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'The New Malaysia': Hopes and Expectations

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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: Prime Minister Dr Mahathir Mohamed and colleagues celebrating the win of the Opposition alliance at Malaysia's 14th General Election on 10 May 2018.]

Message from the President

As part of my 'Mission Commonwealth Connect', visiting various Commonwealth countries has been a fascinating experience.

Europe: In April I was in London during the Commonwealth Heads of Governments (CHOGM) meeting. As well as attending the CLA Council Meeting, I went to some of the pre-CHOGM events organised by ComSec accredited organisations. Attending the reception of Commonwealth Human Rights Initiative (CHRI), to celebrate 30 years of its existence reminded me of the background under which CLA and its sister organisations created CHRI. A visit to Malta in May connected me to their Chamber of Advocates. Basing myself in London for about eight weeks in the summer helped in getting across to the legal fraternity there. We also welcomed the appointment of our new Secretary General, Brigid Watson, who assumed office at the beginning of June. Since then she has shown enthusiasm, unrelenting commitment and a determination to take the CLA to a different level. Along with her, I attended a meeting of the Commonwealth Legal Forum. In July I was part of the ‹Peace at the Crease' initiative of ComSec where a cricket team from Vatican played against a team from the Commonwealth. In September I was in Scotland where I had a meeting with the Dean of the Faculty of Advocates.

Americas: I visited Barbados in May to attend the Annual Whitsun Weekend Conference organised by the Barbados Bar Association where I met Bar leaders and judges from various parts of the Caribbean (including the President-elect of Caribbean Court of Justice). In September I attended the annual conference of the Organisation of Eastern Caribbean States (OECS) Bar Association in St. Kitts. I got an opportunity to speak at this event about CLA and about our Livingstone conference (CLC).

Africa: In April I attended the annual conference of the Law Association of Zambia in Livingstone. With CLA colleagues I also went to inspect the venue of, and the facilities for, the CLC. I then went to the Law Society of South Africa at Pretoria and met some of their Council members as well as the Deputy Head of the General Council of the Bar of South Africa. The August visit also took me to the Law Society of Namibia in Windhoek and to the Law Society of Zimbabwe and to the annual conference of SADC Lawyers' Association in Mozambique, where I got to meet the lawyers from most of the countries of Southern Africa. In October I visited the Mauritius Bar Association in Port Louis and the Law Society of Botswana in Gaborne. Going on to the kingdoms of Lesotho & Swaziland facilitated visits to their Law Societies. On the last leg of this tour I went to Blantyre and to the Law Society of Malawi.

In September I visited the Sierra Leone Bar Association (Freetown) and the Gambia Bar Association (Banjul) where I met the respective Presidents, executives and the countries' Chief Justices. My last visit of the year to West Africa was in October to attend the swearing in ceremony of our own Nene Amegather as a Judge of the Supreme Court of Ghana.

As for East Africa, I attended the annual conference of the Law Society of Kenya in August. In November I was in Mombasa to attend the annual conference of the East Africa Law Society. There we also had the first meeting of the CLA's Regional Hub for Africa, attended by bar leaders from Tanzania, Uganda, Rwanda, Kenya and South Sudan and a representative from the Law Society of England and Wales.

Australasia: In December I was in Fiji to attend the Attorney General's Conference. This gave me the opportunity to meet the President of the Law Society of Fiji. I then went to Samoa and met the President of the Law Society there. This was followed by a visit to Sydney where I called on the Law Society of New South Wales and on Michael Kirby. Later, in Canberra, I met some officials of the Law Council of Australia. I then moved to Wellington to meet the President of the Law Society of New Zealand and some senior colleagues.

I would like to end this message by wishing you all a happy new year!

– R Santhanakrishnan

Editor's Note

I start with an apology: we regrettably had to skip what would have been our August 2018 issue. But I am pleased to say that, with the current issue, the frequency of the journal has now been restored. As you will see from the pages to follow, we have a rich fare of articles, book reviews and other items of interest which I hope you will enjoy.

The Senior President of Tribunals in England and Wales, Sir Ernest Ryder, offers some helpful insights into the opportunities and challenges of modernising the delivery of justice. His reflections will, I am sure, strike a chord with those involved in that process in other jurisdictions as well. The rationale that he puts forward for making change happen merits careful consideration:

> The modernisation of justice is not simply a technical endeavour to digitise process and minimise mountains of paper: we can do that and have done so around the world. It is nothing less than a new emphasis on strategic leadership by the judiciary. We are called upon to deliver an administration of justice that is patently fair, that protects the judiciary's independence and provides equality of access that is open to scrutiny by a diverse public with whom we must engage and communicate if we are to meet their needs and retain their understanding, trust and respect.

Another judicial contributor to this issue, Mr Justice Bernard McCloskey of the Court of Judicature of Northern Ireland (whose writings have enriched these pages from time to time), describes a fascinating run of litigation involving the social media platform Facebook in his jurisdiction in recent years. Many of those cases have involved issues of privacy and the responsibility that the owners of social media sites have in dealing with content that may, while being of interest to readers and therefore 'popular' among users of platforms such as Facebook, potentially be harmful or embarrassing to those commented upon. Such cases also often involve technical questions of applicability of data protection and other similar principles at a trans-national level, with much of the law in this area being territorial in nature. The Northern Irish cases provide a cornucopia of material on highly complex procedural issues as well, including on the all-important questions of interim relief in such proceedings.

Malaysia occupies a significant proportion of the contents of this issue. It is a country which has been very much in the news in recent months, not least for the results of the dramatic general election held on 9 May 2018 which have been variously described as an earthquake or a tsunami. The 'regime change' that the election brought about saw the end of 70 years of uninterrupted rule by a Malay-dominated coalition, the Barisan Nasional (National Front) and the return, in dramatic circumstances, of the country's former strongman, Dr Mahathir Mohamed, as prime minister at the ripe old age of 92. This development has, not surprisingly, spawned a huge volume of media comment and continues to engage the attention of experts and laypersons alike.

One aspect of the 'regime change' that has been the focus of particular scrutiny is the extent to which the new leaders of Malaysia are willing to tackle, head-on, the very thorny issue of the discriminatory policies practised by successive Barisan Nasional governments for decades. Under those policies, race and religion became so deeply entrenched as criteria for determining the entitlements of ordinary citizens that they polarised Malaysian society in a very toxic manner. Racial discrimination in favour of the majority Malay population (the *bumiputeras*), sanctioned by law and used cynically by self-centred politicians, led to numerous highly publicised cases of injustice against the country's minority Chinese and Indian citizens, most of whom practised religions other than Islam. One of the first acts of Mahathir after taking office last May was to signal an end to such divisive politics and to adopt a more even-handed approach to governance.

Whether that important promise has been honoured remains a subject of continuing debate. We carry three articles on different aspects of this thorny issue, including one which takes a reflective look at how corrosive the actions of previous governments have been on the protection of basic freedoms such as freedom of religion and freedom of belief. There is, as I hope you will agree, much food for thought in these articles.

I would like to wish our readers a happy and productive new year!

– Dr Venkat Iyer

Articles

Which God? Whose Country? – Freedom of Religion and Belief in Malaysia

Wong Chin-Huat

Introduction

Article 18 of the Universal Declaration of Human Rights (UDHR) affirms that:

> *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

The inconvenient reality is of course that neither the provisions of the UDHR nor human rights more generally are universally accepted. In fact, in Malaysia, human rights are seen by some as a threat to their religion.

In a Friday summon in 2013, a functionary of the Malaysian Islamic Development Department (JAKIM), one of the government-sponsored custodians of Islam, warned that demands for religious freedom and gender inclusion could confuse people and this can destroy the harmony and undermine Islam's special position in Malaysia.[1]

Special position for Muslims

The constitutional "special position" of Islam is almost inseparable from the political supremacy of Muslims, an overwhelming majority of whom are Malays and Borneo natives. Such people enjoy special privileges under Article 153 of the Federal Constitution of Malaysia. The Article 153 "special position" provides for preferential treatment in public sector employment, education and business licensing, which have been extended in policy terms after 1969 to also cover private sector employment, equity ownership and home ownership.

The special position further makes Islam a key ethnic marker for the Malays, linking spiritual identity with temporal interests. Originally designed for the Malays, it necessitates a constitutional definition of Malays as the beneficiary group, which interestingly lists no genealogical requirement but only geographical origin (Malaya-Singapore) and three behaviourial conditions: professing Islam, habitually-speaking the Malay language, and observing Malay customs. In practice, globalisation and Islamism have reduced the importance of language and custom in Malay identity while political expediency had long made geographical origin irrelevant, hence, leaving Islam as the most salient defining element of Malayness.

Understandably, religious freedom, in both the inter-faith and intra-faith senses, is thus portrayed as an existential threat to the political dominance and socio-economic well-being of Malays/Muslims. While Islam is the fastest-growing faith in the world,[2] and many non-Muslims are embracing Islam in countries with uninhibited freedom of religion like United Kingdom,[3] Malaysian Muslims are often terrified by unsubstantiated news of Muslim apostasy. In November 2016, Harussani Zakaria, the Mufti of the Perak state, spread a rumour about *en masse* baptism of Muslim students in a Catholic Church in the city of Ipoh, Perak, which led to a commotion and terrified the 100 Catholic children who attended their first holy communion.[4] Earlier in 2009, two reporters from an Islamic magazine impersonated Catholics to investigate if apostasy took place in churches. Many 'Malay-looking people' were reportedly spotted in one of the churches where the reporters had entered surreptitiously and where services were conducted in Malay.[5]

Apostasy

Exit from Islam is extremely difficult, if not impossible, for Malaysian Muslims today. While Muslims could leave the faith quietly in the past, the door was officially closed for Lina Joy, who was born Azlina Jalaini and a Malay.[6] She converted

[1] *http://www.themalaymailonline.com/malaysia/article/human-rights-a-facade-to-destroy-islam-says-jakim-in-friday-sermon.*

[2] *https://edition.cnn.com/2015/04/02/living/pew-study-religion/index.html.*

[3] *https://www.economist.com/blogs/economist-explains/2013/09/economist-explains-17; http://www.dailymail.co.uk/news/article-1343954/100-000-Islam-converts-living-UK-White-women-keen-embrace-Muslim-faith.html.*

[4] *https://www.thestar.com.my/news/nation/2006/11/13/baptism-message-started-by-woman-claims-perak-mufti/.*

[5] *http://www.thenutgraph.com/catholics-lodge-report-against-al-islam/.*

[6] *www.reuters.com/article/us-malaysia-religion-ruling/malaysias-lina-joy-loses-islam-conversion-case-idUSSP20856820070530.*

to Christianity at the age of 26 but the National Registration Department (NRD) refused to change her religion in their record, making it impossible for her to marry her Christian boyfriend in Malaysia where inter-faith marriage involving Muslim is illegal.[7] Seventeen years after her conversion, Lina Joy lost her case to update her religious status in the land's highest court which ruled that only Syariah courts could decide on cases of apostasy. Except for Perlis, Negeri Sembilan and Selangor, Syariah laws in most states do not provide an exit mechanism, which includes counselling.[8] In comparison, apostasy is criminalised and harshly punished in many other states. Currently unenforceable because of constitutional and legal obstacles, Syariah laws in Kelantan[9] and Terengganu[10] allow the state to take away both life and wealth from apostates.

Syariah courts in many states send apostates to religious counselling and, in some states, impose a fine or imprisonment if they do not desist from their original decision to quit the religion. Apostates from those amongst born, converted or registered as Muslims have continued to knock at the doors of the civil courts door after Lina Joy, but with very few exceptions,[11] they have usually met with the same fate.

In sharp contrast, religious conversion to Islam is a highway with busy traffic. In the populous state of Selangor alone, it is estimated that annually 3,200 Malaysians convert to Islam.[12] Religious agencies and Muslim NGOs are active and open in *dakwah* (evangelism) activities. In 2016, aggressive Indian Muslim evangelist Zakir Naik was hailed as a hero in his Malaysian roadshows and on-the-spot embrace of Islam was celebrated on national media.[13] For the socio-economically backward *orang asli* (Peninsular indigenous) community, where only 20 per cent were Muslims according to the 2010 census, JAKIM implements systematic evangelical programmes with the assistance of other state agencies including Jabatan Kemajuan Orang Asli Malaysia (JKOAM).[14] In the Borneo state of Sabah, allegations have been made about "paper conversion" by NRD officers[15] and manipulative conversions by Muslim NGOs offering welfare assistance.[16] The victims in both alleged sets of cases were poor non-Muslim indigenous villagers. Quite obviously, the idea of "free, prior and informed consent" has not become a norm in government or private bodies who engage with the indigenous peoples. The apprehension of Christians in the state of Sabah about involuntary conversion into Islam is understandable given that there was a concerted state effort from the national capital to make Muslims the dominant group in a land which was once a Catholic-majority state, using various means from aggressive conversion campaigns to instant-enfranchisement called Project IC for foreign Muslims.[17]

The idea that conversion can only be one-way process in favour of Islam is inferred from Article 11(4) of the Federal Constitution which qualifies religious freedom when it comes to Muslims as follows:

> *State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.*

State authorities have used this provision not only to outlaw propagation of non-Islamic faiths to Muslims, but also to control propagation of Islam amongst Muslims. It is therefore more about thought policing of Muslims than mere protection of Islam.

The phobia of Muslim apostasy or *murtad* (which might be called *murtadophobia*) has led to various restrictions on the propagation of other faiths, justified by the catch-all expression "confusion", with the ban on the Arabic-origin word Allah (The God) as the most illustrative example. First used in an early Malay Bible since 1629, the word Allah, which is also widely used by non-Muslims in Arab countries, India and Indonesia without any difficulties, has sparked much contention in Malaysia in the past four decades. The first attempt by the authorities to ban it came in 1981, the significant year when efforts by the United Malays National Organisation (UMNO) and the Parti Islam Se-Malaysia (PAS) to out-Islamise each other picked up momentum. After Sunday school children's books and CDs containing the word Allah were withheld by customs officers in 2007, churches and individual Christians filed judicial review applications challenging the ban. A High Court decision favouring religious freedom on December 31, 2009, was followed by a series of attacks on churches and missionary schools – accompanied with occasional desecration of mosques[18] – in early 2010.[19]

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7 *http://says.com/my/news/marriage-between-muslim-and-non-muslim-illegal-says-jakim.*

8 *https://www.malaysiakini.com/news/415372.*

9 *http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/edd5daa1361eaa7d482580140012da26?OpenDocument.*

10 *http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen/State_Enact_Ori.nsf/f831ccddd195843f48256fc600141e84/cb36901c419ea86448257385002c3dc8?OpenDocument.*

11 *http://www.christianitytoday.com/news/2016/march/malaysia-rules-muslim-can-convert-to-christianity.html.*

12 *http://english.astroawani.com/malaysia-news/what-we-can-learn-muslim-converts-malaysia-151800.*

13 *https://www.nst.com.my/news/2016/04/139600/four-convert-islam-zakir-naik-lecture.*

14 *https://www.researchgate.net/publication/291074565_Aktiviti_Dakwah_JAKIM_Terhadap_Masyarakat_Orang_Asli_Peaksanaan_dan_Cabaran.*

15 *http://www.themalaymailonline.com/malaysia/article/nrd-urged-to-stop-alleged-paper-conversion-of-sabah-villagers-to-islam.*

16 *http://www.themalaymailonline.com/malaysia/article/sabah-christians-claim-bribed-tricked-into-islam.*

17 *http://www.loyarburok.com/wp-content/uploads/2011/05/Disenfranchisement-of-bona-fide-Sabahans-by-Daniel-John-Jambun.pdf.*

18 *http://www.asianews.it/news-en/Kuala-Lumpur,-mosques-desecrated-with-pig%27s-head--17460.html.*

19 *https://www.iclrs.org/content/events/44/1577.pdf.*

The high court decision was however overturned by the Court of Appeal in October 2013, in which Justice Mohamed Apandi Ali (later to become Attorney General) made a far-reaching and twisted interpretation of the constitutional provision for religious freedom, Article 3(1), which states that, "Islam is the religion of the federation but other religions may be practised in peace and harmony in any part of the federation". For him, this meant that the condition of "peace and harmony" in Article 3(1) was to "protect the sanctity of Islam" and to "insulate" it against any threat. In other words, religious freedom of other faiths had to take a back seat if the condition of peace and harmony ceases to exist. Another judge, Abdul Aziz Abdul Rahim, cited the arson attacks on churches and mosques after the 2009 High Court judgement which overturned the ban on "Allah" to justify the ban on non-Muslims.[20] Unfortunately, the Court of Appeal judgement was not overruled by the Federal Court in June 2014, effectively shrinking the space for religious freedom.

While some have tried to argue that the suitability of non-Muslim usage is a theological question, the real consideration is very much a political one. Words that are not allowed to be used by non-Muslims go beyond "Allah".[21] For example, a *fatwa* issued by the state mufti of Sabah effectively banned 31 other words including "Firman" (decree/command [by God]), "Wahyu" (revelation), "Iman" (faith), "Rasul" (Messenger [of God]), "Nabi" (Prophet) and "Injil" (Gospel).[22] The idea is to basically keep the national language exclusively for Muslims. This mentality was admitted by a straight-speaking senior minister Nazri Abdul Aziz, "it is interpreted that if you translate any religious books into Malay language, then that is seen as an act to propagate religions other than Islam to those who profess the Muslim faith."[23]

Intertwining of religion, ethnicity and language

This idea of policing the Malay language to protect the Malays from conversion to or confusion caused by other faiths sheds light on the delicate and nuanced context wherein ethnicity, religion and language intertwine. Malay was and is largely a mono-faith language in Malaya (and later West Malaysia), as Chinese and Indians who are Buddhists, Hindus, Christians, Sikhs and Taoists do not use Malay in their religious activities. Hence, any attempt to discuss religious matters in Malay is often read as a proselytising tactic to convert the Malays. Thanks to decades of state policy, Malay has replaced English as the dominant language for many Bornean Christians.[24] In other words, Malay is functioning as a multi-faith language in the Borneo States. Free from the toxic communal suspicion common in bipolar societies like Malaya, Muslims in Sabah and Sarawak do not feel threatened by Malay-language bibles. The apprehension with Malay being a multi-faith language comes from Malayan Muslims, many of whom are disturbed by the cognitive dissonance that a Malay-looking and Malay-speaking person may be a non-Muslim. This dissonance obstructs social and moral policing of Muslims when differences are not distinct and unmistakable. The inconvenient but logical question to ask is: if a minority is encouraged to use a language that is exclusively preserved for a dominant faith, will their religious freedom not be impeded?

The restriction of propagation following the line of thought in Article 11(4) was not limited to preachers of non-Islamic faiths, but also Muslims who are perceived to have deviated from the official doctrinal position, which may differ across states. All states except Perlis follow the Shafie school within the Sunni denomination. Muslim preachers are required to have accreditation (*tauliah*) by the state authorities and those who preach without accreditation can be prosecuted under syariah laws. In 2009, a former state mufti of Perlis, often accused of being a Wahhabist, Dr Mohd Asri Zainul Abidin, was arrested by police for conducting religious classes in Selangor, although eventually no charge was pressed.[25] In 2017, Khalid Samad, an opposition parliamentarian from Selangor was fined RM 1,900 – RM 100 short of the punishment required to becoming disqualified from Parliament – for delivering a talk in a surau (*chapel*).[26] In 2015, the National Fatwa Council declared that "Wahhabism has no place in Malaysia".[27] In 2014, the Selangor Islamic Religious Council (MAIS) issued a fatwa that declared religious pluralism and liberalism as "deviant" and a feminist group, Sisters in Islam, lost their battle to challenge that fatwa in the Federal Court.[28] But the greater persecution, from state agencies or non-governmental organisations, is felt by followers of the Shia denomination and sects like the Ahmadiah. In 2017, around 200 Iraqi post-graduate students were arrested for taking part in a Shia ceremony in Selangor.[29] According to sociologist Prof Syed Farid Al-Atas, Malaysia is the only country in the Muslim world that officially condones Shia persecution[30] (Shias are, it may be noted, persecuted

[20] *http://penanginstitute.org/v3/resources/articles/opinion/516-uncommon-sense-with-wong-chin-huat-on-the-allah-judgement.*

[21] *http://penanginstitute.org/v3/files/issues/oct_10_2017_OKH_download.pdf.*

[22] *http://www.freemalaysiatoday.com/category/nation/2013/10/18/withdraw-10-year-fatwa-prohibiting-32-words/.*

[23] *http://www.theborneopost.com/2010/01/16/the-following-is-the-exclusive-qa-by-the-borneo-post-team-of-phyllis-wong-general-operations-manager-of-the-borneo-post-thesundaypost-and-utusan-borneo-and-francis-chan-thesundaypost-senior-editor/.*

[24] *https://www.malaysiakini.com/letters/76487.*

[25] *http://www.theedgemarkets.com/article/updated-former-perlis-mufti-be-probed-no-charges-yet.*

[26] *http://www.freemalaysiatoday.com/category/nation/2017/12/11/khalid-samad-not-challenging-guilty-verdict-over-tauliah/.*

[27] *http://www.themalaymailonline.com/malaysia/article/no-place-for-wahhabism-in-malaysia-fatwa-council-says.*

[28] *http://www.themalaymailonline.com/malaysia/article/mais-gets-courts-nod-to-continue-bid-to-stop-siss-deviant-fatwa-challenge.*

[29] *http://www.freemalaysiatoday.com/category/nation/2017/10/03/poser-over-arrests-of-200-iraqi-shia-muslims/.*

[30] *http://www.freemalaysiatoday.com/category/nation/2018/01/27/prosecution-of-shia-muslims-due-to-apathy-says-syed-farid/.*

in countries like Pakistan and Iraq). In the same year, the National Human Rights Commission (SUHAKAM) defended the religious freedom of the Ahmadiahs in Selangor in response to a threat made against them by a Muslim vigilante group.[31]

Sunni Muslims are to be 'protected' from the influence of not only non-Islamic faiths and non-Sunni denominations/ sects in Islam, but also atheism. Atheism is not a crime under Malaysian law, but deliberately wounding others' religious feeling is. However, in August 2017, when Atheist Republic, a Canada-based non-profit organisation, posted on Facebook a picture of its "Atheist Republic Consulate of Kuala Lumpur annual meeting", Dr Asyraf Wajdi Dusuki, deputy minister in-charge of religious affairs in the Malaysian government, issued a stern warning: "If it is proven that there are Muslims involved in atheist activities that could affect their faith, the state Islamic religious departments or JAWI could take action."[32] In November, the deputy minister claimed that atheism contradicts Malaysia's official ideology established after the 1969 riots, *Rukunegara*, the first of its five principles being "a belief in God" and citing Article 11(4), which stated that "spread[ing] ideologies that incite people to leave a religion or profess no religion at all" is unconstitutional.[33] His assertion was however refuted by constitutional lawyers. Syahredzan Johan pointed to the federal structure and opined that Islam is a state matter controlled by each state's respective Malay Ruler, and that the federal minister could only comment on Islam in the Federal Territories like Kuala Lumpur. And yet no Syariah legislation passed for the Federal Territories make it an offence to propagate atheism. Andrew Khoo of the Malaysian Bar Council stressed that, the Federal Constitution does not force citizens to have a religion, let alone a belief in a deity, theos or God (which technically Buddhists do not subscribe to, for example), nor does it lay down that propagation of atheism as an expression can be suppressed on the ground of public order or morality.

Khoo also underlined that the *Rukunegara* is not part of the Federal Constitution and therefore a precept binding on citizens.[34] Earlier in January, a group led by prominent academic-activist Dr Chandra Muzaffar began lobbying the Malay Rulers, lawmakers and the public for *Rukunnegara* to be adopted as the preamble to the Federal Constitution, arguing that the ideology embodied in it is important for national unity.[35] However, adopting the official ideology a part of the Constitution would affect the right of atheists to not believe in God, and religious freedom guaranteed by Islam covers atheists, argued Zainul Rijal Abu Bakar, president of the Muslim Lawyers' Association.[36]

If the propagation of non-Islamic faiths needs to be prevented at all cost because of fear of apostasy and "confusion", the manifestation of non-Islamic faith is obstructed often for the same reasons but also sometimes just to underline Islam's supremacy. In the west coast states of the Malaysian Peninsula, non-Muslims often find it hard to get a permit from the unelected local governments to build their houses of worship. Hindus often complain about demolition of their temples and shrines, some decades – or even a-century-old, but without legal documents.[37] In 2009, a group of Muslims in Shah Alam staged a violent protest with a freshly-severed cow head against the state government of Selangor run by the federal Opposition for approving the relocation of a Hindu temple to the vicinity of their neighbourhood. This protest was later defended by a senior federal minister, Hishammuddin Hussein,[38] before some protesters were eventually charged and convicted for sedition.[39] One of the reasons given for the objection was that the temple would be too near to a playground and Muslim parents would not allow their kids to play next to a Hindu temple.[40] A rowdy protest in 2015 forced a church housed in a shop lot in Taman Medan, Selangor, to remove the cross. The protesters alleged that 'the sight of the cross in a Muslim-majority area "challenged Islam" and could influence the young', combining both the supremacy and threat narratives.[41] However, one of the reasons why many churches and other religious groups are housed in commercial and industrial areas is structural. "Not enough land is being allocated for non-Muslim religious purposes", said Eugene Yapp, a church activist. And if the religious groups could not get the land use status of their premises converted from commercial to religious, a process which can be obstructed by objections from neighbours, such houses of worship would be technically illegal.[42]

The root cause is eventually political, where the presence of the non-Islamic faiths is seen by some as a challenge to Islam's

[31] *http://www.freemalaysiatoday.com/category/nation/2017/10/05/suhakam-defends-religious-freedom-as-ahmadis-face-threats/.*

[32] *https://www.independent.co.uk/news/world/asia/malaysia-atheist-group-muslim-apostate-members-lapsed-faith-south-east-asia-a7881301.html.*

[33] *https://www.thestar.com.my/news/nation/2017/01/23/chandra-muzaffar-launches-rukun-negara-as-preamble-to-constitution/ ; https://www.thestar.com.my/news/nation/2017/11/23/atheism-is-unconstitutional-says-deputy-minister.*

[34] *http://www.themalaymailonline.com/malaysia/article/lawyers-being-atheist-promoting-atheism-protected-by-constitution.*

[35] *https://www.thestar.com.my/opinion/letters/2017/02/15/why-rukunegara-must-be-preamble-to-constitution/.*

[36] *http://www.themalaymailonline.com/malaysia/article/lawyer-what-happens-to-atheists-if-rukunegara-included-in-federal-constitut.*

[37] *https://www.csmonitor.com/World/Asia-Pacific/2008/0207/p04s01-woap.html.*

[38] *http://www.thenutgraph.com/muddying-the-cow-head-protest/.*

[39] *https://www.malaysiakini.com/news/138423.*

[40] *http://malaysiabreakingnews.blogspot.my/2009/08/cow-head-protest-was-end-of-tether-for.html; original link: http://malaysiainsider.net/index.php/malaysia/36376-cow-head-protest-was-end-of-tether-for-sect-23-folk.*

[41] *https://www.thestar.com.my/news/nation/2015/04/20/50-stage-protest-against-cross-on-new-church/.*

[42] *https://poskod.my/features/malaysias-shoplot-churches/.*

dominance within Malaysia. In the sea resort of Langkawi Islands, even cross-shaped air wells triggered a controversy that eventually forced the developer to repaint them.[43] A retired Court of Appeal judge Mohd Nor Abdullah, claimed that the presence of a 42.7-metre high statue of Lord Murugan in the Batu Caves Temple in Selangor and a 30.2-metre high statue of Kuan Yin (Goddess of Mercy) in the Kek Lok Si Temple in Penang threatened Muslims and hurt their feelings. As Islam forbids idols, these idols, he argued, should be covered up to be allowed.[44]

It is important to note that these complaints over the manifested presence of non-Islamic faiths are both a recent phenomenon and geographically limited to the west coast of the Peninsula. In the 95%-Muslim east coast state of Kelantan, the presence of Southeast Asia's longest sleeping (reclining) Buddha, tallest standing Buddha and largest sitting Buddha has never raised an eyebrow.[45] Similarly, in Penang, the first colony acquired by Britain in 1786, a 800m-long street in the heart of historical George Town hosting two mosques, two Chinese temples, one Anglican church and one Hindu temple is now celebrated as the "Street of Harmony".[46]

Far-reaching implications of restrictions

Restrictions on freedom of religion and belief have much farther-reaching implications than which deity a person worships or which interpretation of a holy scripture a person subscribes to. Their impact is felt on the institutions of marriage and family, gender and sexual inclusion, personal freedom, media and academic freedom, and personal security.

Marriage and family

When interfaith marriage involving Muslim is unlawful, the impact of unilateral and irreversible conversion in favour of Islam is often felt – perhaps intentionally so – by the marital partner and children of a Muslim apostate or new convert to Islam. In February 2018, four Muslims – three of whom were non-Muslims before marriage - failed in their legal bid to leave Islam, in a situation comparable to that of Lina Joy. According to Dr Johan Ariffin Samad, the spokesperson of a secularism advocacy group, Borneo G20, since it was politically impossible for the authorities – not that they should try – to force the quartet to re-embrace Islam, denying them an official exit was "purely to punish them in marital matters so that they cannot marry non-Muslims."[47] Such was also the fate of Lina Joy who waited till the age of 43 but still could not marry her Christian boyfriend.

For non-Muslim divorcees like Indira Gandhi Mutho, custody rights over – and even contact with – their children may be lost if their estranged spouses decided to embrace Islam. Her ex-husband, Mohamad Riduan Abdullah, unilaterally converted their three children – then aged 12 years, 11 years and 11 months old – to Islam shortly after his own conversion. She filed for judicial review over the conversion of the three children and finally won her case in 29 January 2018 after a protracted nine-year-long battle. The Federal Court ruled that conversion of children requires consent of both parents and the unconsented conversion by Indira's ex-husband was invalid. More principally, it ruled that that the Syariah Court may not exercise the civil courts' inherent judicial powers, including the power of judicial review. A non-Muslim has no legal standing to appear before the Syariah courts and the Syariah courts have no jurisdiction over non-Muslims.[48]

However, in less than a month after the Gandhi case, the door opened for those wanting relief from a civil court was seemingly closed by another Federal Court judgement on the Sarawak quartet. The quartet wanted an order of mandamus to compel the director of the Sarawak Islamic Affairs Department (JAIS)/Sarawak Islamic Council (MAIS) to issue a "letter of release" (*surat murtad*) from Islam and the NRD to drop Islam from their identity cards. On February 27, 2018, the Federal Court ordered them to go back to the Syariah Court, asserting that apostasy cases could only be heard under a section in the MAIS ordinance. This was despite JAIS confirming that it had no power to issue "letter of release", which the NRD demanded for changing the religion status of the applicants in registration record.[49] In other words, until the Syariah law was changed, these apostates would likely be just pushed around and could not secure their exit. While realistically they cannot be forced to reembrace Islam, they also cannot marry a non-Muslim unless the latter converts to Islam.

Adding insult to injury, inadequate judicial remedy is further compounded by the shadow of communal anger over the rule of law. Even after the Federal Court's ruling, Indira Gandhi could not meet her youngest daughter, Prasana, who was taken away by her ex-husband since the unilateral conversion and both were 'missing'. The Malaysian Association of Muslim Scholars (PUM) warned that religious violence might erupt if police continued to hunt for Gandhi's ex-husband and daughter.[50] But this was not the first time that Gandhi found a court order to be unenforceable. The Ipoh High Court had on March 11, 2010, placed the children in her custody, overruling

[43] *www.straitstimes.com/asia/se-asia/stir-over-langkawi-housing-projects-cross-shaped-air-wells-prompts-developer-to-repaint.*

[44] *http://www.themalaymailonline.com/malaysia/article/huge-hindu-buddhist-statues-against-islam-ex-judge-says.*

[45] *https://www.thestar.com.my/metro/focus/2017/08/28/this-is-the-default-headline/.*

[46] *https://www.themalaysianinsight.com/s/4723/.*

[47] *https://www.themalaysianinsight.com/s/40285/.*

[48] *http://www.themalaymailonline.com/malaysia/article/simplified-the-federal-courts-groundbreaking-indira-gandhi-judgment.*

[49] *http://m.themalaymailonline.com/malaysia/article/top-court-to-hear-who-has-power-to-decide-four-sarawakians-conversion-out-o; https://www.themalaysianinsight.com/s/40038/.*

[50] *https://www.themalaysianinsight.com/s/35454/.*

the Ipoh Syariah court's earlier decision on September 29, 2009, to grant custody to her ex-husband. When he refused to return Prasana to her, the court cited him for contempt and ordered the police to return the child to the mother. The then Inspector-General of Police (IGP) Khalid Abu Bakar however refused to act on the order claiming that the police were caught in a quandary between two custody orders from the High Court and the Syariah High Court, and "executing one would mean showing disrespect to the other". On September 12, 2014, upon Gandhi's application, Ipoh High Court Judge Lee Swee Seng issued a mandamus for the police to arrest Riduan and retrieve the child, ruling that the police must enforce the civil court's order, not that of the Syariah court. The mandamus order was overturned by the Court of Appeal in December. On April 29, 2014, the Federal Court affirmed High Court's order to arrest Riduan but refused to order for the retrieval of the child because it has "consequences". In the Sarawak case, the Catholic Archbishop of Kuching Simon Poh was heckled by a crowd of Muslims loudly chanting "Allahu Akbar!" when leaving the court but he smilingly said he was not intimidated.[51] When individual well-being is treated as a contest of might between communities or even Gods, and communal rage overshadows court decisions such as in the case of Gandhi and the 'Allah' ban, just and fair arbitration of disputes involving people in different faith categories becomes difficult, if not impossible.

Body snatching is the third type complication caused by the prohibition of interfaith marriage and unilateral conversion. When some non-Muslims died, their bodies were taken by the Islamic authorities for Islamic burial claiming they had quietly converted to Islam, a fact that was either unknown to or rejected by the grieving families. Beyond emotional shock, such posthumous identification as Muslim has also legal and financial implications to the families as the deceased's civil marriage may become invalid and they lose their right to the deceased's estate. In one of the most well-known cases, Moorthy Maniam an ex-soldier who became a national hero for climbing the Mount Everest died after being in a coma following a fall from wheelchair. Three weeks after Maniam was in a coma, his wife Kaliammal Sinnasamy was informed by a military officer that her husband had converted to Islam and would be given an Islamic burial upon his death. After his death, she approached the courts for a declaration that Maniam continued to profess Hinduism and that, therefore, his body should be given to her for cremation. Her evidence included the fact that just 11 days before his accident, he appeared on national television sharing his celebration of Deepavali (the Hindu Light Festival). Before her case was heard in the High Court, the Syariah court ordered that Maniam had embraced Islam and must be given an Islamic burial, on the application of the Islamic Religious Affairs Council. Sinnasamy was not named as a party to those proceedings. Nor was she given any proof of Maniam's alleged conversion. The authorities claimed that the High Court could not question the decision of the Syariah court and Sinnasamy summarily lost her case, Maniam was buried as a Muslim.[52]

Gender and sexual inclusion

Sodomy is an offence under Section 377A of the Penal Code. It is described as "Carnal intercourse against the order of nature" and is punishable with imprisonment up to 20 years and whipping.[53] In reality, few people have been charged with, or convicted for, this crime, with the notable exception of opposition leader Anwar Ibrahim who was twice jailed under highly controversial circumstances.[54] Syariah criminal laws in Kelantan[55] and Terengganu[56] both offer the *Hudud* punishment of stoning to death for married Muslim offenders and 100 lashes and a year's imprisonment for unmarried ones. However, these punishments are not enforceable because the federal law takes precedence and the power of Syariah courts is currently capped at delivering only punishments of up to three years of imprisonment, fines of up to RM 5000 and whipping of up to six lashes of the cane under the Syariah Courts (Criminal Jurisdiction) Act, also known as Act 355.[57] Should these constitutional and legal safeguards be removed in the future, Muslims will have to pay a huge price for such private acts.

Muslim transgender persons are also at risk of punishment under Syariah laws in certain states, including with jail terms. In 2015, religious officers raided a birthday party in Kelantan and arrested nine transgender women who were later convicted and slapped with fines, with two of them also being imprisoned for a month each.[58] In 2012, three transgender women in the state of Negeri Sembilan who worked as bridal make-up artists mounted a constitutional challenge against Section 66 of the state's Syariah Criminal Enactment 1992 which makes any Muslim male wearing a woman's attire or posing as a woman a criminal offence punishable with a fine of up to RM 1000 and six months in jail.[59] They secured a victory in the Court

[51] *https://www.malaysiakini.com/news/413633.*

[52] *http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/re_everest_moorthy_.html?date=2017-11-01.*

[53] *www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Penal%20Code%20%5BAct%20574%5D2.pdf.*

[54] *https://www.theguardian.com/world/2015/feb/10/anwar-ibrahim-guilty-in-sodomy-case.*

[55] *http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/edd5daa1361eaa7d482580140012da26?OpenDocument.*

[56] *http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen/State_Enact_Ori.nsf/f831ccddd195843f48256fc600141e84/cb36901c419ea86448257385002c3dc8?OpenDocument.*

[57] *http://www.malaysianbar.org.my/constitutional_law/jurisdiction_of_state_authorities_to_punish_offences_against_the_precepts_of_islam_a_constitutional_perspective.html.*

[58] *https://globalfreedomofexpression.columbia.edu/cases/the-case-of-nine-transgender-women-malaysia/.*

[59] *http://www.loyarburok.com/2015/10/09/transgender-case-summary/.*

of Appeal which was however soon overturned by the Federal Court in 2015.[60]

Protection for children from child marriage[61] also differs by religion in Malaysia although the legal consensual sex is 16 across the board. A non-Muslim female can legally get married at 18, but must get parental consent if below 21, and must get the approval of Chief Minister if she is only 16. Under Syariah laws, a Muslim male and a Muslim female can get married at 18 and 16 respectively but Syariah judges are given wide discretion to waive the minimum age requirement based on signs of puberty. Consequently, child marriages are not uncommon: between 2011 to 2015, the annual average number of child marriage has been reported at 1029 for Muslims and 421 for non-Muslims.[62] Child grooming was outlawed in 2017 but a proposal to criminalise child marriage was shot down. Ease in obtaining approval for child marriage is effectively used as a way out by some rapists to escape charges of statutory rape, an offence that is attracted when the other party is below 16. Some Syariah judges allegedly just interview the parents and not the girl when deciding on applications for child marriage. A parliamentarian belonging to the previous ruling coalition (who had been a Syariah Court judge previously) even argued in 2017 that a rape victim marrying her rapist could spare her a "bleak future."[63]

Marital rape is not a crime in Malaysia although any man causing hurt or fear of death or hurt to his wife in connection with sexual intercourse with her is an offence under Section 375A of the Penal Code. A proposal submitted to a Parliamentary Select Committee by SUHAKAM advocating the criminalisation of marital rape was criticised by Mufti of Perak, Dr Harussani Zakaria, as a case of the national human rights guardian going against God's law. More interestingly, the religious advisor to the government, Abdul Hamid Othman, reportedly alluded to separate treatment of martial offences by religion, saying that "... the subject of marital rape, when a husband forces a wife to have sex against her will, is relevant only to non-Muslims" and that "Islamic law is adequate to check a husband's abuses" as a Muslim wife can turn to the Syariah Court if she is treated cruelly and can demand a divorce under a procedure called '*fasakh*'.[64]

Policing of women's bodies in daily life is also on the rise, but its association with restrictions on religious freedom must be treated with even more nuance especially in relation to issues such as the wearing of the headscarf (*tudung*). Since 2014, Muslim women who do not cover up their hair or wear tight-fitting outfits while working in markets, restaurants and other commercial premises in Kota Bahru, the state capital of Kelantan may be fined up to RM 500 by the municipal government.[65] On the other hand, in the name of uniformity, Muslim women are denied certain jobs for wearing headscarves by certain employers such as international hotel chains, which testifies to the fact that religious freedom may also be restricted by market forces and not just by the state.[66] Nevertheless, restrictions on display of women's bodies are still overwhelmingly imposed by state organs, which sometimes make no express reference to religion but only to vaguer terms like "respect" and "politeness". Women – and occasionally men too -- have complained of being denied access to hospitals[67], Parliament[68], courts[69], and local authorities on the grounds that they were seen to be 'improperly' dressed.[70]

Personal freedom

Muslims in Malaysia are subject to moral/social policing imposed by state agencies and sometime social groups. The most common form of such policing is the raid on premises based on 'close proximity' (*khalwat*) of a man and a woman who are neither kin nor in a marriage. Conducted by religious officials sometime backed up by the police, such raids are based on tip-offs which are sometimes arbitrary or discriminatory on the basis of class. Wan Saiful Wan Jan, a prominent think tank leader, once encountered such a raid at 3.20 am when he and his mother were staying in a budget hotel. He questioned if the religious officers dared to conduct raids in five-star hotels.[71] In a traumatic case, a married couple staying in hotel was raided: even after showing a photo of their marriage certificate, the raiding officers showed no let-up in their zeal. They instructed the wife to put on her clothes in front of the husband and male officers, while one of them filmed her on video.[72] In another case, a religious officer demanded sexual favours by way of a bribe from a subject of one of his raids.[73]

60 *http://english.astroawani.com/malaysia-news/transgender-case-federal-court-overturns-court-appeals-decision-75716.*

61 *http://penanginstitute.org/v3/files/issues/july_11_2017_OKH_download.pdf.*

62 *http://www.themalaymailonline.com/malaysia/article/three-things-about-child-marriages-in-malaysia.*

63 *http://www.dw.com/en/malaysia-criminalizes-child-grooming-not-child-marriage/a-38327680.*

64 *https://www.malaysiakini.com/letters/30115.*

65 *https://www.thestar.com.my/news/nation/2015/01/15/council-attire-ruling-not-for-all-dress-code-only-for-muslim-women-in-service-industry-says-secretar/.*

66 *http://www.themalaymailonline.com/malaysia/article/nazri-tudung-ban-for-hotel-workers-discriminatory.*

67 *http://www.asiaone.com/malaysia/woman-denied-entry-hospital-wearing-shorts-gets-apology.*

68 *http://says.com/my/news/security-guards-told-these-2-women-that-their-skirts-were-indecent-for-the-dewan-rakyat.*

69 *https://www.thestar.com.my/news/nation/2015/06/25/penang-court-skirt/.*

70 *www.themalaymailonline.com/malaysia/article/elderly-pair-barred-from-ipoh-city-council-for-wearing-bermuda-shorts.*

71 *https://www.thestar.com.my/news/nation/2014/12/25/wan-saiful-wan-jan-checked-for-khalwat-in-hotel-room/.*

72 *http://www.themalaymailonline.com/malaysia/article/married-couple-sues-jawi-after-traumatic-khalwat-raid.*

73 *https://www.thestar.com.my/news/nation/2007/11/05/former-jais-officer-tried-to-get-sex-bribe/.*

Conformist pressure on Muslims is not limited to sexual conduct but also deviation from deeply-rooted social norms. One such example is touching dogs, which are perceived as filthy in Islam. While the Maliki school of jurisprudence permits keeping dog as pets, the Shafie school dictates that an extensive cleansing ritual is required after one's contacts with a dog. Naturally, most Malaysian Muslims loathe and fear dogs, which are commonly kept as pets by Chinese and Indians. Sometime, dogs become a source of neighbourhood tension between Muslims and their non-Muslimrs. In 2014, social activist Syed Azmi Alhabshi organised a "I Want to Touch a Dog" event with a member of the Islamic clergy demonstrating cleansing ritual to change this cultural taboo. The event drew nearly 200 dog owners with their pets and hundreds of Muslims, all willing to touch the canines. Photos of headscarf-wearing Muslim women carrying dogs went viral on social media. While many hailed Syed Azmi as a hero who brought closer not just humans and canines but more importantly humans from different cultural backgrounds, he was also painted by some Muslim conservatives as a villain, a traitor to Islam or even a Christian or a Shia.[74]

The growing consciousness amongst Muslims over what is, in religious terms, permissible (*halal*) and what is not (*haram*) in daily life also has a spill-over effect on non-Muslims. For example, pork must be sold in a secluded corner in wet markets, away from the sight of Muslims. Alcoholic drink disappears from the menu in many outlets. Such attitudes have also led many Muslims to shy away from eating food prepared by non-Muslims, leading to complaints of a religious apartheid. In 2017, two laundries made national headlines for serving only Muslim clients, claiming that clothing brought by non-Muslims might be unhygienic.[75] The practice was stopped following royal instruction. But a year earlier, a Chinese-owned hypermarket chain, NSK, had introduced "halal" and "non-halal" trolleys, and the Domestic Trade, Cooperatives and Consumerism Ministry proposed to set guidelines on the segregation of trolleys as part of the business licensing requirements in future.[76] Notably, such a practice was dismissed as unnecessary by a cleric, Ustaz Wan Ji Wan Hussin,[77] and heavily criticised by prominent scholar Prof Syed Farid Al-Attas as a dangerous push "down the slope to apartheid".[78]

Freedom of speech

While the requirement of official accreditation to speak on Islam has been conventionally applied to those who give religious lectures in mosques, it was alarmingly used to stop academic forums in 2017. Mustafa Akyol, a Turkish author, was arrested and deported from Malaysia after speaking on freedom of conscience and arguing that the Quran forbids compulsion in religion. He was invited by the Islamic Renaissance Front (IRF), a liberal Islamic non-governmental organisation that had translated his book *Islam Without Extremes: A Muslim Case for Liberty* into Malay.[79] Akyol was eventually released without charge but his case suggests that the religious authorities may now stop at whim any intellectual discourse touching Islam, when Islam's presence in Malaysia's life is so extensive that hardly any in-depth discussion on society, politics, law and economy can escape from referring to Islam.

The more common form of thought control is book banning. From 1971 to 2017, a total of 1,695 books have been banned and 604 (36%) of them were related to religion. Famous international authors whose titles are banned include Karen Armstrong (*The Battle for God, Muhammad: A Biography of the Prophet, Muhamad: A Western Attempt to Understand Islam*), John L Esposito (*What everyone needs to know about Islam*), Bernard Lewis (*What went wrong? – The Clash between Islam and Modernity in the Middle East*), Mustapha Akyol (*Islam without Extremes*), Charles Darwin (*The Origin of Species*), Kahlil Gibran (*The Prophet*) and V.S. Naipaul (*Amongst the Believers*).[80] Amongst Malaysian titles banned are seven books by scholar and novelist Mohd Faizal Musa (Faisal Tehrani), the two volumes of *Wacana Pemikiran Reformis* (*Discourse of Reformist Thoughts*) edited by IRF chief Dr Farouk Musa, *Ulamak yang bukan pewaris Nabi* (*Those clergy who are not the Prophet's successors*) by liberal cleric Wanji Wan Hussin[81] and *Breaking the Silence: Voice of Moderation – Islam in a Constitutional Democracy* by the pro-reform eminent persons group G25 which incidentally has a forward by former Prime Minister Tun Abdullah Ahmad Badawi.[82] The banning of books that denounce extremism in their titles like Akyol's and G25's is telling about how even moderation is seen as a threat to the system.

More intriguingly, the most policed language is Malay/Indonesian, in which 40% of the books banned from 1971 to 2017 are published. In fact, some books like those by Charles Darwin and Farouk Musa are only banned in Malay/Indonesian while the English versions are still legally and commercially available. In a parliamentary reply to opposition

[74] *www.themalaymailonline.com/malaysia/article/syed-azmi-the-touch-a-dog-organiser-who-turned-hero-and-villain-in-a-week.*

[75] *http://www.straitstimes.com/asia/se-asia/another-muslim-only-launderette-found-in-perlis.*

[76] *https://www.malaysiakini.com/news/327465.*

[77] *http://www.themalaymailonline.com/malaysia/article/no-need-for-halal-haram-trolleys-muslim-preacher-says.*

[78] *www.themalaymailonline.com/what-you-think/article/pushing-a-trolley-down-the-slope-to-apartheid-in-malaysiasyed-farid-alatas.*

[79] *https://www.nytimes.com/2017/09/28/opinion/mustafa-akyol-detention-malaysia.html.*

[80] *http://penanginstitute.org/v3/publications/issues/1018-the-policing-and-politics-of-the-malay-language.*

[81] *https://www.article19.org/resources/malaysia-joint-statement-by-civil-society-and-individuals-on-book-banning-thought-control-and-academic-meddling/.*

[82] *https://www.thestar.com.my/news/nation/2018/01/09/g25-granted-leave-to-challenge-book-ban/.*

lawmaker Zairil Khir Johari, the Home Ministry explained why the Indonesian edition of Charles Darwin needed to be banned, because it "endangers public harmony" with its depiction of the "origin and creation of species that goes against Islamic teachings and is in contravention of the Islamic Materials Censorship Guidelines as well as the beliefs of the Ahli Sunnah Wal Jamaah [Sunnis]".[83] This leads to the next logical questions: Why is not the English version banned too? Why would only Malay-speaking Muslims be negatively affected by Darwin's theory of evolution but not the English-speaking ones? Like in the banning of 'Allah' and other Arabic-origin words, the real motivation here is political rather than theological. It is to keep Malay a monofaith language in which only religious orthodoxy is allowed to be practised and propagated.

Personal Security

While the zeal to crack down on the threat – real or imagined - of proselytism targeting Sunni Muslims has led to churches being raided[84] or set on fire or minority Muslim sects being harassed, by 2016 it escalated into enforced disappearance of four religious activists, three Christian pastors and a Shia social activist. Amri Che Mat, 43, and Pastor Raymond Koh, 62 were professionally abducted respectively in the northern state of Perlis on November 24, 2016, and in the central state of Selangor on February 14, 2017. Six days after Amri's abduction, Pastor Joshua Hilmy, an ethnic Malay, and his Indonesian wife Ruth, went missing. These three cases, within a span of three months, point to a common pattern: the victims were accused or suspected of proselytising their faith to Sunni Muslims. Koh was known for his charitable work with the marginalised groups with many Malays amongst them, single mothers, drug addicts, sex workers and persons with HIV/AIDS. His former church, Damansara Utama Methodist Church, was raided in 2011 by the Selangor Islamic Religion Department (JAIS) for allegedly converting Muslims.[85] Dr Mohd Asri Zainal Abidin, State Mufti of Perlis who was accused by Amri's wife as being involved in her husband's disappearance, in turn accused Amri's charity group, Perlis Hope, as possibly working towards a Shia theocracy and hence threatening national security. The Mufti who asserted his credentials in speaking on human rights claimed that the activist had "crossed the limit" and made people around him "confused".[86]

The professional abduction by armed men in sports utility vehciles (SUVs) of Koh – his snatching was captured on CCTV[87] – and Amri as well as the police's lukewarm attitude in investigating the cases led to public suspicion that the enforced disappearances were carried out by state-aligned actors. Revelations in an ongoing inquiry conducted by SUHAKAM and the police's moves strengthened such speculation. Koh's abduction on a road in a residential area lasted only 47 seconds, and an eye-witness reported to the police, only to be told by an officer that it "looked like a police operation" given that it took place swiftly, in broad daylight, and under video-recording. The police also insisted that Amri had just gone missing and was not abducted[88] and a statement was taken only a year later from an eye-witness who saw Amri's car was boxed in by dark-coloured SUVs.[89] Lastly, the authorities also offered bizarre stories to explain the cases, with the Inspector-General of Police Khalid Abu Bakar suggesting that Koh's abduction was related to a smuggling ring[90] while the Perlis Mufti speculated that Amri might have gone to Iran or is practicing 'pleasure marriage' (*mu'tah*, a short-term relationship permitted by Shia teachings) in Thailand.[91]

The big questions of why and how

The fundamental challenge to protection of freedom of religion and belief in Malaysia is more political than theological. Notwithstanding all the rhetoric, it is a battle less over which God is true as over whose country Malaysia really is. Fears of Muslims leaving Islam and advocacy for the expansion of Syariah laws are but manifestations of Muslims' response to the plural post-colonial state, and their yearning to return to the pre-colonial order, which once consisted of only small Malay kingdoms with insignificant numbers of non-Muslim traders.

Colonisation and the proto-globalisation which took place during that period shaped Malaysia's society in three ways. First, Chinese and Indians were brought in *en masse* as miners, plantation workers and labourers by the British colonialists, as well as local Malay rulers who wanted Chinese to work in tin mines and cash crops. Second, in Malaya, the British on one hand helped making Islam a key marker for Malays' ethnic boundaries and on the other hand kept Malay commoners in the informal sector and thus socio-economically backward vis-à-vis the Chinese and to a lesser extent, the Indians. Third, animist natives in Sabah and Sarawak were converted to Christianity before Islam could reach them.

The combination of cultural difference and economic inequality prevented a real cross-communal consensus over

[83] *http://www.themalaymailonline.com/malaysia/article/how-is-translated-darwin-a-danger-to-malays-asks-dap-mp*.

[84] *http://www.freemalaysiatoday.com/category/nation/2011/08/12/dumc-maintains-jais-raid-unlawful/*.

[85] http://www.atimes.com/article/malaysias-disappearing-religious-activists/.

[86] *www.freemalaysiatoday.com/category/nation/2018/01/23/asri-attacks-missing-amri-says-shia-islam-threatens-national-security/*.

[87] *https://youtu.be/MzlmLHQzSHs*.

[88] *http://www.themalaymailonline.com/malaysia/article/igp-only-pastor-koh-abducted-the-rest-just-missing*.

[89] *http://www.thesundaily.my/news/2018/03/20/police-recorded-my-statement-year-after-amri-disappeared-witness*.

[90] *https://www.themalaysianinsight.com/s/6012/*.

[91] *www.freemalaysiatoday.com/category/nation/2018/01/23/asri-attacks-missing-amri-says-shia-islam-threatens-national-security/*.

how the post-colonial nation should be, when the British, in 1946, started preparations for the eventual decolonisation of their territories across the South China Sea. The theme that coloured Malayan/Malaysian politics since might be generically phrased as the 1946 Question: "Can citizens be different yet equal?" A full "Yes" would mean a liberal plural nation while a full "No" would mean an ethnocracy where citizenship can only be given to assimilated aliens. Unsurprisingly, most Malay-Muslims take a No position while most members of the minorities hold a Yes position.

In Malaya, the pragmatic compromise reached in 1957 which won the country independence from Britain was that the Malays be given the "special position" under Article 153 of the country's constitution in exchange for citizenship to the Chinese and Indians. Facilitated by a 'winner-takes-all' political system, the discontent to the inter-ethnic bargain eventually triggered the 1969 post-election ethnic riots, which in turn led to an expansion of preferential treatment for the Malays and the indigeneous Borneans.

With the importance of language and custom fading over time, Islam becomes the overarching ethnic marker of Malays. Beyond its spiritual function, Islam has acquired a powerful role in keeping the Malays together politically to ensure their socio-economic interests being protected. Unsurprisingly, then, freedom of religion and belief is seen as a Trojan horse of ethnic minorities or foreign powers to fragment the Malays and erode their political dominance. This explains why secularism in its full sense (which must entail state impartiality to all citizens) never did take root in Malaya/Malaysia. The early ruling elites in the dominant United Malays National Organisation (UMNO) were secular in only the anti-cleric sense. The non-appreciation of the need for state impartiality explains why religious freedom lacks fundamental acceptance in the Malay nationalist narrative and ultimately paves the way for its overriding by, and convergence with, Muslim nationalism championed by UMNO's arch rival the Pan-Malaysia Islamic Party (PAS).

Islamisation however only picked up momentum in 1981 when UMNO and PAS intensified their competition of one-upmanship. Prime Minister Dr Mahathir Mohamad, who ruled from 1981 to 2003 and is not known for his religiousity, introduced a modernist project of Islamisation led by Anwar Ibrahim, then a firebrand and charismatic young Islamist. This has resulted in the mushrooming and strengthening of Islamic institutions, from universities, banks, courts, and religious bureaucracies.

Cornered by UMNO's Malay Unity narrative, which makes the presence of any Malay-based opposition illegitimate by default, a charismatic and young PAS clergy Hadi Awang who would lead the party by 2002, produced the famous "Hadi's Message" (*Amanat Hadi*) three months before Mahathir came into power. The doctrine not only led PAS members to excommunicate their UMNO families, friends, and neighbours (a practice called *takfir*), but also spelled out an alternative vision for Malaysia's post-colonial state, one that would restore an imagined pre-colonial socio-political order dominated by Muslims and based on the Syariah. He rallied pious Muslims to oppose BN because that coalition has "preserved the colonial constitution, infidel laws and pre-Islamic rules.[92] Hadi's position may be seen as a far more radical "No" answer to the question referred to above than to UMNO's Malay nationalism, and therefore more appealing to those who feel stronger that Malay-Muslims are losing their rights to the minorities. While PAS has diluted its demands over time – from wanting to establish a full-blown Islamic state to implementing Hudud punishments to equating the status and power of civil courts and Syariah courts – especially when it joined the opposition coalition, its core ideas have also been mainstreamed over time. If making Syariah laws official was a fringe idea in 1981, it had gained the support of 86% of Malaysian Muslims by 2013, according to a Pew Research Centre study.[93] Recently, Hadi Awang, now the president of PAS, sketched a religiously-segregated Malaysia with a two-tiered cabinet in which only Muslim ministers can make decisions while non-Muslim ministers will be restricted to aid in their implementation.[94]

Encroachment on religious freedom will not stop until the factors fuelling an exclusivist and domineering Islamisation project is addressed with two fundamental paradigm shifts in socio-economic policies and political institutions.

First, the ethnic preferential system established in 1957 and reinforced in 1969 must be substantially reformed and affirmed by, first, ensuring effective empowerment of the poorest segments of the Malay-Muslim community instead of enrichment of their elites, and second, lessening the role of religion as the qualifying criterion and the sustaining force of such empowerment.

Second, the political system may also need to be modified and made less 'winner-takes-all' to reduce inter-communal anxiety, distrust and jealousy. This points to some measures in institutional engineering to build a consensus democracy,[95] which may a require a proportional representation element in the electoral system as well as decentralisation and diffusion of power. Ultimately, Malaysia's party politics need to be restructured in such a way that parties may offer and even compete on differentiated positions on issues relating to religious freedom, but everyone would refrain from cut-throat competition to tear apart the multi-religious society's social

[92] *https://www.malaysiakini.com/news/393375*.
[93] *http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/*.
[94] *https://www.themalaysianinsight.com/s/36100/*.
[95] *Lijphart, A.* (1999). *Patterns of democracy*: Government forms and performance in thirty-six countries. New Haven: Yale University Press.

fabric for extra votes and seats. The legitimacy of Malaysia's post-colonial state and plural society must be unconditionally embraced rather than questioned or rejected, where the Malay Rulers and the Bornean states of Sabah and Sarawak may play pivotal roles when the judiciary is less dependable.

Modelled on the Westminster system, the Malay Rulers are the head of Islam in their respective states, just as the British Monarch is the defender of the Anglican faith. But given the more pervasive role of Islam in Malaysia, the Malay Rulers are more than figureheads in religious affairs. Article 38(2)(b) of the Federal Constitution places in the Conference of Rulers the task of "agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole". Beyond formal power, the palaces yield extensive public influence especially on matters relating to Malay-Muslims on which even senior government leaders avoid open disagreement with them. In September 2017, as noted above, two laundries – in Johor[96] and Perlis[97] – courted public controversies for serving only a Muslim clientele but stopped their discriminatory practices soon after royal condemnation, although the palaces' position came to be criticised by a JAKIM officer. In a rare move, the Rulers issued a public statement to condemn the actions of individuals that go "beyond all acceptable standards of decency", subsequently putting the country's harmony at risk. The statement said,

> *The rulers are of the opinion that the damaging implications of such actions are more severe when they are erroneously associated with or committed in the name of Islam. As a religion that encourages its followers to be respectful, moderate and inclusive, the reputation of Islam must not ever be tainted by the divisive actions of certain groups or individuals which may lead to rifts among the people.*

Meanwhile, Sabah and Sarawak stand out from the rest of Malaysia, not only because they were much more plural in ethno-religious makeup, but also because religious freedom was a key promise in the negotiation for their merger with Malaya and Singapore to form Malaysia in 1963. In the eloquent words of Borneo G20, "not only was the Federation of Malaya established as a secular federation where Islam as the 'religion of the Federation' plays only ceremonial roles, but more importantly, Sabah and Sarawak, which have never been part of the 'Negeri-Negeri Melayu' [the Malay States], proudly embrace their diverse ethnic and religious heritage … Malaysia is a secular federation with the rule of law grounded on the Common Law heritage. Neither the Federal Constitution nor the Common Law legal system is un-Islamic. They are what made Malaysia possible in 1963 and viable till today."[98] As these two over-represented states hold a quarter of seats in the federal parliament, and they deliver one-third of the government seats, they are seen by some as politically the last defenders of religious freedom in Malaysia.

The constitutional and political significance of the Malay Rulers and the Borneo States is most telling over the PAS-dominated Kelantan State Government's renewed push since 2015 to implement Hudud punishments including amputation for theft and robbery, stoning for adultery, and 40-80 lashes in whipping for consuming alcohol. To that end, Hadi Awang tabled a private member's bill to amend the Syariah Court (Islamic Jurisdiction) Act [Act 355], popularly dubbed as Bill 355. The Bill aimed to raise maximum punishments permissible for Syariah Courts from 3 years to 30 years of imprisonment, from RM 5,000 to RM 100,000 in fine and from 6 to 100 lashes in whipping, thus enabling some Hudud punishments. An unprecedented rapprochement between UMNO and PAS led to Hadi's controversial bill being fast-tracked for debate. Citing Article 38, a former UMNO parliamentarian, Taufik Ismail, has filed for an order to stop the Parliamentary speaker from tabling Bill 355 on the ground that such bill must first get the consent of the Conference of Rulers. The parliamentary speaker's bid to strike out his suit was rejected by the Kuala Lumpur High Court in February 2018. Meanwhile, Borneo argued that "the founding fathers of Sabah and Sarawak did not sign up for a federation where personal religious misconduct of Muslims could be punished far more heavily than robbery. To insidiously alter the contract of marriage after 54 years unilaterally with an ill-thought bill is morally wrong and politically disastrous". Borneo G20 cautioned that it may undo the Federation of Malaysia. In 2015, Bornean NGOs called for renegotiation of the Federal Constitution if Kelantan got to implement Hudud punishments.[99] Rahim Noor, a retired Inspector-General of Police too made a point blank warning that Sabah and Sarawak may seek secession if Kelantan got its way to implement hudud punishments.[100]

However, ultimately religious freedom requires a civilisational basis to take root on Malaysia's soil. If religious freedom is rooted in the Enlightenment paradigm in the West, it must find its nurturing ground in Islam here in Malaysia.

Islam needs to be upheld as a promise of blessing for all in the universe (*rahmatan lil alamin*) rather than a basis of worldly supremacy for Muslims over others, or simply as an ethnic marker to distinguish Muslims from others. The pursuit of the former inevitably also means the pursuit of substance

[96] *http://www.themalaymailonline.com/malaysia/article/johor-not-a-taliban-state-sultan-tells-muslim-only-laundry.*

[97] *www.themalaymailonline.com/malaysia/article/muslim-only-perlis-launderette-now-open-to-all-after-visit-from-perlis-mufi*.

[98] *https://www.thestar.com.my/news/nation/2017/05/07/say-no-to-ruu355-for-malaysias-sake/.*

[99] *https://www.thestar.com.my/news/nation/2015/04/08/renegotiate-constitution-is-kelantan-wants-hudud/.*

[100] *https://humanrightsinasean.info/article/sabah-sarawak-may-secede-if-kelantan-hudud-goes-through-warns-ex-igp.html.*

over form, where the values of Islam may be found within non-Muslims. Such was the case for Sheikh Muhammad Abdul, the 19th century reformer and jurist, who famously claimed, "I went to the West and saw Islam, but no Muslims; I got back to the East and saw Muslims, but no Islam."[101] In a thought-provoking 2010 study, two professors at George Washington University, Scheherazade S Rahman and Hossein Askari, constructed an Economic Islamicity Index with 113 variables in 12 dimensions to measure how well the values of Islam are realised in economic life in 208 countries. Ireland was found to be the most Islamic economy, followed by Denmark, Luxembourg, Sweden, United Kingdom, New Zealand, Singapore, Finland, Norway and Belgium. Malaysia ranked highest amongst the Muslim countries at 33rd place, followed by Kuwait at 42nd and at Kazakhstan at 54th.[102]

If the implementation of Syariah is seen as a threat to religious freedom, the reconciliation may lie in a purposive approach to Syariah called "*Maqasid*" (higher purposes). A twelfth century theologian, Abu Hamid al-Ghazali, listed as the purposes of Syariah the protection of five fundamentals: life, religion, property, progeny, and intellect – a list to be expanded over time by later scholars. Two centuries later, another scholar, Abu Ishaq al-Shatibi, focused the study of *maqasid* on "*maslaha*" (pubkic interest), to overcome the rigidity caused by literalism and analogical reasoning. This approach gains currency as political Islam matures, as the so-called the second-generation Islamist parties are looking for pragmatic policy solutions, especially after the Arab Spring in 2011, instead of championing the establishment of an Islamic state, an idea that was born in British India. A year before the absolute sultanate of Brunei expanded its Syariah law in May 2015,[103] the democratised Tunisia adopted a new constitution that protects freedom of conscience and excludes Syariah law.[104] Rached Ghannouchi, the leader of Tunisia's Islamist party, Ennahda, even declared in 2016 his party's migration from political Islam to Muslim democracy.[105]

Conclusion

An inclusive Islam cannot take centre stage until enough Muslims can break free from their colonisation trauma and the reactive religious nationalist frame that sees religious communities as inherent rivals competing against each other for dominance. Under such a frame, non-Muslims can either be hostile or subservient, but not equal and friendly. Such supra-nationalist sentiment is certainly not the prerogative of Muslims but shared by many other communities – religious or other – who had suffered repression and domination. In the past, one's religious freedom might hinge on the might of one's political community, which naturally generates cynical and conspiracy theorists' view on universal values, including freedom of religion and belief. A healthy state of inter-faith relations at the global level may require inclusive solutions to some decades-old conflicts like the one obtaining in Palestine. But faith leaders can still drive home the point that a reciprocal, if not symbiotic, relationship exists between religious communities, and exclusion begets exclusion.

To paraphrase President Theodore Roosevelt's words of wisdom on people and countries, "This world will not be a permanently good place for any religious community to live in unless we make it a reasonably good place for all religious communities to live in."[106] As a borderless world makes selective and incongruent positioning untenable, initiatives to promote freedom of religion and belief must bring wisdom to every religious community for them to spell out what rights they want as a minority in one context and what rights they will give to minorities as the majority in another, such that inconsistencies may be exposed and eliminated. Only when all religious communities see religious freedom as a public good and would defend each other at their own Niemöller's moment,[107], the cause for freedom of religion and belief may advance in a meaningful sense.

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[101] *http://hossein-askari.com/islamicity/.*
[102] *http://hossein-askari.com/wordpress/wp-content/uploads/islamicity-index.pdf.*
[103] *http://www.dw.com/en/sharia-in-brunei-the-sultans-new-laws/a-17627008.*
[104] *http://www.mei.edu/content/tunisia%E2%80%99s-new-constitution.*
[105] *https://www.foreignaffairs.com/articles/tunisia/political-islam-muslim-democracy.*
[106] *http://www.theodoreroosevelt.org/site/c.elKSIdOWIiJ8H/b.9297493/k.7CB9/Quotations_from_the_speeches_and_other_works_of_Theodore_Roosevelt.htm*
[107] *http://hmd.org.uk/resources/poetry/first-they-came-pastor-martin-niemoller.*

The Facebook Conundrum: Challenges for the Northern Ireland Judiciary

Bernard McCloskey

Introduction

The activities of Facebook, a social networking service founded in February 2004 by Mark Zuckerberg and a fellow Harvard University student, have conjured up questions both interesting and challenging in Northern Ireland litigation dating from 2012. Altogether there have been 16 judgments bearing the standard neutral citation.

Facebook has over one billion users worldwide. The emergence of social networking sites is one of the distinct facets of the global phenomenon of information explosion which has continued to expand unremittingly during recent years. Facebook is the largest such site on the planet. It is an open medium available to anyone who can access it via the internet. Users can establish independent, dedicated pages for a broad range of purposes – for example, the creation of a personal profile or a so-called 'campaign'.

Sex offenders

In the first of the 16 Northern Ireland cases, *XY v. Facebook Ireland Limited*[1] the use to which Facebook was put was the increasingly familiar one of pursuing a campaign against a convicted sex offender. (The site operator, McCloskey, was identified and was added as a defendant at a later stage). The mechanism used was that of the so-called "open" site, which facilitated access by the world at large, coupled with rapid and unpredictable change. The evidence demonstrated that there were people ill-disposed to the Plaintiff who were prepared to incite strong feelings of antagonism and hostility towards him, with reckless disregard for the possible consequences and consequential engagement of Articles 3 and 8 ECHR. In contrast, what one has seen most recently is more akin to crude, old-fashioned vigilantism.

The Plaintiff's status was critical to the Court's resolution of the issues. The judgment emphasised that one of the "*towering principles of the common law*", namely non-discrimination (or equality of treatment), was engaged. In a civilised and democratic society, criminals are punished by due process of law. The concrete legal protections which the Plaintiff was entitled to invoke were section 6 of the Human Rights Act 1998 (Articles 3 and 8 ECHR) and the Protection from Harassment (NI) Order 1997. In the context of an application for interim injunctive relief, the Court was satisfied that *prima facie* the offending Facebook page infringed the Plaintiff's rights under these measures, describing some of the "comments" which had been published on the site as "*threatening, intimidatory, inflammatory, provocative, reckless and irresponsible*".[2] The Court ordered Facebook to remove the offending page from its site by a specified date. It emphasised that cases of this nature will be intensely fact-sensitive, while observing that this was a developing area of the law.[3] This was the third or fourth such injunction to be ordered against Facebook in Northern Ireland.

This was followed quickly by *HL (A Minor) v. Facebook Ireland Limited and Others*[4] which involved (*inter alia*) another application for an interim injunction, this time in the context of a Writ action. The proceedings were quite chaotic. In addition to two named Facebook entities, the Plaintiff purported to sue a series of public authorities: the Attorney General (England and Wales), the Attorney General (NI) and the Advocate General (NI) amongst others, giving rise to what the Court described as a "*blizzard*".[5] The Plaintiff was a child in care. The unique feature of this case was that the Plaintiff was seeking legal remedies in an endeavour to protect her from herself: in the particular factual context *she* was the only person accessing and exploiting Facebook and exposing herself to all manner of risk in consequence.

The evidence examined by the Court included a densely detailed and highly technical document – the kind that both intimidates and confuses – running into 62 pages entitled "Facebook Terms and Conditions", purporting to constitute an "Agreement" between Facebook and each registered user. By its terms, this document purported to prohibit the use of the site to bully, intimidate or act maliciously. Users were cautioned to share information only with those whom they trusted. Reporting abuse to Facebook was encouraged, thereby triggering the possibility of pages being removed. There was no suggestion of any system of proactive monitoring. The existence of Facebook's "Child Exploitation and Online Protection Centre" was highlighted. The application for interim injunctive relief was refused: some of the forms of injunction were considered inappropriate, the Plaintiff's ability to circumvent injunctions – *inter alia* by concealing her true identity under countless guises – was evident and the

[1] [2012] NIQB 96.

[2] Ibid at [16].

[3] Ibid at [22].

[4] [2013] NIQB 25.

[5] Ibid.at [9].

supporting evidence was considered to be "*impoverished*".[6] The Court also drew attention to the opaque and unpromising nature of the vast array of causes of action invoked by the Plaintiff (in excess of 20!).

Interestingly, Facebook, via affidavits, compiled a defence to the Plaintiff's claims. This prompted the following judicial observation:[7]

> *The essence of this defence consists of an admission by Facebook that it has created something of a monster which, it alleges, it cannot control …*
>
> *The Courts, in this jurisdiction and others, are increasingly alert to the dangers of the 'internet wild west' in the acquisition, provision and dissemination of information in the contemporary world.*

Facebook's next appearance in the High Court occurred in September 2013 when mandatory injunctions were made requiring it to remove certain pages from its website: "Irish Blessings", "Ardoyne Under Siege" and "Belfast Banner". In these cases, *J19 and J20 v Facebook Ireland*[8] Facebook then brought applications to discharge the injunctions. The impetus for the initial interim injunctions – as in XY (*supra*) – was an online campaign of abuse, including the unauthorised use of photographs, accusing the two Plaintiffs, in substance, of sustained Loyalist bigotry against North Belfast Roman Catholics. The legal context considered by the Court included two measures of – or having their origins in – EU Law: Directive 2000/31/EC (recital 17 and Article 15) and the Electronic Commerce (EC Directive) Regulations 2002 (Regulation 19). The Plaintiffs' case for interim injunctive relief was promoted primarily under section 6 HRA 1998, invoking Articles 2, 3 and 8 ECHR. The need for maximum precision in every injunctive order features prominently in the judgment of Gillen J.[9] This, coupled with the Court's assessment of disproportionate burden (re constant monitoring of the web pages) on Facebook, impelled it to the conclusion that the injunctions should be discharged, in a context where the Plaintiffs' Article 2 ECHR claim was considered to be of little substance and merit.[10]

Procedural contribution

The next contribution which Facebook made to the jurisprudence of the NI High Court was of the procedural variety. In HL (*supra*)[11] Facebook sought to set aside interrogatories served by the Plaintiff. The interrogatories were directed to a series of inter-related issues: Facebook's awareness of significant numbers of profile or account holders aged under 13 years; the impact of this discrete issue on any duty of care or other legal duty owed by Facebook to such as the Plaintiff; reports/complaints received by Facebook relating to the Plaintiff; other more general complaints/reports; Facebook's system of monitoring; and Facebook's procedures, if any, for verifying whether users are children. The contentious procedural issues of interrogatories, disclosure of documents and the provision of adequate particulars to the Plaintiff were resolved by the Court in this context. (In passing, the Plaintiff had by formal notice sought 112 further particulars of matters pleaded in the Defence!)

Facebook's enthusiasm for contributing to the procedural law jurisprudence of this jurisdiction continued unabated: see *CG v Facebook Ireland Limited and McCloskey (No 2)*[12] (as to whether the Plaintiff's costs should be taxed on an indemnity or standard basis) and *HL v Facebook Incorporated and Others*[13] (specific discovery and interrogatories once again).

The litigation in *CG v Facebook Ireland Limited and McCloskey*[14] was the second chapter of the saga begun by *XY* (*supra*). The Plaintiff, CG, was another sex offender and, by this stage, the "operator" of the offending web pages had been identified and was sued in his own right. Notably, at the substantive trial, Facebook adduced no oral evidence, relying exclusively on an affidavit sworn by one of its employees relating to the discrete issue of whether the Data Protection Act 1998 was of any application to this Irish registered company.[15] This resulted in judicial observations about identifiable *lacunae* in Facebook's evidence and a significant observation scotching any notion that Facebook might in some way have had inadequate capacity or resources to *proactively* seek out offending material and take action accordingly.[16]

The second Defendant, Mr McCloskey, seems to have had some active part at the trial. Based on ample evidence relating to the content of the profile page, the Court held that this had been established and operated to destroy the family life of sex offenders, to expose them to total humiliation and vilification, to drive them from their homes and to expose them to the risk of serious harm.[17] Furthermore, as the Court emphasised, the adverse impact extended beyond the Plaintiff to his disabled child:[18] The Court further held:

- Facebook Ireland Limited was, for jurisdictional reasons, beyond the reach of DPA 1998, a Westminster statute;[19]

[6] Ibid at [23].
[7] Ibid at [24]-[25].
[8] [2013] NIQB 113.
[9] at [25] especially.
[10] see [27] - [28].
[11] [2014] NIQB 101.
[12] [2015] NIQB 28.
[13] [2015] NIQB 61.
[14] [2015] NIQB 11.
[15] See generally [59] - [66].
[16] see [61].
[17] see [73].
[18] see [76].
[19] see [91].

- The defence enshrined in regulation 22 of the Electronic Commerce Regulations is *not* dependent upon the provision of prior notice to Facebook of relevant facts and information;[20]
- CG had an expectation of privacy in relation to his name, address, any photograph and certain other items of personal information;[21]
- The second Defendant was the primary publisher and, hence, liable to the Plaintiff for the tort of misuse of private information;[22]
- The second Defendant was also liable to the Plaintiff for unlawful harassment;[23] and
- Facebook's liability in respect of the misuse tort dated from receipt of correspondence from the Plaintiff's solicitors.

The Court granted the following remedies:

(a) An injunction restraining the second Defendant from (*inter alia*) harassing or molesting the Plaintiff in a series of specified respects;

(b) A mandatory injunction requiring Facebook to terminate the profile/page in question; and

(c) An award of £20,000 damages, payable by both Defendants.

In *CG* the Court of Appeal formed a different view on the DPA 1998 jurisdictional issue.[24] Drawing on the decisions of the CJEU in the *Google Spain* case[25] and *Weltimmo v Nemzeti*[26] the Court held that the Directive had a particularly broad territorial scope and should not be interpreted restrictively. Applying a purposive and common sense approach, the Court was satisfied that Facebook (UK) Limited, established for the sole purpose of promoting the sale of advertising space, operated as part of the wider Facebook organisational and commercial network, was clearly established in the UK and was, therefore, a data controller for the purposes of section 5 DPA 1998.

[15] The vital importance of swift, precise and efficacious interim injunctive remedies, one of the recurring themes of this sphere of litigation, was illustrated again in *MM v Facebook (Ireland) Limited and Others*[27] in which the foundation of the application to the Court was the Plaintiff's concern that the first and second Defendants might alter their extant Facebook accounts. The context was the increasingly familiar one of *soi-disant* "revenge porn", the first in the experience of the NI High Court, in which a revealing photograph of her had been published on the web pages in question. Interestingly, the technical evidence provided by Facebook was that while it could suspend the accounts of the other two Defendants, this would have the effect of expunging everything that has previously been generated. The Court reasoned that to permit the first and second Defendants to have continuing access to their Facebook accounts could either unwittingly or intentionally result in alterations in a context where the need to pursue the contents was obvious. The Judge decided that he balance came down firmly in favour of preserving evidence and acceded to the application.[28] Facebook's claims about the technical effect of suspending a user's account elicited a degree of judicial surprise.[29]

The broad array of procedural issues considered by the NI Courts in Facebook cases extended to striking out the Plaintiff's Statement of Claim as disclosing no reasonable cause of action: see *AY v Facebook (Ireland) Limited and Others*,[30] which succeeded in part.

The question of staying proceedings has also arisen in the somewhat unusual context where, at the outset of the civil trial in question, counsel informed the Court that the Plaintiff had suffered a panic attack, had gone home and would, therefore, be unable to give evidence, resulting in an application to adjourn the trial: see *JR19 v Facebook (Ireland) Limited*.[31] The drama on the first day of trial was followed by a period during which the Plaintiff was given an opportunity to provide supporting medical evidence. The Plaintiff's conduct was far from satisfactory, as the Judge noted.[32] However, dismissing the Defendant's application, he concluded that the elevated threshold to be applied had not been overcome.

Awards of damages and more specifically, the principles to be applied in this line of Facebook cases continued to occupy the Courts. In *J20 v Facebook (Ireland) Limited*[33] where the High Court concluded that the Plaintiff's cause of action founded in misuse of private information had been established, making an award of £3,000 damages. Facebook appealed on both liability (unsuccessfully) and quantum. The latter aspect of the appeal was partially successful. Emphasising the limited time span during which the offending post was publicised (approximately one month) and the still shorter window of opportunity for Facebook to remove it from the site and measuring a period

[20] see [95].
[21] see [97].
[22] see [99].
[23] see [100].
[24] See [2016] NICA 54.
[25] [2014] 3 CMLR 50.
[26] [2016] 1 WLR 863.
[27] [2016] NIQB 60.
[28] see [7].
[29] see [8].
[30] [2016] NIQB 76.
[31] [2017] NIQB 42.
[32] Ibid at [38].
[33] [2016] NIQB 98.

of some 14 days during which Facebook's legal liability to the Plaintiff endured, the COA reduced the award of damages to £500.

The marriage of Facebook and defamation proceedings has not been overly evident in this jurisdiction. Not so long ago the press reported the settlement of a libel action brought by a schoolteacher against the mother of a pupil.

Even more recently, a lady secured a High Court (England) injunction requiring Facebook (Ireland) to identify the employee who had deleted the profile of her deceased partner. She asserted grief and distress occasioned by the loss of countless messages and photographs. Notably, her causes of action were breach of DPA 1998 and the torts of confidentiality and misuse of private information.[34]

Conclusion

To summarise, Facebook has provided the senior NI judiciary with multiple opportunities to brush up and hone its skills and expertise in the following areas:

- Case management
- Procedural rules and orders
- Interim injunctions
- Jurisdiction over a non – NI entity
- Human rights law
- The law of torts
- Tort remedies – damages and the mandatory injunction
- EU law

The evolution of the Facebook litigation in the High Court and Court of Appeal of Northern Ireland, if nothing else, reinforces the truism that the law is nothing if not organic, adaptable and responsive. In the not inextensive NI jurisprudence, there is a clearly identifiable trend of incremental development on the part of the judiciary to both substantive and procedural law issues. I venture to suggest that this has unfolded quite seamlessly. While there is clearly discernible judge made law, the stamp of revolution, or radicalism, is nowhere to be found.

The challenge of writing judgments in clear and comprehensible terms, with an associated need for judicial training of a technical nature, has also emerged.

The person accredited with inventing the World Wide Web is Tim Berners-Lee. Within the last week Mr Lee has been something of a news item. The pre-amble to his comments in *The Times*[35] is that –

> *The internet has fuelled an explosion of fake news, political propaganda and provided a platform for illegal and unsavoury activities …*
>
> *Social media in particular has given everyone with internet access the opportunity to air and share their views however ignorant, ill-informed or defamatory.*

The article recognises another discrete mischief, namely that social media has "*amplified prejudicial opinions*". Mr Berners-Lee concedes that those who invented the world Wide Web almost 30 years ago could not have predicted where it has led.

Stripped to their bare essentials, what are the core activities of Facebook and kindred entities? The pithy reply, broadly accepted, is that *they harvest the data* (ie information, frequently penetrating and detailed) of *people* (ie you and me) which is susceptible to distortion, misuse and abuse. The appellation "surveillance" is frequently applied to what these companies do. Very recently it was widely published that Cambridge Analytica, a data analytics firm specialising in targeted digital advertising, accessed the personal data of 87 million user accounts. Surprise, surprise – this data was acquired via a third party app and the company behind this harvested information not only from the users of this app but also from the Facebook "friends and users" (a discrete class of Facebook subscribers).

While the hue and cry for *regulation* increases, there is little sign of any serious governmental response. UK laws and their judicial application seem to be well ahead of their USA counterparts. Are there elements here of the free and unbridled market?

And finally, do shed a tear for Mr Zuckerberg and the shareholders of the multiple Facebook corporate entities. In late March 2018 its stock plummeted, in a single week, by 13%, wiping away 35 billion dollars of its shareholder value. This, I calculate, leaves approximately 380 billion dollars as a fighting fund to deal with, *inter alia*, the recent NI Court of Appeal award of £500 damages. Where are the goal posts and how level is the playing field, one might legitimately ask?

[The Honourable Mr Justice Bernard McCloskey is President, Queen's Bench Division and chief judicial review judge, in the Court of Judicature of Northern Ireland.]

[34] See *The Times*, The Brief, 19/06/18.

[35] The Brief', 06 June 2018.

'The New Malaysia': How Deep is its Commitments to Human Rights?

Myint Zan

Introduction

In an address to the Convention of the Democrat Party in 1984 the former President of the United States Jimmy Carter's opening words were 'Here I go again. And I am talking about the same things [including] human rights, ... having a fair play'. President Carter's use of the phrase 'Here I go again' in his address to the 1984 Democrat Party Convention was an ironic reference to the telling, mocking even contemptuous phrase used by a former actor, Ronald Reagan, in his debate with Carter some years previously. The one and only debate of the 1980 US Presidential elections occurred in October 1980 – just a week before the 4 November 1980 general election that swept Reagan to power. In that debate Reagan, with all his actor-like phoniness, 'charm' and slight smirk on his face used the phrase 'There you go again' a few times. Less than four years later Carter was gracious in indirectly and apparently acknowledging that Reagan's 'clever' use of the phrase might have contributed to the general impression that in their only debate Reagan 'won'. Three and a half years after his defeat to Reagan Carter said to his Democrat colleagues: 'Here I go again'.

Though Jimmy Carter had to go 'permanently' from the presidency of the United States that is not the case with his political contemporary (who is only about 15 months younger), former and now current Prime Minister of Malaysia Tun Dr Mahathir bin Mohamad. On 29 September 2018 as the 'new' Prime Minister of Malaysia *Mahathir came again* ('there he *comes* again') to address the United Nations General Assembly after a 15 year hiatus, so to speak.

Dramatic comeback

In the historic Malaysian elections of 9 May 2018 Mahathir, the erstwhile 4th Prime Minister of Malaysia who after 22 years in that office retired at the end of October 2003, became again its 7th Prime Minister. Former Australian Prime Minister Kevin Rudd has stated that Dr Mahathir, the oldest head of government in the world 'is the patron saint of political comebacks'. (Kevin Rudd had also a brief political 'come back' in that he was also Prime Minister twice but Mr Rudd's comeback lasted only a few months. In addition, not only Kevin Rudd but no Australian Prime Minister since the founding of the country could match Mahathir's previous continuous tenure as Prime Minister – between July 1981 and September 2018, in two stints, 22 years and seven months and 'counting'.)

This is not a general commentary on the 25 minute-long speech of the venerable (in terms of age and seniority) Malaysian Prime Minister. It will deal only with what can be termed as Mahathir's at least passing nod if not (apparently) sincere acknowledgment of the need for –though Mahathir did not use the word – globalism. This is in contrast to United States President Donald Trump who denigrated 'globalism' by name in his – at least in one part – laughable and mocked speech delivered to the same General Assembly a few days before Mahathir spoke.

Mahathir started his speech by drawing attention to the United Nations of 'the new Malaysia'. One is again reminded that, on Ronald Reagan's first inauguration as President of the United States, in January 1981, a big banner stated: 'America: A Great New Beginning'. Three and half decades later another cliché used by the current President is, in a metaphorical sense, almost a call to arms: 'Make America Great Again'. As the preacher states in the *Ecclesiastes*, 'There is nothing new under the sun' or indeed one could add in the rhetoric of politicians.

Talking about rhetoric (and reality) Dr Mahathir said that the (previous) coalition – Barisan Nasional, or National Front – which had ruled Malaysia for 'sixty-one years' was democratically and peacefully defeated and power was transferred to the government which he now leads. (To be precise, the Barisan Nasional coalition which had continuously ruled Malaysia from the country's independence lasted 60 years and 9 months – from 31 August 1957 to 10 May 2018). And Mahathir was also the leader (from 16 July 1981 to 31 October 2003) of that coalition which he has criticized, although his criticism is directed only at 'the immediately preceding government' of his former mentee, Prime Minister Dato Seri Najib Razak.

Human rights

But back to what can be stated to be Dr. Mahathir's commitment to if not globalism then in his own words his 'pledge to ratify all remaining core UN instruments which are related to the protection of human rights'.

After checking the UN website some of the 'core human rights instruments' which Malaysia has not yet ratified or acceded to would include:

(1) The *1965 International Convention on the Elimination on all forms of Racial Discrimination* (ICERD) which has 179 state parties. Malaysia is among the 14 United

Nations members which are *not* a State party to this Convention. Dr Mahathir did say that 'it would not be easy for us' to 'ratify' these treaties as Malaysia is a 'multi-ethnic, multi-racial, multi-religious, multi-lingual nation but we will accord space and time for all to deliberate and to decide freely based on democracy'.

Perhaps among the 'core' human rights international documents acceding to the ICERD would be the ***least*** easy or most difficult for Malaysia to do. It will perhaps need very considerable amount of 'space and time' to implement it, including modifying certain laws, policies and practices, not to mention constitutional provisions and amendments made to the Federal Constitution of Malaysia after the unfortunate racial riots of 13 May 1969. Due to Malaysia's (almost) unique racial and ethnic composition, governmental structures and the 'social contract', Malaysia need not (necessarily) follow the 179 countries which are parties to the ICERD and accede to it. Even an enthusiastic globalist or internationalist would not dispute Malaysia's sovereign right to refuse or decline to ratify or accede to any international conventions including those which arguably deal with 'core' human rights.

(2) *The 1984 Convention on the Prevention and the Punishment of the Crime of Torture* (Torture Convention) has 164 state parties and Malaysia is not yet a State party. Even though the Torture Convention has fewer state parties than the ICERD, arguably this Convention would or should have less 'structural' intricacies to implement if Malaysia were to accede to it.

(3) The *2002 Statute of the International Criminal Court* (ICC Statute) has 123 state parties which is fewer than two-thirds of the members of the United Nations. This writer understands that Malaysia was 'seriously considering' joining the Statute of the International Criminal Court. Several years ago (probably 2013) in a seminar held in Putrajaya, Malaysia's administrative capital, this writer recalls that a functionary from a United Nations organisation was strongly urging the government, especially the Attorney-General's Chambers, to proceed with Malaysia's accession to this statute. Things might have stalled until the recent past, but with a new Attorney-General at the helm perhaps the A-G's Chambers should revisit the issue and recommend to the Cabinet that it should authorize accession to the ICC Statute. (This writer understands that, procedurally, the Attorney-General's Chambers has to advise the cabinet with its opinion on whether or not to accede to Conventions which Malaysia has not signed and whether or not to ratify conventions which Malaysia has signed.)

(4) *The 1966 International Covenant on Civil and Political* Rights (ICCPR) has 172 state parties and Malaysia has not yet become a state party to it.

(5) *The 1966 International Covenant on Economic, Social and Cultural Rights* (ICESCR) has 169 state parties but Malaysia is not one of them.

As far back as December 1991 (on the occasion of Human Rights Day, commemorated on 10 December) the Malaysian Bar held a seminar entitled 'Towards Ratification of the ICCPR and ICESCR' (It would be semantically and legally more appropriate to say 'Towards *acceding* to the ICCPR and ICESCR' since Malaysia has never signed these two international Covenants and the way for Malaysia to become a State party is not to 'ratify' but to accede to these Covenants). It is now more than a generation since the Malaysian Bar made that recommendation, but up until the time of writing Malaysia has not become a party to these instruments.

The Malaysian Bar was at times if not at 'logger heads' with the then – and current – Prime Minister Mahathir, at least not in an uneasy relationship with him, the first non-lawyer Prime Minister of Malaysia. But things have, one presumes, changed since for the better since.

The Prime Minister of Malaysia made a statement in no less a vaunted place than the UN General Assembly wherein he pledged to ratify *all* remaining core human rights instruments even though he did not specifically name any of those instruments. As stated by Dr Mahathir himself Malaysia's peculiar ethnic, racial and religious 'structural' factors which are quite intricate or even 'complicated' needs to be considered in acceding to international documents concerning human rights protections. One hopes that it would not take too long for that pledge to be fulfilled.

(6) *The 1994 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* has 53 state parties. Malaysia is not a state party. Among the major international human rights conventions mentioned here it has the fewest state parties – less than 30 per cent of the 193 members of the United Nations. Among the Association of South East Asian Nations (ASEAN) arguably both in terms of numbers and in terms of percentage of the 'host population' Malaysia and Thailand would probably have the most migrant workers – legal and illegal. Workers from Indonesia may constitute a plurality of migrant workers in Malaysia. Accession to this Convention may be less intricate for Malaysia than, say, accession to the ICERD or the Torture Convention.

(7) Last, but not necessarily the least, the *1951 Convention Relating to the Status of Refugees* has 145 state parties and

> Malaysia is not one of them. In his speech to the United Nations, though he did not use the word 'refugees' Dr Mahathir expressed his concern for the massive outflow and inflow of people across State boundaries with multitudes of people dying during their journeys, through drowning, starvation and 'freezing to their deaths'.

In this regard I recall an 'inconvenient statement' or at least an 'alleged' statement made by Dr Mahathir himself concerning refugees. In June 1979 as Deputy Prime Minister Dr Mahathir allegedly stated that Vietnamese refugees ('boat people') 'arriving' in Malaysia could be 'shot'. I also recall reading Dr Mahathir's subsequent explanation that his statement had been quoted out of context. What he said was "What do you want me to do with them? Shoot them?" (For one contemporaneous report, see *The Washington Post* of 19 June 1979: 'Malaysia, in Clarification, Says It Would Not Shoot Refugees'.)

Since the late 1980s Malaysia's refugee problems, as far as the Vietnamese refugees are concerned, have largely diminished to the point of non-existence. But among others there is –albeit not as serious as the Vietnamese refugee issues in the 1970s and 1980s – the 'Rohingyas' (alternative term used by the Burmese government 'Bengalis') presence in Malaysia: this is an issue for the Malaysian government. Malaysia's accession to the Refugee Convention may hopefully help ease the plight of refugees in Malaysia, including the Rohingyas. Dr Mahathir has specifically expressed great concern about, and sympathy towards, the Rohingyas in his speech.

My mentioning of Dr Mahathir's ostensible (or alleged) comment regarding 'shooting of Vietnamese refugees that came to Malaysia' (1979) and expressions of concern for other refugees (2018) should not be seen only, or even mainly, in a cynical or negative way. Since phrases used by two American presidents (Reagan and Carter) have been adapted earlier, a statement of another American president can be paraphrased here. In the 1988 Republican Convention in the United States then presidential candidate (later President) George H W Bush talked about a 'kinder, gentler America'. The world's oldest Prime Minister's as can be discerned in his UN speech – and in contrast to a few of his previous pronouncements going back to decades ago – appears now to have become 'an older but kinder and gentler' man..

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Unjust Enrichment: the Platypus of Private Law

Susan Glazebrook

Introduction

I want to start by talking about the platypus.[1] In 1799 George Shaw, a parson turned keeper of the Department of Natural History at the British Museum, was sent a dried skin and desiccated bill of an animal. He gave it the scientific name of *Platypus anatinus* (flat foot duck). Some three years later Göttingen anatomist, Johann Blumenbuch, gave the animal another name: *Ornithorhynchus paradoxus* (paradoxical bird-snout). It turned out that the term platypus had already been used for a type of beetle in 1793 and so, in accordance with the rules of classification, Blumenbach's name became the official one, although the name platypus has stuck.

For nearly a century, naturalists argued over the classification of the playtpus. Shaw classified the creature as a mammal. Some considered it could be the missing link between reptiles and mammals. Others thought it a new and different type of animal. Still others thought it was a hoax, perpetuated perhaps by the Chinese[2] (and even Shaw was not certain it was genuine).

The case for the platypus being a new type of animal would have been stronger had it been known that platypus lay eggs. That platypus are egg laying was only discovered (by Europeans at least) in 1884 by William Hay Caldwell, who has been described as an "obnoxious young Cambridge graduate".[3] Mammals at the end of the eighteenth century, by definition, had to have live young. Cold blooded egg layers were reptiles. Warm blooded egg layers were birds. The platypus, quite obviously, was neither a reptile nor a bird.

The platypus now resides in class *Mammalia* with about 5,000 known living mammal species. Its subclass is *Prototheria*[4] and order *Monotremata* (shared with four variety of echidna). Monotremes are the only order in the subclass *Prototheria* and they are only found in Australia and New Guinea.[5]

You are no doubt wondering why am I talking about platypus. Well, I came across an article on platypus and it started in a manner that seemed to have some resonance with the story of unjust enrichment. It said:[6]

> The story of the discovery of the platypus [unjust enrichment] teaches us much that is relevant to the nature of scientific evidence [law], orthodoxy, entrenched authority, the role of personalities in science [legal community], the slow overthrow of old mores, national rivalries [eg United Kingdom and Australia], prejudices and priorities, the structures of animal [legal] classification, … conservation, and extinction.

Unjust enrichment and the importance of terminology

Like the classification of the platypus, unjust enrichment has, at least in much of the common law world,[7] attracted strong and widely divergent views. For example, the High Court of Australia, after initial endorsement of the concept, has in recent times maintained that the notion is not unjust enrichment but

1 This originates from the Greek term, platupous, and so the plural is not the "rogue Latin" platypi but, as I understand it, platypodes. The English plural is either platypus or platypuses. I opt for the former.

2 The alleged involvement of the Chinese was a theory put forward by Robert Knox in1823. He referred to the "monstrous impostures which the artful Chinese had so frequently practised on European adventurers": cited in Brian K Hall "The Paradoxical Platypus" (1999) 49 BioScience 211 at 213. Although considered at the time to be a distinguished professor, Robert Knox is remembered for his role as the purchaser of the bodies from the body snatchers turned murderers Burke and Hare: see Alumni Services "Dr Robert Knox" (1791 – 1862) *The University of Edinburgh* <www.ed.ac.uk>; Ben Johnson "The Story of Burke and Hare" *Historic UK* <www.historic-uk.com>.

3 This quote and the history of the classification of the platypus comes from Hall, above n 2, at 215.

4 As I understand it, this means egg-laying mammals. The other sub class of mammals is *Theria* (mammals that give birth to live young). These in turn are divided into *Metatheria* (marsupials) and *Eutheria* (placental mammals). Marsupials are largely found in Australia and surrounding islands, although opossums also live in North, Central and South America. There are more than 330 species of marsupial: see Vera Weisbecker and Robin M D Beck "Marsupial and Monotreme Evolution and Biogeography" in Athnol Klieve, Lindsay Hogan, Stephen Johnston and Peter Murray (eds) *Marsupials and Monotremes: Nature's Enigmatic Mammals* (Nova Science Publishers, 2015) 1 at 3–10.

5 The Platypus is only found in Eastern Australia and Tasmania. Echidnas, also known as spiny anteater, are found in New Guinea and Australia: Weisbecker and Beck, above n 4, at 5–6.

6 Hall, above n 2, at 211.

7 This is not the case in other jurisdictions. Germany, for example, traces the origins of its unjust enrichment law to Roman law: see Petra Butler "Unjust Enrichment" in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 7 and David A Juentgen "Unjustified enrichment in German and New Zealand law" [2002] 8 Canterbury LRev 505.

unconscionability and that it is firmly grounded in equity.[8] This view has been extensively criticised – in particular for the open-ended character of unconscionability.[9] It has been suggested that the French court was already retreating from it.[10] In *Equuscorp* for example, the plurality judgment of French CJ, Crennan and Kiefel JJ embraced the taxonomical function of unjust enrichment, while noting that it did not encompass an "all-embracing theory of restitutionary rights and remedies". They said that their approach did not, however, "exclude the emergence of novel occasions of unjust enrichment supporting claims for restitutionary relief".[11] Whether there will be some further retreat by the Kiefel court (particularly with the addition of Justice Edelman) is of course an open question.

Another view, expressed strongly by Professor Peter Watts QC, is that a wrong turn was taken when restitution became unjust enrichment. In a New Zealand Law Society seminar in 2014 Professor Watts described himself as the patron saint for lost causes with regard to this view.[12] In his introduction to that seminar he said that unwilled economic gains are a feature of community life.[13] Labelling the cause of action unjust enrichment had the potential to cause prejudice against such enrichment and therefore an unwarranted extension of the granting of restitution. Further, he did not consider it possible to subcategorise types of enrichment into money, services etc and apply the same tests of liability to each.[14]

Professor Watts elaborated on these views in more detail at a 2016 lecture in London chaired by Lady Justice Arden.[15] At that stage, he was very concerned that recent case law in the United Kingdom had realised all his fears of overreach.[16] When discussing the English Court of Appeal decision of *TFL Management Services Ltd v Lloyds TSB Bank Plc,*[17] he said that he had saved the "worst for last".[18] In his view *TFL* reversed the traditional position of English law by requiring "all benefits … to be justified".[19] Professor Watts tells me he is most heartened by the recent United Kingdom Supreme Court cases,[20] which he sees as being back on the right track.

Professor Watts made a number of points in his 2016 lecture. The first was that only certain interests are protected at common law, with preserving and controlling the disposition of property being the most strongly protected.[21] Autonomy in binding ourselves to future action is, although to a lesser extent, also protected. But mere preservation of our wealth against erosion by others is not. It follows that only the protection of a person's interests in property can justify a strict liability restitutionary rule. The law intervenes because there are flaws in the process by which the claimant's property ended up in the defendant's hands, justifying a reversal.[22] The same applies to flaws in the process of binding ourselves in contract. Protection of recognised interests supplies its own basis of intervention. Enrichment, unjust or not, is neither necessary

[8] For initial endorsement of unjust enrichment in Australia see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 227 per Mason and Wilson J and at 256–257 per Deane J; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17, (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ. For later rejection of the concept see the concurring reasons of Gummow J in *Roxborough v Rothams of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [70]–[100] and *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 at [89] where the Court chose to decide the issues on the basis of equity rather than unjust enrichment. For a discussion see also Keith Mason "Strong coherence, strong fusion, continuing categorical confusion: The High Court's latest contributions to the law of restitution" (2015) Aus Bar Rev 284 at 307. See also the discussion in Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, 2011) at 35–43.

[9] James Edelman and Elise Bant in *Unjust Enrichment* (2nd ed, Hart Publishing, Oxford, 2016) at 27, for example say that unconscionability is not helpful in that it is the result of factors, not the overriding principle. It is, in any event, too vague and has a connotation of fault which may often be lacking. In Peter Birks "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UW Austl L Rev 1 at 16–17, Professor Birks said that "Like 'fair' or 'just', the word 'unconscionable' is so unspecific that it simply conceals a private and intuitive evaluation." See also the discussion on this point in Kit Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis, Australia, 2018) at 20–27.

[10] See Mason, above n 8, at 310–312 for a discussion on this point.

[11] *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 at [30].

[12] Peter Watts "Why 'just restitution' is a better label than 'unjust enrichment' – prelude and counterpoint" in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 1 at 1.

[13] At 2.

[14] At 1.

[15] The 2016 lecture served as the basis for Professor Watt's article: Peter G Watts "'Unjust Enrichment' – the Potion that Induces Well-meaning Sloppiness of Thought" (2016) 69 Current Legal Problems 289. All references to Professor Watts' speech refer to this paper [Watts "Unjust Enrichment"].

[16] The cases he discussed included *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc* [2013] EWHC 208 (Ch) which "unjustifiably shrunk" restituitonary liability: at 315–317 and *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC, [2016] AC 176, a decision Professor Watts described as problematic and widening the law of restitution to "an unknowable extent" with the claim better suited to the rules of subrogation than unjust enrichment: Watts "Unjust Enrichment", above n 15, at 303–308. For a similar critique of the English position see Robert Stevens "The Unjust Enrichment Disaster" (2018) 134 LQR 574.

[17] *TFL Management Services Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006.

[18] Watts "Unjust Enrichment", above n 15, at 322.

[19] At 323.

[20] These cases include the decision of *Prudential Assurance Co Ltd v Revenue & Customs Corms (SC(E)* [2018] UKSC 39, [2018] 3 WLR 652 which overruled *TLF* and effectively overruled the earlier decision of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561. *Prudential Assurance* concerned whether compound interest could be awarded on a claim of unjust enrichment that arose for tax levied on dividends from companies based outside of the United Kingdom. Overriding the effect of the earlier decision of *Sempra Metals*, the Court held that compound interest was not available on the basis that such a remedy was compensatory not restitutionary and thus fell outside of the scope of unjust enrichment: see at [71]–[75].

[21] Watts "Unjust Enrichment", above n 15, at 292.

[22] At 293.

nor sufficient.[23]

Despite Professor Watts' valiant efforts, it is probably fair to say that the tide of opinion is with unjust enrichment as the correct terminology.[24] In their text Edelman and Bant say that this is because it is the cause of action that we need to concentrate on, being unjust enrichment, and not the remedy of restitution.[25] And in any event, they say, not all restitutionary remedies result from unjust enrichment.[26] Meeting the criticism that concentration on enrichment could mislead, they would say that the phrase has to be read as a whole; it is not mere enrichment that triggers the cause of action but *unjust* enrichment. They would also say that the recognised four-stage inquiry[27] (properly nuanced) provides the necessary structure and discipline and, in a valiant effort to achieve universality, say that this structure also underlies the Australia unconscionability test.[28] To meet their test, what is required is:

(a) enrichment, which they say requires a benefit and one that is chosen by the defendant;[29]

(b) enrichment at the expense of the claimant, which requires a transactional link to the claimant;[30]

(c) unjustness of the enrichment, with the particular unjust factor being identified.[31] Taking a bob each way, they also say that there must be no juristic reason to retain the benefit.[32] There may have been a juristic reason to receive an enrichment but if there is no longer a juristic reason to retain it, the recipient's enrichment becomes unjust.[33]

(d) absence of any defences available to the defendant. Recognised[34] defences include: change of

[23] At 293–294. Professor Watts does however accept that some cases are suited to the concept of unjust enrichment, above n 12, at 6: citing the example of a guarantor who has honoured the guarantee suing a guarantor who would otherwise be enriched.

[24] For example, in *Goff & Jones*' eighth edition, the title *The Law of Restitution* was changed to *The Law of Unjust Enrichment*: Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, 2011). See the discussion of this at 1-01–1-05 of the 8th ed. The terminology has also been widely accepted and reflected across other texts, which to name a few include: Edelman and Bant's text *Unjust Enrichment*, above n 9, who discuss this point at 29–30; See also Barker and Grantham *Unjust Enrichment*, above n 9, and Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds) *Defences in Unjust Enrichment* (Hart Publishing, Oxford, 2018). Even the United States now uses the term unjust enrichment with the third restatement being called: The American Law Institute *Restatement of the Law Third: Restitution and Unjust Enrichment* (American Law Institute Publishers, Washington DC, 2011), although this kept restitution in its title. This change was also echoed in commentary: for example, Charles Mitchell and William Swadling *The Restatement Third: Restitution and Unjust Enrichment* (Hart Publishing, Oxford, 2013).

[25] Professor Watts accepts that restitution denotes "a response not an event" but he says that "it is a response so closely tied to defective property dispositions as a class of events that it can be said to be the other side of the coin": Watts "Unjust Enrichment", above n 15, at 297.

[26] Edelman and Bant, above n 9, at 33–35 say that the disgorgement of profits of wrongdoing is not restitution for unjust enrichment. Nor is restitution in criminal law or restoring a person to a position before loss was suffered.

[27] See, for example, the discussion in Jessica Palmer *Restitution* [2016] NZLR 435 at 436–348 on the benefits of adopting a four-part analysis.

[28] Edelman and Bant, above n 9, at 7–8 and 13–15.

[29] Chapter 4. The terminology of "chosen" was adopted to align the test with issues that arise with services. This, however, may be thought somewhat artificial with mistaken payments where, as the defendant is often unaware of the enrichment, they have to be presumed to have chosen the benefit: see at 62–80.

[30] Chapter 5. A transaction is defined by Edelman and Bant as including "any action" between the persons involved. The recent English decision of *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 at [43], [46]–[52] affirmed that a direct transactional link is normally required.

[31] Edelman and Bant, above n 9, ch 6. Edelman and Bant note that it is the academic and judicial consensus that "unjust" is not, quoting *Pavey v Matthews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221 at [14] per Deane J, an invitation to "assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate": at 119. Rather unjust refers to the factors that favour ordering restitution. This principle was also encapsulated by Lord Mansfield in one of the earliest judicial recognitions of unjust enrichment in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 where he said the action "…lies only for money which ex æquo bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty … it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances". Issues of policy for restitution are, however, argued by Edelman and Bant, above n 9, not to be part of unjust enrichment: see at 138–139 and ch 13 for a general discussion on this point.

[32] Edelman and Bant, above n 9, at 125. Continental European jurisdictions avoid issues of unjust enrichment by slotting the claim into another area of law in cases where there is a juristic reason allowing the defendant to retain the benefit. Edelman and Bant disagree with this approach as they argue that it "conceals the operation of unjust factors in the law of unjust enrichment and makes it appear as if the law of unjust enrichment is concerned only with the defendant's juristic reason to retain the enrichment". This approach they argue "simply pushes difficult issues arising as a result of the unjust factor into other areas of law where they do not belong": at 126.

[33] Edelman and Bant, above n 9, ch 7. See also 130-138. Situations where the recipient has a juristic reason to receive the enrichment, but not to retain it can arise in contractual relationships normally from failure of consideration. This can occur, for example, where a contract, for which partial payment has been made, is frustrated. In this type of situation, although there was a juristic reason to receive the original enrichment (the clause agreeing to the partial payment), this does not mean that the recipient has a juristic reason under the contract to retain it. Upon the contract becoming frustrated, retaining the payment, despite having received it legitimately, becomes unjust: see Edelman and Bant at: 135–137.

[34] There remain controversial defences such as the defence of passing on. The defence of passing on is an inquiry into whether the loss is actually at the "claimant's expense" or whether they claimant has passed on the loss. The existence of this defence is contentious: see Burrows, above n 8, at 614–616, see also Palmer, above n27, at 326–328. The defence has only been accepted in Canada with Barker noting that it has been "roundly rejected elsewhere in the Commonwealth": see Barker and Grantham, above n 9, at 550–553. It is noted, however, that forms of a passing on defence can exist in statute see Edelman and Bant, above n 9, at 401 and Burrows, above n 8, at 617–618.

position,[35] estoppel,[36] and delay.[37]

It has been suggested that there should be a fifth step to this exercise, one which enquires into the available remedies in restitution.[38]

I will, from now on, use the term unjust enrichment. While I have some sympathy for Professor Watts' concerns about the use of this term, it is not the label that is important but the underlying reasoning and the ability to recognise when there is a danger of overreach,[39] as well as being aware that different considerations may apply to different subclasses of unjust enrichment. The story of the platypus seemed to me to illustrate that, in a broad class (like mammals), there is a need for subclasses and a recognition that, even if there is a general similarity, there may also be important differences.

I agree that classification is useful. It does go some way to ensuring like cases are decided in a similar manner and it can draw attention to inconsistencies in the law.[40] But it should be a tool and not a straightjacket. Justice Edelman said in *Lampson* that in his view the taxonomic category of unjust enrichment serves a useful function similar to that of "torts" in that it "directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity".[41] Lord Toulson (with Baroness Hale, Lord Kerr, Lord Wilson and Lord Hughes agreeing) made a similar point in *Eastenders Cash and Carry*,[42] quoting *Goff & Jones*:

> … the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution' [a citation from the judgment of Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales* (No 2) [2003] NSWSC 987, para 16, quoting *Mason & Carter, Restitution Law in Australia* (1995), paras 59–60]. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).

The scope of unjust enrichment

This leads to another important point about unjust enrichment: that there is no consensus on what should be contained within it. Edelman and Bant, for example, have a relatively narrow view.[43] Others would narrow it even further, excluding services.[44] Some take an expansive view by including

[35] The elements of a defence of change of position are generally accepted to require defendants to have changed their position to their detriment so that it would be inequitable, unconscionable or unjust to require full restitution: see Edelman and Bant, above n 9, 332–333. The defence has been adopted, in various forms, in Australia, New Zealand and England see Barker and Grantham, above n 9, at 462–520. See also Dennis Klimchuk "What Kind of Defence is Change of Position?" in Andrew Dyson, James Goudkamp and Federick Wilmost-Smith (eds) *Defences in Unjust Enrichment* (Hart Publishing, Oxford,2018) 69 and Elise Bant "Change of Position: Outstanding issues" in Dyson and others *Defences in Unjust Enrichment* 133 for a discussion on the nature of and issues with the defence.

[36] Although similar to the change of position defence, with some suggesting that the defences should be merged, estoppel differs in the key respect that it requires a representation to be made by the claimant to the defendant which the defendant relies on to his or her detriment. The representation can be either words or conduct, and, in cases of mistaken payment, has to be something other than payment itself: see Barker and Grantham, above n 9, at 523–532. Burrows, above n8, has endorsed the merits of keeping a separate estoppel defence noting that it allows a better defence, advancing an "all or nothing" approach rather than a pro tanto defence, see at 550–558.

[37] This defence is governed by statutory limitation periods if applicable or generally through common law and equitable principles that examine the circumstances of the particular case: see Barker and Grantham, above n 9, at 553–558. For a general discussion on the operation of the defence see Edelman and Bant, above n 9, at 385–394.

[38] See for example Justice Keith Mason "Where has Australian restitution law got to and where is it going?" (2003) 77 ALJ 358 at 362–363.

[39] This concern has been echoed by commentators. Kelvin F K Low "The Use and Abuse of Taxonomy" (2009) 29 Legal Stud 355 at 359 who noted "Whereas we should be careful not to ignore completely legal taxonomy in developing the common law, the distinct features of legal classification require us to be extremely cautious about any 'logical' developments that legal taxonomy may 'demand'. Indeed, it is important to recognise that the taxonomy is not fully revealing (indeed, sometimes not at all) of the normative values inherent in the law's responses."

[40] Barker and Grantham, above n 9, at 10.

[41] *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 at [51].

[42] *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 at [102] citing the 8th edition of *Goff & Jones*, above n 24, at 1-08.

[43] Edelman and Bant, above n 9, ch 13 for example would exclude policy-based restitution claims such as illegality and incapacity from falling under the umbrella of unjust enrichment. They argue that an imperfect intention is irrelevant to an independent right of restitution.

[44] Academic discussion revolves around the position of services which result in a product and those which do not, the latter labelled pure services. Some commentators dispute whether pure services can constitute an enrichment as the labour cannot be restored: see for example R Grantham and C E F Rickett *Enrichment and Restitution in New Zealand* (Hart Publishing, Oxford 2000) at 165–166 and 172–175. They argue that services are better dealt with under remuneration. For a brief discussion on the issues that arise with claims of unjust enrichment for services see Rohan Havelock "The Enrichment Requirement" in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 37 at 39–40.

unjust enrichment by wrongdoing.[45] Some would have it encompass, and to a degree transform, tracing,[46] knowing receipt,[47] subrogation[48] and equitable contribution.[49] The exact relationship of unjust enrichment to other parts of the law, such as contract or property, remains controversial.[50] For example, is it an equal partner with tort or contract or is it subsidiary? If it is not subsidiary, issues of priority will arise where there is a concurrence of liability.[51]

The operation of the defence of change of position is also contentious.[52] There is for example, disagreement as to whether disenrichment is required or whether the change needs to be irreversible for defendants to establish that they have acted to their disadvantage.[53] In Australia, the High Court has rejected the requirement of disenrichment in favour of the irreversibility approach.[54] Although unsettled, the English approach by contrast, seems to be a broader consideration of whether an alteration in the position of the defendant means that it would be inequitable to require restitution.[55] This in turn can be contrasted with the 'balancing the equities' approach in New Zealand, which is discussed below.[56]

All of this controversy makes it somewhat difficult for judges at the coalface, I venture to say. Whatever you do, you are likely to fall foul of some commentator. And no doubt lawyers are in an even worse position when they are advising clients.

Some of those differences of view come down to different conceptions of the underlying basis of unjust enrichment. While most legal systems have some notion of the maxim attributed to Pomponius that "by the law of nature it is fair that no one should become richer by the loss and injury of another",[57] the underlying reasons for this differ, which can lead to differences in operation.[58]

Nahel Asfour, in a recent book on the cultural underpinnings of enrichment law, suggests that the European concept is based on the private domain of the disadvantaged person and an attachment to property.[59] In the United States, by contrast, the concentration is on the cause of action.[60] This is because of the American hesitation to inhibit the transfer of wealth unless a particular problem arises.[61] The third system Asfour studied was the late Ottoman Empire, where enrichment law was based

[45] Claims involving civil wrongs include trespass and gains made via breach of confidence. These wrongs also have other avenues of redress available to them other than restitution see Barker and Grantham, above n 9, at 395–444 for a discussion on wrongs in claims of unjust enrichment.

[46] Barker and Grantham, above n 9, at 567 say "tracing is a legal process by which one asset is permitted to stand in the place of another for the purposes of whatever rights or claims the plaintiff may have had in respect of the first asset". For their full discussion on the relationship between unjust enrichment and tracing see: 567–596.

[47] There is contention as to whether a strict liability approach should be taken to recipients of property in unjust enrichment claims, an approach that would effectively overtake knowing receipt. This position is controversial and, although supported by some commentators, it has not found favour with others: see the editors of *Goff and Jones*, above n 24, at 8-196 to 8–203. See also Barker and Grantham, above n 9, at 206–213; Jonathan Moore "'Knowing receipt' in Australia" (2006) 1 J Eq 9 and David Salmons "Claims Against Third-Party Recipients of Trust Property" [2017] 76 CLJ 399.

[48] See for example *Banque Financière de la Cité v Pare (Battersea) Ltd* [1999] 1 AC 221, a case that has been extensively criticised by Professor Watts: see for example Peter Watts "Subrogation – a step too far?" (1998) 114 LQR 341. *Banque Financière* allowed the benefit of a security even where none was intended, with Watts "Unjust Enrichment", above n 15, at 304 describing the case as a "commercial law travesty". The *Banque Financière* approach was rejected in Australia in *Bofinger*, above n 8, at [97]. See also the discussion on subrogation in Barker and Grantham, above n 9, at 648–667, and Daniel Friedman "Payment under mistake – tracing and subrogation" (1999) 115 LQR 195 at 197.

[49] Edelman and Bant, above n 9, at 48–49 and 293–298, for example argue that the principles of equitable contribution are in line with unjust enrichment. For a discussion on the general position of equitable contribution in English law: see Mitchell, above n 24, at 20-02–20-10. See also Victoria Stace "The Law of Contribution – An Equitable Doctrine or Part of the Law of Unjust Enrichment?" (2017) VUWLR 471.

[50] Barker and Grantham, above n 9, ch 2.

[51] How unjust enrichment is categorised, and whether it sits as an equal partner to the other core limbs of private law, affects the development of other limbs of the common law: see for example the discussion of the potential issues in Peter Jaffey "The Unjust Enrichment Fallacy and Private Law" (2013) 26 Can J L & Jurisprudence 115. See also Dennis Kilmchuk "The Scope and Structure of Unjust Enrichment" (2007) 57 U Toronto LJ 795 and Low, above n 39, for a discussion on the nature of, and issues with, the Birksian taxonomic classification.

[52] See, for example, the discussion in Barker and Grantham, above n 9, at 458–462 who note that the recognition of a change of position defence in England and Australia is relatively recent and that the exact scope of the defence, especially in Australia, is uncertain. This can be contrasted to the position taken in Germany, which as Butler noted, sees the change of position defence "as central to enrichment law": Butler, above n 7, at 10–12.

[53] Edelman and Bant, above n 9, at 332–338.

[54] *Australian Financial Services and leasing Pty Ltd v Hills Industries* Ltd [2014] HCA 14, (2014) 253 CLR 560. See also Edelman and Bant, above n 9, at 335-338.

[55] *Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548 at 580 where Lord Goff said, "I* do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full". See also *Mindy Chen-Wishart "Unjust Factors and the Restitutionary Response" (2000) 20 Oxford J Legal Studies 557 for a discussion on the operation of the unjust factor on this approach and John Burrows "Change of Position: The View from England" (2003) 36 Loy LAL Rev 803.*

[56] For a discussion on the approach taken in New Zealand see Ross Grantham and Charles Rickett "Change of Position and Balancing Equities" (1999) 6 RLR 158 and Struan Scott "Mistaken Payments and the Change of Position Defence: Rare Cases and Elegance" (2012) 12 Otago LR 645.

[57] Edelman and Bant, above n 9, at 9.

[58] Barker and Grantham, above n 9, at 10–14.

[59] Natel Asfour *Unjust Enrichment: A Study in Comparative Law and Culture* (Hart Publishing, Oxford, 2017) at 47-68.

[60] For a general discussion on the influence of the American culture see at 95–115.

[61] At 114–115.

on the notion of socio-religious accountability.[62]

Turning closer to home, the concept of *utu* in Māori custom, while commonly thought of as revenge, is in fact a much wider concept and could include some form of unjust enrichment.[63] The basis of *utu*, as I understand it, is the need to restore balance, with a view to achieving equilibrium in long-term relationships and particularly those based on kinship. Usually *utu* would be designed to leave the other party in a better position than before and this would create a cycle of reciprocity.[64] I make these comments on the basis that customary law, to the extent not extinguished by statute, may well be part of the common law in New Zealand or at least be relevant to its development.[65]

The role of statute

This leads to the next issue I would like to discuss: the role of statute. This is particularly relevant to New Zealand because of our (at least partial) codification of a large part of contract law such as the law relating to mistake, misrepresentation and illegality.[66] Although limited to situations where there is a contractual relationship, the Contract and Commercial Law Act 2017 provides for relief in a wide range of circumstances that concern issues of restitution. For example, where a mistake of law or fact has resulted in an unequal exchange of values or conferment of benefits that is substantially disproportionate to the consideration,[67] the courts have a wide discretion to grant relief such as compensation, variation of the contract or restitution.[68] How unjust enrichment fits within the framework of those statutes is an issue the courts have not yet considered in depth.[69]

Possible difficulties with the relationship between common law and statute are illustrated by the New Zealand Court of Appeal decision in *National Bank v Waitaki*.[70] In that case the defendant had tried to unsuccessfully convince the Bank that it was not owed money but, in the end, agreed to take it.[71] It was then invested. By the time the Bank accepted that the payment was mistaken, the investment had become worthless.[72] The Court of Appeal held that the statutory change of position defence was unavailable as the defendant had been aware that the bank would eventually claim the money back. When Waitaki had altered its position, it had not done so in reliance of the bank's validation of the payment.[73] However, the Court held that the common law defence had survived the implementation of the statutory defence and that Waitaki had acted in good faith, despite knowing the Bank was mistaken.[74] The Court ordered only partial repayment of the sum mistakenly paid on the basis both parties had been negligent.[75]

The Court's balancing of the equities approach has been

[62] At 115–156. The socio-political framework of the Ottoman Empire was built around the religious philosophy that underpinned the role of the Sultan and central powers. As Asfour notes, restitution in the Ottoman Empire was "an issue of trust, of social and religious expectations and of aligning to potent rules of religion and society": at 156.

[63] For a discussion on the concepts utu encompasses and the difficulty in settling on a single definition see Tai Ahu, Rachael Hoare and Mānari Stephens "Utu: Finding a Balance for the Legal Māori Dictionary" (2011) 42 VUWLR 20.

[64] Waitangi Tribunal Report *Muriwhenua Land Report* (Wai 45, 1997) at 26; Law Commission *M*āori Custom and Values in New Zealand Law (Study Paper 9, Wellington, 2011) at [156]–[157]; Nathan Kennedy and Richard Jefferies *Kaupapa Māori Framework and Literature Review of Key Principles* (PUCM Māori Report 4, 2009) at 71–74 and John Patterson *Exploring Māori* Values (Dunmore Press, Palmerston North, 1992) at 122 as cited in Ahu, Hoare and Stephens, above n 63, at 201.

[65] *Takamore v Clarke* [2013] 2 NZLR 733, [2012] NZSC 116 at [164] McGrath J on behalf of the majority (Tipping and Blanchard JJ) said in the context of customary burial practises that "…the common law of New Zealand requires reference to the tikanga [of the relevant iwi], along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation". A similar view was expressed by Elias CJ who noted that "[v]alues and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case": at [94]. For a general discussion on the position of customary law after *Takamore* see Laura Lincoln "*Takamore v Clarke*: An appropriate approach to the recognition of Māori custom in New Zealand law?" (2013) 44 VUWLR 141. For a brief analysis on the different approaches to tikanga Māori see Rebecca Walsh "*Takamore v Clarke*: A Missed Opportunity to Recognise Tikanga Māori?" (2013) 19 Auckland UL Rev 246 at 248–251. See also Justice Joe Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 15–16 and Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Journal of Māori and Indigenous Issues 25 at 36.

[66] Originally contained in the Illegal Contracts Act 1970, Contractual Mistakes Act 1975 and the Contractual Remedies Act 1979 these Acts have been consolidated into the Contract and Commercial Law Act 2017. For a brief discussion on the statutory codification of the common law see Matthew Barber "Influences" in Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) 13 at 20-21.

[67] See ss 75 and 24(1)(b).

[68] Sections 75 and 76.

[69] Barber, above n 66, at 28–30. For a brief discussion on the current position in New Zealand see Jessica Palmer "Unjust Enrichment: What is it all about?" in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 21 at 32–34.

[70] *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (Henry, Thomas and Tipping JJ).

[71] At 213–214.

[72] At 214–215.

[73] At 227 per Thomas J, 231–232 per Tipping J, Henry J dissented on this point at 218.

[74] At 219 per Henry J, 227–228 per Thomas J and 232 per Tipping J.

[75] At 225 per Henry J, 231 per Thomas J and 233 per Tipping J.

much criticised.[76] I think this criticism may be a bit unfair in that this was a decision that confirmed the continuation of the common law defence of change of position alongside the statutory defence. The statutory defence gives a broad discretion, applying where it is inequitable to grant relief. It arguably would not have done much for coherence in the law if there were two different tests, depending on whether the statutory test or the common law or both applied.

In some cases, statute may occupy the ground. An example of this is the recent Supreme Court case of *McIntosh v Fisk* which related to a large-scale Ponzi scheme.[77] The perpetrator had purported to invest in the share market during the Global Financial Crisis, achieving returns that, unfortunately for investors, turned out to be too good to be true.[78] The issue was whether Mr McIntosh, who had been paid out prior to the collapse of the scheme, was entitled to keep his capital and the fictitious profits that had been paid to him.[79] This was either on the basis that he had given value for those or on the basis of change of position.[80] The case was argued and decided on the basis of the Companies Act 1993[81] and the Property Law Act 2007[82] and not on the basis of unjust enrichment.[83]

Change of position was rejected on the facts.[84] The "profits" Mr McIntosh had received on his investment were required to be repaid, basically on the grounds that they were fictitious.[85] By majority, Mr McIntosh was allowed to keep his capital.[86] I dissented, in part on the basis that an accident of timing should not favour one investor over another, particularly as the very essence of a Ponzi scheme is that investment by new investors is used to pay out investors who wish to withdraw their funds.[87]

Incidentally, the issue of the appropriate treatment of Ponzi schemes has been the subject of a discussion document by the Ministry of Business, Innovation and Employment which has suggested equal sharing of loss between all defrauded investors.[88] Submissions have closed on the document but there has been no further report yet as far as I am aware.

Conclusion

Now you could well be feeling slightly dissatisfied that I have so far raised a number of questions without attempting to be definitive on classifying unjust enrichment (my platypus). Unfortunately, my time is up and it would probably be unwise for me to anticipate where the New Zealand courts might go to from here. So for now I adjourn for further argument.

[The Hon Susan Glazebrook DNZM is a Judge of the Supreme Court of New Zealand. This article is based on a speech given at the 35th Annual Conference of the Banking & Financial Services Law Association on 1-3 September 2018 in Queenstown, New Zealand. The author wishes to thank her clerk, Nichola Hodge, for her assistance with this article and in particular with the footnoting.]

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[76] The approach taken in *Waitaki* was not adopted by the Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) at [45]. Lord Bingam and Lord Goff said they were "most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so". They also noted, quoting Professor Birks, that "that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault". For a general discussion on these cases see Grantham and Rickett, above n 56; Scott, above n 56, and Palmer, above n27, at 449. Australia has also taken a different position to New Zealand: see for example Keith Mason, J W Carter and G J Tolhurst *Mason & Carter's Restitution Law in Australia* (3rd ed, LexisNexis Butterworths, 2016) at 880–881.

[77] *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863.

[78] At [3]–[5].

[79] At [9].

[80] At [9].

[81] See at [9], [47]–[69] and [137]–[184] per Arnold, O'Regan, Ellen France JJ (the majority). The issue under the Companies Act was whether the disposition was an insolvent transaction for the purposes of s 292(1), and if so, whether the change of position defence in s 296(3) was available.

[82] See at [9], [19]–[46] and [192]–[198]. The issue under the Property Law Act was whether the requirements of s 346 (that a disposition of property by an insolvent debtor was made to prejudice a creditor) were established, which, subject to any defences available under s 349, would allow the liquidators to seek repayment of the disposition through an order under s 348 via s 347 of the Act.

[83] It is noted that there was a suggestion that *McIntosh* could be decided in terms of equitable principles, with the Court requesting submissions on the point: see at [15]. The money in dispute had been held on trust which it was argued meant that it did not fall under s 292 of the Companies Act. This argument was rejected on policy grounds see [57]–[60]. The majority also noted at [138]–[140] that the sections in the Companies Act are similar to restitution principles.

[84] The defence under the Property Law Act, s 349(2)(b) was rejected at [192]–[198], and under the Companies Act, s 296(3)(c) at [137]–[191].

[85] At [121]–[129] and [199] per the majority and at [226] with William Young J in agreement.

[86] *McIntosh*, above n 77, at [199] with William Young J in agreement at [225]–[226]. The majority distinguished Mr McIntosh's position from the Privy Council decision of *Fairfield Sentury Ltd v Migani* [2014] UKPC 9, [2014] 1 CLC 611 which concerned an investment fund that had lost money because of the Madoff Ponzi scheme. The majority in *McIntosh* held the investments in the two cases to be materially different. *McIntosh* concerned a direct investment, where the appellant hired the fraudulent investment company to invest on his behalf, whereas *Fairfield* concerned a situation where investors indirectly invested into the fraudulent company by subscribing for shares in the fund at a price that supposedly reflected the fund's net asset value per share: see [108]–[112] and [246]–[247]. In *Fairfield* the particular contractual arrangements of the investment prevented the claim in that case qualifying as unjust enrichment.

[87] At [261]–[282] per Glazebrook J.

[88] Ministry of Business, *Innovation and Employment Discussion paper*: *A New Regime for Unravelling Ponzi Schemes* (May 2018) at [279]. See also Andrew Kull "Defences to Restitution Between Victims of a Common Fraud" in Dyson, Goudkamp and Wilmot-Smith, above n 24, 229 at 250–254 for a discussion of equal sharing in these types of circumstances.

Reflections on Parliament and Civil Society in Malaysia

Tunku Zain Al-'Abidin

Introduction

Before the fourteenth general election in Malaysia, several friends and colleagues suggested that I attempt to become a member of parliament. Their argument was that I would be able advocate change by debating and enacting legislation and bring matters of importance from a constituency to the national stage. My consistent reply, ever since previous elections, was that you don't need to be a politician to effect change.

Malaysian parliamentary democracy ought to be truly a unique inheritance: a fusion of Westminster experience, international best practices and a local narrative of constitutionalism. To me this begins with the conversion of the Hindu Raja of Kedah to Islam in 1136, to the nascent idea of rule of law expressed in the Batu Bersurat Terengganu of 1326, to the Minangkabau socio-political practices of election and decentralisation that began in 1347 which later evolved in Negeri Sembilan, to the Undang-Undang Melaka that enabled free trade prosperity in the fifteenth century, to the modern Constitution of Johor of 1895, and of course to the various native systems that have thrived on both sides of the South China Sea.

In the words of the third Yang di-Pertuan Agong Tuanku Syed Putra Jamalullail when declaring the Malaysian parliament building open in 1963: "There can be no grander witness than this great structure itself of the ideals and hopes that people of Malaysia share… What is profoundly important here is that this building symbolises our highest ideals of democracy."

In this article I will share my experience and observations of Malaysian civil society, how it has contributed to Malaysian policymaking thus far, before adumbrating some thoughts about how a new dynamic between parliament and civil society can contribute significantly to healing and rejuvenating our nation according to the principles of *Merdeka* [independence or freedom].

Growing up I always enjoyed history and geography, and the computer games I played always involved strategic decisions about economic growth, infrastructure development and military tactics. This later translated into academic choices, ultimately leading to degrees in sociology, government and comparative politics at the London School of Economics.

It was here that I built on my understandings of political theory and philosophy, but more importantly, to see them in action. Being a citizen of a Commonwealth country living in the United Kingdom, my university hall of residence automatically registered me as a voter. Whether exercising the right to vote violates Malaysian law has been a subject of contention, but certainly there is a tradition of Malaysian students in London being active in British politics; one famous example is Tun Abdul Razak who was reportedly active in the Labour Party.

Many more Malaysians have participated in rallies and marches while studying overseas, and my first was protesting against the invasion of Iraq by the governments of George W Bush and Tony Blair without a UN resolution.

But I was also exposed to other forms of advocacy, when I embarked on internships and attended the many events of British think tanks within the Westminster Bubble. There I discovered a vast plethora of organisations – some defined by ideology, others by loyalty to political parties – that worked to influence the formulation of public policy.

At the same time I was keeping up my interest in Malaysian politics. The events of 1998 that precipitated *Reformasi* [the call for reform] took place when I was in boarding school. I remember watching the opening ceremony of the Commonwealth Games with my friends who asked me about our then Yang di-Pertuan Agong, Tuanku Ja'afar, who accompanied Queen Elizabeth II. But soon after, Malaysia was again in the news when our Deputy Prime Minister was sacked, arrested and subsequently ended up with a black eye. It was of course, the logo of an eye that brought our current Prime Minister into office earlier this year.

No one could have predicted the ensuing turn of events back then. But with other Malaysians living in London, I had fascinating conversations that stimulated an interest in somehow contributing to Malaysia. It was with two of those friends: Wan Saiful Wan Jan, and Wan Mohd Firdaus Wan Mohd Fuaad, that I co-founded the Malaysian think tank London which later evolved into the Institute for Democracy and Economic Affairs (IDEAS).

IDEAS

I am proud of the achievements of this think tank. We are quoted almost daily in the news on diverse areas of policy,

have cultivated international partnerships and have achieved recognition around the world, including in respected global rankings of think tanks. But much more important are the relationships we have in Malaysia: with the government, political parties, the civil service, academics, students and the public at large.

You might say that these are the standard range of relationships expected of a think tank, but it wasn't easy at the beginning. It was difficult for some people to believe that we were motivated by the promotion of the rule of law, limited government, individual liberty and free markets. Together with Tunku Abdul Rahman's proclamation that we would "forever be a nation based on the principles of liberty and justice", we believe that these values were central to the foundations of our country, are embedded in the Federal Constitution, supplemented by the *Rukun Negara* [National Principles] and consonant with the ideals of 'Vision 2020' introduced by Mahathir Mohamed in 1991.

But believing in things is a hard sell in Malaysia. The emergence of any new organisation is accompanied by suspicion, scepticism, fear and loathing. It is often assumed there must be a sinister agenda to promote a particular person or party. This is of course exacerbated by the fact that our mainstream political parties are not oriented according to an ideological spectrum that is common in most other democracies – one that includes a social democratic centre-left and a classical liberal centre-right with smaller extreme fringes.

You might argue that the Democratic Action Party (DAP), with its Socialist Youth wing, or the Parti Keadilan Rakyat (PKR), with its Parti Rakyat Malaysia component, or indeed the name of the Sabah-based Liberal Democratic Party suggest strong ideological underpinnings, but in reality the politics of personality, and perceptions of racial and religious dominance, still determine their direction. But I am encouraged by individuals who are pushing for less personality cults and more inclusive policy approaches within all parties, for in doing so they open the avenues for evidence-based policy making which is the bread and butter of any serious think tank.

Let me now outline just some of the areas in which IDEAS has been working on this past decade.

On anti-corruption, we have organised numerous public forums on reforming the Malaysian Anti-Corruption Commission and published a book entitled *Combatting Corruption*. We released a policy paper on "Strengthening the Royal Malaysia Police by Enhancing Accountability" which evaluates historical, structural and legislative frameworks which has given the Inspector General of Police (IGP) considerable power, and recommends the establishment of a Independent Police Complaints and Misconduct Commission (IPCMC). Most of our anti-corruption proposals have been presented to MPs from both sides of the divide and many of them were also incorporated into the *Buku Harapan*, the election manifesto of the Pakatan Harapan alliance that swept into power on 9 May 2018.

On asset declaration, we have published a paper asking "How can Malaysia's Asset Declaration System be improved to help combat corruption?" which contains recommendations to create a more comprehensive asset declaration system to curb corruption and change public perceptions of corruption. This paper was presented to the Selangor State Exco and informed their discussions on instituting a mandatory asset declaration system for executive councillors.

On freedom of information, we have advocated the need for a Freedom of Information Act to improve the policy-decision making process, enhance transparency and accountability, reduce bureaucracy, and provide the means for political actors and other stakeholders such as NGOs, businesses, academia and citizens to engage with government and the political discourse in an informed and constructive manner.

On health, we have published policy papers on "Innovations in Vector-Borne Diseases" and the "Financial Burden of Living with Autism" as part of an evaluation of one our special projects, the IDEAS Autism Centre, looking at the costs of autism therapy and medical treatments for affected families.

On property rights, we have published a policy paper titled "Intellectual Property Rights in ASEAN: Developments and Challenges" and have been the local partner for the International Property Rights Index.

On transport, we have explored Malaysia's acknowledgement and regularisation of ride sharing, and expressed caution on regulatory costs to part-time drivers that may reduce services for users.

On aviation, we have explored the "Economic Benefits of the ASEAN Single Aviation Market" (ASAM), evaluating its advantages, what has been achieved so far and what remains to do.

On the reform of Government-Linked Companies (GLCs), we have built upon our best-selling book "Ministry of Finance Incorporated" with a "Malaysia GLC Monitor 2018" led by Professor Edmund Terence Gomez, focusing on the diverse forms in which government intervenes in the economy. This work represents the most comprehensive analysis of GLCs at both the federal and state levels.

On institution building, we have advocated reforms for parliament to make it more independent, including reform of the Dewan Negara. We have called for the Attorney General's roles as legal advisor to the government and public prosecutor to be split, and we have championed the benefits of

decentralisation in the context of our federal system.

On food security, we have published a report on agricultural subsidies which provides an extensive look at the paddy and rice sector in Malaysia, one of the most assisted and subsidised industries in the country which has implications for the cost of rice production and productivity.

On energy, we have published a paper on Malaysia's energy policy challenges which discusses the global energy scenario, Malaysia's place within it, and explains why energy innovation ought to be at the forefront of the national development strategy.

On ASEAN, we have restarted our positively received engagement with a report on ASEAN Economic Integration which concludes that there remain numerous institutional, economic and political challenges to that goal.

And on education, no doubt the most important long-term key to unlocking progress on all these fronts, we have advocated the introduction of trust schools, the idea of vouchers, more autonomy for universities, greater freedom for principals and teachers in secondary schools, and reforms in the curriculum to place civic education and national unity at the forefront.

Beyond that, we have worked with the UNHCR and UNICEF to strengthen the rights of children and refugees through the establishment of IDEAS Academy, a private secondary educational institution for underprivileged students; as well as the IDEAS Autism Centre to provide early intervention care and education for autistic children, particularly from low-income families. The experience of parents and students at both institutions has been immensely encouraging.

Across all these public policy areas my colleagues and I have written hundreds of opinion pieces over the years. And while many of our proposals have been incorporated into recent election manifestos, it can be difficult to quantify our influence; not that it really matters though: for we are not seeking elected office. We are just seeking a better Malaysia.

And there are so many others who contribute to the debate, which is so important in ensuring a multiplicity of views: and on issues such as protecting local urban and rural communities, the environment, animal welfare, and other areas of public concern.

Wearing several hats and working with a number of other organisations, I have been lucky to see the perspectives of public listed companies, educational institutions, charitable foundations, sports associations and cultural bodies on the impact of government policy. Many of these would not be defined as civil society organisations, yet they too contribute, and I would mention for example the considerable corporate support I have seen towards causes such as the rights of Orang Asli [aboriginal] communities or the achievement of the Sustainable Development Goals [SDGs].

Yet, while there have been great collaborations, it would be wishful thinking to assume that there is a broad consensus on issues. Beyond disagreements on how to achieve certain policy goals – for example, whether affordable housing should be built directly by government or through fiscal incentives provided to the private sector – it is crucial to remember that civil society also includes many contrarians and reactionaries, including those who wish to divide, rather than unite, the Malaysian people. And it also may include those who take up the garb of civil society even though they are, in reality, agents of political parties or other vested interests.

Indeed, in recent weeks we have seen how racial and religious rhetoric has been used to pit one set of Malaysians against another.

Populism

But we are not alone in the world in facing threats to national unity.

In the United States of America, the election and continued office of President Donald Trump rests upon a populist narrative of the distrust of traditional institutions: that only by "draining the swamp" can the nation be saved. This has accentuated a polarisation that I first saw when I lived in Washington DC in 2005: citizens can proclaim loyalty to the same constitution and yet pursue completely opposing ideological or political views. However, the US constitution so explicitly demands separation of powers that there may be sufficient checks and balances to ensure the survival of that democracy.

With Brexit in the United Kingdom, although there may have been many well-argued reasons for leaving the European Union, particularly from the viewpoint of legal and parliamentary sovereignty, much of the sentiment for the vote was also driven by a populist distrust of institutions. Right now, political turmoil seems to characterise the process, with both Brexiteers and Remainers seemingly unable to agree on the way forward.

And in France, on the fourth weekend of the *gilets jaunes* protests, the police were firing water cannon and physically ramming into crowds of protestors with shields.

On the same day, Kuala Lumpur also saw a rally: one that was by comparison rather peaceful, in which participants celebrated the government's decision to not ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

That decision is one example of some of the promises being reversed, delayed or downplayed in the face of public pressure. That is why, although it is still true that Malaysia has bucked the trend in an age of populism in electing a government committed to institutional reform, the counter-reactions to these efforts have been immense too.

This gives rise to a situation in which some civil society organisations (CSOs) will be asking the government to stick to their manifesto commitments, while others will be asking the government to abandon them. The positive side of this is that public debate on contentious issues will become a normal feature of Malaysian democracy. The negative side of this is that passions can become heated and threats of violence may surface. That is why it is important for the law, the police and other institutions to play their role in moderating this discourse.

Parliament is one of these institutions, and I'm heartened that reforms are taking place that will enable a closer interplay between MPs and civil society, through the establishment of six new standing committees with roles of oversight, legislative scrutiny and the evaluation of major appointments. Among the features of similar committees in other parliamentary democracies are the extensive sessions in which views are sought from diverse stakeholders as to the potential impact of proposed legislation. Through these forums, rival groups claiming to represent the people will be able to work together in a structured manner, which has not happened before.

Education

There is another area where parliament and civil society should work together, namely civic education, so that young Malaysians have a shared understanding of our Federal Constitution, why we have the institutions we have, what their roles are, and what their rights and responsibilities as citizens are. Naturally, incorporating this into the curriculum is the role of the Ministry of Education and the concerned minister has already expressed his intention to do so.

Perhaps one source of inspiration could be the Malaysian Bar's Rakyat Guides of some years ago, each dealing with a particular aspect of the Federal Constitution. I have visited too many secondary schools where, when I ask "why do we have a Dewan Rakyat [lower house of parliament]?", there is no response. I cannot help but make a comparison to the British curriculum, where students are exposed to the Magna Carta and its importance before their teenage years, with syllabi at more advanced levels adding to those initial lessons of rule of law and constitutionalism.

As I pointed out in my "Healing the Nation" lecture a couple of years ago, we are already seeing how different groups of Malaysians are interpreting the very vision of our nation in completely different terms. It does not help that too many young Malaysians grow up never meeting other young Malaysians of different backgrounds: but as much as programmes to foster national harmony across ethnic, religious are vital, they should also inculcate a shared sense of citizenship based upon the Federal Constitution.

Parliament is the best body to fulfil this role: for while politicians and political parties seek to acquire power for themselves, parliament as an institution exists to moderate the worst excesses of any government. That must be the understanding of parliament going forward; not a mere rubber stamp of the executive as it was perceived in the past.

In recent years, I have been fortunate to have interact with members on both sides of the house, some of them since before they became MPs. Most went into politics for noble reasons, and yet I sympathise with the multiple pressures that they experience: pressure from leaders to support ill-considered proposals; pressure from party colleagues to support their bids for positions; pressure from progressives who want reforms; pressure from conservatives who don't; pressure from corporate players who want contracts in exchange for donations; and pressure from union leaders who want legislative change in exchange for their support to politicians. And at the end of the day, I have seen even the most enlightened, most idealistic individuals surrender to these pressures, entering a downward spiral of ever most promises that cannot conceivably be delivered, and the continuous appeasement of disparate groups.

These transactional relationships will always be a reality of politics. But I would hope that parliament and civil society can work together to craft a broader vision of national progress: one that is based on what was agreed by our forefathers. At the same time, it must take cognisance of real strengths of feeling that permeate across the length and breadth of our country: why, for example, many Malaysian Muslims are upset by a treaty that the majority of OIC countries have signed. Or why vernacular education remains so paramount to different language communities. Or why Sabahans and Sarawakians can be so passionate about their rights. Or why, indeed, institutions matter at all when so many people are struggling to make ends meet.

So it needs to be shown that institutional renewal will improve the lives of all. That the bottom 40 per cent will benefit when strong institutions which prevent billions of ringgit from being stolen, or enable open tenders and transparent bidding that bring down the cost of housing and infrastructure. It is strong institutions that give the market the confidence to invest in Malaysia, hire Malaysians and provide the goods and services that the private sector can deliver more efficiently than the government. There will always be greedy, corrupt and egotistical people in public office, but it is strong

institutions that can prevent them - and indeed, our own temptations - from prevailing.

Conclusion

The government, parliament and civil society all purport to represent the people. But unlike politicians, civil society's success will not be threatened by the electoral cycle. We can continue to speak our mind regardless of the flip-flopping that politicians are prone to do, or the "good cop, bad cop" routine that different leaders among the same party or coalition feel is necessary.

This gives us the ability to pursue issues regardless of which politicians are in office at any given time. And it is our consistency in researching topics of public concern, and our determination to pursue desired changes that gives us our legitimacy.

In this unfolding new chapter of our country's story, I believe that a strong, healthy and transparent relationship between parliament and civil society will enable better discourse, elevate debate and truly express the voice of the *rakyat* [the people]. This is crucial to the sustainability of Malaysian democracy.

I would like to end by quoting the first Yang di-Pertuan Agong, Tuanku Abdul Rahman ibni Almarhum Tuanku Muhammad when His Majesty opened the very first session of parliament on 12 September 1959:

> The Constitution of the Federation of Malaya is a democratic achievement of the highest order. It is a product of many minds working with a common aim, to evolve a basic charter for this new Malayan nation of ours - a charter drawn from our past experience and suited to the conditions of our surroundings and way of life - a charter of our firm faith in the concepts and traditions of parliamentary democracy - and finally, and most important of all, a charter of our common belief that certain fundamental liberties are essential to the dignity and self-respect of man.
>
> We are pulling a switch which starts two dynamos of democracy - our Constitution and our Parliament.
>
> We urge all of you to approach your deliberations as law-makers in the highest spirit of dedicated service to our nation.
>
> We urge that your bearing should be related to the importance of your tasks and consonant with the dignity of the House.
>
> We urge you always to remember that you are the representatives of all the people without exception and that what you do here shall be done for the benefit of all the people.
>
> We urge you to conduct your affairs in such a way that the Parliament of the Federation of Malaya will be a shining beacon of democracy at its brightest and best.
>
> From this day onwards, this Parliament of ours will be centre of national attention for all Malayans wherever they may be. The progress of this Parliament will be watched not be Malayans alone.

[YAM Tunku Dato' Seri Zain Al-'Abidin ibni Tuanku Muhriz is the Founding President of the Institute of Democracy and Economic Affairs (IDEAS), Malaysia, and a well-known commentator on public affairs. This article is based on a speech delivered by him to the Malaysian parliament on 12 December 2018.]

The Modernisation of Justice

Ernest Ryder

Introduction

On 3 December 2018 at approximately 12 noon on the opening day of the First International Forum of Digital Courts in London, there was a notable event. The President of the Caribbean Court of Justice, The Hon Mr Justice Saunders, and his predecessor in that court, the Rt Hon Sir Dennis Byron, spoke to approximately 200 delegates, judges and justice administrators, from over 25 countries. They did so by embedding a video into a presentation that illustrated their content graphically, supported by an computer application ('app') that the conference delegates and organisers could download for free.

They prepared and delivered the presentation overnight while London slept. What was notable was not just how normal and commonplace it has become for lawyers, including Chief Justices, to speak across continents (for they remained at home in the Caribbean while we were looking across the City of London from the 8th floor of the conference centre at the figure of 'Lady Justice' who sits blindfolded with her scales and sword atop the Old Bailey). It was also the way in which lawyers, decision makers, risk assessors, information technologists, data analysts, cyber security consultants, presentation co-ordinators and others, a range of new legal roles, were reflected in the presentation that we enjoyed. It should be said that the efficiency and effectiveness of the exercise, including its proportionate cost, demonstrated an important way forward in an age of austerity where we strive to provide effective access to justice. The examples given in the presentation included a case of constitutional significance, determined online and with expedition. It was a good moment to reflect upon.

Legitimacy

My theme for this article is the modernisation of justice, its quality, outcomes, impacts and process. We all have a critical interest in the development and success of our endeavours: indeed the public, whose trust and confidence is our foundation, have a vital stake in the legitimacy of what we are considering.

The modernisation of justice is not simply a technical endeavour to digitise process and minimise mountains of paper: we can do that and have done so around the world. It is nothing less than a new emphasis on strategic leadership by the judiciary. We are called upon to deliver an administration of justice that is patently fair, that protects the judiciary's independence and provides equality of access that is open to scrutiny by a diverse public with whom we must engage and communicate if we are to meet their needs and retain their understanding, trust and respect. That will be all the more so as we experience what has been described as the digital, or fourth industrial, revolution. The digital revolution will be selective in its attribution of benefit with the consequence that it will be antagonistic to some of our professionals and users.

Lawyers like other professions must acknowledge that change is disruptive but it is also inherent both in our common law tradition and in our ways of working. Judges must help in leading change if they are to prevent the decline of the institutions that are responsible for safeguarding the Rule of Law.

Three perspectives

I want to approach the modernisation of justice from three perspectives: what the user wants and needs, what new and innovative tools the independent, liberal profession of the law can bring to the table, and what part the judiciary should play given the principles and protections we must all respect if we are to safeguard the Rule of Law. Although it is important to begin with the user's perspective if we are not inadvertently to minimise the importance of effective access to justice, I would like to describe the issues so as to set the scene.

If we are to maintain the legitimacy of our justice systems we must foster the trust and confidence that the public reposes in us, that is their respect. Respect is earned, not innate in our buildings, legal costumes and rituals. That they tangibly represent decades or even centuries of history must not be forgotten: freedoms have been hard won and can be easily lost, but their significance seems sometimes to be lost on Governments and Legislatures when they express less understanding than they ought to about the importance of the principles that underpin the Rule of Law and on individuals who can be forgiven for having more immediate needs with which they are concerned.

It goes without saying that to earn respect judges must demonstrate their independence, integrity, impartiality, diligence, competence and the equality of access they provide (the principles enshrined in the 2002 UN declaration known as the Bangalore Principles of Judicial Conduct). I would also suggest that judges must administer justice so as to provide improved process and outcomes that reflect the needs of our users.

This latter obligation is a complex mix of civic obligations to communicate and engage, that is to provide a human

understanding of the problems that we are asked to solve and the vulnerabilities of those who come to us, voluntarily or otherwise, for justice. There is also an implicit obligation derived from one or both of the principles of effectiveness or proportionality, that is to have regard to the performance of the justice system and the quality of its substantive, procedural and social outcomes.

I would also suggest that we have an obligation to provide process that is fair to a wide variety of communities from different backgrounds, with different languages, cultural traditions and social conventions as well as commonly held values. For example, in my Tribunals, there is a well embedded concept in our jurisprudence of making reasonable adjustments to process for those who cannot otherwise present their best case while maintaining fairness to both parties. I hope you will agree that the role of the judiciary in this regard has its reflection in a free and fearless legal profession.

Modernisation programme

In the United Kingdom, where my judges exercise their jurisdictions and, in particular in England and Wales, we have a £1bn modernisation programme for our courts and Tribunals. That programme began nearly three years ago and has approximately four years to run. It is important to acknowledge the imperative that underscores that programme. It is that access to justice is an indivisible right – there can be no second class. The context is austerity: an approach to reform which if not identified and resolved runs the risk of the price rationing of justice which is the antithesis of equal access to justice. At the time the programme was conceived we had to find a way of addressing the gradual decline of an institution through under-investment.

We described our purpose as follows: *"to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost and safeguards the rule of law by improving access to justice"*. Our objectives are:

- To ensure justice is accessible to those who need it;
- To design systems around the people who use them;
- To create a system that is financially viable using a more cost effective infrastructure (better and effective use of IT, buildings and new working practices);
- To eliminate the most common causes of delay;
- To retain the UK's international standing as a world class provider of legal services and the judiciary as world leaders in the delivery of justice, and
- To maintain the constitutional independence of the judiciary.
-

Lord Thomas LCJ and I came to the inescapable conclusion that the justice system had to be modernised and, importantly, that is was a judicial responsibility to lead that process. Our approach was strategic. We put the user whose access to justice we wanted to improve in the spotlight. We put the leadership of modernisation on to the judicial agenda.

Let me go first to the user. The user needs language that is comprehensible, process that facilitates their access to justice, that allows them to present their best case, and procedures that are swift and cost effective without losing the important protections that we have developed over many years, whether those protections are for adversarial or investigative procedures. The solemnity of the law has its place: for example, there are impressive arguments that the replacement of public architecture that embodies the concepts of legitimacy, trust and respect and our historic common law traditions with cardboard box hearing rooms devoid of significance degrades the importance of the legal principles that those buildings embodied. But the legal rituals housed within them must not become so alien, threatening or antagonistic that we damage the confidence of the public.

More than half of the global population is online but according to the Organisation of Economic Co-operation and Development (OECD) only 43 per cent has the protection of the law. That is a thought-provoking statistic in a time of austerity, increasing legal complexity and social isolation which is a by-product of increased personal autonomy. I will suggest that the benefits of modernisation of process and digitisation can be harnessed not only for the majority but also for the minority who most need the protection of the law because of their exclusion and vulnerability.

In his speech to the International Forum the Lord Chancellor and Secretary of State for Justice in the United Kingdom warned against complexity as a secret garden that inhibits those who need to vindicate their rights. I have said more than once that our rules and processes have to be intelligible and usable if they are not to be the exclusive playground of the rich. In England and Wales we have embarked on a programme that will simplify language and process, streamline and expedite procedures, removing unnecessary complexity, duplication, error and waste, and put the user in the driving seat.

That programme involves users who have volunteered to work with project teams and judges to test hypotheses about what works for them and the language that we use. They have or have had real cases. Engagement with users from the beginning of each project sometimes leads to conclusions rather different from those which lawyers expect. We have already come to the very firm conclusion that there is no one size that fits all of our jurisdictions although we can re-use the

software components that we have developed, for example the core case data file, digital case management system, user interfaces and more complex concepts such as continuous online resolution, virtual video enabled hearings and software to help judges make decisions about scheduling and listing.

The needs of a benefits appellant or medical negligence victim who has complex disabilities and medical conditions may be very different from the criminal defendant in a jury trial. Likewise, the different needs of a mental health patient who is detained in hospital as compared with those involved in a commercial land regeneration scheme or a tax avoidance allegation are clear, but for their needs to be reflected in new process they must be listened to. Some processes are heavily dependent on credibility whereas others are primarily reliant on documentation. Some processes involve the assistance of lawyers, others do not. We have already learnt that it is highly likely that modernisation from the perspective of our users will necessitate some new end-to-end process and it is vital that users and judges are involved in the design of that process from the beginning.

By way of an example: in administrative law it is vital to involve all agencies from the investigation through its assessment by the primary decision maker and thence to the court or Tribunal for determination. That process may also extend to those responsible for implementation of the remedy. From the user's perspective, the process needs to be holistic: their day in court is but a step along a more complex path that they may tread more than once. Furthermore, the real benefits of cost effectiveness and the feedback of lessons learned will be lost without such collaboration. To take a different example: In criminal law this involves a process in which the police officer collects evidence digitally, the prosecution assess the digital evidence and make a decision about charge online and the documents and statements that are electronically created or discovered are disclosed to the defence and thence to the court for the judge and the jury to consider in court using digital presentation. If a conviction results, the materials necessary for sentence and for the prison or probation services can be made available online.

Users and their representatives have been clear that new process must lead to better quality decision making: both for the primary decision maker and the court or Tribunal that reviews or remakes the same. We agree. Their perspective on the three stages of problem solving is important. They want new process to be designed to help with *dispute avoidance* (that is to learn about what works both for the decision maker and the user – otherwise known as getting it right first time); *dispute containment* (that is effective settlement opportunities built-in to the process with an imperative to work quickly with all involved); and *dispute resolution* where judges and case supervisors work concurrently to front load case management, identify issues and prepare evidence so that, wherever possible, the dispute does not become disproportionate either in terms of its complexity or cost and the user, including a litigant in person, can be appropriately assisted to present the relevant evidence that exists.

Change and the professions

Now to the second element of the equation. We know very well what specialist skills our lawyers, both advocates and litigators, have brought to the party. But how is change affecting the professions? It is a fear widely remarked upon that lawyers, like many other professions, will atrophy with the progress of the digital age. Forgive me if I sound a note of caution: for the duration of my legal career – at the Bar and on the Bench – one or more of a series of storm clouds was expected to signal our decline if not a fatality. I have not seen it yet and I do not expect to see it. What I have experienced is a remarkable diversification in the talent that is demonstrated in our colleagues. Not just in terms of the variety and depth of specialist practice but the ability to change like a chameleon with the confidence of a lion.

The judiciary has benefited from the diversity of practice and backgrounds that has been the consequence. My younger judiciary is now representative of the UK population. I have a majority of women judges, the majority are solicitors and the proportion of my judges who come from black and minority ethnic (BAME) backgrounds now reflects the communities we serve. That can only lead to greater trust and confidence. It would not have happened if we had not widened our talent pool and if the legal professions had not become more attractive in their diversification. There is still much to do, do not get me wrong, but I do not see the end of the profession anytime soon.

What I do see is innovative change and that is what the judiciary should be preparing for. The roles that lawyers are performing and will perform in the future are changing with remarkable speed. It is already obvious that the specialist advice that lawyers need to embrace involves a new understanding of the ways in which global business and individuals conduct their lives. At one end of the spectrum there is blockchain, smart contracts, LawTech, FinTech, predictive analytics and performance data analytics that are transforming the skills that are necessary to undertake risk assessments, give advice and resolve business and property disputes. They have also informed the way legal business is developing in its response to the challenge. It should not be thought, however, that it is only the commercial user whose demands have changed. The rapid increase in the employment of general counsel in business is testament to the need for the same skills to be exercised where they touch on the consumer. And let us not forget that the consumer makes his or her own choices: the disabled benefits appellant who wants to have an online hearing on

a smartphone in an environment where the personal data is protected is exercising a choice that is important.

So what are the skills that are emerging? I would suggest that they reflect the same skills that I identify in closing as being necessary for the judiciary in a modernised justice system. The modern law firm or chambers is strategic in its leadership and has plans informed by data about the demography, performance and predicted emergence or decline of markets and clients, that is problems to be solved rather than just disputes to be resolved. It thinks in terms of supply and demand. It has timelines, milestones, options and strategic decisions that it constantly reviews. It may be more disaggregated than in the past in that the functions and services it needs to provide may be in collaboration with other lawyers, professionals and specialists. It will offer an understanding of end-to-end process which it will happily help design, change, regulate or govern while at the same time providing boutique and limited services such as predictive analysis, eDiscovery, risk management, preparation or representation.

The modern lawyer may be an expert in the skill of primary decision making or problem solving, project management, risk assessment, rules, procedures and process, the use of experts, the use of predictive analytics, audit and governance, communication and engagement, data protection, cyber security, performance and data analytics, PR, marketing, presentation… or may be the person with the gift of thinking and speaking on his or her feet. I do not intend by any omission I have made to suggest that there are not other specialist functions: there are many, both for lawyers and for their colleagues.

They will be performing these roles in an online as well as an analogue environment. It is almost certainly the case that both will change dramatically and the skill will be in predicting the channel that becomes the most usable for a particular client. The job titles and the scope of the jobs may be very different but, and I say this as a genuine hope for the future based upon the youngsters I see, the generation of lawyers to come will be more informed by the ethics of our profession, good governance and more acute quality assurance, not less. The public want it and my guess is that lawyers will provide it.

Judiciary

Let me then turn to the judiciary. I have nearly 6,000 independent judges and specialist panel members sitting across the United Kingdom. We sit in 14 chambers determining cases in over 140 jurisdictions that are as different as an inquisitorial inquiry into mental health detention and an adversarial hearing in tax, land rights or employment. My judges are selected by the independent Judicial Appointments Commission and have the same status, protections and pay as courts judges. I have a constitutional duty to provide effective access to justice that is open to public scrutiny. I also have statutory duties to provide swift, specialist, innovative justice that is informal and flexible. These are important obligations and I take them seriously. I can only abide by them by embedding data into process so that the system outcomes can be transparently analysed alongside the individual decisions of my judges. In this way I avoid the risk of the price rationing of justice by undertaking performance analysis so that I can successfully conclude financial discussions with Government every year.

If I and my leadership judges are to be involved in change leadership they and I will need to be able to compare outcome measures of different process, rules and procedures. Those measures will need to track a wide variety of access to justice outcomes, both demographic and social as well as the success rates of appeals processes against primary administrative decision-makers in Government, public sector agencies and, for example, those who exercise employment, property and information rights. Those access to justice measures will be important to the determination of whether the administration of justice we provide is effective and efficient.

The data labs that will be the consequence will need the expertise of data analytics, predictive technology and behavioural insight teams. That will engender a whole new environment of transparent research within which leadership judges will be introduced to empirically validate good practice. That will have consequences not just for 'what works' but for rules committees, those who embody good practice in Practice Directions and individual judges selecting the most appropriate process for the case. The feedback loops that the data analysis will provide, both to the judiciary and to the original decision maker, will help transform the quality of decision making. Her Majesty's Courts and Tribunals Service have now embarked on the provision of this ground-breaking endeavour with my judges, ably supported by a new Administrative Justice Council with expert panels of academics, the advice sector and pro-bono lawyers. I have great hopes for the success of the project in which we are involved.

I have repeatedly enjoined my Tribunal judges, who are subject specialist judges sitting with expert members, to think about the state of expert knowledge in the subject matter they are dealing with. I am very pleased to say that the quality of their training with dedicated training judges and Judicial College advisors is second to none. But I am now asking them to go further and have regard to empirical material about what works, which process to use and how best to make a decision. Problem solving is as amenable to research as the specialist subject that gives rise to the question that has divided the parties.

In the specialist area of judicial leadership, for which I am the Course Director at the Judicial College, we have embarked on a major programme to provide development material and teaching for new, experienced and senior judges in leadership

roles. Our aim is to enable all judicial leaders to contribute to change leadership and to collaborate with administrators in change management to improve the governance and performance of the system we lead. We have identified principles which will inform their work and expert tutors to assist them.

We have also undertaken a comprehensive exercise over the last year to obtain feedback from all judicial office holders about modernisation and what works for them and the users in their jurisdictions. The 'Judicial Ways of Working' project was supported by a dedicated judicial office team and external consultants who are experts in project management, communication and engagement. Next week we will publish a summary for each jurisdiction that sets out the problems we were asked to solve and the ways of working we have decided as judges will best protect our fundamental principles while allowing us to modernise the system. The exercise was precisely the kind of collaborative multi-disciplinary endeavour that I have described as being the way forward for the legal profession.

The modernisation programme causes us to consider the quality of what we do and the relative scarcity of existing research. We are already concerned with the changes that digital working makes to language. The replacement of application forms with intuitive questions that populate a case file is becoming a commonplace. It has reduced the divorce and probate error rates in England and Wales by 40 per cent. That is a remarkable achievement but will the user demonstrate the same capability to make or defend a civil or employment claim online? Early trials suggest that they will. How will a vulnerable user answer online questions as a substitute for or in addition to their application and their filed written materials? Will there be the same understanding of the questions and answers that one might otherwise achieve from a face to face or telephone exchange? Can this be developed into asynchronous conversations between the judge and the user so that by using a smartphone or a tablet, the user and the judge need not come to a court building in simpler cases such as benefits appeals? That may be important in cases where a severely disabled appellant might otherwise be dissuaded from vindicating his rights but it is almost certainly going to require new skills for the judge, the lawyer and those who design and manage the technology for us. We are about to embark on these important enquiries as we trial a form of continuous online resolution early next year.

Similar questions arise in the use of virtual video technology where it is possible for no-one to be in the same place while everyone is joined to a video conference that provides a simultaneous hearing. What are the protections that we need to put in place to understand whether the quality of the exchange is the same as face to face? As a way of undertaking case management, simpler hearings where the outcome is primarily document-focussed or out of country asylum and immigration appeals where access to justice would otherwise be compromised, the potential benefits are clear. But how do we maintain the essential solemnity of the process, and will we know what external influences are being brought to bear outside the camera's view? In any event, we must ensure that processes that are already open to public scrutiny remain so, and how will that be done?

These and other similar questions about access to justice, open justice, procedural fairness and the very nature of our fact finding and problem solving process will be asked by multi-disciplinary project teams and researchers as we embark on the next stage of our modernisation programme. We have decided to put the judiciary at the front and centre of the process. We have an obligation to lead and to safeguard the fundamental principles that underpin the Rule of Law. That does not mean that we pretend to be expert software designers, behaviourists, data analytics specialists or academic researchers. Whatever the skills of the individual judge, we must not fall into the trap of becoming the armchair amateur who is the jack of all trades and the expert in none. Our specialist function has hitherto been judgecraft but must now also be the strategic leadership of the administration of justice.

Conclusion

None of that which I have described would be coherent or an appropriate function of the judiciary were it not for the obligations to society which we have as an independent judiciary. The duty to safeguard the Rule of Law governs what we do. The principles that underpin that duty – constitutional, statutory and ethical – involve protections which the public look to in order that their day-to-day lives might be regulated by fairness, predictability, consistency, intelligibility and with equality of access to redress. Modernisation is but a way of making what we do work for and with people. Digitisation is a tool in our armoury but the essential component for the future is you: the lawyer.

[The Rt Hon Sir Ernest Ryder is Senior President of Tribunals, United Kingdom. This article is based on a speech given by him at the 5th biennial Caribbean Court of Justice conference in Jamaica on 13-15 December, 2018.]

Book Reviews

ANWAR RETURNS by Mark Trowell, Marshall Cavendish, Singapore, 2018, pp 400, £15.99 (pbk), ISBN: 978-981-4828-59-8.

Mark Trowell QC has made the noble effort to put in writing the entire episode of Dato' Seri Anwar's persecution while this country was still ruled by the previous administration. This book is a further revised and updated edition of a previouse account of how Anwar was oppressed by the Barisan Nasional (BN) government for about 20 years, from September 1998 to his eventual release in May 2018.

Mr Trowell is a leading criminal lawyer in Australia. He was appointed Queen's Counsel in year 2000. Besides acting as a defence counsel in numerous high-profile criminal cases, he has also prosecuted criminal cases for the Director of Public Prosecutions in Australia. In year 2006, Mr Trowell was appointed by the Australian Government to undertake a review of the coercive legislation governing the Australian Crime Commission. Coupled with his vast experience in the field of criminal practice, the fact that Mr Trowell had been the international observer at the trial and appeal proceedings of Dato' Seri Anwar makes him the ideal legal person to write and comment on what has taken place.

Prior to the present book, Mr Trowell has authored two bestselling books, namely –

1. Sodomy II: The Trials of Anwar Ibrahim, published in 2012; and

2. *The Prosecution of Anwar Ibrahim: The Final Play*, published in 2015.

In this edition, Mr Trowell has covered, painstakingly, eloquently and in minute detail, the latest developments in Anwar's ordeal, up until his release on 16 May 2018, which was followed by an audience with His Majesty the Yang di-Pertuan Agong (the King of Malaysia), and most importantly, the grant of a royal pardon. Remarkably, Mr Trowell, in writing this book, has endeavoured to be exhaustive, succinct and objective.

This book is a 'must-read' for those who wish to learn about Anwar's prosecution, or more aptly, persecution. Implicitly we also learn of Anwar's vision for this country, his character and the principles he holds on to. Law students and legal practitioners may be particularly interested in Mr Trowell's commentary on the judgments that were delivered in the case. What he has to say in his book is most revealing.

Certain parts of the book are very disturbing and yet crucial, particularly when Mr Trowell deals with the injustices inflicted upon Anwar by the courts or by the prosecution. For example, the refusal of the prosecution to provide the defence substantial pre-trial disclosure; or about the manner in which the Court of Appeal rushed through the hearing of the prosecution's appeal against Anwar's acquittal by the High Court; or about how even a request by Anwar for time to make a plea of mitigation, made through his counsel the late Mr Karpal Singh, was unreasonably denied by the Court.

A reading of Chapter 24 tells us how the Federal Court had in coming to its 2015 decision rejected and ignored evidence that raised serious doubts on the credibility of the complainant and the reliability of the evidence upon which the prosecution had relied. Even a first year law student will know that that the standard of proof in a criminal case is "beyond reasonable doubt". Applying that principle, Anwar should have been acquitted as there were serious doubts raised by the defence. But anyone who has closely followed the trial and appeals will be left perplexed, for it is as if the Court of Appeal, and later the Federal Court, was unable to comprehend what "beyond reasonable doubt" really means.

Pages 356-359 of the Book relate to a touching but hard hitting speech that was delivered in the Federal Court by Dato' Seri Anwar on 10 February 2015. This speech was delivered immediately after Anwars's appeal was dismissed by the court. He said:

> I maintain my innocence of this foul charge.
>
> This incident [the alleged sodomy] never happened. This is complete fabrication coming from a political conspiracy to stop my political career.
>
> You have not given proper consideration to the case presented by my counsel from day one – *that* this incident never happened at all.
>
> …It is not a coincidence how the PM [Prime Minister] was able to release a full written statement on your decision barely minutes after you handed your judgment today – even before sentencing.
>
> In bowing to the dictates of the political masters, you have become partners in crime for the murder of judicial independence and integrity. You have sold your souls to the devil, bartering your conscience for material gain and comfort and security of office.
>
> …Yes, you have passed this judgment on me – and I will,

again for the third time, walk into prison, but rest assured my head will be held high. The light shines on me.

But the shame is on you for you will be judged by history as the great cowards of humanity. Sitting on that high horse of judicial power, you have stooped so low to become the underlings of the political masters.

Students of law and professors of jurisprudence will scrutinise your judgments, and as they dissect your reasoning and your decision your credibility and integrity will be torn to tatters. And you will be exposed as the fraudsters who don the robe of judicial power only to pervert the course of justice.

…Going to jail, I consider a sacrifice I make for the people of this country. I have fought most of my life on behalf of the people of this country. For the people I am willing to go to jail or face any other consequence.

My struggle will continue, wherever I am sent and whatever is done to me.

…And Allah is my witness. I pledge, and I will not be silenced. I will fight on for freedom and justice and I will never surrender.

For me the above speech is inspiring and it sums up what Mr Trowell's book is all about.

It is my belief that never before has anyone in this country been so ruthlessly persecuted and publicly humiliated as Dato' Seri Anwar. But he patiently persevered. That was a remarkable feat. And, ultimately, he emerged victorious.

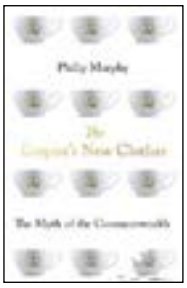
Let Mr Trowell's Book serves as a salutary reminder to all Malaysians that the law and government machinery should never ever be used as a tool by the powerful to suppress dissent or oppress political opponents.

Dato' Seri Anwar's ordeal was the product of a Government that did not have an effective system of checks and balances; nor a truly independent and honest judiciary. It was a system that only paid lip service to the Rule of Law. It was a great shame to the nation, a dark stain on our nation's history which had impacted not only on Anwar, his family and friends, but on everyone who believes in justice and human rights.

But the peaceful transition of power following the historic May general election holds out the hope of a new beginning, a new dawn for Malaysia. It is now up to the new leadership to chart the course of the country's future. We have to learn from the colossal and costly mistakes of the past. We as a nation must ensure that the grave injustices which had been inflicted upon Anwar must never be allowed to happen to any citizen again.

[This review has been contributed by Dato' Hishamudin Yunus, a former judge of the Malaysian Court of Appeal.]

THE EMPIRE'S NEW CLOTHES by Philip Murphy, Hurst, London, 2018, pp xiv + 282, £20 (hbk), ISBN: 978-1-84904-946-7.



This is a book that will infuriate admirers of the Commonwealth (the 'Commonwealth devotees' as the author delicately puts it). In essence, it argues – with intensity, forthrightness, brilliance, and flashes of humour – that this seventy-year old offshoot of the British Empire is an "irrelevant institution afflicted by imperial amnesia". It adds, for good measure, that Brexit – if it happens – is unlikely to lead to a revival of the Commonwealth.

What, then, are Murphy's reasons for condemning the organisation as vociferously as he has done? For a start, that the Commonwealth has achieved precious little – "the gulf between the Commonwealth's lofty rhetoric and its actual achievements", he says, is so wide as to make any claims about the organisation's effectiveness laughable.

Secondly, by indiscriminately taking on all conceivable causes (as Murphy says the organisation has done in recent years), it has lost its focus. To this he links less-than-effective leadership, contrasting the way Arnold Smith and Shridath Ramphal ran the Commonwealth to the style of their successors. Smith and Ramphal, says Murphy, exercised "their own judgment about where the Commonwealth could best make a difference" and acted "quickly and imaginatively to achieve those ends" instead of pronouncing "on all of the world's ills" as appears to be the wont of more recent Secretaries-General.

Another factor that Murphy identifies as contributing to a loss of the Commonwealth's value and significance is that, with the end of the Cold War and the consequent proliferation of new international organisations, Commonwealth member-states found alternative diplomatic networks to connect to. "Particularly striking," he avers, "has been the increasing role and influence of regional organisations, which bring together countries with often widely differing historical formations and links to European colonialism" and which, crucially, "have … a greater coherence, and arguably a greater legitimacy".]

Murphy also points to the massive popular ignorance of the Commonwealth. He compares the institution to the Catholic Church (under whose shadow he grew up in Hull, a child of Irish republican heritage):

> There may be only 1.2 billion Catholics in the world, compared with 2.4 billion members of the Commonwealth. The difference is that the vast majority of the former actually know they're Catholics. They also know roughly what that entails, and it's a significant part of their personal identity. The same cannot be said for most of the inhabitants of the Commonwealth.

He goes on to buttress his case by referring to a survey conducted by the Royal Commonwealth Society in 2010 which did not reveal a high level of familiarity among those interviewed with the Commonwealth. "It's difficult to get a network to function effectively," he concludes, "if most of its supposed members have only the haziest notion of its existence."

Murphy addresses a number of other issues which are as germane to a discussion of the contemporary Commonwealth as they are capable of provoking polarised views. These include the position of the British Monarch and the future of the Commonwealth headship, the question of whether the British Empire was a 'good' or a 'bad' thing; the fragility of the consensus around 'Commonwealth values", including differing attitudes among member-states to sensitive matters such as homosexual rights; and the implications of Brexit for the future of the Commonwealth. Whatever one thinks of Murphy's views, it would be churlish to dismiss this book as the rant of a Commonwealth-baiter.

GO BACK FROM WHERE YOU CAME FROM by Sasha Polakow-Suransky, Hurst, London, 2017, pp viii + 396, £17.99 (hbk), ISBN: 978-1-84904-909-2.

Arguably, the most discussed issue in the debate over Brexit – and one identified as Brexit's single largest driver – is inward immigration into the United Kingdom. This is also, of course, a highly emotive issue on which a free, frank and robust discussion has often proved impossible. Against that backdrop, the appearance of any book which deals with the subject cannot but be welcome.

A particular focus of this book is Muslim immigration into the West. Broadly speaking, the author's thesis is that it is not only far-right groups that demonise Muslim immigrants but, increasingly, large numbers of what she calls "new populists" who have embraced causes that were traditionally associated with progressive people subscribing to a leftist worldview. These activists, he argues, have used issues such as homosexual rights, women's equality, and the protection of Jews from anti-Semitism to attack Islam and its followers. "The new far right, from Europe to the United States and beyond, is," in his view, "poised to transform the political landscape of Western democracies, either by winning elections or simply pulling a besieged political centre so far in its direction that its ideas become the new normal."

Even if that assumption is right, an immediate – and potent – question that those who dissent from that worldview are bound to ask is: why should an attempt at providing an alternative vision for the world, and one which is sought to be realised through legal and democratic means ("winning elections"), be seen as unacceptable? Does not such an attitude reveal a deep-rooted contempt for democracy – that much vaunted value which is invoked time and again to justify important and far-reaching changes in society from time to time? That question has, of course, been at the centre of debates over recent political developments (e.g. the election of Donald Trump and Brexit) and one which has not been convincingly answered by those who have been railing against such developments.

To be fair, the author of this book has some home-truths for those on the left as well. He refers, for example, to the "real tensions … between the identity politics model of progressivism and the old-fashioned leftist politics of class" and the need for these tensions to be "reckoned with". He is no less harsh about other ills that plague the modern left: "The left has lost much of its old base by appearing to care only free trade, technological progress, and limitless diversity." Whether his clarion call for an abandonment of such weaknesses will be heeded is a moot point.

SUPREME WHISPERS by Abhinav Chandrachud, Penguin Viking, Gurgaon (India), 2018, pp xxvi + 303, Rs 599 (hbk), ISBN: 978-0-670-09032-7.

The tradition of institutional portraiture using carefully thought out interviewing techniques is largely unknown in countries like India. More often than not what is published comprises either dreary commemorative volumes or hagiographic glossies which offer very little by way of edification. Against that background, the appearance of a book which throws much-needed light on the Supreme Court of India cannot but be welcomed.

This book grew out of interviews that an American scholar, the late George Gadbois Jr., conducted over a period of eight years (1980-1988) while visiting India. As well as taking down contemporaneous notes, Gadbois prepared typewritten transcripts which faithfully recorded the contents of each interview. These transcripts were handed down to the author of the present book with implicit authorisation to use them as he saw fit. They have now been arranged under six subject-headings and published with an explanatory narrative.

The value of the interviews – and the insights they offered – cannot be underestimated. If any ethical considerations remained, they have evaporated with the passage of time. As Chandrachud explains:

> Revealing these stories in the 1980s would have been like lighting a spark in a powder keg. Today, however, the keg no longer holds any powder. Nearly thirty years have gone by since the last interview took place. Most of the judges who

were interviewed have passed away. The stories contained in the interviews, though incredibly fascinating and still highly relevant today, are now decades old. As such, the notes of the interviews now belong to history and it is only fair t finally make their contents publicly known.

A particular virtue of Gadbois's interviews is that they not only shine a torch on such matters as the functioning of the Supreme Court, its internal dynamics, and the institution's relationship with the government of the day, but also bring out the personal qualities – strengths and weaknesses – of the judges who found their way to the top perch. But can the results of Gadbois's interrogations be taken as the absolute truth? Obviously not. Chandrachud strikes a much-needed word of caution: "[I]n answering the questions that Gadbois posed them, judges maynot have necessarily been telling the whole truth. Perhaps unwittingly, or otherwise, they may have portrayed facts that best suited their side of the story." But even with that caution, what emerges is a gold mine of information.

It may be an uncharitable thing to say, but it is unlikely that such works of value can be replicated by contemporary Indian scholars. For a start, the diligence, the perseverance, the acuity, the incisiveness, and the ability to pose difficult questions politely but without undue deference, remains elusive in Indian academia. Equally sadly, the intellectual calibre of judges has dropped precipitously in the past few decades (with, it must be hastily added, a few honourable exceptions) which means that the current incumbents will struggle to match the capacity of their predecessors of even four decades ago to provide coherent, fully thought out and properly articulated answers to searching questions of the kind posed by Gadbois. A real pity, indeed.

SUPREME COURT OF INDIA: THE BEGINNINGS by George H Gadbois, Jr – eds: Vikram Raghavan and Vasujith Ram, Oxford University Press, New Delhi, 2017, pp xxxii + 245, Rs 795 (hbk), ISBN: 978-0-19-947316-1.

For a relatively young institution, the Supreme Court of India has received more than a modest amount of scholarly attention. Apart from articles that have appeared in academic journals over the past four decades, recent years have seen a number of books on, or dedicated to, the court. The most authoritative of these have been by George Gadbois Jr., who maintained a deep and abiding interest in the institution from his undergraduate days in the 1960s until his death in 2017.

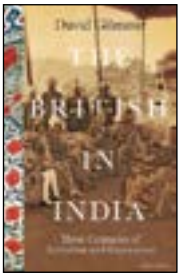
This book is an edited version of a doctoral dissertation prepared by Gadbois at Duke University, USA, in 1965. It was dusted off his shelves by one of the editors who persuaded Gadbois to assent to its publication. It is worth remembering that Gadbois was a political scientist, not a lawyer, and he took a historical approach to the writing of his dissertation. The editors to the present volume add further caveats:

> With its focus on history and case law, Beginnings does not read like a book that a contemporary political scientist would write. We must remember, however, that Gadbois undertook his research as the discipline of political science was undergoing profound changes. Quantitative analysis was quickly becoming the preferred research methodology for a new generation of political scientists. To keep up with these changes, Gadbois had to "retool himself" in Hawaii even as he raced to complete his dissertation. It was too lte for him to incorporate quantitative analysis in his doctorate work.

This work spans the first fourteen years of the court (including the Federal Court which functioned as the highest court in independent India between 1947-50). It discusses, inter alia, the evolution and working of the Federal Court, the jurisdiction and powers of the Supreme Court, the working of the Supreme Court, and the operation of judicial review in the modern Indian state. Its conclusion may sound odd to any contemporary observer of the Supreme Court: "[W]hile the Court's jurisdiction is extraordinarily wide, its ultimate power is limited … Judicial review has certainly not meant judicial supremacy in India."

Oxford University Press deserves to be thanked for agreeing to publish this important piece of scholarship, despite the dated nature of Gadbois's original manuscript.

THE BRITISH IN INDIA by David Gilmour, Allen Lane, London, 2018, pp xviii + 618, £30 (hbk), ISBN: 978-0-241-00452-4.



As India completed seven decades of freedom from British rule, there has been an efflorescence of comment and analysis of the rights and wrongs of British presence in the subcontinent. A particularly popular genre of writing – involving the excoriation of colonial rule and calls for reparation for the alleged indignities heaped on the native population – has captured headlines in recent months, as evidenced by the reception accorded to Shashi Tharoor's tome, *Inglorious Empire*. But there have also been more considered, sober analyses of the Raj, and this offering by David Gilmour, a respected historian, falls into that category.

The focus of the book is the *people* who made British rule in India possible, their motivations in going to this distant land and their experiences while in the country. "I am chiefly interested," says Gilmour in his Introduction, "in the motives and identities of British individuals in the Indian territories of

the Empire, in who these people were and why they went to India, in what they did when they got there, and in what they thought and felt about their lives in the Subcontinent."

A particularly refreshing aspect of Gilmour's approach – which is unlikely to find favour with the 'politically correct' brigade – is his unwillingness to apply contemporary standards of morality while describing the thoughts and behaviour of people who lived decades ago. "I believe," he notes with candour, "that writers of social history should attempt to write impartially about the customs and behaviour even we find them abhorrent; we should look at them in the context of their time and not from the vantage point of a usually smug present." This spirit of open-mindedness permeates his present work.

The book is set on a large canvas and deals with a wide range of characters from viceroys to teachers, missionaries to doctors, engineers to planters. The stories are told with acuity and humour. All the praise that the book has received is richly deserved.

APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA by Arghya Sengupta and Ritwika Sharma (eds), Oxford University Press, New Delhi, 2018, pp xxiv + 259, Rs 750 (hbk), ISBN: 978-0-19-948507-9.

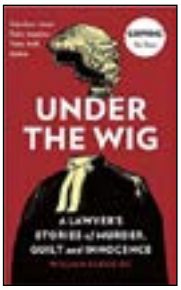
When the Supreme Court of India delivered its much-awaited judgment in what has come to be called the National Judicial Appointments Commission (NJAC) Case in October 2015, it was greeted with a storm of controversy. It also led to much bad blood between the court and the government, and between members of the court itself. Not surprisingly, the verdict spawned much comment – by specialists and lay observers alike – and led to the present collection of essays, put together by two legal academics.

The five-judge bench which heard the case was split 4:1, with the majority holding that the new system of appointments proposed by the government, viz of a National Judicial Appointments Commission making the decisions rather than a 'collegium' of judges alone, was unconstitutional. The dissenting judge, Mr Justice J Chelameswar, has written a Foreword to this book.

Divided into three parts, the book looks, first, at the history of judicial appointments in India, focusing on such matters as the 'committed judiciary' controversy of the Indira Gandhi regime, and the birth of the 'collegium' system. It then moves on provide critiques of the NJAC judgment itself from academic and practising lawyers, before casting an eye on mechanisms and processes for judicial appointments in other countries, including the United Kingdom, South Africa, Canada, Pakistan, Sri Lanka and Nepal.

The quality of the 21 essays comprised in the volume is, as can be expected of such collections, variable. There are flashes of analytical rigour but there is also some pedestrian exploration of issues. Whether the book fulfils the claim in its anonymous Introduction of bridging the "massive gulf in legal scholarship" by becoming a single authoritative volume to deal with the "politics, doctrine and developments pertaining to judicial appointments in India" will remain debatable.

UNDER THE WIG by William Clegg, Canbury Press, Kingston-upon-Thames (UK), 2018, pp 288, £16.99 (hbk), ISBN: 978-1-912454-08-2.



Among contemporary criminal barristers in England and Wales, William Clegg QC belongs to the small band of instantly recognisable names. His 'visibility' – at least among the general public – is due largely to the fact that he has appeared in many famous and seminal cases that have made it to the popular press. These include the Wimbledon Common murder, the killing of the television presenter Jill Dando, the Murdoch phone hacking trials, and a couple of war crimes cases involving the Balkans and Eastern Europe.

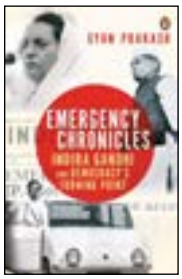
Clegg has now got down to share his experiences and his thoughts in this highly readable memoir, co-authored with (or, more accurately, ghost-written by) a veteran Fleet Street reporter, John Troup. The book follows an unusual format, but one which works: interspersed between accounts of 14 cases in which the barrister has acted – for an eclectic group of defendants – are Clegg's reflections on life at the Bar and on the changing nature of the legal profession.

The cases encompass a wide range of characters – from the attractive 23-year-old Rachel Nickell who was murdered in cold blood on Wimbledon Common in the presence of her three-year-old son, to the aggressive and ill-mannered octogenarian war criminal Anthony Sawoniuk ('Andrusha the Bastard'); from the intellectually challenged young lady Cherie McGovern who was charged with the savage killing of a 21-year-old woman as part of a love triangle in South London to the high-profile soldier in the British Army, Lee Clegg, who had been controversially charged with the murder of a 18-year-old passenger of a stolen car being driven at speed on the streets of west Belfast during the 'Troubles' in Northern Ireland; from the socially ill-adjusted (and delusional) Barry George who was charged and then cleared of the murder of Jill Dando to the misleadingly titled Head of Security in News International, Mark Hanna, who had been charged alongside a number of more prominent people with phone-hacking offences in relation to the now defunct *News of the World*. The tales that emerge are gripping and succinctly told.

As for Clegg's reflections on the law and professional

developments, the topics traversed include: tips on winning the trust of a judge, defending fraudsters, addressing juries effectively and so on; chambers politics; the art of advocacy in general; the implications of the Bribery Act (which confers extra-territorial jurisdiction to English courts) for British businessmen; dealing with private, i e self-funded, clients; and the consequences of the increasing squeeze on Legal Aid funding.

This is, by the standards of memoirs, a rather compact volume. But it is a good read, and Canbury Press – a boutique publisher – deserves to be congratulated for persuading Clegg to put pen to paper (or, more accurately, voice to tape-recorder).



EMERGENCY CHRONICLES by Gyan Prakash, Penguin, Gurgaon (India), 2018, pp x + 441, Rs 699 (hbk), ISBN: 978-0-670-08824-9.

2017 saw the fortieth anniversary of the end of one of the most painful phases in independent India's history, viz the lifting of the highly controversial state of emergency imposed by the then prime minister, Indira Gandhi, after she had been declared guilty of corrupt electoral practices by a court and thus faced disqualification from parliament. That Emergency has, of course, been the subject of countless books, many of them contemporaneous, written from various angles and ideological perspectives.

This offering by a US-based historian has the merit of a degree of detachment in that it comes quite some time after the dust of the event has settled. The central thesis of the book is, in the words of its blurb, that the Emergency was not "a sudden event brought on solely by the then prime minister's desire to cling to power," but a "product of Indian democracy's troubled relationship with popular politics." The author also links the experience of the Emergency to what he calls "the global history of democracy's relationship with popular politics", and brings in comparisons with more recent events, in India and abroad.

The book's treatment of the events preceding, and straddling, the 21-month-long period for which the Emergency was in force is as competent as it is largely uncontroversial. The author has consulted a wide range of sources, including specialist libraries within and outside India. No less commendable are his painstaking interviews with key characters equipped to throw light on the events of 1975-77, including one notorious henchman of Indira Gandhi, the former policeman, Pritam Singh Bhinder, who was responsible for a number of particularly sadistic acts of oppression but who has not featured prominently enough in Emergency-related writings.

But the book is not without blemishes. Some of the analysis, particularly relating to constitutional interpretation, is superficial and debatable (even granting that the author is not a lawyer). There is a jarringly long exegesis on the Indian automobile industry – an entire chapter – which could be pruned drastically. At least one key figure whose opposition to the Emergency was as courageous as it was prominent, Minoo Masani, fails to get even a mention (his journal, *Freedom First*, was one of the first to take on the government censors and to trigger a landmark judgment by the courts). Poor grammar (e.g. 'the Parliament') rears its head up from time to time as does loose editing. But arguably the most contentious aspect of this book is the author's suggestion (in what appears to be a hastily written Epilogue) that recent events in India – under the watch of prime minister Narendra Modi – amount to an undeclared state of emergency comparable to the oppressive legacy left behind by the late Mrs Gandhi.

REMEMBERING RAJNI by Bakul Patel (ed), Rajni Patel Memorial Foundation, Bombay, 2018, pp 212, Price: Rs 1,000 (hbk), ISBN: 978-93-83999-25-5.

Rajni Patel was an Indian lawyer who was better known, depending on one's point of view, either as a social do-gooder or as a political fixer in the 1970s and 1980s when the sub-continent was under the grip of a dirigiste system of governance – the licence-quota-permit raj about which much has been written in recent years. The perennial and acute shortages of essential goods, the endless queues for everything from cars to airline tickets, the swingeing rates of taxation and the widespread corruption provided a fertile operating ground for 'power brokers' with the right connections.

And Patel was extremely well-connected. As the head of the ruling Congress party's regional outfit in India's commercial capital, Bombay, he had direct and unrestricted access to those controlling the levers of power in New Delhi, including the autocratic and imperious prime minister, Indira Gandhi. Not surprisingly, with this background, Patel soon saw himself at the centre of a huge and eclectic coterie of admirers, including businessmen, film stars, sportsmen, journalists, fellow politicians and members of the legal and judicial establishments. His soirees in Bombay became fashionable and at the height of his popularity he attracted endless queues of favour seekers to his office and home.

Patel died, somewhat prematurely, at the age of 67, in 1982. Within a decade, the political and economic ecosystem that had allowed him to flourish came crashing down. The country has not seen the likes of him since, although there are still a number of wheeler-dealers in the modern, liberalised India of today. This coffee-table book, brought out lovingly by Patel's widow, comes three years after the centenary of his birth. It

is a collection of tributes – of varying lengths, substance and literary merit – from his friends, acquaintances and those with slightly remoter connections with the man. Mrs Patel's dedication and perspicacity in getting such a large number of people (some 50 of them) to contribute, and the high technical quality of the production, stand out.

Many readers of this book will probably ponder the question: what if this Cambridge-educated barrister had simply served the cause of the law instead of getting sucked into the murky world of politics? It is, alas, not an easy question to answer.

More briefly…

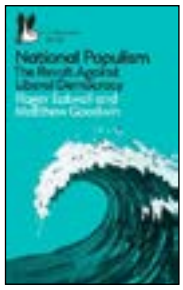
THE CONSTITUTION OF INDIA by Arun K Thiruvengadam, Hart, Oxford, 2017, pp xxiv + 265, £19.99 (pbk), ISBN: 978-1-84113-736-0.

The Hart/Bloomsbury series on contextual analyses of national constitutions has been going from strength to strength. The present volume, focusing on India, offers an accessible introduction to one of the longest and most amended constitutions in the world. It has been long in coming, as the author acknowledges in a prefatory note.

The seven substantive chapters deal with, respectively: the origins of the constitution; the executive and parliament; federalism and local government; fundamental rights, directive principles and the judiciary; technocratic constitutional institutions; constitutional regulation of India's multiple identities; and constitutional change. A concluding chapter throws the spotlight on more recent developments, including how the constitution has fared under Prime Minister Modi, as well as embarking on what the author calls 'Longitudinal Assessment of Indian Society and its Constitutional Politics'.

The book ends on a slightly pessimistic note with a lament over Modi's 'authoritarianism' which, says the author, should worry constitutionalists. "[G]iven the turmoil of the last few years, it is reasonable to believe that Indian constitutionalism may be undergoing a particularly significant churning, which has the potential to change quite drastically the way citizens and government engage with each other as they move forward towards a common future."

There is unlikely to be widespread agreement on the tone and tenor of the analysis but that should not detract from the essential usefulness of this book, as long as it is understood that it offers little more than a broad-brush treatment of an expansive and complicated subject.



NATIONAL POPULISM by Roger Eatwell and Matthew Goodman, Pelican, London, 2018, pp xxxii + 344, £9.99 (pbk), ISBN: 978-0-241-31200-1.

Two defining developments of 2016 – the decision of a majority of the British electorate to pull their country out of the European Union and the election of Donald Trump as the 45h President of the United States – have triggered an avalanche of comment on what has come to be known as 'populist politics' on both sides of the Atlantic. This slim book, by two British academics, attempts to offer an explanation for the phenomenon and to place it in a historical perspective.

Eatwell and Goodwin warn against the tendency, often encountered in some writings on the subject, to dismiss national populism out of hand. On the contrary, they argue, there is an urgent need for serious engagement with those responsible for the phenomenon. They identify four deep trends underlying the populist upsurge: distrust, destruction, deprivation and de-alignment, each of which has to be properly understood and addressed.

"Contrary to some of the hysterical reactions that greeted Trump and Brexit," explain the authors, "those who support these movements are not fascists who want to tear down our core political institutions. A small minority do, but most have understandable concerns about the fact that these institutions are not representative of society as a whole and, if anything, are becoming ever more cut adrift from the average citizen."

A tract whose importance may turn out to be inversely proportional to its size.

WAY OR HARMONY by AJ Heath, AJ Heath Publishing (www.ajheathphotography.com), pp 128, £30 (hbk), ISBN: 978-1-9997475-0-3.

Bhutan remains one of the most fascinating countries of South Asia. Never colonised, it functions as an independent kingdom (albeit with a special relationship with its big neighbour India) and as one of the more recent entrants to the club of democracies in the world. Bhutan's natural environment – it nestles in the mighty Himalayas – has been the subject of many books and articles, including collections of pictures and photographs. This slim volume, published privately by a British photojournalist who spent a year in Bhutan, offers fascinating glimpses of the 'Dragon Kingdom', in the form of portraits of its people, young and old.

The book carries a few dozen pictures, from the 150 or so that Heath clicked over three weekends, setting up a makeshift

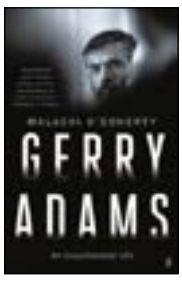
studio in the main square of Thimphu, the capital city and inviting passers-by to be photographed. "It was a lot more challenging than I expected," he says. "The Bhutanese are by nature very reserved people and they seemed wary of what I was trying to achieve and whether it was the correct thing to do." Even so, he managed to persuade enough of them to be able to put together this captivating book.

A particularly noteworthy feature of the book is that each picture is accompanied not only by a description of Heath's subject (name, age, occupation) but also answers to the questions "What makes you happy?" and "What makes you feel Bhutanese?". The answers (some of them encompass a longer list of questions) reveal much about the happy and simple folk of this unique land.

BRITISH` EMBASSIES by James Stourton, Frances Lincoln, London, 2017, pp 352, £40 (hbk), ISBN: 978-0-7112-3860-2.

Gone may be the times when, in diplomatic understatement 'Britain made a difference' around the world, but evidence of the grandeur of British presence in colonial capitals – and further afield – still lingers on, as this richly illustrated volume testifies. The book offers portraits, in text and pictures, of British embassies in some 26 countries. It describes the highs and lows of British diplomacy in such corners of the world as Berlin, Addis Ababa, Tehran, Buenos Aires, Prague and Kabul, with captivating background stories provided by those in the know.

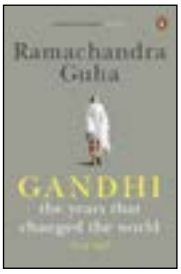
"[D]escribing the architecture alone would not be enough," says the author of the book. "What was distinctive about each mission was its history and diplomacy, always fascinating and to a surprising extent unknown." In conveying that history with relevant anecdotage, this book works like a treat. The pictures, shot specially for the volume by the accomplished photographer Luke White, are as evocative as James Stourton's descriptions of the buildings covered. Frances Lincoln, the publisher of this volume, can take justifiable pride in bringing out a very fine piece of work.



GERRY ADAMS by Malachy O'Doherty, Faber & Faber, London, 2017, pp x + 356, £14.99 (pbk), ISBN: 978-0-571-31595-6.

It would be surprising if any biography of the Irish republican politician Gerry Adams did not polarise public opinion. Malachy O'Doherty, the veteran journalist from Ulster, has taken on the unenviable task of assessing the life of Adams in this comprehensive and illuminating volume which came out shortly before Adams stepped down as the leader of Sinn Fein, the political party historically associated with the Irish Republican Army (IRA).

That Adams has been a bit of an enigma despite his huge public profile would be an understatement. To what extent O'Doherty has been able to unravel that enigma will probably remain a moot point. It would, however, be fair to say that this biography offers a largely sympathetic treatment of a highly controversial figure.



GANDHI by Ramachandra Guha, Penguin Allen Lane, Gurgaon (India), 2018, pp xx + 1129, Rs 999 (hbk), ISBN: 978-0-670-08388-6.

This door-stopper of a book carries the story of Mohandas Gandhi, usually referred to as the 'Father of the Indian nation', from the time he departed from South Africa in 1914 with a mission to take on the British rulers of his motherland to the end of his life in 1948 at the hands of an assassin. It follows on the heels of an equally hefty tome by the author, entitled *Gandhi Before India*, which was published in 2013 but Guha insists that the present volume must be treated as a 'free standing sequel' to that book.

The main burden of Guha's song is that freedom from British rule was by no means the only objective of Gandhi's exertions since 1914. There were three other strands to his campaign: "The forging of harmonious relations between India's often disputatious religious communities was a second. The desire to end the pernicious practice of untouchability in his own Hindu faith was a third. And the impulse to develop economic self-reliance for India and moral self-reliance for Indians was a fourth." How he went about achieving those objectives is described at considerable length and with consummate skill.

There can be some quibble about whether the book needed to be so long, but of the quality of treatment and analytical rigour there is little room for disagreement. The extensive research is supplemented by a meticulous listing of sources and, heart-warmingly, there is even a well-constructed back index (the holy grail of contemporary Indian publishing!).

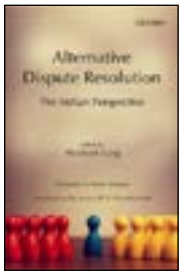
PAKISTAN UNDER SIEGE by Madiha Afzal, Penguin Viking, Gurgaon (India), 2018, pp xvi + 192, Rs 599 (hbk), ISBN: 978-0-670-09078-5.

'A failed state' is a fairly common description of Pakistan in recent times. And what usually makes headlines in relation to this unfortunate country is the Islamic extremism that rears its ugly head repeatedly, through acts of terror either domestically or abroad, notably across the border in India. But is Pakistan much misunderstood? The author of

this book believes it is, and makes a valiant attempt to present an alternative image of the country.

Among the questions she poses, and tries to answer, are: "What do average Pakistanis think of terrorists, of jihad, of militant groups?", "Are their views 'radical'?", "What explains how Pakistanis think?", and "How has the Pakistani state – its politics, laws, and institutions – affected the trajectory of violent extremism in Pakistan and shaped its citizens' attitudes towards terrorism?". She concludes that the country is in its present state because, at every juncture in its recent history (from the time of its founding in 1947 onwards), it has chosen to take a wrong turn when faced with choices. But is it too late to make a dramatic course correction now? The author, optimistically, thinks not.

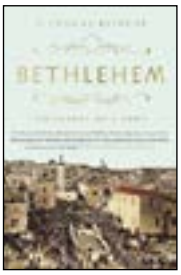
ALTERNATIVE DISPUTE RESOLUTION by Shashank Garg (ed), Oxford University Press, New Delhi, 2018, pp xxx +450, Rs 995 (hbk), ISBN: 978-0-19-948361-7.



If ever there was a country which cries out for resolving disputes away from the courtroom, it is India. So clogged are its dysfunctional courts that, at last count, it was reported that some 33 million cases await disposal, many of them going back at least two decades. In the face of this scandal, one would imagine that those responsible for running its legal and judicial system would embrace alternative dispute resolution (ADR) mechanisms and processes, such as arbitration and mediation, with unbridled enthusiasm. Not a chance.

The reasons are too many and too complex to go into in a review such as the present one. Suffice it to say that there is a pronounced lack of will on the part of everyone concerned in the administration of justice to grasp the nettle. But there is no dearth of platitudes offered by Indian lawyers and judges towards ADR, as this book illustrates. It is a collection of essays describing three ADR mechanisms in particular, viz domestic arbitration, international arbitration and mediation. While the effort in putting together volumes such as these is commendable, it would require optimism of unrealistic proportions to imagine that any of the ideas adumbrated will ever be translated into action on the ground.

BETHLEHEM by Nicholas Blincoe, Constable, London, 2017, pp x + 273, £20 (hbk), ISBN: 978-1-4721-2866-9.



As the troubles in the Middle East show no signs of coming to an end any time soon, a history of the region's most celebrated town through the eyes of someone with genuine feeling for, and close connection with, the place makes a timely appearance.

Blincoe, who has lived in Bethlehem and has ties by marriage to the town, offers a portrait that combines historical, cultural, demographic, political and other aspects of this holy place in a highly readable narrative. He warns that the future of the state of Israel-Palestine relations is linked inextricably to the fate of Bethlehem in the coming years. "In the past sixteen years," he reflects, "… the bonds that hold the town together have dissolved with it. The wall, the settler bypass, and the constant build-up of pressure in town are close to killing something special."

News and Announcements

ENGLAND & WALES: Concern over morale in the judiciary

The Lord Chief Justice (LCJ) of England and Wales has expressed concern over what he calls 'low levels of morale' within the judiciary in his jurisdiction. Writing about this in his latest annual report to Parliament, Lord Burnett of Malden cites increasing workloads, reduction and high turnover of staff, and the poor state of many of the court buildings as contributory factors.

The LCJ has also laid stress on modernisation of the judiciary (a term he prefers to 'reform') and noted that "[t]he pace of modernisation is expected to increase over the coming year as we see more changes introduced locally along with digitalisation of court and tribunal processes."

Another pressing concern which has been highlighted in the report is the continuing challenges in the recruitment of High Court judges. "There is," says the LCJ, "a need to recruit unprecedented numbers of judges over the next couple of years, including through several large-scale recruitment exercises." But judicial remuneration, he laments, remains a major problem in the quest for new judges. "Solving this problem quickly is vital to maintaining a respected and effective judiciary, so fundamental to the rule of law and to the vitality of the legal services sector."

Among the new measures planned for the near future is the establishment of a court building to cater exclusively to the needs of the City of London, the financial district of the capital. "This exciting project will," said Lord Burnett, "deliver a modern 18 courtroom centre comprising Crown Courts, Magistrates' Courts and civil courts. The primary function of the new Crown Court will be to deal with fraud and related economic crime, including the expanding area of cyber-crime."

During the year, another step was taken to underline the independence of the judiciary, viz a change to the web address for the institution from "www.judiciary.gov.uk" to "www.judiciary.uk" The report also refers to the highly topical subject of Brexit, noting that "[t]he Brexit Law Committee brought together a range of organisations and the judiciary to provide insight from the perspective of the legal services sector. Other groups are looking at the direct impact on the courts and tribunals so that the judiciary is prepared for any changes to workload that arise under a new relationship with the EU."

[Source: Courts and Tribunals Judiciary publication, 14 Nov 2018]

NEW ZEALAND: Appointment of new Chief Justice

Justice Helen Winkelmann has been appointed as the next Chief Justice of New Zealand. She will take office on 13 March 2019, according to an announcement by the country's Prime Minister.

Justice Winkelmann studied history and law at Auckland University, focusing on commercial law, and graduating with a BA/LLB. She was admitted to the bar in 1985 and began work as a law clerk with Auckland firm Nicholson Gribbin (later Phillips Fox, now DLA Piper). In 1988, at age 25, Justice Winkelmann became the first female partner and one of the youngest partners ever in the firm's then 117-year history. She remained at that firm until May 2001 when she began practice as a barrister sole specialising in insolvency, commercial litigation and medical disciplinary litigation.

Justice Winkelmann was appointed a High Court Judge in July 2004 and as Chief High Court Judge with effect from 1 February 2010. She remained in that position until her appointment to the Court of Appeal in 2015.

As Chief High Court Judge Justice Winkelmann introduced reforms aimed at improving accessibility to the High Court's processes in its civil jurisdiction, improving the timeliness with which the Court dealt with both civil and criminal matters, and improving public understanding of the work of the Courts.

These initiatives included the reintroduction of the publication of annual reports for the High Court, which included the Court reporting against judgment timeliness standards, and the introduction of the Higher Courts (now Senior Courts) Twitter account to improve communications with the public.

She has spoken regularly on issues concerning the just and efficient operation of the Courts, and access to justice.

In 2011, following the devastating Canterbury Earthquakes Justice Winkelmann worked with Justice Miller to set up the Earthquake List in Christchurch. The objective of that List was to enable proceedings flowing out of the Christchurch earthquake to be dealt with promptly and in a time frame that met the needs of the community. Justice Winkelmann was jointly awarded the Australasian Institute of Judicial Administration Award for Excellence in 2013, for her work in judicial administration flowing out of the Christchurch earthquake.

[Source: Courts of New Zealand announcement, 17 Dec 2018]

TRINIDAD & TOBAGO: Crackdown on copyright infringement

The Judiciary of the Republic of Trinidad and Tobago (JRTT) has expressed concern over the unauthorised reproduction and sale of legislation in the country. Drawing attention to the issue, a public notice issued by the judiciary stated that "the Consolidated Civil Proceedings Rules 2016 (CCPR), that was produced and published by the Judicial Education Institute of Trinidad and Tobago (JEITT), a unit of the JRTT, and circulated for public information, is being reproduced and/or made for sale and/or offered for sale and/or exhibited in public and/or distributed and/or possessed without authorisation."

"Such action," said the judiciary, "is a violation of the JEITT's copyright. The CCPR, as with other publications of the JEITT, cannot be reproduced except in accordance with the Copyright Act Chapter 82:80 of the Laws of the Republic of Trinidad and Tobago without the permission of the JEITT. The publications on the JEITT's E-book Platform (http://www.ttlawcourts.org/jeibooks/index.php) have been made available free of charge, and only private reproductions of single copies by natural persons exclusively for their personal use are permitted."

The JRTT went on to advise that "unauthorised reproduction, sale, offer for sale, exhibition in public, distribution, and possession of the CCPR, and any other JRTT publication, is a violation of the JEITT's copyright, which carries a maximum fine of two hundred and fifty thousand dollars and imprisonment for ten years."

[Source: JRTT media release, 18 Dec 2018]

SOUTH AFRICA: Disquiet over assault on lawyer

The Law Society of South Africa has expressed disquiet over an incident in which a lawyer was assaulted on court premises in early December 2018.

In a public statement the LSSA stated: "We join our colleagues from the Johannesburg Bar Council and the National Association of Democratic Lawyers in condemning, in the strongest possible terms, the violent attack on an advocate by members of Black First Land First (BLF) movement at the Johannesburg High Court last week."

The co-chairpersons of the LSSA said, "Although we accept the right of political entities and members of the public to protest, violence and destruction can never be condoned.". They added: 'The attack involving the woman advocate is doubly unacceptable having taken place during the 16 Days of Activism against Gender-Based Violence. Assault is a criminal offence and we urge the authorities to investigate the matter urgently and bring the perpetrators to book. Justice must be done and seen to be done. In addition, we call on the leadership of BLF to condemn the actions of its members. There can be no justification or encouragement for such mob violence."

The LSSA also expressed deep concern at "the increasing criminal behaviour in and around court buildings and against legal practitioners. We urge the Office of the Chief Justice to look into the aspect of negotiating upgraded security with the authorities so that members of the public, legal practitioners and judicial officers are safe within court precincts. Attorneys and advocates are officers of the court. They must be able to practise freely without fear of intimidation, assault or fear for their lives. Legal practitioners must be able to consult freely with their clients and to represent their clients in court to provide effective legal representation. This is a right enshrined in our Constitution. Unwarranted attacks on legal practitioners are unacceptable and threaten our justice system and the rule of law."

[Source: LSSA press release, 11 Dec 2018]

SCOTLAND: New protocol on broadcasting of court proceedings

A new protocol on recording and broadcasting hearings in Scotland's Supreme Courts, and on tweeting from all courts, has been published.

The document enables journalists to apply to record and broadcast certain types of case from the High Court and from the Court of Session. It also permits journalists registered with the Scottish Courts and Tribunals Service (SCTS) to use live, text-based communications, such as Twitter, from Scottish courts without prior permission – unless the presiding or chairing judge considers that it would not be in the interest of justice during a particular hearing. Those journalists not registered with the SCTS may still apply to tweet on a case by case basis.

The protocol supports the principle that broadcasting court proceedings is in the interests of open justice and provides educational information.

The document details the criteria for the applications, which can be made to broadcast the following types of case: sentencing; appeals; first instance civil debates; criminal trials and civil proofs (the last two as part of a documentary production).

A broadcast working group will review each application, taking into account the views of the presiding or chairing judge, before making a recommendation to the Lord President, Lord Carloway, who will make a final decision.

[Source: Media Release, Judiciary of Scotland, 26 Oct 2016]

SOUTH AFRICA: Welcome for Constitutional Court decision on SADC tribunal

A decision of the Constitutional Court of South Africa which declared the withdrawal, by former President Jacob Zuma, of the jurisdiction of the Southern African Development Council Tribunal over his country has been widely welcomed. Calling it a "decision … of great significance", the South Africa Litigation Centre (SALC) said that it represented "the first step towards the resurrection of the SADC Tribunal in its original form." The organisation encouraged other law societies within the SADC to take up similar challenges, the SALC executive director, Kaajal Ramjathan-Keogh, said in a statement.

The background to Zuma's action lay in the SADC tribunal becoming the only forum in which Zimbabwean farmers whose land had been expropriated by their own government could challenge the expropriations after the domestic courts had been shorn of their jurisdiction in the matter by the then President Robert Mugabe. When the tribunal ruled Mugabe's actions to be illegal, Zuma signed a new SADC Protocol removing "the rights of individuals, both in South Africa and the entire SADC region to access the tribunal for legal redress." The Constitutional Court of South Africa has, in its judgment of 11 December 2018, directed the President to withdraw that signature, thus restoring the tribunal's jurisdiction over South Africans.

"The importance of this decision cannot be overstated; it is precedent setting, not only for South Africa but also as a reference point for governments in the Southern African region," noted the SALC statement. It called upon the South African President "to not only comply [with] and take steps to implement the judgment, but to also use this judgment to lobby his SADC counterparts to consider the principles laid down by the Constitutional Court in calling for the reinstatement of the SADC Tribunal."

[Source: News24 report, South Africa, 12 Dec 2018]

INDIA: Challenge to government's plan for online surveillance

The Supreme Court of India has been moved by a practising lawyer against an order passed by the federal government allowing a plethora of intelligence agencies to intercept "any information" stored in, or passing through, computers within the territorial limits of the country.

Under existing laws, the government is empowered to intercept online communication, subject to certain safeguards, in the interests of "the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognisable offence," but the new order, passed on 20 December 2018, appears to expand those powers.

The challenge refers to a landmark judgment passed by the Supreme Court in August 2017 which was widely seen as strengthening the expectation of privacy deducible from the Indian Constitution's guarantee of a fundamental right to "life and personal liberty".

The government's order has provoked widespread criticism from civil liberties groups, and the outcome of the legal challenge is expected sometime in the new year.

[Source: LiveLaw.in, 24 Dec 2018]

RWANDA: Reforms to the judicial system

Rwanda has introduced changes to its court system to reduce backlog of cases.

An appeals court has been added between the high court and Supreme Court.

"This court will be in the high court to handle most of the appeal cases. The Supreme Court will be reserved to only handle cases which have national and community and justice impact," Rwanda's Justice Minister Johnston Busingye was reported as saying at a press conference on 29 May 2018.

By 2012, it took at least 66 months for a case to start being heard in the Supreme Court which has since been reduced to 20 months. In the high court the waiting time has dropped from 11 months to three months in the same period, as a result of judicial reforms, according to news reports.

Rwanda's existing courts structure starts with primary court, intermediate court, high court and Supreme Court as the highest level of justice. The minister said that plans are underway to further overhaul the court system as a way of boosting court operations to be more productive and efficient.

Currently there are 60 courts in these categories and the ministry of justice says that there is plan to combine some of the courts and cut them down to 41.

Since the 2004 reforms in judicial system, Rwanda has managed to connect most of the courts to the internet enabling citizens to submit their cases online and get a case file immediately.

[Source: Report in KT Press, 30 May 2018]

Conferences

JAPAN: Fundamentals of International Legal Business Practice

The Asia Pacific Regional Forum and the Young Lawyers' Committee of the International Bar Association, together

with the Japan Federation of Bar Associations, is organising a conference on 'The Fundamentals of International Legal Business Practice' in Tokyo on 27 February 2019.

The conference will discuss such matters as:

- Cross-border M&A transactions;
- International commercial disputes and arbitrations;
- How technology affects law firm organisations and career models for young lawyers in the modern law firm; and
- Global trends in data privacy including GDPR, and how they affect Japanese companies

Further details can be obtained from the IBA's website at *www.ibanet.org/Conferences/conf974.aspx*.

INDIA: Human Rights

The Law Association for Asia and the Pacific, LAWASIA, in association with the Bar Association of India, is organising its 1st Human Rights Conference in New Delhi, India on 9-10 February 2019.

Hosted at the Hyatt Regency Delhi, and with a theme of "State Power, Business and Human Rights: Contemporary Challenges", the conference will explore a broad range of human rights issues of relevance in the Asia Pacific region, including:

- Gender, Sexuality and Human Rights
- New Technologies, Privacy and Mass Surveillance
- Experiences and Challenges of Human Rights Lawyers
- Aggressive Policing and Human Rights
- Freedom of the Press in the Digital Age
- Cross-border Migration & its Conflicts
- Climate Change, Water Conflicts & Human Rights
- Business and Human Rights

This is LAWASIA's inaugural Human Rights Conference, and is intended to provide a unique opportunity for lawyers and associated professional members to exchange insights and expertise on topics of significant importance to all.

Registration and other information are available at the conference website, *https://humanrights2019.com/*.

UNITED KINGDOM: Law and Social Transformation

The Society of Legal Scholars (SLS) is putting together a conference on 'Law and Social Transformation' in Lancaster, England, on 9 February 2019.

The aim of this postgraduate conference is to address how changing socio-political scenarios around the world require a re-evaluation of our understanding of applicability of legal rules that can bring about real change and provide opportunity for improved living conditions.

Among the topics that will be discussed are:

Law and social justice;
Gender and sexuality;
Refugee law;
Social and economic rights in the third world;
Brexit and the European Union;
Law and democracy; and
Law and religion..

Further information can be obtained by e-mailing *lawpgrconference@lancaster.ac.uk*.

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