the economically weaker EU Member States rebelled against the much debated Dublin Regulation. The visionary ideals which had formed, underpinned and driven the EU and its predecessors were suddenly threatened as never before.

Mass migration of comparable dimensions had not been experienced in the globe since the enormous population movements of the Second World War. The repercussions have been substantial. They continue to manifest themselves in various ways (legal, political, social *et al*) and, as a result of the United Kingdom's "Brexit" decision, they have had seismic implications for the unitary EU.

The Dublin Regulation

I turn to consider the Dublin Regulation. This is the measure of EU law which, in consequence of the European refugee crisis, has attracted most scrutiny, attention and controversy. In many of their fundamental respects, Regulation number 343/2003 ("Dublin II") and Regulation (EU) number 604/2013 ("Dublin III") have much in common. Their core common denominator is that each prescribes the criteria and mechanisms for determining the Member State responsible for examining an application for asylum (now international protection) lodged in one of the Member States by a third-country national (now extended to stateless persons). Examination, in this context, equates with final determination, to be contrasted with "take charge" or "take back" requests which, by definition, are preliminary or interim decisions only.

The essential underpinnings of the successive Dublin Regulations include the principle of mutual confidence among EU Member States, the full and inclusive application of the Refugee Convention and Protocol within the Common European Asylum System ("CEAS), the need for a system which will be practicable and efficacious, the imperative of inter-state co-operation, the overarching importance of expeditious decision making and the presumption (a rebuttable one) that Member States will comply with their international obligations, in particular the observance and protection of fundamental human rights. The 'Member State of first entry' general rule must be considered in this light. It may be said that the principle of mutual confidence, which dates from the original Dublin measure two decades ago, is the dominant one: and, critically, this failed principle to withstand the stern test posed by the refugee crisis.

The Dublin Regulation is properly seen as a measure of EU law whereby one of the fundamental aims of the Union, namely the creation of an area of freedom, security and justice, is extended to a body of persons beyond that of EU citizens. Furthermore, the Dublin Regulation is linked to the founding values of the Union: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.[1] Thus, non-EU citizens who successfully claim international protection via the Dublin Regulation access, for the purpose of living their lives, both a geographical area and a system of governance regulated by these core values.

What is the Dublin Regulation/Brexit connection? It is widely held that one of the main drivers in the pro-Brexit vote in the UK Referendum some 18 months ago was the perception of the majority that EU asylum law had gone too far and exemplified all that was bad about the Community: in particular excessive surrender of UK sovereignty, adverse impact on the UK economy and excessive numbers of non-British citizens on British territory. In this context the political trajectory of the Conservative Government has been unequivocally clear.

Alf Dubs, a political peer, has become the champion of the cause of unaccompanied third country children present on the

[1] Article 2 TEU.

territory of the EU. If the so-called "Dubs Amendment" tabled in the House of Lords when what became the Immigration Act 2016 was a mere Bill had prevailed, the UK would have committed itself by a measure of primary legislation to accepting 3,000 unaccompanied children into its territory. The amendment was, however, heavily diluted and the result – staggering to some – is that almost two years later only some 500 such children have been accepted into the United Kingdom via this discrete legal route.

The current Government's policies and priorities thus expressed have manifested themselves in other ways. For example, in a recent judgment UTIAC was driven to reproach the Home Secretary's lawyers for the consistent employment of "trench warfare" tactics and their repeated refusals to engage in basic co-operation with the lawyers representing third country nationals in a series of cases brought on behalf of unaccompanied third country children seeking entry to the United Kingdom mainly (though not exclusively) by reliance on their rights under Article 8 ECHR. In one particular case disrespect for the rule of law and an unvarnished lack of respect for the independent judiciary were manifest. They included undisguised and personalised attacks on the President of the court and seriously misleading another court. It was veritable open season.

Putting some flesh on the bones of what is stated immediately above, the case in question is *R (AM) v Secretary of State for the Home Department*.[2] At [30] the Upper Tribunal referred to its earlier decision in a related case, *AR v SSHD*.[3] In [52] and [53] of *AR* the Tribunal dealt with the issue of whether a mandatory order requiring the Home Secretary to admit an unaccompanied third country national child to the United Kingdom should contain a provision requiring active communication and co-operation on the part of the Home Secretary with the child's legal representatives. This was trenchantly opposed by the Home Secretary who complained of excessive intrusion and inadequate clarity and detail. The Tribunal, dismissing this opposition, stated at [52]:

> This dogged resistance has become a feature of all cases belonging to this cohort ……
>
> [The Tribunal is] at a loss to understand why a provision of this kind is resisted so doggedly...
>
> [53] …I consider that mature, adult litigants who have a keen sense of the rule of law, should not require kindergarten-type elaboration in [orders]. Good sense, good faith and reasonableness are the three stand out ingredients in complying with a provision of this kind. In the world of contemporary litigation, there should be no requirement for subsequent judicial monitoring.

The Tribunal also drew attention to the elevated nature of the Government's duty of co-operation with the court. Continuing, it stated at [31]:

> I consider that the conduct of judicial review proceedings by public authorities should at all times by guided by the concept of a partnership with the court.

The Tribunal concluded, at [33]:

> The Secretary of State's conduct of all of these cases has been inappropriate. It has failed to adhere to the high standards expected of Government Departments in judicial review litigation. The allegiance owed by the Secretary of State to the court in public law proceedings arises out of a species of partnership. The essential tenets of this partnership are that the public authority concerned will, figuratively, play its cards face-up and the Court, in turn, will be mindful of its supervisory (not appellate) jurisdiction, will accord such deference as is appropriate according to the context and will fashion remedies which respect the differing roles of the public authority as primary decision maker and the court as supervisory judicial authority. All of this is embedded in the separation of powers and the rule of law itself.

The happenings in *AM*, were a little more sinister. There the Upper Tribunal was driven to say the following, at [27] – [28]:

> [27] This collection of cases has displayed yet another disturbing feature. In the wake of its judgments the Tribunal, following careful reflection, found itself obliged to take two relatively unprecedented steps. First, reflecting its concerns about the aggressive and disparaging nature of the Secretary of State's application for permission to appeal, it considered it necessary to respond by drawing attention to the unfortunate terms in which parts of the application were couched. Second, more disturbing, having received from the Applicants' representatives a Note to the Administrative Court Judge in *Citizens UK v SSHD* prepared by counsel for the Secretary of State, the Tribunal considered it necessary to write to the Government Legal Department in the terms of the letter and enclosure appended to this judgment. These documents speak for themselves.
>
> [28] The Tribunal received a response from the Government Legal Department to the aforementioned letter. Its terms were cursory and perfunctory. It neither acknowledged nor engaged with the Tribunal›s profound concerns about the Note to the Administrative Court. It contained no recognition that issues of professional misconduct could potentially arise. It was not written by the Treasury Solicitor. The response did accept (inevitably) that the Tribunal's letter would have to be brought to the attention of the Administrative Court Judge

[2] [2017] UKUT 372 (IAC)
[3] unreported, JR 6014/2017.

The document prepared by the Home Secretary's legal representatives which prompted the Upper Tribunal to take the steps noted in the above passages contained inaccurate and disparaging comments about the Tribunal's conduct of certain related cases. These included, for example, a demonstrably false claim that the Home Secretary's counsel had not been given sufficient time to make submissions; an equally inaccurate assertion that the Tribunal hearings had been determined without reference to the availability of the Home Secretary's counsel; an accusation of a lack of "care and detail" against the Tribunal in writing the judgments; an astonishing claim that the Tribunal had been hell bent on delivering its judgments in advance of the related hearing in the Administrative Court; and, in contravention of a long established Bar convention, the expression of counsel's personal opinions about matters such as the Tribunal President's motives, integrity and intellectual ability. And yes – in case you are left wondering, this all happened in the United Kingdom, just some months ago.

The UK Government did not seem to mind. After all, one recalls, it is tenaciously negotiating its retreat from an international organisation of States which, in its title deeds, subscribes unreservedly to the rule of law and the constitutional traditions of its Member States. Some commentators have questioned whether there is a subliminal message here. These core values of the EU are invariably repeated in the recitals to important measures of secondary EU legislation and shine brightly in the Lisbon Charter. While they also form part of the common law and the unwritten constitutional law of the United Kingdom, they are less visible, more opaque, less tangible. And, of course, this was the Government whose senior figures had led the infamous cavalry charge against the State's most senior judiciary when judges had had the audacity to conscientiously give full effect to their statutory oaths of office, in full harmony with the separation of powers which is the bedrock of the unwritten British constitution, in deciding a major Brexit – oriented legal challenge against the executive (the celebrated *Miller* case).

What was the cause of this Governmental hostility and antipathy to the Upper Tribunal? What had the most senior immigration and asylum court in the United Kingdom done to attract this? The answer is quintessentially simple: its judges too had conscientiously discharged their statutory judicial oaths of office. In a series of cases, the Upper Tribunal had confronted a variety of unprecedented and complex issues of EU law, human rights law and the common law and, in its jurisprudence which evolved rapidly, developed the law. Via the cases in question the Upper Tribunal decided the following:

(i) While the primacy of the Dublin Regulation as a measure of supreme EU law must be acknowledged, Article 8 ECHR is capable of taking precedence, exceptionally, in an especially compelling case.

(ii) Juridically, the Dublin Regulation belongs to the Article 8(2) ECHR proportionality balancing exercise, in which it must be weighed as a factor of considerable potency.

(iii) In cases where it is decided that Article 8 ECHR prevails, the judicial remedy of requiring the United Kingdom Government to admit the claimant to its territory by a mandatory order is available and will, presumptively, be the usual remedy.

(iv) Non-satisfaction of the family reunification criteria in Article 8 of the Dublin Regulation is <u>not</u> a pre-condition of having recourse to Article 17, the so-called "discretionary" clause.

(v) EU Member States are precluded from unilaterally and selectively disapplying certain provisions of the Dublin Regulation and its sister implementing Commission Regulations.

(vi) Successive "take charge" requests under the Dublin Regulation are not precluded and all must be processed in accordance with all applicable provisions of EU law, human rights law and the common law.

(vii) A decision in response to a "take charge" request generates on the part of the receiving state duties of reasonable enquiry, investigation and evidence gathering which are rooted in three separate legal streams: the Commission implementing Regulations, the procedural dimension of Article 8 ECHR and the common law.

I turn to consider the EU Withdrawal Bill. This measure, which has many detractors, has attracted the following main criticisms:

(a) Excessive resort to delegated powers conferred on Government Ministers which will bypass the scrutiny of the UK and devolved Parliaments. The mechanism of secondary legislation is viewed with suspicion and mistrust by many.

(b) The ability to extinguish overnight, via secondary legislation, fundamental rights created by EU law. This is to be contrasted with the explicit provision that the Human Rights Act 1998 and its consequential subordinate legislation cannot be amended or repelled by this ministerial mechanism. (Why include this statement of unassailable constitutional dogma? Pure cosmetics, the more cynical might say).

(c) The overnight loss of reciprocal justice arrangements and procedures and the associated failure to legislate for preservation, or substitution by equivalent arrangements. These measures are the European Arrest Warrant, the

mutual enforcement and recognition of judgments and the Dublin Regulation.

(d) The absence of clear guidance on how EU law is to be interpreted by the courts following "exit day". Clause 7 of the Bill, which bears the intriguing title "Dealing with deficiencies arising from withdrawal", has stimulated most of these concerns. In short, described by the Government as the "correcting power", this empowers a Government Minister to address the problem of a wholesale single transfer of EU law into UK domestic law overnight by allowing a two year period of reflection, following which subordinate legislation may be made to rectify any perceived failure of 'retained EU law' to "operate effectively", or to rectify "any other deficiency" therein. The official justification proffered for this unprecedented raft of delegated powers is a mixture of time constraints, the practicality of dealing with thousands of EU laws and the flexibility required in the negotiating process.

(e) The vague, hybrid status conferred on the jurisprudence of the CJEU from 'exit day'.

(f) The uncertainty and complexity which the categories of "retained general principles of EU law" and "retained case law" are likely to generate.

(g) It might be said that the one of the Bill's most striking features – and frailties - is the absence of any clearly discernible overarching legislative policy. The extensive EU law preservation provisions which it contains would seem to be the antithesis of what the legislation required by the referendum outcome should be providing.

The Bill also has some notable idiosyncrasies. It takes the form of most modern statutes (irritating to many), consisting of a small collection of primary provisions (25% of the whole), supplemented by a daunting number of dense Schedules (making up the balance of 75%). Intriguingly Clause 8, by the mechanism of establishing a discretionary ministerial power, contemplates the possibility that the Government may consciously act in breach of its obligations under instruments of international law. This clause, perhaps surprisingly, has attracted comparatively little publicity to date.

Schedule 5 contains a positively weird marriage of provisions regulating the duties and powers of the Queen's printer (on the one hand) and rules of evidence (on the other). The nexus between the two is a sheer mystery. Furthermore, this Schedule contains – in Part 2, paragraph 3(1) – the following enigmatic provision:

(1) Where it is necessary, for the purpose of interpreting retail EU law in legal proceedings, to decide a question as to –

(a) The meaning or effect in EU law of any of the EU Treaties or any other treaty relating to the EU, or

(b) The validity, meaning or effect in EU law of any EU instrument,

the question is to be treated for that purpose as a question of law.

Not exactly rocket science, one might observe: whither its rationale?

In addition, one might legitimately question why it was considered necessary to empower a Minister to make regulations relating to judicial notice (a long established doctrine of the common law) and (entirely unrelated) the admissibility in any legal proceedings of specified evidence of "a relevant matter" (strikingly undefined) of instruments or documents issued by or in the custody of an EU entity. In these provisions there seems to be a clearly ascertainable Government policy of restricting judicial power in areas traditionally belonging to the preserve of the judiciary.

Another striking effect of the Bill is that the rights established by the Citizens Directive could be modified and abrogated by Ministerial acts (via secondary legislation). The main rights created by this Directive are a right of EU citizens to reside unconditionally within another Member State for up to three months; to reside for longer periods subject to conditions; and to reside permanently following five years of continuous residence. The exercise of these proposed Ministerial powers could not only impact on these primary rights, but could also have serious negative repercussions for rights contingent thereon – such as working, pension rights and health services. One of the current forecasts (at this stage of the fragile, uncompleted Brexit negotiations) is that this abolition of rights will be justified by the Government on the basis that there is no reciprocal arrangement in place for UK citizens in other EU countries.

And what will become of the much-maligned Dublin Regulation? In 2015 the United Kingdom addressed 3,489 "take charge" requests to other EU Member States and received 1,173 such requests. Where requests of this nature are accepted (the majority of cases), the Member State concerned must process and determine the asylum claim of the individual. At this juncture, there is no agreement on the Dublin Regulation post-Brexit scenario. 'Justice', an all-party law reform and human rights organisation having as its central aim the strengthening of the justice system of the United Kingdom, has recently observed that if this *lacuna* endures countries such as France, Belgium and the Netherlands would have a positive incentive to facilitate the departure of asylum claimants from their territory to the United Kingdom, in the knowledge that such persons could not be returned to their territories. The further imponderable which this raises

is the future of the Le Touquet Treaty, a bilateral measure of international law executed in 2003, which otherwise restricts the flow of migrants from France to the United Kingdom via the implementation of frontier controls at sea ports.

Conclusion

The recent experience of the UK judiciary points to one of the distinctly possible consequences of the completion of the Brexit process being the erosion of the separation of powers – which is nothing if not founded on real and sincere mutual respect – by increasing encroachment on judicial independence and a consequential threat to the rule of law itself.

The current terms of the EU Withdrawal Bill, considered in tandem with the (apparent) current state of UK/EU withdrawal negotiations, give rise to a foreseeable future panorama embodying the following elements:

- A proliferation of legal challenges, by judicial review applications, to the exercise of Ministerial powers focussing in particular on issues of compatibility with protected human rights (Article 8 ECHR especially, via section 6 of the Human Rights Act) and common law protections, in particular the common law principle of equality of treatment and the constitutional law principles of legality and access to the court.
- A profusion of appeals against individual asylum/immigration decisions by the executive to UTIAC.
- Significant under-resourcing of the High Court and UTIAC, both of which, predictably, will require increased judicial resource, enlarged administrative support and specialised training to deal with a wholly new legal environment following upon almost 50 years co-existence of EU law, domestic legislation (both primary and secondary), domestic interpretation of EU law and the common law, in particular its constitutional law compartment.
- Legislation by Ministerial act, the erosion of the rule of law and an associated threat to judicial independence.

A significant weakening of the principle of legal certainty.

I add the observation that any erosion of legal certainty normally results in significantly increased litigation, with the consequential need for the allocation of resources – judicial, administrative, public funding *et al* – in a legal system which, nominally at least, continues to subscribe to the rule of law. An 'exit day' scenario of general chaos and disorder cannot be discounted at this remove. In the new legal landscape which will unfold, judges will, predictably, find themselves asking – if they have the luxury of time for reflection – whither the rule of law? In the memorable words of Judge LCJ, complacency is the enemy of the rule of law. To conclude, the dominant message is resoundingly clear: the need for a strong and independent judiciary will, foreseeably, be greater than ever.

[The Honourable Mr Justice Bernard McCloskey is Senior Queen's Bench and Judicial Review Judge at the Court of Judicature of Northern Ireland.]

Forum Competition in Religious Conversion Cases in Malaysia

Arun Kasi

Introduction

The Court of Appeal in Malaysia handed down on December 30, 2015 its decision in the much publicised conversion case of Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho, which was heard together with two other appeals before the same panel.[1]

All the three appeals arose from the decision of Lee Swee Seng J made in a judicial review application brought by Indira Gandhi, a school teacher, against six respondents including Pathmanathan, the Director of the Islamic Religious Affairs of Perak and Ministry of Education.

Background facts

Indira Gandhi was married to Pathmanathan in 1993. The couple had three children. In March 2009, the husband converted to Islam. At this time, the children were respectively aged 12 years, 11 years and 11 months. Immediately after his conversion, he procured from the Islamic Religious Affairs Department of Perak certificates showing that the three children had been converted into Islam purportedly under the Administration of the Religion of Islam (Perak) Enactment 2004, which is a State legislation ("the Perak Enactment").

Indira Gandhi had no knowledge of the purported conversion of the children. At the material time, the two elder children were with her and the youngest with Pathmanathan. It is apparent that, at the material time, the two elder children had no knowledge of their conversion, and the youngest aged 11 months could not have had any knowledge of his conversion.

Upon coming to know of the certificates of conversion, Indira Gandhi instituted an action before the High Court by way of judicial review to challenge the issuance of the certificates of conversion. In the judicial review application, she named as respondents Pathmanathan, the Director of Islamic Affairs of Perak, the Ministry of Education and three others. The High Court allowed the application and quashed the certificates. All the six respondents appealed to the Court of Appeal through a total of three appeals.

[1] The two other appeals were brought against *Indira Gandhi a/p Mutho* respectively by the *Director of the Islamic Religious Affairs of Perak & Ors* and by *Ministry of Education Malaysia & Anor*. The decision of the Court of Appeal was reversed by the Federal Court on 29th January 2018.

Decision of the Court of Appeal

The panel in the Court of Appeal comprised Balia Yusof bin Hj Wahi JCA, Badariah binti Sahamid JCA and Hamid Sultan bin Abu Backer JCA. The panel heard all the appeals together. The panel was divided in its decision. Balia Yusof JCA, with whom Badariah JCA concurred, found in favour of the Pathmanathan and other five appellants ("the appellants"). Hamid Sultan JCA found in favour of Indira Gandhi. The result was a decision by majority, with Hamid Sultan JCA dissenting, allowing all the three appeals with no order as to costs.

This article will analyse the case from the perspectives both of the majority decision and of the dissenting judgment. In undertaking this task, it will be helpful first to set out the judgment of Balia Yusof JCA and then of Hamid Sultan JCA, followed by the author's review of them.

Judgment of Balia Yusof JCA

Balia Yusof JCA first proposed to resolve the issue of jurisdiction of the High Court to entertain the judicial review application in question. His Lordship framed the question as whether the High Court had "jurisdiction to deal with the issue of conversion to the religion of Islam".

His Lordship adopted an approach which he called "subject matter approach". Taking this approach, he came to the following conclusion in two sentences:

> … whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court.
>
> The determination of the validity of the conversion of any person to the religion of Islam is strictly a religious issue and it falls within the exclusive jurisdiction of the Syariah Court.
>
> [Emphasis added]

In coming to these conclusions, His Lordship relied on the Federal Court decision in Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah (and Another Appeal),[2] and in particular the following passages:

> Article 121 of the Federal Constitution clearly provided that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Syariah Court.

[2] [2014] 3 AMR 309**;** [2014] 3 MLJ 757, FC.

…

Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Syariah Court.

It would be highly inappropriate for the civil court, which lacks jurisdiction pursuant to Article 121, to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue.

Therefore, the question of the plaintiff's conversion in 1983 fell within the exclusive jurisdiction of the Syariah Court.

[Emphasis added]

Balia Yusof JCA further relied on s 50(2)(b) (x) and (xi) of the Perak Enactment which confers the following subject matter jurisdiction, subject to the general limitation that the section applies only when all parties to the action are Muslims:

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death

[Emphasis added]

On that basis, His Lordship strenuously repeated his conclusion in the following words:

A plain reading of the aforesaid provisions puts it beyond doubt that the power to declare the status of a Muslim person is within the exclusive jurisdiction of the Syariah High Court.

It followed that on that ground alone, His Lordship would allow the appeal, i e disallow Indira Gandhi's challenge to the conversion certificates. However His Lordship felt impelled to proceed to deal with the merits of the challenge by Indira Gandhi, i e whether the conversion certificates were issued contrary to the law and thus a nullity ab initio.

In dealing with the merits of the challenge, His Lordship considered ss 96 and 106 and ss 100 and 101 of the Perak Enactment, which are reproduced seriatim below:

96. Requirement for conversion to the religion of Islam.

(1) The following requirements shall be complied with for a valid conversion of a person to the religion of Islam:

(a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;

(b) at the time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean "I bear witness that there is no God but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and

(c) the utterance must be made of the person's own free will.

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the two clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (1)(b).

106. Capacity to convert to the religion of Islam.

For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is of mind and—

(a) has attained the age of eighteen years; or

(b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

100. Registration of Muallafs.

(1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.

(2) If the Registrar is satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, the Registrar may register the applicant's conversion to the religion of Islam by entering in the Register of Muallafs the name of the applicant and other particulars as indicated in the Register of Muallafs.

(3) …

(4) …

(5) …

101. Certificate of Conversion to the Religion of Islam.

(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.

(2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

The merits of the challenge, as framed by Indira Gandhi, were two-fold. Firstly, s 96 was not complied with because the children did not utter the two clauses of the Affirmation of Faith. Secondly, s 106 was not satisfied because she did not give her consent for the purported conversion.

It was not disputed that the three children (the youngest of whom was only 11-months old) did not utter the Affirmation of Faith, and therefore the "requirements for conversion to the religion of Islam" set out in the s 96 were not complied with.

However the issue of whether s 106 was contravened was a disputed one. It was Indira Gandhi's argument that the consent of "parent or guardian" required in the s 106 meant the consent of the "parents" in this case. To the contrary, the appellants argued that it meant either parent.

Before addressing ss 96 and 106, Balia Yusof JCA directed his mind to s 101(2) of the Perak Enactment and relied on it to say that a certificate of conversion was not challengeable because pursuant to the section, the facts stated in the certificate of conversion are conclusive proof thereof. His Lordship pointed out that the conversion certificate stated "the fact of conversion" and "the fact that the persons named therein has been registered in the Registrar of Muallafs".

Having held that, by virtue of section 101(2), the conversion certificates is not open to challenge, he however also said that any challenge to the certificates must be made at the Syariah Court.

In dealing with the issue of conclusiveness of conversion certificates, Balia Yusof JCA also relied on the decision in *Saravanan a/l Thangatoray v Subashini a/p Rajasingam* (and Another Appeal)[3] made by the Court of Appeal by majority (which was affirmed by the Federal Court again by majority)[4].

In Saravanan's case, a husband converted to Islam and subsequently the wife petitioned for divorce under s 51(1) of the Law Reform (Marriage and Divorce) Act 1976. Under this section, when a spouse converts to Islam, the other spouse who has not so converted may petition for divorce. The section also imposes a limitation that a petition under this section may only be presented after expiry of three months from the date of the conversion.

In opposing the petition, the husband contended that the petition was filed within the period of three months after conversion, but the wife argued otherwise. The date of conversion was disputed. In resolving the issue as to the date of conversion, the Court of Appeal (by a majority) held that the date stated in the certificate of conversion was conclusive proof thereof, by virtue of s 112(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("the Selangor Enactment") which is in pari materia with s 101(2) of the Perak Enactment.

Relying on the above, Balia Yusof JCA in the instant appeal was of the view that the certificates of conversion were not open to challenge and said that "the High Court has to accept the facts stated [in the conversion certificates] and it is beyond the powers of the [High Court] to question the same".

Having so discounted the challenge at the outset, His Lordship however dwelled into the question of whether a single parent can give the requisite consent contemplated in s 106, and answered this question in the affirmative. In so answering, he relied on the remarks made by the Federal Court, by a majority, in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* (and 2 Other Appeals)[5] with regard to the meaning of "parent" appearing in Article 12(4) of the Federal Constitution. The remark made by the Federal Court in relation to Article 12(4) in that case was that "[e]ither husband or wife has the right to convert a child of the marriage to Islam".

Article 12 reads as follows:

12. Rights in respect of education

(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) …

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion …

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

His Lordship relied on Subashini's case to say that there was no violation in the case before him of Article 11(1) of the Federal Constitution, which reads as follows:

11. Freedom of religion

(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

The decision of His Lordship can now be conveniently summarised as follows:

1) The jurisdiction to decide the issue of validity of conversion is exclusively vested in the Syariah courts, and as such by virtue of Article 121(1A) of the Federal Constitution, the matter is outside the jurisdiction of the High Court.

[3] [2007] 2 AMR 540; [2007] 2 CLJ 451, CA.

[4] As reported in [2008] 1 AMR 561; [2008] 2 CLJ 1, FC.

[5] [2008] 1 AMR 561; [2008] 2 CLJ 1.

2) Section 101(2) of the Perak Enactment renders the certificates of conversion unchallengeable.

3) Any challenge to the certificates of conversion must be taken before the Syariah court.

4) The right of either parent to consent for conversion is entrenched in Article 12(4) of the Federal Constitution and it does not run contrary to Article 11 of the Federal Constitution.

Judgment of Hamid Sultan JCA

Hamid Sultan JCA, the dissenting judge in this appeal, started off by visiting the framework of the Perak Enactment, which contains 113 sections in 11 parts. His Lordship opined that not all the provisions in the Enactment are protected by Article 121(1A) of the Federal Constitution so as to be out of the realm of civil courts. His Lordship emphasised the meaning of Article 121(1A), which reads as follows:

> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. [Emphasis added]

His Lordship identified that Article 121(1A) is largely applicable to Part IV entitled "Syariah Jurisdiction", which contains 23 sections numbered from ss 44 to 66. His Lordship said that it is only to some of these sections that Article 121(1A) applies. His Lordship simplified this in two sentences by saying that:

(a) "the civil courts' judicial review powers in the administrative decision of the state or its agencies and/or its officers" are not excluded by Article 121(1A); and

(b) "[w]hat the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of its jurisdiction."

His Lordship framed the questions in the appeal as whether the matter of exercise of the powers of the Pendaftar Muallaf came within the jurisdiction of the Syariah court. If the answer is in the negative, then any decision made by the Pendaftar Muallaf is subject to the judicial review powers of the civil courts.

In determining the jurisdiction of the Syariah court, His Lordship visited s 50(3)(b) of the Perak Enactment which set out the civil jurisdiction of the Syariah High Court and read as follows:

(3) The Syariah High Court shall--

(a) in its criminal jurisdiction, …

(b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the action or proceedings relate to –

(i) betrothal, marriage, ruju', divorce, annulment of marriage (fasakh), nusyuz, or judicial separation (faraq) or any other matter relating to the relationship between husband and wife.

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, harta sepencarian;

(v) wills or gifts made while in a state of marad-al-maut;

(vi) gifts inter vivos; or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) other matters in respect of which jurisdiction is conferred by any written law.

In dealing with the subject matter jurisdiction of the Syariah court, His Lordship discounted in particular subsections (x) and (xi), which were relied on by Balia Yusof JCA, because (x) empowers the Syariah court to declare that a person is ***no longer*** a Muslim and (xi) to declare that a ***deceased*** person was Muslim or otherwise at the time of his death [Emphasis added]. The case has nothing to do with the matters covered in either of these subsections.

His Lordship seemed to have in His Lordship's forefront of mind the following:

i) None of the limbs of s 50(3)(b) of the Perak Enactment conferred the jurisdiction on the Syariah court to determine any question as to conversion.

ii) None of the limbs of s 50(3)(b) of the Perak Enactment

clothed the Syariah court with any jurisdiction to judicially review any administrative action including the one by the Registrar of Muallaf in issuing a certificate of conversion.

iii) To the contrary, the civil courts are conferred the jurisdiction to exercise judicial review over any administrative action (see paragraph 1 of the Schedule to the Courts of Judicature Act 1964).

iv) Accordingly, the subject matter jurisdiction to decide an issue of conversion or an application to judicially review the administrative action of the Registrar of Muallaf was vested in the civil courts.

His Lordship put his foot down and concluded that "[i]n the instant case, the Pendaftar Muallaf certificate of conversion has nothing to do with the jurisdiction of the Syariah Court and/or decision of the Syariah Court as asserted in Article 121 (1A) of the Federal Constitution". This will answer the pivotal issue in the case, i e. the jurisdictional issue. However, answering the question as to jurisdiction does not answer the appeal in its entirety, as the next issue, if the High Court had the requisite jurisdiction to judicially review the matter of issuance of the conversion certificates, is whether the High Court rightly quashed the conversion certificates by exercise of that jurisdiction.

Before moving on to the next issue, leaving aside the question of subject matter jurisdiction of the Syariah courts, His Lordship was mindful of the limitation to the in personam jurisdiction in s 50(3)(b), i e the Syariah court has jurisdiction only when all parties to the action are Muslims, which was not the case in the appeal before him.

Now moving on to the next issue, it was not disputed that the requirements for conversion set out in s 96 of the Perak Enactment were not complied with, i e none of the children uttered the Affirmation of Faith, particularly the youngest of them being only 11 months old and the other two being with the mother, Indira Gandhi. His Lordship was also of the view that the parental consent required in s 106 was not complied with, although this was a controversial issue in this appeal.

It followed that His Lordship answered the next issue (whether the conversion certificates should be quashed) in the affirmative and concluded that "the administration order of the Pendaftar Muallaf is nullity ab initio and ought to be set aside of right for non-compliance of ss 96 and 106 of the [Perak Enactment]". In so concluding, he reminded his audience that the principle enunciated in Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd[6] ("the Badiaddin principle") equally applies in judicial review matters.

[6] [1998] 1 AMR 909; [1998] 1 MLJ 393, FC.

Before concluding his judgment, Hamid Sultan JCA helpfully observed that Article 12(4) of the Federal Constitution "has nothing to do with conversion" and that "[i]t only permits a parent or guardian from deciding the religion of the child for purpose of worship of a religion other than his own" and thereby put an end to the controversial practice of applying Article 12 to conversion cases as was done in Subashini's case.

It is worth recalling that Article 12 is entitled "Rights in respect of education" and Article 12(3) and (4), which must be read together, provide as follows:

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

(Emphasis added.)

The issues

The issues for determination in the appeal were as follows:

i) Whether the High Court had the jurisdiction to hear the judicial review application which mounted a challenge to the conversion certificates;

ii) If the above question is answered in the affirmative, whether the conversion certificates were issued in non-compliance with the provisions of the Perak Enactment and were thus a nullity and liable to be quashed.

Each of the issues will in turn be addressed at length below. That will be followed by discussion of a few other matters arising in the course of the respective judgments of Balia Yusof JCA and Hamid Sultan JCA before a conclusion is attempted.

The first issue

At the outset, it must be noted that the "civil courts", meaning High Court, Court of Appeal and the Federal Court are the only courts constituted by the Federal Constitution (in Part IX entitled "Judiciary").

Prima facie, if a matter is within the jurisdiction of the Syariah courts, then the civil courts will have no jurisdiction over it. This is the result of Article 121(1A) of the Federal Constitution, which was added by the Constitution (Amendment) Act 1988.

Accordingly, the question is whether the issue brought by Indira Gandhi is one falling within the Syariah court jurisdiction. In order to rightly understand the jurisdiction of the Syariah courts, it is important to understand the legislative power of States to legislate in matters broadly relating to

Islamic law, because the jurisdiction of the Syariah courts is tied to the said legislative power. This is explained below.

Article 74(2) of the Federal Constitution provides that a State may legislate only in respect of matters falling within the State List (Second List) or Concurrent List (Third List) in the Ninth Schedule to the Federal Constitution. Article 74(2) reads as follows:

> …the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

Only paragraph 1 of the State List contains matters relating to Islamic law and Syariah courts. Accordingly, that is the only part that one has to look at to determine the boundaries both of the legislative power of States in matters connected to Islamic law and of the jurisdiction of Syariah courts.

Paragraph 1 is reproduced below (the splitting and alphabetical sub-numbering of the paragraph, which is not so done in the actual text, is added by the author for ease of reading):

Ninth Schedule – State List

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya:

    a) Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

    b) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

    c) Malay customs;

    d) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

    e) mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;

    f) the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;

    g) the control of propagating doctrines and beliefs among persons professing the religion of Islam;

    h) the determination of matters of Islamic law and doctrine and Malay custom.

(Emphasis and alphabetical sub-paragraphing added)

At this juncture, it must be pointed out that there are two schools of thought. One school looks at State legislation (such as the Perak Enactment) for the jurisdiction of Syariah courts. The other looks at the Federal Constitution, more particularly paragraph 1 of the Ninth Schedule thereto. With due respect, it is erroneous to look at State legislation for the jurisdiction of Syariah courts and the correct approach is to look at paragraph 1.

The subparagraph marked as (f) above provides that "Syariah courts … shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph" [Emphasis added]. This is the jurisdictional boundary of the Syariah courts, and their jurisdiction is neither more nor less than that.

In fact, even apart from subparagraph (f), if one starts looking at State legislation for the jurisdiction, an anomaly will be created. Different States may purportedly confer, in fact as they have done, jurisdiction of different scope on their Syariah courts. When a controversial matter comes before a civil court, it has to hypothetically decide whether the matter is within the jurisdiction of Syariah court. If every Syariah court has a different jurisdiction, then which Syariah court jurisdiction is the civil court to look at? This is what was said as the "anomaly" that will result if one looks at State legislations for Syariah court jurisdiction.

As far as civil matters are concerned, a plain reading of subparagraph (f) above tells that in order for the Syariah courts to gain jurisdiction over a cause, two aspects must be satisfied.

Firstly, that all parties to the cause profess the religion of Islam (which the author will call "personam jurisdiction"). Secondly, that the subject matter is one included in the paragraph, i e included in any of subparagraphs (a) to (h) above (which the author will call "subject matter" jurisdiction). Logically, subparagraph (f) would be excluded from the list of subject matter jurisdiction as it defines the jurisdiction of the Syariah courts rather than providing any subject matter which would fall within the jurisdiction.

At the outset, it must be observed that, in matters broadly of Islamic law, the power of States to legislate and the subject matter jurisdiction of the Syariah courts coincide. They are all in paragraph 1 and are the same.

Under paragraph 1, if a State has authority to legislate on a matter, then it is also necessarily within the subject matter jurisdiction of the Syariah courts. However, this does not mean that the Syariah court automatically gains its jurisdiction over any cause involving such a matter, as there is an additional condition to be fulfilled before it gains jurisdiction, viz that the parties to the cause must all profess the religion of Islam (the personam jurisdiction aspect).

The* personam *jurisdiction aspect

In the instant case, one of the parties (properly a party) to the cause was a non-Muslim and hence the Syariah court did not have any personam jurisdiction over the matter. This fact has already caught the attention of many, but what has not caught their attention is the fact that most of the respondents in the High Court (the appellants in the instant appeal) were also not "persons professing the religion of Islam" within paragraph 1.

Is the Ministry of Education one professing the religion of Islam? Is the office of the Director of the Islamic Religious Affairs of Perak one professing the religion of Islam? The answer is "no". In the context of paragraph 1, religion attaches to an individual and not to an institution. Ordinarily, in any judicial review application, as it was in the present case, the primary respondent will be an administrative authority. An administrative authority is not a person professing any religion in the context of paragraph 1. Hence, ordinarily a judicial review application will necessarily be outside the jurisdictional boundary of Syariah courts, i.e. the personam jurisdiction aspect will not ordinarily be satisfied in cases of judicial review applications.

Leaving that aside, to approach the matter most simply, Indira Gandhi cannot bring an action before the Syariah court. This suffices to say that the matter was outside the jurisdiction of the Syariah court.

It must be borne in mind that if she is not allowed go to the civil courts, she has no place within our land to go to for justice. That is not the law of our land and that is not what Article 121(1A) says. All that Article 121(1A) says is that that the civil courts shall have no jurisdiction if it is a cause over which the Syariah courts have jurisdiction, as stressed by Hamid Sultan JCA.

It must be added that it was not disputed that Indira Gandhi was properly a party to the action and had the requisite locus standi to bring the action. Any parent has certain responsibilities towards, and rights in matters affecting, his or her child. A reference to s 5 of the Guardianship Act 1961 may help those who will look for authority to support this proposition. Section 5 reads as follows:

5. Equality of parental rights

(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

As the personam jurisdiction aspect is not satisfied, it is not necessary to analyse whether the cause is within the subject matter jurisdiction of the Syariah courts. However purely for academic purposes, it will be analysed whether the matter falls within the subject matter jurisdiction of the Syariah courts.

Subject matter jurisdiction aspect

The subject matter in issue in the instant case is "conversion". Under what subparagraph of paragraph 1 does it fall? This is a difficult question to answer. Read at face, none of the subparagraphs covers conversion. It must be borne in mind that conversion is a matter that is transitional in nature, which the author will call a "transreligional" matter. Subparagraph (a) does not cover conversion because it only applies to persons already professing the religion of Islam. Equally subparagraph (c) will not help as Malay custom cannot have anything to do with conversion to the religion of Islam, which is a transreligional matter.

Possibly subparagraph (h) may be wide enough to cover conversion as it includes "determination of matters of Islamic law or doctrine" (emphasis supplied). It is not proposed to delve into this question further but it will be taken that subparagraph (h) covers conversion for the purposes of this article, although it is a subject that requires research in its own right.

Assuming that subparagraph (h) covers conversion, then it is a matter falling within the authority of a State to legislate and hence within the subject matter jurisdiction of the Syariah courts. This does not mean that in such cases, the cause is within the jurisdiction of the Syariah courts. This is because, apart from the fact that the respondent is usually an authority and thus not professing any religion within paragraph 1, when a purported convert challenges the conversion, the underlying dispute is whether he is a Muslim/a person professing the religion of Islam. If a court finds that the conversion is a nullity ab initio, then it follows that he has not been, at any time, a Muslim/a person professing the religion of Islam. In fact if

a Syariah court were to try a conversion case and at the end find that the purported conversion is a nullity ab initio, then it would only have wasted its time as it would have had no jurisdiction to hear the case in the first place and will have no jurisdiction to make any decision at the end.

A civil court can only decline jurisdiction if the cause is within the jurisdiction of Syariah courts. When a claimant raises an issue as to the validity of his own conversion ab initio before a civil court, how can the court decide that it does not have jurisdiction until it decides whether the conversion is valid or void ab initio? If it is void ab initio, then the claimant was not a Muslim/a person professing the religion of Islam, and hence would properly be before the civil court. Whenever an issue as to jurisdiction is raised before a civil court, it must positively decide the issue (in one way or another) and not decline to decide.

Analysis of Balia Yusof JCA's grounds

The author reached a conclusion that the matter brought by Indira Gandhi was outside the jurisdiction of Syariah courts, as was the conclusion reached by Hamid Sultan JCA. However Balia Yusof JCA arrived at a conclusion that is quite the opposite. For a proper understanding of the subject, the grounds of Balia Yusof JCA's judgment must be subjected to fine analysis.

In concluding that the matter was within the jurisdiction of the Syariah court and hence outside the jurisdiction of civil courts, Balia Yusof JCA substantially relied on the case of Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah (and Another Appeal)[7] decided by the Federal Court. In that case, the Federal Court dealt with an appeal arising from an application made by the respondent, Siti Hasnah Vangarama bt Abdullah. The respondent's application was in effect for a declaration that her conversion to Islam was null and void ab initio.

The respondent was born in August 1982. When she was one year and three months old, in November 1983, both her parents converted to the religion of Islam at Pahang. As part of the conversion process, the father made a statutory declaration saying that he had voluntarily embraced Islam together with his five children (which included the respondent). However, the Registrar of Muallaf at Pahang issued conversion certificates only to the parents and not to any of the children. By 1989, the whole family had moved from Pahang to Penang. In 1989, the family was in desperate straits. The respondent and two of her siblings were sent to Ramakrishna orphanage in Penang (a Hindu organisation). By end of 1989, the mother passed away.

Immediately thereafter the Director of the Islamic Religious Department of Penang ("the Director"), through its enforcement officers, removed the respondent (along with her two siblings) from the orphanage. The same day, the Director got the respondent, then aged seven years, to go through the process of conversion and to sign the certificate of conversion and had the certificate of conversion issued to the respondent by the relevant authority in Penang.

The Director placed the three children in an Islamic religious school. The respondent ran away and was subsequently returned to the Director. The Director then placed the respondent under the charge of an officer called Puan Sabariah. Then the respondent was transferred to a children's home in Penang, and then back to the Director and finally returned to the children's home in Penang by an order of the Juvenile Court. The respondent again ran away from the children's home.

Given these circumstances, the respondent applied to the High Court in essence for a declaration that the purported conversion made at Penang in 1989 was a nullity ab initio.

The Federal Court visited paragraph 1 of the Ninth Schedule to the Federal Constitution, in particular subparagraph (a), namely "Islamic law, personal and family law of persons professing the religion of Islam", and said in the peculiar context of the case that "whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court".

It was said that the factual context was peculiar because the Federal Court concluded that on the date of the alleged conversion in 1989, the respondent was already a Muslim, because the respondent was already converted to the religion of Islam in 1983 when her father made the statutory declaration covering not only himself but also his five children including the respondent. In the absence of any challenge to the 1983 conversion, the respondent was already a Muslim by 1989 and hence the question of validity of the conversion in 1989, if any, should only be decided by the Syariah court. In fact any decision as to validity of the 1989 conversion by whichever court would not affect the status of the respondent if she was already Muslim since 1983.

The Federal Court took particular note that the respondent did not challenge the 1983 conversion (see paragraph 29). The court also acknowledged that if the Syariah court were to decide that the 1983 conversion was not valid, then the civil courts would have the jurisdiction to decide the disputed conversion in 1989. The passage of the Federal Court must be repeated in verbatim below:

> [31] … We hold that the matter of conversion of the plaintiff together with her father in 1983 ought to be determined first by the Syariah Court, then only the issue of the alleged conversion in 1989 could appropriately be determined by

[7] [2014] 3 AMR 309; [2014] 3 MLJ 757, FC.

the civil court.

The resultant true understanding from the case is that any dispute as to conversion is a matter falling within the jurisdiction of civil courts. Balia Yusof JCA, with due respect, misunderstood Hj Raimi's case and applied it contrary to its true meaning. If Hj Raimi's case was correctly applied, the result would have been the opposite.

It is not within the scope of this article to analyse whether the Federal Court was correct in holding that there was a conversion in 1983. Considering such a question will involve questions as to the right of parents to convert their child without the consent of the child and whether such a conversion would be contrary to Article 11(1) of the Federal Constitution, which is only lightly discussed towards the end of this article.

For completeness, it must be said that not only the factual matrix was peculiar in Hj Raimi's case with two purported conversions, but the State enactment was equally so. The State enactment applicable to the 1983 conversion was the Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982 ("the Pahang Enactment"). Unlike the Perak Enactment, it did not require children to utter the Affirmation of Faith for conversion but merely required the consent of a parent who himself or herself converts. The relevant section was s 101 of the Pahang Enactment, which read as follows:

101. Minor converted to the Religion of Islam.

No person under the age of eighteen years shall be registered as having been converted to the Religion of Islam otherwise than with the approval of his parents or guardian:

Provided that if his mother, father or guardian is converted to the Religion of Islam …, he may be registered as having been converted to the Religion of Islam.

Having held as above, the Federal Court a little confusingly made a further remark in passing that "it would be highly inappropriate for the civil court to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. As such the civil court shall have no jurisdiction by reason of art 121(1A)". Does Article 121(1A) say that the civil court shall have no jurisdiction if it is a strictly a religious issue? No.

The question is not whether conversion is strictly a religious issue, but whether it falls within one of the subparagraphs within paragraph 1 of the Ninth Schedule to the Federal Constitution so that the matter will be within the subject matter jurisdiction of the Syariah courts. If so, the jurisdiction of the civil courts would be ousted by Article 121(1A) provided that all parties to the action profess the religion of Islam.

Even without reference to paragraph 1, why it is "inappropriate" for the civil courts to decide the validity of conversion? What is the difficulty that a civil court may have in checking whether the process of conversion was duly complied with, such as uttering the Affirmation of Faith by the purported convert, etc.? With due respect, it is neither inappropriate nor does it pose any difficulty for the civil courts to decide the issue at hand.

In making the above discussed remark, the Federal Court referred to its previous decision in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor.*[8] That was a case where the question was whether the applicant had converted out of Islam and not any dispute over his original conversion to Islam. What the applicant asked for in that case was "a declaration that the plaintiff, having renounced the religion of Islam and re-embraced the Sikh faith, is no longer a Muslim …".

The Federal Court in that case held that the issue of conversion out of Islam was a matter within the jurisdiction of the Syariah courts. These are called apostasy or murtad cases. In the absence of "conversion-out", the "conversion-in" stood and he was a Muslim/a person professing the religion of Islam amenable to the jurisdiction of the Syariah courts.

It is not within the ambit of this article to analyse whether "conversion-out" falls within paragraph 1 of the Ninth Schedule to the Federal Constitution, and accordingly it is not proposed to dwell on that subject save for saying that that jurisprudence does not affect the analysis in respect of "conversion-in" cases that is undertaken in this paper.

In the case of Soon Singh, the Federal Court referred to *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*,[9] another apostasy case decided by the Supreme Court. In that case, Dalip Kaur, the mother of a deceased convert son, applied to the court for a declaration that her deceased son was at the time of his death not a Muslim. The civil court assumed jurisdiction and tried the case at full length and found that the convert son had not converted out as a matter of fact. There was no dispute as to the original "conversion-in", which was voluntarily done by the son a few months prior to his death with a view to marrying a Muslim girl.

The son converted to the religion of Islam on June 1, 1991. The convert son went through an engagement ceremony with his girlfriend, a Muslim girl, on September 28, 1991. The wedding was scheduled to take place on November 25, 1991. In the meantime, the convert son fetched his fiancée from home to work in the night of October 2, 1991, and he was found dead the next day on October 3, 1991. The

[8] [1999] 2 AMR 1211; [1999] 1 MLJ 489, FC.
[9] [1992] 1 MLJ 1, SC.

plaintiff, the mother of the convert son, claimed that his son had converted out by a deed poll signed by him on September 9, 1991. The handwriting expert who compared 10 signatures of the deceased opined that the signature on the deed poll did not belong to the deceased. The judge having heard the factual matrix of the case found that the deceased did not sign the deed poll and did not convert out, and hence remained a Muslim at the time of this death.

On appeal, it was agreed by consensus of parties that the question would be referred to fatwa committee. The fatwa committee returned its finding that the deceased was a Muslim at the time of his death. This concluded the matter and the plaintiff was not then allowed to re-open the case.

It is repeated that it is not within the ambit of this article to analyse "conversion-out" cases.

Caution before applying precedents in conversion cases

This is an area of jurisprudence known for its controversy and a profusion of conflicting decisions. Any judge applying a precedent from this jurisprudence must make sure that:

1) The precedent is not per incuriam.

2) The precedent is not contrary to the law rendering it of no effect (see the Badiaddin principle)

3) Applying the precedent does not compromise the constitutional oath taken by the judge by virtue of which he or she holds office.

The third principle above is what Hamid Sultan JCA calls "constitutional oath jurisprudence" and has often been stressed at many instances including in the instant appeal. The foremost duty of the judge is to preserve, protect and defend the Constitution.

Judges of the civil courts, unlike those of the Syariah courts, take a constitutional oath under Article 124 of the Federal Constitution materially in the format in the Sixth Schedule to the Federal Constitution, the essence of which is that his or her foremost duty is to preserve, protect and defend the Federal Constitution. The Sixth Schedule reads as follows:

> I, ..., having been elected (or appointed) to the office of .....do solemnly swear (or affirm) that I will faithfully discharge the duties of that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.
>
> …
>
> [Emphasis added]

In this context, Article 121(1A) must be revisited. Under Article 121(1A), the civil courts have no jurisdiction if the matter before them is one falling within the jurisdiction of the Syariah courts. It must be remembered that Article 121(1A) was inserted by s 8(c) of the Constitution (Amendment) Act 1988, which itself has to be read subject to the Federal Constitution (see Article 4(1) of the Federal Constitution), i . in the present context, subject to the Sixth Schedule to the Federal Constitution. Accordingly, if a Syariah court's decision infringes a constitutionally protected right of a party, then the civil courts, as guardians of the constitution, may question the same.

This will have to be done by way of a judicial review application. It must be noted that the judicial review powers of the High Court are conferred by paragraph 1 of the Schedule to the Courts of Judicature Act 1964. It is a jurisdiction without any fetter. To avoid any doubt, by s 4 of the Act, the provisions of the Act are to prevail in the event of any inconsistency or conflict between itself and any other written law (except the Federal Constitution). In a judicial review, the court checks the process by which any authority or person in power reached its or his decision. Checking the "process of decision making" does not involve any Islamic law or any matter spelled out in paragraph 1 to the Ninth Schedule to the Federal Constitution.

It must be emphasised that on a plain reading of paragraph 1 of the Ninth Schedule to the Federal Constitution, it contains no jurisdiction similar to that contained in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (i e the judicial review jurisdiction). Accordingly, the judicial review jurisdiction of the civil courts is not in any way affected by Article 121(1A). Once this point is clear, the next question is whether the judicial review jurisdiction, as conferred by paragraph 1 of the Schedule to the Courts of Judicature Act 1964, includes a power to so judicially review a decision of the Syariah court. As there is absolutely no fetter to this jurisdiction conferred by paragraph 1 of the Schedule to the Courts of Judicature Act 1964, a decision made by a Syariah court is no exception to this jurisdiction.

Support for this proposition can in general be found in the judgment of Hamid Sultan JCA, when His Lordship said "[w] hat the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of its jurisdiction".

Conclusion

Having visited and discussed the plethora of laws, cases, principles and the grounds of Balia Yusof JCA in the instant appeal, with due respect, it is opined that any issue as to validity of conversion is a matter within the jurisdiction of the civil courts, whether the parties to the action are all Muslims/ persons professing the religion of Islam or not, which Hamid Sultan JCA said with simplicity as follows: "certificate of

conversion has nothing to do with the jurisdiction of the Syariah Court".

The second issue

The author having subscribed to the view that the first issue, namely whether the civil courts have jurisdiction to hear the challenge to conversion certificate, must be answered in the affirmative, now moves on to the second issue, namely, whether issuance of the conversion certificates contravened the provisions of the Perak Enactment and was thus a nullity and liable to be quashed?

It was contended by Indira Gandhi that ss 96 and 106 of the Perak Enactment were not complied with. It must be observed that the basic requirements for conversion are set out in s 96. In the case of minor children, there are some additional requirements laid down by s 106.

In the instant case, the s 96 issue must be considered first. If it is found that s 96 was not complied with, then it would not be necessary to decide if the s 106 additional requirements were satisfied.

Under s 96, the intending convert must utter the Affirmation of Faith. He or she must do so understanding what it means. He or she must do so out of his or her own free will. A person incapable of speech may, instead of uttering, convey the Affirmation of Faith in sign language.

In the instant case, the two elder children were with Indira Gandhi and it is not disputed that they did not utter the Affirmation of Faith. As far as the youngest child is concerned, he was aged 11 months at the time of the alleged conversion and was with the father. It cannot be, and is not, disputed that the youngest too did not utter the Affirmation of Faith. In fact the conversion was documentarily done by their father and the children had no, and could not have had any, knowledge of it. This is not disputed.

It follows that it is not doubted that s 96, and hence the statutory requirements for conversion, was not complied with. Hence, it is not necessary to consider the additional requirements of parental consent in the s 106.

Under s 100 of the Perak Enactment, the convert must apply to the Registrar of Muallaf for registration as a muallaf. If the Registrar is satisfied that the s 96 requirements have been complied with, he may register the conversion in the Register of Muallaf. Upon such registration, under s 101(1) of the Perak Enactment, the Registrar shall issue a certificate of conversion.

In the instant appeal, it is not disputed that the requirements for registration under s 100 were not satisfied. Accordingly, the Registrar acted in excess of authority and contravention of statute in registering the purported conversion and issuing the certificates of conversion, rendering the certificates thus issued a nullity ab initio (see Badiaddin principle).

Hamid Sultan JCA so held. However Balia Yusof JCA felt restrained from so holding by s 101(2) of the Perak Enactment, which provides that "a certificate of Conversion … shall be conclusive proof of the facts stated in the Certificate".

This calls for a detailed discussion of s 101(2) and its application to the facts of the instant case.

At the outset, what did the conversion certificate say? All it said was that the applicants named in the schedule therein (the father and the three children) were registered in the Register of Muallaf. It contained: the "original names" of the purported converts; their "Islamic names"; the "Islamic date" next to each of their Islamic names; and the file number next to each of the Islamic dates. The certificate was signed on behalf of the Registrar of the Islamic Religious Department of Perak. That was all. The certificate is reproduced in Hamid Sultan JCA's judgment.

The certificate did not say that the children uttered the Affirmation of Faith. The fact that needed to be established by Indira Gandhi, in order to nullify the certificate, was only that the requirements of s 96 were not satisfied, i e essentially that the three children did not utter the Affirmation of Faith, and nothing else. This fact was not even disputed. This alone, without more, renders the certificate a nullity ab initio.

Purely for academic purposes, hypothetically if the certificate had said (which the certificate did not do) that the purported converts named therein had uttered the Affirmation of Faith, can that fact be challenged? It is opined that even then it can be challenged for the following reasons.

Firstly, when an applicant challenges, by the process of judicial review, the very issuance of the certificate and proves the facts necessary to establish that the certificate is a nullity ab initio, the certificate is legally non-existing. In such case, it does not matter what is stated in the certificate which is legally non-existing, i e a nullity.

Secondly, in a judicial review application, if a registrar can hide behind what he himself self-servingly said in the certificate, it will in effect bar any judicial review of the process by which he issued the certificate. Judicial review jurisdiction, conferred on the civil courts (who are guardians of the constitution – in Hamid Sultan JCA's language, the entrusted supreme policeman of the constitution) by the Courts of Judicature Act 1964 (federal legislation) cannot be ousted by s 101(2) of the Perak Enactment (state legislation). Reference is made to Article 75 of the Federal Constitution which provides that in case of inconsistency between a State law and a Federal law, the latter shall prevail.

Thirdly, s 101(2) is inconsistent with s 5 of the Evidence Act 1950 (Federal legislation) and thus cannot have any effect overriding s 5. It must be explained why it is said that s 101(2) is inconsistent with s 5 of the Evidence Act 1950.

At the outset, the long title to the Evidence Act 1950 reads "An Act to define the law of evidence". Ss 2 and 3 of the Act read together deliver the effect that the Act applies to all judicial proceedings before any civil court. Having visited them at the outset, now ss 4 and 5 of the Act must be considered, which are reproduced below:

4. Presumption

(1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.

(3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it [Emphasis added].

5. Evidence may be given of facts in issue and relevant facts

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation--This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

Section 5 confers the right on a litigant to tender evidence of any fact in issue, subject only to a caveat that a litigant may be debarred from giving such evidence only if a law relating to "civil procedure" disentitles him from so doing. Accordingly, s 101(2) cannot take away that right, unless s 101(2) is a law relating to civil procedure. Section 101, entitled "Conversion Certificate of Conversion to the Religion of Islam" has nothing to do with civil procedure.

Another exception to the right conferred under s 5 is found in s 4(3) of the Act. Under s 4(3), when a litigant proves one fact and the Act (the Evidence Act 1950) declares that fact to be conclusive proof of another fact, the other party is disallowed from disproving the latter fact which has been deemed to be proved. The Act has so declared proof of one fact to be the conclusive proof of another fact only in two instances, respectively in s 41 in respect of certain judgments and in s 111 in respect of legitimacy of children born during marriage when the couple was in access to each other. Section 101(2) of the Perak Enactment is out of place to gain any exception to the right conferred under s 5 of the Evidence Act.

With due respect, Balia Yusof JCA failed to make due observation at the outset of the facts stated in the certificate in holding that s 101(2) rendered the conversion or the certificate unchallengeable. Had His Lordship made the due observations made hereinabove, the result might have been different.

Before concluding the discussion on s 101(2), it is pertinent to consider the majority decision of the Court of Appeal in *Saravanan a/l Thangathoray v Subashini a/p Rajasingam (and Another Appeal)*,[10] which was relied on by Balia Yusof JCA in holding as His Lordship did. In that case, in less than three months after the date of conversion of a husband as stated in the conversion certificate, the wife petitioned for divorce under s 51(1) of the Law Reform (Marriage and Divorce) Act 1976, which reads as follows:

51. Dissolution on ground of conversion to Islam

(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.

(Emphasis added.)

The wife having so applied less than three months after the date of conversion stated in the certificate challenged the "date of conversion" therein. The court, by a majority, through application of s 112(2) of the Selangor Enactment, which is in pari materia with s 101(2) of the Perak Enactment, held that the "date of conversion" stated in the certificate was conclusive proof of the "date" and accordingly the wife's petition was premature.

In that case, the certificate of conversion was not challenged, but only the date stated therein. It would have been different if the certificate itself was challenged with the result that the court cannot rely on anything stated in the certificate until the issue of validity of the certificate is first decided. With due respect, that case had no application or relevance to the case of Indira Gandhi, where the conversion itself was challenged from the root, and Balia Yusof JCA, again with due respect, misdirected himself in applying that case to the case before His Lordship.

In conclusion, it is opined that s 101(2) cannot be any

[10] [2007] 2 AMR 540; [2007] 2 CLJ 451, CA.

bar to Indira Gandhi proving the facts and the process by which the certificate was issued. In the absence of any hindrance by s 101(2), it cannot be doubted that there was absolute non-compliance with s 96, the statutory requirements for conversion, rendering the purported conversion and the certificate a nullity ab initio and liable to be quashed by the court, as was done by Lee Swee Seng J in the High Court and upheld by Hamid Sultan JCA, the dissenting judge in the Court of Appeal.

By now, both issues due for determination have been considered at length and the reasoned views and opinion have been expressed, namely that the matter carried by Indira Gandhi was within the jurisdiction of the civil courts and that the conversion certificates were liable to be quashed. However, that would not suffice to complete this article; Articles 11 and 12 of the Federal Constitution must be discussed, as Balia Yusof JCA also relied on Article 12 and discussed Article 11 in the course of arriving at the conclusion that he did.

Articles 11 and 12 of the Federal Constitution

Balia Yusof JCA referred to Article 12(4) of the Federal Constitution and to the Federal Court decision in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray (and 2 Other Appeals)*[11] and made a remark in passing that Article 12(4) allows either parent to convert his or her child to the religion of Islam.

As rightly pointed out by Hamid Sultan JCA, Article 12(4) is housed under the Article entitled "Rights in respect of education". This provision has nothing to do with conversion, and it is sad that some decisions have treated the "education" related provision as a "conversion" provision. The difference is not that of an apple and orange but a marble and pumpkin as Hamid Sultan JCA well said. It is hoped that the following distinct passage of Hamid Sultan JCA in the instant appeal will put an end to the injustice of misapplying Article 12(4) to conversion cases:

> … Article 12(3) and 12(4) of the Federal Constitution ha[ve] nothing to do with conversion. It only permits a parent or guardian from deciding the religion of the child for purpose of worship of a religion … Selecting the religion does not mean the child has been converted.

Balia Yusof JCA was of the view that the right of either parent to convert his or her child without the consent of his or her spouse was not contrary to Article 11 of the Federal Constitution. With due respect, the view cannot be justified. Article 11 reads as follows:

> **11. Freedom of religion**
>
> (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

Every person—what does this mean? It is opined that "person" includes children and there is nothing in the Constitution to discriminate against children nor to disregard the fact that children are humans with feelings and legitimate desires too. Although children are subject to parental control, it should not be taken to mean they are slaves (or something near to it) of parents.

By virtue of Article 11, a child who is of sound mind has the right to practise his religion. It is the author's view that "his" religion here means the religion that he was born under or the religion that he has already been practising. If either parent (or even both parents) can force a child, say aged 17 and thus still a minor, to any other religion, that would be a step nearer to treating the child as a slave (or something near to it) of either parent (or both parents) as opposed to wards of parents or guardians.

This principle is well contained in the Perak Enactment, as in most other State enactments; it requires not merely the parental consent in cases of conversion of children, but also requires the child himself or herself to voluntarily embrace the religion of Islam.

Now returning to the other issue of one parent dealing with the religion of the child without the consent of the other parent, a few words must be said. If one were to interpret any provision in the law as allowing either parent to decide the religion of their child, that will only create a battle of religions, as the father may select one and the mother another. Accordingly, any law allowing "a parent" to deal with the religion of a child must be construed as meaning "the parents" if they are both alive. Parliament must take due steps to amend the law for sake of clarity if necessary.

Returning to the case at hand, Article 12(4) has no application to it precisely for the reasons said by Hamid Sultan JCA and Article 11 would be infringed if a child (a person) is disallowed from practising "his" religion at the unilateral decision of his parent (or parents).

Accordingly, it is opined that the act of the Registrar in issuing the certificates in the instant case, among other matters already discussed at length, also evidences an infringement of Article 11.

Overall Conclusion

Having reviewed the instant case at length, it is time to draw an overall conclusion.

With due respect, the challenge to a religious conversion is a matter within the jurisdiction of the civil courts at least for the

[11] [2008] 1 AMR 561;[2008] 2 MLJ 147, FC.

reason that Indira Gandhi, a legitimate party in the case, was a non-Muslim. The purported conversion of her children was a nullity ab initio at least for non-compliance with s 96 of the Perak Enactment, which is an undisputed fact. Section 101(2) does not help the appellants in this case in any way at least because the certificate nowhere said that the children uttered the Affirmation of Faith, which was the central fact in issue in this case.

The decision of the Court of Appeal was duly reversed by the Federal Court on 29 January 2018 essentially on the following grounds:

1) that Article 121(1A) of the Federal Constitution did not oust the judicial review power of the High Court, which is an essential feature of the basic structure of the Federal Constitution, even when it is a matter relating to administration of Muslim law;

2) that the conversion certificates issued by the Registrar of Muallafs were a nullity for non-compliance with ss 96 and 106 of the Perak Enactment and s 101(2) of the Enactment did not bar judicial review when the administrative authority had acted beyond the four corners of the Enactment and in any event the certificate did not state the process of the conversion;

3) that the Syariah court had no jurisdiction over the matter as the appellant, Indira Ghandi, was a non-Muslim and therefore only the High Court had the jurisdiction; and

4) that convesion of child requires the consent of both parents (if alive) by virtue of Articles 12(4), 160(1) and 160B of the Federal Constitution.

The decision of the Federal Court reserving the Court of Appeal decision will be widely welcomed.

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LIVINGSTONE, ZAMBIA, TO BE THE VENUE OF THE NEXT COMMONWEALTH LAW CONFERENCE

The Commonwealth Lawyers Association (CLA) is pleased to announce that the winner of the 21st Commonwealth Law Conference is the Law Association of Zambia. The Commonwealth Law Conference is a wholly owned subsidiary of the Commonwealth Lawyers Association and is held every two years, usually in a member state of the Commonwealth. The conference brings together 1,000+ international lawyers and judiciary with specialisations ranging from Corporate to Human Rights in a programme running over four days. This well-known international conference provides an opportunity for lawyers from around the globe to meet and discuss topics of mutual interest and hear from expert speakers on a variety of legal topics. CLA President Mr R. Santhanakrishnan said "we are delighted to be bringing the conference to Zambia in conjunction with the Law Association of Zambia and I am confident this will be an extremely popular destination for our membership. I look forward to welcoming you all to the conference in 2019."

The Law Association of Zambia has a long history with CLA. The Law Association of Zambia was involved in the transformation of the Commonwealth Legal Bureau to the Commonwealth Lawyers Association in 1986. In 1990, Dr Rodger Chongwe SC became the first Zambian President of the CLA. Delegates to the 2017 conference will recall the keynote address of Zambia's Vice President, Mrs Inonge Wina. The LAZ President, Ms Linda Kasonde said "The Law Association of Zambia is delighted to have been selected for the opportunity to host this prestigious conference. Delegates to the conference can expect warm Zambian hospitality, a magnificent setting and a truly world class conference!"

The conference will be held in Livingstone, Zambia, on the doorstep of the magnificent Victoria Falls, from 14-18 April, 2019.

Please note the conference website address: *www.commonwealthlawconference.org* The website will carry all the latest information as it becomes available. To ensure that you are up to date, it is recommended that you sign up for regular updates on the conference website. The conference is expected to attract a large delegation and early registration for the conference is recommended.

Armed Drones and International Law

Human Rights Institute, International Bar Association

Introduction

Since the turn of the century, a new type of warfare has developed. The standard-bearer is arguably the remotely piloted aircraft or 'drone', a technological innovation that has proliferated at a rapid rate and appears to be becoming commonplace in the arsenals of states throughout the globe. The remote nature of drones means that they can be lighter, smaller and cheaper than conventional aircraft, and can overfly areas otherwise too risky, which is key to their success.[1] Originally utilised for surveillance purposes, the use of drones has evolved over time to enable the swift delivery of lethal force. Carrying laser-guided munitions, drones ostensibly enable precision strikes while removing humans from the battlefield.[2]

Drones have a long history, having been developed during the First World War (1914–1918). They have since been present in numerous conflicts, in Korea (1950–1953), Vietnam (1955–1975) and the Arab/Israeli conflict of 1973, as well as in the many armed conflicts that marked the break-up of the former Yugoslavia. Nonetheless, though some of these drones were used lethally as guided bombs, most were solely for reconnaissance. It was not until the conflict in Kosovo that a drone (the 'Predator') was equipped with missiles that could be fired remotely,[3] and it was not until the war in Afghanistan that such a missile was actually fired.[4] The United States is the world's most prolific user of armed drones and its programme is rapidly expanding: in 2000, it comprised fewer than 50 drones[5] but, by 2012, this figure had risen to over 19,000,[6] and is set to rise further as the Pentagon seeks to increase its daily drone flights by 50 per cent.[7] Many US drones are piloted by the Air Force but, controversially, a large number are flown by the Central Intelligence Agency (CIA), which regularly launches attacks, particularly in Pakistan, Somalia and Yemen.[8] The first of these strikes took place in Yemen in 2002, in which a laser-guided missile was launched from a drone, destroying a car and causing the death of six people, including a suspected al-Qaeda lieutenant.[9] To add to the controversy of this particular strike, it has been argued that there was no armed conflict in Yemen at the time.[10]

Since this first strike in Yemen, drones have been used consistently, in a similar manner. In 2010, Harold Koh (then Legal Adviser at the US Department of State) provided justifications for the targeting of al-Qaeda officials in Pakistan by drone strikes. Under US domestic law, drone strikes are carried out pursuant to the September 2001 Authorization for Use of Military Force, under which 'all necessary and appropriate' measures may be taken against the organisation responsible for the attacks of September 2001.[11] In terms of international law, Koh referred to the US's 'inherent right' to self-defence in response to the attacks of 11 September 2001.[12] Additionally, other US officials have referred to the consent of the states in which the US uses armed drones.[13]

1 J Garamone, 'Unmanned Aerial Vehicles Proving Their Worth Over Afghanistan' (16 April 2002) *American Forces Press Service*, http://archive. defense.gov/news/newsarticle.aspx?id=44165 accessed 20 June 2017

2 S Davies, 'Drone warfare and the Geneva Convention' (15 August 2011) *Engineering and Technology*, https://eandt.theiet.org/content/articles/2011/08/drone-warfare-and-the-geneva-convention accessed 20 June 2017.

3 M Benjamin, *Drone Warfare; Killing by Remote Control* (Verso 2013) 15.

4 K Somerville, 'US drones take combat role' (5 November 2002) *BBC*, http://news.bbc.co.uk/1/hi/world/2404425.stm accessed 20 June 2017.

5 See n 3 above, 17

6 M Hastings, 'The Rise of Killer Drones: How America Goes to War in Secret' (16 April 2012) *Rolling Stone*, *www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416* accessed 20 June 2017.

7 D Alexander and S Heavey, 'Pentagon eyes sharp increase in drone flights by 2019: official' (17 August 2015) *Reuters*, www.reuters.com/ article/us-usa-security-drones-idUSKCN0QM1FR20150817 accessed 20 June 2017.

8 E Schmitt, 'Threats And Responses: The Battlefield; U.S. Would Use Drones To Attack Iraqi Targets' *New York Times* (Washington, 5 November 2002), *www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-drones-attack-iraqi-targets.html?scp=1&sq=drones&st=nyt* accessed 20 June 2017.

9 ME O'Connell, 'Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009' (2010) Notre Dame Legal Studies Paper No 09-43, *http://ssrn.com/abstract=1501144, 3*, accessed 20 June 2017.

10 KJ Heller and JC Dehn, 'Debate: Targeted Killing: The Case of Anwar Al-Aulaqi' (2011) 159 *University of Pennsylvania Law Review PENNumbra*, 175, 183.

11 H Koh, 'The Obama Administration and International Law' (March 2010), speech at the Annual Meeting of the American Society of International Law (stating that the US 'may use force consistent with its inherent right to self-defence under international law'), *www.state.gov/documents/organization/179305.pdf* accessed 20 June 2017.

12 *Ibid*.

13 E Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (5 March 2012) *United States Department of Justice*, *www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law* accessed 20 June 2017. See also J Brennan (White House Counterterrorism Advisor), 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (April 2012) prepared remarks at the Woodrow Wilson International Center for Scholars, *www.wilsoncenter.org/event/*

Currently, more than 50 countries possess surveillance drones, and several are developing armed versions.[14] Many of these countries claim to have created their own armed drones, and at least seven states (Iran, Iraq, Israel, Nigeria, Pakistan, the United Kingdom and the US) have utilised these armed capabilities.[15] Additionally, there is some suggestion that drone technology is now being used by non-state armed groups.[16] Moreover, while the US refuses to market drone technology, China, Israel and other states appear to intend to take advantage of the gap in the market and are likely to commercialise this technology as soon as it is developed.[17]

International law and the *resort* to drones

Article 2(4) of the United Nations Charter prohibits 'the threat or use of force against the territorial integrity' of another state. This self-evidently includes drone strikes, the use of which by one state on the territory of another would be a prima facie breach of Article 2(4). Nevertheless, there are scenarios in which uses of force can be lawfully carried out: with the consent of the territorial state (eg, if a non-state armed group is operating in or from its territory); in self-defence (on either an individual or collective basis); or by authorisation of the UN Security Council (so-called Chapter VII actions).[18] This framework governing when states may resort to the use of force is known as the *jus ad bellum* and it will now be considered how this relates to the use of drones.

Consent

Consent has been cited by the US in support of the lawfulness of its drone programme against 'al- Qaeda, the Taliban and associated forces' on several occasions[19] and, consequently, may provide for the legitimation of drone strikes in Afghanistan, Iraq, Pakistan, Somalia and Yemen. It is, therefore, a key area of investigation, though little scholarly examination has been undertaken.[20]

Article 20 of the International Law Commission Draft Articles on State Responsibility and the accompanying commentary provides a framework for understanding consent in international law. The article refers to 'valid' consent and the commentary asserts that validity requires consent to be 'freely given and clearly established'[21] by an official of a 'legitimate' government[22] who is authorised to do so.[23] In addition to this, Article 20 refers to the 'limits' of consent, demonstrating that, first, intervening states may not stray outside the bounds of the remit provided by consent;[24] and second, that consent is unable to preclude the wrongfulness of acts in breach of international laws other than *jus ad bellum*, most obviously those of international humanitarian law (IHL) and international human rights law (IHRL). Both the consenting and intervening states have a duty to ensure that uses of force by consent do not breach other areas of international law.[25]

Legitimate government

The determination of legitimacy for consent is based primarily on a government's *de jure* control of a state, even if it has lost physical control, when there is 'no new single regime in control to take its place'.[26] This is particularly so when the government remains in control of the capital city.[27]

With regard to drone strikes that have been carried out, there is no reason to conclude that this requirement would impact on the ability of the Pakistan government to consent to strikes upon its territory, as the government maintains both physical and legal control over the country. There is nothing within the doctrine of consent that requires governmental control over

the-efficacy-and-ethics-us-counterterrorism-strategy accessed 20 June 2017.

14 W Wan and P Finn, 'Global race on to match U.S. drone capabilities' (4 July 2011) *The Washington Post*, *www.washingtonpost.com/world/ national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html* accessed 20 June 2017.

15 'World of Drones', *New America: International Security Program*, *www.newamerica.org/in-depth/world-of-drones* accessed 20 June 2017.

16 C Alexander and G Ackerman, 'Hamas Bragging Rights Grow With Drones Use Against Israel' (16 July 2014) *Bloomberg*, *www.bloomberg.com/ news/articles/2014-07-16/hamas-bragging-rights-grow-with-drones-use-against-israel* accessed 25 March 2017.

17 *Ibid*.

18 In addition, there is ongoing debate as to whether force may be resorted to as an ultimate means to avert an impending humanitarian catastrophe, though this remains highly contentious and does not provide a justification akin to those others within the framework governing the use of force.

19 US Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of al-Qa'ida or An Associated Force' (2011) 1, *http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf* accessed 20 June 2017; see also n 13 above.

20 For an in-depth consideration of consent and the use of armed drones, see M Byrne, 'Consent and the use of force: an examination of "intervention by invitation" as a basis for US drone strikes in Pakistan, Somalia and Yemen' (2016) 3(1) *Journal on the Use of Force and International Law*, 97.

21 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), General Assembly Official Records 56th session, supplement no 10 (A/56/10), Art 20 [6].

22 *Ibid*, Art 20 [5].

23 *Ibid*, Art 20 [4] and [6].

24 A point reflected in General Assembly Resolution 3314 (XXIX) Definition of Aggression (1974), Art 3(e) and its reference to actions in 'contravention of the conditions provided for in the agreement'.

25 AS Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 *Harvard International Law Journal*, 1, 35.

26 L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56(1) *British Yearbook of International Law*, 189, 199.

27 D Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 Duke *Journal of Comparative & International Law*, 209, 220.

the entirety of its territory, so the fact that the tribal areas (in which the majority of drone strikes have occurred) are semi-autonomous will have no impact on the government's ability to consent.

The legitimacy question is important when considering US drone strikes in Yemen and Somalia, as both administrations have tenuous control over their respective territories. In Yemen, the Houthi rebellion has forced the Hadi regime out of the capital (and indeed, for a time, out of the country)[28] suggesting a lack of legitimacy. Nonetheless, state practice supports the validity of consent given by regimes in such a situation.[29] Furthermore, many states have affirmed the validity of Yemeni consent to air strikes against Houthi rebels (as distinct to drone strikes against al-Qaeda in the Arabian Peninsula)[30] and the Hadi regime's continued legitimacy has been recognised by the Security Council.[31]

This suggests *de jure* though highly tenuous control, which satisfies the legitimacy requirement.

With regard to Somalia, the Somali federal government has been widely recognised[32] and there is no single alternative regime. Thus, despite it lacking control outside of Mogadishu, the Somali federal government has *de jure* control and is the legitimate government, enabling it to consent to drone strikes.

Similar conclusions are inevitable with regard to Iraq and Afghanistan, as in both cases the governments maintain *de jure* legitimacy despite at times being faced with significant losses of territorial control to armed groups such as the Islamic State of Iraq and Syria (ISIS) and the Taliban respectively.

Consent given by an authorised official

The International Law Commission commentary to the Draft Articles on State Responsibility states that '[w]ho has authority to consent to a departure from a particular rule may depend on the rule… Different officials or agencies may have authority in different contexts'.[33] Due to the significance of consent to intervention, the approach of the Vienna Convention on the Law of Treaties is informative, Article 7(2) of which holds that heads of state, heads of government and ministers for foreign affairs represent states without the need to produce full powers, meaning that such officials are able to speak on behalf of their state per se without needing to be specifically authorised to do so. Thus, according to these authorities, consent to intervention must come from the highest ranks of government.

In Pakistan, the president is the symbolic head of state[34] and *de jure* power lies with the prime minister,[35] thus it is the prime minister who is principally empowered to consent to drone strikes. In addition, the chief of army staff, appointed by the president on the advice of the prime minister,[36] may be able to consent, though it has been suggested that, when in disagreement, the opinion of higher officials is determinative.[37] Prime Minister Yousuf Raza Gilani gave secret consent in 2008, though publicly opposed drone strikes.[38] This consent was operative until 2013 when it was rescinded by Prime Minister Nawaz Sharif[39] and the Pakistani foreign ministry.[40] Therefore, in the case of Pakistan, consent has been given by an

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[28] Agence France-Presse, 'Yemen president "in safety" as rebels advance' (25 March 2015) *The Guardian*, *www.theguardian.com/world/2015/ mar/25/anti-government-militia-captures-airbase-yemen accessed 20 June 2017.*

[29] For instance, Mali consented to French intervention in 2013 despite having lost control of the north of the country. See also, consent from the Iraqi government to intervention against ISIS, despite struggling for its existence at the time. Though differing from the situation in Yemen, the practice is nonetheless informative. See B Nußberger, 'Military Strikes in Yemen in 2015—Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"' (forthcoming) *Journal on the Use of Force and International Law*.

[30] Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217, 3. Despite referring to Art 51, this letter demonstrates the continued legitimacy of the Hadi regime in the eyes of the international community.

[31] Security Council Resolution 2216 (2015), UN Doc S/RES/2216. Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217, 3. Despite referring to Art 51, this letter demonstrates the continued legitimacy of the Hadi regime in the eyes of the international community.

[32] M Bryden, 'Somalia Redux? Assessing the New Somali Federal Government' (August 2013) *Report of the CSIS Africa Program*, 23. In 2015, the US announced the establishment of a diplomatic mission in Mogadishu: see J Kerry, 'Remarks in Mogadishu, Somalia' (5 May 2015) *US Department of State*, *https://2009-2017.state.gov/secretary/remarks/2015/05/241906.htm* accessed 20 June 2017.

[33] See n 21 above, Art 20 [6].

[34] Constitution of the Islamic Republic of Pakistan (2010), Arts 41(1) and 48(1). 36

[35] *Ibid*, Arts 48(1) and 91(3).

[36] *Ibid*, Art 243(1)(b).

[37] C Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (13 September 2013) UN General Assembly, UN Doc A/68/382 [82].

[38] Wikileaks, 'Kayani Wanted More Drone Strikes in Pakistan' (21 February 2013), *https://wikileaks.org/gifiles/docs/30/3049919_-os-us-pakistan-mil-ct-wikileaks-kayani-wanted-more-drone.html* accessed 20 June 2017.

[39] G Miller and B Woodward, 'Secret Memos Reveal Explicit Nature of US, Pakistan Agreement on Drones' (24 October 2013) *Washington Post*, *www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html?utm_term=.e14a589c8ae9* accessed 20 June 2017.

[40] J Boone and S Kirchgaessner, 'Pakistan uses hostage killings to underline risk of US drone strikes' (24 April 2015) *The Guardian*, *www.theguardian.com/world/2015/apr/24/pakistan-us-hostage-killings-drone-strikes-weinstein-lo-porto* accessed 20 June 2017.

authorised official, at least in the period up to 2013.

In the case of Yemen, President Hadi reportedly consents to each strike[41] and, in addition, it has been suggested that general consent has also been given.[42] This is ongoing and, as long as the administration remains the legitimate one, there is no reason to doubt the validity of this consent in terms of international law.

With regard to Somalia, in 2007, President Mohamed consented to US airstrikes against suspected terrorists.[43] Drone strikes have been consented to specifically, Defence Minister Abdihakim Haji Mohamud Fiqi having stated that these were 'welcome[d] against al-Shabaab'.[44] In 2013, President Mohamud asserted his support for US drone strikes against foreign fighters.[45] As with Yemen, as long as the Somali federal government is recognised as legitimate, its consent is valid under international law.

Consent by Iraq to general military actions, including drone strikes, has been evidenced in letters to the UN Security Council from Ibrahim al-Ushayqir al-Ja'fari, Minister for Foreign Affairs,[46] demonstrating that consent has been given by an authorised official. In Afghanistan, general military actions, and thus drone strikes, have been consented to by a 2012 strategic partnership agreement signed by President Hamid Karzai.[47]

Consent has not been given for drone strikes in Syria or Libya. Other justifications under *jus ad bellum* are therefore necessary.

Consent and obligations under international law

States that consent to intervention remain bound by their obligations under IHL and IHRL, as do those that carry out uses of force. It is widely accepted that a territorial state 'may only grant consent to operations that it could itself legally conduct' and so a territorial state 'cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority'.[48] Additionally, the consenting state must take precautions to ensure that the aiding state is respecting the applicable law. Therefore, though consent for the use of drones has been granted by numerous states, this only has implications for the lawfulness of the initial resort to their use, not to the manner in which they are used, which remains governed by IHL and IHRL.

Conclusion

Consent is a key strand governing the lawfulness of many drone strikes under *jus ad bellum*, where legitimacy for their use by other means (ie, self-defence) is limited. This is particularly so with covert strikes carried out by the US in Pakistan, Somalia and Yemen. In Pakistan, where the government has a strong and legitimate hold over the country, it appears likely that consent will, for the period that it was given, provide a lawful justification for the resort to drone strikes, though it must not be forgotten that this consent has been publicly withdrawn. Elsewhere, consent has been given by states with a much less clear mandate to give it, due to a lack of legitimacy arising from very tenuous de facto control over territory, particularly the case in Afghanistan, Iraq, Somalia and Yemen. In these instances, it is possible that consent is unable to provide a watertight justification for the use of drones. This is reflected in the fact that the US has given self-defence as a justification alongside consent.

Self-defence

The use of drones has often been justified by reference to self-defence, which, in the absence of 'host' state consent, provides a lawful basis for the use of force within international law under Article 51 of the UN Charter. Self-defence has been invoked by the US, in addition to consent, to justify drone strikes against 'al-Qaeda, as well as the Taliban and associated forces', which can be read to cover strikes in Afghanistan, Iraq, Pakistan, Somalia and Yemen. Similarly, the US and the UK have invoked the collective self-defence of Iraq for the use of force (therefore including drone strikes) in Syria.[49]

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[41] G Miller, 'Yemeni president acknowledges approving US drone strikes (29 September 2012) *Washington Post*, *www.washingtonpost.com/world/ national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story. html?utm_term=.243ff30f9296* accessed 20 June 2017.

[42] Human Rights Watch, 'A Wedding that Became a Funeral: US Drone Attack on Marriage Procession in Yemen' (February 2014), *www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf*, 6, accessed 20 June 2017

[43] 'US Somali air strikes "kill many"' (9 January 2007) *BBC*, *http://news.bbc.co.uk/1/hi/world/africa/6243459.stm* accessed 20 June 2017.

[44] R Young Pelton, 'Enter the Drones: An In-Depth Look at Drones, Somali Reactions, and How the War May Change' (7 June 2011) *Somalia Report*, *http://piracyreport.com/index.php/post/1096/Enter_the_Drones* accessed 20 June 2017.

[45] J Rogin, 'Somali president asks for more American help' (18 January 2013) *Foreign Policy*, *http://foreignpolicy.com/2013/01/18/somali- president-asks-for-more-american-help* accessed 20 June 2017.

[46] See, eg, letter dated 20 September 2014 from the Permanent Representative of Iraq to the UN addressed to the President of the Security Council, UN Doc S/2014/691.

[47] Enduring Strategic Partnership Agreement Between the United States of America and the Islamic Republic of Afghanistan (2 May 2012), *http://photos.state.gov/libraries/afghanistan/231771/PDFs/2012-05-01-scan-of-spa-english.pdf* accessed 20 June 2017.

[48] MN Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law*, 311, 315.

[49] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the UN, addressed to the Secretary- General, UN Doc S/2014/695; letter dated 7 September 2015 from the Permanent Representative of the United Kingdom

Article 51 allows self-defence by a state when: 1) it has suffered an armed attack; 2) the use of force defensively would be necessary; and 3) it would be proportionate. Further to this, under the same article, all states exercising their right to self-defence are required to report it to the Security Council.

The occurrence of an armed attack

The armed attack requirement is not defined by Article 51 of the UN Charter, though it has been interpreted by the International Court of Justice (ICJ) as involving uses of force 'greater than a mere frontier incident'[50] and could be satisfied by a single act if it is sufficiently grave, for instance, the mining of a naval vessel.[51]

In terms of self-defence against attacks that are imminent, but have not yet begun, there is support in state practice and among scholars that states may exercise anticipatory self-defence, though the entire concept of anticipatory self-defence remains a controversial one.[52] The concept of imminence is often defined narrowly by reference to the 'Caroline standard', that is, 'the necessity of self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation'.[53] There are also statements in support of a more flexible interpretation of 'imminence',[54] but such flexibility does not go so far as to include the idea of pre-emptive self-defence, as advocated by the US 2002 National Security Strategy. This document conceives self-defence as being available without an imminent threat and when 'uncertainty remains as to the time and place of the enemy's attack'.[55] This latter proposal 'lacks support under international law'. There are examples of states and international institutions rejecting the notion of pre-emptive self-defence for being contrary to international law,[56] and a majority of commentators have argued that there is no such doctrine in international law.[57] Even commentators who apparently advocate the possibility that the law is evolving towards acceptance of the doctrine of pre-emptive self-defence have conceded that 'there is insufficient evidence to say with certainty' that it has been.[58] At the same time, the UK Parliament Joint Committee on Human Rights has suggested that the notion of 'imminence' in the context of anticipatory self-defence should be interpreted 'with a degree of flexibility'[59] as some have suggested, but it bears emphasising that even such flexibility continues to be more restricted than the definition promoted by the US 2002 National Security Strategy.

Perhaps the most controversial aspect of the use of drones in self-defence is the invocation of the doctrine against purported armed attacks emanating from non-state armed groups. The existence of a right to self-defence against non-state armed groups remains controversial. The ICJ has implied that an armed attack can only be perpetrated by a state, or a non-state armed group with a connection to its 'host' state.[60] Nonetheless, this has not been determinative of the issue and it has been suggested that the initial need for a connection cited in the Nicaragua case was, in fact, made in reference to state responsibility, not for the determination of the existence of an armed attack.[61] The reality of the law as to the need for a connection between a non-state armed group and its 'host' state remains unclear, though there are powerful

of Great Britain and Northern Ireland to the UN, addressed to the President of the Security Council, UN Doc S/2015/688.

50 AS Deeks, 'Taming the Doctrine of Pre-Emption' in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 676.

51 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003) [72].

52 For a recent summary of the debate with detailed references regarding State practice and scholarship, see C Kreß 'The State Conduct Element' in C Kreß and S Barriga (eds) *The Crime of Aggression: A Commentary* (Cambridge University Press 2017) 473–479.

53 P Alston 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (28 May 2010) A/HRC/14/24/Add.6 [45].

54 See, for instance, E Wilmshurst, 'Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55(4) *International and Comparative Law Quarterly*, 963, 967.

55 US National Security Strategy 2002 (2006 revision) 15.

56 HL Deb 21 April 2004, vol 660, col 370 (Lord Goldsmith asserting the UK government's view that there is no right of pre-emptive self- defence); Security Council Resolution 487 (1981) UN Doc, S/Res/487 (condemning Israel's pre-emptive strike against a nuclear facility in Iraq); Rt Hon Jeremy Wright QC MP 'The Modern Law of Self-Defence' (January 2017) speech at the International Institute for Strategic Studies, www.ejiltalk.org/the-modern-law-of-self-defence accessed 20 June 2017

57 See, eg, C Gray, *International Law and the Use of Force* (3rd edition, Oxford University Press 2008) 163–165; N Lubell, *Extra Territorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 63. Surrounding the 2003 intervention in Iraq, scores of international lawyers rejected the doctrine of pre-emptive self-defence: 'Military action in Iraq without Security Council authorization would be illegal' (2002–03) 34 *Ottawa Law Review* 1; 'War would be illegal' (London 7 March 2003) *The Guardian*, www.theguardian.com/politics/2003/mar/07/highereducation. iraq accessed 20 June 2017; 'Coalition of the willing? Make that war criminals' (Sydney, 26 February 2003) *Sydney Morning Herald*, www.smh. com.au/articles/2003/02/25/1046064028608.html accessed 20 June 2017; '*Appel de juristes de droit international concernant le recours à la force contre l'Irak*' ('Statement by Japanese international law scholars on the Iraqi issue') (2003) 36 *Revue Belge de Droit International* 293.

58 AS Deeks, 'Taming the Doctrine of Pre-Emption' in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 676.

59 House of Commons, House of Lords Joint Committee on Human Rights 'The Government's Policy on the Use of Drones for Targeted Killing' Second Report of Session 2015-16, HL Paper 141, HC 574 [3.33]–[3.36].

60 *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* ICJ Reports (2004) [139]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports (2005) [146].

61 JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart, 2009) 50.

arguments made for and against it.[62] It has been argued that the unwillingness or inability of a state playing 'host' to a non-state armed group is relevant to the satisfaction of this requirement; this controversial view does not appear to have universal acceptance. Relatedly, a response in self-defence to an armed attack carried out by a non-state armed group only provides for the lawfulness of uses of force against that group, not those that, though potentially ideologically aligned or motived by the attacking group, do not form a part of it.[63] This is the case, for instance, with al-Shabaab in Somalia and al-Qaeda in Afghanistan; although they share ideology and have even pledged allegiance to each other, under international law they remain distinct groups, having separate command structures.[64]

Necessity

The requirement of necessity is a complicated one but, fundamentally, it means that the use of force in self-defence will only be legitimate to the extent needed to 'halt or repel an armed attack'. Apart from establishing the required connection between the non-state attacker and the 'host' state, as referred to above, the requirement that the 'host' state is 'unwilling or unable' to neutralise a threat itself is also often seen as being an aspect of necessity.[65] While this doctrine is controversial, with some commentators hesitant to assert its unambiguous existence,[66] it appears to have been increasingly accepted by states.[67] Recent letters to the Security Council from states regarding intervention in Syria have made explicit or implicit assertions to the unable or unwilling doctrine, suggesting acceptance by some states.[68] Conversely, a number of other states have specifically not relied on the inability or unwillingness of Syria to combat the threat from ISIS,[69] while Syria itself has objected to the invocation of the doctrine.[70] This has led prominent writers to suggest that the doctrine has not yet been accepted as law.[71]

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62 See, eg, C Jenks, 'Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict' (2010) 85 *North Dakota Law Rev* 649; CJ Tams 'The Use of Force Against Terrorists' (2009) 20(2) *EJIL* 359; A Henriksen '*Jus ad Bellum* and American Targeted Use of Force to Fight Terrorism Around the World' (2014) 19(2) *Journal of Conflict and Security Law*, 211; T Reinold 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law*, 244.

63 C Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights*, 103, 266; A Paulus and M Vashakmadze 'Asymmetrical War and the Notion of Armed Conflict—a Tentative Conceptualization' (2009) 91(873) *International Review of the Red Cross*, 95, 119; MN Schmitt, 'The Status of Opposition Fighters in Non- International Armed Conflict' (2012) 88 *International Law Studies*, 119, 130; J Pejić 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2015) 96(893) *International Review of the Red Cross*, 67, 83–84.

64 N Lahoud, 'The Merger of al-Shabaab and Qa'idat al-Jihad' (16 February 2012) *Combating Terrorism Center*, www.ctc.usma.edu/posts/the- merger-of-al-shabab-and-qaidat-al-jihad accessed 25 March 2017.

65 See, eg, 'Leiden Policy Recommendations on Counter-Terrorism and International Law' in L van den Herik and N Schrijvers (eds) *Counter- Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 716; statement of the Institut de Droit International, sub-group on self-defence 'Present Problems of the Use of Force in International Law' (27 October 2007); KN Trapp, 'Can Non-State Actors Mount an Armed Attack?' in M Weller (ed) *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 679-696; D Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *The American Journal of International Law* 770; AS Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self- Defense' (2012) 52 *Virginia Journal of International Law*, 483, 493; Lubell, 25–42; C Kreß 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflict' (2010) 15(2) *Journal of Conflict & Security Law*, 245, 248–252.

66 See, eg, T Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010) 487, 506.

67 Eg, Russian uses of force against Chechen non-state armed groups in Georgia in 2002, in which the unwilling or unable standard was implicitly relied upon (letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc S/2002/1012); Israeli uses of force against the Palestine Liberation Organization in Lebanon (with a specific reference to the doctrine: UN Security Council, 36th Session, 2,292nd Meeting (17 July 1981) UN Doc S/PV.2292 [54]); Turkey's use of force against the Kurdistan Workers' Party, in which the doctrine was explicitly relied upon (identical letters dated 27 June 1996 from the Chargé d'affaires ad interim of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc S/1996/479); and an implicit reference to the doctrine in regard to Israel's use of force against Hezbollah in Lebanon (UN Security Council, 61st session, 5,489th meeting (14 July 2006) UN Doc S/PV.5489 6).

68 Eg, letter dated 23 September 2014 from the Permanent Representative of the US to the UN addressed to the Secretary-General, UN Doc S/2014/695; letter dated 31 March 2015 from the Chargé d'affaires ad interim of the Permanent Mission of Canada to the UN addressed to the President of the Security Council, UN Doc S/2015/221; letter dated 9 September 2015 from the Permanent Representative of Australia to the UN addressed to the President of the Security Council, UN Doc S/2015/693; letter dated 10 December 2015 from the Chargé d'affaires ad interim of the Permanent Mission of Germany to the UN addressed to the President of the Security Council, UN Doc S/2015/946; letter dated 9 September 2015 from the Permanent Representative of Australia to the UN addressed to the President of the Security Council, UN Doc S/2015/693.

69 Identical letters dated 8 September 2015 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745; letter dated 11 January 2016 from the Permanent Representative of Denmark to the UN addressed to the President of the Security Council, UN Doc S/2016/34; letter dated 3 June 2016 from the Permanent Representative of Norway to the UN addressed to the President of the Security Council, UN Doc S/2016/513.

70 Identical letters dated 29 December 2015 from the Permanent Representative of the Syrian Arab Republic to the UN addressed to the Secretary-General and the President of the Security Council.

71 O Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29(3) *Leiden Journal of International*

Proportionality

In the Nicaragua case, the ICJ recalled that the customary international law on self-defence permits only those measures that are proportional to the original armed attack. This continues to be an accurate statement of the law, having been affirmed by the ICJ in the Nuclear Weapons advisory opinion.[72] Therefore, force cannot be used lawfully in self-defence if that resort to force was not a proportionate response to the prior attack. The term proportionate is, therefore, relative to the original attack, but it does not connote that the response in self-defence should be symmetrical with that attack. The assessment of proportionality in individual instances requires a benchmark against which it can be measured; there is some debate as to whether this benchmark is the level of force required for a state to adequately defend itself against an armed attack in question,[73] or whether, going further, proportionality may be judged – to some extent – against the gravity of the original and anticipated future attack.[74] The ICJ has previously precluded the use of force in self-defence when a specific armed attack had been 'completely repulsed' but, conversely, in subsequent decisions it has considered the proportionality of a use of force in self-defence with reference to the gravity of the preceding armed attack.[75] The ICJ is thus inclined to recognise the possibility that a forceful defensive measure is disproportionate because its intensity is in excess of the gravity of the armed attack. The jurisprudence offers no real guidance, however, as to when an action taken in self-defence can be said to become excessive in that quantitative sense.[76]

Reporting to the Security Council

The Charter of the United Nations makes it clear that, when exercising self-defence, measures taken by states must 'be immediately reported to the Security Council'.[77] While a failure to comply with the reporting requirement does not automatically render measures taken in self-defence unlawful, it may be indicative of the fact that the state in question did not believe it was acting in self-defence.

Conclusion

Claims to the lawfulness of the resort to drones for the delivery of extraterritorial lethal force have commonly been premised on self-defence.[78] Those carried out by the US against non-state armed groups in Pakistan, Somalia and Yemen have been justified by reference to self-defence in response to the armed attack carried out on 11 September 2001, as have those strikes in Iraq, Libya and Syria against ISIS.[79] The resort to drones in these instances, in particular where there is no 'host' state consent, will only be lawful when the requirements of self-defence, as depicted in this section, are satisfied. As has been made clear, the elements of 'armed attack', necessity and proportionality are subject to competing interpretations, some of which contain a wide degree of latitude as to what is lawful, thereby broadening the scope of situations in which force may be resorted to. It is important that drone strikes based on contested conceptions of self-defence receive proper and thorough assessment as to their adherence to the relevant aspects of international law, and that the use of drones, which has the potential to render the resort to lethal force a more feasible undertaking for states, does not have the effect of normalising novel and expansive interpretations of the law. In addition, it must be always recalled that lawfulness in terms of the resort to force is only one aspect of the overall lawfulness of a drone strike, which 'must satisfy the legal requirements under all applicable international legal regimes'.[80]

International law and the use of drones

This section of the paper will consider the law that governs states' ongoing use of drones, rather than the resort to them. It must be stressed that the lawfulness or otherwise of the resort to force has no bearing whatsoever upon the lawfulness of the conduct of the use of force, and vice versa. Thus, if armed drones were resorted to under a legitimate justification of self-defence, the lawfulness of how they are used is a separate question and will not be influenced by the existence of such a legitimate self-defence claim.

The use of drones within armed conflicts

First, we will consider the use of drones under IHL, which becomes operative during an armed conflict, either international or non-international. During armed conflicts, IHL can become relevant for the interpretation of rights under IHRL in a way that differs from their application

Law, 777–799.

[72] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 [41].

[73] R Ago, 'Eighth Report on State Responsibility' (A/CN.4/318/Add.5-7) (1980) II(1) *Yearbook of the International Law Commission* 13 [121]; *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Higgins, ICJ Reports 1996 [5]; Lubell, 66; J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 156.

[74] D Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24(1) *European Journal of International Law* 235, 262–4.

[75] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003) [77].

[76] C Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 590.

[77] Charter of the United Nations, Art 51.

[78] In addition to the consent of 'host' states, see section 2.1, Consent.

[79] Various letters to the Security Council; letter dated 20 September 2014 from the Permanent Representative of Iraq to the UN addressed to the President of the Security Council, UN Doc S/2014/691.

[80] See further, C Heyns, D Akande, L Hill-Cawthorne and T Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65(4) *International and Comparative Law Quarterly*, 791, 795.

during peacetime. Possible legal bases for the reconciliation of the two have been identified variously as *lex specialis*, mutual application or derogation.[81] This can have the effect of rendering the legal regime applicable during an armed conflict more accommodating of uses of force[82] than when there is no armed conflict, during which time IHRL applies alone.

International armed conflict

The existence of an international armed conflict is based on objective criteria; it is irrelevant in IHL whether a state of war is declared or recognised. Under Common Article 2 of the Geneva Conventions, an international armed conflict will exist in 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. International armed conflicts are regulated by the four Geneva Conventions of 1949 and Additional Protocol I of 1977, as well as customary international law. The Geneva Conventions are generally applicable, having universal ratification. Additional Protocol I has not received universal ratification, but many of its rules, including, as most relevant to this discussion, those on the conduct of hostilities, now exist as customary international law.[83] Accordingly, to be lawful, targeting by means of armed drones in international armed conflict must comply with the relevant IHL principles and rules, as may be complemented by international human rights law.[84]

Non-international armed conflict

A non-international armed conflict exists when there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[85] This has been interpreted further as requiring fighting to be sufficiently intense and involving a group that is sufficiently organised.[86] Both of these thresholds must be met before a non-international armed conflict can be deemed to exist. Under Additional Protocol II, there is arguably a higher threshold, which requires that non-state armed groups must be 'under responsible command' and 'exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[87] However, this is not customary law and so it applies only as a matter of treaty law between the States Parties to Additional Protocol II. Thus, to be governed by the international law applicable in non-international armed conflict, drone strikes must have been carried out as part of fighting that is sufficiently intense, against an organised non-state armed group. US officials have suggested that an armed conflict is ongoing between the US and 'Al Qaeda, the Taliban and other associated forces'. But, this proposition is legally problematic, as it artificially conflates the actions of multiple, separate non-state armed groups under the umbrella of a single entity in order to create a conflict that spans several nations. Such a conflation is incorrect under international law. The UK government, for example, has specifically rejected the US notion of a global non-international armed conflict between a state and a non-state armed group as a possible basis for action against ISIS outside of the extant non-international armed conflict in Iraq and Syria.

All drone strikes undertaken so far have been in the context of non-international armed conflicts. Though controversial, a non-international armed conflict may remain non-international even when it spreads over an international border, as long as the fighting remains between a state (or states) and a non-state armed group. This can occur either by the intervention of a third state (eg, Saudi Arabia's intervention in the non-international armed conflict between the Yemeni government and the Houthi rebellion)[88] or by the fighting spilling over into a third state (eg, the conflict in Afghanistan crossing the border into Pakistan).[89] The legal possibility of a non-international armed conflict of a transnational dimension is based on the requirement of Common Article 2 that an international armed conflict can only be 'between two or more of the High Contracting Parties' and it is in line with the US Supreme

[81] Commentators remain divided as to the nuances of the relationship between IHL and IHRL. See, eg, L Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64(2) *International and Comparative Law Quarterly*, 293; S Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 89–94; M Sassòli and L Olson, 'The Relationship Between International Humanitarian Law and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) *International Review of the Red Cross*, 599, 605.

[82] On the shift in perception of IHL from a protective body of law to one that is permissive, see D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel Law Review*, 8, 23–31.

[83] ICRC, Commentary of 2016 to Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949 [353]; Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press 2005).

[84] *Wall* case, [106].

[85] *Prosecutor v Tadić* IT-94-1-A, Appeals Chamber Judgment (15 July 1999) [70].

[86] International Law Association Committee on the Use of Force, Hague Conference 'Final Report on the Meaning of Armed Conflict in International Law' (2010) 2.

[87] Additional Protocol II, Art 1.1.

[88] ICRC Report on the 31st International Conference, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Geneva, 2011) 31IC/11/5.1.2 10; D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst (ed) *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 62; *The Prosecutor v Bemba Gombo* ICC-01/05-01/08, Decision on Confirmation of Charges (15 June 2009) [245]–[246].

[89] *Ibid*, ICRC Report, 9.

Court's interpretation of the Common Article 3 phrase 'conflict not of an international character' 'in contradistinction to a conflict between nations'.[90]

As such, uses of force by an invited third state against a non-state party to a non-international armed conflict will not render that conflict international.[91] This is because, as per the reasoning above, such a conflict does not pit one state against another, which is the key feature of an international armed conflict, according to Common Article 2. Therefore, all drone strikes that have been undertaken within such a scenario are within the context of a non-international armed conflict, despite certain transnational dimensions.

Additionally, it has been argued that, when force is used against a non-state armed group *without* the consent of the 'host' state, a separate *international* armed conflict will arise between the 'host' and the intervening state. It is argued that the use of force in such a situation is necessarily 'against' the 'host' state, contrary to Article 2(4) of the Charter of the UN, even if only the non-state armed group is targeted. This argument remains controversial and is not supported by a majority of the literature, though it finds support in international and national jurisprudence.[92] In this context, it should be noted that more than one international judicial decision has held that conflict situations may be 'mixed', and contain *both* international and non-international armed conflicts. Therefore, it is important to be aware of the ongoing nature of governmental consent to the intervention of third states. This is particularly important when examining drone use, as many extraterritorial operations will raise the issue of whether 'host' state consent exists.

(a) Organisation

The requirement of organisation has received much consideration within international jurisprudence. In the Boškoski judgment, the International Criminal Tribunal for the Former Yugoslavia (ICTY) asserted that 'the degree of organisation required to engage in "protracted violence" is lower than the degree of organisation required to carry out "sustained and concerted military operations"',[93] which is a requirement of Additional Protocol II.[94] As such, the level of organisation required to constitute a party to a non-international armed conflict is lower than that which characterises national armed forces. Factors indicating requisite organisation have been held by the ICTY to include 'the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms';[95] the use of a spokesperson[96] and public communiqués; and the erection of checkpoints.[97] There is a need for a 'command structure'[98] and the ability for an armed group to be able to speak 'with one voice'[99] and be sufficiently organised to 'formulate… military tactics'.[100]

As things stand, it is very unlikely that al-Qaeda and its affiliates meet the necessary threshold to be considered a *single* global entity, as the disparate groups lack a centralised hierarchy and command structure. Nonetheless, it may be possible that the organisational threshold is met individually by various regional groups (eg, al-Qaeda in Pakistan, Tehrik-i-Taliban Pakistan (TTP), the Haqqani Network, al-Qaeda in the Arabian Peninsula and al-Shabaab), which do bear some of the characteristics of organisation cited in international jurisprudence. This is also likely to be the case with ISIS and its regional affiliates.

(b) Intensity

The intensity requirement operates to exclude the application of IHL to internal disturbances, such as 'riots, isolated and sporadic acts of violence, and other acts of a similar nature'.[101] Establishing whether there is the requisite level of intensity for a non-international armed conflict requires a case- by-case analysis, for which the ICTY has identified a number of indicative criteria, such as:

> [t]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.

The threshold of intensity is a balance between duration and magnitude: in the *La Tablada* case, the Inter-American

[90] *Hamdan v Rumsfeld* 548 US 557, 629-31 (2006) 67.

[91] N Lubell and N Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11(1) *Journal of International Criminal Justice*, 65, 67–68; M Sassòli, 'Use and Abuse of the Laws of War in "The War on Terrorism"' (2004) 22 *Law and Inequality* 199; see n 93 above, Sivakumaran, 229; ICRC Report, 10; D Jinks, 'The Applicability of the Geneva Conventions to the "Global War on Terror"' (2005) 46(1) *Virginia Journal of International Law*, 165, 189.

[92] Separate Opinion of Judge Shahabuddeen [6]; *Armed Activities*; *The Public Committee Against Torture in Israel and others v The Government of Israel and others,* Judgment, 11 December 2006, HCJ 769/02, [18].

[93] *Prosecutor v Boškoski and Tarčulovski* IT-04-82-T, Trial Chamber Judgment (10 July 2008) [197].

[94] Additional Protocol II, Art 1(1).

[95] *Prosecutor v Limaj*, Bala and Musliu IT-03-66-T, Judgment (30 November 2005) [90]. 115.

[96] *Ibid*, [101]–[103].

[97] *Ibid*, [145]; *Prosecutor v Haradinaj, Balaj and Brahimaj* I-04-84-T, Judgment (3 April 2008) [71]–[72].

[98] *Prosecutor v Miloševic*ć IT-02-54-T, Decision on Motion for Judgment of Acquittal, (16 June 2004) [23]–[24]; *ibid*, Haradinaj, [65].

[99] *Ibid,* Haradinaj, [60].

[100] *Ibid*, [129].

[101] Additional Protocol II, Art 1.

Commission on Human Rights (IACHR) found that an armed conflict existed due to the intensity of the fighting, despite it lasting only 30 hours, as it was a 'carefully planned, coordinated and executed… armed attack, i.e., a military operation, against a quintessential military objective'.[102] Thus, the brevity of an engagement will not necessarily negate its classification as a non-international armed conflict.

(c) Are drones used in Armed Conflicts?

Despite assertions from the Obama administration, some situations in which the US has conducted anti-terrorist drone strikes are unlikely to be classified as separate non-international armed conflicts between the US and the relevant non-state armed group due to insufficient intensity of violence on the part of the non-state armed group. For instance, at the time of writing, al-Shabaab, against which the US uses drone strikes in Somalia, has not carried out any form of attack against the US, whether on or outside its soil.

However, in many cases (eg, in Afghanistan, Iraq, Pakistan, Somalia and Yemen), there may be said to be a *pre-existing* non-international armed conflict between a 'host' government and a non-state armed group, into which the US has been invited, in which case the strikes will be part of that non-international armed conflict. In this way, there is an obvious, though nevertheless important, interrelation between consent and the existence of non-international armed conflicts – a strike may be brought within such a conflict, but: 1) only when there is a pre-existing non-international armed conflict ongoing within the territory; and 2) only for as long as consent is operative and to the extent that the manner in which drones are used accords with the terms of that consent.

In Pakistan, there has been intense fighting since 2008, which subsided and then flared up again in 2013 with the beginning of operation Zarb-e-Azb, an action involving 30,000 troops.[103] However, it must be recalled that, in 2013, the Pakistan government withdrew its consent to US drone strikes, so any strikes subsequent to that will ostensibly not have been carried out as part of that non- international armed conflict. The question is, therefore, whether they have been carried out as part of a non-international armed conflict just between the US and the target non-state armed group; whether they have even produced a state of international armed conflict between the US and Pakistan; or whether they occurred outside any armed conflict.

In Yemen, violence of fluctuating intensity has occurred between the government and al-Qaeda in the Arabian Peninsula since 2011, and appears to be ongoing.[104] It must be noted that the first US drone strike in Yemen was in 2002 and therefore outside of this particular non-international armed conflict. In Somalia, the government, supported by African Union troops, has fought al-Shabaab with an intensity indicative of a non-international armed conflict since at least 2007, and continues to do so.[105] Nevertheless, consent has been specifically limited by the Somali government, only to include strikes against non-Somali fighters. Numerous drone strikes have been confirmed as targeting Somali fighters[106] in breach of this specification, and so it is likely that many strikes will not have been undertaken as part of this non-international armed conflict. Drone strikes against al-Qaeda and the Taliban in Afghanistan have been carried out in the context of the ongoing non-international armed conflict between the Afghan government, supported by the US, and the Taliban and al-Qaeda.

Strikes targeting ISIS in Syria are less easy to classify. The US has suggested that it is engaged in a non-international armed conflict with ISIS[107] while the UK has classified its own drone strikes in Syria as part of the ongoing armed conflict between Iraq and ISIS, into which it has been invited.[108] The conflict in Iraq against ISIS appears to be a non-international armed conflict as the violence has been sufficiently intense and the non-state armed group sufficiently organised. It is, therefore, most convincing that drone strikes in Syria have formed part of that conflict, which has spilled over into Syria. This reasoning has been deployed by other states involved in that conflict.[109]

Drone strikes in Libya can be classified less readily, and may depend on whether the non-state armed group targeted is organisationally part of the non-state armed group in Syria and

[102] *Abella v Argentina* IACHR Report No 55/97, Case No 11.137, (30 October 1997) [147] and [155].

[103] F Zahid, 'The Successes and Failures of Pakistan's Operation Zarb-e-Azb' (10 July 2015) *The Jamestown Foundation Terrorism Monitor*, *https:// jamestown.org/program/the-successes-and-failures-of-pakistans-operation-zarb-e-azb/#.VsIEyZOLSRs* accessed 20 June 2017.

[104] 'Yemen declares curfew in Aden as government forces retake strategic port' (4 January 2016) *The Guardian*, *www.theguardian.com/world/2016/jan/04/yemen-declares-curfew-in-aden-as-government-forces-retake-strategic-port*, accessed 20 June 2017.

[105] 'Who are Somalia's al-Shabab?' (3 April 2015) *BBC*, www.bbc.co.uk/news/world-africa-15336689 accessed 20 June 2017.

[106] 'Somalia: Reported US Covert Actions 2001-2016' (22 February 2016) *The Bureau of Investigative Journalism*, *https://www.thebureauinvestigates. com/drone-war/data/somalia-reported-us-covert-actions-2001-2017* accessed 23 June 2017.

[107] B Egan, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign' (April 2016) speech to the American Society of International Law, *http://stockton.usnwc.edu/ils/vol92/iss1/7* accessed 20 June 2017.

[108] Email from Treasury Solicitor to Leigh Day regarding Proposed Application for Judicial Review By Caroline Lucas MP and Baroness Jones of Moulsecoomb (23 October 2015), *www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Govt_Legal_Dept_Leigh_ Day_231015.pdf*, [5.4], accessed 20 June 2017.

[109] Letter dated 7 June 2016 from the Permanent Representative of Belgium to the UN addressed to the President of the Security Council, UN Doc S/2016/523; letter dated 3 June 2016 from the Permanent Representative of Norway to the UN addressed to the President of the Security Council, UN Doc S/2016/513.

Iraq, in which case they will comprise further aspects of the conflict, which has spilled over from Iraq. This possibility has seemingly been confirmed by reports of US drones targeting ISIS fighters in Libya.[110] Until recently, the US described the region of Sirte in Libya as an 'area of active hostilities', though this designation has since been removed.[111] While this designation is not in and of itself determinative of the existence of a non-international armed conflict, it may indicate that the US understands the criteria of such a conflict to have been satisfied for a time, at least in Sirte. Additionally, it has been argued that there is a pre-existing non-international armed conflict[112] into which the US may be intervening.

Drone strikes carried out by Israel against Hamas will likely fall into the remit of IHL to the extent that they were carried out during an armed conflict that raises particularly difficult questions of legal qualification.

Drones and international human rights law

Based on the criteria for the existence of international and non-international armed conflicts, there have been drone strikes that have likely been undertaken outside of armed conflict.[113] In such instances, IHL is not triggered and does not apply, and so consideration of the drone strikes' legality must be done within the framework of IHRL alone. It is almost universally accepted that IHRL also applies during armed conflicts,[114] in a relationship of concomitance, in which the more specific will prevail when there is a conflict between rules, be it one of IHL or IHRL.[115] Therefore, this section will primarily consider the application of IHRL during peacetime, in which it operates in a manner that is not subject to augmentation by IHL, though there will also be some overlap with operations undertaken during armed conflict.

Application of international human rights law

Though their application is virtually axiomatic, the international community has reiterated the need to abide by IHRL during actions to combat terrorism. The UN Global Counter-Terrorism Strategy has reaffirmed that states 'must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law'.[116] Therefore, it is necessary to consider multiple facets of IHRL and how they relate to drone strikes.

(A) Jurisdiction

The first step to determine whether a state deploying drone strikes has obligations under IHRL is to consider whether or not an individual affected by a strike is within the jurisdiction of that state.[117] If the drone use is undertaken within the state's own territory, then this threshold is relatively straightforward, as conduct within a state's territory is necessarily within its jurisdiction. However, at present, the large majority of instances of armed drone use occur extraterritorially, and though there are reports of drones being used – for example, in Pakistan by the Pakistani military – such instances are relatively few.[118]

The extraterritorial application of IHRL is an issue of much debate. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) asserts that its protections apply to actions of a state 'within its territory and subject to its

[110] H Cooper and E Schmitt, 'U.S. Strikes Help Libyan Forces Against ISIS in Surt' (2 August 2016) *New York Times*, *www.nytimes.com/2016/08/03/us/politics/drone-airstrikes-libya-isis.html* accessed 20 June 2017.

[111] C Savage, 'U.S. Removes Libya From List of Zones with Looser Rules for Drone Strikes' (20 January 2017) *New York Times, www.nytimes.com/2017/01/20/us/politics/libya-drone-airstrikes-rules-civilian-casualties.html?_r=0* accessed 20 June 2017.

[112] R Dalton, 'Libya' in L Arimatsu and M Choudhry, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (March 2014) Chatham House, *https://chathamhouse.org/publications/papers/view/198023* accessed 23 June 2017.

[113] Eg, the US strike in Yemen in 2002, which killed al-Qaeda leader Qa'id Salim Sinan al Harithi and five others. The threshold of intensity between al-Qaeda in the Arabian Peninsula and the US has never been reached, and that between al-Qaeda in the Arabian Peninsula and the Yemeni government was not reached until 2012.

[114] See n 80 above, [24]–[25]. Affirmed in the *Wall* case at [106]; see n 65 above, *Armed Activities*, [217]; *Coard v United States* Report No 109/99, Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999 [42]; Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004) [11]; Sivakumaran, 89–94; C Greenwood, 'Rights at the Frontier—Protecting the Individual in Time of War' in Barry Rider (ed) *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (Kluwer Law International 1999) 288–289; L Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 *International and Comparative Law Quarterly* 293, 313–316; M Milanović 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 124; I Scobbie, 'Principles or Pragmatics? The Relationship between Human Rights and the Law of Armed Conflict' (2010) 14(3) *Journal of Conflict and Security Law* 449, 456–457; C Garraway, '"To Kill or not to Kill?"—Dilemmas on the Use of Force' (2010) 14(3) *Journal of Conflict and Security Law* 499, 509–510; M Sassòli and L Olson, 'The Relationship Between International Humanitarian Law and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) *International Review of the Red Cross*, 599, 605.

[115] Y Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 226.

[116] Resolution General Assembly on 8 September 2006, UN Doc A/RES/60/288.

[117] As per the International Covenant on Civil and Political Rights, Art 2; the African Charter on Human and Peoples' Rights, Art 1; and the European Convention on Human Rights, Art 1.

[118] U Ansari, 'Pakistan Surprises Many with First Use of Armed Drone' (10 September 2015) *Defense News, www.defensenews.com/story/defense/air-space/strike/2015/09/08/pakistan-surprises-many-first-use-armed-drone/71881768* accessed 20 June 2017.

jurisdiction', which some have argued restricts its application to only those acts occurring in a state's territory.[119] However, this view appears to be that of a minority, and the ICCPR is applicable to extraterritorial uses of force with 'jurisdiction' therefore being the operative word.

In the context of armed drone use, the issue becomes particularly complicated due to their inherent remoteness: they may be flown by a pilot situated thousands of miles away. As a result, the interpretations of jurisdiction in relation to extraterritoriality, developed by organs such as the European Court of Human Rights (ECtHR), the UN Human Rights Council (HRC) and the UN Human Rights Committee, provide vital insight into the question of whether drone strikes bring targeted individuals within the jurisdiction of drone states.

The first approach to establishing whether a state is exercising jurisdiction outside of its own territory is whether that state has effective control over a geographical area within another state. An example of this is a state that has been recognised as being an occupying power.[120] Thus, the use of drones by Israel over occupied Palestinian territory will be subject to IHRL, but extraterritorial uses by other states that do not fall within this scenario would not be. For those other strikes, alternative methods of establishing jurisdiction are necessary.

The second approach focuses not on geographical control but on personal control, under which it must be shown that a state was exercising control over an individual, an example being an individual who has been detained by state agents. International jurisprudence has supported a finding that the requirement of jurisdiction is satisfied in situations of control less than that of direct physical control, for example, detention. Case law from the ECtHR has emphasised that effective control can manifest at levels less than that of direct physical control. The ECtHR has found that individuals shot by soldiers on patrol during an occupation fell within the jurisdiction of the occupying state.[121] Going further, the ECtHR has also found that jurisdiction may exist prior to invading armed forces having 'assumed responsibility for the maintenance of security' of an area.[122] Similarly, jurisdiction has also been found to exist between members of a state's armed forces and individuals passing through a checkpoint.[123] This personal approach to jurisdiction, dispensing with the need for geographical control, is also present elsewhere in international jurisprudence. For instance, the UN Human Rights Committee adopted an understanding in which the nature of the act could produce jurisdiction, stating that:

> it would be unconscionable to so interpret the responsibility under Article 2 of the [ICCPR] as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.[124]

Furthermore, the UN Human Rights Committee has stated its own understanding of jurisdiction as pertaining 'to anyone within the power or effective control of [a] state party',[125] which, it has been argued, will bring into a state's jurisdiction 'anybody directly affected by a state party's actions'. Elsewhere it has been asserted that, specifically with regard to distance targeted killing, the appropriate test for determining jurisdiction is 'the exercise of authority or control over the individual in such a way that the individual's rights are in the hands of the state'.

The tendency within judicial decisions on jurisdiction appears to be towards a gradual expansion of the concept.[126] This is evidenced by the statement of Leggatt J in Al-Saadoon and others v Secretary of State for Defence that '[u]sing force to kill is indeed the ultimate exercise of physical control over another human being'.[127] This statement has since been reined in by the UK Court of Appeal, which stated that such an expansion of the jurisdictional application of the ECHR should be made by the ECtHR.[128] It is nevertheless arguable that the trajectory of the notion of jurisdiction is towards the model formulated by Marko Milanović in which negative rights (eg, the right to life) may be subject to unlimited jurisdiction, while positive rights (eg, the right to education) will be restricted to geographical areas over which a state maintains effective control.[129]

As a result of the case law surrounding jurisdiction, it can be concluded that a strong case can be made for the inclusion of extraterritorial drone strikes within the framework of IHRL on the basis of drone states' personal relation with those who they strike.[130] There is certainly an argument to be made that the

[119] See, eg, M Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (2006) *ISLA Journal of International and Comparative Law* 459.

[120] Concluding observations of the Human Rights Committee: Israel (18 August 1998) CCPR/C/79/Add.93 [10].

[121] *Al-Skeini v United Kingdom* 55721/07 [2011] ECHR [149]–[150].

[122] *Hassan v United Kingdom* 29750/09 [2014] ECHR [75].

[123] *Jaloud v The Netherlands* 47708/08 [2014] ECHR [152].

[124] *Delia Saldias de Lopez v Uruguay* Communication No 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) [12.3].

[125] 'The Nature of the General Obligations Imposed on States Parties to the Covenant' General Comment no 31 [80] (29 March 2004) UN Doc CCPR/C21/Rev.1.Add.13 [10].

[126] This has not always been the course taken by the courts, as the personal approach to jurisdiction as rejected by the ECtHR in the now (implicitly) overruled case of *Bankovic et al v Belgium et al* 52207/99 [2001] ECHR.

[127] *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin) [95].

[128] *Al-Saadoon and others v Secretary of State for Defence* [2016] EWCA Civ 811 [69]–[70].

[129] M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 209–222.

[130] This point has been made in brief by Robert McCorquodale

nature of drone strikes brings those individuals targeted into the jurisdiction of the drone state. It is submitted that a finding that IHRL is inapplicable to the victims of extraterritorial drone strikes by virtue of jurisdiction when such law would be applicable in situations of detention is unconscionable and runs counter to the object and purpose of numerous human rights treaties.

One final and important point is that IHRL will apply to a state 'through the consent, invitation or acquiescence of the Government of [a] territory'. Therefore it may be possible that, with regard to strikes carried out in Afghanistan, Iraq, Pakistan, Somalia and Yemen (where drones are operated with the consent of the 'host' state), IHRL jurisdiction will be far more readily applicable than in situations in which intervention is based on self-defence alone.

By virtue of this, and the fact that there is the possibility of invoking extraterritorial jurisdiction, it is necessary to consider specific rights implicated by the use of armed drones.

(B) The right to life

The right to life is a fundamental right within IHRL, recognised by multiple treaties and as a norm of customary international law.[131] It is therefore a rule – under Article 6 of the ICCPR, which is binding upon all states using drones – that no one can be arbitrarily deprived of their life.[132] Within an armed conflict, the term 'arbitrary' is interpreted in light of norms of IHL, so that if an individual were to be deprived of their life during an armed conflict, in a manner that was lawful under IHL, it would not be an arbitrary killing. Additionally, States Parties to the European Convention on Human Rights (ECHR) are prohibited from carrying out intentional killing[133] unless they have formally derogated during a 'time of war' and only if that killing is carried out in accordance with IHL.[134] It should be noted, however, that no ECHR State Party has thus far derogated from its obligations in respect of Article 2 in any type of armed conflict.

Outside of an armed conflict, a state may use lethal force when exercising law enforcement, but not arbitrarily. This has been interpreted by the UN Human Rights Committee as requiring that force used is proportionate and necessary; proportionate to the threat the target represents; and necessary as the only available means to stop the threat.[135] Therefore, though the use of drone strikes to kill outside of an armed conflict may likely be unlawful under IHRL, their use would potentially be lawful if other lives were at stake and the urgency of the situation did not leave any choice for methods of incapacitation other than lethal force. This is in accord with the approach taken by the ECtHR to the use of lethal force during law enforcement operations.[136] Lethal force is reconcilable with the right to life when used in 'defence of others against the imminent threat of death or serious injury [or] to prevent the perpetration of a particularly serious crime involving grave threat to life',[137] but the law is unclear as to the precise nature of imminence – that is, the point at which lethal force may be used against a developing threat. This is a determination that must be made on a case-by-case basis.

The use of drones for the targeted killing of specific individuals, a key theme of the US drone programme, will most likely be unlawful under IHRL if undertaken outside the context of an armed conflict. This is because the prior identification of an individual on the basis of acts previously performed, or their position in an organisation, is contrary to the requirements of necessity and proportionality. This has been argued in the case of the 2002 strike in Yemen against Abu Ali al- Harithi who, it was alleged, was involved with the 2000 USS Cole bombing. In the absence of new imminent threats from al-Harithi, this strike would have been solely a response to the 2000 bombing and would therefore fail to satisfy the requirement of necessity. Other strikes that follow a similar pattern will also be contrary to the right to life under IHRL.

(C) The right not to be subjected to cruel, inhuman or degrading treatment

Prohibited by Article 7 of the ICCPR, as well as other regional IHRL instruments,[138] the right not to be subjected to cruel, inhuman or degrading treatment can be impacted by drone strikes. This is due to the psychological impact of the presence of drones upon those who live beneath them. Life in a region in which drones are regularly operated has been described as 'hell on earth', in which the constant sound of droning is juxtaposed with missiles that, moving faster than the speed of sound, impact and detonate without warning.[139] A study, in which individuals living in areas with a drone presence were interviewed, found that:

'[i]n addition to feeling fear, those who live under drones

in 'Human Rights and the Targeting by Drone' (18 September 2015) *EJIL:Talk!*, *www.ejiltalk.org/human-rights-and-the-targeting-by-drone* accessed 20 June 2017.

131 N Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 184–221.

132 International Covenant on Civil and Political Rights, Art 6(1).

133 ECHR, Art 2.

134 ECHR, Art 15(1) and (2).

135 Human Rights Committee, General Comment No 6, HRI/GEN/1/Rev.6 (1982).

136 *McCann and others v United Kingdom* 18984/91 [1995] ECHR [194].

137 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, [9], welcomed by UNGA Res 45/166, 18 December 1990.

138 ECHR, Art 3; IACHR, Art 5(2); ACHPR, Art 5(2).

139 D Rhode, 'The drone wars' (26 January 2012) *Reuters Magazine*, *www.reuters.com/article/us-david-rohde-drone-wars-idUSTRE80P11I20120126* accessed 20 June 2017.

– and particularly interviewees who survived or witnessed strikes – described common symptoms of anticipatory anxiety and post- traumatic stress disorder. Interviewees described emotional breakdowns, running indoors or hiding when drones appear above, fainting, nightmares and other intrusive thoughts, hyper startled reactions to loud noises, outbursts of anger or irritability, and loss of appetite and other physical symptoms. Interviewees also reported suffering from insomnia and other sleep disturbances, which medical health professionals in Pakistan stated were prevalent'.[140]

The definition of torture in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) includes both 'physical or mental' suffering, which means that, depending on the circumstances, the impact of drone flights can be brought within this category. Article 16 of the CAT refers to 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture', demonstrating that the different categories of treatment exist on a spectrum. Thus, if not torture, drone use may amount to cruel, inhuman or degrading treatment. It has been asserted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that cruel, inhuman and degrading treatment is distinct from torture as the latter is done with intent to punish or adduce information, as per Article 1 of the CAT,[141] a position supported by ICTY jurisprudence.[142] On this basis, while it may not amount to torture, it is highly likely that drone use may amount to cruel, inhuman or degrading treatment or punishment.

Further, Article 1 of the CAT requires the intentional infliction of pain or suffering, which might exclude mental suffering arising as an incidental result of drone use, rather than an intended consequence. Early jurisprudence appears to follow this approach: in the Greek case, it was held that 'inhuman treatment covers at least such treatment as deliberately causes severe suffering'.[143] Nevertheless, Nowak appears to suggest that negligent conduct leading to suffering could still be cruel, inhuman or degrading treatment.240 Such an interpretation leaves open the possibility that the mental suffering caused by persistent drone flights could be brought within the definition of cruel, inhuman or degrading treatment.

In this context, it should be noted that Article 16 of CAT does not contain a specific requirement for intent as there is for torture. Consequently, cruel, inhuman or degrading treatment can be inflicted even by negligence.

(D) Conclusion

Despite serious questions over its application due to questions surrounding states' jurisdiction, IHRL raises some important implications for the use of drones. It seems likely that targeted killings conducted by drones outside of an armed conflict will be contrary to the right to life, with a sufficient jurisdictional link. Thus, in those situations in which the existence of an armed conflict is not clear (Gaza, Pakistan, Somalia, Yemen and possibly Libya), the use of drone strikes may be particularly problematic. Depending on whether a determination as to the existence of an armed conflict can be made, many strikes that have been carried out will, in all likelihood, be unlawful.

Overall conclusion

There are numerous facets to the legal framework in which drones operate. Their lawfulness is assessed by multiple regimes of international law, which apply concurrently. Violation of any applicable international legal rule will render a strike unlawful, regardless of whether it has adhered to all other applicable rules. For instance, use of a drone in accordance with all norms of IHL will not be lawful if it has been resorted to in a manner that breaches *jus ad bellum* (ie, if it does not satisfy the test for lawful self-defence and has not been consented to). Likewise, a strike lawfully resorted to with the consent of a 'host' state will become unlawful if it is carried out in a way that is contrary to IHL or IHRL. In this way, it is clear that the lawfulness of drone strikes under international law must be analysed holistically.

There is nothing inherent about drones that renders them unlawful. Like the majority of weapons, their use is lawful if it accords with all applicable international laws. Nonetheless, the fact that they are not *inherently* unlawful should not be taken to mean that their use is *generally* lawful. Drones clearly have the capacity to be employed using methods that may be unlawful. Their ability to access remote areas covertly and without endangering the lives of their pilots presents the possibility that they may be used in a unique manner that stretches the boundaries of accepted norms governing when force may be used, while simultaneously stretching the geography of armed conflict and IHL. Drones remove practical barriers that have previously restricted the resort to force by states, and they reduce the cost of military campaigns, both in terms of financial and political capital. Drones provide a simple recourse to force that would otherwise have been impossible, and this gives them a uniquely destabilising capacity. As the practical barriers to the use of force fall down, it is vital that the legal barriers are reinforced and reasserted.

Additionally, the way in which targeting decisions are made

[140] International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, And Trauma To Civilians From US Drone Practices In Pakistan* (September 2012) 82–83.

[141] M Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 *Human Rights Quarterly* 809, 830–832.

[142] *Prosecutor v Milorad Krnojelac*, IT-97-25-T, Trial Chamber Judgment (15 March 2002) [180].

[143] The *Greek* case (1969) 12 *Yearbook of the European Convention on Human Rights* 180.

has the potential to have produced strikes that may breach IHL and IHRL rules and principles. Thus far, drones, and the interpretation of the international law surrounding their use, have been operated behind a veil of secrecy, which stymies most attempts to assess their lawfulness. Nevertheless, assessments of drone programmes have suggested that wide interpretations of the law may have been adopted, which may go beyond what is acceptable. There is an ongoing need to assess the use of drone strikes in all situations to ensure that the technology is being used in accordance with international law as it actually exists, not as it is interpreted to be, where such interpretations undermine the object and purpose of the law.

[This is an edited version of a background paper The Legality of Armed Drones under International Law *adopted by the International Bar Association, London, on 25 May 2017, and is reproduced with permission. The full text of the paper can be accessed at* https://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Legality-of-armed-drone-strikes.aspx.*]*

When to Recuse and When Not

Austen Morgan

Introduction

When should a judge recuse him/herself from hearing a case? The common law contains the answer for apparent (as opposed to actual) bias: *R v Gough* [1993] AC 646; *Porter v Magill* [2002] AC 357; whether a fair-minded and informed observer would conclude, on the facts, that there was a real possibility of bias?

Recently in England and Wales, the Court of Appeal dismissed such a challenge, even though two of the lords justices had already made separate adverse decisions against a litigant-in-person in an earlier judicial review: *Shaw v Kovac* [2017] EWCA Civ 1028 [2017] 1 WLR 4773.

On 26 January 2018, a Northern Ireland ('NI') judge, McCloskey J (formerly President of the Upper Tribunal [Immigration and Asylum Chamber] in the United Kingdom), sitting in the High Court in Belfast, dismissed an application to recuse himself in an administrative law case brought by two retired police officers.

However, he then withdrew dramatically from the case – causing public controversy – because, as he explained, "the families [had] become engulfed in a veritable maelstrom" during the legal proceedings.[1]

The facts in *Hawthorne*

Six catholic men had been killed watching the World Cup football match in a Loughinisland bar in June 1994. They were among the approximately 30 per cent murdered by Loyalist paramilitaries during the Troubles of the 1960s-90s (Republican paramilitaries being responsible for 60 per cent of some 3,700 deaths and the state for the remaining ten per cent).

The basic facts of the litigation need to be stated, particularly for lawyers outside the jurisdiction of NI. First, there was nothing unusual in the judge, as a senior barrister, having been involved in a previous judicial review in Belfast in 2002, of the first police ombudsman, Nuala O'Loan, a case he had completely forgotten.

Practising lawyers will appreciate how a current case dominates one's mind, until it is shifted from short- to long-term memory, not least to prevent the facts of one case becoming confused with those of another.

Second, the relatives successfully reviewed the second Police Ombudsman, Al Hutchinson (from Canada), whose report – finding no collusion between the police and loyalists – had been quashed through a consent order by a different judge in Belfast, in 2012.

Third, there was a campaign against Al Hutchinson, which led to his early resignation. Dr Michael Maguire, the chief inspector of criminal justice, wrote an extremely critical report of the Police Ombudsman.

Peter Robinson, the First Minister of NI, and Martin McGuinness, the Deputy First Minister, then appointed Dr Maguire as the third Police Ombudsman. He remains in post, even though the former has retired, Martin McGuinness is dead and the regional government at Stormont has not been functioning for over a year.

Fourth, the relatives of the six men killed welcomed Dr Maguire's Loughinisland report of June 2016, which found that there had been collusion between the police and loyalists (as defined by the Police Ombudsman).

Fifth, when a retired police officer (Thomas Hawthorne), with support from Raymond White, of the Retired Police Officers' Association, sought this judicial review, he was up against Dr Maguire, plus the relatives as an interested party; we now know that Mr Justice McCloskey did not intend to quash the report, merely to remove passages containing conclusions reached unfairly.

Sixth, the Police Ombudsman did not apply to have the judge recuse himself, on the ground of apparent bias, before judgment was given on 21 December 2017, and even afterwards.

Seventh, Barra McGrory QC, who had stepped down recently as Director of Public Prosecutions, subsequently altered the position, by agreeing to act as counsel for the Police Ombudsman. The judgement of 26 January 2018 is replete with criticism of this very late challenge by the Police Ombudsman's new counsel.

It is significant that Barra McGrory QC, when in public office, had deprecated in the strongest terms, references to the fact that, when a solicitor, his clients had included Sinn Féin, the political party of the republicans. Yet this former public officer was now visiting the sins of people (Raymond White)

[1] *Thomas Hawthorne & Raymond White v Police Ombudsman for Northern Ireland* [2017] NIQB, JR 16/68976/01, delivered on 19/01/2018. The reference was to the families of the victims whose deaths lay triggered this case.

who had not been Bernard McCloskey's clients in 2002 upon the judge in 2018, on the ground, seemingly, that the Police Ombudsman was being challenged in court on both occasions.

Risk of politicisation

The administration of justice in Norhern Ireland, it is all too obvious, is at serious risk of becoming politicised. During the troubles, the judiciary maintained its independence (and avoided the miscarriages their English brethren did not prevent).

Twenty years after the 1998 Belfast agreement, and with the relative absence of paramilitary violence, so-called legacy litigation has become the new arena of sectarian conflict, on the part of mainly nationalists, by proxy.

A number of questions has now been opened up. One, Mr Justice McCloskey acted out of sympathy for the relatives. But – someone now needs to ask – are the relatives concerned about justice for all, or have they become attached to maintaining Dr Maguire's theory of 'collusion'?

Two, is it sensible for a former Director of Public Prosecutions to return to legal practice, and to do so in such a stunning manner?

Three, did parliament, when it provided for a Police Ombudsman in 1998, envisage such historical investigations, decade after decade?

Four, and separately (and given that Al Hutchinson was driven from office), what chance is there of Dr Maguire resigning as Police Ombudsman, in the general interest of restoring public confidence (or, failing that, amending his report by remove the unfair passages)?

Five, and given that English judges have recently been standing firm against applications to recuse, has an effective precedent now been set about victim power? Has trial by media (including social media), with the emphasis upon emotion and immediacy, replaced the 'bewildering and confusing' legal system, as Mr Justice McCloskey put it on 26 January 2018?

Finally, I muse, what if Thomas Hawthorne were to seek to appeal McCloskey J stepping down? What would his senior judicial colleagues in NI say? And, assuming the Maguire/McGrory/relatives' alliance held, what would the United Kingdom Supreme Court say about Mr Justice McCloskey's decent gesture?

The answer, most likely, was articulated by Chadwick LJ, in *Triodos Bank v Dobbs* [2005] EWCA Civ 468 [2006] CP Report 1:

> It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved…But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant … criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases.

But the Supreme Court may not have to go there. A first judgment was handed down on 21 December 2017. The recusal application was dismissed in a reserved judgement of 26 January 2018. And the learned judge even provided for the applicants' costs. Two summary judgments have been published on line.

Conclusion

Surely, the matter is now *fructus* (as the Romans would have said), and the future is: either the police officers seeking such a declaration to this effect by way of appeal to the Court of Appeal in Northern Ireland; or the Police Ombudsman having to appeal McCloskey J, and his devastating criticisms of the report (not an easy thing to do in a judicial review). H

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Book Reviews

CORRUPTION AND MISUSE OF PUBLIC OFFICE by Colin Nicholls, Tim Daniel, Alan Bacarese, James Maton and John Hatchard, Oxford University Press, Oxford, 3rd ed, 2017, pp lxxviii + 934, £225.00 (hbk), ISBN: 978-0-19-87343-4.

It is difficult to imagine that six years have passed between the publication of the last edition of this magisterial work and the present one. A visible difference between the two editions is the size of the volumes: this one comes in at over 1,000 pages including the tables of cases and legislation. It also has an addition to the team of authors: James Maton, a litigation lawyer. It is dedicated to Clive Nicholls QC, who was a huge inspiration behind the work.

The book's focus continues to remain the UK, although there are useful, if comparatively brief, references to law and practice in other jurisdictions, including some non-common law ones. Now that the Bribery Act 2010 has been in force for a few years, the authors are able to offer a detailed analysis of its working, including the cases that have been brought under that law. The 'deferred prosecution agreements', under which defendants are, in certain circumstances, allowed to make fresh starts, make for particularly interesting reading.

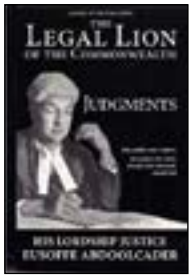
Unsurprisingly, corruption in sport engages the attention of the authors to a degree unprecedented in previous editions. This is, obviously, as a result of a spike in the incidence of sport-related scandals in recent years. The book identifies four main categories of wrongdoing in this area: corruption within international sports bodies; manipulation of sports competitions (match-fixing) and illegal gambling; doping in sport; and other acts such as corruption in the award of contacts. The challenges for law enforcement agencies in this broad area are, say the authors, formidable. In their view, frustratingly, "law enforcement is trying to respond to the challenges of corruption in sport but … the self-serving interests of some of the larger sporting bodies hamper such efforts."

The section of the book which deals with misconduct in public office is just as illuminating. Given how widespread incidents of questionable behaviour by public servants have become, not least in the UK, this area of wrongdoing cannot go unnoticed. As the authors note:

> Although [the offence of misconduct in public office] has existed in its present form for more than two hundred years, it was relied upon relatively sparingly by prosecutors and almost fell into disuse during the mid-twentieth century. In more recent times its value as an offence has been recognised in many of the jurisdictions with a common law tradition. Indeed it has become one of the offences of choice for those tasked with pursuing criminality amongst public servants and law enforcement personnel in England and Wales, Hong Kong, Australia, and some Caribbean states.

The book contains an exhaustive treatment of the offence and of the tort of misfeasance in public office.

In the less than two decades for which this work has been in existence, it has carved out a niche for itself as arguably the most authoritative source of information and guidance on what is becoming an increasingly complex area of the law. The authors are clearly right in maintaining that it remains "work in progress". The time may not be far off when the book will have to be published in two volumes.



THE LEGAL LION OF THE COMMONWEALTH by Angela Yap and Ritchie Ramesh (eds), Akaasa Publishing, Kuala Lumpur, 2017, pp. 932, 2 vols, Price: MYR360 + p&p (hbk), ISBN: 978-967-5764-03-5 (Set).

Eusoffe Abdoolcader was a prominent Malaysian judge who presided over, or was involved in, some of that country's landmark cases. Abdoolcader was also known for being very erudite and one of the most articulate members of the Malaysian legal fraternity. Elevated to the Bench in 1974, he soon gained a reputation for integrity and perfectionism as well as for not suffering fools gladly. This book, put together in two volumes to "revive the legacy" of this towering figure, is a collection of some of his most important judgments spanning the period 1975-1989, but it also carries tributes, vignettes from his life, an interview, and an article penned by the judge in 1977.

The compilers of the volumes have clearly been affected by what they call the "indifference" that has existed towards Abdoolcader in the years that have elapsed since his death in 1996. The book is, they say, "our musketry against such indifference". Not lawyers themselves – nor with any ties to the Abdoolcader family – they hope that their offering "goes beyond the romanticised myths that the people, the media and institutions have, rightly or otherwise, built around him."

Abdoolcader's reputation and influence went well beyond Malaysia. As one British QC is reported to have said in a tribute which appeared in *The Observer* (London),

Abdoolcader's was a "legal mind as formidable as can be found in any Court in the Commonwealth". Not for nothing did he earn the nickname the "Legal Lion of the Commonwealth". As the editors note:

> Firstly, his many judgments created ripples far beyond Malaysian shores and nfluenced the direction of other Commonwealth nations. Cited as foreign precedents by constitutional judges in countries such as New Zealand and Australia, the 'even here-even there' approach was applied when these courts relied on progressive foreign precedents such as Eusoffe's to initiate into their legal system new or revised perspectives in their respective constitutions … As recently as 2013, international law journals have referenced Eusoffe's judgments on constitutional reform for indigenous rights.
>
> Secondly, of the innumerable Commonwealth judges, he is one of the hallowed few with the distinction of having his judgments … cited with approval by the Judicial Committee of the Privy Council in London circa 1981, a rare honour in the days when the Privy Council was the highest court of appeal for the Commonwealth.
>
> But, above all, 'The Legal Lion' is a fitting monicker [sic] for a man whose fierce and regal qualities mirrored that of the king of the jungle.

The judgments chosen for the volumes span a wide range of subject areas: contract, crime, contempt of court, bankruptcy, property, citizenship, employment, education, deprivation of liberty, public order, personal injuries, rights of association, shareholders' rights, copyright, elections, land rights, equitable reliefs, judicial review and much else besides. What runs through the judgments, apart from the judge's mastery of each of these branches of the law, is a felicity of expression which is as rare as it is heart-warming. No less striking is his wry sense of humour: sample these opening sentences in two separate judgments:

> This case, which, like the papacy of Pope John Paul I, lasted 33 days in the hearing…
>
> Merdeka [Freedom], proclaimed Tunku Abdul Rahman to the resounding echo of the populace, and so it came to be. But the cry for Merdeka University has not achieved the same response and result. And thus the matter comes before the court.

Or sample this closing observation in a case involving allegations of electoral corruption:

> I have dealt with the matter before me strictly on its facts and circumstances and what I have said must not be taken to bestow and unbridled licence on would-be political brawn crackers to transcend the twilight zone between campaign pledges and promises and electoral misfeasance, as the next step beyond might well make all the difference.

There is much in these volumes by way of illumination and amusement for lawyers and lay readers alike. That the book should come out now also serves to highlight the very considerable change that the Malaysian judiciary has undergone between Abdoolcader's time and the present – a reminder which is both timely and necessary. The editors indicate that the present work is "merely the beginning, the first of several other books outlining our research to revive the legacy of Eusoffe Abdoolcader and Malaya's most illustrious forgotten family." Those books will, it can be safely said, be eagerly awaited by many in Malaysia and further afield.

HUMAN RIGHTS AND JUDICIAL REVIEW IN AUSTRALIA AND CANADA by Janina Boughey, Hart, Oxford, 2017, pp xxxii + 288, £100 (hbk), ISBN: 978-1-50990-786-1.

Do formal statements of rights, such as chapters on fundamental rights in national constitutions, stifle the development of common law? This is a controversial question on which there is wide divergence of views. Australia is one of the few major common law jurisdictions where fundamental rights are not protected – in formal terms – by either statutory or constitutional mechanisms. Canada, on the other hand, has a Bill of Rights that is well known and which has spawned an impressive body of case law over the years.

In this book, the author advances the thesis that, despite these differing approaches to human rights, "both jurisdictions have reached remarkably similar positions regarding the balance between judicial and executive power, and between broader fundamental principles including the rule of law, parliament sovereignty and the separation of powers."

As befits a work born out of a doctoral thesis, the book follows a predictable academic format and structure. It is divided into two broad parts, dealing respectively with Constitutional and Statutory Frameworks (which encompass both Australia and Canada) and the Effects of Canada's Rights Framework on Judicial Review. Each of the six chapters comprising the analysis carries a round-up of the issues discussed within it.

In terms of overall conclusions, the author identifies two trends which are worthy of note:

> Over the past five years, Canada has gone from what appeared to be a bifurcated approach to human rights and administrative law to a deeply unified one and may now be on the cusp of a return to bifurcation. And many aspects of the relationship between the Charter [of Rights

and Freedoms] and administrative law in Canada remain unsettled. Australian administrative law has also experienced significant and unexpected shifts, the consequences of which remain unclear. One of the stalwart principles of Australian administrative law – *Wednesbury* unreasonableness – may be on the verge of being discarded in favour of a broader, more intrusive approach.

INDIRA GANDHI: A LIFE IN NATURE by Jairam Ramesh, Simon & Schuster, New Delhi, 2017, pp 437, Rs 799 (hbk), ISBN: 978-8-1933-5524-4.

2017 saw the centenary of the birth of Indira Gandhi, the late Prime Minister of India. Although the event was marked with some fanfare by her Congress party, the celebrations were, on the whole, modest. Part of the reason for this was, of course, the fact that the ruling Bharatiya Janata Party (BJP) which has been in power in Delhi since 2014 is not exactly a huge admirer of Mrs Gandhi. But an equally undeniable reason for the absence of large-scale eulogising was the rather ambiguous reputation that the former Prime Minister enjoyed during her time in public life. The one tangible tribute to emerge, however – whether by accident or by design – is this book, penned by a prominent member of the Indian National Congress and one of Mrs Gandhi's self-confessed admirers, Jairam Ramesh.

Ramesh offers a spirited defence of Indira Gandhi's credentials as a champion of the environment. He calls the book, quite fairly, "an unconventional biography" and provides many reasons for putting it together. Foremost among these is that Mrs Gandhi considered herself to be a naturalist:

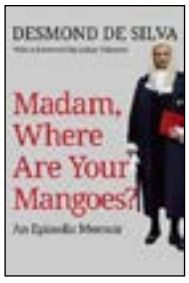
> She got sucked into the whirlpool of politics but the real Indira Gandhi was the person who loved the mountains, cared deeply for wildlife, was passionate about birds, stones, trees and forests, and was worried deeply about the environmental consequences of urbanisation and industrialisation.

Her other claims to fame as an environmental champion were, notes Ramesh, her stewardship of India's best-known wildlife conservation programme, Project Tiger, and of initiatives for the protection of a range of animals, reptiles and birds, as well as her promotion in parliament of two notable conservation laws, one relating to wildlife and the other to forests. Ramesh is also aggrieved that "the environmentalist in her has never got the acknowledgement it warrants from her biographers" (of whom, of course, there have been many).

He goes about his task with an admirable mixture of assiduousness, enthusiasm and passion. The research – which includes unearthing a number of hitherto undiscovered (or at least unpublished) documents – is, by any objective measure, painstaking. It perhaps helps that he brings to bear the zeal of a convert because, as he notes in his introduction, from around 2009 when he was appointed India's Minister for the Environment and Forests, he "got transformed from being a zealot for rapid economic growth at all costs to someone who came to insist that such rapid economic growth must be anchored in ecological sustainability".

The six substantive chapters deal chronologically with Indira Gandhi's evolution as a naturalist and her exertions in the cause of environmentalism, starting with the influences that shaped her thinking on this subject: as a child going to school in various cities (and countries); as a political 'apprentice' of her father, Jawaharlal Nehru; during her first period as Prime Minister; during her wildnerness years (after being banished from power in 1977); and as Prime Minister again before her assassination in 1984. Ramesh's verdict, predictably, is a glowing one: "Without question," he avers, "Indira Gandhi was a trailblazer on environmental issues not just within India but on the world stage as well … Her environmental legacy comes with no qualifiers, no caveats. It is a legacy that continues to resonate and is really for the ages."

That, then, is the case for the defence. Does it excuse or exculpate her overall record as a politician for the twenty-odd years that she presided over India's fortunes – the 'locust years', as one of her sharpest critics once called them: the ruinous economic policies that condemned a whole generation to avoidable misery (and the effects of which still linger on); the cruel suppression of civil liberties during the bogus state of emergency that she declared to cling on to office in 1975; the repeated assaults on parliamentary democracy, independence of the judiciary, and the rule of law; and the barefaced arrogance with which she treated her political opponents? Many would argue not. Indeed, to burnish Mrs Gandhi's image on the basis of her credentials as a champion of the environment is, some would contend, not very different from praising Hitler for being a vegetarian.



MADAM, WHERE ARE YOUR MANGOES? By Desmond de Silva, Quartet Books, London, 2017, pp xviii + 318, £25 (hbk), ISBN: 978—0-70437-442-3.

To say that Desmond de Silva QC comes with an exotic background and a remarkable career would not be an exaggeration. Born in Ceylon of Sinhalese and Anglo-Scottish origins, schooled in England, married to a Yugoslav princess, called to the English Bar (where he established a successful career as a criminal silk) and invited to carry out a number of international missions, including some high-profile ones such as the arrest of the Liberian strongman Charles Taylor for war crimes in Sierra Leone, he has been in the limelight for some years now.

In these, his memoirs, he recounts the highs and lows of his eventful career. Included are reminiscences of some of the cases he has been involved in, pen portraits of many of the 'great and the good' he has mixed with, and observations on important developments in the world of English law. His affection for the common law and its continuing significance will be of particular interest to many, as will his trenchant observations on some of the more controversial happenings of recent years. Sample this broadside on the diminution of the role of the Lord High Chancellor:

> Today, in 2017, there are forces at play that have even left members of the judiciary waiting to leave in droves. Something is terribly wrong when a barrister, in order to obtain a practising certificate, is required to make a contribution to a war chest maintained by the Bar Council to finance battles with the Lord Chancellor who, until 2012, when the rot set in seriously, was a distinguished lawyer and the trusted voice for the Bar in Cabinet.

Hugely entertaining as it is, there is also – in common with many autobiographies – a certain amount of vanity evident in the book. But, taken as a whole, this is a volume which will be welcomed by lawyers and non-lawyers alike within the Commonwealth.

PATRONISING BASTARDS by Quentin Letts, Constable, London, 2017, pp xii + 305, £16.99 (hbk), ISBN: 978-1-47212-735-8.

Elites – or members of the 'chattering classes' – in the West have come in for sharp criticism in the past couple of years. Their excoriation drew particular sustenance from two of the most talked-about events of the recent past, namely the election of Donald Trump as the President of the United States and the UK public's decisive rejection of continuing membership of the European Union. Both represented sharp pokes in the eye for the elites, as many commentators have pointed out. But, says the author of this thoroughly amusing polemic, the malaise – at least insofar as it related to the UK – went much further back in time:

> For decades, Britons have been bossed about by a clerisy of administrators and managers and pose-striking know-alls. The old aristocracy having faded, in came a more furtive elite, driven by the desire to own minds, not acres. They were not interested in buying parkland and vistas. They wanted to control opinion and dictate our attitudes.

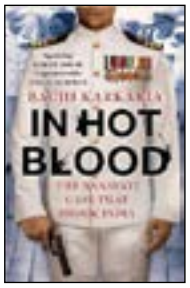
Letts spreads his canvas quite wide. His targets include: MPs who snigger at working class people; film stars who practise the opposite of what they preach; fashionable 'opinion leaders' and pliable industrialists who serve as cheerleaders for the Establishment more out of self-interest than conviction; art critics who suck up to trendy 'artists'; university heads who fall for the charms of politically correct celebrities; political image-makers who specialise in soft-focus sentimentalism; greedy peers; equality 'czars'; pompous media figures; quango queens; self-important actors; egoistic architects; and patronising corporate leaders, to name but a few.

The humour that animates the 300-odd pages of this book is laced with a passion that is no less palpable. Not all the things that Letts considers infuriating and enslaving have, however, been included. Among the omissions are:

> [T]heatres' pre-show warnings to audiences that 'cigarettes are smoked during the performance'; phone-tree answering machines that treat us like idiots; children's commissioners; the National Trust, usurious high-street banks that advertise themselves as our friends; the 'Do you know who I am?' brigade who like that odd man David Mellor shout at cab drivers; supermarket check-outs that say 'unspecified item in the bagging area' when they mean 'stop shoplifting'; identity politics; the way Health and Safety saw off those lovely new Boris buses; think-tanks producing reams of political research that means nothing to the general public.

Many readers will hope that a companion volume will not be long in coming.

More briefly…



IN HOT BLOOD by Bachi Karkaria, Juggernaut, New Delhi, 2017, pp 302, Rs 699 (hbk), ISBN: 978-9-38622-827-7.

As a landmark event in the history of the criminal justice system in India, the *Nanavati* case has few parallels. It led to, among other things, the abolition of trial by jury in India. The case, heard in the Sessions Court in Bombay in 1959, concerned the murder of a businessman, Prem Ahuna, by a high-flying naval commander, Kawas Nanavati, in circumstances of what is usually described as a 'love triangle'. This case etched itself firmly in popular culture and has spawned books, plays, motion pictures and even doctoral dissertations over the years.

Karkaria, a journalist, has attempted to reassess the case based on her own researches, including interviews with some of the dramatis personae connected with the case, although her attempts to speak to those at the centre of the love triangle were unsuccessful (the accused died a few years ago and his widow, though still alive, refused to co-operate). What emerges is, as the blurb on the dust jacket claims, part thriller, part courtroom drama and part legal history. Written in an idiosyncratic style which lapses frequently into breathless,

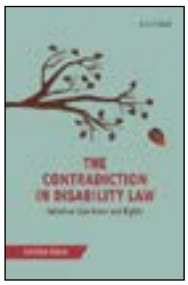
colloquial prose, the book amounts to little more than the proverbial curate's egg – good in parts.

CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL by Susanna Mancini and Michel Rosenfeld (eds), Oxford University Press, Oxford, 2014, pp xxxii + 349, £73 (hbk), ISBN: 978-0-19-966038-4.

The underlying premise of this book is that the concept of constitutional secularism is under such vigorous attack that its legitimacy and viability are being challenged. Those carrying out the attack, say the contributors to the book, believe that the concept is inherently hostile, rather than neutral, towards religion; or that it favours one religion (or a group of religions) over others.

The essays comprising the volume are arranged under five heads: theoretical perspectives on the conflict between secularism and religion; religion, secularism and the public square; religion, secularism and women's equality; religious perspectives and the liberal state; and the confrontation between secularism and religion in specific contexts: education and free speech.

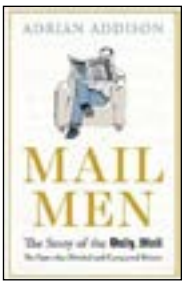
The essays, informative as they are, are fairly disparate. An introduction by the editors is rather brief. Even so, the volume is a welcome contribution to a topical debate of considerable importance.



THE CONTRADICTION IN DISABILITY LAW by Smitha Nizar, Oxford University Press, New Delhi, 2016, pp lxii + 220, Rs 850 (hbk), ISBN: 978-0-19-946665-8.

Given that social attitudes towards the girl child continue to remain negative in countries like India, it is hardly surprising that legislation banning pre-natal tests for sex selection has been enacted. Under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, it is an offence to perform any test for the purpose of ascertaining the sex of an unborn child. However, the same law permits the carrying out of diagnostic techniques to determine if an unborn child suffers from any physical abnormalities. The result is that a parent who is uncomfortable with a foetus carrying a disability can, subject to the provisions of the Medical Termination of Pregnancy Act 1971, decide to abort the foetus – a choice which is denied to parents who might wish to carry out a similar procedure on grounds of the sex of their unborn child.

This legal anomaly is the subject-matter of the present book. The central thesis of the work is that disability-selective abortion negates the rights of persons with disabilities. As part of her critique, Nizar looks at: the interplay between natural and social selection; competing discourses on the value and quality of human life; different perspectives on sex- and disability-selective abortions; the implications of disability-selective abortions; and the position occupied by such abortions by national and international law. There are no prizes for guessing where the author's sympathies lie. "Resources and technology," she firmly argues, "should be used to empower the lives of persons with disabilities, not diminish their value by denying them the right to life on an equal basis with others."



MAIL MEN by Adrian Addison, Atlantic Books, London, 2017, pp 407, £20 (hbk), ISBN: 978-1-78239-970-4.

The Daily Mail – together with its sister publication, *The Mail on Sunday* – is a newspaper which is as successful as it is controversial. For more than a century now it has been an influential shaper of public opinion, much loved by 'middle England' and despised with equal passion by the 'chattering classes'. In this, a highly illuminating history of the paper, Adrian Addison tries to explain what makes the *Mail* tick.

"[S]ome believe," he says, "that the *Daily Mail* is imbued with almost supernatural powers – it can handpick government policy and [it] almost single-handedly scared over half the electorate into taking Britain out of the European Union." Addison examines the influences behind the paper's success and offers insights into those behind making it the institution that it has now become. He warns those who might wish it ill from raising their hopes high. "The *Mail*," he reminds them, "now reaches far more readers, far more *young* readers, than ever before, all over the planet." Liberals, beware!

News and Announcements

MALAYSIA: Landmark verdict on religious conversion

Malaysia's highest court declared on Jan 29, 2018, that the consent of both parents is needed to change a child's religion, voiding the unilateral conversion of Hindu mother M Indira Gandhi's children by her Muslim ex-husband and ending her nearly decade-long ordeal.

The Federal Court ruling has drawn a line under a searing debate over whether Muslim parents can convert a child without the consent of their non-Muslim spouse, as the judges decided that the word "parent" in the Constitution cannot be read literally and referred to both parents where applicable, as "both parents have equal rights."

Article 12(4) of the Constitution states that the religion of a person under the age of 18 years shall be decided by his parent or guardian.

"Since the children were not present (during the conversion), and the conditions were not fulfilled, the registrar has no power to register them as Muslims," Tan Sri Zainun Ali said when reading out a summary of the 99-page judgment that comes after 14 months of deliberation.

She was referring to the Registrar of Muallafs (Muslim converts), which the apex court said had acted beyond its powers when authorising the conversion in 2009.

The five-member panel was led by Court of Appeal president Zulkefli Ahmad Makinudin, whose own court had in 2015 upheld the conversion of Ms Indira's three children, reversing a 2013 High Court ruling that set aside the registrar's decision.

"Today, surprisingly the Federal Court had made the decision which the elected representatives of this country has failed [to make]," said Ms Indira's lawyer M Kulasegaran. He was referring to Parliament's decision last August to not proceed with a statutory amendment that would have barred unilateral conversions.

De facto law minister Azalina Othman Said said in a statement on Monday the government's decision in August was due to the prevailing legal interpretation of the Constitution at the time.

"In line with today's development that trumps previous decisions, I will bring the matter to the attention of the Cabinet," she said.

Ms Indira's ex-husband, Mr Mohd Riduan Abdullah, formerly K Pathmanathan, converted the three children three weeks after he embraced Islam. The Syariah Court granted Mr Riduan custody of the three children soon after their conversion to Islam.

The two elder children – daughter Tevi Darshiny, 20, and son Karan Dinesh, 18 – have stayed with their mother despite their conversion, but her youngest daughter, eight-year-old Prasana Diksa, was abducted by the father when she was 11 months old and has remained with him since. Mr Riduan has gone into hiding and failed to appear for numerous court hearings.

In 2014, Ms Indira secured a court order compelling the police to find Prasana and return the child to her, However the then national police chief Khalid Abu Bakar refused to execute the order, citing jurisdictional conflicts between the secular and Syariah Courts.

"Even though we have won this case she is not here and that is the saddest part," Ms Indira told reporters on Monday, saying the police have no more excuses not to locate Prasana. New police chief Mohamad Fuzi Harun told The Straits Times that the force will abide by the court order but efforts to locate Prasana have so far been in vain.

"We have exhausted our resources in trying to locate the child but so far, to no avail. In fact, a report has been submitted to relevant parties for scrutiny," the Inspector General of Police said.

[Source: The Straits Times (Singapore), 29 January 2018]

INDIA: Revolt by senior Supreme Court judges

The Supreme Court of India was thrown into its biggest-ever crisis on 13 January 2018 when its four senior-most judges revolted against the Chief Justice of India (CJI), Dipak Misra and launched an unprecedented public attack against his allegedly arbitrary way of assigning important cases to benches headed by junior SC judges, ignoring senior ones.

Justices Jasti Chelameswar, Ranjan Gogoi, Madan B Lokur and Kurian Joseph, who have been restive over cases of "far reaching consequences for the nation" being "assigned selectively" to "benches of preference", held a press conference on the lawns of Chelameswar's bungalow on Tughlaq Road, barely 200 metres from the CJI's residence on Krishna Menon Marg.

They alleged serious infirmities and irregularities in administration and assigning of cases for hearing to benches in the SC.

The judges, who have traditionally been camera-shy, said they were forced to hold the briefing, a first, because a letter they had sent to the CJI two months ago pointing out mistakes had gone unanswered.

"We tried to persuade the CJI that certain things are not in order. Unfortunately, the efforts failed. We are convinced that unless corrective steps are taken immediately, the judiciary will lose its strong and independent tag, an essential hallmark of a vibrant democracy," Chelameswar said, taking the lead in the press conference.

Chelameswar said he and his colleagues were moved only by their concern for the institution. "No wise man should say after 20 years that Justices Chelameswar, Gogoi, Lokur and Joseph had sold their souls and did not do anything about rectifying the problems. That is why this press conference," he said.

Gogoi added, "It is about assignment of a case. Whatever Justice Chelameswar said is enough. It is a discharge of debt to the nation and we have done it."

[Source: The Times of India, 13 January 2018]

SOUTH AFRICA: Plea to Promote and Protect Rule of Law

The Law Society of South Africa has publicly appealed to the ruling African National Congress to protect and promote the rule of law.

In a press release issued on 14 December 2017, it called upon the ANC, its leadership and its structures, to take urgent steps to, among other things:

- Openly support the Judiciary, and respect for the courts and their judgments;
- Decisively rebuke the Youth League and others who unjustifiably attack and criticise the judiciary without proper grounds to do so; including personal attacks on judges and unwarranted accusations of overreaching and partiality with ludicrous threats of impeachment;
- Restore the status and dignity of the National Prosecuting Authority so that it can serve as an independent and trusted light in the search for truth and justice for all persons in our country;
- Level with the people of South Africa as to the true intentions behind state of emergency regulations, a media tribunal and our country's withdrawal from the International Criminal Court;
- Show leadership, take responsibility and restore accountability;
- Deal decisively with the state of capture that our country has been mired in and which has affected our economy and our standing and credibility in the region, on our continent and internationally by implementing the remedial action of the Public Protector in the State of Capture report, which has now been declared to be binding by the Gauteng High Court; and
- Guarantee us that the Constitution, Rule of Law and our constitutional democracy are secure.

The appeal was issued jointly by the co-chairmen of the LSSA, David Bekker and Walid Brown.

[Source: LSSA Press Release]

NEW ZEALAND: Denial of e-mails to sacked academic held lawful

The Office of the Privacy Commissioner has determined that a university did not have to comply with a request from an academic to allow him access to all his emails over a year.

The Office says in its decision that, while emails generated at work could be personal emails, it was reasonable for the university to refuse to provide them in the form requested.

The academic had been dismissed from his university position. He then requested all of his work emails from a 12-month period of his employment. The university refused, saying the about 12,000 emails were university property.

In his complaint, the academic said he had been unfairly dismissed. On the day of his dismissal, access to his work email account was terminated. As a result, he lost contact with many of his colleagues, business partners and personal contacts.

After he made a request to the university, he was told he would be allowed access to some of the emails through an approval process. The academic said the effect of being cut off from his email account meant a significant financial loss, as well as humiliation, loss of dignity and injury to feelings. He said his candidacy for two roles he was applying for was seriously undermined because of the sudden termination.

He told the Office he wanted access to all the emails, an apology and $100,000 in financial compensation.

The academic's complaint raised issues under principle 6 of the Privacy Act 1993 which says individuals have a right to have access to personal information held by an agency - but that right is subject to a number of withholding grounds.

The university said the academic had been dismissed for serious misconduct. It withheld the emails because in its view, the emails sent or received using the university's IT system were university property, and most were work-related.

The university also argued that disclosing the information would involve the unwarranted disclosure of the affairs of another individual. In addition, many of the emails were likely to contain information that was confidential to the university, its stakeholders and clients.

The Office says that even though emails generated in a work capacity did meet the test of being 'personal information', it was reasonable for the university to refuse to provide them in the form requested.

It says it accepted that in order to process a request for such a large amount of personal information, and to determine what was and wasn't personal information, would be significantly burdensome to the university.

"We noted the university had made an offer to release approved emails in some form other than the totality of a computer hard drive. But the academic declined this offer, despite attempts by our investigator to reach a compromise between the two parties," the decision says.

"We formed a final view that there was no interference with the academic's privacy. We advised him that he could provide the university with a specific list of the information he wanted to access, but we did not consider any further action by our office was necessary. We offered the academic an opportunity to respond to our view but he did not reply."

[Source: NZLS News Release]

AUSTRALIA: New President of Law Reform Commission

The Attorney-General of Australia, George Brandis QC, announced, on 30 November 2017, the appointment of Professor Sarah Derrington as the new President of the Australian Law Reform Commission (ALRC), for a five-year term. She replaces Professor Rosalind Croucher, who was recently appointed as the President of the Australian Human Rights Commission.

Professor Derrington has had a distinguished career both as a practising lawyer and a legal scholar. She is currently the Academic Dean and Head of School at the TC Beirne School of Law at the University of Queensland. Professor Derrington's fields of specialisation are admiralty, maritime law and insurance law. She has published extensively in these areas and is widely acknowledged as one of the leading scholars in the field. This has extended to active membership of a number of prestigious international maritime law associations, including the Comite Maritime International.

Beyond the academy, her professional experience has involved time working as a lawyer at the leading commercial law firms Minter Ellison and Freehills, as well as practice at the Bar.

She is also currently a member of the Board of the Australian Maritime Safety Authority and the Australian Maritime College, and is a member of the Council of the Australian National Maritime Museum.

Professor Derrington will bring practical experience as a legal practitioner, eminence as a scholar and skills as an administrator to the role of President of the ALRC. She has also been appointed a judge of the Federal Court of Australia, from which she will be seconded during her tenure as President of the ALRC, said the Attorney-General.

[Source: Press Release, Attorney-General's Office, 30 November 2017]

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